

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

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

**[2026] NZEmpC 6  
EMPC 445/2024**

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

AND IN THE MATTER OF an application to set aside witness  
summonses

BETWEEN FMV  
Plaintiff

AND TZB  
Defendant

Hearing: On the papers

Appearances: L Yan, agent for plaintiff  
T L Clarke, counsel for defendant and for summonsed witnesses

Judgment: 21 January 2026

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**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN  
(Application to set aside witness summonses)**

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[1] At the request of the plaintiff, the Court issued three witness summonses, requiring the summonsed witnesses to attend and give oral evidence at the upcoming hearing of preliminary issues in this case.<sup>1</sup>

[2] The summonsed witnesses have applied to set the summonses aside. This judgment resolves that application.

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<sup>1</sup> The summonsed witnesses are referred to as Ms A, Mr H, and Mr L.

## **The hearing is on preliminary issues**

[3] The hearing, scheduled to commence on 3 March 2026, is principally on two preliminary matters:

- (a) whether the Employment Relations Authority was correct in holding that the plaintiff's application would be treated as withdrawn as no action had been taken on the matter for more than three years; and
- (b) whether the Authority was correct in holding that the plaintiff's application was already time barred before it was lodged with the Authority, and that the plaintiff could not establish the entirety of the delay between her employment ending in February 2010 and when her claim was lodged in December 2016, was occasioned by exceptional circumstances.<sup>2</sup>

[4] The plaintiff also seeks non-publication orders.

[5] The plaintiff says that the evidence of the summonsed witnesses is relevant to the second preliminary issue.

## **The summonsed witnesses say the application is oppressive, being used for an improper purpose and/or is an abuse of process**

[6] The summonsed witnesses say the plaintiff's application for the issue of witness summonses is oppressive or being used for an improper purpose:

- (a) The prospective witnesses lack direct knowledge of the preliminary issues to be determined in these proceedings.
- (b) Other than limited interactions with the plaintiff, the "will say" statements filed by the plaintiff contain matters that are not within the direct knowledge of the prospective witnesses.

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<sup>2</sup> *FMV v TZB* [2024] NZERA 584.

- (c) The evidence of the prospective witnesses is not necessary to fairly dispose of the hearing of the preliminary issues.
- (d) The witness summonses are being sought for an ulterior purpose; namely as a collateral attack on the sufficiency of the defendant's formal discovery in proceedings that were brought before the Human Rights Review Tribunal, and to circumvent decisions made by the Tribunal and the High Court about the adequacy of the defendant's disclosure in that context.

[7] They say further that the application for the issue of witness summonses is an abuse of process:

- (a) The witness summonses have been brought for a collateral attack on the sufficiency of the defendant's formal discovery in the Tribunal proceedings.
- (b) The defendant gave formal discovery in the Tribunal proceedings in a manner and form that complied with the High Court Rules 2016.
- (c) The Tribunal dismissed the plaintiff's application for further and better discovery and her challenge to the defendant's claims of privilege. Therefore, the presumption that the defendant's affidavit of documents is conclusive continues to apply.
- (d) The plaintiff applied to the High Court for judicial review of the Tribunal's decision.
- (e) The High Court dismissed the plaintiff's application for judicial review of the Tribunal's decision.

- [8] The plaintiff opposes the application to set aside the summonses and maintains:
- (a) The summonsed witnesses' allegation that the plaintiff's application for the issue of witness summonses is being used oppressively and for improper purpose is baseless.
  - (b) Their allegation that the plaintiff's application for the issue of witness summonses as an abuse of process is untenable.
  - (c) In the particular circumstances of this case, there are genuine reasons for the summonsed witnesses to give evidence.
  - (d) The anticipated evidence from the summonsed witnesses is relevant to the preliminary matter regarding the time bar issue and is necessary for the case to be disposed of fairly.

### **The Court may set summonses aside**

[9] Any party to any proceeding before the Court may give and call evidence.<sup>3</sup> The Court may, on the application for any party to the proceedings, or of its own volition, issue a summons to any person requiring that person to attend before the Court and give evidence at the hearing.<sup>4</sup> Summonses are generally issued by the Registrar on application from a party.

[10] The Court may set aside a summons, however, if the Court considers, on the application of the person served with the summons, that the summons is oppressive or that it causes, by reason of distance or short notice, undue hardship to that person.<sup>5</sup>

[11] The issue in this application is whether the summonses are oppressive.

[12] In this context, oppression can include (among other things) where the witness lacks knowledge of the matter. Anticipated evidence from summonsed witnesses must

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<sup>3</sup> Employment Relations Act 2000, sch 3 cl 4.

<sup>4</sup> Schedule 3 cl 6.

<sup>5</sup> Employment Court Regulations 2000, reg 34(3).

be relevant and necessary to enable the matter before the Court to be disposed of fairly.<sup>6</sup>

[13] Circumstances in which a summons had been irregularly issued, unlawfully procured, or was being used for an improper purpose would likely be oppressive. This would extend to where the summons is being used to promote a collateral process. In *Auckland Council v George*, a witness summons was set aside on the basis that it had been issued to circumvent a previous decision about disclosure and therefore was an abuse of process and oppressive.<sup>7</sup>

[14] Ultimately, the Court will be guided by what is required for a particular case to be disposed of fairly and will exercise its powers consistently with equity and good conscience. Ensuring the proper use of court time is one part of the equation that should not be overlooked.<sup>8</sup>

### **The plaintiff filed “will say” statements**

[15] The plaintiff has filed statements of what she expects each of the summonsed witnesses to say in evidence (“will say” statements).

*Ms A*

[16] The plaintiff anticipates Ms A giving evidence regarding the defendant’s response to requests from the plaintiff under the then-applicable Privacy Act 1993 and the withholding of certain information that is relevant to the Court’s consideration of the second preliminary question.

[17] Ms A has confirmed she was not employed by the defendant during the plaintiff’s tenure. Her affidavit addresses the way the defendant responded to the plaintiff’s Privacy Act requests, noting that its response was the subject of proceedings before the Human Rights Review Tribunal, which Ms A was not involved in.

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<sup>6</sup> *AlKazaz v Enterprise IT Ltd* [2020] NZEmpC 138 at [9], [12] and [15].

<sup>7</sup> *Auckland Council v George* [2013] NZEmpC 179 at [17]–[18].

<sup>8</sup> *AlKazaz v Enterprise IT Ltd*, above n 5, at [7].

*Mr H*

[18] The plaintiff anticipates Mr H giving evidence regarding his involvement with the plaintiff's health issues in 2009 and the defendant's involvement in obtaining reports in relation to those health issues, leading up to the plaintiff's resignation in January 2010.

[19] It is intended that Mr H would also give evidence about ongoing interactions with the plaintiff and steps taken with respect to those by the defendant.

[20] Further, it is intended that Mr H would give evidence in respect of the plaintiff's Privacy Act requests for information.

[21] Mr H has provided an affidavit in which he attests that, to the best of his recollection, he has never met the plaintiff. He says he was copied into various emails from the plaintiff in 2011 and then again in 2015 when the plaintiff lodged a complaint with the Office of the Privacy Commissioner. In summary, Mr H says he has had no personal involvement with the plaintiff and would not be able to provide the evidence suggested in the "will say" statement.

*Mr L*

[22] The plaintiff anticipates Mr L giving evidence regarding the plaintiff's Privacy Act request in 2015 and information he was provided by the directors of the defendant, following which Mr L provided the plaintiff with an apology letter on behalf of the defendant. It is proposed that Mr L would give evidence about the Human Rights Review Tribunal's formal discovery process.

[23] In the affidavit, Mr L has provided in support of the application to set aside the summonses, he says that the "will say" statement does not accurately reflect his responsibilities at the defendant, and many of the matters referenced are not within his personal knowledge. He says the "will say" statement primarily concerns the plaintiff's request for access to personal information under the Privacy Act, the defendant's disclosure of her personnel file, her claims before the Human Rights Review Tribunal, and the adequacy of the defendant's discovery in those proceedings.

[24] Mr L says that at no time did he have any involvement in the day-to-day matters in issue in these proceedings, including:

- (a) the plaintiff's employment at the defendant in 2009;
- (b) her request in 2015 for access to personal information under the Privacy Act;
- (c) the defendant's response to the plaintiff's information privacy request; and
- (d) the defendant's formal discovery in the Human Rights Tribunal proceedings.

[25] In the Human Rights Review Tribunal proceedings, the plaintiff applied for a witness summons for Mr L. In the context of those proceedings, the Human Rights Review Tribunal declined to issue a summons on the basis that Mr L did not have direct knowledge of the matters to be determined in the claim and could not give relevant and material evidence relating to those issues.

### **Other witnesses are providing evidence for the defendant**

[26] The defendant has filed two affidavits in respect of the preliminary issues. There is an affidavit from a solicitor at Bell Gully that is focussed on the procedural history and is primarily relevant to the first of the preliminary issues. The other affidavit is from the general counsel of the defendant and deals primarily with the plaintiff's employment with the defendant and the communications that followed that employment. It is relevant to the second issue.

### **The preliminary issue is limited in scope**

[27] The issue of whether the defendant fulfilled its obligations under the Privacy Act was a matter for the Human Rights Review Tribunal; it is not a matter for the Court.

[28] The second issue, to which the proposed evidence is said to be relevant, is limited. It has three parts, first whether the plaintiff raised a personal grievance within 90 days of the matters it concerns occurring, second, if not, did the defendant consent to her raising it out of time, and third, was any delay in raising the grievance occasioned by exceptional circumstances and is it just to allow the grievance to proceed.

### **Neither Ms A nor Mr L will be able to assist the Court**

[29] Whether the plaintiff raised a personal grievance within 90 days of it occurring will be determined largely on the evidence of the plaintiff and on documentary evidence. Neither Ms A nor Mr L had any involvement with the plaintiff during her employment or in the 90 days after it ended; they have no direct knowledge of what passed between her and the defendant during that time and only very limited direct knowledge of subsequent communications.

[30] Whether the delay in raising the grievance was occasioned by exceptional circumstances again will need to be considered based on evidence from the plaintiff, and those who she was dealing with in the time after she left the defendant, and on documentary evidence from that time. It seems the plaintiff believes there were, or should have been, more records of her communications with the defendant but there is nothing to suggest any of the proposed witnesses were aware of any such communications.

[31] As acknowledged by Ms Yan, agent for the plaintiff, the proposed evidence of Ms A and Mr L is in respect of the defendant's response to the plaintiff's information request. That issue has already been considered by the Human Rights Review Tribunal and the High Court and will not be revisited by the Court.

[32] Neither Ms A nor Mr L are going to be able to assist the Court in determining whether the plaintiff raised a grievance within 90 days of it occurring or whether the defendant consented to her raising a grievance after that time, or on the reasons for any delay in the plaintiff raising her grievance. The witness summonses for Ms A and Mr L are set aside; they are not required to give evidence.

### **Mr H's evidence is not of assistance**

[33] Mr H was formerly the CEO of the defendant, including in 2009, when the plaintiff was employed by it. However, he says he only had a vague awareness of the plaintiff, with day-to-day matters being handled by the person to whom she reported, or by others, including in the defendant's human resources team. After the plaintiff left the defendant's employment, Mr H received or was copied into some further correspondence from the plaintiff but did not engage with her. The emails have been made available to the plaintiff, and speak for themselves.

[34] The "will say" statement prepared for Mr H is notable in that it largely comprises hearsay statements regarding the plaintiff's interactions with other people or statements about what the defendant did or was aware of. As with the other "will say" statements, there is proposed evidence regarding the defendant's response to the plaintiff's information requests and her proceedings in the Human Rights Review Tribunal. Little in the "will say" statement is said to be attributable to Mr H himself and what there is does not provide further assistance with resolving the preliminary issues as against the other evidence already made available. It also is relevant that the defendant's general counsel is giving evidence, including of the defendant's business records relating to the plaintiff.

[35] Mr H's witness summons also is set aside. He is not required to give evidence.

[36] Costs in respect of this application are reserved.

J C Holden  
Judge

Judgment signed at 11.30 am on 21 January 2026