

An appeal

- by -

Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc. (Associated
pursuant to section 95 of the Employment Standards Act)

("Fetchomatic")

- 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: David B. Stevenson

FILE No.: 2001/577

DATE OF DECISION: October 19, 2001

DECISION

OVERVIEW

Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc. (Associated pursuant to Section 95 of the Employment Standards Act) (“Fetchomatic”) have appealed a decision of the Director of Employment Standards (the “Director”) dated July 13, 2001 (the “Determination”). The Determination associated two companies under Section 95 of the *Act* and concluded that Fetchomatic had contravened Part 3, Section 18, Part 7, Section 57 and Part 8, Section 63 of the *Act* in respect of the employment of twenty persons and ordered Fetchomatic to cease contravening and to comply with the *Act* and to pay an amount of \$126,055.66.

Fetchomatic argues the Determination is wrong in its calculation of the amounts owed to the employees and in its conclusion that Colin Fraser and Kevin Kosick were employees and not independent contractors. Fetchomatic also alleges the investigation of the complaints was not conducted in accordance with principles of natural justice and the Director erred in finding all of the preconditions for associating the two companies were present.

Fetchomatic has requested an oral hearing.

Fetchomatic has also made a request under Section 113(2) of the *Act* that the Tribunal suspend the effect of the Determination on payment to the Director of \$12,605.57 pending the outcome of the appeal process. This decision deals with that request.

ARGUMENT AND ANALYSIS

Section 113 of the *Act* reads:

113. (1) *A person who appeals a determination may request the tribunal to suspend the effect of the determination*
- (2) *The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
- (a) *the full amount, if any, required to be paid under the determination, or*
- (b) *a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

Counsel for Fetchomatic says there is a meritorious case for appeal and his client ought to be allowed to pay an amount that is considerably less than the amount of the Determination.

Counsel refers to the decision in *Tricom Services Inc.*, BC EST #D420/97 for the proposition that the Tribunal should be prepared to allow payment of a smaller amount where the appeal “might have some merit”.

In response, the Director says there was adequate information upon which to reach the conclusions made in the Determination. In response specifically to the allegations of errors in the calculation of wages, the director says, first, that Fetchomatic was provided with the calculations prior to the Determination being issued, made some corrections to the calculations and returned those corrections to the Director and, second, that subsequent analysis of the calculations has shown the amount to have been lower than required by the *Act*. The Director says there is no evidence that the amount eventually found to be owing by Fetchomatic will be less than the Determination and if a suspension of the effect of the Determination is to be ordered, it should only be done upon payment of the full amount.

The Tribunal has also received a submission from a director/officer of Fetchomatic and from two of the employees, but neither assist significantly in adjudicating the request under Section 113 of the *Act*.

Counsel for Fetchomatic correctly states that it is not a function of the Tribunal considering a request under Section 113 to conduct an extensive analysis of the merits of the appeal. It is sufficient that the Tribunal satisfies itself that the appeal, or even parts of it, may have some merit. Conversely, the Tribunal would not suspend the effect of a Determination in circumstances where the appeal is frivolous or has little or no apparent merit.

In this case, however, I am not persuaded by the material provided and the arguments made by Counsel for Fetchomatic that there is merit to the appeal. The appeal itself is devoid of any objective foundation for the assertion by counsel that, in his opinion, there is merit to the appeal. Even accepting the investigation was done expeditiously, there is no presumption that the results of such investigation are wrong. Counsel for Fetchomatic says the employer has found errors in the calculations, but has not identified where those errors have arisen, their scope and their potential impact on the total amount of the Determination.

As well, counsel has simply made the bald assertion in the appeal that had the investigating officer discussed the matter of the relationship of Fraser and Kosick she would have found the common law tests for independent contractors were satisfied. The appeal does not indicate what sort of factual analysis that would have involved.

Similarly, counsel says there was a denial of fair hearing. This assertion also does not arise in a factual vacuum. As the Tribunal indicated in *Insulpro Industries Ltd, and Insulpro (Hub City) Ltd.*, BC EST#D405/98, while the Director is required at all times to afford a level of procedural protection to the parties involved in a proceeding under the *Act*, the level of procedural protection required is flexible and will depend on the function being performed by the Director (see also comments from *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602). There

is nothing in the appeal to suggest the circumstances required the Director to have afforded Fetchomatic the degree of procedural protection demanded in their submission.

Finally, I adopt and apply the comments of the Tribunal in *Tricom Services Inc.*, *supra*, that:

. . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the “total amount” of the determination is posted; a “smaller amount” should only be ordered if such lesser amount would be “adequate in the circumstances of the appeal”. In my opinion, the “adequacy” of any proposed deposit must be evaluated not only from the perspective of the employer, but also from the perspective of any employees whose rights might be affected by a suspension order.

In this case there are twenty persons, at least who have not received wages. Fetchoamtic’s request is to post approximately ten cents on the dollar. That does not adequately protect the rights of the individuals.

There are other circumstances, not specifically referred to in any submission, but apparent on the record, that also compel a denial of the request: the companies appear to be liquidating assets in the province; the type and structure of the business makes it improbable there will be other assets available; and many of the directors/officers appear to be outside the jurisdiction of the Director.

ORDER

The Tribunal will not exercise its authority under Section 113 of the *Act* in this case.

David B. Stevenson
Adjudicator
Employment Standards Tribunal