Employment Standards TRIBUNAL

An appeal

- by -

David Mollenhauer
("Mollenhauer")

- 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: David B. Stevenson

FILE No.: 2008A/134

DATE OF DECISION: January 22, 2009

DECISION

SUBMISSIONS

David Mollenhauer	on his own behalf
Michael James Schalke	on behalf of Atlas Anchor Systems (B.C.) Ltd.
Sherri Wilson	on behalf of the Director

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the "*Act*") by David Mollenhauer ("Mollenhauer") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 3, 2008.

2. The Determination was made on a complaint filed by Mollenhauer against Atlas Anchor Systems (B.C.) Ltd. ("Atlas Anchor"). Mollenhauer alleged Atlas Anchor had contravened the *Act* by failing to pay regular and overtime wages and vacation pay.

3. The Director decided that Mollenhauer was a professional engineer carrying on the occupation of professional engineering, as that term is defined in the *Engineers and Geoscientists Act*, RSBC 1996, c. 116, and as such was excluded from the *Act* by application of section 31 of the E*mployment Standards Regulation* (the "*Regulation*").

4. Mollenhauer challenges that conclusion. He says the Director erred in law in deciding he was excluded from the *Act* and failed to comply with principles of natural justice in making the Determination. The latter ground of appeal arises out of the procedure used by the Director to establish the factual and legal foundation for the Determination.

5. The Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue is whether the Director erred in law in concluding Mollenhauer was excluded from the *Act* and whether the Director failed to comply with principles of natural justice in making the Determination.

THE FACTS

7. It is safe to say there is no disagreement on most of the facts that are relevant to this appeal.

8. Atlas Anchor operates a business that manufactures and sells anchor systems for permanent fall protection on buildings and, possibly, other structures. Mollenhauer was employed as the British Columbia Regional Manager under a fairly comprehensive employment agreement, parts of which are included in

the Determination. At the time of, and throughout, his employment with Atlas Anchor, Mollenhauer was a professional engineer. Mollenhauer used his status as a professional engineer in aspects of his employment. There was a factual disagreement between Mollenhauer and Brian Robinson ("Robinson"), the President of Atlas Anchor, about how much of Mollenhauer's work required him to use his professional status. As I read the Determination, Robinson estimated Mollenhauer was engaged in "purely engineering responsibilities" for 20 – 25% of his time and in "original analysis" for another 20 – 25% of his time. Robinson indicated the time spent on "original analysis" was not "hard engineering". Mollenhauer said he spent approximately 85% of his time on "non-engineering tasks" and "approximately 15% of his time on "stamping drawings". The last matter refers to Mollenhauer placing his engineering stamp on field reviews and project designs.

9. There was evidence before the Director that Atlas Anchor paid Mollenhauer's dues and his professional Errors and Omissions Insurance to the Association of Professional Engineers.

10. The Director found that Mollenhauer was engaged by Atlas Anchor as a professional engineer, although the Director refrained from reaching any firm conclusion on the amount of time spent in that capacity. In respect of the difference between Mollenhauer and Robinson, the Determination states:

> Although Mr. Mollenhauer and Mr. Robinson did not agree on the amount of Mr. Mollenhauer's time dedicated to engineering work in the strictest sense, at a minimum Mr. Mollenhauer spent 15% of his time engaged in the practice of engineering work in the practice of engineering. According to testimony given by both Mr. Robinson and Mr. Mollenhauer, Mr. Mollenhauer regularly used his technical expertise to discharge his duties at Atlas.

11. The Director interpreted the *Regulation* as not requiring Mollenhauer to have spent all or "even 50%" of his time engaged in the practice of engineering before applying the exclusion to his employment. As stated in the Determination:

> It only requires that he use the knowledge and expertise required under the *Engineers and Geoscientists Act* to carry out tasks including the design, reporting and construction of works that require that same knowledge and experience.

12. The Director also accepted the evidence of Robinson that Mollenhauer's designation as a professional engineering and the work he performed in that capacity were an integral function or component of his employment.

ARGUMENT AND ANALYSIS

13. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *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:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*

> *(c) evidence has become available that was not available at the time the determination was made.*

14. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

15. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).

16. Mollenhauer argues the Director erred in law and failed to observe principles of natural justice in making the Determination. In respect of the latter ground, Mollenhauer says there is evidence he was unable to present because of the procedure adopted by the Director for gathering the facts which were used in making the Determination. The appeal is not completely clear on the nature of the evidence, although it appears that some of it will address the amount of time Mollenhauer spent doing professional engineering.

17. The Director and counsel for Atlas Anchor submit the Tribunal should not accept this new information, primarily because it is evidence that was reasonably available at the time the Determination was made and should have been provided to the Director. In addition, counsel for Atlas Anchor says the proposed "new" evidence is neither probative nor relevant. He says that while a full outline of the evidence has not been provided, it appears intended to go to establishing Mollenhauer spent only a small amount of time "carrying on the occupation governed by" the *Engineers and Geoscientists Act*.

18. In his final reply, Mollenhauer does not directly address the objections of the Director and Atlas Anchor to this new evidence, but does seem to acknowledge that this evidence would only go to the amount of time he spent doing engineering work.

19. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal, indicating in several decisions that this ground of appeal is not intended to be an invitation to a dissatisfied party to seek out additional evidence to supplement an appeal if that evidence could have been acquired and provided to the Director before the Determination was issued. The Tribunal has discretion to allow new or additional evidence. In addition to considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana's Cantina Ltd.*, BC EST #D017/05).

20. I am not inclined to give any consideration in this appeal to what Mollenhauer says is newly available evidence. He has plainly framed this appeal as a question of law that is about whether the Director was correct in concluding the amount of time he spent working in the capacity of a professional engineer, which by his account was no more than 15%, was sufficient to exclude the remaining 85% of his employment from the *Act*. It is the same question of law he unsuccessfully argued to the Director. The facts on which that question of law was argued to the Director, and is argued in this appeal, is unchanged by the prospect of any additional evidence. Mollenhauer acknowledges in this appeal that he does not resile from his admission that about 15% of his work with Atlas Anchor involved professional

engineering. The appeal is about the other 85%. Accordingly, the new evidence that he refers to is only marginally relevant but is not probative on the question of law.

21. If Mollenhauer is successful on the question of law, the Determination will be cancelled and the matter will be referred back to the Director, based on the conclusions reached by the Tribunal. If that occurs, the evidence which he has referred to in the appeal might be relevant to the continuing process before the Director. It is premature, however to reach any conclusions in this appeal about that possibility. It is sufficient to conclude such evidence is unhelpful in deciding this appeal and will not be accepted or considered.

22. On the legal question, Mollenhauer's argument is simple: the wording of section 31 of the *Regulation* only excludes a professional engineer from the *Act "so long as that person is carrying on the occupation governed by the [Engineers and Geoscientists Act]"* and as he was not carrying on that occupation for a substantial portion of his employment, that portion of his employment should be covered by the *Act*. The full text of the statutory provision reads:

> ***31*** *The Act does not apply to an employee who is . . .*
>
> *(f) a professional engineer, as defined in the Engineers and Geoscientists Act, or a person who is enrolled as an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists of the Province of British Columbia . . .*
>
> *so long as that person is carrying on the occupation governed by the Acts referred to paragraphs (a) to (p).*

23. The essence of Mollenhauer's submission is that the proviso in the concluding words of Section 31 should be read as excluding the professional engineer only "when" or "while" that person is engaged in "professional engineering".

24. Counsel for Atlas Anchor takes the opposite view and submits the Director did not err in interpreting section 31 of the *Regulation* as excluding Mollenhauer from the *Act*.

25. He says the conclusion of the Director that Mollenhauer was carrying on the practice of professional engineering as an employee of Atlas Anchor is determinative. He agrees with the conclusion of the Director that there is no wording in section 31 which requires the employee to spend all or most of their time engaged in the practice of professional engineering work before they are excluded from the *Act*. He adopts the language and reasoning of the Director found in the following passage:

> . . . there is no basis upon which I could fail to apply the clear language in the *Regulation*, excluding individuals working in specifically defined professions, based on the percentage or proportion performed as the excluded professional compared with work performed as a non-excluded employee. I accept the attempt to do so would not be practical, nor would it be fair or efficient, contrary to the purposes of Section 2 of the *Employment Standards Act*.

26. Counsel for Atlas Anchor says the above passage is supported by the wording of Section 31 of the Regulation, which contains no language suggesting all of the time worked by Mollenhauer be assessed and apportioned into time worked in the "practice of professional engineering", which would be excluded from the Act, and time worked performing duties that were not professional engineering, which presumably would not be excluded. In other words, counsel for Atlas Anchor submits that the proviso in

the concluding words of Section 31 should be read as excluding the professional engineer from the *Act* provided that person is engaged in "professional engineering" in their employment.

27. The Director submits no error of law has been made and relies on the reasoning found in the Determination.

28. The *Act* sets out minimum terms and conditions of employment for most, but not all, employees in the province. Members of most professions, including professional engineers, are entirely excluded from the *Act*. Other employees are subject to most, but not all, provisions of the *Act*. The *Act* is broad based public policy legislation. The fact that exclusions to all or parts of the *Act* exist at all suggests the legislature has accepted that, as a matter of public policy, it would be inconsistent with the objectives of the *Act*, as well as being unfair, to require that such employment be performed within the framework of the *Act*. For the most part, the work performed by excluded employees has unusual or unique features that do not allow it to conform to the requirements found in the *Act*. In the context of those employees listed in section 31 of the *Regulation*, it must be accepted that the legislature has recognized the identified professions and occupations have built into them different needs or expectations that justify their exclusion from minimum employment standards.

29. The legislature has not, however, considered it necessary or appropriate to exclude professionals from the *Act* based simply on their professional status. The legislature has also required, as the language of the *Act* indicates, that the person be "*carrying on*" the professional occupation in their employment before they will be entirely excluded from the *Act*. In my view, that language requires the professional to be involved essentially in discharging professional duties, in the sense that the performance of the professional duties are a basic and necessary aspect of the employment. In such circumstances, the exclusion would apply and the *Act* would not apply to any part of the employment of the employee.

30. There is no dispute that Mollenhauer was a professional engineer. There is also no dispute that Mollenhauer was "*carrying on the occupation*" of a professional engineer during his employment with Atlas Anchor. The use of his professional status was not accidental or incidental. One may argue whether the Director has overstated the effect of the evidence by indicating his status as a professional engineer was an "integral function or component" of his employment, but his profession status and the use of that status in his employment was clearly contemplated by both parties as both a basic and necessary element of his employment. The Employment Agreement describes his responsibilities as including a responsibility for BC Branch engineering and provides for a commission for performing engineering functions. The intention expressed in the Employment Agreement, that he would use his status as a professional engineer in carrying out the responsibilities of his employment, was manifested in Mollenhauer actually engaging in the practice of professional engineering during his employment and in the fact that Atlas Anchor paid his professional dues and insurance.

31. I cannot accept Mollenhauer's argument that the exclusion should apply only while actually performing professional engineering. The approach to statutory interpretation of the *Act* contemplates that the *Act* be read in its entire context and in the grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of the legislature: see *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at para. 21. The words of section 31 say, "*so long as that person is carrying on the occupation governed by the Acts referred to….*" and not "only so long as", "when" or "while" the person is carrying on the excluded occupation. In this context, the words "*so long as*" must be read as "provided" and not when or while. There is no qualifying language that suggests the exclusion applies "only" while the employee is actually engaged in the professional occupation. As indicated above, in my view the

intention of the legislature was to exclude most profession employees using their professional status as a basic and necessary part of their employment from the *Act*.

32. This view is reinforced by examining the effect of the interpretation suggested by Mollenhauer. I agree with the view expressed in the Determination and in the submission made on behalf of Atlas Anchor in this appeal that applying an interpretation of the closing words of section 31 which has the potential effect of including part of the employment within the Act and excluding another part would be extremely inefficient and impractical. As well as engaging the obvious problem of recording, identifying or deciding, in the event of a dispute, the amount of time a professional employee spent doing included or excluded work and the potential interpretive minefield involved in identifying which work might be included in the term "*carrying on the occupation governed by the Acts"*, a truly fair and effective assessment would also require a decision on whether the wage claim itself arose out of the performance of excluded or non-excluded employment. In addition, there is the question of whether there would be a "threshold", beyond which a professional employee would be entirely excluded, and below which the included/excluded assessment would take place. Would that threshold be 50% or something else and, whatever it might be, what rationale exists for that figure? If there is no threshold at all, should some of the professional employee's employment be included even where that person is carrying on a professional occupation for 95% of the time worked? I can't accept the legislature intended to create the potential for such a process in the face of the clear statutory objective for efficiency and expedience in resolving disputes under the *Act*.

33. For the above reason, I must dismiss the appeal.

ORDER

34. Pursuant to Section 115 of the *Act*, I order the Determination dated October 3, 2008 confirmed.

David B. Stevenson
Member
Employment Standards Tribunal