Determination Number: AA 451/05
File Number: AEA 242/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Gregory Paul Sinclair (Applicant)
AND	Local Media Group Limited (Respondent)
REPRESENTATIVES	Roger Bowden, Counsel for Applicant Phillip Howard-Smith, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	6 September 2005
DATE OF DETERMINATION	24 November 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Gregory Sinclair says he was unjustifiably dismissed by his former employer, Local Media Group Limited ("LMG") trading as the George FM radio station. He seeks: declarations that he was an employee of LMG and that the parties' employment agreement was not a fixed term agreement; remedies flowing from his allegation that he was unjustifiably dismissed; and damages for breaches of contractual obligations in respect of access to clients and access to a shareholding in a company named Brand Direct Limited.

[2] Mr Sinclair's employment relationship problem as originally filed included an application for an order for interim reinstatement. An investigation meeting into all matters referred to in the statement of problem, including the substantive grievance, was scheduled for 15 April 2005. The meeting was abandoned on the basis of an indication from counsel that the problem had been settled. There is a written settlement agreement dated 22 April 2005, but there was also a dispute about the implementation of the settlement. None of the issues arising from the settlement are before the Authority, and there was some suggestion the matter would be the subject of proceedings in the courts of general jurisdiction. I am unaware of the fate of any such proceedings.

[3] An amended statement of problem was filed in June 2005. Reinstatement was no longer sought. Instead Mr Sinclair seeks the relief set out above.

[4] This determination addresses the preliminary question of whether the parties were in an employment relationship or whether Mr Sinclair was an independent contractor.

The parties and their agreement

[5] A written agreement commencing 1 February 2002 records the parties as Local Media Group Limited, and G & J Sinclair Limited ("GJSL") by its principal Gregory Paul Sinclair as 'the

Contractor'. The agreement was expressed to be for a term of three years, with a right of renewal for a further two year term on terms and conditions to be negotiated at the time (clause 10). To a significant extent, the present problems arose in the course of the attempts to renegotiate the agreement.

[6] Clause 1 of the agreement said it was a contract for the provision of services, while clause 15 contained an acknowledgement that the Contractor was not an employee of LMG.

[7] GJSL was registered as a company in April 1997. Mr Sinclair and his former wife are the registered directors and shareholders. The company owns real estate and, according to the annual financial statements for the years ending March 2002, 2003 and 2004, its trading activities are principally concerned with the real estate. I was told remuneration under the contract with LMG was paid on invoice, but not to GJSL. Rather for accounting purposes Mr Sinclair was paid initially as a sole trader, and, later, payments were made to Mr and Mrs Sinclair's partnership. Copies of relevant financial statements supported that evidence.

[8] Mr Sinclair himself is a senior and experienced radio sales manager. Because of that, LMG 'headhunted' his services. Thus 'the Contractor' – or Mr Sinclair in practice – was to provide marketing services for the sale of radio advertising to radio stations operated by LMG. Clause 2 (c) of the agreement specified that (with exceptions) Mr Sinclair took sole responsibility for marketing to advertising agencies and advertisers placing commercials across all or part of the George FM national network. The parties referred to these clients as agency and national clients respectively.

[9] Mr Sinclair said in evidence that, as at the commencement of the parties' relationship, he considered himself to be self-employed rather than an employee. Accordingly he has not put in issue his status as at the commencement of the agreement. Instead he says among other things he expected to have exclusive access to national and agency clients, and full control over the way he used his time. He saw himself as operating his own 'agency within an agency' to the extent that his company could employ its own staff and train them to sell to the relevant clients. His expectations were not met once the working relationship began, to a degree Mr Sinclair says meant in reality the relationship became one of employer and employee.

The relationship in practice

[10] In further support of his position that he became an employee, Mr Sinclair relied on the following aspects of the relationship as it operated in practice:

(a) he was not permitted to employ his own staff;
(b) he reported to and was subject to day-to-day control and direction by his managers, extending to aspects of the way he spent his time;
(c) he was subjected to disciplinary procedures; and
(d) clients were removed from his client base without reference to him.

1. Employing his own staff

[11] Clause 2 (c)(v) of the parties' agreement provided:

> "… if the sales activity amongst the target clients of the contractor increases beyond the level of the contractor's ability to provide the quality of service LMG requires, then LMG, after discussion with the contractor may employ an additional sales person. In this situation, the Contractor will retain existing clients."

[12] Although Mr Sinclair envisaged employing his own sales staff and growing his own business, clause 2(c)(v) created an obvious limit on that ability by allowing LMG itself to employ such staff.

It was common ground that Mr Sinclair subsequently raised with Jeffrey Kay, George FM's general manager, a proposal involving his own employment of additional sales staff, but Mr Kay refused to agree to this. Mr Kay said in evidence a reason for the refusal was that there was no justification at the time for acting on the proposal.

[13] That matter was part of a wider dispute between the parties about the allocation of clients under the agreement, not to mention being a significant issue in the parties' attempts to renegotiate it. The issue is also associated with Mr Sinclair's allegation that clients were removed from his client base without reference to him, which I address shortly.

[14] Of more relevance in the present context is the fact that Mr Sinclair employed his own support staff. Whether directly or indirectly he did so by virtue of an income-splitting arrangement with his wife, and for accounting purposes a modest but not insignificant sum was allocated to her in respect of George FM-related activities. Mr Sinclair said his wife did provide him with clerical assistance.

[15] There was also an arrangement with an LMG employee named Maggie. Maggie was originally employed as a receptionist at George FM, but was not fully occupied and sought to advance her position. Messrs Kay and Sinclair, as well as another sales employee named Richard Kirby, reached agreements with her about a new role. Mr Sinclair gave her a position as a sales assistant, on which she was expected to spend about a third of her time. She was paid by way of deductions from Mr Sinclair's remuneration. That much is consistent with the existence of a principal and contractor relationship between Mr Sinclair and LMG.

[16] The matter does not end there because the other two thirds of Maggie's time was to be spent working for George FM and paid for by LMG. Part of that time, however, was to be spent on assisting Mr Kirby. Again at least part of her payment for that assistance was made by way of deduction from Mr Kirby's remuneration, although I was told she did some of Mr Kirby's work in her own time. Mr Kay justified the arrangement by saying Mr Kirby's administrative skills were so lacking that, when Mr Kirby suggested obtaining further assistance at his own expense, Mr Kay saw no need to disagree.

[17] Mr Sinclair argued that, because Mr Kirby was an employee and entered into an arrangement with Maggie similar to his, this meant he was treated in the same way as other employees and the arrangement with Maggie should be seen in that light. Indeed Mr Sinclair said he was treated the same as other employees in a number of respects, including the level of control exerted over his activities.

[18] Mr Kirby's paying for Maggie's assistance is an unusual arrangement for an employee. Mr Sinclair's paying for Maggie's assistance is not an unusual arrangement for a contractor. I do not accept that the mere existence of Mr Kirby's arrangement indicates Mr Sinclair's is consistent with the existence of an employment relationship between Mr Sinclair and LMG.

2. Reporting to and control by managers

[19] The parties' agreement obliged Mr Sinclair to report to the sales and marketing director (clause 2(b)). It also obliged him to use his best endeavours to promote the objectives, listener profile and advertising standards of LMG and its associated formats (clause 3), to meet revenue targets (clauses 11 and 14), and to abide by LMG's policies, work rules and general code of conduct (clause 15 and 'special conditions'). Again, while provisions like these are often said to be indicative of an employment relationship they are not necessarily determinative, and here they were part of a written agreement Mr Sinclair accepted was an independent contract.

[20] The hours of work provision required Mr Sinclair to be available to LMG for sufficient hours of work to fulfil the objectives of the position (clause 4). Such a provision is more consistent with the existence of a principal and contractor relationship than an employment relationship. The leave provision (clause 5) was a little less straightforward in that it referred to annual leave and absences in respect of sickness and for domestic reasons, but it also required the contractor to make arrangements at his own expense to fulfil his contractual obligations during any leave. The latter is a clear indicator of a principal and contractor relationship.

[21] Mr Sinclair said that, in practice, control was exercised over his hours of work and his activities in that he was expected to attend sales meetings, report for work at 9.00 am, and apply formally for leave when he sought time off. Further, he was answerable to Mr Kay regarding his whereabouts. He said restrictions such as these meant in reality he became an employee of LMG's.

[22] I did not find Mr Sinclair's arguments persuasive in this respect. There was no dispute that in general he carried out his contractual obligations with the degree of independence expected of the senior and experienced professional he was, and even he said in evidence that the work environment was not a heavily supervised one. Subject to some limits inherent in the fact that he had contracted to act on behalf of another organisation, as well as those expressed in the parties' written agreement, he was not told how to carry out the substance of those obligations.

[23] Thus, while I accept Mr Sinclair was expected to attend sales meetings, attendance was primarily for communication rather than supervisory reasons. Mr Sinclair could not conduct his duties effectively in isolation – both he and LMG needed to know which clients were being called on, by whom, when and for what purpose, so the activities of both parties were complementary rather than clashing. In short, they needed to be aware of each others' plans.

[24] As for other alleged restrictions on the way Mr Sinclair used his time, I do not accept that he was required to be in the office from 9.00 am – 5.00 pm on Monday to Friday. If in practice he worked from the office, I am not persuaded he did so other than by preference. Moreover his financial accounts showed some provision for a home office, and he claimed tax deductions in respect of some equipment relevant to his George FM activities. Finally, it was abundantly clear that he could not and did not carry out all of his duties at any office, since a great deal of direct client contact was required. Mr Sinclair's point seemed in reality to arise from his general assertion that if he was not in the George FM office at 9.00 am he would be telephoned about where he was. Mr Kay's reply was that staff needed to know how to contact Mr Sinclair so they could pass on approaches or messages from clients which they had received. I found that reply more persuasive than Mr Sinclair's assertion.

[25] There was some generalised evidence about Mr Sinclair's taking Mondays off. Mr Sinclair said he did so a few times a year. The overall vagueness of that evidence was not helpful, and I found more telling Mr Sinclair's comment when asked about whether he worked on Mondays: "I thought I was self employed." While it did not answer the question, such a response indicates Mr Sinclair considered himself free to take time off on Mondays if he wished.

[26] Mr Sinclair also challenged the real extent of his ability to take leave, or time off, when he chose. The procedure was that, if Mr Sinclair wanted time off then, as he put it, he would put in email messages saying he intended taking the specified time off. Mr Kay's evidence was that LMG's expectation was merely that Mr Sinclair ensure cover was in place, and Mr Sinclair was held to that. Otherwise Mr Sinclair's name did not appear on the company's leave schedule and he was not expected to fill in the leave application form applicable to employees.

[27] There were particular incidents which Mr Sinclair said were indicative of a level of control on his attendance beyond this. In August 2004 Mr Sinclair was on holiday in Ohakune when he said Mr Kay ordered him to return to work. When expanding on that in oral evidence he said he had told the sales manager he was going to Ohakune, and if the weather was good he would stay. He did stay, and his evidence was that Mr Kay ordered him back saying his contract would be in jeopardy if he did not return.

[28] Mr Kay denied ordering Mr Sinclair back to work, but not that he contacted Mr Sinclair. I understood it to be common ground that one of Mr Sinclair's clients had approached George FM and Mr Kay wanted Mr Sinclair to contact the client. Mr Kay said he told Mr Sinclair to get hold of the client, or he would. That is not the same thing as ordering Mr Sinclair back to work, but I consider it more likely to be what Mr Kay said to Mr Sinclair. In those circumstances Mr Kay was entitled to expect Mr Sinclair to act on the approach from the client whether or not Mr Sinclair was an employee.

[29] The second incident occurred in late February 2005, when Mr Sinclair planned an absence to conduct personal business in Whangarei. He says Mr Kay contacted him to say he should apply for leave like everyone else. Mr Kay told him any such request would be declined. Mr Kay denied that. Elsewhere Mr Sinclair asserted that Mr Kay told him the 'leave' was cancelled. There was not enough information to support a finding on what really happened during that disagreement. By then the parties' relationship been dysfunctional for several months, and had been the subject of a number of exchanges between lawyers over the same period. I am not persuaded that anything in the incident supports a conclusion that Mr Sinclair had become an employee of LMG's, rather the behaviour was a symptom of the wider disputes between the parties.

[30] Overall I do not accept that, to the extent any control was exercised over Mr Sinclair's activities, it was either inconsistent with a genuinely independent contract or it changed the essential nature of that contract.

3. Subjection to disciplinary procedure

[31] LMG raised with Mr Sinclair concerns about aspects of his behaviour. Four incidents were referred to in evidence. One concerned Mr Sinclair's allegedly drunken and inappropriate behaviour while attending a function to which he had been invited as an associate of George FM. A second involved his behaviour at a nightclub, when he was recognised as an associate of George FM. A third followed a complaint from a Peugeot dealer who made vehicles available to George FM. The vehicles were signwritten with the George FM logo. Mr Sinclair's driving of one such vehicle attracted the attention of the Police, hence the dealer approached George FM. In the fourth incident Mr Sinclair's girlfriend was driving a George FM vehicle, contrary to advice that she was not permitted or insured to drive it.

[32] Regarding Mr Sinclair's behaviour in social situations, George FM was entitled to raise concerns about behaviour which reflected on or was identified with it. This follows from the contractor's obligations in the written agreement, and does not amount to a material change in the nature of the agreement as it was operated in practice.

[33] LMG's response to Mr Sinclair's driving of the Peugeot bore strong similarities to the response that would be expected if Mr Sinclair was an employee. By letter dated 24 September Mr Kay advised that Mr Sinclair's motor vehicle privileges were being withdrawn, and that he was to be subject to the rules applying to other account managers regarding after-hours use of company vehicles. Indeed it seems that was the action which prompted Mr Sinclair to take the view he was in reality an employee. In a letter dated 1 October 2004 from counsel for Mr Sinclair, the removal

of the vehicle was challenged and the possibility that the parties' relationship was really one of employment was raised for the first time. By then the difficulties with the renegotiation had already begun, and associated correspondence had been predicated on the existence of an independent contract.

[34] Regarding the vehicle, the parties' agreement provided at clause 7 (f):

> "If negotiated by the contractor, the provision by contra arrangement of a vehicle on lease, available for the exclusive use of the Contractor, having a capital value of no more than $30,000. Any Fringe Benefit Tax levied to be the responsibility of the Contractor."

[35] The Peugeot in question was provided as part of an agreement of the kind set out in clause 7 (f). Discussion during the investigation meeting revealed a difference of opinion over whether 'if negotiated by the contractor' meant 'if negotiated between the contractor and the provider of the vehicle' or 'if negotiated between the contractor and LMG.' When he acted as he did in September 2004, Mr Kay relied on the latter interpretation. In those circumstances it appears that the real issue concerns the interpretation and application of the contract, and whether there was a breach of the contract, rather than whether any essential change in its nature had occurred in practice.

4. Removal of clients

[36] The allegation about the removal of clients concerns national and agency clients allegedly 'redirected' to George FM sales representatives. Mr Sinclair's evidence in this respect rested on his bare assertion that Mr Kay had removed such clients without reference to him. Mr Kay denied doing so, unless it was at the request of a client. Neither party provided further details.

[37] As I have mentioned, the issue of access to clients was the subject of ongoing disagreement between the parties during their relationship, and is closely related to Mr Sinclair's concern about his ability to employ his own sales staff. The disagreement took on greater importance in late 2004 during the renegotiations, because of its effect both on Mr Sinclair's ability to meet his contracted targets and generate income, and LMG's concerns about its own overall financial performance. Hence in a letter to Mr Kay dated 13 September 2004, counsel for Mr Sinclair wrote:

> "Mr Sinclair tells me that he has had no discussions, as contemplated by the existing contract with LMG, regarding the allocation of agency clients and national clients other than Mr Sinclair.
>
> Mr Sinclair acknowledges that there have been discussions between himself and yourself regarding the allocation of such clients to Company Representatives other than Mr Sinclair, but that these discussions have never reached resolution, and that certainly, there has been no agreement by Mr Sinclair to the provision or allocation of such clients to Company Representatives other than himself. …
>
> It would be helpful … if you could send a list of all agency and national clients, together with a statement of revenue for each client …. This would assist both parties with regard to establishing the amount of money that is owing to Mr Sinclair from any breach of his contract. …"

[38] The letter makes it clear that, at the time, the allocation of clients was being treated as a breach of contract issue. The relevant provision in the parties' agreement is clause 2. I believe that was the correct way of addressing the matter. I do not accept the actions giving rise to the allegation of breach should be interpreted as evidence of a change in the true nature of the parties' contract.

Conclusions

[39] A full analysis of the true nature of the parties' agreement at the time it was entered into is not necessary because the statements Mr Sinclair made in evidence mean he has not put it in issue.

However there was nothing in the evidence to raise any concern about the foundation for his view that at the time he was, and agreed to be, an independent contractor.

[40] What is in issue is whether the essential nature of the agreement changed. Such an approach is available – see for example:

> "… an inquiry into the dealings between the parties after the signing of their contract may be justified to determine whether what may have been intended as an independent relationship has altered to one of employer/employee." **TNT Worldwide Express (NZ) Limited v Cunningham** [1993] 1 ERNZ 695, 712

> "[31] The real nature of the relationship may have evolved or developed in a way that, looked at realistically, is different to the nature of the relationship at the time of its formation or at subsequent times, so the way the relationship has worked in practice may be relevant." **Koia v Carlyon Holdings Limited** [2001] ERNZ 585, 595.

[41] For the reasons set out earlier in this determination, I do not believe the real nature of the relationship changed. Some aspects of the way it worked in practice supported the existence of an employment relationship but these were significantly outweighed by aspects indicating otherwise, and many of the concerns about the working of the contract amounted to disputes about it rather than indicators of a change in its nature.

[42] I therefore conclude that Mr Sinclair and LMG were not in an employment relationship. The Authority cannot take the employment relationship problem Mr Sinclair has raised any further. Such remedies as he may have in respect of his relationship with LMG lie elsewhere.

Apparent concession regarding the existence of an employment relationship

[43] In a letter to counsel for Mr Sinclair, dated 17 December 2004, among other things counsel for LMG said this:

> "Just to summarise:
> 1. …
> 4. Having considered the matter our client accepts your client is an employee."

[44] That is a quite unambiguous statement, and several other references on the face of the letter make it appear that LMG was conceding Mr Sinclair's status as an employee. Accordingly I questioned counsel for LMG about it.

[45] He said the letter was written for the purposes of negotiation, although that is not explicit in the letter. However the letter does open by making reference to a meeting several weeks earlier, and by then the contract renegotiations had been continuing for several weeks. Some of the other issues which are part of this employment relationship problem had also been raised. I accept, at least, that the letter was written in the course of a wider process of negotiation.

[46] Counsel for Mr Sinclair replied by letter dated 20 January 2005, referring to the statement about Mr Sinclair's status as an employee and going on to raise an issue about the fixed term nature of the parties' written agreement in that context.

[47] Counsel for LMG responded in a letter dated 28 January 2005. The letter opened with an assertion that the letter of 17 December 2004 was perfectly clear, and a comment that counsel had not understood it, before saying:

> "1. The contract between the parties dated 1st February 2002 is a contract for the provision of services. …
> 2. …

> [references to counsel for Mr Sinclair's initial stance that the contract was one for services, and the change to the stance that it was one of service]
> 6. We have always been of the view and remain of the view that your client is a contractor and the contract can be terminated in accordance with its provisions.
> 7. What we are saying in our letter is however that if the contract is a contract of service as you now allege (and which we deny), then there is economic justification for your client to accept new conditions of employment and we have set that out in some detail.
> 8. If it is a contract of service then your client faces the prospect of dismissal if he refuses to accept the new conditions."

[48] I do not agree that the 17 December letter was perfectly clear, if by that counsel for LMG meant on its face it set out the same position as the one in the 28 January letter. The letters do not set out the same position, rather the opposite.

[49] Overall while I have not found the explanation entirely satisfactory, I take into account that the parties were in the process of negotiating and any apparent concession was either retracted or corrected relatively soon afterwards. Not only that, Mr Sinclair himself has from time to time changed his position on whether he was an employee or not. Even the April 2005 settlement, which was produced, records that the parties were parties to a contract for services and includes a new contract for services.

[50] For those reasons I have disregarded any apparent concession in the 17 December letter.

Costs

[51] Costs are reserved. The parties are invited to agree on the matter. If they are unable to do so they may seek a determination of the Authority by the filing and service of memoranda within 28 days of the date of this determination.

R A Monaghan
Member, Employment Relations Authority