

An appeal

- by -

Valley Agro Ltd.
("Valley Agro")

- 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: Carol L. Roberts

FILE No.: 2015A/163

DATE OF DECISION: April 1, 2016

DECISION

SUBMISSIONS

Arvinder Randhawa on behalf of Valley Agro Ltd.

Melanie Zabel on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Valley Agro Ltd. (“Valley Agro”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on November 6, 2015.
2. On June 16, 2015, the Employment Standards Branch Agriculture Compliance Team conducted roadside inspections of farm labour vehicles in conjunction with WorkSafe BC and the Commercial Vehicle Safety and Enforcement. The inspections are conducted to inspect vehicles being used to transport farm workers for the purpose of ensuring compliance with the *Act* and *Employment Standards Regulation* (the “*Regulation*”). One of the vehicles stopped bore a licence plate number G5 3747 (“the vehicle”). The driver informed the team that the vehicle belonged to Valley Agro, and that he was transporting 12 workers to Johal Berry Farm in Chilliwack.
3. Following an investigation, a delegate of the Director concluded that Valley Agro had contravened section 13 of the *Act* and section 6(1)(f) of the *Regulation*. The delegate imposed a \$500 administrative penalty for each of the contraventions, for a total of \$1,000.
4. Valley Agro contends that the Director both erred in law and failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled.
5. These reasons are based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

Preliminary issue

6. On December 16, 2015, after Valley Agro had filed its appeal, the Tribunal disclosed the Record from the Director to Valley Agro and gave Valley Agro the opportunity to provide any objections to the completeness of the Record by January 5, 2016. On January 8, 2016, the Tribunal advised the parties that no objections to the Record had been received, and assigned the appeal to me. On January 12, 2016, Valley Agro informed the Tribunal that although it had received the Tribunal’s January 8, 2016 correspondence, it had not received the Tribunal’s December 16, 2015, correspondence. The Tribunal gave Valley Agro additional time to object to the completeness of that Record.
7. On January 20, 2016, Arvinder Randhawa (“Mr. Randhawa”) wrote to the Tribunal objecting to a portion of the Record on the basis that the material in the Record had not been disclosed to Valley Agro prior to the delegate making the Determination. Mr. Randhawa also objected to the manner in which the delegate conducted the investigation.

8. I am not persuaded that the Record is incomplete. In my view, it fairly represents the material that the delegate relied on in arriving at the Determination. I have addressed Valley Agro's objection to the manner in which the delegate conducted the investigation in the reasons that follow.

FACTS AND ARGUMENT

9. Mr. Randhawa is the sole director and officer of Valley Agro. He is also the director of 661161 B.C. Ltd. ("661161"), a British Columbia company which is licensed as a farm labour contractor.
10. Valley Agro was issued a farm labour contractor license on January 1, 2003. That licence expired on December 31, 2003. Valley Agro does not have a current farm labour contractor license. As of June 16, 2015, it had not filed any vehicle license or registration numbers, or inspection certificates, with the Director.
11. On June 23, 2015, a delegate of the Director sent a letter to 661161, assuming that the vehicle had been used to transport workers employed by 661161 on June 16, 2015, despite the driver's contrary information. The delegate informed 661161 that the vehicle had not been registered and invited 661161 to respond to the observations.
12. On July 1, 2015, Mr. Randhawa sent the Director an up-to-date registration number and inspection certificate for the vehicle, which was registered to Valley Agro.
13. The delegate spoke to Mr. Randhawa on July 7, 2015, at which time Mr. Randhawa said that because Valley Agro did not operate as a farm labour contractor, he was not required to register the vehicle with the Branch. He said that he faxed the information about the vehicle to the Branch on July 1, 2015, because he wanted to demonstrate that Valley Agro was the registered owner of the vehicle.
14. Mr. Randhawa also informed the delegate that Valley Agro owned and operated its own farm and supplied its own labour directly to the farm. He said that, from time to time, when 661161 required a vehicle to transport its workers, it borrowed vehicles from Valley Agro. He also informed the delegate that on June 16, 2015, the workers in the vehicle were not 661161 workers but Valley Agro workers being transported to Valley Agro's own farm.
15. On July 16, 2015, the delegate sent Valley Agro a letter offering it an opportunity to provide "any and all evidence to clearly show that the workers in [the vehicle] were being transported to a farm that is owned and operated by Valley Agro Ltd., including [the] full name and address of the farm." In that letter, the delegate noted the discrepancies between the information provided by the driver and the information provided by Mr. Randhawa in his conversation with the delegate on July 7, 2015. The delegate also advised Mr. Randhawa that Valley Agro could be found to be operating as an unlicensed farm labour contractor.
16. On August 10, 2015, Mr. Randhawa sent a letter to the delegate repeating his assertion that Valley Agro was not a farm labour contractor. He said that the driver had been recently hired and was likely confused when questioned at the roadside inspection. Mr. Randhawa stated that Valley Agro never supplied labour or worked with Johal Berry Farm at any of its locations; rather, it only supplied workers who picked berries "at farms owned, leased or crop purchased farms." Mr. Randhawa further informed the delegate that on June 16, 2015, Valley Agro purchased blueberry crops from Sahota Farms Ltd. ("Sahota") in Abbotsford and that the driver of the vehicle was actually transporting Valley Agro workers to Sahota. The berries picked that day were shipped to a processing plant owned by a Sahota director.

17. Mr. Randhawa submitted a “crop purchase agreement” dated June 10, 2015, between Mr. Randhawa and Paul Sahota as well as a receipt, dated June 16, 2015, for payment made to Valley Agro from Sahota for the sale of blueberries, with the letter.
18. On September 17, 2015, the delegate sent a letter to Johal Berry Farms Ltd. (“Johal”) and to Sahota requesting a list of all contractors who provided labour on June 16, 2015, in connection to the planting, cultivating or harvesting an agriculture product on any farms owned or leased by those companies. On October 2, 2015, the delegate received faxes from both Johal and Sahota stating that there were two contractors who provided labour to them on June 16, 2015, neither of which was Valley Agro or 661161.
19. The delegate asked Sahota to provide the addresses for the farms at which the two contractors provided labour on June 16, 2015. Sahota informed the delegate that both contractors provided labour at one address in Abbotsford. The delegate then spoke to two employees at Sahota, one of whom was the office manager. The office manager informed the delegate that, apart from the two farm labour contractors mentioned in the October 2, 2015 fax, no one else picked blueberries, including blueberries from crops purchased from Sahota. The office manager indicated that Mr. Sahota owned all of Sahota’s blueberry crops.
20. At issue before the delegate was whether Valley Agro had contravened section 13 of the *Act* by operating as a farm labour contractor without a valid license, and if it did, whether it contravened section 6(1)(f) of the *Regulation* by failing to file with the Director a registration number and inspection certificate for its vehicle used for transporting employees.
21. The delegate considered the definition of farm labour contractor contained in section 1 of the *Act*, and noted that section 13 restricted persons from acting as a farm labour contractor unless they were licensed.
22. The delegate noted the conflicting information provided by the vehicle driver and Mr. Randhawa, and found that, while it was “surprising” that a driver would be confused about where he was transporting his passengers, she confirmed that neither Valley Agro nor 661161 provided labour to Johal on June 16, 2015. The delegate also noted that although Mr. Randhawa stated that Valley Agro was transporting its employees to Sahota on June 16, 2015, Sahota confirmed that two farm labour contractors provided labour on June 16, 2015, neither of which was Valley Agro or 661161.
23. The delegate relied on the cheques and receipts provided by Mr. Randhawa to make a finding that Valley Agro’s employees picked blueberries at Sahota on June 16, 2016, despite Sahota’s denials.
24. The delegate then had to decide whether Valley Agro engaged its workers on June 16, 2015, to pick blueberry crops that it actually owned or purchased, or whether it operated as a farm labour contractor on that date.
25. The delegate noted that the agreement between Sahota and Valley Agro provided for a sale price for blueberries and that the sale could not occur until after the berries had been picked. The delegate found that Valley Agro’s “Crop Purchase Agreement” did not have the effect of exempting Valley Agro from the definition of a Farm Labour Contractor (“FLC”) under the *Act*. She noted that companies could not exempt themselves from the *Act* by structuring service agreements to make it appear that the FLC “owns” the berries at the time of harvest briefly before re-selling it to the original owner.
26. The delegate was not satisfied that the crop purchase agreement between Valley Agro and Sahota was genuine and determined that Valley Agro supplied labour to pick blueberries from crops controlled by Sahota. The delegate concluded that Valley Agro’s payment to Sahota was a discount on the harvesting rate per pound. The delegate found no evidence to support Valley Agro’s assertion that it had any control of the harvesting of

the blueberries before or after they were picked, and determined that Sahota maintained control over the blueberries throughout the transactions and remained at Sahota's to be processed.

27. The delegate also noted that, according to the agreement, Sahota provided the tools for harvesting the blueberries while Valley Agro provided only the labour.

28. The delegate wrote:

It appears that Valley Agro has attempted to circumvent the requirements of the Act and Regulation by structuring the arrangements between it and Sahota farms to make it appear that it owned the berries very briefly only during the time of harvest.

Therefore, I find that on June 16, 2015, Valley Agro operated as a farm labour contractor when it provided labour to Sahota Farms, who maintained control over the harvesting of its blueberries.

29. The delegate concluded that Valley Agro had contravened section 13 of the *Act*. The delegate also found that, as Valley Agro did not file an up-to-date list of registration numbers and licence numbers of each vehicle used to transport employees until July 1, 2015, it was not in compliance with section 6(1)(f) of the *Regulation* on June 16, 2015.

30. Valley Agro says that the delegate failed to inform it of the case against it or offer it an opportunity to respond. Although Valley Agro acknowledges receiving the delegate's July 16, 2015, letter informing it that the Director was investigating an allegation that it was operating as an unlicensed farm contractor, the evidence supporting that allegation was the statement of the vehicle driver and the delegate's conversation with Mr. Randhawa on July 7, 2015. Mr. Randhawa acknowledges responding to those allegations in writing on August 10, 2015. However, he says that the delegate "misreported" their July 7, 2015, conversation, asserting that he informed the delegate that Valley Agro employees picked berries at farms owned, leased or crop-purchased farms, not just farms owned by Valley Agro. Mr. Randhawa also asserts that he told the delegate that Valley Agro employees were actually transported to Sahota to pick berries that had been pre-purchased by Valley Agro as per the crop purchase agreement.

31. Valley Agro says that, after receiving this information, the delegate obtained additional information including correspondence with Johal and Sahota as well as telephone conversations with employees of Sahota without giving it the opportunity to respond to this information.

32. The delegate does not dispute Valley Agro's contention that she did not afford it the opportunity to respond to the information she obtained from Johal and Sahota. However, she says that the evidence from Johal Berry Farms corroborated Valley Agro's evidence that it did not provide labour to Johal. The delegate says that, despite Sahota's evidence, she preferred Valley Agro's evidence, and therefore, not disclosing the evidence gathered from Sahota and Johal was not prejudicial to Valley Agro.

33. Valley Agro further argues that there is no evidence upon which the delegate could conclude that it is a farm labour contractor. Mr. Randhawa says it makes no sense for Valley Agro to dispatch its employees for contract labour when he operates a separate company for that purpose.

34. Valley Agro also says there is no evidence upon which the delegate could conclude that Valley Agro's employees worked for or under the control or direction of another person. Valley Agro says that the employees worked under the direction and control of Valley Agro, that Valley Agro pre-purchased unharvested berries and controlled how its employees harvested those berries. Valley Agro contends that Sahota had no control over which worker picked what berry, how it was picked or when it was picked.

Sahota provided only the buckets into which the workers put the berries, as that is regulated for food safety purposes.

35. Valley Agro argues that the delegate has simply decided that the crop purchase agreement was not authentic without any basis for doing so.

36. The delegate says that, during the investigation Valley Agro provided the Director with a “crop purchase agreement” between it and Sahota, copies of cheques and a receipt. She says that Valley Agro has submitted new evidence on appeal consisting of an explanation about why it entered into a crop purchase agreement, the degree of control it exerted over its harvesters and information about food safety requirements.

37. The delegate says that she determined that Valley Agro attempted to circumvent the requirements of section 13 of the *Act* by making it appear as though it briefly owned the berries during the time of harvest before re-selling them to Sahota. She submits that the chronology of payments made between Valley Agro and Sahota did not support Valley Agro’s assertion that it first owned the berries then sold them back to Sahota. She says therefore, that she found that Valley Agro’s payment to Sahota on June 26, 2015, was simply a discount on the harvesting rate for which it had already been paid.

38. Finally, the delegate says:

If the Tribunal views the “crop purchase agreement” between Valley Agro and Sahota Farms as a method by which a labour provider could exempt itself from being defined under the Act as a farm labour contractor but still be able to supply farm worker labour to harvest an agricultural product on land that it does not own or lease at the time of the harvest, then this would provide opportunity for the other labour providers to simply make arrangements with producers to “pre-purchase” crops with a promisory [*sic*] note before the harvest as a way to exempt themselves from being defined as farm labour contractors to avoid being licenced under the Act. “Pre-owning” pre-harvested berries, as opposed to genuinely owning or leasing land, should not make a labour provider exempt from being defined as a farm labour contractor under the Act.

39. The delegate seeks to have the appeal dismissed.

ISSUE

40. Whether or not the Director erred in law, or failed to observe the principles of natural justice in making the Determination.

ANALYSIS

41. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

42. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. For the reasons that follow, I am referring this matter back to the delegate for a new investigation.

43. I conclude that the delegate failed to comply with the principles of natural justice when she contacted Johal and Sahota regarding the supply of labour to their farms, and did not disclose the information she received to Valley Agro for its response. The fact that she unilaterally judged the information “not prejudicial” to Valley Agro is irrelevant. Clearly, the delegate relied on information she obtained to arrive at her conclusion that Valley Agro contravened the *Act* and *Regulation*. For this reason alone, I would refer the matter back to the Director for a new investigation. I note that Valley Agro has responded to that new information from Sahota and Johal in its appeal, and the response should be taken into consideration in the new investigation.
44. Valley Agro also contends that the delegate erred in law.
45. I have a number of difficulties with the delegate’s reasoning, which I found confusing as well as lacking in analysis.
46. While I agree that agreements between parties that are nothing more than attempts to circumvent farm labour contractor regulations should be given little weight, it is not at all clear to me how the delegate arrived at the conclusion that Valley Agro’s employees picked blueberries at Sahota farms on June 16, 2015, in light of the evidence before her. That evidence included a June 16, 2015, statement from the driver of the vehicle that 12 workers were being transported to Johal, Mr. Randhawa’s July 7, 2015, statement that the workers were being transported to Valley Agro’s farm (which Mr. Randhawa asserts was misrepresented), Mr. Randhawa’s August 10, 2015, written communication that the workers were being transported to Sahota and the statements of Sahota’s office manager that the farm workers at the farm on June 16, 2015 were not under contract to Valley Agro. The analysis of this evidence was inadequate.
47. The delegate preferred the information she obtained from Mr. Randhawa over the information she obtained from Sahota’s office manager without explaining why she did so. There is nothing in the Determination setting out why she found the information provided by Sahota’s office manager to be false or incorrect, particularly when she found the crop purchase agreement, which was the foundation for the cheque and receipts that she appeared to rely on, was not authentic.
48. Finally, I agree with Mr. Randhawa that the delegate’s conclusion that the crop purchase agreement was not authentic lacks a proper analytical foundation. As such, it is impossible for me to assess her reasons for rejecting it.
49. For these reasons, I refer the matter back to the delegate for a new investigation.

ORDER

50. Pursuant to section 115 of the *Act*, I order the Determination dated November 6, 2015, be cancelled and the matter is referred back to the Director for a new investigation.

Carol L. Roberts
Member
Employment Standards Tribunal