Employment Standards TRIBUNAL

An appeal

- by -

International Paper Industries Ltd.
("IPI" or the "Appellant")

- 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: Ib S. Petersen

FILE No.: 2003/19

DATE OF DECISION: May 14, 2003

DECISION

OVERVIEW

This is an appeal by the Appellant, IPI, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director's Delegate issued on November 14, 2002 (the "Determination"). In the Determination, the Delegate concluded that Mr. Vitali Tcherkas, who had worked as a truck from April 1, 1998 to June 30, 2001, was an employee, not an independent contractor, and was owed $5,321.43 on account of statutory holiday pay and vacation pay.

It appears from the Determination that the Delegate attempted to apply the common law tests often applied in these cases. He also referred to the definitions of "employee" and "employer" in the *Act*.

The appellant argues that the Delegate applied these tests incorrectly and takes issue with some of the factual underpinnings of the Determination. In light of my decision to refer this case back to the Director, I do not intend to go further into these grounds.

From the Determination, in particular, the heading "Findings of Fact/Analysis," I am of the view that the Delegate erred in law. In my view, the errors are evident on the face of the decision.

First, in my view, the factual underpinnings of the Determination is not clear to me. At best, perhaps, these underpinnings are mixed fact or characterization of facts. These facts and characterizations, such as they are, read as a basic summary of the analysis in the decision of the British Columbia Labour Relations Board in *International Paper Industries Ltd.*, BCLRN No. B113/2000 (which forms part of the record before me). In that decision, the Labour Relations Board decided that IPI drivers were dependent contractors for the purposes of a certification application under the *Labour Relations Code*, R.S.B.C. 1996, c. 244 as am. (the "*Code*"). In my view, the factual basis for the Determination is not clear.

Secondly, it is clear to me that the Delegate, at least in part, relied on tests that have no foundation in law. Under the heading "Integration," the Delegate opined that "[a]n ordinary person would view the relationship as one of employer and employee." In my view, this "ordinary person" test have no basis in law.

Thirdly, and importantly, however, is this quote from the Determination:

> "From the above analysis and taken as a whole, I find *the relationship more closely resembles an employment relationship than that of a relationship between two independent businesses.* I, therefore, determine that the complainant was an employee of the employer and not an independent contractor as alleged." (Emphasis added)

The first sentence tracks the language of the definition of "dependent contractor" in the *Code*. In the context of this particular appeal, and despite the references to the statutory definitions to "employee" and "employer," it appears to me that the Delegate may have applied the wrong law and asked the wrong question. The question is not whether the relationship more closely resembles an employment relationship than an independent contractor relationship. The question is whether a person is an employee under the *Act*.

Quantum does not appear to be an issue--at least it was not raised on appeal--and I see no reason to go beyond the Delegate's findings on this point. However, as mentioned, I refer the question of whether an employment relationship existed between Mr. Tcherkas and IPI under the Act back to the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order that the determination of employee status in the determination dated November 14, 2002, be referred back to the Director.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal