



Employment Court of New Zealand

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Innovative Landscapes (2015) Limited v Popkin [2020] NZEmpC 4 (10 February 2020)

Last Updated: 15 February 2020

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2020\] NZEmpC 4](#)

EMPC 71/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application to hear evidence at a distance
BETWEEN	INNOVATIVE LANDSCAPES (2015) LIMITED Plaintiff
AND	CELIA POPKIN Defendant

Hearing: On the papers

Appearances: C McNoe, agent for plaintiff
E Yu and LC Taylor, counsel for
defendant

Judgment: 10 February 2020

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

(Application to hear evidence at a distance)

[1] The plaintiff is challenging a determination of the Employment Relations Authority finding that Ms Popkin had been unjustifiably dismissed.¹ The challenge is set down for hearing in Christchurch on 20 February 2020. Ms Popkin will be giving evidence along with another witness, Ms Adams, who worked at the plaintiff company with her at the relevant time. Ms Popkin has applied for orders allowing Ms Adams to give evidence via audio-visual link (AVL). The application is opposed. The parties agreed that the application could be dealt with on the papers.

¹ *Popkin v Innovative Landscapes (2015) Ltd* [\[2019\] NZERA 64](#).

INNOVATIVE LANDSCAPES (2015) LIMITED v CELIA POPKIN [\[2020\] NZEmpC 4](#) [10 February 2020]

[2] The plaintiff's objection is focussed on fair trial rights. Mr McNoe, director of the company, says that he had difficulty with evidence being given at a distance (by way of telephone link-up) during the Authority's investigation meeting, that he is unaccustomed to interaction with remote screen presence and that he believes that it would be detrimental to his case if evidence were allowed to be given via AVL on the company's de novo challenge.

[3] Ms Adams will be in Tauranga at the time the hearing occurs, due to circumstances which she had not foreseen at the time the hearing date was set. It is said that the cost of returning to Christchurch for the hearing is an inhibiting factor. If she cannot attend the hearing to give evidence via AVL, her evidence may not be available to the Court.

[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.² As the Court of Appeal has made clear, there is no presumption in favour of giving evidence in the ordinary way.³ The [Courts \(Remote Participation\) Act 2010](#) provides for the use of AVL in civil and criminal

proceedings. The criteria for allowing the use of AVL is set out in [s 5](#), which provides that:

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

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

2. See, for example, [High Court Rules 2016](#), r 9.51 “Evidence to be given orally”; [Evidence Act 2006](#), [s 83](#).

3. See the discussion in *V (CA492/10) v R* [\[2011\] NZCA 525](#), citing *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 [\[34\]](#).

[5] I accept that without AVL Ms Adams may not attend the hearing. The documentation which might be referred to the witness in cross-examination is not extensive and AVL would not present any difficulties with it. The proceedings are of a straight-forward nature. AVL is available through the Tauranga District Court and there is nothing to indicate that there would likely be any problems or difficulties with the quality of the technology.

[6] While I accept that Mr McNoe is unused to audio-visual technology, I do not accept that allowing Ms Adams to give evidence via AVL would undermine the fairness of the hearing. Any issues that do arise, for example, in respect of Mr McNoe being able to hear what the witness is saying, can be addressed in the usual way at the hearing. As Stevens J observed in *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue*:⁴

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

[7] Nor will AVL compromise Mr McNoe’s ability to challenge Ms Adam’s evidence by cross-examination or the Court’s ability to assess any issues of credibility that arise.

[8] The company seeks to overturn the Authority’s remedies awarded against it, totalling \$15,000. While I appreciate that is not an insignificant amount, the cost and inconvenience of securing the attendance of Ms Adams for the defendant at hearing must be weighed in the mix.

4. *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* [\(2007\) 18 PRNZ 710 \(HC\)](#).

[9] In the circumstances, the application for leave for Ms Adams to give her evidence by AVL is granted. Counsel for Ms Popkin is to liaise with the Court and Mr McNoe (who is appearing for the company) to make the necessary arrangements and to ensure that the agreed bundle of documents is available in the Court at Tauranga when Ms Adams gives her evidence.

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

Christina Inglis Chief Judge

Judgment signed at 12.30 pm on 10 February 2020