

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 319
3374503

BETWEEN KELVIN LEWIS TAYLOR
Applicant

AND DESTRO LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Applicant in person
Matthew Hutcheson and Grace Guy, counsel for the
Respondent

Date of Investigation: On the papers

Submissions and Other 3 February, 10 and 13 March 2026 from the Applicant
Information: 3 March 2026 from the Respondent

Date of Determination: 25 May 2026

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Kelvin Taylor, claimed that he was employed by the respondent, Destro Limited (Destro) as a ‘casual’ employee. Destro denied that, and said Mr Taylor was an independent contractor pursuant to a Brand Ambassador Services Agreement dated 17 November 2024 (the Agreement).

[2] Mr Taylor claimed that Destro:

- (a) Breached clauses 1, 6, 7 and 14 of the Agreement.
- (b) Defamed him by making false statements about him.

- (c) Breached the Worker Protection (Migrant and Other Employees) Act 2023, by soliciting free labour and unpaid work from him.
- (d) Breached the Human Rights Act 1993 by discriminating against him on the grounds of his race and gender.

[3] Destro denied Mr Taylor's claims and it disputed the Authority's jurisdiction to investigate them because it said there was not employment relationship with him.

Material facts

Destro

[4] Destro is a marketing agency that services clients who want to run experimental marketing campaigns. "Experimental" marketing referred to "interactive live experiences for companies", such as pop-up stands and product demonstrations that are seen in high traffic pedestrian areas. It also includes mascot work. There are approximately 20 other agencies in New Zealand doing similar work as Destro.

[5] Destro sources Brand Ambassadors to work on its clients' campaigns. Most of its clients are in the Fast Moving Consumer Goods (FMCG) industry, so a lot of campaigns involve marketing those products, such as coffee, food and the like.

[6] Destro employs six permanent internal staff who mostly work from Destro's office in Ponsonby. Destro's director, Ms Portia Brodie works remotely from London and another staff member also usually works remotely, with other staff usually being office based.

Destro's contractors

[7] As at March 2026 Destro had almost 500 contractors, who were categorised into three main titles:

- (a) Brand Ambassadors, engaged as independent contractors.
- (b) Team Leads, who co-ordinate with clients and who have experience and preferably a degree in event management.
- (c) Mascots, involving people who have some acting experience and who are comfortable appearing on television and/or social media, for example by acting as the Colonel Sanders mascot for KFC at events.

[8] Destro also had almost 200 inactive contractors as at March 2026, who had registered with Destro but who had elected to put their profile on “inactive” so they are not offered work. It was usual for contractors to be inactive for several months, often because they are travelling or have found a job.

Brand Ambassadors

[9] Brand Ambassadors are the people who are at the front and centre at the experiential marketing events run on behalf of Destro’s clients, such as the people who hand out products, wear mascot suits and interact with the public. If a Brand Ambassador was not actually working on a campaign then they were not doing any other work for Destro or its clients.

[10] Destro does not provide Brand Ambassadors with uniforms, clothing, tools of trade, Destro branded items or a company email or business card. Brand Ambassadors provide their own clothing for campaigns and are expected to have their own black top and trousers they can wear to campaigns if the client has not supplied clothing or a costume for them.

[11] Brand Ambassadors chose when and where they worked and what they did. They do not have to be available for any campaigns, nor do they need to undertake a certain number of campaigns each month or year. That contrasts with internal staff who are employed to work specified hours and who have to show up to work as per their contracted hours of work.

[12] Brand Ambassadors upload their personal details to Destro’s database, complete an independent contractor agreement and fill out an IR330C IRD form which is the tax document independent contractors have to use. Mr Taylor did this, in the same way that Destro’s other Brand Ambassadors did.

[13] Mr Taylor initially did that through the Jotform platform, but from March 2025 it was done via Destro’s online “Staff Connect” platform. The section in Destro’s Brand Manual that addressed the question “How Do I Fill Out My Invoice?” stated (among other things), “Reminder you are an independent contractor. Scheduling Payments: 20% @ WT”. Individuals were also told this before Destro agreed they could become Brand Ambassadors.

[14] Brand Ambassadors, including Mr Taylor, were paid two weeks after a completed campaign, provided the contractor had submitted an online invoice. Withholding tax at the rate of twenty per cent was deducted from the amount invoiced, but apart from that the contractor

was responsible for any other tax obligations, and they had to pay the ACC levies themselves. Invoices were only paid once the campaign had been completed.

[15] Brand Ambassadors were not paid performance incentives or bonuses by Destro. Sometimes Destro's clients would provide a Brand Ambassador with gift cards for engaging in their campaign, but Destro had no involvement in that, and when it did occur it did not form part of the contractual relationship.

[16] When Mr Taylor first became involved with Destro in November 2024 it was using an Excel spreadsheet to record its contractors' details, so Mr Taylor initially had his personal details added to this Excel spreadsheet. In March 2025 Destro implemented its current online platform Staff Connect, so all contractors' details (including Mr Taylor's) were transferred to that platform, which is still used today.

[17] Brand Ambassadors do not have restraints in their contracts, while Destro's employees do. Brand Ambassadors are free to work for Destro's competitors, and they can and do develop direct relationships with Destro's clients. If a client provides feedback, then Destro will pass on the client's feedback on to the Brand Ambassador. Destro does not discipline or performance manage a Brand Ambassador, as it would (if necessary) for its employees.

[18] If a client requires reporting for their campaign, then the Brand Ambassador needs to do that as part of the work they do on the campaign. Destro does not require any reporting to it from a Brand Ambassador regarding a campaign, so reporting that does occur is client driven as part of the campaign.

Onboarding of Brand Ambassadors

[19] If Destro was interested in someone who wanted to sign up as a Brand Ambassador then an onboarding meeting was conducted with that individual. This addressed Destro's expectations of Brand Ambassadors, pay rates, how to use Staff Connect which is Destro's online campaign listing platform, and IRD independent contractor requirements regarding tax rate and taxation requirements.

[20] If Destro and the individual both wanted to proceed after that onboarding discussion, then the individual was provided with access to Staff Connect and asked to complete their profile by:

- (a) Uploading a photo of themselves.
- (b) Posting a short “blurb” about themselves.
- (c) Uploading a signed copy of the Independent Contract Agreement, a copy of which was provided to them via Staff Connect.

[21] Staff Connect was the online platform Destro used as an internal recruitment tool from March 2025 onwards. Prior to then, this information was exchanged via email and via the online Jotform platform.

[22] After a client asked Destro to provide it with ‘talent’ (i.e. a Brand Ambassador or mascot) for their campaign, Destro entered the campaign into Staff Connect (or prior to March 2025 emailed it out to those signed up to its database). This essentially involved placing the campaign listing, the requirements of the campaign and the pay rates on staff connect for all Brand Ambassadors to see and if interested to apply for.

Brand Ambassador campaigns

[23] A campaign starts with a client contacting Destro and telling it what the campaign brief is. The client advises what qualities it wants in a Brand Ambassador and what is needed from them on the day, when and where the campaign will happen and how long it will take. Destro does not develop the campaign, instead it meets the client’s stated ‘talent’ needs for the campaign.

[24] When Mr Taylor started as a contractor Destro would email out details of each campaign brief and invite the contractors on its database to express interest in campaigns they were available for and interested in doing. Mr Taylor provided an example of campaign opportunities he had received from Destro dated 25 April 2025 which stated, “You have been invited to apply for 4 positions”, which was an example of the usual process for campaign work.

[25] Since March 2025 Destro posts campaigns on its online Staff Connect platform which contractors have registered to access for all Brand Ambassadors to see. Brand Ambassadors can review the client's brief for the campaign and then put their name down if they are interested in doing the campaign.

[26] In some cases a client may specifically ask Destro for a particular Brand Ambassador, in which case that campaign is not posted and instead that particular Brand Ambassador is reached out to individually to see if they want to do the campaign. That did not occur in Mr Taylor's case. Apart from that scenario, all campaign opportunities are open to all Brand Ambassadors.

[27] Once Brand Ambassadors have put their name down for a campaign, Destro checked they met the client's requirements. If so, Destro sent a list of the Brand Ambassadors who were interested in the campaign along with their profiles and the information they had provided when they first signed up as a Brand Ambassador.

[28] Destro did not make a selection or recommendation from the Brand Ambassadors who had applied to work on a particular campaign, it just checked they met the client's particular specifications (such as height requirements) before being presented to the client.

[29] The client selected who they wanted to work on their campaign and Destro informed the Brand Ambassador(s) they had been selected. Then if the Brand Ambassador agreed to work on the campaign the client (or occasionally Destro) would provide a short briefing session on the campaign.

[30] If Destro did the briefing then it simply passed on what the client had told them about the campaign. Destro did not shape or influence the campaign and it had minimal (if any) involvement in the actual campaign. Prior to attending the campaign the Brand Ambassador would be given a campaign briefing document which included all relevant information. This was usually provided by the client but on occasion Destro would draft it based on the client's instructions.

[31] The client supplied the Brand Ambassador with any costume, clothing, uniform or tools needed for the campaign. If the client wanted anything specific done then they raised that directly with the Brand Ambassador, for example the client might specify that a certain number of products had to be handed out during the campaign. Apart from meeting the client's specifications, the Brand Ambassador had a free rein in terms of deciding how they would meet the campaign objectives.

[32] The Brand Ambassador recorded their attendance at the campaign on Staff Connect by logging their arrival and departure time at the campaign event. The Brand Ambassador had to inform Destro if they could not do a campaign that they had committed to working on.

The Dating Void

[33] On 5 November 2024 Mr Taylor was selected as an unpaid participant in The Dating Void, which was a You Tube online dating show, after he had applied for that opportunity. The Dating Void which was run by an entity called The Attention Seeker and was filmed on 7 November 2024. The recording was released on Instagram and then on You Tube in January 2025.

Mr Taylor's relationship with Destro

[34] On 8 November 2024 Destro asked Mr Taylor if he was interested in becoming a Brand Ambassador following his unpaid appearance on The Dating Void. He had a successful onboarding meeting, so on 12 November 2024 Destro sent him an invitation to become a Brand Ambassador. Destro's email stated in bold and underlined font "This role is an Independent Contractor role, please be aware of this when filling out the Contract and IRD form."

[35] Destro emailed Mr Taylor a copy of the Agreement, and IR330C form, its Brand Manual, a link to an invoicing form and instructions on how to complete it which included (among other things) referring to his tax rate being "20% (schedular payments – modelling)".

[36] Mr Taylor signed the Agreement on 17 November 2024 and he sent Destro his "Pitch Deck (Press Kit)". On 26 November 2024 Mr Taylor emailed Destro explaining who he was and what industry skills he had. Mr Taylor described himself as a professional actor, comedian, presenter and host. He said he was a You Tube content creator and relationship coach day-to-day and he was the Head of a Film Collective and Co-CEO of a Production company.

[37] Mr Taylor worked on six campaigns over the period 17 November 2024 to 14 April 2025. He followed the usual Brand Ambassador campaign application process for each campaign. Mr Taylor declined a street casting opportunity on 6 March 2025 because it was considerably less than the rate he had previously charged for such work.

[38] Mr Taylor's text message to Destro declining that opportunity stated, "But taking time away from my business for \$30-\$40 [per hour] gigs (without a guaranteed minimum) or a rate higher than I can find on my own" was not worth it to him.

[39] In April 2025 Destro was asked by the Attention Seeker if it had any "talent" who could replace the previous host of the Dating Void show, which was an unpaid opportunity for someone who wanted to expand their hosting portfolio. On 3 April 2025 Mr Taylor asked to be put forward as host to Destro's pro bono client The Attention Seeker, which Destro did.

[40] The Attention Seeker subsequently informed Destro it was not interested in having Mr Taylor work on its show due to feedback it had received after his appearance on The Dating Void in November 2024. This appearance had pre-dated Mr Taylor's involvement with Destro. On 9 April 2025, Destro informed Mr Taylor he was not successful in obtaining the hosting opportunity and explained The Attention Seeker's feedback as to why.

[41] Mr Taylor disputed the feedback that The Attention Seeker had received about him from others and he also took issue with how Destro had dealt with The Attention Seeker's feedback about him. It was this dissatisfaction that resulted in Mr Taylor's claims against Destro.

[42] The Authority has not investigated The Attention Seeker's views about Mr Taylor or the feedback it said it had received after his appearance on The Dating Void, as it was not relevant to the determination of the status of the parties' relationship and the disputed jurisdiction issues. Suffice to say Mr Taylor believes any negative feedback about him was unfair, unwarranted and likely discriminatory.

[43] On 12 April 2025 Mr Taylor worked on another campaign for one of Destro's clients, during which he attended a client's Super Rugby campaign. Mr Destro said he elected not to continue with Destro after 19 April 2025 due to his dissatisfaction with how it had dealt with The Attention Seeker's feedback about him.

The Authority's investigation

[44] The parties agreed that the disputed jurisdiction should be determined 'on the papers' before any substantive claim was progressed.

[45] Mr Taylor lodged two affidavits. Destro's director, Ms Brodie, lodged an affidavit. Destro's Operations Manager, Ms Rogers, also lodged an affidavit for Destro.

[46] Both parties lodged written submissions after the affidavit evidence had been lodged.

Issues to be determined

[47] The parties agreed the following issues were to be determined:

- (a) Were the parties in an employment relationship?
- (b) If so, does the Authority have jurisdiction over Mr Taylor's alleged:
 - (i) Defamation claim?
 - (ii) Breach of the Worker Protection (Migrant and Other Employees) Act 2023?
 - (iii) Breaches of the Human Rights Act 1993?
- (c) What costs and disbursements should the successful party be awarded?

Were the parties in an employment relationship?*Relevant law*

[48] Mr Taylor's statement of problem (SoP) was lodged on 5 May 2025. Accordingly, the definition of "employee" that applies to him predated the amendments that were made by the Employment Relations Amendment Act 2026 which came into effect on 21 February 2026 as these changes did not apply retrospectively.

[49] Section 6(1) of the Act defines an "employee" as any person employed to do work for hire or reward under a contract of service. An independent contractor performs work under a contract for services so does not fall within this definition of employee.

[50] Section 6(2) of the Act requires the Authority to objectively assess the “real nature of the relationship” between the parties when determining whether someone is an employee. Section 6(3) of the Act requires the Authority to consider all relevant matters, including the intention of the parties, but any statement by the parties about the nature of their relationship is not to be determinative of the status of the parties’ relationship.

[51] The leading case on how s 6 of the Act is to be applied is the Supreme Court decision in *Bryson v Three Foot Six*.¹ An assessment of the “real nature of the relationship” is fact specific and involves consideration of all relevant matters, which includes:²

- (a) The written and oral terms of the contract between the parties.
- (b) Any divergences from or supplementation of those terms and conditions regarding the way in which the relationship operated in practice.
- (c) The way in which the parties have actually behaved in implementing their contract.
- (d) Features of control and integration.
- (e) Whether the contracted person had effectively been working on their own account.

[52] The Court of Appeal in *Raiser Operations BV v E Tū Incorporated Anor* held that a two-step inquiry was necessary. First, the terms of the relationship had to be examined, then the common law tests had to be applied.³ That approach was upheld by the Supreme Court in *Raiser Operations BV v E Tu Inc*.⁴

[53] The Supreme Court in *Raiser Operations BV v E Tu Inc* stated that the parties’ contract terms can be given their normal weight unless the terms were essentially “window dressing” to disguise the true nature of the relationship.⁵

¹ *Bryson v Three Foot Six* [2005] NZCS 34.

² *Bryson*, above n1 at [32].

³ *Raiser Operations BV v E Tu Inc* [2024] NZCA 403, at [97]-[99].

⁴ *Raiser Operations BV v E Tu Inc*, above n3.

⁵ *Raiser Operations BV v E Tu Inc* [2025] NZSC 162, at [86].

Written terms of the parties' relationship

[54] The Agreement recorded that:

- (a) Destro carried out the business of marketing and event management services to businesses in New Zealand.
- (b) Mr Taylor (Brand Ambassador) had expressed an interest in providing marketing and event management services to Clients of Destro from time to time as an independent contractor.
- (c) Destro and Mr Taylor had agreed that he would be engaged as a Brand Ambassador “**as an independent contractor** on the terms and conditions set out in the Agreement”. (emphasis added)
- (d) Mr Taylor agreed Destro could add his name and contact details to “its database of independent contractors” so it could communicate with him about potential, ongoing and concluded campaigns.⁶

[55] The Agreement defined a “Campaign” as a piece of work for Client where the Brand Ambassador provides services to the Client. “Client” was defined as the third party who has engaged Destro to provide Services to it. “Services” was defined as the services provided to the Client as part of a campaign described in a brief provided to the Brand Ambassador by Destro pursuant to clause 21.1 of the Agreement.

[56] Clause 2 of the Agreement recorded that “the Client would determine at its sole discretion whether they wished to engage [Mr Taylor] for a Campaign. Clause 2 also expressly stated “Nothing in this Agreement guarantees [Mr Taylor] any work from Destro.”

[57] Clause 4 set out the online reporting that was required with 24 hours of a Campaign concluding, and provided failure to do so would result in the services provided by Mr Taylor being “incomplete”, which could delay payment. Clause 4 also recognised that Campaigns could be cancelled at short notice, and that “Destro was not responsible for any loss of income, expenses, or damages [Mr Taylor] incurred as a result of [short notice] cancellation.”

⁶ Clause 2 of the Agreement.

[58] Clause 5 of the Agreement had the heading “Independent Contractor” in bold font. Clause 5 expressly stated:

- (a) The parties acknowledged the nature of their relationship was one of contractor and independent contractor.
- (b) There was no obligation on Destro to offer work to Mr Taylor.
- (c) Mr Taylor was not obliged to accept any work that was offered.
- (d) Mr Taylor would not accrue annual, sick, bereavement or other leave.

[59] Clause 6 of the Agreement dealt with “Fees and Payment by Destro”. It provided that Mr Taylor would be paid the fee detailed in the brief Destro had given him subject to provision of a timesheet, audit report, online reporting or feedback (if required) and the return of any gear or equipment the client had given him.

[60] Clause 6 also provided that:

- (a) Destro was not obliged to pay Mr Taylor’s travel costs.
- (b) Mr Taylor had to provide his bank details and a completed IR330C form “to allow Destro to deduct withholding tax from the fee as required by New Zealand tax laws.”
- (c) Schedular Payment Activity on the IR330C would be listed as “Promotional Model”.
- (d) Mr Taylor was responsible for any taxes over and beyond the withholding tax deducted by Destro “including but not limited to ACC levies and student loan payments”.
- (e) Expenses had to be pre-approved and correctly documented before they would be reimbursed.

[61] Clause 7 of the Agreement addressed “Termination”. Clause 7 provided that:

- (a) Either party could terminate the Agreement by one week’s written notice.
- (b) Destro could terminate “at any time” for “any breach” by Mr Taylor that Destro “at its sole discretion deems material”.
- (c) Mr Taylor’s breach of any of the obligations in clause 3 of the Agreement, which set out his obligations as a Brand Ambassador, would be considered by Destro to be a “material breach”.

[62] Clause 11 of the Agreement provided that Mr Taylor would indemnify Destro for any loss it sustained as a result of his breach of the Agreement or arising from a “wrongful or negligent omission” by him.

[63] Clause 12 of the Agreement prevented the parties from assigning or transferring their rights under the Agreement without the prior written consent of the other party.

[64] Clause 14 provided that disputes were to be resolved by mediation and if that failed then by arbitration.

Summary of relevant terms

[65] Relevant terms of the parties’ Agreement included:

- (a) There was no guarantee of work, no contracted minimum hours, nor any expectation or obligation that Mr Taylor accept any work that was available or had been offered to him. Mr Taylor therefore was free to pick which campaigns he worked on.
- (b) While working on a campaign, the parties agreed that Mr Taylor would act professionally, which was considered to be a common sense agreed way of working for public facing campaigns.
- (c) If Mr Taylor was unable to work on a campaign he had committed to, he agreed to notify Destro accordingly.
- (d) Mr Taylor was required to use his own clothing and footwear, although campaign specific products and clothing (such as a costume) could be provided for him to use.

- (e) Training may be provided by Destro's clients relating to the products or services relevant to their particular campaign.
- (f) Reporting may be required by Mr Taylor following a campaign.
- (g) Mr Taylor was not entitled to any annual, sick, bereavement or other leave.
- (h) Mr Taylor agreed to complete an IR330C form (tax rate notification for contractors).
- (i) Mr Taylor was responsible for any taxes due over and beyond withholding tax, including ACC levies and student loan payments.
- (j) Expenses were reimbursed by agreement between the parties.
- (k) Either party was entitled to terminate the Agreement with one week's written notice. Destro could also terminate the Agreement immediately if Mr Taylor had committed a material breach of the Agreement.
- (l) Mr Taylor agreed to indemnify Destro for any losses arising from his actions.
- (m) Both parties agreed they could not assign or transfer their obligations under the Agreement without the other party agreeing in writing.
- (n) The parties agreed disputes would be addressed through mediation and then arbitration.

[66] There were no terms in the Agreement:

- (a) Restricting Mr Taylor's freedom to work or collaborate with other parties, either during the term of the Agreement or after its termination;
- (b) Requiring Mr Taylor to work from Destro's office.
- (c) Providing for disciplinary or performance management.

[67] The contractual terms of the Agreement provided that the parties had entered into an independent contractor arrangement, not an employment relationship.

What was the parties' intention regarding the status of their relationship?

[68] The parties' clearly expressed and mutual intention was that there would be a commercial independent contractor arrangement between them.

[69] That intention was recorded in bold and underlined font in the email that Destro sent Mr Taylor on 12 November 2024 before he had agreed to become a Brand Ambassador. It was also expressly recorded in clause in the “Background”; “Definitions & Interpretation”; “Engagement” and “Independent Contractor” sections of the Agreement the parties had signed.

[70] Mr Taylor had the Agreement for five days before he signed it, so he had time to take advice before signing it had he wanted to do so. By agreeing to the terms Destro had proposed, Mr Taylor had agreed to be an independent contractor.

How did the relationship operate in practice?

[71] Mr Taylor worked on five campaigns and attended one event as a mascot. This involved a total of 30.25 hours work over the period 17 November 2024 to 14 April 2025, which was paid for at the agreed hourly rate advised to him before he had accepted each offer of work.

[72] The parties operated consistently with the arrangements outlined in Destro’s email dated 12 November (sent prior to them entering into a relationship) and with the written terms they had mutually agreed and recorded in the Agreement they signed.

[73] There was no evidence that either party had departed from these arrangements or agreed terms. Nor was there any evidence that the parties’ relationship had changed over time from an independent contractor arrangement into an employment relationship.

[74] Mr Taylor, alongside other Brand Ambassadors, had received campaign briefs from Destro, initially by email, then through Staff Connect. These campaign briefs were informed by Destro’s clients’ expectations for their campaigns.

[75] Destro provided its clients a list of Brand Ambassadors who had indicated they were willing to work on the clients’ campaign, which resulted in clients selecting Mr Taylor on at least six occasions. Mr Taylor also either did not apply for or turned down campaign offers that did not suit him.

[76] Rates for any given campaign were usually offered as per Destro’s standard rates, and these were advised to Mr Taylor via Destro’s Brand Manual. Although Mr Taylor was able to negotiate his rates for a particular campaign, on the one occasion there was evidence he had attempted to do that (by setting out what he had previously charged for that type of work) the client did not select him for its campaign.

[77] The evidence demonstrated that Mr Taylor had exercised his freedom to choose which campaigns he wanted to work on, and he also turned down at least one opportunity that was available to him because it would not have paid him enough to forgo his own other business activities.

[78] Mr Taylor accepted and worked on several campaigns at irregular times from 17 November 2024, at varying rates. At the commencement of a clients' campaign, Mr Taylor would be briefed either by Destro or the client whose campaign it was. If Destro ran the briefing session, then it communicated to him what the client had wanted to happen on their campaign.

[79] Mr Taylor provided his own clothing and he decided how he would meet the client's the campaign objectives. For example, on one instance Mr Taylor decided to do cartwheels in a banana costume which resulted in a delighted client who gave him positive written feedback.

[80] Mr Taylor appeared to have met the specific aims each client he worked for had for their particular campaigns, whether that had involved him promoting a product or engaging with the public in a mascot suit. Once the client's objectives were communicated to Mr Taylor, he was free to decide how to achieve the client's campaign aims. Destro had no involvement in or control over Mr Taylor's creative process in that regard.

[81] If the campaign required certain clothing or items, the client would provide that to Mr Taylor to use. For example, Mr Taylor was provided with a mascot suit by the client for the campaign on 5 January 2025 that he had worked on. Otherwise, Mr Taylor was expected to supply his own clothing, such as a suit for more formal events.

[82] Following each campaign, Mr Taylor was required to fill out and submit a tax invoice to Destro in order to be paid. Ms Brodie's affidavit evidence was that:

- (a) Destro provided Brand Ambassadors a form to use to fill out their own invoices which ensured consistency with invoices and made payment easier, but contractors were free to invoice Destro through other software if they wanted to do so.
- (b) The reference to "PAYE" in the invoices Mr Taylor submitted to Destro was incorrect because in reality it was withholding tax.

- (c) Every deduction in the invoices Mr Taylor submitted was for twenty per cent which reflected the applicable tax rate Destro was required to deduct was withholding tax for non-resident entertainer contractors.

[83] The Agreement did not permit Mr Taylor to subcontract his work for campaigns he had been selected to work on, because the client in each campaign had specifically chosen Mr Taylor to perform that work based on his unique profile. That restriction on subcontracting was understandable given the nature of the work he had been engaged to do.

[84] Mr Taylor was free to contract with whoever he wanted to, even if that was in competition with Destro. Destro assumed Mr Taylor was performing work for others (and/or himself) during their relationship, given his reference to being engaged by an acting agency, his extensive resume, and because he had only worked intermittently for Destro during the relevant period.

[85] There were no restrictions on Mr Taylor developing relationships with any third party, including with Destro's clients.

[86] Destro's evidence established Mr Taylor was treated differently to its employees:

- (a) Employees had contracted hours, whereas Mr Taylor's hours were variable.
- (b) Mr Taylor was not required to attend Destro's office, whereas employees were required to do so unless remote working had been agreed.
- (c) Mr Taylor was not invited to any of Destro's staff/employee events. He did go to a Christmas party that Destro put on for the Brand Ambassadors.
- (d) Mr Taylor could never potentially be subject to a disciplinary process or to performance management, whereas Destro's employees could be.
- (e) Mr Taylor was not provided with a Destro email address, or device (laptop or phone), whereas employees were.
- (f) Destro did not provide Mr Taylor with any performance incentives or bonuses, whereas some employees were provided with those benefits.
- (g) Mr Taylor did not accrue any leave entitlements, whereas employees did.
- (h) Destro's employees have restraints in their employment agreements preventing competition, but Mr Taylor's Agreement did not.

The control test

[87] The control test assesses to what extent Destro exercised control over Mr Taylor. A high level of control is usually indicative of an employment relationship while freedom, flexibility and autonomy is often indicative of an independent contractor arrangement.

[88] Mr Taylor had complete freedom over what if any work he performed. While a particular campaign would require him to work at a specific time and place, he could have refused an offer of work on that campaign if what was required had not suited him.

[89] Mr Taylor was free to decide how he performed a campaign, within the confines of the client's campaign requirements and expectations. Those expectations were similar to any other acting work Mr Taylor performed. He would be required to wear certain clothes during some campaigns, or market a product or perform in a certain way in other campaigns.

[90] The imposition of those expectations was not indicative of a high level of control by Destro that would have been consistent with an employment relationship. The nature of the promotional work Mr Taylor did meant it was reasonable for a client who was engaging his services for marketing purposes to expect minimum standards of professionalism from him in terms of how he showed up during their campaign, to ensure its brand and product were presented to the public in a certain way that met their requirements.

[91] Mr Taylor was free to work for any other party, and he could continue to build his own acting career, run his production company, work on the Film Commission he had established and was running, create You Tube content as well as other creative, business and entrepreneurial activities he was engaged in. Destro did not restrain Mr Taylor's ability to work for others during the parties' relationship.

[92] The minimal level of control exerted by Destro regarding Mr Taylor's services contrasted with the high level control it exercised over its own employees. Destro's employees work certain specified hours, their work was managed and reviewed by Destro, and they were (if appropriate) disciplined and/or performance managed. None of these control indicators applied to Mr Taylor's situation. The control test indicated Mr Taylor was likely an independent contractor, not an employee.

The integration test

[93] The integration assesses to what extent (if any) Mr Taylor's work was an integral part of Destro's business.

[94] Mr Taylor was not provided with a uniform or email address. He did not work from Destro's office, nor was he ever required to attend the Ponsonby office. He was not incentivised for his performance. He was not invited to Destro employee gatherings or events, although he did attend a Xmas function in 2024 that Destro put on for its Brand Ambassadors.

[95] Destro did not hold Mr Taylor out to be 'part and parcel' of its business. Clients who chose him to work on their campaigns would likely have known he was one of a number of Brand Ambassadors who were available to work on their campaigns, in terms of being potential talent that Destro could connect its clients with.

[96] From the outside it would have looked as if Mr Taylor was a contractor, and therefore was separate to Destro's employees. He was able to run his own business and pursue his own entrepreneurial, business, creative and artistic endeavours without limitation. He promoted and marketed himself and his activities without being tied in any way to Destro.

[97] Mr Taylor's time and resources were available for him to use as he wished. Destro did not place any restrictions, limitations or expectation on him, other than requiring him to complete a campaign he had agreed to do in a professional manner. Mr Taylor decided if, and when, he wanted to work, what work he wanted to do and how he wanted to do it.

[98] Mr Taylor could pursue his own relationships with Destro's claims, which would not have been possible had he been an employee.

[99] The integration test indicated the parties were in an independent contractor arrangement not an employment relationship.

The fundamental/economic reality test

[100] The fundamental or economic reality test assessed whether Mr Taylor was in business on his own account. Mr Taylor said he did not provide his services to Destro via a limited liability company but did so personally as an individual.

[101] Mr Taylor's IRD records recorded he was an "Entrepreneur". He described himself in documentation as "a public figure" and he promoted himself as a "personal brand". He declined an offer of work because it paid less than he had previously charged for similar work. Mr Taylor also said such work would have taken "time away from my business". These were all indicators that Mr Taylor was in business on his own account.

[102] Mr Taylor represented himself as someone who was in business on his own account. In communications with Destro, Mr Taylor used his own email address. The sign off for that email included his brand name and listed his accomplishments as an actor, and included links to his social media and Wikipedia page. This indicated he was promoting himself for work opportunities, rather than himself as Destro's employee.

[103] Mr Taylor submitted in evidence his press kit, which detailed his extensive acting experience. He was clearly engaging in other work opportunities while he had an Agreement with Destro.

[104] Mr Taylor promotes himself using his own website and Wikipedia page. He describes himself as a public figure. He does not hold himself out to be Destro's employee.

[105] Mr Taylor's communications demonstrated that he was concerned about his personal brand and anything that could limit his work opportunities or damage his personal reputation and brand. However, he did not show any concern about potentially facing disciplinary or performance management process as a result of The Attention Seekers' feedback about him, which would likely have been the case had he viewed himself as an employee.

[106] Mr Taylor has a production company. He also referred to having a "team" supporting him, comprising a publicist, acting agent, and business partner that supported him with his professional endeavours. He also provided a copy of an agreement dated 24 October 2024 with a "Producer" in which he was recorded as the "Artist" and his Talent Agency was recorded as the "Agent".

[107] Mr Taylor had the ability to profit through his relationship with Destro by accepting the paid campaigns that were on offer, because the more he worked the more he could earn. He also benefited as these increased his acting profile, because he could market the campaigns he had worked in to further increase his public profile.

[108] However, Mr Taylor did not take any business risks as he did not face the risk of incurring personal losses via his relationship with Destro.

[109] Mr Taylor invoiced Destro for the work he did. Although Destro deducted withholding tax, which it had mislabelled as PAYE, this was required for companies engaging non-resident contractors in the entertainment industry.

[110] The fundamental and/or economic reality test indicated the existence of an independent contracting arrangement, not an employment relationship.

Taxation arrangements

[111] Destro provided the invoice template that Mr Taylor completed online in order to be paid. Destro deducted 20 per cent withholding tax which is consistent with an independent contractor. Mr Taylor was advised of that by Destro in its email dated 12 November 2024 and in the Brand Manual before the parties entered into a relationship.

[112] The Agreement also made Mr Taylor responsible for his own tax (apart from the 20 per cent withholding tax Destro had deducted before paying him) and for paying his own ACC levies, which is consistent with an independent contractor's obligations.

[113] However, Destro also provided Mr Taylor with a payslip when it paid him that recorded "Employment details" and which described the tax deducted as PAYE, which is used for employees, even though his tax code was recorded as "WT" which is used for independent contractors.

[114] Accordingly, Mr Taylor's IRD records reflected that Destro was the employer and that PAYE had been deducted from the money it paid him. Destro said that was an administrative error which contradicted the other documentation to the contrary.

[115] Although this pay record indicated Mr Taylor was an employee that one factor did not override all of the other evidence that pointed to him being an independent contractor and that the parties were not in an employment relationship.

Outcome

[116] After standing back and weighing all relevant factors, including the nature of the Agreement, the way it operated in practice, the parties' stated intentions (which was only one factor, so not determinative) and after applying the well-recognised common law tests, Mr Taylor was unable to establish on the balance of probabilities that he had been employed by Destro.

[117] Accordingly, the Authority did not have jurisdiction over the claims Mr Taylor wanted to pursue against Destro, because the parties were not in an employment relationship. Mr Taylor was an independent contractor, not a casual employee.

[118] The Authority does not have jurisdiction over any of the claims Mr Taylor has made in his statement of problem.

What costs and disbursements should be awarded?

[119] Destro as the successful party is entitled to a contribution towards its actual legal costs. This matter will be treated as involving a half day investigation, so the notional starting point for assessing costs is \$2,250.00, which is half of the daily tariff for the first day of an investigation meeting, which is currently \$4,500.00.

[120] The parties are encouraged to resolve costs by agreement. However, if that is not possible then Destro has 28 days from the date of this determination to lodge costs submissions. Mr Taylor then has 14 days within which to lodge his reply cost submissions.

[121] If a costs determination is required, then proof of the legal costs Destro has actually incurred is required. The parties should also identify in their costs submissions any factors they say should result in the notional starting tariff of \$2,250.00 being adjusted.

Rachel Larmer
Member of the Employment Relations Authority