

An appeal

- by -

Zai Sheng Wei  
("Wei")

- 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.:** 2001/672

**DATE OF DECISION:** October 25, 2001

## DECISION

### OVERVIEW

The appeal is by Zai Sheng Wei (also referred to as “the Appellant”) and pursuant to section 112 of the *Employment Standards Act* (“the *Act*”). Wei 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. (the “Fetchomatic companies”) should be treated as one person and the employer of Wei 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 vacation pay due for reason of the outstanding wages. That total is broken down in a table attached to the Determination. According to that table, Wei is owed \$5,794.81.

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 is requesting that the Tribunal exercise that power in his case. I have decided that this is a case in which to extend the time limit.

### 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 an appeal. In explaining why the appeal is late, Wei explains that he was led to believe that there was no need to file an appeal because the delegate had said that she would take care of her error.

### FACTS

Wei worked for Fetchomatic Global Internet Inc. (“Fetchomatic”). He held the job of “ASP programmer”. The employment ran from November 28, 2000 to and including June 7, 2001.

The Determination deals with complaints by 20 different people. It is that 19 of the complaints are of substance.

In explaining the Determination, the delegate states that she 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”.

Wei contacted the delegate immediately on receiving the Determination and pointed out that the Determination does not account for an NSF cheque issued to him. According to Wei, the delegate said that she would correct the error. I accept that, nothing to the contrary.

On or about August 8, 2001, Wei was advised by the Tribunal that an appeal had been filed by the Fetchomatic companies. Wei, at that point, called the delegate once again. The delegate advised Wei to respond to that appeal and that he should, in doing so, bring up the matter of the NSF cheque. Wei did that, through a letter to the Tribunal, one dated August 19, 2001, but he did not file an appeal at that point.

It was not until September 18, 2001 that Wei was led to file the appeal which is of particular interest herein. It appears to have been filed because the Tribunal was in contact with Wei over correspondence received from the delegate that very day. In that correspondence the delegate indicates a belief that a determination may be varied after an appeal had been filed, indeed, that the Determination has now been varied so that it reflects Wei's NSF cheque.

The deadline for the appeal was August 7, 2001.

The appeal is that the Determination should reflect the amount of the NSF cheque. The appeal is accompanied by evidence of an NSF cheque issued to the Appellant.

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 just over a month late. That said, I am satisfied that there is a compelling reason to extend the time limit for the appeal.

The Appellant immediately acted to have the Determination reviewed and varied. It is just that he contacted the delegate, not the Tribunal.

I am led to believe that the appeal would have been in time, if only the delegate had been clearer. By the Determination, Wei is led to believe that, while there is a deadline for appeals, the delegate can consider arguments regarding payroll at any time, appeal or no appeal. And the Determination having been issued, the delegate, did nothing to clarify matters. Rather than telling Wei to appeal, she told him that she would correct the Determination. To Wei, a person that does not understand the ways of courts and tribunals, that is to say that there is no need to appeal.

It is not surprising to me that it is not until the burden of that misconception is removed that Wei filed the appeal. Employees will naturally trust in the delegate. Wei should not be penalised for doing so.

I am satisfied that it is for reason of confusing instructions by the delegate that the appeal is late. There is a reasonable explanation for why the appeal is late.

Neither the delegate, nor Fetchomatic is claiming that actual prejudice will flow from a decision to extend time limit for the appeal.

I am also satisfied that the appeal on its surface would appear to raise a serious issue.

**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.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**