

An appeal

- by -

International Paper Industries Ltd.  
(“International”)

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** William Reeve

**FILE No.:** 2002/635

**DATE OF DECISION:** March 11, 2003

## DECISION

### OVERVIEW

This is an appeal by International Paper Industries Ltd. (“International”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 14, 2002. The Determination found that the complainant, Vitali Tcherkas (“Tcherkas”) whose complaint initiated the matter, was an employee, not an independent contractor, and that vacation pay and statutory holiday pay in the amount of \$5,321.43 were owing to Tcherkas.

The deadline for filing an appeal of the Determination was 4:30 p.m. on December 9, 2002. An appeal by International dated December 30, 2002 was received by the Tribunal on December 31, 2002. The appeal included reasons why it was late, by implication the International is asking that the appeal deadline be extended and the appeal be allowed to proceed on its merits. This decision on the timeliness issue is based on written submissions from the parties.

### ISSUE

The only issue to be addressed in this Decision is whether the Tribunal should extend the deadline for requesting an appeal in accordance with the powers of the Tribunal under section 109 (1)(b) of the Act.

### ARGUMENT

On the appeal form Kathleen Houston (“Houston”), who filed the appeal for International, stated,

“Emmie Leung was out of Privity on business and out of town, I was ill and much of her mail was filed in several piles and I was unaware of Determination until today and went through pile of paper where it was attached with other papers.”

In the accompanying letter Houston stated,

“We received the Determination ER#2844 back mid November, however, Emmie Leung was out of town on business as the company has rapidly expanded and requires her to open new offices /plants in B.C. and Winnipeg, and I, handling much of her work have been ill. I started to work on the backlog of paperwork that piled in various areas and came across the Determination.”

In a subsequent letter to the Tribunal dated January 13, 2003 Houston said, in comments related to the timeliness issue,

“1. International Paper Industries Ltd. filed a Late Appeal due to the fact the personnel directly involved with this issue were not aware that there was a Determination Issued by the Director in the Vitali Tcherkas vs IPI issue, until the end of December, this was however an internal IPI problem and not the fault of Employment Standards or the Officer issuing the Determination.

“2. The Determination was issued mid November and a six week response to the Determination is not unreasonably long in our way of thinking.

“3. We intended to Appeal the Determination immediately upon reading the Determination.

“4. International Paper Industries immediately informed the Officer who wrote the Determination that an Appeal was being made, by way of faxing a letter of same, as well as faxing a copy of our Appeal”

In response to the appeal, on the timeliness issue, the Respondent, Tcherkas, made a number of comments including the following.

“Firstly, I strongly believe that International Paper Industries Ltd. (the “Appellant”) is appealing this Determination in order to postpone the payment and in hope that they can avoid this responsibility in view of current changes with Employment Standards.

“Secondly, the Appellant does not have a strong case that might succeed in the appeal because they don’t provide any new evidence which were not available prior to the Determination, they simply waste our time.

The Director’s Delegate stated,

“In view of the appellant’s explanation for the delay in the filing of the appeal, I have no objection to the Tribunal extending the time for the filing should it see fit in the circumstance.

“The employer has from the commencement of the investigation always challenged the complainant’s assertion that he was an employee and this appeal is, therefore, expected.

“As the employer has an arguable case, I do not wish to deprive it of the opportunity to appeal.”

## **THE FACTS AND ANALYSIS**

The Tribunal does not grant extensions automatically but it may extend a time limit if there are compelling reasons to do so. To help it decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria. They are the following:

1. is there a good reason why the appeal could not be filed before the deadline;
2. was there an unreasonable delay in appealing;
3. did the appellant always intend to appeal the determination;
4. were the other parties aware of the intent to appeal;
5. is an extension of the appeal deadline harmful to the interests of the respondent; and
6. does the Appellant have a strong case that might succeed if an extension were granted.

The explanation by Houston of the reasons why the appeal was filed late appear to be credible. Her explanations are that the Chief Executive officer of the firm was away for an extended period at the time the Determination was received and that Houston, Executive Assistant to the C.E.O and the person who filed the appeal, was ill at the same time, so that the Determination did not come to her attention for some weeks, until she resumed her duties. This explanation sounds forthright and honest.

In the question of whether the delay was unreasonable I note that the appeal was received twenty two days late. Houston argues that this is not unreasonable. The fact remains that the deadlines are set by legislation and the deadline was exceeded. Recent changes in legislation and policy have allowed a somewhat longer appeal period but even under those rules, were they to apply, and in this case they do not, the appeal would be late.

As to the question of whether International always intended to appeal the Determination I am inclined to accept the statement of the Delegate that the appeal was expected, at least by him. The Respondent, Tcherkas, stated that he had no advance knowledge of the intention to file an appeal and I am sure he is correct in that assertion.

To the extent that acceptance of the appeal may act to delay a final resolution of the issues concerned it may be that acceptance of the appeal is not in the interest of the Respondent. I should note, also, that the concern by the Respondent that the late appeal was motivated by a desire to take advantage of changes in legislation are unfounded. The legislation and policies in effect at the time the Determination was issued, November 14, 2002, will be applied in this matter regardless of whether the deadline for appeal was met or is extended.

The final factor usually considered is whether the Appellant has a good case that might succeed. On this point I must agree with the Delegate that International has an arguable case and they the firm deserves an opportunity to be heard.

After considering and balancing all these factors, I believe that the interests of fairness and justice are best served by extending the deadline and allowing the appeal to be heard on its merits.

## **ORDER**

Pursuant to section 109(1)(b) of the Act I order that the time for filing of an appeal in this matter be extended to December 31, 2002 and the the appeal by International be accepted.

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**William Reeve**  
**Adjudicator**  
**Employment Standards Tribunal**