

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 -

Nova Express Inc.
("Nova Express")

-and-

Jack Ramnauth
("Ramnauth")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/233

DATE OF DECISION: May 15, 2000

DECISION

OVERVIEW

I have before me two appeals. The first is an appeal, filed on January 21st, 2000, by Nova Express Inc. (“Nova Express”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 29th, 1999 under file number ER 17594 (I shall refer to this determination as the “Corporate Determination”).

The Director’s delegate determined that Nova Express [or, more particularly, its predecessor company, Dwarf Courier (1993) Ltd.] fell under provincial jurisdiction and that one Keith M. Eremko (“Eremko”) was an employee, rather than an independent contractor, of Nova Express. The delegate awarded Mr. Eremko the sum of \$7,985.09 on account of unpaid statutory holiday pay, vacation pay, unauthorized payroll deductions and uniform costs.

The second appeal, filed on March 14th, 2000 by Jack Ramnauth (“Ramnauth”), is of a determination issued by a Director’s delegate on February 21st, 2000 also under file number ER 17594. By way of this latter determination, the delegate determined that one Michael J. Scott (“Scott”) was employed by Nova Express and that Ramnauth was a director and officer of Nova Express when certain wages (statutory holiday pay, vacation pay and unauthorized payroll deductions) were earned or should have been paid by Nova Express to Scott. Accordingly, a determination was issued, pursuant to section 96 of the *Act*, against Ramnauth in the amount of \$6,755.44 (I shall refer to this determination as the “Director/Officer Determination”).

It is my understanding that Nova Express made an assignment into bankruptcy on February 7th, 2000; *i.e.*, shortly after the filing of the appeal of the Corporate Determination and prior to the issuance of the Director/Officer Determination.

ISSUE TO BE DECIDED

Nova Express and Ramnauth have appealed, respectively, the Corporate Determination and Director/Officer Determination to the Tribunal. Nova Express’ reasons for appealing the Corporate Determination include, *inter alia*, that the delegate erred in finding that Eremko was an employee and that the delegate did not conduct a procedurally fair and impartial investigation of the matter.

Ramnauth’s appeal is based on several assertions including an allegation that the delegate’s investigation was fatally flawed and that he is entitled to the benefit of certain section 96(2) defences. Ramnauth also says that Scott’s relationship with Nova Express was that of an independent contractor rather than as an employee.

By way of a letter to the Tribunal dated March 30th, 2000, legal counsel for Mr. Ramnauth asked that each of the Corporate Determination and the Director/Officer Determination be suspended, pending a decision on the merits of the two appeals, upon deposit of a “nominal amount”. The

suspension application is made pursuant to section 113 of the *Act*. *These reasons address only the suspension request.*

Since counsel for the Director asserts that the suspension request, at least as it relates to the Corporate Determination, is not properly before the Tribunal, I will first address that matter.

THE CORPORATE DETERMINATION SUSPENSION REQUEST

As noted above, Nova Express made an assignment into bankruptcy on February 7th, 2000. At that point the “stay” provisions of the federal *Bankruptcy and Insolvency Act* were triggered. Although the appeal of the Corporate Determination, filed on January 21st, 2000 by the company’s legal counsel, was properly filed with the Tribunal, once Nova Express entered into bankruptcy, only its licenced trustee-in-bankruptcy could thereafter maintain the appeal (see *Fyfe and Canadian Neon Ltd.*, BC EST #D080/00 and *Centrux Management Ltd.*, BC EST #D091/00). That being the case, legal counsel for Mr. Ramnauth does not have the authority to continue to pursue the appeal of the Corporate Determination on behalf of Nova Express or on behalf of Mr. Ramnauth, a former director and officer of that firm (Ramnauth resigned both his directorship and office on January 21st, 2000).

Accordingly, inasmuch as neither Mr. Ramnauth nor his legal counsel have, at present, the legal authority to act on behalf of Nova Express with respect to an appeal of the Corporate Determination--that right being vested in its trustee--I must refuse the request for a suspension of the Corporate Determination on the basis that the suspension request is not properly before the Tribunal.

I might add that quite apart from the bankruptcy of Nova Express, given that Ramnauth is no longer a director or officer of that firm (and, apparently, has not been given any express authority by the trustee to act as an agent for Nova Express with respect to an appeal of the Corporate Determination), I fail to see how Ramnauth can apply for any sort order from the Tribunal relating to the Corporate Determination.

SUSPENSION OF THE DIRECTOR/OFFICER DETERMINATION

Legal counsel for Ramnauth has submitted information in the form of a letter from the Employment Standards Branch that suggests there are some 23 other potential claimants as against Ramnauth. However, so far as I am aware, to date no further section 96 determinations have been issued against Ramnauth relating to the unpaid wage claims of any of those individuals. It appears to me, though, that if and when further section 96 determinations are issued against Ramnauth, appropriate suspension applications can be made in the course of any appeal(s) that may be taken from any such section 96 determinations. For my part, I need only address the one section 96 determination that is properly before the Tribunal, namely, the Director/Officer Determination in favour of Mr. Scott for the sum of \$6,755.44.

As previously noted, Ramnauth asserts that Scott was an independent contractor rather than a Nova Express employee. Ordinarily, that issue would be addressed in an appeal of an underlying determination issued against the corporate employer but in light of Nova Express’ bankruptcy, no such corporate determination was issued with respect to Mr. Scott’s claim. On the other hand,

the surrounding facts and circumstances relating to Mr. Scott's status are not materially different from those relating to Mr. Eremko and Mr. Eremko's status (and perhaps, at least by inference, the status of any other Nova Express "contractors") can be addressed in the appeal of the Corporate Determination.

There is no allegation before me that the delegate erred with respect to his calculations although Ramnauth does say that the delegate carried out a "flawed" investigation and that a section 96 determination ought not to have been issued without a prior "corporate determination". As noted above, Ramnauth also relies on the "section 96(2) defences"--although he has not provided any particulars relating to any section 96(2) defence. Further, there does not appear to be any dispute about the fact that Ramnauth was a Nova Express director and officer until his resignation on January 21st, 2000 and, given that Scott's wage claim spans the period up to and including January 7th, 1999, it would appear that Ramnauth is *prima facie* liable for any unpaid wages owing to Scott subject to the 2-month wage liability "ceiling" and any other applicable defence.

Notwithstanding the foregoing, while Ramnauth's appeal may not ultimately succeed, all tolled, I cannot conclude that the present appeal is wholly lacking in merit. Even so, while the Tribunal will not suspend a determination in the face of an obviously frivolous appeal, it does not follow that merely because an appeal is not frivolous, a suspension order will follow as a matter of course. The Tribunal has repeatedly stressed that suspension orders will be issued only when there are rather unusual circumstances.

Counsel for Ramnauth says that his client will suffer "unique prejudice" (see *Tricom Services Inc.*, BC EST #D420/97) if he is required to post "a significant deposit" and that "personal bankruptcy is a possibility". Despite this latter assertion, I should note that I have no information whatsoever before me regarding Mr. Ramnauth's present financial circumstances. Indeed, as I understand the situation, Ramnauth may have left the jurisdiction and his counsel has specifically refused to provide any information to the Director regarding Ramnauth's present whereabouts. With respect to this latter point, I see nothing improper *per se* about counsel's refusal to disclose his client's whereabouts but that refusal simply solidifies one's concern about Ramnauth's willingness and/or intentions to voluntarily abide by the Director/Officer Determination should it be confirmed.

No doubt, Mr. Ramnauth's potential liability, should the other 23 claims result in section 96 determinations, might indeed create a serious financial hardship. On the other hand, at present, I have but one determination before me in an amount of less than \$7,000. An appellant seeking a suspension upon payment of a lesser sum than that set out in the the determination bears a "heavy onus" (see *New Pacific Limousine Service Inc.*, BC EST #D054/96) and I am simply not satisfied that Ramnauth has met that heavy onus in this instance.

ORDERS

The application to suspend the Corporate Determination is dismissed inasmuch as that application is not properly before the Tribunal.

The application to suspend the Director/Officer Determination is refused as I do not consider it appropriate to issue such a suspension order in the circumstances of this case.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal