

APPEAL INFORMATION AND APPEAL FORM INSTRUCTIONS

The purpose of this document 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”) under either the *Employment Standards Act* (“ESA”) or the *Temporary Foreign Worker Protection Act* (“TFWPA”). More specifically, the information provided will help you complete your Appeal Form and will provide information about filing supporting submissions and documents with the Employment Standards Tribunal (“Tribunal”). The information related to grounds of appeal in this guide applies solely to appeals filed under the *ESA*.

This document is not a substitute for, nor does it replace, the requirements of the *ESA*, the *TFWPA*, the *Administrative Tribunals Act*, the *Employment Standards Regulation*, the *Temporary Foreign Worker Protection 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.

This document is not binding on individual Tribunal Members.

This document is not meant to provide you with any legal advice.

HOW TO APPEAL A DETERMINATION ISSUED BY THE DIRECTOR OF EMPLOYMENT STANDARDS (“DIRECTOR”)

An application to appeal a determination should include the following:

- Appeal Form (6 pages)
- Contact Information Form (4 pages)
- Copy of the determination and reasons for determination
- Reasons and argument for appeal
- Supporting documents

If you are filing appeals of multiple determinations, you must make a separate submission including an Appeal Form for each determination being appealed.

An appeal submission may be filed with the Employment Standards Tribunal by the following methods:

Mail / courier / in person:	650 -1066 West Hastings Street, Vancouver, BC V6E 3X1
Fax:	(604) 775-3372
E-mail:	registrar@bcest.bc.ca

If an appeal submission is being filed by e-mail, **only submit attachments with the file extensions .PDF, .DOC, .DOCX, .JPEG, .JPG, .PNG and .MSG**. If an appellant wants to include audio and video files in their appeal submission, they must contact the Tribunal to discuss the process for submitting such files. If the Tribunal is unable to process an appeal submission in the format submitted, the Tribunal will require an appellant submit the attachments in a different format if the appellant wants the submission considered by the Tribunal.

IMPORTANT: The Tribunal will not receive your e-mailed submission if it includes attachments with the file extensions .7Z, .ZIP, .TGZ, .ZI, .ISO, and password-protected attachments with executable content. There will be no notification to you or to the Tribunal that the Tribunal has not received your e-mail.

It is the appellant’s responsibility to confirm that a submission has been received by the Tribunal.

IF YOU NEED MORE INFORMATION

Please contact the Tribunal by telephone at 604-775-3512 or by e-mail at registrar@bcest.bc.ca if you would like more information on the appeal process.

HOW TO COMPLETE THE APPEAL FORM

Provided below, in numbered paragraphs corresponding to the numbered paragraphs in the Appeal Form, is the information required of you as an appellant.

Section A: Appellant Information

1. APPELLANT (person, business, or organization served with the Determination who is appealing)

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* and the *TFWPA*, a person served with a determination may appeal the determination. It may be that you are an individual served with a determination 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.

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

2. APPELLANT'S LAWYER OR REPRESENTATIVE (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 his or her behalf, the appellant must provide written authorization of representation to the Tribunal. This may be in the form of a separate letter to the Tribunal.

Section B: Determination and Appeal Period Information

3. TYPE OF DETERMINATION BEING APPEALED

You must indicate whether the appeal is related to a determination issued under the *ESA* or the *TFWPA*.

4. PROVIDE A COPY OF THE DETERMINATION AND THE REASONS FOR THE DETERMINATION¹

You must provide the Tribunal with a copy of the determination and the Reasons for the Determination.

If you do not have one or both of the documents, you may contact the Employment Standards Branch by e-mail at employmentstandards@esb.gov.bc.ca or by telephone through Service BC at 1-833-236-3700 in order to request a copy of the documents.

5. HOW WAS THE DETERMINATION SERVED ON THE APPELLANT AND WHAT IS THE STATUTORY APPEAL PERIOD?

For appeals under the *ESA*, the appeal period is defined in s. 112(3) of the *ESA*. For appeals under the *TFWPA*, the appeal period is defined in s. 68(3) of the *TFWPA*.

You must indicate how the determination was served on the appellant as well as the statutory appeal period.

The appeal deadline is usually indicated on the last page of the determination in an information box titled "Appeal Information".

SECTION C: TIMELINESS OF THE APPEAL AND REQUEST TO EXTEND THE APPEAL PERIOD

6. HAS THE APPELLANT COMPLIED WITH THE REQUIREMENTS FOR FILING AN APPEAL BEFORE THE EXPIRY OF THE STATUTORY APPEAL PERIOD?

Section 112 of the *ESA* and section 68 of the *TFWPA* set out the requirements for filing an appeal of a determination. You must indicate if the appeal submission complies with the requirements.

7. DOES THE APPELLANT REQUIRE AN EXTENSION TO THE APPEAL PERIOD?

Requirement to file a written explanation for the delay

If you, as an appellant, file your appeal of a determination after the expiry of the appeal period, 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 or could not be 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?

The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST #D099/96. The following criteria must be satisfied to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The responding party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension; and
5. There is a strong *prima facie* case in favour of the appellant.

While there may be stronger evidence of one criterion, and some (or no) evidence concerning another, the Tribunal will weigh all the evidence in making its final decision on whether to grant or deny an extension of an appeal period.

¹ s. 112(2)(a)(i.1) of the *ESA* and s. 68(2)(a)(ii) of the *TFWPA* state that you must provide the Tribunal with a copy of the Reasons for the Determination.

- Check the checkbox indicating **Yes** if
 - the appeal period indicated at Question 5 has already expired.
 - You must provide the Tribunal with
 - reasons why you were unable to file the appeal prior to the appeal deadline
 - grounds of appeal
 - Reasons for the Determination
 - reasons and argument for appeal
 - supporting documents, if applicable
 - the appeal period indicated at Question 5 has not yet expired and
 - you have not included the Reasons for the Determination in your appeal submission and
 - you require additional time to provide your complete appeal to the Tribunal
- Check the checkbox indicating **No** if
 - the appeal submission, including the grounds of appeal and the Reasons for the Determination, along with your reasons and arguments for appeal and your supporting document have been filed with the Tribunal before the expiry of the appeal period as indicated at Question 5.
- Check the checkbox indicating **No** along with the related sub-checkbox if
 - the appeal submission, including the grounds of appeal and the Reasons for the Determination, have been filed with the Tribunal before the expiry of the appeal period as indicated at Question 5 but you require additional time to provide the Tribunal with your reasons and arguments and/or supporting documents. You will be asked to provide further details at Questions 9 and 10.

SECTION D: GROUNDS OF APPEAL, REASONS AND ARGUMENTS, AND SUPPORTING DOCUMENTS

8. SELECT YOUR GROUND(S) OF APPEAL

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.

Both the *ESA* (see s. 112(1)) and the *TFWPA* (see s. 68(1)) set 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.

IMPORTANT: At this time, the information provided below in this section relates solely to appeals of determinations filed under section 112(5) of the *ESA*.

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.

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.

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 their claim; a bare assertion that they have been denied a fair hearing is not sufficient.

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:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

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.

9. PROVIDE YOUR REASONS AND ARGUMENTS FOR YOUR APPEAL

The Tribunal usually decides an appeal solely by way of considering the written submissions of the parties. The Tribunal, after considering whether the appellant’s grounds of appeal have been satisfied, has the authority² to confirm, vary (change), or cancel the determination or refer it back to the Director in its entirety or with respect to one or more issues.

It is very important that you, as an appellant, set out in writing your full submissions on each ground of appeal you are raising. It is also important that you tell the Tribunal what remedy you are seeking. As an appellant, you must prove that your appeal satisfies one or more of the available grounds of appeal, if you are to win your appeal.

If you require additional time to provide the Tribunal with some or all of the reasons and argument for the appeal, you must indicate the submission deadline you are requesting. You must also provide reasons why you are unable to provide the reasons and arguments at the time you are filing the appeal.

IMPORTANT: If the appeal is being filed by the employer and the determination involves multiple complainants, the appellant’s appeal submission should include separate reasons and arguments for each complainant. The Tribunal may require an appellant to resubmit their submission to comply with requirements of the *Freedom of Information and Protection of Privacy Act*.

10. PROVIDE YOUR 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 before the determination was made. You should, however, submit all of the documents that you believe support your ground(s) of appeal.

Section 112(5) of the *ESA* and section 68(5) of the *TFWPA* requires the Director of Employment Standards to provide the Tribunal with a copy of documents that formed a part of the Record before the Director. Therefore, at the time of filing your appeal, you may refer to the documents, but it is not necessary to provide the Tribunal with copies of documents previously sent to the Director during the investigation or hearing of the complaint. You will be provided an opportunity to review the Record and advise the Tribunal if there are documents missing from the Record prior to the Tribunal deciding your appeal.

In addition, 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”.

IMPORTANT: Please redact (block out, such as with a black marker) any references to a Social Insurance Number, Date of Birth, Passport Number, Permanent Resident Number, or any other personal identity numbers from the documents included in your submission.

² See section 115 of the *ESA* or section 71 of the *TFWPA*.

If you require additional time to provide the Tribunal with the supporting documents, you must indicate the submission deadline you are requesting. In your appeal submission, you must also provide reasons why you are unable to provide the supporting documents at the time of filing the appeal and why they are relevant to your appeal.

Section E: Submission Checklist, CONFIRMATION OF COMPLETENESS, AND SIGNATURE

11. APPEAL SUBMISSION CHECKLIST

Complete the checklist and confirm the documents you are submitting with the Appeal Form.

12. CONFIRMATION OF COMPLETENESS OF APPEAL SUBMISSION

Indicate whether your appeal submission is complete or incomplete.

13. SIGN AND DATE THIS APPEAL FORM

Print your name, sign, and date the Appeal Form. If you are unable to attach an electronic signature to the document, you may print your name in the signature field.

If the person signing the Appeal Form is not the appellant, you must state your relationship to the appellant.

WHAT WILL THE TRIBUNAL DO WITH THE APPEAL FORM, THE CONTACT INFORMATION FORM, AND THE INFORMATION PROVIDED IN THE APPEAL SUBMISSION?

On receipt of an application to appeal a determination issued by the Director, the Tribunal reviews the submission to establish if the submission meets the requirements for filing an appeal and if the submission was filed within the appeal period³.

If the appeal submission does not fulfill all the requirements, the Tribunal will:

- notify the appellant that the appeal submission must be corrected before it will be accepted; and
- set out the time limits for the appellant to correct the appeal and comply with any other directions.

If the appellant fails to deliver the corrected appeal within the time allowed, the Tribunal may dismiss the appeal without holding a hearing and without notifying any other party.

Usually, the Tribunal will give a copy of the Appeal Form and the appeal submission to the respondent(s) and the Director so they can, if requested to do so by the Tribunal, respond to the appeal. The Tribunal may also give the Director the information in the Appellant's Contact Information Form.

PRIVACY NOTICE

The *Freedom of Information and Protection of Privacy Act* ("FIPPA") applies to the Tribunal. The Tribunal collects personal information to process appeals and applications for reconsideration under the *Employment Standards Act* ("ESA") and the *Temporary Foreign Worker Protection Act* ("TFWPA"). For information on the Tribunal's Privacy Policy, visit the Tribunal's website: www.bcest.bc.ca.

TERRITORIAL ACKNOWLEDGEMENT

The Employment Standards Tribunal acknowledges the traditional territories of the many diverse Indigenous Peoples in the geographic area we serve. With gratitude and respect, we acknowledge that the Tribunal's office is located on the traditional unceded territories of the Coast Salish peoples, including the territories of the x^wməθk^wəyəm (Musqueam), Skwxwú7mesh (Squamish), and səliiwətaʔt (Tsleil-Waututh) Nations.

³ See section 112 of the *ESA* or section 68 of the *TFWPA*.