BC EST # D155/97
Reconsideration of BC EST # D019/97

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-

Awassis Home Society
("Awassis")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE NO.:	96/176 and 96/273
DATE OF DECISION	May 30, 1997

DECISION

OVERVIEW

This is an application filed by Awassis Home Society ("Awassis") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to vary Determination Nos. CDET 001389 and CDET 001816. These two Determinations were issued by the Director of Employment Standards (the "Director") on February 29th, 1996 and March 29th, 1996, respectively.

By way of Determination No. CDET 001389, the Director held Awassis liable in the total amount of $22,888.63 on account of unpaid overtime and other wage entitlements owed to seven former Awassis employees. By way of Determination No. CDET 001816, the Director held Awassis liable for the further amount of $10,121.41 also on account of unpaid overtime owed to former Awassis employees. In addition, this latter Determination also made an award of compensation for length of service in favour of former Awassis employee, Sylvia Bibault.

Awassis appealed both Determinations to the Tribunal. Following an oral hearing held on August 7th, October 7th and 8th, 1996, Adjudicator Hans Suhr, in a nineteen-page written decision issued on January 16th, 1997, varied both Determinations. Adjudicator Suhr held that Determination No. CDET 001389 should be reduced to $14,990.43 and that the claims of two employees, Anna Pinesse and Agnes Miller, be set aside in their entirety. I would note that the parties all agreed that Awassis did not owe any wages to either Ms. Pinesse or Ms. Miller. The parties also agreed that in the event both Determinations were upheld, the total amount of the employees' claims would be $24,843.84. Adjudicator Suhr reduced Determination No. CDET 001816 to the total sum of $9,853.41 reflecting the parties agreement regarding Awassis' total liability.

In reaching his conclusion, the adjudicator held that the regulatory exclusion regarding hours of work and overtime (Part 4 of the *Act*) set out in *Regulation* 34(1)(r) did not apply to Awassis. The adjudicator also held that Awassis was obliged to pay its former employee, Sylvia Bibault, compensation for length of service in the amount of five weeks' wages.

ISSUES ON RECONSIDERATION

Awassis' request for reconsideration is contained in a letter to the Tribunal dated February 20th, 1997, under the signature of Arlene LaBoucane whom I understand to be a director of Awassis. The main grounds upon which the reconsideration request is predicated are as follows:

- The overtime and hours of work provisions of the *Act* (Part 4) do not apply to Awassis by reason of section 34(1)(r) of the *Employment Standards Regulation*; and

- the adjudicator erred in confirming the Director's Determination that Awassis did not have just cause to terminate Sylvia Bibault.

I will deal with each of these matters in turn.

ANALYSIS

By way of a general introduction, I would note that 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.

Employment Standards Regulation 34(1)(r)

The *Act* sets out minimum terms and conditions of employment for most, but not all, employees in the province. Members of most professions, for example, are entirely excluded from the *Act* (*cf.* ESA Regs., s. 31). In other cases, certain employees are subject to most, but not all, provisions of the *Act.* Of specific interest in the this case, employees who work as a counsellor, an instructor, a therapist, or a *childcare worker* for a charitable institution *and who assist in a program of therapy, treatment or rehabilitation of physically, mentally or otherwise disabled persons* (emphasis added) are excluded from the hours of work and overtime provisions set out in Part 4 of the *Act.*

Awassis, which I understand has now ceased operations, is a charitable institution, registered as a society under the provincial *Society Act;* it formerly operated a five-bed home in Fort St. John for the benefit of children up to twelve years of age who were in the care of the Superintendent of Family and Child Services. This arrangement was formalized by way of a contract between Awassis and the provincial Ministry of Social Services. Many of the children resident at the Awassis group home facility were disabled, either physically or mentally. The adjudicator accepted that all of the complainant employees were "childcare workers". However, and this is the critical point, the adjudicator was not satisfied, on the evidence, that the complainant employees were engaged by Awassis to "assist in a program of therapy, treatment or rehabilitation". Indeed, the adjudicator found that Awassis did not operate *any* therapy, treatment or rehabilitation program during the relevant period.

I have reviewed the adjudicator's summary of the evidence. It is clear that there was evidence before the adjudicator upon which he could reasonably conclude that the complainant employees were not actively assisting in the delivery of any therapy, treatment or rehabilitation program--many of the children in Awassis' care did receive therapy and treatment but these efforts were undertaken by external professionals. The most that could be said in terms of "assistance" is that the employees attended, from time to time, with the children at various healthcare (I use this term in the widest sense) professionals' offices but the employees did not undertake any material role in the design or delivery of such treatment or therapy programs.

Awassis, in its request for reconsideration, emphasizes the fact that most of the children in its care were aboriginal children (approximately 75% according to the Adjudicator's Reasons) and that a very real effort was made to preserve and enhance the children's knowledge with respect to their aboriginal culture and traditions. However, this argument was expressly dealt with by the adjudicator and I cannot say that his analysis of this particular matter is clearly wrong. I should add that I entirely agree with Adjudicator Suhr's point that while the *Act* ought to be given "fair, large and liberal construction" consistent with section 8 of the *Interpretation Act,* such a broad approach should not be taken when dealing with regulatory exclusions from the *Act.*

Awassis also states that at various times it received assurances from the Employment Standards Branch that it was exempted from the hours of work and overtime provisions of the *Act*. To the extent that this is so, this argument is, in my view, irrelevant to the wage claims of the former employees. Even if the Employment Standards Branch, at some point in time, gave assurances that the employer in this case was excluded by regulation from paying overtime (and the evidence falls far short of showing that this was, in fact, the case), then perhaps (and this is a matter about which I express no opinion) some sort of civil claim might lie against the Branch.

Of course, the more appropriate course for Awassis to have followed would have been to secure a variance from the Director in which case it would have had the legal authority to avoid paying overtime as prescribed by the *Act.* However, absent such a variance, all employers in the province have an obligation to comply with the *Act* (unless such employers fall under federal jurisdiction or their employees are otherwise excluded from the *Act* by regulation).

Sylvia Bibault's Claim for Termination Pay

In my view, this aspect of the matter was fully and correctly dealt with by Adjudicator Suhr at pages 17-19 of his Reasons. The employer, by way of a request for reconsideration, has simply reiterated arguments that were advanced at the appeal hearing and subsequently (and in my view quite properly) rejected by the adjudicator.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is dismissed and I confirm the earlier order of Adjudicator Suhr issued on January 16th, 1997.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal