



An appeal

- by -

John Ell  
(the “Employee”)

- 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:** Yuki Matsuno

**FILE No.:** 2006A/118

**DATE OF DECISION:** December 28, 2006

## DECISION

### SUBMISSIONS

John Ell

for himself

Serina Tipper

for the Director of Employment Standards

### OVERVIEW

1. John Ell appeals a Determination of the Director of Employment Standards (the “Director”) issued August 14, 2006 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. In a complaint which was investigated by a delegate of the Director (the “Delegate”), Mr. Ell alleged that his employer, Pinnacle Athletic Mats Ltd., (the “Employer”) had not given him notice of termination of employment, or compensation in lieu of notice, pursuant to section 63 of the *Act*. Mr. Ell began his employment with the Employer on May 9, 2002. On May 12, 2006, Mr. Ell was informed that he was being laid off, effective immediately. Mr. Ell was issued a ROE which indicated the reason for issuance as code “A” (shortage of work), and the date of expected recall as “unknown”.
3. On May 30, 2006, Mr. Ell received a phone call from Hans DeBoer, the plant manager for the Employer, who asked him to come back to work on Thursday and Friday, June 1 and 2, and all the following week. Mr. Ell responded that he could not commit to come in to work at that time, as he was waiting to hear from a prospective employer about a position for which he had applied.
4. The next day, Mr. Ell phoned Mr. Spence, the owner of the Employer, and Mr. DeBoer, to see if their offer of work was still open. Both men indicated that they were unsure whether the offer still stood. They said they would get back to Mr. Ell, but ultimately did not do so.
5. In the Determination, the Delegate decided that John Ell’s complaint was unfounded. She found that Mr. Ell’s layoff was temporary and that the following definition in the *Act* applied:  
  
    **“temporary layoff”** means
  - (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
  - (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;
6. The Delegate found that the Employer called Mr. Ell to come back to work and Mr. Ell declined the offer. Because he declined the offer to return to work, the Delegate found that Mr. Ell quit his position with the Employer, which in turn absolved the Employer of the obligation to pay Mr. Ell compensation in lieu of notice for termination of employment, pursuant to section 63(1) and 63(3)(c) of the *Act*:

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

....

(3) The liability is deemed to be discharged if the employee

....

(c) terminates the employment, retired from employment, or is dismissed for just cause.

7. Mr. Ell now appeals the Determination on the ground that the Director failed to observe the principles of natural justice in making the Determination. However, his appeal was filed late. Although the appeal had to be submitted to the Tribunal by September 21, 2006, it was not received by the Tribunal until October 12, 2006. The appeal form is dated September 19, 2006 and appears to have been received by the Office of the Director, Employment Standards Branch, on September 20, 2006. The form then appears to have been faxed from "Employment Standards Branch HQ" (presumably the Office of the Director) to the Employment Standards Branch Office where the Delegate works on October 11, 2006. The Tribunal appears to have received the appeal form from the Delegate on October 12, 2006.

8. Before the merits of the case are to be adjudicated, the Tribunal must decide whether it will accept this late appeal. The Tribunal has decided that the matter of the late appeal will be heard on the basis of written submissions only.

## ISSUE

9. Should the Tribunal exercise its discretion under section 109(1)(b) to extend the appeal period in this case?

## 10. ANALYSIS

11. When deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied of the following:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

12. See *Niemesto*, BC EST #D099/96. These factors are not exhaustive.

13. It should also be noted that the Tribunal will not grant extensions as a matter of course; will do so only where there are compelling reasons; and that the burden is on the appellant to show that the time period for an appeal should be extended: *Moen & Sagh Contracting Ltd.*, BC EST #D298/96.

14. By letter dated October 13, 2006, the Tribunal asked Mr. Ell to provide reasons for why his appeal was late and why the Tribunal should extend the appeal deadline. The letter outlines the *Niemesto* factors considered by the Tribunal. By letter dated October 20, 2006, Mr. Ell stated that the appeal "was sent to

the wrong fax number (1-250-356-1886).” The letter contains no other information regarding why the appeal was filed late, or why the Tribunal should extend the appeal deadline.

15. The Director takes no position on whether the appeal deadline should be extended. No correspondence about this matter was received from the Employer.
16. When the evidence is considered in the context of the *Niemesto* factors, it would appear that Mr. Ell had an intention to appeal the Determination at least since September 19, 2006, the date on the original appeal form. However, even though the Director may be taken to be aware of Mr. Ell’s intention to appeal, there is no indication that the Employer was aware of this intention. The Employer did not respond to invitations to comment on the appeal deadline extension issue, so I assume from the lack of response that it would not be unduly prejudiced by the granting of an extension.
17. The explanation provided by Mr. Ell is that the appeal was faxed to the wrong fax number. In fact, it was faxed to the Director of Employment Standards, which Mr. Ell was obliged to do in any event under the appeal process. However, he failed to send the appeal to the Tribunal as well. In my view, Mr. Ell’s explanation is credible; however, it is difficult to say whether it was reasonable, as he provides no reasons beyond the fact that the appeal was faxed to the wrong number.
18. Lastly, and most importantly, I am not persuaded that Mr. Ell has a strong *prima facie* case. He alleges in his appeal that the Director failed to observe the principles of natural justice in making the Determination. However, he provides no information that indicates how the Director failed to observe the principles of natural justice. The statements and information Mr. Ell provides in his appeal form are no different from that which he provided in the course of the investigation. He appears to be presenting the Tribunal with the same facts that he presented to the Delegate, with the hope of achieving a different result. However, it is a well-established principle that an appeal to the Tribunal is not an opportunity to re-hear the merits of the case.
19. In my view, Mr. Ell, whose burden it is to show that the appeal period should be extended, has provided no compelling reasons for extension. This, combined with an absence of a strong *prima facie* case, leads me to decide that this is not an instance where I should exercise my discretion to extend the appeal period.

## ORDER

20. Pursuant to section 109(1)(b) of the *Act*, I decline the application to extend the appeal period.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**