

An Application for Reconsideration

- by -

International Paper Industries Ltd.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2003/43

DATE OF DECISION: January 19, 2004

DECISION

OVERVIEW

This is an application by International Paper Industries Ltd. ("IPI") pursuant to Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Tribunal decision #D276/03 (the "Original Decision") which was issued by the Tribunal on September 26, 2003.

IPI operates a garbage and recycling business. IPI has two categories of workers. The workers in one group are treated for all purposes as "employees". The other workers are considered "independent contractors". There have been a number of decisions from other government agencies agreeing that the workers in this latter group are indeed contractors and not employees. One of these workers, Vitali Tcherkas, subsequently applied for relief from the Employment Standards Branch. A delegate of the Director determined, despite the rulings of other agencies and a contract executed by Tcherkas, that Tcherkas was an "employee" as that term is defined in the *Act*. The delegate determined that IPI owed Tcherkas some \$5,321.43 for employment related benefits.

IPI appealed the determination but an adjudicator appointed by the Tribunal confirmed, in the original decision, the delegate's determination. IPI now asks the Tribunal to reconsider the original decision pointing out that the adjudicator did not adequately consider the documented proof but instead accepted the unsworn word of Tcherkas. It is also submitted that the adjudicator misunderstood or misinterpreted the nature of the relationship and did not give due weight to intention of the parties that Tcherkas would work as an independent contractor.

ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. 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 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.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submissions made by IPI on this reconsideration application only reiterate the arguments that have already been decided by the delegate and by the adjudicator in the original decision.

There is no doubt that IPI has raised a substantial argument that Tcherkas should have been considered an independent contractor. There is a signed contract in which Tcherkas holds himself out as an independent contractor willing and able to perform the necessary services and to provide the necessary equipment and skilled personnel to perform the work. Tcherkas contracts to provide such equipment and personnel and to provide a Performance Bond in case of failure to perform the work (this is certainly inconsistent with an employment relationship). The contract provides that Tcherkas, as a business entity, is free to carry on any other business including working for competitors as long as he fulfils his contractual obligations. There was also documented evidence that Tcherkas arranged for another driver to work for him while he was on vacation.

The delegate and the adjudicator discounted this latter document on the basis of the unsworn evidence of Tcherkas. However both provided reasons for so doing and made rational findings of fact in regard to this point.

Despite the written contract the delegate and the adjudicator quite properly found that it was their obligation to examine the actual day-to-day activities involved in the work done by Tcherkas to see if that work fell within the definitions in the *Act*. They both concluded that those activities had all the hallmarks of employment and that Tcherkas had to be considered an employee for the purpose of the Employment Standards legislation.

While I may have taken a different view of the facts in this case, the purpose of the reconsideration process is not to substitute my opinion for that of the delegate or the adjudicator. The argument that Tcherkas was an independent contractor was presented fully to the adjudicator and was considered carefully. The delegate and the adjudicator considered the relevant jurisprudence. There is no suggestion in the application that the adjudicator failed to understand the argument or failed to give the appellant's submissions due consideration. There is no clear error in law.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal