

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Miles Derl Davis (Applicant)  
**AND** Canwest Radioworks Limited (Respondent)  
**REPRESENTATIVES** Miles Davis, in person  
Clare Bradley, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 2 June 2006  
**ADDITIONAL MATERIAL RECEIVED** 24 July 2006  
**SUBMISSIONS RECEIVED** 4 August 2006  
**DATE OF DETERMINATION** 10 August 2006

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Miles Davis says he was unjustifiably dismissed by his former employer, Canwest Radioworks Limited (“Canwest”). Canwest says Mr Davis was not an employee, but a contactor.

[2] This determination addresses whether the parties were in an employment relationship.

**The parties’ relationship**

[3] Section 6 of the Employment Relations Act 2000 sets out the approach the Authority is required to take when determining this issue. The Authority must determine the real nature of the relationship between the parties, and in particular:

“(3)..

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
- (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.”

1. Written terms of agreement

[4] The written terms of the parties’ agreement are relevant.

[5] Canwest NZ Radio Holdings Limited (a former name of Canwest), Large Productions Limited (a company of which Mr Davis is the sole director and majority shareholder), and Mr Davis

himself as Large Productions' employee, were parties to a written contract dated 24 September 2004. Their arrangement was stated to be a contract for services, with Large Productions contracting to Canwest for the purpose of providing on-air commentary services to Radio Pacific. With reference to s 6 of the Act, this is an indication of the parties' intentions, although it is not to be treated as determining the true nature of their relationship.

[6] Clause 3 of the contract specified that Large Productions was an independent contractor and Mr Davis was its employee. Clause 4 and Schedule A provided that payment of a fee be made to Large Productions following the provision of commentary services and after receipt of an invoice including the company's GST number. The fee was calculated as a specified hourly rate for sports shows, and a specified hourly rate for talk shows. Clause 5 required Large Productions to pay all relevant taxes, and indemnify Canwest for those payments as well as against any loss or damage caused to Canwest's property by Large Productions while Mr Davis was providing talk show services. Clause 6.4 provided that the arrangements with Canwest were not exclusive. All of these provisions are consistent with the true nature of the relationship being that of principal and contractor.

[7] The hours of work requirement, in clause 1.2, required only that Large Productions dedicate the time and commitment necessary to ensure services under the contract were performed. Those services were to be provided at such times as were agreed between the parties. Clause 6.4 provided expressly that Large Productions' arrangements with Canwest were not exclusive. These, too, are consistent with the true nature of the relationship being that of principal and contractor.

[8] For the most part the remaining provisions were neutral as to the true nature of the relationship. At most the provisions relating to termination for misconduct might arguably suggest a degree of control more usually associated with an employment relationship.

## 2. The relationship in practice

[9] Mr Davis accepts that, when it was entered into, the parties' relationship was properly characterised as one of principal and contractor. He has given several inconsistent or unclear statements of his position on that point, but when asked for clarification at the investigation meeting, that was his response.

[10] At the beginning of the relationship Mr Davis' services amounted to providing cover for other on-air hosts on a casual basis, although in or about October 2004 Mr Davis worked for four nights on alternate weeks as a general talkshow host. For awhile (and as permitted by the contract) he carried out other radio work with a competing network during the same period as he was working for Canwest, and he also maintained full time work outside broadcasting. However he was hoping to make a career as a radio talkshow host.

[11] All of this is consistent with the parties' relationship being one of principal and contractor.

[12] Mr Davis says the nature of the parties' relationship changed on 7 February 2005, being the date on which he terminated his full time work outside broadcasting. He was to begin what he says was a full time role at Radio Pacific, as drive time host working Monday – Friday from 3 pm to 6 pm, so left his full time position to be available to take on those duties. By then he had also ceased working for the competing network. He says he was given additional commentary spots on another Canwest radio station, the Rock, thus achieving full time employment with Canwest.

[13] Canwest says Mr Davis remained the casual contractor he had always been. Christopher Gregory, programme director at Radio Pacific, in general accepted Mr Davis' account of the work

he undertook in late 2004 and said he gave Mr Davis work when he could. This tended to amount to covering for other hosts, and Mr Gregory denied making any promises of full time or long term work at Radio Pacific.

[14] Towards the end of 2004 Canwest was planning to launch a new talk back station, Radio Live, revamping Radio Pacific so it focussed on sport. Radio Live would focus on talk shows. The drive show host at Radio Pacific did not return to his slot after the Christmas break, and the pending reorganisation of the station meant Mr Gregory did not seek a permanent replacement. Instead, in or about February 2005, he offered the slot to Mr Davis on an interim basis. The slot would cease to exist when the reorganisation was put into effect.

[15] Radio Live was launched in or about April 2005.

[16] Mitchell Harris, the programme director at Radio Live, wanted to offer Mr Davis some work on the new station. He reviewed the September 2004 contract and also regarded the arrangement with Mr Davis as being for the provision of services on a casual basis. He believed Mr Davis had talent, but did not consider him ready for a full time front line host's position. He told Mr Davis this, and offered him slots on Radio Live on Friday, Saturday and Sunday nights. Later a co-host joined Mr Davis on Saturday and Sunday nights, and Mr Davis agreed to hand the Friday show to another host. He had also participated in a Sunday quiz show which was discontinued in September 2005, as well as providing two 15 minute commentary spots on the station's breakfast show on Mondays to Fridays. On several occasions he provided cover for hosts who were absent.

[17] Because of an incident in October 2005, Mr Harris decided it would be better if Mr Davis' co-host continued to host the Saturday and Sunday night shows alone. By letter dated 19 October 2005 he advised of his conclusion that in recent weeks Mr Davis' on air conduct during those shows was unacceptable, but said, too, that:

"I am still prepared to allow you to continue to do other casual shifts on Radio Live ... but only once I have your written assurance that your behaviour will be to an acceptable standard."

[18] An inability to resolve the matter escalated to the point where Mr Davis ceased to provide any services to Canwest, with the circumstances being the subject of his personal grievance.

### 3. Conclusion as to the real nature of the relationship

[19] Because Mr Davis did not dispute that the arrangement between the parties was one of principal and contractor prior to 7 February 2005, I focus on the nature of the relationship after that date and in particular on the nature and effect of any change in it.

[20] Mr Davis' principal argument seems to be that the offer of the drive time slot on Radio Pacific meant he had achieved the full time broadcasting role he said he had always been promised, thereby making him unavailable for other work. His fortunes thereafter were tied to Canwest. Accordingly he became an employee.

[21] I do not accept that, without more, Mr Davis' accumulation of slots to the point where he arguably achieved full time hours means he became an employee. It is likely his apparent understanding to the contrary is based on a practice Mr Harris described as follows:

"[6] As the station manager I am keenly conscious of the need to differentiate between casual or occasional provision of services to the station and regular, full or near full time employment. Where a host is required to expend full time energies in their work with RadioWorks they are regarded as employees and their employment contracts reflect that status.

[7] However where their role is as commentator and occasional provision of announcing or commentary work, which could not be regarded as a 'fulltime gig', many of those people are employed either personally or through their companies as independent contractors to the station."

[22] I find that the way in which Mr Davis accumulated slots from February 2005 was consistent with his position as a casual host, although he was obtaining an increased amount of work.

[23] For example, the pending reorganisation of Radio Pacific meant the days of the drive time slot were numbered. Mr Davis cannot reasonably have failed to recognise as much, or to understand that the slot was only temporary. There was some equivocation about that during the investigation meeting, but it seems from Mr Davis' submissions that his argument really concerns the likely availability of work on Radio Live once the slot disappeared. He knew the slot was temporary, but does not believe that makes any difference to his argument that he had become an employee. The reason is that there was ongoing work available on Radio Live.

[24] However Mr Davis could have declined the drive time slot and continued to take offers of other slots as before. He chose to accept the drive time slot because he recognised, probably with justification, that it was an opportunity for him to advance his prospects in broadcasting. Retaining his full time work outside broadcasting would mean he was unavailable to take that opportunity. He chose to take it, burning a bridge in the process. That did not change the nature of his relationship with Canwest.

[25] As for the overall availability of work on Radio Live, Mr Harris denied offering full time work to Mr Davis. Indeed he said he warned Mr Davis against cutting off other avenues of work because he could not guarantee enough at Radio Live to constitute full time employment. Because Mr Harris sought to encourage Mr Davis, several slots were made available to Mr Davis. Nevertheless there remained a degree of variability with those slots, and cumulatively they did not have the characteristics of a full time permanent arrangement. They were a step in the right direction as far as Mr Davis' broadcasting career was concerned, but I do not accept they were sufficient to change the essential nature of his agreement to provide services to Canwest.

[26] Mr Davis also relied on the common tests for the existence of an employment agreement, particularly the 'control' and 'integration' tests.

[27] Accordingly Mr Davis pointed to a number of ways in which he said he was closely identified with the radio station, as well as certain controls imposed on the conduct of his radio slots. However there was no evidence any of that changed in a material way after 7 February 2005. In any event, I do not believe a radio station's wish to exercise some quality control over its broadcasts necessarily indicates its relationship with a particular radio host is one of employee and employer. Nor do I accept that encouraging a host to associate his or her name with a radio network or station, or encouraging a host to participate in marketing or public relations events, necessarily means the host is integrated into the station's business.

[28] Finally, it is relevant that Mr Davis offered his services through a company. At least part of that company's business was to provide Mr Davis' services on contract to broadcasters. It maintained that business during and after 2005, apparently with some success in the period from February to October 2005. This indicates that Mr Davis was integrated into the business of Large Productions, not Canwest.

## **Conclusion**

[29] For these reasons I am not persuaded that the true nature of the relationship between Mr Davis and Canwest was one of employer and employee.

[30] Since the Authority can deal only with employment relationships, it is unable to take the termination of the parties' relationship any further.

### **Costs**

[31] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and exchange written details of their position on the matter within 28 days of the date of this determination.

**R A Monaghan**  
**Member, Employment Relations Authority**