IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2020] NZERA 277
3059494 and 3059495

	BETWEEN	CHRISTOPHER BENTERMAN Applicant in 3059494
	AND	DUANE CURD Applicant in 3059495
	AND	NEW ZEALAND STEEL LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Garry Pollak, counsel for the Applicants Carter Pearce, counsel for the Respondent
Submissions:	11 March 2020 from the Applicants and 21 April 2020 from the Respondent
Determination:	13 July 2020

COSTS DETERMINATION OF THE AUTHORITY

A. New Zealand Steel Limited must pay E tū $6,393.12 as a contribution to the costs and expenses of representation of Christopher Benterman and Duane Curd.

Employment Relationship Problem

[1] By determination issued on 30 January 2020 Christopher Benterman and Duane Curd succeeded in claims they had pursued with the support of their union E tū.[1] The determination found New Zealand Steel Limited (NZSL) had breached the individual terms of employment of Mr Benterman and Mr Curd and had breached its collective agreement (the CA) with three unions by implementing changes to the two men's pay

[1] *Benterman & Curd v New Zealand Steel Limited* [2020] NZERA 37.

rates before following and completing a procedure for resolution of disputes set in clause 59.2 of the 2018-2021 CA.

[2] In light of that success Mr Benterman and Mr Curd sought an award of costs.

[3] NZSL accepted the applicants' success would normally mean it should pay costs to E tū for the legal representation provided to the union's two members to pursue their claim. However NZLS submitted the Authority should instead take into account an offer the company made to settle the matter prior to the arrangements for the Authority's investigation being made. NZSL said its settlement offer effectively had the same financial outcome that Mr Benterman and Mr Curd later achieved through the Authority determination so E tū should contribute to NZSL's costs which could have been avoided if they had accepted the earlier offer. Alternatively NZSL submitted each party should be left to bear their own costs.

[4] The general rule, absent countervailing factors, is that litigants who fail to achieve any more than was proposed in a reasonable, prior settlement offer made to but rejected by them, must then contribute to the other party's costs.[2] This is because the public interest in fair and expeditious resolution of disputes would be undermined if a party were able to ignore reasonable settlement offers without any consequence as to costs. However the reasonableness of those offers, and what effect they might have on any costs awards made later, is not assessed solely on economic considerations, that is the monetary value of the outcome. The elements of a claim whereby litigants seek vindication through a statement of principle in the employment context is recognised as relevant to the exercise of the Authority's discretion to award costs.[3]

[5] In this case the parties' counsel had exchanged correspondence between 24 June and 4 July 2019, on a without prejudice save as to costs basis, about the prospects of resolving the claims made in the applications of Mr Benterman and Mr Curd. That correspondence, now disclosed for the purposes of the costs issue, showed the parties were both willing to resolve the matter on the basis that a higher rate paid to the two men would be "grandfathered", that is continued as individual rates for them. However they ultimately failed to reach agreement because E tū would not agree to a further term

[2] *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [109], referring to the Court of Appeal's remarks at [20] in *Bluestar Print Group (NZ) Limited v Mitchell* [2010] NZCA 385 [20] and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 at [53].
[3] *Bluestar,* above n 2, at [19].

required by NZSL, as part of any settlement agreement in this matter, about the normal rate that applied to other union members who were electrical tradespeople working in the same department as Mr Benterman and Mr Curd.

[6] NZLS accepted the Authority's determination had also resolved another issue that arose in the claim brought by Mr Benterman and Mr Curd, that is about the operation of clause 59. The clause set some requirements about how the parties should deal with disputes over interpretation and application of the CA. The clause applied in this case because there was a dispute over what rate the two men were receiving and how any change to that rate could be made. However NZSL said Mr Benterman and Mr Curd, through their union-appointed counsel had not raised the issue regarding clause 59 in the earlier correspondence over a possible settlement so they could not now suggest NZLS's settlement offer was rejected because E tū, and its two members, were seeking vindication of its position on how the clause should be interpreted and applied.

[7] In considering both parties' submissions on costs I found those made for the applicants more persuasive on two key points.

[8] Firstly, on reviewing the settlement correspondence, rejecting NZLS's offers was not unreasonable. Put another way, it was not reasonable for NZSL, as it did in its offer, to require the union to accept the company's interpretation of another clause in the CA about the particular pay rate applicable to all other electrical trade workers as part of settling the issue of what pay rates were applicable to Mr Benterman and Mr Curd. The union was not, at that stage, prepared to compromise the potential position of other workers which was not directly related to the basis of the claim made for Mr Benterman and Mr Curd. The case of those two men did not rely on that particular other clause but, rather, on individual oral terms they said had been agreed earlier with them by an NZSL representative.

[9] Secondly, and even if my conclusion on the first point were wrong, the interpretation and application of clause 59 was an important issue on which Mr Benterman and Mr Curd and, through them as union members, their union had sought vindication. Their counsel submitted that NZSL's alleged breach of CA clause 59 was of wider significance in the workplace for the members of all three unions that are party to the CA with NZSL. The statements of problem lodged on behalf of Mr Benterman and Mr Curd had both initially sought a penalty for the alleged breach but they did not

pursue that outcome. Instead they eventually sought only a determination about how the clause 59 should be interpreted and applied. This was addressed at some length in the determination.[4] And NZSL costs submissions accepted the Authority's examination of the clause was helpful for future reference by the parties.

[10] Because of the vindication achieved on a point of principle in the employment context, the outcome could not be assessed solely on the economic consideration of the value of arrears NZSL was ordered to pay Mr Benterman and Mr Curd.

[11] On that analysis an order could appropriately be made for NZSL to pay costs for the legal representation provided to Mr Benterman and Mr Curd.

[12] The appropriate amount, at tariff, for an investigation meeting that spanned one-and-a-half days comprised $4,500 for the first day and half of $3,500 for the second day, along with reimbursement of the two filing fees paid for each application. The total on that calculation was $6,393.12. This is the amount NZSL must pay E tū within 28 days of the date of this determination as its contribution to costs and expenses the union incurred in providing legal representation to Mr Benterman and Mr Curd.

Robin Arthur
Member of the Employment Relations Authority

[4] *Benterman*, above n 1, at [48]-[62]