

**EMPLOYMENT STANDARDS TRIBUNAL**

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

*Employment Standards Act*

-by-

Richard Nixon

(“Nixon”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/270

**DATE OF HEARING:** July 4, 1996

**DATE OF DECISION:** July 5, 1996

**DECISION**

**APPEARANCES**

Richard Nixon	on his own behalf
Bergie Wilson	for Coast Vancouver Airport Hotel Limited Partnership
No Appearance	for the Director of Employment Standards

**OVERVIEW**

This is an appeal brought by Richard Nixon (“Nixon”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 001767 issued by the Director of Employment Standards (the “Director”) on March 26, 1996. The Director determined that Coast Vancouver Airport Hotel Limited Partnership (“Coast Hotel”) had just cause to dismiss Nixon and, therefore, did not owe him any severance pay pursuant to section 63 of the *Act*. Nixon commenced his employment as a bartender with Coast Hotel on February 10th, 1995; he was terminated on or about February 16th, 1996. Accordingly, if Nixon was dismissed without cause, he is entitled to two weeks’ wages pursuant to section 63(2)(a) of the *Act*.

**FACTS**

Nixon worked as a bartender at the Coast Hotel. He usually worked an evening shift from 6:00 P.M. to 1:30 A.M. On or about February 16th, 1996 Nixon reported for work and was taken aside by the bar manager, Ms. Joanne Fedoruk. They proceeded to Ms. Fedoruk’s office whereupon she gave Nixon an undated letter (Exhibit 1) and indicated to Nixon that his employment was terminated, effective immediately. When Nixon inquired about severance pay, he was told that Coast Hotel did not believe that, in the circumstances, it was obliged to pay him any severance pay. Nixon testified, and this was not challenged by Coast Hotel, that the entire “termination meeting” lasted only a couple of minutes.

Exhibit 1, on Coast Hotel letterhead, reads as follows:

Richard Nixon

1. Changing his schedule without proper authorization - particularly to go to another job.  
It was brought to management's attention only because the staff member who was asked to covert [sic] his shift did so.  
  
Totally unacceptable to do this!
2. Time Cards:
  - Must be punched in/out not written in.
  - Lying on his time card saying he started at 5:00 pm when we have witnesses who say he started at 6:30 pm
  - No time recorded for last night's shift (February 15-16)
  - Punched out on Colleen's card, wrote in his starting time  
Again not acceptable.
3. Constant shortages of money that is not being paid back i.e. \$100.00, \$17.00 and last night \$12.00.
4. Securing rooms at the hotel under the pretence of receiving the staff rate and giving the keys to friends to use.

In addition to the grounds alleged in Exhibit 1, Coast Hotel also alleged before me that it had just cause to terminate Nixon because, on one occasion, the night's cash receipts for Nixon's shift were lost.

### **ISSUES TO BE DECIDED**

Did Coast Hotel have just cause to terminate Nixon?

### **ANALYSIS**

I am satisfied on the evidence before me that Coast Hotel did not have just cause to terminate Nixon. I will now deal with the allegations Coast Hotel advanced before me to support its position that it had just cause to terminate.

#### *Unauthorized Schedule Change*

Nixon testified that the shift exchange in question (January 26th, 1996) was authorized by Lisa Sampaio, who was one of three persons authorized to approve shift changes. Bergie Wilson, the General Manager of the Coast Hotel, testified that Ms. Sampaio was authorized to approve shift changes and, as Sampaio did not testify at the appeal hearing, there is no evidence before me that

the shift change in question was not approved. In any event, I am not satisfied that a single instance of exchanging a shift amounts to just cause to terminate.

*Failing to Punching In/Out on Time Card*

Coast Hotel implemented a time card system for its employees several months after Nixon commenced his employment. The time clock and punch cards are located in a separate building from the bar where Nixon worked. I am satisfied that Nixon repeatedly failed to punch his time card at the beginning or end of his shift. Nixon's explanation for this behaviour is two-fold: first, that he simply forgot to punch in on some occasions; second, that rather be late (by going to the other building to punch in) he went directly to the bar and wrote in his start time later. While this behaviour is not laudable and was contrary to the employer's rules, I am not satisfied that, in this case, such behaviour constitutes just cause for dismissal.

This behaviour continued for several months and yet the employer took no concrete steps to ensure that the behaviour did not continue save that the bar manager repeatedly issued verbal "reminders". Nixon was *never* disciplined for this behaviour. In effect, the employer condoned Nixon's behaviour and, as a consequence, cannot now rely on that behaviour as a justification for dismissal.

As for the allegation that Nixon punched another employee's time card, I am satisfied that this single incident was an nonculpable error on Nixon's part. Nixon simply pulled and punched the wrong card. I am not satisfied that Nixon had any malevolent intent. I would also note that there is no evidence before me that the other employee was disciplined for this incident.

*Cash Shortages*

Before the start of each shift, the bartender obtains a cash drawer with a \$500 "float". At the end of the shift, the cash drawer is returned to a safe area and the night's cash and credit card receipts, along with tally sheet, are put into a bag and deposited into a drop box. I must say that I was not impressed with the employer's bar receipts audit/control system. For example, several Coast Hotel employees have access to the cash drawer once it has been returned to the safe area; neither the amount of the float nor the total cash/credit card receipts are independently verified by a third party. The \$100 shortage in the cash drawer float (which occurred, according to the bar manager Ms. Fedoruk, sometime in either late December 1995 or early January 1996) can be attributed to any number of actors--the bartender on the next shift could have taken the money as could a number of other employees; the float may simply have been miscounted at the end of the shift.

What the employer alleges against Nixon, in effect, is that he is a thief. Such a serious allegation calls for clear and cogent evidence. There is simply no evidence before me upon which I could conclude, on a balance of probabilities, that Nixon stole \$100 from the float.

As for the so-called "missing bag", Nixon testified, and the employer conceded that the front desk person (the drop box is apparently near the front desk of the hotel and the practice is for the front-desk attendant to witness the deposit of the bag into the drop box) specifically recalls seeing Nixon drop the bag in the secure drop box on the evening in question. As the entire bag subsequently went missing, I fail to see how this event can be attributed to Nixon. I would also point out that

this event occurred in late January 1996; there is no explanation as to why the employer waited until February 16th, 1996 to take any concrete action against Nixon arising from this matter.

As for the two shortages in the evenings' receipts (\$12 and \$17), I am advised that such shortages occasionally occur and there is no evidence before me that other employees have been terminated in similar circumstances. Indeed, the employer apparently does not consider that such shortages justify termination as it has implemented a policy whereby the bartender in question must repay any shortages noted. I do not consider that two cash shortages, occurring within a period of one year of employment, constitutes just cause for dismissal. Nixon advanced several innocent (and I should say, uncontradicted) explanations as to why there might be a shortage--from ringing in the wrong amount in the till to misrecording a credit card transaction.

*Misusing the Staff Hotel Rate Policy*

Coast Hotel apparently (I say apparently, because a copy of the policy was not produced at the hearing) has a policy of making rooms available for staff members at a preferred rate. This rate is not supposed to be made available to friends or associates. Nixon testified a friend called him to say that, due to a car breakdown, he was stranded in Vancouver. Nixon then contacted the front desk night auditor, Gordon Murray, and asked if a room could be made available to Nixon's friend at the staff rate. Mr. Murray obliged and all other arrangements were made directly between Nixon's friend and Mr. Murray. There is no contrary evidence before me--Murray was not called as a witness by the employer. Again, as with the previous matters, this event took place several weeks prior to Nixon's termination and yet was only raised with Nixon during his termination interview.

*Summary*

In my view, Coast Hotel did not have just cause to terminate Nixon and, accordingly, Nixon is entitled to severance pay equivalent to two weeks' wages. Nixon testified that he typically worked a 35 hour week; his hourly wage was \$10. Nixon also earned tips but I am not prepared to make a monetary order that reflects tips because "gratuities" are specifically excluded from the definition of "wages" in section 1 of the *Act*. Thus, Nixon is entitled to severance pay calculated as follows:

$$\text{\$10 per hour} \times \text{35 hours per week} \times \text{2 weeks} = \text{\$700.}$$

**ORDER**

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 001767 be varied and that an amended Determination be issued forthwith as against Coast Vancouver Airport Hotel Limited Partnership in the amount of \$700 together with interest to be calculated by the Director in accordance with section 88 of the *Act*.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**