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.: 2003/39

DATE OF DECISION: September 26, 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 driver 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.

In an earlier decision, *International Paper Industries Ltd.*, BCEST #157/03, I referred the determination of employee status back to the Director:

> "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."

In a report dated June 20, 2003, the Delegate again concluded that the relationship between the parties was one of employer-employee. The Delegate based his conclusion on the language of the *Act* and various common law tests commonly utilized in making such determinations.

FACTS AND ANALYSIS

The Appellant still takes issue with the Delegate's conclusions. As has been noted in many decisions of this Tribunal, the onus is on the Appellant to satisfy the Tribunal that the Delegate erred. I have carefully considered the material on file, including the submissions and documents filed earlier. I am of the view that the appeal must be dismissed.

As often stated, the application of the statutory definitions of "employee" and "employer" is not as easy as one might expect. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (*Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986). With those principles in mind, a useful summary is set out in my decision in *Knight Piesold Ltd.*, BCEST #D093/99:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

The background facts are as follows. The Appellant operates a garbage and recycling collection business. The work is done by persons it, IPI, considers "employees" and others it considers "contractors," Mr. Tcherkas being in the latter category. He had a written "contractor" agreement with IPI. He was paid $2,950 plus GST, twice a month, invoicing IPI for his services, to do "weekly garbage and yard trimmings service" in an area designated by IPI. The agreement contemplates that the contractor may hire others to actually do the work. There is some disagreement between the parties with respect to the extent to which that actually occurred. There is no dispute that IPI supplied the (leased) vehicle to Mr. Tcherkas. There is some disagreement with respect to other supplies and who provided them.

In its response to the report, the Appellant makes many reference to its relationship with other "contractors"--arguing that the relationship is similar to that with Mr. Tcherkas--and determinations of Canada Customs and Revenue Agency (or its predecessor)--and others--supporting its position that the "contractors" are independent contractors. I note, as well, that there is CCRA determination from 2001 that Mr. Tcherkas was considered an employee for the purposes of federal employment insurance legislation. In any event, these determinations, based on other legislation and made for other purposes, are not determinative of the issue before me. As well, the matter before me is Mr. Tcherkas' status, and the Appellant's arrangements with other "contractors"--and there may well be similarities--are not, in my view, particularly relevant and, in the circumstances, I do not find an argument based on such allegations persuasive. My decision must be based on the facts of the Respondent's relationship with IPI.

While the analysis can be characterized as brief, perhaps sketchy, I am not satisfied that the Delegate erred. Looking at all of the facts and circumstances, the business is IPI's. I do not think it can be seriously argued that it is not. IPI obtain the contracts with the municipalities (such as West Vancouver and North Vancouver) for the work done by the contractors. As well, the main piece of equipment, the vehicle, is leased by IPI but operated by the contractor, Mr. Tcherkas. The Appellant maintains that the "contractor supplies tools [and] supplies." In his response, Mr. Tcherkas asks: what tools? what supplies? He says that the Appellant provided him with "all necessary equipment starting with truck and finishing with working gloves," including safety vests, safety glasses, first aid kits, and emergency triangle. This does not appear to be in dispute. In the circumstances, it is not clear to me what the Respondent, in fact, supplied. To my mind this supports the finding of an employment relationship.

Perhaps the strongest point in the appeal is the fact that Mr. Tcherkas could, from a contractual standpoint, and did, in fact, hire employees from time to time. From the submissions, there does not seem to be much dispute that Mr. Tcherkas was the usual and regular operator of the vehicle, he was generally the one doing the work. The Appellant supports its case with a typed memorandum, signed by Mr. Tcherkas, stating that he has arranged for "Cam Rourke to drive for [him] whilst [he was] on vacation." Mr. Tcherkas denies hiring this person. He says that he signed the memorandum given to him by IPI. He says he never met Cam Rourke before and never hired him. The Appellant provides a list of contractors and "workers". This list seems to suggest that on a few days (in 1999) Mr. Tcherkas used a certain worker. I note that the worker in question also worked for other "contractors." I am not persuaded, in the circumstances, that these facts alleged by the Appellant, taken on face value, is sufficient to deprive Mr. Tcherkas of employee status under the *Act*.

Finally, not surprisingly, the Appellant attacks the "genuineness" of Mr. Tcherkas' claim to employee status. IPI says that it would have exercised more control, pay etc. would have been different. While that is regrettable, my jurisdiction is the *Act* and, while intention may well be a factor to be considered, it does not determine the issue of status. In the decision of the Supreme Court of British Columbia, *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365, the court noted that "the declared intention and

classification of the contract by the parties may not bind statutory or third parties not party to the contract as against its true nature."

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination, dated November 14, 2002, be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal