

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

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2020] NZEmpC 178
EMPC 218/2019**

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

AND IN THE MATTER of applications to set aside witness summons
 and related orders

BETWEEN SUSAN WILLS
 Plaintiff

AND FARMLANDS CO-OPERATIVE SOCIETY
 LIMITED
 Defendant

Hearing: 4 November 2020
 (by telephone)

Appearances: A Sharma, counsel for plaintiff
 S Townsend, counsel for defendant
 N Mason, in person

Judgment: 4 November 2020

ORAL JUDGMENT OF JUDGE K G SMITH

[1] In anticipation of a hearing on Wednesday, 18 November 2020, the plaintiff, Ms Wills, has issued a witness summons to her former lawyer Nick Mason.

[2] Mr Mason was summonsed to attend the hearing to give evidence and to produce documents falling into two categories; a copy of Ms Wills' client file and of a complaint she made about him to the New Zealand Law Society. This second category of documents is very wide, because the summons also requires Mr Mason to produce:

...all supporting attachment information and subsequent correspondence in relation to that matter being directly relevant to the noted client file number, and this proceeding.

[3] That broad reference was to the investigation undertaken by, presumably, a Standards Committee appointed by the New Zealand Law Society. Additionally, the summons instructed Mr Mason to bring with him all relevant information in his possession "...in connection with this matter".

[4] I am advised by counsel for Ms Wills, Ms Sharma, that the summons was served on 23 October 2020. A few days later, on 29 October 2020, Mr Mason wrote to the Court about the summons. As well as acknowledging being served, Mr Mason's letter advised that he would be away from Nelson on leave between 6 November 2020 and 23 November 2020. His accommodation and travel have been booked and paid for and on 18 November 2020 he will be in Wellington.

[5] The letter asked if the Court would allow Mr Mason to give evidence on a different and more convenient date or to do so by audio visual link from Wellington. He also requested that, if his presence in Nelson is required, the Court fix his travel costs.¹

[6] Mr Mason did not object to the breadth of the witness summons, encompassing not only giving evidence but providing copies of documents. At first blush, the Law Society's response to the professional complaint appears unlikely to be relevant, but since that matter was not argued this afternoon no further comment will be made about it.

[7] Ms Sharma replied to this letter by memorandum, the relevant parts of which can be summarised as follows:

- (a) Mr Mason is a key witness.
- (b) Ms Sharma has misgivings about the suitability of an audio visual link, based on her recent experience.

¹ Pursuant to cl 7 of sch 3 of the Employment Relations Act 2000; and see also the Witnesses and Interpreters Fees Regulations 1974.

- (c) Giving evidence by audio visual link might protract the hearing.
- (d) The reason the hearing was being convened in Nelson, instead of being wholly conducted by AVL as originally planned during the COVID lockdown, was because Mr Mason is resident in Nelson.
- (e) Mr Mason had not provided any supporting information to confirm his unavailability.
- (f) It would be unreasonable to expect Ms Wills to pay any travel costs Mr Mason would incur in returning to Nelson to give evidence in person.
- (g) As to the breadth of the summons and the documents to be produced by Mr Mason pursuant to it, the information demanded was essentially similar to what had been expected of him during the Authority's investigation meeting.

[8] Given the proximity of Mr Mason's anticipated leave, and the hearing, I directed that his letter would be treated as applications:

- (a) seeking to set aside the witness summons; and
- (b) as an alternative, for his evidence to be given by AVL from Wellington.

[9] A direction was also made that Ms Sharma's memorandum would be treated as a notice of opposition to those applications.

[10] At my direction, these applications were heard urgently to avoid unnecessary delay and inconvenience to the parties and to Mr Mason. The hearing was conducted by telephone on 4 November 2020.

[11] The power to set aside a witness summons is in reg 34 of the Employment Court Regulations 2000. Generally described, the grounds to do so are that the summons is oppressive or might cause undue hardship to any person.²

[12] While Mr Mason's letter was treated as an application to set aside the summons, the reality is that he is either asking for his evidence to be taken before he leaves Nelson or, alternatively, to be given by AVL. His fall-back position was asking for some of the costs of his travel to be met if he has to return to Nelson (he does not expect to have some incidental expenses met such as taxi fares). That is the position Mr Mason advanced at this afternoon's hearing.

[13] I accept that Ms Wills is entitled to regard Mr Mason's evidence as likely to be relevant to her claim that exceptional circumstances exist to justify leave being given to raise a personal grievance after the 90-day time period has elapsed.³ In fact, Mr Mason conceded today that he considers his evidence is likely to be material.

[14] Turning to reg 34, there is no reason to conclude that the summons is either oppressive or will cause undue hardship arising from the coincidence in timing of Mr Mason's planned leave and the hearing date. That said, it is certainly arguable that attempting to compel Mr Mason to return to Nelson when an alternative is available might justify setting aside a summons under reg 34, but that point was not the subject of submissions and does not need to be decided.

[15] The Courts (Remote Participation) Act 2010 allows a witness to give evidence in the manner proposed by Mr Mason. Section 5 of that legislation allows participation in this way to be authorised after taking into account the nature of the proceeding, the availability and quality of the technology to be used, considering the potential impact of the use of that technology and any other relevant matters.

[16] This proceeding is suitable for the use of AVL and the available technology is appropriate. While Ms Sharma is less concerned about the quality of the available AVL now than she was when her memorandum was filed, I do not accept either that

² Regulation 34(3)(a)–(b); in relation to undue hardship the cause of it must be by reason of distance or short notice.

³ See Employment Relations Act 2000, s 114.

initial criticism or any residual criticism of it. Furthermore, there is no reason to assume that Mr Mason's evidence will in some way be adversely impacted by the mere fact that he would present it from Wellington.

[17] As to the balance of Ms Sharma's submissions, which I have interpreted as inviting the Court to require Mr Mason's personal presence rather than participation remotely, they are not accepted. Mr Mason has a legitimate reason to be away from Nelson. There is no reason to believe that his evidence would take longer to give just because he would be in Wellington and, even if it did, that is not sufficient to dismiss the application and require his personal attendance. Finally, the fact that the hearing is to be in Nelson, where Mr Mason lives, is not relevant.

[18] The last matter that needs to be commented on is Ms Sharma's argument, in her memorandum, that costs that might have been incurred by Mr Mason to return to Nelson ought to be borne by him. All that needs to be said about that is that it is contrary to cl 7 of sch 3 to the Employment Relations Act 2000 and to the Witnesses and Interpreters Fees Regulations 1974, neither of which contemplate a witness being required to bear his or her own costs when summonsed.

[19] There is no realistic alternative to remote participation because it is too late to arrange for this evidence to be given before Mr Mason goes on leave. I am satisfied that Mr Mason's applications can be disposed of as follows:

- (a) The witness summons will not be set aside and he is required to be available to give evidence on 18 November 2020; but
- (b) The application by him to give evidence by AVL is granted, subject to him doing so from the Employment Court at Wellington (at Level 5, 43 Ballance Street) and he is to make himself available from 9.30 am that day until his evidence is completed and/or he is released.
- (c) If Ms Sharma wishes Mr Mason to refer to documents in the bundle of documents that has been filed, she is to provide them to him prior to the

hearing. Those documents are to be numbered or otherwise identified in the same way as in the bundle of documents.

[20] Finally, Ms Sharma will need to liaise with Mr Mason promptly if other documents are to be relied on so that they can be copied and made available at the hearing.

[21] Costs are reserved.

K G Smith
Judge

Judgment delivered orally at 3.26 pm on 4 November 2020