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-

Anne Elizabeth Lowan
and
Timothy James Lowan
operating as "Corner House"

("Corner House" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	98/406
DATE OF DECISION:	August 18, 1997

DECISION

OVERVIEW

This is an application filed by Anne Elizabeth Lowan and Timothy James Lowan operating as "Corner House" ("Corner House" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the *"Act"*) for reconsideration of an adjudicator's decision issued on June 9th, 1998 (EST Decision No. D254/98). The adjudicator confirmed a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on September 5th, 1997 under file number 083211 (the "Determination"). The delegate determined that the employer owed its former employee, Jo-Ann E. Richards ("Richards"), the sum of $23,600.14 on account of unpaid wages (primarily overtime wages).

Corner House appealed the Determination to the Tribunal and following an oral hearing held on March 31st, 1998, the adjudicator issued a written decision on June 9th, 1998 confirming the Determination. The employer's principal ground of appeal was that Richards was a "residential care worker" as defined in section 1 of the *Employment Standards Regulation* and thus was excluded from the overtime pay provisions contained in Part 4 of the *Act* [see section 34(1)(x) of the *Regulation*]. Alternatively, Corner House argued that Richards was a "sitter" and, therefore, her employment was not governed by the *Act* (see section 32 of the *Regulation*).

Corner House also asserted that Richards was employed by the B.C. provincial government rather than by Corner House, however, the adjudicator refused to hear and consider this argument--"...this issue had not been raised with the Director at the time of the investigation [and cannot] be raised at [the appeal]" (see page 3 of the adjudicator's Reasons for Decision). I would parenthetically note that the position taken by the adjudicator on this latter point is entirely consistent with a now well-established line of Tribunal decisions (see *e.g. Kaiser Stables Ltd.,* EST Decision No. D058/97).

Corner House's request for reconsideration is contained in a three-page written submission dated June 23rd, 1998. In essence, Corner House says that:

- it was not given an adequate opportunity to be heard at the oral hearing;
- it was not Richard's "employer";
- the adjudicator was biased;
- Richards was either a "residential care worker" or a "sitter" as defined in section 1 of the *Regulation.*

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.

I have reviewed the evidence that was before the adjudicator and the provisions of section 34(1)(x) of the *Regulation;* having done so, I fully agree with the adjudicator's analysis--Richards was not a "residential care worker" as defined by section 1 of the *Regulation.* A "residential care worker" is a person who "resides" at the "group home or family type residential dwelling" operated by the employer "during periods of employment". The concept of residence is much broader than mere presence at the workplace during working hours. The adjudicator carefully examined both the legal and colloquial definitions of "residence" and concluded, based on the evidence before him, that Richards did not reside at Corner House *at any time,* let alone during the times when she was "on shift". In my opinion, the adjudicator's decision on this point was entirely correct.

I might add that I also agree with the adjudicator's view that while it may be regrettable if the employer received incomplete or even inaccurate information from the Employment Standards Branch, the issue before him was the proper interpretation of section 34(1)(x) of the *Regulation* as currently drafted.

As noted above, the adjudicator's refusal to hear evidence and argument regarding whether or not Corner House was an "employer" as defined in the *Act* is consistent with established Tribunal jurisprudence and I cannot find that the adjudicator erred on this point.

In my view, the evidence before the adjudicator clearly established that Richards was not a "sitter" as defined in section 1 of the *Regulation*--for one thing, the Corner House group care respite facility was not the "private residence" of the children who were cared for, on a temporary basis, by the Corner House staff. All of the children who attend Corner House ordinarily reside in separate private residences with either their parents or guardians. Corner House is not so very different from the myriad of child daycare facilities that operate throughout this province. True, the children who attend Corner House have very different needs, and the periods of attendance are longer (including overnight stays) than one would find at the typical child daycare, but the children nevertheless attend Corner House for limited and defined periods and then return to their homes (that is, their ordinary private residences) to be with their families.

There is absolutely no evidence before me to suggest bias, or even the apprehension of bias, on the part of the adjudicator--such as evidence that the adjudicator was in a conflict of interest or had prejudged the issues on appeal. I do not consider that a pre-hearing conversation with the Director's legal counsel regarding the Community Social Services Employers' Association's (Corner House is a member employer)--whose submissions supported those of Corner House--

status to appear at the appeal hearing as an intervenor created any climate of bias. I have no evidence before me (or even a suggestion) as to how such a conversation might have biased the adjudicator.

As for the claim that Corner House was denied an adequate opportunity to be heard, I note that this argument is primarily premised on the adjudicator's refusal to hear evidence that was apparently relevant to the issue regarding Corner House's status as an "employer" under the *Act.* Once the adjudicator ruled that this latter issue was not properly before him, it follows that any evidence touching on that issue was properly excluded from the hearing.

ORDER

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

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal