

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

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

**[2025] NZEmpC 257
EMPC 187/2025**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER OF an application for a witness to appear by
AVL

BETWEEN JOHN MCDERMOTT
Plaintiff

AND PENINSULA GROUP NZ LIMITED
Defendant

Hearing: 1 December 2025
(Heard at Christchurch by Audio Visual Link)

Appearances: A Halse, advocate for plaintiff
J Laphorne and M Blackwood, counsel for defendant

Judgment: 1 December 2025

**ORAL INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for a witness to appear by AVL)**

[1] This proceeding is set down to be heard in Wellington beginning on 23 February 2026. It has been set down since 20 August 2025.

[2] Today I have urgently heard an application by the defendant for its only witness, Michael Francis Morris, to give evidence by audio visual link (AVL). The application is only urgent because it was made on 4 November 2025 with Mr Morris' affidavit explaining his circumstances not being filed until 25 November 2025.

Recent procedural history

[3] The proceeding has something of a chequered procedural history. As recently as 24 November 2025, I issued a minute providing directions for the hearing. That minute followed one issued on 17 July 2025 timetabling steps for the hearing and a further minute on 20 August 2025 revising those directions.

[4] The minute issued last week responded to memoranda filed by Mr Halse and Ms Laphorne about the timetabled directions and compliance with them. To avoid the hearing being derailed, when the minute of 24 November 2025 was issued it contained directions to deal with the defendant's application for Mr Morris to give evidence by AVL.

[5] That said the defendant has not adequately explained its delay in applying for this evidence to be given by AVL, even though the subject was discussed during the conference of 17 July 2025. However, not resolving the application now will inevitably lead to complications over hearing preparation and risks compromising the hearing dates.

[6] The problems are not all one way. The plaintiff did not file a notice of opposition to the AVL application within time. Instead, when the parties were exchanging memoranda last month trying to address other difficulties, such as completion of the common bundle of documents and the briefs of evidence, Mr Halse's memorandum stated that the plaintiff intended to continue with his opposition.

[7] Taking a pragmatic view, I extended the time for the plaintiff to oppose the AVL application and for Mr Morris' affidavit to be filed. A direction was made that the application would be heard promptly, today.

[8] This degree of urgency would not have been required if the application had been made in a timely way.

The grounds of the AVL application

[9] As already foreshadowed in these remarks, the application is made on the basis that Mr Morris:

- (a) lives in Australia;
- (b) is no longer employed by Employsure, the parent company of the defendant;
- (c) is willing to support his former employer but that support does not extend to travelling to New Zealand to give evidence in person; and
- (d) is the defendant's only witness.

[10] Mr Morris' supporting affidavit confirms those grounds. He lives in Sydney. He resigned from Employsure in May 2021 and ceased employment with it in December 2021. Mr Morris has deposed to being the person with oversight of the processes that are the subject of the claims by the plaintiff. He said that he is "one of the only people" who has knowledge of those matters and would be able to give evidence for the defendant.

[11] Mr Morris went further. He stated his willingness to support the defendant and to attend as a witness but that he is not prepared to travel to New Zealand. The reasons for his refusal to travel were explained. That is, the time commitment involved and impact on him if he travelled.

[12] Mr Morris explained that he is self-employed, owning a business that limits his ability to travel. He did not otherwise describe the business or what creates this limitation. Mr Morris said that, if he was required to attend in person, he would withdraw his support and not be a witness.

The opposition

[13] The grounds of the plaintiff's opposition are extensive, although some of them are more probably correctly seen as a commentary on how Mr Morris' evidence was given by AVL in the Authority. In summary, the grounds of the opposition are:

- (a) Mr Morris has not provided adequate reasons for his inability to travel;
- (b) related to ground (a), the nature of his work has not been explained to enable the Court to assess whether the reasons are valid;
- (c) travel between Australia and New Zealand is frequent and ought not to inconvenience Mr Morris;
- (d) technical issues with AVL are anticipated because they were experienced in the Authority;
- (e) the Court will be unable to exercise adequate supervisory control over Mr Morris, to ensure that he does not have access to undisclosed information, or to prevent him from reading prepared answers to cross-examination questions;
- (f) Mr Morris will be able to give evidence from his own familiar surroundings not the formal setting of a court;
- (g) he could disengage from AVL at any point should the questions get too difficult with no legal consequences;
- (h) there were no assurances by the defendant about the technology to be used or that Mr Morris will be situated in a "secure environment with no ability to have unauthorised persons sitting off-screen";
- (i) Mr Morris is not employed by the defendant and never has been (a reference to the fact that he was employed by the defendant's parent company);

- (j) the defendant has not given the Court any reason explaining why one of its employees is not able to give evidence in response to the claims; and
- (k) the more formal procedures of the Court lend themselves to appearances in person.

[14] For completeness, the plaintiff accepted that attendance by AVL is satisfactory in some circumstances, but he claims that is the exception rather than the rule.

[15] At today's hearing Ms Laphorne and Mr Halse spoke to the application and opposition.

The Court's (Remote Participation) Act 2010

[16] The ordinary way a witness gives evidence in civil proceedings is orally in a courtroom in the presence of a Judge, the parties, and any members of the public who choose to attend.¹

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

[18] As conceded by Mr Halse, the Court has the statutory power to allow evidence to be given remotely in suitable cases. The criteria provided in the Court's (Remote Participation) Act 2010 are in s 5:

5 General criteria for allowing use of audio-visual links and audio links

A judicial officer or Registrar must consider the following criteria when they are making a determination under this Act whether or not to allow the use of AVL or AL for the appearance of any participant in a proceeding or for the observation of a proceeding by a victim or support person:

- (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

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

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

- (ii) the level of contact with other participants:
- (d) any other relevant matters.

[19] While the notice of opposition was not written to direct itself specifically the criteria in s 5, that is probably what it intended. I consider the application against that criteria.

The nature of the proceeding

[20] This is a reasonably conventional challenge to a determination of the Authority.³ Mr McDermott failed in his claims in the Authority in which he sought to establish personal grievances for alleged unjustified disadvantage, discrimination on the grounds of the union membership, an alleged breach of his employment agreement concerning the payment of commissions and unjustified dismissal. The defendant denies that it engaged in any of those actions.

[21] The statement of claim alleges that Mr McDermott was subjected to what was pleaded as a sham restructuring process and that his employment was terminated by “a foreign entity that was not his employer”. That is a reference to allegations that the employers parent company was involved in the decision making. That is coupled with pleadings asserting that there are difficulties of a legal nature for what is referred to as an Australian company conducting activities that engage New Zealand employment law.

[22] There is no part of the application, or the notice of opposition, which identifies any aspect of the proceeding which might make it ill-advised to grant the application and allow evidence to be given by AVL.

[23] Neither representative was able to point to any aspect of the claim that would make it unsuitable for evidence to be given by AVL.

[24] There is a prospect that Mr Morris’ evidence might be lengthy. That by itself I consider not to be a determining factor.

³ *McDermott v EmploySURE Ltd* [2025] NZERA 187.

[25] This criteria favours granting the application.

The availability of technology

[26] The notice of opposition referred to technical difficulties experienced in the Authority and to support criticisms of deficiencies in the application because no reference was made to the proposed technology to be used. There should have been information in the application explaining the nature of the technology to be used and that was a fair and reasonable point taken by the plaintiff. That said, the point is not persuasive. AVL has been used by this Court in any number of proceedings including for evidence from remote places within New Zealand and to hear from witnesses from overseas. That has included from the United Kingdom, the United States of America and Australia.

[27] There is no reason to assume that there will be technical difficulties. The position is covered because the Court's *Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings* requires a test to be conducted well before the hearing to ensure that the technology intended to be used is suitable.⁴

[28] This ground is insufficient to shift this assessment away from granting the application.

Impact of the use of technology on maintenance of the rights of the other party

[29] Section 5 requires the Court to consider the potential impact on the use of technology on the effective maintenance of the rights of the other party to the proceeding. That criteria includes the ability to assess credibility and the reliability of evidence and the level of contact with the other participants.

[30] The notice of opposition criticises the manner in which Mr Morris gave evidence before the Authority. That criticism was not supported by evidence and therefore it is able to be given only little weight.

⁴ Employment Court of New Zealand "Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings" (February 2022) <www.employmentcourt.govt.nz>.

[31] In any event, the issues identified in the notice of opposition are matters for effective control of the proceeding by the Court and are not, even if they had been supported, sufficient to shift this evaluation against granting the application.

[32] This ground is very similar to an argument that was made for Mr McDermott when he unsuccessfully sought to judicially review the Authority's decision to allow Mr Morris to give his evidence to the investigation meeting by AVL.⁵ When I decided Mr McDermott's application there was a discussion about a submission made for him that he had not met in person the decision makers who dismissed him and that he would be deprived of an opportunity to see and hear them in person at the investigation meeting.⁶ I concluded that AVL is a well-recognised tool in reasonably common usage in New Zealand courts without giving rise to those types of concerns. That position has not changed.

[33] Some of the points Mr Halse raised fall within this part of the criteria. They raise an issue about the impact on Mr McDermott if the previously mentioned concerns about using AVL are made out. I do have to weigh that in the balance and it cannot be simply put aside. There is also a tactical element in this opposition which Mr McDermott is entitled to take. I accept that there may be an impact on Mr McDermott's case if AVL is used.

[34] There will, however, be a very significant impact on the defendant if the order is not made. Without Mr Morris it has no case. Even if it can be said that there are some disadvantages to Mr McDermott in allowing the defendant to provide evidence in this way, they are overwhelmingly outweighed by those it will suffer if unable to call this evidence.

Other matters

[35] There are no other matters to address. The balance of the grounds of opposition are, I consider, not relevant at this point.

⁵ *McDermott v EmploySure Ltd* [2022] NZEmpC 160, [2022] ERNZ 759.

⁶ At [24].

Outcome

[36] The application for Mr Morris' evidence to be given by AVL is granted. That is subject to satisfactory compliance with the Court's *Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings*.⁷

[37] The defendant is entitled to costs. If they cannot be agreed memoranda may be filed.

K G Smith
Judge

Judgment delivered orally at 10.20 an on 1 December 2025

⁷ Employment Court of New Zealand, above n 4.