

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

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

**[2024] NZEmpC 37
EMPC 394/2022**

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 via audio visual link
BETWEEN	MATTHEW LAI Plaintiff
AND	DAVID GRAY Defendant

Hearing: 5 March 2024
(Heard at Christchurch via telephone)

Appearances: Plaintiff in person
P Mathews, advocate for defendant

Judgment: 6 March 2024

**INTERLOCUTORY (NO 3) JUDGMENT OF JUDGE K G SMITH
(Application to participate at a hearing via audio visual link)**

[1] This proceeding is set down to be heard in Christchurch on 7 and 8 March 2024. The notice of hearing was issued to the parties on 2 November 2023.

[2] On 4 March 2024, the plaintiff applied to participate in the hearing by audio visual link giving as the grounds for his application that he is unable to afford the airfare, travel and accommodation costs associated with a Christchurch hearing. This subject has not been raised at any previous time.

[3] The application was not accompanied by a request for urgency but, given the proximity of the hearing, I directed that it would be dealt with urgently at noon on 5 March 2024. Before the hearing Mr Lai informed the Registrar that he would represent himself in this application even though he will be represented at the substantive hearing. I confirmed those intentions with him before discussing the application.

[4] The ordinary way for a witness to give evidence in a civil proceeding is orally in a Courtroom in the presence of a Judge, the parties and any members of the public who choose to attend.¹ There is no presumption in favour of giving evidence in the ordinary way.²

[5] The Court may allow evidence to be given by audio visual link in civil proceedings including for the appearances of a party and witness. Before such an order is made, however, the Court must take into account whether or not the other party consents and must have regard to the criteria in s 5 of the Courts (Remote Participation) Act 2010. The criteria are:

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact on 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.

[6] Despite Mr Gray's opposition to the application, the outcome turns entirely on considerations of access to justice given what Mr Lai's application disclosed about his financial situation.

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

² *Wealleans v R* [2015] NZCA 353 at [34].

[7] There is nothing about the nature of the proceeding that would suggest using AVL is unsuitable. Mr Lai confirmed that both he and his representative have access to suitable technology.

[8] There are no other factors that weigh against granting the application.

[9] The application is granted. During the hearing I advised Mr Lai that it is usual for participation by AVL to be accompanied by the satisfactory completion of a test to ensure that the device or devices to be used are adequate for the Court's purposes.³ If it transpires, for any reason, that the tests results are unsatisfactory the AVL facility at the Employment Court at Wellington will be provided (Level 5, District Court Building, 43-49 Ballance Street, Wellington).

[10] Mr Lai's representative will need to ensure that documents to be relied on are available for his use during the hearing. The representative will also need to confirm that Mr Lai has been provided with a copy of the Court's *Summary of Guidelines for a Witness Giving Evidence by Audio-Visual Link Including in Virtual Hearings*.⁴

[11] Costs are reserved.

K G Smith
Judge

Judgment signed at 12.45 pm on 6 March 2024

³ Employment Court of New Zealand "Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings" <www.employmentcourt.govt.nz>.

⁴ Employment Court of New Zealand "Summary of Guidelines for a Witness Giving Evidence by Audio-Visual Link Including in Virtual Hearings" <www.employmentcourt.govt.nz>.