

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 3/07
ARC 30/06**

IN THE MATTER OF an application for a declaration of whether
 a person or persons are employees

BETWEEN PAUL MAURICE MCGREAL
 Plaintiff

AND TELEVISION NEW ZEALAND
 LIMITED
 Defendant

Hearing: 1, 14-16 November 2006
 (Heard at Auckland)

Appearances: Paul Maurice McGreal in person
 Anthony Drake and Naomi Cervin, Counsel for defendant

Judgment: 5 February 2007

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr McGreal has brought this proceeding before the Court seeking a declaration as to whether he was an employee of Television New Zealand Ltd (TVNZ). The application is made pursuant to s6(5) of the Employment Relations Act 2000. The period to which the application relates is January 1995 to January 2005.

[2] Mr McGreal represented himself at the hearing. He presented evidence, which ordinarily would be inadmissible. Mr Drake, counsel for TVNZ, properly raised objections to some of the evidence, which will be noted on the record. I allowed some laxity in the evidence Mr McGreal produced to ensure that he would feel he had been given ample opportunity to present his case.

[3] Having heard the evidence it is difficult to know the real basis upon which Mr McGreal claims to have been an employee of TVNZ for the period in question. I got the impression from some of his evidence and cross-examination of TVNZ witnesses that Mr McGreal brought the proceedings to support his contentions as to his professional abilities and to boost his own self-esteem. On more than one occasion he referred to himself as the best sound engineer at TVNZ and asked witnesses to fortify this view. The relevance of such evidence to the point at issue in this case is negligible.

[4] Originally four days was allocated as hearing time. The Court also made available two extra days in case the case went longer than expected. As it transpired, the hearing occupied three days. In addition, the hearing management meeting was held two weeks prior to the fixture. The opportunity was taken at that time to hear evidence from a defence witness, who was not going to be available for the specified fixture days. All in all Mr McGreal cannot complain that he was not given adequate time for a fair hearing.

[5] It was clear that prior to the hearing and possibly even before commencing proceedings, Mr McGreal had read *Bryson v Three Foot Six* [2003] 1 ERNZ 581. It seemed from the comments he made during the course of evidence, cross-examination of witnesses, and his final submissions, that he was relying upon the integration and control tests enunciated in that decision. As the actual evidence led appeared to be somewhat misdirected, I have endeavoured in this decision to deal with Mr McGreal's application as conscientiously as I can.

Factual events

[6] The history of this matter was set out by Mr Drake in a chronology of events filed at the outset. This document is referred to as an agreed chronology although when I took Mr McGreal through it, he disagreed on one or two points, which I shall shortly mention.

[7] The chronology is set out as follows:

8 November 1989 *Paul McGreal commences employment with Television New Zealand as a sound operator.*

6 April 1994 *Paul McGreal resigns his employment with Television New Zealand with effect from 6 April 1994. Paul*

- McGreal leases approximately \$20,000 worth of equipment to start up a new business.*
- 27 June 1994 Paul McGreal registers Eclipse Audio Limited with the Companies Office.*
- November 1995 – July 1998 Paul McGreal provides services as a sound recorder/engineer with equipment to Television New Zealand through his company Eclipse Audio Limited. Eclipse Audio Limited invoices Television New Zealand for Paul McGreal's services and charges Television New Zealand for equipment hire. During this period, Eclipse Audio Limited also undertakes work for a number of other companies and individuals.*
- July 1998 – April 1999 Paul McGreal provides services as a sound recorder/engineer with equipment to Television New Zealand through Silverback Productions. Silverback Productions invoices Television New Zealand for Paul McGreal's services and for equipment hire. During the same period, Silverback Productions also undertakes work for a number of other individuals and companies.*
- 1999 Martin Gresley of Television New Zealand provides Paul McGreal with a contract for services. Paul McGreal refuses to sign the contract, indicating that he already has a verbal deal in place with Tom McVeigh.*
- 30 March 2000 Television New Zealand makes an offer to Paul McGreal to employ him as a sound operator. Paul McGreal rejects this offer on the basis that the salary offered is too low and the hours do not suit his childcare commitments.*
- April 1999 – February 2002 Paul McGreal, trading as Silverback Productions, provides services to Television New Zealand as a sound recorder/engineer plus equipment. Silverback Productions invoices Television New Zealand for Paul McGreal's services and for equipment hire. During the same period, Silverback Productions also undertakes work for a number of other individuals and companies.*
- February 2002 – June 2003 Paul McGreal, trading as Redline Recorders, provides services to Television New Zealand as a sound recorder/engineer plus equipment. During the same period, Redline Recorders also undertake work for TV3 Network Services Limited.*
- 13 June 2003 Paul McGreal, trading as Grae Sound, provides services as a sound recorder/engineer plus equipment to Television New Zealand.*
- 9 February 2004 Paul McGreal has a discussion with Craig Morris (formerly a Human Resources Manager at Television New Zealand).*

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| <i>April 2003 – March 2005</i> | <i>Grael Sound provides services as a sound recorder/engineer plus equipment to Television New Zealand. During the same period, Grael Sound also provides services to TV3 Network Services Limited.</i> |
| <i>April 2005 – June 2006</i> | <i>Paul McGreal, through Eclipse Audio Limited, provides services as a sound recorder/engineer plus equipment to Television New Zealand. During the same period, Eclipse Audio Limited also undertakes work for a number of other individuals and companies.</i> |
| <i>8 February 2006</i> | <i>Paul McGreal emails Paul Hedges in relation to the sale of a Sony Digibeta multi-format player and editor. Paul McGreal wishes to sell this equipment for \$70,000 plus GST.</i> |
| <i>28 February 2006</i> | <i>Paul McGreal asks Paul Hedges to provide a reference (in support of an application for a rental property). Paul Hedges provides a reference.</i> |
| <i>16 March 2006</i> | <i>Paul McGreal emails Mark Brokenshire of Television New Zealand to enquire as to whether he can rent studio downtime at Television New Zealand for work Mr McGreal is undertaking in relation to music records.</i> |
| <i>22 March 2006</i> | <i>Paul Hedges emails Mark Brokenshire and advises him that he has no difficulty with Paul McGreal renting TVNZ's studio as Mr McGreal is a talented freelance operator.</i> |
| <i>29 March 2006</i> | <i>Paul McGreal emails Paul Hedges in relation to the sale of his studio.</i> |
| <i>21 April 2006</i> | <i>Paul McGreal has a discussion with Sidney Smith at Television New Zealand in relation to his Employment Court claim.</i> |

[8] Mr McGreal disagreed that it was 1999 that Martin Gresley provided him with a contract for services. Mr McGreal says it was more likely the agreement was provided in 2001. He denied refusing to sign it on the basis of a verbal deal with Tom McVeigh. However, in evidence he agreed that he had refused to sign it.

[9] In respect of the offer of employment on 30 March 2000, he denied mentioning that the hours did not suit his childcare commitments. The evidence, however, made it plain that his commitments to his children were a major impediment to his working hours required as an employee.

[10] Apart from these two disagreements, Mr McGreal accepted the chronology as accurate. The events set out coincide with the evidence I heard.

[11] Mr McGreal conceded in evidence sometimes on more than one occasion:

- (a) From 6 April 1994 when he resigned employment with TVNZ he set up a new business as a freelance sound engineer. (In fact an entry from his diary on that date shows that he regarded his resignation for this purpose with considerable glee and elation.)
- (b) Throughout the period for which the declaration is sought he operated as a freelance self-employed sound engineer;
- (c) He contracted work not only with TVNZ but with other television and recording companies including TV3 and the Sky Network;
- (d) He was registered for GST and he invoiced his clients accordingly;
- (e) For periods during the overall period in question he operated his business through registered companies and trading entities and that he was paid a salary by those companies and trading entities. (Accounts produced in the bundles of documents also confirm this.)
- (f) He constantly changed the names under which he operated his business. (I perceive that this was for purposes of minimising income tax. However, when I questioned him about this he indicated that he did it for “*Fun*”.)
- (g) He purchased equipment, leased premises and set up his own sound recording studio as part of his business enterprises. At times he tried to sell equipment to TVNZ and also to persuade them to use his studio.

[12] Prior to his resignation of employment with TVNZ in April 1994, Mr McGreal claimed to have had a dispute over payment of salary with Mr McVeigh who was at that time general manager of operations for TVNZ. The amount involved was approximately \$850. Mr McGreal accused Mr McVeigh of intercepting his pay, which had gone to TVNZ’s pay agent, Armourguard. He further alleged that Mr McVeigh removed the alleged overpayment of \$850. Mr McGreal alleged that after he disputed the matter, the payment was reimbursed to

him. Mr McVeigh appeared as a witness for TVNZ even though he is no longer employed by it. He came to Court under trying circumstances following a long flight from Singapore to Auckland on the day he gave evidence. He stated he could not remember the incident, would have been totally unable to intercept payroll as alleged, and suggested Mr McGreal was lying in his allegations attacking Mr McVeigh's integrity. The events suggested by Mr McGreal seemed to me to be most unlikely. But again I wonder what relevance this incident had to the issue to be decided in this case. Nevertheless it seemed to be a major point in Mr McGreal's evidence and presentation of his case.

[13] Mr McGreal in his evidence and submissions suggested that this incident turned TVNZ against him. That souring, he alleged, meant that throughout the period following his commencing as a freelance sound engineer TVNZ refused to treat him fairly or pay him appropriate rates for his work. He alleged that he was tricked into this situation because:

- (a) TVNZ was and remains a monopoly;
- (b) he would have only been able to obtain work elsewhere in his chosen profession by leaving New Zealand and working abroad; and
- (c) TVNZ knew he was committed to caring for his children as a solo parent and somehow took advantage of the situation.

[14] Mr McGreal called his former wife, Elizabeth Stokoe, to give evidence. Her evidence I think was to provide corroboration for his allegations as to the pay dispute with Mr McVeigh. In that regard of course it was totally hearsay as Mrs Stokoe could only report to the Court what Mr McGreal had told her at the time. She confirmed that he was clearly upset by it.

[15] From another point of view I was a little saddened by Mrs Stokoe's evidence. It confirmed appalling and obsessive behaviour by Mr McGreal towards his wife. At the time of the incident she described, she had just gone through a difficult birth of her second child and the infant was in Intensive Care. When Mr McGreal arrived at the hospital he made no inquiry as to her health or the health of her child. Mrs Stokoe said in evidence that all he could talk about was the dispute at work.

[16] Mr McGreal later attempted to use Mrs Stokoe's evidence as a basis for cross-examination of Mr McVeigh. I could see that he was attempting to put to Mr

McVeigh that Mrs Stokoe's evidence confirmed the truth of his allegations. I had previously anticipated that he was going to attempt this and stopped him from proceeding with that line of questioning. I indicated to Mr McGreal that Mrs Stokoe's evidence was mainly hearsay and could not possibly be used as a basis for the truth of the allegations he was making against Mr McVeigh but merely that he had stated these allegations to her at the time. Of course Mrs Stokoe had not gone into detail as to what the dispute was about, merely that she was aware of a dispute involving Mr McVeigh.

[17] Mr McGreal I perceived did not have any comprehension as to why Mrs Stokoe's evidence could really be given little weight. However, her evidence provided me with considerable insight into Mr McGreal's obsessive personality, which was confirmed by his own evidence, submissions, cross-examination of TVNZ, and behaviour generally as the matter proceeded.

[18] Sadly, Mrs Stokoe confirmed that Mr McGreal's behaviour towards her on the occasion in question was a contributing factor in the demise of their marriage.

Integration

[19] As I have indicated, Mr McGreal raised the issue of integration on many occasions throughout the hearing. He submitted that he was integrated into the workforce of TVNZ and was in effect an employee even though he had resigned employment in 1994 and set up in business on his own account. His submissions on this point were a little muddled. He submitted that his integration arose out of the way in which TVNZ abused its monopoly position to force him to work primarily for it with long hours for inadequate pay. One example he pointed to was the fact that he appeared in the weekly rosters. However, this was no different from other freelance contractors. I cannot see how a roster prepared for good management purposes, which included both employees and independent contractors, confirmed Mr McGreal's allegation that he was an employee.

[20] TVNZ resisted the suggestions by Mr McGreal that he had become an employee. For instance, Mr McGreal claimed on one occasion that he should receive a Christmas bonus along with other employees. This was soundly rejected and it was pointed out to him at the time that he was not an employee and accordingly could not expect such bonus.

[21] The allegation that TVNZ abused its monopoly position was in any event not borne out by the evidence – even that emanating from Mr McGreal himself. A substantial number of invoices were produced in evidence, which showed Mr McGreal provided services to TV3, the Sky Network and other sound recording companies over the years to which he refers. It is true that a substantial amount of the time that he worked as a freelance sound engineer was for TVNZ. However, there was no evidence that he was integrated during that period into the workforce. TVNZ clearly had the work available for him and he took the opportunity to do it. If he had declined the work it is clear it would have been contracted to another freelance engineer.

Control

[22] Mr McGreal also submitted that the control, which TVNZ exercised over him in reality placed him as an employee. There was little if any evidence to support this contention. Mr McGreal was very much left to his own devices. Indeed, the witnesses who confirmed Mr McGreal's abilities, at his prompting, provided the reason as to why he could be left pretty much unsupervised in his work. I suspect, in view of Mr McGreal's view of his abilities, that he would have resented and rejected any attempts to control the way he operated in any event.

Further grounds raised

[23] Other submissions he made to support his application were:

- (a) that there as no written contract – hence this meant he could not be an independent contractor; and
- (b) that the work with TVNZ subsisted for many years – the period was therefore too long for a contract of services to continue.

[24] As to the first of these points, there is substantial evidence as to the way the services were provided including the contemporary documents to which I have referred. These prove conclusively that an oral contract existed. TVNZ did in fact try and get Mr McGreal to sign a written contract but he refused. On another occasion it asked him if he wished to change his status, become an employee and sign an employment contract. He refused to do this. He said in evidence this was because he would have to work hours, which would not enable him to care for his

children as he was a solo parent. In any event, the pay offer was too low. This evidence confirmed that for his own convenience he chose the benefits and flexibility of being in business on his own account.

[25] As to the second of these points, little discussion is required. Simply because a contract exists for many years that cannot per se convert the provider of the services into an employee. There have been many instances where a contract for services has been upheld where the provider of services is tied to a single contracting party over many years. There may be instances where, because of the lengthy nature of engagement with one employer on a contract for services, the reality of the relationship by virtue of control and other factors means it is in fact an employment situation. That is not the case here. It would have some serious conceptual difficulties in this case in any event. This is particularly so when the provider of Mr McGreal's services was a limited liability company or commercial trading entity, which in each of the entities specified in evidence employed Mr McGreal separately.

[26] Mr McGreal expressed considerable bitterness towards TVNZ. He complained about the rates of payment and the way pay was calculated (by hour rather than daily or half-daily rates). My perception, however, is that he was reasonably well treated by TVNZ. It gave him work at times to suit his commitments to his children. He certainly got a lot of work from TVNZ. He was able to work for other players in the industry. For some of the years disclosed in the accounts produced, he earned a good income and indeed substantially more than he would have earned as an employee on salary. In later years he was permitted to charge on a daily or half-daily basis even if he did not work for the full period. He was paid accordingly. There were times when he unilaterally increased his rates and TVNZ agreed to pay the higher rates.

[27] Mr McGreal indicated both in evidence and documents provided to the Court that once his status is decided by me, he intends to launch a claim for damages. Presumably, if he is held to be a self-employed contractor, this will be commenced in the civil jurisdiction of the High or District Court. If he is an employee, presumably he will commence these further proceedings in the Employment Relations Authority. That of course is not the issue before me now. I suspect, however, that a lot of the evidence led by him, which I regard as irrelevant to the one issue before me now, is a precursor as to what is to come.

[28] I gained the impression that any perceived mistreatment of him by TVNZ is not the only reason for his bitterness. There appear to be other factors here. Mr McGreal made no secret of the fact that he had suffered a mental illness and required medical treatment for it. I understand this occurred before he embarked on the present proceedings. I detected an underlying sadness as to the break-up of his marriage and responsibilities and obligations to his children. It may be time for him to try and put his feelings of grievance behind him and get on with life.

Principles applying

[29] I shall deal with these briefly. In view of the evidence I have heard this is not a case where the matter is finely balanced or requires careful analysis of the facts in the context of the legal principles. Mr McGreal specifically referred to the principles of control and integration. I shall deal with his specific submissions shortly.

[30] Using s6 of the Employment Relations Act as the starting point, the Court is required to determine the real nature of the relationship between Mr McGreal and TVNZ. The section requires, as part of that determination, consideration of all relevant matters including any matters that indicate the intention of the parties. In this case there was no written contract and therefore no statement specifically describing the nature of the relationship.

[31] The intention of the parties can in this case be ascertained from the history of the matter starting from the point where Mr McGreal clearly changed from being an employee to a freelance sound engineer, a fact which he specifically recorded in his diary. From that point both parties acted consistently with a contract for services being in place. I have already referred to the steps Mr McGreal then took to set up and run his business. TVNZ was from that point careful to always act consistently with Mr McGreal being a freelance contractor rather than an employee.

[32] I have no doubt from the evidence I have heard that from the date of Mr McGreal's resignation as an employee, it was the intention of the parties that he would continue from that point as a self-employed contractor. Mr Drake included in his submissions reference to the payment and taxation arrangements, the non-exclusive relationship between the parties, and the structuring of the business as evidenced by Mr McGreal's business records. I agree with Mr Drake's analysis.

[33] Industry practice, as far as the evidence went, seemed to suggest that sound engineers were employed by the television companies as either freelance contractors or in-house employees. This factor was therefore inconclusive.

[34] As I have indicated, Mr McGreal referred to the control and integration test. He conveniently overlooked the fundamental or economic reality test, which in this case, if applied to his relationship with TVNZ, would be conclusive. His assertion that the control TVNZ exerted over his performance was such that he was in reality an employee, is difficult to accept. Very little evidence was adduced on this aspect. Indeed, most of the evidence suggested he acted independently, attending when he was required for specifically contracted programmes, and being left very much to his own devices when performing the work.

[35] So far as integration is concerned, I understand his submission to be based on the length of time he performed services for TVNZ and the substantial and concentrated nature of the hours he spent there. Nevertheless, when incidents arose where integration was suggested, TVNZ took care to refute any such suggestion. The request for a bonus is one such example. TVNZ was always careful that the required payments were made only upon submitted invoices. When increases in rates were requested, payment was only agreed following consultation within management. Mr McGreal, while having a substantial amount of work from TVNZ, never reached the position where he was required to be on standby for a full day and perform work as and when requested such as would be required of a salaried employee. He was free to come and go as he pleased when not performing tasks for a specifically contracted programme.

[36] As far as the fundamental or economic reality test is concerned, I have already referred to the way he structured his businesses and little more needs to be said. Consideration of this test leads conclusively to Mr McGreal or more particularly his companies or business entities being engaged by TVNZ on a contract for services. Several of the authorities refer to the situation where, for the purposes of obtaining the benefits of being self-employed such as the substantial tax advantages and independence, plaintiffs are initially happy to be classified as independent contractors. However, they then try to claim the opposite upon termination of engagement to obtain the remedies available for an alleged unjustifiable dismissal: *Massey v Crown Life Insurance Co* [1978] 2 All ER 576,

TNT Worldwide Express (NZ) Ltd v Cunningham [1993] 3 NZLR 681, *Hollis v Vabu Pty Ltd* [2001] HCA 44. In such cases the courts have expressed reluctance to accede to anything other than the economic reality.

Conclusions

[37] None of the usual tests to be applied persuade me that once Mr McGreal resigned from TVNZ as an employee he was then anything other than a self-employed contractor, a “freelancer”, which appears to be the terminology used in the industry. Industry practice is not conclusive as the television companies appear to employ sound engineers both as employees and on independent contracts. Over many years Mr McGreal structured his business operation to maximise the advantages of being self-employed. The way he engaged himself in performing the services required over the time, point clearly to the fact that he was a self-employed independent contractor. This was not only with TVNZ but also the other broadcasters and sound recorders, with which he contracted.

[38] Applying the factors I have referred to, to Mr McGreal’s case, I do not accept his contention that he was so integrated within the structure of TVNZ or that TVNZ exercised such control over him that he could only be regarded as an employee. In this case the evidence to the contrary is simply overwhelming. Indeed, Mr McGreal conceded on numerous occasions during his own evidence that he was a self-employed freelance engineer.

[39] Accordingly, I decline to make a declaration under s6(5) of the Employment Relations Act 2000 that for the period specified in the statement of claim Mr McGreal was an employee of the defendant.

[40] Costs are reserved. I anticipate there will be a dispute as to costs. If an order is sought, memoranda are to be filed within 14 days.

ME Perkins
Judge

Judgment signed at 9.15am on Monday, 5 February 2007