BC EST #D254/99
Reconsideration of BC EST #D551/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

David Marshall operating as Sedona Orchards

("Marshall" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/246

DATE OF DECISION: July 14th, 1999

DECISION

OVERVIEW

This is an application filed by David Marshall operating as Sedona Orchards ("Marshall" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to confirm a determination that was issued by a delegate of the Director of Employment Standards on October 5th, 1998 under file number 90472 (the "Determination").

By way of the Determination, the Director's delegate levied a monetary penalty against Marshall in the amount of $2,100. The penalty was issued on the basis that Marshall was acting as a farm labour contractor without being licensed. Marshall appealed the Determination to the Tribunal and in a decision issued December 14th, 1998, the adjudicator confirmed the Determination.

Marshall's request for reconsideration is contained in a letter from his solicitors to the Tribunal dated April 23rd, 1999. I have also reviewed a subsequent submission to the Tribunal filed on behalf of the employer and dated May 28th, 1999 as well as a submission, dated May 17th, 1999, filed on behalf of the Director of Employment Standards.

THE SUSPENSION REQUEST

I should also note that by way of a letter to the Tribunal dated March 11th, 1999, Marshall's solicitors requested that "no steps be taken to enforce the Order"; in turn, the Tribunal Registrar wrote to Marshall's solicitors on March 16th drawing their attention to section 113 of the *Act.* On April 23rd, 1999 Marshall's solicitors forwarded a $250 cheque payable to the Director of Employment Standards and asked that such amount "be accepted as an adequate deposit to warrant a suspension of any enforcement proceedings *until the appeal has been heard and decided*" (my *italics*).

Marshall's solicitors appear to be under a misapprehension regarding the present proceedings. The appeal has already been heard and decided--the Determination was confirmed. The present application is a request for reconsideration made pursuant to section 116 of the *Act*--it is not an appeal of the original Determination.

In any event, given my view that the instant request for reconsideration ought to be refused on its merits, I need not address the question of whether or not a suspension is appropriate, or the terms and conditions that might be imposed if I was inclined to suspend the Tribunal's decision to confirm the Determination pending a decision on the substantive application.

I now turn to the merits of the within application for reconsideration.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act* (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the Act is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

Several relevant uncontroverted facts ought to be noted:

- Marshall did not hold a farm labour contractor's licence in June or September 1998;

- On June 8th, 1998 a Determination was issued pursuant to which Marshall was penalized, in the amount $0, for failing to have a farm labour contractor's licence--Marshall did not appeal this Determination;

- On September 28th, 1998, 14 employees of Marshall were observed to be working at a site known as "Kettle Mountain Ginseng" in Kelowna, B.C. harvesting ginseng roots, resulting in the instant Determination being issued on October 5th, 1998; and

- As noted in the adjudicator's decision, while the employer on appeal challenged the delegate's finding that 14 of his employees were working at Kettle Mountain Ginseng on September 28th, 1998, he accepted this figure on September 28th and thus can no longer challenge that finding in accordance with the Tribunal's well-established line of authority now known as the *Tri-West Tractor/Kaiser Stables* rule (see *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97).

A "farm labour contractor" is 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 (see section 1 of the *Act*). Marshall's solicitors, in effect, concede Marshall's status as a farm labour contractor: "...there was absolutely no prejudice to any of his employees involved...[who] were paid properly according to their rates of pay and [Marshall] made a very negligible profit from permitting his employees to work on the ginseng farm" (Marshall's solicitor's April 23rd letter to the Tribunal). Any person acting as a farm labour contractor must be licensed as such (section 13 of the *Act*).

The Director's authority to levy monetary penalties is set out in section 98 of the *Act.* Monetary penalties are imposed "in accordance with the prescribed schedule of penalties" [section 98(1)]. In Appendix 2 of the *Employment Standards Regulation,* certain "specified provisions" are set out, including the section 13 farm labour contractor licence requirement. Section 29(2) of the *Regulation* states that:

> (2) The penalty for contravening a specified provision of a Part of the Act or a Part of this regulation is the following amount:
>
> > (a) $0, if the person contravening the provision has not previously contravened any specified provision of that Part;
> >
> > (b) $150 multiplied by the number of employees affected by the contravention, if the person contravening the provision has contravened a specified provision of that Part on one previous occasion...

As noted above, Marshall had, only a few months previous, contravened the very same licensing provision and thus the Director was obliged, once she determined to issue a penalty, to impose a $2,100 monetary penalty given the number of employees involved. The employer now asserts that the penalty was "unduly harsh" because it was levied for a relatively minor offense. One may or may not accept that assertion regarding the comparative seriousness of the contravention, but in any event, once the Director decided to levy a penalty, she had no discretion as to the amount of that penalty.

The employer also asserts that "there has been a failure to comply with principles of natural justice in that no hearing has been held and our client has not had an opportunity to make oral representations". A hearing, albeit not an oral hearing, was held and the result was the adjudicator's decision to confirm the Determination. The Tribunal was not required to hold an oral hearing--see section 107 of the *Act*--and given the nature of the uncontroverted facts and the issues raised in the employer's appeal documents in this case, I cannot fathom why an oral hearing would have been necessary.

In light of the foregoing, I see no reason whatsoever to vary or cancel the adjudicator's decision.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal