

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2026] NZERA 247  
3315180  
3322080

BETWEEN	BNS GROUP LIMITED [In Liquidation] First Applicant
AND	BNS CO LIMITED [In Liquidation] Second Applicant
AND	FUYU ZHUO First Respondent
AND	MOVENPICK OREWA LIMITED Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael Meyrick, counsel for the Applicant David Fleming, counsel for the Respondent
Submissions received:	None from the Applicants 1 March and 7 April 2026 from the Respondents
Determination:	24 April 2026

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**COSTS DETERMINATION OF THE AUTHORITY**

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[1] This was a matter of some complexity and involved several preliminary determinations being issued prior to the substantive determination issued on 28 January 2026<sup>1</sup>. The preliminary determinations were in respect of interlocutory applications brought against BNS Co Limited and BNS Group Limited (BNS) and Khieng Chiv who controlled them, shareholder.

[2] BNS was wholly unsuccessful in its claims against Mr Zhao and Movenpick, Mr Zhao was successful in his claims against the BNS companies. He was also successful in all the interlocutory matters which resulted in the preliminary determinations.

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<sup>1</sup> *BNS Co Limited & BNS Group Limited v Fuyu Zhuo and Movenpick Orewa Limited* [2025] NZERA 45.

[3] Mr Zhuo, who incurred actual costs of \$54,786.21 including GST, has filed a memorandum seeking a contribution to costs of between \$45,340.62 and \$47,556.50.

[4] Mr Zhuo is also seeking to have Mr Chiv joined as a party for the purposes of costs.

*Note*

[5] Both BNS Co Limited and BNS Group Limited are in liquidation. The liquidator has given consent to the outstanding costs matter which is before the Authority proceeding.

*Costs application*

[6] The notional daily tariff in the Authority is \$4,500.00.00 for the first day of a hearing, and \$3,500 for each second and subsequent day. That would be a total of \$22,000.00 for the six days.

[7] One of the preliminary determinations involved an in-person investigation, the three other preliminary determinations were dealt with on the papers. It is usual for a costs contribution to be based upon a half day tariff for 'on the papers' matters. The tariff amount total is therefore \$11,250.00 for the preliminary matters.

[8] From a starting tariff amount of \$33,250.00, Mr Zhuo is seeking an uplift in costs on the following basis:

*A. Conduct of the proceedings:*

[9] It is submitted that BNS repeatedly engaged in conduct that unnecessarily increased the costs of Mr Zhuo and Movenpick Limited. This included:

- i. Failing to provide relevant documents in advance of the investigation meeting or to cooperate with the compiling of the common bundle of documents;
- ii. Refusing to provide details for a witness originally called by BNS who needed to be summonsed;
- iii. Filing witness statements making new allegations against a non-party the day before a preliminary investigation meeting, necessitating a postponement and rescheduling of the fixture;
- iv. Offering an improper financial inducement to a witness, and repeated defiance of non-publication orders;
- v. Repeated late attendance at the substantive investigation meeting;
- vi. Repeated failures to comply with timetabling directions; and making interlocutory applications that had little prospect of success .

[10] It is submitted that the above actions had a significant impact of Mr Zhao's costs, and that an uplift on tariff costs of 25 – 30 per cent is justified on this basis.

#### *B. Rejection of a Calderbank Offer*

[11] It is submitted that Mr Zhuo made a Calderbank offer to settle the matter on the grounds that all proceedings be withdrawn and each party bear its own costs.<sup>2</sup> The Calderbank Offer was contained in a letter dated 27 July 2025, shortly before the commencement of the substantive investigation meeting.

[12] It is submitted that this would justify an uplift of 25 percent on costs incurred after the lapsed on the commencement of the investigation meeting. Costs incurred after 29 July 2025 were \$17,326.37 including GST.

#### *Submissions for the Applicant*

[13] No submissions were received on behalf of BNS.

#### *Principles*

[14] The power of the Authority to award costs arises from Section 15 of Schedule 2 of the Employment Relations Act 2000 which states:

##### **15 Power to award costs**

- (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
- (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

#### **Costs Award**

[15] Mr Zhuo was the successful party in both the substantive and preliminary matters and costs normally follow the event.

[16] The principles the Authority applies in respect of costs are well-settled and outlined in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*<sup>3</sup>. The principles include that costs are discretionary, and awards made are consistent with the Authority's equity and good conscience jurisdiction.; they generally follow the event, and will be modest and reasonable.

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<sup>2</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA).

<sup>3</sup> *PBO v Da Cruz* [2005] 1 ERNZ 808.

[17] I have had regard to the submissions and grounds for justifying an increase in the tariff costs award.

[18] I accept that BNS acted in such a way as to increase costs as outlined in paragraph [8] above. This conduct had the effect of delaying the investigation meeting, and the preliminary applications involved additional submissions to be made for the Respondent. The repeated failure to observe the non-publication order also required additional submissions and Authority time.

[19] I consider that the Calderbank Offer should also be given some weight, although I observe that it was made just prior to the substantive investigation meeting.

[20] I consider that in all the circumstances an appropriate costs award to be \$44,500.00.

[21] **I order BNZ to pay to Mr Zhuo the sum of \$44,500.00 as costs pursuant to clause 15 of Schedule 2 of the Act.**

#### **Joinder of Mr Chiv as a party for the purposes of costs**

[22] Mr Fleming submits on behalf of Mr Zhuo that Mr Chiv should be joined to the proceedings as a party for the following reasons:

#### *Legal Grounds*

[23] The Authority and the Court have a broad power to join a person as a party for the purposes of costs where appropriate pursuant to s 221 of the Act which states:

#### **221 Joinder, waiver, and extension of time**

In order to enable the court or the Authority, as the case may be, to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,—

- (a) direct parties to be joined or struck out; and
- (b) amend or waive any error or defect in the proceedings; and
- (c) subject to section 114(4), extend the time within which anything is to or may be done; and
- (d) generally give such directions as are necessary or expedient in the circumstances.”

[24] Costs against non-parties require exceptional circumstances, however it is submitted that this is not a high threshold, the circumstances need only to be outside the ordinary situation of parties conducting litigation for their own benefit.<sup>4</sup>

[25] A third party may be joined for costs purposes in circumstances including where:<sup>5</sup>

- a. There has been relevant impropriety by the third party, which has had an effect on costs; or
- b. Where the third party is the 'real party' behind the proceedings.

### *Reasons*

[26] It is submitted that liquidation proceedings have been brought against the BNS businesses by the Inland Revenue Department (IRD). IRD will be a higher-ranking creditor than Mr Zhuo, as would any current staff owed wages or holiday pay. It is therefore very unlikely that any costs awarded in Mr Zhuo's favour would be received by him.

[27] As determined by the investigation process, Mr Chiv was the person with ultimate say over both the operation of the BNS businesses and the conduct of the litigation.

[28] Mr Chiv was the real driver of the litigation, and his personal conduct increased the cost of the proceedings to Mr Zhuo. In the second preliminary determination a penalty was issued against BNS for Mr Chiv having offered a financial incentive to a witness. It is submitted Mr Chiv was also personally responsible for wilful breaches of the Authority's interim non-publication orders, and a penalty awarded against him in person for obstructing the Authority's investigation.

[29] BNS had not been paying taxes even before Mr Zhuo was dismissed, and it is submitted that it was likely to have been insolvent for some time. Mr Chiv was BNS' accountant as well as the person who controlled the business' accounts. He would therefore have been well aware of its financial circumstances and yet it is submitted, he chose to bring, and to continue the litigation.

[30] It is submitted that it would be inequitable for Mr Chiv to avoid liability for costs in respect of the proceedings.

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<sup>4</sup> *Alim v LSG Shy Chefs New Zealand Ltd* (Interlocutory BNo 22) [2016 NZEmpC 166 at [80] – [82].

<sup>5</sup> *Alim* above n 7 at [78] – [79].

[31] During the Authority's instigation of BNS's claims against Mr Zhuo, Mr Chiv was held to be the controlling mind of BNS: "Mr Chiv was to all intents and purposes the owner of BNS".<sup>6</sup>

[32] In these circumstances I determine that Mr Chiv should be joined as a party to the proceedings in respect of costs.

[33] **Accordingly, I order that Mr Chiv pay Mr Zhuo the sum of \$44,500.00 as a contribution to costs.**

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>6</sup> *BNS v Zhuo and Movenpick Orewa Limited* above n 1 at [69].