

**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 -

Just'n Time Communications Ltd.  
("Just'n Time")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood

**FILE NOS.:** 1999/157

**DATE OF HEARING:** June 18 1999

**DATE OF DECISION:** June 28, 1999

## DECISION

### APPEARANCES

For Just'n Time Communications Ltd.  
Appearing on his own behalf

Steven Manuel  
David E. Martin

### OVERVIEW

Just'n Time Communications Ltd. ("Just'n Time", also, "the employer") appeals a Determination by a delegate of the Director of Employment Standards dated February 22, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the "Act").

The Determination orders Just'n Time to pay David E. Martin wages of \$1,086.89, with vacation pay and interest on top of that. The delegate considered whether he should exercise discretion and not proceed with Martin's claim for wages (the "Complaint"), the employer alleging theft, but he has found that, while cell phones may indeed be missing, there is insufficient evidence that it is the result of some deliberate act on Martin's part. The delegate then goes on to conclude that the mere loss of the phones is a cost of doing business which cannot be passed on to the Complainant as it is contrary to section 21 of the *Act*.

Just'n Time appeals the Determination and complains that the evidence does clearly show that Martin took the telephones, or is at least responsible for the lost phones. The employer advises that Martin has now been charged with theft. And it is said that Martin is responsible for them under his employment contract and that Just'n Time is entitled to be reimbursed for the missing telephones under its agreement with Martin.

### ISSUES TO BE DECIDED

The sole issue before me is whether or not the employer is entitled to withhold commissions earned by Martin for reason of the missing telephones.

### FACTS

Just'n Time sells cellular telephones and cell phone accessories. It has two stores. Martin worked for commissions as a salesperson in one of the two stores.

Martin exchanged the faulty telephones that customers brought in to the store and replaced them with new phones. That required him to activate the new telephones and deactivate the

problem phone. All of that is done through Cantel -- AT &T. And it requires that the salesperson handling the exchange give both an agent code and his or her Personal Identification Number ("PIN").

A Service Report is to be filled out by the salesperson handling the exchange. The practice at Just'n Time is that when a telephone is returned to the store and is faulty, it is to be wrapped with that Sales Report and an elastic band and put in a back room. The telephones are not under lock and key and several people have access to that room.

Six empty telephone boxes were found at the Just'n Time store where Martin worked. Finding that odd, Just'n Time checked each of the serial numbers listed on the boxes against records kept by Cantel – AT&T. That company's records show that telephones with those serial numbers replaced other phones, were active, and that each was activated by a person using Martin's PIN. The deactivated telephones have never been found.

Just'n Time advises that faulty, deactivated telephones are of no value to anyone but it in that it can return the telephone to Cantel – AT&T or, in some cases, its manufacturer, for a refund. Each of the missing telephones is worth about \$300 to the employer.

Steve Manuel of Just'n Time has contacted Surrey RCMP and has charged Martin with theft. But that is of no importance to the appeal.

Manuel is of the view that even if someone other than Martin took the missing telephones, that Martin is still responsible for them and that he must pay Just'n Time the cost of the telephones. In that regard, Manuel claims that the employment contract provides for that but he does not show me the agreement which is said to exist.

## **ANALYSIS**

What I must decide is whether or not the appellant has met the burden for persuading the Tribunal that the Determination ought to be varied or cancelled for reason of an error in fact or in law.

The facts as I have found them are in all important respects just as found by the delegate. I also find that the delegate is correct in his application of the law.

In explaining his Determination, the delegate draws attention to section 21 of the *Act* and he points out that it prohibits the employer from passing on to the employee any losses which are incurred by the employer in the course of doing business. That section of the *Act* clearly states that the employer may not withhold any part of an employee's wages for any purpose. And it very clearly states that an employer may not require an employee to pay for any part of its business costs. Just'n Time has withheld wages and it wants Martin to pay what I am satisfied is a cost of doing business. That is contrary to the *Act*.

Section 21 is as follows:

- 21 (1) *Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*
- (2) *An employer must not require an employee to pay **any of the employer's business costs** except as permitted by the regulations.*
- (3) *Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.*

(my emphasis)

The employer claims that the employment contract allows it to deduct the value of the missing telephones. No contract is produced but that matters not. The provisions of the *Act* cannot be contracted out. They are minimum standards. An agreement between an employer and an employee that requires that the employee pay some part of an employer's business costs may have no force or effect by virtue of section 4 of the *Act*. That section is as follows:

*The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect subject to sections 43, 49, 61 and 69.*

Sections 43, 49, 61 and 69 refer to employees covered by collective agreements and as such they have no application in this case.

It is not clear to me that Martin acted to deprive Just'n Time of telephones but if the employer is convinced of it, it may turn to the courts for relief.

## **ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated February 22, 1999 be confirmed in the amount of \$1,167.93, plus whatever further interest has accrued pursuant to Section 88 of the *Act* since the date of issuance.

**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**