



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.:** 2013A/27

**DATE OF DECISION:** July 3, 2013

## DECISION

### SUBMISSIONS

Daniel Alberto De Buen	on his own behalf
Sukh Khaila	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision completes an appeal filed by Daniel Alberto De Buen (“Mr. De Buen”) regarding a determination issued by the Director of Employment Standards (the “Director”) on December 14, 2011, (the “Determination”) which decided a complaint filed by Mr. De Buen with the Employment Standards Branch (the “Branch”) on July 6, 2010, (the “Complaint”). After conducting a hearing of the Complaint on February 2 and June 9, 2011, (the “Hearing”), a delegate of the Director of Employment Standards (the “Delegate”) found in the Determination that the *Employment Standards Act* (the “Act”) had not been contravened, and no wages were outstanding.
2. Mr. De Buen appealed the Determination to the Employment Standards Tribunal (the “Tribunal”). I decided the appeal which is reported at BC EST # D025/12 (the “Decision”). In the Decision, I confirmed the Determination save for the following: I found that the Delegate failed to observe the principles of natural justice by failing to consider email submissions of Ecodrive Technology Group Inc. (“Ecodrive”) dated September 10, 2010, (the “Email”) when concluding there was no evidence which would place Mr. De Buen at Ecodrive during the period of October 31, 2009, to November 9, 2009, and if an employment relationship did exist between the parties prior to November 10, 2009, Mr. De Buen did not work during the period of October 31, 2009 to November 9, 2009. The Email apparently contains an inconsistency in that it states that Ecodrive agreed to hire Mr. De Buen at \$1,500 in gross wages per month and that Mr. De Buen started renovations on June 9, 2009, which, on the face of it, may place him at Ecodrive during the material period in question. As a result, I referred the matter back to the Director with specific directions to consider the Email (which incidentally was missing in the Director’s record) and determine, in light of the Email, the following two questions:
  - (i) Whether or not Mr. De Buen was employed during the period October 31, 2009 to November 9, 2009?
  - (ii) Is Mr. De Buen entitled to any outstanding wages during the material period?
3. On May 13, 2013, the Delegate, on behalf of the Director, issued a Referral Back Report (the “Report”) and the Tribunal forwarded the Report to both Mr. De Buen and Ecodrive on May 14, 2013, and offered both parties an opportunity to submit a Reply, along with a copy of any records and documents in support. Mr. De Buen replied by email dated May 24, 2013.

### ISSUE

4. Are the conclusions reached in the Report correct, and should the Determination be confirmed, varied or cancelled as a result?

## THE REPORT AND THE REPLY

5. In the Report, the Delegate addressed two issues:
  - (i) Was Mr. De Buen employed during the period October 31, 2009 to November 9, 2009?
  - (ii) Is Mr. De Buen entitled to any outstanding wages during the material period?
6. The Delegate notes in the Report that Ecodrive provided a written submission with respect to the two questions in the referral back. More particularly, the Delegate notes that Ecodrive denies that Mr. De Buen had any employment relationship with Ecodrive during the period October 31, 2009, to November 9, 2009, and that the Email contained dates that “were written as a result of human error”. According to Ecodrive, Mr. De Buen’s employment period was November 10, 2009, to April 30, 2010, and in support of its contention, the Delegate notes that Ecodrive refers to the pay statement it issued Mr. De Buen which indicates that his salary was prorated for the month of November, 2009, consistent with a “post-November 9, 2009 start date” of employment. The Delegate also notes that Ecodrive argues that its other submissions, entered into evidence at the Hearing, reinforce its position that Mr. De Buen started employment on November 10, 2009. The Delegate also notes that Mr. De Buen did not provide a submission on the referral back questions in the Report. Based on his assessment of evidence in his further investigation in the Report, the Delegate found Ecodrive’s submissions reasonable and persuasive, and went on to conclude that Mr. De Buen was not employed by Ecodrive during the period October 31, 2009, to November 9, 2009, and is not owed any further wages.
7. Mr. De Buen, understandably, disagrees with the Report. He finds that the Delegate is merely reiterating the position he previously expressed in the Determination. Mr. De Buen again reiterates the portion of the Email where Ecodrive suggested that he commenced employment on June 9, 2009, and he also mentions the EI investigation and findings in that investigation, which he states shows that Ecodrive had misrepresented the terms of his employment, the length of time he had been employed and the total hours he worked.

## ANALYSIS

8. Section 115(1) of the *Act* sets out the statutory authority of the Tribunal to refer a matter back to the Director:
  - 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
    - (a) confirm, vary or cancel the determination under appeal, or
    - (b) refer the matter back to the director.
9. In *Hub-City Boatyard Ltd.*, BC EST # D028/04, the Tribunal delineated its practice with respect to matters that are referred back:

The legislature empowered the Tribunal to refer a matter back to the Director in cases where the Determination under appeal could not properly be confirmed, varied or cancelled, and where a reinvestigation or reconsideration is required, with directions (see *Re: Zhang*, BC EST #D130/01). The Tribunal’s decision will normally identify the errors made in the Determination, and the referral back is normally an opportunity for the Director to remedy those errors and arrive at a correct Determination. A practice has arisen, however, in which the Director makes a report back to the Tribunal instead of a new Determination, and in that report, the Director outlines the results of its reinvestigation or reconsideration. This practice renders the process more efficient, as the Tribunal is placed in a position to

confirm, vary or cancel the Determination with the benefit of the Director's reinvestigation and reconsideration, but without the delay and expense involved with making of a new Determination (with a new right of appeal).

10. In this case, the burden is on Mr. De Buen to show that the Report is incorrect. Having reviewed the Delegate's reasons in the Report and the submissions of Mr. De Buen, I confirm the Report and find no basis to interfere with the conclusions found within. In my view, it was open to the Delegate in his Report to prefer the evidence of Ecodrive and reach the conclusion he did based on Ecodrive's explanation of the error in the Email with respect to the start date of Mr. De Buen's employment and Ecodrive's pay statement to Mr. De Buen for November, 2009, which pro-rated his pay consistent with a start date after November 9, 2009, and Ecodrive's other submissions entered into evidence at the Hearing. I do not find Mr. De Buen's submissions, reiterating for the most part his previous appeal submissions with respect to the Email and his reliance on the EI investigation or determination, compelling for me to disturb or change my decision herein. As for Mr. De Buen's reliance on the EI investigation findings or determination, as with my previous ruling in the Decision with respect to his reliance on materials from his WorkSafe BC application, I do not find the EI investigation or determination relevant to the material issues in this proceeding. I do not think the EI information would qualify as new evidence under the tests set out in *Re: Merilus Technologies Inc.* (BC EST # D171/03) and furthermore, the Tribunal is not bound by any decisions made in other proceedings which are governed by a different statutory scheme.

## **ORDER**

11. Pursuant to section 115 of the *Act*, I order that the Delegate's Referral Back Report, dated May 13, 2013, and the Determination, dated December 14, 2011, be confirmed.

---

**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**