

An appeal

- by -

Bradley Mawson carrying on business as Loadman Truck Equipment Inc.  
(“Loadman”)

- 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 (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2009A/16

**DATE OF DECISION:** May 5, 2009

## DECISION

### SUBMISSIONS

Bradley Mawson	on his own behalf
Bradley Roll	on his own behalf
Jennifer Redekop	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Bradley Mawson carrying on business as Loadman Truck Equipment Inc. (“Loadman”) pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards (“the Director”) issued January 12, 2009.
2. Mr. Mawson was a Director/Officer of Loadman, which was dissolved on May 19, 2008 for failure to file corporate returns. Mr. Mawson operated Loadman as a sole proprietorship until September 25, 2008 at which time it ceased to operate.
3. Mr. Roll worked at Loadman as a welder/fabricator from December 27, 2007 until August 1, 2008. He filed a complaint alleging that Loadman had contravened the *Act* in failing to pay him wages and vacation pay.
4. Mr. Roll said that he was Loadman’s employee; Mr. Mawson contended that Mr. Roll was an independent contractor. Following an investigation of Mr. Roll’s complaint, the delegate determined that he was an employee and that Loadman had contravened sections 18 and 58 of the *Act* in failing to pay Mr. Roll wages and vacation pay. She determined that Mr. Roll was entitled to wages, vacation pay, and interest in the total amount of \$8,479.10. The delegate also imposed a \$500 penalty on Loadman for the contravention of the *Act*, pursuant to section 29(1) of the Employment Standards Regulation.
5. The time period for filing an appeal expired February 19, 2009. The Tribunal received Loadman’s appeal on March 10, 2009.
6. The grounds of appeal are that the delegate erred in law, that the delegate failed to comply with the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made. Loadman also sought an extension of time in which to file the appeal. These reasons address only the timeliness of Loadman’s appeal and are based on the written submissions of the parties.

### ISSUE

7. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## FACTS AND ARGUMENT

8. The delegate advised Loadman of Mr. Roll's complaint by registered and regular mail on October 8, 2009. The letters were sent to the addresses noted in the corporate search. The registered letter was returned unclaimed; the letter sent by regular mail was not. On October 30, 2008 the delegate received a voicemail message from Mr. Mawson stating that Mr. Roll was an independent contractor and that he had been paid in full. Mr. Mawson also confirmed that the delegate had Loadman's correct mailing address. On November 7, 2008, the delegate sent another letter to Loadman including the records she had received from Mr. Roll. She also discussed the complaint with Mr. Mawson by telephone on November 13, 2008. The delegate received a second written response from Loadman on December 8, 2008. On December 9, 2008 the delegate sent a preliminary finding letter giving Loadman a final opportunity to respond. The registered letter went unclaimed, the letter sent by regular was not returned to the Director. The delegate determined that Loadman had the opportunity to respond to the complaint under section 77 of the *Act*.
9. The delegate considered the legislation and common law tests to analyze whether Mr. Roll was an employee or an independent contractor. She noted that Mr. Roll worked regular hours of work for Loadman and at Mr. Mawson's instruction. She noted that all of the clients were Loadman's. She concluded that Mr. Mawson had control over the work done by Mr. Roll, that Mr. Roll did no work for anyone else and that the majority of the tools used by Mr. Roll to perform his work were owned by Loadman. She determined that Mr. Roll had no chance of profit or risk of loss and concluded that the business was Loadman's, rather than Mr. Roll's. Accordingly, she decided that Mr. Roll was an employee of Loadman and entitled to wages as set out above.
10. On February 4, 2009, Mr. Mawson telephoned the delegate stating his intention to file an appeal. However, it was not until February 17, 2009 that Loadman sent its appeal documents to the Head Office of the Employment Standards Branch. Loadman's appeal was not perfected, or filed with the Tribunal, until March 10, 2009.
11. In his appeal submission, Mr. Mawson states that after he discussed Mr. Roll's appeal with the delegate in November, 2008, he received nothing further from the delegate and only learned about the Determination when he was contacted by the Okanagan bailiff informing him of enforcement proceedings.
12. Mr. Mawson said that the Grand Forks post office had "been somehow sending all [Loadman's] mail" to his old post office box, after which it was returned to sender. He suggests that the post office was responsible for erroneously redirecting Loadman's mail.
13. Mr. Mawson contends that Loadman never received any documents from Employment Standards so it "never had a chance to legally defend" itself. Mr. Mawson also repeats arguments it appears he made to the delegate at first instance, including asserting that Mr. Roll had an agreement to work on contract for Loadman. He argues that the Director cannot make a decision about an employment arrangement it was "not a part of", and says that if Mr. Roll was an employee, he would have been given an employee number, and had WCB and other deductions made from his pay.
14. Mr. Mawson also seeks to have the Tribunal suspend the Determination "because our company had no idea of the Employment Standards guidelines on hiring a contractor or an employee."

15. The delegate submits that the Tribunal should not exercise its discretion to extend the deadline for filing an appeal. She says that Mr. Mawson telephoned her on February 4, 2009 indicating that the bailiff had contacted him, which was the first time he had become aware of the Determination and that he wanted to appeal the Determination. She provided him with the contact information for the Tribunal and advised him of the appeal deadline. The Branch received a copy of Loadman's appeal on February 19, 2009 and inquired with the Tribunal as to whether it had received the appeal. The Branch faxed the appeal directly to the Tribunal. On March 2, 2009, the Tribunal advised Mr. Mawson that if he wanted to pursue an appeal, he had to submit it by March 9, 2009. The appeal was filed with the Tribunal on March 10, 2009.
16. The delegate argues that Loadman has failed to follow the proper procedure for filing the appeal, and has provided no reason why it was unable to meet the original appeal deadline or the March 9, 2009 deadline set by the Tribunal.
17. The delegate acknowledges that there is no unreasonable delay between the expiration of the appeal period and the date Loadman filed his appeal. She also acknowledges that Loadman notified her on February 4, 2009 of his intention to file an appeal.
18. Finally, the delegate submits that Loadman does not have a strong *prima facie* case on any of the grounds of appeal.
19. Mr. Roll also submits that Loadman's application to extend the time to file the appeal should not be granted. He suggests that Mr. Mawson's claim of a 'wrong address' by the post office is simply an excuse to avoid or delay matters he did not want to deal with. He disputes several evidentiary assertions made by Mr. Mawson and makes additional comments unrelated to the timeliness issue.

## ANALYSIS

20. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
21. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes regarding the application and interpretation of the *Act*.
22. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
23. In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
  - (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this 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.

24. These criteria are not exhaustive.
25. While I find that Mr. Mawson had a *bona fide* intention to appeal the determination, I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
26. Mr. Mawson notified the delegate of his intention to file an appeal on February 4, 2009. It is evident that he knew about the Determination by that time. The delegate advised Mr. Mawson about the appeal process as well as the appeal deadline on that date. It took Mr. Mawson a further 15 days to attempt to file the appeal. When notified that his appeal was sent to the wrong address and given additional time to file his appeal properly, he yet again missed the deadline. The appeal was not perfected until March 10, 2009, well over one month after speaking to the delegate. Mr. Mawson provides no explanation for why he did not file the appeal with the Tribunal by March 9, 2009, the extension granted by the Tribunal Vice Chair in the first instance.
27. While I am not persuaded that there would be any prejudice to Mr. Roll or the Director if an extension were granted, I am unable to find that there is a strong *prima facie* case in Loadman's favour.
28. Mr. Mawson had knowledge of Mr. Roll's complaint as well as an opportunity to respond to it. While I accept that he may not have received the delegate's preliminary findings, without evidence that the post office "misdirected" his mail, I am unable to conclude that he was unable to fully respond to the allegations.
29. Although Loadman also alleges that evidence has become available that was not available at the time the Determination was being made, Mr. Mawson does not outline what that new evidence is or how it might have led the delegate to arrive at a different conclusion on the issue of whether or not Mr. Roll was an employee. Indeed, in his submissions, Mr. Mawson acknowledges that he knew nothing about the distinction between an employee and a self employed contractor.
30. Finally, although Loadman also asserts that the delegate erred in law, there is nothing in the appeal submission that identifies what that error is. Essentially, Mr. Mawson wishes to have another opportunity to make submissions to the delegate because he disagrees with the result. A disagreement with the delegate's conclusions, without more, is not a ground of appeal.
31. Having reviewed the record and the Determination, I find that the delegate's conclusions were supportable on the evidence before him and would thus find no *prima facie* case in support of any of the other grounds of appeal.

## ORDER

32. Pursuant to section 109(1)(a) of the *Act*, I deny Loadman's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**