

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

The Parents Auxilliary of the Nanaimo Gymnastics School
("PANGS")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/265

DATE OF **D**ECISION: June 29, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by the Parents Auxilliary of the Nanaimo Gymnastics School (“PANGS”) of a Determination which was issued on April 28, 1999 by a delegate of the Director of Employment Standards (the “Director”). In the Determination, the Director concluded that PANGS had contravened Sections 34(1) and (2) and 58(3) in respect of the employment of two employees and ordered PANGS to cease contravening the *Act*, comply with its requirements and to pay an amount of 6309.81 in respect of the contravention of the *Act*.

ISSUES TO BE DECIDED

The sole issue in this case is whether the Director erred in deciding that PANGS was not excluded from the hours of work and overtime requirements of the *Act* under Section 34 of the *Employment Standards Regulations* (the “*Regulations*”).

FACTS

PANGS is a registered not-for-profit society, whose constitutional purpose is to promote gymnastics. It is, for all intents and purposes, a recreational or athletic club. The complainants were part-time instructors who were hired to teach gymnastics classes.

ANALYSIS

PANGS argues that its employees should be excluded from Part 4 of the *Act* (Hours of Work and Overtime) under either, or both, subsection 34(1)(c) and subsection 34(1)(e) of the *Regulations*. Those provisions read:

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

...

(c) *a teacher;*

...

(e) *a person employed part time by an institution that*

(i) *provides training or instruction in a trade, occupation, vocation, recreational activity or hobby, and*

(ii) *is owned and operated by a municipality, regional district or the government;*

The term “*teacher*” is also defined in the *Regulations* and has, for the purposes of the *Act*, the same meaning as in the *School Act* and the *Independent School Act*. The term “*independent school*” also has, for the purposes of the *Act*, the same meaning as in the *Independent School Act*.

The burden is on PANGS in this appeal to show that the Director’s conclusion is wrong. In this context, PANGS must show the individuals met the definition of “*teacher*” in the *Act*. Neither the appeal nor any of the material on file support the proposition that the complainants were teachers under the *Act*. Under the *School Act* only a person holding a certificate of qualification and working for a board of school trustees satisfies the definition of “*teacher*”. Those same requirements exist in the *Act*. Both individuals were employed by PANGS, not a board of school trustees. The *Independent School Act* excludes from the definition of “*independent school*” a school that “*solely offers a program of recreational or athletic activities*”. The Nanaimo Gymnastics Club could not be considered an “*independent school*” and it follows that the individuals could not meet the definition of “*teacher*” for the purposes of the *Act* under the auspices of being independent school teachers.

Accordingly, the complainants are not teachers under the *Act* and would not be excluded from Part 4 on that basis.

Section 34(1)(e) contains two preconditions to its application: first, that the part time employee be employed by an institution to provide instruction in a “recreational activity”, a requirement that appears to be met on the facts of this case, and that the institution be owned or operated by a municipality, regional district or the government. Both preconditions must be present before a person will be excluded from Part 4 of the *Act*.

The *Act* is remedial legislation. Exceptions and exclusions from its requirements are limited and are strictly construed. There is no evidence that PANGS is owned or operated by “*a municipality, regional district or the government*”. In fact, the evidence indicates PANGS is a private organization. Except that it seeks to meet its constitutional objectives through agreements with the City of Nanaimo’s Parks and Recreation Department, PANGS is unrelated to any body contemplated by the reference to “*municipality, regional district or the government*” in subsection 34(1)(e) and consequently, does not qualify to have its part time employees excluded from application of Part 4 of the *Act*.

PANGS also raised a Charter argument, alleging the right of an individual to seek employment has been violated by the Determination. There is no indication on file that PANGS has complied with the notice requirements of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. Notwithstanding, I do not agree that the minimum daily hours of work provisions of the *Act* interferes with the constitutional protection of subsection 6(2)(b) of the *Canadian Charter of Rights and Freedoms* and this argument is rejected.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 28, 1999 be confirmed, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal