IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 122
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
Submissions Received:	11 February 2014 from Applicant 20 January and 28 February 2014 from Respondent
Date of Determination:	3 April 2014

COSTS DETERMINATION OF THE AUTHORITY

The substantive determination

[1] In its substantive determination dated 21 November 2013 issued as 2013 NZERA Auckland 537, the Authority disposed of Mr Tomo's personal grievance claim. The Authority found that Checkmate had successfully resisted Mr Tomo's personal grievance claim.

[2] Costs were reserved.

[3] There is also an earlier determination of the Authority between these parties, issued in 2011, where costs were reserved. That matter also falls for determination here.

The claim for costs (2013 determination)

[4] Checkmate say they have incurred costs totalling $14,613.00 in the preparation for and attendance at the Authority's investigation meeting. Checkmate seeks a costs order of $10,500.

[5] That costs award is sought on the footing that an uplift in the usual daily tariff is required because of the conduct of the hearing by Mr Tomo and his refusal to accept either of two distinct *Calderbank* offers.

[6] Dealing with the conduct of the hearing first, it is the case that Mr Tomo made a number of claims during the course of the proceedings which the Authority did not find had been made out. An example of this was Mr Tomo's allegation that his membership of a union weighed negatively with the employer when the question of redundancy was in issue.

[7] The Authority is not much persuaded that those matters are of any real moment; it is a common place that unsuccessful parties raise arguments or claims which are not made out.

[8] Of more moment is Checkmate's reliance on two separate *Calderbank* offers. There is ample precedent for the view that the failure to accept a *Calderbank* offer by an unsuccessful party must sound in costs. This is because the whole purpose of a *Calderbank* proposal is to provide an opportunity for the parties to resolve the dispute by agreement without having recourse to the expensive resources of the Crown's Employment Relations institutions.

[9] In the present case, Mr Tomo was offered not one but two opportunities to settle matters and rejected both those opportunities. Because he was completely unsuccessful, each of those *Calderbank* offers would have put him in a more advantageous position, had he accepted the offer, than the end result before the Authority.

[10] A common approach in the Authority in circumstances such as this is to simply require payment of full solicitor/client costs on an indemnity basis from the point a *Calderbank* offer is refused down to the date of hearing.

[11] In the present case, Checkmate do not propose such an outcome but suggest a middle ground figure of $10,500.00 which plainly would be less than the total costs incurred from the date of the second *Calderbank* offer to the date of hearing.

The response (2013 determination)

[12] Mr Tomo seeks an order that costs lie where they fall, or in the alternative an award based on the daily tariff approach often used by the Authority, scaled back to reflect the fact that the investigation meeting was of less than one day's duration such that costs of $1,166.67 are all that is justified.

[13] Mr Tomo's submissions also resist Checkmate's proposed uplift in the daily tariff and advance an argument for the Authority not to take into account the *Calderbank* offers.

[14] Mr Tomo also complains that there is no evidence that Checkmate has incurred the costs it claims (although that is remedied in the submissions in reply from Checkmate).

[15] Finally, Mr Tomo refers, rather obliquely, to his financial position, without providing the appropriate details. On the face of it, if Mr Tomo is impecunious, he should say so. It is a relevant factor in the Authority's consideration of matters to do with costs.

[16] What Mr Tomo does say is that he is represented by a community law service which he says is analogous to being on legal aid. It is nothing of the kind. A legally aided person is defined by the Legal Services Act 2011 and either Mr Tomo falls within that category and is eligible for legal aid or he does not. If indicating that Mr Tomo is represented by the community law service is code for indicating that Mr Tomo is not well off financially, then it would be better to say so. For the avoidance of doubt, the Authority is prepared to assume that because Mr Tomo is represented by a community law service, he is impecunious.

The application for costs (2011 determination)

[17] In his memorandum of 24 November 2011, Mr Tomo sought full indemnity costs. Counsel now acting for Mr Tomo quite properly indicates that such a claim is

not appropriate and proposes that a two thirds award apply, the effect of which would be that costs are sought in the sum of $6,077.

The response (2011 determination)

[18] Checkmate resists Mr Tomo's claim for costs arguing the claim is excessive in all the circumstances, ought to be based on the daily tariff, appears to include time for mediation, and contends there is no basis for the suggestion that two thirds of the full indemnity costs ought to apply.

[19] Checkmate proposes either that costs lie where they fall or that the Authority applies the daily tariff approach.

Determination

[20] The law on costs fixing in the Authority is well settled and need not be recited again here. It is of enough to say that the Authority has a discretion, that the law requires the Authority to take account of *Calderbank* offers made by successful parties where they are not accepted by the unsuccessful party, and that the Authority has an obligation to consider the means of an unsuccessful party before making an award of costs.

[21] On the basis of the implication the Authority takes from Mr Tomo's submissions concerning his engagement of the community law service, it is likely that an award of any magnitude would not be able to be met from his resources.

[22] That said, as the Authority has already observed, two *Calderbank* offers were made by Checkmate to Mr Tomo in an effort to settle matters and despite the attempt made by counsel for Mr Tomo to deflect my consideration of those offers, I am satisfied from a perusal of the file that they are operative *Calderbank* offers pertaining to the particular matter before the Authority now and therefore relevant to the issue of costs.

[23] However, Mr Tomo's financial circumstances are also relevant and while the submissions for Mr Tomo did not make as much of that factor as the Authority would have thought appropriate, it is a matter which the Authority is duty bound to consider.

[24] Of course, in the present case, there are two awards of costs to be considered, one in relation to the 2013 proceedings and one relating to the 2011 proceedings. Put

shortly, in the 2011 proceedings, Mr Tomo was successful and therefore, in the normal order of things, is entitled to an award of costs in his favour. Conversely, in the 2013 proceedings, Checkmate was successful and again, in the normal course of events, the costs would follow the event.

[25] Dealing first with the 2011 matter, the Authority is not persuaded that the figure of $6,077 claimed by Mr Tomo is in any way justifiable. There is no reason in principle to depart from the usual daily tariff approach adopted by the Authority and in all the circumstances of the case, the Authority is persuaded that costs of $2,000 would be appropriate. That figure reflects the reality that the matter was dealt with by the Authority in less than a full day, that the costs of mediation are not capable of being recovered in accordance with the Authority's invariable practice, and that there is nothing in the submissions which would encourage the Authority to apply any uplift to the normal daily tariff approach.

[26] A consequence of this order is that Checkmate is to pay to Mr Tomo the sum of $2,000 as a contribution to his costs for the 2011 proceedings.

[27] Turning now to the 2013 decision, Checkmate as the successful party seeks an award of costs in the order of $10,500 and base its claim for an uplift from the normal daily tariff approach, on the existence of two *Calderbank* offers.

[28] The Authority is not persuaded of the logic in the calculation advanced by Checkmate. The 2013 investigation meeting was presided over by me and was dealt with in less than one hearing day. Indeed, given a generous allowance to Checkmate, it would be appropriate to calculate for a half day. That makes the starting point $1,750, not $3,500.

[29] Then if some uplift is allowed to address the existence of operative *Calderbank* offers, the Authority might arrive at a sum of $5,000.

[30] But that does not take account of Mr Tomo's financial circumstances. Given the Authority's assumption that Mr Tomo is impecunious, based on the oblique submissions to that effect in his costs submissions, I am minded to apply a reduction to take account of his financial circumstances. I determine that Mr Tomo is entitled to a discount of $1,000 on the costs he would otherwise have had to contribute to Checkmate.

[31] On that footing then, Mr Tomo owes Checkmate $4,000 and Checkmate owes Mr Tomo $2,000. In a practical sense, there is a $2,000 difference in favour of Checkmate. The Authority apprehends that Mr Tomo may be in no position to make such a payment. If that is the case, and an application is made by Checkmate for compliance with this costs award, the Authority will use its powers to inquire in more detail into Mr Tomo's financial circumstances and if it is satisfied that Mr Tomo has no ability to meet the difference between the two costs awards, then the Authority could decline to make an order for compliance.

James Crichton
Member of the Employment Relations Authority