

An appeal

- by -

Sumas Valley Berry Farm Ltd.
(“Sumas Valley”)

- 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: Robert E. Groves

FILE No.: 2012A/149

DATE OF DECISION: February 19, 2013

DECISION

SUBMISSIONS

Davinder Deol

on behalf of Sumas Valley Berry Farm Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Sumas Valley Berry Farm Ltd. (“Sumas Valley”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 6, 2012 (the “Determination”).
2. The Determination states that Sumas Valley contravened section 13 of the *Act* when it engaged the services of a farm labour contractor that was not licensed under the *Act*. The Director imposed an administrative penalty of \$500.00.
3. I have before me the Determination, the Reasons for the Determination, the Appeal Form filed by Sumas Valley along with its submission, and the record that was before the Director at the time the Determination was made.
4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. A review of the material that has been delivered by the parties persuades me that I may decide the merits of this appeal on the basis of the written documentation now before me.

FACTS

5. On September 18, 2012, the Employment Standards Branch Agriculture Compliance Team (the “Team”) conducted a worksite visit of property owned by Sumas Valley.
6. The Team noted, and it is not disputed, that persons were harvesting blueberries at the time of the visit. Some of the persons observed were employed by licensed farm labour contractors. Others were employed by a company called Sanghera Farm Ltd. (“Sanghera”). All of the persons harvesting blueberries were working together in the same field. No separate sections of the field were assigned to individual contractors, or to Sanghera.
7. Sanghera was not licensed as a farm labour contractor at the time of the visit.
8. On September 20, 2012, the Director wrote to Sumas Valley advising that since Sanghera had provided contract labour to it for the purpose of harvesting blueberries, and as Sanghera was not a licensed farm labour contractor, it appeared that Sumas Valley had violated section 13(3) of the *Act*, which provides:
 - (3) A person must not engage the services of a farm labour contractor unless the farm labour contractor is licensed under this Act.
9. The letter invited a response. On September 24, 2012, representatives of both Sumas Valley and Sanghera attended at the offices of the Director and submitted a response in the form of a lease agreement between

them, dated for reference September 6, 2012, relating to the property on which the blueberries were being harvested on the date the Team conducted its visit. The lease agreement said this, in part:

2.01 – Purpose – The lands shall be used for blueberry farming only and shall be used for no other purpose or purposes whatsoever.

3.01 – Length of Term – The Lessee shall have and hold the said lands for a term of one harvest season in 2012.

4.01 – Rent – The Lessee shall during the currency of this Lease pay to the Lessors annual rent as follows:

(a) 25% of net profit from the sale of the harvested berries.

4.04 – Payment of Rent – The Lessee shall pay all rent herein reserved at the time and in the manner in this Lease set forth, without any abatement or deduction whatsoever.

10. It is clear from the Reasons for the Determination that the Director doubted the *bona fides* of the lease agreement. The Director set out the policy reasons behind the provisions in the *Act* relating to the regulation of farm labour contractors, and the producers who retain them. The Director then said this:

If FLC's were able to enter into contracts to lease land from producers and thereby circumvent these provisions of the Act, the purpose of protecting vulnerable workers would be defeated.

In other words, if a person was able to contract out of the FLC requirements simply by agreeing to pay "rent" on the profit they receive from the sale of the product harvested there would be no need for FLCs. Each person who had labour to supply to a producer would "lease" a number of the plants to be harvested or a number of acres of land, pay "rent" and claim an exemption from the licensing and bonding requirements of the Act and Regulations.

11. In the result, the Director determined that the lease agreement was an attempt to circumvent the requirements of the *Act*, and so it was void. Although unstated, it would appear that the Director was relying on the provisions of section 4 of the *Act*, which reads:

4. The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.

12. I digress to say that sections 3(2) or (4) have no application to the circumstances of this case.

13. The Director found that Sumas Valley was a "producer" under the *Act*, and that Sanghera was performing the duties of a farm labour contractor. Since Sanghera was unlicensed at the time, the Director determined that Sumas Valley had contravened section 13(3) of the *Act*.

ISSUE

14. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

15. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law;

- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was being made.
16. Section 115(1) of the *Act* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.
17. Sumas Valley claims that the Director erred in law, and so the Determination should be cancelled. It relies on the lease agreement in support of the argument that Sanghera had the farm “out on lease,” and that the subject property was “theirs to work on.”
18. In effect, Sumas Valley argues that it did not engage Sanghera to act as a farm labour contractor. Rather, it merely leased its farmland to Sanghera in return for rent characterized as 25% of the net profit from the sale of the harvested blueberries.
19. The difficulty I have with this argument is that the Director came to factual conclusions on the evidence that contradict it. The Director determined that since the lease agreement was an attempt to circumvent the requirements of the *Act*, it was void for that purpose. Implicit in this finding was the conclusion that Sumas Valley had engaged Sanghera to provide services as a farm labour contractor, notwithstanding that a lease agreement was executed.
20. In my view, this conclusion was a finding of fact. In order for the Tribunal to disturb a finding of fact made by the Director, it must be shown that the finding was irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
21. In my opinion, there were several facts noted by the Director that could support a finding that the lease agreement was but a tool employed by Sumas Valley and Sanghera to disguise the fact that Sanghera had been engaged by Sumas Valley to provide services as a farm labour contractor. They include the following:
- When interviewed by the Team on the day of the worksite visit, a representative of Sumas Valley did not disclose the existence of the lease agreement.
 - Several licensed farm labour contractors were also harvesting blueberries in the same field in which the Sanghera employees were working. The Director concluded that it would be unlikely that Sanghera would permit others to harvest blueberries in the same field that Sumas Valley had “leased” to Sanghera.
 - The undisputed evidence was that the other farm labour contractors were being paid directly by Sumas Valley. If the said lands had actually been leased by Sumas Valley to

Sanghera, one would expect that it would be Sanghera, and not Sumas Valley, who would be paying the other contractors to harvest the blueberries located there.

- The lease agreement was dated September 6, 2012. The Director concluded that it would be unlikely that Sumas Valley would bear the risks of raising the blueberry crop throughout the entire growing season and then, at the end of the season, when the profits from the crop would be discernible, “lease” the land in exchange for but 25% of the profits.

22. For these reasons, I have decided that Sumas Valley has failed to demonstrate that the Director erred in law when making the Determination.

ORDER

23. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal