



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *E. D. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 59

Tribunal File Number: GE-16-2797

BETWEEN:

E. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Josée Langlois

HEARD ON: April 13, 2017

DATE OF DECISION: April 27, 2017

REASONS AND DECISION

PERSONS IN ATTENDANCE

[1] The Appellant, Mr. E. D., attended the teleconference hearing and was represented by Counsel Jean-Sébastien Brady.

[2] Mr. L. S., an employee at Auberge du X Inc. (the Inn), attended the hearing as a witness.

DECISION

[3] The Tribunal finds that the Appellant lost his employment by reason of his own misconduct under sections 29 and 30 of the *Employment Insurance Act* (Act).

INTRODUCTION

[4] On March 25, 2016, the Appellant filed an initial claim for regular benefits with the Canada Employment Insurance Commission (Commission). According to the Record of Employment provided by the Inn, the Appellant stopped working for this employer on March 2, 2016, due to dismissal (code M-Dismissal), (Exhibits GD3-3 to GD3-9).

[5] On April 8, 2016, the Commission informed the Appellant that he was not entitled to receive regular benefits as of February 28, 2016, because he had stopped working at the Inn due to his misconduct (Exhibits GD3-16 and GD3-17).

[6] On April 26, 2016, the Appellant requested a reconsideration of the Commission's decision to deny him benefits because of his misconduct (Exhibits GD3-20 to GD3-22).

[7] On June 22, 2016, the Commission informed the Appellant that it was upholding the decision that it had made on April 8, 2016 (Exhibits GD3-29 and GD3-30).

[8] On July 14, 2016, the Appellant filed a notice of appeal with the Employment Insurance Section of the Tribunal's General Division (Exhibits GD2-1 to GD2-6).

TYPE OF HEARING

[9] The appeal proceeded by videoconference for the following reasons (Exhibit GD1):

- a) The information in the file, including the need for additional information.
- b) This method of proceeding best meets the parties' needs for accommodation.
- c) This method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[10] The Tribunal must determine whether the Appellant lost his employment by reason of his own misconduct under sections 29 and 30 of the Act.

EVIDENCE

[11] The evidence in the Commission's file is as follows:

- a) The Appellant's initial claim for regular benefits submitted to the Commission on March 25, 2016 (Exhibits GD3-3 to GD3-9).
- b) A Record of Employment, dated March 15, 2016, indicating that the Appellant worked for the Inn from December 4, 2015, to March 3, 2016, inclusively (code M-Dismissal), (Exhibit GD3-10).
- c) A statement from the employer to the Commission indicating that it had dismissed the Appellant because he had been stealing bottles of wine. The employer stated that it had discovered this incident by accident when it watched the Inn's video footage because it was wondering what the employees were doing near the garbage bins after their shifts. The employer said that other employees were involved in this scheme. The employer said that the camera footage showed four employees leaving the Inn with bottles of wine. A dismissal letter was sent to them after this incident (Exhibits GD3-15 and GD3-23).

- d) A dismissal letter sent to the Appellant from the employer indicating that a meeting took place on February 24, 2016, and that the Appellant was able to give his version of the facts concerning the stolen bottles of wine. The letter indicates that the employer conducted an investigation, which showed that, on January 15, 17, 28 and 31, and on February 12, 16 and 17, 2016, the Appellant stole bottles of wine from the Inn. This letter mentions that, during his shifts, the Appellant worked as a team leader responsible for operations and that, given the seriousness of the misconduct, the relationship of trust between employer and employee had permanently been broken. The letter indicates that the Appellant acted in a wilful and deliberate manner. Furthermore, the letter notes that section 3.2.2 of the Inn's rules and policies provides that no goods shall be taken from the Inn without prior authorization. The letter states that the Appellant admitted during the meeting that he had taken bottles of wine, that he downplayed his actions and that he showed no remorse. The employer said that the Appellant's actions were dishonest and that the theft constituted a serious wrongdoing. The employer said that he dismissed the Appellant because his job as a server required absolute confidence and honesty. The letter is signed by J. D., Director of Human Resources for the Inn (Exhibits GD3-13 and GD3-14).
- e) The Appellant's statement to the Commission admitting that he [translation] "left with the leftover wine" even though he did not have the employer's permission to do so. The Appellant said that everyone did it, but that only the four people involved in the union were dismissed (Exhibit GD3-15).
- f) A Commission decision, dated April 8, 2016, indicating to the Appellant that he was not entitled to receive regular benefits as of February 28, 2016, because he stopped working at the Inn on March 3, 2016, due to his misconduct (Exhibits GD3-16 et GD3-17).
- g) A request for reconsideration of the Commission's initial decision, filed by the Appellant on April 26, 2016 (Exhibits GD3-20 to GD3-22).
- h) A statement from the employer to the Commission indicating that in December 2015, upon watching the content of the Inn's video footage, it discovered that employees were going to the garbage room after their shift and leaving with full bottles of wine. The employer stated that he hired a specialized firm to investigate and that the investigation was carried out over a six-week period (Exhibits GD3-23 to GD3-24).

- i) A statement from the employer to the Commission indicating that this investigation was not intended to undermine the union in any way. The investigation demonstrated that the employees in question had developed a scheme to steal bottles of wine at the end of banquets. For example, customers would come to a banquet, order 20 bottles of wine and drink 18. The employees in question would take the full and empty bottles of wine, leave them beside the garbage room, and then leave with the bottles after their shift (Exhibits GD3-23 to GD3-24).
- j) A statement from the employer to the Commission indicating that the Appellant had signed the document concerning the Inn's rules and policies when he was hired and that he was aware of section 3.2.2 prohibiting him from leaving the hotel with food or drink. The employer stated that at the end of banquets, unopened bottles of wine were to be returned to the wine cellar and any opened bottles were used by the Inn's kitchen to make sauces. The employer stated that the Appellant was one of its best servers and that the content of the video footage showed that he was regularly stealing bottles of wine. The employer stated that even if the bottles of wine had been paid for by the customers, the Appellant knew that he was not authorized to leave with the bottles of wine and that doing so, in secret, showed that he knew the practice was not allowed and that he was knowingly breaking the Inn's rules (Exhibits GD3-23 to GD3-24). - 6 -
- k) A statement from the employer to the Commission indicating that it was unable to disclose or send the evidence regarding this file because the Appellant had challenged his dismissal under section 15 of the Labour Code, and that a hearing was scheduled for June 7, 2016, at the Administrative Labour Tribunal.
- l) The Commission's reconsideration decision dated June 22, 2016, informing the Appellant that it was upholding the initial decision rendered on April 8, 2016 (Exhibits GD3-29 and GD3-30).

[12] On July 14, 2016, the Appellant sent the Tribunal a copy of the following documents:

- a) A reconsideration decision from the Commission dated June 22, 2016, informing the Appellant that it had not modified its initial decision of April 8, 2016 (Exhibit GD2-6).
- b) A notice of appeal of the Commission's June 22, 2016, decision (Exhibits GD2-1 to GD2-5);

c) A statement by the Appellant indicating that the employer's policy regarding the removal of goods from the Inn was "flexible" and did not apply equally to all employees. The Appellant added that he was sure that there were extenuating circumstances that supported his position (Exhibit 2-3).

[13] On April 13, 2016, the Appellant's representative sent the Tribunal a copy of the following documents (Exhibits GD8-1 to GD8-49):

a) Three decisions by Quebec's labour relations board in 2009 and 2010, including one involving the witness, L. S.

[14] The Appellant submitted the following evidence at the hearing:

a) The Appellant submitted that he had been a server at the Inn since 2003. He stated that he was responsible for waiting on tables in the dining room, bar and during banquets. The Appellant stated that he worked mainly full-time nights.

b) The Appellant stated that he was a union representative at the Inn. He had been treasurer as well as head of grievances for about five years. As treasurer, the Appellant was responsible for the union's accounting and as head of grievances, he received employees' complaints and filed grievances.

c) The Appellant stated that he had been dismissed on March 3, 2016, and that he had received a dismissal letter from the employer (Exhibit GD3-13). The Appellant stated that in January and February 2016, the management of billing bottles of wine worked as follows: For example, during a banquet, a wine quota was calculated for the group—approximately half a bottle of wine per person. The Appellant stated that if people in a group did not pay the Inn enough or did not consume enough, the head server, who was also his immediate supervisor, asked him to bill the customers for the bottles of wine that were not consumed. The Appellant stated that the bottles that were not consumed were to be returned to the Inn's wine cellar. The Appellant stated that he would tell his immediate supervisor that he had billed the bottles of wine, but that he also kept some for himself: [translation] "I'd leave with a couple of them." The Appellant said that his supervisor told him that it was not a problem, but to be discreet.

- d) The Appellant stated that while he was responsible for billing, the contract would be determined in advance by the Inn. The Appellant stated that he had permission to leave with the bottles of wine and that the bottles were dealt with as follows at the end of the night: sometimes, bottles of wine would be left unopened, others would be started. For those that were opened, the Appellant and his co-workers would combine half empty bottles to make full bottles. The Appellant and his co-workers would then put the empty and full bottles that had already been billed to the customers beside the garbage room. The Appellant said that he would put some bottles back in the wine cellar and that he would take the full bottles that had been left outside the garbage room on his way out, after getting his coat, in order to be discreet. The Appellant stated that he was doing what his immediate supervisor had told him to do in order to be professional and that the customers were not aware of what was going on.
- e) The Appellant stated that the majority of the servers, and especially those who worked banquets, took full or open bottles of wine. The Appellant stated that his immediate supervisor, who was also the restaurant manager, was aware that they were being taken. The Appellant stated that if his inventory did not balance, his supervisor would see that he had billed the customer for ten extra bottles and that if there were only eight in the wine cellar it was because he had taken two of them. The Appellant stated that his supervisor never asked to know how it worked when the Appellant left and took bottles of wine. The Appellant stated that his immediate supervisor had told him [translation] "I'm Pontius Pilate it's not my concern." The Appellant stated that the important thing was to be discreet and that the customers were unaware of what was going on. The Appellant stated that it was his immediate supervisor who had introduced him to the practice.
- f) The Appellant stated that he had been taking bottles of wine since 2004, that no disciplinary action had ever been taken and that his immediate supervisor or another manager could have penalized employees for this practice.
- g) Regarding the dates mentioned by the employer in his dismissal letter, the Appellant stated that it is true that he took the bottles of wine but that it was not stealing because he had permission. The Appellant stated that he mostly took bottles that had been opened, but that once or twice he had taken unopened bottles.

- h) Regarding the unopened bottles, the Appellant stated that three quarters of the bottles had been returned to the wine cellar to be resold.
- i) The Appellant stated that he learned of the employer's policy concerning the removal of goods and the permission required to take food and drink out of the establishment only when he was dismissed. The Appellant stated that everyone could leave with whatever they wanted. For example, the bartender took home food for his dogs. The Appellant stated that he had never seen a physical pass and did not believe they existed. The Appellant stated that he had sometimes borrowed a coffee maker or tablecloths for union meetings and that the employer never had a problem with it.
- j) The Appellant stated that he and his co-workers had challenged the dismissal before the Administrative Labour Tribunal.
- k) The Appellant stated that he could not have expected to be dismissed for his actions because his supervisor was aware of the practice and had given permission. The Appellant stated that he did not ever feel that he was stealing and that his conduct did not merit dismissal.

[15] During the hearing, witness Mr. L. S. submitted the following evidence:

- a) The witness stated that he had been working as a server at the Inn since 2004. He said that his duties included waiting on tables in the dining room and during banquets.
- b) The witness stated that he had been involved in unions for around 10 years and that he was the vice-president of the Inn's union. The witness stated that his duties consisted of resolving disagreements, issuing disciplinary notices, receiving grievances and working in cooperation with the director of human resources.
- c) The witness stated that in January and February 2016, billing management for bottles of wine at the Inn worked in the following way: bottles of wine were charged to the customer based on an established quota and any unopened bottles were returned to the wine cellar. The witness stated that bottles of wine that had been opened but not consumed were returned to the bar or servers put the bottles in cardboard boxes to drink or take home. The Appellant stated that this was how servers took wine that had been charged to customers.

- d) The witness stated that during a banquet, if bottles of wine had not been consumed, they were taken to the garbage room and servers took them home. The witness stated that the majority of servers took home bottles of wine. He said the hotel manager was aware that this was going on because during a student dance, bottles of wine had been billed and the hotel manager had seen that the bottles were not stamped. Because he was unable to keep them at the Inn, he asked some of the servers to take them home. It was at that time that they obtained permission from the hotel manager to take bottles of wine.
- e) The witness stated that the hotel manager was aware of what was going on in June 2015 during the student dance and that, at that time, he had given servers permission to leave with bottles of wine. The witness stated that the servers were responsible for billing during the banquets. He said that the practice of overbilling had been in place since he started working at the Inn.
- f) The witness stated that disciplinary measures had never been taken against servers who took bottles of wine and that it was the hotel manager who was responsible for discipline.
- g) The witness stated that he had heard of the employer's policy because he was a union representative and the employer had talked to them about it, but that regarding the pass for permission to remove goods, it was not an established practice. The witness stated that there was no written permission—only verbal.
- h) The witness stated that he had been aware of the employer's policy for two years, since 2013 or 2014, because there had been a review of the Inn's policies and rules.
- i) The witness stated that the employer loaned out coffee makers for use during union meetings and never had a problem with that.
- j) The witness stated that the director of human resources had left his position in 2014 and that since the arrival of the new director, the employment relationship had not been the same. Similarly, the owner's son had come back to work at the Inn during that time, which drastically changed the employment relationship.
- k) The witness said that he had won a case involving the employer before the Labour Relations Board in 2009 (Exhibit GD8).

PARTIES' ARGUMENTS

[16] The Appellant submitted the following arguments at the hearing:

- a) The Appellant's representative claims that although the employer submits that the Appellant stole or participated in stealing bottles of wine without permission and dismissed him, the Inn had a system of overbilling for bottles of wine.
- b) The Appellant's representative claims that banquet groups were charged based on the number of bottles of wine stipulated in the contract and not on how much they actually drank. Excess bottles of wine were to be returned to the wine cellar and servers would leave with bottles of wine [translation] "under the blessing" of their immediate supervisor.
- c) The Appellant's representative claims that when banquets were over, unconsumed bottles of wine were first taken to the garbage room and then placed discreetly in employees' bags, coats or backpacks and servers would leave with the wine. The Appellant's representative submits that servers act discretely at the request of their supervisor, but also so that customers were unaware of what was going on.
- d) The Appellant's representative claims that the employer's written policy and rules were not well known by employees. The witness said he had heard about them in 2014, but beyond that statement, the policy was not well known or applied in practice.
- e) The Appellant's representative claims that the servers' practice of taking bottles of wine was tolerated by the Appellant's immediate supervisor and that they had never been penalized for it.
- f) The Appellant's representative submits that the Appellant was dismissed for what was a common practice at his place of employment.
- g) The Appellant's representative submits that the Appellant may have been targeted by this dismissal, and not another employee, because of his union background.
- h) The Appellant's representative submits that the Appellant could not have expected that he would be dismissed because it was a practice that was tolerated and that the employer knew about and even benefitted from to a certain point. The Appellant's representative submits that the Appellant never could have known that he would be dismissed.

- i) The Appellant's representative submitted several decisions to the Tribunal's attention in which the facts are similar: decision from Umpire Guy Collard (Employee accused of committing theft and stealing goods from the employer. The employee submitted that when merchandise was not sold, it was made available to the employees. The Board of Referees therefore concluded that while theft is of such severity that normally the employee could expect a dismissal, given that the practice was established and tolerated by the employer, the employee should not have expected a dismissal). In CUB 76282, a decision from Umpire Guy Collard (Employee accused of stealing goods from the employer without permission, roofing and stairs from an abandoned building, as well as tools and the use of a City vehicle. The employee submitted that the building was abandoned and that he had the consent of his foreman. The Umpire concluded that the employee could not have expected to be dismissed in this case). In 2010 FCA 237 (CUB 72004, Umpire Guy Collard), (The employer dismissed seven employees from a food warehouse, accusing them of taking and consuming food, such as chocolate eclairs, thus violating the employer's policy, which constitutes theft. This practice was tolerated by the foremen, who also consumed these products. The employees were dismissed. The Umpire concluded that since this practice was tolerated by the supervisors, the employees could not have expected to be dismissed).
- j) The Appellant's representative submits that the Appellant could not have expected to be dismissed and that his actions did not constitute misconduct.

[17] On July 28, 2016, the Commission sent a written submission to the Tribunal (Exhibits GD4-1 to GD4-8):

- a) The Commission submits that subsection 30(2) of the Act provides for the imposition of an indefinite disqualification if it is established that the claimant lost an employment because of his or her own misconduct. The Commission states that, for the alleged action to constitute misconduct under section 30 of the Act, it must have been wilful or deliberate or so reckless or negligent as to approach wilfulness. It specified that there must also be a causal relationship between the misconduct and the dismissal (Exhibit GD4-4).

- b) The Commission maintains that the employer dismissed the Appellant because he took bottles of wine from the Inn with his co-workers, on at least four separate occasions. The Commission supports the employer's position that these actions constitute theft and that the Appellant acted in a wilful and deliberate manner.
- c) The Commission maintains that the Appellant admitted to leaving with opened bottles of wine even if he did not have permission from the employer (Exhibits GD3-15 and GD4-5).
- d) The Commission submits that leaving with the open bottles of wine without permission constitutes a violation of the relationship of trust between employer and employee, since this practice is prohibited according to the employer's rules (Exhibits GD3-15 and GD4-5).
- e) The Commission states that although the Appellant said that the bottles were paid for by the customers, this fact did not give the Appellant the right to steal them. The employer's rules provide that no employee may leave with drinks and it is understood that unopened bottles of wine were to be returned to the cellar while opened bottles were taken to the hotel kitchen (Exhibits GD3-23, GD3-24 and GD4-5).
- f) The Commission submits that, although the Appellant claims that the employer's policy "was flexible" and did not apply equally to all employees, the solution is not to take justice into one's own hands by breaking the rules and assuming everyone else is doing the same. The solution in this case was rather to make a complaint or to request an investigation (Exhibits GD2-3 and GD4-5).
- g) The Commission submits that the Appellant's actions led to his dismissal. The Commission maintains that taking wine without the employer's permission constitutes misconduct within the meaning of the Act because it broke the relationship of trust with the employer (Exhibit GD4-5).
- h) The Commission submits that the Appellant's actions were wilful and deliberate. The Commission submits that the Appellant was dismissed as a result of his actions and that these actions constitute a breach of his employment contract (Exhibit GD4-5).

ANALYSIS

[18] According to subsection 30(1) of the Act, a claimant is disqualified from receiving benefits if the claimant loses an employment because of his or her own misconduct or leaves an employment without just cause.

[19] The Court has defined misconduct as follows: “In 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” (*Canada (Attorney General) v. Tucker*, 1986 FCA 381).

[20] For the Tribunal to conclude that there was misconduct, it must have before it relevant facts and sufficiently detailed evidence for it to be able, first, to know how the employee behaved, and second, to decide whether such behaviour was reprehensible (*Meunier*, A-130-96; *Joseph*, A-636-85).

[21] 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—*Canada (Attorney General) v. Mishibinijima*, 2007 FCA 85 (CanLII).

[22] The Court also determined that the failure to meet a condition of employment stems from the misconduct and that the misconduct led to the loss of employment (*Canada (Attorney General) v. Brissette*, A-1342-92).

[23] Misconduct must be committed by the claimant while he or she was employed by the employer, and must constitute a breach of a duty that is expressed or implied in the contract of employment. Therefore, there must be a connection between the loss of employment and the alleged misconduct (*Canada (Attorney General) v. Brissette*, A-1342-92).

[24] The Appellant testified that he had been a server at the Inn since 2003. He stated that his duties included waiting on tables in the dining room, at the bar and during banquets. The Appellant also testified that he had performed union functions for about five years. He was treasurer as well as head of grievances (Exhibit GD3-15).

[25] The employer told the Commission that the Appellant was also team leader in charge of operations. On March 3, 2016, the Appellant was dismissed on the ground that he had been taking bottles of wine without permission (Exhibits GD3-34 and GD3-35).

[26] The employer submitted to the Commission the letter giving the reasons for dismissal: the employer conducted an investigation finding that on January 15, January 17, January 28, January 31, February 12, February 16 as well as February 17, 2016, the Appellant took bottles of wine from the Inn without permission. The letter states that during his shifts, the Appellant worked as team leader in charge of operations and that, given the seriousness of the misconduct, the trusting relationship between employer and employee was definitely broken. The letter indicates that the Appellant acted in a wilful and deliberate manner. Furthermore, the letter states that the Inn's rules and policies provide in section 3.2.2. that no property may be removed from the Inn without prior permission. The letter indicates that during the disciplinary meeting held on February 24, 2016, the Appellant admitted to taking the wine, downplayed his actions and showed no remorse (Exhibits GD3-24 and GD3-35).

[27] Relying on the employer's statement, the Commission submits that the Appellant lost his employment by reason of his misconduct because he stole bottles of wine from the employer without permission, which constitutes misconduct within the meaning of the Act because this gesture had the effect of breaking the employment relationship. The Commission contends that the Appellant's actions were wilful and deliberate and that they constitute a breach of the Appellant's contract of employment.

[28] The Appellant does not dispute the events; however, he testifies that his immediate supervisor was aware of and had given permission for his actions.

[29] The Tribunal must determine whether the Appellant's behaviour (taking wine from the Inn) constitutes misconduct within the meaning of the Act. The Commission has the burden of proof to demonstrate, on a balance of probabilities, that the claimant lost her employment by reason of her misconduct (*Canada (Attorney General) v. Larivée*, 2007 FCA 312 (CanLII)).

Employer's policy and rules

[30] The employer told the Commission that the Appellant had signed the document concerning the policy and rules when he was hired and that he was aware of the Inn's rules. The employer told the Commission that the Appellant knew the rule that employees are prohibited from leaving the Inn with food or drink without permission from senior management (Exhibits GD3-15, GD3-34 and GD3-35).

[31] The employer told the Commission that employees are not authorized to leave with drinks, that bottles of wine that are not consumed during banquets must be returned to the wine cellar and that opened bottles still containing wine must be returned to the kitchen because they were used for cooking (Exhibit GD3-15).

[32] The Appellant testified that he became aware of the employer's policy concerning the removal of goods and the pass that was required to remove food and drink from the Inn only when he was dismissed. The Appellant testified that everyone could leave with whatever they wanted, for example, the bartender brought home food for his dogs. The Appellant testified that he had never seen a physical pass and that he had sometimes borrowed a coffee maker or table cloths for a union meeting and that it was never a problem.

[33] The witness testified that he had been aware of the employer's policy at least since the review of the Inn's policy and rules in 2013 or 2014. The witness explained that the employer had already talked to employees about the policy and rules, but that concerning the pass required to remove food and drink, there was no established practice. The witness explained that there was no written permission—only verbal.

[34] The Tribunal analyzed the various statements in the Commission's file as well as those from the hearing and is of the opinion that the Appellant was aware of the Inn's policy and rules.

[35] The Tribunal heard that the employer had reviewed the policy and rules in 2013 or 2014. The witness testified that in 2014, there had been a change in the workplace environment when a new human resources manager was hired. The Tribunal finds that the review of the policy and

rules corresponds to this change. The Tribunal does not see why the employer would have reviewed its policy if it was not going to share any changes with its employees.

[36] The witness testified that the employer had already talked about this policy. The Tribunal finds that because he performed union functions at the Inn, the Appellant should have known about the policy if he was receiving complaints and grievances from the Inn's employees.

[37] The Tribunal finds that the Appellant was aware of section 3.2.2. of the rules concerning the removal of goods from the Inn. This document provides as follows (Exhibits GD3-34 and GD3-35):

Section 3.2.2

[translation] No goods (tools, material, food, drink or other), may be removed from the hotel property without permission.

Employees must obtain a pass signed by a member of senior management.

[38] Concerning the pass authorizing the removal of food and drink, the employer stated to the Commission that an employee wishing to remove food or drink had to obtain permission from management (Exhibits GD3-15 and GD3-23).

[39] The Appellant testified that he had never seen a physical pass. However, the Appellant stated that he had sometimes borrowed a coffee maker or table cloths for union meetings and that it had never been a problem. Therefore, the Appellant had verbally requested permission from the employer and the employer gave permission.

[40] The witness testified that the practice of obtaining a pass was not established, but that verbal permission was given.

[41] The Tribunal finds that, at the very least, verbal permission to remove goods from the Inn was required for the Appellant, whether to borrow a tablecloth or to take wine from the Inn. The Tribunal finds that the Appellant knew or ought to have known that he had to obtain permission to leave with bottles of wine.

Theft of bottles of wine and participation in plan to steal bottles of wine

[42] The employer stated to the Commission that after learning of the content of the Inn's camera footage and to figure out why the servers were hanging out near the garbage room after banquets, it had hired a specialized firm to conduct an investigation (Exhibit GD3-23). The employer stated to the Commission that the investigation had revealed that the Appellant was stealing unopened bottles of wine on a regular basis (Exhibits GD3-15 and GD3-23).

[43] The employer's dismissal letter indicates that the Appellant had taken bottles of wine on January 15, January 17, January 28, January 31, February 12, February 16 and February 17, 2016 (Exhibits GD3-34 and GD3-35).

[44] The employer stated to the Commission that the Appellant had been involved in a scheme with three other employees (Exhibit3-12) The employer stated to the Commission that the Appellant's actions were carried out in secret, that the Appellant was hiding the fact that he was stealing bottles of wine and that he had to have known that his actions constituted misconduct because he was aware that he was breaking the rules (Exhibit GD3-23).

[45] The Appellant stated to the Commission that everyone knew about this practice and that all the servers took wine because the employer could not resell it, as the bottles had already been paid for by the customers (Exhibits GD3-10). The Appellant testified that he acted in secret in order to be discreet around customers.

[46] The Tribunal analyzed the various statements in the Commission's file as well as the various testimonies. As the Appellant testified, the Tribunal accepts that a practice involving employees' consuming or taking home leftovers after banquets may have been established since the Appellant began working at the Inn in 2004.

[47] The Tribunal finds that the work environment changed in 2014 when a new director of human resources was hired. As the witness testified, the Inn's policy and rules were revised at that time.

[48] The Tribunal understands that servers who leave the Inn with food or drink must obtain prior authorization from management (Exhibits GD3-23, GD3-34 and GD3-35).

[49] The Appellant submitted during his testimony that he had his supervisor's permission to take the bottles of wine. The Appellant explained to the Tribunal that the employer billed customers for wine they did not consume. The Appellant admits that these bottles of wine, that were unopened and already paid for by the customers, were to be returned to the Inn's wine cellar and the Tribunal cannot rule on the legality of that practice. The Appellant testified that he allegedly told his supervisor that he would bill customers for unconsumed bottles of wine, that he would return those bottles to the wine cellar, but that he would also keep some for himself. His supervisor allegedly told him that "it wasn't a problem."

[50] The Appellant admitted to the Commission that he left the Inn with leftover wine even though he did not have the employer's permission (Exhibit GD3-15).

[51] During his testimony, the Appellant submitted that he had his immediate supervisor's permission to take bottles of wine and that it was in fact his supervisor who had initiated this practice. Although the Tribunal can accept that the billing method was established by the Appellant's supervisor, stealing bottles of wine by servers including the Appellant is another situation. The Appellant testified that he had told his supervisor that he would bill customers for unconsumed bottles of wine but that he would keep some of those bottles for himself.

[52] The Tribunal finds the Appellant version of the facts credible, concerning the permission he had obtained to take home wine that had been opened or leftover food after banquets.

[53] The Tribunal does not accept the Appellant's testimony concerning unopened bottles of wine. The Tribunal finds that the Appellant has not demonstrated that he had his immediate supervisor's permission. According to the Appellant's testimony, his immediate supervisor had given him permission to share full bottles of wine in the garbage room without prior decision on his part and that his only request was that the servers remain discreet. The employer stated to the Commission that full bottles of wine that had not been consumed were to be returned to the Inn's wine cellar and that four employees had developed a scheme to leave with the unopened bottles of wine (Exhibits GD3-15 and GD3-23).

[54] The Appellant testified that he brought full bottles of wine to the garbage room to share them with the other servers and that he then brought the bottles to the wine cellar. The

Appellant stated that not only did his supervisor go along with this practice, it was his idea initially. Is the Tribunal to understand that the Appellant's supervisor initiated this practice, but then let the servers decide how many bottles of wine they would take home with them and how many they would return to the wine cellar? The Appellant testified that he had his supervisor's permission to take the wine and that he had agreed to bill customers for unopened bottles of wine, but that in return, he had warned his supervisor that he would keep some of the bottles for himself. However, the Appellant later testified that he had left only once or twice with unopened bottles of wine.

[55] The Tribunal is of the opinion that the idea was to take the unopened bottles of wine before the employer knew how many bottles were consumed by the customers. This raises other questions about the service of these bottles of wine. But the Tribunal is concerned only with the issue of the bottles of wine that the Appellant was taking. The Tribunal does not accept the Appellant's version of the facts that he had his immediate supervisor's permission to take bottles of wine on January 15, January 17, January 28, January 31, February 12, February 16 and February 17, 2016, because the evidence contained in the file does not support this finding (Exhibits GD3-15, GD3-23, GD3-34 et GD3-35).

[56] The employer stated to the Commission that it had hired an external firm to investigate before the Appellant was dismissed. This investigation lasted six weeks. The Appellant attended a meeting on February 24, 2016, where he was able to give his version of the facts. The letter shows that the Appellant admitted that the facts were true, but that he downplayed his actions (Exhibits GD3-34 and GD3-35). The Tribunal finds that the Appellant's actions (taking wine from the Inn) were wilful and deliberate and that he knew or ought to have known that this conduct was such as to impair the performance of the duties owed to his employer (*Canada (Attorney General) v. Tucker*, 1986 FCA 381; *Canada (Attorney General) v. Mishibinijima*, 2007 FCA 85 (CanLII)).

[57] The Tribunal is of the opinion that by taking opened and unopened bottles of wine on January 15, January 17, January 28, January 31, February 12, February 17 and January 17, 2016, the Appellant breached section 3.2.2 of the employer's policy and rules. The Tribunal

finds that the Appellant was aware of this policy and that he disrespected an explicit condition of his employment contract (*Canada (Attorney General) v. Brissette*, A-1342-92).

[58] The Tribunal heard the Appellant's testimony about the employment relationship. The Tribunal understands that the relationship with the employer had changed at the Inn in 2014 (Exhibits GD3-34 and GD3-35).

[59] The Tribunal finds that the Appellant knew the employer's rules and is of the view that the evidence on file demonstrates that the dismissal was a direct consequence of the Appellant's failure to respect an obligation set out in his contract of employment (Exhibits GD3-30 and GD3-39), (*Canada (Attorney General) v. Brissette*, A-1342-92).

[60] The Commission demonstrated that the Appellant's actions were wilful and deliberate. The evidence shows that on January 15, 17, 28 and 31 and on February 12, 16 and 17, the Appellant took bottles of wine without the employer's permission.

[61] The Tribunal finds that the Appellant could have presumed that his actions, i.e. taking bottles of wine that should have been returned to the Inn's wine cellar, were such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility because he knew the employer's rules (*Mishibinijima v. Canada (Attorney General)*, 2007 FCA 85 (CanLII)).

[62] In cases of misconduct, the Court has stated that the Tribunal's role is not to determine whether the dismissal or penalty was justified (*Fakhari*, A-732-95). It must instead determine whether the claimant's action constituted misconduct under the Act (*Marion*, 2002 FCA 185). In this case, the Appellant admitted to taking full and unopened bottles of wine and the evidence showed that the Appellant carried out the alleged actions without the employer's permission. The Tribunal finds that the Appellant's actions were "wilful or deliberate or so reckless as to approach willfulness."

[63] The Tribunal finds that the disentitlement imposed on the Appellant due to his own misconduct under sections 29 and 30 of the Act is justified.

CONCLUSION

[64] Having weighed the evidence and the parties' arguments, the Tribunal finds that the Appellant lost his job by reason of his own misconduct, under sections 29 and 30 of the Act.

[65] The appeal is dismissed.

Josée Langlois
Member, General Division – Employment Insurance Section

APPENDIX

THE LAW

Employment Insurance Act

29 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;
- b.1)** voluntarily leaving an employment includes
 - (i)** the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,
 - (ii)** the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and
 - (iii)** the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and
- c)** just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:
 - (i)** sexual or other harassment,
 - (ii)** obligation to accompany a spouse, common-law partner or dependent child to another residence,
 - (iii)** discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,
 - (iv)** working conditions that constitute a danger to health or safety,
 - (v)** obligation to care for a child or a member of the immediate family,
 - (vi)** reasonable assurance of another employment in the immediate future,
 - (vii)** significant modification of terms and conditions respecting wages or salary,

- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30 (1) 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 employment; and
- (b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) 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.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

- (a) hours of insurable employment from that or any other employment before the employment was lost or left; and
- (b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

- (6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.
- (7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.