BC EST # D304/98
Reconsideration of BC EST # D172/98

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-

Coastview Fruit Packers Inc.

("Coastview")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/270
DATE OF DECISION:	July 8, 1998

DECISION

OVERVIEW

This is an application filed by Coastview Fruit Packers Inc. ("Coastview") pursuant to section 116 of the *Employment Standards Act* (the *"Act"*) for reconsideration of an adjudicator's decision to confirm a Determination issued by the Director of Employment Standards on December 19th, 1997 under file number 65608 (the "Determination").

The Director's delegate held that Coastview owed its former employee, Jagdev Sahota ("Sahota"), $14,260.19 on account of unpaid wages (including overtime, vacation pay and statutory holiday pay) and interest. Sahota claimed he was employed as a bus driver (driving farm labourers to and from various farms) during the period May 5th, 1997 to August 24th, 1997; while acknowledging that it had employed Sahota in 1995, Coastview denied that Sahota was employed at all in the calendar year 1997.

Coastview appealed the Determination alleging that it had not been given a reasonable opportunity to respond to the complainant's allegations (see section 77 of the *Act*). Coastview also sought an oral hearing to "test the credibility of the various parties involved in the case" (see page 1 of the adjudicator's decision). The adjudicator proceeded on the basis of the parties' written submissions and, as noted above, confirmed the Determination.

Coastview's request for reconsideration is contained in a letter from its solicitors dated April 27th, 1998 and addressed to the Tribunal's Registrar. The primary ground advanced in support of the reconsideration request is the assertion that the Tribunal ought to have conducted an oral hearing rather than proceeding on the basis of the parties' written submissions. Further, by way of a letter dated April 22nd, 1998, Coastview's solicitors forwarded two affidavits sworn by Mr. Rajinder Nijjer and Mr. Kash Nijjer, Coastview's president and "operations supervisor", respectively, and Coastview now asks that these affidavits be taken into account on the reconsideration. These latter two affidavits were not before the adjudicator. The solicitors' April 22nd letter enclosing the affidavits was date-stamped April 23rd by the Tribunal--the day after the adjudicator's decision was issued.

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. Nor is the reconsideration provision to be used to submit evidence that, more properly, ought to have been put forward during the initial investigation or at the appeal stage.

The adjudicator quite properly decided that Coastview's appeal did not need to be disposed of via an oral hearing (see pages 4-5 of the adjudicator's decision). Coastview now claims that the Tribunal's decision not to hold an oral hearing was made without "sufficient warning"--such a position is patent nonsense.

As noted above, the Determination was issued on December 19th, 1997; Coastview's appeal was filed on January 9th, 1998--the primary ground of appeal was a denial that the complainant was employed by Coastview in 1997. The appeal form itself directs the appellant to "attach...all documents which support your appeal" and continues: "The Tribunal may decide this appeal *based solely on the documents submitted to it"* (*italics* added).

On January 12th, 1998 the Tribunal Registrar wrote to all parties (including the appellant and its solicitors) requesting that all written submissions (including supporting documents) be filed by no later that February 2nd, 1998. The Registrar's letter continues:

> "The parties are advised that this matter will be decided by an Adjudicator. The *Adjudicator may decide this appeal based solely on written submissions* or an oral hearing may be held. *An oral hearing may not necessarily be held.*" (*italics* added)

In response to this letter, Coastview's solicitors wrote to the Tribunal on January 21st, 1998 but did not provide *any* written submission (or supporting documents) with respect to the matters in dispute between the parties--this two paragraph half-page letter merely requests an oral hearing. I understand that Coastview was advised, yet again, on April 16th, 1998 that an oral hearing would not be held. I can find nothing in the record before me that even remotely suggests that the Tribunal indicated to the appellant that an oral hearing *would* be held in this matter.

In the absence of any submissions from the appellant, beyond those set out in the appeal form, and given the overwhelming body of evidence in favour of the Determination, the adjudicator quite properly confirmed the Determination.

The evidence discloses that this appellant refused to fully participate in the initial investigation conducted by the delegate--for example, Mr. R. Nijjer was invited to attend the local Employment Standards Branch office to discuss the matter but refused to attend saying he did not want to discuss the complaint.

Further, despite being put on clear notice, both the appellant and its solicitors neglected or refused to provide, as directed, a written submission (with supporting documents) to the Tribunal. Coastview has not provided a satisfactory explanation for its failure to submit, in a timely manner, the two affidavits so that they might have been put before the adjudicator for his consideration.

I also noted there is evidence before me to suggest that the payroll records that were produced to the Director's delegate are not the same records that were produced to the Tribunal thus calling into further question the veracity of the appellant's assertion that the complainant was not employed by Coastview in 1997. It would appear that the employer's payroll records are not a reliable guide as to who was, or was not, employed in any given period.

ORDER

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

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal