

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 -

Jack Ramnauth
(" Ramnauth ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/168

DATE OF HEARING: August 1st, 2000

DATE OF DECISION: August 8, 2000

DECISION

APPEARANCES

No appearance	for Jack Ramnauth
Michael J. Scott	on his own behalf
Shirley Kay, Barrister & Solicitor	for the Director of Employment Standards

OVERVIEW

This appeal was filed on March 14th, 2000 by legal counsel for Jack Ramnauth (“Ramnauth”). Ramnauth appeals a determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on February 21st, 2000 under file number ER 17594 (the “Determination”).

The Determination was issued pursuant to section 96 of the *Act* (which provides for personal liability on the part of corporate officers and directors for up to two months’ unpaid wages per employee) and is in the amount of \$6,755.44. The Director’s delegate determined that Michael J. Scott (“Scott”) was employed by a company known as Nova Express Inc. (“Nova Express”) and that Ramnauth was a director and officer (president) of Nova Express when certain monies (including statutory holiday pay, vacation pay and unauthorized payroll deductions) were earned or should have been paid by Nova Express to Scott. The section 96 Determination was issued following Nova Express’ assignment into bankruptcy on February 7th, 2000.

Ramnauth concedes that he was a director and officer of Nova Express when Scott was associated with that firm—Scott’s claim spans the period March 13th, 1996 to January 7th, 1999—although Ramnauth subsequently resigned both his office and his directorship on January 21st, 2000.

This appeal was scheduled to be heard at the Tribunal’s offices in Vancouver commencing on August 1st and continuing on August 3rd, 2000. Mr. Scott appeared in person—having traveled to Vancouver from Vancouver Island—as did counsel for the Director. Ramnauth was supposed to appear by teleconference but he did not call in at the appointed hour. Some 25 minutes after the time set for the commencement of the hearing, I dismissed the appeal as abandoned.

THE APPEAL

In his appeal documents, Ramnauth alleges that the delegate’s investigation was fatally flawed and that he is entitled to the benefit of certain (unspecified and not particularized) 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.

BACKGROUND FACTS

In a letter to the Tribunal dated March 30th, 2000, legal counsel for Mr. Ramnauth requested, pursuant to section 113 of the *Act*, that the Determination be suspended pending a decision on the merits of the appeal upon deposit of a “nominal amount”. The suspension request was refused—see BC EST #D199/00 the relevant portions of which are reproduced below:

“...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.”

In a lengthy written submission appended to the notice of appeal, Ramnauth’s counsel noted “that, in view of the contest of facts and the necessity to test credibility, [Ramnauth requests that] a hearing be held in this matter”.

In order to clarify the issues that would be argued on the appeal [recall, for example, that Ramnauth, in his appeal documents, simply pleaded “the defences set out in s. 96(2)” without providing any further particulars], the Tribunal ordered that a prehearing conference be held. The prehearing conference was conducted, by teleconference, on May 24th, 2000—both Ramnauth and the Director were represented by their respective legal counsel. Certain procedural matters were addressed at the prehearing conference and it was agreed that the appeal hearing would proceed on July 6th and 7th, 2000; appropriate hearing notices were subsequently sent out by the Tribunal to all interested parties. During the prehearing conference, counsel for Ramnauth indicated that he expected to call three witnesses including Mr. Ramnauth.

Subsequent to the prehearing conference (on May 29th, 2000), the Director issued another determination relating to Scott's unpaid wage claim against Nova Express. Ramnauth obtained authorization from Nova Express' bankruptcy trustee to appeal this latter corporate determination and did so on June 8th, 2000. I should add that counsel for the Director indicated during the prehearing conference that such a corporate determination might be issued; indeed, my impression following the prehearing conference was that such action on the Director's part was likely. It should perhaps be noted that the Director agreed to issue the corporate determination so that the issue of whether Scott was an "employee" or an "independent contractor" would be addressed in the most appropriate forum—namely, in an appeal of a corporate determination. Generally speaking, directors and officers are not entitled to raise such an issue in an appeal of a section 96 determination—see *e.g.*, *Perfekto Mondo Bistro Corp.*, BC EST #D205/96. Thus, the Director's issuance of the corporate determination removed a possibly significant procedural hurdle that Ramnauth faced in his appeal.

On June 16th, 2000 the Director's counsel faxed a letter to the Tribunal which states, in part:

"I, as counsel for the Director and [counsel for Ramnauth] have discussed the appropriate procedure to be followed with respect to the appeal of the [corporate determination] and the appeal of the [director/officer determination], and *we are agreed* as follows:

1. The appeal of the [corporate determination] should take place first;
2. The appeal of the [director/officer determination]...should be adjourned...
4. *[Counsel for Ramnauth] and I have tentatively agreed to have the appeal [of the corporate determination] scheduled for hearing during the week of July 31st or the week of August 7th, subject to the availability of our witnesses and the Adjudicator...* (my italics)

Accordingly, the July 6th and 7th hearing dates were adjourned and both appeals—namely, Ramnauth's appeal and the appeal of the corporate determination—were set down to be heard on August 1st and 3rd, 2000. Since Ramnauth was apparently planning to be away from the lower mainland in early August on a business trip to Toronto, the Tribunal made arrangements for Ramnauth to participate in the hearing by way of a telephone conference call. On June 26th and again on July 26th, 2000 counsel for Ramnauth unsuccessfully applied for an adjournment of the appeal hearings on the ground that Ramnauth wished to appear in person rather than by teleconference. Counsel for the Director opposed the adjournment request but, alternatively, suggested that if the appeals were to be adjourned yet again that the appellants post, as a condition of granting the adjournment, the entire amount of the determinations to be held in trust pending the outcome of the appeals.

On July 28th, 2000 counsel for Ramnauth faxed a letter to the Tribunal in which he advised that: i) Ramnauth would not attend the appeal hearing by teleconference; ii) Ramnauth would not agree to post the amount of the determinations (or any amount) as a condition of any adjournment; and iii) that he was no longer acting as counsel for Ramnauth. Mr. Ramnauth was advised to make any further application for adjournment that he might wish to make before me on August 1st, however, Ramnauth did not attend the hearing—either in person or by

teleconference. Further, neither of the other two witnesses that were supposedly going to testify for the appellants appeared at the hearing.

In my view, there is absolutely no reason why Ramnauth could not have made his application for adjournment by telephone on August 1st; indeed, he was advised by the Tribunal's staff to do so. It should be remembered that it was Ramnauth who first asked for an oral hearing and it was his decision—and his alone—to arrange to be in Toronto on business rather than attend the appeal hearing. It should be recalled that the appeal hearing dates had been agreed to by counsel for Ramnauth by no later than mid-June and that Ramnauth made his travel arrangements after the hearing dates had been agreed to between counsel. Finally, there is no explanation before me with respect to the nonattendance of the other two witnesses that Ramnauth proposed to call on his behalf.

In light of the foregoing circumstances, I consider that Ramnauth, by his actions, has effectively abandoned his appeal.

ORDER

This appeal is dismissed. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$6,755.44** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal