

**Attention is drawn to the order
prohibiting publication of certain
information in this Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 282
3162442

BETWEEN VTK
 Applicant

AND WAW
 Respondent

Member of Authority: Marija Urlich

Representatives: May Moncur, advocate for the Applicant
 Eva Ho and Svetlina Vasileva, counsel for the
 Respondent

Investigation: On the papers

Determination: 29 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] WAW has applied for a witness (the witness) to give evidence by audio-visual link at the investigation meeting for this matter scheduled in October 2022. VTK opposes the application.¹

The Authority's investigation

[2] By consent this preliminary issue is determined on the papers. The Authority has received affidavit evidence from the witness dated 17 May 2022, another employee of WAW dated 18 and 30 May 2022 and VTK dated 25 May 2022. Submissions from the parties have been considered.

¹ Interim non-publication orders are in place: *VTK v WAW* [2022] NZERA 113.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all information received from the parties.

Discussion

[4] There is no dispute the witness is a key witness. There is also no dispute the substantive issues before the Authority for investigation and determination are serious matters involving a degree of complexity. Given this, VTK raises a concern that the witness's attendance by audio-visual link will impede the Authority's ability to scrutinise his evidence including the assessment of 'non-verbal cues' and this may contribute to the risk of obfuscation. VTK says because credibility is a critical issue in this matter the witness should be required to give evidence in person. VTK also says given the witness works for an airline any travel difficulties are not insuperable. There is also a suggestion in VTK's affidavit that the witness not attending in person may negatively impact her wellbeing.

[5] The Authority is able to and does take evidence at a distance.² The use of audio-visual technology to do so is not unusual and in recent times has become more frequent. VTK raises serious concerns about whether it is reasonable to do so in this matter with respect to the witness's evidence. The issue for consideration is whether the witness giving evidence remotely will undermine the fairness of the investigation meeting.

[6] The witness resides offshore and on the information before the Authority has no plans to travel to New Zealand. It is understood WAW has stopped flying between New Zealand and the witness country of domicile. If the witness is required to attend in person the cost of travel would have to be borne by WAW and, WAW's employee avers it is a cost it should not reasonably be expected to carry and can ill afford given the impact of Covid-19 on the business. While it is accepted WAW is a subsidiary of an offshore national carrier that entity is not the respondent. There is insufficient

² Refer s 160(1) Employment Relations Act 2000, s 5 Courts (Remote Participation) Act 2010, s 7 District Courts Act 2016.

information before the Authority that that entity could reasonably be expected to meet the costs of the witness's travel.

[7] I have carefully considered VTK's concerns that the witness's evidence will be compromised if it is given remotely. While I accept the concerns are sincere, I am satisfied given the technology available and the Authority's experience taking evidence via that technology, that the witness can satisfactorily give evidence remotely, be questioned on that evidence and the Authority can make an assessment of any issues of credibility. Any issues of access to documents can be addressed by a common bundle of documents being provided to the witness. Any other issues which may arise during the course of the witness' evidence, for example sound quality, may be addressed in the usual way at the investigation meeting.

[8] A further relevant consideration is whether a summons can be issued to an offshore witness. Even if the Authority said the witness must attend in person the usual manner in which a witness may be required to attend an investigation meeting to give evidence by way of summons would likely not be available.

[9] The witness may give evidence to the Authority by audio-visual link. The witness is to do so in an environment appropriate for such a purpose for example a court room and is to file evidence of identity with the written witness statement. A case management conference is to be convened to finalise necessary arrangements including any support necessary for those witnesses attending in person.

Outcome

[10] Leave is granted to the witness to give evidence by audio visual link.

Costs

[11] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority