IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 657
3355103

	BETWEEN	ZIHAO WU Applicant
	AND	HOUGARDEN.COM LIMITED Respondent

Member of Authority:	Helen van Druten
Representatives:	David Kim, Advocate for the Applicant Peng Yin as the Respondent
Investigation Meeting:	On the papers
Submissions received:	29 September 2025 from the Applicant 30 September 2025 from the Respondent
Determination:	17 October 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem arose following cessation of Mr Wu's work with HouGarden.com Limited (HouGarden). Mr Wu was initially an employee and claims even though he signed an independent contractor agreement from 12 August 2024, he remained an employee, and therefore termination of his work with HouGarden in October 2024 amounted to an unjustified dismissal from his employment. He further claims unjustified disadvantage and unpaid wage and leave entitlements.

[2] HouGarden disputes Mr Wu's claim that he remained an employee after 12 August 2024. Mr Yin, as director of HouGarden, says that Mr Wu asked for the contract change, knew he would no longer be paid for annual or sick leave, submitted detailed invoices as a contractor and operated with the autonomy of a contractor in both

hours and work undertaken. Mr Yin submits that from 12 August 2024 Mr Wu 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 grievance claim, the Authority must determine whether Mr Wu was an employee after 11 August 2024 for HouGarden as defined under s 6 of the Act.

The Authority's investigation

[4] In the case management call on 11 June 2025, the parties agreed that investigation and determination of the initial issue of employment status will be determined on the papers.

[5] For the Authority's investigation written witness statements were lodged from Mr Zihao (Alex) Wu and Mr Peng (Sam) Yin. Both parties were given the opportunity to provide written submissions.

[6] Several further specific questions were asked by email from the Authority on 24 September 2025. As permitted by s 174E of the Employment Relations Act 2000 (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.

The issues

[7] Initially, the first preliminary issue was whether the grievances raised for unjustified disadvantage and unjustified dismissal met the requirements of s 114 of the Act. Mr Wu provided a letter of 14 October 2024 raising the personal grievances and I am satisfied that the requirements of s 114(1) of the Act are met.

[8] Therefore, the primary issue requiring investigation and determination is whether Mr Wu was a contractor or an employee for HouGarden between 12 August 2024 and 4 October 2024.

Background Facts

[9] Mr Wu was employed by HouGarden from 27 May 2024 to work 40 hours per week as a Senior Golang/PHP Developer. There is no dispute that upon commencement of his employment, Mr Wu was an employee.

[10] From 24 June 2024 HouGarden increased Mr Wu's salary by 35 percent. Mr Yin said that HouGarden did so as Mr Wu was a strong performer and he wanted to support Mr Wu's immigration objective to sponsor his parents to come to New Zealand under a Parent Resident Visa.

[11] Payslips show that Mr Wu received the increased hourly rate from 24 June 2024 until 11 August 2024.

[12] In July 2024, Mr Wu indicated to his employer he needed to meet a higher minimum income threshold to be eligible for the specific visa he needed. Mr Wu's current salary did not meet the Immigration New Zealand required threshold levels at that time. As he received a significant pay increase the previous month, it was not feasible that HouGarden would increase his salary sufficiently to meet the new threshold.

[13] Mr Wu proposed HouGarden gave him a contract for 30 hours per week but he would actually work for 40 hours per week. This would mean his hourly rate would be documented as significantly higher than it was in reality and presented as his wage information to Immigration New Zealand for the visa application. Based on Immigration New Zealand website information for the relevant period, this contrived increase would bring Mr Wu up to the minimum income threshold of $197,246.40 per annum required by Immigration New Zealand.

[14] HouGarden agreed to action Mr Wu's proposal. However, instead of presenting Mr Wu with a modified employment agreement, HouGarden gave Mr Wu an independent contractor agreement (ICA) which Mr Wu signed around late August or early September 2024. This ICA was backdated to 12 August 2024 and was "based on a 30-hour working week".

[15] On 11 August 2024, Mr Wu's employment agreement ended and his employee holiday pay entitlements were paid into Mr Wu's account in the 28 August 2024 pay period.

[16] From 12 August 2024, Mr Wu's employment status is disputed. Mr Wu says he did not understand what he was signing and thought his terms and conditions remained unchanged, except the contract showed a higher hourly rate as needed for the visa sponsorship application. Mr Wu claims "nothing changed" in practice and he continued to work 40 hours per week.

[17] HouGarden says:

(a) Mr Wu initiated the request to achieve a higher income to sponsor his parents and to do so he needed to accommodate a second job;
(b) Mr Wu also wanted to manage his own tax and invoicing independently;
(c) HouGarden gave him an ICA so that he would be paid for all the hours that he worked (rather than being on a salary); and
(d) initially the ICA was for 40 hours "however Mr Wu requested it be amended to 30 hours per week, citing the desire for a higher average hourly rate for immigration purposes".

[18] HouGarden further says it decided to terminate Mr Wu's contract in September 2024 as Mr Wu was not meeting the requirements of his duties and his commitment to work the 40 hours a week. Mr Wu was given two weeks' notice of termination on 20 September 2024.

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]

[1] Employment Relations Act 2000, s 6(1)(a).
[2] Employment Relations Act 2000, s 6(2) and (3).

[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* discussed the *Bryson* tests and laid out a two-step inquiry to determine the status of the employment relationship:[4]

> 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] In assessing whether a person is an employee, s 6(2) of the Act requires the Authority to take a "real nature" approach. All relevant matters must be considered, including those indicating the intention of the parties.[7] Taking this approach means that

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[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.
[5] *Rasier Operations BV & Ors v E Tu Inc*, above n 4, at [7].
[6] At [112].
[7] Employment Relations Act 2000, s 6(3)(a).

Mr Wu signing a contract for service does not mean he is unequivocally a contractor. The Authority must apply the common law tests in *Bryson* to determine Mr Wu's employment status.

Initial documentation

[25] Both the individual employment agreement (IEA) and ICA were provided in evidence and signed by both parties and they cover the fundamental terms and conditions of employment or engagement one would expect.

[26] The ICA front page has a note advising that "before you sign this agreement you are entitled to seek and obtain independent advice as to its effects and implications. We encourage you to seek independent advice. You are entitled to take a reasonable time to obtain any advice you wish to take". I am satisfied that the contract was not presented in haste or that there were any factors to prevent Mr Wu raising any concerns with Mr Yin prior to signing the document.

Intent of the parties

[27] To determine the intent of the parties, I explored two key questions:

(a) Did the parties, specifically Mr Wu know that he was moving from an employee agreement to a contractor agreement and they were different?

(b) Was Mr Wu given an opportunity to understand what was presented to him or was he coerced into a contract arrangement?

[28] Mr Yin explained that HouGarden has other contractors used for video production and digital marketing and explained when he uses contractors and when he uses employees. Mr Yin's explanation showed an understanding of the difference in employment status and the parties' obligations for employees and contractors.

[29] The parties differ in their recollection of how the contract discussions were initiated and their understanding of the new contract. I prefer Mr Yin's account that Mr Wu initiated the conversation about changing his terms of employment as Mr Wu had a strong motive for wanting to change his terms of employment. HouGarden did not.

[30] Mr Yin gave evidence that when first approached by Mr Wu in July 2024, he did not initially accept Mr Wu's suggestion to change his employment because of security and confidentiality issues in the project work Mr Wu was doing. He said that as Mr Wu's role shifted to focus on other research it also involved fewer daily meetings and interactions with development teams so a contractor relationship was viable. This made practical sense and explained the reason for the time delay between the request in July 2024 and the contract start date on 12 August 2024.

[31] Mr Yin's explanation above also aligns with the difference in position titles in the two documents. In the IEA Mr Wu is employed as a Senior Golang / PHP Developer. The ICA engages him as a Senior Backend Developer. The key responsibilities of each are identical with one exception, that exception also aligning with Mr Yin's evidence about the shift in job focus.

[32] Looking objectively, I accept that Mr Wu did not necessarily want to change from an employment relationship to a contractual one. However, there are several key pieces of evidence that show he knew that the contract he was signing was different to the earlier one he had signed:

(a) Mr Wu sent a message on 29 August 2024 to Mr Yin outlining the transitional steps for the change in contract. The wording is very precise and differentiates between a "permanent contract duration" and a "new subcontractor contract". It also shows an understanding that annual leave and public holidays needed to be calculated up to 11 August 2024. Sent through the internal mail system the message sets out detail of the transition arrangements with headings:

> Permanent Contract Duration:
> - Start Date: 27 May 2024
> - End Date: 11 August 2024
> - Total: 53 working days + 2 public holidays
> - Yearly Context: 250 working days + 12 public holidays in 2024
> - Annual Leave Calculation: 0.21 * 20 days = 4.2 days of annual leave entitlement
>
> Annual Leave Usage:
> - 8 August 2024: 1 day
> - 7 October 2024: 1 day
> - 18 June 2024: 0.5 day
> - Remaining Annual Leave: 4.2 - 2.5 = 1.7 days

Adjusted Start Date for New Subcontractor Contract:
- Considering the remaining 1.5 days of annual leave, the new start date is the afternoon of 8 August 2024.

Financial Details:
Old Salary Terms:
- Hourly Rate: $XX.XX
- Annual Salary: $XX,XXX

New Salary Calculation for Subcontractor:
- Daily Rate: $XX,000 / 52 weeks / 30 hours per week = $XX.XX per day

Invoice Calculation
- Start Data: 8/Aug/2024 Afternoon
- End Data: 29/Aug/2024 Afternoon
- Total: 15.5 working days * 6 hours
- Salary: 15.5 * 6 * $XX.XX = $XX.XX

(b) Additionally, a screenshot of the message shows that Mr Yin's response to Mr Wu's message was that "annual leave will still be paid in the system otherwise the employment relationship cannot be terminated".

(c) Another factor supporting Mr Yin's account of events is that on 30 August 2024, Mr Wu presented his first tax invoice for the agreed amount sent to Mr Yin. Further invoices followed fortnightly for the periods to 6 October 2024. These invoices looked professional. They included the invoice number, date, GST and the description of services provided was "computer consultancy service hours". If Mr Wu genuinely believed nothing changed in his employment, I would have expected the descriptor to read something other than the word "consultancy".

(d) Mr Wu received his final pay of outstanding leave entitlements on 28 August 2024. There was no evidence provided that he queried why his final pay was being paid or concerns about what was changing. He had an opportunity to do so between the payment on 28 August 2024 and signing the ICA on or around 2 September 2024.

[33] I was not presented with any evidence to suggest that at the time of signing the agreement, Mr Yin intended to use the ICA as a means of ending Mr Wu's employment or attempted to disguise the nature of the agreement. On the contrary, HouGarden

recognised Mr Wu's skills nine weeks previously by giving him a 33 percent salary increase.

[34] Mr Wu denies that he intended any change in employment status and only signed because he trusted Mr Yin. I accept that Mr Wu may not have wanted to move to a contractor arrangement and may not have fully understood what that meant for his employment. However, he did have the opportunity to seek advice if he wished to do so, was advised to do so, understood that he was moving to a different type of contract (as he detailed comprehensively in his 29 August 2024 email) and he achieved his goal of a contrived hourly rate for immigration purposes.

[35] Based on the documentation and information provided, I am satisfied that Mr Wu knew that his employment status was changing but chose to ignore what that meant practically and signed it on the basis that he was achieving his hourly rate objective. HouGarden cannot be responsible for Mr Wu choosing not to read the document he was asked to sign and choosing not to ask questions at the time if he had concerns.[8]

How did the relationship operate in practice?

[36] Initially, Mr Wu continued to work 40 hours per week or more and was still under the instructions and control of HouGarden. On the limited evidence available, I accept that his work was still under the scope of work instructed by HouGarden.

[37] There was a difference between pre- and post- 12 August 2024 leave communication. On 10 July 2024, Mr Yin referenced Mr Wu's request for leave. In contrast, on 11 September 2024, Mr Wu advised Mr Yin that "this week I'm working 4 days, 8 hours per day. I have things to take care of today and on Monday, so I won't be going into the office". While not definitive of a contractor relationship, it indicated a change in the relationship.

[38] As Mr Wu's work changed and his role shifted to focus on research, he was no longer required to attend daily meetings he had previously attended.

[8] I refer to *Crisafulli v Pristine Air Limited* [2015] NZERA 33 at [34] where an employee did not read letters sent to him, preferring to "turn a blind eye to efforts to seek his views".

Did Mr Wu control his own work?

[39] Despite a request in earlier Directions to provide evidence on this point, there was little evidence presented by Mr Wu to indicate "strict and complete instructions and control" as he claimed. From the text messages provided, Mr Wu, like others, looked to have an autonomous role. He knew what he needed to do and did so independently.

[40] Mr Yin's statement and other messages stated that Mr Wu:

(a) ceased attending company meetings once he became a contractor;
(b) no longer reported directly to Mr Yin, focusing instead on the independent research.
(c) brought his own laptop and iPad to work and was observed using them for his own work;
(d) selected his own technologies and deliverables via the HouGarden workflow system; and
(e) HouGarden provided him with project requests rather than direct daily oversight.

Was Mr Wu integrated into the business operations?

[41] Mr Wu's role shifted in July 2024 into a research-based role. He was not a critical part of the business *per se* but his work allowed HouGarden to continuously develop its expertise. He was no more integral than any other contractor or employee in the business. Mr Wu did not have responsibility for a team or any people reporting to him.

Was Mr Wu effectively working on his own account?

[42] According to Mr Yin, Mr Wu wanted to work on his own account. He initially indicated that he would work 40 hours as long as the contract reflected 30 hours. Managing his tax would give him the opportunity to increase his earnings and reach the higher visa income threshold, give him more scope to control his income and minimise tax payments. There was no indication that Mr Yin prevented Mr Wu working on other work provided there was no conflict of interest.

Conclusion

[43] The 1 October 2024 recording was a sworn transcript of a conversation between Mr Wu and Mr Yin. Mr Yin suggested this was set up and recorded to support Mr Wu's claim that he was unaware of the implications of the ICA. It does show that he did not think about the implications of an ICA and it also serves to support my conclusion that Mr Yin's desire to artificially increase his hourly rate for the visa application overrode any contractual concerns. As Mr Wu said in his affidavit "the only thing I wanted was to increase my hourly rate in order to support my parent's visa application".

[44] On balance, the evidence received by the Authority supports my finding that Mr Wu was a contractor. While he may not have wanted a contractor relationship when he signed the new contract, I am satisfied that he knew what he was signing was different to his existing employment agreement. He chose to change employment status to a contractor and get the '30 hours on paper and work 40 hours in practice' higher hourly rate rather than continue as an employee on his same terms and conditions and not meet the visa requirements.

[45] As I find that Mr Wu was a contractor for the period from 12 August to 4 October 2024, Mr Wu's claims for wage arrears and unpaid annual leave during that period are outside the scope of the Authority's jurisdiction and are therefore declined.

Claim for wage arrears

[46] While the wage arrears claim for 12 August 2024 to 4 October 2024 is declined, Mr Wu claimed 48 hours overtime between 26 June and 25 September 2024. Mr Wu's employment agreement provides for payment at his ordinary hourly rate for hours worked where "the employer at its sole discretion require[s] the employee to work such additional time". As he was an employee through to 11 August 2024, I reviewed the overtime claim prior to that date. With one exception, the Authority did not receive any evidence that HouGarden required Mr Wu to work the overtime hours. The one exception was two hours worked on 30 June 2024, where Mr Yin messaged "@Alex Wu: To do some overtime work. Tomorrow I need a file like this one". There is nothing to suggest that HouGarden's failure to pay this overtime was anything more than an oversight.

[47] In support of that conclusion, there was no evidence to show that Mr Wu raised any concerns about overtime. Given the precision of his 29 August 2024 calculations, they would reasonably been addressed in that email. No further overtime payments are awarded for the relevant period.

[48] Mr Wu's payslip does not show any overtime paid for that date so I order that HouGarden pay Mr Wu for two hours worked on 30 June 2024 (being $129.81 gross less PAYE and any applicable deductions).

Good faith

[49] Mr Wu also claimed a breach of good faith by HouGarden. With reference to s 4 of the Act and for reasons as already outlined, I did not find evidence that Mr Yin used Mr Wu's request as an opportunity to mislead or deceive Mr Wu. Mr Wu was asking HouGarden to be complicit in assisting an inaccurate visa application. It would have been much easier for HouGarden to decline the request and insist Mr Wu remained on a 40 hour per week employment agreement.

Order

[50] HouGarden is to pay Mr Wu overtime for two hours worked on 30 June 2024 (being $129.81 gross less PAYE and any applicable deductions).

Costs

[51] As HouGarden was self-represented and is the successful party, costs will lie where they fall.

Helen van Druten
Member of the Employment Relations Authority