IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 19
5470556

	BETWEEN	CARL ELKINGTON Applicant
	A N D	NEW ZEALAND KING SALMON LIMITED Respondent

Member of Authority:	M B Loftus
Representatives:	Martin Logan, Counsel for Applicant Karen Radich, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	8 October 2014 from Applicant 11 November 2014 from Respondent
Date of Determination:	13 February 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Carl Elkington, claimed he was disadvantaged as a result of the respondent New Zealand King Salmon Limited (King Salmon) *imposing improper conditions on his salary review*. While that claim was resolved there remains a consequential one concerning the legal costs Mr Elkington incurred with respect to the initial dispute. He claims they constitute a further disadvantage.

[2] King Salmon denies the claim has validity.

Background

[3] As already said, this originated as a claim Mr Elkington was unjustifiably disadvantaged in his employment as a result of the manner in which King Salmon performed a salary review.

[4] Mr Elkington's employment agreement contained a provision which required an annual review. In July 2013 and following the 2013 salary review King Salmon offered an increase but the letter communicating this also contained advice King Salmon intended changing a clause in the employment agreement which dealt with the payment of Mr Elkington's salary. The proposed clause would allow the company to alter the payment period from fortnightly to monthly if it chose to do so at some later date.

[5] Mr Elkington signed and returned the offer but before doing so deleted the reference to the pay period clause.

[6] King Salmon did not act on this but later (19 September 2013) sent another copy of the original offer. When Mr Elkington queried this he was told the offer of a pay increase was conditional on acceptance of the clause allowing the company to move to a monthly pay cycle.

[7] Mr Elkington objected and enlisted the aid of a solicitor to argue his case. This led to some three months of correspondence with King Salmon finally conceding the increase without requiring Mr Elkington accept the new payment clause.

[8] Mr Elkington accepted the increase but in doing so advised, through his solicitor, that the issue of costs remained. The argument cost him $2,346.90 in legal costs. He considers that an unreasonable impost and now seeks its reimbursement.

Determination

[9] In support of his argument Mr Elkington claims the original proposition constituted a disadvantage and that King Salmon *impliedly accepted* that.

[10] It follows he was entitled to challenge the proposed contractual change which he claims he was doing on behalf of all employees and King Salmon then aggravated the situation by prolonging the debate.

[11] Note is taken of various decisions in which the Authority has concluded it is inappropriate to award pre-application costs but he counters these with an assertion the substantive applications would have failed in almost every instance. It is submitted that while such awards may be exceptional there is no outright prohibition and some may succeed on their facts. Reference is made to *Masoe v Te Roopu Awhina Ki Porirua Trust*[1] which saw the employee reinstated prior to the filing of a dismissal claim and then receiving damages in relation to costs incurred.

[12] In closing it is argued this was a clear case of an employer trying to wear down an employee when it should have conceded.

[13] The response is costs incurred in trying to resolve an employment relationship problem prior to intervention by the Authority are not generally recoverable for public policy reasons and reference is made to a number of cases which support this contention.

[14] There are various arguments as to why the original argument was unlikely to succeed and King Salmon was acting in a perfectly reasonable and lawful manner.

[15] It is also argued it was ridiculous to incur these costs given they exceed the amount being contested by some 800%. Note is also made that Mr Elkington is seeking full client/solicitor costs which are, in the circumstances, unobtainable.

[16] Finally it is argued the argument simply cannot succeed as Mr Elkington has not been disadvantaged in his employment and nor has any condition there-of been altered to his disadvantage.

[17] I find the arguments tendered on behalf of King Salmon persuasive. It is difficult to see how Mr Elkington has been disadvantaged. He got his pay increase and there were no other changes to his terms and conditions of employment.

[18] I also agree with the submission there are a number of reasons why Mr Elkington may not have succeeded with his original claim. The information I have suggests there is an argument King Salmon was doing nothing more than it was entitled to do – trying to negotiate terms of employment.

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[1] [2011] NZERA Wellington 16

[19] That distinguishes this case from Ms Masoe. Apart from the fact her claims were significantly more serious than this, she was dismissed in circumstances which the employer had to concede were totally unjustified. She suffered directly attributable loss and would undoubtedly have succeeded had the case proceeded.

[20] The argument Mr Elkington was taking a principled stand on behalf of all employees also fails. He was authorised to represent no-one.

[21] There is then the fact Mr Elkington seeks full solicitor client costs. That is untenable in the circumstances. Such an award will only occur in exceptional circumstances and where there is unconscionable behaviours such as that discussed in *Bradbury v Westpac Banking Corporation*[2]. There is no evidence of such behaviour here.

[22] Lastly I note the case law and the principle pre-application costs are not normally allowed in this jurisdiction. The statutory scheme is designed to facilitate settlement without litigation. This is reflected in the fact the Employment Relations Act emphasises mediation and costs to and including that point are not recoverable even if legal assistance is used or present. The arguments tendered on Mr Elkington's behalf fail to convince me this is a situation in which I should deviate for that approach.

Conclusion and costs

[23] For the above reasons Mr Elkington's claim fails.

[24] Costs are reserved but for the parties guidance I advise I am of the view this matter has, as suggested by Ms Radich ([15] above), already escalated to a ridiculous point. I am of an initial view the parties should avoid additional cost and accept those already incurred lie where they fall.

M B Loftus
Member of the Employment Relations Authority

[2] [2009] 3 NZLR 400