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

[TRANSLATION]

Citation: *T. G. v. Canada Employment Insurance Commission*, 2016 SSTGDEI 133

Tribunal File Number: GE-15-1234

BETWEEN:

T. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Employment Insurance Section

DECISION BY: Normand Morin

HEARD ON: August 25, 2016

DATE OF DECISION: October 21, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The hearing initially scheduled for June 22, 2016 was postponed and a new hearing date was set for August 25, 2016.

[2] The Appellant, T. G., was present at the videoconference hearing held on August 25, 2016. She was represented by Gilbert Nadon, Counsel, of the firm Ouellet Nadon et associées.

INTRODUCTION

[3] On July 6, 2014, the Appellant made an initial claim for benefit commencing July 13, 2014. The Appellant stated she worked for the employer, Symphony Senior Living Inc., (2229928 Ontario inc. – Les Résidences Symphonie) from February 14, 2013 to June 11, 2014, inclusive, and that she stopped working for this employer because of a dismissal or suspension (Exhibits GD3-3 to GD3-15).

[4] On August 20, 2014, the Respondent, the *Canada Employment Insurance Commission* (the "Commission") informed the Appellant that she was not entitled to regular Employment Insurance benefits starting on July 13, 2014 because she had ceased working for the employer 2229928 Ontario inc., on June 10, 2014 because of misconduct (Exhibits GD3-29 and GD3-30).

[5] On January 14, 2015, the Appellant filed an Employment Insurance decision Reconsideration Request (Exhibits GD3-31 to GD3-36).

[6] On March 6, 2015, the Commission informed the Appellant that it was upholding the decision of August 20, 2014 (Exhibits GD3-38 and GD3-39).

[7] On April 2, 2015, the Appellant, represented by Counsel Gilbert Nadon, filed a Notice of Appeal to the Employment Insurance Section of the General Division of the Social Security Tribunal of Canada (the "Tribunal") (Exhibits GD2-1 to GD2-6).

[8] In a letter dated April 22, 2015, the Tribunal informed the Employer, 2229928 Ontario inc. that if it wished to be included in the appeal as an "added party" it would have to file the appropriate request with the Tribunal no later than May 7, 2015 (Exhibits GD5-1 and GD5-2). The letter was returned to the Tribunal marked: *"*Moved / Unknown \ *Déménagé ou inconnu* – Return to Sender – *Renvoi à l'expéditeur."*

[9] On May 7, 2015, the Tribunal contacted the Employer to update her address.

[10] On May 7, 2015, the Tribunal informed the Employer, Symphony Senior Living Inc., that if it wished to be included in the appeal as an "added party," it would have to file the appropriate request with the Tribunal no later than May 22, 2015 (Exhibits GD6-1 and GD6-2). The employer did not respond to the letter.

[11] At a preparatory conference held July 9, 2015, the Appellant's representative confirmed that the language of communication for this file would be French (Exhibits GD7-1and GD7-2).

[12] On October 19, 2016, in response to a request submitted to the Tribunal on October 17, 2016 and pursuant to s. 32 of the *Social Security Tribunal Regulations*, the Commission sent the Tribunal information clarifying the nature of the documents referred to by the representative at the hearing on August 25, 2016 (Exhibits GD10-28, GD10-29 and GD13-1).

[13] This appeal was heard by videoconference for the following reasons:

a) The fact that credibility may be a determinative factor;

b) The fact that the Appellant or other parties are represented; and

c) The availability of videoconferencing in the Appellant's locality (Exhibits GD1- 1 to GD1-4).

ISSUE

[14] The Tribunal must determine whether the Appellant lost her employment because of her misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the Act).

THE LAW

[15] The provisions relating to misconduct are stated in sections 29 and 30 of the Act.

[16] Paragraphs 29(a) and 29(b) of the Act provide as follows with respect to "disqualification" from receiving employment insurance benefits or "disentitlement" to such benefits:

> […] For the purposes of sections 30 to 33, (a) "employment" refers to any employment of the claimant within their qualifying period or their benefit period; (b) 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 […];

[17] Subsection 30(1) of the Act states the following about "disqualification" for "misconduct" or "leaving without just cause":

> […] 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.

[18] Subsection 30(2) of the Act states the following about the "length of disqualification":

> […]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.

EVIDENCE

[19] The evidence on file is as follows:

a) A record of employment dated June 25, 2014, indicates that the Appellant worked for the employer, 2229928 Ontario Inc., from February 17, 2013 to June 10, 2014

inclusive, and stopped working for this employer for a reason identified as "other" (Code K - Other), Exhibit GD3-16);

b) On August 11 and 13, 2014, the employer reported that the Appellant had been dismissed on June 10, 2014 for theft. The employer said that the Appellant worked at a seniors' residence and had been stopped at the end of her work shift, at about 11 p.m. on Tuesday, June 10, 2014. The employer explained that it asked the Appellant to open the bag she was carrying and, inside, it discovered leftover food from the cafeteria of the facility where she worked, and also from a resident of the facility. The employer said that the Appellant admitted to stealing the food, and said that it subsequently reported the incident to police. The employer said that the Appellant was fired on the spot. It underscored that she had been under suspicion for a long time (Exhibit GD3-18);

c) On August 15, 2014, the employer sent the Commission a copy of the following documents:

    i. Letter of dismissal sent to the Appellant on June 17, 2014. In the letter, the employer informed the Appellant that it intended to have her charged with theft (Exhibit GD3-22);

    ii. Excerpt from the company policy on conduct or violations in breach of the rules of conduct possibly leading to disciplinary action, up to and including termination of employment (i.e., theft or inappropriate removal of goods or property), (Exhibit GD3-23).

d) On August 15, 2014, the employer said that it had decided to bring criminal charges against the Appellant. It stated that the Appellant had received a letter explaining the reason for her dismissal. The employer explained that all workers employed at the facility required a diploma (Exhibit GD3-24);

e) On August 19, 2014, the employer said that the food taken by the Appellant had not been thrown away. It said that the food in question included a carefully sealed package of cheese and alcohol-free beer kept for one of the facility's residents. The employer

provided the number of the police report (incident number: 140610-03890) completed in connection with the Appellant's alleged actions (Exhibit GD3-25);

f) On August 19, 2014, concerning the reason given by the Appellant for her dismissal, namely, that she had refused to take a training program required by the employer, the employer said that all workers were required to register for refresher training. It said that the Appellant had been instructed to sign up on a Web site for an assessment of her skills in order to determine whether she needed to register for the course. The employer explained that if the Appellant need to take the training courses, it would be delivered in the workplace, free of charge and during work hours. The employer said that the Appellant would not have lost any salary and would not have had to spend anything on the training. The employer said it had no opportunity to speak with the Appellant about the steps she should take concerning these courses, but it had encouraged her to begin the process. As for the actions alleged against the Appellant on June 10, 2014, the employer explained that it had to make a police report against her and bring criminal charges against her. The employer explained that the Appellant was a kitchen worker, who brought food to residents and had access to everything. It said that the Appellant was already the target of suspicion because she would arrive at work with an empty bag and leave at the end of her shift with a full bag. The employer said it did not initially make the connection. After doubts mounted, the employer began watching the Appellant's behaviour after one resident complained about paying too much for his non-alcoholic beer and receiving only a meagre amount. The employer (Ms. I. G., supervisor and Ms. F. T., coordinator) said they stopped the Appellant on the night of June 10, 2014, and asked her to empty her bag. The employer said that the Appellant had put many things that did not belong to her into her bag (ex.: the leftovers of a resident's meal, a carefully sealed block of cheese belonging to a resident, one non-alcoholic beer and fruit). The employer said that leftovers are set aside for residents and served to them at other times of the day, otherwise they are offered to employees, but it was not the Appellant's place to help herself. The employer said it took photos of the incident in question (Exhibit GD3-26 and GD3-27);

g) In a decision report dated August 19, 2014, the Commission made the following assessment [TRANSLATION] […] "The employer also provided us with a copy of an excerpt from the handbook. It prohibits employees from taking food that has been thrown away. It also prohibits employees from taking items that do not belong to them (i.e., theft). In the case herein, there is sufficient evidence on the record to find that the client [the Appellant] took more than discarded leftovers. Solid evidence shows that she took unused food items that were carefully sealed (cheese and non-alcoholic beer) and that were the property of residents of the facility (Exhibits GD10-28 and GD10-29);

h) On March 6, 2015, the representative explained that the Appellant was awaiting a hearing in Criminal Court and asked that the Commission make its decision based on the facts in the Appellant's file because he could not provide us with more information at this time (Exhibit GD3-37);

i) On May 27, 2016, the representative sent the Tribunal a copy of the following documents:

    i. Notice of a hearing on April 25, 2016 (Exhibit GD8-3);

    ii. Document concerning the stay of proceedings against the Appellant (document from the Legal Aid office, criminal and penal law, *Centre communautaire juridique de X* – Information regarding the charges stayed of proceedings or withdrawn of the proceedings, dated February 10, 2016 (Exhibit GD8-4);

    iii. Document issued by the City of X docket management system, indicating that the Appellant appeared on December 15, 2014 and pleaded guilty to an offence committed on June 11, 2014, and that the case was closed (Exhibit GD8-5);

    iv. Document issued by the City of X docket management system, indicating that the complaint against the Appellant on June 11, 2014 had been withdrawn on February 10, 2016 (Exhibit GD8-6);

v. Documents concerning the Appellant's participation in a clinical research project for a pharmaceutical company during the period from May 2016 to July 2016 (Exhibits GD8-7 to GD8-15).

j) On August 28, 2016, after the hearing on August 25, 2016, the Appellant's representative sent the Tribunal a copy of the following documents:

i. Decisions and excerpts from decisions given by the Federal Court of Appeal (the "Court") in ***Stoddart* (2008 FCA 333)**, (Exhibit GD10-20), ***Locke* (2003 FCA 262)**, (Exhibits GD10-30 to GD10-33), ***Guay* (A-1036-96)**, (Exhibits GD10-to to GD10-37), ***Fakhari* (A-732-95)**, (Exhibits GD10-38 to GD10-41), ***Meunier* (A-130-96)**, (Exhibits GD10-42 to GD10-49) and ***Choinière* (A-471-95)**, (Exhibits GD10-50 and GD10-51);

ii. Decisions in CUB 53687 (Exhibits GD10-18, GD10-19 and GD10-64 to GD10-69), CUB 68805 (Exhibits GD10-21 to GD10-23), CUB 70100 (Exhibits GD10-24 to GD10-27), CUB 48021(Exhibits GD10-52 and GD10-53), CUB 10407 (Exhibits GD10-54 to GD10-57), CUB 68397 (Exhibits GD10-58 and GD10-59),CUB 68397A (Exhibits GD10-60 to GD10-63), CUB 61769 (Exhibits GD10-70 to GD10-73);

iii. Decisions by the Appeal Division of the Tribunal in ***B. B. v. Canada Employment Insurance Commission* (2015 SSTAD 687, AD-14-213, June 3, 2015)**, (Exhibits GD10-12 to GD10-17) and ***M. G. v. Canada Employment Insurance Commission* (2015 SSTAD 1361, AD-13-88, November 26, 2015)**, (Exhibits GD10-2 to GD10-11and Exhibits GD10-74 to GD10-77);

iv. Decision report (Service Canada) summarizing a conversation between the employer and a Commission officer on August 19, 2014 indicating that the decision made in the Appellant's case would be upheld (Exhibits GD10-28 and GD10-29).

k) On October 14, 2016, the Appellant's representative sent the Tribunal a copy of the following documents:

   i. Request for a pardon, certificate of conviction request, CD reproduction request, document copy request form (X Municipal Court, Legal Services) indicating that a request for a copy of documents (transcript from December 15, 2014 and February 20, 2016) pertaining to the Appellant's case (file number: 114-307-432) had been received at the Municipal Courthouse on September 14, 2016 (Exhibit GD11-2);

   ii. A document (City of X docket management system) indicating that the Appellant appeared on December 15, 2014 and pleaded not guilty to an offence committed on June 11, 2014. This document corrects the guilty plea previously entered in a similar document on file (Exhibits GD11-3 and GD8-5);

   iii. Transcript (City of X Municipal Courthouse) dated February 10, 2016 indicating a withdrawal of charges in the Appellant's case before this authority (file 114 307 432), (Exhibits GD11-5 and GD11-6);

   iv. Transcript (City of X Municipal Courthouse) dated December 15, 2014 indicating that the Appellant entered a plea of not guilty before this authority (file 114 307 432), (Exhibits GD11-7 and GD11-8).

[20] The evidence presented at the hearing is as follows:

a) The Appellant gave an overview of the circumstances leading to her dismissal from her employment with the employer 2229928 Ontario inc. (Symphony Senior Living inc. – Les Résidences Symphonie), to prove that she had not lost her employment because of her misconduct at work.

b) The representative stated that he would be sending new documents after the hearing (i.e., a copy of the Service Canada decision report, documents related to the withdrawal on February 10, 2016, a complaint filed against the Appellant for an offence committed on June 11, 2014 (Exhibits GD8-5 and GD8-6), and

transcripts from the City of X Municipal Courthouse, jurisprudence), (Exhibits GD10-1 to GD10-77 and GD11-1 to GD11-8).

PARTIES' ARGUMENTS

[21] The Appellant and her representative, Counsel Gilbert Nadaon, made the following submissions and arguments:

a) In her claim for benefits made on July 6, 2014, the Appellant said that the employer dismissed her because it consider her unfit for work (ex., poor performance, inability to perform certain duties, lack of experience, qualifications or knowledge), (Exhibit GD3-9);

b) She said that she objected to the food theft charge by her employer and the employer's version of the circumstances surrounding her dismissal (Exhibits GD3-19 and GD3-20);

c) The Appellant said she was not dismissed for theft but for other reasons (Exhibit GD3-28);

d) In a statement given to the Commission on August 15, 2014, the Appellant explained that she left her work station without incident at the end of the day on June 10, 2014, and that no one searched the bag she had with her at the time. She said that the next day, when she reported for work at approximately 11 a.m., the employer had called the police. The Appellant specified that the employer considered her aggressive. She said that the police had no case against her (Exhibits GD3-19 and GD3-20);

e) In the same statement and at the hearing, the Appellant reported taking food from the cafeteria of the facility where she worked, and said it happened only once and that the food in question had already been thrown away. She underscored that everyone could see her put the food in her bag and that she had not concealed it. The Appellant said that the bag in her possession was searched by the employer on Tuesday, June 10, 2014 at approximately 11 p.m., after her work shift ended; she

said that the bag contained fruit, six slices of cheese wrapped in plastic—cheese from sandwiches--and one non-alcoholic beer given to her by a resident two days earlier, on Sunday. She said that she sometimes received chocolates, but this was the first time a resident had given her a beer. The Appellant said she was unaware that taking thrown away food was prohibited. She said she found out that food may not be taken outside the facility during the search. She said that the employer had no policy on this matter and had never given her any warning about it before. The Appellant said she had a copy of the *Employee Handbook* (Exhibits GD3-19 and GD3-20 and GD3-28);

f) The Appellant explained that she was told nothing at her meeting with the coordinator (F. T.) and her supervisor (I. G.) on June 11, 2014, and that they took back her keys and access cards. The Appellant said she did not take the matter to a higher level, such as the director, because there was none, only several coordinators. The Appellant also said that after her shift on June 10, 2014, she was supposed to work another shift at midnight, on June 11, 2014, but the employer had taken her keys and told her it would notify the executive director. The Appellant said she returned to work on the morning of June 11, 2014, and spoke with the pay manager who confirmed that she had been fired for "various reasons" (Exhibits GD3-19 and GD3-20);

g) She also pointed out the following information: [TRANSLATION] "[…] The reasons for her dismissal are varied and concern the fact that she [the Appellant] was not suited to her employment, refused to register to have her qualifications evaluated in compliance with the Ministry's new regulations, and was being asked to take a course that would cost time and money she did not have. The client [the Appellant] denied that she received the letter or that she was dismissed for theft. The client initially denied the incident involving a search of her bag, but later admitted to it, saying she had taken items only once, on the day in question, and that the items had been thrown out. When she was confronted about the negative decision, she said again that she had not been dismissed for theft but for other reasons. She admitted that she had other items in her bag that had not been 'thrown

away,' but said they were gifts from residents. The client said that she has a copy of the employee handbook and that it says nothing about any prohibition against taking items that have been thrown away" (Exhibits GD10-28 and GD10-29);

h) She said that she did not receive her record of employment or a formal letter of dismissal stating the reasons for her termination (Exhibits GD3-19, GD3-20 and GD3-22);

i) She said that several weeks before her dismissal, the employer had been giving her a hard time at work and making comments about the quality of her work. She said that the employer had also informed her she would have to take an 1,800-hour training course to obtain her certification following regulatory changes introduced by the Department (government), and that she would have to absorb the costs (ex., leave without pay). She said that she had several discussions on the matter with the employer before she was dismissed. The Appellant said she could not afford such a course or to lose salary over it. She said that the employer wanted all employees to register for the training before September 2014, otherwise they might face "serious consequences" (Exhibits GD3-19 and GD3-20);

j) She said that she had three dependent children and was going through personal problems following the death of her ex-husband, but that the employer showed no compassion for her situation;

k) The Appellant said she had been unable to work for medical reasons for about two or three weeks (ex.: on May 25, 2014 and from May 27, 2014 to June 6, 2014). She said she took only five days of sick leave, but was paid for just one, not the four others, and that mistakes had been made in entering dates on her record of earnings (ex., the entry for las pay: June 6, 2014). The Appellant explained that she had not complained to the *Commission des normes du travail*, the labour standards board, (now the *Commission des normes, de l'équité, de la santé et de la sécurité du travail – CNESST*) to obtain her 4% and payment of sick leave days, or compensation for being dismissed without cause, because she had disliked the job for quite a while and was not interested in fighting to keep it (Exhibits GD3-19 and

GD3-20). At the hearing, the Appellant also said she had been reluctant to file a complaint with the labour standards board (CNESST) for fear of losing her job;

l) The Appellant's representative pointed out that the Appellant had not stolen anything and that the acts alleged against her, namely, putting leftover food in her bag (ex., retrieving slices of cheese used in sandwiches and wrapping them up in plastic) had been done in plain view of everyone in the kitchen. He underscored that the beer found in the Appellant's bag had been given to her by a resident a few days earlier, also in plain view of everyone;

m) He underscored that the employer had no specific policy concerning leftover food, as shown by the Service Canada report dated August 19, 2014 (Exhibits GD10-28 and GD10-29);

n) The representative asked whether the employer had decided to dispense with the Appellant's services for various reasons, given that the Appellant said she had stolen nothing and that the story was a loose concoction. The representative pointed out that if the Appellant had intended to steal something, she would not have carried it in a bag in plain view of everyone;

o) He stated that there was insufficient evidence to show that the Appellant had lost her job because of misconduct. The representative pointed out that in cases of misconduct, the onus of proof is on the Commission and the employer (***Stoddart***, **2008 FCA 333**, ***Locke***, **2003 FCA 262**, ***Guay*** **A-1036-96**, ***Fakhari*** **A-732-95**, ***Meunier***, **A-130-96**, ***Choinière*** **A-471-95**, CUB 53687, CUB 68805, CUB 70100, CUB 48021, CUB 10407, CUB 68397, CUB 68397A, CUB 61769, decisions by the Tribunal Appeal Division in ***B. B. and Canada Employment Insurance Commission***, **2015 SSTAD 687**, **AD-14-213**, **June 3, 2015** and ***M. G. v. Canada Employment Insurance Commission***, **2015 SSTAD 1361**, **AD-13-88**, **November 26, 2015**), (Exhibits GD10-1 to GD10-27 and Exhibits GD10-30 to GD10-77);

p) The representative reviewed the content of the decision by the Tribunal Appeal Division in ***B. B. and Canada Employment Insurance Commission*** **(2015 SSTAD 687 – AD-14-213)**, (Exhibits GD10-12 to GD10- 17). It underscored that the Tribunal stated in this decision (at paragraph 8): "[…]First, the Board of Referees decision correctly stated that the legal test for misconduct under the *Employment Insurance Act* is different than for theft under the *Criminal Code*. A claimant may be terminated for misconduct which is not criminal conduct. In this case, the Board of Referees decision noted that the Appellant had been charged with theft from the employer. It concluded, based on evidence only from the employer that the Appellant had stolen from the employer. It placed weight on this evidence in deciding that the Appellant was terminated for misconduct. The criminal charges were later withdrawn against the Appellant. The Board of Referees did not hear any evidence from the Appellant regarding the charges or the circumstances surrounding them." (Exhibit GD10-15);

q) The representative stated that when a crime is the alleged reason for dismissal, the weight of the evidence must be greater than usual. He said that in CUB 10407 (Exhibits GD10-54 to GD10-57), the Umpire recalled that the Supreme Court had determined in ***Hanes v. Wawanesa Mutual Insurance Company (1963), S.C.R.***, 154, that [translation] "when a crime is the purported reason for a civil case, the evidence must be more cogent and more persuasive than in other civil cases that involve no criminal charges" (Exhibit GD10-56);

r) The representative underscored that in ***Meunier*** **(A-130-96)**, the Court found: "[…]In order to establish misconduct such as is penalized by section 28, and the connection between that misconduct and the employment, it is not sufficient to note that criminal charges have been laid which have not been proven at the time of the separation from employment, and to rely on speculation by the employer without doing any other verification. The consequences of loss of employment by reason of misconduct are serious. The Commission, and the board of referees and the umpire, cannot be allowed to be satisfied with the sole and unverified account of the facts given by the employer concerning actions that, at the time the employer makes its

decision, are merely unproved allegations. Certainly, the Commission will be more easily able to discharge its burden if the employer made its decision, for example, after the preliminary inquiry had been held and**,** *a fortiori*, if it made the decision after the trial" (Exhibit GD10-47);

s) The representative said that the complaint brought against the Appellant on June 11, 2014 was withdrawn on February 10, 2016, and the Appellant had also entered a plea of not guilty (Exhibits GD8-4 to GD8-6 and GD11-1 to GD11-8);

t) He said that the Appellant had encountered difficulties concerning the training required by the employer. The representative said that despite the fact that the Appellant had taken an initial training program, the employer had also required that she take another training program without fully explaining the reasons;

u) The representative said that the Appellant had experienced personal difficulties in the fall prior to her dismissal, after the death of her ex-husband. He underscored that the employer had even instructed the Appellant to stop crying over her circumstances because it might upset others;

v) He also explained that in the period immediately prior to her dismissal, the Appellant had been absent for medical reasons but the employer had not acknowledged that the matter concerned a work injury;

w) The representative explained that the Appellant understands French, speaks it a little and she speaks English. He said that this situation may have partly contributed to the Appellant's confusion about explaining her situation;

x) He said that the Commission's decision in the Appellant's case is unfounded in fact and in law. He pointed out that the Appellant was wrongfully dismissed, and that she had not pleaded guilty to any misconduct while she was working for the employer, 2229928 Ontario inc. (Exhibits GD2-2 and GD3-32).

[22] The Respondent (the Commission) made the following submissions and arguments:

a) Subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is determined that the claimant lost their employment due to their own misconduct. The Commission clarified that, for the action complained of to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or so reckless or negligent as to approach willfulness. It stated that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-4);

b) The Commission said that it considered the employer credible because the Appellant gave different versions of the facts (Exhibit GD4-4);

c) The Commission explained that the employer dismissed the Appellant after discovering that she had been taking property that belonged to it and to a resident without permission. The Commission said that the Appellant took food from her employer and from a resident (Exhibits GD3-18, GD3-24, GD3-25 and GD3-26). It underscored that the Appellant admitted to taking food from the employer and a product from a resident, but tried to minimize her actions by saying that the food had been thrown away and that the other product was a gift (Exhibits GD3-19, GD3-28 and GD4-4);

d) The Commission pointed out that the act of taking property belonging to the employer without permission violates the rules of ethics, and therefore prevents an essential condition of employment from being met, leading to dismissal for theft (Exhibit GD4-4);

e) It determined that the Appellant's actions, i.e., to take property owned by the employer without permission, constituted misconduct within the meaning of the Act because her actions permanently severed the relationship of trust essential to the continuation of employment. The Commission determined that the Appellant had acted wilfully and deliberately, which constitutes misconduct (Exhibits GD4-4 and GD4-5);

f) The Commission determined that the Appellant had lost her job because of misconduct (Exhibit GD4-5);

g) The Commission said that the decision report dated April 19, 2014 that was forwarded to the Tribunal by the Appellant's representative (Exhibits GD10-28 and GD10-29) was completed by an agent of the Commission when the initial decision was made in the Appellant's case. The Commission underscored that the decision report in question is one of the documents that it shall not include in the reconsideration file. According to the rules, the Commission said that only decision reports showing that it exercised its discretionary authority must be included; in other words, it is only required to include decision reports about penalties, denials of appeal extensions or disqualifications. The Commission said that since the current case involves a dismissal-related decision, it is not required to append such a document (Exhibit GD13-1);

h) The Commission specified that the reference made to the excerpt from the employee handbook submitted by the employer and mentioned in the decision report dated August 19, 2014 (Exhibits GD10- 28 and GD10-29) does indeed match the excerpt of the corporate policy on conduct or violations of the rules of conduct that the employer forwarded to the Commission on August 15, 2014 (Exhibits GD3-23 and GD13-1).

ANALYSIS

[23] While the Act does not define "misconduct", case law states, in Tucker (A-381-85), that:

> [I]n order to constitute misconduct the act complained of must have been willful or at least of such a careless or negligent nature that one could say the employee willfully disregarded the effects his or her actions would have on job performance.

[24] In that decision (***Tucker,* A-381-85**), the Federal Court of Appeal (the "Court") recalled the words of Reed J. of the Court:

> […] Dishonesty aside, the courts seem to be prepared to accept that employees are human; they may-get ill and be unable to fulfill their obligations and they may make mistakes under pressure or through inexperience […]Misconduct, which renders discharged employee ineligible for unemployment compensation, occurs when conduct of employee evinces willful or wanton disregard of employer's interest, as in deliberate violations, or disregard of standards of behavior which employer has right to expect of his employees, or in carelessness or negligence of such degree or recurrence as to manifest wrongful intent […].

[25] In ***McKay-Eden* (A-402-96)**, the Court offered the following clarification: "In our view, for conduct to be considered "misconduct" under the Unemployment Insurance Act, it must be willful or so reckless as to approach willfulness."

[26] In ***Mishibinijima* (2007 FCA 36),** the Court recalled as follows:

> Thus, there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[27] The Court defined the legal notion of misconduct within the meaning of subsection 30(1) of the Act as willful misconduct where the claimant knew or ought to have known that his or her conduct was such as to result in dismissal. To determine whether the misconduct could result in dismissal, there must be a causal link between the claimant's alleged misconduct and his or her employment. The misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (**Lemire, 2010 FCA 314)**.

[28] The decisions rendered in ***Cartier* (A-168-00)** and ***MacDonald* (A-152-96)** confirm the principle established in ***Namaro* (A-834-82)** whereby it must also be established that the misconduct constituted cause for the claimant's dismissal.

[29] In **Djalabi (2013 FCA 213)**, the Court recalled as follows:

> According to the case law, the concept of misconduct does not require evidence of the elements of criminal liability: "It is not necessary for a behaviour to amount to misconduct under the Act that there be a wrongful intent. It is sufficient that the reprehensible act or omission complained of be made 'wilfully', i.e. consciously, deliberately or intentionally" (*Canada (Attorney General) v. Secours*, [1995] F.C.J. No. 2010 (QL) at paragraph 2, as cited in *Canada (Attorney General) v. Pearson*, 2006 FCA 199 at paragraph 15). That is, an act is deliberate if "the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the employer and as a result dismissal was a real possibility" (Mishibinijima v. Canada (Attorney General), 2007 FCA 36 at paragraph 14).

[30] The Court has reaffirmed the principle whereby the onus is on the employer or the Commission to prove that the loss of employment by the claimant was because of the claimant's own misconduct ***(Lepretre*, 2011 FCA 30, *Granstrom*, 2003 FCA 485**).

[31] In ***Murray* (2013 FC 49)**, the matter involves an application to the Federal Court by the claimant, Norman Murray, for the following purpose:

> […] to quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006.

[32] In that decision ***(Murray*, 2013 FC 49**), the Court set out, in the following terms, the components of the test to be applied to receive evidence adduced after the completion of the hearing:

> […] The parties agreed that the three-part test summarized in Whyte v Canadian National Railway, 2010 CHRT 6 [Whyte], which followed that used in Vermette v Canadian Broadcasting Corporation, [1994] CHRD 14, should be used. The test is the following: 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial; 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[33] On this element, the Tribunal is not including in its analysis the new evidence submitted by the Appellant's representative on October 14, 2016 (Exhibits GD11-1 to GD11-8) following the hearing on August 25, 2016 because the documents do not have a decisive impact on the case and do not contain information likely to influence the Tribunal's decision (***Murray,* 2013 FC 49**).

[34] For the action complained of to constitute misconduct within the meaning of section 30 of the Act, it must be willful or deliberate or be so reckless or negligent as to approach willfulness. There must also be a causal link between the misconduct and the dismissal.

[35] The determination that behaviour by the employee leading to the loss of employment constitutes misconduct is a question of fact to be settled based on the circumstances of each case.

[36] Herein, the Appellant's alleged actions, namely, taking food without permission from the senior's residence where she worked, clearly constitutes misconduct within the meaning of the Act.

[37] In the letter of dismissal sent to the Appellant on June 17, 2014, the employer stated the following: [Translation] "Following the incident on June 10, 2014 at 11 p.m., this letter confirms that your employment with the Résidence Symphonie X is immediately terminated. We also wish to inform you that we are taking steps to charge you with theft." (Exhibit GD3-22).

Intentional nature of the alleged actions

[38] The Appellant in this case admitted to committing the actions alleged against her.

[39] The Tribunal considers that the Appellant's action was willful. Her actions were conscious, deliberate or intentional (***Mishibinijima*, 2007 FCA 36)**.

[40] The Tribunal considers the Appellant's explanations regarding the actions alleged against her to be contradictory.

[41] In a statement to the Commission on August 15, 2014, the Appellant initially said that everything had proceeded without incident at the end of her work shift on June 10, 2014 and that no one searched the bag in her possession at that time (Exhibits GD3-19 and GD3-20). The

Appellant also said that no charges had been brought against her at that time, and that [translation] “the police had no case against her.” (Exhibits GD3-19 and GD3-20).

[42] Then, in the same statement, as she was questioned by an officer of the Commission, the Appellant admitted to the actions alleged against her, namely, taking food from the cafeteria at the facility where she worked, and that the bag in her possession had indeed been checked by the employer at the end of her work shift on June 10, 2014 (Exhibits GD3-19 and GD3-20). She also said that the actions alleged against her had happened only the once (Exhibits GD3-19 and GD3-20).

[43] The Tribunal considers that such contradictions undermine the credibility of the Appellant’s testimony.

[44] The Tribunal also believes that the Appellant tried to minimize the scope of her actions.

[45] The Tribunal does not accept the Appellant’s argument that the food in her bag was going to be thrown out. Nothing supports such an assertion. The employer clearly indicated that the food the Appellant took did not belong to her and was not intended to be thrown away (Exhibits GD3-25 to GD3-27).

[46] On this matter, the employer explained that food left over from residents’ meals was kept for residents or sometimes offered to employees, but it was not up to the Appellant to help herself without permission (Exhibits GD3-26 and GD3-27).

[47] An excerpt from the employee handbook reads: [translation] “Here are a few examples of violations of the rules of conduct that could lead to disciplinary action, up to and including termination of employment: […] Theft or the inappropriate removal of goods or property” (Exhibit GD3-23).

[48] The Tribunal believes that the Appellant breached an express or implied duty of the contract of employment (***Tucker,* A-381-85; *Lemire*, 2010 FCA 314**).

[49] Although the employee handbook does not specifically prohibit people from taking discarded food, which incidentally was not the case according to the employer’s statements, this document prohibits employees from taking items that do not belong to them (Exhibit GD3-23).

[50] The Appellant's representative pointed out that the Appellant committed the actions alleged against her in plain view of everyone, and made no effort to conceal what she was doing.

[51] Nevertheless, the Tribunal considers it unthinkable that employees of a facility such as the one operated by the employer should have the opportunity to immediately take food leftover after serving meals to residents of such facility, without first obtaining permission from the employer.

[52] The Appellant breached the relationship of trust that bound her to her employer. The Appellant chose to disregard the standards of behaviour that the employer had the right to expect of her (Tucker, A-381-85).

[53] The Tribunal considers that the Appellant also behaved in a manner detrimental to her employer's interests.

[54] The Tribunal does not give credibility to the Appellant's explanations that other reasons, apart from the theft of food, caused her dismissal.

[55] The Appellant said that several weeks before her dismissal, the employer had been giving her a hard time at work and making comments about the quality of her work, and she claimed she had been dismissed for reasons other than the alleged theft of food (Exhibits GD3-19 and GD3-20).

[56] The Appellant did not offer significant evidence to show that the employer was dissatisfied with her work based on her performance, the quality of her work or because she lacked some of the qualifications required to perform the tasks assigned to her.

[57] The Tribunal does not accept the Appellant's argument that she was dismissed for unsatisfactory performance, or her inability to perform certain tasks or her lack of experience, qualifications or knowledge, as mentioned in her claim for benefits (Exhibit GD3-9).

[58] The Tribunal does not consider the Appellant's argument valid that she was dismissed in relation to the employer's requirement that she take courses at her own expense to obtain certification, in light of changes in the Department's regulations (governmental).

[59] The employer explained that if the Appellant had to take courses, they would be given in the workplace during work hours, and that such courses would have been provided at no cost to her and with no loss of salary (Exhibits GD3-26 and GD3-27). - 24 -

[60] In the Tribunal's view, the acts alleged against the Appellant were of a nature that a person could normally expect that they might result in her dismissal. She knew that her conduct was such as to impair the performance of duties owed to her employer and that dismissal was a real possibility (***Tucker*, A-381-85, *Mishibinijima*, 2007 FCA 36**).

[61] The Appellant's representative pointed out that when a crime is alleged as a reason for dismissal, the weight of the evidence must be greater than usual in situations that do not involve a criminal charge (CUB 10407). The Tribunal does not accept this argument in this case.

[62] The Tribunal points out that, according to the case law, "the concept of misconduct does not require evidence of the elements of criminal liability" (***Djalabi*, 2013 FCA 213**).

[63] It is not necessary for the behaviour in question to result from wrongful intent, but only that the reprehensible act or omission complained of be made "wilfully", i.e. consciously, deliberately or intentionally (***Djalabi, 2013 FCA 213, Mishibinijima*, 2007 FCA 36**). The Tribunal believes that this type of behaviour has been amply proven in the Appellant's case.

[64] The Tribunal believes that even though the Appellant pleaded not guilty and the charges against her were withdrawn, the actions she admitted to committing retain their intentional and deliberate nature and tie to misconduct within the meaning of the act.

Reason for dismissal

[65] In the Tribunal's opinion, the causal relationship between the Appellant's actions and her dismissal has been established. The Employer clearly showed the reasons giving rise to the Appellant's dismissal (***Namaro*, A-834-82, *MacDonald*, A-152-96, *Cartier*, A-168-00**).

[66] In short, the Tribunal considers that the Appellant was dismissed because of actions she took wilfully and deliberately (***Tucker*, A-381-85, *McKay-Eden*, A-402-96, *Mishibinijima*, 2007 FCA 36**).

[67] For these reasons, the Tribunal considers that these actions constitute misconduct within the meaning of the Act and that the Appellant lost her employment by her own fault. Her dismissal was the direct consequence of the acts alleged against her (***Namaro*, A-834-82, *MacDonald*, A-152-96, *Cartier*, A-168-00**).

[68] Relying on the above-mentioned case law and on the evidence adduced, the Tribunal considers that the Appellant lost her employment because of her misconduct and consequently, the Commission's decision to disqualify her from receiving employment insurance benefits is justified in the circumstances.

[69] The Tribunal concludes that the appeal of the issue is without merit.

CONCLUSION

[70] The appeal is dismissed.

Normand Morin
Member, General Division - Employment Insurance Section