

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 328
3311460

BETWEEN	TROY TAWA Applicant
AND	GARDEN CARE COMPANY LIMITED Respondent

Member of Authority: Helen van Druten

Representatives: Kara Orviss, advocate for the Applicant
Karen Jackson as the Respondent

Investigation Meeting: On the papers

Submissions received: 27 November 2024 and 4 April 2025 from the Applicant
23 December 2024 and 28 March 2025 from the Respondent

Determination: 12 June 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem has arisen following cessation of Mr Troy Tawa's work with Garden Care Company Limited (GCC). Mr Tawa claims that he was an employee for GCC not a sub-contractor and therefore the termination of his work with GCC amounted to an unjustified dismissal from his employment. He also claims a breach of the Wages Protection Act 1983.

[2] GCC claim that Mr Tawa was engaged as a contractor therefore a personal grievance cannot be raised under the Employment Relations Act 2000 (the Act).

[3] Before investigating or determining issues relating to any unjustified dismissal claim, the Authority must determine Mr Tawa's employment status. Only if the Authority determines Mr Tawa was an employee for GCC can Mr Tawa pursue his personal grievance claim under the Act. If Mr Tawa is an independent contractor, as GCC claim, the Authority cannot investigate his claims.

Anonymisation

[4] I consider that, having regard to the nature of these proceedings, it is appropriate for the names of GCC's clients (see [50] below) to be anonymised. A random generator has been used to refer to them in these proceedings. YHB and YUG are randomly generated names and do not resemble the names of clients.

The Authority's investigation

[5] In the case management call on 4 November 2024, the parties agreed that investigation and determination of the initial issue of employment status will be determined on the papers.

[6] In a further case management call on 14 March 2025, I directed that further information was required to make a determination on employment status. After discussion, it was agreed that the parties would be invited to submit documentation including responses to specific questions of the Authority. The Authority received information from the parties. Affidavit evidence was also filed and considered.

[7] As permitted by s 174E of the Act, this preliminary determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received.

The preliminary issue

[8] The preliminary issue for determination is whether or not Mr Tawa was an employee of GCC in accordance with section 6 of the Act.

[9] The onus is on Mr Tawa to establish on the balance of probabilities that he was an employee under the Act, and not an independent contractor.

Background Facts

[10] GCC has multiple contracts with a variety of public and private clients to undertake garden care and maintenance around Auckland. According to Ms Karen Jackson (as GCC Director) she seeks the work, costs it and then sub-contracts that work to individual contractor gardeners. She liaises with the clients to ensure delivery of the specific services within the timeframes and quality standards required. GCC is paid on satisfactory completion of the work.

[11] Ms Jackson said that the nature of gardening work for multiple clients is necessarily contractual. The “vast majority” of contracts are permanent and repetitive baseline work but some are one-off jobs and seasonal variation is usual.

[12] In reply to a Trade Me advertisement, Mr Tawa began work for GCC on 27 September 2023 providing his skills as a gardener. He worked both by himself and with another gardener at times. The wording of the advertisement is discussed in greater detail below at [25].

[13] From the outset, Ms Jackson found communication with Mr Tawa difficult. She found him difficult to contact by phone and said that he did not respond to calls including while working in the GCC vehicle.

[14] According to Ms Jackson, GCC is very dependent on being able to contact the contractor by phone or email to rearrange work if clients change their mind, weather affects work available, additional last-minute work comes in or if a particular contractor is not available.

[15] Mr Tawa performed well initially, then Ms Jackson reported and evidenced that a range of performance issues and at least two serious allegations against Mr Tawa arose between October 2023 and February 2024. These are not within the scope of this preliminary issue but are relevant to the extent that the working relationship was not a happy one.

[16] On 5 February 2024, Mr Tawa phoned Ms Jackson and, according to Ms Jackson, advised that he had injured himself at work and did not know if he would be returning.

[17] On 16 February 2024, Mr Tawa asked for a copy of his contract for ACC. ACC subsequently phoned Ms Jackson to ask if he could undertake light duties. According to Ms Jackson, when she spoke to other gardeners to explore if this was an option for Mr Tawa, she “became aware of the depth of resistance from the other contractors to working with Mr Tawa and it...was a revelation.”

[18] On 19 February 2024, Ms Jackson gave Mr Tawa two weeks’ notice that his work would finish.

Relevant law

[19] Section 6 of the Act defines the meaning of an employee. It includes any person employed to do work for hire or reward under a contract of service.¹ The Authority must determine “the real nature of the relationship between them”, by considering all relevant matters including the intention of the parties but must not treat as determinative any statement by the parties that describes the nature of their relationship.²

[20] The common law tests in this area have been firmly in place since the decision of the Supreme Court in *Bryson v Three Foot Six Limited*.³ In that decision the Court set down clear factors to consider in determining the status of an employment relationship:

The written and oral terms of the contract between the parties ... any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice ... the way in which the parties have actually behaved in implementing their contract ... features of control and integration and ... whether the contracted person has been effectively working on his or her own account.

[21] The recent decision of the Court of Appeal in *Rasier Operations BV & Ors v E Tū Incorporated Anor* discussed the *Bryson* tests and laid out a two-step inquiry to determine the status of the employment relationship:⁴

¹ Section 6(1)(a) of the Act.

² Section 6(2) and (3) of the Act.

³ *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] NZLR 721.

⁴ *Rasier Operations BV & Ors v E Tu Inc* [2024] NZCA 403.

The first stage involves identifying the substance of the parties' mutual rights and obligations as a matter of reality. The second stage involves determining whether those rights and obligations amount to a contract of service...Section 6 reinforces the common law requirement to focus on the substance of the parties' agreement when determining their mutual rights and obligations.

[22] Section 6 of the Act emphasises the importance of the real nature of the relationship and how that relationship operates in practice.⁵ If a contractor is treated like an employee, with significant control over their work, integration into the business and limited ability to work elsewhere, the contractor will likely 'in law' be an employee, even if their contract labels them a contractor.

[23] Whether a person is engaged as an independent contractor or employed as an employee therefore requires an objective look rather than a subjective one. *Rasier* emphasises the importance of the protections provided by the Act and that a party cannot contract out of the Act by applying inaccurate labels to describe the relationship.⁶

Analysis

[24] Taking a "whole nature" approach and applying the common law tests in *Bryson* the Authority must then determine Mr Tawa's employment status.

Initial documentation and intent of the parties

[25] Initially, the work was advertised on Trade Me as a "Contract/Temp" position. The advertisement referenced the ability to "be almost your own boss but work in the company of another gardener." Other than a reference to the "pay rate and "weekly pay" there was little else in the advertisement to indicate whether this was work as an employee or contractor.

[26] The "Conditions of Sub-Contract Agreement / Independent Contractor Agreement" document given to Mr Tawa is very clearly a sub-contractor contract. It includes specific hours of work "unless otherwise specified by GCC or the contractor," reference to IR13 tax payments, the contractor's responsibility for weekly invoicing,

⁵ *Rasier Operations BV & Ors v E Tu Inc*, above n 4, at [7].

⁶ At [112].

payment of ACC premiums and that “contractors will only be paid for the work hours allocated to that job contract...”.

[27] Several texts and emails exchanged prior to Mr Tawa’s start date included statements from Ms Jackson such as “do you need to give notice to your current employer” and a “days trial early next week and if you like then start you up.” Ms Orviss submitted that these lean towards an employer/employee relationship as Mr Tawa’s current employment would not prevent from taking up work with GCC as a contractor. A person engaging a contractor would also generally not suggest a trial period. This was considered but given the clear nature of the contract emailed to Mr Tawa, I find that these statements were not sufficiently definitive to conclude Ms Jackson intended an employer/employee relationship.

[28] Both parties agree that GCC gave Mr Tawa a copy of his contract but they disagree exactly when he received it and all versions of the contract received in evidence were unsigned. Mr Tawa says that GCC gave it to him “after hurting my shoulder” on or around 2 February 2024 and this was the first time he had received a contract. Ms Jackson says that she sent it to him by email on 21 September 2023 (six days before he began work) and after hurting his shoulder.

[29] On balance, I accept Ms Jackson’s account regarding the timing of the documentation as her email to Mr Tawa of 21 September 2023 says, “I have sent the contract so let me know if you are interested”. Despite Mr Tawa stating that he “informed her” there was no contract, Mr Tawa’s 22 September reply does not reference any missing documentation and simply says “Yes, I am still interested in the position”.

[30] For his part, Mr Tawa needed the work. His emails show he was keen to get started and did not give thought to the nature of the working relationship until his injury. He stated in evidence that he “didn’t fully understand the difference between an employee and a contractor at the time.” I accept that Mr Tawa may not have been concerned with the nature of his working relationship with GCC until his injury. For his part, he sent an email of his hours each week and received payment for those hours.

[31] Having reviewed the initial documentation as it stands, I reach the conclusion that Ms Jackson intended this to be a sub-contractor relationship with Mr Tawa and the

contract, though unsigned, reflected that intent. However, she did not evidence that he understood the nature of the working relationship as she saw it or what a contractor relationship looked like in practice.

How did the relationship operate in practice?

[32] The courts have said that written documentation is not determinative of employment status. It must reflect the realities of the relationship.⁷ This was also emphasised by Ms Orviss, specifically that “merely labelling the relationship as such does not make it so.”

[33] Looking at the day-to-day operations of GCC, there was a list of work that needed to be done each week for various clients. This was largely set by client requirements and maintenance contracts. Several factors including weather and changing client demand could change the work list at short notice. According to Mr Tawa, some mornings he would pick up another gardener from the train station, drive to the GCC site in Ramarama and get his job list saying where they needed to be and how long each job would take. He was expected to attend the work site that had been identified and undertake all necessary gardening or maintenance work on that site. At the end of each day sometimes he would drop his colleague at the train station and head home.

[34] Based on the ‘roster’ arrangement of work allocated to Mr Tawa and his hours paid, Mr Tawa usually worked Monday to Friday. Based on review of his hours between 1 November 2023 and 31 January 2024, his hours each day varied. One day he worked three hours, most other days he worked between six and a half to eight and a half hours per day.

[35] Witness statements were received from five other gardeners. Three of these statements referenced their working relationship with GCC and all described themselves as contractors. I found Mr Jon Cross’s evidence particularly valuable as Mr Cross is not currently working with GCC, worked with Mr Tawa for approximately one month in the same work truck and worked with GCC for almost 2 years.

⁷ *Rasier Operations BV & Ors v E Tu Inc*, above n 4, at [117] and [204].

[36] Mr Cross made significant statements in his evidence regarding the nature of the relationship between the gardeners and GCC. These include:

- a. "I was more than comfortable that [Mr Tawa] would be a suitable person to work with and would not impair my ability to earn money."
- b. "We only got paid on the basis of contracted jobs done and if we wasted time or did not complete the work to the clients satisfaction, I was well aware that a partner who did not work efficiently compromised my ability to earn what was good pay."
- c. "Troy and I worked together for about a month as I drove the work truck. In that time I showed Troy the addresses of the client base and also made sure Troy understood how to record our hours, charge and invoice Garden Care so that he could be paid weekly."
- d. "I was acutely aware that Troy understood that...myself and Troy were contract gardeners."

[37] Like other gardeners Mr Tawa sent an email to Ms Jackson each week with details of his hours worked and his hours were paid by GCC on that basis. Mr Cross and Ms Jackson referred to the emails as invoices. The emails were rudimentary invoices at best, but if the purpose of an invoice is to charge for work undertaken, then they met that requirement. They contained the date, were sent and paid weekly and they detailed work completed for the clients. Other than GPS records this was the only record of hours claimed and work done.

[38] The external accountant's statement and filing records provided evidence to show that the gardeners had withholding tax payments deducted as contractors, not PAYE as employees.

[39] While Mr Tawa says that he was required to work on specific days, various emails between Mr Tawa and Ms Jackson show that several times she checked if he was working the next day and he was free to decline to work as she would get another gardener to cover him.

[40] Mr Tawa often took the work vehicle home. This is unusual for a contractor. Ms Jackson explained that Mr Tawa would sometimes pick up his 'work partner' for the

day from the train station so it made practical sense. If he was not working for them, someone else would use the work vehicle.

[41] At first glance, this looks like an employment relationship in practice. Mr Tawa had the list of jobs to be completed each week, the day that those jobs were to be done and the location of each job. He had use of a work vehicle with petrol provided or reimbursed and was sometimes asked to pick up others from the train station in the morning. He was reliant on receiving a job list from Ms Jackson to have work to do.

[42] Taking a step back, the nature of the business is important and relevant here. GCC does garden maintenance. GCC presented evidence that the nature of gardening work for multiple clients is necessarily contractual and as Ms Jackson pointed out the “vast majority” of contracts are permanent and repetitive, but some are one-off jobs and seasonal variation is usual.

[43] Practically, it makes sense that the work completed each day is very defined as it would be reasonable to conclude that regardless of employment status:

- a. most clients do not expect garden maintenance to be undertaken at night so requiring the work to be done between 7am and 5pm would be expected; and
- b. most private clients would want to know the specific day a gardener is on their property so scheduling the date to visit a particular location would be client driven not employer driven.
- c. gardeners on private property needed to be easily identified as a legitimate part of the Garden Care team for security reasons so any requirement to wear a uniform was appropriate. I do not accept this requirement as an indicator Mr Tawa was an employee.

[44] The first stage of the ‘real nature of the relationship’ test shows it was consistent with the freedom/autonomy that would be expected from a genuine independent contracting arrangement and had elements of an employment relationship.

Did Mr Tawa control his own work?

[45] Ms Jackson exercised control over Mr Tawa’s workday, including setting the date, type and location of tasks he was required to perform. As noted above at [42], the

rigidity and control over the workday was primarily driven by the client's needs and routines of repetitive maintenance contracts rather than the nature of the employment relationship.

[46] To effectively undertake the maintenance work as its clients needed, GCC must have specific gardeners in specific places on specific days. Equally, Ms Jackson stated in her evidence there is a level of unpredictability inherent in this type of work. Seasonal variability, weather impacts, clients changing their mind, gardener availability and this can all affect how much work is available and what changes are needed to the baseline work. How the gardeners achieved the work was up to them provided it met the client's standards and as agreed with GCC.

[47] Mr Tawa presented "roster documents" as evidence of his engagement as an employee. Having reviewed the evidence, I prefer Ms Jackson's explanation that these were "nothing more than a schedule of work to be completed by the contractor on any one day."⁸

[48] Ms Jackson's explanation for the control over hours was reinforced by two other witnesses in their statements. Mr Cross said that:

"on a weekly basis the list of clients Karen provided in the form of a list of days for work to be done was a list compiled due to the clients specific request for the visit times to fall on those days..."

[49] I consider this limitation on days and hours to be relevant but not determinative of an employer relationship. Given the nature of GCC's operation in practice, the same limitation would apply to both contractors and employees.

[50] Mr Tawa gave two examples where Ms Jackson had required the jobs each day to be completed in a particular order. Usually this was for practical reasons "can you do YHB client first pls so Dean can bring trimmer for YUG client later". In his evidence, Mr Cross said that they didn't get paid for travel time, which meant that "Karen had worked out the best way to travel between job to job to enable us to get the maximum work hours hands on". Evidence shows that Ms Jackson was providing the

⁸ Affidavit of Ms Jackson at point 15.

order of jobs for the gardeners benefit but objectively it did add an element of control to the work that they did.

[51] Mr Tawa did have control over his availability. As evidenced by email, lack of any requests for leave, and Mr Tawa's work pattern, Mr Tawa had the choice whether he worked on any particular day. If he chose to work, he was expected to visit specific clients for a specific length of time and do the specific tasks requested by that client or maintenance contract.

[52] A review of the vehicle GPS records against the 'workplan' (GCC list of clients and work to be done each day) for 1 November 2023 to 30 January 2024, shows significant anomalies between the locations visited in the vehicle driven by Mr Tawa versus the client locations, and the vehicle's duration at that location versus time invoiced by Mr Tawa. By way of a single example, Wednesday 1 November 2023 shows there were three clients to visit that day. The truck driven by Mr Tawa was at those three locations for six hours. He claimed seven hours work for that day and the vehicle visited five other addresses that day, including his home address. While this is also not definitive of employment status, it shows that Mr Tawa had a lot of control over his own work and had ample opportunity to visit other locations and undertake other work had he wished to do so.

[53] Within those GPS records, there are also other days where Mr Tawa used the work vehicle for other purposes, travelling around his immediate neighbourhood. By way of a single example on 5 and 6 November 2023, Mr Tawa visited 29 locations in the work vehicle. None of these were for GCC garden maintenance.

[54] GPS vehicle records matched against Mr Tawa's client list and hours worked show he had significant flexibility and licence how and when he used the work vehicle, how he worked and when he did his work.

[55] Mr Cross reinforced this, stating that "Troy was very aware of this [flexibility] as we often stopped for food or toilet breaks at our own leisure...if we wanted to have a short day again that was our choice, I often had to pick up my daughter from school so worked hours that suited me" and he said that Troy did the same with his family

commitments. There is GPS evidence that Mr Tawa drove to his home address regularly and sometimes multiple times during some workdays.

[56] Looking at the work patterns and the number of times Mr Tawa visited other non-client locations Monday to Friday over the three-month period, this looks to be either be an employee using the employer's vehicle for non-work purposes or a contractor undertaking work on his own account or with considerable freedoms. Mr Tawa had control over when he worked and where he went during an average workday.

[57] The subcontractor agreement advised Mr Tawa that if he didn't want to work, he simply needed to let GCC know so the work could be reallocated to another gardener. This was never really tested as Mr Tawa worked relatively regularly, taking four Mondays off between 1 November 2023 and 31 January 2024. Wage details show he didn't turn up every day, his hours each day were variable and he was paid for the work he claimed. According to Ms Jackson's evidence, her struggles to communicate with Mr Tawa meant that she was sometimes unsure if he was working the next day or not.

[58] Flexibility over days worked is reinforced in evidence that Mr Tawa took two weeks off from 24 December 2023 to 7 January 2024. He did not claim public holiday payments for the Mondays and Tuesdays (25 and 26 December 2023 and 1 and 2 January 2024 statutory holidays) over that time or claim annual leave during that period.

[59] Mr Tawa was required to provide some tools for his use and these were listed in the contract sent to him. Larger garden machinery such as weed trimmers, hedge trimmers or chainsaws were provided and maintained by the Company. Mr Tawa confirmed in evidence that he prefers to use his own tools.

[60] Also relevant to the control test, is Mr Tawa's ability to control who he worked with. This was evidenced in a 6 November 2023 email when Mr Tawa was asked to pick up a female gardener from the train station. Mr Tawa replied with "I don't work with other females as you were told previously". The following day he sent a text message to Ms Jackson "Hey Karen my partner not giving me permission to pick up any females ... so might have to give in this job".

[61] Taking all these factors into account to apply the test of control, Mr Tawa controlled his work within the confines of the type of business and client need sufficiently to suggest that his work was as a contractor, not as an employee.

Was Mr Tawa integrated into the business operations?

[62] Mr Tawa was a gardener. This is the core business of GCC but he was no more integral than any of the other gardeners that GCC engages. He was not involved in the financial aspects of the business and was expected to deliver the gardening service to specific clients on a specific day and invoice for that work.

[63] Ms Jackson said that all her contractors had the ability to engage in other work, negotiate rates and choose when they worked. Mr Tawa did choose when he worked and could have subcontracted or negotiated but he did not.

[64] Mr Tawa claimed that his tools were used by other employees. This is not accepted as his tools were returned to him when he left and the list of tools he was expected to have for his work was listed in the original contract documents. There was evidence that some gardeners did not have their own tools. One example of this was a gardener Mr Tawa was asked to pick up from the train station. This person was asked in an email of 6 November 2023 “if you have any hand tools please bring them”.

[65] Some gardeners including Mr Tawa were provided with a company vehicle. Mr Tawa took this home on many occasions, was asked to pick up other gardeners “from the station” from time to time and his movements across each day were recorded by vehicle GPS. This control is more indicative of an employee relationship. If Mr Tawa was a contractor, I would expect less oversight of his specific movements and more focus on allocating contract jobs, checking quality of the work was acceptable, then Mr Tawa invoicing for that work.

[66] Ms Jackson occasionally asked Mr Tawa to pick up employees from the train station. A contractor would not be expected to do this. In this case, Mr Tawa had a work vehicle that he took home so this was an expectation.

[67] In relation to fuel and usage costs Mr Tawa also said in evidence that:

“I was provided with a company truck and an allowance for petrol. If I went over the allowance I had to pay for the excess, but I kept receipts and was always reimbursed. All business expenses were covered by the company including trailer hire and tipping fees”.

Was Mr Tawa effectively working on his own account?

[68] The fundamental/economic reality test examines whether the person performing the services was doing so on their own account. The purpose of the fundamental/economic reality test is to assess whether the reality of the situation is that Mr Tawa was truly in business on his own account.

[69] I am satisfied that Mr Tawa had not thought about this reality when he began work with GCC. His statement suggests he saw himself as an employee. This contradicts with the witness statements from three other gardeners who were clear they were contractors.

[70] There is no evidence of Mr Tawa knowingly operating a business on his own account. There was no evidence that Mr Tawa worked anywhere else. GCC suggested Mr Tawa worked elsewhere on Mondays due to his absences on that day, but this is not accepted based on the evidence provided. Work and pay records show that for the period 1 November 2023 to 26 January 2024 he worked seven out of nine Mondays in that period.

[71] There are factors that suggest Mr Tawa was not in business on his own account, including:

- a. He was largely dependent on GCC for his income and was not building any goodwill in his own business.
- b. Larger tools of trade and a work vehicle were provided by GCC. Mr Tawa said that he received fuel reimbursements at times.
- c. Mr Tawa did not negotiate his pay. He was given an hourly rate based on the length of time taken for a particular job and given an hourly rate after his first month “trial”.
- d. He was not GST registered and his ‘invoices’ were emails of hours worked. On 29 Sept 2023 a screenshot showed direct credit of “wages” from Garden Care into his account.
- e. There is no indication he was undertaking other work.

- f. He was reliant on work given to him by Ms Jackson to get paid.

[72] Conversely, there are several factors that support the conclusion that Mr Tawa was working on his own account:

- a. The contract was clear that the gardeners “are engaged as sub-contractors as this gives you the flexibility to work for more than one business or own/operate your own business...and the possibility of a 40–50-hour week is worked at your advantage and/or discretion”.
- b. 35-40 hours per week was not guaranteed.
- c. Even if he had not signed the contract, two witnesses said they had explained or overheard Mr Tawa being told about being a contractor.
- d. Based on the work undertaken, Mr Tawa was no different from the other gardeners.
- e. Ms Jackson explained that if the contractor does a few extra jobs after the contracted job is completed they can keep the money. Both witnesses reinforced Ms Jackson’s statement and the wording in the contract documentation reflects this for Mr Tawa as well.
- f. Ms Jackson submitted that Mr Tawa was likely not registered for GST as he did not earn above the threshold. He had received information on how to ‘invoice’.
- g. Mr Tawa had withholding tax deducted, as did others and this was verified by the external accountant in a letter of 16 December 2024:

“Our firm have been the accountant of Garden Care Company Limited since July 2024. The company engages contractors on a regular basis and from accounting records viewed from the Xero file this has been done for many years. The contractors choose their own hours of work, supply their own tools and invoice the company. The IRD payments...are withholding tax payments, not PAYE...”

[73] Applying this test, Mr Tawa had the opportunity to be in business on his own account and had been told (in documentation and by at least Mr Cross) that he was a contractor. He chose not to take on other work (based on the evidence provided).

Other factors

[74] Evidence was received from several witnesses in support of GCC. While I look at the evidence from Mr Halligan with some scepticism given his personal relationship

and his position as a shareholder, I put greater weight on the evidence from other gardeners.

[75] Mr Cross submitted that he was an independent contractor for GCC, uses his own tools, does other contracting work if he needs more income and that he was told by Ms Jackson that she would try to give them 40 hours a week but that the work could run out at any time. Equally Mr Lealiiee provided affidavit evidence that he was a contractor, this was explained to him and that Mr Tawa also knew he was a contractor.

[76] Mr Tawa did not apply for any type of leave during his tenure at GCC and did not email Ms Jackson or others when he was not available for work. This could have meant he saw himself as a contractor or saw himself as an employee who could come and go as he chose. Either way, it reinforces that he controlled the days he worked.

[77] Industry practice was also considered and this was inconclusive. Based on the information received, the industry has large numbers of contractors and has employees in the industry. It depends very much on the type of work and regularity of that work.

[78] The challenge here, and what differentiates this case from others, in some respects, is that Mr Tawa worked for less than 6 months and for over half of that time (at least since 1 November), there was evidence presented by Ms Jackson of Mr Tawa potentially not undertaking the work allocated, accuracy of his hours paid versus hours worked, unsatisfactory client interaction, deciding who he wanted to work with and use of the company vehicle for personal use. It is difficult to determine whether this is the sign of a contractor taking control of his own work or a poor performing employee.

Conclusion

[79] Mr Tawa did not consider the nature of his employment until his injury in February 2024. He worked and was paid as he had been in previous jobs. Ms Jackson intended Mr Tawa to be a sub-contractor but did not satisfactorily ensure that Mr Tawa understood this. However, at least two other contractors provided evidence that they had explained the nature of their work as a contractor to Mr Tawa and what that looked like in practice.

[80] Taking an overall view of how the business operated in practice and the conflicting evidence presented, I accept that Ms Jackson genuinely considered her gardeners to be sub-contractors. Looking at the relationship objectively there were several points that muddled the work relationship. It is evident that Ms Jackson went above and beyond for her gardeners. She paid their tax for them, allowed an email to suffice as an invoice, suggested the order to visit clients to minimise travel time and assist the gardeners, provided a vehicle where needed so she could contract people who did not have their own transport. GCC also encouraged gardeners to bring their own smaller equipment but this was not a requirement and they paid trailer and tipping fees and reimbursed expenses if required.

[81] Balancing those factors, the contract was a sub-contractor agreement. Most of the control put on his work by GCC was not due to his employment status but due to the nature of the work itself. Even though Mr Tawa did not undertake other work, he had the flexibility to do so if he had wanted. Mr Tawa took days without any application for leave, had withholding tax deducted not PAYE and emails evidenced Ms Jackson asking if Mr Tawa was working on particular days. While the contract provided for 35-40 hours each week, the provision “unless advised by GCC” meant there was a risk to Mr Tawa that no work was available. Lastly statements from other contractors clearly state that they consider themselves as contractors. There was no reason for Mr Tawa’s engagement to be any different.

[82] As well as applying the common law tests to the detail of Mr Tawa’s work, I must also review the whole relationship objectively - not subjectively as the parties want the relationship to be.

Summary

[83] On that basis, Mr Tawa has not established to the Authority’s satisfaction that he falls within the definition of “employee” in s 6(1)(a) of the Act, so the Authority does not have jurisdiction to investigate his other claims.

Costs

[84] As GCC was self-represented, costs will lie where they fall as costs cannot be claimed for time spent personally preparing or attending an investigation meeting.⁹

Helen van Druten
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1