

Guide to the Appeal Form

The purpose of the *Guide to the Appeal Form* (the “*Guide*”) is to provide you, as an appellant, with information to assist you in properly preparing and completing your appeal of a determination issued by the Director of Employment Standards (the “Director”). More specifically, this Guide will help you complete your Appeal Form and will provide information about filing supporting submissions and documents with the Employment Standards Tribunal (“Tribunal”).

The *Guide* is not a substitute for, nor does it replace, the requirements of the *Employment Standards Act* (the “*ESA*”), the *Administrative Tribunals Act*, the *Employment Standards Regulation* (the “*Regulation*”) or the Tribunal’s *Rules of Practice and Procedure*. You may wish to separately review these documents; they may be accessed through the Tribunal’s website. The Guide is not binding on individual Tribunal Members. The *Guide* is not meant to provide you with any legal advice.

For your ease of use, the *Guide* will explain, in numbered paragraphs, below, corresponding to the numbered paragraphs in the Appeal Form, the information required of you as an appellant as well as other things you should consider when preparing your appeal and Appeal Form for submission to the Tribunal.

1. **The Appellant:** (Company/Organization/Individual named in the determination who is making the appeal)

Appellant means a person who files an appeal with the Tribunal, and includes an incorporated company, an unincorporated business, an organization, an association or a partnership.

It is important to note that, under the *ESA* a person served with a determination may appeal the determination. It may be that you are an individual served with a determination of the Director arising out of your complaint against your existing or former employer. Alternatively, you may be a director or officer of an incorporated company or an association or an owner or principal of an unincorporated business that is the subject of the Director’s determination.

Name of the Appellant

Although the Director’s determination you are appealing may have already identified you (and other parties) by your proper name, it bears repeating that if you are an individual appealing a determination, make sure you use your full legal name. Initials are not enough:

Say: John Herbert Smith

Not: J.H Smith

If you are an individual known more commonly by another name, you should point out both your legal and the other name you are known by:

For example: John Herbert Smith also known as Herbie Smith

If the appellant is a company incorporated in British Columbia, use the legal name of the company registered with the Corporate Registry:

For example: ABC Ltd.

Not: ABC

Sometimes, the incorporated company is doing business under a different business name in which case you should disclose both the legal name, as well as the name under which the company operates its business:

For example: 123456 B.C. Inc. doing business as ABC Manufacturing

Not: ABC Manufacturing

Address of the Appellant

The appellant, whether an individual or not, should provide their current address for delivery on the Appeal Form so that the Tribunal can use the address for delivering notices and documents in the appeal proceedings.

It is very important that the address for delivery provided to the Tribunal is both accurate and current. If the address changes at any time during the appeal proceedings, after the Appeal Form is filed, it is the appellant's responsibility to immediately inform the Tribunal, in writing, of the change and provide the new address for delivery.

If the appellant is an incorporated company, its business address may not be the same as its address for its registered and records office. The appellant may choose the address it wants to use on the Appeal Form for the purpose of communicating with the Tribunal. It may be the company's business address, the registered and records office address or another address. Similarly, an appellant who is an individual may choose the address he or she wants to use on the Appeal Form for communicating with the Tribunal.

Telephone number

The appellant must provide the Tribunal with a current telephone number on the Appeal Form so as to allow the Tribunal to contact the appellant, if necessary. As with the appellant's address, if the telephone number of the appellant changes after the Appeal Form is filed, it is the appellant's responsibility to advise the Tribunal in writing of a new telephone number.

Fax number and e-mail address

If the appellant provides the Tribunal with a fax number, the Tribunal may deliver notices and documents to the appellant by fax.

If the appellant provides the Tribunal with an e-mail address the Tribunal will use the appellant's e-mail address to communicate with the appellant and deliver any notices and documents.

Where the appellant does not provide an e-mail address or a fax number on the Appeal Form, the Tribunal, as a default option, will communicate with the appellant *via* mail at the address provided by the appellant on the Appeal Form.

Delivery of documents by the Tribunal

If the Tribunal delivers a document by mail, the document is considered to be delivered five (5) days after it was mailed, unless that day is not a business day of the Tribunal, in which case the document is considered to be delivered the next business day.

If the Tribunal delivers a document by fax or e-mail, the document is considered to be delivered on the day after it was sent unless that day is not a business day of the Tribunal, in which case the document is considered to be delivered the next business day.

2. Appellant's lawyer or agent (if applicable)

Although in most cases an appellant is self-represented, an appellant may choose to be represented by a lawyer or an agent. An agent is simply a person who is authorized to act on behalf of another person.

Where the appellant authorizes a lawyer or agent to act on the appellant's behalf, the lawyer's or agent's name, address, e-mail address, telephone number and fax number must be set out on the Appeal Form.

As with self-represented appellants, where a lawyer or an agent representing an appellant provides the Tribunal with a fax number, the Tribunal may deliver notices and documents by fax.

Where a lawyer or an agent provides the Tribunal with an e-mail address then the Tribunal will use the e-mail address to communicate with the appellant's lawyer or agent.

The same rules with respect to deemed delivery set out in paragraph 1 above (see heading *Delivery of documents by the Tribunal*) will apply where the appellant has a lawyer or an agent.

It is the appellant's obligation to immediately notify the Tribunal in writing if his or her lawyer or agent withdraws or ceases to represent the appellant.

3. Select your ground(s) of appeal (See Section 112(1) of the *Employment Standards Act*).

An appeal is not a second chance for you to re-argue your case before the Tribunal just because you do not like the decision contained in the determination or because the Director preferred the evidence of the opposing party. You must have a sound legal basis for appealing a determination.

The *ESA* sets out *very specific and limited grounds or reasons for appealing* a determination. You may only appeal a determination in three situations, namely: (i) where the Director made an error in law in making the determination; (ii) where the Director failed to observe the principles of natural justice in making the determination; or (iii) where new evidence has become available that was not available when the determination was being made by the Director.

Do not simply check-off all three (3) grounds of appeal in the Appeal Form indiscriminately; it is important to understand what each of these grounds or reasons for appeal mean, if you are to properly submit your appeal based on one or more of them.

What does error of law mean?

Error of law in the appeal context includes a circumstance where the Director, in making the Determination, (i) did not apply the law correctly or misinterpreted or misapplied the applicable law; (ii) misapplied an applicable principle of general law; (iii) acted without any evidence; (iv) acted on a view of facts which could not reasonably be entertained; or (v) adopted a method of assessment which is fundamentally wrong.

A few examples of errors of law are set out, below:

Example: The Director dismissed the employee's claim for overtime work simply because the employee failed to write down overtime hours in a daily planner at the time when he or she worked overtime. Currently, there is no statutory obligation on an employee to record the employee's hours of work in writing anywhere as a precondition to advancing a claim for overtime wages. The obligation to record the employee's hours of work is on the employer. In this example, the Director's decision is based on an incorrect application of the law.

Example: Where the Director applied the wrong analysis or test for determining if a person is an employee or an independent contractor, the Director may have committed an error of law.

Example: Where the Director awarded wages to an employee who is excluded from the application of the *ESA* (for instance, an architect, lawyer, chiropractor, chartered accountant, etc. set out in s.31 of the *Regulation*), the Director will have erred in law.

Example: Where the Director awarded overtime pay to an employee who is a Manager as defined in the *Regulation*, the Director will have erred in law (because Managers are excluded from the overtime provisions of the *ESA* by virtue of section 32 of the *Regulation*).

Example: If, despite no evidence that the employee worked on specific days or, alternatively, despite overwhelming evidence that the employee did not work on certain days, the Director made a finding of fact that the employee worked on those days and awarded the employee wages, the Director may have made an error of law because he acted without any evidence or on a view of facts which could not reasonably be entertained.

What does breach of natural justice principles mean?

The principles of natural justice refer to fundamental rules of fairness that govern or apply in the adjudication of disputes between parties. In the case of an investigation and adjudication of a complaint by the Director, natural justice requires that the parties involved in the dispute have an opportunity to hear about the case

against them, to present their evidence and arguments, to be heard by an independent and impartial decision-maker and to have their dispute decided by the decision-maker who actually heard the parties' evidence and argument.

It is important to note that parties do not have a right to an oral hearing of a complaint before the Director (or for that matter before the Tribunal on appeal of a determination). The Director's delegate may, after investigating a complaint, make a decision without an oral hearing. It is not a breach of natural justice simply because the Director or his delegate decided the complaint without an oral hearing. It is also not a breach of natural justice for the Director or his delegate to have preferred the evidence of your opponent over your own evidence or to have made a credibility finding against you. It is part of the delegate's job to make credibility findings. It is also not a breach of natural justice if you did not have a lawyer represent you during the investigation or at a hearing of a complaint, whether or not a lawyer represents the other party.

As with the error of law ground of appeal, an appellant claiming a breach of natural justice on the part of the Director must provide clear evidence in support of the appellant's claim; a bare assertion that the appellant has been denied a fair hearing is not sufficient.

Some few examples of a breach of natural justice include the following:

Example: Where a Director's delegate, at a hearing of the complaint, refused to allow a party to cross-examine a witness of the other party, a breach of natural justice may have occurred.

Example: If parties have been required, before the hearing, to make full disclosure of their evidence, a breach of natural justice may be found if a party is allowed to present critical evidence that was not disclosed before the hearing and the Director or his delegate relies on this evidence in making a decision.

Example: The Director or his delegate must provide adequate reasons for not accepting the evidence of a party (in other words, the delegate cannot simply say that he or she does not believe a witness without explaining why) and a failure to provide adequate reasons may amount to a breach of natural justice.

Example: A failure by the Director or his delegate to share with one party relevant documents obtained from another party, or to share critical evidence verbally communicated to the delegate by the other party, may amount to a breach of natural justice.

What does "new evidence" mean?

Where the appellant wants to submit "new evidence" on appeal, the Tribunal has established a four-part test, which *the appellant will have to satisfy before the Tribunal will accept evidence* on appeal as "new evidence".

The appellant must establish that:

- (i) the evidence could not, with the exercise of reasonable steps, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination;
- (ii) the evidence is relevant to an important issue arising from the complaint;
- (iii) the evidence is reasonably capable of belief; and
- (iv) the evidence is sufficiently relevant or useful, in the sense that, if believed, it on its own or when considered with other evidence, could have led the Director to a different conclusion on an important issue in the complaint.

These four requirements are conjunctive; that is, the appellant has the burden of showing that each of them is satisfied in relation to the evidence the appellant is asking the Tribunal to admit as "new evidence" before the Tribunal will admit and consider it on appeal.

Some examples of where evidence *may or may not* be found to constitute “new evidence” on appeal include the following:

Example: New evidence will *not* be found to exist on appeal where the appellant fails to participate in the investigation or a hearing of a complaint or fails to provide the Director’s delegate any evidence otherwise available during the investigation or a hearing of a complaint.

Example: Simply seeking out more evidence to supplement what was already provided to the Director’s delegate during the complaint process, if in the circumstances the evidence was available and could have been provided to the delegate during the investigation or hearing of the complaint, will also not qualify as “new evidence” and the Tribunal will not allow or consider it in the appeal.

Example: The Tribunal may consider evidence on appeal as “new evidence” where the appellant clearly establishes that during the investigation of a complaint he asked the delegate for a reasonable extension of time to present new evidence which was material to an issue relating to the complaint but the delegate, for some reason, failed to accept the request.

Example: Where a party fails to provide evidence at a hearing of a complaint but offers to retrieve it and provide it to the Director, the party will *not* be able to successfully introduce such evidence on appeal as “new evidence” because it could have been introduced at the hearing of the complaint.

Example: Evidence that does not presently exist but may exist in the future will *not* qualify as “new evidence” in the appeal.

Example: Where the failure to provide records or documents by the appellant during the investigation or hearing of the complaint was due to the actions of a third party and not the fault of the appellant, the Tribunal may receive the records or documents as new evidence.

4. What do you want the Tribunal to do about the determination?

The Tribunal, after considering whether the appellant’s grounds of appeal have been satisfied, has the authority (under section 115 of the *ESA*) to *confirm, change or cancel the determination or refer it back to the Director in its entirety or with respect to one or more issues.*

As an appellant, you must choose and indicate on the Appeal Form which one or more of these remedies you are seeking and provide fully your explanation why you want that remedy in your submissions in support of your appeal.

5. Provide your reasons and argument for your appeal on a separate sheet of paper.

Reasons, argument and supporting documents

It is very important that you, as an appellant, set out in writing your full submissions on each ground of appeal you are raising and deliver those submissions, together with all your supporting documents, and your Appeal Form, to the Tribunal within the “appeal period”.

Form of proceeding

While the Tribunal has the authority to hear an appeal by way of written submissions, in person hearings, hearings by telephone or by other electronic means, the Tribunal usually proceeds by way of a written submissions only hearing. Therefore it is especially important that the applicant file with the Tribunal full and complete written submissions along with their Appeal Form.

Burden of proof on the appellant

As an appellant, you must prove, on a *balance of probabilities*, that your appeal satisfies one or more of the available grounds of appeal, if you are to win your appeal. The “balance of probabilities” is a civil standard for assessing proof that the Tribunal uses to assess evidence. It means that you as an appellant must convince the Tribunal that what you are saying or asserting is more probable than not.

Supporting documents

“Supporting documents” does not mean simply copying the same documents you previously sent to the Director’s delegate during the investigation of the complaint or produced at the hearing of the complaint before the determination was made. You should, however, submit all of the documents that you believe support your ground(s) of appeal. If you have “new evidence” in the form of documents that satisfies the Tribunal’s test for new evidence (see above under the heading *What does “new evidence” mean?*) then you should enclose those documents with your Appeal Form, together with an explanation why the documents qualify as “new evidence”.

Documents disclosed

Documents submitted to the Tribunal as part of your appeal are disclosed to the other parties to the appeal, including the Director of Employment Standards. Please redact all instances of Social Insurance Number(s) and Date(s) of Birth from the documents you are submitting to the Tribunal.

6. I am requesting an extension to the statutory appeal period.

Appeal period

The appellant must file their appeal within the “appeal period”. Appeal period is described in section 112(3) of the *ESA*, which is: 30 days after the date of service of the determination if the appellant was served by registered mail; or 21 days after the date of service of the determination if the appellant was served in person or served under section 122(3) of the *ESA* (electronically or by fax).

Requirement to file a written explanation for requesting an extension of the appeal period before the expiry of the appeal period

If you, as an appellant, file your appeal of a determination before the expiry of the appeal period (see heading *Appeal period* above), you *must*, at the same time as filing the appeal, submit a written request (pursuant to section 109(1)(b) of the *ESA*), to extend the appeal period and provide a reasonable and credible explanation for the extension sought.

If you fail to file a written request for an extension of the appeal period or if you provide insufficient reasons to explain the delay in filing your appeal, then your appeal may be dismissed. Therefore, it is very important that you provide a sufficient written explanation for the extension request with your appeal.

Requirement to file a written explanation for the delay in filing an appeal until after the expiry of the appeal period

If you, as an appellant, file your appeal of a determination after the expiry of the appeal period (see heading *Appeal period* above), you *must*, at the same time as filing the appeal, submit a written request (pursuant to section 109(1)(b) of the *ESA*), to extend the appeal period and provide reasons why the appeal was not filed on time.

If you fail to file a written request for an extension of the appeal period together with your reasons why your appeal is late or if you provide insufficient reasons to explain the delay in filing your appeal, then your appeal may be dismissed as out of time. Therefore, it is very important that you provide a sufficient written explanation with your late-filed appeal explaining why it was filed late or out of time.

What factors will the Tribunal consider in determining whether to grant or reject an extension application?

Some factors the Tribunal will consider in deciding whether to grant or deny the appellant an extension of time to appeal include the following:

- (1) if there is a reasonable and believable explanation for the appellant's failure to request an appeal within the time limits;
- (2) there is not an unreasonably long delay by the appellant in filing the appeal;
- (3) there has been a genuine, and continuing, intention to appeal the determination;
- (4) the appellant has made the other parties, including the Director, aware of the appellant's intention to appeal before the expiry of the appeal period;
- (5) the other party will not be unduly prejudiced if the appellant is granted an extension of time to appeal; and
- (6) the appellant, based on first or initial impressions, has a strong case that might succeed.

The Tribunal will weigh and balance these factors; that is, the appellant *does not* have to prove the existence of all of them to get an extension of the appeal period. While there may be stronger evidence of one factor, and some (or no) evidence concerning another factor, the Tribunal will weigh all the evidence in making its final decision on whether to grant or deny an extension of an appeal period.

Some examples of where the tribunal *may grant or deny* an extension of the appeal period include the following:

Example: Where the Director has commenced proceedings to enforce the determination, the Tribunal *may deny* an extension application for the late appeal as it may be unreasonably prejudicial to the other party if that party is unduly delayed in collecting any wages awarded in the determination.

Example: Where the appellant fails to read or turns a blind eye to the Appeal Information in the determination expressly setting out the deadline for filing their appeal and how and where to file the appeal, the Tribunal *may not* extend the time for appeal as the appellant is required to exercise reasonable diligence in pursuing the appeal.

Example: Where the appellant, after accepting correspondence or at its last operating address before the determination was made, refuses to accept the determination at that address and fails to provide an alternate address to the Director when he or she knows that the determination has been issued or is due to be issued any day, the Tribunal *may not* extend the appeal period.

Example: Where the appellant, due to a simple oversight, files the appeal within the appeal period with the Director and subsequently, after the expiry of the appeal period, files the appeal with the Tribunal, the Tribunal *may allow* an extension of time as the appellant in this case has shown a continuing interest to appeal before the appeal period expired.

Example: Where the late appeal has no prospect of succeeding and merely repeats the submissions made earlier in the investigation of the complaint, the Tribunal *may not* extend the appeal period.

7. Submit the following documents to the Tribunal within the statutory appeal period

To complete and file your appeal application, you must submit by mail to the Tribunal's office address (provided on the Appeal Form) or by e-mail to registrar@bcest.bc.ca, or by fax to 604-775-3372 your signed Appeal Form together with your written reasons and argument in support of your grounds of appeal; a complete copy of the determination you are appealing, including the reasons for the determination (the

Director, after making a determination, usually serves both of these documents together on all parties to the determination); your supporting documents; and your written explanation for your late appeal application (if your appeal is late).

8. I confirm I have delivered a copy of this Appeal Form to the Director of Employment Standards

You must deliver a copy of the Appeal Form setting out the grounds of appeal to the Director of Employment Standards.