

**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 -

Wayne White

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** James Wolfgang

**FILE NO.:** 1999/128

**DATE OF HEARING:** May 25, 1999

**DATE OF DECISION:** June 18, 1999

**DECISION**

**APPEARANCES**

Wayne White	for himself
Patricia Bouchard	for White
Lana Thibeau	for White
Cindy Summers	for White
Terry Visia	for White
Liz Jones	for Coast Hospitality Inn
Dale Holliday	for Coast Hospitality Inn
Ian MacNeill	for the Director

**OVERVIEW**

This is an appeal by Wayne White pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination dated February 12, 1999 issued by a delegate of the Director of Employment Standards. Wayne White (White) claims he was terminated without proper cause for a window breaking incident at the Beer and Wine Store adjacent to the hotel.

The delegate felt the evidence points to White as the person responsible for breaking the window in the Beer and Wine Store. This was considered gross misconduct and the employer had just cause to terminate him. The case was closed with no compensation to be paid. The delegate did not find any apparent motive for White to have broken the window.

White appealed the Determination on the grounds he did not break the window and therefore had been improperly discharged. He is seeking to have his name cleared and an apology made to him and published in the Alberni Valley Times newspaper. He also wants a letter of recommendation from the manager of the hotel. He is not seeking to be rehired to his position.

I conducted a hearing and took evidence from those in attendance.

**ISSUES TO BE DECIDED**

Was White properly discharged? If not, what relief is available?

**FACTS**

White was employed as a night janitor at the Coast Hospitality Inn in Port Alberni from April 1992 until June 25, 1998. He worked 24 to 32 hours per week on a 4 days on, 4 days off shift.

White claims on June 25, 1998, he started helping the kitchen staff at 05:55, which was not part of his normal duties. One of the kitchen staff was in the kitchen before 06:00 and White spoke with her. He cleaned the pig skewer, cleaned around the dishwasher area and loaded and turned on the dishwasher. He then went downstairs and brought up some dry goods. He claims he put ice in the sink, filled the creamers for the waitress that was coming on shift and then went downstairs to do some cleaning.

Early that morning someone broke a window in the Beer and Wine Store adjacent to the hotel. At 06:11:26 the security camera records a person checking the street by the main door of the Beer and Wine Store and then going off camera to the right. Approximately 30 seconds later that person returns and walks in front of the side window and goes off camera to the left. 30 seconds later he returns and again walks in front of the side window, turns and walks off camera again. Shortly after the window is broken and an object identified as a rock appears on the tape. The person then appears on camera at 06:14:04 and runs toward the hotel. At no time do we see the rock being thrown or the person who threw the rock at the time of the incident.

At 06:14:03 the security alarm sounded and the police were called. White was working downstairs when contacted by the desk clerk to investigate the incident. He came upstairs and went across the parking lot to the Beer and Wine Store.

Jodi and Surinder Rai, the operators of the convenience store and laundromat across the street, observed two teenagers in the hotel parking lot at the time the alarm went off. Mr. Jodi Rai (Rai) left his store to catch the teenagers but could not find them. The Rais did not attend the hearing, however Surinder Rai provided a letter outlining her recollection of the events on the morning the window was broken. Mrs. Rai's letter states:

On Thursday, July (I believe this to be an error and should read June) 25, 1998 at approximately 6:00 a.m., I, Surinder Rai, heard the sound of glass breaking. Next I heard the alarm sound from the Beer and Wine Store. I looked that way and saw a guy running toward the Coast Hotel. Then I saw another guy waiting on a bike in the parking lot of the restaurant. By the time I told my husband, Jodi Rai, and he ran outside to look, the two guys were both on one bike and turned into the back alley. The guy on the back was wearing a yellow raincoat with a hood on his head. Jodi went after them in a truck but could not find them anywhere in the alley. He drove around a couple of blocks and came back to the Beer and Wine Store. At that time, the police, Barb and the janitor were there.

A letter from D. Baxter (Baxter), the desk clerk, dated July 18, 1998 states, in part:

What I remember is hearing the alarm while I was working near the switchboard checking in-coming reservations for the day. When I heard the alarm I went into the dining room, saw that the alarm was indeed flashing at the Beer and Wine Store, noticed two young boys on the driveway near the dining room exit door. They were facing the alley which runs from Redford to Morton streets, paying no attention at all to the alarm, calmly preparing to ride double. I then went to the kitchen to see if you were there. When I asked Gloria about your whereabouts she kept on working at the grill and said that she had "no idea". I then returned to the desk to call downstairs extensions and heard you at the bottom of the inside stairs leading to the lobby. You came up, jogged across to the beer and wine. I saw this because I had returned to see what I could see from the dining room. The police and Barb arrived moments later.

Shortly after, White appears on camera at 06:16:36 coming from the hotel and searches the area. The police arrive at 06:17:36 and White speaks to them. Rai arrives after unsuccessfully looking for the two teenagers. He speaks briefly with the police and returns to his convenience store directly across the street. The manager of the Beer and Wine Store arrives on the scene less than six minutes after the alarm went off. White went back to the hotel and completed his work and left about 07:30.

The two teenagers seen by the owners of the convenience store and the hotel staff do not appear in any of the camera shots. They apparently did not enter the parking lot from the street entrance, as they would have appeared on the camera. The police indicated they were going to the store and were not involved. White claims the police did not check out the teenagers until later, after he had laid charges against the police.

The assistant manager of the hotel notified White at home not to report for work and that the police were looking for him. He went to the police station and was questioned. The police advised White they had enough evidence to charge him. The police offered him a chance to plead guilty and he would not have to go to court. There would be no record and they would try and get his job back White repeatedly claimed he did not break the window. White left the police station and hired a lawyer. The police constable responsible for the file was not available until the next day. White met with his lawyer at the police station and was informed by the constable that they did not have the proper equipment to view the tape, however they could view it on an ordinary video machine at regular speed.

The security camera is a time delay camera and viewing it at regular speed accelerates the motion making it difficult to clearly see the events. It also uses black and white tape so colours are not identified. They viewed the tape approximately three times and, while White agreed the person in the video looked like him, he did not break the window. The

officer said they could send the tape to Victoria and have blowups done. White and the lawyer agreed to this and left.

The hotel manager and bookkeeper viewed the video from the security camera and identified White as the person on the video before the window is broken. The bookkeeper is White's sister in law. We have no evidence that either the Rais or Baxter were requested to view the tape. White later phoned the hotel manager to arrange to view the tape on a different machine at the hotel. The police allowed White to view the tape once and they refused a request by White to view it again. The officer again said they would send the tape to Victoria for blowups and they would be back in about two weeks

The hotel suspended White July 25 and he remained suspended while the hotel was waiting for the police blowups of the tape. They terminated him on July 10, 1998 when the pictures did not come. According to White the tapes were not sent to Victoria nor were any blowups made.

On July 10, 1998 White was advised by telephone to pick up his vacation pay and separation papers. During that conversation he asked the manager if he was fired and she said "Yes, because the video looks bad for you". He asked if he could have his job back if he was found not guilty. White indicated the manager told him if he came back he would be on probation as his work had been slipping and was not up to standard. She asked if the assistant manager had spoken to him about his work and White said he had not. White then asked for a letter from the manager indicating what complaints and problems they had with him. White indicates she agreed to do so. White met with the assistant manager and, according to White, he did not have any knowledge of any complaints regarding his work performance.

White has charged the RCMP with a number of complaints. He has accused the Port Alberni Detachment with making false accusations, failing to conduct a proper investigation, causing the complainant to lose his job, and denying the complainant the chance to defend himself in court. That case is proceeding.

The witnesses for White felt quite strongly that it would be out of character for White to have broken the window. There was a suggestion there was more evidence available but the fear of reprisal had prevented it from coming forward.

The hotel took the position they had acted without bias and believe the camera shows White to be the person who broke the window. They indicated even if the Tribunal finds White was improperly terminated they would not rehire him.

## **ANALYSIS**

Is there any doubt White is the person appearing on the security camera before the window is broken? There is a remarkable similarity between the first person and White if

they are not the same person. A careful review of the security camera tape on a frame-by-frame basis offers some information.

While a strong resemblance exists between the person who appears on camera before the window is broken and White they are not identical. They are about the same height and build however I believe the first person may be slightly taller and larger. Their clothes are similar but differences appear. The cap on the first person is a lighter colour than White's. The shirt styles are different with White wearing what appears to be a western style shirt with two pockets with buttons. That is not evident on the first person. The first person is wearing his shirt out of his pants with the sleeves down but not buttoned. White is wearing his shirt tucked in and his sleeves are rolled up.

The pants of the first person appear to be lighter coloured and baggier. The shoes are similar but the first person has lighter coloured shoes and they appear slightly larger. White appears to have something dark in his right back pocket. This is not evident on the first person although there is a fairly good image of the back view of the first person. They each appear to have a different posture when running. We have good images of them running at 06:14:04 and at 06:17:30 respectively.

White had no apparent motive to break the window. The regular janitor was to retire in January and White expected to get the full time position. There were no complaints on his record concerning his work. It was only after he had been terminated he became aware the manager had some concerns about his work. The assistant manager and the other staff did not support this. The staff gave evidence his work record was very good and he was always willing to help others, even if it was not his job to do so.

Having worked there for over 6 years White knew the location of the security cameras. It would seem highly unlikely he would walk in front of the camera several times and then break the window. Both eyewitnesses were able to identify that two teenagers were in the parking lot at the time of the incident. If White were aware the teenagers were in the parking lot why would he go out to the street to check if anyone was around, go back toward the parking lot, and then return and break the window?

Finally, White claims to have known the Rais for many years and there would be a risk of being seen from the convenience store if he broke the window, knowing the alarm would sound.

The police indicated the teenagers were going to the convenience store but were observed by at least two witnesses in the hotel parking lot across the street when the window was broken at 06:14:04. If the teenagers were going to the store, as indicated by the police, why did they not cross the street and wait for the store to open? It was reported the store did not open until 06:30.

The police claim they checked the teenagers and they were not involved. For White to break the window he would have had to pass by them when coming from the hotel to the Beer and Wine Store and run past them again when returning to the hotel. We have no

evidence from the police that the teenagers identified White or informed the police that anyone else ran across the parking lot. I find it difficult to believe White would walk in plain view of the teenagers over to the Beer and Wine Store, break the window and run back past them.

Surinder Rai indicates when she first saw them, one teenager was standing with the bicycle and one was running toward the parking lot of the hotel. They came together and rode off on one bicycle. When Baxter saw them they were together and preparing to leave without hurrying. This follows as Baxter came from the switchboard to the dining room after the alarm went would off. Rai took a truck and drove around the area and was unable to locate them yet the evidence was they left the parking lot at a slow pace appearing to be in no hurry.

As there are no charges pending from either the hotel or the police, White has been unable to get still photo blowups of the tapes. The police indicate their file is closed and they are not prepared to provide any more information. White claims he cannot afford to have the work done privately. He had also requested a lie detector test, which was denied.

The security camera did not pick up the actual breaking of the window. Both the window that was broken and the person throwing the rock are off camera.

The delegate found the most compelling evidence against White was from his sister-in-law who also worked at the hotel. When she reviewed the tape she believed White was the person in the picture before the window was broken. She was not informed of the reason for viewing the tape before seeing it.

The person working in the kitchen said White was missing for 5 minutes and the hotel believes that was the time the window was broken and White had sufficient time to have done it. No one has disputed that White did a number of jobs in the kitchen before going down stairs. White claims he started work in the kitchen at 05:55. He would have had to leave the kitchen shortly after 06:10 to go downstairs, cross the parking lot and be on camera at the Beer and Wine Store at 06:11:26. If the times indicted are correct, I believe the time period is too short for White to have left the hotel, break the window, return to the hotel, alter his appearance and respond to the call from the desk clerk. Unless further evidence is available, I believe there is reasonable doubt the person in the security tape before the window is broken is White.

The charge of gross misconduct is a serious one and we must be sure of the facts. There is doubt in my mind that White broke the window and, on the balance of probabilities, I do not believe he should have been terminated, at least until a more thorough investigation had taken place.

I therefore find that White has been terminated without proper notice and is entitled to compensation for length of service. The Director will have to determine the amount of compensation that is owed to White. The Tribunal is without jurisdiction to deal with the other matters requested by White.

**ORDER**

Pursuant to s. 115 of the *Act*, I order the Determination dated February 12, 1999 be cancelled.

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James Wolfgang  
Adjudicator  
Employment Standards Tribunal