

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

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

**[2023] NZEmpC 204
EMPC 266/2023**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to appear by audio- visual link
BETWEEN	MIKAYLA ZHANG Plaintiff
AND	TE WHATU ORA HEALTH NEW ZEALAND Defendant

EMPC 268/2023

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to appear by audio- visual link
BETWEEN	TE WHATU ORA HEALTH NEW ZEALAND Plaintiff
AND	MIKAYLA ZHANG Defendant

Hearing:	On the papers
Appearances:	M Donovan, counsel for Mikayla Zhang T Oldfield, counsel for Te Whatu Ora Health New Zealand
Judgment:	20 November 2023

**INTERLOCUTORY JUDGMENT OF JUDGE KATHRYN BECK
(Application for leave to appear by audio-visual link)**

[1] This matter is set down for a two-day hearing on 6 and 7 December 2023. An application has been made by Te Whatu Ora Health New Zealand (Te Whatu Ora) for leave for a witness to participate at the hearing by audio-visual link (AVL). Ms Zhang is not opposed to the order sought.

[2] In his application for leave to bring an interlocutory application, Mr Oldfield, counsel for Te Whatu Ora, has stated that he omitted to bring the possibility of this application to the attention of the Court or Ms Zhang in the parties' joint case management memorandum filed on 18 September 2023.

[3] Despite the fact that there is no opposition to the application, the Court must be satisfied that it is appropriate that the order be made.

[4] 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.¹ There is no presumption in favour of giving evidence in the ordinary way.²

[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 2010.³ The criteria are:⁴

- (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 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:
- (d) any other relevant matters.

¹ See High Court Rules 2016, r 9.51; and Evidence Act 2006, s 83.

² *Wealleans v R* [2015] NZCA 353 at [34]; *R v O (CA433/2012)* [2012] NZCA 475 at [37]; and *R v Shone* [2008] NZCA 313 at [28].

³ Courts (Remote Participation) Act 2010, s 7.

⁴ Section 5.

[6] In his application, Mr Oldfield fully canvasses the matters relevant to the Court's discretion. In summary, the witness resides in Christchurch and has young children who he ordinarily picks up from day care on Wednesdays. Travelling to Auckland and being away from his family for the duration of the hearing would present personal difficulties for him.

[7] Ms Zhang does not oppose the application. There is nothing about the nature of the proceedings which suggests that the giving of evidence via AVL would be unsuitable. Appropriate AVL facilities are available. While I have considered the potential impact of AVL on the ability to assess credibility and the reliability of evidence presented, those considerations do not warrant an in-person appearance in this case.⁵

[8] In the circumstances, the application for leave for the identified witness to appear at the hearing and give evidence by AVL is granted.

[9] Counsel for the plaintiff is to ensure that the agreed bundle of documents is available to the witness when the hearing takes place.

[10] Counsel must also confirm to the Registrar of the Employment Court prior to the hearing that the witness has been provided with a copy of the Court's Guideline for Appearing by Audio-Visual Link.⁶

[11] I do not understand any issue of costs to arise.

Kathryn Beck
Judge

Judgment signed at 9.50 am on 20 November 2023

⁵ *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC) at [37].

⁶ Employment Court of New Zealand "Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings" (February 2022) <www.employmentcourt.govt.nz>.