

[2] At the conclusion of the hearing I granted the application for adjournment, directed the Registrar to liaise with the representatives to find the first available dates in the New Year for a reconvened hearing and indicated that my reasons for granting the adjournment would follow. These are my reasons.

[3] The plaintiff's challenge is against a determination of the Employment Relations Authority.¹ The challenge is being pursued on a non-de novo basis, but engages issues relating to the justification for their dismissal on the grounds of allegedly falsifying documents in respect of their application for employment. The challenge was set down for a three-day hearing commencing 30 July 2024 and timetabling orders were made for the exchange of briefs of evidence and the preparation and filing of a bundle of documents. This hearing was adjourned on the application of the plaintiff and the hearing rescheduled for 6-8 November 2024. The adjournment was granted to allow criminal proceedings against the plaintiff to be resolved prior to the plaintiff's challenge in this Court.

[4] The timetabling orders have been extended a number of times at the request of one, or other, or both parties.

[5] It appears that one charge against the plaintiff has been withdrawn, and one charge remains. It also appears that the plaintiff has applied to the District Court for a stay pending determination of their challenge in the Employment Court (although there is no documentation before the Court setting out the details of this). It is understood that the application for a stay is currently with a District Court Judge and the hearing of the remaining criminal charge is currently set down for 18 November 2024. Mr Upton submits that it is appropriate that proceedings in this Court be adjourned pending the outcome in the District Court, rather than the other way round.

[6] Mr Upton further submits that there are a number of outstanding disclosure issues that have arisen and which will need to be resolved before the hearing. This too, it is said, supports an adjournment.

¹ *YJL v Talent Propeller Ltd* [2023] NZERA 534 (Member Urlich).

[7] There is an additional matter in this case, relating to the availability of the defendant's key witness. While there are no details before the Court, counsel advised that a key witness is confronting serious health issues and will be unable to attend the hearing in person on the dates currently scheduled. The witness would, however, be able to attend via AVL. Mr Upton submits that given the centrality of the witness to the proceedings it is undesirable, and potentially prejudicial to the defendant's case, to proceed with the taking of evidence via AVL. The witness would, however, be available to give evidence in person in the early New Year. These circumstances are also said to weigh in favour of an adjournment.

[8] The plaintiff is opposed to an adjournment. Ms Fechny, advocate for the plaintiff, submitted that the residual charge before the District Court was not directly related to the matter at issue on the plaintiff's non-de novo challenge in the Court. I understood her to say that the fair trial rights that had been flagged as engaged on the plaintiff's previous (successful) application for an adjournment of the hearing in this Court are not now as acute. Ms Fechny made the point that the plaintiff's brief of evidence has been filed and travel arrangements made. The plaintiff would be prejudiced by any further delay in hearing the matter and it is desirable to bring matters to an end. She submits that the outstanding disclosure issues can be resolved prior to trial and do not necessitate an adjournment, and that, insofar as issues around subsequently discovered misconduct may emerge, those can appropriately be dealt with by way of split hearing – the substantive challenge and then remedies.

[9] In my view it is desirable for the criminal matters to be disposed of before the hearing in this Court. That will ensure that any fair trial rights that might otherwise arise are not compromised. As Mr Upton says, there appears to be an overlap in the subject matter before the District Court and before the Employment Court, although the precise dimensions of the overlap are contested. I consider it desirable to adopt a conservative approach. There is also an overlap in respect of non-publication orders made in the Employment Relations Authority, interim orders made by this Court and suppression orders in the District Court.

[10] An adjournment will enable the outstanding disclosure issues to be dealt with in an orderly manner, along with any residual pre-trial issues and any issues that may arise as a result of the District Court proceedings. The delay being proposed by the defendant is relatively modest (three or four months).

[11] For completeness, I would not have granted the adjournment solely on the basis of concerns about the defendant witness's health (I would have directed further information to be filed in support of it, to be considered on a representative-to-representative only basis if appropriate). Nonetheless, the adjournment means that issues relating to the appropriateness or otherwise of AVL will not now arise.

[12] I accept that further delay is undesirable but must be weighed against other factors. Prejudice to the plaintiff relating to the expenses associated with travel and accommodation arrangements can be addressed via other means (namely costs).

[13] In the circumstances, and having heard from the representatives, I concluded that it was in the interests of justice to adjourn the hearing to dates in the early New Year, to be set by the Registrar in consultation with the parties.

[14] The representatives agreed that it was appropriate for a copy of this judgment to be provided to the District Court Judge who has carriage of the stay application, so that there is clarity as to the position being adopted in this Court. Ms Fechny is to make the necessary arrangements to ensure that this judgment is placed before the District Court Judge dealing with the plaintiff's file in that Court.

[15] It was agreed that the representatives will work towards resolving their outstanding disclosure issues by agreement, or at least whittling them down, so that any residual issues can be brought back before the Court on Judge Smith's return from leave. In this regard I direct that the representatives are to file (preferably by way of joint memorandum) a memorandum outlining what, if any, disclosure issues remain outstanding no later than 4 pm Tuesday 15 October 2024. The memorandum should include reference to any orders being sought by either party.

[16] Costs on this application are reserved.

Christina Inglis
Chief Judge

Judgment signed at 5.15 pm on 3 October 2024