

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUHAHI**

**[2020] NZEmpC 105
EMPC 427/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to hear evidence at a distance
BETWEEN	CERES NEW ZEALAND LLC Plaintiff
AND	DJK Defendant

Hearing: On the papers

Appearances: S Townsend, counsel for plaintiff
Defendant in person

Judgment: 15 July 2020

**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application to hear evidence at a distance)**

[1] The plaintiff challenges a determination of the Employment Relations Authority, finding that the defendant had raised her personal grievance within the 90-day period prescribed in s 114(1) of the Employment Relations Act 2000 (the Act).¹ A hearing is set down in Christchurch on 11 August 2020.

[2] The plaintiff has applied for orders allowing one of its witnesses, the director and shareholder of the company, Mr David McIntyre, to attend the hearing via audio-visual link (AVL). Mr McIntyre currently resides in Florida, USA. Attending the

¹ *TKG v OEN* [2019] NZERA 629 (Member van Keulen).

hearing in person would present significant difficulties because of the COVID-19 global pandemic. The application is not opposed by the defendant.

[3] The ordinary way for a witness to give evidence in a civil proceeding is orally in a courtroom in the presence of the Judge, the parties and the public.² There is no presumption in favour of giving evidence in the ordinary way.³

[4] The Courts (Remote Participation) Act 2010 provides for the use of AVL in civil and criminal proceedings. The criteria for allowing the use of AVL is set out in s 5, which provides:

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and
 - (ii) the level of contact with other participants;
- (d) any other relevant matters.

[5] I accept the submission advanced by counsel for the company, Ms Townsend, that Mr McIntyre's attendance at the hearing is important, including because of his position within the company and his likely centrality as a witness for it. I accept, too, that if he cannot attend via AVL, he may not attend the hearing at all in light of the current official advice against international travel. The proceedings are relatively straightforward, they have been set down for one day and do not require extensive documentation. AVL is available and there is nothing to indicate that there would likely be any problems or difficulties with the quality of the technology.

² See, for example, High Court Rules 2016, r 9.51; Evidence Act 2006, s 83.

³ See the discussion in *V (CA492/10) v R* [2011] NZCA 525, citing *R v Shone* [2008] NZCA 313 at [28]. The Court of Appeal confirmed this is still the principle in *Wealleans v R* [2015] NZCA 353 at [34].

[6] The alternative is an adjournment. I do not consider this a satisfactory option, including because of the early stage these proceedings are at (dealing with a contested 90-day issue) and the uncertainty surrounding the current pandemic and how long restrictions on travel will remain in place. In the circumstances the application for leave for Mr McIntyre to attend the hearing and give his evidence by AVL is granted. Counsel for the company is to liaise with the Court and counsel for the defendant to make the necessary arrangements and to ensure that the agreed bundle of documents is available when Mr McIntyre gives evidence.

[7] I do not understand any issue of costs to arise on this application.

Christina Inglis
Chief Judge

Judgment signed at 4.30 pm on 15 July 2020