



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *X v Canada Employment Insurance Commission and HM*, 2020 SST 1204

Tribunal File Number: GE-20-1689

BETWEEN:

X

Appellant

and

Canada Employment Insurance Commission

Respondent

and

H. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Bonnie Ozirny

HEARD ON: July 28, 2020

DATE OF DECISION: October 7, 2020

DECISION

[1] The appeal is dismissed. The Appellant (Employer), has not proven that the Claimant, who is the Added Party, committed the conduct for which it dismissed her. This means that the Claimant is not disqualified from being paid employment insurance (EI) benefits.¹

OVERVIEW

[2] The Claimant lost her job of 22 years as a bookkeeper in the accounting department of the Employer's resort hotel and spa (hotel). The Employer dismissed the Claimant for theft of \$172,660.00 during 2017, or, in the alternative, it dismissed the Claimant for gross negligence in the performance of her duties for failure to detect the missing money during 2017.

[3] The Employer says the Claimant told it she would pay the Employer the amount of money that was missing. So, the Employer considers that to be an admission of guilt by the Claimant.

[4] The Commission originally accepted the Employer's reason of the Claimant's theft for the dismissal. The Commission decided that she lost her job because of misconduct, and disqualified her from being paid EI benefits. The Claimant made a reconsideration request. On reconsideration, the Claimant provided a court decision² that acquits her on two charges under the *Criminal Code* for the alleged conduct for which the Employer dismissed her. On reconsideration, the Commission decided that the Claimant did not lose her job because of misconduct.

[5] The Employer disagrees with the Commission, and appealed to the Tribunal. It argues that it has proven that the Claimant stole the money over the course of 2017.

¹ Section 30 of the *Employment Insurance Act* disqualifies claimants who lose their employment because of misconduct from being paid benefits.

² GD3-51 to 56. The Claimant was charged with two offences under the *Criminal Code* relating to the missing money. The court found that there was no evidence before it, which provides the only reasonable inference is that the accused took the money that is unaccounted for. It states there are three other individuals who had equal access to the large hotel safe.

POST-HEARING DOCUMENTS

[6] During the hearing, I gave the Appellant the opportunity to: file job descriptions for the employees in the accounting department; file the notes made by the Employer's Chief Executive Office and General Manager (CEO) of his interview of L. M. during his investigation into the missing money; and, to review the audio recordings it filed³ for the purpose of informing the Tribunal of the chronological order of the recordings of the CEO's meetings with the Claimant on February 24 and February 26, 2018. I admit as evidence the following documents that the Appellant provided:

- a) One typewritten page, with the title "Accounting Department Restructure 2013 Update", not dated or signed, listing the duties of an employee, E. M., and of the Claimant;⁴
- b) One handwritten page, not dated or signed, entitled "Questions that I NEVER asked her 2nd time yet", submitted as being the CEO's notes of his meeting with L. M. during his investigation into the missing money in February 2018;⁵
- c) The Employer's original audio recording of the CEO's meeting with the Claimant on February 24, 2018⁶, and its original audio recording of the meeting on February 26, 2018.⁷

[7] After the hearing, the Claimant's Representative filed a copy of the transcript of the evidence of L. M., an employee in the accounting department, given at the preliminary hearing in the matter of criminal charges against the Claimant for alleged theft from the Employer.⁸ He identified portions of the transcript for the purpose of rebuttal of the CEO's testimony at the hearing.⁹ I admit the transcript as evidence in this appeal because it is relevant to proof of certain

³ GD7A to 7I.

⁴ GD12-2.

⁵ GD12-7.

⁶ GD14A.

⁷ GD14B.

⁸ GD11-3 to 40.

⁹ GD11-1.

facts that are in dispute. The Employer provided a written submission regarding evidence in the transcript, and did not object to its admissibility.¹⁰

ISSUE

[8] Did the Claimant lose her job because of misconduct?

ANALYSIS

[9] To answer the question of whether the Claimant lost her job because of misconduct, I must first determine the reason why she was dismissed. I then have to determine whether the Claimant committed the conduct for which she was dismissed. If I find that she did commit the conduct, I then have to determine whether the law considers that conduct to be misconduct for the purposes of employment insurance.

Why did the Claimant lose her job?

[10] The parties agree that the Employer terminated the Claimant's employment for theft of money. In the alternative, the Employer says that, if the Claimant did not steal the money, it had cause to terminate her employment because she was grossly negligent in the performance of the duties of her position for her failure to detect that money was missing during 2017.

[11] There is no termination letter in evidence.

[12] The audio recordings of the CEO's meetings with the Claimant on February 24 and 26, 2018¹¹, show that the reason the Employer dismissed the Claimant on February 26, 2018, was for theft of money. The CEO repeatedly states that everything points to the Claimant with regard to the missing money. The CEO states at the conclusion of the meeting on February 26, 2018, that

¹⁰ GD12-5.

¹¹ Prior to the hearing, the Employer provided nine audio recordings of the two meetings before the hearing, GD7A to GD7I. The recordings were not in chronological order and there was duplication of a portion of the recordings. There was no indication of the date on each recording. The Employer submitted two recordings after the hearing: GD14A, the recording of a meeting on February 14, 2018; and GD14B, the recording of the meeting it says on February 26, 2018.

he was really hoping for a confession from her.¹² The recordings do not contain any direct statements or allegations by the CEO that the Claimant was being dismissed for gross negligence in the performance of her duties. However, he did tell the Claimant that she was 100% responsible.

[13] Based on the evidence before me, I find that the Employer terminated the Claimant's employment for theft of money during 2017, and, if she did not steal the money, the Employer dismissed the Claimant for gross negligence in the performance of her duties because she failed to detect that money was missing.

[14] The Employer has made inconsistent statements about the amount of the alleged theft ranging from \$172,660.00 to more than \$194,000.00 in cash from cheques (ATM cheques) the Claimant cashed to obtain cash for the two Automated Teller Machines (ATMs) in the hotel. The alleged theft that is in issue in this appeal is theft during in the year 2017. The Employer has made submissions alleging that the Claimant stole money in 2016 and 2018, however, the CEO tells the Claimant at its meeting on February 24, 2018, that the problem may have started in 2016, but they did not have a "reading" then so the Employer has concentrated on 2017.¹³

[15] Based on the CEO's verbal statements to the Commission in 2018 that the Employer's accountant identified \$172,660.00 in cash missing from the ATM cheques during 2017¹⁴ when he performed the 2017 year end in February 2018, the Employer's written submission to the Commission and the documents it provided to the Commission, I find that the amount of the alleged theft in 2017 is \$172,660.00.

[16] The Employer also submits that, after the date it terminated the Claimant's employment, it discovered evidence that cash from other sources in early 2018 was missing, and alleges that the Claimant stole that cash. For the reason set out in paragraph 14, I find that alleged theft from other sources in early 2018 is not in issue in this appeal.

Did the Claimant commit the alleged conduct for which she was dismissed?

¹² GD14B at 35:32 minutes.

¹³ GD14A, recording of the meeting on February 24, 2018, at approximately 31:53 minutes.

¹⁴ GD3- 24 to 26 and 35 to 40.

[17] No. Based on the evidence and for the reasons that follow, I find that the Claimant did not commit the conduct for which she was dismissed. The Employer has not proven, on a balance of probabilities, that the Claimant stole the money or that the Claimant was grossly negligent in the performance of her duties.

[18] There is a heavy burden on the party alleging misconduct to prove it.¹⁵ To prove misconduct on the part of the Claimant, it must be established that she should not have acted as she is alleged to have acted. A finding of misconduct, with the grave consequences it carries for the Claimant, can only be made on the basis of clear evidence, irrespective of the employer's opinion, and not merely on speculation or suppositions.¹⁶

[19] The Employer submits that there was misconduct because the Claimant engaged in large-scale conversion of funds and fraud by removing cash from the Employer's business, and/or, acted in dereliction of her duties as accounting manager in financially mismanaging the business, such that the business suffered a loss of cash assets.¹⁷

[20] The Employer provided the following documents to the Commission:

- a) Copy of one cheque (ATM cheque), as an example of the ATM cheques the Claimant prepared for the CEO to sign so she could obtain cash for the ATMs;¹⁸
- b) Three handwritten pages, referred to as the Claimant's "ledger", with columns showing the date she and another employee loaded cash into each ATM, the number of \$20.00 bills added, and the initials of the two employees who loaded the ATMs;¹⁹
- c) Copy of a spreadsheet (spreadsheet), which the CEO says he and his wife, C. H., prepared for the accountant in February, 2018, and triple checked for accuracy, showing the total amount of \$322,340.00 loaded into the ATMs in 2017 and showing \$498,000.00 as the total amount of ATM cheques he says the Claimant cashed in 2017.²⁰

¹⁵ *The Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁶ *Crichlow v Canada (Attorney General)*, A-562-97 (FCA).

¹⁷ GD7-3.

¹⁸ GD3-31.

¹⁹ GD3-32 to 34.

²⁰ GD3-35 to 40.

[21] On reconsideration requested by the Claimant, the Commission rescinded its original decision that the Claimant lost her job due to her own misconduct. The Claimant provided a copy of the Provincial Court decision²¹ (court decision) in the matter of criminal charges brought against her. The court acquitted her of both charges, and found the Claimant's evidence credible. The Commission notes that the court decision made findings of fact: about the Claimant's role and responsibilities; that three other individuals had access to the large hotel safe; and, that the Employer did not review its security camera footage to try to identify who may have accessed the safe where cash was stored. The Commission says the Claimant told it that she did not know how the money went missing, that her books always balanced and that L. M., an accounting employee, who left employment to return the Philippines, prepared the monthly financial statements, which the Claimant believes always balanced. The Claimant denied stealing the money.

[22] On reconsideration, the Commission tried to reach the Employer to ask it questions: regarding the court's findings of fact in the criminal proceeding; why it believes the Claimant stole the money as opposed to someone else; and, how the amount of missing money could go undetected by the Employer for so long.²²

[23] The Commission submits that the documents submitted by the Employer reflect the Employer's written allegations of theft, and the allegations are not supported by independent evidence. It submits that it is not credible that 58 to 61 ATM cheques for \$3,000.00 each were cashed without being recorded in the Claimant's ledger, but, that the monthly financial statements did not show a discrepancy. It submits that it is not credible that the CEO, who is the only individual who signed the ATM cheques, did not become suspicious, and that the missing money remained undetected by the Employer for over a year.²³

[24] The Commission submits that, while the Claimant initially felt responsible for the missing money and said that she would try to pay the amount missing to the Employer because she felt she was responsible for it, she changed her mind once she thought about the allegations and realized that others had responsibility for the money. The Commission submits that the

²¹ GD3-51 to 56.

²² GD3-60.

²³ GD4-3.

Employer's evidence does not support its allegation that the Claimant was negligent in the performance of her duties or that she failed to follow procedures.

[25] In its supplementary representations to the Tribunal²⁴ after its review of the documents and submissions the Employer filed with the Tribunal²⁵, the Commission states that it maintains its position that the Claimant did not lose her job due to misconduct because many questions remain unanswered, and the Commission must base its decision on the evidence presented.

[26] The Claimant submits that the Employer's evidence is circumstantial. Is says that the Employer has not provided any direct evidence to prove that the Claimant committed theft. The Claimant submits that the Tribunal should and is entitled to rely on the finding of facts in the court decision.

Theft

[27] The Employer filed the following documents with the Tribunal:

- a) Copies of ATM cheques cashed from March 29, 2016, to February 8, 2018;²⁶
- b) Spreadsheets entitled "COMPARISON OF ATM PAYMENTS/SLIPS/BANK ACCOUNT" for 2016, 2017 and 2018";²⁷
- c) A two-page typewritten document²⁸, dated March 6, 2018, entitled "Re: Discrepancies Found in H. M.'s Bookkeeping", prepared by the Employer showing the typewritten name, C. H., with two photographs of small plastic bags containing cash and handwritten notes²⁹, and two photographs of handwritten notes³⁰. The amount of cash in photographs is not identifiable;
- d) Affidavit of L. M., sworn on July 27, 2019, filed in the Employer's legal action against the Claimant;³¹

²⁴ GD9.

²⁵ GD7 consisting of 324 pages and GD7A to GD7I.

²⁶ GD7-13 to

²⁷ GD7-291 to 302.

²⁸ GD10-4 & 5.

²⁹ GD10-6 & 7.

³⁰ GD10-8 & 9.

³¹ GD7-307 & 308.

- e) 2018 Comparison of ATM Payments/Slips/Bank Account from March to December, 2018 and January and February 2019 prepared by the Employer;³²
- f) One page entitled “L. M. ... Holidays vs Missing ATM cash”, prepared by the Employer, for the period from December 24, 2016, to January 26, 2017, and for the period from November 20, 2017, to January 12, 2018;³³
- g) Statement of Claim issued on August 31, 2018, in the Employer’s legal action against the Claimant.³⁴

[28] I give no weight to the Statement of Claim because it makes unproven allegations against the Claimant.

[29] I find that the portions of the documents described in paragraph 27 regarding 2016 and 2018 are not relevant to proof of the alleged misconduct in 2017 for which the Claimant was dismissed. I give no weight to those documents. I find that the document described in subparagraph 27 c) regarding the Employer’ allegation that the Claimant stole cash from other sources in early 2018, which the Employer states C. H. discovered after the date the Claimant was dismissed, is not relevant to the issue in this appeal. I give it no weight.

[30] The CEO attended the hearing on behalf of the corporate Employer, and was affirmed as a witness. The CEO testified that:

- The Claimant has held the position of accounting manager from the time the CEO assumed the position of CEO in 2009, and for many years prior when his father was the owner and CEO;
- The Claimant, as accounting manager, was 100% in charge of when ATM cheques were prepared, made out to “ATM cash”, and left in the accounting office for him to sign. The Claimant had a ledger in which she entered the date when she loaded cash into each ATM, which L. M., the accounting assistant, would watch the Claimant do, and they would both initial the entry. The ATMs generated a slip each time cash was loaded. The

³² GD7-308 to 312.

³³ GD7-313.

³⁴ GD7-315 to 320.

ATM company provided a monthly report showing all ATM transactions by individuals using the ATM and the amount of commission it paid the Employer for each transaction;

- The Claimant was entrusted to handle all deposits for all departments of the business. He discussed her role as accounting manager with the Claimant many times, and there was never a time when she was not 100% in charge of the ATMs and for all cashouts for all hotel departments;³⁵
- L. M. was on vacation from November 12, 2017, until January 12, 2018, so there is absolutely no reason to suspect her of stealing the money because six cheques for a total of \$18,000.00 in cash went missing during that period;
- L. M. told him that she did not have access to the safe;
- He knows nothing about the ATMs, except that the Claimant decides when to issue ATM cheques for him to sign;
- The accounting process for ATMs is quite simple, but it does not get reconciled until the accountant comes in at the end of the fiscal year (calendar year) to prepare the year-end financial statement;
- The Employer's professional accountant discovered that money was missing when he prepared the Employer's 2017 year-end financial statement in February 2018;
- He and C. H. prepared a spreadsheet for the accountant (paragraph 27 b));
- In 2017, ATM cheques in the total amount of \$507,000.00 were cashed, and approximately \$174,000.00 is unaccounted for;
- He and the accountant had to make sure they dotted all the i's and crossed all the t's and did their due diligence. By the Thursday evening prior to February 24, 2017, it was evident that they had to talk to the Claimant because "every finger pointed to her" for the missing money;³⁶
- As owners of the business, it doesn't make sense that he or C. H. would take the money. He had no reason to take it, and, from the size of their bank account and financial situation, there was no reason for C. H. to take it;
- Only he, his wife and the Claimant had access to the large hotel safe, which is located in the housekeeping room;

³⁵ Recording of hearing, Part 1, at approximately 53:00 to 55:00 minutes.

³⁶ Recording of hearing, Part 1, at approximately 55:20 minutes.

- It is the Claimant's job, as accounting manager, to report missing money to the Employer;
- About \$174,000.00 in cash from ATM cheques cashed in 2017 never made its way into the ATMs;
- L. M. was on vacation from November 12, 2017, to January 12, 2018, and cash was missing from ATM cheques cashed during that period, so he concluded that she did not steal any money;
- He asked the Claimant if she ever noticed any money missing, and she told him she noticed only once, one bundle of cash, that is, \$3,000.00 in \$20 bills, but she was not sure. She did not report that to him;
- The Claimant has no explanation for the missing money;
- He has never seen bundles of cash in the safe;
- The Claimant offered to pay back the money five or six times during the meetings with her;
- The time when the cash started to go missing coincides with when the Claimant started going home for lunch.

[31] In her Affidavit, L. M. states that she was not present at the hotel between November 21, 2017, and January 9, 2018.³⁷ This contradicts that CEO's testimony that L. M. was away from November 12, 2017, to January 12, 2018.

[32] On cross-examination by the Claimant's Representative, the CEO said:³⁸

- C. H. was the accounting supervisor in 2017 and still is, and the Claimant was the accounting manager;
- The position of accounting manager is above the accounting supervisor in the business hierarchy;
- C. H. was not the Claimant's immediate supervisor;
- The Employer's accountant reconciled the monthly statements from the ATM company with the ATM account at the end of the year when he prepared the year-end financial

³⁷ GD7-307.

³⁸ Recording of hearing, Part 2, beginning at approximately 1:12 minutes.

statement. No one checked the monthly ATM statements against the Employer's bank account during the year;

- The CEO was uncertain in his response to the Claimant's suggestion that C. H. and L. M. checked the monthly ATM statements and reconciled them with the monthly Employer's monthly bank statements. He said he doesn't know, but his understanding was that the only monthly check was that the slips generated by the ATMs were paid back to the Employer by the ATM company, and those amounts were compared with the Claimant's ledger;
- The Employer has no direct evidence, that he is aware of, that the Claimant stole any money.

[33] I asked the CEO to describe the organizational structure for the business. He told me that he is the Chief Executive Office and General Manager. There is a manager for every department, and a supervisor below that, for example, his wife is the accounting supervisor in the accounting department, and there are other employees below the supervisor. Some departments have an assistant manager, and not all departments have a supervisor. He told me that the Employer did not have an organizational chart in 2017 because he did not think it needed one.

[34] The CEO told me there were three employees in the accounting department in 2017. I asked him to describe their functions. He told me he could "generally speaking"³⁹:

- Accounting manager, the Claimant: in charge of handling all cash, so that would include the ATMs; gather all deposits/cash-outs from each department out of the large hotel safe, count it and take it to the bank; she was 100% responsible for all the cash;
- Accounting supervisor, C. H.: part-time; take care of paying GST, PST and workers' compensation;
- Accounting Clerk, L. M.: take care of some other items in accounting, for example, anything to do with not handling cash; sometimes prepared termination documents for employees who quit or were dismissed.

³⁹ Recording of hearing, Part 2, beginning at approximately 10:45 minutes.

[35] I asked the CEO if the Employer had written job descriptions for the three positions in the accounting department. He said he would check. The Employer provided only the document described in paragraph 7 a), Accounting Department Restructure 2013 Update. It lists the duties of “E. M.”, which include: all aspects of payroll, CEO cheques, director fees, GST and PST self-assessments, hotel entries, such as revenue, accounts payable, bank reconciliations for the spa and hotel, knowledge of ATM, and should also know the Claimant’s jobs. It lists the duties of the Claimant, which include: deposits for pool, giftware and X restaurant, spa entries – revenue, ATM, tills, help calculating time cards, maintain petty cash, in Town errands – deposits and change, mail and other errands, keep track of and order supplies when needed.

[36] There is no position name specified for the two employees listed in that document. A review of the duties of each shows that E. M.’s position is responsible for more onerous duties relating to financial accounting, and has a duty related to the ATMs as the Claimant does. The requirement that E. M.’s position should know the Claimant’s jobs suggests that E. M.’s position is senior to the Claimant’s position.

[37] The CEO told me that there are two offices in the accounting department. There is an inner office separated from the other office by its own door, where C. H. worked, and an outer office, approximately 20 feet by 15 feet, where the Claimant and L. M. worked. Their desks were about six feet apart.

[38] The Record of Employment (ROE) was issued by C. H. and states the Claimant’s occupation as “bookkeeper”. C. H. is specified as the contact for further information.⁴⁰ The CEO told me that he could not comment on why C. H. specified the Claimant’s occupation as bookkeeper, and that he does not know all the options C. H. would have been given. I note that the Record of Employment form does not have a drop-down list of occupations to choose from. The Employer referred to L. M.’s evidence at the preliminary hearing when she referred to both the Claimant and C. H. as bookkeepers. The Employer submits that shows that all three employees were called bookkeepers. However, L. M. states in her Affidavit that C. H. is the accounting supervisor.⁴¹ I reject the Employer’s submission because C. H. was the person the

⁴⁰ GD3-22.

⁴¹ GD7-306 at paragraph 5.

Employer tasked with completing the ROE, so, it makes common sense that she would have knowledge of what she states as facts in it.

[39] I asked the CEO when the Claimant started going home for lunch. He told me that the Claimant lives down the street from him and C. H., so they could notice the Claimant's vehicle. He says they only saw the Claimant's vehicle home for lunch a few times, but did not specify any dates.

[40] I listened to the nine audio recordings of the CEO's meetings with the Claimant on February 24, 2018, and February 26, 2018, which the Employer originally filed with the Tribunal, and the two audio recordings of those meetings that it filed after the hearing. I note, in particular, that:

- The CEO did not inform the Claimant that he was recording the meetings;
- At the meeting on February 24, 2018, the account says that C. H. prepared the spreadsheet.⁴² The CEO refers to the spreadsheet "we made up".⁴³ At the meeting on February 26, 2018, which the accountant did not attend, the CEO states that C. H. and the accountant prepared the spreadsheet;⁴⁴
- The accountant states that all printouts from ATM company are consistent with the Claimant's ledger, but what doesn't jive is the 61 ATM cheques shown in the spreadsheet that were cashed but the cash is nowhere to be found;
- Only C. H. and L. M. had the password for Direct Cash;
- The CEO describes the amount of missing money as a "pretty epic amount";⁴⁵
- The Claimant says she stored extra bundles of cash in the safe;
- The Claimant says that she doesn't know how to reconcile ATM;
- The CEO says that L. M. told him that she does not know the combination to the safe, and that L. M. knew where the Claimant keeps the business card in a desk drawer with the combination for the hotel safe. She tells him that L. M. told her that the CEO had asked her if she knew the combination, and that she told him she did;

⁴² GD14A, at approximately 35 minutes.

⁴³ GD14A, at approximately 43 minutes.

⁴⁴ GD14B, at approximately 34 minutes.

⁴⁵ GD14B, at 17:34 minutes.

- The CEO repeatedly tells the Claimant that everything points to her, and that she is responsible;
- The CEO says the timing when the money started to go missing doesn't look good because it was at a time when "we all knew" J. M. wasn't going to come in anymore to do the checks and balances on the ATM accounts;⁴⁶
- The Claimant repeatedly, in both meetings, denies stealing the cash;
- The Claimant's offers to pay the amount of missing money to the Employer are qualified by her saying: if she made an error; if she is responsible; and, similar wording. She says she is in shock;
- The CEO says they talked to the bank, and went through the bank's procedures. But, he does not finish his sentence;
- When the CEO terminates the Claimant's employment, he suggests that she tell people that she is on medical leave, and, after some time has passed, to tell people she retired. She is not receptive to his suggestion about saying she is on medical leave when it is not true.

[41] In his testimony, the CEO refers to the Claimant having told him at a meeting in February 2018, that she always left the one of the two dials on the safe on the same number when she locked the safe. She told him she only noticed once that the dial was not on the number she left it on. I do not accept the CEO's suggestion that the Claimant's statements prove that only she accessed the safe or prove any fact. Any person who would access the safe for the purpose of theft would readily see the number that the dials are left on before the person opens the safe, then leave the dials on those numbers when the person locks the safe.

[42] In response to my questions about his investigation, the CEO told me that he looked at some different ways of investigating and that is all he could come up with. He said that the accountant did most of the investigation, and he tried to do his due diligence on the matter outside the accounting office. He told me that he did not take the issue of the missing money to the board of directors because he wanted to do a little research first. He did not consider engaging an independent investigator. He prepared a very detailed list of questions that he

⁴⁶ GD14A, at approximately 28.17 minutes.

thought were very pertinent. He told me that an independent investigator would not have the kind of knowledge of the resort that he has.

[43] The evidence shows that the accountant identified that there was money unaccounted for, but he then relied on the spreadsheet that he asked C. H. to prepare. The CEO testified that he and C. H. prepared the spreadsheet. The Claimant's testimony shows that he is the individual who conducted the investigation. His testimony shows that his investigation was comprised of asking L. M. six questions, asking the housekeeping manager one question, and meeting with the Claimant twice for a total of more than 90 minutes after he concluded that everything pointed to her as the person who took the money. Despite the CEO's statements to the Claimant at the February 26, 2018 meeting that they tried to find other avenues and other ways and other people who might be suspicious of wrongdoing, they "can't find anybody else that was here for all of this and had hands on the cash"⁴⁷, there is no evidence to support those statements.

[44] Based on the Employer's evidence about the investigation, I find that the CEO's investigation was quick, cursory, and driven predominantly by the CEO's unsupported conclusion that everything pointed to the Claimant as the individual who stole the money. Neither the CEO nor C. H. were interviewed during the investigation. The CEO controlled the investigation. I find that the Employer's investigation was seriously deficient and flawed, and designed to conclude that the Claimant stole the money. I note that the Employer states that money was missing from ATM cheques in 2016. Based on the CEO's testimony that reconciliation of ATM cheques with bank statements only occurred when the accountant prepared the year-end financial statement, the missing money in 2016 would have been identified by the accountant in February 2017. However, the evidence shows that the alleged money to be missing in 2016 was not detected until February 2018. I find that this calls into question the Employer's credibility.

[45] The CEO's statement that the missing money coincided with J. M. no longer coming in to perform checks and balances on the ATM accounts is inconsistent with his testimony that the Claimant has always been 100% responsible for the ATM accounts and that there was never any reconciliation of the ATM accounts other than the one the accountant did at year-end. There is

⁴⁷ GD14B, at 50:13 minutes.

no evidence as to why J. M.'s stopped performing that function, or whether, and to whom, the Employer assigned that duty. Those are decisions the Employer would make.

[46] The CEO says that the Claimant was the accounting manager, so she was the employee solely in charge of accounting matters.⁴⁸ But, the only document the Employer provided shows the Claimant's duties as at the Employer's restructuring of the accounting department in 2013.

[47] The CEO's assertion that the Claimant was the accounting manager is not supported by the evidence. Based on the evidence before me, I find that the Claimant did not hold a position of accounting manager and she was not 100% responsible as the Employer submits. I find that there is no evidence to show that the Claimant had the duty to "ensure that the funds were not removed from the business" as the Employer asserts⁴⁹. I find that there is no evidence to support the Employer's submission that there was no way for the Employer to uncover the removal of funds in the monthly accounting system "which was controlled and managed by the Employee"⁵⁰, or that the Claimant mismanaged the business accounting system and failed to follow proper procedures and protocols to prevent the shortfall⁵¹. It is not plausible that the Claimant would have the level of responsibility and accountability that the CEO asserts, but that the Employer would not confer the corresponding powers on her to access all accounting records or provide her with the passwords to access electronic financial information. It does not make common sense that, if the Claimant were the accounting manager, she would work in the outer office with L. M., but C. H., as accounting supervisor, would have her own office separated from the outer office.

[48] Who had access to the safe? The CEO said that L. M. told him she did not have access to the safe. At the meeting in February 2018, the Claimant told the CEO that L. M. knew the combination to the safe. The court decision relies on L. M.'s evidence at the preliminary hearing because she did not appear as a witness at the trial. The court found that L. M. did have access to the safe. In her evidence at the preliminary hearing, L. M. says that when she started work in 2014, E. M. in the accounting department showed her the combination to the safe.⁵² L. M. states

⁴⁸ GD12-4.

⁴⁹ GD7-8 at paragraph 27.

⁵⁰ GD7-8 at paragraph 30.

⁵¹ GD7-9 at paragraph 32.

⁵² GD11, at T78, lines 38 to 40.

in her Affidavit that she never had access to the safe and did not know the combination.⁵³ I rely on L. M.'s sworn evidence at the preliminary hearing and the court's finding that she had access to the safe and give it weight over the CEO's testimony that L. M. did not have access to the safe. I find that the CEO, C. H., L. M. and the Claimant had access to the safe where cash was stored.

[49] In response to my questions, the CEO told me that he and his two siblings are the three partners in the business, and they are the only shareholders. This contradicts his testimony that C. H. was an owner of the business. His salary as CEO is set by the board of directors. This contradicts his testimony described in paragraph As a partner of the corporation, he is paid by dividends. Therefore, I reject the Employer's submission that the CEO could have accessed money legally any time he wanted to⁵⁴.

[50] I find that the numerous inconsistencies in the CEO's testimony and his statements in the recordings of his meetings with the Claimant described above damages his credibility. Another example of his inconsistent statements is that he says C. H. took over the Claimant's duties when she was dismissed. L. M.'s evidence at the preliminary hearing is that A. M. took over the Claimant's duties when the Claimant left, and L. M. helped A. M. fill the ATMs.⁵⁵ I find that the CEO is not credible.

[51] I note the court's finding of fact in its decision that there were 30 security cameras in the hotel in 2017, including a camera focused on the safe, but the Employer did not check the video footage to see who accessed the safe. I asked the CEO if there is a camera focused on the safe. He told there is not. He told me the nearest camera to the safe is located in the hotel lobby. He told me that that, unfortunately, there is no camera near the locked door to the room where the safe is located. He told me there is no camera in the outer accounting office where he says the spa safe is located and there is no camera in the inner accounting office.⁵⁶ I find it is not plausible that the Employer would have a security camera system installed in the hotel complex, but would not have a camera focused on the safe or on the entrance to the housekeeping office where the

⁵³ GD7-306, at paragraph 3.

⁵⁴ GD7-6.

⁵⁵ GD11-3 to 40 at T70, lines 26 to 40.

⁵⁶ GD14A, at approximately 46:24 minutes.

safe is located. I rely on the court's finding of fact about the security cameras, and give it weight over the CEO's testimony. Therefore, I find that the Employer had a security camera focused on the safe, but it did not check the camera's video in its investigation into the missing money.

[52] The CEO told the Claimant at the meeting on February 24, 2018, that at one point, but can't remember when, he mentioned to C. H. that he was signing a lot of ATM cheques, but he didn't know how busy the ATMs were then.⁵⁷ He says he should have trusted his instinct then and checked. It does not make common sense that he would make that comment, but that he would not ask the Claimant why there were so many ATM cheques.

[53] I find that it does not make common sense that, when the Employer discovered that \$172,660.00 was unaccounted for, the Employer would not engage an experienced investigator, to conduct a comprehensive investigation; and, that the CEO, who had access to business records and who created the spreadsheet with C. H. which the accountant relied on, would be considered to be the appropriate person to conduct the investigation.

[54] It is not plausible that the CEO would sign the number of ATM cheques that he did in November and December, 2017, when the CEO states the hotel was not busy during that period⁵⁸. It does not make common sense that he would not ask the Claimant why she was leaving so many cheques for him to sign then.

[55] Based on the evidence about the investigation, I find that the Employer's conclusion that the Claimant stole the money is based on circumstantial evidence, which contains inconsistencies described above, and the CEO's speculation. The CEO's tone and his persistent and intrusive questions to the Claimant about her and her adult daughter's finances in the meetings in February 2018 suggest that he had already concluded that the Claimant stole the money. The CEO did not respond to the Claimant's offer at the meeting to provide her bank statements to him.⁵⁹

⁵⁷ Recording of hearing, Part 2, at approximately 35 minutes.

⁵⁸ GD14X at XXX of the recording.

⁵⁹ GD14B.

[56] I reject the Employer's submission that cash from ATM cheques cashed at the bank did not find its way back to the hotel.⁶⁰ There is no evidence to support its statement.

[57] Given the serious consequences for the Claimant of a finding of misconduct for employment insurance purposes, I must analyze the facts independently of the Employer's decision to dismiss her.⁶¹ I am not bound by the way in which the grounds for dismissal are qualified by the Employer, the Commission or the Claimant. Instead, I must base my conclusions on the evidence before me and the application of the law.

[58] Based on the CEO's testimony and evidence on the file and for the reasons set out above, I find that the Employer has not proven, on a balance of probabilities, that the Claimant committed theft.

Gross negligence in the Claimant's performance of her duties

[59] The Employer submits that Claimant failed to follow procedures to ensure cash was properly accounted for and deposited into the ATMs. The Employer did not provide any documentary evidence of the procedures or of which procedure it alleges she failed to follow.

[60] Based on the absence of evidence described above and my finding that the Claimant did not hold the position of accounting manager, I find that the Employer has not proven that the Claimant was grossly negligent in the performance of her duties. I find it does not make common sense that, if the reason for dismissal was the Claimant's gross negligence in the performance of her duties, the Employer would not have investigated further to attempt to identify the individual(s) who stole the money.

So, did the Claimant lose her job because of misconduct?

[61] Because I have found that the Claimant did not commit the conduct for which she was dismissed, I do not have to examine whether the conduct is misconduct under the law, whether

⁶⁰ GD3-26.

⁶¹ *Crichlow v Canada (Attorney General)*, S-562-97 (FCA); *Meunier v Canada (Employment and Immigration Commission)*, A-130-96 (FCA).

the Claimant knew or ought to have known that the conduct could impair the performance of her duties owed the Employer, or, as a result, that dismissal was a real possibility.⁶²

[62] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.

CONCLUSION

[63] The appeal is dismissed. This means that the Claimant is not disqualified from receiving EI benefits.

Bonnie Ozirny
Member, General Division - Employment Insurance Section

HEARD ON:	July 28, 2020
METHOD OF PROCEEDING:	Videoconference
APPEARANCES:	D. H. for X, Appellant Jacob Watters, Representative for the Appellant H. M., Added Party, Claimant John Will Q.C., Representative for the Added Party

⁶² *Mishbinijima v Canada (Attorney General)*, 2007 FCA 36.