IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2025] NZEmpC 133
EMPC 462/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER OF	an application for security for costs
BETWEEN	GARY OWEN BURGESS Plaintiff
AND	TUTTON SIENKO AND HILL PARTNERSHIP Defendants

Hearing:	On the papers
Appearances:	G Burgess, plaintiff in person A Keir, counsel for defendants
Judgment:	28 May 2025
Reissued:	1 July 2025

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application for security for costs)

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[1] On 29 October 2024, the Employment Relations Authority dismissed all of the claims by Gary Burgess against his former employer, Tutton Sienko and Hill Partnership.[1]

[1] *Burgess v Tutton Sienko and Hill Partnership* [2024] NZERA 641.

[2] Mr Burgess started work for the partnership in September 2003 as a vineyard labourer. Over time what began as casual employment became permanent work.[2]

[3] Two issues were identified by the Authority for resolution. The first one was whether Mr Burgess had raised personal grievances within time following two accidents. One accident involved a mower in October 2018 and the other was in a tunnel house in December 2018. The Authority also considered whether, if the grievances were not raised in time, there were exceptional circumstances justifying granting an extension of time. The second issue was whether Mr Burgess was constructively dismissed.

[4] The Authority dismissed all of Mr Burgess' disadvantage claims and declined to grant extensions of time.[3] It held that his employment ended by resignation on 30 November 2020 and he was not dismissed.[4]

[5] Mr Burgess challenged the determination. He sought as relief compensation for alleged breaches of the duty of good faith, discrimination, breaches of employment standards, and a finding that he was unjustifiably dismissed. Additionally, claims were made for lost wages, exemplary damages and for the Court to make a recommendation under s 123(1)(d) of the Employment Relations Act 2000 (the Act).

[6] The defendant partnership does not accept that the Authority's determination is wrong in any respect. It opposed the relief being claimed.

[7] The partnership applied for an order requiring Mr Burgess to pay security for costs of $42,064 and for the proceeding to be stayed until the security is paid. That amount was calculated by making some assumptions about the steps needed to conclude the litigation and applying them to the Court's Guideline Scale on a category 2B basis.[5]

[8] The partnership's application consisted of seven grounds:

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2 At [10] and [11].
3 At [306].
4 At [307].
5 "Employment Court of New Zealand Practice Directions" (1 September 2024) <www.employmentcourt.govt.nz> at No 18.

(a) There is reason to believe Mr Burgess will be unable to pay costs to the partnership if he is unsuccessful.

(b) Mr Burgess' case has little chance of success.

(c) There is good reason to believe the proceeding will be complex and drawn out.

(d) The partnership is entitled to costs in the Authority, but they are yet to be resolved.

(e) The amount sought as security is a conservative estimate of costs that might be awarded.

(f) It is just in the circumstances to make an order.

(g) It is just in the circumstances that the proceeding be stayed until such security has been paid.

[9] The application was supported by an affidavit from one of the partners, Vicki Tutton. Ms Tutton's evidence touched on two events after the Authority's investigation that need to be briefly mentioned. One of them is that she has suffered a debilitating illness, compromising her ability to respond to Mr Burgess' claims. The other was the sudden death of her husband, Lindsay Hill. Mr Hill was also a partner in the business and a witness in the Authority. His death will have an impact on how the litigation is conducted.

[10] The balance of Ms Tutton's evidence was divided into two broad parts. In the first part she described Mr Burgess as litigious, because an online search revealed his involvement in 45 other cases.

[11] The second part of this evidence contained Ms Tutton's doubts about Mr Burgess' ability to fund any future costs if his claims fail. Only a brief statement was made on this subject. She referred to Mr Burgess having lost a farm to a mortgagee sale in 2010 and being adjudicated bankrupt in 2017. She described being aware that

he was in receipt of ACC for a period of time after his employment with the partnership ended, but had no further information about that. She stated her belief that he did not have any assets of any significance and thought that he qualified for New Zealand Superannuation. She did not know if he is working or had any other source of income.

[12] The application is opposed. Mr Burgess' response can be summarised as follows:

(a) The application is incomplete and informal.

(b) There was no evidence he will be unable to pay.

(c) The other cases he was involved in are irrelevant.

(d) While not resiling from opposing the application, the amount sought is excessive.

[13] Mr Burgess completed his response to the application by stating that his case is strong. He contended that, if the litigation becomes drawn out, that is likely to be because of the partnership's failure to admit facts (although it is not clear what those facts are), their "denial of trite law", failure to provide certain information he has sought and the "lack of adequately particularised pleadings".

Legal principles

[14] The Act and the Employment Court Regulations 2000 do not provide the Court with power to order security for costs. Instead, the Court applies r 5.45 of the High Court Rules 2016.[6]

[15] Relevantly, r 5.45 empowers the Court to order security if there is reason to believe an unsuccessful plaintiff will be unable to pay costs awarded to the defendant.[7] If that threshold is reached, the Court must consider whether it is just in all the

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6 Applied by reg 6 of the Employment Court Regulations 2000.
7 High Court Rules 2016, r 5.45(1)(b).

circumstances to make an order.[8] The factors to take into account in exercising this discretion vary, depending on the circumstances of each case. However, the merits or nature of the case may be considered along with the interests of both parties.[9] Importantly, the discretion extends to the amount of any security if it is ordered.

[16] What must be borne in mind is that, where ordering security to be paid or provided that may have the effect of preventing a claim from being pursued, it should only be made following careful consideration and where the claim has little chance of success. This approach is taken because access to the Court for a genuine claim should not lightly be denied.[10]

The partnership's submissions

[17] For the partnership, Ms Keir submitted that the threshold in r 5.45 was met. Mr Burgess' only source of income may be superannuation, the property the partnership knew he owned was sold by the mortgagee and he has been adjudicated bankrupt previously. Ms Keir accepted that the bankruptcy was discharged, but submitted that there was no evidence to suggest that after the discharge took effect he had been able to rebuild his assets or that he has a "significant income on an ongoing basis". The litigation history was said to show that Mr Burgess' inability to pay costs is an ongoing problem.

[18] Ms Keir also made submissions to address any concerns the Court might have about security for costs stifling Mr Burgess' challenge. She did so by referring to the conundrum facing Courts discussed by the Supreme Court in *Reekie v The Attorney-General*.[11] That case was primarily concerned with providing security for costs on an appeal but contains comments that might be more generally applied. The Court's concern in *Reekie* was about the possibility of a meritorious claim by an impecunious plaintiff being prevented with unsatisfactory consequences for access to justice. Ms Keir suggested that, if such a concern arose in this case, it could be addressed by setting costs at a modest level or an available alternative may be the possibility that

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8 Rule 5.45(2).
9 *A S McLachlan Ltd v MEL Network Ltd* [2002] 16 PRNZ 747 (CA) at [14], [15] and [16].
10 At [15].
11 *Reekie v The Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

Mr Burgess qualifies for legal aid.[12] As part of this submission, Ms Keir made a modest concession that the security sought could be reduced to $39,435.

[19] The Court was asked to take into account that the partnership is in a vulnerable position, with the death of Mr Hill and Ms Tutton's incapacity. That is because the partnership is likely to face higher costs in defending the claim than might otherwise have been the case.

Mr Burgess' submissions

[20] Mr Burgess did not provide evidence about his finances or ability to pay a future costs award if one is made against him. He resisted the application by submitting, in summary, that:

(a) the power to award costs is discretionary;

(b) the onus is on the partnership to show that there are grounds for an order to be made;

(c) the evidence about his finances was speculative; the only paragraph in Ms Tutton's affidavit about his ability to pay was, in effect, an admission that she did not know anything about his resources;

(d) there were irrelevancies in Ms Tutton's evidence;

(e) contrary to the adverse conclusion invited by the partnership about the cases he was involved in previously, in many of them he was successful;

(f) the application is an abuse of process;

(g) mere suspicion is insufficient to justify granting the application; and

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[12] Section 45 of the Legal Services Act 2011 precludes costs being awarded against an aided person unless there are exceptional circumstances.

(h) he has a strong case.

Further submissions

[21] At the time the parties exchanged submissions Mr Burgess had an unquantified liability to the partnership for the costs of the Authority investigation. Subsequently, Ms Keir supplied to the Court a copy of the Authority's costs determination in which he was ordered to pay $13,450 by 15 May 2025.[13]

[22] Following the costs determination, Mr Burgess amended his statement of claim incorporating a challenge to it but he did not apply for a stay.

[23] I raised with Ms Keir and Mr Burgess whether the costs determination had a bearing, one way or the other, on the partnership's application and the response to it. What followed was an opportunity to provide further submissions.

[24] Ms Keir's further submissions were succinct. She submitted that the failure to satisfy the costs determination supported the application. Mr Burgess' further submissions acknowledged he had not paid. He explained that he was refusing to pay as a protest against the "ongoing and unlawful conduct of the partnership". Mr Burgess drew support for his response to the costs determination from *Sfizio Ltd v Mawhinney*.[14]

[25] Finally, Mr Burgess mentioned recent publicity about the possible sale of the partnership's assets.

Analysis

[26] As is apparent from r 5.45, there is a threshold to be reached before the Court considers exercising the discretion to grant or refuse an application for security for costs.[15] To reach that threshold there must be reason to believe Mr Burgess will be

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13 *Burgess v Tutton Sienko and Hill Partnership* [2025] NZERA 220.
14 *Sfizio Ltd v Mawhinney* [2019] NZEmpC 140.
15 *A S McLachlan Ltd*, above n 9.

unable to pay future costs. That does not mean the partnership must establish that he will, in fact, be unable to pay.[16]

[27] What does the evidence show? There was no evidence about Mr Burgess' present finances or assets. Instead, reliance was placed on his past circumstances, based on which inferences were invited.

[28] I do not accept Mr Burgess' submission that the evidence from the partnership can be dismissed as speculation. In any application like this it is likely that the applicant will have limited information about the other party's financial resources. The issue is whether there is reason to believe he will be unable to pay costs, which threshold is not particularly high.

[29] No weight can be placed on the mortgagee sale in 2010, because it was too long ago to be meaningful. Similarly, Mr Burgess' litigation history does not assist the partnership. There is, however, evidence from which inferences can be drawn supporting the application. Considerable weight can be placed on Mr Burgess' reasonably recent bankruptcy. Even though the bankruptcy was discharged about five years ago, it is doubtful that since then he has had sufficient time to build his resources so that they would be sufficient to meet costs of the magnitude that might be anticipated if his claim fails.

[30] The Authority's costs order provides weight to that assessment. The liability is substantial and has not been stayed, so Mr Burgess is exposed to recovery action by the partnership.[17] The absence of information from Mr Burgess about his financial resources means his statement about not paying in protest carries very little weight.

[31] Mr Burgess' reliance on *Sfizio* does not assist him. The case takes a conventional approach to the application of r 5.45. It sheds no more light on this application than being an example of the weighing exercise that is required to establish whether an order is appropriate.

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16 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd (No 2)* [1977] 1 NZLR 516 (HC) at 519 applied in *Banks v Farmer* [2019] NZHC 53; and see *Hebei Huaneng Industrial Development Co Ltd v Shi* [2023] NZHC 2501.

17 Employment Relations Act 2000, s 180.

[32] Similarly, while Mr Burgess' submissions referred to some advertising seemingly about the partnership's assets being for sale (which did not go beyond a reference to a website advertisement), that does not advance his position in relation to the application. The financial position of the partnership is not relevant.

[33] That leaves for assessment whether the merits of the case are such that it would be unjust to order security to be provided.[18] At this stage such an assessment is difficult. Ms Keir pointed to Mr Burgess' claims in the Authority being wholly unsuccessful as an indication that his prospects of successfully challenging the decision are limited. Conversely, Mr Burgess is satisfied that the Authority was wrong in each of its conclusions and that his case is strong. The parties have not, however, pointed to something, aside from the confidence they each have in their own cases, from which even tentative conclusions could be reached about possible success or failure. All that can really be said is that there is nothing in these competing positions that assists in determining if security should be ordered.

[34] I have concluded that what brings down this assessment in favour of granting the application is the available evidence about Mr Burgess' financial circumstances; that is, his reasonably recent discharge from bankruptcy and the unpaid costs arising from the Authority investigation.

[35] The next issue is to decide what amount to order. The Court is not obliged to make an award reflecting anticipated costs under the Guideline Scale. The task is to set an amount that is just in the circumstances. Those circumstances will generally include the amount or nature of the relief claimed, the nature of the proceeding including the complexity and novelty of the issues and therefore the likely extent of any interlocutory applications, the estimated duration of the hearing and the probable costs for the plaintiff if the claim is unsuccessful.[19]

[36] Mr Burgess' second amended statement of claim is extensive.[20] The pleading claims significant breaches by the partnership giving rise to several alleged personal

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18 See *Very Nice Productions Ltd v Ormond* [2024] NZEmpC 220 at [17], citing *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801 at [39](c).

19 *Very Nice Productions*, above n 18, at [18].

20 Mr Burgess is in the process of preparing a further amended statement of claim.

grievances and other claims including breaches of the duty of good faith and employment standards. The amount claimed is significant at $120,000, plus exemplary damages of $25,000 and other compensation yet to be quantified.[21] In my assessment, the litigation is likely to be lengthy and complex.

[37] While taking those factors just mentioned into account, I have concluded it would not be just to order Mr Burgess to provide security in the amount sought by the partnership of $42,064 or, as revised, $39,435. I consider the amount should be sufficient to provide a reasonable assurance to the partnership that if it succeeds some costs recovery will be made, while not being so large that it may prevent Mr Burgess from pursuing his claim. That task is difficult in the absence of financial evidence from him. Balancing the interests of both parties, I conclude that approximately 50% of the anticipated scale costs is appropriate. That sum is $20,000.

Outcome

[38] The application for security for costs is granted.

[39] Mr Burgess is to pay security for costs to the Registrar of this Court in the sum of $20,000, or provide security for that amount to the satisfaction of the Registrar, no later than **14 July 2025**.

[40] If security is not paid, or provided, by the date specified in paragraph [39], this proceeding will be stayed without the partnership having to make a further application.

[41] The partnership is entitled to costs of this application. If there is any disagreement about the amount to be paid memoranda may be filed.

K G Smith
Judge

Judgment re-signed at 3.15 pm on 1 July 2025

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[21] The statement of claim contains a pleading for an unquantified sum for make-up pay over a period of time taking into account ACC compensation.