

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

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

**[2025] NZEmpC 191
EMPC 2/2024**

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

AND IN THE MATTER OF an application for severance of proceedings
from substantive challenge EMPC 221/2023

BETWEEN GARTH MURRAY CUNNINGHAM
Plaintiff

AND HEALTHALLIANCE NZ LIMITED
Defendant

EMPC 119/2025

IN THE MATTER OF an application for compliance order under
s 140

AND IN THE MATTER OF an application for witness to give evidence
by AVL

BETWEEN HEALTHALLIANCE NZ LIMITED
Plaintiff

AND GARTH MURRAY CUNNINGHAM
Defendant

Hearing: 22 August 2025 (heard by audio-visual link)

Appearances: G Cunningham in person
R Upton, counsel for healthAlliance NZ Ltd

Judgment: 29 August 2025

**INTERLOCUTORY JUDGMENT (NO 2) OF JUDGE M S KING
(Application for witness to give evidence by AVL)
(Application for severance of proceedings)**

Application for witness to give evidence by AVL

[1] healthAlliance NZ Ltd (healthAlliance) has applied for compliance orders against Mr Cunningham. The application is scheduled to be heard on Monday, 8 September 2025.

[2] On 14 August 2025, healthAlliance applied for its witness, Christopher Jury, to participate in the hearing by audio-visual link (AVL). The application is made on the grounds that Mr Jury lives out of Auckland and would incur costs and extra time to travel to appear in person. Mr Cunningham opposes the application.

Legal principles

[3] The ordinary way for a witness to give evidence in a civil proceeding is orally in a courtroom in the presence of a judge, the parties, and any members of the public who choose to attend.¹

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

[5] The Court may allow evidence to be given by AVL in civil proceedings including for the appearances of a party and witness. However, before such an order is made, the Court must take into account whether or not the other party consents and it must have regard to the criteria set out in s 5 of the Courts (Remote Participation) Act 2010.³ The criteria are:

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact on the use of the technology on the effective maintenance of the rights of the 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.

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

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

³ Courts (Remote Participation) Act 2010, s 5.

[6] Consent to the use of technology is an important consideration but is only one factor that needs to be considered alongside the other factors set out in s 5 above.⁴

The nature of the proceeding

[7] healthAlliance has applied for relief under s 140(6) of the Employment Relations Act 2000 (the Act). It claims that Mr Cunningham has failed to comply with the following compliance orders:

- (a) On 20 December 2023 the Authority ordered Mr Cunningham to pay healthAlliance \$10,000 in costs by 18 January 2024.⁵ On 15 November 2024 the Authority issued a determination granting healthAlliance a compliance order, which required Mr Cunningham to pay the costs awarded in its earlier determination, plus interest, by 29 November 2024.⁶
- (b) On 19 July 2024 the Court ordered Mr Cunningham to pay healthAlliance \$7,311.50 in costs by 9 August 2024.⁷ On 20 February 2025 the Court issued a judgment granting healthAlliance a compliance order, which required Mr Cunningham to pay the costs awarded in its judgment by 6 March 2025.⁸

[8] Mr Jury has filed a brief affidavit, in which he produces copies of written communications between healthAlliance and Mr Cunningham regarding the compliance orders. Mr Jury confirms in his affidavit that Mr Cunningham has not complied with the compliance orders made by the Authority and the Court. Mr Cunningham does not dispute these aspects of Mr Jury's evidence.

[9] Mr Jury is healthAlliance's sole witness in support of its application and he is based in Christchurch. Mr Cunningham wishes to cross-examine Mr Jury on the evidence provided in his affidavit. Mr Cunningham opposes Mr Jury giving evidence

⁴ *Smith v Chief Executive of the Department of Corrections* [2019] NZHC 2314 at [27].

⁵ *Cunningham v healthAlliance NZ Ltd* [2023] NZERA 771.

⁶ *healthAlliance NZ Ltd v Cunningham* [2024] NZERA 680.

⁷ *Cunningham v healthAlliance NZ Ltd* [2024] NZEmpC 132.

⁸ *Cunningham v healthAlliance NZ Ltd* [2025] NZEmpC 24.

by AVL, he maintains that healthAlliance's application for a compliance order is substantive and could have serious consequences for him, including a fine and/or a stay of his proceedings.

[10] In these circumstances Mr Cunningham submits that Mr Jury's evidence is central to healthAlliance's claims against him. He considers it is essential for him to have a fair hearing, and that he is able to cross-examine Mr Jury in person.

[11] I consider the nature of the proceeding, on its face, favours Mr Jury appearing as a witness by AVL. Mr Jury's affidavit evidence is brief. It focuses on Mr Cunningham's non-compliance with the Court and Authority's orders which Mr Cunningham does not appear to dispute. It is unclear what relevant or contentious issues Mr Cunningham intends to cross-examine Mr Jury on that would justify his presence in person at the Court hearing.

The availability of technology

[12] AVL has been used by this Court in proceedings in the past without issue. healthAlliance has confirmed that it has access to appropriate AVL facilities for Mr Jury to use, and in the alternative, Mr Jury has offered to attend a Christchurch courtroom to give evidence by way of AVL.

[13] I am satisfied that the availability and quality of AVL technology is sufficient and weighs in favour of the application.

The impact of AVL on the rights of the parties

[14] healthAlliance maintains that Mr Cunningham's right to have a fair hearing would not be negatively impacted by Mr Jury participating as a witness via AVL.

[15] Mr Cunningham maintains that Mr Jury appearing by AVL will impact his ability to have a fair hearing. Mr Cunningham accepts that the AVL facilities in the courtroom will allow him to see and hear Mr Jury on a large screen when he is giving evidence. However, he submits that AVL may reduce the immediacy of his interaction with Mr Jury as a witness. He raises concerns that this may compromise his ability to

cross-examine Mr Jury and affect the judicial assessment of Mr Jury's demeanour. Mr Cunningham accepts that any compromise to his ability to cross-examine Mr Jury may be only marginal.

[16] Mr Cunningham also submits that healthAlliance is publicly funded and is expected to act as a model litigant. He maintains that the time and cost of Mr Jury travelling to Auckland to participate in the hearing in person should not be a determinative factor.

[17] In the circumstances, I am satisfied that the use of AVL will allow Mr Cunningham the opportunity to cross-examine Mr Jury and provide the Court with an opportunity to fairly assess his credibility. Given the brevity of Mr Jury's evidence, and the fact that the content of his affidavit is focused on Mr Cunningham's failure to comply with Authority and Court orders, which is not in dispute, it is difficult to see how issues of credibility or reliability may arise. In addition, when assessing the credibility or reliability of the evidence given by a witness, the courts are now less willing to place weight on factors such as demeanour.⁹ I also consider healthAlliance's application for Mr Jury to give evidence by way of AVL is consistent with its obligation, as a company owned by a public entity, to manage litigation costs responsibly. This factor weighs in favour of the application.

Other matters

[18] Mr Cunningham does not consent to Mr Jury using AVL to give evidence.

[19] Mr Cunningham's submissions focused on s 7(3)(b) of the Courts (Remote Participation) Act, which specifically refers to the consent of the parties as a matter to be taken into account in making a determination under s 7(1). Although consent is a mandatory consideration, it is not a determinative factor.¹⁰ Sections 5 and 7 contemplate situations where the Court may, on its own motion, direct that AVL be used in certain proceedings, whether or not the parties consent. The Courts (Remote

⁹ To the extent that issues of credibility or reliability may arise, the Court can determine such issues when witnesses give evidence by way of AVL. See *Addleman v Lambie Trustee Ltd* [2017] NZHC 1719 at [3]-[4].

¹⁰ *Smith v Chief Executive of the Department of Corrections*, above n 4, at [27].

Participation) Act envisages that the Court retains discretion in such situations to determine whether AVL is the appropriate method of appearance, taking into account the s 5 criteria, s 7 considerations, and what is in the overall interests of justice.

[20] I have weighed the s 5 considerations and taken into account the respective parties' positions on consent. While the overriding consideration is that Mr Cunningham has a fair and reasonable opportunity to present his case, I am satisfied that Mr Jury's appearance by AVL for this particular hearing meets that opportunity and the use of AVL in this case is in the interests of justice for both parties.

[21] healthAlliance's application for Mr Jury to give evidence by AVL is granted.

Application for severance of proceedings

[22] On 23 June 2023 Mr Cunningham filed a de novo challenge to a substantive determination of the Authority which dismissed his claims for unjustified dismissal and his complaint of bullying.

[23] On 5 January 2024 Mr Cunningham filed a non-de novo challenge to the parts of the Authority's costs determination which dealt with whether a costs award would cause him undue hardship and an uplift of \$2,000 to account for healthAlliance's Calderbank offer.

[24] On 21 February 2024 a directions conference was held. The Court considered the nature and scope of Mr Cunningham's non-de novo challenge to the Authority's costs determination in circumstances where he was also challenging the Authority's substantive determination on a de novo basis. The substantive challenge had been set down at that time for a hearing. An extract from the Court minute issued following that directions conference is set out below:

[3] During the Conference the Court queried whether allowing the non-de novo challenge to a costs determination to proceed separately to the de novo challenge of the substantive determination was the best use of the Court's limited time and resources, whether a separate non-de novo challenge was necessary, and whether it would have the effect of unduly hampering the Court's ability to form its own view on the issue of costs. Both parties gave fulsome submissions on the nature and scope of the hearing during the directions conference.

[4] A summary of Mr Cunningham's key submissions included, an acknowledgement that it may be unusual for a plaintiff to file a separate non-de novo challenge to a costs determination while pursuing a de novo challenge of the Authority's substantive determination. He submitted that he had made a deliberate choice to file a non-de novo challenge. He was seeking for the entire costs determination of the Authority to be found to be invalid and for the defendant to be forced to reapply for costs with the Authority. However, he appeared to acknowledge that his non-de novo challenge did not challenge the entire costs determination. His statement of claim confined his challenge to the following parts of the costs determination:

- (a) Supporting evidence showing a costs award would cause him undue hardship.
- (b) The uplift of \$2,000 by the Authority to account for the Calderbank offer issued by healthAlliance.

Mr Cunningham nevertheless submitted that the remedy he was effectively seeking from his non-de novo challenge was to set aside the Authority's costs determination in its entirety.

[5] A summary of Mr Upton's key submissions included an acknowledgement that Mr Cunningham appeared to be concerned with the Authority's costs determination which required him to pay the defendant \$10,000 in costs. He understood that Mr Cunningham was effectively seeking to overturn the determination on the two grounds mentioned and that Mr Cunningham appeared to believe that this would "wipe the slate clean" in terms of costs awarded by the Authority. He submitted that if Mr Cunningham wanted to "wipe the slate clean" then he would need to file a de novo challenge to the costs determination. He acknowledged that if Mr Cunningham's challenge to the substantive determination of the Authority was successful, the Authority's determination would be set aside. Alternatively, if Mr Cunningham's challenge was not successful the Court could then deal with his challenge to the Authority's costs determination separately and on the papers.

[25] During the February 2024 directions conference, and after hearing from the parties, I made an order consolidating Mr Cunningham's challenge to the costs and substantive determinations of the Authority and directed the consolidated challenge to be heard on a de novo basis.

[26] On 12 August 2025 Mr Cunningham filed an application to sever his non-de novo costs challenge to the Authority's costs determination, from his de novo challenge to the Authority's substantive determination.

[27] A summary of the key grounds relied upon by Mr Cunningham when making his application for severance are set out below:

- (a) Mr Cunningham has a statutory right to file a limited non-de novo challenge under ss 179(1), 179(4) and 179(5) of the Act.
- (b) The Authority's costs determination had legal and procedural errors, including failing to consider Mr Cunningham's submissions on financial hardship. These errors resulted in a breach of Mr Cunningham's rights under ss 27(1) and 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA).
- (c) The Court has procedural powers to determine matters according to the substantial merits of a case, equity and good conscience. It also has powers under the Employment Court Regulations 2000 to order a stay of proceedings or execution where a determination is being challenged.

[28] Mr Cunningham appears to be seeking to sever the costs and substantive challenges with the intention of applying for a stay over the costs determination and thereby suspending healthAlliance's application under s 140 of the Act for relief.

[29] The grounds of Mr Cunningham's application appear to be misconceived and do not support the making of the order.

[30] Mr Cunningham has a statutory right not to seek a full hearing of the entire matter. He has exercised this right by filing a non-de novo challenge under ss 179(3) and 179(4) of the Act to the Authority's costs determination. However, the Act is clear that the nature and scope of such a challenge is ultimately a matter for the Court to determine.¹¹ The Court has discretion to direct that a de novo hearing be held, despite one or both parties seeking a non-de novo challenge to only parts of an Authority determination. The Court has previously exercised this discretion where a non-de novo, or partial hearing would be "artificial" and risk being unfair.¹²

¹¹ See Employment Relations Act 2000, ss 183(1) and 182. Section 183(1) requires the Court to make its own decision on a matter to be heard by the Court under s 179 of the Act. Section 182(3) provides that when a non-de novo challenge has been filed, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

¹² *Goodman Fielder New Zealand Ltd v Ali* [2003] 2 ERNZ 65; and *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680.

[31] In the current circumstances, the Court exercised its discretion and directed that Mr Cunningham's non-de novo challenge to the Authority's costs determination be consolidated with his de novo challenge to the Authority's substantive determination. That consolidated challenge would then proceed on a de novo basis. The discretion was exercised on the basis that hearing the challenges separately would be artificial and unnecessarily increase Court time and resources. I do not consider Mr Cunningham's statutory right to bring a non-de novo challenge in the circumstances is a relevant ground for the Court to consider when determining his application for severance.

[32] Mr Cunningham's right to be heard under s 27 of the NZBORA is unaffected by the outcome of his application for severance. Mr Cunningham's challenge to the Authority's costs determination is before the Court and he is entitled to be heard on it, regardless of whether severance is granted or not.

[33] It appears Mr Cunningham's application for severance is motivated by a desire to avoid the compliance order proceedings filed by healthAlliance. In particular, healthAlliance is seeking relief in the form of an order staying Mr Cunningham's proceedings before the Court, until Mr Cunningham complies with the Authority's costs and compliance orders. I do not consider that this is a relevant or appropriate ground for the Court to consider when determining the application for severance.

[34] Mr Cunningham's last ground for his application relies on the Court's procedural powers to determine matters according to the substantial merits of a case, equity and good conscience. However, as noted above, the application for severance appears to be an attempt by Mr Cunningham to avoid paying the Authority's costs determination. Mr Cunningham has previously confirmed to the Court that he had the ability to pay the Authority's costs determination, but he does not agree to paying the costs ordered to healthAlliance. Mr Cunningham has unsuccessfully applied for the Authority's costs determination to be stayed. If he was unhappy with that judgment, the appropriate course of action was to appeal it. In these circumstances, I do not consider that equity and good conscience would support granting Mr Cunningham's application for severance.

[35] Lastly, the Court observes that Mr Cunningham’s application and submissions refer to the following cases and legal propositions:

- (a) *Shanmuganathan v Commissioner of Police* [2022] NZHC 1094, in support of the proposition that procedural fairness includes the right to meaningfully participate; and
- (b) *Goodricke v Maritime Union of New Zealand Inc* [2015] NZEmpC 55, in support of the proposition that the Court should order a stay where access to justice and appeal rights would otherwise be undermined.

[36] However, neither of these cases exist. This information may have therefore been provided by generative artificial intelligence. If so, Mr Cunningham is reminded that information provided by generative artificial intelligence ought to be checked before being relied on in documents filed in Court proceedings.¹³

[37] Mr Cunningham’s application for severance is declined.

Outcome

[38] healthAlliance’s application for Mr Jury to give evidence by way of AVL is granted.

[39] Mr Cunningham’s application for severance is declined.

[40] healthAlliance has been successful and is entitled to costs. If this issue cannot be agreed upon between the parties then healthAlliance are to file and serve memoranda within 21 days; Mr Cunningham will have 14 days to file and serve any response, following which healthAlliance will have seven days to file and serve any memoranda strictly in reply.

M S King
Judge

Judgment signed at 12.15 pm on 29 August 2025

¹³ Courts of New Zealand “Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Non-lawyers” (7 December 2023) <www.courtsofnz.govt.nz>.