

An appeal

- by -

Pursuit International Investigations Ltd.

- 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

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2005A/37

DATE OF DECISION: May 18, 2005

DECISION

OVERVIEW

This is an appeal by Pursuit International Investigations Ltd. pursuant to s.112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on January 28, 2005 in favour of one Christina Dean (“Dean”).

Having made a finding in the Determination that Pursuit International Investigations Ltd. had contravened Sections 18 and 40 of the *Act*, the Delegate ordered the company to pay \$2,100.83 in respect of regular wages, overtime, and accrued interest, and two administrative penalties of \$500.00 each, for a total of \$3,100.83.

Pursuit International Investigations Ltd. appealed the Determination by means of an Appeal Form dated March 9, 2005, attaching a submission over the signature of one Gail Hewitt (“Hewitt”), who identified herself as the Administrator for the company.

On March 23, 2005, the Tribunal received the record which was before the Delegate, and a written submission. By letter dated April 1, 2005, the Tribunal solicited submissions in reply from Pursuit International Investigations Ltd. and Dean, but none were received.

On April 19, 2005, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received.

ISSUES TO BE DECIDED

Having reviewed the Appeal Form and submissions filed by Pursuit International Investigations Ltd., I have concluded that the substance of the issues it has identified it wishes determined on this appeal are as follows:

- did the Delegate err in law in determining that Pursuit International Investigations Ltd. was Dean’s employer for the purposes of the complaint?
- did the Delegate provide a proper accounting of the amounts determined to be payable by Pursuit International Investigations Ltd.?
- did the Delegate err in determining that Dean was entitled to overtime, either as a matter of law, or because the Delegate failed to observe the principles of natural justice, or because errors were made in the calculation of the amount of overtime payable?
- did the Delegate otherwise fail to observe the principles of natural justice?

FACTS

The Appeal Form, the materials submitted in support of it, the Determination, the Delegate's reasons for making it, and the record submitted by the Delegate for the purposes of this appeal reveal the following:

- Pursuit International Investigations Ltd. operates a private investigations firm from offices in Surrey, British Columbia.
- Pursuit International Investigations Ltd. was incorporated on January 13, 2004. Prior to this the principal of Pursuit International Investigations Ltd., one Brian Van Vlack, also known as Joseph Brian Van Vlack ("Van Vlack"), carried on business through a corporate vehicle known as Pursuit Investigations Ltd. Pursuit Investigations Ltd. was dissolved on January 9, 2004 for failure to file an annual report.
- Dean worked as an investigator for Pursuit Investigations Ltd., and thereafter for Pursuit International Investigations Ltd., from June 2003 to April 2004, when she was discharged.
- On May 27, 2004, Dean filed a complaint with the Employment Standards Branch (the "Branch") under Section 74 of the *Act*, alleging that Pursuit Investigations Ltd. and Van Vlack had failed to pay her regular wages, annual vacation pay and statutory holiday pay. Forming part of the record on this appeal is a fax transmission report indicating that Dean's Self-Help Kit was forwarded by the Branch to Van Vlack and to "Pursuit Investigations" on June 1, 2004.
- The record contains a Notice of Mediation Session dated June 1, 2004 returnable on July 19, 2004 directed to Dean and to "Joseph Brian Van Vlack operating as Pursuit Investigations". The Notice gives 166-151-10090 152nd Street, Surrey, British Columbia, as the address for Van Vlack and "Pursuit Investigations", being the address for them identified by Dean on her Complaint and Information Form. The record contains Canada Post registration particulars confirming that delivery of the Notice to Van Vlack and "Pursuit Investigations" occurred on June 3, 2004.
- On July 19, 2004, Dean and Van Vlack attended at the scheduled mediation, facilitated by a representative of the Branch. The complaint was not resolved.
- The Branch scheduled a Complaint Hearing for October 21, 2004. The record contains a Notice of Complaint Hearing returnable on October 21, 2004, and a Demand for Employer Records, both dated August 25, 2004. The Notice and the Demand exhibit references on the face of each document suggesting they were to be forwarded via registered mail. I note, however, that while the record contains a copy of what appears to be an envelope directed to Dean, and marked "Certified Mail", which was returned to the Branch "unclaimed" on September 23, 2004, there is no similar documentation demonstrating how the Notice and the Demand were actually forwarded to the addressee "Joseph Brian Van Vlack operating as Pursuit Investigations Ltd.", or whether they were ever received.
- On October 1, 2004 the Delegate wrote to Dean at her address, and also to "Joseph Brian Van Vlack operating as Pursuit Investigations Ltd." at 166-151-10090 152nd Street, Surrey, British Columbia, advising that the hearing had been scheduled for October 21, 2004, but that Dean was unable to attend because she was working outside the country and would not be returning to Vancouver until February of 2005. The letter then advised the parties that the matter "will be

decided entirely by written submissions” and directed the parties to provide the Delegate with the information and evidence to support their respective positions by October 29, 2004, in duplicate, so that the Delegate could forward a copy to the other party for written comment. The letter then stated that “(a)fter all evidence has been exchanged and comments received, a determination will be written outlining my decision as to whether or not wages are owed to the complainant as claimed.”

- In his Determination the Delegate states that his October 1, 2004 letter was forwarded by means of registered mail, and the letter does state on its face “Registered Mail”. I observe, however, that the Canada Post documentation contained in the record is insufficient to confirm that the correspondence was actually forwarded in that manner. Instead, the relevant Canada Post manifest and the labels on the envelopes addressed to the parties indicate that the correspondence was forwarded by Xpresspost, and that no signature on delivery was required.
- It appears that Dean received the October 1, 2004 correspondence because, as the Delegate states in his Determination, she submitted additional evidence on October 22, 2004. The Delegate states that Dean’s additional evidence was forwarded to “Pursuit” along with a request for written comments, and in the record there is a fax transmission report dated November 8, 2004 confirming that some nineteen pages were sent to “Brian Van Vlack Pursuit Investigations Ltd.” by one Grace Pascoe of the Branch along with a note saying “(a)s discussed attached are the records received from Christina J. Dean”.
- The Delegate states in the Determination that his October 1, 2004 letter was delivered to “Pursuit” on October 4, 2004. I am prepared to conclude that this is so because the Delegate further states in his Determination that “Pursuit” requested an extension of time until November 26, 2004 to submit additional evidence. I say in passing, however, that I was unable to discern any documentary evidence emanating from Canada Post contained in the record verifying that the October 1, 2004 letter was actually delivered to Van Vlack, Pursuit Investigations Ltd., or Pursuit International Investigations Ltd. on October 4, 2004, apart from a handwritten “Oct4/04” on the Xpresspost label of a copy of an envelope addressed to “Joseph Brian Van Vlack operating as Pursuit Investigations Ltd.”, which I find only marginally probative.
- The Delegate states in the Determination that although he granted the request from “Pursuit” for an extension to November 26, 2004 to provide additional evidence, no submission was received from “Pursuit” in response to the Delegate’s request contained in his October 1, 2004 letter.
- On December 8, 2004, the Delegate obtained a BC Online Corporate Registry search which revealed that Pursuit Investigations Ltd. had been dissolved as a legal entity on January 9, 2004, for failure to file an annual report.
- On December 9, 2004, the Delegate wrote to Dean and to “Joseph Brian Van Vlack operating as Pursuit Investigations” at the Surrey address, requesting that the parties respond in writing to the Delegate’s further inquiries set out in that letter, by January 7, 2005. The December 9, 2004 letter was stated to be further to the Delegate’s October 1, 2004 letter. One of the questions for the parties contained in the December 9, 2004 letter was: “Is the proper name of the employer ‘Joseph Brian Van Vlack operating as Pursuit Investigations?’” Another question suggested that overtime might be an issue that should be considered in the proceedings.

- The December 9, 2004 letter was stated to be “Via Xpresspost”. In the case of “Joseph Brian Van Vlack operating as Pursuit Investigations” the Canada Post documentation in the record confirms that the letter was “successfully delivered” on December 10, 2004. There is, however, no material in the record confirming that this correspondence was forwarded by registered mail.
- The Determination states that Dean submitted a two-page document dated December 27, 2004 in response to the Delegate’s request for further information contained in the December 9, 2004 letter, but that no written submission was received from “Pursuit”.
- The two-page response from Dean was received by the Branch on January 6, 2005. In it Dean stated that when she started work the letterhead employed by the business read “Pursuit Investigations Ltd.”. Later, she was told that the name for the company had changed to “Pursuit International Investigations Ltd.”. Dean’s two-page response also contained submissions going to the merits of the wage and overtime issues ultimately determined by the Delegate in the Determination.
- There is no evidence that the Delegate forwarded Dean’s December 27, 2004 response to any of Van Vlack, Pursuit Investigations Ltd., or Pursuit International Investigations Ltd.
- On January 17, 2005 the Delegate obtained a BC Online Corporate Registry search which disclosed that Pursuit International Investigations Ltd. was incorporated on January 13, 2004.
- In the Determination, the Delegate noted that the corporate searches for Pursuit Investigations Ltd. and Pursuit International Investigations Ltd. revealed the same registered and records offices for both companies, and only one director and officer for both companies, namely, Brian Van Vlack or Joseph Brian Van Vlack.

ARGUMENTS

Pursuit International Investigations Ltd., through Hewitt, challenges the Determination principally on the ground that it was not provided with an opportunity to “come and discuss” the matter with the Delegate, and that Van Vlack “was only contacted once” and “the gentleman never called him back.” It further challenges the Delegate’s finding that Pursuit International Investigations Ltd. is the proper employer. In addition, it argues that Dean should not be entitled to overtime, and requests an accounting in support of the amounts for wages and overtime found to be owed in the Determination.

The Delegate submits that “Pursuit” refused to participate in the investigation, which resulted in the Delegate’s concluding that Dean’s employer was Pursuit International Investigations Ltd. without the benefit of submissions from that company. The Delegate also asserts that Hewitt’s submissions contain evidence not previously provided to the Delegate, which the Tribunal should not consider, again because of the refusal of “Pursuit” to participate in the investigation.

ANALYSIS

On the view I take of the manner in which this appeal must be resolved, I find it unnecessary to deal with all of the issues raised by the parties in this matter. In my opinion, there was a failure on the part of the

Delegate to observe the principles of natural justice when he made his Determination, which requires that the matter be referred back to the Director for a reconsideration afresh in accord with these reasons.

The provision in the *Act* which is engaged in this instance is Section 77. It reads:

If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

As has been stated in previous decisions of this Tribunal, Section 77 is a manifestation of one of the statutory objectives of the *Act*, found in Section 2, which is that it provide fair and efficient procedures for resolving disputes which arise pursuant to it (*Insulpro*, BC EST #D405/98).

In other decisions such as *Argenti*, BC EST #D332/00, and *All Seasons Spa Ltd.*, BC EST #D419/99, the Tribunal has observed that Section 77 does not create a form of “discovery” of the type contemplated in actions conducted within the framework of the Supreme Court Rules. Furthermore, Section 77 does not impose a requirement that the Director disclose all documents and information received by the Director to the other parties involved in the complaint, so long as the general thrust of the complaint, and the evidence in support of it, is made known.

The crux of the issue is not, therefore, whether every scintilla of information has been disclosed. What matters is that reasonable efforts have been made to give a person under investigation details of the complaint sufficient to permit an informed response. If reasonable efforts are not made, the determination is tainted, at least because a person who may be the subject of an adverse finding has not been given adequate notice of the case to be met and a fair opportunity to be heard. It is in this sense that Section 77 is considered to be a minimal requirement for an investigation conducted pursuant to the *Act* (*J.C. Creations Ltd.*, BC EST #RD317/03; *Cyberbec.Com AD & Host Services Inc.*, BC EST #RD344/02).

There are two aspects of the factual history in this matter which trouble me concerning the question whether the Delegate made reasonable efforts to give Pursuit International Investigations Ltd. sufficient details of the complaint in order to make an informed response, in light of the Determination that was actually made. The first relates to the fact that the Delegate determined that Pursuit International Investigations Ltd. was the proper employer. The second involves the Delegate’s determining that Dean was entitled to payment in respect of overtime.

As to the finding that Pursuit International Investigations Ltd. was the legal entity in respect of which the Determination should be made, it is important to note that Dean’s complaint did not name that company as her employer. Rather, it named Van Vlack personally, and Pursuit Investigations Ltd. This is curious, in light of the fact that in her December 27, 2005 memorandum, on which the Delegate relied, Dean stated that a couple of months after she was hired by Pursuit Investigations Ltd. in June 2003 Van Vlack told Dean that the name of the company had been changed to Pursuit International Investigations Ltd.

The record discloses that prior to the issuance of the Determination, no correspondence or other material directed to the subject of the investigation was addressed to Pursuit International Investigations Ltd. Invariably, it was directed to Van Vlack “operating as” either “Pursuit Investigations Ltd.” or “Pursuit Investigations”. Even the December 9, 2004 correspondence, on which the Delegate heavily relies, was directed to “Joseph Brian Van Vlack operating as Pursuit Investigations”, and the question the Delegate asked was: “Is the proper name of the employer ‘Joseph Brian Van Vlack operating as Pursuit Investigations’?”. Pursuit International Investigations Ltd. was nowhere mentioned.

With respect to overtime, I note that Dean did not include a claim for it in her complaint. Moreover, I could not discern from my review of the record that an issue as to overtime was raised by anyone before the Delegate raised it for the first time in his December 9, 2004 letter to the parties. In her December 27, 2004 memorandum, Dean states that she was not paid overtime. It appears that the Delegate decided to make an award of overtime based on his own calculations, and Dean's statement.

There is nothing in the record which confirms that Dean's December 27, 2004 memorandum was forwarded to any of Van Vlack, Pursuit Investigations Ltd., or Pursuit International Investigations Ltd. or, indeed, that the Delegate made any attempt to apprise them of its contents. In my view, this is fatal to the validity of the Determination, for two reasons. First, the memorandum contained evidence from Dean relating to the issues of the proper employer, and overtime, which had only lately been raised as "live" issues in the proceedings. Second, the Delegate had stated quite explicitly in his October 1, 2004 letter to the parties that "(a)fter all evidence has been exchanged and comments received, a determination will be written outlining my decision..."

The Delegate asserts that Pursuit International Investigations Ltd. was made aware of the issue of the proper employer (and, presumably, the issue of overtime) in his December 9, 2004 letter. He also asserts that the company did not participate in the "entire investigation", the inference being that it received the December 9, 2004 letter and simply declined to respond. I note, however, that Van Vlack did attend the mediation conducted by a representative of the Branch, and an unidentified representative of "Pursuit" did contact the Delegate at one point in the process for an extension of time to submit additional evidence. It cannot be said, therefore, that Pursuit International Investigations Ltd. completely ignored the proceedings.

Indeed, what troubles me about the lack of response from the company to the December 9, 2004 letter is that a representative of Pursuit International Investigations Ltd. may not have received it. The letter was not addressed to Pursuit International Investigations Ltd. It was addressed to "Joseph Brian Van Vlack operating as Pursuit Investigations". The letter was not personally served. Nor was it forwarded by registered mail. Instead, it was delivered by way of Xpresspost. One may conclude from the Canada Post documents in the record that the letter arrived at the premises identified on the letter, being 166-151-10090 152nd St., Surrey, British Columbia. That is the address identified by Dean in her complaint as the address for Van Vlack and Pursuit Investigations Ltd., and it is the address to which the Delegate directed his written communications to Van Vlack, Pursuit Investigations Ltd., and Pursuit Investigations throughout the course of his investigation. I note that the record contains correspondence on the letterhead of Pursuit International Investigations Ltd. which also identifies that address as an address for that company, but I note further that the BC Online Corporate Registry search the Delegate obtained for Pursuit International Investigations Ltd. discloses that the registered and records office for that company is located at a different address in the City of Vancouver. Mere delivery of the December 9, 2004 letter to the Surrey address does not convince me that a representative of Pursuit International Investigations Ltd. must have become aware of it.

In the whole of the circumstances of this particular case, therefore, I conclude that the Delegate did not provide Pursuit International Investigations Ltd. with a reasonable opportunity to respond of the type contemplated in Section 77 of the *Act*. In light of the recent appearance of issues relating to the identification of Pursuit International Investigations Ltd. as the proper employer, and overtime, and given the Delegate's assurances to the parties that implied no Determination would be issued without the parties' having an opportunity to comment on the evidence submitted, the Delegate's failure to make efforts to apprise Pursuit International Investigations Ltd. of the substance of Dean's statements in her

December 27, 2004 memorandum, and to assure himself that Pursuit International Investigations Ltd. had received his December 9, 2004 letter satisfy me that the process which resulted in the Determination being issued was seriously flawed.

ORDER

I order that this matter be referred back to the Director for consideration afresh in accord with this decision, pursuant to Section 115(1)(b) of the *Act*.

Robert E. Groves
Member
Employment Standards Tribunal