Employment Standards TRIBUNAL

An appeal

- by -

G.C. Farms Ltd.
("GC")

- 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.: 2008A/107

DATE OF DECISION: December 4, 2008

DECISION

SUBMISSIONS

David L. Takahashi, Barrister & Solicitor	on behalf of GC Farms Ltd. and Gurcharn Uppal, President, GC Farms Ltd.
Ravi Sandhu	on behalf of the Director of Employment Standards.

OVERVIEW

1. This is an appeal by GC Farms Ltd. ("GC"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued August 19, 2008 (the "Determination"). The Director found that GC contravened (i) section 13(1) of the *Act* in acting as a farm labour contractor ("FLC") without being licensed under the *Act*; (ii) Section 6 of the Employment Standards Regulation (the "*Regulation*") for failing to make available for inspection by the Director a daily log and for failing to file with the Director an up to date list of all vehicles used for transporting farm workers; and (iii) Section 6.1 of the *Regulation* for failing to post the required safety notice the vehicle used by GC for transporting farm workers.

2. As this was GC's first offence under each of the above referenced provisions of the *Act* and *Regulation*, the Director imposed an administrative penalty of $500 for each contravention for a total of $1,500 pursuant to Section 29 of the *Regulation*.

3. In its appeal, GC, through its counsel, David Takahashi ("Mr. Takahashi") argues that the Director erred in law and failed to observe the principles of natural justice in making the Determination and further asserts that evidence has become available that was not available at the time the Determination was being made.

4. GC is seeking a cancellation of the Determination.

5. Pursuant to Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act,* and Rule 17 of the Tribunal's Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. While GC has not specifically requested an oral hearing of its appeal, Mr. Takahashi, in his submissions indicates he has not been retained to appear at the hearing of the appeal. In my view, an oral hearing of the appeal is not necessary to decide the issues in this appeal and therefore, I propose to adjudicate the appeal based on the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

6. The issues in this appeal are the following:

    1. Did the delegate err in law in finding that GC was an unlicensed FLC and therefore operating in contravention of Section 13 of the *Act*? Correspondingly, did the

Director err in law in finding that GC contravened Sections 6 and 6.1 of the *Regulation*, which only apply if GC is a FLC?

2. Did the Director fail to observe the principles of natural justice in making the Determination?

3. Has evidence become available that was not available at the time the Determination was made? If so, is it evidence of high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on a material issue in the matter?

FACTS

7. On July 3, 2008, the Employment Standards Branch Agricultural Compliance Team (the "Team") conducted a worksite visit at Felix Farms ("Felix"). The purpose of the visit was to ensure compliance with the *Act* and *Regulation* with respect to farm labour contractors, producers, and farm workers.

8. During the worksite visit, the Team noticed that there were workers weeding a squash field, some of whom were employed by a licensed farm labour contractor ("FLC") and the rest were employed by GC who is not a FLC.

9. The Team asked the workers if a daily log had been given to them for the purpose of providing it to the delegate of the Director for inspection and the workers responded by saying "no", according to the delegate.

10. The delegate indicates that one of the individuals interviewed on site by the Team, Satnam Uppal ("Satnam"), identified himself as the owner of the farm and the employer of every worker other than those of the other FLC on site. However, the delegate notes that the other FLC on site, when asked by the Team, advised that Satnam did not own the farm and that the owner of the farm was not on site. The same FLC also confirmed that he was not working for GC, according to the delegate.

11. The delegate also notes that the Team interviewed a worker by the name of Balvir Johal ("Johal") on site and he informed the Team that Gurcharn Uppal ("Uppal") of GC was the FLC. However, Uppal was not on site at the time of the worksite visit. Johal also indicated to the Team that he was the driver of the vehicle that brought GC's workers to Felix Farms. The Team noticed the vehicle in question with license plate 174 APS which was on site at the time of the Team's visit. Upon inspection of the vehicle in question, the delegate notes that it was missing the safety notice required under Section 6.1 of the *Regulation* and the vehicle was also not on the list of vehicles registered with the Branch.

12. After the Team interviewed the workers on site at Felix Farms, the delegate states that the Team proceeded to Felix's office where they interviewed Felix's Ms. Donna Gerrard ("Gerrard"). Gerrard, according to the delegate, confirmed that Felix owned the fields in which the interviewed workers were working and she also confirmed that GC was only providing labour to Felix.

13. Subsequent to the worksite visit by the Team, on July 8, 2008, the delegate sent a letter to GC to the attention of Uppal delineating the Team's observations and findings set out above during the worksite visit and provided GC an opportunity to respond in writing by July 18, 2008.

14. On July 24, 2008, Uppal of GC sent his reply to the delegate's correspondence of July 8, 2008 enclosing a letter from Felix's counsel, Ronald Piters ("Mr. Piters") of Piters & Co., dated July 18, 2008 to the Director. Uppal also pointed out in his correspondence that GC was an operator of the farm and not a general labour contractor and all of GC's employees had their own mode of transportation.

15. Mr. Piter's letter of July 18, 2008 advised the Director that GC "was in fact the leasee of the farmlands in question" and attached a copy of the agreement between Felix and GC, which agreement was dated for reference May 1, 2006 (the "Expired Agreement") and expired on March 31, 2007. Mr. Piters' letter also indicated that he had spoken with Gerrard who "advised that at no time did she indicate to any investigator that GC Farms Inc. was a labour contractor" and therefore the delegate's conclusion that GC was a FLC was erroneously arrived at.

16. In response to Mr. Piter's letter of July 18, 2008, the delegate emailed Mr. Piters on July 21, 2008 advising that he had received the Expired Agreement and inquired whether this agreement was the correct one.

17. On July 22, 2008, Mr. Piters responded to the delegate's email advising that the Expired Agreement was renewed for 2007 and 2008; however, Mr. Piters did not forward the renewed agreement to the delegate, as Mr. Piters did not have it at the time. Subsequently, on September 8, 2008, Mr. Piters, after the Determination was made, forwarded to the Director a copy of the renewed agreement between Felix and GC dated for reference May 1, 2008 and expiring on April 30, 2009 (the "Renewed Agreement"). In the correspondence in which he forwarded the Renewed Agreement to the Director, Mr. Piters notes that he only received the Renewed Agreement on September 5, 2008 without any explanation why it was not provided earlier and Uppal also does not explain why the Renewed Agreement was not produced to the delegate prior to the Determination on August 19, 2008.

18. The Expired Agreement and the Renewed Agreement are substantively similar. Both agreements refer to Felix as the "Owner" and GC as the "Operator". Both agreements also provide that Felix is demising unto GC the farmlands in question solely for growing crops for the period indicated in the agreements in question and in turn, Felix is to pay GC compensation "which will be either equivalent to the value of 10% of the yield of potatoes, pumpkins and turnips that is produced on the said lands during the period of the lease or the sum of $500,000.00, whichever is the lower amount". The Renewed Agreement also has the following covenants that appear with minor non-substantive changes in the Expired Agreement:

> The Operator [GC] hereby covenants with the Owner [Felix]:
>
> a. To deposit all the yielded crops with the Owner;
>
> b. Not to assign or sublet this lease;
>
> c. To carry out the processing, spraying, pruning, harvesting in a manner agreeable to the Owner;
>
> d. To use such fertilizers as are agreed to by the Owner;
>
> e. To spray the plants in a manner agreed to by the Owner;
>
> f. To pay all the wages, salaries and other payment due to all workers who come to perform any work on the premises. In this connection, the Operator shall take out all necessary liability insurances including Workers Compensation Insurances to protect the worker;

. . .

i. To pay all Worker's Compensation payments in a timely fashion;

j. Do all such work as may be necessary to conform with the true intent of the parties herein.

3. The Owner covenants with the Operator:

. . .

d. To provide such equipment for the use by the Operator as agreed by the parties.

19. The delegate did not have the benefit of the Renewed Agreement prior to the Determination but relied upon the Expired Agreement to conclude that it "provided insufficient evidence to prove that GC was not operating as a FLC for two key reasons", namely, the agreement was expired and secondly, because of the substantive covenants contained therein. With respect to the latter, the delegate particularly refers to the covenants in the Expired Agreement that required GC to deposit all yielded crops with Felix and further required the harvesting of the same to be carried out in accordance with the instructions given by Felix to GC. According to the delegate, since the covenants in the Expired Agreement allowed Felix to maintain control over GC's employees in the harvesting of the agricultural product, GC came within the definition of FLC in Section 1 of the *Act* and Felix was engaging the services of an unlicensed FLC pursuant to Section 13 of the *Act*. This conclusion of the delegate in the Determination was further strengthened, in the delegates view, by Gerrard's evidence during the site visit that GC was only providing labour to Felix and Johal's confirmation that GC was operating as a FLC at the worksite at the time of the Team's site visit.

20. Based on the delegate's finding that GC was acting as a FLC, the delegate concluded that GC was responsible to comply with the legislated duties of a FLC including the duty, under Section 6(4) of the *Regulation,* to keep at the worksite and make available for inspection by the director a daily log, which GC failed as no representative of GC was able to provide, at the worksite, a daily log for each of the workers and the latter indicated that they did not have a daily log with them.

21. The delegate also noted, based on his finding that GC was a FLC, that GC had an obligation to submit to the Branch the registration numbers, license numbers and inspection certificates for all vehicles used to transport GC's workers which GC failed to do in the case of the vehicle with license plate number 174 APS which Johal drove GC's workers in to Felix's Farm. The delegate also noted that the said vehicle also did not have posted within it a safety notice required under Section 6.1 of the *Regulation.*

22. As a result, the delegate issued three administrative penalties of $500.00 each in respect of GC's contravention of Section 13 of the *Act* and Sections 6 and 6.1 of the *Regulation*.

SUBMISSIONS OF GC

23. In his appeal submissions, Mr. Takahashi, counsel for GC, is critical of the delegate for basing his findings on the Expired Agreement and not requesting GC to provide a copy of the Renewed Agreement because Mr. Piters, counsel for Felix Farms Ltd. ("Felix"), had advised him that the Expired Agreement had been renewed in advance of the Determination.

24. Mr. Takahashi further submits that notwithstanding the delegate's reliance on the Expired Agreement, the delegates reasoning is faulty in finding GC to be a FLC. In particular, Mr. Takahashi notes that it is "normal for the leasee to be subject to the rules and regulations of the landlord/owner of a property" and that the delegate, in this case, "is keying on the word 'harvesting'" as being under the control of the owner and therefore GC is a FLC." Mr. Takahashi goes on to submit "there is a clear and distinguishable difference between saying that something is to be done in accordance 'with instructions from the owner' and saying that this is 'under the control or direction of another person'". Mr. Takahashi further submits that had the delegate reviewed the Renewed Agreement, he would have found that it clarified "some of these issues". Furthermore, that had the delegate requested a copy of the Renewed Agreement, GC would have provided it to him.

25. Mr. Takahashi further submits that in the Determination, the delegate refers to an unnamed FLC who was at the worksite during the Team's visit. According to Mr. Takahashi the unnamed FLC was "K.G. Sandhu" who was a licensed FLC and had the delegate asked "the right questions he would have been informed that this FLC was in fact hired by GC and not Felix Farms".

26. Mr. Takahashi also submits that Johal is "not a reliable source for the delegate to rely upon in determining that GC was operating as a FLC as Johal "is not even aware of the requirements for being a FLC. He is only a driver and not authorized to speak on behalf of GC".

27. Mr Takahashi also submits that GC's workers only work on Felix Farms and not in any other "farm being leased by GC". Mr. Takahashi reiterates his earlier submission that the Renewed Agreement (a copy of which he submits in the appeal submissions of GC) clarifies the relationship between the parties and proceeds to explain that the covenants in the Renewed Agreement suggesting GC's employees were under the control of Felix as justifiable for "it is only prudent for a landlord to want to ensure its property is used in a proper manner".

28. On the basis of his assertion that GC is not a FLC, Mr. Takahashi submits that Section 6 of the *Regulation* requiring registration of vehicles used by FLCs to transport their employees to the farm does not apply to GC. Moreover, argues Mr. Takahashi, GC's employees "are required to arrange their own transportation to Felix and most drive their own cars".

29. With respect to the vehicle with the license plate number 174 APS which Johal used to transport GC's workers to Felix Farms, Mr. Takahashi notes that the *Regulation* "is intended to cover the transporting of farm workers to the work site, that is, from off the farm, using the highway, to the farm" and the vehicle in question "was used only for transporting farm workers from a central parking area on the farm to … one of the farm's fields" and therefore, Section 6 of the *Regulation* did not apply to GC.

30. Finally, with respect to the posting of a safety notice in the said vehicle pursuant to Section 6.1 of the *Regulation*, Mr. Takahashi submits that GC is not subject to this section as GC is not a FLC. Moreover, states Mr. Takahashi, GC only used the vehicle in question "for transporting farm workers within the farm itself and not from a location off the farm to the job site on the farm".

31. In addition to Mr. Takahashi's submissions on behalf of GC, on November 20, 2008, GC sent a fax to the Tribunal's office attaching four executed statements all dated November 20, 2008. The first statement appears to be signed by M.S. Dhillon ("Dhillon") and he states that at the time of the worksite visit by the Team, he "was interrogated by (a) person identifying himself as Jas". He further states that he does not have a driver's license and he carpools to get to Felix Farms with other employees of GC. Dhillon also states that on July 8, 2008, he was a passenger together with five others in a vehicle driven by Johal that transported him to "a field approximately 1.5 miles from where employees' vehicles are normally parked". He further submits that the vehicle driven by Johal is normally used by Uppal for his personal use and that this was the very first time that he was a passenger in the vehicle. He further submits that he, as an employee of GC, exclusively works at Felix Farms.

32. The second statement is from Johal and he too indicates in similar language to Dhillon that he is employed by GC and was "interrogated by (a) person identifying himself as Jas". Johal also goes on to state that he normally drives his own vehicle to Felix Farms as well when he is required to travel to different fields at Felix Farms. However, on July 8, 2008, Johal indicates that he operated a vehicle owned by Uppal to transport him and "6 passengers to a field approximately 1.5 miles from where (his) own vehicle was parked". He further states that while he would normally take his own vehicle to transport himself, this time he carpooled with some of the other workers as none of the workers had drivers' licenses and his own vehicle could not safely transport six passengers. It was for this reason that he borrowed Uppal's vehicle. He also indicates that his regular position with GC is as a farm worker and he occasionally drives for GC when instructed by GC "to use the vehicle to pick-up goods required for the farm". He also states that he is aware that the owner of Felix Farms is not GC and that he refers to GC as a contractor in the sense that it is the operator of Felix's farms and his employer. Like Dhillon, Johal states that while employed with GC he exclusively works at Felix Farms.

33. The third statement is from Satnam. Satnam indicates that he was present at the worksite at Felix Farms during the Team's worksite visit and he "was interrogated by a person identifying himself as Ravi Sandhu". Satnam indicates that he is not a farm owner and does not employ any farm workers. He also states that he does "not recall making statements to this effect to Ravi Sandhu". He further states that he is retired and "not a farm worker or other employee of GC" and does not know why Mr. Sandhu, the delegate, interviewed him.

34. The final statement is of Uppal who indicates that he is a director and officer of GC and the latter operates Felix Farms under the terms of the "lease made with Felix Farms Ltd" which lease is renewable on an annual basis. He further indicates that GC operates Felix Farms not as a FLC and employs farm workers to work on Felix Farms. He also states that employees of GC work exclusively on Felix Farms and that GC "will engage the services of a farm labour contractor when there is more work than can be handled by GC Farm's employees".

35. Uppal further explains in his statement that the "rents payable under the lease are calculated as a percentage rent based on production. He further states that "[t]o ensure accuracy in reporting and to ensure that farming is being carried out in an efficiently [*sic*] and in accordance with good farming practices, the landlord does retain the right to direct how GC Farms carries out its business of operating the farm as set out in paragraph 2 of the lease." He further explains that "as long as GC Farm abides by best practices in its farming operations the terms of paragraph 3 of the lease which contains Felix's covenants with GC governs the relationship between Felix as landlord and GC as tenant. He submits that the lease needs to be read in its totality and not out of "out of context".

36. He further states that employees of GC are responsible for arranging their own transportation to and from Felix Farms. He also points out that he is the owner of "a 1998 Chevrolet van" which he uses for his personal use to travel to and from Felix farms.

37. On July 8, 2008, the date of the worksite visit, Uppal states he had parked his vehicle at Felix Farms while he drove a truck to Langley to pick up some items for the farm. He further states that without his prior knowledge, Johal used his vehicle to transport "6 workers to a field approximately 1.5 miles away from where [his] vehicle was parked". Uppal states that Johal advised him that he borrowed his vehicle, as Johal's vehicle was incapable of carrying six passengers safely and none of the workers transported had their own vehicles or drivers licenses. Uppal concludes by stating that his vehicle is not required to be licensed as a farm vehicle as it used for his own personal use and also not intended for transporting workers to or within Felix Farms.

SUBMISSIONS OF THE DIRECTOR

38. The Director submits that the delegate only received the Renewed Agreement between Felix and GC after the Determination was made. Notwithstanding, the Director submits that the Renewed Agreement does not change the findings of the Director in the Determination.

39. The Director further submits that in the usual course of a lease agreement, "the party leasing the property pays the party that owns the property rent". However, in this case, it is the party that owns the property, namely Felix that is required to pay the party purportedly leasing the property, GC. This, the Director states, is rather unlikely "in a genuine lease agreement".

40. The Director further submits that even if the Renewed Agreement is legitimate, GC "still fits the definition of farm labour contractor". In particular, the Director submits that the Renewed Agreement requires GC "to carry out all processing, spraying, pruning, harvesting, etc. 'in a manner that is agreeable to the owner'". Therefore, in the Director's submissions, Felix "is retaining control over how GC sprays, prunes, processes or harvests the crops grown on Felix's farm". The Director further submits that since GC provides labour to grow and harvest crops on Felix's farm and the latter pays GC pursuant to their agreement, GC is acting as a FLC and since GC is not licensed to act as a FLC under Section 13 of the *Act*, GC has contravened the *Act*.

41. The Director further submits that since GC satisfies the definition of a FLC under the *Act*, GC is responsible for complying with the legislated duties of a FLC, which include the duties set out in Sections 6 and 6.1 of the *Regulation*, which GC, in this instance, has failed to comply with.

42. Finally, the Director submits that Section 6(1)(f) of the *Regulation* requires a FLC to file with the Director a current list of registration numbers and license numbers of each vehicle used for transporting employees and that this requirement is not simply for vehicles used to transport employees from home, but also applies to any vehicle that is used for transporting employees between worksites. Accordingly, the delegate submits that GC has failed to comply with this requirement in respect of the vehicle used by Johal to drive GC's workers to Felix's Farm.

ANALYSIS

43. GC appeals the Determination on the basis of all three grounds of appeal available in Section 112(1) of the *Act*:

> (a) The director erred in law;
>
> (b) The director failed to observe the principles of natural justice in making the determination; and
>
> (c) Evidence has become available that was not available at the time the determination was made.

44. With respect to the error of law ground of appeal, I am deducing from Mr. Takahashi's submissions that this ground of appeal is based on his view that Director erred in law in finding that GC was a FLC and unlicensed as such and therefore operating on Felix Farms in contravention of Section 13 of the *Act*. Furthermore, it appears to be Mr. Takahashi's view that the related findings of contraventions on the part of GC by the Director –namely contraventions of Sections 6 and 6.1 of the *Regulation*- should also fail as they are based on the error of law of the Director in finding GC to be a FLC.

45. In considering the error of law ground of appeal of GC, if the Director's finding that GC is a FLC is based on either no evidence or a view of the facts which could not reasonably be entertained then that finding and the related findings based on that finding must fail. I note that based on the authority of *Britco Structures Ltd*., BC EST #D260/03, findings of facts by the Director or the tribunal are reviewable as errors of law if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. However, before this ground of appeal can be considered, I am of the view that the preliminary issue of whether the Renewed Agreement should be considered as "new evidence" in this appeal must be considered first as there is a suggestion in the submissions of Mr. Takahashi that the Renewed Agreement should have been sought by the delegate from GC before the Determination and considered by the delegate before the Determination as it may arguably have made a difference in the conclusion reached by the delegate in the Determination.

46. Having said this, I also note that GC has checked off the "new evidence" ground of appeal in the Appeal Form, which Mr. Takahashi in his submissions, does not address, but I surmise that it relates to GC's presentation of the Renewed Agreement in its appeal as well as the four executed statements of Dhillon, Johal, Satnam and Uppal (jointly hereafter referred to as the "Statements") referred to earlier. Accordingly, I will deal with the both the Renewed Agreement and the Statements together.

47. The onus or the burden of proof to establish the new evidence ground of appeal as well as all other grounds of appeal-the error of law and the natural justice grounds of appeal- is on GC. GC must provide persuasive and compelling evidence, in the case of the new evidence ground of appeal, that the Renewed Agreement and the Statements it has submitted in its Appeal of the Determination were not available at the time the Determination was being made.

48. In my view, neither Mr. Takahashi's nor GC's final submissions address the question of why the Renewed Agreement or the Statements were not presented to the delegate before or at the time the Determination was made. The Determination was made on August 19, 2008. Prior to the Determination, the delegate delineated his findings based on the Team's site visit in his letter of July 8, 2008 to GC, which was sent to Uppal's attention and sought a response from Uppal, if GC disputed those findings.

49. On July 24, 2008, Uppal, on behalf of GC, sent his reply to the delegate's correspondence of July 8, 2008 enclosing a letter to the Director from Felix's counsel, Mr. Piters, dated July 18, 2008 which enclosed the Expired Agreement and indicated that GC was only a lessee of Felix Farms and disputed the delegate's view of the representations made by Gerrard to the Team during the worksite visit. Uppal also, in his reply letter to the delegate, reiterated that GC is an operator of the farm and not a "General Labour Contractor" and all employees of GC have their own mode of transportation. Uppal did not send the Renewed Agreement or the Statements together with his letter to the delegate.

50. The Section 112(5) record of the Director in the appeal shows that at the time of the Determination, the delegate had the benefit of the Expired Agreement and there was an email to Mr. Piters from the delegate on July 21, 2008 enquiring whether the Expired Agreement was the correct agreement. Mr. Piters, in his emailed response on July 22, 2008 advised the delegate that the Expired Agreement was renewed but did not provide the delegate with the Renewed Agreement. Mr. Takahashi has produced in GC's appeal the Renewed Agreement and takes the position that the delegate should have asked GC for it. In my view, the onus is on GC to produce the Renewed Agreement (which is dated for reference May 1, 2008 and appears to have been in existence at least 3 months in advance of the Determination) and any other documents including the Statements to the delegate in a timely fashion during the latter's investigation. In the case of the Statements, the evidence contained in the Statements clearly existed well in advance of the Determination and there is no explanation why GC waited to submit it in its final reply in the appeal on November 21, 2008.

51. In the circumstances, the question I must determine is whether the Renewed Agreement and the Statements, in this Appeal, qualify as "new evidence" that I should accept in my determination of Felix's appeal.

52. The test this Tribunal is bound by in determining whether or not to accept new evidence or whether evidence qualifies as new evidence for acceptance on an appeal is delineated in *Re: Merilus Technologies Inc.,* B.C. E.S.T. #D171/03. The Tribunal in *Merilus* sets out the following four conditions that must be met before new evidence will be considered:

- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- The evidence must be relevant to a material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on a material issue.

53. The above referenced criteria in the *Merilus* decision are a conjunctive requirement and therefore any party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

54. In the case at hand, I am not satisfied that GC has met the first criterion in the *Merilus* test. The Renewed Agreement and the Statements are not evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. As indicated, the Renewed Agreement is dated for reference

May 1, 2008 and I am satisfied that it existed prior to August 19, 2008 when the Determination was made, as I have not heard anything from Mr. Takahashi or GC to the contrary. Similarly, in the case of the Statements, the evidence contained therein is clearly evidence that existed prior to the Determination but GC did not produce the Statements or the evidence contained in the Statements earlier particularly when the delegate was seeking a response to his letter of July 8, 2008 from GC. As GC fails on the first of the fourfold test in the *Merilus* decision, I need not consider the balance of the tests.

55. I also wish to observe generally that the Statements are unusually similar sounding in various respects and I have some doubts about their veracity particularly where they are inconsistent with what the affiants said to the Team during the worksite visit. In any event, GC should have produced such evidence to the delegate during the investigation on the matter and most definitely prior to the Determination being made.

56. With respect to my decision to reject the Renewed Agreement as new evidence, in the event that I am wrong I have carefully reviewed the Renewed Agreement, which substantively is similar, if not identical to the Expired Agreement, which the delegate considered in making the Determination. It is my view that had the delegate had the benefit of the Renewed Agreement, it would not have led the Director to a different conclusion on the material issue in the Determination, namely, on the issue of whether GC is a FLC and operated in contravention of Section 13 of the *Act* being unlicensed as such.

57. I have also considered the submissions of Mr. Takahashi on the interpretation of both the Expired Agreement and the Renewed Agreement but find myself compelled to accept the conclusion reached by the Director in the Determination. I will, more specifically, discuss my reasons for this conclusion below.

58. Section 13 of the *Act* states:

> **Farm labour contractors must be licensed**
>
> 13 (1) A person must not act as a farm labour contractor unless the person is licensed under this Act.
>
> (2) A person who engages the services of an unlicensed farm labour contractor is deemed for the purposes of this Act to be the employer of the farm labour contractor's employees.
>
> (3) A person must not engage the services of a farm labour contractor unless the farm labour contractor is licensed under this Act.

59. Section 1 of the *Act* defines "farm labour contractor" as follows:

> "**farm labour contractor**" means an employer whose employees work, for or under the control or direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product;

60. It is undisputed by GC that when the Team visited Felix Farms on July 3, 2008, GC had its employees weeding a squash field owned by Felix. It is also undisputed by GC that it is unlicensed to operate as a FLC. What GC disputes is the finding of the Director that GC is a FLC. GC argues that it is merely an operator of the farm and truly involved in a lessor-lessee relationship with Felix under the Renewed Agreement or for that matter under the Expired Agreement as well. Upon very careful review of the Renewed Agreement which, as repeatedly indicated in this decision, is substantively similar or identical to the Expired Agreement which the delegate considered, it is clear to me that the Renewed Agreement is

an attempt, albeit a very creative one, by both GC and Felix to avoid the statutory and regulatory scheme of the *Act* and *Regulation* governing FLCs and intended to protect employees of FLCs.

61. As pointed out by the Director in the appeal submissions, the Renewed Agreement does not require GC to pay any monetary compensation to Felix for the latter's agreement to demise its lands unto GC. Instead, the Renewed Agreement requires Felix to pay GC compensation "either equivalent to the value of ten percent of the yield of potatoes, pumpkins and turnips that is produced [on Felix's] land during the period of the lease or the sum of $500,000, whichever is the lower amount", Further, the Renewed agreement requires GC to "deposit all the yielded crops [from Felix's field] with Felix"; "to carry out the processing, spraying, pruning, harvesting [of the crops] in a manner agreeable to [Felix]"; "to use fertilizers as are agreed to by [Felix]"; and "to spray the plants in a manner agreed to by [Felix]". The Renewed Agreement also contemplates that Felix is "to provide [to GC] such equipment for the use by [GC] as agreed by the parties". In my view, it is transparent from quoted passages in the Renewed Agreement that GC is a FLC and the true intent of both Felix and GC in the Renewed Agreement is for Felix to engage the services of a FLC, namely, GC, and to have the latter's employees effectively work, for or under the control or direction (whether direct or indirect) of Felix, in connection with the planting, cultivating or harvesting of agricultural products-potatoes, pumpkins and turnips-on Felix Farm's fields. If GC were a licensed FLC under the *Act*, it would not have found itself in the predicament it does now.

62. In light of my decision to uphold the Director's finding that GC is a FLC and since GC is unlicensed as such, I find that the Director's Determination correctly found GC in contravention of Section 13 of the *Act*.

63. With respect to the Director's findings that GC breached Sections 6 and 6.1 of the Regulation, I uphold these findings on the basis of my decision to uphold the Director's finding that GC is an FLC and my decision to reject the Statements as new evidence.

64. Finally, with respect to GC's natural justice ground of appeal, I find no basis or credible evidence in support thereof and dismiss this ground of appeal.

65. The appeal is dismissed.

ORDER

66. I order, pursuant to Section 115 of the *Act*, that the Determination ER #105-669 dated August 19, 2008, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal