

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. And TNL Management Ltd.
("TNL")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 96/360

DATE OF DECISION: October 2, 1996

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by TNL from a Determination, No. CDET 002337, dated May 24, 1996, of a delegate of the Director of Employment Standards (the “Director”). The Determination concluded TNL had contravened the *Skills Development and Fair Wage Act* (the “Fair Wage Act”) in respect of the employment of Douglas Thompson (“Thompson”) on a highway reconstruction project in the Pine Pass: Bijoux Falls to Azouetta Lake, Ministry of Transportation and Highways Contract No. 08546-0003 (the “Highway 97 reconstruction project”). TNL says the *Fair Wage Act* does not apply to the Pine Pass reconstruction project and, in the event it does, the wage calculations for Thompson are wrong.

FACTS

There is substantial agreement on the facts.

1. TNL was involved in the reconstruction of Highway 97 between Bijoux Falls and Azouetta Lake from August, 1994 to August, 1996.
2. The project was tendered for bid by the Ministry of Transportation and Highways and TNL, the successful bidder, entered into a contract with the Ministry on or about July 21, 1994.
3. In the contract between the Ministry and TNL, TNL agreed to comply with the Fair Wage and Skills Development Policy, which was in place at the time the contract was entered. The Policy was declared to be invalid by the Supreme Court of British Columbia on April 11, 1995 in *Independent Contractors and Business Association of British Columbia v. British Columbia*.
4. On September 1, 1994 the *Fair Wage Act* was enacted and, like the Policy, required employers contracting on certain publicly funded projects to pay specified minimum wages and benefits. The required wages and benefits are identified in the Regulations to the *Fair Wage Act*.

5. Thompson was employed by TNL from June 6, 1995 to November 6, 1995 as a “rod-man”, a surveyor’s helper. He filed a complaint October 9, 1995 alleging TNL was not paying him wages and benefits required by the *Fair Wage Act*.

ISSUES TO BE DECIDED

There are two issues to be decided:

1. Does the *Fair Wage Act* apply to the employment of Thompson with TNL on the Highway 97 reconstruction project; and
2. If so, are the wage and benefit calculations made by the director shown to be wrong.

ANALYSIS

Application of *Fair Wage Act* to the Employment of Thompson with TNL

Counsel for TNL argues the *Fair Wage Act* does not apply to the employment of Thompson for two reasons:

1. The *Fair Wage Act* does not have retroactive or retrospective application; and
2. The *Regulations* to the *Fair Wage Act* do not have retroactive or retrospective application and to the extent they purport to have such application are invalid and illegal.

Counsel for the Director agrees the *Fair Wage Act* and the *Regulations* have no retroactive or retrospective application. He argues the *Fair Wage Act* and the *Regulations* are purely prospective in application and apply to all work performed by employees on publicly funded projects after September 1, 1994. He points out the *Fair Wage Act* has, as its reference points, work (in this case construction work tendered by the Ministry of Transportation and Highways) and the contracts of employment between the contractor (in this case TNL) and its employees.

Section 3 of the *Fair Wage Act* applies to “all construction that is contracted for by a tendering agency”. Construction is defined in Section 1:

construction means the construction, renovation, repair or demolition of property and the alteration or improvement of land that is undertaken by a tendering agency using Provincial money.

Section 5 of the *Fair Wage Act* says:

All employees of a contractor, subcontractor or any other person doing or contracting to do the whole or any part of the construction to which this *Act* applies must be paid fair wages in accordance with the regulations.

Neither the *Fair Wage Act* nor the *Regulations* require any adjustment to the wages of an employee to be made for any period prior to September 1, 1994. The argument of Counsel for TNL infers some retroactive or retrospective application of the legislation. I do not find there to be any such application. The *Fair Wage Act* and *Regulations* speak only from the date of enactment and operate only prospectively. The real substance of the argument of Counsel for TNL is that the Province may not legislate minimum wages for construction contracts on publicly funded projects that have already been tendered. In effect, it is contended there should be no minimum fair wage standards applicable to publicly funded construction work tendered before September 1, 1994. I do not accept that proposition.

The statutory purpose for the *Fair Wage Act* is to establish a standardized, unified and comprehensive scheme requiring payment of minimum wages and benefits to persons employed on publicly funded projects. The objective of the legislation is remedial, just as any minimum wage legislation is remedial, and this objective would be nullified if two classes of workers were created: those hired pursuant to work tendered before September 1, 1994 and those hired pursuant to work tendered after September 1, 1994. I accept the line of authority provided by Counsel for the Director which suggests remedial legislation can have an affect on existing contractual relations in meeting its legislative objectives:

Board of School Trustees of Acme Village School District v. Steele-Smith, [1933] 1 D.L.R. 545 (S.C.C.).

The Calculation of Thompson's Wages

I will now address the alternative ground of appeal. Counsel for TNL argues the calculation of Thompson's wages is wrong in three respects:

1. The Director ignored benefits in the amount of \$2.33 per hour paid to Thompson while employed by TNL Management Ltd. This employment covers a period from June 6, 1995 to October 15, 1995.
2. No account was taken by the Director of an amount of \$5750.00 paid to Thompson while employed by TNL Management Ltd.

3. The director ignored the fact Thompson spent 30% of his employment with TNL Management Ltd. working “off-site” and would not be entitled to fair wage for that work.

The burden in this appeal rests with TNL to show the calculations made by the director are wrong. No support for the contention Thompson received \$2.33 per hour for benefits or unaccounted wages in the amount of \$5750.00 has been provided by TNL. No record of any benefits being paid to Thompson have been provided and the pay cheques issued to Thompson by TNL show no benefits paid. Thompson received living out allowance from TNL. This payment is not wages for the purpose of the *Fair Wage Act* and would not be included in any calculation of wages and benefits paid or payable. TNL has not shown Thompson was paid this amount as wages or benefits.

TNL states Thompson was hired to work on the Highway 97 reconstruction project. There was no other reason for his employment. It is contended Thompson worked “off-site” for 30% of his employment with TNL Management Ltd. The “off-site” work is identified as work taking place in the construction office and in the apartment of the surveyor to whom Thompson was assigned as assistant or helper.

Thompson was an employee of TNL. Thompson was performing construction work on a construction project. By application of Section 5 of the *Fair Wage Act* Thompson was a person in respect of whom his employer was required to pay fair wages. That statutory requirement is not defined in terms of the situs of the employment but in terms of the nature of the work, in this case construction. I do not accept the argument Thompson was not employed in “construction” when he was in the construction office or otherwise assisting the surveyor in work directly related to the construction of the project.

The second aspect of the appeal is also dismissed.

ORDER

Pursuant to Section 115 of the *Act* I confirm Determination No. CDET 002337 dated May 24, 1996.

David Stevenson
Adjudicator
Employment Standards Tribunal