

with the parties, the Authority also heard evidence about what occurred in October 2006 when the relationship ended. If the Authority was to find that it had jurisdiction to investigate Mr Evans' personal grievances, then there will be no need to conduct a further investigation meeting in Queenstown.

The issues

- Was Mr Evans an employee of Gibbston Valley?
- If the finding is that Mr Evans was not an employee, then the Authority has no jurisdiction to investigate his claim with respect to his personal grievances.
- If the finding is that Mr Evans was an employee of Gibbston Valley, then the Authority has jurisdiction to investigate whether Mr Evans has personal grievances that he was unjustifiably dismissed and/or unjustifiably disadvantaged.

Was Mr Evans an employee of Gibbston Valley?

The relationship before November 2003

[4] Mr Evans commenced as an employee with Gibbston Valley in 1998. He was initially employed as a kitchen hand but quickly changed roles and became a cellar hand working in the winery.

[5] There was no written employment contract or employment agreement provided to Mr Evans.

[6] In January 2000, Mr Evans was given a position as an assistant/trainee winemaker and he was under the supervision and control of the head winemaker, Grant Taylor. Mr Evans was paid \$17 per hour and bonuses depending on whether the wines received gold, silver or bronze awards.

[7] In January 2002, a company called De Vine Concepts Limited was incorporated. De Vine Concepts Limited subsequently changed its name to De Vine Creations Limited on 19 September 2006. Mr Evans was a sole director of the company which I shall refer to hereafter as the company or De Vine.

[8] Mr Evans' evidence was that he believed the head winemaker was an employee. I accept Mr Stone's evidence that Mr Taylor was engaged by Gibbston Valley as an independent contractor.

The relationship after November 2003

[9] Mr Evans had some discussions and sought some advice from his accountant in terms of De Vine invoicing Gibbston Valley for his services. In November 2003, Mr Evans approached Mr Stone and asked him if he could be paid through a company.

[10] Mr Stone said that Mr Evans asked about becoming an independent contractor like Mr Taylor. I find it more likely than not that Mr Evans did say that he wanted a similar arrangement to that which Gibbston Valley had with Mr Taylor. Mr Stone was comfortable with the arrangement but he did not want it to cost Gibbston Valley any more money. Mr Evans said in his evidence that Gibbston Valley had the advantage of not having to pay PAYE or ACC on his behalf, but there were tax advantages that would stem from such an arrangement for Mr Evans.

[11] The administrative manager for Gibbston Valley, Jane Corbett, gave evidence that she was advised by Mr Stone that Mr Evans was to be treated the same way as Mr Taylor. Ms Corbett said that she was advised that Gibbston Valley would be invoiced for the hours that Mr Evans worked.

[12] Mr Evans' final pay from Gibbston Valley from which PAYE was deducted was 2 November 2003. Mr Evans had been paid all his holiday pay in August 2003 before he went overseas for the September/October period as he had done in previous years to gain overseas experience in wineries. I was provided with all the invoices sent to Gibbston Valley from 10 November 2003 for Mr Evans services. They were in the name of De Vine and contained the company's GST number.

[13] The cost of the service set out in the invoice was initially \$18.36 per hour plus GST. Mr Evans said that the \$18.36 hourly rate was his previous hourly rate of \$17 plus 6% holiday pay and 2% ACC levy. De Vine continued to invoice Gibbston Valley for bonus payments depending on whether the wines received gold, silver or bronze awards. De Vine also invoiced Gibbston Valley for any travel undertaken by Mr Evans in the sum of 62c per kilometre.

[14] From January 2004, De Vine was invoicing at an increased rate of \$19.98 per hour for Mr Evans' services. There was a further discussion between Mr Stone and Mr Evans in or about late 2004 or early 2005. It was agreed as a result of that discussion that from early 2005 Gibbston Valley would be invoiced by De Vine on a monthly basis for Mr Evans' services in the sum of \$4,166.66 plus GST and related expenses and bonuses. This arrangement continued through until October 2006, although, after September 2006, the invoices were received from De Vine Creations Limited.

[15] Mr Evans said that other than being paid in a different way, there was no change to the practical day-to-day relationship he had with Gibbston Valley.

[16] Mr Evans shared an office with Mr Taylor and said that he did not have time, apart from the quiet period of the year, to spend at any duties for anyone other than Gibbston Valley. Mr Evans did accept that he purchased and bottled some wine with his own label, De Vine, but said that this was toward the end of his time with Gibbston Valley from about August 2006.

[17] Mr Evans said that this was the only business in which he was involved other than working full time for Gibbston Valley. Mr Stone said that he thought a considerable amount of preparation had gone into Mr Evans business prior to August 2006. Mr Stone said in his evidence that he considered Mr Evans was establishing himself as a competitor of Gibbston Valley and selling the same varieties of wine. Mr Evans did not accept that.

[18] De Vine did not invoice for Mr Evans' services during the time he was overseas during the September/October months when the invoices were still on the basis of an hourly rate. De Vine did invoice for the period that Mr Evans was overseas when Gibbston Valley was invoiced on a monthly basis. Mr Stone's evidence supported that he was unaware of this. I think that is likely. Ms Corbett said in her evidence that in the initial stages of De Vine invoicing Gibbston Valley Mr Taylor approved the invoices. After a while however Ms Corbett said that she simply processed them regardless of whether they had been approved or not.

[19] Mr Evans said that it was always agreed that holiday pay would simply be incorporated into an hourly rate and that whenever he was sick, Gibbston Valley would continue to be invoiced.

[20] Mr Stone denied that there was any agreement to continue treating Mr Evans as an employee with paid holidays and sick leave. Mr Stone said the agreement was that so long as the work was done, when and how he required it, then that was acceptable.

[21] I accept that there was no keeping of any holiday or leave records for Mr Evans as one would expect for an employee after November 2004. The invoices themselves show no specific entry that would show Mr Evans was sick on a particular day. That is not to say that De Vine did not invoice Gibbston Valley for services performed when Mr Evans was absent. There is no evidence, however, to support that Gibbston Valley was aware of this at the time it processed and paid the invoices.

[22] In September 2006, Mr Evans suffered second degree burns from a house fire. He was unable to attend at the winery for about three weeks.

[23] On 4 October 2006, Mr Evans returned to the winery and Mr Stone advised him that his services were no longer required. One months' notice was paid (invoice 75 from De Vine).

The legal position

[24] Subsection 6(1)(a) of the Employment Relations Act 2000 provides that an employee *means any person of any age employed by an employer to do any work for hire or reward under a contract of service ...*

[25] Section 6(2) provides:

In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

[26] Section 6(3) provides:

For the purposes of subsection (2), the Court or the Authority –
(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.*

[27] Guidance as to *all relevant matters* can be found in *Bryson v Three Foot Six Ltd* [2005] NZSC 34 where the Supreme Court, upholding the decision of the Employment Court, stated in its judgment:

[32] “All relevant matters” certainly include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship. They will also include any divergences from or supplementation of those terms and conditions which are apparent in the way in which the relationship has operated in practice. It is important that the Court or Authority should consider the way in which the parties have actually behaved in implementing their contract. How their relationship operates in practice is crucial to a determination of its real nature. “All relevant matters” equally clearly implies the Court or Authority to have regard to features of control and integration and to whether the contracted person had been effectively working on his or her own account (the fundamental test), which were important determinants of the relationship at common law. It is not until the Court or Authority has examined the terms and conditions of the contract and the way in which it actually operated in practice, that it will usually be possible to examine the relationship in light of the control, integration and fundamental test. ...

[28] There are two other cases to which I wish to refer. The first is *Telecom South v. Post Office Union* [1992] 1 ERNZ and the second is the unreported judgment of Employment Court Judge Travis in *Davis v. CanWest RadioWorks Ltd* ARC 62/07.

[29] In *Telecom South*, a warning was sounded by Sir Gordon Bisson to those who introduce taxation advantages into the terms of their employment that they may have to abide by the consequences that they be classed as self-employed. Sir Gordon Bisson referred to *Massey v. Crown Life Insurance Co* [1978] 2 All ER 576 where Lord Denning said at p.581:

In the present case there is a perfectly genuine agreement entered into at the instance of Mr Massey on the footing that he is “self-employed”. He gets the benefit of it by avoiding tax deductions and getting his pension contributions returned. I do not see that he can come along afterwards and say it is something else in order to claim that he has been unfairly dismissed. Having made his bed as being “self-employed”, he must lie on it. He is not under a contract of service.

[30] In *Davis*, there was a written contract between CanWest and a company, Large Productions, and Mr Davis. Mr Davis was described in the contract as Large Productions’ employee. Large Productions was, in that case, found to be the vehicle by which Mr Davis’ services were provided to CanWest. It was found that the relationship between Mr Davis and CanWest was not one of employer and employee.

[31] Travis J also said in *Davis* that there was a clear implication from the *Telecom South* case that if Mr Devlin's company had stood between him and his employer, a different result may have been reached. It was stated in *Telecom South* that the provision in Mr Devlin's contract in that case was an attempt to assist his tax position but without structuring the arrangement as one for the provision by Mr Devlin's company of services to Telecom South. It was recognised in that case that the salary clause did not change the true character of the underlying relationship between the parties which was that of employer and employee.

Discussion and analysis

The intention of the parties

[32] I find that Mr Evans gave careful consideration as to how the relationship with Gibbston Valley would be structured before approaching Mr Stone in late 2003. He had discussed the matter with Mr Taylor and had received advice from his accountant. I find that it was clear to Mr Evans that the relationship with Gibbston Valley would be different from the way it was when he was an employee. Mr Evans was aware of the benefits in operating as other than an employee. This was clear from his evidence about claiming vehicle expenses. Mr Stone agreed to the change on the basis that it would not cost Gibbston Valley any more and that it would be a similar arrangement to that he had with Mr Taylor who was an independent contractor.

[33] I find that both parties clearly intended at the end of the discussion that the relationship would change from an employment relationship to a contract for services. Mr Evans continued performing services as an assistant winemaker for Gibbston Valley but De Vine invoiced and was paid by Gibbston Valley in terms of those services.

Control

[34] Mr Evans was under the supervision and control of the head winemaker Mr Taylor. I accept that the quiet period aside the requirements of the role left little opportunity for other business and it was in essence a full time role. Mr Evans performed the wine making role together with additional tasks such as setting out the wine cave for functions and showing groups around the winery.

[35] There was an expectation that Mr Evans/De Vine would not be involved in any business that competed with Gibbston Valley. I accept that Mr Evans had quite limited control in terms of when he could do the work particularly in the busy season. On the other hand he was not required, particularly after the invoicing changed to a set monthly amount in 2005, to account for how and when he spent his time in the way an employee would be required to. That was evident in my view by the fact that the De Vine invoices were still paid for a period when Mr Evans was not providing any services at all because he was overseas. I find that there are many factors of control indicative of an employment relationship but the fact that Mr Evans was not required to account for his time was not such a factor.

Integration and Industry Practice

[36] Mr Evans attended staff functions and was provided with business cards which referred to him as an assistant winemaker. He was paid with respect to training and conferences he attended by Gibbston Valley and Gibbston Valley provided the equipment for wine making and safety equipment.

[37] Mr Evans did not take any particular financial risk and his ability to profit appears to have been limited to any bonuses from wine awards. There was no evidence of industry practice for assistant winemakers being contractors although I did not hear sufficient evidence to conclude that was not the situation with head winemakers. It did appear that the role of an assistant winemaker who was responsible to and under the supervision of a head wine maker was an integral part of the winemaking process.

Fundamental Test

[38] The economic reality of the relationship was that De Vine, of which Mr Evans was a director, invoiced Gibbston Valley for his services from 10 November 2003. Even in the absence of a written contract it can be implied that the company was the vehicle through which Mr Evans provided his services. Expenses were claimed for business-related activities such as vehicle expenses and the company was registered for GST. There were tax advantages for Mr Evans. Mr Evans said that his accountant took care of those matters. Toward the end of the relationship with Gibbston Valley Mr Evans did undertake some business other than that for Gibbston Valley.

[39] Mr Evans did not go so far as to say that he was an employee of De Vine and does not accept, in his evidence, that he took any salary from his company but that he merely drew cheques as and when required to pay for his needs. Mr Evans said in his evidence that he only changed the method he was paid to maximise his finances and not to progress or further a business in his own right.

[40] As was expressed in *Telecom South* there are risks to employees wanting to structure a relationship to gain some tax advantages. I find that the factors in terms of the economic reality or fundamental test that Mr Evans was in business on his own account strongly favour a contract for services. Mr Evans only raised issues about the status of his relationship after October 2006.

Conclusion

[41] I find that the relationship between Mr Evans and Gibbston Valley had elements of a contract for services and an employment relationship.

[42] Mr Evans and Gibbston Valley intended to and did enter into a contract for services in November 2003 at Mr Evans' request. The economic reality of the relationship was that it was other than an employment relationship. Mr Evans structured his business in such a way that he could maximise tax benefits. I find that the true nature of the relationship was not that of employee and employer from November 2003.

Determination

[43] Mr Evans was not an employee at Gibbston Valley and the Authority does not have the jurisdiction to consider his personal grievances.

Costs

[44] I reserve the issue of costs. Mr Rhodes has until Wednesday, 21 May 2008 to lodge and serve any submissions as to costs. Mr Grant, on behalf of Mr Evans, has until 4 June 2008 to lodge and serve any submissions in reply as to costs.

Helen Doyle
Member of the Employment Relations Authority

