EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Herbert H. Maier operating as Maier & Company

(“ Maier ”)

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/097

DATE OF HEARING: April 20, 2000

DATE OF DECISION: May 2, 2000

DECISION

APPEARANCES

Herbert H. Maier	on his own behalf
Kevin Jeske, Agent	for Penny Jane Cartier
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Herbert H. Maier operating as Maier & Company ("Maier") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 27th, 2000 under file number ER 096-439 (the "Determination").

The Director's delegate determined that Maier terminated the employment of Penny Jane Cartier ("Cartier") without just cause and, accordingly, awarded her 4 weeks' wages as compensation for length of service. In addition, Ms. Cartier was awarded further compensation representing unused vacation time and accrued vacation pay. Maier was ordered to pay Cartier a total sum, including interest, of $6,967.54.

This appeal was heard at the Tribunal's offices in Vancouver on April 20th, 2000 at which time I heard the evidence and submissions of both Maier and Cartier. Neither party called any other witnesses and the Director did not appear at the appeal hearing.

ISSUE TO BE DECIDED

The central issue in this appeal is whether or not Maier had just cause to terminate Cartier's employment on or about June 30th, 1999. If there was just cause, Maier was not obliged to pay Cartier any compensation for length of service [see section 63(3)(c) of the *Act*].

Maier did not present any evidence or make any submissions regarding the award in favour of Cartier on account of vacation pay.

EVIDENCE AND ANALYSIS

Maier is a barrister and solicitor. He is a sole practitioner located in Surrey, B.C. At the time of her termination, Ms. Cartier was on sick leave from her employment but remained an "employee" of Maier since she was away from work on an authorized sick leave--see section 1(d) definition of "employee". Cartier had formerly been the only staff member in Mr. Maier's office.

Maier testified that while Cartier was, for the most part, an excellent worker, he did have some concerns regarding late arrivals/early departures from work. This concern, however, was never formalized into a specific written, or even verbal warning. Ms. Cartier, for her part, maintains that she was always a diligent and productive worker but that the workload in Mr. Maier's office was simply too much for a single employee.

In mid-1998, Cartier's workweek was reduced from 5 to 4 days per week; there was no proportionate reduction in her monthly salary although, according to Maier, there was an expectation that she would stay late on certain days as the work demands required.

According to Maier, in late April 1999, Cartier handed Maier a personal injury file and noted that the "limitation period" had passed without a court action having been commenced; the limitation period had apparently expired one month earlier. All civil actions are governed by various "limitation periods"; in general (although there are a number of exceptions to this principle) once the applicable limitation period expires, a party loses their right to sue the party who has caused them loss or damage. Maier testified that the problem with this particular file is that the limitation date was never recorded in the office's "master" limitation list. I understand that it was Maier's practice not to commence an action when first retained but rather to file court proceedings only if the client's claim could not be settled. Ms. Cartier attributed this practice to the fact that most civil claims were undertaken by Maier on a contingency fee basis with Maier agreeing to underwrite the interim costs (including filing fees) and thus actions were held in abeyance so that Maier would not have to incur costs on his own account pending settlement.

In any event, two days after being informed about the missed limitation period, Cartier handed Maier a physician's note and stated that she would be away, commencing immediately, on sick leave for an extended period. The medical note, dated April 26th, 1999, simply states that Cartier "was found to be unfit for work because of [a] peptic ulcer" and that she would be disabled for a 6- to 8-week period. Maier granted Cartier's leave request and fully expected that she would return to work in 6 to 8 weeks' time. Maier testified that he did not report the missed limitation period to his insurer. Rather he settled the matter directly with his client and obtained from the client a full release in exchange for a payment by him of slightly less than $3000.

In a written submission to the Tribunal dated March 22nd, 2000 Maier indicated that "I have determined that I will 'set off' the financial loss incurred on my part as a result of the missed limitation date, which I intend to enforce via a Small Claims Division of the Provincial Court of British Columbia" [sic]. Although, at the appeal hearing, Maier did not ask that I make such an "set off" order, for the sake of completeness, I should observe that I consider Mr. Maier's position to be contrary to the provisions of section 21(1) of the *Act.*

Notwithstanding the missed limitation period--which Maier characterized as an act of "negligence" by Cartier--Maier testified that he did not decide to terminate Cartier when informed of the matter and that he fully expected her to return to work at the conclusion of her sick leave. Maier hired someone from a temporary help agency as an interim replacement for Ms. Cartier; that person lasted only one week following which another temporary replacement was hired as well as another inexperienced part-time assistant. During Ms. Cartier's sick leave, Maier directed a review of the some 35 to 40 active civil litigation files in his office to determine if there were any other actual or potential limitation problems. Apparently, one other file was

discovered where, although the limitation period had not passed, the file had not been recorded in the "master" list (*i.e.*, it was a potential problem, or as Maier characterized it, "a ticking time bomb"). *It was only upon the discovery of this second file that Maier determined to terminate Cartier's employment* and thus not allow her to return to work once her leave had ended.

It should be noted that throughout these proceedings Maier took the position that he only decided to terminate Cartier's employment following his office's "review" of all litigation files. Further, Maier consistently maintained in his written submissions (but not in his evidence before me) that several "limitation problems" were uncovered during this review:

- July 22nd, 1999 letter to Cartier: "...the substitute secretaries had to review all files to establish that all limitation dates had been properly diarized and recorded, and I dare add that *further missed limitations* were uncovered.";

- Notice of appeal filed February 21st, 2000: "...*further missed limitation dates* were uncovered after the complainant's leave of absence commenced..."; and

- March 22nd, 2000 submission to the Tribunal: "...subsequently, my temporary staff having discovered *further missed limitation entries,* I came to a determination that I had no choice [but to terminate Ms. Cartier]..."

(my *italics*)

Maier's present position is that he had no intention of terminating Ms. Cartier's employment until the one (and only one) further "limitation" problem was discovered during the office "audit" of all civil litigation files. I am somewhat troubled by Maier's present position in that this second "limitation" problem is not mentioned in any fashion in his June 30th, 1999 letter of termination forwarded to Ms. Cartier. Maier's June 30th letter refers to various alleged performance deficiencies and the first "missed limitation period" as grounds for termination but, tellingly, the second limitation problem is not mentioned at all even though, apparently, this was *the key event* that triggered Maier's decision to terminate Cartier. I wish to reiterate that Maier's position before me is that he only decided to terminate Cartier upon the discovery of the second "limitation" problem, however, the June 30th termination letter refers only to alleged events that occurred *prior to* Ms. Cartier's sick leave--events that Maier says did *not* give rise to a decision on his part to terminate Ms. Cartier's employment.

It is, of course, axiomatic, that the employer bears the burden of proving just cause for termination. Given the delegate's Determination that Maier did not have just cause, it remains Maier's burden on an appeal to the Tribunal to prove just cause. Unexcused absences and other performance deficiencies may constitute just cause for dismissal but rarely, if ever, in the absence of prior formal warnings. As previously noted, Maier never issued any such formal warnings to Cartier.

Individual acts of serious misconduct (for example, theft or gross insubordination) may justify termination, even in the absence of a prior warning, but I am not satisfied that a single error (or even two errors) in recording a limitation period amounts to such serious misconduct. Furthermore, Ms. Cartier's version of events--which I find to be wholly credible--places most, if

not all of the blame for the "missed limitation period" on Maier's shoulders. According to Cartier, the file in question "sat" (along with a several other files) on Maier's desk for some 6 to 8 months during which time Cartier repeatedly reminded Maier about the file (since the client was calling the office from time to time to inquire about her claim) only to have Maier reassure her: "Not too worry, I'll settle this one". It was Maier who brought the file to Cartier's attention (not the other way around) with Maier noting that the limitation period had expired. Cartier says--and I accept her uncontradicted evidence--that Maier at no time instructed her to prepare or file a writ of summons with respect to this particular file.

Ms. Cartier uncontradicted testimony is that during the 4 years of her employment by Maier, the office complement decreased from 2 full-time and 1 part-time employees to a single employee, namely, Cartier. Cartier's position is that she simply could not complete all of her assigned tasks (despite working overtime hours without additional pay) due to the heavy workload and absence of any other staff assistance. Due to her heavy workload and the ensuing work-related stress, Cartier submitted her resignation in mid-November 1997 only to withdraw her resignation after Maier, who stated he was very satisfied with her work, asked her to continue. During her tenure, Cartier received regular salary increases and, as previously noted, was never formally (or informally) warned about her work performance.

To summarize, I am not satisfied that Maier has discharged his burden of proving just cause for termination. I have a very real doubt as to whether the "fault" for the missed limitation period lies with Ms. Cartier. Even if she did fail to record one or two particular files in the office's "master" limitation calendar, I do not consider those isolated events to constitute just cause for termination. As for her work performance and attendance, I am not satisfied that Maier has proven any performance deficiencies and, in any event, in the absence of any prior warning regarding her performance or attendance, I do not consider that Maier has met his burden of proving just cause based on poor work performance. Indeed, on balance, the evidence before me suggests that Cartier was a dedicated and entirely competent employee.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **$6,967.54** together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal