Employment Standards TRIBUNAL

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.: 2001/572

DATE OF DECISION: December 20, 2001

DECISION

OVERVIEW

Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc. (Associated pursuant to Section 95 of the *Employment Standards Act*) ("Fetchomatic") has 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.

The Tribunal has decided this appeal can be considered without the requirement of an oral hearing.

ISSUE

The issues in this appeal are whether the Director failed to conduct the investigation of the complaints in accord with principles of natural justice and whether Fetchomatic has demonstrated the Determination was sufficiently wrong in its conclusions of fact, in its interpretation of the facts or in its conclusions and decisions in respect of amounts owed to justify the Tribunal exercising its authority under Section 115 of the *Act* to vary or cancel it.

FACTS

The Determination considered complaints from twenty former employees of Fetchomatic, alleging they were owed final wages, vacation pay and length of service compensation. Some of the twenty former employees also alleged they were owed medical expenses and overtime. The Determination set out the following background information:

> Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc ("Fetchomatic"), collectively referred to as the "employer", operates Fetchomatic which is an internet company under the jurisdiction of the *Act*.
>
> The Employment Standards Branch received complaints from 20 former employees alleging that they were owed money. The complaints were all filed in the time period allowed under the *Act*.

> An initial investigation revealed that Fetchomatic Global Internet Inc. is a registered as A Foreign Company in Nevada, with Canadian Directors and for the most part was located at 1521- 56th Street, Delta BC V4L 2A9. Fetchomatic.Com Online Inc. is Registered as a BC company. Both company's [sic] have a common Director/Officer, namely Wayne Edward Loftus (Loftus). Loftus appears to have operated mainly at 370-444 Victoria Street, Prince George BC V2L 2J7. It appears from my initial investigation that these two company's [sic] are interchangeable. I will argue later in the Determination that the two company's [sic] should be associated.
>
> Both sites have been shut down, however, all the complaints were initiated from former employees working at the Delta address.
>
> The Delta company has been closed due to a Landlord Distress Sale and all inventory from the Delta address has been seized by BC Collateral Recovery Services A Division of Atomic Bailiff (Atomic). The Auction for this inventory took place July 10. 2001.
>
> I have conducted a quick audit on the information I received by the employees and employer and am satisfied that the information appears to be correct.
>
> I have advised the employer that in the interest of time, I am issuing this Determination without a comprehensive investigation, and am therefore prepared to consider arguments regarding payroll after the fact.

The Director concluded that the preconditions to a declaration under Section 95 of the *Act* were met: there was more than one corporation, individual, firm, syndicate or association was involved; all of the entities being associated were carrying on business; there was common control or direction; and there was a statutory purpose for the decision to associate the entities.

During the investigation, Loftus agreed that some employees were owed wages and an audit was done by the companies' bookkeeper of what the various complainants were owed and the results of that audit was provided. Fetchomatic disputed the employee status of Colin Fraser ("Fraser"), Kevin Kosick ("Kosick") and one other person. The Determination concluded Fraser and Kosick were employees for the purposes of the *Act*, but the other person was an independent contractor. The Determination provided no reasons for those conclusions. In reply to this ground of appeal, the Director has provided additional information concerning the employment of Fraser and Kosick, noting that Revenue Canada has determined that both are employees under the relevant

Federal legislation, that Fetchomatic had effective control over their work and owned the 'tools' used by each, that both received regular paycheques from Fetchomatic and neither had any chance for profit or risk of loss relative to Fetchomatic's business. Each of the individuals has also filed a reply. Fraser said he was hired as a full time employee, he worked Monday to Friday, was paid regularly, on the 15th and 30th of each month (until Fetchomatic defaulted),

was paid the same rate of pay throughout his period of employment with Fetchomatic, had an office at the Delta location, next to the accounting department, which, along with all other 'tools' required for the job, was provided by Fetchomatic, did not submit any invoices for work done and received a T4 slip from Fetchomatic for tax purposes. Kosick submitted that he was hired as the Director of Sales & Marketing and given the title of Vice-President Business Development. He was provided with an office at the Delta location and given all the 'tools' required to perform his job. He was given authority to hire employees, and hired Fraser, Nicole Syme and Gabriel Cruz. The last two named persons are included in the Determination. No issue has been taken with their status as employees. A news release, issued October 5, 2000, described the hiring of Kosick as "an exciting addition to our management team".

The Director also submitted that the figures used in the calculation of wages owed were provided to Fetchomatic, who was given the opportunity to review the figures. It is noted that the figures "were corrected and resubmitted by the employer" and that information was considered in reaching the amount set out in the Determination.

Fetchomatic has filed no reply to the submissions described above.

The Director has also submitted that the calculations made did not include the 4% annual vacation pay or interest under Section 88 of the *Act* and should be adjusted upward by an amount of $5,893.47 to account for that omission.

ARGUMENT AND ANALYSIS

I can find no merit in this appeal. While Fetchomatic says the calculations done by the Director are incorrect, there is nothing supporting that assertion. There is a burden on an appellant to persuade the Tribunal of an error in the Determination. That burden is not met by simply making the assertion. It is apparent from the Determination that Fetchomatic has done its own audit of what wages are owed to former employees. I will not presume that audit is inconsistent with the conclusion reached in the Determination or that the audit makes all the correct presumptions and applications required of a wage calculation under the *Act*. Fundamentally, however, there is an obligation on an appellant to adequately demonstrate some objective foundation for alleging an error in the calculation done by the Director and to provide some rational argument for preferring the result demonstrated by that objective information. Neither is present in this case. If the audit done by Fetchomatic is the basis for this ground of appeal, it is incumbent upon Fetchomatic to provide it with the appeal and to identify the relevant areas for the purposes of the appeal. This ground of appeal is dismissed.

Similarly, there is no basis for finding the conclusions in respect of Fraser and Kosick were wrong. The appeal is devoid of any facts, properly supported, indicating there was an error in regard to their status under the Act. I was initially concerned by the absence of reasons in the Determination for the conclusion that the two persons were employees for the purposes of the Act, but that concern has been alleviated by the submissions of the Director, Fraser and Kosick

in reply to this ground of appeal, none of which generated any response from Fetchomatic. This ground of appeal is also dismissed.

On the allegation by Fetchomatic of a failure by the Director to conduct her investigation in accord with principles of natural justice, neither does the appeal provide any factual foundation for that allegation. As I stated in the decision on Fetchomatic's application under Section 113 of the *Act*, see BC EST #D550/01:

> 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.

The same deficiency that affects the other grounds of appeal also affects the appeal from the decision to associate the two companies under Section 95. The Determination contains an analysis of the basis upon which the Director concluded the preconditions to a decision under Section 95 were met. Fetchomatic says the Director has misapplied the second precondition to a valid declaration, that each the entities associated must be carrying on a business, trade or undertaking. There is nothing in the appeal, however, that indicates what the alleged deficiency in the Director's analysis was or how it ought to affect the outcome. The Director noted that both company names were used interchangeably and that, while the actual operation was in Delta, the headquarters for the operation was in Prince George and that the weekly time sheets were kept by and the paycheques issued through the Prince George location. Clearly, that information indicates the company in Prince George was carrying on some form of undertaking. If that information is correct, that is sufficient to satisfy the requirement of showing each entity is carrying on a business, trade or undertaking. In the absence of any evidence in the appeal that one or both of the entities was not carrying on a business, trade or undertaking, this ground of appeal is also dismissed.

Finally, the Director has suggested I should vary the Determination, increasing the amount owed to $133,853.50 to rectify the omission of the annual vacation pay and interest calculation in the Determination. The request to vary the Determination in that manner is not granted in this appeal. The appropriate procedure would be to confirm the Determination as it presently stands and to refer it back to the Director for the purpose of correcting the omissions.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 13, 2001 be confirmed in the amount of $126,055.66, together with any interest that has accrued pursuant to Section 88 of the *Act* and the matter is referred back to the Director to correct the omission of the annual vacation pay and interest calculation.

David B. Stevenson
Adjudicator
Employment Standards Tribunal