

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 274
3176987

BETWEEN	LINDSEY GRIFFITHS Applicant
AND	BOOST PROMOTIONS LIMITED First Respondent
AND	RICHARD KULUZ Second Respondent

Member of Authority: Claire English

Representatives: Johanna Drayton and Jaenine Badenhorst, counsel for
the Applicant
Bridget Smith, counsel for the First Respondent

Investigation Meeting: 23 and 24 February 2023 at Wellington

Submissions received: 14 March and 4 April 2023 from Applicant
27 March 2023 from Respondent

Determination: 26 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Lindsey Griffiths claims she was, between 1 January and 31 March 2022, an employee of the first respondent company (Boost). Ms Griffiths' work with Boost came to an end when the second respondent (Mr Kuluz), terminated her contract following a restructure. Ms Griffiths claims that she was unjustifiably dismissed, and is entitled to remedies in accordance with employment law. She also claims that Mr

Kuluz was a “person involved in a breach” in that he did not pay minimum statutory entitlements on the ending of her employment with Boost.

[2] Boost and Mr Kuluz resist these claims. Specifically, they deny that Ms Griffiths was ever an employee of Boost, and say rather that she was an independent contractor, in accordance with the terms of a document titled “Offer of Engagement”, which he and Ms Griffiths had signed.

[3] Accordingly, the question as to whether or not Ms Griffiths was an employee of Boost, or alternatively, an independent contractor, will be determined as a preliminary matter prior to the hearing of any substantive claims.

The Authority’s investigation

[4] For the Authority’s investigation written witness statements were lodged, on Ms Griffiths’ behalf, from Ms Griffiths herself, Ms Joan Hart, and Ms Sascha van der Plas. Mr Kuluz, Ms Shelly-Ann Ngatuere, Ms Carolyn Archer, and Mr Bruce Judge gave evidence on behalf of the respondents. All witnesses answered questions under affirmation from me and the parties’ representatives. The representatives also gave oral closing submissions.

[5] 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

[6] The issues requiring investigation and determination were:

- (a) Was Ms Griffiths an employee of Boost, between 1 January and 31 March 2022?

Background

[7] Starting in 2017, Ms Griffiths began working for a company then named Signature Promotions Limited (Signature). Mr Bruce Judge was the owner of that company. When Ms Griffiths first joined Signature, she worked as an employee. She had an individual employment agreement, received a salary, paid tax on a PAYE basis,

and was entitled to receive annual and sick leave, among other indicators of employment.

[8] Ms Griffiths worked alongside the Account Managers at Signature, and was keen to move up into that role.

[9] She spoke with Mr Judge about this. Mr Judge said that he would support her in her ambition to become an Account Manager. He and Ms Griffiths discussed how this would occur, as the role of Account Manager was a “commission only” role. It was agreed that, for the first 6 months, Ms Griffiths would be paid a monthly retainer, and if she earned more commission than her salary, she would receive the additional payment. After this, it was anticipated that she would have built up a sufficient client base to meet or exceed her salary, and would become “commission only”, with the potential to significantly increase her earnings over and above what she had been earning via salary.

[10] Ms Griffiths explained that she was happy to accept this, as she was confident she could earn significantly more over time than remaining on a salaried basis, and she was also attracted to the inherent flexibility that came with the Account Manager role. She explained that she already had some understanding of how the Account Manager role worked at Signature, and she knew that the Account Managers could earn significant amounts, and were able to have greater flexibility to manage their own time than salaried staff, which was viewed as part of the logical “trade off” that came with becoming “commission only”. She was happy to make the change and believed she could grow her salary, skills, and career.

[11] In the event, it transpired that Ms Griffiths was not able to grow her account base as quickly as both she and Mr Judge had hoped, and it was further agreed between them that she would continue to receive the retainer for a period of time.

[12] After this, Ms Griffiths became entirely “commission only”. As well as being paid on a commission basis, she explained that she ceased receiving paid leave, and tax was deducted from her monthly commission at the rate of 30%. Ms Griffiths hired an accountant, and at the end of each year, relied on him to process her various expense claims (mostly for travel and the costs associated with client meetings), and she would expect to receive a tax refund in due course. She was not able to explain the basis for

her tax arrangements, other than that she knew the rate of deduction and that she relied on her accountant. Mr Judge stated that he (or rather, Signature) had a practice of deducting tax for commission-based sales people at a flat 30%, and that this practice was informed by an IRD audit that he had undergone in the 1990's.

[13] In terms of working arrangements, Ms Griffiths worked partly out of the Signature premises, and partially from home. As anticipated, she had a good degree of freedom and control over the hours she worked and when she worked in the office, including the freedom to visit clients as needed. Mr Judge did express the view from time to time that she needed to spend more time in the office rather than working from home, but this did not truly amount to anything more, as Ms Griffiths continued to make satisfactory sales, and earn commission at rates acceptable to both her and Mr Judge.

[14] Signature provided her with an office and office equipment, including an email address. She was originally provided with a phone plan, but elected to pay her own phone bill for personal reasons.

[15] Commission was paid monthly in arrears, and varied depending on sales achieved. The rates at which commission was payable were set by Mr Judge. Ms Griffiths had a list of what margins were payable for certain matters, and the other Account Managers had similar lists which they negotiated with Mr Judge. In addition, Ms Griffin says that occasionally Mr Judge would reduce the amount of commission payable, if he deemed the margin she had sold at too low.

[16] Nevertheless, Ms Griffiths was overall happy to work for Signature and Mr Judge, and considered herself appropriately rewarded for her work.

[17] In late 2021, Mr Judge sold the business to Mr Kuluz, the owner of Boost. Mr Judge and Mr Kuluz were known to each other, and had in fact talked about such a transaction before, although the timing had not been right.

[18] Mr Judge and Mr Kuluz talked about the business, and Boost agreed to take on Signature's staff, including the Account Managers, on substantially the same terms and conditions.

[19] Mr Kuluz said that when he asked Mr Judge what those terms and conditions were, Mr Judge provided him with a template individual employment agreement, which

was incomplete and non-compliant. Mr Judge also explained to Mr Kuluz that the Account Managers were paid on a “commission only” basis, and provided Mr Kuluz with a list of the margins payable on certain types of work.

[20] Mr Kuluz had a lawyer draw up a two-page agreement, headed “Offer of Engagement”. This document stated that there was no employment relationship, and that the relationship was that of principal and independent contractor. Attached to this was the list of margins payable on different types of work.

[21] Mr Kuluz held a meeting with all the Account Managers on 16 December 2022, where he talked about taking over the company. He gave copies of the Offer of Engagement and attached list of margins to all the six Account Managers, and asked them to sign.

[22] At the investigation meeting, Ms Griffiths explained that she wished to continue to earn via a commission basis, (which she viewed as being more advantageous to her than a fixed salary) and she wanted to know if Mr Kuluz and Boost would continue to honour the commission rates she enjoyed with Signature. Mr Kuluz confirmed these would remain the same.

[23] Ms Griffiths signed the Offer of Engagement, and corrected the attached list of margins to reflect the terms she had agreed with Mr Judge and Signature. She returned the updated and signed document to Mr Kuluz on 17 December 2021, when he stopped by her office to inquire if she was willing to sign. Ms Griffiths recalled that this was somewhat rushed as Mr Kuluz was traveling back to Auckland the following day and her decision was needed before he left. Mr Kuluz disagreed, and said that when he spoke to Ms Griffiths in her office, she appeared ready and willing to return the signed and updated document to him and made no comment otherwise. Mr Kuluz accepted the changes to the list of margins made by Ms Griffiths (and indeed, the different changes made by the other Account Managers to reflect their own terms and conditions) on trust, and proceeded to implement these in due course.

[24] Both Mr Kuluz and the Account Managers, including Ms Griffiths, understood that the Offer of Engagement was a temporary arrangement (and the document itself records such). In early February 2021, Mr Kuluz had another meeting with the Account Managers to discuss how to proceed. In that meeting, he expressed his concerns that the Account Managers could be viewed as being employees, and his desire for Boost to

formally engage them as employees so as to remove this potential for confusion and legal risk.

[25] Ms Griffiths says that this was an admission by Mr Kuluz that he knew she and the other Account Managers were, properly viewed, employees at all points. Mr Kuluz says that this was not what he said or knew. Rather, he was being honest about the potential for legal risk given the lack of clear documentation in place, and that he wanted the Account Managers to be employees moving forwards, as this was how his other staff were engaged, and he wanted consistency throughout the company.

[26] Following this meeting, Mr Kuluz undertook a restructure of Boost. He offered 4 of the 6 Account Managers employment agreements. The other 2 Account Managers, being Ms Griffiths and one other, were terminated on a month's notice. Ms Griffiths accepts that her commissions earned over January and February that year were low, but says that January was always a low-earnings month, as clients were on holiday, and in both January and February her earnings were lower than they would normally be as she was focused on landing a large commission, which she succeeded in doing the following month.

[27] Ms Griffiths' engagement with Boost came to an end as of 31 March 2022. I must therefore determine if she was an employee of Boost as she claims, before any of her substantive claims stemming from the ending of her engagement with Boost can proceed.

Tests of Employment Status

[28] Section 6 of the Act sets out matters which the Authority must consider when deciding whether a person is employed, as follows:

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority —

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[29] In addition, industry practice may be relevant, although it is far from determinative.

[30] The impact of section 6 is that it is for the Authority to determine the real nature of the relationship, and that the way the parties describe their relationship may not be determinative of the matter, taking into account the entire factual matrix. The position is that:

It is important that the Court or the Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature¹.

[31] I will therefore consider the real nature of the relationship between Ms Griffiths and Boost, as it was while it existed between 1 January 2022 and 31 March 2022. I will analyse the relationship by applying the well-recognised tests of:

- a. Intention;
- b. Control;
- c. Integration;
- d. The “fundamental test”, or whether Ms Griffiths was in business on her own account; and
- e. Industry practice, to the extent that I received evidence about this.

Intention

[32] Both Ms Griffiths and Mr Kuluz gave evidence which went towards establishing the intention held by each of them when entering into the Offer of Engagement, in or around 17 December 2021.

[33] Ms Griffiths gave evidence that she believed the terms and conditions she enjoyed at Signature would not change (or at the least, not significantly change) if she agreed to take up an engagement with Boost.

[34] In giving this evidence, Ms Griffiths emphasised two things. First, she was concerned to ensure that her remuneration structure remained the same. In this, she meant that she wanted to continue her current commission-based earnings structure (she had previously worked on a salaried basis, and had no interest in reverting to that method of remuneration), and she wanted to ensure that Boost would pay her the same

¹ *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [32].

commission rates, or margins, that Signature had paid on her sales. When she was given the Offer of Engagement and attached margin list, she took care to update the margin list by hand, to reflect the payment arrangements she enjoyed at Signature, and which she wanted to continue during her engagement with Boost. Mr Kuluz was aware of these changes, and accepted them upon Ms Griffiths' return of the signed and amended document to him.

[35] Ms Griffith also pointed out that the Offer of Engagement was temporary, and she expected that at some point, a permanent arrangement would be entered into.

[36] With those changes and that caveat, she was willing to enter into the Offer of Engagement. Although Ms Griffiths in her written brief emphasised that she had been told that if she agreed to accept an engagement with Boost "nothing would change", this is not a statement that is helpful in establishing the parties' expectations. Ms Griffiths evidence was consistently that she did not fully or properly understand her legal status or her tax status, and she relied entirely on her accountant for assistance in such matters. Rather, she understood that in exchange for the potential to greatly increase her earnings via the commission-only system, she would not be entitled to regular salary payments or items like paid leave. She also understood she would have greater flexibility to arrange her work, subject to the idea that the more she worked, the greater the likely rewards.

[37] Ms Griffiths expected these aspects of her then-current engagement with Signature to continue if she accepted the Offer of Engagement with Boost, and was reassured by the (albeit limited) terms in the Offer of Engagement. Beyond these practical matters, I find that she did not turn her mind to the question of employment status.

[38] Mr Kuluz's evidence is similar. He gave evidence that he inquired about the existing terms and conditions for the Signature Account Managers, so that he could assess them as part of his due diligence process and make appropriate offers to them. Mr Judge provided him with an unsigned template employment agreement that in Mr Kuluz's view was incomplete and non-compliant, and the template margin list already referred to, which did not reflect the actual margins Mr Judge had agreed with various Account Managers.

[39] On receiving these documents, Mr Kuluz had his lawyer draw up the “Offer of Engagement” document to which was attached a copy of the template margin list, as he viewed the template employment agreement provided as not being a realistic reflection of the terms and conditions actually enjoyed by the Account Managers. The Offer of Engagement clearly stated that it was “on an independent contractor basis”². Point 4 of the Offer of Engagement went on to exclude employment status, saying: “Or relationship is not one of employer and employee, but is one of principal and contractor”.

[40] The other terms in the Offer of Engagement were consistent with this, referring to the Account Manager invoicing Boost monthly, proving their own motor vehicle which was to be “of good standard”, and telephone, allowing the Account Manager to provide the services “at times that suit you” subject to providing notice of an intention to “take time for yourself”, and being responsible for their own tax liabilities.

[41] In addition, the Offer of Engagement invited the Account Manager to take independent advice, although Ms Griffiths’ evidence was that she only had three days to sign and return the Offer and did not in fact take any such advice.

[42] The Offer of Engagement indicates that (at least at that time) Mr Kuluz intended to offer engagement with Boost on an Independent Contractor basis, both then and in the future, as the Offer of Engagement goes on to state: “We intend to issue you with a formal Contractor Agreement in due course, but in the meantime, this is to confirm the basis of your engagement with Boost”³.

[43] I find that the parties did not share a common intention as to Ms Griffiths’ legal status. Mr Kuluz intended to offer her an Independent Contracting Agreement, and Ms Griffiths did not turn her mind to her legal status once she had satisfied herself that the parameters of the Offer of Engagement were sufficiently similar to the practical terms she had previously enjoyed at Signature.

[44] This test is inconclusive.

Control

² This was stated in the first sentence.

³ The second sentence of the Offer of Engagement.

[45] Ms Griffiths' evidence on this point was mixed. She gave evidence that she had considerable freedom to organise how she spent her time, and that this was important to her. She also felt that Mr Kuluz exercised control over how she performed her work when he decided that Boost would not reimburse her for travel to Auckland to visit clients. She indicated that she continued to take responsibility for arranging any time away from work that she intended to take, and that she was not paid for this time, and it was her responsibility to ensure that her clients had coverage (eg by being able to be serviced by another Account Manager) while she was away.

[46] Mr Kuluz took the view that Ms Griffiths was free to a great extent to choose when and how she worked, although he did expect her to be in the office at times. This aspect was less important to him than it was to Ms Griffiths.

[47] On balance, my view is that Ms Griffiths had considerable control of her own time including determining when, where, and how she worked, in a manner more consistent with that of an independent contractor than that of an employee.

Integration

[48] Ms Griffiths' role was to represent Boost, and to effectively be one of the "faces" of Boost, holding client relationships on its behalf. Clients contacted her using a Boost email address, and could contact her by ringing the Boost office telephone number if needed. I have previously mentioned that Ms Griffiths was to provide her own car and mobile phone, however, this distinction would not be visible to clients, and the Offer of Engagement required the car to be "of good standard", which speaks to the expectation that Ms Griffiths was to present herself in a certain way to benefit Boost.

[49] Ms Griffiths was paid by Boost, and received a monthly pay slip in from "Boost Promotions Limited".

[50] In terms of the way Ms Griffiths worked, she was fully integrated into Boost's operation. Her job involved her actively liaising not just with external clients, but with other Account Managers, and several (if not all) other departments within Boost, as needed to ensure that the orders her clients placed through her were being fulfilled in a timely way and so she could be across the process to assist with any problems that might arise. In addition, as an Account Manager, Ms Griffiths' role was one that was integral to Boost's operations, as her role was to sell to clients the products and services that Boost provided. Mr Kuluz acknowledged the importance of the Account Manager role

to Boost, and ensured that the Account Managers as a group were identified as “key personnel” as part of the sale and purchase agreement between Signature and Boost, including that the deal required at least 4 of the 6 Signature Account Managers to agree to transfer to Boost for the sale to proceed.

[51] My view is that Ms Griffiths was, and was acknowledged to be, deeply integrated into the business of Boost in a way consistent with employment status, and inconsistent with independent contractor status.

The Fundamental Test

[52] The fundamental test is a test that examines whether the person performing the services is doing so on their own account. Or to put this another way, whether the person may be said to be acting “as a separate business entity.”⁴ Indications that a person is in business on their own account include situations where the person has some form of profit-share with the business (other than simply earning more by working more hours), where the person has some exposure to business risk along with reward (whereas an employee will usually have little to no personal exposure to the risks involved with running the business), where the person services other businesses or clients, or has other business interests in addition to the services they provide for the respondent business, and where the person has structured their affairs so as to take advantage of their independent contractor status.

[53] The facts show that Ms Griffiths acted more like an employee than an independent contractor. In particular, she worked exclusively for Boost, with her full time role meaning she had no other actual or practicable avenues to provide services for others. The Offer of Engagement in fact required her to provide her services to Boost personally. Ms Griffiths’ opportunities to increase her earnings were explicitly and practically tied to her working more hours for Boost, in the same way an employee would (theoretically) be able to increase their earnings, by providing more of their labour to their employer.

[54] There was mixed evidence provided by Ms Griffiths as to her tax status, and how she had represented her status to other agencies. Ms Griffiths was unable to satisfactorily explain her tax status. I do not find her tax status to be determinative either way. During her time working for Signature, Ms Griffiths applied for a Covid-

⁴ As described in *Bryson v Three Foot Six Ltd* [2005] NZSC 34 at [14].

19 subsidy as an independent contractor, rather than as an employee. There is evidence this was done on advice provided on behalf of Signature. Given the lack of intention or knowledge on the part of Ms Griffiths as to her employment status, I do not find that this single instance was determinative of her status while working for Boost at a later date.

[55] I find that Ms Griffiths was not in business on her own account during the time she was engaged with Boost. Both Ms Griffiths and Boost understood and intended that she was to work for Boost, to the exclusion of other interests, and a key part of her role was to represent Boost to its clients.

Industry Practice and Other Matters

[56] I received very little evidence about what standard industry practice might be, and the evidence I did receive consistently from all witnesses, was that there was a degree of variation. Account Managers or similar roles were employed both as employees and as independent contractors, according to the various needs, desires, and experience of both the company and the worker. I did not find this helpful in establishing Ms Griffiths' status as a matter of fact in her particular circumstances.

[57] I note that Mr Kuluz, through Boost, employed other Account Managers, and after he had taken over the Signature business, he then expressed a desire to engage the Account Managers who had originally worked for Signature as employees.

[58] Although the Offer of Engagement was expressed to be an independent contractor agreement, it was also expressed to be temporary. Ms Griffiths accepted that arrangement. Mr Kuluz explained that Boost already had other Account Managers who were employees. He wanted to run all aspects of Boost's business in a consistent way, which would mean all Account Managers (including Ms Griffiths) would need to be treated like employees, and he was aware that this could expose Boost to legal risk. Mr Kuluz identified this risk, and was open about it with the Account Managers including Ms Griffiths. Mr Kuluz's choice to be open about what he saw as the risk created by the lack of clear and consistent documentation he had inherited, does not amount to an admission of employment status. And, Ms Griffiths (in both the transcript and in her verbal evidence) was more concerned about the commission structure, and retaining this in its current form, than she was about her legal status during these discussions.

[59] For these reasons, I find that these aspects are inconclusive in establishing Ms Griffiths legal status.

Conclusion

[60] I have found that there was no shared intention as to whether Ms Griffiths would be an employee or an independent contractor during her engagement with Boost. Mr Kuluz intended her to be an independent contractor, and Ms Griffiths did not turn her mind to her legal status, or the potential impact of the way her tax affairs were managed.

[61] I have found that Ms Griffiths exercised a level of control over her work that was more consistent with that of an independent contractor than that of an employee. I have also found that the degree of integration into Boost's business was more consistent with that of an employee. Finally, when looked at overall, Ms Griffiths was not in business on her own account, she was working for Boost.

[62] Standing back, and particularly considering the interaction between the high level of integration Ms Griffiths had with Boost, and that she was not in business on her own account, I find that the true nature of the relationship between Ms Griffiths and Boost was that of employee and employer. As the Court has said:

An employee works for the employer, within 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.⁵

[63] In her work for Boost, Ms Griffiths was working in that business, and the work she did enabled Boost's interests to be met. Accordingly, I find that Ms Griffiths was an employee of Boost between 1 January and 31 March 2022.

Outcome

[64] The parties will be contacted by the Authority in due course to discuss how the remaining issues between the parties (including costs) might be appropriately progressed.

⁵ *Leota v Parcel Express Limited*, [2020] NZEmpC 61 at [30].

Claire English
Member of the Employment Relations Authority