IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 132
3091634

	BETWEEN	VULCAN STEEL LIMITED Applicant
	AND	MANUFACTURING & CONSTRUCTION WORKERS UNION Respondent

Member of Authority:	Philip Cheyne
Representatives:	Chris Patterson & Anneke Reid, counsel for the Applicant Lou Yukich, advocate for the Respondent
Costs Submission:	1 March 2021 from the applicant 4 February 2021 from the respondent
Date of Determination:	7 April 2021

COSTS DETERMINATION OF THE AUTHORITY

A. The application for costs is dismissed.

[1] In determination [2021] NZERA 2, I determined that the provisions of the collective agreement entitle employees, required to undergo a drug test by Vulcan Steel, to choose whether to be tested in accordance with AS/NZS 4308:2008 or AS/NZS4760:2019. In summary, I did not accept the position argued for by the Vulcan Steel, preferring the Union's position. Cost were reserved, but have not been agreed. I now have submissions from both parties.

[2] The Union says that costs should follow the event. It says that the Authority should have struck out Vulcan Steel's application at an early point, as it had sought. The Union seeks an uplift in addition to the daily tariff as a consequence of the extra

and unnecessary costs it was required to incur. The Union says that unnecessary costs arose from erroneous restrictions on travel and appearance in Christchurch. It also says that Vulcan Steel's case was conducted in a way that added unnecessarily to costs. I am provided with an invoice by the Union to the Union for representation at the Authority ($12,580.00), IFC invoice #2002512 ($1,200.00) dated 9 October 2020 for "Review of additional materials and provision of testimony (8 October)" and IFC invoice #200251 ($3,900.00) dated 14 October 2020 for ""Review of provided materials and provision of rebuttal report - $2600.00" and "Review of additional materials and provision of testimony (8 October) – 1,300.00". Copies of the strike out application and some emails are included.

[3] It is not necessary to canvass the response by Vulcan Steel.

[4] The Authority is granted specific power by clause 12A of Schedule 2 to the Employment Relations Act 2000 to dismiss frivolous or vexatious proceedings. That power had no application here as the position of neither party could be considered frivolous or vexatious. The Authority also has power when investigating a matter to follow whatever procedure it considers appropriate, but in compliance with the principles of natural justice. The Union considered that Vulcan Steel would have breached the collective agreement by requiring its members to provide a urine sample. Vulcan Steel did not agree. The matter between the parties was in essence a dispute about the interpretation, application or operation of the collective agreement. Both sides were entitled to advance their cases as part of the investigation into and determination of the dispute between them. While the Union eventually prevailed, that does not mean that the problem should have been "struck out" in August. This argument in support of an uplift from a daily tariff fails.

[5] In *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport*, the Employment Court said:[1]

> In relation to the hearing before the Authority, it seems questionable whether the Authority should ever award costs when asked to assist parties by investigating the meaning of a collective instrument or by determining its proper application and operation.

[1] *New Zealand Tramways Union (Wellington Branch) v Wellington City Transport* [2002] 2 ERNZ 435 at [73].

[6] The determination of the dispute is of general application to the Union, its members and Vulcan Steel. It determined the proper application and operation of the agreement. It resolved the respective rights under the collective agreement. I see no reason to distinguish the approach to costs described in *New Zealand Tramways Union* and similar cases before and since, from being applied to the present case.

[7] Both parties incurred costs of expert evidence, the Union doing so in response to Vulcan Steel's expert evidence. The evidence helped give context to the respective positons. There is no reason treat the costs involved differently from my general approach.

[8] An investigation meeting was adjourned at short notice because of COVID 19 issues and the Level 3 lockdown affecting Auckland. The Union's representative apparently travelled from Auckland before the lockdown ended. He says he was authorised to do this, so he says the Authority needlessly adjourned the investigation meeting. It is not necessary to rehearse the steps taken by the Authority beforehand. Even if the Union's representative is correct, it provides no basis for an award of costs against Vulcan Steel. Counsel for the company had arranged travel to commence after the end of the lockdown, so the company had no part in the reasons for the adjournment.

[9] For these reasons, the claim for costs fails.

Philip Cheyne
Member of the Employment Relations Authority