IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 537
5307295

	BETWEEN	MAPU TOMO Applicant
	A N D	CHECKMATE PRECISION CUTTING TOOLS LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Marcia Insley, Counsel for Applicant Mark Beech, Counsel for Respondent
Investigation Meeting:	23 October 2013 at Rotorua
Date of Determination:	21 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Tomo) alleges that he was unjustifiably dismissed for redundancy and the respondent (Checkmate) resists that contention.

[2] Mr Tomo's statement of problem was filed in the Authority on 9 July 2010 and a statement in reply was filed by Checkmate on 20 July 2010.

[3] Contemporaneously with the filing of the statement in reply, Checkmate filed an application to strike out on the footing that there was a binding agreement between the parties which resulted in the employment relationship coming to an end by agreement and as a consequence, the filing of the statement of problem constituted an abuse of process.

[4] That strike out application was dealt with as a preliminary issue in an investigation meeting held by the Authority on 1 July 2011. The Authority

determined that what was agreed between the parties prior to Mr Tomo's dismissal for redundancy was the process for the implementation of the redundancy and was not as Checkmate maintained *"a revocation by Mr Tomo of his wish to contest the redundancy or a settlement of the personal grievance that had been referred to"*: para.[25]. The Authority determined that "*there was no meeting of minds regarding anything other than how the redundancy would be implemented"*: para.[28].

[5] Then on 15 November 2011 Checkmate applied to the Authority for a stay on the footing that contemporaneously with that application to the Authority, it had lodged a challenge to the Authority's determination in the Employment Court at Auckland. The application for a stay of proceedings was granted by the Authority and a determination issued on 31 July 2012.

[6] Then on 10 April 2013, the Employment Court issued its judgment on the challenge as [2013] NZEmpC 54.

[7] In deciding the de novo challenge, the Court's conclusion was that there was no agreement between the parties or, put another way, that by raising a personal grievance promptly after the dismissal, Mr Tomo was effectively putting Checkmate on notice that he did not agree with their categorisation of the matter as a concluded bargain.

[8] Thereafter, the Authority was requested to conclude its deliberations on Mr Tomo's personal grievance and this determination attends to that.

[9] Mr Tomo was employed by Checkmate as a driver. A restructuring exercise was undertaken and in March 2010, Checkmate wrote to Mr Tomo advising him of the possibility of the disestablishment of his position as a consequence of the financial pressures that Checkmate was then under.

[10] A meeting between the parties took place on 29 March 2010 and Mr Tomo was represented at that meeting by his advocate Mr Stan Austin.

[11] It is apparent that Checkmate's Chief Executive at the time, Mr Quin, told Mr Tomo at the meeting that it wished to consider all options short of disestablishing his position, including redeployment within the company, and it invited Mr Tomo to reflect on his position and provide any feedback.

[12] Mr Austin, for Mr Tomo, raised various issues about the propriety of Checkmate's conduct of the matter and suggested that severance might be an option. Checkmate asked Mr Austin to put his thoughts in writing which he subsequently did.

[13] Mr Austin's letter was dated 29 March 2010 and in that letter, he indicated his understanding that Mr Tomo's job had gone and he proposed two offers, one of which was redeployment with protected conditions, and the second was voluntary severance with a compensatory payment.

[14] Those proposals were promptly rejected by Checkmate and a further consultation meeting was scheduled for 6 April 2010. This meeting proved to be the tipping point in the dispute between the parties and it was the interpretation of what happened at this meeting which caused the delay in focusing on the gravamen of Mr Tomo's personal grievance.

[15] While Checkmate understood there was an agreement on all matters, Mr Tomo's understanding was simply that there was an agreement that his position would be disestablished and that he would be dismissed for redundancy.

[16] That is in fact precisely what happened; a letter was generated by Checkmate which confirmed its decision to make Mr Tomo's position redundant and as a consequence Mr Tomo was given six weeks' notice of the termination of his employment for redundancy.

[17] Because the issue of whether there was or was not an agreed basis on which the parties brought the employment relationship to an end has already been comprehensively dealt with by Her Honour Judge Inglis in the Employment Court, the Authority's focus in the present determination is exclusively on the residual issue of whether in fact Mr Tomo's personal grievance is made out, or not.

[18] The basis for that personal grievance, according to Mr Tomo, was that the redundancy was not a genuine one, that there was information which was sought on his behalf which Checkmate failed to provide, that the employer had failed to engage in genuine consultation and Mr Tomo was unfairly targeted for redundancy.

[19] At the commencement of the Authority's investigation meeting, the Authority made the observation that the task before it had been focused somewhat by the helpful clarity in the judgment of the Court which had dealt conclusively with the question of

the putative agreement between the parties at the meeting of 6 April 2010. Consequent upon the Court's judgment then, the Authority observed, its sole focus would be on the underlying grievance raised by Mr Tomo and within the context of some of the findings of fact which the Authority might, in the normal course have to make, the Court's judgment had helpfully disposed of some of those matters.

[20] Because, in the Authority's investigation meeting, it was deprived of the benefit of Mr Quin's evidence, it seemed sensible for the Authority to rely upon the evidence Mr Quin gave to the Court and on the judgments that Judge Inglis made on that evidence and the consequences of it.

[21] As the Authority has wide powers of investigation, the Authority's considered view was that it was able to effectively take judicial notice of the conclusions the Court had already reached and not seek to second-guess those conclusions, particularly when the Court had the benefit of hearing from one of the principal protagonists and the Authority had not.

[22] Those views were supported by counsel for Checkmate who handed up a memorandum summarising the findings of fact made by the Court in its judgment and reaching a similar conclusion of the Authority in respect to the matters still open for the Authority to determine.

[23] While counsel for Mr Tomo took a slightly different approach, the Authority is satisfied that its analysis of the matter is appropriate and that it needs to consider if the redundancy was a genuine one or not and whether it was available to Checkmate to conclude that its actions were what a fair and reasonable employer would have done in the particular circumstances of that case.

[24] For the avoidance of doubt, the Authority notes that the dismissal took place with effect from 18 May 2010, thus pre-dating the amendment to s.103A of the Employment Relations Act 2000 (the Act), which amendment came into effect on 1 April 2011. In summary then, to use the shorthand familiar to employment lawyers, it is the "would" test and not the "could" test that should apply in the present case.

Issues

[25] It is appropriate for the Authority to consider each of the elements which Mr Tomo says underpin his claimed personal grievance. Accordingly, the Authority needs to consider the following matters:

(a) Was the redundancy a genuine one; and

(b) Was Mr Tomo unfairly targeted for dismissal; and

(c) Did Checkmate provide all the information asked of it; and

(d) Did Checkmate undertake proper and effective consultation?

Was the redundancy a genuine one?

[26] In its submissions, Checkmate refers to a decision of the Authority *Bode-Patterson v Hammond-Smith and Smith t/a I Love Merino Limited* [2013] NZERA Auckland 294 (Member Anderson). In that decision, the Authority sets out an excellent summary of the law in respect to redundancy and for the purposes of the present decision, the analysis in *Bode-Patterson* is adopted without amendment.

[27] For present purposes, it is enough to say that the law requires the Authority to enquire into the genuineness of a redundancy so as to ensure that the redundancy is being activated for proper business purposes and not being undertaken for base motives.

[28] Further, it is important to note that it is not enough for a business owner to simply claim the necessity to make structural changes; they must be prepared to demonstrate that necessity to the satisfaction of the Authority.

[29] In broad terms then, there are two enquiries that the Authority must make to satisfy itself about the genuineness of the redundancy. The first is to establish whether the evidence supports the employer's contention that there were genuine business reasons for the redundancy and the second is to ensure that there is no base motive underpinning the decision to dismiss for redundancy such as, for instance, a conviction on the part of the employer that the business would be better off without the incumbent of the role to be made redundant. Attached as it were to that last consideration is an examination of whether there is evidence of "mixed motives".

[30] Dealing first with the underlying genuineness of the decision to declare redundancy, it is appropriate to remember Chief Judge Colgan's observations in *Michael Rittson-Thomas t/a Totara Hills Farm v Hamish Davidson* [2013] NZEmpC 39 (*Rittson-Thomas*) wherein His Honour had this to say:

> *It will be insufficient under s.103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer to say that this was a genuine business decision and the Court (or Authority) is not entitled to enquire into the merits of it. The Court (or Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer would/could have done in all the relevant circumstances.*

[31] The appropriate place to start is with the evidence for the employer. Checkmate told the Authority that Mr Quin, who it will be remembered the Authority did not hear from directly, was employed by Checkmate as its chief executive officer, in effect as a change manager. Apparently, Checkmate has not undertaken a structural review of its operations and its staffing resources, despite a fall off in demand for its services occasioned by the global financial crisis.

[32] A particular reason for the structural review was the intelligence that the Carter Holt Harvey plant at Kawarau was intent upon becoming self-sufficient rather than importing goods and services as previously.

[33] The impact of this decision on Checkmate was that, previously, Checkmate had provided all saw doctor services at the mill and Carter Holt Harvey was intent upon taking those functions back in house.

[34] Under the previous arrangements, prior to the Checkmate restructuring, Checkmate had been running multiple trips from Rotorua base to the Kawarau site and with the change in *modus operandi* at Kawarau, the necessity for the majority of those trips would cease.

[35] Because it appeared to be common ground that 85% of Mr Tomo's work as a driver for Checkmate was involved in shuttling between the Rotorua base and the Kawarau site, it was inevitable that his designated role as a driver would be identified as being potentially surplus to requirements.

[36] The operations manager for Checkmate, Mr Kiff, in answer to a question from the Authority, indicated that Mr Quin had been brought into Checkmate by its bankers to improve Checkmate's financial position.

[37] Mr Kiff was adamant that the thrust of Mr Quin's activities as chief executive officer was to look at matters from a banking perspective and Mr Tomo's role as the only designated driver employed by Checkmate was identified by Mr Quin simply on a business-like analysis of the changes at the Kawarau site.

[38] There was simply no proof, the Authority was told, in the contention that Mr Tomo had been somehow singled out for redundancy on the basis that he was somehow perceived to be an undesirable employee. Indeed, quite the reverse was the case. Mr Kiff's own position on Mr Tomo was that he (Mr Kiff) regarded Mr Tomo highly, thought that he had a terrific work ethic, and was sorry that there were no redeployment options available for him.

[39] Furthermore, the Authority thinks it appropriate to conclude that as Mr Quin (the decision-maker) had been in the business for a very limited period of time, and as a consequence, had barely formed any view about Mr Tomo on a personal basis, it seems inconceivable that Mr Quin would have formed any personal view adverse to Mr Tomo. Indeed, it seems much more likely, and the Authority is satisfied on the balance of probabilities that this was the case, that Mr Quin simply applied normal commercial principles to identify a role that was surplus to the requirements of Checkmate going forward.

[40] The Authority was told that, prior to the changes at the Kawarau mill, Mr Tomo was making 120 deliveries a week to Kawarau, which was in fact the bulk of his working week, and that once Kawarau became fully self-sufficient in saw doctoring, that number of trips would fall away dramatically. Indeed, on the evidence the Authority heard, it seems reasonable for the Authority to conclude that, at the absolute outside, there would be no more than 20 trips a week rather than 120. Even that figure may overstate the position, but certainly the change was a dramatic one.

[41] Mr Kiff told the Authority that the intention was to use other staff, in effect as part time drivers, as and when the need arose. The Authority was also told that Mr Tomo had no other skills beyond his driving ability and his general willingness to work and so, unlike the persons continuing in the employment who had other skills to

contribute to Checkmate's overall business, Mr Tomo was only able to offer his abilities as a driver.

[42] That fact meant that, once the decision was taken to disestablish Mr Tomo's role, there was no alternative position for him, even although his general aptitude and his willing attitude were highly regarded, certainly by Mr Kiff as Checkmate's operations manager.

[43] For the avoidance of doubt then, the Authority's considered view is that the evidence plainly discloses that this was a genuine redundancy situation effected for proper commercial reasons. There is ample evidence that Mr Quin was inserted into the business by Checkmate's bankers, that he was required to effect cost savings in order to turn the business around, that one of those cost savings identified was the need to reduce the expenditure on the position which Mr Tomo happened to occupy, that there were no alternatives within the business that would have enabled Mr Tomo to remain employed, and that as a consequence, when Mr Tomo's position was disestablished as being surplus to Checkmate's requirements, Mr Tomo was inevitably dismissed for redundancy.

[44] The Authority is absolutely satisfied that Mr Quin adopted a proper commercial approach to the consideration of whether Mr Tomo's position was surplus to the business's needs, and that his intention was activated by where his instructions effectively came from (the bank), and that he was not in the business long enough to have formed any negative view about Mr Tomo, even if one were available.

[45] Indeed, all the evidence before the Authority suggests that Mr Tomo was held in high regard by the senior managers of Checkmate who knew him. Mr Kiff gave evidence to the Authority. He was the operations manager of Checkmate. He was absolutely clear that Mr Tomo was highly regarded and that had it been possible to retain him in the business, Checkmate would have wanted that.

[46] There is simply nothing there to suggest anything other than a commercial decision made for proper reasons on a proper basis and without any base motive whatever.

Was Mr Tomo unfairly targeted for dismissal?

[47] The Authority desires to comment on the contention made by Mr Tomo in his evidence that he was unfairly targeted either because he was the only person made redundant and/or because he was a member of a union. First, it is true that Mr Tomo occupied the only position disestablished in the restructuring. That does not invalidate the Authority's conclusion that the restructuring was a proper one in all the circumstances. There is ample evidence to support Checkmate's conclusion that the position was not sustainable with the changes at Kawarau. He was the only permanent driver employed by Checkmate and that was the role which was identified as being surplus to Checkmate's requirements.

[48] On the allegation that Mr Tomo was targeted because he was a member of a union, again the Authority is unmoved by the contention. Mr Tomo's evidence was that he had been remonstrated with by Mr Kiff for joining the union.

[49] It is plain from the notes of the consultation meeting held between the parties on 29 March 2010 that Mr Kiff was simply stating a personal view, based on his own experience, that the cost of union membership did not balance appropriately with the benefits received. Mr Kiff made those observations, it seems, from a position of having previously been a union delegate himself.

[50] Mr Kiff emphasised that the observations were personal ones and were not Checkmate policy. As a matter of fact, the Authority was satisfied on the evidence it heard, that a number of staff, including Mr Tomo, were members of the union.

[51] There is nothing in Mr Kiff's observation other than a personal expression of view. Mr Kiff is entitled to hold those views and entitled to express them if he chooses to. That said, there is nothing in the evidence before the Authority to suggest that Mr Kiff's personal view had any influence whatever on the decision-maker, Mr Quin, or indeed could possibly have influenced the fundamental commercial imperatives which determined that Mr Tomo's position as a driver be disestablished.

[52] This was a genuine redundancy, activated for proper commercial reasons; there was no base motive either in whole or in part, so this was not a mixed motive redundancy of the sort referred to in the Authority decision in *Rillstone v. Product Sourcing International 2000 Ltd*, ERA Auckland, AA167/07.

Did Checkmate provide all of the information asked of it?

[53] It is apparent on the evidence that, during the process leading up to the declaration of redundancy for Mr Tomo, Mr Tomo's advocate, Mr Austin, sought a range of written materials from Checkmate which it is alleged Checkmate failed to provide.

[54] In particular, it is alleged for Mr Tomo that Checkmate either failed to provide a proper basis for its provisional conclusion that the disestablishing of his role was likely, or it failed to provide all of the information at its disposal concerning the changed business circumstances.

[55] It is a truism that employers in a restructuring environment are obligated to provide affected staff with *"access to information, relevant to the continuation of the employee's employment, about the decision; and ... an opportunity to comment on the information to their employer before the decision is made"*: s.4(1A)(c) of the Act.

[56] Those precepts were emphasised in a decision of the Full Bench of the Employment Court in *Vice Chancellor of Massey University v. Martin Wrigley & Ors* [2011] NZEmpC 37 (*Wrigley*).

[57] In para.[48] of the judgment, the Court says:

> *When a business is restructured, the employer will, in most cases, have almost total power over the outcome. To the extent that affected employees may influence the employer's final decision, they can do so only if they have knowledge and understanding of the relevant issues and a real opportunity to express their thoughts about those issues. In this sense, knowledge is the key to giving employees some measure of power to reduce the otherwise overwhelming inequality of power in favour of the employer.*

[58] And again at para.[55] of the judgment, the Court says:

> *The purpose of s.4(1A)(c) is to be found in para.(ii) which requires the employer to give the employees an opportunity to comment before the decision is made.* ***That opportunity must be real and not limited by the extent of the information made available by the employer***. [emphasis added]

[59] So, the legal position is very clear that an employer in Checkmate's position has an absolute obligation to provide all relevant information to affected employees so that they have a genuine opportunity to engage with the employer in the consultation process which the law requires.

[60] In the present case, the Authority is not persuaded that Checkmate either failed to provide material it had or withheld information that it was required to provide, when requests for that information were made.

[61] An examination of the factual matrix makes clear that at the beginning of the process, this was a straightforward restructuring proposal. There was a meeting between the parties on 24 March 2010. At that meeting Mr Tomo was advised what Checkmate was up to and why.

[62] It is said for Mr Tomo that Checkmate had not dealt with the issue in a timely fashion.

[63] Taking that point, the allegation is that Checkmate knew that Carter Holt Harvey was in the process of changing the way in which it provided saw doctoring services to the Kawarau plant, and that it had known that that change was in the wind for many months if not a year before it actually engaged with Mr Tomo.

[64] It may be there is some truth in that allegation. Certainly it is the case that Mr Quin was brought in to Checkmate by its bankers to urgently address Checkmate's failing financial health. Even if Checkmate could have dealt with the matter more expeditiously than it did, the fact remains that when it engaged with Mr Tomo, it told him what was happening and why. A letter was provided dated 24 March and it is alleged for Mr Tomo that this is the only documentation that Checkmate provided.

[65] That is not quite accurate; Checkmate also provided notes of the meetings that it held with Mr Tomo, although the accuracy of those notes is disputed.

[66] But the Authority is satisfied that at this very early stage in the consultation process, the letter of 24 March 2010 accurately sets out the position that Checkmate was in and provides Mr Tomo with the rationale for what was being proposed.

[67] The fact that the information provided is not voluminous does not make it inaccurate nor is the Authority satisfied that in order to meet the test required by s.4 of the Act, Checkmate is required to produce a whole raft of material simply for the sake of it. In the Authority's opinion, the test must be whether the material that has been provided is sufficiently clear to enable the employee to participate in the consultation process; put another way, there must be sufficient information provided so as not to constrain the ability of the employee to engage with the employer.

[68] The Authority is satisfied that at the beginning of the process just described, Mr Tomo was in that position. Checkmate had told him what its circumstances were, what the prognosis was, what specifically affected the continuation of the role that Mr Tomo performed and the fact that all of that might impact on Mr Tomo's continued employment.

[69] As the consultation process continued, there were requests made for information by Mr Tomo. A request was made on his behalf after the 29 March 2010 meeting, again on 6 April 2010, but at the meeting of the same date, the parties agreed to *"park"* the information requests. Notwithstanding that apparent agreement to set aside the provision of further material in writing, the exchange of information continued at the 6 April 2010 meeting including information about the effect the changes at Kawarau were expected to have on the work that Mr Tomo did for Checkmate.

[70] Further and finally, a request for more information was received on Mr Tomo's behalf on 16 April 2010.

[71] It is clear then that during the consultation phase, there were several requests from Mr Tomo for information beyond that provided by Checkmate. It is also clear that some of that material was provided, such as the employment agreement that applied to him and the employees' handbook which had been signed by Mr Tomo. Other material sought had been *"parked"* by agreement, and more data still had not been provided in documentary form by Checkmate because of its contention that that information had been provided verbally, particularly in the consultation meeting on 6 April 2010.

[72] So was there a failure by Checkmate to provide material sufficient to enable Mr Tomo to engage in the process? The Authority answers that question in the negative. The Authority's conclusion is based on first the self-evident proposition that Mr Tomo actively participated in the consultation process and there was nothing to suggest that his participation was in any way limited or constrained by the shortage of information. Indeed, it seems to the Authority that there was a plethora of information available, although not all of it was provided in documentary form.

[73] As Checkmate is a pains to emphasise, much of the material sought in a documentary format by Mr Tomo was actually provided to him orally in the consultation meetings and particularly the meeting of 6 April 2010.

[74] Moreover, it is important to focus on why relevant information is to be provided. It is to be provided to enable an affected employee to participate appropriately in the employer's obligation to consult with him or her. Once the consultation process ends, the Authority is satisfied the law does not require that relevant information continue to be provided. This was precisely the situation here. The Employment Court found as a fact that Mr Tomo accepted that he was to be made redundant. That much anyway was common ground with the parties as well. Once there was an understanding and an acceptance by both parties that the position occupied by Mr Tomo was to be disestablished, and that in consequence he would be dismissed for redundancy, the legal requirement for consultation ceased and so also did the obligation on Checkmate to provide *"relevant information"* to facilitate consultation. Consultation becomes otiose once the die is cast and redundancy declared.

[75] Accordingly, the Authority is satisfied that on and from 6 April 2010, there was no obligation on Checkmate to provide *"relevant information"* because on and from that date, there was an understanding between the parties that Mr Tomo's position was to be disestablished and that he was to be dismissed for redundancy.

[76] It follows from those observations that the Authority is not persuaded that Checkmate has failed in its obligations to provide Mr Tomo with relevant information about the proposed restructure so as to prevent him adequately engaging with his employer in relation to its plans.

Did Checkmate undertake proper and effective consultation?

[77] The law on consultation in a redundancy setting is well settled. An employer contemplating a restructure which affects an employee or employees must engage with those employees in good faith such that the employee has a straightforward opportunity to engage in the process, be aware of the issues driving the employer, and, amongst other things, suggest alternatives that the employer may not have thought of or may not have fully worked up.

[78] The Authority observes first that, on its face, the process adopted by Checkmate was a straightforward commonsense approach where the affected employee was provided with basic information and then engaged with in a succession of meetings.

[79] One of the outcomes of that process was the proposal provided to Checkmate by Mr Tomo's adviser, proposing two alternative strategies, neither of which had been fully worked up by Checkmate.

[80] In the result, Checkmate rejected both of those proposals, as it was entitled to do, but the very fact that those proposals were floated, and considered, suggests to the Authority that the process was working as it should have.

[81] Looked at in its totality then, the Authority is not persuaded there is anything improper in the consultation that Checkmate undertook. It adopted a stock standard approach to consultation and it persevered with that process right up to the point at which it is apparent that agreement was reached that Mr Tomo would leave the employment for redundancy. In the Authority's judgement, Checkmate fulfilled its obligations.

[82] The particular allegation made by Mr Tomo that Checkmate ought to have engaged with him earlier (because of the contention that the changes at Kawarau had been signalled earlier), has already been commented on earlier in this determination. For the avoidance of doubt, the Authority is satisfied that an employer is only under an obligation to consult with an employee in respect of possible job loss once the employer has itself concluded that such a process is possible.

[83] It may well be that Checkmate could have engaged earlier with Mr Tomo but for the avoidance of doubt, the Authority is satisfied that its obligation was to engage with Mr Tomo once it had concluded that restructuring was a genuine possibility and unless and until Checkmate, as employer, had reached its own conclusion on the matter, it was not under any obligation to engage earlier with Mr Tomo.

Determination

[84] For reasons already set out, the Authority is not persuaded that Mr Tomo has a personal grievance. In the Authority's opinion, based on the analysis set out earlier in this determination, the decision that Checkmate made and the process that it used to

get to that decision, was the decision that a fair and reasonable employer would have made in all the circumstances that existed at the time: s.103A of the Act applied (the old test).

Costs

[85] Costs are reserved.

James Crichton
Member of the Employment Relations Authority