

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 236  
5350998

BETWEEN            SONG GUILIN  
                                 Applicant

A N D                KOURA BAY WINES LIMITED  
                                 (IN RECEIVERSHIP)  
                                 Respondent

Member of Authority:    M B Loftus

Representatives:        Lei Zhang, for the Applicant  
                                 Jeff Hart, Receiver, on behalf of the Respondent

Investigation meeting:    26 October 2012 at Blenheim

Submissions Received:    At the investigation

Date of Determination:    29 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]    This is a wage arrears claim. The applicant, Mr Song Guilin, claims the respondent, Koura Bay Wines Limited (KBW) owes the sum of \$13,668.52 for work performed in 2009.

[2]    KBW accepts the work was performed and Mr Guilin was never paid. That said, it denies responsibility on the basis it never employed, or otherwise engaged, Mr Guilin. He has the wrong respondent.

**Background**

[3]    The work performed by Mr Guilin involved pruning on various vineyards in the Marlborough area. While these are, or in some cases were, owned by different companies with disparate shareholding and directorships, there was one consistency, Mr Geoffrey Smith.

[4] Aside from KBW there are two other relevant companies: Awatere Vineyard Contracting Limited (AVC) and Quality and Quantity Limited (Q&Q).

[5] KBW was owned by Mr Smith and his wife. It is now in receivership but previously engaged in the marketing and distribution of wine, including that produced by vineyards in which Mr Smith had an interest.

[6] AVC was jointly owned by Mr Smith and his son, Cameron. It has now been liquidated but, as its name suggests, it once provided services to vineyards including those in which Mr Smith had an interest.

[7] Q&Q is operated by Mr Lei Zhang. It provides labour for contracting work on vineyards. Most of its staff are foreigners in New Zealand on visas which require them to work for a single named entity, Q&Q, which then contracted their services to various clients. That said, Mr Guilin (who is Mr Zhang's uncle) suffers no such restrictions - he can work for whoever he chose.

[8] First contact between Q&Q and one of Mr Smith's companies occurred in 2007. They began cooperating under an arrangement whereby the tasks were sourced and directed by AVC who provided larger items of equipment, while Q&Q sourced the labour. These arrangements were, according to the evidence, entered into in an informal way with nothing more than an oral agreement. Q&Q would, upon completion of a task, invoice AVC for the labour.

[9] Most contact was, according to Mr Zhang, with Cameron Smith. Discussions with Geoff Smith tended to cover issues of quality, as opposed to the task to be performed. Discussion about new jobs and tasks were generally, but not always, with Cameron Smith. Mr Smith has no dispute with that evidence.

[10] That said, a different approach is alleged to have been taken in respect to the work which gave rise to this claim. In a written statement Mr Zhang said Mr Smith approached him and asked whether some of his people would do a *cash job*. He says he responded by advising his uncle was available and could do the job *directly*. It is Mr Zhang's view this meant Mr Guilin would, in this instance, perform the task as an employee of Mr Smith.

[11] Mr Smith accepts he approached Mr Zhang. He says they had a brief discussion. His recollection is he explained he was having cashflow difficulties but

had a pruning task that needed completion. He asked whether Mr Zhang could be of assistance. Mr Smith says Mr Zhang offered the services of his uncle and he, Smith, accepted. Mr Smith says he was aware Mr Guilin spoke no English so he made it clear that supervision and any paperwork had to be Mr Zhang's responsibility. He says Mr Zhang agreed.

[12] Mr Smith also accepts cash was mentioned, but says that should be put in context. It was when they discussed the cashflow problem and led to a statement payment would be intermittent and some would be in cash. As events transpired, and given Mr Zhang's understanding about the arrangement, no invoice was raised and payment was not made. Some time passed before Mr Zhang realised this and by the time he started to query it, Mr Smith's situation had become such there was no money left to address the issue. The two did discuss the possibility of payment in kind (wine) for a restaurant Mr Zhang was in the process of establishing but nothing came of this.

### **Determination**

[13] As already said, this is a wage arrears claim. It concerns payment for work performed on vineyards in which Mr Smith had an interest. Mr Smith, through knowledge gained as a principal in a number of the businesses concerned, accepts the work was performed. Indeed, he goes so far as to say it was performed to a very high standard. He also accepts payment was never made.

[14] That said it is, through the receiver who is now responsible for the affairs of KBW, denied that KBW is responsible. First KBW denies ever employing Mr Guilin. Second, and irrespective of Mr Guilin's status (employee or otherwise), KBW denies it is responsible for any payment which may be due.

[15] KBW's position is one with which I must agree. I do so for the following reasons.

[16] It is accepted that up until this instance those who provided labour on the vineyards were, whether employees or not, the responsibility of and paid by Q and Q, who contracted their services to either the vineyard concerned or through an intermediary such as AVC. In respect to Mr Smith's interests it is agreed an intermediary had, until this instance, always been used and that was AVC. The question is therefore whether or not the discussion that led to Mr Guilin's engagement in this instance altered that approach.

[17] I consider the answer is no. On one hand I have Mr Smith's evidence concerning an express requirement Q&Q be responsible as normally occurred. This was due to his knowledge he would be unable to communicate with Mr Guilin. On the other I have Mr Zhang's admission his recollection of the discussion is, with the passage of time, hazy. He can not deny Mr Smith's claim he specified Q&Q be responsible and accepts there was never any statement to the effect Mr Guilin would be an employee of either Mr Smith or KBW. He says he simply assumed that would be the case given the mention of cash.

[18] There is also the fact AVC, along with other interests of Mr Smith's, owes money to Q&Q. Whilst the amount is in dispute, it is fair to say it is significant. Mr Zhang's evidence, especially in respect to the possibility of payment in kind, evidenced some difficulty in separating those debts from this claim. In essence he digressed and started describing the various debts as one large pot, which was needed to cover distributions to those who had worked for, or had work arranged through, Q&Q. In these circumstances, I must accept Mr Smith's assertions.

[19] Secondly there is the fact KBW was a marketing and wine distribution company. It owns neither land nor vines. It simply had no need for the services provided by Mr Guilin and would have been unlikely to have sourced them.

[20] For the above reasons I conclude that Mr Guilin's claim is unsustainable, at least with KBW as the respondent.

[21] Costs are reserved.

**M B Loftus**  
**Member of the Employment Relations Authority**