

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 369
3157602

BETWEEN	RAJENDRA CHAUHAN First Applicant
AND	HEM LATA CHAUHAN Second Applicant
AND	SD & SD INVESTMENTS LIMITED First Respondent
AND	PRATAP KOLLURU Second Respondent
AND	SREE DEVI KOLLURU Third Respondent

Member of Authority:	Nicola Craig
Representatives:	Amy De-La Cruz, advocate for the applicants Rose Alchin and Sarah Fraser, counsel for the respondents
Investigation Meeting:	21 and 22 September 2022 and 8 February 2023 in Hamilton 13 February 2023 by audio-visual link
Submissions received:	3 March and 11 April 2023 from the applicants 21 March 2023 from the respondents
Date of determination:	12 July 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In 2020 to 2021 Rajendra Chauhan and his wife Hem Lata Chauhan had business arrangements with Pratap Kolluru and his wife Sree Kolluru, running a Chicking fast food store in Taupō.

[2] The Kollurus currently own SD & SD Investments Limited (SD or the company) but for a time the Chauhans were also shareholders.

[3] The Chauhans see themselves as having been employees of SD when they worked at the store. They bring grievances, minimum entitlement and other claims against SD. The company and the Kollurus oppose those claims, arguing there was a business arrangement but not employment relationships. They emphasise that the Chauhans' claim to be employees only arose after they exited the business.

The Authority's process

[4] It was agreed that the preliminary issue of whether Mr Chauhan and/or Ms Chauhan were employees of SD would be investigated first.

[5] An investigation meeting was held in Hamilton commencing on 21 September 2022 and continuing the next day. The Authority was assisted by an interpreter of the Hindi language for Ms Chauhan's evidence, who was involved by telephone and audio-visual link.

[6] A further investigation meeting day set for October 2022 was adjourned at the request of the Chauhans' representative, with consent from the respondents. The parties were unable to find other dates when they were both available until early 2023. The investigation meeting day resumed on 8 February 2023 in Hamilton with the remainder of the evidence heard via audio-visual link on 13 February 2023. Submissions were received in writing.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[8] The issue for preliminary determination is whether Mr Chauhan and/or Ms Chauhan were employees of SD.

[9] It was not suggested that if Mr and/or Ms Chauhan were employees, anyone other than SD was their employer.

The parties' backgrounds

[10] The Kollurus are experienced business people. They have run and owned businesses for over 10 years, including retail stores. Mr Kolluru focused on management with Ms Kolluru having undertaken business studies and worked in bookkeeping. They were looking for a new venture.

[11] The Chauhans were younger although Mr Chauhan accepted he was an experienced businessman. He had previously been a franchisee of a fast food business. In 2020 he was the manager of a Pizza Hut store in 2020 and looking for a business opportunity. He had explored a couple of other franchise possibilities. Ms Chauhan was working at the Pizza Hut store. She had lesser experience in business matters and relied on her husband's expertise and advice.

The establishment of the business arrangement

[12] The Chauhans and the Kollurus were introduced to each other by a mutual friend, as both were looking at going into a new hospitality business. There were discussions and meetings.

[13] In late July 2020 Mr Chauhan and Mr Kolluru both applied for a franchise agreement with Chickling. In August 2020 SD was incorporated with those two as directors and each of the four holding a 25% shareholding. SD, with the Kollurus and Chauhans as guarantors, entered into an agreement to lease Taupō premises intended for the Chicking store.

[14] On 7 October 2020 a sub-franchise agreement was entered into with SD and the Chauhans and the Kollurus as guarantors. Substantial payments were required regarding the franchise. These were paid by the Kollurus.

[15] On 7 October a Memorandum of Understanding (MOU) was entered into between the shareholders of SD. The terms were drafted by the Kollurus in consultation with an accountant.¹ It is not a lengthy document – the terms in relatively large font run a little over a page and encompass 12 paragraphs. They include:

- Both directors had all the rights to do day to day management

¹ Not Mr Vette who gave evidence.

- Mr Kolluru was the director primarily responsible for handling banking, finance, accounts, bill payments and taxes
- Mr Chauhan was the director primarily responsible for the duties of the kitchen, materials purchase, staff issues and sales development
- Clause 6 – “All the shareholders including both the Director(s) can work maximum of 40 hours per week with a remuneration of \$25 / Hour paid fortnightly with strict maintaining roster hours.”
- Clause 7 - Ms Kolluru was solely responsible for PAYE and GST submissions with separate payments to her on invoice of bookkeeping fees of \$150 for each PAYE submission and \$350 for each GST submission. This is “excluding normal working hours pay as per Point no 5”.
- Clause 8 – shareholders “can withdraw amount towards their remuneration and will be adjusted in the profit share of the company at the end of annual financials”.
- Clause 9 – no shareholder can “withdraw more amount than the actual share of profit at the end of the yearly financials, any excess amount drawn more than the profit share has to be returned to the company before 31 March of the year”.

[16] In clause 7 the reference to normal working hours seems likely to relate to clause 6 as clause 5 is about the operation of bank accounts by the directors.

[17] Both parties planned to contribute capital to the business but it seems the Chauhans did not get the funding anticipated. Another Memorandum of Understanding between the Pratap Kolluru Family and the Rajendra Chauhan Family was also signed on 7 October 2020. It provided that the Kolluru Family would advance \$100,000 as a temporary loan to the Chauhan Family towards the capital amount for the Chicking business. This was said to be due to delay in processing “Chauhan’s personal loan application with Bankers”.

[18] Both the Chauhans gave evidence that they had read the MOU before signing it and could have sought advice or raised any concerns with the Kollurus. No issues were raised.

[19] The MOU makes no reference to an employment agreement as such.

[20] Over these months Mr Chauhan, and in some cases Ms Chauhan as well, had to sign a substantial number of documents. These included those for the bank, the Companies Office, insurance and suppliers. The Kollurus did similarly.

[21] The original plan was to open the Chicking store in about October 2020 but that was delayed for various reasons, some of which were Covid related.

Operation of the Chicking business

[22] Mr Chauhan resigned from his full time role at Pizza Hut and became occupied full time on the construction and decoration of the store premises. This full time commitment continued after the store opened with Mr Chauhan managing its operation.

[23] The store opened in mid-January 2021. Mr Chauhan describes working from open until close most days of the week. There was some uncertainty between witnesses about the exact hours but they were around 10am to 10pm, possibly until midnight on weekends.

[24] Ms Chauhan retained her job at Pizza Hut but she claims to have also worked, in her free hours, at the Chicking store.

[25] The Kollurus undertook work for the business. Some was office based work. They also came from their home in Hamilton to work in the store in Taupō, particularly on weekends.

[26] There was some evidence that the business struggled although this was disputed.

Exit of the Chauhans from SD

[27] I do not need to go into detail regarding the conclusion of the business connection between the two families. Suffice it to say that the Chauhans did not receive the funding for their capital input into SD, some extra time was allowed but ultimately the Kollurus decided to bring the arrangement to an end. The parties are in dispute about this.

[28] Mr Chauhan is no longer a director of SD and the Chauhans are no longer shareholders.

Ms Kolluru's diary

[29] I turn to two particular topics before focussing on the criteria for deciding whether the Chauhans were employees or not.

[30] Despite being legally represented for many months, a diary was provided at the Authority's request, when mentioned by Ms Kolluru on the third day of the investigation meeting. For SD and the Kollurus it was submitted that they had not attempted to rely on the diary and so it was not produced earlier. Counsel explained that particular entries were provided earlier to the instructing solicitor and used in drafting the statement in reply. They were not provided to counsel previously. The legitimacy of the diary was challenged by the Chauhans.

[31] I accept that for the purposes of the preliminary issue the diary could well be seen as being less relevant than for the remaining issues. Any issues regarding the genuineness of it can be dealt with along with the substantive issues, if necessary.

Ms Chauhan worked

[32] It is not accepted by SD and the Kollurus that Ms Chauhan undertook work in the Chicking store, whether as an employee or in some other capacity.

[33] Ms Chauhan refers to herself working at the store in what I describe as a flexible way – sometimes 12 noon until 2pm, sometimes 9am to 2pm and sometimes in the evening if needed. She was involved in making salad. Documents referred to as shift time records show her, from the third week after the store opened, working a variety of times. Some weeks no hours are recorded for her. These records were created by Mr Chauhan for both rostering and time sheet purposes.

[34] The Kollurus told the Authority they never saw Ms Chauhan at the store when they were there. That is not surprising as her evidence and the shift time records have her largely working during the week. She was particularly not required when the Kollurus were in Taupō working at the store, which was usually on weekends.

[35] However, the Kollurus did receive the shift time records through the management group chat. Some of these showed a "Hema" working, who Ms Chauhan

identifies as herself. Although he was a part of this group chat, Mr Kolluru was reluctant to accept that he opened or examined these record but admitted that sometimes he might have. Under cross examination he accepted that he sometimes looked at the timesheets to check his own upcoming hours in the store. I do accept that he was not directly involved in paying staff and so would have less focus on the records.

[36] Ms Kolluru did the payroll. Her initial evidence indicated she did not know the the roster contained references to Hema, and that was a reference to Hem Chauhan. When the investigation resumed at a later date, Ms Kolluru provided evidence from her doctor that she is stressed and anxious for certain reasons. She attributed her confusion about the “Hema” reference to this, meaning she could not completely understand the question. Ms Kolluru accepted that Hema was Hem Chauhan and that she knew Ms Chauhan was on the roster.

[37] Two explanations were offered about why the Kollurus might not have thought Ms Chauhan was working despite “Hema” appearing on the shift time records. On the first day Ms Kolluru gave evidence she indicated she had been told by Mr Chauhan that it was not Hema (his wife) but some other person. She recalled him saying he would explain later. She was not told whom the other person was with the other person never paid. She was unable to recall following up regarding this possible other employee. On the next day of the investigation meeting Ms Kolluru suggested that the franchisor required all the shareholders to work in the business and that was why Ms Chauhan had to be on the records.

[38] The Kollurus suggest they understood Ms Chauhan could not work at the Chicking store kitchen due to the slippery floor and back pain. I do not find this likely when Ms Chauhan worked in a similar environment in the other food business.

[39] I conclude that Ms Chauhan did undertake periods of work at the store. From around 11 April 2021 she stopped working at the store, with her evidence being this was because she was not being paid. Her employment status will be considered below.

Determining whether an individual is an employee

[40] Under s 6(1)(a) of the Act an employee is defined as any person “employed by an employer to do any work for hire or reward under a contract of service”.

[41] It is the real nature of the relationship between the parties which must be assessed rather than just relying on any label given by the parties to their arrangement.² All relevant matters including things which indicate the intention of the parties must be considered.³

[42] Excluded from the employee provision is a volunteer who under s 6(c):

- does not expect to be rewarded for work to be performed as a volunteer;
and
- receives no reward for work performed as a volunteer.

[43] Shareholders and directors can have the additional status of employees as well.⁴ This is somewhat accepted by SD and the Kollurus, as discussed below.

[44] The Supreme Court decision in *Bryson v Three Foot Six Limited* provides the following criteria for the employment status assessment:

- the parties' intentions
- any written documentation about the relationship's terms, including any label given
- control over the individual
- integration into the business
- whether the individual was in business on their own account
- any established industry practice

[45] Given that Mr Chauhan and Ms Chauhan had different roles it is possible that one could be an employee and one not.

² Employment Relations Act 2000 (the Act), s 6(2) and (3).

³ The Act, s (3)(a).

⁴ *Lee v Lee's Air Farming Limited* [1961] NZLR 325 PC and *Smith v Practical Plastics Limited* [1998] 1 ERNZ 323.

Intentions and documents

[46] As is not uncommon in such cases, the parties identify different subjective intentions. The Kollurus did not think the Chauhans were going to be employees. The Chauhans thought they were employees.

[47] There was obviously intention to establish a business relationship, as shown by the incorporation of SD and the establishment of directorship and shareholding roles. But what about employment relationships?

[48] Mr Chauhan recalled talk, in the discussions before the MOU, about the shareholders being employees when they worked. There was mention of PAYE. Mr Chauhan's previous experience, even when he was a franchisee was to be an employee. Ms Chauhan was not able to provide much evidence about the discussions leading to the MOU but did think she had been an employee for SD.

[49] Mr Kolluru's understanding was that a director could be an employee but not if they were a shareholder. He thought the Executive Director title indicated employment for non-shareholding director/s. He recalls discussion with the Chauhans about two possible arrangements which he describes as "director's remuneration" or "PAYE wages". He did not see the latter as involving employment, although this was not identified to the Chauhans. There were also mentions of "salary". More on this later in terms of Mr Vette's advice to the Kollurus. Mr Kolluru remembers Mr Chauhan specifying once time for payment was to start, when the store opened, that he wanted the PAYE option.

[50] I conclude that than identification of the Chauhans or all shareholders as employees, it is more likely than not that discussion about the possibility of PAYE being deducted, along with the references to work, salary and the like, lead Mr Chauhan and Ms Chauhan to conclude that employment was what was envisaged.

[51] The concept of employment was not explicitly rejected despite someone who appears to have been an accountant, not Mr Vette, being at one of the meetings.

[52] In terms of documents, the shareholders did not have employment agreements. SD had an agreement with a company to provide employment relations services, including employment agreements for its staff. Mr Chauhan signed this services

agreement for SD. He also signed staff members' employment agreements on behalf of SD.

[53] Mr Chauhan describes him not having an agreement himself as a mistake, saying he believed he did not need one. The Kollurus suggest it was only after the Chauhans were exited from the business and anticipated profits did not materialise that the Chauhans made their claim to be employees.

[54] There was the MOU which describes the intentions and expectations of the parties. The support which provisions of the MOU give to the parties' respective arguments is discussed below.

[55] Where Mr Chauhan's role is referred to in the documents signed for or on behalf of the business, he is referred to as director rather than "Manager" or "Managing Director". This does not assist his claim to employment status.

Some control was exercised

[56] Submissions for the Chauhans emphasise that even Mr Chauhan did not have control over the business (particularly the finances). However, the focus of the employment status assessment is usually whether the business had control over Mr Chauhan or he had control over himself.

[57] Mr Chauhan was the store manager and so had quite a lot of control over the day to day running of the store. He made decisions about hiring staff and accepts that he decided how many hours he worked. However, it seems significant decisions were discussed with Mr Kolluru. Mr Chauhan sent through what were effectively rosters, in advance, to the Kollurus. They changed rosters regarding themselves and occasional comments were made about others.

[58] There could be seen as less control over Mr Chauhan's running of the store than might usually be the case with a store manager. However, I do not accept SD's submission that the Chauhans had absolute autonomy. There were requests to reduce staff hours and therefore the costs. Mr Chauhan, Ms Kolluru and Ms Kolluru discussed a number of aspects of the business. As Mr Kolluru was in charge of the accounts, some decisions had to be run past him.

[59] Example of the Kollurus' control include:

- Ms Kolluru messaging on the management group chat one afternoon, when she was presumably working, indicating that things were quiet and two identified staff were not needed that evening
- Her asking why a particular person was in the morning roster
- Ms Kolluru messaging Mr Chauhan suggesting that the business close by 10 until the alert level is lifted and that would give staff a rest and save wages for the company.
- Mr Kolluru providing numerous reminders to Mr Chauhan about undertaking tasks, particularly regarding the depositing of cash in the bank
- Him messaging Mr Chauhan several times, telling him to postpone and stop media advertisements and instructing him to talk to a creditor about payment

[60] In terms of the company records, Mr Kolluru and Mr Chauhan had similar power; both were directors, both held 25% shares in the company. However, I accept that from a practical perspective there was a power imbalance between the two. Mr Kolluru was a rather more experienced businessman than Mr Chauhan. The MOU gave Mr Kolluru primary responsibility for the important finance and accounts portfolios. The Chauhan family had not paid their share of the capital, rather borrowing it from the Kolluru family. I accept Mr Chauhan's evidence that he felt obliged and grateful to Mr Kolluru for effectively lending him the money for the business.

[61] Ms Chauhan was not involved in company decision making. Her kitchen role was under substantial control of the manager, her husband.

The Chauhans were integrated in the business

[62] It is not disputed that the Chauhans' work was an integral part of the business. However, it is submitted that the work was completed as required by the franchise agreement which prescribed that the franchisee devote their full time and attention to the business.

[63] Looking at the franchise agreement, the franchisee was SD, although the Chauhans and the Kollurus were all shareholders. The company was thus required to devote its full time and attention to the business. The agreement also requires the appointment of one natural person to be appointed as the Manager of the Business (SD) to ensure it is fully compliant with its obligations. Mr Kolluru was the Manager listed at item 23 of Schedule 1, with his phone number and personal email address appearing in the schedule, not that of Mr Chauhan.

[64] A further argument is that the Chauhans accepted that they wanted a profitable business. They did not expect to be paid for the hours worked above the MOU proscribed rates, with the submissions describing it as sweat equity. This is covered below under the volunteers consideration.

[65] I conclude that a number of features point to integration, including:

- Both Chauhans worked at the business' site of operation, the store.
- Mr Chauhan attended work regularly. Ms Chauhan also worked quite a number of shifts.
- The Chauhans and the Kollurus wore the Chicking uniform when working in store.
- Both the store manager and the salad maker role can be seen as integral to the operating of the business. Mr Chauhan has a second in charge who was an employee and other employees made the salad if Ms Chauhan was not present
- The Chauhans were required to advise when they would be away
- Mr Chauhan had an SD credit card although on occasions directors who were not employees may also have such cards.

[66] Mr Chauhan did use his own car and cell phone for the business, including letting staff use his car for work purposes. This is less suggestive of an employment relationship, although there were no other SD vehicles immediately available for use.

[67] Ms Chauhan could be seen as having less integration in the business although potentially only in the way that a casual or part time employee on relatively few hours often does compared to a full time employee.

[68] The Chauhans, including Ms Chauhan while she did time at the store, were integrated in the business, although I accept that there were also other motivations for their involvement than an employment relationship.

Aspects of pay and taxation arrangements conflicting

[69] The arrangement did involve the Chauhans operating in a business which they were partial owners of. They also guaranteed the franchise agreement. As well as being a director Mr Chauhan acted as guarantor for the store's lease and a business loan.

[70] I look now at pay and taxation. Both the Chauhans were named in the shift time records used for staff, although the Kollurus were too. Mr Chauhan was paid regularly, and on the face of his payslips, on an hourly basis. He was only paid for some of his time, to keep within the MOU limit. Ms Chauhan was not paid.

[71] Mr Chauhan did not submit invoices or run his own accounts. He was not working elsewhere or providing services for other businesses. Ms Chauhan did not submit accounts but was working regular shifts in another business. As they were fixed shifts she was able to combine them with work at the Chicking store.

[72] The MOU envisaged fortnightly payments but it appears Mr Chauhan requested weekly payments. In any event, the company's payroll system only allowed one pay frequency and as staff were paid weekly, so were payments to Mr Chauhan and the Kollurus. At some point payments to Ms Kolluru by the system ceased. It was suggested that the amounts received by the two men included the amounts owing to their wives.

[73] PAYE was deducted from payments Mr Chauhan and the Kollurus received for SD activities. The Kollurus had adopted a similar approach with other companies they operated previously. Mr Vette described it as being a matter of convenience that business owners pay regular sums as PAYE rather than intermittent provisional tax or face a large tax bill at the end of the year. These are seen as advances towards payment from profits at the end of the year. However, Mr Vette was not involved in the meetings leading to the MOU being signed and did not draft the terms.

[74] For the Kollurus it was suggested that the payments under clause 6 of the MOU would be deducted from profit sharing at the year. However, although Mr Kolluru also referred to the PAYE arrangement being a matter of convenience, he gave mixed descriptions of whether or not these payments were to be taken into account with the end of year withdrawals. The parties never got to this point.

[75] Until 31 March 2021 the payments to Mr Chauhan were recorded in the company accounts as wages. Ms Kolluru's evidence was that this was a function of the coding by their accounting software. Thus information drawn from bank records allocated all remuneration, said now to be wages and director's salaries, was coded as wages. After this was discovered the accountant recoded it. There is some documentary evidence to support the accountant being given access to make account code additions.

[76] Subsequent payments were identified as directors' salaries but the accounts could not be retrospectively amended.

[77] Kiwisaver payments were made by SD on behalf of Mr Chauhan and Mr Kolluru. Mr Vette indicated that business owners enrolled in a Kiwisaver scheme must pay their contributions to their registered scheme. His understanding is that simply being a business owner does not automatically opt an individual out of the scheme. That may be the case but the payment of employer contributions to a scheme, as distinct from passing on contributions of the owner, plus the deduction of Employer Superannuation Contribution Tax (ESCT) does suggest employment. ESCT was deducted here.

[78] There was also some evidence from Mr Kolluru that the payments to directors from SD included an 8% holiday pay component.

[79] The MOU provision allowing Ms Kolluru to claim by invoice for specific accounting tasks also supports the other arrangement for up to 40 hours work being of a different nature.

[80] I accept that the payment of tax arrangements are not a determinative factor but they go into the mix. Particularly where the Chauhans were not informed about the practical convenience of PAYE payment. SD deducted PAYE, and paid ACC levies and employer contributions to Kiwisaver.

[81] Mr Kolluru sought the wage subsidy for at least himself and Mr Chauhan, along with staff. His evidence was that he understood he was entitled, as a business owner to claim the wages subsidy as long as he was paying PAYE and on IRD tax payment list. This view was based on advice received. Material provided with the Chauhans' closing submissions suggests otherwise but given the late provision of this material, I give this topic little weight.

The Chauhans not solely volunteers

[82] I next look at whether the Chauhans could be seen as volunteers and thus excluded from the definition of employees. The two factors identified in s 6(1)(c) are those who, for their volunteer work, do not expect to be rewarded for work and those who receive no reward for work performed.

[83] Given that Mr and Ms Chauhan were both 25% shareholders in SD it could make sense for them to volunteer for the business. Their efforts could have been compensated by an increase in the value of the company and withdrawal of amounts up to the annual profit level. This is envisaged in clauses 8 and 9 of the MOU.

[84] However, the MOU provides specifically at clause 6 for remuneration to shareholders including directors. The Chauhans could on that basis be seen to expect to be rewarded for work in the business. Pointing towards an employment arrangement are references to:

- Work
- 40 hours per week, a standard full time working pattern
- An hourly rate above the minimum wage, rather than payment for an outcome or a project
- Strict maintaining of roster hours suggesting employment
- The reference in clause 7 to Ms Kolluru's invoice arrangement "excluding normal working hours pay" in (presumably) clause 6
- The language of shareholders withdrawing amounts towards their remuneration does not sit comfortable with remuneration of \$25 per hour being paid fortnightly

[85] The Kollurus and SD argue that clause 6 needs to be read in light of clauses 8 and 9. The work 'remuneration' is used in clause 6 and again in clause 8 about shareholders withdrawing amounts. Their approach is described in submissions as being a living allowance drawable by directors and shareholders which would be accounted for at the end of years financials.

[86] That approach would however mean that someone who had done absolutely nothing for the business would get the same as someone who had devoted 40 hours each week to the business for the whole year. Mr Chauhan's evidence was that there was never talk about the \$25 per hour payment being deducted from the shareholders' returns. I am not satisfied that the Kolluru's approach was spelled out orally and it is not clearly captured in the MOU.

[87] The fact that the claims of employment status were only raised after the Chauhans were exited from the business is a factor but is not decisive. The assessment of whether a person is an employee is an objective one, although including consideration of intentions. The fact that a person did not appreciate that they were an employee during their working time is not fatal.

[88] Mr Chauhan initially acknowledged in his evidence that he did not expect to be paid for all the hours he worked, only those captured by the MOU. For the up to 40 hours of work he did expect to be rewarded and he was rewarded, by way of the payment for \$25 an hour. In re-examination he expressed that he should be paid for the hours above 40.

[89] Ms Chauhan equally expected to be rewarded having understood the arrangement at the start, as captured in the MOU to be that everyone would get paid for the hours they did. She was not actually paid, but raised this with the manager, her husband.

[90] I do not consider that the failure to pay Ms Chauhan at all means she must be considered a volunteer. There must be some element of operating on a voluntary basis, otherwise anyone at arms' length from an employer who works for a short time in a role and is not paid, would be taken to be a volunteer.

[91] I conclude that Mr Chauhan was not a volunteer for the first 40 hours of his work each week. Ms Chauhan was not a volunteer for her work at the store.

The Chauhans were employees

[92] There are a number of factors which suggest that these were not employment relationships. These include the lack of specific discussion about employment and the absence of employment agreements when other staff had written agreements.

[93] However, standing back and looking at the totality of the evidence I conclude that both Mr Chauhan and Ms Chauhan were employees of SD. There were elements of control, particularly for Ms Chauhan and both were integrated in the business. Some aspects of the payment and tax arrangements supported them being employees rather than in business on their own account. They did not run a separate business. In light of clause 6 of the MOU they expected to be remunerated. Mr Chauhan was not volunteering for his first 40 hours and was paid. Ms Chauhan expected to be paid and should not be seen as volunteering.

[94] Along with the Chauhans' substantive claims I leave two questions to be dealt with later. The first is whether Mr Chauhan's work in addition to the 40 hours was as a volunteer rather than as an employee. I do note his initial evidence that he did not expect to be paid for hours worked over 40 a week. The second is whether Ms Chauhan's employment was of a casual nature. These matters were not the subject of submissions and should be left for further evidence and submissions, if needed.

[95] I am considering whether to direct the parties back to mediation now that the employment status of the Chauhans has primarily been determined. The parties are to inform the Authority of their views on that by 26 July 2023.

[96] Costs are reserved and will be dealt with along with costs regarding the substantive investigation, if necessary.

Nicola Craig

Member of the Employment Relations Authority