

An appeal

- by -

Dhesi Farm Ltd.
("Employer")

- 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: Sheldon M. Seigel

FILE No.: 2008A/68

DATE OF DECISION: August 26, 2008

THE FACTS AND ANALYSIS

11. The Employer's submissions do not provide reference to or evidence that could be construed as addressing the issue of the Director's failure to observe the principles of natural justice.
12. The Determination also provides no hint as to such failure.
13. The Employer submits that new evidence is now available that was not available at the time of the Determination. In support of this submission, Mr. Dhesi provides only his letter of June 25, 2008, indicating that the workers were employees of Gelderman Farms Ltd., and paid by Gelderman Farms Ltd.
14. If the employees were indeed working for Gelderman Farms Ltd, and were not employees as defined by the *Act*, or provided by Dhesi Farm Ltd. then Dhesi did not act as a farm labour contractor. If Dhesi did not act as a farm labour contractor then it cannot have contravened s. 13(1) of the *Act*.
15. The thrust of the Employer's argument, as I understand it, is that notwithstanding a previous history of providing workers for Gelderman Farms Ltd., the workers on site on the date of the contravention were ultimately paid by Gelderman, not Dhesi, and therefore Dhesi did not act as a farm labour contractor.
16. At the time of the inspection, individuals working at the site believed that they were employed by Dhesi Farm Ltd. They believed that they were to be paid by Dhesi, and they had in fact been physically provided (dropped off at the site) by Dhesi. Mr. Gelderman advised the agent of the Director that they were employees of Dhesi. The workers were entitled to be paid for work performed and so were employees as defined by the *Act*.
17. The Director determined based on all of the relevant evidence that at the time of the inspection, the workers were employees of Dhesi. I have no evidence before me that suggests that the Determination was wrong at that time. The Employers argument is that by agreement between itself and Mr. Gelderman, Gelderman took on the responsibility for paying the workers after the fact, and that agreement effectively changed the status of the workers from employees of Dhesi to employees of Gelderman.
18. The test is the status of the employees at the time of the alleged contravention. Certainly one can take on the liability for wages owing by another, but I find that doing so does not and cannot change the status of the employee retroactively for the purpose of the *Act*.
19. At the time of the contravention, the workers were employees of and had been provided by Dhesi, and I find that but for a subsequent agreement, would have been paid wages by Dhesi.
20. The Director provided a short submission in reply to the Employer's appeal. The Director indicated that the argument relating to the Dhesi/Gelderman agreement regarding wages of the employees was already put before him prior to the Determination. A review of the Determination confirms this. Accordingly, the submission/evidence is not new or was unavailable at the time the Determination was made.
21. I find that each of the grounds of appeal fails. The Employer provided no persuasive evidence that the Director failed to observe the principles of natural justice, or that new evidence became available that was not available at the time of the Determination.

ORDER

22. Pursuant to section 115 of the Act, I confirm the Determination.

Sheldon M. Seigel
Member
Employment Standards Tribunal