

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

TNL Paving Ltd., TNL Management Ltd. & TNL Construction Ltd.

(the “TNL Companies”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/644

DATE OF DECISION: January 2nd, 1997

DECISION

OVERVIEW

This is an appeal brought by TNL Paving Ltd., TNL Management Ltd. and TNL Construction Ltd. (the “TNL Companies”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 004471 issued by the Director of Employment Standards (the “Director”) on October 25th, 1996.

REQUEST FOR SUSPENSION

The appellants have requested a suspension of the Determination pending consideration of the appeal. The appellants’ application is made pursuant to section 113 of the Act which provides as follows:

113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.

(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either

(a) the total amount, if any, required to be paid under the determination, or

(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

BACKGROUND FACTS

On June 24th, 1996, the Director issued a “Demand for Employer Records” (the “Demand”) to the TNL Companies relating to:

“All employees working in the Pine Pass (HWY # 97 between Chetwynd and McKenzie Junction) January 1, 1994 to December 31, 1995.”

The Demand was issued pursuant to section 85 of the *Employment Standards Act* and the records were to be produced on or before “4:00 o’clock [presumably 4:00 P.M.] on July 12, 1996”. The nub of the appellants’ appeal is that, apparently, the Director now wishes to utilize the records produced in response to the Demand in an investigation into whether or not the TNL Companies have paid wages according to, and have otherwise complied with, the *Skills Development and Fair Wage Act (SDFWA)*.

The Director issued a Determination to the effect that she could utilize the records produced pursuant to the Demand in the SDFWA investigation. The TNL Companies have appealed this Determination.

ANALYSIS

I am somewhat uncertain as to why the Director issued a Determination in this case. It seems to me that the Director could have merely proceeded with the investigation and if there was a subsequent Determination issued under section 8 of the SDFWA, the TNL Companies could have appealed, *inter alia*, on the ground that the Director was not entitled to rely on the records produced pursuant to the Demand. Alternatively, the Director could have simply issued a new demand for production of records under section 6(2) of the SDFWA Regulations. However, as a Determination was issued, and an appeal has now been filed with respect to that Determination, I must proceed to consider the suspension request.

In response to the Demand, the solicitor for the TNL Companies sought, and apparently was given, an undertaking by the Director limiting the use of the records (see p. 2 of the Reason Schedule to the Determination and Counsel for the Director’s letter of November 8th, 1996 addressed to the Tribunal). Specifically, the Director agreed that the records would only be used for the purposes of an investigation into complaints filed under the *Employment Standards Act*.

Counsel for the Director submits that the Determination should not be suspended because:

- a) only Determinations for a particular monetary sum can be suspended; and
- b) if a suspension is granted, the Director will be prejudiced by delaying the SDFWA audit.

I am not persuaded by either submission.

First, section 113(2)(a) refers to depositing with the Director the “total amount [of the Determination], *if any...*”. Determinations need not always involve the payment of money (as is evidenced by the present case). In my view, the words “if any” specifically address the situation where an appellant seeks a suspension of a Determination that does not involve the payment of money.

Second, counsel for the Director has not indicated *how* the Director is prejudiced; and I cannot see that there would be any prejudice to the Director, as the Director need only issue a new demand under the SDFWA Regulations if she requires particular records in order to determine if the TNL Companies have complied with the SDFWA.

I note that counsel for the Director, in her written submission, did not address what I consider to be a central point, namely, the Director’s undertaking regarding the limited purpose for which the records were being disclosed. Whether it was appropriate for the Director to agree to such an undertaking is not in question; rather, given that the records in question were produced on the condition that the records would be used for a limited purpose, I am satisfied that some form of suspension order is appropriate. In light of the agreement between the solicitors for the TNL companies and the Director, I am prepared to suspend the Determination until such time as the appeal of the Determination has been decided or until further order. In accordance with the authority granted by section 113(1), I also propose to attach some conditions to the suspension order.

ORDER

Pursuant to section 113 of the *Act*, I order that Determination No. CDET 004471 be suspended until this Tribunal has issued a decision with respect to the TNL Companies’ appeal of the Determination, or until further order. This suspension order is subject to the condition that the TNL Companies preserve and maintain, in their original form, all of the records which have been reproduced and provided to the Director in response to the Demand.

Kenneth Wm. Thornicroft, Adjudicator

Employment Standards Tribunal