EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act, S.B.C. 1995, c. 38

-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:	February 14th, 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" or the "ESA") from Determination No. CDET 004471 issued by the Director of Employment Standards (the "Director") on October 25th, 1996 (the "Determination"). In an earlier decision (BC EST # D002/97), issued December 2nd, 1996, I suspended the Determination pending the outcome of this appeal, or until further order. In this decision I will deal with the merits of the TNL Companies' appeal.

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 ESA and the records were to be produced on or before "4:00 o'clock [presumably 4:00 P.M.] on July 12, 1996". In particular, the following records were demanded:

> 1. all records relating to wages, hours of work, and conditions of employment.
> 2. all records an employer is required to keep pursuant to Part 3 of the Employment Standards Act and Part 8, Section 46 & 47 of the Employment Standards Act Regulations.

The catalyst for the issuance of the Demand appears to have been a complaint filed by one Douglas Thompson, a former TNL employee on the Pine Pass project (see letter dated November 27th, 1996 from R.W. Joyce, Industrial Relations Officer to the Tribunal). Mr. Thompson complained that he was not paid all of the wages to which he was entitled under the *Skills Development and Fair Wage Act*, S.B.C. 1994, c. 22 as amended by S.B.C. 1995, C. 38, s. 137 (the "SDFWA"). The Director investigated Mr. Thompson's complaint and issued Determination No. CDET

002337 on May 24th, 1996 in the total amount of $18,906.77 as against TNL Paving Ltd. and TNL Management Ltd.

This latter Determination was confirmed in a subsequent appeal to the Tribunal (BC EST # D283/96, October 2nd, 1996). The two employers have now applied for reconsideration of the Tribunal's decision to confirm Determination No. CDET 002337; a final decision on the reconsideration request has not yet been issued. According to Mr. Joyce's November 27th letter, referred to above, "[a]s a result of the Thompson audit it was decided to complete an audit on all employees". I understand that this ongoing audit relates to approximately 200 TNL employees.

The Determination now under appeal (CDET 004471) relates to this ongoing audit. The Determination states that the Director intends to utilize the records produced in response to the Demand in an investigation concerning whether or not the TNL Companies have paid wages according to, and have otherwise complied with, the SDFWA. According to the Reason Schedule appended to the Determination:

> The Director's intention was to examine the TNL records to determine wages owing including fair wages where the wage rates are set in accordance with the SDFWA.

The appellants say that the Determination should be cancelled because:

> ...the Director may [not] invoke section 85 of the [Act] to seize private business records which belong to the Appellant for the purpose of investigating compliance with the [SDFWA]" (see Schedule A of the appellants' appeal form).

ANALYSIS

In my view, the appeal must succeed based solely on the undertaking given by the Director when the TNL companies agreed to produce documents pursuant to the Demand. I would reiterate, and adopt, the following comments from my decision with respect to 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*... Whether

> it was appropriate for the Director to agree to such an undertaking is not in question...

Having given an undertaking that the records would "be used only for the purposes of any investigation under the ESA" (see Reason Schedule, p. 1), the Director cannot now unilaterally withdraw that undertaking.

In her submission to the Tribunal dated January 14th, 1997, counsel for the Director stated that certain circumstances surrounding the undertaking "were not raised by either party in the arguments on the suspension" and that, in particular, the "...[undertaking] was accepted by the Director pending issuance of a Determination. The condition was, in fact, time limited." Counsel then referred me to various passages in certain correspondence between counsel for the TNL Companies and the Director's delegate. I now turn to this correspondence.

In a letter to the Director's delegate dated July 11th, 1996, counsel for the TNL Companies, after having first set out the proposition that the Director was not entitled to use records demanded under the ESA in an investigation under the SDFWA, stated:

> We are prepared to provide you the records which you requested...on the clear understanding and your undertaking that they will only be used for the purposes of ensuring compliance with the Employment Standards Act. If this is not satisfactory, please immediately advise.

In a further letter, also dated July 11th, counsel for the TNL companies reasserted its view that, *inter alia,* the Director was without statutory authority to use records obtained pursuant to a demand under the ESA in an investigation under the SDFWA and that the records would be produced "...on the clear understanding and your undertaking that they are to be used only for the purposes of any investigation under the ESA."

The second July 11th letter continues:

> If the Employment Standards Branch is not prepared to agree to these conditions, we suggest that the matter be referred to the Supreme Court of British Columbia pursuant to Rule 33, by way of a special case...We can make such application by next week or any other date that is convenient to both parties.
>
> Please advise upon receipt of this letter whether you are prepared to accept the documents only for the purposes of investigation under the ESA or whether you wish to have this matter referred to the Supreme Court by way of a special case.

In a reply dated July 11th, 1996 the Director's delegate stated that he "will be enforcing the [SDFWA]" and that the Demand "will be enforced". The Director's delegate did not directly respond to the proposed undertaking.

The documents were couriered to the Director's Burnaby office together with another letter from TNL's solicitors on July 12th, 1996. In this letter, counsel asserts, yet again, TNL's position that the documents cannot be used for any purpose other than an investigation under the ESA; the letter concludes with the following paragraph:

> If the Employment Standards Branch intends to use the documents for purposes other than the ESA, please advise immediately as we are instructed to commence legal proceedings to obtain an injunction.

It was not until October 16th, 1996 that the Director's delegate replied to the July 12th letter from TNL's solicitors. In this letter the Director's position regarding the issues in dispute between the parties is set out. In particular, the Director's delegate stated that:

> • "[t]he Supreme Court of British Columbia does not have jurisdiction to determine the Director's right to use the TNL records";
>
> • "As a result of the imposed undertaking, the office of the Director has not used for any purpose the TNL records"; and
>
> • "If you have any further written submissions in light of Tribunal Decision No. 283/96, then please deliver those submissions to me within seven days of the date of this letter. I will then make a Determination with respect to the use of the records. That Determination can be appealed to the Tribunal."
> [Note: In Tribunal Decision No. 283/96, referred to earlier in these Reasons, the Tribunal held that the SDFWA applied to all TNL employees working on the Pine Pass project as and from September 1st, 1994. This issue is not before me; rather, I must consider a narrower question, namely, whether records demanded under section 85 of the ESA may be used in an investigation under the SDFWA].

Simply to complete the chronology, I should note that the Determination now under appeal was issued on October 25th and the subsequent TNL appeal was filed on

October 31st, 1996. I would further note that the Director's delegate made specific reference to the undertaking in the Reason Schedule appended to the Determination in the following terms:

> On producing the records, counsel for the employer imposed an undertaking on the Director that the records are to be used only for the purposes of any investigation under the ESA.

In light of the foregoing, I am not able to accede to counsel for the Director's submission that the undertaking was "time limited". I do not infer from the correspondence between the Director's delegate and counsel for the TNL Companies that the undertaking was limited in any way. Nor, apparently, did the Director's delegate believe that he was not bound by the undertaking--there is absolutely no suggestion in the Determination itself that the undertaking was time limited.

In my view, if the Director did not wish to be bound by the undertaking, then the Director should have immediately returned the records, without making any copies, to TNL's solicitors. The Director could have then issued a Determination regarding production and, if the records were still not produced, enforce its Demand for production of documents by filing the Determination in the Supreme Court of British Columbia pursuant to section 91 of the ESA. Alternatively, perhaps the matter could have been dealt with by way of an application under Rule 33 or 34 of the Supreme Court Rules. However, I do not believe that the Director was entitled to unilaterally proceed in defiance of the undertaking upon which the documents were delivered.

Although, in light of the foregoing comments, it is unnecessary to do so, I also propose to address the substantive question raised by the appeal, namely, whether or not documents produced pursuant to a demand under the ESA can be used in an investigation under the SDFWA. In my opinion, if the Director wishes to demand payroll records for purposes of an investigation under the SDFWA, the Demand for production ought to be issued pursuant to the statutory or regulatory authority contained in the SDWFA.

Section 85 of the ESA provides as follows:

> 85. (1) *For the purposes of ensuring compliance with this Act and the regulations,* the director may do one or more of the following: ...

> (c) inspect any records that may be relevant to an investigation under this Part; ...
>
> (f) require a person to produce, or to deliver to a place specified by the Director, any records for inspection under paragraph (c)... [emphasis added]

In the instant case, the Demand was issued, not in conjunction with an investigation under the ESA, but rather with respect to an investigation under the SDFWA. Under this latter statute [or, more properly, section 6(2) of the SDFWA Regulation] the Director is entitled to demand production of documents. I would also note that under section 9 of the SDFWA, employers are obliged to maintain certain records, including payroll records. These provisions would be totally unnecessary if the records were, in any event, required to be maintained, and production could be demanded, pursuant to the ESA.

In the case of an investigation under the SDFWA, a demand for production of documents ought to be issued under that legislation. While it is true, as argued by the Director, that wages found to be owing under the SDFWA "are deemed to be wages for the purposes of the [ESA]"--see section 8 of SDFWA--it must be remembered that, in the instant case, the Director has yet to determine if *any* wages are owing; the Demand was issued to investigate that very question. It is only when wages have been found "owing under the SWFWA" that the collection, complaint and appeal procedures set out in the ESA apply. In other words, once "fair wages" are found to be owing, a Determination can be issued, the enforcement provisions found in Part 11 of the ESA can be utilized, and an aggrieved party may appeal the Determination to the Tribunal in accordance with Part 13 of the ESA.

My decision to cancel the Determination might appear to some to be needlessly "technical", especially when all the Director need do is seize the payroll records in accordance with section 6(2) of the SDFWA Regulation, in which case the very records now is dispute will be, once again, in the hands of the Director. However, I cannot lightly ignore the undertaking given in this case, the wording of the relevant provisions of the ESA and the SDFWA, or, indeed, section 8 of the *Canadian Charter of Rights and Freedoms* (in my opinion, in order for a records seizure to be "reasonable" it must be undertaken in accordance with the proper statutory authority). In my view, all three considerations impel me to cancel the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004471 be cancelled.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal