

**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 -

TNL Paving Ltd.  
("TNL")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**A**DJUDICATOR: David Stevenson

**F**ILE N<sub>O.</sub>: 1999/481

**D**ATE OF **D**ECISION: September 9, 1999

## DECISION

### OVERVIEW

TNL Paving Ltd. ("TNL") has appealed a Determination issued on July 16, 1999 by a delegate of the Director of Employment Standards (the "Director") ordering, among other things, that TNL pay an amount of \$436,022.79. In conjunction with the appeal, TNL applies pursuant to Section 113 of the *Employment Standards Act* (the "Act") requesting a suspension of the effect of the Determination.

This decision addresses the application under Section 113 of the *Act*.

### GROUND OF APPEAL

TNL has identified several reasons for appeal. These are summarized as follows:

1. The *Skills Development and Fair Wage Act* (the "SDFWA") does not apply to the Pine Pass Project (the "Project");
2. The Director is estopped from making the *SDFWA* applicable to the Project;
3. TNL should not be responsible for any amount that results from differences between the Fair Wage Policy and the *SDFWA*;
4. The Determination does not contain information relating to hours worked by each employee in each pay period, the rate of pay for each employee or the nature of employment of each employee covered by it;
5. TNL paid benefits for which they were not credited in the calculation made by the Director of the amounts owing;
6. The calculations for some individuals are wrong; and
7. The employment of some individuals is not covered by the *SDFWA*.

### APPLICATION FOR SUSPENSION

Section 113 of the *Act* 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.*

Counsel for TNL says the test for determining whether a suspension of the determination will be granted should involve three considerations:

is there is a serious question to be tried;  
will the applicant suffer irreparable harm if the relief is not granted; and  
will the applicant suffer greater harm , on balance, by the refusal of the relief than the other party or parties by its granting.

Counsel for the Director says there are five matters that should be considered in an application for relief:

the ability of the applicant to pay;  
the likelihood of success of enforcement;  
any delay in the proceedings to date;  
the likelihood of settlement; and  
the prejudice to the parties.

### **Serious Question**

Counsel for TNL says that the Director has not provided TNL with appropriate information for it to respond to the Determination, receiving no more than a summary of the Director's conclusions. Counsel also says that the key issue, the applicability of the *SDFWA* to the Project is still before the Courts. Finally, Counsel says there are "numerous other serious questions to be tried".

In reply to that point, Counsel for the Director says, first, that TNL has been unsuccessful on the key issue before two panels of the Tribunal and before a Justice of the Supreme Court on judicial review. Second, Counsel says that the issues raised in the appeal relate primarily to a dispute or to questions about the calculations in the Determination.

In reply, Counsel for TNL acknowledges there are issues relating to the calculations, arguing they are significant issues that could substantially alter the amount of the financial liability of TNL.

### **Irreparable Harm and Balance of Harm**

Counsel for TNL says TNL could be significantly prejudiced if the Director were allowed to collect and begin distributing money to the complainants and other employees. Under this heading Counsel for TNL also asks the Director to address whether any amounts determined to be owed arise because of a difference between the *SDFWA* and the Fair Wage Policy and says it is prejudiced by its inability to determine whether the amounts claimed in the Determination are amounts owed by MOTH. Counsel for the Director takes the position that any question relating to alleged potential liability of MOTH under its agreement with TNL are not matters within the jurisdiction of the Tribunal.

Counsel for TNL says TNL will suffer considerable financial hardship if it is asked to pay the amounts and significantly more harm if the money is distributed to the employees, whereas the complainants and other employees will only suffer delay which will be compensated by additional interest on the amount, if any, found to be owed.

Counsel for the Director says TNL has provided no evidence of hardship, to which Counsel for TNL replies:

It is submitted that it is self evident that any party that is required to pay a Determination in the amount of approximately half a million dollars (which may not necessarily be owed) will suffer harm.

Counsel also says TNL is prepared to provide financial statements to the Tribunal that will show that TNL is not able to pay the amount of the Determination.

#### **Director's Position**

Counsel for the Director says that the ability of the Director to collect on the Determination may be compromised by any suspension of the Determination. She notes the present availability of assets which could be put up as security, the implication being those assets may not be available later. Counsel also says that TNL has "not been especially forthcoming in its dealings with the Director" and the three years that has already passed since the completion of the Project represents a substantial prejudice to the affected employees.

Counsel for TNL reiterates its position that TNL is financially unable to pay the amount claimed in the Determination and also says the Director delayed notifying TNL until 1999 that there were five other individual complainants and, as for the "non-complainant" employees, they are essentially unaware of the Determination and will suffer no real prejudice by waiting further.

#### **Order Sought**

Counsel for TNL asks the Tribunal to order a suspension of the Determination without requiring TNL to deposit any money into trust. Three reasons are given for this position:

1. TNL has not been given a fair opportunity to respond to the Determination relating to the "non-complainants";
2. In regards to the benefits issue (i.e. that benefits provided to employees were not credited in the calculation), the Director failed to investigate; and
3. TNL is not able to determine from the Determination whether some other party, MOTH, is responsible for payment of all or part of the Determination.

Counsel for the Director says TNL has been given ample opportunity to respond and, arguably, is attempting to introduce new evidence or have the matter re-investigated. The Director conducted its investigation on the basis of all the information available.

In reply, Counsel for TNL says TNL is not trying to introduce new evidence or to have the matter re-investigated. He says:

When TNL learned of the audit [February, 1999], it cooperated and provided all information and made detailed submissions. Thus TNL has not been uncooperative, nor is it trying to introduce new evidence. TNL made the Branch aware of all the information in its possession **before** the Determinations were issued.

. . . before the Director made his [sic] Determinations, he [sic] was aware of TNL's position and was aware of information which was available to him [sic]. In this appeal, TNL is not raising any new information which it did not put before the Director prior to the Director making the Determinations.

Counsel also says the jurisdictional argument concerning TNL's agreement with MOTH is inappropriate and, in light of the relationship between MOTH and the Director in respect of the Project and the state of knowledge of the Director of understanding and commitments made by MOTH, the issuance of the Determination without identifying amounts allegedly owed by MOTH was an abuse of process.

**ANALYSIS**

It is not a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit. Conversely, the Tribunal would not suspend the effect of a Determination in circumstances where the appeal is frivolous or has little or no apparent merit.

In this case, I am not persuaded by the material provided and the arguments made by Counsel for TNL that there is much merit to substantial parts of the appeal. On the other hand, some parts of the appeal may have some merit and I am not prepared to discount the appeal as being frivolous or completely without merit. On balance, I am prepared to exercise my discretion and grant an order under Section 113(2) of the *Act*

It remains to consider the terms of the order. Counsel for TNL says TNL will suffer “significant prejudice” if the Determination is not suspended on deposit of little or no money. The nature of that prejudice is identified as financial hardship and irreparable harm if the money is distributed before the appeal is concluded. Any order will address the latter concern. I do not consider the issue between TNL and MOTH to be an aspect of “significant prejudice”. Finally, I do not accept that financial hardship is the sort of prejudice that is sufficient to justify an order under Section 113 of the *Act* such that the Determination is suspended on deposit of little or no money. I agree with the comments of the Tribunal in *Tricom Services Inc.*, BC EST #D420/97, that:

. . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the “total amount” of the determination is posted; a “smaller amount” should only be ordered if such lesser amount would be “adequate in the circumstances of the appeal”. In my opinion, the “adequacy” of any proposed deposit must be evaluated not only from the perspective of the employer, but also from the perspective of any employees whose rights might be affected by a suspension order.

The “financial hardship” argument raised by TNL is a two-edged sword. On the one side it speaks to the position of TNL that the Determination should be suspended on deposit of little or no money. On the other it speaks to the need to ensure there is sufficient money in trust to satisfy the employees’ unpaid wage claims in the event TNL’s “financial hardship” becomes acute. As well, the circumstances of the appeal, which includes a preliminary assessment of the relative merits of the appeal, do not suggest a small deposit would be adequate. An appropriate balance in this case requires TNL to deposit a substantial portion of the amount of the Determination.

**ORDER**

Pursuant to Section 113(2) of the *Act*, I order that the Determination dated July 16, 1999 in the amount of \$436,022.79 be suspended until TNL’s appeal of that Determination has been heard and decided, or until further order of this Tribunal, provided TNL deposits with the Director an amount of \$325,000.00 to be held in trust pending the outcome of the appeal.

**David Stevenson**  
**Adjudicator**