

An application for Reconsideration

- by -

David Mollenhauer  
("Mollenhauer")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2009A/014

**DATE OF DECISION:** April 22, 2009

## DECISION

### SUBMISSIONS

David Mollenhauer	on his own behalf
Michael J. Schalke	on behalf of Atlas Anchor Systems (B.C.) Ltd.
Andres Barker	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an application made by David Mollenhauer (“Mollenhauer”), pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of a Tribunal Member’s decision (BC EST No. D013/09) issued on January 22nd, 2009 (the “Original Decision”). I am adjudicating this application based solely on the parties’ written submissions.
2. By way of the Original Decision, the Tribunal confirmed a Determination issued by a delegate of the Director of Employment Standards on October 3rd, 2008 (the “Determination”). The Director’s delegate held that the Act did not apply to Mr. Mollenhauer’s employment since he was excluded by reason of section 31(f) of the *Employment Standards Regulation* (the “*Regulation*”) which provides as follows:
  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 in paragraphs (a) to (p).
3. I should parenthetically note that section 31 of the *Regulation* excludes most licensed professionals including physicians, lawyers, dentists, chiropractors, optometrists and veterinarians. Thus, for such persons, their terms and conditions of employment are principally defined by contract and by other statutory schemes that govern their employment (for example, human rights and workplace safety legislation).
4. In his application for reconsideration dated February 20th, 2009 Mr. Mollenhauer acknowledges that he was, at the relevant time, a registered dues-paying professional engineer, however, he maintains that “since 85% of my time at [the employer] was spent doing non-engineering work, that the Employment Standards Act applies to 85% of my work, as outlined in Clause 31 [of his employment agreement]”.
5. I note that the Tribunal Member accepted in the Original Decision, for purposes of analysis, that Mr. Mollenhauer’s “pure” engineering duties occupied about 15% of his working time. The Tribunal rejected, however, the assertion that his workday could be parcelled out into separate segments that either were, or were not, governed by the *Act*. The present application for reconsideration largely revisits the same arguments that were raised, and rejected, in both the Determination and Original Decision.

## ISSUE

6. The threshold issue raised by this application is whether it raises an issue appropriate for reconsideration. The Tribunal's reconsideration power is discretionary and will only be exercised sparingly in accordance with the two-stage analysis discussed in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST Decision No. D313/98. At the first stage, the Tribunal will determine:

...whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

## STAGE ONE ANALYSIS

7. In my view, this application does not meet the first stage of the *Milan Holdings* test. As noted above, the arguments advanced by Mr. Mollenhauer on reconsideration are essentially identical to those made (and rejected) before the Director's delegate and again before the Tribunal Member who issued the Original Decision. Mr. Mollenhauer now says that the job posting for his replacement makes no mention of a requirement for a professional engineering licence. That may be so, but that fact is also wholly irrelevant. This matter must be determined based on the work situation that prevailed during Mr. Mollenhauer's period of employment. The simple unarguable fact is that Mr. Mollenhauer could not have undertaken the full scope of his contractually defined duties had he not held a professional engineer's licence
8. I am prepared to accept (as was the Member in the Original Decision), and strictly for purposes of these reasons, that Mr. Mollenhauer's engineering credentials were only required with respect to approximately 15% of his total workload. There is nothing particularly unusual about a professional's workday including "non-professional" activities. For example, a lawyer during the course of a typical workday might undertake various tasks that, strictly speaking, do not amount to practising law—for example, billing, research (legal or otherwise), proofreading correspondence and other documents, photocopying etc. It would be incorrect to say that a person could not undertake these tasks unless they belonged the Law Society. It would be equally incorrect to assert that, to the extent a lawyer spent some portion of their day occupied in such tasks they were not, at least with respect to that portion, carrying on the practice of law.
9. In the Original Decision, the Tribunal Member carefully reviewed the regulatory language and the applicable policy considerations and held that Mr. Mollenhauer's position was not well founded in either law or policy (see particularly paragraphs 28 to 32 of the Original Decision). I entirely agree with the Member's views as expressed in those paragraphs.
10. This application is not one that is appropriate for reconsideration. I might add, simply for the sake of completeness, that this outcome does not leave Mr. Mollenhauer without a remedy even though he does not have a remedy under the *Act*. Mr. Mollenhauer says that his former employer breached the terms of his employment contract. If that is, in fact, the case (and this issue has never been adjudicated one way or the other), he can pursue a claim for breach of contract in the B.C. Provincial Court (Small Claims Court) or, if his claim exceeds the \$25,000 monetary limit of that court, in the B.C. Supreme Court (which has unlimited monetary jurisdiction).

**ORDER**

11. The application for reconsideration of the Original Decision is refused. It follows that, pursuant to section 116(1)(b) of the *Act*, I order that the Original Decision be confirmed

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**