

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 746
3287259

BETWEEN	CORNELIUS O'DRISCOLL Applicant
AND	REHAB CO MOBILE LIMITED First Respondent
	JOHN GBENDA-CHARLES Second Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Cornelius O'Driscoll in person Costas Matsis and Georgia Drummond for the Respondent
Submissions Received:	21 July 2025 from the Applicant 20 August 2025 from the Respondent
Investigation Meeting:	9 July 2025 and by AVL
Determination:	18 November 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr O'Driscoll says he was unjustifiably dismissed from Rehab Co Mobile Limited (RCML) and that he was not paid all the wages he was entitled to. RCML say Mr O'Driscoll was a director and shareholder but never an employee. Mr O'Driscoll says he was under the control and direction of one of the other directors Mr Gbenda-Charles and there are payslips and evidence of wages paid to Mr O'Driscoll and such that the relationship was one of employment rather than sweat equity.

[2] Mr O’Driscoll seeks compensation, unpaid wages and reimbursement of legal and accounting costs incurred.

[3] RCML accepts wages were paid for a period but says these can be explained. It says analysis of the relevant tests leads to the conclusion that the fundamental nature of the relationship was not one of employment with either RCML or Mr Gbenda-Charles. The parties intended the relationship to be a sweat equity relationship and this did not change.

The Authority’s investigation

[4] At the investigation meeting Mr O’Driscoll, Mr Gbenda-Charles, Lauren Short and Nicholas James gave evidence. Mr O’Driscoll provided additional statements from two other witnesses who did not attend to give evidence under oath in the form of emails. Those emails have not been considered. All other evidence was given under oath or affirmation.

[5] Several adjournments were taken to allow Mr O’Driscoll opportunities to seek independent advice about lodging new evidence at the investigation meeting and mediation. Leave to lodge new information at the investigation was not given and both parties agreed to proceed with the investigation meeting.

[6] Mr O’Driscoll confirmed he was assisted by artificial intelligence in presenting his case in the Authority. He was reminded it was his obligation to check the information being relied on was accurate and he was asked to provide copies of two cases referred to in his submissions.¹ Counsel for the respondents requested the cases for the purposes of submissions. The cases were provided.

The issues

[7] The following issues arose for determination:

¹ Courts of New Zealand “Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: None-lawyers” (7 December 2023).

- (a) Was Mr O'Driscoll an employee or was he working under some other arrangement such as a director and shareholder of the company working for sweat equity in RCML?
- (b) If Mr O'Driscoll was an employee, was he unjustifiably dismissed, and if so;
- (c) What remedies should be awarded?

[8] Having regard to s 174E of the Employment Relations Act 2000 (the Act) I do not refer in this determination to all the evidence received during the investigation meeting. For completeness the additional material presented on the day of the investigation meeting has not been considered in accordance with the order made during the meeting.

Rehab Co Limited and Rehab Co Mobile Limited

[9] Mr O'Driscoll was involved in two companies. The Rehab Co-Ltd (RCL) and RCML. RCL was incorporated as a registered company providing physiotherapy services on 26 July 2018 until 3 October 2025 when it went into liquidation. RCL's original directors and shareholders were Mr O'Driscoll and Lauren Short. They are both physiotherapists who were in business together until RCL became a shareholder in RCML and they became involved in RCML as well as RCL. RCL continued to trade as a separate entity.

[10] RCML was incorporated on 12 March 2019. Mr Gbenda-Charles, a Mr Nonu and Mr O'Driscoll were the directors. The shareholders were initially RCL, Mr Gbenda-Charles and Mr Nonu until July 2021 when the shareholding was adjusted. Additional shares were issued. Mr Gbenda-Charles' shareholding went up to 90 shares based on the personal finance and UDC finance security he provided. The other director went down to 40 shares and Mr O'Driscoll became a shareholder in person instead of RCL and he held 70 shares. RCL had previously held 50 shares. Ms Short says she was unaware RCL's shareholding was to be replaced by Mr O'Driscoll personally until after it happened.

[11] Both parties accept there was initial agreement that Mr O'Driscoll and Ms Short would both contribute sweat equity to RCML. The position changed from Mr O'Driscoll's perspective after a conversation with Mr Gbenda-Charles. Mr O'Driscoll says it was agreed he would receive wages because of his role as operations manager in light of how the business was growing. This is the point in time Mr O'Driscoll says he became an employee and he started receiving wages.

[12] Mr Gbenda-Charles denies that conversation took place and says there was no agreement Mr O'Driscoll would become an employee. Mr O'Driscoll says the relationship deteriorated over the next two years and he places the blame for this on Mr Gbenda-Charles withdrawing funds out of the company. Mr Gbenda-Charles says there was a need to understand RCML's financial situation and he started to have some concerns about his financial investments in RCML. Mr O'Driscoll says at some point Mr Gbenda-Charles and the other director agreed to stop taking drawings from the company but only if Mr O'Driscoll stopping receiving the salary payments. Mr O'Driscoll received wages for approximately two years in the amount of \$55,000.00 per annum.

[13] Mr Gbenda-Charles says he does not recall Mr O'Driscoll telling him the business had cashflow issues leading to his salary stopping in January 2023 and said Mr O'Driscoll had authority and autonomy to pay wages including his own which is what he did.

[14] Matters came to a head on 7 November 2023 at a meeting where steps were taken to remove Mr O'Driscoll as a director and shareholder. It appears the correct process was not followed and Mr O'Driscoll was not removed but Mr O'Driscoll says he was also dismissed from the operations manager role at the same time.

Mr O'Driscoll's evidence

[15] Mr O'Driscoll says he co-founded RCML with Mr Gbenda-Charles and Mr Nonu but while they were **equal shareholders** and directors on paper the reality was "fundamentally imbalanced". Mr O'Driscoll ran the operations and led the clinical systems. He was paid PAYE salary of \$55,000.00 and worked full time delivering outcomes and growth. He says Mr Gbenda-Charles by contrast had no clinical experience, was not involved in operations and contributed solely as a capital investor.

[16] From his perspective Mr Gbenda-Charles assumed a controlling role and explained Mr Gbenda-Charles became increasingly obstructive, ill-informed and combative including withdrawing money by way of shareholder loans. Despite Mr O'Driscoll raising this as an issue causing financial risk to the company, he says those concerns were ignored.

[17] Mr O'Driscoll accepts the arrangement was initially sweat equity although he described it as "contributing growth tasks for no recognition". His evidence was this changed and he became employed after the change in shareholding and the conversation with Mr Gbenda-Charles.

[18] In January 2023, Mr O'Driscoll says his salary was already modest but in good faith he agreed to stop his salary payments and continued to work essentially unpaid for 10 months until without warning or process he was removed from his role at a meeting. He says he also suffered reputational damage and intimidation caused by claims made about him to entities RCML was involved in after he was dismissed on 7 November 2023.

Mr Gbenda-Charles' evidence

[19] Mr Gbenda-Charles and Mr Nonu were interested in the mobile nature of the physiotherapy business and wished to invest in that type of business. Because Mr O'Driscoll and Ms Short were already business partners in RCL they decided the safest way to separate the two businesses was to form RCML with Mr O'Driscoll, Ms Short and the two financial investors as directors and shareholders.

[20] Mr Gbenda-Charles says at the start ownership was based on cash injection from the two directors who provided the finance (Mr Gbenda-Charles and Mr Nonu) with an allocation of shares to Mr O'Driscoll and Ms Short based on their sweat equity contribution. Only limited and pre-agreed shareholder drawings would be available at the start. Once the business got up and running employment of Ms Short and Mr O'Driscoll would be considered.

[21] Initially there were three directors (Mr Gbenda-Charles, Mr Nonu and Mr O'Driscoll) and three shareholders (Mr Gbenda-Charles, Mr Nonu and RCL). Each shareholder owned 50 shares.

[22] Mr Gbenda-Charles says neither Ms Short or Mr O'Driscoll were in a position to financially contribute to the business and it was understood their shareholdings in the business would be paid via work (sweat equity) and involvement in building RCML to a point where its debts were paid. At that point they could be employed on a formal and permanent basis. He says it was always agreed their contributions would be by way of sweat equity. They would work in the business and through RCML take drawings as and when there were funds to do so.

[23] Mr Gbenda-Charles is also named personally as a respondent and says neither the company nor him personally employed Mr O'Driscoll. He says it was never suggested Mr O'Driscoll become an employee and he would never have agreed to that because the business needed time to get up and running and repay the financial investors. That never happened. RCML was not in a position to pay a salary or leave entitlements to Mr O'Driscoll or Ms Short in the same way it did for its other employees and Ms Short never considered herself to be an employee. RCML employed physiotherapists, receptionists and administration staff.

[24] Mr Gbenda-Charles agrees the shareholding changed in July 2021. The total number of shares in the company increased from 150 to 200. Mr Gbenda-Charles shareholding went up to 90 shares based on his financial contribution and security for loans. Mr Nonu's shareholding went down to 40 shares and Mr O'Driscoll requested his shareholding increase to 70. Mr Gbenda-Charles says this was to reflect that Mr O'Driscoll was due to undertake more "sweat equity" and the share increase reflected in his increased ownership stake in the business.

[25] Seventy shares were transferred to Mr O'Driscoll in person. Mr O'Driscoll reported Ms Short was not contributing to RCML and Mr Gbenda-Charles took Mr O'Driscoll's word for that saying it was a matter for RCL and its directors and shareholders. It transpires Mr Gbenda-Charles has since learned Ms Short was not consulted and that Mr O'Driscoll instead communicated to her that Mr Gbenda-Charles and Mr Nonu did not want her in the business.

[26] From late 2021 Mr Gbenda-Charles and Mr Nonu had concerns about Mr O'Driscoll's lack of focus and impact on the financial performance of RCML. These concerns were mounting by March 2023. Mr James, chartered accountant, had signalled some red flags and that the business required more attention. It was noted Mr O'Driscoll was growing RCL, taking on new premises and doubling RCL's staff which Mr Gbenda-Charles says reduced Mr O'Driscoll's time and attention on RCML.

Mr James' evidence

[27] Mr James is a Chartered Account who took over the account for both RCL and RCML in March 2020. He predominantly met with Mr O'Driscoll and I understood this to be monthly about the accounts. His understanding was that Mr O'Driscoll ran the operations for RCML and both Mr O'Driscoll and Mr Gbenda-Charles worked on the business and growth. Mr Gbenda-Charles was overseas from time to time but Mr O'Driscoll was able to give him instructions and make decisions about financial matters related to RCML. He said Mr O'Driscoll managed all payroll as far as he was aware.

[28] Mr James' understanding of the way RCML operated was that there were two directors who invested money into the company and Mr O'Driscoll worked in the business and while he was to get some wages he needed to put in time to cover the disparity between the directors due to Mr O'Driscoll not funding the business.

[29] Mr James also explained how Mr O'Driscoll came to be receiving a salary. He said initially he was receiving drawings as a shareholder only but he was not good at paying his taxes so it was Mr James' advice that it would be more beneficial for him for some of his drawings to be by way of wages with having the benefit of PAYE being deducted. Mr James said Mr O'Driscoll was also planning to purchase a house and needed evidence of income for a mortgage application. This arrangement helped with that and ensured there were regular tax payments.

[30] Mr James says he has no knowledge of the reasons why Mr O'Driscoll stopped his wages in January 2023. He also said Mr O'Driscoll has full financial control including payment of wages. Mr James' evidence was that he did not see a change in

Mr O'Driscoll's role in the RCML. The only change was PAYE and that was for Mr O'Driscoll's personal cash flow purposes.

Ms Short's evidence

[31] Ms Short confirmed the initial arrangements between RCML and RCL. Her evidence was that as RCML grew so did a challenging power struggle dynamic with Mr O'Driscoll. She became worried about how finances were being managed and Mr O'Driscoll's attempts to change the shareholdings between them to give him a greater portion. Ms Short never considered herself an employee of RCML. She worked in the business and was in the same position as Mr O'Driscoll until RCL was removed as a shareholder from RCML and replaced with Mr O'Driscoll personally. She was unaware this was going to happen.

[32] Ms Short received intermittent shareholder drawings and at the end she received no remuneration or benefit from RCML despite RCML operating off multiple systems within RCL that she had created and managed.

Was Mr O'Driscoll an employee?

[33] Section 6 of the Act is the starting point. An employee is a person employed by an employer to do any work for hire or reward under a contract of service. In deciding whether or not a person is an employee the Authority must determine the real nature of the relationship between them (s 6 (2)). All relevant matters including the intention of the parties must be considered. Statements by either party describing the nature of their relationship are not to be treated as being determinative (s (3)).

[34] The court in *Leota v Parcel Express Limited* said:²

An employee works for the employer and the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

² *Leota v Parcel Express Limited* [2020] NZEmpC 61.

The parties' submissions

[35] It is not until the conversation Mr O'Driscoll says he had with Mr Gbenda-Charles that he says he became an employee. From that point on Mr O'Driscoll relies on the payment of wages, the control he says Mr Gbenda-Charles had over him and his integration into the business as the operations manager.

[36] RCML say the mutual intention both parties had with Mr O'Driscoll and Ms Short's sweat equity while the business got up and running never changed. Mr Gbenda-Charles denies he was involved in a discussion with Mr O'Driscoll about employing Mr O'Driscoll. He says he did not agree to that and never would have agreed to it because from his perspective the business was not running smoothly and he was concerned about his financial investment in the company. There is no independent record of that alleged conversation or the specific date on which it was said to have occurred. Ms Short's evidence is consistent with Mr Gbenda-Charles evidence about the parties intentions at the start.

[37] Mr O'Driscoll did not dispute that he had control of the finances and worked with little oversight but he had to report weekly on the finances. He said Mr Gbenda-Charles exerted control over him in a manner consistent with an employer employee relationship. Mr Gbenda-Charles and Mr James pointed to the fact Mr O'Driscoll was solely responsible for a number of things and acted as the operations manager. Recruitment of staff and payment of wages were part of that role. There were no regular meetings, performance reviews and no employment agreement. Mr O'Driscoll says he did not have control over hiring. Mr Gbenda-Charles said he did but confirmed consultation was required before final decisions to hire were made.

Analysis

[38] While it is possible to be an employee as well as a company director and/or shareholder, it is clear both parties intended Mr O'Driscoll would not be an employee at the beginning. The structure and roles of those involved was clearly articulated with two providing financial investment and two working in the business. The intermittent shareholder drawings and increase in Mr O'Driscoll's shareholding in 2021 are consistent with this.

[39] While payment of a salary and PAYE can often indicate an employment relationship, Mr James' evidence provides a different perspective. Mr O'Driscoll produced an email from Mr James dated 11 May 2021 showing the arrangements put in place for Mr O'Driscoll's tax purposes:

As you will see you have an income of \$73,184.86.
Going forward your income is as follows for the 2022 financial year:
Rehab Co Mobile Ltd – paye deducted \$55,000 salary
Rehab Co Ltd – planning on around \$35,000 shareholder salary
Rehab Co Mobile – planning on around \$20,000 shareholder salary
Total income \$110,000.

This shows wages being paid but with Mr James' evidence about the reasons for the salary payments they do not strongly indicate Mr O'Driscoll was an employee.

[40] Mr O'Driscoll's claim he was integrated into the company is also not clear evidence of employment. The intention at the start was a period of sweat equity with Mr O'Driscoll and Ms Short working in the business and building it to a point where its debts were paid. At that point they could be employed on a formal and permanent basis. Ms Short confirmed that was the agreement she entered into at the start. Mr Gbenda-Charles did not deny Mr O'Driscoll had a key role in the business but not as an employee. Although there was a position description for the operations manager, Mr O'Driscoll wrote that himself independently of any of the other directors and shareholders. In any event, as a director and shareholder Mr O'Driscoll had duties towards the company to act in its best interests.

[41] At the point there was disagreement over financial management and the relationship soured, it is telling Mr O'Driscoll was able to withdraw significant amounts of money from the company bank accounts and he continued to grow and expand RCL. Mr O'Driscoll denied RCL was in competition with RCML but putting competition aside, the point was made that Mr O'Driscoll was spreading himself across two businesses. That is relevant as the ability to operate independently for the benefit of the individual can be a factor that counts against employment.

[42] Mr O'Driscoll's role with RCML was clearly a role he undertook seeking gains for his own enterprise. In light of the fact he did not financially contribute at the start, he was building up equity through work so he could receive shares and hopefully obtain a greater interest in the company by providing labour. This indeed occurred when the

shareholding changed into his name and the number of shares increased. His shareholding had previously been shared on an equal basis with Ms Short through RCL and it appears through RCL they each would have had 25 shares. After the removal of RCL as a shareholder Mr O'Driscoll had 70 shares which according to Mr Gbenda-Charles reflected the position they had reached and in return Mr O'Driscoll was due to undertake further work in the form of sweat equity.

[43] Ms Short and Mr O'Driscoll's company RCL still operated both independently and embedded in RCML. Embedded because RCML used RCL systems and processes, it was initially a one third shareholder in RCML. RCL continued to trade and Mr Gbenda-Charles was concerned about Mr O'Driscoll spreading himself between both businesses particularly in terms of RCML's performance in 2023. Mr O'Driscoll on the other hand referenced Mr Gbenda-Charles wanting a share in RCL and says this was part of the controlling behaviour he witnessed from Mr Gbenda-Charles.

[44] The reality of the arrangement between the parties after the shareholding was adjusted, was that Mr Gbenda-Charles and Mr O'Driscoll took a greater share in the company. First because of the financial contributions made and secondly because of the work he was undertaking in the operational side of the business. Mr Gbenda-Charles was overseas for large periods of time and admitted he was not initially involved in the operational side of RCML.

[45] Mr James' evidence confirms Mr O'Driscoll was the face of the company when it came to finances although he met at times also with Mr Gbenda-Charles but mostly with Mr O'Driscoll. This suggests Mr O'Driscoll was not under the control of Mr Gbenda-Charles in the way an employer would have control over an employee's work and the finances of the company. Mr O'Driscoll did not ask or apply for annual leave, he was free to run the operational side of the business how he wanted. He also did all the hiring and was responsible for payment of wages although his evidence was of needing to get hold of Mr Gbenda-Charles before final hiring decisions were made and that became increasingly difficult because he was overseas and hard to get hold of.

[46] Mr O'Driscoll also pointed to weekly financial reporting he was required to do which he said he would not have had to do if he was viewed as an equal shareholder and director. It was unclear how long that reporting had been a requirement and the context appears to be a deteriorating relationship with both voicing their concern about

finances with the other. Mr O'Driscoll had obligations to the other directors and the company and at the time when there was concerns about the finances. With the relationship deteriorating this does not clearly indicate employment.

[47] The degree to which Mr O'Driscoll could operate independently within the company is also illustrated by the steps he was able to take after he says he was dismissed on 7 November 2023. Mr O'Driscoll was able to withdraw a lump sum from RCML's bank account which he says was for annual leave entitlements. This could be actioned by Mr O'Driscoll without communication or authorisation from anyone else involved in RCML.

[48] Mr Gbenda-Charles also said email accounts were deleted and Mr O'Driscoll was able to remove his and Mr Nonu's access to RCML business operating systems. Without making comment about Mr O'Driscoll's entitlement to any of those withdrawals, the fact the systems allowed him to do that are relevant to degree of control that existed in reality. Evidence was also provided that Mr O'Driscoll was able to terminate RCML's digital certificate that was required for revenue billing from ACC for RCML. Mr O'Driscoll's ability to operate in this way and to continue to build and grow RCL are all factors that point away from the employee status that he is claiming.

Conclusion

[49] The rationale for payment of wages does not strongly indicate employment in the context of this matter. Taking a step back and considering how the relationship operated in practice Mr O'Driscoll was performing services in a way predominantly consistent with a person in business and acting as a company director and shareholder rather than an employee. He received drawings from RCML and was able to operate his other company RCL with no limitations despite the cross over with RCML. He had a high degree of autonomy in the operations manager role including access to bank accounts and operating systems that allowed changes with little oversight or checks and balances. Reporting and communicating with other directors and shareholders were akin to obligations he had to the company rather than being indicative of control exerted over him by an employer. There were opportunities to profit had the business been successful and that was consistent with the parties' intentions at the start. I find that intention did not change and on balance more factors point towards the real nature of

the relationship being a sweat equity arrangement as opposed to an employment relationship.

Outcome

[50] The evidence has not established the existence of a contract of service. Mr O’Driscoll was not an employee of either RCML or Mr Gbenda-Charles which means the Authority does not have jurisdiction to resolve Mr O’Driscoll’s claims.

Costs

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

[52] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Rehab Co Mobile Limited and Mr Gbenda-Charles may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr O’Driscoll will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[53] 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.³

Sarah Kennedy-Martin
Member of the Employment Relations Authority

³ www.era.govt.nz/determinations/awarding-costs-remedies