

REMOTE PARTICIPATION IN EMPLOYMENT COURT HEARINGS¹

Background

It has been widely acknowledged around the globe that years of progress in remote hearings were achieved very rapidly – in some jurisdictions within weeks – due to the COVID-19 pandemic.² This is as true in New Zealand, as it is elsewhere.

Fortunately, some of the New Zealand systems for accommodating remote hearings were in place well prior to 2020, although they had been utilised in a somewhat piecemeal fashion. The main tool related to the provision of evidence by video links.

In the late 1990s and early 2000s, courts began to debate the pros and cons of such a mode of giving evidence. A useful summary of the position as it was in 2007 is found in *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue*, where Stevens J emphasised that the use of technology such as video link communications “may well contribute to the just, speedy, and inexpensive conduct of litigation”.³ He was able to conclude that giving evidence by video-link was an accepted feature of litigation. He went on to say that such technology enabled remote litigants to be spared costs, and in some instances, the stress of travelling significant distances to give evidence.⁴ But he noted that against such positives, there needed to be an assessment of the requirements of natural justice, and in particular, fairness to all parties.⁵ At that stage, applications for the use of this mode of giving evidence fell under the High Court Rules⁶ and the provision in the Evidence Act 2006 which deals with alternative ways of giving evidence.⁷ But, in 2010, the utility of using audio visual links (AVL) was recognised by the enactment of the Courts (Remote Participation) Act 2010 (RPA). Its enactment was driven in part by the desire to reduce transport of prisoners from correction facilities to court for more routine court events.⁸

¹ We wish to acknowledge the significant contributions to this paper of Clare Abaffy, Judges’ Clerk, and Anna Piaggi, Assistant Crown Counsel.

² Janet Clark “Evaluation of remote hearings during the COVID-19 pandemic” HMCTS, December 2021; House of Lords Select Committee on the Constitution “COVID-19 and the Court” (2021); Marie Burton “Remote hearings in the Social Security Tribunal: Should we be worried” (2021) 28 J SSC 36; “Remote hearings and their implications for family justice” Journal of the Commonwealth Magistrates’ and Judges’ Association, Vol 26, June 2022 at 30.

³ *Deutsche Finance New Zealand Ltd v Commissioner of Inland Revenue* (2007) 18 PRNZ 710 (HC) at [15].

⁴ At [15].

⁵ At [15] and [17].

⁶ High Court Rules, r 496.

⁷ Evidence Act 2006, s 103.

⁸ A helpful summary of the extrinsic material considered when the RPA was enacted is found in *Taylor v The Manager of Auckland Prison* [201] NZHC 1241 at [17].

As is well known, the statute provides criteria against which judges, and registrars, can assess and determine the use of AVL in a civil proceeding.⁹ As we shall explain later, the statute spells out “whether or not” to allow the use of AVL.¹⁰

Over the next few years AVL facilities were enabled in many courthouses throughout the country. The use of this mechanism became more frequent in all courts.¹¹ Other digital enhancements were also introduced. These included the introduction of electronic bundles particularly for document-heavy cases, and the introduction of File and Pay, which is an online mechanism for use when commencing a proceeding.

The state of play in 2020

When the pandemic hit, there was accordingly an existing infrastructure for remote participation. There was obviously, however, a capacity issue. The Ministry of Justice addressed this issue in the first half of 2020 and again in late 2021, resulting in significant escalation of the pre-existing video conferencing facilities and enhancing the prospect of hearings by that means.

This mechanism is now known as Virtual Meeting Room (VMR). The use of MS Teams is also now possible. The current position in the Employment Court is that when VMR is required, it is available.

The protocols made under the COVID-19 Protection Framework (the traffic light system) mandate these processes. Thus, the idea of all parties – including not only witnesses, but also counsel, and even judges – participating remotely, is no longer novel.

The use of remote technology has the potential to enhance access to justice for some users, but it also risks excluding others, as we will shortly explain. These processes place additional responsibilities on all of us who are regular participants in litigation, no less in the Employment Court than any other court.

This webinar is intended to assist in bringing users of the Court’s system up to speed, so that in addition to all the other responsibilities they carry when running or defending a case, they know what is expected of them in a virtual hearing, and how to deploy virtual resources in the best interests of the parties they represent, properly discharging the obligations they owe to the Court. The webinar is intended to have a practical focus.

A preliminary comment is that we are only part way along the road towards a fully-fledged use of technology. Before long, it will be necessary to review what has been achieved in the last couple of years, and what may be realistically expected from here on.

⁹ And separately in a criminal proceeding.

¹⁰ Courts (Remote Participation) Act 2010, s 5.

¹¹ See for example *Taylor v The Chief Executive of the Department of Corrections* HC Auckland CIV-2010-404-6985, 21 July 2011; *Taylor v The Manager of Auckland Prison* [2012] NZHC 1241; *Addleman v Lambie Trustee Ltd* [2017] NZHC 1719; *Re Canterbury Cricket Assoc Inc* [2013] NZEnvC 121; *Mathews v Bay of Plenty District Health Board* [2018] NZEmpC 136.

To date, the thrust has been on using technology to automate existing court processes: what Professor Richard Susskind calls “turbo charging our traditional ways of working”.¹² He says that what this involves is grafting new technology onto old working practices which has dominated the theory and practice of court technology over recent decades.

We are not – yet – at the stage of using technology to transform dispute resolution, particularly for low-level disputes: that is, online courts or tribunals. Such bodies are being introduced overseas. For example, the British Columbian Civil Resolution Tribunal offers a state-provided system for small claims relating to damages, debts, recovery of personal property, and certain kinds of condominium disputes.¹³ Serious work is being undertaken in this area in New Zealand, but that is not for today.¹⁴

In short, this webinar will briefly introduce representatives to the pros and cons of the digital opportunities as they stand at present.

When is a virtual hearing appropriate?

The protocols

The Court’s protocols guide users as to when online hearings may take place, under the various levels of the COVID-19 Protection Framework. The protocols are available on the Courts of New Zealand website; and on the Employment Court website.¹⁵ These are modified from time to time, as circumstances change. Practitioners are notified immediately of any alteration to the protocols, via the relevant employment law committees and publications.

The current protocol took effect on 26 April 2022.¹⁶ It emphasises that courts are an essential service, and that the Court will remain open at all levels under the Protection Framework to ensure access to justice.

Under the red level, the Court’s business is to be conducted using remote participation technology, where that is reasonably possible and is permitted by law. In-person hearings may take place if a judge decides that is in the interests of justice to do so. Such a question is to be considered as part of a directions conference, or following a request from the relevant case officer, it may be dealt with on the papers after receipt of memoranda from the representatives.

Notice of any application to participate by way of an in-person hearing must be given at least five working days prior to the hearing. The principles of the RPA apply by analogy.

¹² Online Courts and the Future of Justice, R Susskind OUP 2019, p 34.

¹³ The UK Online Money Claims Service for relatively small amounts is another well-known overseas example.

¹⁴ ADR options in New Zealand currently include Complete Online Disputes Resolution, New Zealand Dispute Resolution Centre, Fairway and Focus Mediation.

¹⁵ Employment Court “What to expect at the Employment Court” <www.employmentcourt.govt.nz/what-to-expect/before-a-hearing/#AVL>.

¹⁶ Employment Court “Employment Court operations under Covid-19 Protection Framework effective from 26 April 2022” <www.employmentcourt.govt.nz/>.

Under the orange level, all hearings of one day or less are presumptively conducted by remote technology where permitted by law, and subject to the particular circumstances of an individual case, which may mean an in-person hearing would be in the interests of justice.

Longer matters are to take place in-person unless a judge directs otherwise. A party may apply for a longer matter to be conducted using remote technology, where that is desirable in the interests of justice, and to protect health and safety in the courts.

Under the green level, it is presumed that all matters will be conducted in-person. However, a party may seek a direction that a matter should be conducted using remote technology if that is desirable in the interests of justice and to protect health and safety in the courts.

Under the orange and green levels, a party, representative or other participant may apply to participate in a hearing by remote technology. Particular consideration will be given to any health vulnerabilities, the distance that would otherwise have to be travelled, and the likely length and complexity of the hearing, as well as any relevant criteria under the RPA. Notice of application to participate by remote technology must be given at least five working days prior to the hearing. The RPA applies.

The protocol goes on to explain the measures which will apply at all Protection Framework levels – the requirements on participants attending the courthouse, how media access is to operate, the guidelines for participation and viewing, health and safety measures in the court building, and expectations of representatives.

RPA criteria

The Court’s protocol states that applications for the use of remote participation technology may be undertaken “where that is reasonably possible and permitted by law”.

The provisions which are footnoted in the protocol are ss 5 and 7 of the RPA. Section 5 spells out the general criteria for use of AVL; s 7 outlines applicable processes with regard to civil proceedings.

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or not to allow the use of AVL for the appearance of any participant in a proceeding:

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

...

7 Use of audio-visual links in civil proceedings

- (1) AVL may be used in a civil proceeding for the appearance of a participant in the proceeding if a judicial officer or Registrar determines to allow its use for the appearance of that participant.
- (2) A judicial officer or Registrar may make a determination under subsection (1)—
 - (a) on his or her own motion; or
 - (b) on the application of any participant in the proceeding.
- (3) A determination under subsection (1) must—
 - (a) be made in accordance with the criteria in section 5; and
 - (b) take into account whether or not the parties consent to the use of AVL for the appearance of the participant.

We also note s 7A, which deals with the use of audio links in civil proceedings.¹⁷ That is, if a judicial officer or Registrar considers s 5 criteria are established, and that an audio link would not be contrary to the interests of justice instead of AVL, this may be authorised.

Section 5(a): the nature of the proceeding

A variety of factors have been considered under this rubric. These considerations are of course fact-specific. For example, extended cross-examination of a key witness on an important issue may point to the hearing being conducted on an in-person basis.¹⁸

There is a line of cases that the more important the witness, the more important is the requirement to attend in-person.¹⁹ The contrary position, however, also has some support. That is, an application for AVL will succeed if, without it, an important witness would not attend.²⁰

Cases which centre on legal issues, and/or an analysis of documents, rather than the credibility of witnesses, might well be considered suitable for a virtual hearing.

A relevant factor relates to possible sharing of confidential documents, either onscreen or by reference when receiving evidence or submissions.

¹⁷ This section was inserted by the COVID-19 Response (Further Management Measures) Legislation Act 2020 and is automatically repealed when the Epidemic Preparedness (COVID-19) Notice 2020 expires or is revoked.

¹⁸ *Smith v Attorney-General* [2020] NZHC 1157 at [11].

¹⁹ For example *Yang v Chen* HC Auckland CIV 2007-404-1751, 13 May 2010; *Erceg v Erceg* [2014] NZHC 2601, [2016] NZAR 85, (2014) 22 PRNZ 245.

²⁰ *Ra Ora Stud Ltd v Colqhoun* (1997) 11 PRNZ 353 (HC) at 356.

Section 5(b): the availability and quality of the technology that is to be used

This is another fact-specific consideration. The technology used by the Court is of a high quality, and from its perspective there should be no issues intrinsic to the technology alone that would cause disadvantage. Sound and visual images are presumed to enable full participation.

Connectivity failures, however, can arise. These include frozen screens, time-lags in picture and/or sound, or participants dropping off the hearing link. Such failures obviously cause interruptions and frustrations that would not be experienced in the courtroom.

Whilst some potential participants may well have access to reliable equipment and/or stable platforms for receiving/sending the data involved, some may not. For example, a participant may wish to rely on a cell phone, which obviously has viewing limitations, especially if documents are to be shared online.

Section 5(c): credibility

The topic of credibility is specifically referred to in the statute and can be a pivotal point.

In *Taniwha v R*, the Supreme Court considered the assessment of credibility in the context of a criminal appeal.²¹ The Court referred to the Law Commission's discussion paper entitled *Evidence Law: Character and Credibility*, which pointed to research demonstrating popular beliefs about demeanour being erroneous.

Particular reference was made in that case to an article of Hon Robert Fisher QC, "The Demeanour Fallacy".²² There he stated:²³

The words used (the verbal content) can be contrasted with the way in which they are uttered (the non-verbal content). A speaker simultaneously manifests a package of non-verbal information which is normally subconscious. It consists of facial expressions, bodily movements, and vocal characteristics. The vocal characteristics (also known as "paralinguistic cues") include pitch, pace, volume, timbre, expression, and tremors. It is this package of face, body, and voice that lawyers describe as "demeanour".

(footnote omitted)

He went on to conclude:²⁴

The overwhelming conclusion is that demeanour is not a useful guide to veracity. There are no observational advantages when assessing the honesty of a witness' evidence. Those confined to reading the transcript will do just as well. Of particular concern is

²¹ *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [26]–[47].

²² Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575.

²³ At 577.

²⁴ At 582.

the fact that so many sincerely believe that they are capable of assessing veracity through demeanour. The widespread belief that they can is a popular fallacy.

(footnote omitted)

The Supreme Court considered that a judge addressing a jury on demeanour for the purpose of assessing credibility could refer to the following factors:

- (a) whether the witness's evidence is consistent with the evidence of other witnesses which has been accepted;
- (b) whether the witness' evidence is consistent with objective evidence such as documents or text messages and, if it is not, what explanation is offered for any inconsistencies;
- (c) whether the witness' account is inherently plausible; and
- (d) whether the witness has been consistent in their account over time and, if not, why not.

The Court emphasised the jury must consider a witness's evidence in the context of all of the evidence in the case.²⁵

The observations in *Taniwha* have been applied to the assessment of credibility in two civil cases. The Supreme Court's observations may accordingly be regarded as relevant to an application for remote participation.²⁶

Thomas J summarised the position in *Burden v Debonair Furniture Ltd*:²⁷

... New Zealand courts focus on a critical analysis of the evidence with an emphasis on consistency and how the evidence relates to other material. There is little support for the notion that demeanour is a reliable indicator of credibility. This context is important when considering the observations which have been made in various cases about the potential difficulty in assessing credibility when a witness gives evidence by AVL. ...

Thus, what is required in deciding whether AVL/a virtual hearing process should be adopted, involves a consideration as to whether such a method of taking evidence may compromise the possibility of witnesses being appropriately challenged. This is a question of fact which may turn on the nature of the proceeding.

Section 5(d): other relevant matters

In addition to the specific criteria, other matters, if relevant, may be assessed.

²⁵ *Taniwha v R*, above n 21, at [45].

²⁶ *Burden v Debonaire Furniture Ltd* [2017] NZHC 1553; *Smith v Attorney-General*, above n 18.

²⁷ *Burden v Debonaire Furniture Ltd*, above n 26, at [49].

In favour of the use of AVL/virtual technology are considerations such as:

- (a) **Delay:** the significant delay which could potentially occur if the hearing would otherwise proceed on an in-person basis. Such an option may be unavoidable, but against that factor has to be balanced the right of parties to have their case heard sooner rather than later. Justice delayed may be justice denied.
- (b) **Time savings:** remote hearings are efficient, as they reduce travel time to and from the Court for all. Parties and witnesses may connect to the courtroom almost instantly from their own home or offices using their home devices. During a hearing, the evidence of one witness can quickly follow that of another. Witnesses do not have to wait either in or near a courtroom. These factors tend to support a conclusion that courts may continue to operate even although unprecedented events have arisen.
- (c) **Costs savings:** travel and accommodation for parties, representatives, and witnesses may be expensive. Moreover, witnesses may need to take unpaid time off work to attend a hearing; productive business time may be lost. Against that, a party may incur expenses in arranging an appropriate remote hearing system, especially if devices normally used by a participant have poor connectivity. Costs may include receiving technical assistance. These costs may need to be evaluated. That said, it would normally be expected that the costs of an in-person hearing are likely to be greater.
- (d) **Courtroom visibility:** in some instances, technology options may enhance the ability to gauge the reactions of participants – particularly witnesses, but also others such as counsel and even judges.

Technology options may allow participants to be presented in a particular manner. On some platforms, each participant may occupy the same sized “box” on the screen, which allows comparative evaluation of reactions. An alternative view is an enlarged “box” for the participant who is speaking. This may be helpful for providing a closeup view of witnesses. All of this may be contrasted to the expanse of a courtroom, where these comparisons/observations may be undertaken more readily.

Factors which may point away from an AVL/virtual hearing are:

- (a) **Document use:** the fact that a case involves a substantial volume of documents does not necessarily disqualify the use of virtual technology, since it is relatively straightforward for remote participants to access their own copy of a common bundle. If it is properly paginated and presented in a way that facilitates easy navigation there should not be a problem. The sharing of documents on a screen is possible, through the use of ClickShare.

However, consideration must be given to the size of screen that a participant may be using. Attempting to read documents on a cell phone, whilst giving evidence, has obvious pitfalls. Provision of a second screen for sharing documents is ideal.

- (b) ***Individuals without access to or comfort level with technology:*** where a remote hearing involves a person who cannot access or is not comfortable with the necessary technology, inequities can arise. There are many individuals who are challenged by remote technology, and do not understand how to use it.

This is a real issue which requires careful identification and consideration. One option is for the individual to attend a local courthouse with AVL facilities, which means that person does not have the responsibility of ensuring the technology is operating correctly. The court and other parties can also be confident as to the reliability of the equipment being used by that person.

- (c) ***Screen fatigue:*** studies have shown that participants to remote hearings may experience this problem, which can make it harder to focus for a full sitting day, and lead to more breaks.²⁸ This may be a relevant issue in a longer case.
- (d) ***Witness preparation and evidence presentation:*** preparing a witness may involve a longer briefing, if it has to be dealt with remotely, than would be the case otherwise. There may be difficulties in building trust and confidence with witnesses over a screen, when compared to an in-person dialogue. Where witnesses reside overseas, briefings – and the hearing – may occur across different time zones. Language barriers may also be exacerbated through an online forum, with non-English speakers finding it more difficult to communicate, and/or being hard to understand; together with the problem which can arise of an interpreter being at a separate remote location.
- (e) ***Vulnerable witness:*** consideration may need to be given to a vulnerable witness having to testify remotely, especially if they would feel isolated from their lawyer.

Section 7: RPA

Section 7 spells out the process for determining an AVL application. Under the Court’s protocol, issues as to the conduct of a virtual hearing are to be dealt with by a judge rather than a Registrar. Consent to the use of technology will be an important consideration, but is only one factor in the mix.²⁹ A consent application is likely to be dealt with on the papers.

The Court’s “Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings” contains many of the details relating to applications for use of AVLS, including in virtual hearings.³⁰

²⁸ See discussion in “The Courts, the Remote Hearing and the Pandemic: from action to reflection” UNSW Law Journal, vol 44(1), 126.

²⁹ *Smith v Chief Executive of Corrections* [2019] NZHC 2314 at [25]–[28].

³⁰ Employment Court “Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings” <www.employmentcourt.govt.nz/assets/Documents/Publications/2019-03-21-AVL-Guideline.>.

Cases

Guidance as to the assessment of pros can cons can be obtained from previous judgments involving RPA applications, including in the Employment Court.³¹

There are also useful overseas discussions on the topic, albeit in their own particular statutory contexts.³²

Orders

After a judge has determined that a virtual hearing is to take place under the Court's protocol, a minute will be issued. It will normally contain a reference to the applicable guidelines. The first is the guideline already mentioned, which contains a comprehensive summary of the Court's expectations.³³ It is primarily designed to assist representatives. A second guideline, "Guideline for Remote Viewing of Hearings" is a summary of expectations which is intended to be of assistance to not only representatives, but also witnesses and those intending to view the hearing.³⁴

Modes of virtual hearing

Remote participation in the Employment Court is normally via VMR which is a web-based video conferencing system supported by the Ministry of Justice and Spark. In some cases, a virtual hearing might be run using MS Teams, a meeting solution that uses an Internet browser or the Teams app.

There are advantages in using VMR. The platform can accommodate a mix of in-person and remote participants and has sufficient capacity to accommodate a substantial number of simultaneous participant connections. Live streaming to multiple viewers can be arranged, if approved.

VMR has superior document sharing. The display of documents via MS Teams can result in the screen freezing or an image appearing which is not in sync with the sound.

³¹ *Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 4; *Ceres New Zealand LLC v DJK* [2020] NZEmpC 105; *Vulcan Steel Ltd v Manufacturing and Construction Workers Union* [2021] NZEmpC 108; *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 128; *AlKazaz v Enterprise IT Ltd (No 2)* [2020] NZEmpC 78; *Shah Enterprise NZ Ltd v A Labour Inspector of Ministry of Business, Innovation and Employment (No 3)* [2021] NZEmpC 172. See also *Shah Enterprise NZ Ltd v Labour Inspector of the Ministry of Business, Innovation and Employment (No 2)* [2021] NZEmpC 121.

³² As conveniently summarised in "The Courts, the Remote Hearing and the Pandemic: from action to reflection" UNSW Law Journal, vol 44(1), 126.

³³ Employment Court "Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings" <www.employmentcourt.govt.nz/assets/Documents/Publications/2019-03-21-AVL-Guideline.pdf>.

³⁴ Employment Court "Guideline for Remote Viewing of Hearings" <www.employmentcourt.govt.nz/assets/Documents/Publications/Guideline-for-Remote-Viewing-of-Hearings1-February-2022.pdf>. See also Employment Court "Summary of Guidelines for a Witness Giving Evidence by Audio-Visual Link including in Virtual Hearings" <www.employmentcourt.govt.nz/what-to-expect/before-a-hearing/#AVL>.

The use of MS Teams by the Employment Court is relatively unusual but might arise where an AVL-enabled courtroom is not available for, say, a Judicial Settlement Conference, or where the Ministry has capacity issues for VMR use.

Technology requirements

In cases of either VMR or MS Teams appearances the Registry will need to know whether the participant will be able to meet the following requirements:

- (a) **Browser:** *For Windows* - Microsoft Edge or Google Chrome (these are recommended, but other platforms may work; Internet Explorer or Mozilla Firefox is not to be used).
For Apple – Google Chrome or Safari (these are recommended, but other platforms may work. Again, Internet Explorer or Mozilla Firefox may not be used).
- (b) **Connectivity:** a strong and stable internet connection (preferably broadband or Wi-Fi, but otherwise any stable high-speed data connection).
- (c) **Device and hardware:** a computer or laptop with a microphone and camera; headphones with an in-built microphone (strongly recommended) or the device microphone may be used with a regular headphone.
- (d) **Positioning:** a blank background is preferable which reduces picture distortion for other participants.

The Court will need to be satisfied that the AVL link will be secure at all times. If a participant is unable to meet these requirements, the Registry is to be advised for discussion as to options.

If a participant does not have access suitable technology and does not need to appear visually, a landline and/or mobile phone may be used to dial in.

Remote place

The remote place which is to be used for a virtual hearing, whether by a representative or a witness, is expected to meet at least the following requirements (and should be addressed in the application):

- (a) to allow remote participation without interpretation or distraction;
- (b) to be well lit to enable the Judge, and other parties, to see the participant in the remote place at all times;
- (c) to be sufficiently spacious as to enable suitable images of the participant to be transmitted to the hearing courtroom at all times;
- (d) to be available for tests to be conducted in advance of the participation taking place; and
- (e) if an oath is to be taken, that a Bible is available for use.

One of the issues which can arise in respect of remote locations is the situation where the camera is to be placed some distance from the participant, so that it is difficult for a viewer to either see the participant clearly or observe any necessary reactions or interactions of that person. Some thought may need to be given to the intended use of a conference room containing multiple participants, which can lead to difficulties in identifying and focusing on a particular individual.

In terms of s 13 of the RPA, the place of hearing will ordinarily be the courtroom with the Registrar, especially in Auckland and Wellington where AVL facilities are available. The Registrar will usually be physically present in the courtroom, operating the recording of evidence for transcription purposes. The Judge may or may not need to be present in the courtroom – that is, the Judge may be linked from another remote location. As set out above, MS Teams may be used where there are constraints on courtrooms, which cannot be avoided, in which case the hearing will be run from Judge’s chambers or another suitable room.

Pre-hearing

Test call

The Registry may request the participant to take part in a test call. If the witnesses are to be in a remote location, they should also attend the test call. If so:

- (a) ***VMR hearings*** – The Registry will provide instructions and set a date and time for a test call and provide a link and a password to connect to the VMR system. The participant, including any remote witness, must copy and paste the link into their browser and enter meeting ID and password.
- (b) ***Microsoft Teams hearings*** – The Registry will send an email or Outlook calendar invitation with the Teams meeting link. The participant needs to click on the link to wait to be admitted to the remote hearing.
- (c) Participants will be taken to a new screen where they will then be asked to set up their video, microphone, and speakers (if they have an inbuilt microphone, camera, and speakers these should be working already). For MS Teams they will then wait to be admitted to the meeting.
- (d) The Registry will ensure that all parties can hear and see one another and then provide a rundown of how the system works. This provides an opportunity for a participant to resolve any technical issues and ask any questions about the system or the virtual hearing itself. It is not always possible to run the test with all parties at the same time. Sometimes it is more suitable to do the test call on the day of a hearing.
- (f) All participants should ensure they know how to use the functions they will need to use in the hearing – especially the mute button, which should be used when a participant is not speaking.

Witness preparation

Giving evidence remotely can be very convenient for a witness – removing the cost and time of travel and allowing for informal comfortable surroundings. However, if representatives and witnesses are in separate locations, there will be decreased interaction and it will be harder to develop the usual confidence which comes with this relationship. For example, witnesses gain confidence from the final day-before briefing, having the opportunity to ask the “dumb” questions and from discussions in the breaks (before cross examination begins).

The usual briefing should still take place prior to the hearing, but set aside extra time for more questions, to confirm logistics and to fix any problems that might come up at the last minute. Undertaking a full read-through of their brief might assist a nervous witness. Running through examples of questions and answers may help the witness to be comfortable with the view on the screen and the timing of answers, although coaching is obviously prohibited.

A witness will usually be required to be at the remote place 10 minutes before the scheduled time for their evidence to avoid unnecessary delays.

In advance of the virtual participation, the party calling the witness must provide them with copy of their brief of evidence; and all documents to be referred to or relied on. All documents supplied for the use of the remote witness must:

- (a) be identified in the same way in which they are to be identified when produced in court;
- (b) not to be marked in any way by the witness unless that action is to comply with a direction of the Judge (such as where the witness is asked to mark a passage of text or to identify part of a document); and
- (c) unless the Judge directs otherwise, the party calling the witness is responsible for securing the signed brief of evidence and other documents at the remote place and sending them to the Court as soon as possible after the virtual hearing ends.

If the witness is expected to refer to or rely on a lot of documents that possibility should be stated in the application, so that an order may be made to require a copy of the common bundle of documents to be supplied in advance to the remote place, if necessary in digital form.³⁵

At the end of the Guideline there is a summary to be provided to a witness who is to participate remotely.³⁶ The party calling the witness must ensure that a copy of the summary is provided to the witness as soon as possible after the application has been granted.

³⁵ See Employment Court “Electronic Casebook Protocol” <www.employmentcourt.govt.nz/what-to-expect/before-a-hearing/#bundle>.

³⁶ See Employment Court “Summary of Guidelines for a Witness giving evidence by audio-visual link including in Virtual Hearing <www.employmentcourt.govt.nz/assets/Documents/Publications/Summary-of-Guidelines-for-a-witness-giving-evidence-by-AVL-September-2021>.

The witness giving evidence from the remote place must be informed that the virtual hearing will only be terminated at the direction of the Judge and, once that has happened, he or she is free to leave.

If the witness is at a separate location from their representative, court protocols often require an independent person to be present in the room – this can be a representative (who may need to be paid) or any other person who is independent to the parties or their representative. The role of the independent person is to ensure the witness is alone in the room, to deal with any interruptions, to ensure that the trial papers are unmarked (e.g. brief of evidence and common bundle) and to collect the signed brief of evidence at the end for couriering up to the Court. They can also observe the witness's interaction with others during breaks while under cross-examination, although this duty remains primarily on the witness. Ideally, the independent person would have a level of IT knowledge, to assist the witness with any technical issues. If extra evidence is likely to be handed-up, the independent person could receive these during the trial via email.

Hearing

Joining

Where VMR is to be used, the Registry will let the participant know the date and time for the virtual hearing and provide them with a link and password. This will be the same link and password as used for a test call. The link and password provided is for the participant's personal use - it is not to be passed on to someone else.

If the remote hearing is via MS Teams, a meeting link is emailed; as noted, this can be operated from a calendar.

Any participant who wishes to display the hearing on a larger screen to a group must first obtain permission to do so from the Registry.

The participants appearing remotely must connect at least 10 minutes before the hearing starts. If the hearing is via VMR, the Registrar will connect at this time. The Judge or Judges will then enter the virtual hearing once the Registrar confirms that all parties are connected. If the hearing is via MS Teams, the participants will remain in the "lobby" until admitted to the hearing by the Registrar. The Judge(s) will already be in the hearing when participants are admitted.

The Registrar will then call the case and the Judge will ask representatives to enter appearances as usual. Next, the Judge will inform participants as to how the hearing is to proceed, usually emphasising matters of etiquette which apply to a virtual hearing.

IT issues during hearing

Participants should remain alert to any deterioration in picture and sound quality and inform the Court immediately if this is impacting on their ability to participate fully in the hearing. It will be useful for participants to have alternatives in the event technology issues arise, such as a hotspot connection that may be used or an IT expert on call.

From time to time, a connection may be lost. This is usually due to a technical problem arising with the device being used by a remote participant.

Factors which may give rise to difficulties for remote users include poor connectivity, or overuse of the particular Wi-Fi system being adopted. Thus, a remote participant who is situated in their home, for example, where there are other persons also using Wi-Fi may encounter difficulties; some commercial entities – including law firms – have similar problems within the confines of their workplace.

Etiquette and practical tips

For remote attendances, standing is not required, and counsel are not required to wear gowns. Formal attire, however, is required for all participants. Participants appearing remotely should:

- (a) Speak directly into the microphone when addressing the Court.
- (b) Be familiar with how to mute their microphone. The video should be left on for the duration of the hearing.
- (c) Mute the microphone when not speaking.
- (d) Reduce body movements as much as possible.
- (e) When positioning the camera on their device, be mindful of camera angles, glare from windows, and the background.
- (f) Speak more slowly than a normal courtroom pace, especially if wearing a mask in the presence of other participants. Speak as clearly as possible.
- (g) Note that audio cues are more important in a remote context. If remarks are addressed to a particular person, the participant should identify them and audibly signal when they expect a response.
- (h) Attempt to find a remote site that is free from as much background noise and interruption as possible. Ensure mobile phones are on silent mode and switch off notifications on the device being used for the virtual hearing, or any other device within earshot.

Participants attending remotely:

- (a) must not record the screen (video) or audio and must not take still photographs – this includes a prohibition on downloading or capturing, by any means, sounds or images from the video feed, whether by software or digital devices, including cell phones, and a prohibition on electronic sharing of any content from the hearing;
- (b) must not publish any report of the hearing while it is in progress – this includes publishing material on any social media platform or any other media; and
- (c) must adhere to court suppression orders – this includes a prohibition on publishing information on social media.

An order allowing a person to participate in a hearing remotely is made on the basis the participant will do so in accordance with the protocol, and the participant will comply in all respects with the conditions set out above. The purpose of these conditions is to preserve the integrity of the court process and to protect the privacy of those involved in the proceeding. Failure to comply with the protocol may be treated as a breach of a court order.

Witness management

In a remote hearing the logistical safety blanket of having representatives and witnesses in the same location may not be available. The small things that can delay a witness's attendance (traffic, sick children) will be outside the representative's control. This means witness logistics need to be well organised before the trial.

- (a) Courier the bundles to them well in advance (if using hard copies).³⁷
- (b) Check in with the witness again in the morning they are due to give evidence, to make sure the technology is working.
- (c) Make sure you have the witness's cell phone number and that they have their cell phone with them, visible but muted, so you can ring them if something is going wrong (ask the Court's permission for this).
- (d) Talk to the independent person (if present) to ensure they understand their role.

For busy witnesses or witnesses in a different time zone, it can be helpful to arrange taxis to/from the location, food and coffee at the venue.

If evidence continues across a break, the witness may remain visible on the screen, and will be audible unless they press the mute button – explain this to them during the test run. The caution about talking to others under cross-examination also becomes more important, as counsel have less control over a witness's movements.

It is an unfortunate reality that accents and linguistic differences become more pronounced over remote technology. This can be addressed by reiterating the usual encouragement to speak slowly, and to ask for the question to be repeated as many times as necessary. It is also good practice to check the transcript each night and agree any edits with the opposing representative.

Requests to observe

Most Employment Court hearings are conducted in public. Notification of these is placed on the schedule of upcoming cases which is published on the Court's website. If a member of the public wishes to observe such a hearing, the process for participating in this way is as follows:

³⁷ See "Witness preparation" above.

- (a) A request to observe is made by email or telephone to the Registry – a formal application in the usual sense is not required.
- (b) If access is to be granted, the Registry makes the necessary arrangements, and ensures that the guidelines of participation (which includes conditions for observing and prohibition on use of material and so on) are drawn to the observers' attention, and that they must comply with them since they constitute an order of the Court. The Registry will send members of the public who wish to attend with a letter and a guideline for remote viewing.
- (c) If there are non-publication orders, the participant must have these drawn to their attention, together with the obligation that they have not to disclose the information which is the subject of the order.

Media participation

Court reporting is of course an integral part of the court process – court reporters are the eyes and ears of the wider public. This is even more important when there are restrictions on members of the public being able to enter court buildings, or where court proceedings are being conducted remotely.

Prior to the pandemic, the relationship of the media with the courts was straightforward – reporters appeared in person and were accommodated on the press bench. A virtual hearing requires an extra step, so that the Registry can supply remote login details to a media representative.

A media representative should contact the Registry by email or telephone. Members of the media do not need to fill in an in-court media coverage application, unless they wish to film, broadcast, or record the proceedings.

Freelance journalists, or those working for organisations outside the definition of accredited media, may cover the court proceeding at the Judge's discretion. But again, there needs to be a prior communication with the Registrar.

The presiding Judge will expect to be told by the Registrar at the commencement of the hearing as to which members of the media are present.

The hearing – a representative's perspective

A remote hearing from a representative's office has many up-sides: your colleagues, secretarial support, coffee room, fridge and library are easily accessed. A client or junior representative not appearing can be present in the room (off camera with the Court's permission). During the breaks you may be able to work or even attend meetings. Your co-representative can ask you (discreet) questions while on mute without distracting the Judge unduly. Witness questioning is more informal and conversational, meaning you can build a relationship with the witness and they may give more constructive answers.

However, the informal setting has its down sides. It feels less like a courtroom, with representatives seated throughout – the adrenaline rush that comes from standing and

addressing the Judge is diminished. Etiquette may fall away – with piles of paper and water bottles visible to the Judge, which is not to be encouraged. Representatives chatting while on mute may become distracting for other parties. The Judge cannot see everyone in the room, including people entering and leaving, so it is important to observe protocol and inform the Judge who is in the room.

Note taking may be an issue. As from 1 June 2022, the policy as to note taking changed. Representatives and litigants in person may take notes via pen and paper, unless the Judge directs otherwise. For people other than media, representatives and litigants-in-person, leave is required to take notes on an electronic device.³⁸

Given the ability to live stream the hearing, counsel will not know how many people are watching, or who they are – on matters of public interest there may be several hundred.

Similarly, live streaming makes it easy for media to record the whole hearing, including breaks, and counsel/witnesses may easily forget this is happening. As discussed further below permission for recording from the Registry is still required in advance. Counsel should think carefully about seeking orders regarding filming and publication of footage, as well as non-publication orders for identifying details of vulnerable parties/witnesses and confidentiality orders over sensitive evidence. An order requiring publication of a minimum amount of footage (e.g. a minimum of two minutes, or question-plus-answer) may prevent over-editing of footage before publication.

Virtual mediations and Authority investigations

Online mediations can be positive if undertaken with some prior logistical planning. The technology enables the usual mediation procedures to occur, by placing participants into a plenary room where the parties come together, and later into a private “break-out” room – with the ability to summons the mediator at any time through the push of a button. The same process of initial exchange of position/impact statements in the plenary applies, followed by negotiation using break-out rooms with the mediator shuttling between the parties. This means remote mediation will still have the cathartic qualities that are valued in alternative dispute resolution. Using remote means can be less intimidating and confrontational, which is seen as a benefit for employees.

In-person mediations may still be preferable where there is an ongoing employment relationship, as the online setting takes away from the experience in which the participants are sitting in the same room and using eye contact while presenting and listening to their employment relationship problem. However, experience suggests that virtual mediations have provided an efficient forum for negotiating monetary settlements where an employment relationship has ended.

³⁸ Heads of Bench “Note taking in court” <www.courtsofnz.govt.nz/going-to-court/practice-directions/practice-guidelines/all-benches/note-taking-in-court/>.

The Employment Relations Authority has a COVID-19 update section on its website,³⁹ most recently updated on 4 April 2022. The Authority is trending back to in-person investigation meetings, although the decision is in the Authority member's discretion in each case, consistent with its investigative nature. The Authority will consider alternative means of attendance when needed for health reasons, including meetings by telephone or audio-visual link or on the papers.

Authority members travel widely around New Zealand and remote hearings are more likely to be conducted on a laptop in a hotel or conference room than on a big VMR screen in a courtroom. This means technology issues and poor Wi-Fi connection may have a greater impact.

Representatives may wish to discuss the room set-up in such cases to ensure that each participant is easily seen and heard. Those conducting cross examination where credibility is in issue may wish to dial in through an additional laptop, so they have a clear view of the witness on their own screen (and vice versa).

In both mediations and investigation meetings the technology and room should be set up properly. This includes having the speaker and screen close enough to engage with all participants effectively, in a quiet, private space that shows a commitment to mediation/investigation meeting. For example, being on the phone while traveling is not an ideal set up.

Counsel report that the best experiences have occurred where every participant in the mediation/investigation meeting has their own screen – meaning each participant has a view of everyone else. For example, a client may join a mediation from a separate room with their own screen (and a parallel private meeting can be set up between the representative and the client).

³⁹ <www.era.govt.nz/footer/about-us/updates/covid-19-update/>.