Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *W. W. v. Canada Employment Insurance Commission,* 2016 SSTGDEI 61

Tribunal File Number: GE-15-2449

BETWEEN:

W. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

Strathcona Hotel of Victoria

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Teresa Day

HEARD ON: March 17, 2016

DATE OF DECISION: May 4, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

The hearing of this appeal proceeded by way of an in-person hearing in Victoria, BC on March 17, 2016. The Appellant attended the hearing with her counsel, Eric Pederson (Mr. Pederson), and an Amharic interpreter provided by the Social Security Tribunal of Canada, Tawolde Mehari. The Appellant's employer, Strathcona Hotel of Victoria, was added as a party to the appeal, and was represented at the hearing by D. O., Human Resources Director for Strathcona Hotel of Victoria (Ms. D. O.).

INTRODUCTION

[1] The Appellant made an initial application for regular employment insurance benefits (EI benefits) on January 22, 2013. On her application, the Appellant indicated she had been dismissed from her job as a housekeeper because her employer accused her of theft. The Respondent, the Canada Employment Insurance Commission (Commission), investigated why the Appellant was no longer employed and, on February 27, 2013, approved the Appellant's reason for separation from employment. The Appellant was paid EI benefits from January 20, 2013 to June 29, 2013.

[2] On April 10, 2013, the Appellant's employer, Strathcona Hotel of Victoria (the Strathcona), requested the Commission reconsider its decision to allow the Appellant's claim for EI benefits, as she had been terminated "for cause" because she was "caught stealing". On July 16, 2013, following further investigations, the Commission modified its decision and advised the Appellant that misconduct had been proven. As a result, the Appellant did not, in fact, qualify for the EI benefits she had received, which resulted in an overpayment in the amount of $2,283.00.

[3] On August 22, 2013, the Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal) and, on April 15, 2014, the Tribunal dismissed the Appellant's appeal. The Appellant appealed to the Appeal Division of the Tribunal and, on July 16, 2015, the Appeal Division issued its decision allowing the Appellant's appeal and ordering the case be returned to the General Division of the Tribunal for a new hearing.

[4] The hearing was held by way of an in-person hearing for the following reasons:

a) the fact that credibility would be a prevailing issue;

b) the fact that more than one party would be in attendance;

c) the fact that an interpreter would be present;

d) the fact that multiple participants, such as a witness, would be present;

e) the fact that the Appellant or other parties are represented;

f) the availability of videoconference in the area where the Appellant resides; and

g) this form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[5] Whether the Appellant is disqualified from receipt of EI benefits because she lost her employment by reason of her own misconduct.

THE LAW

[6] Subsection 30(1) of the *Employment Insurance Act* (EI Act) provides that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

[7] Subsection 30(2) of the EI Act stipulates that the disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the

disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

[8] The terms "employment" and "loss of employment" are defined in section 29 of the EI Act. Subsection 29(a) of the EI Act provides that for the purposes of sections 30 to 33, "employment" refers to any employment of the claimant within their qualifying period or their benefit period.

[9] Subsection 29(b) of the EI Act provides that for the purposes of sections 30 to 33, "loss of employment" includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers.

EVIDENCE

[10] The Appellant made an initial application for EI benefits on January 22, 2013 (GD2-63 to GD2-80) and advised that her last day of work was December 14, 2012, after which she was dismissed from her job as a housekeeper with the Strathcona. On the "Questionnaire: Fired (Dismissed)" completed as part of her application (GD2-69 to GD2-71), the Appellant indicated she was fired because her employer accused her of theft, which she did not admit to. The Appellant stated that she was falsely accused of taking items found in a garbage can and one item near the garbage can (GD2-69). According to the Appellant's statements on her application (at GD2-69 to GD2-70), she showed the items to her Housekeeping Manager, S. H. (Ms. S. H.) and asked Ms. S. H. what to do with them. When Ms. S. H. told the Appellant she could do whatever she wanted to do, the Appellant put the items in the staff room and they remained there until December 14, 2012. The Appellant was not charged with theft by the police (GD2-71).

[11] The Record of Employment (ROE) provided by the employer indicated the Appellant worked for the Strathcona up to December 14, 2012 and had accumulated 1,117 hours of insurable employment in the reporting period. According to employer, the reason for issuing the ROE was "Dismissal" (GD2-81).

[12] On February 27, 2013, an agent of the Commission spoke with a representative of the employer, B. E., Director of Human Resources (Ms. B. E.), regarding the reason the Appellant

was no longer working for the Strathcona, and documented the conversation in a Supplementary Record of Claim (GD2-82). The agent noted Ms. B. E.'s statements that the Appellant had been *dismissed without cause, was paid severance, and that there was no specific incident which led to her dismissal (emphasis added).*

[13] On February 27, 2013, the Commission wrote to the Strathcona and advised the employer it had approved the Appellant's claim for benefits because the employer did not provide enough information to prove that the Appellant lost her job because of her own misconduct (GD2-83).

[14] The Appellant established a claim for EI benefits effective January 20, 2013 and was paid EI benefits from January 20, 2013 to June 29, 2013 (GD2-106).

[15] The employer made a request for reconsideration on April 10, 2013 (GD2-85), stating:

> "W. *(sic)* W. was terminated for cause. She was caught stealing."

[16] On June 3, 2013, a different agent of the Commission telephoned Ms. B. E. about the employer's request for reconsideration and documented the call in a Supplementary Record of Claim (GD2-87). The agent noted Ms. B. E.'s statement that she made a mistake and was thinking of a different employee when she spoke with the Commission's agent in February 2013. The agent then noted Ms. B. E.'s description of the final incident that led to the Appellant's dismissal as follows (referring to the Appellant as the claimant in this instance):

> "The employer stated the final incident was claimant did not turn in items that were found in a room. The employer stated the claimant had worked for them for a while and was aware of the policy that if there is *(sic)* items found in a room they are to be turned in to the front desk. The employer stated this incident is on their video surveillance cameras as well as witnesses at the front desk. The employer stated the claimant was seen on camera trying to hide a bag and trying to hide the bag when leaving the hotel. Advised the employer that the claimant stated she placed these items in the lunchroom as per a conversation with the manager who stated do what you want with the items. The employer again stated the claimant was there long enough and knew the procedures with lost and found items. The employer stated the claimant left the hotel with items in her bag and was then dismissed."

[17] The agent asked Ms. B. E. about the statements made by the Appellant on the "Questionnaire: Fired (Dismissed)" completed as part of her application for EI benefits about (i)

feeling intimidated, harassed, bullied and discriminated against by the Housekeeping Manager and (ii) having her hours reduced (see GD2-70). The agent noted Ms. B. E.'s statements in response that (i) she was never advised by the Appellant about any situation with the Housekeeping Manager and (ii) the Strathcona's staffing needs are seasonal in nature and hours vary accordingly, something the Appellant was aware of after having worked there for a while (GD2-87).

[18] On June 28, 2013, the employer submitted the following documentation to the Commission:

(a) Covering letter from Ms. B. E. (GD2-88), in which she stated:

> "In regards to W. W. *(sic)* prior to her termination on December 14, 2012, we had a similar incident on October 15, 2012 where she was suspected of theft. At that time we were not able to prove that she indeed had taken any items despite strong suspicion. I personally at that time reviewed again our lost and found policy with W. W. *(sic)* to ensure that she understood how to handle any items found, left behind by our hotel guests."

(b) Ms. B. E.'s notes documenting the lead up to and dismissal of the Appellant on December 14, 2012 for "cause, theft and refusing to follow company policy" (GD2-89).

(c) Termination letter issued to the Appellant on December 14, 2012, which the Appellant refused to sign (GD2-90).

(d) The Strathcona's Lost and Found Policy (Revised February 20, 2012), which states in part:

> "All articles found on the premises must be turned into the front desk of the hotel. A front desk staff member will then log the item and place it in safe keeping. Any item of significant value including personal identification (wallet/credit card/drivers license etc) must be locked in the front office safe and every effort must be made to locate the owner of the missing item. Item(s) not claimed after 3 months may be claimed by the staff member who found the item. Any items not claimed by patron or by staff member will be donated to charity and copy of the items donated must be kept in the log book." (GD2-91)

[19] On June 7, 2013, the agent spoke with Ms. B. E. in order to obtain further information about the prior incident that occurred on October 15, 2012 and particulars of what items were taken by the Appellant on December 14, 2012. The agent documented their conversation in a Supplementary Record of Claim (GD2-92). With respect to the prior incident, the agent noted Ms. B. E.'s statements as follows (again referring to the Appellant as the claimant):

> "The employer stated on October 15, 2012 there was an incident that involved the claimant and another employee where there was a suspicion of theft. The employer stated there was a guest statement where they had made a purchase at the pharmacy and inside the plastic bag was *(sic)* some items including a phone charger. The employer stated the claimant instead of turning the items into the lost and found as per the policy made a decision to throw the items in the garbage. The employer stated an investigation was launched as in this area there is no video surveillance but the garbage's *(sic)* were checked and these items were not retrieved.
>
> The employer stated they could not prove that these items were taken and gave the benefit of the doubt to the claimant.
>
> The employer stated the claimant, the other employee and herself went over every policy regarding the lost and found policy at the hotel and what to do in the event an item is found. The employer stated the claimant understood.
>
> The employer stated when the claimant was hired she read and signed the lost and found policy."

[20] With respect to the items taken by the Appellant on December 14, 2012, the agent noted Ms. B. E.'s statements as follows:

> "The employer stated the items that were taken on the final incident were a backpack, shoes, shirt, and pants. The employer stated they have video surveillance showing the claimant leaving the hotel with a backpack that looked like there were items inside, not an empty bag but the employer cannot confirm if these items were inside the backpack or not."

[21] On June 19, 2013, the agent spoke with the Appellant by telephone and documented the call in a Supplementary Record of Claim (GD2-94). The agent noted the Appellant did not provide any details about the incident that occurred on October 15, 2012 or have any further information about the incident that occurred on December 14, 2012, but stated she knew and understood the employer's lost and found policy.

[22] By letter dated July 16, 2013, the Commission advised the Appellant that, as part of a request for reconsideration received from her employer, the Strathcona had provided new information regarding the reason for her dismissal, and that the Commission had now determined the Appellant was dismissed for misconduct with the meaning of the EI Act (GD2-100 to GD2-101). As a result, the Appellant was disqualified from payment of EI benefits because she lost her employment with the Strathcona due to her own misconduct. A Notice of Debt for an overpayment in the amount of $2,283.00 was issued to the Appellant on account of the disqualification (GD2-104).

[23] On August 22, 2013, the Appellant appealed to the Tribunal by filing a Notice of Appeal with detailed submissions on her reasons for the appeal (GD2-51 to GD2-55).

[24] In the employer's request to be added as a party to the Appellant's appeal (GD2-119), (which request was granted by the Tribunal on January 15, 2014 – see GD2-142), Ms. B. E. reiterated that there were two reasons for the Appellant's termination, namely:

1) "Did not follow company policy in regards to lost and found"
2) "Theft"

[25] The first hearing in this appeal took place on March 18, 2014. Two days later, on March 20, 2014, the employer submitted the following additional documents to the Tribunal:

(a) The Strathcona's Disciplinary Process (Revised March 6, 2013) (GD2-128).

(b) A letter dated December 13, 2012 from S. H. (Ms. S. H.), Executive Housekeeper (GD2-129), detailing her interactions with the Appellant in connection with the items found by the Appellant in hotel room 309. With respect to the employer's videotape surveillance, Ms. S. H. wrote:

> "I went to the Front Desk and I told (name redacted) to please watch out for these items and to let me know if they do not get turned in. I was sitting

> in the back of the Front Desk with (name redacted) at the time that the Housekeepers left for the day. I witnessed W. W. on the security camera come into the Lobby with the now full back pack. She sat on the chair with the full back pack, and then she left the property with the items.
>
> (Name redacted) and I then checked the security camera for W. W. coming in for the start of her shift. W. W. clearly did not have the back pack."

[26] Following the decision of the Appeal Division of the Tribunal referring the Appellant's appeal back to the General Division for a new hearing, the Tribunal invited all of the parties to make updated submissions and submit any additional evidence they intended to rely upon at the new hearing. Updated submissions were filed by the Appellant (RGD4) and the Commission (RGD5); and the employer submitted the video evidence from its security cameras.

At the Hearing on March 17, 2016

[27] At the opening of the hearing, the Member ruled that all non-party witnesses would be excluded from the hearing room except during their own testimony. The Appellant's husband was permitted to remain in the hearing room following his testimony.

(I) Testimony of the Appellant

[28] The Appellant testified that her first language is Amharic, and that she is able to understand English and speaks "a little", but when the subject matter is complicated, "I need an interpreter". The Appellant stated that her supervisor when she started working at the Strathcona in May 2005 was H. K. (Ms. H. K.), who also spoke Amharic. According to the Appellant, her language ability did not cause any problems for her at work, even after Ms. H. K. "was fired in April 2012" and the appellant then had non-Amharic speaking supervisors, namely J. C. and Ms. S. H. The Appellant stated that she was able to follow instructions and complete her paperwork in English but, when she was dismissed, she asked her husband to get involved and assist in the communications.

[29] The Appellant testified that she was aware the Strathcona had a lost and found policy, but when asked to read aloud in English a paragraph from the lost and found policy provided to the Commission by the Strathcona (GD2-91), the Appellant was unable to do so. The Appellant

stated she required someone like Ms. H. K. to read such documents to her and/or explain what they said. According to the Appellant, the lost and found policy was "never posted anywhere" and she "never saw it" it before she was terminated. The Appellant stated her understanding of the employer's lost and found policy was that if an item was found in a hotel room, it had to be brought to the front desk, with the exception of garbage (something that is dirty or disposable or something like a half used tube of toothpaste) or items found in the garbage. For an item found in a garbage container in a hotel room, the Appellant explained "if it is something useable, we take it to the staff room, otherwise it goes to the garbage."

[30] The Appellant testified that she once found a camera in a hotel room and "handed it over to the front desk" and "a reward gift was sent to me from America". The Appellant stated that she did occasionally show her supervisor an item she found and ask the supervisor what to do with it, and that if the supervisor said "I don't know", the Appellant put the item in the staff room.

[31] The Appellant produced the backpack the employer accused her of stealing and it was admitted into evidence at the hearing. The backpack was examined by the Member, who noted for the record that it was an ordinary black nylon backpack with no brand name apparent, was not in new condition, with ripped padding in the back and some stains on the surface.

[32] The Appellant testified that she found the backpack while she was cleaning room 302 on December 11, 2012. The Appellant stated that the backpack was inside the washroom garbage container and there were some dirty clothes in a plastic bag close to the garbage container. She collected them and, as she was putting them outside the room door, Ms. S. H. came by. The Appellant asked Ms. S. H. what to do with them and Ms. S. H. said "I don't know". According to the Appellant, Ms. S. H. did ***not*** instruct her to bring the items to the front desk, so "as usual, I took them to the staff room". The Appellant stated that she left the clothes on a chair in the staff room and took the backpack home with her at the end of the day.

[33] The Appellant stated that she "never" thought she might get fired for taking the backpack. The Appellant further stated that she did not think she was stealing because she had checked with Ms. S. H., and that she didn't try to hide the backpack when she left work for the day, walking right past the front desk and leaving through the front door of the Strathcona.

[34] The Appellant testified that she was supposed to start a pre-approved 6-week vacation upon finishing work on December 12, 2012 and, instead, she was fired at the end of that day. She stated she was not given any chance at all to explain her side of the story, but was asked to sign a letter, which she refused to sign because she did not understand its contents.

[35] With respect to the October 2012 incident, the Appellant testified that she recalled "getting in trouble", but stated she did nothing wrong, and that she was blamed when another housekeeper found some items in another room and asked the Appellant what to do with those items. According to the Appellant, she told the other housekeeper: "I don't know" and continued with her own work. However, the next day, Ms. S. H. accused the Appellant of taking the items and she was told to go home. After a couple of days, the Appellant and her husband met with Ms. B. E., at which time the Appellant was asked to return to work. The Appellant denied that the lost and found policy was discussed or reviewed during this meeting with Ms. B. E.

[36] When asked on cross-examination by Ms. D. O. if she had taken all of the items she found in the guestroom home with her or just the backpack, the Appellant stated that she took only the backpack. The Appellant repeated that she left the other items in the staff room for anyone else who might want them.

[37] When asked by the Member if she checked the backpack for personal items before taking it home with her, the Appellant said: "No". When asked if she had a supervisor or anyone else check the backpack for personal items before she left with it, the Appellant said: "No". The Appellant stated that she thought the backpack was empty because when she opened it up to put her work shoes in it to take them home, there was nothing inside. However, the Appellant acknowledged that there were compartments and zipper pockets both inside and on the exterior of the backpack that were not checked for personal items or identification that may have belonged to the hotel guest who left it behind – before she took the backpack home with her.

[38] When asked by the Member what she thought the consequences would be for an employee who did not follow the Strathcona's lost and found policy, the Appellant said "they would be punished if they took something they shouldn't have". When asked what the nature of that punishment would be, the Appellant responded "How would I know?"

(II) Testimony of the Appellant's witness: H. G.

[39] H. G. (Mr. H. G.) stated that he worked as a janitor for the Strathcona from 2003 to 2005 and again from 2010 to 2014.

[40] Mr. H. G. testified that he saw items in the staff room that were put there for the staff to take home. Mr. H. G. described these items as shoes and clothes, and stated that there was a "FREE" sign indicating the items could be taken. When asked if these items were things found in rooms after guests had checked out, Mr. H. G. said: "Maybe. I don't know." When asked if he ever heard of anyone getting in trouble for removing these items from the staff room, Mr. H. G. said: "No."

[41] When asked what he did if he found anything while he was working, Mr. H. G. said: "If I found anything at all – a wallet, a jacket – I take it to the front desk."

(III) Testimony of the Appellant's witness: H. K.

[42] Ms. H. K. stated that she worked for the Strathcona for 18 years and was the "Supervisor Assistant in Housekeeping" for 5 years, during which time she was the assistant to J. C., who was then the Manager of Housekeeping. Ms. H. K. further stated that she was "let go" on April 25, 2012 and told "they did not need me anymore".

[43] Ms. H. K. testified that she has known the Appellant since the Appellant started working at the Strathcona in 2005, and that the Appellant was a good and honest worker, with no incidents of theft or dishonesty. Ms. H. K. stated that the Appellant received a pair of gold earnings as a reward from a guest when she found a camera the guest had left behind and turned it in.

[44] With respect to the Appellant's language abilities, Ms. H. K. testified that sometimes the Appellant pretended that she understood English, saying "Yes, Yes" when she really didn't, and then Ms. H. K. had to explain to the Appellant in Ahmaric, such as when a guest had a question. Ms. H. K. further testified that the Appellant had difficulty reading English and Ms. H. K. had to read and explain printed items for her, including the Strathcona's lost and found policy.

[45] With respect to the Strathcona's lost and found policy, Ms. H. K. said the policy was that any items of value that were found, such as "a passport, gold, credit cards", were to be put at the front desk. Ms. H. K. was shown a copy of the lost and found policy provided to the Commission by the Strathcona (GD2-91) and responded: "This is the same thing. Yes". However, Ms. H. K. immediately went on to state that a half-used bottle of shampoo or tube of toothpaste did not need to be brought to the front desk, nor did anything that was found in the garbage containers in the rooms. According to Ms. H. K., if a housekeeper found some clothing in the garbage, they would have to show the Manager (J. C.) and she would say whether it had to be taken to the front desk or if the employee could have it. On weekends, when the Manager was off, Ms. H. K. was in charge and made that decision.

[46] Ms. H. K. testified that sometimes jackets, shoes, hats, shirts and t-shirts were found in the garbage and it was common practice for these items to be put in the staff room for any staff member who might want them to take them. According to Ms. H. K., the lost and found policy never changed during her 18 years at the Strathcona (although she said it was reviewed periodically at staff meetings), and no one ever got in trouble for taking a discarded item that had been put in the staff room.

(IV) Testimony of the Appellant's witness: J. C.

[47] J. C. (Ms. J. C.) stated that she worked for the Strathcona for "23 or 24 years" and was Head Housekeeper for approximately 20 years until her last day of work on July 27, 2012.

[48] Ms. J. C. testified that she was the Appellant's Manager when the Appellant was hired in May 2005, and stated that Ms. H. K. was in charge when she was off on weekends and vacation. Ms. J. C. described the Appellant as "honest" and "one of my best workers", and stated the Appellant had a "strong work ethic", was never late, and had no incidents of theft or taking items home that she shouldn't have.

[49] With respect to the Appellant's language abilities, Ms. J. C. testified that the Appellant was "not very good with the English language" and would say "Yes, Yes" when she didn't really understand, so Ms. J. C. would ask Ms. H. K. to translate for the Appellant when something important had to be communicated. Ms. J. C. stated the Appellant could function at work and

communicate with guests “on a low level basis”, but also stated that she had to speak slowly to the Appellant when instructing her about a particular room.

[50] Ms. J. C. was shown a copy of the lost and found policy provided to the Commission by the Strathcona (GD2-91) and responded: “I’ve never seen this document.” Ms. J. C. then read the document and stated it was “pretty much” her understanding of the employer’s lost and found policy except that there was a lost and found that Ms. J. C. logged and kept under lock and key, until Ms. B. E. began working at the Strathcona and the policy changed such that lost and found items were to be kept at the front desk and not by the Head Housekeeper.

[51] With respect to the Strathcona’s lost and found policy, Ms. J. C. testified that if an item was found in a guest room, unless it was in the garbage container, it was to be taken to the front desk. If an item was found in a garbage container in a guest room, the housekeeper brought the item to her and she (Ms. J. C.) decided if the item was to go to the front desk or if the housekeeper could take the item home. If the housekeeper didn’t want the discarded item, it was put in the staff room for another staff member to take if they wished. According to Ms. J. C., “this was because we didn’t have a lot of space to store things”. Ms. J. C. stated that if she was not at work because it was the weekend or she was on vacation, Ms. H. K. made the decision about what was to be done with discarded items found in the garbage. Ms. J. C. further stated that, during her 23 or 24 years with the Strathcona, no employee was ever punished for taking items home that had been put in the staff room.

[52] Ms. J. C. testified that the Appellant would have understood what the practice was if she found something in the garbage and that she (Ms. J. C.) had “no reason to think otherwise”.

[53] When asked what would be the practice for an item found “in close proximity” to the garbage container, Ms. J. C. stated the item was to be “brought to me to make the call”.

[54] When asked if an item found in the garbage “such as a damaged purse” would be searched before an employee was allowed to take it home or put it in the staff room, Ms. J. C. stated: “Yes”. Ms. J. C. testified that she would have gone through the item “for anything of value” even if she was going to let the staff have it, but that “most of the time” the discarded item had been “cleaned out”.

(V) Testimony of the Appellant's witness: Y. K.

[55] Y. K. (Mr. Y. K.) stated that he is the Appellant's husband.

[56] Mr. Y. K. testified that he had to involve himself at the hotel "many times" on behalf of the Appellant, including two incidents in October 2012. According to Mr. Y. K., in early October 2012, the Appellant was upset because Ms. S. H. decided the housekeepers could not have a break. Mr. Y. K. stated he went to the hotel and spoke with Ms. B. E., who agreed the housekeepers should get a break, although he also stated that things "never really improved" afterwards. Then there was the incident on October 15, 2012, when the Appellant was "accused of taking some things from the garbage" and was sent home with pay because "HR was not around to investigate". Mr. Y. K. stated he went with the Appellant to a meeting with Ms. B. E. "a couple of days later", at which time they were told the investigation "didn't find anything" and that the Appellant could return to work.

[57] Mr. Y. K. was shown a copy of the lost and found policy provided to the Commission by the Strathcona (GD2-91) and asked if it was discussed at the October 2012 meeting with Ms. B. E. Mr. Y. K. responded: "No" and said he had never seen the document before. Mr. Y. K. stated that there was "no way" the Appellant would have been able to understand a document like the one at GD2-91, and that his English was better than the Appellant's, which was why she needed him when issues came up at work.

[58] Mr. Y. K. testified that, after the Appellant was fired, he telephoned Ms. B. E. to ask why the Appellant had been fired and was told it was because she took the backpack home. Mr. Y. K. stated that he told Ms. B. E. the backpack was "old" and asked her "Can I bring it back?", but Ms. B. E. said: "No."

[59] Mr. Y. K. testified that in August 2013, after the Appellant received the Notice of Debt (GD2-104), he reviewed the Appellant's employee personnel file at the Strathcona in an effort to find out what the employer had "said to EI" that would cause them to have to "repay the money". Mr. Y. K. was shown the December 13, 2012 letter from Ms. S. H. (GD2-129) and asked if it was in the Appellant's personnel file when he reviewed the file. Mr. Y. K. said: "No", but then added that he couldn't say for certain, because it was not what he was looking for.

[60] When asked if the Strathcona's lost and found policy was discussed at the October 2012 meeting Mr. Y. K. had with Ms. B. E. after the Appellant was sent home after being accused of having taken items found in the garbage, Mr. Y. K. said: "No". When asked what was discussed at that meeting, Mr. Y. K. stated that Ms. B. E. "asked what happened and who said what" and then told the Appellant "they didn't find any fault so she can go back to work".

(VI) Testimony of the Added Party's witness: A. E.

[61] A. E. (Ms. A. E.) stated that she has worked for the Strathcona since 2007 and has been the Front Office Manager/Front Desk Manager for the past 1.5 years.

[62] Ms. A. E. testified that the Strathcona's lost and found policy requires all items to be turned in to the front desk, where they are logged with the date, time, location they were found and the name of the person who found the item. After three months, if the item is unclaimed, the person who found it can claim it. "Smaller items, not of value, are bagged" and, if unclaimed after one month, can be given to the staff or donated.

[63] Ms. A. E. testified that the reason the Strathcona requires all items found by staff to be turned in to the front desk is because the front desk has 24-hour access for guests to call in and enquire about items turned in at the lost and found. Ms. A. E. stated she was not aware of the practice of leaving any found items in the staff room for staff to take if they wished. When asked if anyone was ever disciplined for not following the Strathcona's lost and found policy, Ms. A. E. testified that a "night audit staffer" was disciplined for not following the lost and found policy in regards to a wallet where a guest alleged a large sum of money was missing.

[64] With respect to the incident in December 2012, Ms. A. E. testified that she was working at the front desk when Ms. S. H. asked her if anything had been turned in to the lost and found. According to Ms. A. E., nothing had been turned in at that point, but later some housekeepers came by to drop off items for the lost and found. Also according to Ms. A. E., "the guest had called to say they'd left clothes and shoes behind", but "we looked the prior day and nothing had been left behind", and this had been reported to the guest. Ms. A. E. testified that Ms. S. H. asked if she and Ms. A. E. could take a look at the video footage from the hotel's surveillance cameras

of the Appellant leaving for the day. Ms. A. E. stated: “From the front desk view, it looked like she had left with a backpack.”

[65] Ms. D. O. then requested that the employer’s video evidence be shown at the hearing. The four (4) short video excerpts submitted by the Strathcona (which had been circulated to the parties by the Tribunal prior to the hearing) were then viewed on the Member’s laptop computer.

[66] The video excerpts show the Appellant arriving for work at the hotel, leaving for the day, and on the street outside of the hotel getting into a vehicle, which then drives away.

[67] When Ms. A. E. was asked if she was aware of the practice in housekeeping regarding an item found in the garbage, Ms. A. E. stated that she never reported to Ms. J. C. or Ms. H. K., so neither of them would have explained any such practice to her.

[68] When asked on cross-examination by Mr. Pederson for particulars about exactly when the guest had called about the items left behind and what was said, and exactly when Ms. S. H. had asked her to keep an eye out for the Appellant and what was said, Ms. A. E. was unable to recall any specific details. Ms. A. E. denied that she and Ms. S. H. ever talked about trying to catch the Appellant on tape so the Strathcona could fire the Appellant.

[69] When asked about what efforts, if any, she made to get the backpack back, Ms. A. E. responded: “I didn’t do anything.” According to Ms. A. E., it would have been up to “Housekeeping or Human Resources” to take steps to get the item back. Ms. A. E. testified that, as a general rule, the hotel would have tried to get the item back in order to return it to the guest. When asked it if would surprise her to learn the Appellant offered to return the backpack and the Strathcona declined that offer, Ms. A. E. responded: “That would be uncommon.”

(VII) Testimony of the Appellant in response to the Added Party's video evidence

[70] The Appellant was asked: "Did you know there were cameras there?" and she responded: "I didn't know if there were cameras there or not."

(VIII) Testimony of the Added Party's witness: B. E.

[71] Ms. B. E. stated she was the "Director of Human Resources" for the Strathcona from February 2007 to February 2016.

[72] Ms. B. E. testified that, as Director of Human Resources, she was in charge of "making" the Strathcona's policies, including the lost and found policy. According to Ms. B. E., she re-wrote all of the policies and procedures in 2007, including the lost and found policy, which was posted in 2008, revised in 2011(to require all items found by staff to be brought to the front desk and kept for 3 months), reposted in 2012 and reposted again in 2015. Ms. B. E. testified that prior to the 2011 revisions, the lost and found policy required all times found on the property to be brought either to the front desk or to housekeeping and kept for 2 months.

[73] Ms. B. E. testified that the housekeeping staff was aware of the revised policy because it was posted online at the staff website, posted in the staff room, and all Department Managers were provided with copies of the policies and instructed to review them with their staff when the policies are reposted and revised.

[74] With respect to the incident in October 2012 when the Appellant was accused of taking something from the garbage, Ms. B. E. testified that she personally sat down with the Appellant and read the lost and found policy (GD2-91) to the Appellant, explaining that it was "critical" that if she "found anything, it must be brought to the front desk". Ms. B. E. stated that Mr. Y. K. was not at the meeting where she read the policy aloud to the Appellant, but further stated that she "absolutely believes" the Appellant understood, as they "communicated well" in English as long as Ms. B. E. spoke clearly and slowly.

[75] With respect to the incident in December 2012 when the Appellant left with the backpack, Ms. B. E. testified that Ms. S. H. reported the incident to her and she asked Ms. S. H. to prepare the "written statement" (GD2-129), which was put in the Appellant's "employee file". According to Ms. B. E., the Appellant was terminated for not following the lost and found policy

and for theft. Ms. B. E. stated that the number of times she had disciplined an employee for violation of the lost and found policy "could be counted on two hands".

[76] Mr. Pederson engaged in a rigorous cross-examination of Ms. B. E. about her credentials, her role within the Strathcona, the number of employees in the housekeeping staff at various points in the year, her interactions with the Appellant, the Strathcona's policy with respect to hiring temporary foreign workers and the progressive discipline process at the Strathcona.

[77] When asked if there were any issues with the Appellant's job performance while she was employed at the Strathcona, Ms. B. E. testified that she knew of none prior to the incident in October 2012.

[78] When asked about the Strathcona's payroll, Ms. B. E. stated it was not her responsibility to control payroll costs, but acknowledged that if an employee is fired without cause, the employer has to pay that employee severance based on their length of service, whereas if an employee is fired with cause, the employer saves money because it doesn't have to pay that employee any severance. When asked if there was anyone else fired at or around the same time as the Appellant, Ms. B. E. responded: "No." Ms. B. E. was then shown the Supplementary Record of Claim at GD2-87 and was asked who she was referring to when she told the Commission's agent that she was thinking about a different employee when she gave the statement on February 27, 2013 at GD2-82 (that the Appellant was dismissed without cause and paid severance). Ms. B. E. answered that she didn't recall. When asked if there was anyone else with a similar sounding name to the Appellant's name working at the Strathcona (as it was pointed out that the Commission's agent specifically advised she was calling about "W. W." – see GD2-82), Ms. B. E. stated that she didn't recall. When asked why it was important to pursue a reconsideration (GD2-85 and GD2-87), Ms. B. E. stated: "The truth is the truth. I had given a wrong answer and I wanted to set the answer straight." Mr. Pederson suggested to Ms. B. E. that, if the Appellant was fired without cause, the Strathcona would have had to pay the Appellant severance, which was something Ms. B. E. would not have wanted "on the record" - which it was when she told the Commission's agent on February 27, 2013 that the Appellant was

"dismissed without cause and was paid severance". When asked if this was the mistake she was trying to correct, Ms. B. E. stated: "No. That's not the case."

[79] When asked about the number of Ahmaric speaking employees on staff at the hotel, Ms. B. E. stated there were six (6) Ahmaric speaking employees on staff between 2007 and 2012, but "none of those people are still working for the Strathcona". According to Ms. B. E., when the Appellant was fired in December 2012, she was 1 of only 2 Ahmaric speakers left on staff. When asked if it was fair to say the Appellant was "no longer a good fit", Ms. B. E. responded: "I don't think so at all". When asked if it was more difficult for the Appellant after Ms. H. K. left her employment with the Strathcona in April 2012, Ms. B. E. responded: "No. After 5 years, her duties were the same and she would have been just fine."

[80] When Ms. B. E. was shown the lost and found policy she had provided to the Commission (GD2-91), she identified it as the Strathcona's lost and found policy, and stated she clearly remembered reviewing this policy with the Appellant during their meeting in October 2012 "because I didn't want any problems going forward". When asked how that review was conducted, Ms. B. E. stated that she read the policy to the Appellant and that she may have simplified some words, but was very careful and did not change the content. When asked if she told the Appellant she could be subject to progressive discipline or fired for a breach of the lost and found policy, Ms. B. E. responded: "I would have said it could mean up to being terminated."

[81] When asked if the Appellant was given a warning or whether anything was put in her employee file following the October 2012 incident, Ms. B. E. said: "No, because nothing was proven."

[82] When asked why Ms. S. H.'s "written statement" (GD2-129) was not provided until after the first hearing in this matter. Ms. B. E. stated: "because EI never asked for it", and only asked for the termination letter and the lost and found policy. When asked about her own investigation of the incident, Ms. B. E. stated that she interviewed the staffer who was in the elevator with the Appellant, Ms. A. E. and Ms. S. H. When asked why she didn't get written statements from the others, Ms. B. E. responded: "I thought there was."

[83] When asked why the Strathcona had not accepted Mr. Y. K.'s offer to return the backpack, Ms. B. E. stated that she was unaware the customer had called in about the missing property and further stated that as Human Resources Director, she "was not involved in a customer claiming an item". However, according to Ms. B. E., if an item goes off the premises, "it depends, the hotel may reimburse the customer instead".

[84] Ms. B. E. was shown the video evidence submitted by the Strathcona and asked if the video excerpts, in fact, showed what Ms. B. E. had told the Commission's agent on June 3, 2013 (GD2-87), namely that the Appellant was seen on camera trying to hide a bag and trying to hide the bag when leaving the hotel. Ms. B. E. responded: "Not super hiding" and stated: "I could maybe have used more accurate words."

[85] When asked if the lost and found policy at GD2-91 says anything about items found in the garbage, Ms. B. E. responded: "No." When asked what a housekeeper should do with a half-used bottle of shampoo found in the garbage, Ms. B. E. testified that such an item was a garbage item and the housekeeper could take it home. When asked who was responsible for explaining the lost and found policy to the housekeepers, Ms. B. E. stated it was a joint effort by herself and Ms. J. C. (and then Ms. S. H. when she took over from Ms. J. C.). When asked who was in charge of making sure the policy was followed, Ms. B. E. stated it was a joint effort between Human Resources and the Department Managers. Ms. B. E. testified that she went into the staff rooms regularly and never saw lost and found items in the staff rooms that were available for the staff to take home.

SUBMISSIONS

[86] The Appellant submitted that:

(a) She did not steal the backpack, nor did she breach the Strathcona's lost and found policy as she understood it. When she took the backpack home, she did so in accordance with a long established practice at the Strathcona respecting items left in the garbage by guests.

(b) The Appellant's conduct in taking the backpack home does not rise to the level of misconduct within the meaning of the EI Act. There was no element of willfulness in the Appellant's conduct, as it conformed to a long standing practice within housekeeping for dealing with discarded items found in the

garbage. In the alternative, if the Appellant was mistaken in her belief that she was permitted to take the backpack home, this was an innocent misunderstanding of the Strathcona's lost and found policy. Either way, the Appellant could not have anticipated that she would likely be dismissed for taking the backpack home with her.

(c) The December 13, 2012 letter from Ms. S. H. (GD2-129) should not be given any consideration for the detailed reasons set out in the letter to the Tribunal filed by Mr. Pederson on April 7, 2014 (GD2-131 to GD2-133) and in the submissions filed on behalf of the Appellant (RGD4).

[87] The Commission submitted that the Appellant's action in taking the backpack was in direct violation of the employer's lost and found policy, and was the cause of her dismissal. The Appellant was aware of the Strathcona's lost and found policy, and her act of not following the policy was willful and one she reasonably should have known would result in her dismissal. As such, her conduct constitutes misconduct within the meaning of the EI Act.

[88] The Added Party submitted that the Appellant was terminated for cause, namely breach of the employer's lost and found policy and theft, and should not be eligible for EI benefits as a result.

ANALYSIS

[89] Section 30 of the EI Act disqualifies a claimant from receiving benefits if the claimant has lost their employment as a result of misconduct.

[90] The onus is on the Commission to show that the claimant, on the balance of probabilities, lost her employment due to her own misconduct (*Larivee A-473-06, Falardeau A-396-85*).

[91] In order to prove misconduct, it must be shown that the employee behaved in a way other than she should have and that she did so "willfully", i.e. consciously, deliberately, intentionally or so recklessly as to approach willfulness: *Eden A-402-96, Tucker A-381-85* . For an act to be characterized as misconduct, it must be demonstrated that the employee knew or ought to have known that her conduct was such as to impair the performance of the duties owed to her employer and that, as a result, dismissal was a real possibility: *Lassonde A-213-09, Mishibinijima A-85-06, Hastings A-592-06, Locke 2003 FCA 262*; and that the conduct will

affect the employee's job performance, or will be detrimental to the interests of the employer or will harm, irreparably, the employer-employee relationship: *CUB 73528.*

What is the conduct that led to the Appellant's dismissal?

[92] From the time of the employer's Request for Reconsideration onward, the Strathcona has maintained that the Appellant was dismissed for 2 reasons: breach of the employer's lost and found policy and theft.

[93] The Appellant denies that she stole anything or that she breached the lost and found policy as she understood it.

(I) The Allegation of Theft

[94] The Tribunal first considered the allegation of theft. The Commission based its decision to deny the Appellant's claim for EI benefits upon the various statements of Ms. B. E. about a "final incident" where the Appellant did not turn in items that were found in a guestroom, contrary to the Strathcona's lost and found policy, and left the hotel with those items, which the employer deemed to be theft; and upon the Appellant's failure to dispute those statements when questioned about them during the reconsideration process (GD2-94).

[95] In its most basic elements, theft involves the *unauthorized taking*, keeping or using of another individual's property by a person who *intends to deprive* the owner (or person with rightful possession of that property) of the use of the property. For the reasons set out below, the Tribunal finds that the evidence does not support the employer's allegation of theft.

Unauthorized Taking

[96] The Appellant stated from the very outset of her claim that she had the permission of her supervisor, Ms. S. H., to take the backpack if she wanted to. On her initial application for EI benefits, the Appellant stated:

> "I was falsely accuses *(sic)* of theft items founded *(sic)* in the garbage trash can. I asked my Housekeeping New Manager what to do with the items and she told me to do whatever I want to do. And I put it in the staff room until December 14, 12 some of the times was there."

[97] She has never wavered from this statement. She refused to sign the termination letter (GD2-90). She protested the decision as "unfair" and referred to her original application for EI benefits when the Commission's agent verbally advised her of the reconsideration decision (GD2-97). She testified in detail about the items she found, where she found them, how she encountered Ms. S. H. when she was putting the items outside of the room she had just cleaned, that she asked Ms. S. H. what she should do with them and was told "I don't know", and that "as usual" she put them in the staff room for the staff to take if they wished, taking the backpack home with her at the end of the day.

[98] The Tribunal notes the consistent and unequivocal testimony of Ms. H. K. and Ms. J. C., two long-serving employees with housekeeping: one the Housekeeping Manager (Ms. J. C.) for all but the last few months of the Appellant's 8 years of employment with the Strathcona, and the other the Housekeeping Manager's Assistant (Ms. H. K.). The both provided highly credible testimony about the practice at the Strathcona for items found by housekeeping staff in the garbage of a guestroom. They both testified that such items were to be brought to the Housekeeping Manager (or the Manager's Assistant if the Manager was not on duty) and the Manager (or the Manager's Assistant in the event of the Manager's absence) would decide if the items were to be taken to the front desk and logged in the lost and found or whether the staff member could have the items (or leave them in the staff room if the staff member did not want them). The practice of leaving discarded items in the staff room for staff to take as they wished was also supported by concise and credible testimony from the Strathcona's janitor at the time of the December 2012 incident, Mr. H. G.

[99] While Ms. B. E. repeatedly pointed to the Strathcona's written lost and found policy (GD2-91), it is simply beyond the boundaries of common sense that any and all items found in the garbage were to be brought to the front desk and logged. It is far more likely that a housekeeping Manager would make a decision as to what to do with a found item so that garbage, used toiletries and other discarded items of no value would not have to make an appearance at and accumulate at the front desk, where presumably guests could be present at any time and where there is (as was evident from the employer's surveillance video clips) very little room for storage, let alone for sorting through the quantity of garbage items that might be found in a hotel on any given day.

[100] The Commission did not have the December 13, 2012 written statement of Ms. S. H. (GD2-129) when it made its decision to deny the Appellant's claim for EI benefits, as this document was provided to the Tribunal after the conclusion of the first hearing in this matter. The Tribunal notes that Ms. S. H. did not testify at the new hearing, and that instead Ms. A. E. and Ms. B. E. testified as to Ms. S. H.'s version of events, and Ms. B. E. stated that she relied on the December 13, 2012 written statement of Ms. S. H. in coming to the decision to terminate the Appellant. The Tribunal also notes that Ms. D. O. had very few questions by way of cross-examination of the Appellant and asked no questions at all about the version of events set out in Ms. S. H.'s written statement of December 13, 2012 (GD2-129).

[101] While the Tribunal can consider hearsay evidence on an appeal, it must be considered within the context of the whole of the evidence in the proceeding and weighted accordingly. In the present case, the Tribunal gives more weight to the Appellant's testimony at the hearing that she followed the long-standing practice in the housekeeping department by consulting the Housekeeping Manager at the time, Ms. S. H., as to what was to be done with the items she had found in the garbage in the guest room she had just cleaned, and received an answer from Ms. S. H. that made it clear to the Appellant that she was ***not*** required to take the discarded items to the front desk to be logged in the lost and found, so she put the items in the staff room for staff to take and took the backpack home herself. The Tribunal found the Appellant to be credible and that the Appellant's version of events made sense in the circumstances of both her role at the Strathcona for nearly 8 years and what she had been told about the lost and found policy and housekeeping practices by her immediate superiors, Ms. H. K. and Ms. J. C.

[102] The Tribunal therefore finds that there is ample evidence that the Appellant was authorized by her supervisor, Ms. S. H., to take the backpack home with her if she wished.

Intention to Deprive

[103] According to Ms. B. E., the incident was captured on the employer's video surveillance cameras and witnessed by employees at the front desk. While the Strathcona did not make the video surveillance available to the Commission at the reconsideration stage, the agent noted Ms. B. E.'s description of the video in her statement on June 3, 2013:

> "The employer stated the claimant was seen on camera trying to hide a bag and trying to hide the bag when leaving the hotel." (GD2-87)

In a subsequent conversation with Ms. B. E. on June 7, 2013, the agent noted:

> "The employer stated the items that were taken on the final incident were a backpack, shoes, shirt and pants. The employer stated they have video surveillance showing the claimant leaving the hotel with a backpack that looked like there were items inside, not an empty bag but the employer cannot confirm if these items were inside the backpack or not." (GD2-92).

A description of the video evidence was also set out in the termination letter Ms. B. E. provided to the Commission on June 28, 2013 (GD2-90), in which Ms. B. E. identified the items in question as "bag *(sic)* pack, shirt, pants & shoes" and wrote:

> "The Strathcona Hotel have *(sic)* zero tolerance for theft and after our review of video footage seeing you taking these items with you when leaving the property we are terminating you for cause effective immediately."

[104] The Tribunal reviewed the video surveillance clips entered into evidence at the hearing and finds it is impossible to conclude that they show the Appellant trying to hide the backpack at any point, or that there were any items inside the backpack, let alone the "shoes, shirt and pants" referred to by Ms. B. E. on June 7, 2013 (GD2-92) and or the "items that were found in a room" referred to by Ms. B. E. on June 3, 2013 (GD2-87).

[105] The video evidence shows that the Appellant left the hotel premises by way of the front entrance, slowly walking past the front desk where another employee can be seen working; and that the Appellant then sat down on a lobby chair in full view of the front desk, placing the backpack at her feet on the side of her body that was visible from the front desk and to the employee working the desk at the time. After a brief period (where the Appellant appears to be waiting on the chair and watching out the front door), the video evidence shows that the Appellant got up, walked to the front door and exited the hotel, carrying the backpack at her side as she left – not in front of her body where the front desk employee wouldn't have seen it, and not concealed under her coat or inside of another bag. Ms. B. E.'s speculation as to the backpack's contents is also not supported by the video evidence, as the backpack appears to be neither full nor weighted down, and the Appellant was easily able to carry it in one hand.

[106] The Tribunal acknowledges that the Commission did not have the benefit of reviewing the video evidence and instead relied upon Ms. B. E.'s description of what she stated was seen on the employer's surveillance video. However, contrary to what was implied by Ms. B. E., there is nothing on the surveillance video which indicates the Appellant made any effort whatsoever to conceal the backpack and, indeed, shows that the Appellant waited for a vehicle to arrive and pick her up at the end of the day in full view of the front desk and the employee working there. This is not the behavior of an individual who is hiding anything, as Ms. B. E. effectively admitted on cross-examination.

[107] The Commission's agent documented that the Appellant "did not want to add any further information" when questioned about the incident as part of the agent's investigation of the employer's reconsideration request (GD2-94). The Tribunal finds that this cannot be taken as any form of admission of guilt on the part of the Appellant. It is clear from the Member's observation of the Appellant during the hearing, as well as the consistent testimony of Ms. H. K., Ms. J. C. and Mr. Y. K. regarding the Appellant's language abilities, that the Appellant was simply not capable of adequately responding to such questions in English and, indeed, likely didn't even understand the questions themselves.

[108] The Tribunal finds there is no evidence that the Appellant intended to deprive either the rightful owner of the backpack or the Strathcona (as custodian of lost and found items left behind by guests of the hotel) of the backpack.

[109] For the reasons set out in paragraphs 96 to 108 above, the Tribunal finds that the Appellant did not engage in the theft that the employer alleges led to her dismissal.

(II) Breach of Policy

[110] The Tribunal next considered the allegation that the Appellant breached the Strathcona's lost and found policy.

[111] The written lost and found policy at GD2-91 has been consistently identified as the Strathcona's official lost and found policy by Ms. B. E. The Tribunal accepts Ms. B. E.'s evidence on this point and finds that the Strathcona's lost and found policy states that "all articles found on the premises" must be turned in to the front desk, logged and placed in safe keeping.

[112] The Appellant admitted that she did not take the items she found in the garbage to the front desk to be logged in the lost and found. The Tribunal therefore finds that the Appellant breached the terms of employer's lost and found policy, and that she was dismissed for doing so.

Does that conduct constitute "misconduct" within the meaning of the EI Act?

[113] The Federal Court of Appeal has held that it is not the role of the Tribunal to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul 2006 FCA 251*), but rather whether the conduct amounted to misconduct within the meaning of the EI Act (*Marion 2002 FCA 185*).

[114] The Federal Court of Appeal has also held that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely on speculation and suppositions, and that it is for the Commission to prove the presence of such evidence irrespective of the opinion of the employer: *Crichlow A-562-97.*

[115] Having found that the Appellant did not commit the theft that the employer alleges led to her dismissal, but did breach the terms of the employer's lost and found policy, the Tribunal is not satisfied that the Appellant's behavior was in any sense "misconduct" within the meaning of the EI Act. There is nothing in the evidence or the testimony at the hearing that points to willful or reckless behavior on the part of the Appellant such that she knew or ought to have known that her behavior could lead to her dismissal. Indeed, there is no evidence that the Appellant's breach of the terms of the policy was even done knowingly.

[116] The Tribunal acknowledges Ms. B. E.'s many years as a highly-skilled Human Resources professional. Her deep knowledge of hotel operations and staffing was abundantly clear during her testimony. However, while Ms. B. E. may well have wanted the terms of the written lost and found policy at GD2-91 to be followed strictly and to the letter, the Tribunal cannot ignore the consistent and unequivocal testimony of Ms. H. K. and Ms. J. C.r as to the long-standing practice within housekeeping at the Strathcona regarding what was to be done with items found in the garbage of a guestroom. Nor can the Tribunal ignore their testimony and that of Mr. H. G. that no staff member had ever "got in trouble" for taking a discarded item that had been put in the staff room.

[117] Mr. Pederson referred the Tribunal to the Federal Court of Appeal's decision in *Attorney General of Canada v. Phillipe Gagne et al 2010 FCA 237*, and emphasized the court's ruling that misconduct will ***not*** be found where the claimants could not have suspected that their behavior would jeopardize their employment, where their behavior had long been tolerated by management, and where the actions in question were "committed in plain sight with the knowledge of supervisors, at least as far as the claimants knew". As has already been set out in detail herein, the evidence in the Appellant's case, taken in its entirety, brings her conduct squarely within the circumstances of the *Gagne (supra)* case.

[118] The Tribunal is somewhat troubled by the fact that the Appellant did not bother to check the backpack – nor did she suggest Ms. S. H. do so – in order to ensure there were no personal items or items of value in any of the zippered pockets or inside compartments. However, the Tribunal notes that the backpack was found in the garbage and that, according to Ms. A. E., the guest who had called the hotel about the missing items had only mentioned clothes and shoes left behind and did not mention anything in the way of personal identification or particular value. While careless, this omission does not elevate the Appellant's conduct to misconduct within the meaning of the EI Act.

[119] The Appellant breached the terms of *the written* lost and found policy at the Strathcona when she took the discarded items she found in the garbage to the staff room instead of the front desk and, ultimately, took the backpack home with her. However, that written policy is silent on what is to be done with items found in the garbage. Ms. B. E. herself testified that a housekeeper was free to take home a half-used bottle of shampoo found in the garbage and, by implication, admitted that items found in the garbage do not necessarily have to be taken to the front desk and logged in the lost and found.

[120] The Tribunal finds that the Appellant did not knowingly violate the lost and found policy when she followed the long-standing practice at the Strathcona of consulting with her Housekeeping Manager about items found in the garbage and having the Housekeeping Manager decide if the items had to be taken to the front desk or not and, if not, of taking the discarded items to the staff room and leaving them there for staff to take home if they wished. The Tribunal

accepts as credible and reasonable the evidence as to what the Strathcona's lost and found policy was *in practice.*

[121] The Tribunal finds that the Appellant's adherence to the practice for items found in the garbage precludes a finding that her breach of the terms of the written lost and found policy was conscious or deliberate. As such, it cannot be said to have been willful. By following the practice that had been explained to her by her supervisors (Ms. H. K. and Ms. J. C.) for nearly 8 years without incident, the Appellant could not have suspected that her behavior in connection with the items she found in the garbage in December 2012 would have jeopardized her employment. The Tribunal therefore finds that the Appellant's breach of the terms of the Strathcona's lost and found policy was not willful.

[122] For these reasons, the Tribunal finds that the evidence relied upon by the Commission is not sufficient to prove misconduct in the present case.

CONCLUSION

[123] The Tribunal finds that the Commission has not proven, on a balance of probability, that the Appellant lost her employment with the Strathcona by reason of her own misconduct. The Tribunal therefore finds that the Appellant is ***not*** subject to an indefinite disqualification from EI benefits pursuant to section 30 of the EI Act.

[124] The Appellant is reinstated to EI benefits.

[125] The appeal is allowed.

Teresa M. Day

Member, General Division - Employment Insurance Section