

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

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

**[2020] NZEmpC 78
EMPC 397/2019**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to participate at a hearing by audio-visual link
BETWEEN	AHMED ALKAZAZ Plaintiff
AND	ENTERPRISE IT LIMITED Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person R Bryant, counsel for defendant
Judgment:	3 June 2020

**INTERLOCUTORY JUDGMENT (NO 2) OF
CHIEF JUDGE CHRISTINA INGLIS
(Application to participate at a hearing by audio-visual link)**

The issue

[1] The plaintiff's challenge to a determination of the Employment Relations Authority, declining to reopen its investigation into his personal grievance,¹ is set down for hearing in Auckland on 8–9 September 2020.

[2] The plaintiff lives in Dubai and has applied for leave to participate at the hearing by audio-visual link (AVL). The application is primarily advanced on the

¹ *Alkazaz v Enterprise IT Ltd* [2019] NZERA 560 (Member Craig).

basis of difficulties with international travel caused by the COVID-19 pandemic. Mr Alkazaz says that even if the current tight restrictions are relaxed prior to the hearing (which is by no means certain), air travel will pose a significant health risk to him and his family. In addition, Mr Alkazaz's wife is expecting another child; Mr Alkazaz is employed in Dubai and risks losing his job if he takes time off to travel to New Zealand; and he needs to support his family.

[3] The defendant accepts that it is unlikely that there will be a return to normal international travel prior to the date of hearing and does not oppose the application.

Analysis

[4] Mr Alkazaz is the plaintiff in these proceedings and anticipates that both he and his wife will give evidence in support of the challenge. A party generally appears at a hearing in person, or through a representative. 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 As the Court of Appeal has made clear, there is no presumption in favour of giving evidence in the ordinary way.³

[5] The Court may allow the use of AVL in civil proceedings, including for the appearance of a party and witnesses. Before doing so, it must take into account whether or not the other party consents to the use of AVL and must have regard to the criteria in s 5 of the Courts (Remote Participation) Act 2010.⁴ The criteria are:

- (a) The nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;

² See, for example, High Court Rules 2016, r 9.51 "Evidence to be given orally"; and Evidence Act 2006, s 83 "Ordinary way of giving evidence".

³ See the discussion in *V (CA492/10) v R* [2011] NZCA 525 at [21], n 8, referring to *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].

⁴ Courts (Remote Participation) Act 2010, s 7.

- (c) the potential impact of the use of the technology on the effective maintenance of the rights of the 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;and
- (d) any other relevant matters.

[6] The defendant accepts the travel difficulties identified by the plaintiff. The proceedings are of a relatively straight-forward nature; they involve two parties and ought not to require extensive documentation or cross-examination. Suitable AVL facilities are available and there is nothing to indicate that there would likely be any problems or difficulties with the quality of the technology.

[7] I have considered the potential impact of AVL on the ability to assess credibility and the reliability of evidence presented to the Court. As I have said, the matters at issue on the challenge (namely to the Authority's determination declining to reopen its earlier investigation) are relatively narrow and the scope of the evidence should be reasonably confined. And, as Stevens J observed in *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue*:⁵

[14] Evidence by video link is no longer the unusual or novel mode of giving evidence it once was. As Giles CJ noted over a decade ago in *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* 11/3/97, Giles CJ, NSWSC, at p 6, it is now an "accepted feature of litigation". Operating in a world where improvements in technology increasingly enable people to enter into complex and global business arrangements, the Courts must be attuned to the needs of modern litigants and to the practicality of conducting modern litigation in today's business world. Indeed, Williams J in *R v Wong* 17/5/06, Williams J, HC Auckland CRI-2005-404-15296 stated, at para 56 "it would be odd if, in the 21st century, courts were to refuse to use such

⁵ *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC).

technology and insist on compliance with an aphorism which long pre-dates the electronic age”.

[8] I have also considered whether the matter could simply be adjourned, pending a return to normal international air travel. It is, however, desirable that the challenge is determined in a timely manner and is not left to some indeterminate time in the future absent good reason. I also factor in the related issue of cost. This challenge is to a determination declining to reopen an investigation. It is not a full-blown substantive claim. If the plaintiff succeeds it will need to return to the Authority for further consideration. The cost, financial and otherwise, of requiring the in-person attendance at the hearing of the plaintiff and his wife, even assuming they can get to New Zealand in early September 2020, weighs in favour of the grant of leave.

[9] In the circumstances, the application for leave for the plaintiff to appear at the hearing and to give his evidence by AVL is granted. His wife may also give her evidence by AVL. The plaintiff 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 in Dubai when the hearing takes place.

[10] Costs on this application are reserved pending the outcome of the challenge.

Christina Inglis
Chief Judge

Judgment signed at 11 am on 3 June 2020