

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act*

- by -

Awassis Home Society  
("AHS")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**Adjudicator:** Hans Suhr

**File Nos.:** 96/176, 96/273

**Dates of Hearing:** August 7, 1996, and  
October 7 & 8, 1996

**Written Submissions Received:** November 19, 1996 and  
December 23, 1996

**Date of Decision:** January 16, 1997

## DECISION

### APPEARANCES

Mary N. Fus	Counsel for Awassis Home Society
Arlene Laboucane	for Awassis Home Society
Evelyn Danahy	for Awassis Home Society
Audrey Cowger	for Awassis Home Society

Lisa Herle	on her own behalf
Chris Ducharme	on her own behalf
Florence Martin	on her own behalf
Agnes Miller	on her own behalf
Deanne McLeod	on her own behalf
Sylvia Bibault	on her own behalf
Norma Laliberte	on her own behalf

Thomas F. Beasley	Counsel for the Director of Employment Standards
Michelle J. Alman	Counsel for the Director of Employment Standards
Robery Joyce	for the Director of Employment Standards

### OVERVIEW

This is an appeal by Awassis Home Society (“AHS”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determinations No. CDET 001389 and CDET 001816 issued by a delegate of the Director. In this appeal, AHS makes a number of claims, among which are the following:

- that the Director erred in finding that the employees of AHS were not excluded under Sec. 34 (1) (r) of the *Employment Standards Act Regulations* (the “*Regulations*”)
- further that the Director erred in determining that Sylvia Bibault (“Bibault”) was entitled to severance pay
- further that the Director erred by including Deanne McLeod (“McLeod”) in the Determination

Written submissions were received from AHS and the director. Subsequently, an oral hearing was held in Fort St. John on August 7, and October 7 & 8, 1996. Final argument from the parties was by way of written submission.

## ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Were the employees of AHS excluded from Part 4 of the *Act* under the provisions of Section 34 (1) (r) of the *Regulations* ?
2. If the answer to question #1 is in the negative, is Bibault entitled to overtime pay for hours worked in excess of 8 hours in a day or 40 hours in a week pursuant to Section 40 of the *Act* ?
3. Was the complaint of McLeod for unpaid wages made within the time limits as set forth in the *Act* ?
4. Is Bibault entitled to compensation for length of service pursuant to Section 63 of the *Act* ?

## FACTS

AHS is a charitable society registered under the *Society Act*, R.S.B.C. 1979, c.390 and operates a five bed home in Fort St. John, for children up to 12 years of age who are in the care of the Superintendent of Family and Child Services (“Superintendent”).

AHS entered into a **Residential Child Care Resources Agreement** (the “Agreement”) with the Ministry of Social Services dated February 21, 1995.

AHS employed a number of workers as “childcare” workers in order to care for the children placed in its facility by the Superintendent.

The board of directors of AHS employed a coordinator to supervise the employees and manage the day to day operations of the home.

On some occasions, the employees of AHS worked in excess of 8 hours per day or 40 hours per week and were not paid overtime rates of pay.

Bibault was suspended without pay on January 12, 1996 and simultaneously served with 5 weeks notice of termination to be effective February 16, 1996.

At the outset of the October 7, 1996 hearing date, the parties agreed that should both of the Determinations be upheld, the total amount owing would be \$24,843.84. The parties further agreed that no wages were owing to Anna Pinesse or Agnes Miller.

A preliminary order was issued October 7, 1996 that any funds in excess of \$24,843.84 being held by the Ministry of Labour were to be forwarded to AHS as soon as possible.

## **EVIDENCE OF THE PARTIES**

I heard testimony from four witnesses, Arlene Laboucane (“Laboucane”), director of AHS on behalf of the appellant; Bibault, McLeod and Norma Laliberte (“Laliberte”), on their own behalf. As the evidence provided was rather lengthy, I will only summarize the relevant evidence.

Laboucane testified that she has been involved with AHS since its inception. Laboucane stated that the society was registered in 1987, fund raising events were conducted and the home was purchased in 1987. Laboucane further stated that operational funding for the home was consistently being pursued through Social Services to no avail until July 1990.

Laboucane stated that the main objective for AHS was to prevent child apprehensions through having a supportive home for people to place their children while the parents underwent treatment for various medical conditions or for drug and alcohol related problems. Laboucane further stated that the focus of the home was to be for the aboriginal community.

Laboucane stated that the initial funding was used for furnishing and equipping the home and actual operations commenced on October 1, 1990. Laboucane further stated that fundraising activities on behalf of AHS continued until 1992 when the home was paid for. Laboucane further stated that at that time, the bingo license, which was a major part of the fundraising activities, was changed to be in favour of the Northern Cultural Healing Centre (“NCHCS”), a new society set up to promote cultural healing among the first nations people.

Laboucane stated that a coordinator was hired to supervise the staff and perform the day to day managing of the home. Laboucane further stated that a number of childcare workers were hired for the home.

Laboucane stated that the AHS home was a group home licensed by the Ministry of Health and further that the coordinator also was required to be licensed.

Laboucane stated that in the two years prior to closing the home AHS had a number of coordinators. Those coordinators were: Robert Bergen, May 1, 1994 to April 30, 1995; Anna Pinesse, May 1, 1995 to Sept. 1, 1995; Agnes Miller (acting coordinator) Sept. & Oct. 1995; Norma Laliberte, Nov. 1, 1995 to Mar. 15, 1996.

Laboucane stated that the board of directors did not approve of or agree with some of the changes made by the coordinators over the years, especially with respect to visiting being discouraged and complaints not being forwarded to the board.

Laboucane stated that the board did not get involved in the day to day operations of the home as that was the coordinators responsibility.

Laboucane stated that while the focus of the home was the first nations people, out of the approximately 200 children who were placed in the home from 1990 to 1996, about 75% were first nations children.

Laboucane stated that she had reviewed the files of AHS and those files revealed that while there were some children placed who would be considered physically disabled or mentally disabled, the majority of the children were, in her view, otherwise disabled. Laboucane stated that a number of the children had been diagnosed with Fetal Alcohol Syndrome (“FAS”) or Fetal Alcohol Effect (“FAE”), both of which require special treatment. Laboucane further stated that a great number of the children placed in the home and their parents were personally known to her.

Laboucane stated that the intent of the board of directors was, in conjunction with regular medical care, to utilize traditional first nations activities such as “sweats” and “smudgings” to protect the home and to promote the well being and healing of the first nations children placed there. Laboucane explained in great detail the types of traditional first nations cultural and healing activities which the board wanted to be utilized in the home. Laboucane further stated that the “sweats” were provided through the NCHCS and conducted by the elders or medicine people and she did not know if any employees of AHS ever performed or attended “sweats”. Laboucane further stated that she was present on some occasions when the AHS home was “smudged” by an elder or medicine person. Laboucane further stated that it was her understanding that the employees of AHS would carry out the intent of the board to have the home operate utilizing the traditional first nations cultural activities as much as possible.

Laboucane stated that it was her understanding that the coordinator and employees of AHS worked closely with the various social workers and medical practitioners with respect to the care of each child.

Laboucane stated that on more than one occasion she personally contacted the Employment Standards Branch with respect to the payment of overtime to the childcare workers and was informed that the employees of AHS were excluded from the requirement to pay overtime wages. Laboucane further stated that at no time prior to these complaints was AHS ever informed that the information on the exclusion of its employees from payment of overtime was in error.

Under cross examination by counsel for the Director with respect to issue #1, Laboucane testified that:

- “sweats” were never performed at the AHS home, they were performed on some land provided at mile 62 of the Alaska Highway;
- she had been on the board of directors of AHS in different capacities since 1987;
- she had no personal knowledge of whether employees ever got instructions from a social worker or the Child Development Centre with respect to any specific child;
- the board expected that the employees would follow the instructions of the first nations medicine people with respect to utilizing traditional healing activities;

- her understanding of “disabled” means children who are unable to cope with schoolwork, unable to socialize with others, unable to establish friendships, have been traumatized and become withdrawn;
- she feels that “emotional disability” is different and distinct from “mental disability”;

With respect to issue #2, (employees working overtime), Laboucane stated that some employees incurred overtime hours when they decided to swap shifts amongst themselves in order to attend some training courses that the board had determined not to approve. Laboucane further stated that other overtime hours would have arisen as a result of providing coverage for absent employees. Laboucane further stated that some employees took compensatory time off in lieu for overtime hours worked.

Laboucane stated the personnel policies of AHS were being reviewed in late 1995 with a view of updating them.

Under cross examination by counsel for the Director with respect to issue #2, Laboucane testified that:

- that AHS never paid overtime wages to employees who worked the 2 twelve hour shifts on the weekends as those employees did not work more than forty hours in a week;
- that while the personnel policy of AHS contemplated the payment of overtime to the employees who worked more than 40 hours in a week, this was done as a matter of policy, not as a result of any legal requirement to do so;
- that this policy had been amended from time to time in response to budgetary concerns;
- that at the November 14, 1995 board meeting it was decided to adhere to the *Act* and the exclusion from payment of overtime;
- the coordinator at the time, Bergen apparently was aware of Bibaults swapping shifts in order to attend training and then putting in for the scheduled hours for that week even though she did not work those particular hours;
- the board did not become aware of Bergen permitting some employees to swap shifts and “doctor” the books in order to attend training until some 3 months later.

With respect to issue #3, ( McLeods complaint), Laboucane stated that she did not become aware that McLeod had a complaint until March 1996 and that McLeods last day of work was July 7, 1995. Laboucane further stated that the staff knew who signed the paycheques and if there was a problem they should have come to the board.

Laboucane stated that in the beginning the staff used to attend most board meetings but those meetings ended up being a “bitch session” and that with the exception of the coordinator, the staff was asked not to attend board meetings.

Under cross examination by counsel for the Director with respect to issue #3, Laboucane testified that:

- she was not aware of any staff unhappiness with the way things were being run;

- there had been rumours of previous employees going to the Employment Standards Branch but she had no personal knowledge of that taking place.

With respect to issue #4, (compensation entitlement for Bibault), Laboucane stated that it was a requirement for all staff to have undergone a criminal records check, a class 4 drivers license and a letter from the Doctor that the staff member could work with children. Laboucane further stated that she received a telephone call from the licensing person at the Ministry of Health to advise that Bibault had a criminal record. Laboucane then stated that as a result of that telephone call she contacted the current coordinator Laliberte and requested that a review of Bibaults file be conducted.

Laboucane stated that prior to the telephone call to Laliberte, the board was not aware that Laliberte had taken steps in early December 1995 to ensure that all employees criminal record checks were updated. Laboucane also stated that Laliberte was informed that the new legislation would not be effective until April 1, 1996 therefore all updates to the criminal record checks had to be completed prior to that date.

Laboucane stated that in early January 1996 she reviewed the employee files with respect to the criminal record checks and discovered that the previous criminal record check for Bibault was not complete. Laboucane also stated that the incomplete criminal record check was a cause for great concern to the board and after discussing the situation with AHS legal counsel, it was decided to suspend Bibault until her criminal record check was completed. Laboucane further stated that Bibaults letter of suspension on January 12, 1996 also included 5 weeks notice of termination “because of her own performance and the closing of the home” to be effective February 16, 1996.

Laboucane stated that at a board meeting held either January 13 or 14, 1996, a decision was made to cease operating the home effective February 29, 1996 and subsequently notice of termination of employment was issued to all employees immediately after that meeting.

Under cross examination by counsel for the Director with respect to issue #4, Laboucane testified that:

- she had seen a consent for criminal record check signed by Bibault dated January 16, 1996;
- she was not aware of a consent for criminal record check signed by Bibault dated December 14, 1995;
- she had seen the consent for criminal record check dated September 12, 1990 but that the results of the fingerprinting was not attached;
- she did not know if the results of the fingerprinting in 1990 were ever in the files, all she knew was that those results were not in the file in January 1996;
- she did not know why the coordinator would not have pursued the issue of the incomplete criminal record check from 1990;
- she was not aware until January 1996 that Laliberte had already taken steps to update all employees criminal record checks in December 1995;

- she does not recall if Bibault ever informed the board at the time of hiring in 1990 that she did have a criminal record;
- she told Bibault that she couldn't work unless she had a completed criminal record check;
- she instructed Laliberte what to type on Bibault's letter of suspension and notice of termination;
- when she read the results of the criminal record check on March 19, 1996, the contents would not have resulted in Bibault not being hired as an employee;

Bibault testified that she started working at AHS October 1, 1990 and prior to that had gotten the required criminal record check, letter from a doctor and a TB test. Bibault also stated that the coordinator at the time, Erma Soumont ("Soumont") provided the consent for criminal record check forms to her and that the results were to be sent to AHS. Bibault further stated that when she was advised by Soumont that fingerprinting was required she provided the fingerprints. Bibault further stated that she advised Soumont that her criminal record was for shop lifting and impaired driving.

Bibault stated that she did not know if AHS ever received the results of the fingerprinting as all employee files were kept in a locked filing cabinet in the office at AHS.

Bibault stated that on a daily basis her duties included waking the children, feeding them, driving them to and from school, driving them to and from Doctors appointments etc., driving them to and from various court hearings as required, performing various activities with them such as taking them swimming, to the park, to the mall, helping with their homework.

Bibault stated that when children were taken to the Doctor, the childcare worker usually accompanied the child while the Doctor examined them and explained the proper administration of any medication prescribe. Bibault also stated that when the child was taken to the psychiatrist or psychologist, the child was usually not accompanied into the treatment area.

Bibault stated that in her five years of employment she only accompanied a child on one occasion into a psychiatrists treatment area for a meeting, however the Doctor did not advise her with respect to any treatment for the child. Bibault also stated that on another occasion she attended a meeting at the child's school with the teacher, social worker, parent and home worker to discuss changes observed in the child. Bibault further stated that on another occasion she attended a meeting with the social worker and the parents to explain how a child was being treated. Bibault further stated that except for these 3 occasions she was not involved in any meeting or discussions with respect to children she provided care for.

Bibault stated that she had undergone training to recognize and deal with issues such as sexual abuse, FAE, FAS, aids and methods of restraints. Bibault stated that the purpose of this training was to upgrade the knowledge and skills of the staff.



With respect to the aboriginal environment at the AHS home, Bibault stated that except for some pouches, flags and 3 colouring books obtained from the Native Friendship Centre, there were no other aboriginal materials provided for the staff to use with the children. Bibault also stated that she was not aware of any aboriginal ceremonies being conducted in the home for the benefit of the children however, as she worked on rotating shifts, it may have taken place when she was not at work. Bibault further stated that she burned sweetgrass and sage in the office area for her own benefit but never in the rest of the home. Bibault further stated that she did not participate in any “sweats” with any of the children nor did she ever drive any children to mile 62 to participate in a “sweat”.

Bibault stated that the employees were provided with information on forms from the Health Unit with respect to the nature of treatment for each child. Bibault also stated that the employees were not permitted to give any medication without a note from a Doctor.

Bibault stated that she had never been advised that there were any problems with her work performance nor had she ever received any verbal warning or letter regarding her work.

Bibault stated that the issue of new criminal record checks first arose when Laliberte advised the staff near the end of 1995 that all criminal record checks had to be updated. Bibault also stated that Laliberte told her and Agnes Miller that they needed to obtain new criminal records checks and provided the necessary forms. Bibault further stated that she filled out the form, signed it on December 13, 1995 and left it in the staff book for Laliberte to send it in. Bibault further stated that when she was asked to complete this new criminal record check, she told them that she had a criminal record.

Bibault stated that she was not aware when or if the results of that criminal record check were sent to AHS.

Bibault stated that she was on vacation from December 15, 1995 until January 1, 1996.

Bibault stated that she worked on January 4, 1996 and then received a call from Laliberte and advised that as a result of a call from Laboucane, Bibault was to be suspended but could work on the Friday but not afterwards. Bibault also stated that after receiving this call from Laliberte, she called the Labour Board (ESB) and was told that AHS had to provide notice and reasons.

Bibault stated that at approximately 2:15 p.m., she received another call from Laliberte who then advised her that she could not work on the Friday either because she did not have a completed criminal record check. Bibault also stated that she requested Laliberte contact Laboucane and that they provide a letter advising why she was suspended. Bibault further stated that Laliberte called back and advised that no letter would be provided. Bibault further stated that she did not work on Friday January 5, 1996.

Bibault stated that Laliberte called her home on January 8, 1996 and left a message for her to call. Bibault stated that when she returned the call, Laliberte advised her that she would be able to return to work and she would have until April 1996 to get the criminal record

check completed. Bibault also stated that she returned to work on January 8, 1996 and also worked on January 9, 10 and 11.

Bibault stated that when she was to pick up her paycheque on January 12, she was told to come back later which she did at approximately 4:30 p.m. when she was advised that she was suspended until she completed her criminal record check. Bibault also stated that she was given here letter of suspension and notice of termination at that time. Bibault further stated that no one spoke to her between January 8 and 11 with respect to the criminal record check.

Bibault stated that Laliberte advised her Laboucane would not accept the December 1995 criminal record check and that another criminal record check had to be done. Bibault further stated that she requested new forms from Laliberte and had to wait until January 16, 1996 for Laboucane to drop them off. Bibault further stated that she filled out the forms on January 16 and submitted them to Laliberte. Bibault further stated that she was advised by Laliberte on January 26 that the results had been received and that Bibault was required to be fingerprinted. Bibault further stated that she had to wait until January 29 to be fingerprinted and that she has never seen the results of the fingerprinting.

With respect to the issue of swapping shifts in order to attend training, Bibault stated that it was only done with the permission of the coordinator Bergen and that the records were changed at his suggestion to reflect the hours scheduled instead of the hours actually worked in order that no cost accrue to AHS.

Bibault stated that she did not return to work after January 16, 1996 because she was not asked to do so.

Under cross examination by counsel for AHS Bibault testified that:

- she did not follow up to see if the criminal record check was complete as the results would be sent to AHS and she would be informed by the coordinator;
- it was not a secret to AHS that she had a criminal record;
- it was a condition of employment to undergo criminal record check;
- the employee files were kept in a locked cabinet and the coordinator had keys;
- she never asked the coordinator for the keys to the file cabinet;
- she completed a criminal record check including fingerprinting in 1990 prior to being hired;
- she was not aware until December 1995 that there was not a complete criminal record check in her file;
- she was not aware that any other employee had a problem with respect to the criminal record check even though some did have a criminal record;
- the criminal record check presented to her at this hearing accurately discloses her record;
- she was told by the Health Unit that there had been a mix up with her criminal record check in Burnaby;

- she filled new forms for a criminal record check on January 16, 1996 because the board would not accept the one from December 1995;
- with respect to her work duties, on two occasions only did she meet with a social worker away from AHS to discuss a child in care;
- when the social workers came to AHS, they met alone with the children;
- the employees were told by social services that they were not allowed to burn sweetgrass and sage for the children;
- she never participated in any “sweats” while she was employed at AHS;
- she was never asked to take any of the children to a “sweat”;
- she had some concerns about how AHS was spending its funding as there wasn’t much for the children;
- the petty cash was for the occasions when employees took children for an outing and needed some money or had to be repaid although that did not always happen;
- for some of the children it was necessary to read the forms from social services to see if the children were of aboriginal ancestry;
- part of her responsibility as an employee was to provide a positive role model for the children.

McLeod testified that she began working at AHS as a part time employee on August 26, 1993. McLeod also stated that she gave notice to AHS that she would be leaving on July 15, 1995 as she had been told the home would be shutdown due to budgetary problems. McLeod further stated that her last day worked was actually July 9, 1995 as she was only working weekends and some relief shifts.

McLeod stated that she made a number of calls to the Branch in Dawson Creek during 1995 with respect to problems arising at the home. McLeod also stated that she did not file a written complaint to the Branch with respect to unpaid wages but that after becoming aware of the Branch’s investigation in November / December 1995, she called the Industrial Relations Officer (“IRO”) in early December to discuss her situation. McLeod further stated that while initially the IRO advised her that she was out of time, he later advised her that her situation was within the time limits provided in the *Act* and that he would include her in his investigation.

Under cross examination by counsel for AHS McLeod testified that:

- she believes that the calls to the Branch were made from either her own home or her mothers home;
- she did not file a written complaint with the Branch as the IRO advised she did not have to;
- she was aware that some employees were calling social services with respect to the operations of the AHS home;
- she was not aware that copies of some AHS cheques were sent to social services;
- she was aware of the shift swaps that took place to permit the training;

- she did not feel that the memo from the board applied to her as the training was from Monday to Thursday and she only worked on the weekends;
- in her opinion there was a lack of communication between the board and the employees in the home;
- she never saw any notices regarding “sweats” and never participated in any;
- she became aware that a “sweat lodge” had been put up but that was from other places, not AHS;
- she was aware that some staff had spoken to social services with regard to burning sweetgrass, sage etc. and had been told by Bibault that social services did not approve of these practices;
- she chose not to follow the board's directions with regard to the burning of sweetgrass and sage in areas where the children would be affected;

In reply to a question from the tribunal, McLeod stated that she was never instructed to ignore the wishes of social services with regard to the burning of sweetgrass or sage, nor was she ever disciplined or otherwise chastised by the coordinator or the board for not following orders.

Laliberte testified that she began to work at AHS in July 1994 on a part time and relief basis. Laliberte also stated that she returned to school in the fall of 1994 until May 1995 when she again began to work at AHS on weekends and for relief until November 1995 when she was appointed as the coordinator.

Laliberte stated that her duties consisted of working with the children on a day to day basis and further that she did not participate in any cultural activities with the children. Laliberte further stated that after she became the coordinator the board talked about how they wanted to get into a program of restoring cultural activities for the children.

Laliberte stated that she did not receive any special training to become the coordinator, she had to go through the files to determine what was expected to be done and she did receive some assistance from Agnes Miller who had been the acting coordinator prior to Laliberte's appointment. Laliberte stated that the files she reviewed included the employee personnel files as well as the children's files.

Laliberte stated that as she had to be licensed to be the coordinator she was aware that criminal record checks and doctors letters etc. had to be updated.

Laliberte stated that upon review of the files she found that 3 employees, Florence Martin (“Martin”), Chris Ducharme (“Ducharme”) and Janice Bouvier (“Bouvier”) had never had criminal record checks done and some other employees did not have the required letter from a doctor. Laliberte further stated that Martin and Ducharme were working at the home when she first worked there in July 1994.

Laliberte stated that she had the employees fill out the necessary forms for a criminal record check and as Bibaults and Millers hadn't had a criminal record check since 1990, they were also asked to fill out the forms. Laliberte stated that she understood that there

was a requirement to have criminal record checks updated every 5 years. Laliberte further stated that she took the completed forms to the Health Unit and did not hear anything back until January 8, 1996 when she was called from a person at the Health Unit to advise that something had gone wrong with Bibaults check in Burnaby so it would have to be refaxed to Burnaby. Laliberte stated that she then obtained a photocopy from the Health Unit and the person at the Health Unit said she would have to speak to Laboucane about Bibaults check.

Laliberte stated that she called Laboucane and told her that she had the photocopy and Laboucane came to pick it up and take it to the lawyer. Laliberte stated that Laboucane advised her that Bibault would not be able to work beyond Friday January 8 without a complete criminal record check. Laliberte stated that she then told Bibault about Laboucanes instructions and after a while Laboucane called again and said that Bibault could not work on the Friday either. Laliberte stated that Laboucane did not mention anything about the status of Miller.

Laliberte stated that when Bibault was advised that she was suspended until the criminal record check was complete, she asked to have the reasons put into writing. Laliberte stated that she then contacted Laboucane who said that she would decide about the letter at the board meeting scheduled for January 9. Laliberte stated that she passed this information on to Bibault.

Laliberte stated that on January 8, 1996, Laboucane called her and said that she had been at some meeting and was made aware that the criminal record check did not have to be completed until April 1996 so Bibault could return to work until then.

Laliberte stated that she left message for Bibault that she could return to work and that she had until April 1996 to get the criminal record check completed. Laliberte stated that Bibault then requested that the board put this in writing and upon approaching Laboucane, Laliberte was advised that verbal notice was good enough.

Laliberte stated that she provided Laboucane with the photocopy of the December criminal record check on January 10, 1996 and on January 12, Laliberte was advised not to release Bibaults paycheque until a notice could be written up. Laliberte stated that Laboucane came to the office at approximately 3:00 p.m. and had her type the letter for Bibault.

Laliberte stated that the remaining employees were advised on January 15, 1996 that the home would be closing effective February 29, 1996.

Laliberte stated that she was instructed by Laboucane to prepare a list of the children who had been placed in the home with respect to their ages, disabilities etc. and to make special notation of any FAS or FAE.

Laliberte stated that she was never criticized by AHS for her work performance and further that she was never told to force the employees to follow the boards policies and procedures.

Under cross examination by counsel for AHS, Laliberte testified that:

- she had been commended by AHS for following the policies and procedures;
- she was working at enforcing the policies and procedures;
- she was required to keep the office closed and ensure that employees kept out of the files;
- she asked to be laid off March 15 instead of working to March 30
- she kept some written notes in regard to the issues she had given evidence on and compiled those notes into a journal for the purposes of this hearing;
- some of the dates might be in error but the things that she said happened did happen.

## **ANALYSIS**

The purposes of the *Act* are set forth in Section 2 which states:

### **Purposes of this Act**

2. The purpose of this Act are to
  - (a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,
  - (b) promote the fair treatment of employees and employers
  - (c) encourage open communication between employers and employees
  - (d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,
  - (e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and
  - (f) contribute in assisting employees to meet work and family responsibilities.

The scope of the *Act* is set forth in Section 3 which states:

### **Scope of this Act**

3. This Act applies to all employees, other than those excluded by regulation, regardless of the number of hours worked.

The relevant section of the Employment Standards Regulations (the “*Regulations*”) is Section 34 (1) (r) which states:

### **Exclusions from hours of work and overtime requirements**

**34.** (1) Part 4 of the Act does not apply to any of the following:

(r) any of the following who are employed by a charity to assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons;:

- (i) a counsellor;
- (ii) an instructor;
- (iii) a therapist;
- (iv) a childcare worker;
- (v) an instructor or counsellor employed by a charity at a summer or seasonal camp for persons under 19 years of age;

There is no dispute that AHS is a charity and that the employees were childcare workers. The nub of the issue is whether the employees are excluded from overtime pursuant to the provisions of the Regulations, Section 34(1) (r).

The preamble of the contract between AHS and the Ministry of Social Services provides that "...the Contractor has represented its willingness and ability to care for and nurture one or more of those children at the following facility:...".

The contract goes on to state in item #5 **CARE AND NURTURING**, "The Contractor will provide care for and nurture any Child placed pursuant to this Agreement."

The contract also goes on to state in item #8 **OBLIGATIONS OF THE CONTRACTOR**, The Contractor covenants and agrees as follows; (with the relevant portions being)

- a) To ensure the provision of good care by meeting the physical, emotional and social needs of the Child according to the plans for the Child, as outlined in Clause 9(b) (i) of this Agreement, and to Schedule A;
- b) To perform the nurturing functions normally provided by a Child's natural parents of Guardian;
- e) To ensure a good homelike environment for the Child;
- i) To ensure each Child is nurtured and clothed, and fed according to Canada's Food Guide taking into account the Child's cultural background;
- k) To encourage and sustain the Child's moral and intellectual well being and generally care for the Child;
- l) To ensure that the Child is provided with medical and dental care and follows routines prescribed by physicians;

I am mindful of the provisions of the *Interpretation Act* 1979 c.206 section 8 which state:

Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.”

I agree that the minimum requirements of the *Act* should be interpreted as contemplated by Section 8 of the *Interpretation Act*, that is, in a manner that is “fair, large and liberal”, however, **exceptions to those minimum requirements such as the exclusions under Section 34 of the *Regulations* must be interpreted in the most narrow manner in order to preserve the intent and purposes of the *Act*.**

The evidence of Laboucane was that the board of AHS had determined that one of the purposes of the Society was the care and healing of families through the use of traditional First Nations culturally-specific activities. This stated intent of the board however was not carried out at the facility except on an infrequent and intermittent basis. The evidence was that the board was aware that the staff at the facility were not utilizing the traditional First Nations culturally-specific activities on any regular or consistent basis and, in fact, there was no evidence that the board took any steps to correct this matter. I am not persuaded that the performance of traditional First Nations culturally-specific activities on an intermittent and infrequent basis can be considered as a “program of therapy, treatment or rehabilitation”. Furthermore, there was no evidence provided that there was in existence at the AHS facility during all the relevant times, any program of therapy, treatment or rehabilitation for the employees to “assist”. The absence of any such program clearly removes this workplace from the exclusion contemplated by Section 34 of the *Regulations*.

For all of the above reasons, with respect to issue #1, I conclude that the employees of AHS were not excluded by the provisions of Section 34 (1) (r) of the *Regulations* from Part 4 of the *Act*.

With respect to issue #2, the allegation by AHS that Bibault had engaged in deceitful practices by swapping shifts in order to attend training and thereby accruing overtime entitlements is without merit as these activities of Bibault were approved by her immediate supervisor at the time and, in any event, the absence of any subsequent discipline for this alleged deceitful behaviour would indicate that this was a non-issue at that time. I conclude therefore, that pursuant to the provisions of Section 40 the *Act*, Bibault is owed wages.

With respect to issue #3, McLeods complaint, I conclude that pursuant to Section 76 (3) of the *Act*, it is not necessary for every, or in fact any, employee in a workplace to file a written complaint as contemplated by Section 74 (2) in order to have contraventions of the *Act* investigated by the director and, subsequent to that investigation, should the director decide to issue a determination, those employees who become entitled to certain benefits under the *Act* even though they did not file a written complaint, must be included in the



determination. I conclude that McLeod is properly a party to the determination issued by the director.

With respect to issue #4, Bibault's entitlement to compensation for length of service, Section 63 of the Act sets forth the statutory liability faced by AHS. Section 63 states:

- 63.**
- (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages compensation for length of service.
  - (2) The employer's liability for compensation for length of service increases as follows:
    - (a) after 12 consecutive months of employment, to an amount equal to 2 week's wages;
    - (b) after 3 consecutive years of employment, to an amount equal to 3 week's wages plus one additional week's wages for each additional year of employment, to a maximum of 8 week's wages.
  - (3) The liability is deemed to be discharged if the employee
    - (a) is given written notice of termination as follows:
      - (i) one week's notice after 3 consecutive months of employment;
      - (ii) 2 week's notice after 12 consecutive months of employment;
      - (iii) 3 week's notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 week's notice;
    - (b) is given a combination of notice and money equivalent to the amount the employer is liable to pay, or
    - (c) terminates the employment, retires from employment, or is dismissed for just cause.
  - (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
    - (a) totaling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
    - (b) dividing the total by 8, and
    - (c) multiplying the result by the number of weeks' wages the employer is liable to pay.
  - (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

The rules with respect to the notice given to an employee are set forth in Section 67 of the Act which states:

**Rules about notice**

67. (1) A notice given to an employee under this Part has no effect if
- (a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or
  - (b) the employment continues after the notice period ends
- (2) Once notice is given to an employee under this Part, the employee's wage rate, or any other condition of employment, must not be altered without the written consent of
- (a) the employee, or
  - (b) a trade union representing the employee.

The notice of termination of employment presented to Bibault in the same letter as her suspension is not considered to be appropriate notice as contemplated by Section 67. The intent of the notice period is to provide the employee with working notice in order to be able to arrange their affairs to deal with the loss of employment. For the employer to issue notice of termination in conjunction with a period of suspension is in my view contrary to the intent of the *Act*. I conclude that the notice of termination of employment issued to Bibault is without effect.

There was no evidence that AHS attempted to recall Bibault to work after January 12 and before February 29, 1996 when the home ceased operation.

The evidence of AHS that they were so concerned with Bibault not having a completed criminal record check on file they had to suspend her is somewhat questionable given the fact that according to AHS, Bibault did not have a completed criminal record check on file since she commenced employment in 1990. Furthermore the evidence was that the new legislation requiring criminal record checks contained a transition period to April 1, 1996 for obtaining those criminal record checks.

There was no evidence provided that Bibault was a threat to the safety or well being of the children placed in the home. There was no evidence provided that Bibault would not have been able to continue to perform her duties in an efficient and satisfactory manner until the closure of the home. There was no evidence provided that Bibault had ever been disciplined for any reason during her more than 5 years of employment.

The statutory liability of AHS for compensation for length of service for Bibault can only be discharged by the exceptions in Section 63 (3)(a), (b), or (c). In the absence of any such exceptions, AHS is liable to pay compensation for length of service to Bibault.

For all of the above reasons, I conclude that Bibault is entitled to compensation for length of service pursuant to Section 63.

**ORDER**

Pursuant to Section 115 of the *Act*, I order that Determination No. CDET 001389 be varied to be in the amount of \$14,990.43 with Anna Pinesse and Agnes Miller being removed from the determination, and further that Determination No. CDET 001816 be varied to be in the amount of \$9,853.41.

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**Hans Suhr**  
**Adjudicator**  
**Employment Standards Tribunal**

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