

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

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

**[2020] NZEmpC 35
EMPC 211/2019**

IN THE MATTER OF an application for a status declaration
AND IN THE MATTER OF an application to adjourn hearing
BETWEEN ATAPATTU ARACHCHIGE
 Plaintiff
AND RASIER NEW ZEALAND LIMITED
 First Defendant
AND UBER B.V.
 Second Defendant

Hearing: 18 March 2020
 By telephone

Appearances: G Pollak, counsel for plaintiff
 K Dunn and E Peterson, counsel for defendant

Judgment: 19 March 2020

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application to adjourn hearing)**

[1] Mr Arachchige, the plaintiff, has applied to the Employment Court for a declaration pursuant to ss 6(2), 6(3) and/or 6(5) of the Employment Relations Act 2000 (the Act) as to whether he is an employee of the defendants (Uber). He is seeking that declaration in the hope that he is declared to be an employee and can then pursue a personal grievance against Uber over what he considers was his unjustifiable dismissal, as well as various claims for reimbursement and compensation.

[2] Mr Arachchige's application for a declaration is presently set down for a three-day hearing next week, commencing on Wednesday 25 March 2020.

[3] Uber now applies for an adjournment of that hearing and this judgment resolves that application.

[4] Uber makes its application on the basis that its one and only witness, and Uber's representative providing instructions to counsel, are both based in Australia. Up until recently, they were intending to travel from Australia to New Zealand for the purposes of the hearing. As a consequence of the travel restrictions now in place in New Zealand as a result of the COVID-19 pandemic, neither would be able to be present in Court for the hearing; even if they were to travel from Australia immediately, they could not attend as they would be required to self-isolate in New Zealand for 14 days following their arrival.

[5] Mr Arachchige opposes Uber's application. His position is that Uber's witness can give her evidence by way of Audio-Visual Link (AVL). He also provides suggestions as to ways in which the hearing could be managed that would enable counsel for Uber to obtain instructions.

[6] Understandably, particularly given it is a preliminary issue only, Mr Arachchige wishes to have his matter dealt with quickly, so that, if he is successful, he can promptly pursue his proposed personal grievance.

The parties agree on the legal position

[7] There is no disagreement over the law to be applied by the Court in considering the application here, where the situation has arisen through no fault of Uber or its representatives.

[8] The Court has the power to regulate its own procedure and the jurisdiction to determine matters in such a manner as it thinks fit in equity and good conscience. In addition, pursuant to regulation 6(2) of the Employment Court Regulations 2000 (the Regulations), where a case arises for which there is no procedure prescribed in the Act or the Regulations, the Court will look to the provisions of the High Court Rules.

[9] If it is in the interest of justice, the Court may postpone or adjourn a trial for any time and upon any terms it thinks just.¹

[10] The primary consideration in an application for an adjournment of a fixture is the need to do justice to both parties. It is essentially a balancing exercise.²

Interests of justice require an adjournment

[11] The present application is for an open-ended adjournment, until the travel restrictions are changed. Counsel for Uber suggested that the scheduling of this matter is reconsidered by the Court in two months (or when travel restrictions are lifted, if that occurs earlier). Mr Arachchige strongly opposes an open-ended adjournment.

[12] As both parties acknowledge, we are in unprecedented circumstances. Nevertheless, the courts continue to operate. Each case where an application for an adjournment is received will need to be considered on its particular circumstances. AVL is regularly used by the Employment Court and other courts and is found to be a useful tool, subject to the AVL available being of good quality.

[13] The situation here though is not about the availability or quality of AVL, but about whether having Uber proceed in the circumstances is in the interests of justice.

[14] Significant features of the current case are that Uber effectively has no managerial presence in New Zealand. This means, if the case were to proceed next week, no appropriate representative of Uber would be able to be present in Court. The witness who is unable to attend is not a peripheral witness but is the one and only witness for Uber. Counsel for Uber submits that having both the witness and the representative who provides instructions to counsel only able to attend by AVL would significantly compromise Uber's ability to actively participate in the hearing and to respond to the case as it unfolds, including to give instructions to counsel.

¹ High Court Rules 2016, r 10.2.

² *Snowdon v Radio New Zealand Ltd* [2011] NZEmpC 96 at [30]; *O'Malley v Southern Lakes Helicopters Ltd* HC Christchurch CP513/89, 4 December 1990 at 1-2.

[15] The case is important to Mr Arachchige and Uber acknowledges that. However, counsel for Uber submits it also is of fundamental importance to Uber's ongoing business in New Zealand. I accept that submission.

[16] While I acknowledge the suggestions Mr Arachchige's counsel has made to minimise the difficulties for Uber, I consider that the interests of justice require the hearing set down for next week to be adjourned.

Adjournment is for a limited time

[17] At this stage, the insurmountable difficulty for Uber is the two-week isolation period required of visitors coming to New Zealand. The outcome, in my view, that best balances the interests of the parties in the current circumstances is to adjourn the proceeding for a set period that would allow the representative and witness to come to New Zealand, isolate in accordance with the current requirements, and then attend at Court. I acknowledge that having two key employees in isolation in New Zealand will create some issues for Uber. Those issues can be ameliorated by adjourning the hearing for not less than eight weeks. This timeframe would allow Uber to put in place mechanisms by which those people could maintain contact and engage with the work of Uber while they are in isolation.

[18] Accordingly, the application for an adjournment is granted on the basis that the adjournment is to a date as soon after 19 May 2020 as can practicably be arranged by the Registrar after consultation with the parties.

[19] Leave is reserved for either party to apply to the Court for further directions or orders on reasonable notice.

[20] Costs are reserved.

J C Holden
Judge

Judgment signed at 11 am on 19 March 2020