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" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/481

DATE OF DECISION: November 16, 1999

DECISION

APPEARANCES

Mr. Nazeer Mitha	on behalf of the Employer
Ms. Martha Rans	on behalf of the Director
Mr. Emilio Bruno	on behalf of himself

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determinations of the Director of Employment Standards (the "Director") issued on July 16, 1999 which determined that a number of employees had not been paid in accordance with the *Skills Development and Fair Wage Act* (the "*FWA*") and, in the result, were entitled to $436,022.79.

BACKGROUND AND DETERMINATION

From the lengthy Determination the background for this appeal may be summarized as follows. TNL contracted with the Ministry of Transportation and Highways ("MOTH") to do the reconstruction of Highway 97 on July 21, 1994 (the "Project"). Subsequently, on September 1, 1994, and after construction had commenced, the *FWA* was proclaimed into force. Certain named employees, who worked on the Project between September 4, 1994 and June 9, 1996, filed a complaint with the Employment Standards Branch (the "Branch") alleging that they had not been paid in accordance with the *FWA* or overtime in accordance with the *Act*. I understand from the submissions, that one of the (complainant) employees was awarded compensation for overtime. The Branch investigated the complaints and audited TNL's records. The delegate determined that the *FWA* and the *Act* applied to the Project and, based on the records in the Director's possession, determined that the non-complainant employees were entitled to $350,175.65 plus interest. Four of the five complainant employees supplied copies of their daily hours and wages from TNL. The fair wage adjustment amounted to $18,236.03 plus interest. A fifth employee did not supply any records of daily hours and the delegate was unable to establish any entitlement for that employee.

In making the determination that the FWA did apply to the Project, the delegate relied upon decisions of the Tribunal, upheld on judicial review. These decisions arose out of a complaint, separate from these proceedings, filed by a Mr. Thompson (see *TNL Paving Ltd. and TNL Management Ltd.*, BC EST #D326/97 denying reconsideration of BCEST #D283/96, judicial review denied in *TNL Paving Ltd. v. British Columbia (Attorney General)* <1998> B.C.J. No. 620 (Owen-Flood J.). The British Columbia

Court of Appeal heard the appeal of that decision on October 27, 1999. The court rendered a decision on November 8, 1999, quashing the order of the Director "for lack of jurisdiction".

ANALYSIS

The appellant, TNL, has the burden to show that the delegate erred in making the Determination. For the reasons set out below, I am of the view that the delegate erred in law when he determined that the *FWA* applied to the Project.

The delegate decided, based on decisions of the Tribunal, upheld on judicial review, that the *FWA* applied to the Project. TNL takes issue with that. TNL disagrees with those decisions and has appealed them. From the appellant's (well-reasoned) factum which was submitted as part of this appeal, it says that the Court erred when it concluded that the *FWA* was applicable to the Project that it "constituted a prospective effect and not a retrospective or retroactive effect". Not surprisingly, the Director argues that the *FWA* applies.

As mentioned above, the appeal was heard by the Court of Appeal on October 27, 1999 and a decision was rendered on November 8, 1999. I agree with the decision of the Court of Appeal and it applies to the Determination now under appeal. It arose out of the same construction project and the material facts are identical. In the Court of Appeal, as in this case, TNL argued that the *FWA* did not apply to the Project because the contract with MOTH "was a pre-existing contract".

The Court of Appeal noted, at page 4:

> "The issue in the first instance turns on a proper interpretation of the *Act*. Section 3(1) reads as follows:
>
> 3(1) <T>his Act applies to all construction that is contracted for by a tendering agency.
>
> It is agreed that the TNL contract is a construction contract and the ministry is a tendering agency. The question is simply whether the words "is contracted for" applies to employment after 1 September 1994 under a contract made before that date. If so, s. 5 of the Act is engaged and employees of TNL must be paid fair wages in accordance with the regulations. …"

The relevant portions of Sections 4(1) and (2), Section 6(1) and Section 7 of the *FWA* provide:

> 4(1) Subject to subsection (2), all employees of the 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:
> (a) be registered under the Apprenticeship Act,

(b) hold a British Columbia certificate of apprenticeship,
(c) hold a British Columbia certificate of qualification, or
(d) hold a certificate with an Interprovincial Red Seal, recognized by the director of apprenticeship, except for a trade designated under section 23(1) of the Apprenticeship Act.

4(2) Subsection (1) applies only to a trade where both an apprenticeship program and a British Columbia certificate of qualification are available under the Apprenticship Act.

6.(1) 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 provide a statutory declaration to the tendering agency

(b) before the first progress payment is made under the contract, specifying the following for each employee:
(i) the employee's name and trade in which the employees is working, as the trade is described in the regulations;
(ii) the employee's certificate or apprenticeship number and, for apprentices, the apprenticeship level;
(iii) the wage rate and benefits paid per hour;
(iv) any other information required by the regulation.

7. Every contract for construction to which this Act applies must include a provision that in subcontracting any part of the construction contemplated by the contract, the contractor or subcontractor must

(a) place conditions in the subcontract that will ensure compliance by the subcontractor with this Act, and
(b) be responsible for the carrying out of any conditions referred to in paragraph (a).

The Court of Appeal stated with respect to these provisions of the *FWA*, at page 7-9:

"In my opinion, these provisions leave no doubt that the Act was not intended to apply to pre-existing contracts. If it did, s. 4(1) and (2) would require the contractor, on the date the Act came into force, to immediately discharge all employees in a trade covered by s. 4(2) who did not meet the subsection (1) qualifications. ...

Sections 6 and 7 would go even further and impose obligations impossible to perform under a pre-existing contract. A contractor under a pre-existing contract could not provide a statutory declaration to the tendering agency before the first progress payment is made, as required by s. 6, if the first progress payment was made before the Act came into force. Similarly, the section 7 obligation that the contractor must place certain conditions in a subcontract is incapable of compliance if the contract and the subcontract predate the Act coming into force. If the intent of the Legislature had been to include pre-existing contracts within the purview of the statute surely one would expect that s. 7 would have been worded to deem such conditions to be included in

> existing subcontracts. In my opinion, the obligation "must include" can only contemplate reference to a contract to be entered into after the Act came into force. The fact that s. 6 and 7 obligations imposed impossible obligations in the case of pre-existing contacts is conclusive in my view that the Legislature did not intend to include pre-existing contracts within the purview of the Act.
>
> .... Accordingly, the Act has no application to the TNL contract in question here and the fair wage obligation imposed by s. 5 has no application to employment under that contract. ..."

Except as noted below, the decision of the Court of Appeal answers and disposes of the issues raised by the appeal. The *FWA* does not apply to the Project. That being the case, the employees are not entitled to fair wages in accordance with that legislation.

From my reading of the Determination and the submissions filed, it appears that the award of compensation, with one exception, was in respect of the TNL's alleged failure to pay fair wages under the *FWA*. I understand from the appellant's July 9, 1999 submission that the delegate was of the view that one of the employees, Mr. Nixon, was entitled to overtime pay. It appears from the Determination that there is an award of overtime pay, although it does not set out any reasons or factual basis for that conclusion. TNL says that Nixon was covered by a collective agreement which "meet or exceed" the requirements of the *Act*. The Director does not respond in any detail to this. It is clear that Nixon was covered by a collective agreement. There is nothing in the Determination to indicate that the delegate considered this issue and made a reasoned decision. In the result, I uphold the appeal on this issue.

In short, the appeal must succeed.

ORDER

I order that the Determinations in this matter, dated July 16, 1999 be cancelled.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal