

An appeal

- by -

Natalia Garbuzova
("Garbuzova")

- 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: Lorne D. Collingwood

FILE No.: 2001/602

DATE OF DECISION: September 24, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) and by Natalia Garbuzova (who I will also refer to as “the employee” and “the Appellant”). Garbuzova appeals a Determination issued on July 13, 2001 by a delegate of the Director of Employment Standards (“the Director”). In that Determination, it is decided that, for purposes of the *Act*, Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc. should be treated as one person and the employer of Garbuzova and 18 other persons. The Determination goes on to order the payment of \$126,055.66.

The amount of the Determination is the total amount of outstanding wages, irrespective of interest and any vacation pay which is due for reason of the outstanding wages. That total is broken down by individual in a table attached to the Determination. According to that table, Garbuzova is owed \$740.

The appeal was received by the Tribunal after the statutory period for appealing the Determination had expired. The Tribunal has the power to extend the time limit for an appeal and the Appellant has requested that the Tribunal exercise that power in her case. I have decided to allow the appeal.

ISSUE TO BE DECIDED

The sole issue before me is whether the Tribunal should or should not exercise its discretion to extend the time period for appealing the Determination. According to Garbuzova, the appeal is late because she does not understand English very well and it was not until she had terms used in the *Act* and the Determination translated, and she obtained the assistance of an accountant, that she realized that it is not \$740 to which she is entitled but much more than that.

FACTS

Garbuzova worked for Fetchomatic Global Internet Inc. (“Fetchomatic”) for a period which is just short of a year. She was employed as a programmer.

On May 16, 2001, Fetchomatic served Garbuzova with written notice that the company faced a financial crisis and that it was terminating her immediately. Some time after that, Garbuzova filed a complaint in which she claimed an entitlement to wages. Other former employees of the employer filed complaints with the Employment Standards Branch at about the same time as Garbuzova filed her complaint.

The Determination was issued when it became apparent that the complaints were of substance. The delegate did not undertake a comprehensive investigation of earnings and pay but moved quickly so as to secure the assets of the employer. The delegate states in the Determination that she performed a “quick audit”, that the Determination was issued “without a comprehensive investigation” and that she is “therefore prepared to consider arguments regarding payroll after the fact”.

Garbuzova claims that, on receiving the Determination, she sought to have terms used in the *Act* and the Determination translated. She also claims to have sought the help of an accountant. I am prepared to accept that she did so and that such assistance was required. The Appellant’s command of English is quite limited. That is shown by her submissions, her spelling and choice of words. I find, moreover, that she appears to believe that a detailed analysis of earnings and entitlements was conducted by the delegate even though the Determination indicates that none was performed.

The appeal is that the Determination awards less than the amount to which Garbuzova is entitled to under the *Act*. It is said that the Determination is in error in respect to both the rate of pay, separation pay, the amount of outstanding regular wages and vacation pay. I find that the Determination awards Garbuzova \$740 in compensation for length of service (a form of separation pay) but nothing in the way of interest or vacation pay. I find that that is likely an oversight as the delegate’s table indicates that the employee is owed at least \$347.78 in vacation pay [\$318.18 + 29.60]. Garbuzova, moreover, produces evidence to show earnings which indicate a vacation entitlement which is far in excess of \$347.78 in vacation pay.

Neither the employer, nor the Director has responded to the request that the time limit for the appeal be extended.

ANALYSIS

Section 112 of the *Act* establishes a 15 day period for appealing Determinations.

- 112** (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
- (2) The request must be delivered within
- (a) 15 days after the date of service, if the person was served by registered mail, and
 - (b) 8 days after the date of service, if the person was personally served or served under section 122 (3).

The Tribunal may dismiss an appeal without holding a hearing if it is satisfied that the appeal is not in time, the appeal is not within the Tribunal’s jurisdiction, or the appeal is frivolous,

vexatious, trivial or not in good faith. The Tribunal may also extend the time limit for filing an appeal.

- 114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
- (a) the appeal has not been requested within the time limit in section 112 (2),
 - (b) the appeal is not within the tribunal's jurisdiction, or
 - (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

- 109** (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

...

- (b) extend the time period for requesting an appeal even though the period has expired;

....

The statutory period for appeals will not be overridden lightly but only where there is a compelling reason to do so. Where there is a reasonable explanation for the failure to file the appeal in time, no actual prejudice to the other parties, and it appears that there is a serious issue to address, I am satisfied that the Tribunal should not deny the appellant access to the Tribunal but that it should accept the appeal even though it is late. That being said, however, I am satisfied that the Tribunal should be more inclined to extending the time limit for an appeal where the appeal is only late by a few days and far less inclined to doing so if deadline is missed by a wide margin.

In this case the appeal is late by about a week, weekends excluded, and I am prepared to extend the time limit for the appeal. While the Appellant does not say when it is that she acted to have the *Act* and the Determination translated, the appeal is not overly late and I am prepared to believe that she acted to have the documents translated soon after receiving the Determination and, having done so, that she acted to file the appeal with reasonable dispatch. I am given no reason to believe that an extension of the time limit for the appeal is prejudicial to the employer or the Director. I am satisfied that there is a serious issue to address in that the evidence before me indicates that it may not be \$740 that the employee is owed but quite a bit more than that. I also find that there is a reasonable explanation for the failure to file the appeal in time. The Appellant's command of English is such that, unlike the case of most workers, she would not have known just through reading the Determination whether she should appeal. She had to have terms translated and that takes time.

This case is unusual in that the period for filing a complaint has not expired. It may well be open to the employee to file a complaint for vacation pay, the Determination not addressing that issue foursquare. That would, however, only serve to prolong matters in a case where time is of the essence. A better course, in my view, the fair and efficient course, is to have the Appellant's issues addressed at the appeal stage.

ORDER

I order, pursuant to section 109 (1)(b) of the *Act*, that the time limit for an appeal of the Determination dated July 13, 2001 be extended and that further submissions be invited in respect to that appeal.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal