

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 469  
3158542

BETWEEN                    MARCONE GOMES DE  
   OLIVERIA  
   Applicant

AND                            AGB STONE (CHRISTCHURCH)  
   LIMITED  
   Respondent

3178780

BETWEEN                    KIMBERLEY McLEAN  
   Applicant

AND                            AGB STONE (CHRISTCHURCH)  
   LIMITED  
   Respondent

Member of Authority:        Helen Doyle

Representatives:             Ramses Hunt, counsel for the Applicants  
   Chris Eggleston, counsel for the Respondent

Submissions and affidavit    19 August 2022 from the Applicants  
evidence received:

Submissions received:        9 September 2022 from the Respondent

Date of Determination:        16 September 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicants have applied to the Authority for leave to attend the Authority investigation meetings by audio visual link (AVL) from Canada. The application is opposed by the respondent.

[2] The investigation meeting for Mr Gomes De Oliveira is scheduled for 16 and 17 November 2022. The investigation meeting for Ms McLean is scheduled for 18 November 2022.

[3] It was agreed with counsel at a directions conference on 8 July 2022 that the applicants' request to attend the investigation meetings by AVL would be dealt with as a preliminary matter on the papers. The Authority has received submissions from both parties and affidavits in support of the application.

[4] I have considered the submissions together with the affidavit evidence. I have not recorded all the content of the submissions received but the material has been carefully considered.<sup>1</sup>

### **The applicants' affidavits**

[5] The affidavit evidence from the applicants refers to the cost of return flights as \$3,271 each with additional costs for documentation, accommodation, and transport in New Zealand. They state that this would cause financial and emotional strain. Further that domestic and international travel is unreliable due to the pandemic and labour shortages. Concerns about health and missing work because of travel delays are referred to.

### **The applicants' submissions**

[6] Mr Hunt submits it is in the interests of justice to allow the applicants to give evidence by way of AVL. He submits that any negative impact of them attending in person is offset by the hardship of travelling for attendance in person. Mr Hunt has set out in his submissions the recognition by the Courts of the use of AVL and the advancement of this means of attendance following the COVID-19 pandemic. Mr Hunt recognises that the provisions of the Court (Remote Participation) Act 2010 (RP Act) do not apply strictly to the Authority. He submits that the general criteria in s 5 of the RP Act for allowing use of AVL should nevertheless be applied in this instance and that they are in keeping with the statutory purpose of the Authority.

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<sup>1</sup> Section 174E of the Employment Relations Act 2000.

[7] Mr Hunt makes submissions in line with the criteria in s 5 with reference to the nature of the proceedings, quality of technology, credibility, and other relevant matters. Mr Hunt accepts that the applicants' evidence is of fundamental importance to their cases but he submits that the issues in this particular case about statutory contractual entitlements will turn on an assessment of documents. Mr Hunt submits that the technology used by the Authority is high quality and in Canada both applicants have secure access to reliable equipment and stable platforms for receiving data involved. Mr Hunt refers to observations made by the Supreme Court in assessing credibility in the criminal context and the current view that demeanour is not a reliable indicator of credibility.<sup>2</sup>

[8] Mr Hunt submits that there is a risk of delay if the hearing could not otherwise proceed in person and that remote hearings are efficient as they reduce travel time. He also refers to potential health risks and equity and access to justice and meeting visibility.

[9] Mr Hunt submits that document use can be problematic with an AVL, however with a proper bundle that is not so much of an issue and he does not see this case as one with substantial volumes of documents to traverse. He acknowledges screen fatigue, however, submits that the relatively short duration of both investigation meetings should not present such an issue. Mr Hunt submits that the application to allow both applicants to attend the investigation meetings by audio visual link should be allowed and that the applicants are willing to meet any accommodations as directed by the Authority and work productively with the respondent.

### **The respondent's submissions**

[10] Mr Eggleston on behalf of the respondent opposes the request that the applicants attend the meetings by AVL. He submits it will undermine the fairness of the investigation meeting and that the applicants are the grievants and principal witnesses in the proceedings. He submits that there are claims of alleged unjustified constructive dismissal for which the applicants bear the onus of proof and examination of the key witnesses weighs against remote participation.

[11] Mr Eggleston submits that a consideration of the criteria set out in s 5 and 7 of the RP Act weighs against a grant of leave in those circumstances and that the fact that the respondent

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<sup>2</sup> *Taniwha v R* [2016] NZSC 121.

strongly objects is a material consideration as set out in s 7. He submits there is no evidence of any health vulnerabilities and that by the time of the scheduled investigation meetings there will be few restrictions in force in the world. Further he submits that the applicants elected to relocate from New Zealand to Canada during the height of the pandemic and travel restrictions disruption. If there are health concerns, then he submits that matters should be adjourned until the applicants are more comfortable about travel.

[12] With reference to the nature of the proceedings Mr Eggleston submits that the Courts have been more likely to approve AVL where there is a preliminary matter only involved.<sup>3</sup> Further, he submits that the availability and quality of the technology being proposed is a fact-specific consideration and there can still be connectivity failures causing interruptions, delays and frustration. He submits where AVL has been approved for attendance successful applications are often made subject to conditions such as having an independent person in the room. He further submits that whilst there is currently little judicial support for the notion that demeanour is a reliable indicator of credibility, it is a specific statutory consideration and important. Mr Eggleston submits that there is no detailed financial information provided to support the applicants' statement of financial hardship. Further, he submits that both applicants were employed in New Zealand and their alleged causes of action arose here.

[13] Mr Eggleston submits that the applicants giving evidence remotely will undermine the fairness of the investigation meetings and that in the interests of justice in-person appearances are required.

### **Analysis and conclusion**

[14] The applicants are key witnesses and I acknowledge that the respondent has concerns about their attendance remotely and strongly opposes remote attendance at the investigation meeting.

[15] There is no full disclosure of the applicants' financial position before the Authority, but the applicants would face a financial cost if they were to travel. The affidavits state there are issues about potential delays in their return to Canada and their current work commitments.

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<sup>3</sup> *Alkazaz v Enterprise IT Ltd* [2020] NZEmpC 78.

They are migrant workers who now live and work in Canada. Whilst Mr Eggleston questions their decision to leave New Zealand and the timing the Authority without further information is focussed on the current situation.

[16] The claims for both applicants include those of alleged unjustified constructive dismissal and disadvantage and alleged breaches of the Minimum Wages Act 1983, the Wages Protections Act 1983 and individual employment agreements. Some of the issues will require focus on the relevant documentation. The personal grievance claims do not impress as such that they strongly weigh against remote participation even with the onus falling on the applicants to establish a dismissal in the circumstances.

[17] The use of AVL is now relatively commonplace in the Authority. The Authority officer can send full instructions and conduct a test before the investigation meetings. I note from the affidavits that the applicants have already participated by AVL for mediation. I am confident the technology will enable evidence to be given in a satisfactory manner and questioning to be undertaken in the usual way. The Authority will be able to assess the evidence in the usual way including any issue of credibility. If technology issues arise then they will be addressed.

[18] I have considered the matters put forward in opposition to attendance by AVL. I do not consider attendance by the applicants by AVL will undermine the fairness of the investigation or that justice requires the applicants attend in person. Mr Hunt will be present at the Authority investigation meeting and will be able to give instructions to the applicants, for example during breaks, to ensure proper conduct.

[19] I do not see screen fatigue as being a significant issue however the Authority will monitor and take steps as appropriate.

[20] I grant leave for the applicants to give evidence to the Authority by AVL on the following conditions:

- (a) That Mr Hunt work with Mr Eggleston to compile a common bundle of documents for each applicant's investigation.
- (b) That each applicant has before them the bundle of documents, all statements of evidence and the pleadings when they give evidence.

(c) That each applicant attends alone when giving evidence in a place where they are not likely to be disturbed.

(d) That each applicant engages fully with the Authority Officer in arrangements for AVL including dealing with time differences.

**Costs**

[20] I reserve the issue of costs until after the substantive matters have been determined.

**Helen Doyle**  
**Member of the Employment Relations Authority**