



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. L. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 83

Tribunal File Number: GE-15-4112

BETWEEN:

D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Teresa M. Day

HEARD ON: May 11, 2016

DATE OF DECISION: June 22, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

The Appellant attended the hearing of her appeal via teleconference.

INTRODUCTION

[1] On July 21, 2015, the Appellant applied for regular employment insurance benefits (EI benefits). On her application, the Appellant indicated she had been dismissed from her position as a cashier because she had personally collected reward points from customer purchases, something she believed she was authorized to do. The Respondent, the Canada Employment Insurance Commission (Commission), investigated the reason for separation from employment and determined that the Appellant had lost her employment because she had collected reward points for personal use, which was prohibited under the reward program. On August 5, 2015, the Commission advised the Appellant that she was disqualified from receiving EI benefits because she lost her employment due to her own misconduct.

[2] On September 11, 2015, the Appellant requested the Commission reconsider its decision, stating that she was authorized by her supervisor to use her personal reward card on customer purchases. The Commission maintained its decision and, on December 11, 2015, the Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal).

[3] The hearing was held by teleconference because that 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

[4] Whether the Appellant is disqualified from receipt of EI benefits because she lost her employment due to her own misconduct.

THE LAW

[5] 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.

[6] 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.

[7] 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.

[8] 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

[9] The Appellant made an initial application for EI benefits on July 21, 2015 (GD3-3 to GD3-15) and stated that her last day of work was July 15, 2015, at which time she was dismissed from her position as a cashier by her employer, Italian Centre Shop Ltd. (Italian Centre). On the “Questionnaire: Fired (Dismissed)” completed as part of her application (GD3-7 to GD3-9), the Appellant gave a lengthy description of the misconduct that resulted in her dismissal, setting out

how the employer decided to participate in the Alberta Motor Association (AMA) reward program, how the cashiers were told by their supervisor that they could use their personal AMA cards to collect reward points on customer purchases if the customer did not have an AMA card and gave their permission, how the Appellant accumulated a large number of AMA reward points doing this, how the employer pressured staff to increase the AMA sales percentages, how the Appellant thought she was helping the store by using her card to increase the AMA sales, how when upper management became aware the Appellant was doing this they fired her immediately, and how she was a long-serving, honest employee who did not know at the time that the store paid for every reward point.

[10] A Record of Employment (ROE) was provided by the employer, indicating that the Appellant had worked for Italian Centre as a cashier, was paid up to July 15, 2015 and had accumulated 2,404 hours of insurable employment. The reason for issuing the ROE was recorded as “M” for “Dismissal” (GD3-16).

[11] On July 30, 2015, an agent of the Commission spoke with both a representative of the employer and the Appellant regarding the reason the Appellant was no longer working for Italian Centre, and documented these conversations in Supplementary Records of Claim (GD3-18 to GD3-19). The agent noted they gave the following versions of events:

- (a) The payroll administrator for Italian Centre, on behalf of the employer, stated that the Appellant was dismissed because she was collecting AMA points for personal use (GD3-18). The payroll manager stated that the employer paid for the reward program and employees were advised in a meeting that they were not allowed to use the program for personal use. According to the payroll manager, there was a written statement about the AMA program at each cash register. The payroll manager also said that on November 9, 2014, employees were notified in a staff meeting about the new program and told they were not supposed to collect points from store purchases by customers. The program was implemented at the end of February 2015 and that policy never changed. The payroll manager stated that the employer had been partly

reimbursed for the points collected by the Appellant, but some points had already been used by the Appellant personally.

(b) The Appellant stated that in October 2014 the employees were told they could use their own AMA cards to collect points, and she was even given points from another till by her immediate supervisor. However, the program changed in March 2015 and customers were no longer able to give their points to other people. The Appellant said she was advised by her supervisor that she could no longer use her AMA card for personal collection at the end of 2014, but she was never told that the employer paid for the AMA points, and never received any warnings that she might face consequences for continuing to use her card. The Appellant also said there was no written policy about the AMA program. According to the Appellant, AMA flagged her card because she had accumulated around 800 points, which they thought was very high. AMA sent a report to the employer, and the Chief Financial Officer (CFO) called the Appellant in to his office on July 15, 2015 to ask her about it and fired her on the spot. The Appellant stated that she subsequently received a statement showing that her points had been cancelled and Italian Centre had been reimbursed the money for the points she collected. The agent noted the following quotation from the client:

“With all the pressure on us to raise percentages there was little that I could do about it even with all the efforts of trying to promote the positive benefits of using AMA and cards at the store. I have been at the Italian Centre for 8 years & was one of their best cashiers. Most of our customers are regular & they know & like me. When I would have a customer with a large purchase I would think to myself ‘what a waste’ that order could have helped bring up our sale percentages. When I would explain this to them they would offer they points for me to use on my card. With pressure to bring up sales would overrule policy at that time & used my card. I was not doing it for the points, I thought it would be helping the store percentages. I didn’t think that it really mattered who claimed the points as long as the sale was made. I did this a few times.”

[12] On July 31, 2015, the payroll manager faxed a copy of what she referred to as “the AMA form that is available to the cashiers at all of the Italian Centre Shop Ltd. locations” (GD3-

22). Under “How to enter Reward Sales” the following appears at the bottom of the list of instructions:

“Cashiers are not allowed to use any AMA cards other than the customers (*sic*) at the time of their transaction or when customers returning with their receipt and their AMA cards will be able to claim their points within 30 days”

[13] By letter dated August 5, 2015, the Appellant was advised that she would not receive EI benefits because the Commission determined she had lost her employment with Italian Centre on July 15, 2015 as a result of her own misconduct (GD3-24 to GD3-25).

[14] The Appellant made a Request for Reconsideration of the decision (GD3-26 to GD3-27), pointing out that management did not appear to realize that the Appellant’s supervisor had told her she could use her AMA card during the program’s trial period prior to the February 2015 official launch – and had even given the Appellant points from transactions on the supervisor’s till. The Appellant subsequently provided additional documentation for the Commission to consider (GD3-28 to GD3-37), including copies of various emails between the Appellant and other employees about the use of AMA cards, and an analysis of her reward point collection and withdrawals. The following statements by the Appellant are relevant:

- (a) The Appellant confronted her supervisor “M. E.” (M. E.) on the day she was fired and stated: “*You told me I could use my card...and you even gave me transactions.*” to which M. E. responded: “*Ya, but this was before I knew we couldn’t.*” (GD3-32)
- (b) The Appellant has text messages from M. E. where M. E. acknowledged that she did give her transactions, but said none of them were more than \$300. (GD3-32)
- (c) M. E. told the Appellant that she didn’t think the Appellant would get fired over this, but just thought the Appellant would get a warning and be made to return the points. After the firing, M. E. told the Appellant to wait a day to see if the owner would reinstate her (GD3-32).

- (d) M. E. didn't admit to the owner or CFO that she told the Appellant she could use her card in the beginning or that she had given the Appellant transactions from other tills.
- (e) The AMA points used by the Appellant were by way of an automatic withdrawal by AMA for her annual membership fee (which she was unaware had occurred) and for her annual vehicle registration fee (GD3-33 to GD3-34). Of the 826.45 points the Appellant collected, 288.60 went to personal use and 537.85 were credited back to Italian Centre.
- (f) The Appellant assumed M. E. had approval from management when she told the cashiers they could use their AMA cards. There was never an orientation on how AMA worked or what the rules and restrictions were – the employees relied upon the supervisor (i.e. M. E.) for all of that (GD3-35)

[15] On December 1, 2015, an agent of the Commission contacted Italian Centre about the Appellant's request for reconsideration and documented this in a Supplementary Record of Claim (GD3-38). The agent spoke with M. E., who stated that all cashiers were told that they could not use their own AMA card for customer purchases. However, when the agent asked M. E. if initially the cashiers were allowed to do so, M. E. stated she would prefer the agent to speak with the Human Resources Department, at which point the payroll administrator came on the line and spoke with the agent. The payroll agent stated that she herself had been a cashier when the AMA program first started, and that the AMA employees came into the store and advised the cashiers, including the Appellant, that they could not use their cards for personal gain or use. The payroll administrator stated they were also told in staff meetings that they were not allowed to use their personal AMA cards to collect reward points.

[16] The agent then contacted the Appellant and documented their conversation in a Supplementary Record of Claim (GD3-39). The agent noted the Appellant's statements that she had M. E.'s permission to use her AMA card as long as she had the customer's approval, and that M. E. had given her points from M. E.'s own customers because M. E. did not have an AMA card herself. The agent then read the AMA form that the payroll administrator said was at all the cash registers (GD3-22) and noted the Appellant's statement in response that she had never been

given any information or brochures about the points program, but had only been shown manually how to enter transactions. The Appellant also stated that no one said anything to her when she collected 550 points in the fall of 2014 under M. E.'s direction.

[17] The agent then asked the Appellant: "After your supervisor told you that you could not use the points anymore – did you still use your AMA card to collect points?" The Appellant responded: "*Yes, I still used them a few times only to raise up the percentages.*" According to the Appellant, the employer was putting pressure on them to raise the percentages of people using their AMA card and she used her card to raise the percentages as that was the only way to raise the percentages. The Appellant stated that she was not aware the employer paid for the points, nor was she aware AMA had used points in her account for the renewal of her membership until she received her statement months later.

[18] At the Appellant's request, the agent contacted the owner of Italian Centre and documented their conversation in a Supplementary Record of Claim (GD3-41). The agent noted the owner's statements that neither the owner nor the CFO were at any meetings where the cashiers were told not to use their personal AMA cards. The agent also noted that the owner stated she was "not sure" if M. E. had initially told the Appellant she could use her card, but that the owner feels they did not do a good job of communicating the AMA program to the staff.

[19] By letter dated December 3, 2015, the Commission advised the Appellant that it was maintaining its decision of August 4, 2015 that the Appellant was not entitled to EI benefits because she lost her employment due to her own misconduct (GD3-42).

[20] After filing her appeal materials (GD2), the Appellant filed additional materials (GD6), including the following:

- (a) A memo commenting on misinformation in the Commission's reconsideration file (GD6-1 to GD6-2);
- (b) Copies of the AMA Rewards Program sheets that were actually taped to the cash registers at Italian Centre (GD6-4 and GD6-5). These differ from the document provided by the payroll administrator at GD3-22 in that there is no

statement whatsoever that cashiers are not allowed to use their own AMA cards to collect points; and

- (c) Copies of Meeting Minutes from the cashier meetings (GD6-6 to GD6-11), which document the discussions about the introduction of the AMA reward program at Italian Centre and say nothing about cashiers not being allowed to use their own AMA cards to collect points.

At the Hearing

[21] The Appellant testified as follows:

- (a) In October 2014, Italian Centre was introducing the AMA reward program in the store. The Appellant had an AMA card, but was unaware the AMA had a reward program. The program was new to all of the cashiers. M. E. gave the cashiers a “tip sheet” on how to use the AMA card at point-of-sale and had the cashiers put them at their tills so they could follow the steps for processing. There was no mention on the tip sheet that the cashiers could not use their personal AMA cards to collect points or that they had to be careful to only use the customer’s card. In fact, at the start of the program, cards were passed around by customers in line and people were using cards that belonged to family members too.
- (b) When the Appellant received the appeal docket in this matter, she saw the document the employer provided at GD3-22 for the first time and realized it was not the same as the tip sheet at the cashier tills. Specifically, the document at GD3-22 contains a specific statement that cashiers cannot use any AMA cards except those of the customers. So in February 2016, the Appellant went to the Italian Centre store and made copies of the tip sheets that were taped up at the cashier tills. Those copies are in her materials at GD6-4 and GD6-5 – and do not contain the statement that cashiers are not allowed to use any AMA cards except those of the customers.
- (c) Representatives from AMA did come to the store to instruct management on the program. M. E. and the CFO were present at this training session, as was the payroll administrator (who was a cashier in housewares, but training at the time in Human Resources). None of the cashiers attended this meeting, including the Appellant. Following this training session, M. E. made up the tip sheets (GD6-4 and GD6-5) and they were taped up at the cashier tills. There was nothing further provided to the cashiers in the way of training or information about the AMA rewards program.

- (d) On the first day of the program (early October 2014), M. E. said: "D. L., you can use your card if you want." To which the Appellant said "Really?" and to which M. E. responded "Yes, but only if you get the customer's permission." The Appellant operated on that basis and in the first 11 days she accumulated 315 AMA reward points. After a month, the Appellant had 543 points. At the next staff meeting, the only thing mentioned about the AMA program was the need to raise the percentage of AMA sales.
- (e) The Appellant assumed M. E. told all the cashiers that they could use their own AMA cards, but later found out that M. E. only told the Appellant and another cashier, Carmella. Carmella didn't even have her own card, but brought her son's card in to the store and collected reward points on his card.
- (f) M. E. was aware the Appellant was using her AMA card on customer purchases. M. E. did not have an AMA card, but M. E. brought transactions from other tills over to the Appellant's till so the Appellant could collect the AMA points on those transactions.
- (g) At some point late in November 2014, M. E. said casually: "I guess E. K. (the CFO) doesn't really like us using our AMA cards." M. E. said it as if it were a joke and made it sound like this was just E. K.'s opinion, not that it was an actual rule. At no time did M. E. tell the Appellant that she was not allowed to use her AMA card. However, the novelty had worn off by this time and because it was an extra step in processing a sale, the Appellant was only using her card when a customer made a large purchase. In fact, the points the Appellant accumulated between November 2014 and July 2015 were less than the points she accumulated in the first 11 days of the program.
- (h) In January, February and March 2015, the management put a big push on the cashiers to raise the percentage of AMA sales, as they wanted to capture large dollar-value sales. The Appellant used her own card to try to capture these sales for the company. She did not know the company paid for the points or that she was doing anything wrong. She continued with such occasional use until July 2015 when she was fired.
- (i) The Appellant kept all of the minutes from the cashier meetings. The minutes she included in GD6 are the only ones where AMA was even mentioned:

Feb. 8, 2015: "Remember how important AMA is to us. Promote what AMA has to offer through our company. Please remember to ask every single customer if that (*sic*) are a member of AMA" (GD6-7)

March 22, 2015: "AMA Rewards Program: Goal is 30% we are now at 23%" (GD6-8)

April 19, 2015: "AMA Rewards Program: Goal is 30%, we are still at 23% with average AMA member transaction of \$51.64." (GD6-9)

June 14, 2015: “AMA Rewards Program: Goal is 30%, we’ve gone down from 23% to 22% average. AMA member transaction has gone down \$51.64 in March to \$40.00 in April and \$5025 in May.” (GD6-10)

- (j) The Appellant also provided an undated “Cashier Department Daily Operation Issues” memo (GD6-11), which includes only reference to the AMA program as follows:

“5. AMA Transaction – Always remember to hit the AMA button for members. The company need (sic) an accurate percentage of AMA customers that we process”

- (k) Nothing was ever said at the cashier meetings about the cashiers being prohibited from using their own AMA cards to collect reward points on purchases. But M. E. did tell the cashiers that they had to get the AMA sales percentages up and to do whatever they could to accomplish this. The Appellant addressed this by putting big purchases on her own AMA card, and M. E. was aware that she was doing so.
- (l) The Appellant was never told that using her AMA card was against the reward program policy. The Appellant was never even aware that there was a reward program policy. The information the cashiers were given about the program changed all the time. For example family members were originally allowed to use another family member’s card, but then the staff was told that wasn’t allowed; and customers were allowed to pass their cards to other customers in line, but eventually the staff were told that wasn’t allowed either.
- (m) After the Appellant was fired in July 2015, she found out that the CFO didn’t know anything at all about employee card use and only found out when AMA flagged the Appellant’s AMA card and contacted the Italian Centre. The Appellant believes M. E. made up the statement “I guess E. K. (the CFO) doesn’t really like us using our AMA cards” to cover up for the fact that M. E. told us (the Appellant and Carmella) that we could use our cards and then somehow found out that it wasn’t allowed. Rather than admit she made a mistake, M. E. made a joke about E. K. not liking it and never actually told the Appellant that she was, in fact, not permitted to use her own AMA card to collect points on customer transactions.
- (n) The Appellant didn’t know there was any policy or rule against using her own card. The Appellant thought that M. E.’s subsequent statement about E. K. “not liking us using our AMA cards” was a comment or a suggestion at best – especially since M. E. was aware the Appellant continued to do so for occasional large purchases and even encouraged the Appellant in this regard so that the cashiers could get the AMA sales percentages up.

- (o) The Appellant was authorized by M. E. to use her AMA card from the start and M. E. was aware of her continued use. Being fired for using her AMA card was a total shock. The Appellant had no idea there was even a remote possibility that she could have lost her employment for doing so.

SUBMISSIONS

[22] The Appellant submitted that she did not lose her job due to misconduct. Rather, the Appellant submitted she was unaware of any policy prohibiting employee use of AMA cards to collect reward points and that she was terminated because upper management found out she was using her card and her supervisor did not admit that she (the supervisor) had authorized the Appellant to do so.

[23] The Commission submitted that the Appellant breached the company policy by continuing to collect AMA reward points from customers who did not have an AMA card to use on their purchases. The Commission gives the Appellant the benefit of the doubt with respect to whether her supervisor authorized her to use her card at the start of the reward program. However, in early 2015, the employer clarified the policy with notices, meetings and instructions, but the Appellant continued to use her AMA card to collect points. The Appellant therefore breached the employer's policy prohibiting employee card use and had a personal gain at the employer's expense, and this conduct constitutes misconduct within the meaning of the EI Act.

ANALYSIS

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

[25] 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*).

[26] 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, deliberately, or so recklessly as to approach willfulness: *Eden A-402-96*. 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, Lock 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 dismissal?

[27] The employer stated that the Appellant was dismissed because she was collecting AMA reward points for personal use despite being advised that she was not allowed to do so (GD3-18). The Appellant knew this was a breach of the employer's policy, and she was terminated accordingly. The employer denied that the Appellant was ever authorized to use her personal AMA card to collect points on customer purchases.

[28] The Appellant admitted that she used her personal AMA card to collect reward points on customer purchases, but steadfastly maintained that she was authorized to do so by her supervisor, M. E.. The Appellant denied that the employer had a policy prohibiting her from using her own AMA card to collect points, and further denied that she was ever explicitly advised by her supervisor, or anyone else, that she was not allowed to do so or that she could lose her job if she did so.

[29] The Tribunal first considered whether the Appellant was authorized to collect AMA points on customer purchases. The Appellant has given detailed, consistent and credible evidence on this point, and her version of events makes the most sense in the circumstances. The Appellant's use of her AMA card began with the inception of the AMA reward program at Italian Centre, and the Appellant immediately took every opportunity to collect points if a customer did not have an AMA card, accumulating an exceptionally large number of points in a very short time. It is not possible she could have done this without the knowledge of her supervisor, M. E., and, indeed, other employees. The Tribunal accepts the Appellant's evidence that she was, in fact, authorized by M. E. to use her own AMA card to collect points on customer purchases. The Tribunal notes that when M. E. was asked directly if employees were initially allowed to use their cards to collect points, she declined to answer the question (GD3- 38). The

Tribunal also notes that, as supervisor, M. E. has a vested interest in denying that she authorized the Appellant to use her card to collect points if, in fact, employees were not allowed to do so under the AMA reward program.

[30] Similarly, the Tribunal gives little weight to the evidence of the payroll administrator who says she was a cashier at the time the reward program began (GD3-38), yet somehow did not notice the Appellant avidly collecting points on customer purchases or report the activity to management if it was, in fact, unauthorized. The payroll administrator is also not credible in her statements about the cashiers being advised at the outset by the AMA representatives who came to the store to introduce the program that they could not use it for personal gain (GD3-38) because she previously told the Commission that it was specifically the company's owner and CFO who were advised by the AMA representatives that the program could not be used by employees (GD3-18). The owner herself later said that she did not attend any meetings where cashiers were advised they could not use their personal AMA cards when customers did not have theirs (GD3-41). The Tribunal also notes that the payroll administrator stated that the employees were notified about the AMA program in a staff meeting on November 11, 2014 and told they were not supposed to collect points from store purchases done by other people (GD3-18), but it is clear from the AMA statement that the Appellant's point accumulation started on October 12, 2014 (GD3-33 to GD3-34).

[31] The Tribunal strongly prefers the evidence of the Appellant on this point and finds that the Appellant was authorized by her supervisor, M. E., to use her AMA card to collect points.

[32] The Tribunal then considered whether the Appellant was told, at some point, that she was no longer allowed to use her card to collect points.

[33] The employer states, in effect, that there were many times when the Appellant was told she could not use her AMA card to collect reward points. However, the employer's evidence on this point is thin and unpersuasive. In light of the findings in paragraphs 29 and 30 above, the Tribunal gives little weight to the statements by the payroll administrator that employees were advised at the start of the program that they were not allowed to use the AMA program for personal use (GD3-18). The payroll administrator also stated that the staff was advised of this prohibition in staff meetings (GD3-38), yet the Minutes from those meetings contain no record

of this (GD6-7 to GD6-10). Given the seriousness of the eventual consequences to the Appellant for using her card (i.e. immediate termination), it seems unlikely that this rule would not have been included in the Minutes circulated to the cashiers. It seems equally unlikely that this rule would have been left off of the Daily Operational Issues sheet issued to the cashiers (GD6-11), which has a heading for AMA transactions and instructions thereunder, but says nothing about cashiers being prohibited from using their own card.

[34] The payroll administrator also stated that the instructions sheet taped at each cash register set out that cashiers were not allowed to use their cards, but the copy of the sheet she provided to the Commission (GD3-22) is notably different from the copies the Appellant obtained directly from the cash registers at Italian Centre (GD6-4 and GD6-5). In examining the two versions, it appears as if the document provided by the payroll administrator is an amended version of the ones the Appellant obtained from the cash registers in the store, as it contains an additional bullet point for the rule against cashiers using their cards whereas the versions from the store have no room for this additional bullet point as the text continues directly into the next phrase about “Wholesale or charge account customers not included”.

[35] The Tribunal notes that the Appellant’s evidence on this point is also inconsistent. There are the references in her application for EI benefits (GD3-7 to GD3-8) and in the documents filed with her Request for Reconsideration (GD3-29 to GD3-36) to being told she could use her card during a “trial period” and to being told several weeks later that she could no longer claim points; and to the pressure to bring up sales overruling the policy against using her card. The Appellant stated to the Commission that she was approached by her supervisor at the end of 2014 and advised she could no longer use her AMA card for personal use, but that she continued to do so because of pressure to raise the AMA sales percentages (GD3-19).

[36] However, in her testimony at the hearing, the Appellant stated exactly what she was told by M. E. at the end of 2014, namely:

“I guess E. K. (the CFO) doesn’t really like us using our AMA cards.”

The Appellant testified that M. E. said it as if it were a joke and made it sound like this was just E. K.’s opinion, not that it was an actual rule. According to the Appellant, M. E. never told her

that she was not allowed to use her AMA card. However, the novelty had worn off and by this time the Appellant was only using her card when a customer made a large purchase. In fact, the points the Appellant accumulated between November 2014 and July 2015 were less than the points she accumulated in the first 11 days of the program. The Appellant also pointed out that E. K., the CFO, didn't know about any employee card use until he was alerted by AMA, at which point the Appellant was immediately terminated. The Tribunal accepts the Appellant's evidence that the CFO didn't know about any employee card use until July 2015 and notes that it would, therefore, be unlikely he could have been unhappy about card use or telling anyone to stop using their cards in late 2014. This supports the Appellant's contention that M. E. was just trying to cover her tracks.

[37] It is troubling that the Appellant stated she continued to use her AMA card to collect points after being told she could no longer do so (GD3-39), and that she wrote in her Notice of Appeal (at GD2-4) that M. E. said "*E. K. (CFO) does not want us to use our cards any more*", which is more definitive than the statement in her testimony. However, the Tribunal accepts the Appellant's testimony that she never understood M. E.'s statement about E. K.'s comments (however they were put to her) to be a definitive pronouncement that, going forward, the cashiers were strictly prohibited from using their cards to collect points. Given that the Appellant was detailed and credible in her testimony that M. E. was aware the Appellant occasionally continued to use her card for large purchases in order to boost the sales percentages, it seems very unlikely that if M. E. had, in fact, told the Appellant that she couldn't use her card anymore that M. E. would have done nothing to stop or at least report the Appellant's actions. Instead, the Appellant continued on in this fashion for months, until the AMA alerted the employer in July 2015. Indeed, the Appellant's sporadic use of her card to capture occasional large purchases is much more in keeping with being alerted to the CFO not liking the card use than to being told that her card use was, in fact, not allowed.

[38] For these reasons, the Tribunal prefers the testimony of the Appellant at the hearing and finds that the Appellant was never definitively told that she could no longer use her AMA card to collect points on customer purchases.

[39] The Tribunal next considered the allegation that the Appellant breached the employer's policy with respect to the AMA rewards program.

[40] The Tribunal gives significant weight to the statement by the owner of Italian Centre that she does not feel the employer did a good job of communicating the AMA program to the staff (GD3-41). In fact, there is very little evidence of a clearly stated policy with respect to the AMA reward program, let alone with respect to the collection of AMA reward points by employees for personal use. When asked about the employer's policy, the payroll administrator made broad statements (at GD3-19) such as:

Employees were advised in a meeting that they are not allowed to use the program for personal use.

The company's owner, T. S., and E. K., Chief Financial Officer, were advised by the AMA representative that the program could not be used by employees.

When asked if employees were aware that breaching the company policy related to the AMA program would lead to dismissal or loss of employment, the answer was:

Employees were advised that using their personal AMA card was essentially stealing from the company.

When asked if there was anything in writing that states that employees are not supposed to use the AMA program for personal use, the answer was:

There is a written statement about the AMA program at each cash register.

[41] The payroll administrator provided the Commission with a copy of the written statement she was referring to (at GD3-21), but for the reasons discussed in paragraph 34 above, the Tribunal gives little weight to this document.

[42] On the other hand, the Appellant has been consistent in her statements to the Commission that the employer did not have any official policy prohibiting cashiers from using their AMA cards to collect points:

When asked if there was a written policy regarding the AMA program, the answer was NO. (GD3-19).

When asked if she was advised of any consequences for using her card to collect points, the answer was:

She was not informed of any consequences. She did not know the company paid for AMA points until she was dismissed. (GD3-19)

When asked if there were any warnings about personal card use, the answer was NO. (GD3-19).

[43] The Tribunal notes that the Appellant's statements are supported by the documents she provided at GD6, including the Minutes from the staff meetings and other information about tracking AMA purchases, and by her testimony at the hearing.

[44] The Tribunal also gives weight to the following statement by the Appellant in her email to the owner of Italian Centre on October 2, 2015:

“We never had an orientation on how AMA worked or what the rules and restrictions were. Or even what the consequences of breaking those rules would be. We had not been informed of any guidelines we needed to follow or what was and wasn't allowed. We relied on our Supervisor for that information.” (GD3-35).

[45] The employer has not produced any credible evidence of a written policy prohibiting the Appellant's card use. It therefore makes much more sense that the cashiers would have been trained in the AMA program by their supervisor, M. E., and guided by her instructions. The Tribunal finds there is insufficient evidence to support the Commission's submission that in early 2015 the employer clarified the policy against employee card use with notices, meetings and instructions. The Tribunal prefers the evidence of the Appellant and finds that the employer did not have a policy prohibiting employees from collecting AMA points for personal use *that was ever communicated to the Appellant*. The Tribunal therefore finds that, if such a policy existed, the Appellant did not knowingly breach it.

[46] For the reasons set out in paragraphs 29 to 45 above, the Tribunal finds that the Appellant did not engage in the behavior that the employer alleges led to her dismissal.

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

[47] 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*).

[48] 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*; and that an employer's opinion or subjective appreciation of the type of misconduct which warrants dismissal for just cause does not satisfy the onus of proof (*Fakhari A-732-95*).

[49] Having found that the Appellant did not engage in the behavior that the employer alleges led to her dismissal, the Tribunal is not satisfied that the Appellant's behavior was in any sense "misconduct" within the meaning of the EI Act. On an objective assessment of all of the evidence filed and the testimony at the hearing, the Tribunal finds there is nothing that points to willful or reckless behavior on the part of the Appellant such that she knew or ought to have known her behavior in using her AMA card to collect reward points could lead to her dismissal. Her testimony that she was acting under the authorization of her supervisor is consistent and credible and, as she was acting under that authorization, the willful element required for her behavior to constitute "misconduct" within the meaning of the EI Act is not present. Nor is it possible to conclude that the Appellant knew or ought to have known she could be dismissed for doing something that she was authorized by her supervisor to do.

[50] The Tribunal is supported in its analysis by the Federal Court of Appeal's decision in *Attorney General of Canada v. Phillippe Gagne et al 2010 FCA 237*, where the court ruled that misconduct will not be found where the claimants could not have suspected that their behavior would jeopardize their employment, where their behavior had 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 within the circumstances of the *Gagne (supra)* case.

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

to the Appellant's alleged misconduct and, therefore, as per the Federal Court of Appeal's rulings in *Joseph v. C.E.I.C. A-636-85* and *M.E.I. v. Bartone A-369-88*, the Commission has not proven that the Appellant lost her employment as a result of misconduct.

CONCLUSION

[52] The Tribunal finds that the Commission has not proven, on a balance of probability, that the Appellant lost her employment with the Italian Centre 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.

[53] The appeal is allowed.

Teresa M. Day
Member, General Division - Employment Insurance Section