

**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")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE NO.:** 2000/396

**DATE OF HEARING:** August 1, 2000

**DATE OF DECISION:** August 8, 2000

**DECISION**

**APPEARANCES**

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

**OVERVIEW**

This is an appeal brought by Nova Express Inc. (“Nova Express”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 29<sup>th</sup>, 2000 under employer file number 17594 (the “Determination”).

Nova Express formerly operated a courier business. The Director’s delegate determined that Michael J. Scott (“Scott”), a contract driver for Nova Express, was a Nova Express employee thus rejecting its contention that Scott was an independent contractor. The delegate awarded Scott the sum of \$10,544.18 on account of unpaid statutory holiday pay, vacation pay, recovery of unauthorized payroll deductions and interest.

Nova Express made an assignment into bankruptcy on February 7<sup>th</sup>, 2000. Mr. Jack Ramnauth subsequently obtained written authorization from the bankruptcy trustee for Nova Express, Arthur Andersen Inc., to appeal the Determination. The appeal was filed by legal counsel acting on Mr. Ramnauth’s instructions.

On July 28<sup>th</sup>, 2000, counsel for Ramnauth faxed a letter to the Tribunal indicating that he was no longer acting for Ramnauth and that Mr. Ramnauth did not intend to appear at the appeal hearing—by teleconference or in person—on behalf of Nova Express. It is not clear from the material before me whether or not the trustee was so advised but, in any event, I understand that the trustee never had (nor does it now have) any interest in pursuing an appeal of the Determination although, as is obvious, the trustee was prepared to permit Ramnauth to appeal the Determination as agent for Nova Express.

This appeal was scheduled to be heard at the Tribunal’s offices in Vancouver commencing on August 1<sup>st</sup> and continuing on August 3<sup>rd</sup>, 2000. Mr. Scott appeared in person—having travelled to Vancouver from Vancouver Island—as did counsel for the Director. Mr. Ramnauth was supposed to appear, by teleconference, on behalf of Nova Express (he is a former officer and director of that firm) but, consistent with his counsel’s written advice to the Tribunal, he did not call in at the appointed hour. Some 25 minutes after the time set for the commencement of the hearing, I dismissed this appeal as abandoned.

## ISSUES ON APPEAL

Nova Express alleges that the delegate's investigation was fatally flawed and that Scott was an independent contractor rather than a Nova Express employee.

## FACTS AND ANALYSIS

This appeal was scheduled to be heard together with another appeal, filed by Ramnauth personally, of a determination issued against Ramnauth pursuant to section 96 of the *Act* (this section establishes personal liability on the part of corporate officers and directors for up to two months' unpaid wages per employee). Ramnauth's appeal has also been dismissed as abandoned—see *Ramnauth*, BC EST #D328/00, issued concurrently with these reasons for decision.

Ramnauth's appeal of the section 96 determination was originally scheduled to be heard on July 6<sup>th</sup> and 7<sup>th</sup>, 2000. Those arrangements were made following a May 24<sup>th</sup>, 2000 prehearing conference attended by Ramnauth's and the Director's respective legal counsel. At the prehearing conference, counsel for the Director indicated that a determination against Nova Express might well be issued in favour of Scott so that the issue of Scott's status (employee or independent contractor) could be addressed in the proper forum. Generally speaking, directors and officers are not entitled to challenge an employee's wage entitlement in an appeal of a section 96 determination; that issue is more appropriately addressed by way of an appeal of the underlying corporate 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 16<sup>th</sup>, 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 31<sup>st</sup> or the week of August 7<sup>th</sup>, subject to the availability of our witnesses and the Adjudicator...* (my italics)

Accordingly, the July 6<sup>th</sup> and 7<sup>th</sup> 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 1<sup>st</sup> and 3<sup>rd</sup>, 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 26<sup>th</sup> and

again on July 26<sup>th</sup>, 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, the appellants should be ordered to 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 28<sup>th</sup>, 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 an adjournment; and iii) that he was no longer acting as counsel for Ramnauth. Mr. Ramnauth was advised by the Tribunal to make any further application for adjournment that he might wish to make before me on August 1<sup>st</sup>, however, as noted above, Ramnauth did not attend the hearing—either in person or by teleconference. Further, neither of the other two witnesses who were supposedly to testify for Nova Express (I understand with respect to the matter of Scott's status) appeared at the appeal hearing nor has any explanation been tendered for their failure to appear.

In my view, there is absolutely no reason why Ramnauth, on behalf of Nova Express, could not have made an application for adjournment (by telephone) on August 1<sup>st</sup>; indeed, he was advised—in writing on July 27<sup>th</sup>, 2000--by the Tribunal's staff to do so. It should be noted that in its appeal documents Nova Express specifically asked that its appeal be the subject of an oral hearing. It was Ramnauth's decision—and his alone—to arrange to be in Toronto on business rather than attend the appeal hearing. It was Ramnauth's decision not to appear at the appeal hearing by teleconference.

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 Nova Express' behalf.

In light of the foregoing circumstances, I consider that the agent for Nova Express, namely, Mr. Ramnauth, by his actions, effectively abandoned the appeal on behalf of Nova Express.

## **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 **\$10,544.18** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**