

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

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

**[2026] NZEmpC 14
EMPC 319/2024**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for leave to file further evidence
BETWEEN	THINZIYELO THEBE Plaintiff
AND	HEALTH NEW ZEALAND – TE WHATU ORA Defendant

Hearing: On the papers

Appearances: E Whittome and L Lambert, advocates for plaintiff
J Rainbow, counsel for defendant

Judgment: 2 February 2026

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE KATHRYN BECK
(Application for leave to file further evidence)**

[1] A hearing for this matter was held on 25 July 2025.

[2] On 23 September 2025, the plaintiff filed a memorandum which sought to introduce into evidence a document which was not previously before the Court. The plaintiff also filed an affidavit alleging that the document contained notes written by him, which were used as “talking points” during a meeting he had with the defendant on 5 November 2021.

[3] I directed the plaintiff to file a separate application for leave to adduce new evidence setting out the grounds for the application, the reason the evidence was not produced until the closure of the hearing, and any prejudice there might be to the plaintiff if the evidence is not before the Court.

[4] The primary ground for the plaintiff's application is that the document is a contemporaneous record of matters discussed during the 5 November 2021 meeting at which the plaintiff alleges he raised a personal grievance.

[5] At the hearing the plaintiff stated under cross-examination that he had recorded his concerns regarding the COVID-19 vaccine in writing and took these notes to the meeting with the defendant. When asked by the Court whether he gave these notes to the defendant, the plaintiff stated he provided them "to the DHB or at least to my lawyer but I know that I wrote something down to say what my concerns were on top of what I was sharing in person".

[6] The plaintiff deposed in his affidavit that the document he is seeking to introduce is an accurate record of the issues he raised with the defendant during the 5 November 2021 meeting.

[7] The defendant opposes the application on a number of grounds. Its primary objection is that the document's relevance to the outcome of the proceeding is outweighed by the prejudice the defendant would suffer if the evidence was permitted, specifically the potential need for a new hearing or the recalling of witnesses.

Legal principles

[8] Under s 189 of the Employment Relations Act 2000 (the Act), the Court may accept, admit, and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[9] In *Lorrigan v Infinity Automotive Ltd (No 5)*, the Court confirmed that:¹

¹ *Lorrigan v Infinity Automotive Ltd (No 5)* [2018] NZEmpC 143 at [9].

It is well established that parts of the Evidence Act 2007 (the EA), and even remnants of common law of evidence, can affect and guide the exercise of the equity and good conscience test which arises under s 189(2).

[10] While the Court’s practice directions outline the approach to final submissions following the conclusion of a hearing,² there is no guidance for how evidence may be introduced after the closure of a hearing.

[11] The Evidence Act 2006 is therefore instructive. Section 98 of the Evidence Act codifies the general rule prohibiting further evidence from a party after that party’s case is closed. In relation to civil proceedings, s 98 provides:

98 Further evidence after closure of case

- (1) In any proceeding, a party may not offer further evidence after closing that party’s case, except with the permission of the Judge.
- (2) In a civil proceeding, the Judge may not grant permission under subsection (1) if any unfairness caused to any other party by the granting of permission cannot be remedied by an adjournment or an award of costs, or both.
- ...
- (5) The Judge may grant permission under subsection (1),—
 - (a) if there is a jury, at any time until the jury retires to consider its verdict:
 - (b) in any other proceeding, at any time until judgment is delivered.

[12] The starting point under s 98 is that evidence is not to be offered without permission. Subsections (2) and (5) then permit discretionary departure from that starting point, but only where unfairness cannot be remedied by an adjournment, costs award, or both.

[13] In *Jackson v Te Rangi*, Duffy J described the discretion in s 98 as broad and observed that the common law principles for the admission of this type of evidence provide helpful guidance.³ Reference was made to *Equitcorp v Hawkins* as setting out a helpful summary of the relevant common law principles, namely:⁴

² “Employment Court of New Zealand: “Practice Directions” (1 September 2024) at No 4.

³ *Jackson v Te Rangi* [2014] NZHC 2981, [2015] 2 NZLR 351.

⁴ *Equitcorp Industries Group Ltd (in stat man) v Hawkins* [1996] 2 NZLR 82 (HC) at 85.

- (a) The discretion should be exercised sparingly once the cases on both sides have closed and leave should only be given in exceptional circumstances.
- (b) Only if the failure to call evidence at the proper time is adequately explained should the discretion be exercised.
- (c) The justice of the case must require the admission of the additional evidence.
- (d) Leave will be refused if the evidence would have been available had due diligence been exercised.
- (e) If the party is taken by surprise, leave will be more readily granted.
- (f) The difference between a failure to tender evidence, and an election not to, can be important.

[14] In *Savill v Chase Holdings (Wellington) Ltd*, Tipping J added the following principles to those referred above:⁵

- (a) The Court should consider whether the new evidence could with reasonable diligence have been adduced at the trial or whether the party seeking to adduce the further evidence has shown on a reasonable basis that he did not earlier appreciate its significance.
- (a) The Court should consider whether the new evidence is such as will either (a) be conclusive of the case; or (b) at least be likely to have a substantial bearing on a central issue.
- (b) The Court should consider from the nature of the new evidence sought to be adduced how credible and reliable it is likely to be.

⁵ *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257 (HC) at 291–292.

[15] Those common law principles should not be treated as rigid criteria which must be met in the context of an application to offer further evidence under s 98.⁶ In this Court, that is consistent with the notion that s 189 prevails and the admission of evidence is ultimately guided by equity and good conscience.

Submissions

[16] The plaintiff's representative, Ms Whittome, filed an affidavit explaining why the evidence was not produced at the closure of the hearing. She states that, as a representative with no formal legal training, she did not appreciate the significance of the evidence until the hearing. At that point, she realised that it should have been included in the plaintiff's first affidavit.

[17] Ms Whittome explains that she initially believed she could not introduce this document into evidence because it was undated. However, her recollection of the document during the hearing prompted her to access its digital properties and identify the date it was last accessed.

[18] The plaintiff argues that the prejudice resulting from exclusion of the evidence would be significant, as it is directly relevant to whether a personal grievance was raised in time. The plaintiff submits that he will be unduly prejudiced because he considers that the document is a contemporaneous record of events which contradicts the evidence of the defendant.

[19] The defendant opposes the application to introduce new evidence. It says the two-month delay is unexplained and unreasonable and that Ms Whittome and the plaintiff have been in possession of the evidence since at least 2021, but failed to disclose it.

[20] The defendant also alleges that Ms Whittome's assertion that she believed she was unable to file the document due to a lack of legal training, is untenable. The

⁶ *PBL Solutions Ltd v AFT Pharmaceuticals Ltd* [2023] NZHC 881 at [30]–[31] citing *Lindsay v Nobel Investments Ltd* [2014] NZHC 799 at [123].

defendant emphasises that the explanations for the delay have been inconsistent, noting that the plaintiff has previously filed documents which were undated.

[21] Regarding the relevance and probative value, the defendant argues that, on its face, the evidence provides little to no insight into the matters in dispute. Admitting the document would unreasonably prejudice the defendant, as it has not had an opportunity to respond to the evidence, undertake cross-examination, or introduce evidence from its own witnesses. The defendant submits that the only way to remedy the unfairness is to schedule an additional hearing.

[22] Further, the defendant submits that this application is part of a demonstrated pattern of behaviour by the plaintiff and his representatives of late filings, which denies the defendant an opportunity to meaningfully engage with the case.

No exceptional circumstances identified

[23] As noted above, the discretion to admit evidence after the closure of a hearing is to be exercised sparingly. Section 98 of the Evidence Act directs that leave should only be granted in exceptional circumstances; however, s 189 of the Act allows for the introduction of evidence as long as it is consistent with equity and good conscience.

[24] While I appreciate that Ms Whittome is not legally trained, she is a representative appearing before this Court and has done so on previous occasions.⁷ Representatives are expected to exercise due diligence and care; mere oversight and ignorance of the law does not in and of itself constitute an exceptional circumstance justifying the admission of new evidence.

[25] Ms Whittome and the plaintiff have not therefore provided a satisfactory explanation for their failure to call this evidence earlier. Given that Ms Whittome has also previously filed undated evidence, it remains unclear why she considered this specific document should be treated differently.

⁷ *Devine v Heart Kids New Zealand Inc* [2024] NZEmpC 236; *Young v Port of Tauranga Ltd* [2025] NZEmpC 2.

[26] However, an unreasonable failure by a representative may constitute an exceptional circumstance where new evidence is likely to be conclusive of the case or likely to have a substantial bearing on a central issue. It would be consistent with equity and good conscience to permit evidence in those circumstances, as parties cannot be unfairly disadvantaged by a failure in representation. However, that is not the end of the inquiry.

Evidence not likely to have substantial bearing

[27] While the plaintiff maintains that the evidence is highly relevant, the defendant argues that it does not meet the threshold test for relevance and does not corroborate any disputed fact or address any ambiguity. It notes that the document was not shared with the defendant at the time and does not demonstrate what was in fact conveyed between the parties. The defendant further argues that even if it were accepted that the plaintiff spoke to these notes, it cannot support a conclusion that he said everything contained in the document.

[28] I am satisfied that the document the plaintiff seeks to introduce is neither relevant nor useful to the Court in resolving the issues in dispute. The issue is whether Mr Thebe raised a grievance with the defendant within 90 days. It is not disputed that he raised concerns about the vaccine in that meeting and that he offered alternatives to termination, such as covering remote clinics. The only disputed issue the notes deal with is the topic of his heart condition. Mr Thebe submits that these notes support his evidence that he raised it, whereas the defendant's notes of the meeting record that "he was not going to reveal his medical concerns with us today without his GP input". That dispute of fact is not material to the question of whether the grievance was raised.

[29] The document is therefore not conclusive of the case; nor is it likely to have a substantial bearing on the outcome. Any marginal probative value the document has is outweighed by the significant prejudice its late admission would cause to the defendant. Further, given that the plaintiff seeks to introduce this document to contradict the defendant's account of events, it could not be admitted as evidence without granting the defendant a fair opportunity to respond (which may include recalling witnesses).

[30] The threshold to demonstrate exceptional circumstances reflects the importance of finality and fairness in litigation. It is not a mechanism to cure errors or oversights after a hearing has concluded. To grant leave in these circumstances would be inconsistent with equity and good conscience.

Outcome

[31] The application is declined.

[32] Costs are reserved.

Kathryn Beck
Judge

Judgment signed at 9 am on 2 February 2026