

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 146  
EMPC 4/2019  
EMPC 360/2019**

IN THE MATTER OF challenges to determinations of the  
Employment Relations Authority

AND IN THE MATTER of an application to set aside witness  
summons

AND IN THE MATTER of an application for evidence to be given by  
audio-visual link

BETWEEN ANA SHAW  
Plaintiff

AND BAY OF PLENTY DISTRICT HEALTH  
BOARD  
Defendant

Hearing: 16 September 2020  
(by telephone)

Appearances: A Halse, advocate for plaintiff  
M Beech, T Carlisle and C McGregor, counsel for defendant  
K Single, witness in person

Judgment: 17 September 2020

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**INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH  
(Applications to set aside witness summons and for evidence to be given by  
audio-visual link)**

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[1] These proceedings are set down to be heard in Auckland on 21 September 2020. A hearing notice was sent to the parties on 24 June 2020.

[2] In anticipation of the hearing there are two applications to be dealt with. The first relates to a witness summons served on behalf of Ms Shaw, on her former representative Kerry Raymond Single. The second application is by Bay of Plenty District Health Board (DHB) seeking an order that its former General Manager of Governance and Quality, Gail Bingham, be allowed to give evidence by audio-visual link (AVL).

[3] Ms Shaw was dismissed by the DHB on 27 March 2015. It is not necessary for the purposes of this decision to attempt to summarise the disputed circumstances in which Ms Shaw's employment ended beyond noting that she claims to have been unjustifiably dismissed and unjustifiably disadvantaged by the DHB. A significant feature of the pleadings is that Ms Shaw alleges she was the victim of bullying and harassment.

[4] Mr Halse, advocate for Ms Shaw, has explained that Mr Single's evidence is needed because Ms Shaw's case depends, significantly, on a conversation that took place on 21 January 2015. He was referring to a meeting that day attended by representatives of the DHB, Ms Shaw and Mr Single, as her representative. The claim to be made is that Mr Single spoke with DHB representatives privately during the meeting and, immediately afterwards, ceased acting for her. The evidence that Mr Single is expected to give, I understand, is about that discussion and its result, to support the pleadings of bullying and harassment. However, as a summonsed witness there is no brief of his expected evidence, and no "will say statement" of the anticipated evidence was filed.

[5] Against that brief background, Mr Single was served with a witness summons on 11 September 2020. Pursuant to that summons he is required to attend the Employment Court, in Auckland on 21 September 2020 at 9.30 am until released from attendance. The summons compels Mr Single to be present and to bring with him and produce any documents or notes in relation to his representation of Ms Shaw during the time he provided advice to her in the years 2014–2015 inclusive.

[6] Despite the breadth of that summons, I understood from Mr Halse's submissions, that the evidence anticipated to be given will concentrate on what happened in the conversation on 21 January 2015.

[7] Mr Single applied to set aside the summons. The grounds he relied on were that:

- (a) he ceased to represent Ms Shaw in January 2015;
- (b) he has supplied Ms Shaw with copies of the file he kept for her;
- (c) he responded to correspondence written on Ms Shaw's behalf;
- (d) he has health concerns that impact on his ability to travel and preclude him from travelling to Auckland; and
- (e) he has no recollection of anything that might be relevant to Ms Shaw's proceeding arising from the time when he acted for her, because of his poor health.

[8] A notice of opposition to Mr Single's application was filed for Ms Shaw. After setting out the basis of Ms Shaw's case, summarised as the DHB having exercised vexatious and abusive processes for a number of years, the grounds of opposition relied on were that:

- (a) the meeting on 21 January 2015 was significant;
- (b) there are documents in the common bundle of documents to which Mr Single may be able to speak, although they were not identified;
- (c) Mr Halse's company would be prepared to assist in providing "comfortable door-to-door personalised transport" from Mr Single's home to the Court in Auckland; and
- (d) it was in the interests of justice for Mr Single's evidence to be heard.

[9] Some elaboration about Mr Single’s personal circumstances is called for. Mr Single lives in Waihi. He is 72 years old and has compromised health. He had surgery on 19 February 2015 for a heart blockage resulting in a pacemaker being fitted. Since then he has been admitted to hospital several times for “mini” strokes and continues to require regular hospitalisation for his health. The most recent health event was on 19 May 2019 when he suffered a further stroke. In the hearing on 16 September Mr Single explained, and I accepted, that his poor health places significant limitations on him and he has been advised by his doctor to limit his activities. He has an additional concern about being required to attend Court from 21 September, because he has an eye operation scheduled that day.

[10] The power to issue a witness summons is conferred by cl 6 of sch 3 to the Employment Relations Act 2000. Witness summons are provided for in regs 33 and 34 of the Employment Court Regulations 2000. Relevantly reg 34(3) provides that a witness summons may be set aside if it is oppressive or causes, by reason of distance or short notice, undue hardship to the summonsed person.<sup>1</sup>

[11] There is little case law on the scope and application of reg 34(3).<sup>2</sup> As was observed by Chief Judge Inglis in *Alkazaz v Enterprise IT Ltd*, summons are administratively issued by the Court Registry in response to an application.<sup>3</sup> The Court is empowered to control potential abuse or misuse of witness summons via reg 34(3).<sup>4</sup> The decision on an application to set aside a summons is guided, ultimately, by what is required for a particular case to be disposed of fairly, consistent with the Court’s equity and good conscience jurisdiction and ensuring the proper use of Court time.<sup>5</sup>

[12] Despite Mr Single’s health problems there was no evidence from him that there is a medical reason precluding him from giving evidence. The issue is whether the need to travel from his home in Waihi to Auckland amounts to oppression or undue

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<sup>1</sup> Employment Court Regulations 2000, reg 34(3)(a)–(b).

<sup>2</sup> See for example *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 138; *Nisha v LSG Sky Chefs New Zealand Ltd (No 19)* [2015] NZEmpC 139; and *Auckland Council v George* [2013] NZEmpC 79.

<sup>3</sup> *Alkazaz*, above n 2, at [7].

<sup>4</sup> Employment Court Regulations 2000, reg 34(3).

<sup>5</sup> *Alkazaz*, above n 2, at [7]; For comments about what amounts to oppression see *George*, above n 2.

hardship, in light of his health, such that the summons should be set aside. I accept that what happened at the meeting on 21 January 2015 may, potentially, be relevant given what has been pleaded.

[13] While reg 34(3) might be read as requiring a binary decision (for example that the witness summons is oppressive or not oppressive), I consider a more nuanced approach is required in accordance with the Court's equity and good conscience jurisdiction.<sup>6</sup> In this case, that can be satisfied by striking a balance between accommodating Mr Single's health concerns relating to having to travel and being able to hear relevant evidence. That is satisfied by amending the witness summons so that Mr Single is required to give evidence, but can do so by AVL. It follows that the summons is not set aside.

[14] Mr Halse will need to make suitable arrangements for Mr Single to participate by AVL taking into account his eye operation on Monday. Mr Halse will also need to provide Mr Single with sufficient copies of any documents he intends to question him about. Those documents will need to be numbered, or otherwise identified, in the same way as they are in the common bundle of documents.

[15] To facilitate this decision the Registrar is to provide to Mr Single a copy of the Court's guideline for witnesses giving evidence by AVL.

### **DHB application**

[16] The second application can be dealt with briefly.

[17] The DHB has applied for the evidence of Ms Bingham to be given by AVL because of chronic pain she suffers from a back injury, for which medical treatment is ongoing. That pain precludes her from travelling from Tauranga to Auckland. Mr Halse was concerned at this application because he considers Ms Bingham's evidence to be significant and that it will be more appropriate for her to give evidence in person rather than by AVL.

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<sup>6</sup> Employment Relations Act 2000, s 189(1)–(2).

[18] I am satisfied that the DHB has established the appropriateness of Ms Bingham being able to give her evidence by AVL. The medical evidence supporting the application confirmed what it contained; namely the existence of a long-standing problem still being treated and which would make travel from Ms Bingham's home in Tauranga to Auckland unnecessarily problematic. There is no reason to assume that giving evidence by AVL is less ideal than a witness appearing in person and there are adequate safeguards in the Court's guidelines for AVL to ensure the evidence is fully and fairly presented.

[19] The application is granted subject to:

- (a) The AVL service being provided at the District Court in Tauranga. I understand preliminary arrangements have been made to use the AVL services at that Court. Mr Beech will need to make arrangements for that link to be available.
- (b) A copy of the Court's Guidelines for Witnesses Giving Evidence by AVL being provided to Ms Bingham forthwith.

[20] Costs are reserved.

K G Smith  
Judge

Judgment signed at 10.45 am on 17 September 2020