

An appeal

- by -

Sanghera Farm Ltd.
(“SFL”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2012A/146

DATE OF DECISION: January 23, 2013

DECISION

SUBMISSIONS

Raj Sanghera

on behalf of Sanghera Farm Ltd.

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Sanghera Farm Ltd. (“SFL”) of a determination that was issued on November 5, 2012, (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. The Determination found that SFL contravened section 13 of the *Act* and sections 6(1)(f), 6.1, and 6(4) of the *Employment Standards Regulation* (the “*Regulation*”) and pursuant to section 29(1) of the *Regulation*, ordered SFL to pay an administrative penalty of \$500.00 for each contravention for a total of \$2,000.00.
3. SFL challenges the Determination on the ground that the Director erred in law in making the Determination, and seeks the Tribunal to cancel the Determination.
4. Pursuant to Rule 22 of the Tribunal’s *Rules of Practice and Procedure* and section 114 of the *Act*, the Tribunal may dismiss all or part of an appeal without seeking submissions from the concerned parties. If the Tribunal does not dismiss the appeal or confirm all of the Determination, the Tribunal may invite the Director to file a reply submission on the appeal and afford SFL an opportunity to make a final reply to these submissions, if any.

ISSUE

5. The sole issue in this appeal is whether SFL has shown the Director erred in law in making the Determination.

FACTS

6. On September 18, 2012, the Agriculture Compliance Team (the “Team”) of the Employment Standards Branch (the “Branch”) conducted a site visit at the location of Sumas Valley Berry Farm Ltd. (“Sumas Valley”), at 2825 Interprovincial Highway, Abbotsford, British Columbia. The purpose of the site visit was to ensure compliance with the *Act* and the *Regulation* with respect to farm labour contractors, producers and farm workers.
7. During the site visit, the Team spoke with Chamkaur Gill (“Mr. Gill”), a representative of Sumas Valley. Mr. Gill confirmed to the Team that there were five (5) farm labour contractors (“FLCs”) on site, namely, Super Sandhu Enterprises Ltd., Dhillon Labour Contractor Ltd., Columbia Labour Contractors Ltd., Unique Labour Force Ltd., and JKJ Contracting Ltd.
8. The Team also discovered a red GMC van with the licence plate “G4 8047” at the site that did not belong to any of the named FLCs. The Team spoke with the driver of the vehicle, Rashpal Singh (“Mr. Singh”), who confirmed that the van belonged to SFL and that he used the van to transport 14 employees in the vehicle to the Sumas Valley site. The van, however, was not registered with the Branch contrary to section 6(1)(f) of the *Regulation*, and there was no safety notice posted in the van contrary to section 6.1 of the *Regulation*.

9. Further, during the site visit, the Team requested of SFL a daily log pertaining to its workers but, contrary to section 6(4) of the *Regulation*, the latter did not have it available.
10. The Team also observed at the site SFL's employees hand harvesting blueberries in the same field alongside other FLCs' workers. That is, there was no sectioning off of the field or separation of SFL's workers from the workers of other FLCs.
11. When the Team spoke with Mr. Gill of Sumas Valley, he did not advise that SFL and Sumas Valley were involved in a relationship different than the usual producer-FLC relationship.
12. After the site visit, on September 20, 2012, the Branch sent SFL a letter (the "Letter") delineating the Team's findings during the site visit of September 18, 2012. In particular, in the Letter, the Branch indicated that the Team's findings appeared to show that SFL was operating as an FLC without being licensed contrary to section 13 of the *Act*. The Letter also indicated that SFL appeared to be in breach of sections 6(1)(f), 6.1 and 6(4) of the *Regulation* for failing to register the vehicle it used to transport employees to the site, failing to post a safety notice in the said vehicle and failing to keep at the worksite and make available for inspection to the Director a daily log relating to SFL's workers on site. The Branch provided SFL an opportunity to respond to the Letter by October 4, 2012.
13. On September 24, 2012, representatives of both SFL and Sumas Valley attended at the Branch and provided a lease agreement between SFL and Sumas Valley dated September 6, 2012, (the "Lease"). Under the Lease, Sumas Valley is shown as leasing to SFL approximately ten (10) acres of land located at 2825 Interprovincial Highway, Abbotsford for a period of one (1) harvest season in 2012 for the sole purpose of blueberry farming. The Lease also contemplates that SFL will pay Sumas Valley rent based on "25% of net profit from the sale of harvested berries", which rent is payable "at the time and in the manner in this Lease set forth". However, the Lease does not provide when and how the rent is to be paid.
14. The Director did not find the Lease persuasive but viewed it as an attempt by SFL to circumvent the requirements of the *Act* and therefore of no effect. In proceeding to make the Determination that SFL was operating as an FLC without a license in contravention of section 13(1) of the *Act* and that SFL breached sections 6(1)(f), 6.1 and 6(4) of the *Regulation*, the Director reasoned as follows:

Sanghera was doing exactly what the other licensed FLCs were doing at the worksite, picking blueberries. The workers of the licensed FLCs stated they were being paid by their respective contractor and the workers who stated their employer was Sanghera said they were paid by Sanghera. The licensed FLCs on site stated that they were being paid by Sumas Valley not Sanghera. When the Team arrived at the worksite, Chamkaur Gill confirmed the FLCs onsite, but he failed to mention that Sumas Valley was in a lease agreement with Sanghera.

If Sanghera was leasing part of the farm, it seems unlikely the other FLCs on site would have been working alongside Sanghera in the same field. It seems strange that if Sanghera is leasing the field that they would allow other FLCs to harvest part of that field for Sumas Valley.

The lease agreement states Sanghera would 'have and hold' the said lands for one harvest season in 2012. If the said lands were actually held by Sanghera under the lease, then Sanghera, not Sumas Valley, should have been paying the other FLCs on site. Sumas Valley could not have hired the other FLCs on site to harvest the blueberries as only Sanghera could have made this arrangement under the alleged lease agreement.

If, under article 4.01 Sanghera was paying Sumas Valley rent from the sale of the harvested blueberries then it would not make sense for Sanghera's workers to work in the same field as the other FLCs who were paid by Sumas Valley. That is, the licensed FLCs on site were being paid for harvesting the

blueberries and under the lease agreement Sanghera was supposed to pay Sumas Valley 25% of the net profit of sales from the harvested blueberries. These are two very different agreements for blueberry harvesting and it seems unlikely that Sanghera's workers would be picking in the same field as the workers of the other FLCs if a lease agreement was in effect.

Additionally, article 4.04 states that the lessee must pay all rent 'reserved at the time and manner in this Lease set forth' but nowhere in the lease agreement does it specify when and how the rent is to be paid.

The lease agreement is dated September 6, 2012. It seems highly unlikely that a producer would undertake the risks associated with an entire growing season and then, at the end of the season, at the time when it should be able to estimate profit, 'lease' the land in exchange for 25% of the profits.

SUBMISSIONS OF SFL

15. In his very sparse written submissions in support of SFL's appeal, Raj Sanghera ("Mr. Sanghera"), a director of SFL, states that SFL was on the Sumas Valley property under the Lease and he attaches an unsigned copy of the Lease and makes no further submissions. It should be noted that the section 112(5) record of the Director in this appeal contains a signed copy of the Lease.

ANALYSIS

16. The burden is on SFL to show that its appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1) of the *Act*, failing which SFL's appeal will be dismissed. In its Appeal Form, as previously noted, SFL has checked off the error of law ground of appeal found in section 112(1)(a) of the *Act* and it is asking the Tribunal to cancel the Determination.
17. Having said this, under section 114 of the *Act*, the Tribunal has authority to dismiss an appeal that it considers has "no reasonable prospect" of succeeding. I find that Mr. Sanghera's submissions are no more than a re-argument of SFL's position, which the latter advanced previously during the investigation by the Branch. As noted previously, in response to the Letter from the Branch, SFL and Sumas Valley attended at the Branch and presented the Lease as a full answer to the findings of the Branch in the Letter and now, in its appeal, SFL similarly is presenting the Lease without more to argue that the Determination should be cancelled. SFL has not established how the Director erred in law in making the Determination. SFL simply wants to re-argue its earlier position during the investigation and take the proverbial "second kick at the can" before this Tribunal with a view to having a favourable result on this occasion.
18. The Tribunal has consistently dismissed appeals where the sole purpose of the appeal is to re-argue the case made by the appellant during the investigation or hearing before the determination is made. I find this is such a case. I also note that to allow re-argument on appeal is contrary to the stated objective of the *Act* in section 2(d), namely, the fair and efficient procedure for resolving disputes.
19. Having said this, I also note that there is nothing in the submissions of SFL that remotely support the error of law ground of appeal that SFL relies upon in its Appeal Form. I note the Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
- (1) A misinterpretation or misapplication of a section of the Act;
 - (2) A misapplication of an applicable principle of general law;
 - (3) Acting without any evidence;
 - (4) Acting on a view of the facts which could not reasonably be entertained; and

- (5) Adopting a method of assessment which is wrong in principle.
20. Nothing in SFL's appeal submissions gives rise to any one or more of constituents of error of law delineated in *Gemex Developments, supra*.
21. This is also not a case of the delegate acting without any evidence or on a view of facts that could not reasonably be entertained. To the contrary, in the Reasons for the Determination, the delegate has persuasively set out the evidentiary basis for his conclusion and I find SFL's appeal is without any merit and there is no reasonable prospect that the appeal will succeed. Therefore, I dismiss SFL's appeal under section 114(1)(f) of the *Act*.

ORDER

22. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal of Sanghera Farm Ltd.

Shafik Bhalloo
Member
Employment Standards Tribunal