Employment Standards TRIBUNAL

An appeal

- by -

Daniel Alberto De Buen
("Mr. De Buen")

- 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: Shafik Bhalloo

FILE No.: 2012A/11

DATE OF DECISION: March 8, 2012

DECISION

SUBMISSIONS

Daniel Alberto De Buen	on his own behalf
Gordon World	on behalf of Ecodrive Technology Group Inc.
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal filed by Daniel Alberto De Buen ("Mr. De Buen") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a determination that was issued by a Delegate of the Director of Employment Standards (the "Director") on December 14, 2011(the "Determination"). The Determination dismissed Mr. De Buen's complaint that his employer, Ecodrive Technology Group Inc. ("Ecodrive"), contravened the *Act* by failing to pay him all wages.

2. On his Appeal Form, Mr. De Buen has checked off all available grounds of appeal in section 112(1) of the *Act*. In particular, Mr. De Buen submits that the Delegate erred in law and failed to observe the principles of natural justice in making the Determination. He also submits that new evidence has become available that was not available at the time the Determination was made.

3. By way of remedy, Mr. De Buen has checked off all available remedies on the Appeal Form. More specifically, he is asking the Tribunal to "change or vary" the Determination, although he does not specifically explain how he wants the Tribunal to change or vary the Determination. However, one may deduce from his submissions that he wants the Tribunal to cancel the Determination and make an order directing Ecodrive to pay him wages he claims he is owed. On that note, Mr. De Buen has also checked off the box on the Appeal Form asking the Tribunal to cancel the Determination, as well as the box asking the Tribunal to refer the Determination back to the Director.

4. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (pursuant to s. 103), and Rule 17 of the *Tribunal's Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUES

5. Did the Director err in law or breach the principles of natural justice in making the Determination?

6. Has evidence become available that was not available at the time the Determination was made by the Director and, if so, does that evidence justify cancelling, changing or varying the Determination in any manner?

FACTS

7. Ecodrive operates a pedicab and electric cycle business and for some disputed period in 2009 and 2010 employed Mr. De Buen as an audiovisual specialist and to provide assistance with renovation work at its new business location.

8. On or about July 6, 2010, Mr. De Buen filed a complaint (the "Complaint") against Ecodrive alleging that it failed to pay him all wages, as well as compensation for length of service. While the latter claim was settled through mediation between the parties, the claim for unpaid wages was not. As a result, the Delegate conducted a hearing on February 2 and June 9, 2011 (the "Hearing"), to determine the outstanding claim.

9. In his Reasons for the Determination (the "Reasons"), at the outset, the Delegate notes that Mr. De Buen claimed Ecodrive owed him wages for the period of June 6, 2009, to April 30, 2010, the date when Ecodrive terminated his employment. More specifically, the Delegate notes Mr. De Buen claims that he was not paid any wages for the period June 6, 2009, to November 9, 2009, and only $1,500 per month for the period November 10, 2009, to April 30, 2010. According to Mr. De Buen, states the Delegate, he had a verbal agreement with Ecodrive which he made with the latter's representatives, Lance Hui ("Mr. Hui") and Gordon World ("Mr. World"), pursuant to which he was to be paid $4,500 per month during this period. He states he accepted one-third of the agreed monthly amount, $1,500, for work he agreed to perform and the balance of $3,000, as deferred wages in order to "buy in" Ecodrive and "yield a higher commission of sales". However, later in the Hearing, the Delegate notes Mr. De Buen testified that under the wage deferral arrangement with Ecodrive, he expected Ecodrive would pay him the deferred monthly amount of $3,000 when it became profitable after the renovations were completed or upon the termination of his employment. However, Mr. De Buen states this did not happen when Ecodrive terminated his employment on April 30, 2010, and thus his Complaint.

10. The Delegate also notes in the Reasons that Mr. De Buen contended, based on his own opinion in the marketplace, someone with his skill set and ability would command $4,500 per month.

11. The Delegate also points out that Mr. De Buen challenged the credibility of Ecodrive stating that while Ecodrive cited financial reasons to terminate his employment, at the same time, Ecodrive was intending to expand its workspace. He points to this apparent inconsistency to challenge the credibility of Ecodrive and particularly the latter's explanation at the Hearing of its relationship with him.

12. The Delegate also points out in the Reasons that Mr. De Buen contends that Ecodrive, despite repeated requests, deliberately did not commit the terms of their employment relationship, including compensation, in writing because Ecodrive intended to pay him less than his full wages.

13. Ecodrive, on the other hand, contended that Mr. De Buen worked as a subcontractor for Ecodrive between June 9, 2009, and September 26, 2009, and was only employed by Ecodrive from November 10, 2009, to April 30, 2010. Ecodrive, notes the Delegate, produced financial statements detailing payments to Mr. De Buen during the latter period. I also note that the section 115 "record" contains a letter or memo dated November 17, 2009, from Mr. Hui to Mr. De Buen asking him to complete a Personal Tax Credits Return form called TD1 which was "supposed to be given to [him] last week when [he] commenced employment here". The TD1 form is attached to the said correspondence and is filled in and executed by Mr. De Buen on December 3, 2009.

14. According to Ecodrive, Mr. De Buen is not owed any further wages because he agreed to work for $1,500 per month and there was no verbal or other agreement to pay him $4,500 per month. Ecodrive produced wage

statements of $750 evidencing payments of the said amount made to Mr. De Buen on a bi-monthly basis. The wage statements are dated and signed by Mr. De Buen and Ecodrive states that there is no reference on these wage statements of any deferred wages.

15. Ecodrive contends that Mr. De Buen's dispute is as a direct result of the Canada Revenue Agency determining that he is ineligible to collect Employment Insurance due to insufficient number of insurable hours of work and Ecodrive's refusal to mislead the Canada Revenue Agency regarding the hours worked by Mr. De Buen.

16. The Delegate, in making the Determination, separated the two periods of Mr. De Buen's wage claims under separate headings and delineated succinctly his reasons for denying Mr. De Buen's claims under both periods. I find it more efficient, in light of the brevity of the Reasons, to set out the Delegate's analysis verbatim below.

> 1. Wage claim for the period: June 6, 2009 – November 9, 2009.
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> Section 80 of the Act limits the amount of wages an employer is required to pay an employee to 6 months before the earlier of the date of the complaint or the termination of employment. In this case, the termination date is April 30, 2010 and the date of the complaint is July 6, 2010. Only wages earned over the recovery period: October 31, 2009 – April 30, 2010 will be investigated. As a result, this part of my analysis will focus on the time period: October 31, 2009 – November 9, 2009.
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> Ecodrive and Mr. De Buen agree a professional relationship existed between them prior to November 10, 2009. Ecodrive contends that prior to November 10, 2009, Mr. De Buen was a sub-contractor while the Complainant argues that he was an employee. The parties also disagree as to when this phase of the relationship ended. Mr. De Buen states it ended on November 9, 2009. Ecodrive claims September 26, 2009 was the complainant's last day as a sub-contractor and the employment relationship did not commence until November 10, 2009.
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> Regardless of the characterization of the relationship between the parties, the complainant provided no evidence to show what hours and dates he worked or tasks he performed during the period of October 31, 2009 – November 9, 2009. Also, no evidence was presented which would place Mr. De Buen at Ecodrive during this period. Ecodrive, in support of its position, provided payment summaries for Mr. De Buen ending September 2009. This is the only evidence I have in regards to this phase of the relationship between Ecodrive and Mr. De Buen. Therefore, I find the evidence provided by Ecodrive is the best available evidence in this case. As a result, I find that if an employment relationship did exist between the parties prior to November 10, 2009, the complainant did not work during the period of October 31, 2009 – November 9, 2009 and there are no wages outstanding.
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> 2. Wage claim for the period: Nov 10, 2009 – April 30, 2010.
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> With respect to Mr. De Buen's claim the employer agreed to pay him $4500.00 per month from November 10, 2009 – April 30, 2010. The evidence submitted by Mr. De Buen to support his position lacks cohesion or consistency and is beset with contradictions. In particular, Mr. De Buen's characterization of the deferred wages as claimed ranges from entering into a 'buy in' or investor type arrangement with the employer to Ecodrive's outright refusal to pay him $4500.00 per month. Such contradictions raise serious questions concerning the credibility of the evidence provided by Mr. De Buen.
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> With respect to the employer's position, Ecodrive denies it ever offered to pay Mr. De Buen $4500.00 per month. In support, the employer provided copies of wage statements signed and dated by Mr. De Buen amounting to $1500.00 per month. I did not find any evidence which associates Ecodrive to an agreement to pay Mr. De Buen $4500.00 per month. Ecodrive's version of events maintained a level of consistency and rationality, which leads me to prefer their evidence over that of the complainant.
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> With respect to Mr. De Buen's argument regarding the market value of the labour he provided Ecodrive to be in the range of $4,500.00. It is not for me to determine what an appropriate wage would be for Mr.

> De Buen under the circumstances. I also cannot make assumptions as to why the parties did not enter into a written agreement outlining the terms and conditions of employment. In this case, the burden of proof is on the Complainant to prove he is entitled to further wages. Mr. De Buen has failed to provide any substantial evidence to support his claim. I am tasked to consider the evidence before me and make a decision based on a balance of probabilities. In my evaluation of the evidence, I did not find any proof to indicate Ecodrive offered to pay Mr. De Buen $4500.00 per month on a deferred basis or otherwise. In addition, I have no proof the statutory minimums of the Act were not met.
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> Accordingly, I find the Act was not contravened.

SUBMISSIONS OF MR. DE BUEN

17. I have read all of Mr. De Buen's appeal submissions, including his final reply submissions. While I do not find it necessary to reiterate all his submissions here, I will summarize the gist of those submissions.

18. Mr. De Buen is very critical of the Delegate's conduct at the Hearing. He alleges that the Delegate failed to make any effort to "listen to the facts" and was concerned with the time the Hearing was taking. He feels that the Delegate did not treat him professionally nor took him "seriously" and alleges the Delegate addressed him as "DUDE" which was inappropriate. He also alleges that the Delegate had "made up his mind" and "cut" him off and "threaten(ed) to shut down the hearing".

19. Mr. De Buen also criticizes the Delegate for preferring the evidence of Ecodrive to his and alleges that there were many inconsistencies in the evidence of Ecodrive, which the Delegate overlooked. He states that the evidence he provided the Delegate was indeed "created by Ecodrive" and contends that "the deciding factor" for the Delegate's Determination against him was credibility, yet the Delegate refused to consider evidence of inconsistencies in the evidence of Ecodrive.

20. Mr. De Buen continues in his submissions to dispute the evidence of Ecodrive, which he disputed at the Hearing. More particularly, he reiterates his evidence from the Hearing that Ecodrive did not declare his full hours of work (which led to a rejection of his Employment Insurance claim). As a result, he contacted Ecodrive to have the latter declare fully his hours of work and threatened to ask the Canada Revenue Agency to investigate Ecodrive's "false submissions and shady bookkeeping". Eventually, the Canada Revenue Agency investigated the matter and Mr. De Buen states the Canada Revenue Agency concluded he was an employee of Ecodrive during the period June 6 to November 9, 2009, and, therefore, he had sufficient hours to make a claim for Employment Insurance. He states he is prepared to provide the Canada Revenue Agency's ruling if required.

21. He reiterates that Ecodrive lies and its evidence is contradictory and consists of fabrications. He also reiterates that his arrangement or agreement with Ecodrive was verbal so that Ecodrive could challenge the terms when put to the task.

22. He then refers to some materials (he has submitted with his appeal) he obtained as a result of a request he made under the *Freedom of Information and Protection of Privacy Act* ("FOIPA") to Vancouver City Hall (the "City"). He submits that the documents show that, contrary to Ecodrive's "claims that they were running out of money" for renovation and that is why they terminated his employment, during the same period Ecodrive was expanding its property "above their current location".

23. Mr. De Buen also refers to the WorkSafe BC complaint he made against Ecodrive alleging that the latter, in terminating his employment, discriminated against him. Mr. De Buen previously made similar submissions and I note that the record adduced by the Director contains the WorkSafe BC file. However, Mr. De Buen

has resubmitted in his appeal the Consultation Record of the investigator in the WorkSafe BC matter and argues that Ecodrive, in the investigation by WorkSafe BC, made various misrepresentations to the inspector, including the value of work done in the renovation to its business site. Mr. De Buen also discusses the threats of employment termination Ecodrive made to him if he did not cover up some electrical wiring contrary to the building regulations. Mr. De Buen reiterates this information in the appeal with a view to challenging the character and credibility of the representatives of Ecodrive.

24. Mr. De Buen also refers to the affidavits of two (2) employees of Ecodrive, which the latter submitted in his WorkSafe complaint. He states that the affidavits were false and were "rescind(ed)" later when the employees in question had an opportunity to review the WorkSafe BC files. He also refers to the affidavit of a customer of Ecodrive that the latter filed in the WorkSafe BC matter and alleges that the customer was "mentally challenged" and Ecodrive "fed him a story" about him.

25. He also disputes the police report Ecodrive made about him as false in order to further discredit him.

26. For the reasons I set out under the Analysis section of my decision, I do not find it necessary to delve into the matter of the City's or WorkSafe BC's files or the police report.

27. However, I find relevant the submissions of Mr. De Buen pertaining to an email response of Ecodrive to Mr. De Buen's Complaint submitted to the Employment Standards Branch (the "Branch") by Ecodrive on September 10, 2010 (the "Email"), which document the Branch sent to Mr. De Buen for his response during the investigation of the Complaint and well in advance of the Hearing. Mr. De Buen contends that the Email is missing from the record adduced by the Delegate in the appeal and there is no reference in the Delegate's Reasons to the Email. Mr. De Buen states that the Delegate "refused to see how [the contents of the Email]" were relevant, although he states the Email shows inconsistencies in the evidence of Ecodrive. In particular, Mr. De Buen points out that in the Email, Ecodrive, *inter alia*, states that it "hired him for $1,500 a month to do the renovations"; he "started (work) on June 9, 2009"; and he "accepted $1,500 per month for 11 months" and signed for payments made to him. However, Mr. De Buen contends, when put to the task of proving its evidence, Ecodrive "changed (its) story and said it was an error". Mr. De Buen submits that this evidence raises doubts about the credibility of Ecodrive.

28. Finally, in his final reply submissions, Mr. De Buen, in great detail, questions the motivation of Ecodrive in terminating his employment and challenges the evidence and representations of Ecodrive at the Hearing, in the WorkSafe BC proceeding and in the police report filed against him. I have read those submissions, and, as indicated previously, I do not find it necessary to set out the details of Mr. De Buen's submissions here for the reasons set out in my decision under the heading Analysis below.

SUBMISSIONS OF THE DIRECTOR

29. The Director submits that Mr. De Buen was afforded "full and fair opportunity to present his evidence in a professional environment" and he has failed to demonstrate any error of law or breach of the principles of natural justice by the Delegate.

30. The Director also submits that the "Delegate considered all of the evidence presented by the parties when making his findings".

31. As concerns the "new evidence" from the City's file Mr. De Buen submits in the appeal, the Delegate states that the "core argument pertaining to those documents was presented by Mr. De Buen at the (H)earing" and it is referenced in the Reasons. The Director also disputes the relevance of the documents obtained from the

City's file and submitted by Mr. De Buen in his appeal as irrelevant on the issue of his claim for outstanding wages.

32. The Director concludes by reiterating the Delegate's conclusion in the Reasons that Mr. De Buen failed to provide sufficient evidence to demonstrate any further wages were owing to him and asks the Tribunal to dismiss the appeal and confirm the Determination.

SUBMISSIONS OF ECODRIVE

33. Ecodrive, in its submissions, agrees with and adopts the Director's submissions and states "no relevant evidence … has become available since the time of the Determination" and the documents Mr. De Buen submits as a result of his FOIPA request for the City's file are irrelevant.

34. Ecodrive, like the Director, argues that Mr. De Buen has failed to prove he is entitled to further wages and the "fact remains that (Ecodrive) never did offer to pay Mr. De Buen $4,500 per month on a deferred basis".

ANALYSIS

35. Section 112(1) of the *Act* delineates the limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director:

> 112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

36. The onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which the appellant's appeal may be dismissed.

37. In this case, as indicated previously, the appellant, Mr. De Buen, has invoked all three (3) available grounds of appeal. While he may not have most cogently argued all three (3) grounds of appeal, my task in the appeal is to look at the substance of the appeal and consider the nature of the challenge keeping in mind the following instructive comments of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03:

> When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

38. Having said this, while a significant portion of the appeal submissions, including the final reply submissions, of Mr. De Buen can be characterized as a challenge by Mr. De Buen of findings of fact made by the Delegate which the Tribunal has no authority to consider on appeal unless such findings raise an error of law, there is, however, one (1) thread or line of argument Mr. De Buen raises in his appeal that I find of substance and requiring further consideration. Specifically, it is his argument relating to the Email submissions of Ecodrive dated September 10, 2010. I note the Email is noticeably missing from the record adduced by the Director in

the appeal (which may be through complete inadvertence as a different Delegate received it earlier in the investigation of the Complaint) and I also find no evidence in the Reasons showing the Delegate considered the submissions of Ecodrive in the Email. I find this troubling and disconcerting particularly because the Delegate in making the Determination against Mr. De Buen states "Ecodrive's version of events maintained a level of consistency and rationality which leads me to prefer their evidence over that of the complainant" and he also states that "no evidence was presented which would place Mr. De Buen at Ecodrive during [the period of October 31, 2009 to November 2009)" and concludes that "if an employment relationship did exist between the parties prior to November 10, 2009, the complainant did not work during the period of October 31, 2009 – November 9, 2009 and there are no wages outstanding". There is no mention of the Email, nor the inconsistencies in Ecodrive's own evidence in the Email compared to the evidence it adduced at the Hearing, upon which the Delegate appears to have relied. More specifically, in the Email, Ecodrive states:

> The period of time from June 6-Sept 26, 2010 Mr. de Buen [*sic*] worked as a pedicab operations person on a 25/75 revenue sharing basis. In addition Mr. de Buen [*sic*] kept 100% of what he earned operating a pedicab.
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> The critical point here is that during this time Mr. de Buen he [*sic*] was NOT an employee and no contracts of any sort were ever entered into. It is unclear why Mr. de Buen [*sic*] even brings up this period of time as he was not an employee and this period has absolutely no relation or relevance to his allegation, except perhaps to attempt to blur the length of time he was in our employ.
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> Unemployed for some time, Mr. de Buen came to us in April, 2009 to convince us to renovate our retail store. … We agreed to hire him as an employee at $1,500 in gross wages/month. … *He started renovations on June 9, 2009*. [italics mine] … There were never any agreements to pay him more than the agreed $1500/mth in wages. … *He accepted $1500/mth for 11 months, signing for them* [italics mine].

39. In the record adduced in the Appeal there is no evidence that Mr. De Buen was paid $1,500 per month for 11 months, although I note that he was paid $1,500 in bi-monthly payments during the period November 10, 2009 to April 30, 2010, (slightly less than 6 months) and there is some financial information prior to this period evidencing a revenue split arrangement between Ecodrive and Mr. De Buen for the pedicab operations he was involved in with Ecodrive. However, what does not reconcile with the Delegate's Reasons is that Ecodrive states in the Email that Mr. De Buen was paid $1,500 for 11 months and he commenced renovation work as of *June 9, 2009*. As indicated previously, the Delegate, in the Reasons, found that "if an employment relationship did exist between the parties prior to November 10, 2009, the complainant did not work during the period of October 31, 2009 - November 9, 2009 and there are no wages outstanding." This conclusion of the Delegate appears to disregard or not consider at all the submission of Ecodrive in the Email that Mr. De Buen started renovation work as of June 9, 2009. Whether or not the Delegate will arrive at the same conclusion after considering the Email submissions of Ecodrive, I think it is important for the Delegate to have considered and weighed in his decision-making this pre-Hearing Email of Ecodrive which appears to place him at Ecodrive premises doing renovation work as of June 9, 2009,and earning $1,500 per month for a period of 11 months.

40. Having said this, I am mindful of the limitations of intervening in a Determination on the basis that the Delegate failed to consider relevant evidence. In *Jane Welch operating as Windy Willows Farm,* BC EST # D161/05, the Tribunal stated at paras. 40 - 43:

> . . . there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at paragraph 12:3700,

> . . . any attempt to determine whether an administrative decision-maker has considered 'all of the evidence' as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.
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> Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence.
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> Although the Director and his delegates have a duty, both under the Act and at common law, to provide reasons for their determinations, '[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision': International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also Manuel D. Gutierrez, BC EST # D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.
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> Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In Université du Québec à Trois-Rivières v. Larocque, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:
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> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.
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> Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although Université du Québec à Trois-Rivières involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.

41. While the Delegate does not have to mention particular relevant evidence in his Reasons, in this case, the evidence in the form of submissions of Ecodrive in the Email is both relevant and probative and, therefore, there is, in my view, a greater expectation that it would be considered expressly in the Delegate's Reasons. In the circumstances, I find it more probable than not that the Delegate, in failing to mention the submissions of Ecodrive in the Email, failed to consider those submissions outright, otherwise I would expect the Delegate to have explained in the Reasons the material inconsistencies between the submissions in the Email and Ecodrive's evidence at the Hearing. I also note that the Director has not, in the Appeal submission, addressed the matter of the Email specifically. I would think that in the face of the unequivocal allegations by Mr. De Buen that the Email is missing in the record and the inconsistencies in the Email and the Hearing submissions of Ecodrive, the Director or the Delegate would respond or specifically address the matter in the reply submissions.

42. Having said this, I note that I agree with the Delegate and do not find any error in his conclusion that the material period for wage recovery in Mr. De Buen's case is dictated by Section 80 of the *Act* and is limited to the period October 31, 2009, to April 30, 2010. I do not find there to be any challenge by Mr. De Buen of this finding or conclusion.

43. Further, notwithstanding the lack of consideration by the Delegate of the Email, I am not persuaded by Mr. De Buen to disturb the Delegate's conclusion of fact that there is *no* proof of any agreement that Ecodrive offered to pay Mr. De Buen $4,500 per month on a deferred basis or otherwise. I find that it was open to the Delegate to arrive at this conclusion based on the facts before him and the Email (which I have carefully reviewed) does not give me any basis to conclude otherwise.

44. However, on the matter of the whether or not Mr. De Buen was employed during the period October 31, 2009, to November 9, 2009, I find the Delegate to have breached the principles of natural justice in failing to consider the submissions in the Email when concluding that there is no evidence which would place Mr. De Buen at Ecodrive during the period October 31, 2009, and November 9, 2009. I also note that in the Email, Ecodrive states that it agreed to pay him $1,500 per month and he "accepted $1500/mth for 11 months" and signed for payments to him. I did not see any evidence in the record of payments to Mr. De Buen of $1,500 per month for 11 months (which would require payments to start from June 9, 2009, to April 30, 2010). I query how that can be reconciled with the Delegate's finding that there was no evidence that would place Mr. De Buen at Ecodrive during the material period. I find the Reasons deficient in that regard and would have liked to see the Delegate reconcile inconsistent statements or evidence of Ecodrive in the Email and at the Hearing in the Reasons. However, it is clear to me that the Delegate did not have the benefit of the Email, which was or should have been part of the record. In the circumstances, the appropriate remedy is to send the matter back to the Director with specific directions to consider the submissions of Ecodrive in the Email and determine, in light of the Email:

(i) Whether or not Mr. De Buen was employed during the period October 31, 2009, to November 9, 2009?

(ii) Is he entitled to any outstanding wages during the material period?

45. Finally, I would like to address the materials Mr. De Buen adduces in the appeal that are from his application before WorkSafe BC, as well as those obtained from the City pursuant to his FOIPA request. I find those materials are not relevant to the material issue on appeal relating to his claim for outstanding wages and they would not qualify as new evidence under the test set out in *Re: Merilus Technologies Inc.,* BC EST # D171/03.

ORDER

46. Pursuant to Section 115(1)(b) of the *Act*, I order that this matter be referred back to the Director on the basis of the specific directions delineated above.

Shafik Bhalloo
Member
Employment Standards Tribunal