

NOTE: This determination contains an order prohibiting publication of certain information at [3].

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 26
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
Investigation Meeting:	26 August and 17 October 2025 in Auckland and by audio-visual link
Submissions and other information received:	4 September and 17 October 2025 from the Applicant 28 August and 17 October 2025 from the Respondent
Determination:	19 January 2026

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Imogene Motufoua has raised personal grievances of unjustified dismissal and unjustified disadvantage against Kiwi Charters Limited (KCL or the company). However, KCL contend that the grievances arise after Mr Motufoua was no longer employed and had begun providing services as an independent contractor instead.

How has the Authority investigated?

[2] For the Authority's investigation, Mr Motufoua provided two written witness statements and was supported by his wife Daisy Motufoua at the investigation meeting. For KCL, I heard from its two company directors, husband and wife, Katie and Calvin

West. Mr West attended the investigation meeting via teleconference as he was outside Auckland at the time. The representatives also made oral closing submissions by audio visual link.

[3] As requested, the parties provided me with a copy of their business bank account statements for the financial year ending 31 March 2024. In addition, Mr Motufoua provided his income summary for the same period from Inland Revenue (IR). As the parties' bank statements and Mr Motufoua's IR documents contain private or commercially sensitive information, pursuant to cl 10 Sch 2 of the Employment Relations Act 2000 (the Act), a non-publication order applies to this information.

[4] All witnesses answered questions under oath or affirmation from me and the parties' representatives. As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[5] The issues requiring investigation and determination were:

- (a) What was the real nature of the parties' relationship?
- (b) If one of employment, was Mr Motufoua unjustifiably dismissed and/or unjustifiably disadvantaged?
- (c) If the real nature of the parties relationship was one of independent contract, the Authority will have no jurisdiction.

What are the relevant facts?

[6] It is common ground that Mr Motufoua was employed by KCL on 17 April 2023 as a tour bus driver on a casual or as-required basis. Both parties also accept that the employment relationship was evidenced in writing but for reasons that remain unclear, a copy of Mr Motufoua's individual employment agreement can no longer be found. Even so, KCL has retained two induction documents evidencing Mr Motufoua's employment, the first being a "New Employment Input Form" which records, among other things, his personal details such as his name, residential address, IRD number, date of birth, and two hourly rates for him being \$30 per hour, the ordinary rate for an

employed driver, and \$35 per hour for “disrupts” which is paid to a driver whose work is affected by cancelled flights or some other disruption at the airport.

[7] The second document retained by KCL is Mr Motufoua’s TORO consent form that he signed and which enabled the company to check his driver’s licence information with the NZ Transport Agency Waka Kotahi.

[8] The number of hours Mr Motufoua worked for KCL from April to June 2023 varied from week to week. Six payslips for him were provided which show that the number of hours Mr Motufoua worked during this period varied from a minimum of 11.87 hours per week to a maximum of 33.41 hours per week. The six payslips also record his ordinary hourly rate of \$30 and his disrupt rate of \$35 per hour.

[9] While it is not in dispute that the relationship between the parties began as a contract of service, Mr Motufoua believes that this never changed. He further contends that his missing employment agreement benefits KCL who maintain that he subsequently became an *ad hoc* subcontractor who invoiced the company for his services.

[10] Mr Motufoua denies any change to his employment because KCL never provided him with a written contractor agreement. He further asserts that, on 29 June 2023, he was told by KCL’s second company director, Calvin West, to start working as a contractor and to invoice the company accordingly. While the company submits that the 59 invoices it subsequently received from Mr Motufoua demonstrate that he had become a subcontractor, he argues that his invoices do not reflect contractor autonomy and are, in effect, payslips in the guise of invoices.

[11] Upon commencing work as a contractor in June 2023, Mr Motufoua worked 40 to 60 hours per week and was paid an ordinary rate of \$40 per hour and \$45 for any “disrupts”. It was submitted by Mr Motufoua that he continued to work for the company until it unfairly terminated his services on 18 March 2024 for no genuine reason.

[12] KCL denies that it unjustifiably disadvantaged or unjustifiably dismissed Mr Motufoua and maintains that during the period from June 2023 to March 2024, he was

engaged as an independent contractor rather than as an employee. KCL further states that it stopped using Mr Motufoua because of a shortage of work which meant that it needed to prioritise what work was available to its employed staff. It was KCL co-director Katie West's evidence that the company employed 80 drivers and that at the material time, it had 12 subcontractors or "subbies" on its payroll.

What is the relevant law?

[13] The statutory definition of "employee" is set out in s 6 of the Act and in determining whether a person is employed by another, the section stipulates that the Authority (or the court) must determine "the real nature of the relationship" between the parties."¹ In making such an assessment, the Act requires the Authority to consider "all relevant matters", including any matter that indicates the parties' intention.² Further, the Authority must not treat as determinative, any statement by either party that describes the nature of their relationship.³

[14] The traditional common law tests of control, integration, and whether the contracted person is effectively working on their own account (the fundamental or economic reality test) have been routinely applied in this jurisdiction since the Supreme Court's decision in *Bryson v Three Foot Six Ltd* in 2005.⁴ Twenty years on, these tests remain just as relevant as recently reaffirmed by the Supreme Court in *Raiser Operations BV v E Tū Inc.*⁵

[15] In *Raiser*, the Supreme Court stated that while the Court of Appeal's two-step inquiry in determining the status of an employment relationship is not prescriptive, it would normally apply.⁶ In short, this approach involves as a first step, identifying what is being classified, namely the agreement between the parties which is to be assessed as a matter of reality and not form.⁷ The second step involves the criteria for classification namely the common law indicia of control, integration and the fundamental test noted above.

¹ The Act, s 6(2).

² s 6(3)(a).

³ s 6(3)(b).

⁴ *Bryson v Three Foot Six Limited (No.2)* [2005] ERNZ 372 at [32].

⁵ *Raiser Operations BV & ors v E Tū & anor* [2025] NZSC 162.

⁶ At [75].

⁷ *Raiser Operations BV & ors v E Tū & anor* [2024] NZCA 403 at [97] – [98].

Analysis

[16] The absence of a written subcontractor agreement for Mr Motufoua does not necessarily mean that there was no such agreement at all. A contract can be entirely verbal but still be legally enforceable. There is a body of secondary documents including some 59 invoices that Mr Motufoua invoiced KCL using his own company, J'digta Company Limited, from 7 June 2023 to 17 March 2024. I am reminded by s 6 of the Act to be wary of the way parties describe their relationship and look at all relevant matters to ascertain its real nature.

Control

[17] The control test looks at the degree of control or supervision exercised by the employer over an employer's work. Mr Motufoua submitted that his work after June 2023 continued to be monitored by KCL as he drove a charter bus or van that was fitted with GPS. He also received emails of schedules for work ahead of time. However, the use of GPS and the emailing of schedules by KCL was the same for all staff including those whom it engaged as subcontractors.

[18] When I questioned Mr Motufoua, he accepted that KCL did not have him on a roster. Being on a roster would have indicated some measure of control by the company as Mr Motufoua's time would not have been his own. He also accepted that he could turn down work offered to him without any adverse consequences for himself. His statement of problem to the Authority records one occasion where he declined work offered to him by Mrs West. This was with respect to Mr Motufoua having returned to Auckland following a journey to New Plymouth. When asked by Mrs West to prepare for another journey to Wanganui, Mr Motufoua declined stating that he was tired and that he had reached his driving time limits for the day. Consequently, Mrs West found a replacement driver and the statement of problem records no adverse consequence to Mr Motufoua for declining the trip.

[19] When I asked Mr Motufoua whether he was free to say 'yes' or 'no' to a job, he confirmed that he had that freedom. Similarly, Mrs West stated that there was no consequence for Mr Motufoua if he chose to turn down work. In that case, she would simply move down the list of subcontractors and offer the job to the next one available.

[20] Mr Motufoua claims that he was told by KCL what to invoice the company. This was denied by Mrs West who stated that Mr Motufoua was responsible for invoicing his own hours. She referred to a couple of instances where he had overcharged the company which he corrected. Evidence of one of these errors can be found in an email from Mr Motufoua to KCL dated 30 June 2023 in which he apologised to Mrs West for not subtracting from his invoice two one-hour breaks for lunch. Subcontractors were not paid for their lunch breaks but did receive payment for any disrupts. The email demonstrates that Mr Motufoua was responsible for the content of his invoices to KCL.

[21] Determinative of control in my view are the following: the absence of a roster for Mr Motufoua, the freedom to turn down work without consequence, and that he invoiced KCL of his own accord. While KCL monitored its drivers through the use of GPS and emailed work schedules in advance, this was the same for all staff including subcontractors. The only discernible difference between employees and subcontractors was that the former lacked autonomy when it came to work while the latter had the freedom to accept or reject work without consequence. The level of autonomy that Mr Motufoua enjoyed from June 2023 to March 2024 when it came to accepting or rejecting work offered to him is characteristic of an independent contractor.

Integration

[22] The integration test examines the extent to which the work performed by an individual is an integral part of an employer's business. It is common ground that Mr Motufoua wore a KCL uniform and that he was provided with a fuel card. Even so, the wearing of a uniform and the supply of a fuel card was common to both employees and subcontractors alike. However, I accept that while behind the wheel and driving, Mr Motufoua was the public face of the company and an integral part of its business.

Fundamental test

[23] This is a test of whether Mr Motufoua was in business on his own account. It was Mr Motufoua's evidence that in June 2023, he was told by Mr West to start invoicing the company, which he did. This is denied by Mr West who says that Mr Motufoua came to him wanting to be paid at the end of every day rather than wait for the following Wednesday which was the usual pay run for all employed staff.

[24] This was not so for subcontractors who were paid on invoice or the day after invoicing the company. Subcontractors were also paid higher than employed staff. The ordinary rate for a subcontractor was \$40 per hour and for any disrupts, the hourly rate was \$45. Employed drivers on the other hand were paid \$30 and \$35 per hour respectively but received sick leave, annual leave and public holiday pay.

[25] I find Mr Motufoua's assertion that Mr West told him to start invoicing the company at the higher subcontractor rate implausible as it simply makes no commercial sense for Mr West to have done that. There were benefits to Mr Motufoua in becoming a subcontractor because he could earn more and be paid sooner on invoice rather than wait for the next pay cycle like other employed staff.

[26] Although Mr Motufoua was not provided with a written subcontractor agreement, Mrs West stated that none of her 'subbies' had written contracts either. They simply invoiced the company and were paid accordingly.

[27] As requested, the parties provided their business bank account statements for the financial year ending 31 March 2024. This information shows that from 26 April to 1 June 2023, KCL used the reference 'wages' in depositing funds into Mr Motufoua's business bank account. That reference changed from 15 June 2023 onwards to 'Kiwi Coaches'. Other references used by KCL included 'advance', 'inv 014', 'invoice', and 'meals'. However, the company never used 'wages' again to describe the nature of its payments to Mr Motufoua once he started invoicing the company.

[28] Mrs West also gave evidence that upon becoming a subcontractor in June 2023, she terminated Mr Motufoua's employment and notified IR. This evidence is consistent with Mr Motufoua's income tax summary for the relevant period which shows that he stopped receiving salary and wages from the company on 31 May 2023.

Conclusion

[29] The absence of a written subcontractor agreement between the parties is not a legal requirement as a contract can be purely oral and still be legally enforceable. However, having a written contract is recommended as it would record accurately the parties' bargain to avoid any misunderstanding later on.

[30] I am reminded that s 6 of the Act requires me to look beyond ‘form’ and focus on ‘substance’ in order to ascertain ‘the real nature of the relationship’ between the parties. There is before me a sufficient body of secondary documents which when cumulatively considered lead me to conclude that the real nature of the relationship between Mr Motufoua and KCL changed over time. I find that it was one that began in April 2023 as a contract of service but which changed in June 2023 to a contract for services where Mr Motufoua engaged with KCL as an independent contractor.

[31] It follows that the Authority does not have jurisdiction to investigate Mr Motufoua’s alleged claims of unjustified disadvantage and unjustified dismissal, both of which arise when he stopped receiving further work from KCL in March 2024. For want of jurisdiction, these personal grievances cannot be taken any further and are declined.

Costs

[32] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[33] If the parties are unable to resolve costs, and an Authority determination on costs is needed, KCL may lodge, and then should serve, a memorandum on costs within 21 days of the date of this determination. From the date of service, Mr Motufoua will then have 14 days to lodge any reply memorandum.

[34] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁸

Peter Fuiava
Member of the Employment Relations Authority

⁸ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.