

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 59/2026
[2026] NZSC 102

BETWEEN GARY OWEN BURGESS
 Applicant

AND TUTTON SIENKO AND HILL
 PARTNERSHIP
 Respondent

Court: Ellen France, Kós and Cooke JJ

Counsel: Applicant in person
 A L Keir for Respondent

Judgment: 11 August 2026

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
- C The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] Mr Burgess used to work for Tutton Sienko & Hill, a partnership in the business of viticulture and vinification. An accident in October 2018 rendered Mr Burgess unfit to work. In June 2022, he initiated proceedings for constructive dismissal and various other claims in the Employment Relations Authority. Those claims failed.¹

[2] When Mr Burgess sought to challenge the determination in the Employment Court, the partnership sought security for costs, driven (in part) by Mr Burgess having

¹ *Burgess v Tutton Sienko and Hill Partnership* [2024] NZERA 641 (P Cheyne).

failed to pay costs in the Authority. Judge Smith granted the application, but for \$20,000, rather than the \$40,000 sought.² The Judge considered that sum balanced the need to assure the partnership as to recovering costs and the need not to prevent Mr Burgess from pursuing the challenge.³

[3] Mr Burgess sought leave to appeal Judge Smith’s decision to the Court of Appeal, but failed.⁴ He now seeks leave to appeal directly to this Court.

Our assessment

[4] The application must clear three additional hurdles beyond the usual leave criteria. First, the application being brought out of time by almost a year, Mr Burgess needs an extension of time. We will grant the extension since Mr Burgess filed his notice of appeal in this Court soon after the Court of Appeal refused him leave to appeal. Secondly, because leave to appeal is sought against a decision of the Employment Court, there must be exceptional circumstances justifying a direct appeal.⁵ And thirdly, this Court may entertain such an appeal only on a question of law.⁶

[5] That third hurdle proves fatal to all but one of Mr Burgess’s proposed arguments, which seek essentially to challenge the Judge’s factual findings as to there being reason to believe Mr Burgess would not be able to pay costs. There is no basis to disturb those findings.

[6] The remaining argument does raise a question of law. Mr Burgess proposes to argue the Judge was required—yet omitted—to find his case was weak before ordering security for costs be given.⁷ We do not however consider that point holds sufficient prospects of success justifying the grant of leave. If there is reason to believe a plaintiff will be unable to pay costs, the question is whether it is “just in all the

² *Burgess v Tutton Sienko and Hill Partnership* [2025] NZEmpC 133 [EmpC judgment].

³ At [37].

⁴ *Burgess v Tutton Sienko and Hill Partnership* [2026] NZCA 149 (Whata and Edwards JJ) [CA leave judgment].

⁵ See Senior Courts Act 2016, s 75. See also Employment Relations Act 2000, s 214A(4).

⁶ See Senior Courts Act, s 70; and Employment Relations Act, s 214A(1).

⁷ See EmpC judgment, above n 2, at [33].

circumstances” to make the order.⁸ The Judge followed that approach here.⁹ He was plainly aware of access to justice concerns, reflected in the lower level of security ordered. As the Court of Appeal noted, his nuanced approach was fair and just.¹⁰ It is not therefore necessary in the interests of justice for this Court to hear or determine the proposed appeal.¹¹

Result

[7] The application for an extension of time to apply for leave to appeal is granted.

[8] The application for leave to appeal is dismissed.

[9] The applicant must pay the respondent costs of \$2,500.

Solicitors:
P M Shaw, Christchurch for Respondent

⁸ High Court Rules 2016, r 5.45; and Employment Court Regulations 2000, reg 6. See also *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA) at [13]–[14]; and *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [23(b)].

⁹ See EmpC judgment, above n 2, at [15], [26] and [33].

¹⁰ CA leave judgment, above n 4, at [6]–[7].

¹¹ See Senior Courts Act, s 74(1).