

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Nova Express Inc.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John Orr

FILE No: 2000/428

DATE OF DECISION: September 20, 2000

DECISION

OVERVIEW

This is an application by Nova Express Inc. (formerly Dwarf Courier (1993) Ltd. and Dwarf Courier Ltd.) referred to herein as (“Nova”) under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Decision #D201/00 (the “Original Decision”) which was issued by the Tribunal on May 15, 2000.

The following review of the circumstances leading to this application for reconsideration draws primarily from the facts set out in the original decision.

On December 29, 1999 the Director determined that a certain Mr Keith Eremko (“Eremko”) was an employee of Nova [or, more particularly, its predecessor company, Dwarf Courier (1993) Ltd.] and that Nova owed Eremko some \$7,985.09 in wages.

During the time that the liability for these wages was incurred Mr Jack Ramnauth (“Ramnauth”) was the sole officer and director of Nova.

On January 21, 2000 Nova appealed the determination. On the same date Ramnauth then resigned as a director and officer of Nova.

On February 7, 2000 Nova made an assignment into bankruptcy. The “stay” provisions of the federal *Bankruptcy and Insolvency Act* were triggered. Thus, as of February 7th, 2000 the appeal could only be continued by the licensed trustee-in-bankruptcy. In this case the trustee was Arthur Anderson Inc., (hereinafter referred to as “the trustee”).

In a letter, dated March 06, 2000, to the trustee, an Industrial Relations Officer, Robert D. Krell, a delegate of the Director stated:

Further to our conversation this morning, this will confirm that Arthur Anderson Inc. Trustee in Bankruptcy for Nova Express Inc. (in bankruptcy), will not be proceeding with the corporations appeal of the December 29, 1999, Determination issued with respect to wages found to be owed to Keith Eremko.

By way of copy of this letter, I am informing the Employment Standards Tribunal of this development.

On March 17, 2000 legal counsel for Ramnauth purported to adopt the appeal filed by Nova on behalf of Ramnauth because he was concerned about the possible personal liability of a director of a company pursuant to section 96 of the *Act*. No determination had, at that stage, been made against the directors or officers of Nova.

BC EST #D380/00
Reconsideration of BC EST #D201/00

In the original decision the adjudicator pointed-out that in light of the bankruptcy of Nova Express, the right to continue the appeal was solely within the power of the trustee. The adjudicator then stated:

As noted above, the Trustee does not wish to pursue the appeal. Second, and quite apart from the bankruptcy of Nova Express, Ramnauth (whom I understand was Nova Expresses' sole officer and director) resigned both his office and his directorship with Nova Express on January 21st, 2000. Accordingly, Mr Ramnauth is no longer in a position to act on behalf of Nova Express with respect to this appeal. There is no evidence before me that he has been appointed by the Trustee as an authorized agent to pursue the appeal. Any liability that may be imposed on Mr Ramnauth by way of a section 96 determination will have to be addressed through an appeal by Mr Ramnauth of such a determination should the Director choose to proceed against Mr Ramnauth under section 96 of the *Act*.

By the decision dated May 15, 2000, the adjudicator then dismissed the appeal as abandoned.

On May 16th, 2000 the trustee assigned to Ramnauth the right to carry on the appeal.

On May 23, 2000 counsel for Ramnauth applied for reconsideration of the original decision and asked the Tribunal to re-open of the appeal.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively “re-weigh” evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, “At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general”. Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a “re-weighing” of evidence or the seeking of a “second opinion” when a party simply does not agree with the original decision.

In my opinion this is a case that warrants the exercise of the reconsideration discretion. The application was made in a timely manner and goes beyond a re-weighing of evidence or seeking a second opinion.

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The significant problem for a former director such as Ramnauth is that if the corporate determination is not appealed there is little defence to any determination, under section 96 of the *Act*, against him in personal capacity as a director. The Tribunal has held that it is not open to the former director to argue the merits of the corporate determination during a section 96 appeal.

It is not disputed that at the time of the original decision Ramnauth did not have the capacity or standing to pursue the appeal. In effect the original decision *per se* is not disputed. On this basis it seems to me that a reconsideration of that decision is not appropriate.

However, on my review of the original decision, I have a concern that requires the original decision to be cancelled.

It seems to me that if the trustee did in fact withdraw or abandon the appeal then the Tribunal has no jurisdiction to re-instate it. However, it concerns me that the only evidence of such intent to abandon appears to be the March 6th letter from the Director's delegate. In my opinion such an indirect communication is not sufficient to constitute an abandonment or withdrawal of the appeal. In my opinion there must be evidence of both the intent to abandon and some actual act of abandonment. There is no evidence referred to of any act by the trustee to abandon the appeal or to withdraw it. It appears from the original decision that the adjudicator accepted the delegate's letter as proof of the fact that the trustee had abandoned or withdrawn the appeal. In my opinion that alone is insufficient evidence to support a finding that the appeal was abandoned.

While I agree with the original decision on the substantial issue in regards to Ramnauth's standing at the time, I cannot agree with the final order. I find that the appeal was not abandoned. The Trustee has assigned Ramnauth the right to pursue the appeal and I find that the appeal should be considered by the Tribunal. Therefore, pursuant to section 116 of the *Act*, the order made in the original decision is cancelled and this matter is referred to the Registrar to submit the matter to an adjudicator for either a written or oral hearing of the appeal.

ORDER

This Tribunal orders that, pursuant to Section 116 (1)(b) of the *Act*, the order made in the original decision is cancelled and this matter is referred to the Registrar to appoint an adjudicator to hear the appeal.

“JOHN M. ORR”

John M. Orr
Adjudicator
Employment Standards Tribunal