

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 676
3075592

BETWEEN

ROGER SIMPSON
Applicant

AND

BRAND DEVELOPERS LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: David Balfour, advocate for the applicant
Simon Laphorne, counsel for the respondent

Investigation Meeting: 30 October 2023 by audio visual link

Determination: 14 November 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Brand Developers Limited (BDL) advertises and sells products online and on television through its “TV Shop” brand. It also sells products around New Zealand at live events such as home and trade shows, field days, as well as at pop-up kiosks in shopping malls. TV Shop is known for selling products like ladders, cookware, tools, pillows and more. Roger Simpson is an experienced salesperson who sold BDL products as a demonstrator at live events for around five years. He specialised in selling tools and ladders.

[2] Mr Simpson’s company R & R Demonstrations (2007) Limited (R&R) was engaged through a written agreement to provide those services to BDL. Mr Simpson says BDL exerted significant control over his work over the years and it was not until the end of the relationship that he realised he was actually an employee. For Mr Simpson there was a turning point in the

relationship, when BDL's director began to take an active interest in the New Zealand event operations. Mr Simpson says his conditions of work were altered with no consultation and his sales commission was reduced. Shortly after the relationship was terminated, Mr Simpson raised a personal grievance for unjustified disadvantage. He now seeks an award of compensation, wage and holiday pay arrears and a penalty.

[3] BDL says at all material times it had a business to business relationship with Mr Simpson's company consistent with a written contract between the two companies. BDL says Mr Simpson provided his services through R&R and that he was genuinely in business on his own account for the duration of the engagement.

The Authority's process

[4] This matter took time to progress to an investigation meeting for a number of reasons, not the least being difficulties convening an in person meeting during the COVID-19 pandemic in 2020 and its resurgence in 2021.

[5] Another Authority member held an investigation meeting into this matter in June 2022. The matter was subsequently allocated to me for the continuation of an investigation.¹

[6] A further investigation meeting was held at Mr Simpson's request. All participants attended by audio visual link. Mr Simpson, his wife Rosemary Simpson and BDL's general manager of Live Events Andrew Bailey answered questions under affirmation about written witness statements and affidavits they had provided. The parties chose to rely on written submissions provided to the Authority at an earlier date.

[7] 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. Further, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

The issue

[8] This determination addresses as a preliminary issue whether or not Mr Simpson was an employee while carrying out his work.

¹ Employment Relations Act 2000, Schedule 2, clause 16.

Background

[9] Mr Simpson and Mrs Simpson have been the sole directors and shareholders of R&R since February 2007. Prior to this the Simpsons had operated another company with ostensibly the same name and purpose since June 2004. At the investigation meeting Mr Simpson described R&R as a “Ma and Pa Kettle” company - a small husband and wife company. Mrs Simpson gave evidence that they live off the commissions they earn.

[10] Between about 2010 to 2014 the Simpsons, via R&R, carried out demonstration work for another marketing company. In 2014 BDL acquired that company and a number of demonstrators entered an agreement with BDL to continue services previously provided to the other marketing company. It is common ground that BDL and Mr Simpson signed an agreement on or about 16 October 2014.

[11] The Simpsons then both sold products for BDL. Mrs Simpson was R&R’s first point of contact with BDL and did R&R’s paperwork including invoicing BDL for commissions. Mrs Simpson largely stopped selling BDL products from April 2018 apart from on a couple of occasions, but continued doing the other tasks.

[12] On 6 May 2019 Mrs Simpson wrote to Mr Bailey advising she and Mr Simpson were “resigning” and “terminating” the agreement, giving notice of R&R’s last event.

The law

[13] The Authority’s task is to determine the real nature of the relationship between Mr Simpson and BDL as required by s 6 of the Act. The Court noted in *Leota v Parcel Express Limited* at [6]:²

As s 6(3) makes clear, the mutual intention of the parties (if it can be ascertained) will be relevant to undertaking that task, as will be the way in which the parties have labelled their relationship. But what is equally clear from the express wording of s 6(3)(a) and (b), is that neither intention nor the labelling are determinative; both are pieces of a larger s 6(2) real-nature-of-the-relationship puzzle. If it were otherwise, the underlying purpose of s 6, in particular, and the objectives of the legislation more generally, would be undermined.

[14] The Court also succinctly stated:³

² *Leota v Parcel Express Limited* [2020] NZEmpC 61 at [6].

³ *Leota* at [30].

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.

[15] The outcome of the Authority's inquiry will determine whether Mr Simpson's claims are employment relationship problems amenable to being resolved by the Authority.

[16] I will analyse how the relationship operated in practice and developed over time, including towards the end of the relationship, by considering all relevant factors. The Authority refers to the traditional tests of intention, control, integration, the fundamental or economic reality test, and industry practice in doing so.

Intention of the parties

[17] The agreement signed by the parties in October 2014 is labelled "Independent Contractor Agreement" and identified BDL as "the Company" and "R and R Demos" as "the Contractor". Mr Simpson was the signatory on behalf of R&R. The agreement stated the parties agreed the Company would engage the services of the Contractor on the terms and conditions set out in the agreement.

[18] The agreement recorded that both parties acknowledged the relationship is that of principal and contractor and not that of employer and employee. Under the heading "Relationship", the agreement stated nothing in the agreement "should be interpreted constituting the Contractor, or any person employed or engaged by the Contractor, as an agent, partner or employee of the Company". It further stated the Contractor nor any person employed or engaged by it may "pledge the credit of the Company or represent to anyone" that it or they are an employee of the Company, or that they have any power or authority to incur any obligation on behalf of the Company except as set out the Schedule to the agreement.

[19] The schedule to the agreement succinctly stated the Contractor would provide the services of "Demonstration and Sales". Under the heading "Fees", the agreement stated in consideration for providing services, BDL would pay R&R a fee based on the rate of 25% commission on sales plus GST. The Contractor was required to invoice BDL for payment.

[20] The agreement stated the Contractor would “employ or otherwise engage” Mr Simpson to perform the services under the agreement, with no other person performing them without the Company’s written agreement.

[21] Subject to clauses relating to conflicts of interest, confidentiality and intellectual property, the agreement provided nothing in it should be interpreted as placing any constraints on the Contractor’s ability to perform services for other businesses.

[22] Although Mr Simpson has given evidence he was not involved in R&R’s paperwork, I do not understand his evidence to be that he did not understand the agreement or the legal framework for the relationship. Rather, following R&R’s incorporation in 2007, the Simpsons operated the business for seven years before R&R contracted with BDL. Although admittedly R&R was (and remains) a small family business, Mr Simpson was by October 2014 an experienced business owner along with Mrs Simpson. Further, R&R contracted with BDL on the same or similar terms with which R&R contracted with the company acquired by BDL. I am satisfied that when he accepted BDL’s offer in October 2014, Mr Simpson did so with the knowledge of what such a contract entailed, and with the intention of entering into that type of arrangement. He and BDL had a mutual intention that he would provide services through R&R as a contractor.

[23] Mrs Simpson’s email “resigning” or terminating the agreement in May 2019 enclosed what was said to be a “termination letter according to contract”. The attached letter stated R&R no longer wished to be independent contractors to BDL and was signed off “Roger & Rosemary Simpson, R&R Demonstrations Ltd”. Although not determinative, it was clear from the Simpsons’ evidence that at the point of termination, they had not formed the view that an employment relationship existed or had come into existence. It was only after the relationship was over that Mr Simpson asserted that he was an employee.

[24] I conclude that, at all material times, the parties’ common intention was that theirs was not a relationship of employer and employee. Having that mutual intention is however not determinative. I turn now to considering how the relationship worked in practice.

Control

[25] Mr Simpson says BDL retained almost total control in the relationship and pointed to a number of matters indicating the level of control exerted. BDL disputes this and submits

any control exercised was reasonable and necessary to ensure the efficient and profitable conduct of R&R's business, and to comply with strict regulatory requirements including fair trading requirements and the specific operating conditions required by event organisers and shopping centre owners. It was also intended to maintain consistency in branding.

Ability to appoint substitutes

[26] Clause 3.1 of the agreement entitled R&R to appoint a substitute, which is entirely inconsistent with an employment relationship. While the clause provided BDL's written agreement was required, until BDL updated its Code of Conduct in April 2019, R&R was not required to have written permission for Mrs Simpson or others to sell BDL products.

[27] Mr and Mrs Simpson both worked events and malls selling BDL's products over the years. Sometimes they worked together at events, and sometimes only one of them worked at an event. R&R also employed casual staff, usually students, to work at events (most often malls). It is common ground BDL was not involved in the recruitment of R&R's staff. R&R also paid staff directly without BDL's involvement. Mr Simpson's personal performance of services under the agreement was therefore not required, consistent with the agreement.

Extent of flexibility

[28] Mr Simpson says he had no control over when and where he worked. His evidence was that the itinerary of events for BDL was set six to nine months in advance by attachment of a spreadsheet to emails from BDL employees. He said demonstrators were simply presented with an itinerary of shows and not offered any flexibility. He says once BDL set the schedule without negotiation, he was tied into it. He recalls one instance where he wished to attend an important family event but BDL's response was that if nobody could be found to do that show, he would have to pay for the stand costs.

[29] BDL says the dates of live events are determined by the event organisers, not by BDL. It is accepted that as live events tend to take place on the same dates each year, the dates are known far in advance. Mr Bailey gave evidence that how far in advance live events are booked depends on the event. For example, a major event for the next year may need to be booked shortly after it ends the previous year. With other smaller events, they may be only booked a few months or perhaps weeks in advance. BDL says demonstrators were offered the opportunity to participate in live events but were not obliged to do so. BDL has provided evidence of a small number of occasions when Mr Simpson turned down shows offered by

BDL, and says generally, he had the ability to decide when, and where, he worked. BDL says the only exception was if he withdrew from an event with less than two weeks' notice as BDL would be liable, in these circumstances, to pay costs to the event organiser.

[30] Mr Bailey further says after an event, demonstrators provided feedback about whether they wished to return to the event the next year. If they did not wish to return, they were not required to. Mr Bailey provided an example of an event Mr Simpson declined to return to for economic reasons. The evidence showed Mr Simpson had the ability to make himself unavailable for events, and did so on occasion. The Authority accepts although schedules were set and sent in advance to R&R, and there were restrictions around pulling out of them, this was largely due to the nature of booking live events.

Hours of work and breaks

[31] Mr Simpson says he worked long hours with limited breaks. Given the nature of and trading hours of events and malls, it would not be surprising if long hours were worked and the opportunity for breaks limited. There is no direct evidence of Mr Simpson being penalised or prevented from taking breaks, nor is there a legislative requirement for breaks for persons engaged as contractors.

Mr Simpson's ability to earn

[32] In the early years of the relationship, BDL and R&R (and the other demonstrators) operated a paper-based point of sale system. Mr Bailey gave evidence that BDL had concerns about the level of discounts being offered by demonstrators which created inconsistency with BDL's prices advertised on television. He says this created a compliance issue with its trading obligations. As a result BDL says it introduced an electronic point of sale system which allowed demonstrators to offer discounts to customers only within set parameters.

[33] I am not persuaded that the fact prices were set by BDL with discounts given within certain approved parameters points towards an employment relationship. It could not be said BDL set or controlled Mr Simpson's income by taking the approach it did. That discounts were available and could vary gave Mr Simpson an amount of discretion as to how much profit could be made from a sale which had a direct effect on the amount of commission he could make. He had considerable freedom to maintain or increase his income by using his sales ability, working and selling at more events, and having Mrs Simpson and other workers

work at additional events. He also had the ability to increase his income by selling the products of other companies, as addressed below.

R&R's ability to sell for other companies

[34] R&R retained the ability to sell the products of other companies throughout the relationship. Once Mrs Simpson made the decision to no longer sell on BDL's behalf from about April 2018 (except for on a couple of occasions) she began selling jewellery products on behalf of another company not associated with BDL. As with BDL, R&R invoiced that company following live events and other occasions. While the evidence was clear the Simpsons did not and were not able to sell another company's products on a BDL stand at an event or shopping centre, they were able to do so at another stand as long as it was not a competing product. BDL did not exert unreasonable control on Mr Simpson in this regard, and R&R's ability to sell other products was consistent with their agreement.

November 2018 meeting

[35] Mr Bailey says that by November 2018 BDL's profits were diminishing and the director was reviewing all areas of the business including Live Events in New Zealand. The director travelled here and took the opportunity to express his concerns, apparently using characteristically strong language, at a meeting with demonstrators about the diminishing profits. Mr Simpson gave evidence that after the meeting he went through six months of hell – doubting his abilities, stressing over income, with his mental health suffering. Mr Simpson says the director's mantra was it "was my way or the highway".

[36] Mr Simpson says demonstrators were criticised, verbally abused and belittled on a regular basis at this point. Mr Simpson says the contracts demonstrators originally had were pretty much ripped up and thrown out and at this point they were "most definitely treated like employees and with no respect".

Introduction of Yammer app

[37] Mr Simpson says that after the meeting with the director in November 2018, demonstrators were told to sign up to a Microsoft app called Yammer (now Viva Engage). Yammer could be used on mobile phones and other devices, and allows people within organisations (including by leaders to employees) to share information including through posts, messages and photos. Mr Bailey gave evidence that BDL as a company moved to using

Yammer, and set up a group chat with the demonstrators. Mr Bailey says Yammer allowed BDL to give feedback to demonstrators and see sales figures in real time. Yammer clearly enabled BDL to have more oversight of demonstrators which it did not have previously.

Unilateral commission change

[38] On 14 January 2019 Mr Bailey wrote to the five remaining demonstrators including the Simpsons advising as costs for shows had been steadily increasing and margins for products had declined, especially with a large number of sales being discounted, it was no longer making a sustainable margin anymore. The email stated it was notice that commission rates would be reduced from 11 February 2019. Mr Simpson's commission rates would be reduced by 5% for all events and malls that BDL booked. There was no evidence BDL attempted to reach agreement on this. This was the case despite the agreement stating any changes or additions to the agreement would not be binding unless mutually agreed in writing.

Introduction of recording devices

[39] Mr Bailey gave evidence that BDL put forward a case to demonstrators that they should be audio recorded during events. Mr Bailey says BDL did not implement the requirement for recording devices "across the board" and it appears Mr Simpson was not the only demonstrator to pushback on using a recording device.

Code of Conduct changes

[40] During the relationship R&R was expected to comply with a Code of Conduct. On 17 April 2019, Mr Bailey wrote to the Simpsons providing an updated Code of Conduct. The covering email stated:

As per our phone conversation there have been some updates to the Code of Conduct and requirements for demonstrators for BDL. As discussed the commission rate for the contract has been set and no further discussion will be entered in on rates. It is expected that all contractors provide daily updates of sales and stand display on Yammer. Recordings of demonstrations will commence and you will be required to use the provided recording device at shows to record continuous demonstrations.

Please have a read through the attached and this will need to be signed and returned.

[41] The updated Code of Conduct stated new requirements of demonstrators, including that demonstrators were required to use Yammer and with "no exception" for every event they must send a photo of the stand set up no later than the evening prior to the first day of the event/mall trade; post sales results for each trading day on the same day; and send a photo

of the demonstrator (and any server staff) to ensure appropriate dress code was being complied with. By the first business day after an event, the demonstrator needed to have emailed or called Live Events Accounts to confirm point of sale totals and provide information on discrepancies.

[42] The updated Code also stated each demonstrator was required to record their demonstration/pitch on a continuous basis for each show. Each demonstrator would be provided with a recording device with the purpose of the recording is to work on “improving sales, updating scripts, tweaking demonstrations to get better results and more sales”. Mr Simpson says the requirement to do so was last straw for him and this was when he felt he could no longer continue his services. He objected to wearing a recording device due to privacy concerns of customers, and spoke to the director by phone in April 2019. Mr Simpson recorded the call apparently without the director’s knowledge, and has provided the recording and a transcript of the conversation to the Authority.

[43] In the recording they discuss demonstrators wearing a recording device, and Mr Simpson says he will. The director refers to the remaining demonstrators “whinging” and “moaning” about commissions, his dissatisfaction with the demonstrators’ attitudes and how their stands looked at a show, and how the director was contemplating shutting down live events in New Zealand, and suggesting Mr Simpson get a job with somebody else. There is no express reference during the conversation to Mr Simpson being an employee. BDL also makes the point that any suggestion by the director that Mr Simpson could find another job, could apply equally to an employee or an independent contractor. The Authority is mindful about the weight to be given to the contents of the recording, particularly given the director has not been made available to comment on it. However, it is fair to say it reflects the fact BDL had chosen to take an aggressive approach to issues it saw with the way demonstrators were performing.

[44] Ultimately Mr Simpson did not wear a recording device at live events. BDL says Mr Simpson received no sanction for this. However, Mr Simpson’s evidence is that there were only a small number of shows at which he refused to wear a device, with this requirement being very near the end of the relationship. The updated Code of Conduct makes it clear BDL intended to require the demonstrators to record shows, although Mr Bailey says the first recordings BDL has are from June 2019 of demonstrators who agreed to be recorded.

Finding on control

[45] Although the Authority acknowledges BDL is subject to statutory obligations regarding the sale of goods as well as the requirements of event organisers and malls, the focus of the control test is now generally accepted as focused on whether or not control is exerted and able to be exerted on a worker, not why it is exerted.⁴ BDL clearly exerted direction and control during Mr Simpson's relationship with BDL, but I am not satisfied the level of control was such that an independent contractor relationship did not exist. BDL attempted to and did sharply increase the level of direction and control from around December 2018 or January 2019 to increase sales and profits, more akin to an employment relationship. However, elements of control of Mr Simpson's working activities were, although significant, not uncommon in non-employment situations. Other relevant factors must now be considered.

Integration

[46] The traditional integration test involves an examination of the extent to which a worker is integral to and integrated with an organisation.

[47] The selling of BDL's products at live events and shopping malls clearly formed a part of BDL's business model through which it generated profit. Having demonstrators available to demonstrate and sell products directly to customers at these places was integral to that model. The work Mr Simpson did was in this sense integral.

[48] In terms of integration into the business, Mr Simpson obviously did not generally work at the same workplace as BDL employees, his workplace being mobile at events and malls. This points away from Mr Simpson being integrated with other BDL employees. He did work alongside other demonstrators who were also contracted to BDL in the same way he was.

[49] BDL communicated with the Simpsons as a couple, and also included them as part of an email group when communicating with other demonstrators. None of the demonstrators had a BDL email address and instead they all used their own email addresses – the Simpsons' email address had "r&rdemos" as part of its name. Further, Mr Simpson did not personally

⁴ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150, [2017] ERNZ 835 at [82]-[84], *Bryson v Three Foot Six Ltd* [2003] 1 ERNZ 581 (EmpC) at [48]-[49], as noted in *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192 at [58].

communicate with BDL via email. Instead, all communications from R&R were from Mrs Simpson.

[50] There was evidence BDL provided Mr Simpson with a business card although no example was provided to the Authority.

[51] Mr Bailey says there was no requirement for Mr Simpson to wear a uniform but Mr Simpson asked for personalised t-shirts referring to himself as the “Tools Guy”. Mr Simpson denies he asked for these and that he was required to wear shirts provided by BDL. Mrs Simpson’s evidence was equivocal about whether there was a requirement to wear the shirts provided, however. The updated Code of Conduct provided that a high standard of tidy casual dress was required of demonstrators, stating BDL’s preferred presentation. On balance I am not satisfied were required to wear BDL branded shirts, which has traditionally been seen as a visible indicator of integration into an organisation.

[52] R&R purchased and used their own vehicles for transporting BDL products and for travelling to shows and malls. There was no evidence that the vehicles were BDL branded.

[53] On a number of occasions Mr Simpson sold products at events for BDL and Mrs Simpson sold products for an unrelated company at the same event. Invoices prepared by Mrs Simpson from R&R show this was the case. R&R was therefore able to, and did, contract with other companies. The ability to do so points away from Mr Simpson being integrated into BDL’s business.

[54] Overall I do not find Mr Simpson was fully integrated into BDL’s business.

Fundamental test or economic reality

[55] This test considers whether Mr Simpson could reasonably be in business on his own account or performing services on his own account and thus assumed an element of risk in his engagement with BDL including profit and loss from any joint venture.

[56] Although no doubt Mr Simpson had specialist knowledge and sales skills which he deployed, R&R was able to and did use casual employees to sell products at events and malls. Mr Simpson was able to increase earnings by R&R committing to and working at more shows and malls and selling more products at them. There was also evidence Mrs Simpson negotiated the rental of a Pukekohe retail property with BDL’s approval. She then operated

a pop-up shop from the address between around February 2016 to April 2016, which sold BDL products. This demonstrates the Simpsons had the ability to be entrepreneurial and in doing so increase their income.

[57] R&R was paid by commission and Mr Simpson was incentivised to sell as the more he sold, the more he made. BDL says Mr Simpson had the ability to earn significant revenue, and points to one day where he earned \$17,000 when he sold \$69,000 of ladders. As already noted, R&R rendered invoices to BDL for commissions based on gross sales which were paid accordingly.

[58] The updated Code of Conduct stated all equipment provided (or reimbursed as an expense) was the property of BDL not to be used for any personal purposes. It further stated all images, demonstrations, presentations, audio visual displays, graphics, equipment, layout and designs used at events are the property of BDL. Any materials provided to contractors (for example, demonstration script, or company sales information) were confidential and not to be distributed to any third party without express permission. Mr Simpson was also not responsible for after sales care, as this was strictly BDL's responsibility.

[59] While BDL did reimburse Mr Simpson for certain show expenses for demonstrating product (for example, food to demonstrate cookware) Mr Simpson otherwise met his own travel, accommodation, and fuel costs.

[60] Taxation arrangements are a relevant consideration although care is to be taken to consider whether these may be a consequence of the labelling of a person as an independent contractor.⁵

[61] The agreement provided R&R would be solely responsible for the payment of all levies, assessments, taxes or other payments levied upon it. Mr Simpson believes BDL never saw the demonstrators as contractors for anything other than avoidance of paying a proper hourly wage, overtime, ACC levies, PAYE and KiwiSaver.

[62] The Authority has been provided with copies of R&R's financial reports for the years ending March 2015 to March 2018. R&R used their own accountant who prepared each of the reports. The evidence was clear the Simpsons have managed R&R's accounts since 2007. The reports show R&R offset expenses to claim tax relief and claimed depreciation on various

⁵ *Singh v Eric James & Associates Ltd* [2010] NZEmpC 1 at [17].

home office items, two vehicles (which by 2018 increased to three vehicles). Mr Simpson says the first two vehicles were used for work purposes and third was Mrs Simpson's vehicle used as back up if necessary. Other equipment offset included a generator and a coffee machine. Sales revenue was reported less costs of site fees (where Mr or Mrs Simpson directly booked sale sites) and travel.

[63] The reports show expenses such as ACC levies, accountancy fees, bank charges, computer expenses, entertainment, home office rent, telephone, tolls and internet were deducted from R&R's gross surplus from trading. The reports record R&R reimbursed home office costs to the Simpsons.

[64] The statements show the Simpsons drew shareholder salaries, and R&R paid Mrs Simpson "PAYE wages" as a shareholder. R&R's financial reports record terminal and provisional tax as paid in relation to both Mr and Mrs Simpson.

[65] I do not consider that these tax arrangements were simply a consequence of the labelling of Mr Simpson's activities as a business and not as employment. The tax arrangements entered into and maintained favour strongly an independent contractual relationship rather than one of employment.

[66] Although on a small husband and wife scale, the Simpsons were experienced business operators and submitted invoices for payment to BDL but also to other clients. It was clear that it was Mrs Simpson who undertook administrative tasks including drafting R&R invoices and providing all relevant information to R&R's accountant used to generate the reports supplied to Inland Revenue.

[67] It has been reasonably established Mr Simpson (together with Mrs Simpson) operated the R&R business on their own account.

Industry practice

[68] There was no direct evidence from the parties about what industry practice is. However, the Authority did hear some evidence from Mr Bailey about the current structure of BDL's Live Events division in New Zealand. That evidence was not of particular assistance although it appears BDL now operates a mixed model of contractors and employees. Again, although not indicative of industry practice, the Simpsons themselves continue to operate R&R as they did during their relationship with BDL by selling the

products of other businesses. R&R's current industry classification is recorded as "commission selling service".

Outcome

[69] Section 6 of the Act requires the Authority to determine the true nature of the relationship. I acknowledge and accept Mr Simpson experienced a very difficult period over the last several months of R&R's relationship with BDL. Further, that BDL believed it could make unilateral changes to the relationship (including reducing commission payable and new requirements in the Code of Conduct) certainly highlights where the balance of power lay between BDL and R&R. However, taking account of the totality of the relationship and how it operated, I conclude the real nature of Mr Simpson's engagement was as an independent contractor via his company R&R. For completeness, the Authority is not satisfied the real nature of the relationship changed over time or in its last months to the point that it morphed into an employment relationship.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between them. If they are not able to do so and a determination on costs is needed BDL may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service, Mr Simpson would then have 14 days to lodge any reply memorandum. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. Costs will not be considered outside this timetable unless prior leave is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment to that tariff.

Sarah Blick
Member of the Employment Relations Authority