

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 (as amended)

**TRIBUNAL MEMBER:** Robert Groves

**FILE No.:** 2005A/141

**DATE OF DECISION:** September 28, 2005

## DECISION

### OVERVIEW

1. This appeal has come before me once more, following my decision in BC EST #D068/05 in which I ordered that the appeal be referred back to the Director for consideration afresh, pursuant to section 115(1)(b) of the *Employment Standards Act* (the “*Act*”).
2. The appeal was originally brought by Pursuit International Investigations Ltd. (“Pursuit International”) pursuant to s.112 of 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”).
3. Having made a finding in the Determination that Pursuit International 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.
4. On March 9, 2005, Pursuit International appealed the Determination to the Tribunal, alleging that the Delegate had erred in law, and that he had failed to observe the principles of natural justice in making the Determination.
5. When the appeal came on before me, and I reviewed the record, I decided that the matter must be referred back to the Director for reconsideration, as I had concluded that the Delegate had failed to fulfill his duty under section 77 of the *Act* requiring him to make reasonable efforts to give Pursuit International an opportunity to respond to two issues that had arisen during the course of the Delegate’s investigation, namely:
  - whether Pursuit International was the real employer of Dean, for the purposes of the complaint; and
  - whether Dean was entitled to payment in respect of overtime.
6. As a result of the referral back, the Delegate conducted a further investigation and provided to the Tribunal a further report and submission in support of the Determination, dated July 29, 2003. The Tribunal invited Pursuit International and Dean to make reply, but no further submissions were received.
7. The Tribunal has determined that the appeal will be decided on the basis of the written submissions of the parties. The matter now returns to me for decision on that basis.

### ISSUES TO BE DECIDED

8. Having reviewed the Appeal Form and submissions filed by Pursuit International, the record produced by the Delegate, and the Delegate’s submissions, I have concluded that the issues I must now resolve on this appeal are as follows:
  - have the procedural flaws I identified in my previous decision been cured?

- did the Delegate err in law in determining that Pursuit International was Dean’s employer for the purposes of the complaint?
- did the Delegate err in determining that Dean was entitled to overtime?
- did the Delegate provide a proper accounting of the amounts determined to be payable by Pursuit International?

## FACTS

9. The facts supporting my conclusions in BC EST #D068/05 were set out in detail in that decision and need not be repeated here.
10. By way of summary, Pursuit International was incorporated on January 12, 2004 and operates a private investigations firm from offices in Surrey, British Columbia. Prior to the incorporation of Pursuit International, the principal of the company, 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”). Pursuit Investigations was dissolved on January 9, 2004 for failure to file an annual report.
11. Dean claims she worked as an investigator for Pursuit Investigations, and thereafter for Pursuit International, from June 2003 to April 2004, when she was discharged.
12. Following the referral back to the Director, the Delegate interviewed Van Vlack and Gail Hewitt, the Administrator for Pursuit International. Dean was unavailable to attend that meeting as she was out of the country working on a cruise ship. During the course of the discussion between the Delegate, Van Vlack, and Hewitt, the issues relating to the identity of Dean’s employer, and the matter of overtime, were canvassed. In addition, Van Vlack asserted that Dean was an independent contractor, and not an employee, for the purposes of the *Act*.

## ANALYSIS

13. The process which has come to be followed in circumstances where a matter in an appeal has been referred back to the Director pursuant to section 115(1)(b) of the Act has been described as follows in *Hub-City Boat Yard Ltd.* BC EST #D027/04:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re Zhang* BC EST #D130/01). The Tribunal’s decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to confirm, vary or cancel the Determination with the benefit of the Director’s reinvestigation and reconsideration, but without the delay and expense involved with the making of a new Determination (with a new right of appeal).

***Have the procedural flaws I identified in my previous decision been cured?***

14. The concern which persuaded me that the matter must be referred back was that I was not satisfied that Pursuit International had been apprised, first, that it was in jeopardy of being named as the employer in Dean's complaint, and second, that overtime was a live issue.
15. The Delegate's July 29, 2003 report and submission makes it clear that following the referral back Van Vlack, the principal of Pursuit International, and Hewitt, the company Administrator, were made aware that Pursuit International was being considered as Dean's employer, and that a further issue involved overtime. Van Vlack and Hewitt were interviewed by the Delegate, at which meeting they provided further information and made submissions supporting their argument that Pursuit International had never employed Dean, and that she was not entitled to overtime.
16. The Tribunal forwarded a copy of the Delegate's July 29, 2003 report and submission to Pursuit International for reply. No submission was received thereafter from Pursuit International suggesting that it had been deprived of the opportunity to make a case in support of its position that Pursuit International was not Dean's employer, or that Dean was not entitled to overtime.
17. In the circumstances, I am satisfied that the procedural flaws I identified in my original decision have been cured, as the Delegate appears to have made the reasonable efforts to give Pursuit International the opportunity to respond that section 77 requires.

***Did the Delegate err in law in determining that Pursuit International was Dean's employer for the purposes of the complaint?***

18. Pursuit International's challenge to the Delegate's finding that it was Dean's employer is two-pronged. First, Pursuit International appears to assert that it had not been incorporated when Dean commenced to perform work in June, 2003, so Dean could not have been employed by it. Second, Pursuit International argues that if Dean can be said to have had a business relationship with it, that relationship is to be properly characterized as one in which Dean was an independent contractor and not an employee.
19. The BC Online Corporate Registry searches conducted by the Delegate show that Pursuit Investigations was dissolved on January 9, 2004, and that Pursuit International was incorporated on January 13, 2004. Both searches list Van Vlack as the sole officer and director. Both companies are listed as having the same registered and records offices. Van Vlack acknowledged in his meeting with the Delegate that he wound up Pursuit Investigations, and created Pursuit International, when he opened an office in the United States.
20. The employer records produced by Van Vlack clearly show that Dean performed remunerative work from June, 2003, until April, 2004. After January 9, 2004, Dean could not have worked for Pursuit Investigations, as it was no longer a legal entity, having been dissolved. There are, in addition, copies of letters in the record, on Pursuit International letterhead, over Van Vlack's signature, relating to Dean and her work performance.
21. All of this material is sufficient to persuade me that the Delegate made no error in law in finding that Pursuit International was the entity with whom Dean had her working relationship, and no other.

22. Pursuit International says, however, that Dean was not an employee. In support of this contention Pursuit International relies on a Memorandum of Agreement dated July 29, 2003, in which Dean is specifically characterized as an “independent contractor”.
23. Two things undermine Pursuit International’s argument founded on the agreement. First, as the Delegate notes in his report and submission, the agreement appears to have been executed some weeks after Dean commenced to perform work. Second, and more important in my view, the agreement is stated to be between Dean and Pursuit Investigations, not Pursuit International. In my opinion, the agreement has limited, if any, probative value in resolving the question of Dean’s status vis-à-vis Pursuit International.
24. Apart from the agreement, Pursuit International offers no other evidence of substance in support of its contention that Dean was an independent contractor. At the same time, the record reveals that Pursuit International withheld CPP and EI deductions from Dean’s remuneration, and wrote a letter dated April 14, 2004 to the Security Programs Division of the Ministry of the Attorney General, which administers the licensing of investigators, reporting that Dean had been “dismissed for cause”. Both these acts on the part of Pursuit International are consistent with an intention to characterize Dean as an employee, rather than an independent contractor, and they support the Delegate’s careful analysis of the various common law tests in his report and submission leading him to the conclusion that the argument of Pursuit International on this point was untenable.
25. In my opinion, there is no support for the assertion that the Delegate erred in law in finding that Dean was an employee of Pursuit International for the purposes of the complaint.

***Did the Delegate err in determining that Dean was entitled to overtime?***

26. In the Delegate’s report and submission the following appears with regard to the issue of overtime:

Van Vlack simply stated that they treated Dean as an independent contractor and thus they thought she was not entitled to overtime wages. Dean was simply paid her regular hourly wage rate for all hours worked...

27. Van Vlack’s statement is confirmed by the employer records submitted on behalf of Pursuit International. Having found that Dean was an employee, the Delegate reviewed the employer records, which revealed hours for which Dean should have been paid overtime, but was not. Those records were produced in the record. Pursuit International has provided no evidence supporting an inference that no overtime hours were accumulated. I see no reason to conclude that the Delegate erred in law in finding that overtime was payable, or in the calculation of the amount owed.

***Did the Delegate provide a proper accounting of the amounts determined to be payable by Pursuit International?***

28. In the Determination, the Delegate calculated the regular wages owed at \$1,677.77, consisting of a dishonoured cheque in the amount of \$1,079.63, and \$598.14 Pursuit International’s own employer records showed had not been paid to Dean. During the course of the Delegate’s discussion with Van Vlack which followed the referral back, Van Vlack admitted that the cheque had been dishonoured, and that the \$1,079.63 was still owed. This, taken with the admission in its employer records that \$598.14 was also owed demonstrates clearly that the Delegate made no mistake in his calculation of the regular wage element contained within the Determination.

29. As for the calculation of overtime wages at \$358.80, including 4% vacation pay, I have reviewed the Pursuit International employer records relating to Dean myself. They reveal several days in the last six months of Dean's employment on which she worked many more hours than the eight for which she would have expected only her regular rate of pay. While it may have been more helpful for the Delegate to have specified more carefully the particular days in respect of which he felt overtime was payable, and the mathematical computations he employed in respect of each day that resulted in his statement of the final sum owed, it is not obvious to me that he erred in determining that \$358.80 was the amount Pursuit International should be ordered to pay.
30. It must be remembered that this is an appeal brought by Pursuit International. The onus rests on it to demonstrate that the Delegate's calculation is wrong. It is not for the Delegate to prove it is right.

### **ORDER**

31. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**