EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C.113

\- by -

Herbert H. Maier operating as Maier & Company
(" Maier ")

\- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: C. L. Roberts

FILE No: 2000/349

DATE OF DECISION: July 14, 2000

DECISION

This is a decision based on written submissions by Herbert H. Maier, on behalf of Maier & Company, Penny J. Cartier on her own behalf, and Steve Mattoo on behalf of the Director of Employment Standards.

OVERVIEW

This is an application by Herbert H. Maier operating as Maier & Company ("Maier"), under Section 116(2) of the *Employment Standards Act* ("the *Act*"), for a reconsideration of Decision #BC EST #D172/00 (the "Original Decision") which was issued by the Tribunal on May 2, 2000.

The Original Decision confirmed a Determination made by a delegate of the Director of Employment Standards on January 27, 2000. The Director's delegate found that Maier had terminated Penny Cartier ("Cartier") without cause, and awarded her compensation for length of service in the amount of $6,967.54.

The Tribunal found, as did the Director's delegate, that Maier failed to discharge the burden of proving just cause for the termination, and dismissed the appeal.

GROUNDS FOR REVIEW

Maier sets out the following grounds for the reconsideration:

1) the applicable law and the *Act* mandate that the Tribunal inquire into an employee's other employment or other income for the notice period, and further information and evidence is available now in that regard;

2) the employee's admission that she was responsible for the preparation of "standard Writs", and the fact that she did not prepare one in the case at hand, is more than sufficient to satisfy a civil standard of proof that she was grossly negligent, and such, does not justify calling into question the credibility of an employer in that regard;

3) the Tribunal did not have a jurisdiction in that the employee did not comply with s. 74(3) of the *Act*, in that her complaint was not filed within 6 months after the last day of employment, that latter date being the 27th day of April, 1999;

4) that the adjudicator failed to advise the employer of the right to a set off in respect to the monies expended on the part of the employer as a result of the employee's negligence, the employer being under the obvious misapprehension that same would have to be subject of a claim in the Small Claims Division of the Provincial Court of British Columbia, the *Act* being silent in that regard; and

5) that the adjudicator erred in law in finding that an employees' failure to discharge a fundamental requirement of her employment, that is to say, a failure to diarize limitation

periods, one of which resulted in financial loss to the employer, and one of which could have resulted in further financial loss to the employer, does not constitute just cause for termination.

In a subsequent submission dated June 19, 2000, Maier acknowledged that he was in error in his argument on issue number 3, and did not pursue that ground of appeal.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (*Milan Holdings Ltd*. (BC EST #D313/98). At the first stage, the Tribunal decides whether the matters raised in the application in fact warrant reconsideration. In deciding this question, the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator at first instance. However, the primary factor weighing in favor of reconsideration is 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. (*Milan Holdings*, p. 7)

The Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law (*Bicchieri Enterprises Ltd.* (BC EST #D335/96).

The scope of review on reconsideration is a narrow one (see *Zoltan Kiss* BC EST #D122/96), and include:

- failure by the adjudicator to comply with the principles of natural justice,
- mistake in stating the facts,
- failure to be consistent with other decisions which are not distinguishable on the facts,
- significant and serious new evidence that would have led the adjudicator to a different decision,
- misunderstanding or a failure to deal with a significant issue in appeal, and
- a clerical error in the decision.

I will address each of Maier's grounds for reconsideration in light of these principles.

1) The Determination was that Cartier was dismissed without notice. The *Act* requires an employee to be paid compensation for length of service in those instances. As there was no

"notice period," there is nothing for the Tribunal to inquire into even assuming it was under a duty to do so.

2) This issue was fully argued before the adjudicator on appeal. The argument is an attempt to have the Tribunal "re-weigh" that evidence, and, pursuant to *Milan*, is not a basis upon which the reconsideration power will be exercised.

3) Maier says that the adjudicator "indicated, or at least implied, that a set off could have been available to me..", and contends that he erred in failing to advise him of that. The adjudicator in fact says no such thing. He states that, although Maier did not ask that he make a "set off" order in respect of a financial loss he allegedly incurred as a result of Cartier's actions, "I should observe that I consider Mr. Maier's position to be contrary to the provisions of section 21(1) of the *Act*."

Maier has put forward no basis on which the reconsideration power should be exercised.

4) Maier contends that the adjudicator erred in law in finding that an employee's failure to discharge a fundamental requirement of her employment does not constitute just cause for termination. What the adjudicator said is as follows:

> 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.

The adjudicator found that missing one, or even two limitation periods did not constitute serious misconduct. More fundamentally however, the adjudicator preferred Cartier's evidence that the responsibility for the error rested with Maier. That finding does not constitute a breach of natural justice, new evidence, or a fundamental error of law for which a reconsideration will be granted.

ORDER

I Order, under Section 116(1) of the *Act*, that the application for reconsideration is dismissed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal