

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 469
5307295

BETWEEN MAPU TOMO
 Applicant

AND CHECKMATE PRECISION
 CUTTING TOOLS LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Stan Austin, Advocate for Applicant
 Lisa Jones and Mark Beech, Counsel for Respondent

Investigation Meeting: 1 July 2011

Submissions Received: 15 and 25 July 2011 from Applicant
 22 July from Respondent

Determination: 28 October 2011

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Mapu Tomo, lodged a Statement of Problem claiming that he had been unjustifiably dismissed by the respondent, Checkmate Precision Cutting Tools Limited (“Checkmate”).

[2] The respondent sought to have a preliminary determination on the issue of whether or not a binding agreement to settle the matter had been reached.

[3] This determination deals solely with that application.

Background

[4] Checkmate was undergoing a restructuring. Mr Tomo was employed as a driver. Mr Quentin Quin was the acting Chief Executive Officer. On 24 March 2010

he met with Mr Tomo to give him a letter inviting him to a meeting on 29 March 2010 to discuss a proposal to disestablish his position.

[5] On 29 March Mr Tomo attended with his representative, Mr Stan Austin. Mr Quin attended together with Mr Murray Kiff, the Operations Manager. Mr Quin said that Checkmate wanted to look at alternative options or, if possible, redeployment. He asked Mr Tomo to consider the proposal and to meet again in five days to provide feedback.

[6] There was discussion regarding Mr Tomo's employment agreement. Mr Quin said while there was a signed copy of the company's handbook on file there was no signed copy of the individual employment agreement.

[7] It appears that Mr Tomo subsequently became a member of the EPMU. Mr Austin said the EPMU collective would apply.

[8] Mr Austin suggested redeployment under the adult apprenticeship scheme. Failing that his client would accept a severance package of voluntary resignation with Mr Tomo to finish work that Friday, payment of holiday pay, six weeks' notice paid in lieu and an \$8,000 compensation payment.

[9] The respondent's position was that there was no basis for such a payment. Mr Quin said a consultation process had been commenced and no decisions had been made. He told Mr Austin that as Mr Tomo was a member of the EPMU he had notified that Union of the process that had been undertaken and their involvement was welcome if Mr Tomo wished it.

[10] Mr Austin suggested that Mr Tomo resign from the EPMU and handwrote a letter of resignation, which Mr Tomo signed. Mr Quin said the EPMU collective no longer applied to Mr Tomo. He said there would be a further meeting on 6 April to discuss the restructuring proposal.

[11] On 29 March Mr Austin sent a letter headed "*Without Prejudice Except as to Costs*", saying it was clear Mr Tomo's position would become surplus and while he did not accept that the termination on the grounds of redundancy would be justifiable,

he was prepared to discuss options, which were redeployment and voluntary severance with the package put forward at the meeting. Any severance agreement was to be signed by a mediator.

[12] He referred to a desire of both parties to “*move on*” and that that could only be on terms that were mutually agreed.

[13] The respondent’s solicitors, Sharp Tudhope, replied rejecting the settlement proposal and stating that the 6 April meeting would take place and Mr Tomo should engage in constructive dialogue about the proposal.

6 April Meeting

[14] Mr Austin presented a letter asking for information. Mr Quin provided the EPMU Collective and it was agreed the other requests would be set aside and discussed at a later stage.

[15] Mr Austin asked if Mr Tomo was being made redundant. Mr Quin said they were looking at resources and options and he wanted feedback from Mr Tomo. Mr Tomo was not interested in an apprenticeship role and said he could not see a position to which he could be redeployed.

[16] Mr Austin said he could understand the rationale for the redundancy proposal and asked about Mr Tomo’s entitlements. Mr Quin said during the 6 week period he had been a member of the EPMU the collective provided for 6 weeks’ notice but since he had resigned the individual provided for 4 weeks’ notice. However, the notice period was agreed to be 6 weeks.

[17] Mr Kiff said that towards the end of the meeting Mr Austin proposed that they come to an agreement regarding Mr Tomo and Mr Austin asked Mr Quin for a letter. Mr Austin says the discussion was about the implementation of the redundancy, not about the personal grievance.

[18] Mr Quin said he and Mr Austin agreed Mr Tomo would be made redundant and would receive 6 weeks’ notice and work out his notice period. Mr Quin also

agreed to give Mr Tomo time off to attend interviews or WINZ appointments to a value of \$500. Mr Austin says he accepted that Mr Tomo would be made redundant.

[19] Mr Quin said the meeting then concluded as an agreement had been reached. He walked with Mr Austin to the foyer where he asked for a letter confirming the details of the agreement. He said he could type it straight away if Mr Austin didn't mind waiting but Mr Austin said he needed to leave. Mr Quin said he would email the letter, which was subsequently typed and a copy given to Mr Tomo by Mr Kiff.

[20] Mr Austin and Mr Tomo say there was no meeting and that they stayed behind to discuss what had happened and Mr Austin asked Mr Tomo to make notes about his work.

[21] The next day Mr Austin emailed Mr Quin stating:

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

[22] Mr Quin replied, attaching a copy of the letter and advising that Mr Tomo already had a copy.

[23] Mr Austin then wrote disputing that an agreement had been reached. Mr Quin said there had been an agreement reached at the meeting and all that was required was for him to confirm it in writing.

[24] Mr Quin said Mr Tomo acted on the basis of the agreement taking paid time off work and seeking a reference from the Contracts Manager.

Decision

[25] Looking at what took place at the meeting on 6 April and the surrounding circumstances, the conclusion I reach is that what was agreed at the meeting on 6 April was a process for the implementation of the redundancy of Mr Tomo. It was not a revocation by Mr Tomo of his wish to contest the redundancy or a settlement of the personal grievance that had been referred to.

[26] Neither the letter nor the meeting notes refer to a personal grievance. There was no mention of a full and final settlement. There was no consideration. The parties agreed at the hearing that the notice period was 6 weeks. That was what Mr Tomo was, in any event, legally entitled to per virtue of s 61 (2) (a). Neither can the offer of a reference or time off to look for other employment or seek the assistance of WINZ be categorised as consideration. Time off to attend interviews would be a normal aspect of a fair redundancy process.

[27] An accord and satisfaction is an agreement supported by consideration to settle a genuine dispute between the parties: *Graham v Crestline Pty Ltd* [200] 1 ERNZ 848. Whether an accord and satisfaction has been reached is a question of fact and requires the finding of a meeting of minds.

[28] There was no meeting of minds regarding anything other than how the redundancy would be implemented. Mr Austin talked to Mr Tomo after the meeting and asked him to keep records of his trips. That makes no sense if Mr Tomo and Mr Austin had agreed that the redundancy was not to be disputed.

[29] Mr Austin's email makes specific reference to the arrangement being without prejudice to his client's rights. Those rights are the rights to pursue a personal grievance.

[30] There was no accord and satisfaction and Mr Tomo is not estopped from pursuing a personal grievance.

[31] Costs are reserved. If the parties are not able to resolve the issue of costs the applicant is to file a memorandum within 28 days of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority