

NOTE: This determination contains an order prohibiting publication of certain information at [6].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 215
3299259

BETWEEN	IMOGENE JAZZ MOTUFOUA Applicant
AND	KIWI CHARTERS LIMITED Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person John McMeekin, advocate for the Respondent
Submissions and other information received:	Up to, and including 2 March 2026 from the Applicant Up to, and including, 10 March 2026 from the Respondent
Determination:	9 April 2026

COSTS DETERMINATION OF THE AUTHORITY

[1] By determination dated 19 January 2026, I declined Imogene Motufoua’s personal grievances of unjustified dismissal and unjustified disadvantage. Summarising the determination briefly, I found that Mr Motufoua’s employment relationship with Kiwi Charters Limited (KCL or the company) had changed from a contract of service to a contract of services where Mr Motufoua was no longer an employee of the company but had agreed to be engaged as an independent contractor.¹ As a result, this meant that the Authority lacked jurisdiction to investigate matters further.

¹ *Imogene Motufoua v Kiwi Charters Limited* [2026] NZERA 26 at [30].

[2] The question of costs was reserved and while the parties were encouraged to resolve this matter between themselves,² they have not been able to do so. This costs determination resolves this issue.

What do the parties say about costs?

[3] KCL seeks indemnity costs against Mr Motufoua in the amount of \$19,978 being what the company was invoiced for by Mr McMeekin for his professional services. A copy of the invoice was provided to the Authority.

[4] On 23 February 2026, Mr Motufoua emailed the Authority that he opposed the award of any costs against him because he participated in the investigation in good faith and did not act vexatiously or improperly at any stage. Mr Motufoua further stated that he was currently on ACC due to a work-related injury, was not working, and had no meaningful income. Any award of costs would cause severe and undue hardship and would be punitive in nature. Mr Motufoua requested that no costs be awarded or that in the alternative, costs be significantly reduced given his current circumstances.

What evidence is there of financial hardship?

[5] As no supporting information was provided by Mr Motufoua in his email, I requested this from him which he provided and which was forwarded to KCL for further comment. The additional information from Mr Motufoua comprised an ACC medical certificate confirming his injury, a return-to-work plan, and his personal bank account statement but not his business bank account statement, which had previously been provided as part of my preliminary investigation of Mr Motufoua's employment status.

[6] As the above information contains personal and sensitive information about Mr Motufoua, pursuant to cl 10 Sch 2 of the Employment Relations Act 2000 (the Act), a non-publication order shall apply to this latest information.

What costs principles apply?

[7] The Authority has the power under sch 2 cl 15 of the Act to award costs. However, the discretion to order a party to pay costs to another must be exercised on a

² Above at [32].

principled basis. Those principles are well settled and are outlined in the Authority's Practice Note,³ and Practice Direction,⁴ both of which are publicly available online.

[8] Informing the Authority's approach to costs is the leading decision of *PBO v Da Cruz* in which the Employment Court established key principles for the Authority to consider when determining costs. Relevantly for this determination, those key principles comprise:⁵

- There is a discretion as to whether costs are awarded and in what amount.
- The discretion is to be exercised in accordance with principle and not arbitrarily.
- Equity and good conscience are to be considered on a case-by-case basis.
- Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.
- That costs generally follow the event.
- That awards will be modest.
- That frequently costs are judged against a notional daily rate.
- The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

Kiwi Charters Limited is entitled to costs

[9] KCL is the winning party having successfully defended Mr Motufoua's claims on the ground that the Authority lacked jurisdiction. However, this was not without the company incurring significant advocate costs of \$19,978.

[10] The investigation meeting was held on 26 August 2025 in Auckland and started at 10 am. The meeting was adjourned part-heard at 1.45 pm later that same day for the

³ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.

⁴ www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf.

⁵ *PBO Ltd (formerly Rush Security Ltd v Da Cruz* [2005] 1 ERNZ 808 at [44].

supply of further information from the parties including Mr Motufoua's business bank statements for his company, J'Digta Company Limited.

[11] Subsequent to the investigation meeting, it appeared that Mr Motufoua had withdrawn his application electronically from the Authority's online computer system. However, when clarified with Mr Motufoua, he confirmed that he had made a mistake. In his closing submissions, certain without prejudice information concerning mediation confidentiality needed to be worked through with a duty Member resulting in an amended closing submission from Mr Motufoua being filed.

[12] Closing oral submissions from the parties were eventually heard on 17 October 2025 and lasted approximately 35 mins.

[13] Given the actual meeting time and additional attendances by KCL to the without prejudice matter, in all, I consider the notional tariff for a one-day investigation meeting or \$4,500 to be an appropriate starting point. I make no other uplift and, as far as without-prejudice matters go, the matter was straight forward for the duty Member, requiring no preliminary determination or a minute from the Authority. Further, as a lay litigant, I find that Mr Motufoua did not act in bad faith and made a genuine mistake in referring to matters arising in mediation in his written closing submissions that he ought not.

[14] Although KCL seeks indemnity costs against Mr Motufoua, these are rarely given in the Authority as the level of misconduct required must be exceptionally bad, egregious, and flagrant. I have previously raised this with Mr McMeekin during the course of this investigation stressing the punitive nature of indemnity costs and its impact on access to justice. While Mr Motufoua's claim in the Authority was found wanting, he nevertheless ran his case appropriately. Ensuring that costs remain modest in the Authority goes a long way to lessen the chilling effect that a significant costs award might have on employees pursuing legitimate grievances in what is, a first instance forum.

[15] That said, given the amount spent by KCL in its successful defence, it would be unfair for it to have to shoulder all of that expense without some contribution by Mr Motufoua. He is to understand that the nature of his case does not fall in any of the

categories noted in the Authority's Practice Direction where the parties could expect to bear their own costs.⁶

[16] Applying all of the above including the Authority's good conscience and equity jurisdiction to the present case, I consider that KCL's interests as well as those of Mr Motufoua can best be met by not requiring that costs lie where they fall, but rather giving Mr Motufoua a sufficient period of time to pay costs while he completes his return to work plan following his personal injury.

Costs order

[17] For the reasons given above, the Authority orders Imogene Jazz Motufoua to pay Kiwi Charters Limited costs of \$4,500 as a contribution towards its actual and reasonable costs.

[18] Payment is to be made in two equal instalments of \$2,250 with the first instalment to be paid on Wednesday 6 May 2026 and the second instalment of \$2,250 by Wednesday 3 June 2026.

Peter Fuiava
Member of the Employment Relations Authority

⁶ Practice Direction, n 4, at pg 5, paragraph 6(i) to (ix).