Employment Court of New Zealand

Checkmate Precision Cutting Tools Limited v Tomo [2013] NZEmpC 54 (10 April 2013)

Last Updated: 13 April 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 54

ARC 85/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN CHECKMATE PRECISION CUTTING TOOLS LIMITED

Plaintiff

AND MAPU TOMO Defendant

Hearing: 22 June 2012 and 12 March 2013 (Heard at Auckland)

By submissions filed on 15 and 19 March 2013

Counsel: Sam Wimsett, counsel for defendant

Mark Beech and Elizabeth Smith, counsel for plaintiff

Judgment: 10 April 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff seeks a declaration from the Court that the defendant, Mr Tomo, is estopped from pursuing his personal grievance claim for unjustified dismissal on the basis that the parties agreed that Mr Tomo's position was redundant and agreed the terms on which the redundancy would take effect. The defendant contends that he never agreed to compromise his ability to pursue a personal grievance and that the plaintiff's challenge ought to be dismissed.

Background

[2] Mr Tomo was employed as a driver for the plaintiff company. A restructuring exercise was undertaken and Mr Tomo was identified as a potentially affected

employee. He was invited to a meeting on 29 March 2010 to inform him of the

proposal to disestablish his role. Mr Tomo attended with his representative, Mr Austin. Mr Quin, the plaintiff company's Chief Executive, and Mr Kiff, the Operations Manager, were also present.

[3] During the course of the meeting Mr Quin advised that the company wished to consider alternative options, including redeployment. He invited Mr Tomo to take some time to reflect on the issues that had been raised and provide feedback. Mr Austin told Mr Quin that he did not consider that an appropriate process had been followed by the company and that the defendant was willing to explore other options, including a severance package. Mr Quin asked Mr Austin to put something in

writing. The parties agreed to meet again in five days' time.

[4] Mr Austin wrote to Mr Quin on 29 March 2010. The letter was entitled "Without prejudice except as to costs." It stated that it was clear that Mr Tomo's position would become surplus and while he did not accept that termination on the grounds of redundancy would be justifiable, he was prepared to discuss "a way/s forward that may be mutually beneficial." Two options were set out. Redeployment on the same terms and conditions as he currently enjoyed, with the costs of training being met by the company, and voluntary severance on terms (including a compensatory payment of $8,000). The letter stated that any severance agreement would be signed by a mediator (pursuant to s 149 of the Employment Relations Act

2000). This was in accordance with Mr Austin's invariable practice. Mr Austin also set out in some detail the basis on which it was contended that termination would be unjustifiable, including inadequate consultation, breach of good faith and "mixed motives in pursuing this matter." The letter referred to the benefits to the parties of

'moving on', noting that this could only be done if mutually agreed. Further information was also sought.

[5] The plaintiff's solicitors responded by way of letter dated 31 March 2010, rejecting the settlement proposal. The letter confirmed that a meeting would take place as previously arranged and Mr Tomo was encouraged to engage in constructive dialogue. Mr Austin responded on 1 April 2010, inviting the plaintiff to put forward a proposal for consideration.

[6] A further meeting took place on 6 April 2010. Messrs Tomo, Austin, Quin and Kiff were in attendance. At the meeting Mr Austin tabled a letter advising that Mr Tomo took issue with the company's perspective of his terms of employment and detailing requested information which, it was said, was relevant to the issue of consultation and whether it had been adequate.

[7] It is apparent that the 6 April 2010 meeting had two phases. Mr Quin's evidence was that following an adjournment Mr Austin indicated that he understood the reasons why the company was restructuring and that there was no longer a need for Mr Tomo's role. He said that an agreement followed, that Mr Tomo's role would be made redundant and that he would receive six weeks' notice of termination and paid time off to attend job interviews or WINZ appointments to a value of $500. Mr Quin said that the meeting came to an end at this point because an agreement had been reached. Mr Kiff's evidence was to similar effect. Mr Quin said that he escorted Messrs Tomo and Austin to the foyer where he was asked for a letter confirming the details of the agreement. Mr Quin said that he could type it straight away if Mr Austin did not mind waiting. However, Mr Austin needed to leave.

[8] Mr Austin's evidence was that he understood, from the discussions, that the company was going to make Mr Tomo's role redundant and that he would get six weeks' notice. Mr Tomo said that, following the adjournment, there was a discussion about whether there were any other roles available and that Mr Quin indicated that there were not. He asked Mr Tomo whether he could see any options and Mr Tomo said that he could not. It was following this discussion that Mr Quin confirmed that Mr Tomo's position would be made redundant. This is consistent with Mr Kiff's notes of the meeting.

[9] I accept that Messrs Tomo and Austin had a discussion after the meeting about the parameters of a proposed personal grievance. Mr Austin asked Mr Tomo to make notes about his work, which he subsequently did. These notes were directed at the tasks he was completing and when, in order to bolster a personal grievance claim.

[10] Mr Quin wrote to Mr Tomo following the meeting. Despite the agreement that the letter would be provided to Mr Austin, Mr Kiff gave the letter to Mr Tomo on 7 April 2010. The letter (dated 6 April 2010) was in the following terms:

It is agreed today with you and your adviser Stan Austin that your role is being made redundant effective 6th April 2010 at Checkmate Precision Cutting Tools Ltd.

The process followed has been collective, communicative and consultative and is a result of the tasks and function of your role no longer remaining sustainable.

Checkmate Precision Cutting Tools Ltd advises of 6 weeks' notice effective on this day 6th April 2010, and for the 6 weeks period remaining employed in the company. In addition the company agrees to the contribution of $500.00 in time to allow you to follow up on future employment opportunities and/or WINZ obligations.

Checkmate agrees that all terms and conditions under clause 26.5 of the Metal and Manufacturing Industries collective agreement apply where applicable to redundancy.

[11] Because Mr Austin was expecting a letter and had not received it, he emailed

Mr Quin on 7 April asking for it. He said:

It is my understanding (without prejudice to [Mr Tomo's] rights) that the letter will give six weeks notice of termination of his employment by Checkmate.

Please forward the letter as promised.

[12] Mr Quin's immediate reaction was to advise Mr Austin that Mr Tomo had been given a copy of the letter the previous day and that he would send Mr Austin a copy of it when he returned to the office, which he did.

[13] Mr Austin immediately replied (on 7 April) disputing the assertion that an agreement had been reached. The letter stated:

What is demonstrably true is that at the conclusion of our meeting on 6 April

2010 [Mr Tomo] and I acknowledged that you might issue [Mr Tomo] with six weeks notice of termination on grounds of redundancy. That situation was said to have arisen as a consequence of Checkmate's decision, without consultation with [Mr Tomo], to change the nature of its contract for services with CHH Wood Products, Kawerau.

In acknowledging that Checkmate might do as I have indicated above, I also

clearly indicated that [Mr Tomo's] rights at law were reserved.

Notwithstanding your inference that Checkmate may be trading while insolvent, it does seem likely that [Mr Tomo] will commence proceedings in respect of a personal grievance claim alleging unjustifiable dismissal.

For the avoidance of doubt then, there was no agreement reached with me, or [Mr Tomo] that [Mr Tomo's] position is redundant nor that termination of employment is justifiable.

Your further claim to a 'collective, communicative, and consultative process' is also untrue. That claim is clearly contradicted by the ridiculous correspondence from your solicitors.

[14] The next day the company's lawyer, Mr Beech, wrote to Mr Austin advising that the company was:

... very clear that at the conclusion of yesterday's meeting there was an agreement between the parties that:

1. Mr Tomo's employment was terminating by reason of redundancy;

2. He would receive six weeks' notice;

3. During his notice period he would be released from work to attend job or WINZ interviews, if necessary;
4. The terms and conditions of the relevant collective agreement would apply, where applicable to redundancy.

...

[15] Mr Beech also advised that:

... Agreement to these terms is clearly recorded by the note-taker at that meeting. We consider the present attempt to resile from these terms to be a breach of good faith. Any proceedings issued by you will be met with an application to strike out, which will plead accord and satisfaction, estoppel and abuse of process. In these circumstances, any claim advanced on behalf of Mr Tomo will have little prospect of success.

[16] Mr Tomo worked during the next six weeks, took limited time off work to attend appointments, and sought a reference from the Contracts Manager. His undisputed evidence was that he took two hours off to attend appointments and that this would have equated to $36 worth of time given his hourly rate.

[17] The plaintiff 's short point is that, having agreed that he would be made redundant and the basis on which he would depart from the company, the defendant cannot now pursue his personal grievance claim challenging the justifiability of his

dismissal. A declaration is accordingly sought pursuant to s 162 of the Act that the defendant is not entitled to pursue a personal grievance in relation to the termination of his employment. Abuse of process and accord and satisfaction, flagged in counsel's earlier correspondence, were not pursued in the context of this challenge.

[18] The matter came before the Employment Relations Authority (the Authority) by way of a preliminary determination on the issue as to whether or not a binding agreement settling the matter had been reached. The Authority found that it had not, and that the defendant was entitled to pursue a personal grievance claim.1 The Authority found that what was agreed at the meeting was a process for implementation of the defendant's redundancy, rather than an agreement not to pursue his personal grievance in relation to it.2

[19] The plaintiff 's challenge to the Authority's determination proceeded on a de

novo basis.

Analysis

[20] The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so.3 There must be clear words or conduct by one party which creates a belief or expectation in the other, and the party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word.4 I do not consider that either pre-requisite is satisfied in the circumstances.

[21] Following discussions on 6 April 2010 the defendant understood that the company would be making his position redundant, that he would receive six weeks' notice commencing on that date, that he would be able to attend WINZ and job

interviews with the prior permission of Mr Kiff, and that he would work out his

1 [2011] NZERA Auckland 469 at [29].

2 At [25].

3 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549 per Tipping J.

4 John Burrows, Jeremy Finn, and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington) at [4.7.4].

notice period. I agree with the Authority's conclusion that the agreement was directed at the implementation of the defendant's redundancy, rather than an agreement as to justification. I am not satisfied that there was clear words or conduct either by or on Mr Tomo's behalf that he would relinquish his right to pursue a personal grievance in relation to his dismissal and I do not consider that the company's representatives could reasonably have believed that he had in the circumstances.

[22] It is evident that Mr Austin, on Mr Tomo's behalf, had gone to some lengths to identify the procedural failings that he perceived in the process adopted by the company and it was these alleged failings that gave rise to his "Without prejudice" correspondence around one week prior to the meeting. Mr Austin had also tabled a letter at the meeting of 6 April 2010 setting out a number of perceived deficiencies in the company's process.

[23] Mr Austin had set out options for settlement and had, according to the company's evidence, threatened legal proceedings. It is inherently unlikely that either the plaintiff or Mr Austin on the plaintiff's behalf would agree to forfeit grievance rights for something that contained no appreciable benefit during the meeting of 6 April 2010 in this context. It is also evident that Mr Austin was alive to issues of full and final settlement, having regard to the terms of his earlier correspondence, and his evidence as to the invariable practice he follows in relation to settlement agreements.

[24] Mr Quin is a very experienced businessman who is evidently well versed in commercial dealings. It is revealing that Mr Quin did not raise any concerns or issues when Mr Austin wrote to him on 7 April referring to his understanding that the company would be giving six weeks' notice of redundancy, "without prejudice" to Mr Tomo's rights. Mr Quin accepted in cross-examination that he is familiar with such phrases. While he said that he was off-site at the time he received Mr Austin's correspondence, that does not adequately explain his failure to immediately take issue with Mr Austin's characterisation of what had been agreed. The omission supports the defendant's position.

[25] As counsel for the plaintiff points out, there is nothing in the meeting notes of

6 April which indicates that Mr Tomo had expressly reserved his position. Mr Tomo gave evidence that Mr Austin had advised Mr Quin that the discussion at the meeting was conducted on a without prejudice basis. Mr Austin's evidence was to similar effect. Mr Quin accepted in evidence in chief that the discussions on 6 April had proceeded on a without prejudice basis.

[26] Conversely there was nothing in the correspondence to Mr Tomo which followed the meeting that expressly indicated that the company believed that Mr Tomo had waived his right to pursue a personal grievance, as Mr Quin accepted.

[27] Further, it is evident that neither the plaintiff nor his representative considered that the outcome of discussions on 6 April brought an end to the matter, as they discussed the parameters of a proposed personal grievance and agreed that Mr Tomo would compile a record of the tasks he was doing, with the purpose of bolstering such a grievance.

[28] The plaintiff submits that it relied on the defendant's agreement and that it would be inequitable to allow him to go back on his word. This submission is advanced on the basis that the company would be denied the opportunity to complete its process, believing that Mr Tomo would not be taking issue with the redundancy. It is difficult to reconcile this submission with what occurred. The company knew, no later than 7 April, that the defendant believed that he was entitled to pursue a personal grievance in relation to the redundancy. That is because Mr Austin had written to it clearly stating that this was so, advising that it was likely that Mr Tomo would be commencing proceedings in respect of a personal grievance alleging unjustified dismissal, and asserting that:

For the avoidance of doubt then, there was no agreement reached with me, or [Mr Tomo] that [Mr Tomo's] position is

redundant nor that termination of employment is justifiable.

[29] It was readily apparent that the defendant did not share the company's expressed view as to what had occurred at the meeting the previous day. It could, at this stage, have sought to revisit the issue with Mr Tomo based on the apparent misunderstanding that had arisen. It did not do so. Rather it asserted that the

defendant was no longer able to pursue a grievance and that any attempt to do so would be met with strong resistance and would be unlikely to succeed. Even if the defendant had led the plaintiff to believe at the 6 April meeting that he was compromising his right to bring a personal grievance by accepting that his position would be made redundant (which I reject) I do not accept that it would be inequitable or unconscionable to allow him to go back on his word in the circumstances. Nor do I accept that the fact that the defendant formally notified a personal grievance shortly after, but not before, his departure alters the position. The fact is that the defendant had put the plaintiff squarely on notice that he took issue with the plaintiff's interpretation of what had occurred, and had 90 days within which to notify a grievance.

[30] Mr Tomo accepted the company was going to make his role redundant but that does not mean that he gave away his right to pursue a grievance in relation to his dismissal and nor does it mean that, in order to preserve his position, he was required to expressly state that this was so. Such an approach would cut across the timeframes contained within the Act for notifying a personal grievance.

[31] The plaintiff's challenge is dismissed.

[32] Costs are reserved. If they cannot otherwise be agreed between the parties, they may be the subject of an exchange of memoranda. The defendant is to file and serve any application, together with supporting material, within 20 days of the date

of this judgment, with the plaintiff filing and serving within a further 20 days.

Judgment signed at 3.15pm on 10 April 2013

Christina Inglis
Judge
