

**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 -

445864 B.C. Inc. operating The Cellular Store

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

<b>ADJUDICATOR:</b>	John M. Orr
<b>FILE No:</b>	1999/313
<b>DATE OF DECISION:</b>	August 13, 1999

## DECISION

### OVERVIEW

This is an appeal by 445864 B.C. Inc. operating The Cellular Store ("445864" or "the employer") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination dated April 26, 1999 (ER# 089008) by the Director of Employment Standards (the "Director").

The Director determined that an employee, Michelle Morton ("Morton") was dismissed from employment with 445864 without cause and without compensation. The Director also found that certain commission wages and vacation pay were also unpaid.

445864 does not appeal the findings of the Director in relation to wages and vacation pay. However, 445864 does appeal two issues relating to the conclusion of Morton's employment. Firstly, 445864 claims that Morton quit her employment or if there was a constructive dismissal there was just cause. Secondly, 445864 claims a set-off from wages for Morton's extensive personal use of a company telephone.

### ISSUE TO BE DECIDED

The two issues to be decided in this case are whether compensation for length of service is payable to Morton and whether an employer can claim a set-off against wages.

### FACTS AND ANALYSIS

#### Compensation for Length of Employment:

Morton is entitled to two weeks compensation for length of employment unless the employer shows that there was just cause for dismissal or that she terminated her own employment. On an appeal to the Tribunal the onus is also on the appellant to demonstrate that the Determination is wrong.

The Determination states that "*there is no evidence to establish just cause for termination*" but clearly the employer did submit reasons for termination. They stated that their primary point was that Morton quit before she could be terminated. On the evidence submitted by the employer there are substantial grounds to find that the employee quit her position because she had other employment which conflicted with her employment with 445864. The employer admits that if she had not quit she would have been fired and it appears that there were grounds upon which just cause could be founded. From the Determination it would appear that this situation was not explored or investigated by the Director's delegate.

While I acknowledge that the onus is on the employer at the appeal it is clear that the

Determination is in error in finding that there was "no evidence" to support dismissal when the employer's primary point was that the employee quit. There was real and substantial evidence that required further investigation and Determination. For this reason I am referring this issue back to the Director for further investigation.

The "set-off" claim:

The employer gave Morton the use of a phone for business purposes and it appears from the employer's submissions that Morton abused this privilege and used the phone extensively for personal use. The employer alleges that there was an agreement that any such personal use would be paid-for by the employee. The employer wishes to set off the amount owing by Morton for personal phone use against wages owing.

The employer submits that the *Law and Equity Act* of British Columbia recognises the equitable right of set-off and submits that the provisions of the *Act* are subject to this legislation. Section 21 of the *Act* provides:

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.*

Subsection 2 above does not apply to this case as the amounts claimed by the employer are not business expenses but rather personal use of company equipment.

The issue raised by the employer is that section 21(1) says that the prohibition against deductions is "*except as permitted ... by ... any other enactment of British Columbia*". The employer submits that the *Law and Equity Act* is such an enactment which specifically recognises the equitable right of set-off. While I agree with the employer that it is such an enactment I do not agree that the *Law and Equity Act* permits such a set-off.

The Tribunal has decided in a large number of cases that the sort of set-off claimed herein is not permitted by the *Act*. I am not persuaded that they are wrong and therefore conclude that the employer may not set-off or deduct the amount claimed for personal phone use against the wages admittedly owed to the employee in this case.

Accordingly I confirm the findings of the Director in relation to wages and vacation pay owing to Morton but refer the issue of compensation for length of service back to the Director for further investigation.

**ORDER**

I order, under section 115 of the *Act*, that, in so far as the Determination applies to compensation for length of service, it is referred back to the Director.

I further order, under section 115 of the *Act*, that in all other respects the Determination is confirmed.

**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**