

An appeal

- by -

Pashaura Enterprises Ltd. carrying on business as Surjit Gill Farms
(“Pashaura”)

- 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: David B. Stevenson

FILE No.: 2009A/132

DATE OF DECISION: December 9, 2009

DECISION

SUBMISSIONS

Tony Bhullar Counsel for Pashaura Enterprises Ltd. carrying on business as Surjit Gill Farm

Reena Grewal on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Pashaura Enterprises Ltd. carrying on business as Surjit Gill Farm (“Pashaura”) of a Determination that was issued on September 3, 2009, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Pashaura had contravened Part 2, Section 13 of the *Act* and imposed an administrative penalty on Pashaura under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
2. Pashaura has filed an appeal of the Determination, asserting the Director erred in law and failed to observe principles of natural justice in making the Determination. Pashaura has also submitted additional evidence with the appeal.

ISSUE

3. The issues in this appeal are whether the Determination should be set aside because it has been issued against a person that does not legally exist and, alternatively, whether the Director erred in finding Pashaura was using an unlicensed farm labour contractor in contravention of section 13 of the *Act*.

THE FACTS

4. The Determination provides the following facts:
 1. On July, 2009, the Employment Standards Branch Agricultural Compliance Team (the “Team”) conducted a worksite visit of Pashaura for the purpose of ensuring compliance with the *Act* and *Regulation* with respect to farm labour contractors, producers and farm workers.
 2. While at the work site, the Team found Samra Bros. Blueberry Farms Ltd. (“Samra”) providing Pashaura with contract labour for harvesting blueberries.
 3. The Team interviewed Mr. Jaswant Gill, an employee of Pashaura, who confirmed that a vehicle on the work site belonged to Samra.
 4. The Team interviewed Hardev Ughra, the driver of the vehicle, who also confirmed the vehicle belonged to Samra and that he had brought fourteen employees of Samra to the Pashaura work site to pick blueberries because the blueberry crop at Samra’s farm was not yet ready to be picked.
 5. Other persons on the work site were also interviewed and identified Samra as their employer.
 6. Samra was not licensed under the *Act* to operate as a farm labour contractor.

7. On July 28, 2009, Pashaura was sent a letter by the Director advising of the findings and asking for a response by August 10, 2009.
 8. On August 7, 2009, the Director received a written response from Pashaura which said Pashaura had no knowledge that Samra was picking blueberries on their property, that it was done without authorization from Pashaura and, upon finding out Samra was picking blueberries on their property, they were asked to leave the property.
5. The Director found that Samra was providing labour at the Pashaura property, that Pashaura had acknowledged this finding, that Samra was not licensed to provide farm labour and that it was the responsibility of Pashaura to monitor its work site and ensure no unlicensed farm labour contractor is engaged.
 6. As a result of the findings, an administrative penalty was imposed on Pashaura.

ARGUMENT AND ANALYSIS

7. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
 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 made.*
8. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds. Accordingly, the burden is on Pashaura to show the Director erred in law. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03).
9. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
10. Counsel for Pashaura raises two arguments in this appeal: that the Director has issued a Determination against a person that does not legally exist; and that, in any event, the facts do not establish that Pashaura was engaging an unlicensed farm labour contractor.
11. Pashaura has submitted new evidence with the appeal that was not before the Director when the Determination was made. The evidence comprises a 2009 tax notice, which Pashaura says goes to who owns the farm on which the inspection was done (this document was provided with the appeal) and an affidavit from Lakhwinder Samra (this evidence was attached to the final reply made by Pashaura). The Tribunal has a discretion to allow new evidence in an appeal. In deciding whether to allow new evidence, the Tribunal considers whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the

Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana's Cantina Ltd.*, BC EST # D017/05.

12. I am not inclined to exercise my discretion under the *Act* and allow this evidence, as I do not perceive either piece of evidence to be particularly relevant to the issues I have to decide or that it would change the conclusion in this case.
13. Returning to the grounds of appeal, I will first address the argument that the Determination has been issued against a person that does not legally exist. Pashaura says the description of the employer in this case mixes two legal notions – a corporate entity and a sole proprietorship - and creates confusion and doubt about which of the two is liable under the Determination. Counsel for Pashaura goes on to argue that the proper naming of the employer is not a mere technicality, but is a substantive matter which cannot be rectified and has the effect of rendering the Determination a nullity. He says that should be the result in this case. Pashaura says, as well, the failure to correctly identify the employer has denied the “employer” the right to make full answer and defence and, as a consequence, is a breach of natural justice.
14. The Director says this is the first time the question of the description of the employer has been raised, noting that the notice sent to Pashaura on July 28, 2009 identified the employer in the same way as it is described in the Determination and no question was raised at that time. Pashaura responded to the notice without expressing any confusion about the identity of the employer. The Director says in any event that the correct legal entity has been named: Pashaura Enterprises Ltd.
15. While I have never fully understood the apparent fascination of the Director with including the name of the business under which a corporate entity operates in a Determination, I do not find that practice identifies or creates another legal entity against which the Determination is issued. At most, the phrase “carrying on business as . . .” can be described as descriptive and clarifying; otherwise, it is largely irrelevant in legally identifying the employer. Pashaura has not shown the description is wrong, in the sense of identifying the employer as Pashaura Enterprises Ltd. or that it has had the effect of confusing or misleading Mr. Gill in his July 28, 2009, response.
16. On the natural justice argument, Pashaura was provided with the opportunity to know the case against it and to respond. The July 28, 2009, response from Pashaura is made by Surjit Gill, for “Pashaura Ent. Ltd.” I find Pashaura has not met the burden of showing a denial of natural justice on the facts.
17. Pashaura says the Director has not established they engaged an unlicensed farm labour contractor because the Director failed to determine if Samra fell within the definition of farm labour contractor in the *Act*. The definition of farm labour contractor in section 1 of the *Act* reads:

“farm labour contractor” means an employer whose employees work, for or under the control and direction of another person, in connection with the planting, cultivating or harvesting of an agricultural product.
18. Specifically, Pashaura says the Director failed to determine whether the employees of Samra were under the “control or direction” of “another person”, in this case, Pashaura. In that respect, Pashaura asserts “control or direction” of Samra’s employees remained at all times with Samra, that as a result Samra did not come within the definition of farm labour contractor under the *Act* and Pashaura could not be found to have engaged an unlicensed farm labour contractor.
19. As well, Pashaura says the breach, if there was one, was trivial and should not concern the Director because Samra is not a farm labour contractor in the traditional sense and their use by Pashaura does not undermine

the purpose of the proscriptions found in section 13. Counsel for Pashaura submits the circumstances require section 13 to be interpreted and applied narrowly and should result in a finding that there was no violation of the *Act*.

20. The Director says the facts support a conclusion that Samra's employees were under the control and direction of Pashaura but, in any event, the facts showed that Samra's employees were helping Pashaura harvest their blueberries. That last conclusion is not disputed by Pashaura and is, in fact, confirmed in the appeal submission, where counsel states, "Samra, due to a shortage of labour, was assisting the Appellant [Pashaura] with his harvest who was losing much of the crop to the ground."
21. A similar argument about "control and direction" was raised and addressed by the Tribunal in *Mainland Farm Labour Supply Ltd.*, BC EST # D058/06. In that case, Mainland argued it fell outside the definition of "farm labour contractor" because it alone had control and supervision of its employees at all material times. Mainland contended that the definition applies only to a contractor who simply supplies labour, but is not involved in the direction or control of that labour. In rejecting that argument, the Tribunal said:

The issue, as it is raised in this appeal, has focused on whether the employees of Mainland were under the control or direction of Mainland or of Harry Bros. Farms. That is a factual question which, if it were necessary to resolve in order to decide this part of the appeal, would need to be returned to the Director for further investigation and consideration. The argument by Mainland, however, ignores one element of the definition about which there is no dispute. The definition of "farm labour contractor" includes an employer whose employees work *for . . . another person, in connection with . . .*. In my view, the word "*for*" should be given an expansive meaning consistent with the nature of the relationship that is being described. An employee of a farm labour contractor is, at least, working "*for*" another person where the work that is being done by that employee benefits that other person in a material way. The Determination and material indicate the employees of Mainland were working on Harry Bros. Farms land, harvesting blueberries on that farm for Harry Bros. Farms. There is no doubt on those facts that Mainland's employees were working for Harry Bros. Farms at the relevant time. Those facts are sufficient to bring Mainland within the definition of "farm labour contractor" in the *Act*.
22. Like the argument made in the *Mainland* case, the argument made by Pashaura here ignores the clear and obvious inference from the facts: that the employees of Samra were working *for* Pashaura, harvesting Pashaura's blueberries for the benefit of Pashaura. That circumstance brings Samra within the definition of farm labour contractor in the *Act*. There is no dispute that Samra was not licensed to operate as a farm labour contractor. Accordingly, the contravention is established on the facts as they are applied to the definitions and provisions of the *Act* without the need to resolve the question of "control and direction".
23. In respect of the argument based on the contention the administrative penalty scheme in the *Act* is penal in nature, the Tribunal has reached a different conclusion: see *Kimberly Dann Kopchuk*, BC EST # D049/05 (Reconsideration denied, BC EST # RD114/05). Consequently, the arguments based on that suggestion are misconceived and require no further analysis.
24. For the above reasons, the appeal is dismissed.

ORDER

25. Pursuant to section 115 of the *Act*, the Determination dated September 3, 2009, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal