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

[TRANSLATION]

Citation: *X v Canada Employment Insurance Commission and AA*, 2017 SSTGDEI 203

Tribunal File Number: GE-15-1229

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

A. A.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Lucie Leduc

HEARD ON: May 8, 2017

DATE OF DECISION: July 20, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

X, Appellant

Sébastien Sénéchal (counsel), Representative for the Appellant

Langlois (counsel), Representative for the Appellant

A. A., Added Party (Claimant)

Mario Lavigne (counsel), Representative for the Added Party

M. L., Witness for the Appellant

T. S., Witness for the Appellant

P. S., Witness for the Appellant

INTRODUCTION

[1] The Claimant made an initial claim for Employment Insurance benefits on November 29, 2014. The Canada Employment Insurance Commission (Commission) approved the claim for benefits in its January 9, 2015, decision. On January 9, 2015, the Commission imposed a stop payment due to allegations of misconduct by the employer. On January 21, 2015, the Commission received the Claimant's reconsideration request. In a March 13, 2015, decision, the Commission reconsidered its position in favour of the Claimant and determined that there was not enough information to find that the Claimant had lost her job because of her own misconduct. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal) on April 9, 2015.

[2] This appeal was heard by in person for the following reasons:

a) The complexity of the issue(s).

b) The fact that credibility may be a prevailing issue.

c) The fact that more than one party will be in attendance.

d) The information in the file, including the need to obtain additional information.

[3] A hearing was scheduled for January 29, 2016. The Claimant asked for an adjournment on January 13, 2016, on the grounds that the hearing before the court concerning the theft allegations had been postponed and that, as a result, no decision had been given in that case. The Claimant submitted that it would be better to wait to proceed in this file after the May 20, 2016, proceeding. The Tribunal granted the adjournment on January 15, 2016. The Tribunal scheduled a new hearing date for May 30, 2016.

[4] On May 25, 2016, the Appellant requested an adjournment because the civil case before the Court of Québec involving the Claimant had to continue its hearings on November 16, 17, and 18, 2016. On June 6, 2016, the Tribunal granted the adjournment to give the parties the opportunity to be heard and scheduled a new date—July 25, 2016—considering that the Tribunal was not bound by the civil proceedings and considering that waiting until after November 2016 would unduly delay the proceedings, which would be contrary to the Tribunal's general principle to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[5] On June 8, 2016, within the two-day administrative deadline, the Appellant sent a request to change the hearing date due to a scheduling conflict. This change was granted, and a new hearing date was scheduled on June 21, 2016, for September 12, 2016.

[6] On June 29, 2016, the Appellant submitted a new adjournment request, citing the need to be heard after the hearing of its case before the Court of Québec involving the Claimant and held on November 16, 17, and 18, 2016.

[7] On July 8, 2016, the Tribunal refused the adjournment request and repeated its reasons to the effect that the matter before the Social Security Tribunal is an independent proceeding unrelated to other legal proceedings that may be in court. The Tribunal also found that the Applicant had not established exceptional circumstances justifying another adjournment.

[8] The hearing took place as scheduled on September 12, 2016, but the Tribunal had to adjourn on its own initiative because it did not have enough time to complete the proceedings. The continuation of the hearing was scheduled for January 23, 2017.

[9] On January 19, 2017, the Appellant requested an adjournment because one of its key witnesses was in the hospital (the president, P. S.). The Tribunal refused the adjournment in order to speed up the proceedings and hear the other witnesses in this case in the interest of justice. The Tribunal told the parties that it reserved the right to adjourn or not after hearing the other witnesses and after judging whether the witness that was absent should be heard at a later date. At the beginning of the January 19, 2017, hearing, the Appellant's representative tried to argue the denial of the *audi aleram partem* rule by requesting an adjournment again given that its witness is the president of the Appellant's company, is very involved in all the proceedings, and that it would be a denial of natural justice to deprive him of being present for all steps of the proceedings. The Tribunal determined that the adjournment issue had already been decided and that there was no need to review it. The Tribunal also re-explained the reasons for its decision to refuse the adjournment, including its finding that the *audi alteram partem* rule had not been breached in this case and that the issue did not involve him personally, but the corporation that is his company and which is represented at the hearing. The Tribunal also noted that no medical evidence had been submitted to justify P. S.'s absence.

[10] After the January 19, 2017, hearing, and after hearing from all the scheduled witnesses, the Tribunal decided that it would like to hear the last witness, P. S. An adjournment was then initiated by the Tribunal, and a new hearing date was scheduled for March 20, 2017.

[11] On March 16, 2017, the Appellant requested an adjournment because of a case at the Palais de Justice de Montréal [Montréal courthouse] that involved its representative that day following unforeseen circumstances. The Tribunal granted the adjournment with the requirement that it provide the Tribunal with evidence that the representative's presence was required in court on March 20, 2017.

[12] The Tribunal held a prehearing conference with the parties on March 20, 2017, to reach an agreement on the last scheduled hearing date to complete the testimonial evidence and present

the parties' arguments. A new hearing date was scheduled for May 8, 2017, and actually took place. The evidence and the parties' arguments were completed by that date.

ISSUE

[13] The Tribunal must decide whether the Claimant lost her employment because of her own misconduct and whether to impose a disqualification under sections 29 and 30 of the *Employment Insurance Act* (Act).

EVIDENCE

[14] The Tribunal reviewed all the documents in the appeal file. Here is a summary of the evidence that the Tribunal found relevant to its decision.

[15] A Record of Employment from X dated December 22, 2014, indicates that the Claimant worked from September 13, 2014, to November 21, 2014. The reason for the Record of Employment is written as "dismissal."

[16] The Commission contacted the Claimant on January 9, 2015. The Claimant says that she was dismissed because the employer accused her of theft, which she denies having committed. She says that she made a complaint with the labour standards board and that the employer made a formal complaint with police.

[17] On January 9, 2015, after the Commission's decision in favour of the Claimant, the employer contacted the Commission to give it more information. It said it had evidence about the Claimant's theft and that she should not be paid benefits. The employer agreed to send the evidence to the Commission that same day and the Commission imposed a stop payment.

[18] On January 9, 2015, the employer sent the Commission a page of handwritten and illegible notes as well as unidentified tables showing negative amounts for the months of November 2013, December 2013, January 2014, February 2014, March 2014, April 2014, May 2014, June 2014, July 2014, August 2014, September 2014, October 2014, and November 2014.

[19] The Commission contacted the employer on January 12, 2015. The employer said it had discovered that the Claimant was stealing from it on October 16, 2014. It said that, since November 2013, it has been missing deposits at the end of the month. After further investigation and doubts about the Claimant, video cameras were installed. They then discovered that the Claimant was using the manager's codes in the computer system, which allowed her to make various transactions such as transferring orders to other employees who did not work on those days. At the end of her shift, the Claimant allegedly deposited [*sic*], but did not make the deposit for the other server to whom she had transferred orders, and she kept the money. The employer says that the Claimant admitted to this scheme and to stealing $1,000, but that it was actually $10,076.93. The employer also says that a complaint was filed with police for theft on November 21, 2014, and that a court date was confirmed.

[20] The Commission contacted the Claimant on January 12, 2015, to confront her with the employer's version of events. She denied having admitted to anything and denied having committed theft. The Claimant said she had hired a lawyer to represent her and said that she should have news from the investigator whether the evidence against her is conclusive. She noted that she had not yet been contacted and therefore that the evidence must not be conclusive.

[21] In a conversation with the employer on February 13, 2015, the Commission told it that the decision could be reconsidered in favour of the Claimant due to a lack of evidence of misconduct. P. S. (employer) allegedly raised his voice, swore, and insulted the Commission agent, telling him that he did not understand and that he was going to lodge a complaint against the Commission. The agent noted that he had had to end the conversation without getting more information from the employer. That same day, P. S.'s representative called the Commission back and it is noted that P. S. was still yelling in the background about his frustrations toward the Commission agent.

[22] On February 17, 2015, after the Commission's questions over the phone, the Claimant repeated that she had not committed theft. She also said that no court date had been scheduled yet. She also repeated that the employer had no concrete evidence of its allegations.

[23] Several exchanges took place between the Commission and the employer's representative between February 24, 2015, and March 13, 2015, during which the representative said it had sent video evidence of the Claimant's theft. The video evidence was not received before the reconsideration decision in favour of the Claimant.

[24] A statement from the SPVM [Montréal police service] signed by the Claimant and two police officers from the fraud unit on March 25, 2015, gives the Claimant's statements and version of events about what happened on November 21, 2014, at X. In her statement, the Claimant denies having committed fraud or theft at X. Confronted with the fact that the videotape shows that she made a table transfer, the Claimant said that two customers at the same table wanted separate bills and that she transferred one of the customer's orders to another table to print a separate bill. She added that that was the only way to reprint a bill.

[25] An application initiating proceedings at the Court of Québec dated January 13, 2016, indicates that the Appellant filed a civil action against the Claimant for the recovery of an amount of $10,393.43, as well as $10,000 in damages and interest. The application alleges that the Claimant took sums of money to which she was not entitled between November 2013 and November 2014.

[26] In a written statutory declaration dated April 24, 2015, P. S., the Appellant's president, says that all the alleged facts in the notice of appeal are true to his knowledge.

[27] The Appellant submitted video evidence that was viewed during the hearing, along with screen captures submitted in documentary evidence.

[28] A timecard in the Claimant's name for the period from November 17 to 23 (no year) indicates that she punched in on November 20 at 11:00 a.m. and out at 4:43 p.m., then in on November 21 at 8:45 a.m. It is handwritten that she left at 2:00 p.m.

[29] A timecard in the name of R. M. for the period from November 17 to November 23 (no year) indicates that she punched in on November 20 at 10:43 a.m. and out at 2:02 p.m.

[30] A timecard in the name of M. A. (manager) for the period from November 17 to 23 (no year) indicates that he did not work on November 20 and 21.

[31] A timecard in the name of C. A. for the period from November 17 to 23 (no year) indicates that she did not work on November 20. She punched in on November 21 at 5:00 p.m. and out at 3:01 a.m.

[32] A list of names and numbers of servers indicates that the Claimant was server #30, C. A. was server #42, and R. M. was server #20.

[33] A document from X indicates, for the month of November 2014, a loss of $1.64 for server #17, a loss of $10.93 for server #31, and a loss of $1.49 for server #20.

[34] A document from X indicates, for November 20, 2014, a loss of $1.64 for server #17, a loss of $10.93 for server #31, and a loss of $1.49 for server #20.

[35] A document from X indicates, for November 2014, a loss of $1.64 from the envelope of S. D.

[36] Judge Cameron of the Court of Québec, Civil Division, gave a decision on March 31, 2017, finding the Appellant guilty of fraudulently taking a total of $8,134.49 from the Appellant. The Claimant was therefore ordered to repay the sum of $8,134.49 plus interest to the Appellant. Judge Cameron also stated that the conviction was the result of the Claimant obtaining property by false pretences or fraudulent misrepresentations of facts, under section 178(1)(e) of the *Bankruptcy and Insolvency Act*.

Testimonial Evidence

Witness 1 for the Appellant: M. L.

[37] The Appellant led evidence from M. L. (manager of X). She says she started working at X in May 2013 and still works there. She has 15 years of restaurant experience, including 10 years in management. She says that the tasks of a manager are to manage the employees, make orders, and do the employees' cash after their shifts. She said she hired A. A. (Claimant) in

August or September 2013. M. L. says that the Claimant initially received three days of training for the server position. She says she has no complaints about the Claimant's general way of working.

[38] M. L. says she received a call from her head office approximately two weeks before the Claimant's dismissal to tell her that the brewery's accounts were not balancing and asking her to look into it. She says she then consulted the Maitre'D system, which is the cash register computer system the employer uses. M. L says she realized by looking at the summaries that employees were showing sales for days they did not work. She says she also noted that this happened on days when the Claimant was working and that table transfers were made those days.

[39] M. L. says she then told P. S., and that T. S., who is in charge of accounting, came to see her in person. They decided to have a camera installed at the restaurant on November 19, 2014, to see the Claimant's scheme, and they filmed her during her workday on November 20, 2014. They saw that the Claimant had transferred an order to R. M's account, another server at the restaurant. The Appellant then showed the videotape to demonstrate the transfer of items from one server to another.

[40] Next, M. L. told the Tribunal about the Claimant's actions as seen on the screen captures printed from the videotape. She notes that the Claimant puts in her code (GD18-33), that she enters table 60 (GD18-34). That she punched in a host table #1 at $9.95 (GD18-36), that she added a coffee (GD18-37), that she entered into the table by entering code 30 (GD18-39), that she entered the password (GD18-40), that she came back to table 60 (GD18-41), that she entered "status" and then "transfer" (GD18-42), that she took her host table #1 item and transferred it to table 500 (GD18-43), that she pressed "new customer" (GD18-45), that she transferred the item from table 60 to table 500 (GD18-46), that she then went back to table 60, where we can see that there is only a coffee left (GD18-47). M. L. says that, next, the Claimant selected cash payment (GD18-48), she pressed four keys, which was the manager's code, she then found herself in the manager's menu and pressed "table transfer" (GD18-50), then she transferred table 500 to table 79 (GD18-51). M. L. claims that the next image shows that the Claimant selected table 79 (GD18-52), transferred it to R. M., another server (GD18-53), and entered the code for the manager M. A. (GD18-56). She also says that the Claimant then entered the section for servers'

reports (GD18-58), pressed on R. M. to bring up her report (GD18-59), that we can see an open table for R. M. (GD18-60), that we can see the transferred dish at $11.44 (GD18-61), that the Claimant clicks on “Promo S.,” which gives a discount, that the total bill is then $1.49, and that the Claimant selects cash payment (GD18-63).

[41] Regarding GD-18-9, the witness presents the daily summary for November 20, 2014, indicating the employee’s code and name (Claimant). She says that the last three lines show the time of the last report and says that it is when the server got out her reading and finished her shift. The report indicates that the Claimant printed her last bill at 4:19 p.m.

[42] Regarding GD-18-12, M. L. indicates that it is the summary of November 20, 2014, for server R. M. She notes that we can see “promo S.” $9.95 and says that it means that the manager made a promo S. under the name of R. M. The witness says that the report also shows that she finished her last bill at 1:48 p.m. and that she finished her shift at that time.

[43] M. L. presents a page and explains that it is a copy of R. M.’s deposit envelope for November 20, 2014, and her reading that was printed at 1:48 p.m. (GD18-15). She explains that each employee prints their reading and puts money in the envelope, which is then verified by the manager. She says that the deposit envelope and the reading always balance.

[44] M. L. describes a copy of the bill (GD18-17) indicating promo S. and a balance of $1.49, which is the tax for the $9.95 meal. She notes that we can see the time (4:20 p.m.), which is the time the bill was printed, and that she was paid cash.

[45] M. L. describes the events of November 21, 2014, as follows: She says that P. S. was sitting down and eating and that Mr. T. S. from accounting at the head office was in the office where the camera system was installed. It is around 1:15 p.m., 1:30 p.m., after the lunch rush, and she went to join T. S. to watch the activity on the video camera. She says that it was then that she saw the Claimant transfer three plates of pork hock to another server who selected “promo S.” M. L. adds that they then went to see P. S. to share what they had seen and that he decided to talk to the Claimant after her shift. M. L. says that P. S. met with the Claimant and that she wrote the time the Claimant finished her shift by hand because the Claimant was in a meeting with P. S.

[46] In cross-examination, M. L. says she was informed in November 2014 by M. E. from the head office about the cash register imbalance and was told to verify with Maitre'D and produce all the Maitre'D documents. She says that, before November 2014, she had no knowledge of a cash register imbalance. She is not at all aware of other cases of fraud, just of a case of an employee who was dismissed for ordering plates in the kitchen.

[47] When asked to verify Maitre'D, M. L. explains that this means to look at the sales. She says she then noted that money was missing and that it corresponded to all the days when the Claimant was working. She therefore verified the entire period the Claimant was working. She said she did the verifications once and that it took a good three to four days. M. L notes that she was asked to produce all the sales since the Claimant was hired, over approximately eight months.

[48] M. L confirms that, if two customers at the restaurant ask for two bills, you have to make a transfer. She notes that the server will then make a transfer and that there will be no record of the bill with the two customers. She also notes that a cashier can go back into the cash register after having worked, but they have to enter their code. She also says that there is a bartender and that she can also order food by entering a code.

[49] M. L. says she found out quickly that it was the Claimant who had stolen. According to her, there is no way to block the system to avoid using a manager's code. She says that the Claimant's cash was still balancing because she was transferring tables using M. A.'s code. M. L. says that the missing amounts did not appear in the Claimant's readings.

[50] The witness explains that, at the end of the shift, the manager verifies the deposit envelope; there is the reading, the credit card receipts, and the cash. Each time, the Claimant's balanced. The whole thing is verified by the head office. She says that, if the head office notices an amount missing, it shows the employee the evidence and asks the employee to repay it. M. L. says that that is very rare, however, and that in four years of experience, the envelopes always balanced. After questioning, M. L. explains that the practice of selling your credit cards means that, to get cash, a server can exchange credit card receipts for cash. In this case, the servers will must [*sic*] go into Maitre'D to transfer transactions.

[51] M. L. says that she was told that a camera was being installed about a week after the call from the head office. They installed one camera over the main cash register. There are already 16 cameras in the establishment, like in all of P. S.'s establishments. She says that the head office called back the next day to say that they had discovered that it was the Claimant who was stealing. M. L. says she saw directly on the cameras how the Claimant had transferred orders to another account. The other employees were not aware of the changes to the camera.

[52] M. L. says that she has never used someone else's code to make transactions in Maitre'D. Employees have four-digit codes and managers have three-digit codes.

[53] Regarding the "promos S.," M. L. explains that, when P. S. comes to eat, he does not have to pay, so the server would select that button in the ordering system. She said that P. S. had never asked in the past to use the code for his friends or acquaintances. P. S. was at X on November 21, 2014, at lunchtime.

[54] M. L. says that she was not there for the discussion between the Claimant and P. S in the office, at the Claimant's request.

Witness 2 for the Appellant: T. S.

[55] The Appellant led evidence from T. S., who works at the office as supervisor for the purchasing department and supervisor for the cashiers department for X businesses, including X.

[56] T. S. explains document GD18-2 by stating that, for server #17, who is S. D., you can see the employee's deposit envelope number in column B. He states that each employee enters their receipts for the day in an envelope. He continues, saying that column C corresponds to the money that was in the envelope the day of the deposit. Column D is what the employee must include in the envelope based on the reading. Column E corresponds to their sales total for the day, column F to their sales minus the promotion if applicable. He states that F–E equals the promotion after taxes and that column H represents the amount of the promotion before taxes. T. S. says that the amounts highlighted in yellow on the lines of servers #31, #17, and #20 indicate amounts not received. He also says that these three amounts are amounts that these employees had not cashed themselves. T. S. says that, in the case of November 20, 2015, these

three employees were working, but had finished their shifts when the transactions for amounts not received were made.

[57] T. S. says that he was not there at X on November 20, 2014. He says that an analysis was done for November 20, but that the transactions were not captured on video. He says that the video showing the Claimant's scheme is from November 21, 2014. He adds that he was there at X on November 21, 2014, and remembers the Claimant's fraudulent transaction.

[58] T. S. explains with the help of GD18-3 that, at column 11, $51.30 is missing from C. A. He says that the amount is in yellow because it was missing from X's envelope. T. S. says he had assigned this amount to the Claimant because he saw her making the transfer on the video on November 21, 2014.

[59] With the help of GD18-15, T. S. says that you can see on the bill from November 21, 2014, in the name of C. A., a sub, three plates of pork hock, as well as a promo S. He says that the statement on the left is the bill for the promotion S. from C. A. by M. A. (M. A. is the manager). He also says that C. A. had finished her number [*sic*] at the time of the transaction. He also notes that M. A. did not work on November 21, 2014.

[60] On reading GD18-21, T. S. notes that C. A.'s timecard showed an entry at 5:00 p.m. and an exit at 3:00 a.m. On reading GD18-15, T. S. notes that the bill by C. A. came out at 1:20 p.m. when she was not working.

[61] In cross-examination, T. S. explains that the Maitre'D system is a software program commonly called a point-of-sale system in the restaurant industry. He is of the opinion that it is not an accounting system, but a restaurant system, and that it is approved by the Québec government. He does not know where to buy this system but says that you cannot buy it on the street corner.

[62] T. S. says that employees that he supervises who work in the cashiers department became aware of irregularities in the X cash registers. He notes that these employees often changed and that the error was found late. He adds that the Maitre'D system is a system that is not used often by X businesses because it is the only restaurant purchased by P. S. that uses this system. T. S.

notes that the employees never noticed the irregularities before they did an overall analysis of the restaurant instead of what he was doing—that is, an analysis by employee. He notes that the restaurant's receipts balanced that day.

[63] T. S. says that the process for manager's at the restaurant is to receive the employee's money and receipts, check the envelope, seal it, and deposit it in the safe. An employee from the head office then comes by to collect the envelopes and is in charge of opening the envelopes to complete the accounting.

[64] T. S. says that it is very rare for the individual envelopes not to balance.

[65] T. S. repeats that he saw the Claimant on the video using the code for the manager M. A., who was not there, and transferring the three plates of pork hock. He says he then went to see P. S. to tell him that he had witnessed this act.

Testimony A. A., Added Party

[66] A. A., the Claimant, says she worked at restaurant Y for approximately a year and a half as a server and worked at X from September 2013 to November 21, 2014, also as a server. She also says that she liked her work and that it was next to her home. She says she had a good relationship with M. L., the manager.

[67] Regarding the events of November 21, 2014, the Claimant says that, at the end of her shift, she went to see M. L in the office to give him her deposit. She says that P. S. was there, asked her to sit down, and started asking her questions. T. S. was also in the office and an investigator from the head office whose name she did not know. The Claimant says that P. S. accused her of theft and that T. S. asked her whether she wanted to be alone in the office with P. S., to which she responded that she [translation] "didn't care."

[68] The Claimant says that, once she was alone with P. S., he gave her a piece of paper asking her to sign a confession that she had stolen. She says she refused because she had done nothing wrong, after which P. S. left the office and called the police.

[69] The Claimant says that she could not leave the premises because the door behind the office was barricaded with containers of bread. Two women police officers arrived. One came over to see her to take her statement, and then P. S. became angry because he wanted her to go to jail and the police officers let her go. She says that he became angry and called the supervisor of the police service to express his dissatisfaction with the work of the two police officers. The Claimant repeats that he absolutely wanted her to go to prison.

[70] The Claimant says that the police officer took the money that she had in her purse and in her work apron. The police service later returned the money to her. She filed a receipt that she received from the police when her money was taken.

[71] The Claimant submits the statement that she made to police. She says she had contacted the police on her own initiative to meet with them. She says that she made an appointment with the police officers to go tell them what had happened and give her version of the facts. She says she also offered to take a lie detector test to support her version of the facts.

[72] In cross-examination, the Claimant denies having made a statement to P. S. and says that she never admitted to stealing. She says that she told P. S. that she wanted to leave in the presence of T. S. and M. L in the office. That happened before the police arrived at the restaurant. She says that they did not physically prevent her from leaving, but that they told her to stay and that they had her purse and her coat.

[73] The Claimant said that she knew the manager M. A.'s password and that she also already knew the password for M. L., the other manager. She explains that she knew M. A.'s password because M. L often left M. A.'s password beside the cash register, and M. L sometimes asked to use M. A.'s password for various transactions.

[74] To the question [translation] "Do you see that you are transferring the transfer of three pork hock on the video?" the Claimant answered "No." Furthermore, she denies having made the transfer of this order as she is accused and having made a "promotion S." that day.

[75] The Claimant says she learned sometime after her dismissal that a criminal complaint had been made against her. She says she thought it would be a good idea to go meet with the investigator from the police service (SPVM) to give her version of the facts.

[76] The Claimant acknowledges that it is indeed her in the photo in GD18-33. She also acknowledges that it is indeed her timecard in GD18-5. She reads from it that she started at 8:45 a.m., and it appears that she did not punch out at the end of her shift.

[77] The Claimant says that she has never not balanced. She is aware of a co-worker who did not balance. That person had to repay the amount or have her pay withheld. She said usually from the next shift. Approximately once a week, something would be missing, and the manager would ask them to repay it.

[78] She was accused of theft and that is the reason for her dismissal. She has no idea why she was accused. She confirms that the video shows that she made a transfer. According to her, the transfer that you see on video is for a table transfer. Once a bill is printed and it contains two people, if they ask for separate bills, she has to transfer part of the order to another table to create a new bill and leave the items for the first customer on the initial table.

[79] The other proceedings that are ongoing are a civil proceeding, pending decision, and a complaint made by the Claimant to labour standards. The criminal complaint is no longer in progress.

Witness #3 for the Appellant: P. S.

[80] P. S. is the owner of X and president of the company X. With the help of his personal notes, he says that on November 21, 2014, he was at X for lunch and ordered spaghetti. He was sitting at a high table with stools. He notes that M. L. and the Claimant were on the floor. P. S. says that he had had a video camera installed to see exactly the Claimant's actions. He says that, after lunch, M. L. came to see him at his table and told him that she and T. S. had seen what the Claimant was doing and that it was clear she was stealing. T. S. allegedly told him the same thing. P. S. claims to have then waited for the Claimant to finish her shift to invite her into the office in the presence of M. L. and T. S. In the office, P. S. claims to have said to the Claimant

[translation] “A. A., we’ve caught you, we know what you’re doing, what you were doing, that you did it again today, we’ve got it on camera.” He says that the Claimant denied everything at all times during the discussion, which lasted about 15 minutes. He says he then left the office leaving the other three people. He went into the restaurant. S. G., the head of security then arrived at the scene because P. S. had called him. He notes that it is S. G who usually deals with police. He had instructed S. G. to call the police.

[81] P. S. claims that, a few minutes later, M. L. and T. S left the office and told him that the Claimant wanted to talk to him alone. As a precaution, he asked T. S. to go with him, but T. S. refused, saying that the Claimant would not talk in front of another person. P. S. says he therefore found himself alone in the office with the Claimant, who allegedly confessed to stealing and apologized. P. S. says he asked her how much, that she did not want to answer at first, but that she ended up telling him between $1,000 and $2,000. He adds that there was a piece of paper on the edge of the desk and that he asked her to write down that she had stolen between $1,000 and $2,000 from him. The Claimant allegedly refused. He told her that the police had already been called and left the office.

[82] P. S. claims that the Claimant did not ask to leave and that they would not have kept her there against her will.

[83] P. S. explains that, once the two police officers arrived, he explained to them what had happened and they continued with the Claimant separately. He says that they also spoke briefly to M. L. and T. S. He says the other employees were not aware of anything.

[84] He claims that the police officers stayed for about an hour. He says he had discussions with the police officers about bringing the Claimant to the station. He admits that he was disappointed that they did not bring her to the station. He says that the police officers spoke to the Claimant for a long time in the car, and he then learned that she was free to go when the police officers came back inside to talk to him and they told him that she would be charged, but that they had let her go.

[85] P. S. says that, approximately two days later, he went to the police station with T. S. to make their statements about the circumstances.

[86] P. S. says that the charges were dragging on and that he learned recently that charges would not be laid against the Claimant, but that he did not agree and that he will continue to intervene with police so that charges are laid.

[87] P. S. admits that he does not understand the computer system, but that M. L. and T. S. had explained the Claimant's scheme to him. He remembers that after hours of verifications, it was found that the Claimant was reducing her sales by putting items under another server's name and that she was pocketing the balance. Money was therefore missing on those days. He adds that, if memory serves him well, that day of the dismissal, the Claimant had put three plates of pork hock on his owner's account.

[88] P. S. confirms that he was the one who decided to have a camera installed because, with his years of experience in the industry, he understands that he must try to have as much evidence as possible. He says that, even though his staff had already discovered the Claimant's scheme by verifying documents, he wanted to make sure that he had as much evidence as possible.

[89] P. S. says that he was disappointed in the Claimant, who had been working for him for a year. He also says that, in the restaurant industry, he is used to being stolen from, but that theft by table transfer was a new experience.

[90] P. S. says that there was no conflict between M. L. and the Claimant, that they were good friends, and that she was an excellent server.

[91] To the question why his establishment became aware of the irregularities only one year later, P. S. said that his company owns 45 different types of restaurants and that they were very behind [translation] "in their paperwork." He indicates that the accounting department went from 12 to 6 employees during that period.

[92] In cross-examination, P. S responded yes to the question [translation] "On November 21, 2014, was there another police officer who arrived at the end?" He says that he did not know who it was, but that he had asked the two police officers to bring their boss to help them with their investigation. To the question [translation] "Were you angry with the police officers?," he

says that he was disappointed because he had been robbed. P. S. says that the police officers were very young and were doing all they could.

[93] To the question [translation] “Did you raise your voice to the police officers?,” P. S. responded that he had not measured the volume of his voice. To the question whether he had shouted at the police officers, he responded no and that he would not dare shout at a woman police officer. He repeats that he was disappointed and that police officers usually take their suspects to the police station.

[94] P. S. says that video cameras were installed on November 19, 2014, at his request. He says that he does not remember whether he had seen the video recording before the police arrived.

[95] P. S. says that the office is located at the back of the restaurant and that the Claimant could have gotten up and left through the door if she had wanted to. He says they were in the office for between 10 and 15 minutes.

[96] P. S. says that he learned that charges would not be laid against the Claimant through his lawyer after a police officer called the office. He does not know which police officer it was that called.

[97] P. S. says that T. S. told him that money was disappearing and that, after checking, it was always on days when the Claimant was working.

[98] To the question [translation] “How did you know that the Claimant and M. L. got along well?,” P. S said that he had seen the Claimant bring M. L coffee in the morning.

[99] P. S. says that the Claimant did not contact him to make a payment agreement following the Court of Québec decision.

PARTIES’ ARGUMENTS

[100] The Appellant argued that the Claimant is not entitled to Employment Insurance benefits for the following reasons:

a) The Claimant was dismissed due to serious misconduct. She stole $10,393.43 from the employer. To do this, she stole a manager's administrator code. Manager M. A.'s timecard shows that he was off on November 21, 2014. The timecard for C. A., the server to whom the Claimant transferred three plates of pork hock shows that she was also not working on November 21, 2014. On the detailed server's summary, you can see the Claimant's code. You can see the time of her last report (2:02 p.m.) and the time of the last bill (1:12 p.m.). On the detailed server's summary for November 21, 2014, you can see on the line promo S. the amount of $51.30, and the time of the last report indicates 2:19 p.m., and the time of the last bill indicates 1:43 p.m.

b) In a factual manner, P. S. met with the Claimant following what the employer believed was fraud, on November 22, 2014. The Claimant made verbal confessions, but no written confession. The two main witnesses said that P. S. handed her paper and a pencil to write down her confession. Why would he give her a pencil? Because she had just confessed to him. Verbal confessions are very difficult evidence to have recognized before the Tribunal and the decision-maker must look at the circumstances as a whole. The fact that the Claimant acknowledged that P. S. had given her paper and a pencil gives credibility to P. S.'s version.

c) The Court of Québec decision has proven the Claimant's theft. Specifically at paragraph 102, it is noted that the Claimant's actions had a fraudulent intent, having taken the employer's property, which she pocketed. The judge finds that there is reason to find that the section of the Bankruptcy Act applies. The judge not only sentenced the Claimant to pay the amount of $8,134.49, but he stated in his second finding that the obligation giving rise to the previous conviction results from the fraudulent acquisition of the employer's property. This means that, even though the Claimant went bankrupt, since she committed civil fraud, she will not be relieved of that amount. Not only did Judge Cameron find that the woman stole, committed fraud, but he recognized the woman's intention. He notes the confession. He arrives at a conclusion with respect to these confessions and says at paragraph 30 that the Claimant maintains her denial while acknowledging that she was offered paper and a pencil. The Claimant is trying to make it

look like it was not a confession, but that is certainly the case. Judge Cameron did not decide on the confession, but he went on circumstantial evidence in paragraphs 59 and after. For example, he finds that, in view of this presumptive evidence, she is the only one who could have made all the fraudulent transactions, and when she is absent, there are none. Furthermore, he notes [translation] "that no other explanation is offered, the defence is rather a defence of good character."

d) All of these factors support a finding of misconduct. Although it is not necessary for there to be a civil and criminal conviction, we must keep in perspective that, when that is the case, and the employer has gone through the trouble of presenting such complete evidence in civil court, and it appears that the civil court decided that the woman had committed fraud, this Tribunal cannot dismiss it and must consider it.

e) The decision *Tucker,* A-381-85 (*Tucker*) reminds us that the act of misconduct must be done voluntarily and must have been of such a careless nature that the person knew or ought to have known that they would be dismissed. *Larrivée* requires decision-makers to weigh the facts of each case. An example of theft by an employee *PC v Canada Employment Insurance Commission*, 2014 SSTGDEI 82 refers to *Tucker* to establish the causal link. In that case, a video showed the claimant taking toilet paper rolls from the employer and putting them in his bag. It was found that this act constituted misconduct, and [the claimant was] disqualified from Employment Insurance benefits. In this case, did the Claimant know that by stealing from her employer she could lose her job? She allegedly said that she took amounts, but she also apologized. It is clear that when it comes to theft, and this theft is at the expense of the employer's property, it is impossible to claim that they did not expect to be dismissed.

f) In *OK v Canada Employment Insurance Commission*, 2014 SSTGDEI 94, at paragraph 15, it says that the claimant had received three warnings. At paragraph 18, we can read that the Claimant met with the detective, but that the police were not going to lay charges because it was the word of one against the other, and there was not enough evidence. It was filmed; an investigation is still in court. It was shown that the claimant was in the business while it was closed. There was a failure to respect his implied and

express duties. The Tribunal indicates that, even though hearsay evidence is not ideal, it can draw a reasonable inference. In this decision, we go even further; the Tribunal says that it is not mandatory that the person has stolen, but that the mere fact that the employer sincerely believes it and that there are enough factors on which to base an assumption allows the Tribunal to make a finding of misconduct and that a disqualification should be imposed.

g) It is clear that there was an incident of theft that was shown and recorded on the video camera. The Tribunal is invited to go through Judge Cameron's process and find that, if a theft was shown by the employer on the balance, and the Claimant did not provide any valid explanation of the theft, and also the fact that the theft happened only on the days when she was working, the Tribunal must find that the Claimant should not have received Employment Insurance benefits, for the benefit of all citizens.

[101] The Respondent argued that the Claimant is entitled to Employment Insurance benefits for the following reasons:

a) In this case, the Commission found that the Claimant had not lost her job due to her own misconduct because the employer did not provide evidence.

b) The Court reaffirmed the principle that the onus is on the employer and the Commission to prove that the Claimant lost her employment due to her own misconduct (*Lepretre v Canada (Attorney General)*, 2011 FCA 30; *Canada (Attorney General) v Granstrom*, 2003 FCA 485).

c) Yet, the Commission has not had access to any evidence to date, allowing it to overturn the decision. The onus is on the employer and the Commission to prove that the Claimant lost her job due to her own misconduct, which the Commission is unable to do at the moment. Furthermore, the Claimant denies the facts.

d) The Commission argues that the case law supports its decision. The Federal Court of Appeal defined the legal notion of misconduct within the meaning of section 30(1) of the Act as wilful misconduct, where the claimant knew or ought to have known that

their conduct was such that it would 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 their employment; the misconduct must therefore constitute a breach of an express or implied duty resulting from the contract of employment (*Canada (Attorney General) v Doucet*, 2012 FCA 105; *Canada (Attorney General) v Gagne*, 2010 FCA 237; *Canada (Attorney General) v Lemire*, 2010 FCA 314).

e) Based on the case law principles set out in this case, the employer's statements do not have more or less value than those of the person who is asking for benefits; these statements must be considered objectively without accepting them as though one over another contained the entire truth about a particular event.

f) After collecting and analyzing the available information, the responsible agent will opt for the version of the facts that seems the most credible given the circumstances. In some cases, not one version of the facts presented by the parties is more credible than the other, so the responsible agent cannot really decide the issue in favour of one or the other version. In this case, the agent will give preference to the version given by the person who is applying for benefits even if the other version seems just a credible. The benefit of the doubt will play in favour of the version given by the person who is applying for benefits since the responsible agent cannot really decide in favour of one or the other version because they both appear credible. This position is applied under section 49(2) of the *Employment Insurance Act*.

g) In this case, the Commission can only give the Claimant the benefit of the doubt because she denies the facts, and the evidence the employer presented does not prove that it is indeed the Claimant who committed the theft. The employer never presented the evidence to the Commission. In light of the evidence the Commission possesses, it cannot prove misconduct.

h) The Commission also relies on another Federal Court decision—*Luc Cartier*, A-168-00— in which the Court confirmed the principle, established in *Namaro*, A-

834-82, that it must also be established that the misconduct was the reason for the Claimant's dismissal.

[102] The Added Party argued that:

a) P. S. did not testify clearly. He had difficulty responding clearly to clear questions.

b) Certain factors must be considered by the Tribunal, such as the fact that the Claimant went to the police station herself, where she made a free and voluntary statement. She even offered to take a polygraph test. It is recognized in most of case law that a person who is lying would not want to do a polygraph test because it would not be in their interest to do it.

c) According to the minutes, in the Court of Québec decision, Judge Cameron unfortunately went over these details quickly. He very quickly went over the fact that the Claimant had made a free and voluntary statement. Judge Cameron moved extremely quickly over the statement from police officer Marie-Claude Boisclair, who is the detective sergeant in the SPVM fraud unit. She is in the same squad as the one that allegedly contacted the Appellant's supervisors to inform them that no charges would be laid.

d) On the other hand, in the civil court case, the employer filed extensive documentary evidence presented against a simple litigant who has very little means and who had even less means to have a full and complete defence. The balance of power between the company P. S. and the Claimant was disproportionate.

e) The Claimant came to testify with only her good faith and honesty to tell the facts as she knew them.

f) They tried to explain the implications of the videotape that was submitted, but the videotape does not contain clear and conclusive evidence of wrongdoing on the part of the Claimant doing one or more table transfers. Moreover, there is nothing clearly demonstrated in all of the evidence submitted that could show a criminal act on the

part of the Appellant [*sic*]. We could say that the woman opens a page here and there. We are told that there are amounts missing, but they cannot be pinned on one person.

g) The employer was unable to reverse its burden of proving the Claimant's misconduct. That is what should be accepted by the Tribunal.

ANALYSIS

[103] The relevant statutory provisions appear in the annex of this decision.

[104] Regarding misconduct in Employment Insurance, the notion of "misconduct" is not defined as such in the Act or in case law. It is largely a question of circumstances (*Gauthier*, A-6-98; *Bedell*, A-1716-83). In *Tucker*, the Court sets out what constitutes misconduct. The Court established that "to constitute misconduct the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects his or her actions would have on job performance."

[105] The Tribunal must first decide whether the Claimant's alleged acts were the real cause of her dismissal. The Tribunal notes that no dismissal letter was filed. The employer says that it dismissed the Claimant after discovering that she was stealing money from it. The Claimant denies having stolen from the employer but submitted no other possible reasons for her dismissal. In light of the totality of the evidence, the Tribunal finds that there is no other apparent reason to believe that the Claimant would have been dismissed for reasons other than the allegations of theft raised by the Appellant.

[106] It follows that the Tribunal must determine whether the Claimant actually committed the acts of which she is accused. For the Tribunal to find 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). The Tribunal must examine the facts and circumstances of each individual case to make its findings about misconduct. In this case, the Claimant denies all the employer's allegations, specifically the allegations of theft by misappropriating cash orders.

[107] The Commission has the burden of proving on a balance of probabilities that there is evidence of the alleged misconduct (*Lepretre v Canada (Attorney General)*, 2011 FCA 30; *Canada (Attorney General) v Granstrom*, 2003 FCA 485). In this case, the Commission is of the view that the employer's and the Claimant's versions of events are equally credible. The Commission therefore applied section 49(2) of the Act giving the Claimant the benefit of the doubt when the evidence is equally balanced. Section 49(2) is solely within the Commission's jurisdiction, and the Tribunal cannot base its decision on the benefit of doubt principle. As a result, the Tribunal will review the applicable law to determine the question and determine whether there is misconduct under the Act in this file. Where appropriate, the Tribunal finds that the evidence submitted by the employer does not meet the requirements of its burden of proof.

[108] Furthermore, the Tribunal shares the Commission's view that, until the hearing date, the employer's allegations were not supported by any convincing evidence and therefore cannot lead to a finding of misconduct. For evidence, the file contained only the contradicting oral versions of events from the employer and the Claimant that could appear equally credible. In a situation like this, although it is possible that the employer's version is true, without evidence to support its testimony, the statement alone would not have been enough to show that the Claimant had committed the alleged theft.

[109] The Claimant denies responsibility for the theft and fraudulent transactions alleged by the Appellant. The Appellant argues that it is clear that an incident of theft was recorded and proven. To support its position, it provided additional evidence at the hearing in the form of a videotape and witness's statements. The Appellant claims that the videotape captures an incident on November 20, 2014, where the Claimant used a certain scheme in her use of the Maitre'D system—the computer system used to mange orders and sales of meals and beverages by the Appellant's establishment.

[110] M. L., the manager for X, testified for the Appellant during the viewing of the videotape consisting of a clip of less than a minute with the date of November 20, 2014. In the clip, the Tribunal can see a person's back and part for the screen of the Maitre'D system. During her testimony, the Claimant acknowledged that it was her in the video. The Tribunal finds that the Claimant's acts on the Maitre'D system touch screen are very fast and comfortable, making it

difficult to decipher what is actually being done, even when viewed in slow motion. The Tribunal finds that we can see the Claimant's finger making entries on the screen, but it is impossible to see which numbers are selected. Sometimes, the Claimant's arm or hand hides part of the screen, hiding the entry selected.

[111] In support of the video evidence, the Appellant submits a paper copy of the screen captures from the videotape for practically each second of the video clip. M. L. testified about each page of screen captures indicating what she could see. Unfortunately, the Tribunal cannot draw the same conclusions as M. L from viewing the video clip or from reading the images of the screen captures from the videotape. The Tribunal notes that, for most of the images of screen captures, what appears on the Maitre'D screen is blurry and difficult to see. At best, the Tribunal can, at certain moments, read what is written in the screen title bar, which could corroborate M. L.'s testimony. However, the Tribunal is unable to confirm with the help of the images that the Claimant used a manger's code or used the "Promo S." function. The Tribunal is also unable to confirm the exact keys the Claimant selected when she enters numbers, whether for table number, server number, or some sort of code.

[112] Regarding M. L.'s testimony, the Tribunal finds that he is merely offering his personal interpretation of the videotape and the entries the Claimant made. The Tribunal gives little weight to his interpretation of the video evidence because it doubts the credibility of his conclusions. Several times during his testimony analyzing each image submitted, M. L. accused the Claimant of actions that the Tribunal clearly could not confirm. If the Claimant's acts, observed on the videotape and the screen captures, seemed crystal clear to M. L., they certainly are not clear to the Tribunal. The Tribunal therefore finds that the video evidence, as well as the documentary evidence of screen captures from that videotape, are not conclusive and do not allow the Tribunal to determine on a balance of probabilities that the Claimant was engaged in the fraudulent scheme of which the Appellant accuses her. The Tribunal also notes the very short duration of the video recording and the fact that it leaves out any context or circumstances around the Claimant's shift. As a result, the Tribunal gives very little weight to this evidence.

[113] The Tribunal notes, however, that it is possible to see that certain transactions showed as a "transfer." It is therefore reasonable to believe that the Claimant actually transferred certain

items. Moreover, the Claimant did not deny making transfers on occasion, explaining that it was necessary when, for example, customers at the same table asked for separate bills. The Tribunal accepts the Claimant's explanation as plausible. The Tribunal also finds that, if the video evidence shows the Claimant making transfers, it is not possible to see the nature and context of these transfers or whether they were made as part of some kind of scheme as alleged by the Appellant. The Tribunal finds that it cannot draw the clear conclusion that, if the Claimant was making transfers, it was because she was making them fraudulently to steal from the employer.

[114] Regarding P. S.'s version of events about the alleged theft, the Tribunal accepts that he was not a witness to any action and that he only repeated what was reported to him. The Tribunal therefore gives no weight to his testimony with respect specifically to the fraudulent use of the Maitre'D system.

[115] On the other hand, P. S. submits that the Claimant allegedly confessed to her theft during a one-on-one interview in X's office on November 21, 2014. The Claimant categorically denies having made that confession and notes that P. S. allegedly handed her paper and a pencil asking her to write down that she had stolen. The Appellant argues that P. S.'s version of events should be retained as circumstantial and presumptive evidence. Specifically, it argues that P. S.'s version of events is more credible because the fact that the Claimant had received paper and a pencil implies that the Claimant had just confessed. The Tribunal notes that the employer's only evidence is its own statement, which is contradicted by the Claimant's statement. The Tribunal is of the view, as recognized by the Appellant, that it is very difficult to determine what really happened during the private interview between P. S. and the Claimant and therefore very difficult to establish whether the Claimant actually confessed to anything.

[116] The Tribunal accepts the parties' admission that P. S. handed paper and a pencil to the Claimant during their exchange in the office on November 21, 2014, but finds that this fact does not establish the Claimant's confession. The Tribunal finds that the Claimant's version is just as plausible as that of P. S.—that is, that P. S. tried to get her to admit to her fraud in writing by handing her paper/pencil and claiming that he had video evidence. Furthermore, the Tribunal gives significant weight to the Claimant's testimony. The Tribunal finds that the Claimant maintained the same version of the facts throughout numerous statements to the Commission and

during her testimony at the hearing. Her testimony was convincing, logical, coherent, and without any appearance of embellishment or exaggeration. On the contrary, the Tribunal finds that P. S.'s credibility raises doubts. He testified with animosity, emotion, and got carried away, interrupting and not always answering the questions clearly or without having to refer to his personal notes.

[117] The Tribunal therefore rejects the comparison of this case with *PC v Canada Employment Insurance Commission*, 2014 SSTGDEI 82 because that file involves a clear confession from the employee who took material from his employer, which is not so in this case.

[118] The Appellant argues the fact that Judge Cameron decided in a Court of Québec civil case that the Claimant committed fraud of $8,134.49 and that the decision includes extensive evidence of the Claimant's theft. The Claimant noted that the Appellant had submitted extensive documentary evidence to the Court of Québec, which is not so in this case. The Appellant also acknowledged in its arguments that it [translation] "took the time to file such complete evidence in civil court that it appears that the Court decided that the woman committed fraud." The Tribunal considered this and does not dismiss the Court of Québec decision involving the Claimant. However, with respect, the Tribunal is not bound by the findings of the Honourable Judge Cameron without having the same evidence. Furthermore, the decision as such does not constitute evidence in itself that the Claimant committed or did not commit the alleged fraudulent acts. Although the decision may be convincing, the facts established at the Court of Québec result from evidence that this Tribunal does not necessarily have and do not come under its jurisdiction. Considering this distinction between the evidence presented, it is possible that this Tribunal does not reach the same findings of fact. The Tribunal therefore gives little weight to the Court of Québec decision and has no negative inference against the Claimant.

[119] The Appellant argues that the Claimant failed to give any valid explanation for the fraudulent transactions that she made or the fact that the incidents of theft happened only on days when she was working. The Tribunal notes that the Claimant does not have the burden of demonstrating the lack of misconduct. Besides giving her version of the facts and her explanation about the table transfer transactions made on the Maitre'D system (which she did

and which was accepted by the Tribunal), it would be unreasonable and contrary to the rule of law to require that she prove something she did not commit.

[120] The Tribunal accepts that the Appellant may have noted deficiencies in its accounts at X in 2014, but it is up to the Appellant to clearly prove that the Claimant committed acts of misconduct, regardless of its opinion in this regard (*Crichlow*, A-562-97). The Tribunal also accepts the Appellant's documentary evidence showing that, on some occasions, transactions were made in an employee's name when that employee was not working (timecards, transaction records, etc.). These factors do in fact support irregularities occurring at the employer. However, the Tribunal remains dissatisfied with the outcome of this evidence. The Tribunal finds that, ultimately, the evidence does not prove who carried out the scheme.

[121] The Appellant argues that the Tribunal should apply Judge Cameron's analysis in the Court of Québec decision when he found by presumptive evidence that the Claimant was responsible for all the fraudulent transactions at the employer for a total of $8,134.49. The Tribunal notes that, in his decision, Judge Cameron states that [translation] "... if A. A. made one of the transactions, which was directly observed, she is the only one who could have made all of them, and when she is absent, there are none." However, an important distinction must be made and results from the fact that, if Judge Cameron directly observed (my emphasis) a fraudulent transaction allowing him to assume that later transactions were made by the Claimant, this Tribunal cannot say the same. As stated above, from the evidence before it, the Tribunal did not directly observe a fraudulent transaction allegedly made by the Claimant. The Tribunal did not clearly observe a transaction associated with the fraudulent scheme raised by the Appellant or the Claimant take a certain amount of money belonging to her employer. As a result, in the absence of a first incident of theft, it is not necessary for the Tribunal to presumptively address the possibility that the Claimant made or did not make all of the transactions of which she is accused. Therefore, the Tribunal gives little weight to T. S.'s statements because the substance of his testimony was explaining how employees do things, the Appellant's computer systems, and processes at the head office, which might have helped shed light on the scheme of which the Claimant is accused over a whole year.

[122] The Tribunal notes that a finding of misconduct, with the grave consequences it carries, can only be made on the basis of clear evidence and not merely of speculation and suppositions (*Crichlow*, A-562-97). The disqualification provisions establish penal sanctions (*McLaughlin*, A-244-94).

[123] Accusations of fraud and theft are not to be taken lightly. The Tribunal finds that anyone wishing to demonstrate them must provide clear and convincing evidence. Furthermore, because the misconduct provisions are an exception to the general rule that insured persons who are unemployed are entitled to benefits, they must be interpreted strictly (*McLaughlin*, A-244-94; *Goulet*, A-358-83).

[124] On the balance of probabilities, and based on all the evidence presented, the Tribunal is of the view that the employer has failed to establish that the Claimant committed the alleged misconduct leading to her dismissal. The Tribunal finds that the Appellant's evidence does not establish in a convincing way the Claimant's actual conduct, which is fundamental in cases of misconduct (*Meunier*, A-130-96; *Joseph*, A-636-85). Therefore, the Tribunal cannot find that the Claimant lost her job because of her own misconduct under the Act. As a result, it is not appropriate to impose a disqualification on her under sections 29 and 30 of the Act.

CONCLUSION

[125] The appeal is dismissed.

Lucie Leduc
Member, General Division – Employment Insurance Section

ANNEX

APPLICABLE LAW

Employment Insurance Act

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
>
> **(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.