

An appeal

- by -

Felix Farms Ltd.
("Felix")

- 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/113

DATE OF DECISION: December 4, 2008

7. 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 an FLC.
8. 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.
9. The delegate also notes that the Team also interviewed a worker by the name of Balvir Johal (“Johal”) on site and he informed the Team that he was the driver of the vehicle that brought GC’s workers to Felix Farms. He also indicated that Gurcharn Uppal (“Uppal”) of GC was the FLC. However, Uppal was not on site at the time of the worksite visit.
10. 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.
11. On or about July 8, 2008, the delegate sent a letter to Felix advising of the previous worksite visit and the Team’s discovery that Felix was engaging the services of an unlicensed FLC, namely, GC. Furthermore, the delegate also noted in the said letter the Team’s interview of Gerrard who confirmed that GC was a labour contractor to Felix and Felix owned the field that GC’s workers were working on. The delegate requested Felix to provide its response no later than July 18, 2008, if Felix did not agree with the delegate’s said findings.
12. On July 18, 2008, counsel for Felix, Mr. Ronald Piters (“Mr. Piters”) responded to the delegate’s letter of July 8, 2008, advising 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 dated for reference May 1, 2006 (the “Expired Agreement”) which had expired on March 31, 2007. Mr. Piters’ letter also indicated that he had spoken with Ms. 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 an FLC was erroneously arrived at.
13. 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.
14. 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, at least before the Determination was made on August 25, 2008.

15. 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.

16. 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 an 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 an FLC at the worksite at the time of the Team’s site visit.

FELIX'S SUBMISSIONS

17. Mr. Piters, on behalf of Felix, checked off all three grounds of appeal available in Section 112(1) of the *Act*, namely, the director erred in law, the director failed to observe the principles of natural justice and new evidence has become available that was not available at the time the Determination was made.
18. Attached to the appeal form, there is a very brief submission by Mr. Piters on behalf of Felix, which I propose to delineate verbatim. Mr. Piters states:

Please accept this as our Notice of Appeal of the Determination of the Director on the basis that the Director erred in law, failed to observe the principles of Natural Justice and although, advised by counsel, that evidence was available, made a determination without that evidence before it.

Attached is a copy of the Director's written reasons.

19. Mr. Piters also attaches to his appeal submissions on behalf of Felix the Renewed Agreement.

DIRECTOR'S SUBMISSIONS

20. The Director indicates that the delegate only received the Renewed Agreement after the Determination was made. Notwithstanding, the Director submits that the Renewed Agreement does not change the findings of the Director in the Determination.
21. The Director also submits that in the usual course "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 paying the party purportedly leasing the property, GC. This, the Director states is rather unlikely "in a genuine lease agreement".
22. The Director further submits that even if the Renewed Agreement is a legitimate lease agreement, 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 Farms' fields". The Director further submits that since GC provides labour to grow and harvest crops on Felix Farms' fields, and the latter pays GC for the crops, GC is acting as an FLC. However, since GC is not a licensed FLC under Section 13 of the *Act*, Felix has contravened the *Act* by using an unlicensed FLC, according to the Director.

ANALYSIS

23. Felix 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.

24. In the very limited written submissions of Felix, however, the latter's counsel, Mr. Piters simply states that "the Director erred in law, failed to observe the principles of natural justice and although advised by counsel that evidence was available, made a determination without that evidence before him." Mr. Piters attaches to those submissions his letter of September 8, 2008 to the Director enclosing the Renewed Agreement stating "we had advised your investigator, the Agreement had been renewed, and we only received a copy of the renewal on Friday, September 5, 2008." Also attached to the written submissions of Mr. Piters is the Renewed Agreement.
25. It would appear from Mr. Piters' submissions that the available evidence he is referring to which the Director allegedly failed to consider in making the Determination is the Renewed Agreement, which was not before the delegate at the time the Determination was made. The delegate only had the Expired Agreement.
26. Further, while Mr. Piters does not explain the basis on which he is invoking the "natural justice" ground of appeal on behalf of Felix, it would appear that it is related to the delegate not considering the Renewed Agreement that was not before him at the time the Determination was made.
27. With respect to the error of law ground of appeal, again, Mr. Piters simply makes a bare assertion that the Director erred in law without more. Again, I am deducing from the limited focus of Mr. Piters' appeal submissions that the error of law ground is based on Mr. Piters' and Felix's view that the Director's finding that Felix contravened Section 13 of the *Act* by engaging the services of GC, an unlicensed FLC, is based on either no evidence or a view of the facts which could not reasonably be entertained, had the Director had the benefit of the Renewed Agreement. In this regard, I note that based on the authority of *Britco Structures Ltd.*, BC EST #D260/03, findings of facts by the Director 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. 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 and I propose to do that in the ensuing paragraphs.
28. As indicated previously, Felix has checked off the "new evidence" ground of appeal in the Appeal Form, however, noticeably missing in Mr. Piters submissions is any mention of the new evidence ground of appeal and any submissions in support thereof. 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 Felix. Felix must provide persuasive and compelling evidence, in the case of the new evidence ground of appeal, that the Renewed Agreement it has submitted in its Appeal of the Determination was not available at the time the Determination was being made.
29. In my view, Mr. Piters' submissions do not address the question of why the Renewed Agreement was not presented to the delegate before or at the time the Determination was made. The Determination was made on August 25, 2008. Mr. Piters provided the delegate with the Expired Agreement on or about July 21, 2008 by fax and the delegate, on the same date, emailed to Mr. Piters enquiring whether the Expired Agreement was the correct agreement. Mr. Piters responded to the delegate that the Expired Agreement was renewed but did not provide the delegate with the Renewed Agreement. Subsequently in the Appeal, Mr. Piters produces his correspondence of September 8, 2008 to the Director, sent two weeks after Determination was made, enclosing the Renewed Agreement and advising the Director that he had received the Renewed Agreement on September 5, 2008.

30. There is no explanation why the Renewed Agreement which is dated for reference May 1, 2008, well over three months before the Determination was made, was not produced at any time in advance of or at the time the Determination was made. While I appreciate and do not doubt the veracity of Mr. Piters statement in his correspondence to the Director on September 8, 2008 that he had only received the Renewed Agreement on September 5, 2008, he does not explain why his client, Felix, did not produce it earlier. Surely Felix and Mr. Piters must be aware of the relevance of this document as Mr. Piters sent the delegate a similar document in the form of the Expired Agreement as early as July 21, 2008. In the circumstances the question that I must determine is whether the Renewed Agreement, in this Appeal, qualifies as “new evidence” that I should accept in my determination of Felix’s appeal.
31. 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.
32. 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.
33. In the case at hand, I am not satisfied that Felix has met the first criterion in the *Merilus* test. The evidence Mr. Piters wishes to adduce on behalf of Felix as new evidence in this appeal, namely the Renewed Agreement, is 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. The Renewed Agreement is dated for reference May 1, 2008 and I am satisfied that it existed prior to August 25, 2008 when the Determination was made, as I have not heard anything from Felix or Mr. Piters to the contrary. It is not sufficient for Mr. Piters to simply state that he did not receive the Renewed Agreement until September 5, 2008 without more and expect Felix to successfully discharge its burden to satisfy the first element of the *Merilus* test. As Felix fails on the first of the fourfold test in the *Merilus* decision, I need not consider the balance of the tests.
34. In the event that I am wrong in rejecting the Renewed Agreement as new evidence, 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 if 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 Felix breached Section 13 of the *Act* by engaging GC, an unlicensed FLC. The Renewed Agreement also does not lead me to a different

conclusion than that reached by the Director in the Determination. I will, more specifically, discuss my reasons for this conclusion below.

35. 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.

36. 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;

37. It is undisputed by Felix that when the Team visited Felix Farm’s fields on July 3, 2008, GC had its employees weeding a squash field owned by Felix. It is also undisputed by Felix that GC is unlicensed to operate as an FLC. What Felix disputes is the finding of the Director that Felix engaged the services of GC, an unlicensed FLC. Felix, based on the Renewed Agreement appears to argue that it did not engage an FLC and that its relationship with GC was a simple lessor/lessee relationship. 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 Felix and GC to avoid the statutory and regulatory scheme of the *Act* and *Regulation* governing FLCs and intended to protect employees of FLCs.

38. As pointed out by the Director, 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 the true intent of both Felix and GC in the Renewed Agreement is for Felix to engage the services of an 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*, Felix would not have found itself in the predicament it does now.

39. Finally, with respect to Mr. Piters' submission in his post Determination correspondence to the Director (which is submitted in this Appeal) that Gerrard advises that she never indicated to any member of the Team that GC was an FLC, I do not find any basis to doubt the delegate's findings in the Determination that at the time of the site visit Gerrard "clearly and confidently stated that GC was only providing labour to Felix".
40. The appeal is dismissed.

ORDER

41. I order, pursuant to Section 115 of the *Act*, that the Determination ER #156-267 dated August 25, 2008, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal