

IN THE MATTER OF AN ARBITRATION BETWEEN
United Food and Commercial Workers Union Local 175
(“Union”)

and

Metro Ontario Inc. - The Barn Markets
(“Employer”)

Grievance of Deja Kennedy
(Grievance #R4-25-0103)

Before: Peter Dailleboust, Arbitrator

APPEARANCES:

For the Employer: Artimes Ghahremani, Counsel
Daniel Pavlova, Sean McPherson, Josh Demers, Noor Saba, Mary-Anne Eggett

For the Union: Geoff Dunlop, Counsel
Jennifer Hanley

Hearing Dates: March 30th and 31st, 2026

AWARD

[1] This matter concerns a grievance filed by the Union challenging the Employer's decision to terminate the employment of Deja Kennedy (also referred to as the "Grievor"), a 3-year part-time cashier with a discipline-free record.

[2] The Grievor's employment was terminated for breaching the Employer's Employee Purchase Policy and Theft Policy when she failed to scan two items during self-checkout, which she removed from the store for her personal use.

[3] The Employer, Metro, runs many grocery stores throughout Ontario. Like most retail businesses, Metro has strict policies about employee purchases and employee theft. Metro takes a zero-tolerance approach to violations of those policies due in part to the significant shrinkage (inventory losses) it suffers.

[4] There is no dispute between the Parties in this case that the Grievor removed items from the Metro store where she worked without paying for them. The issue I must determine is whether her conduct constituted theft in violation of company policy, or as the Grievor has indicated, was simply an honest mistake and she has a reasonable and believable explanation for the oversight.

[5] For the reasons below and after carefully considering the parties' evidence and submissions, including the Grievor's responses, I find that the Employer had just cause to terminate the Grievor's employment. I am not inclined to exercise my discretion to reinstate the Grievor in these circumstances, and so the termination is upheld.

Background

[6] The Grievor was employed by Metro as a cashier for almost the entire 3 years she was employed there. The unchallenged evidence I heard establishes that cashiers have a heightened level of trust and responsibility, given that they handle cash, ensure customers pay for all their items by scanning each one, and have a role in trying to foil customer attempts to shoplift.

[7] Metro owns and operates many grocery stores throughout Ontario. The particular store where this incident arose is in Windsor, Ontario. Like most modern large grocery stores, this Metro has both self-checkouts (SCO) and regular checkouts with an attendant. An item moves along the intake belt; the cashier grabs it, scans it and moves it to the outgoing belt. This aligns with the evidence I heard that establishes that all items must be scanned and that the cash out system then calculates any applicable discounts, giveaways, etc. At the SCOs, customers scan their own items, and an attendant is nearby to assist and monitor them. The process is somewhat the same, though. The customer scans an item from one side of the scanner and, when prompted by the terminal, places it on the other side. If they place it in the wrong area or don't place it at all, the system alerts the customer and prevents any other items from being scanned until the issue is resolved.

[8] Metro has two policies that are engaged in this matter. The Employee Purchase Policy and the Employee Theft Policy. The policies are posted in two conspicuous places in the workplace, and the Grievor acknowledged she was aware of and understood them both. There was no dispute that Metro consistently enforced these policies and frequently reminded staff of their importance.

[9] The Employee Purchase Policy (EPP) sets out many rules about employees' purchasing of store items while they are working or scheduled to work. The rules in the EPP that are relevant here are:

- Any employee purchases not for on-premise consumption made on days when the employee is scheduled to work must be made on their own time, either before or after their shift.
- After the transaction is completed, the items must be removed from the store through the same doors used by the public and must be accompanied by a receipt.
- Only purchases for which an employee has concluded a proper transaction can be removed from the store.
- During vacation periods or days off, employees will follow the same checkout procedures as the public.
- All purchases from all departments must remain as individual items, and every purchase must be packaged as it would be for a regular customer.

While it is not set out in the EPP, I understand from the evidence that employees enjoy an Employee discount on items they buy only on those days they are scheduled for work.

[10] The Employee Theft Policy reinforces the importance of compliance with the EPP and clearly states that either removing a product from the store without payment or consuming a product on the premises without payment constitutes a breach of trust and will lead to termination. The policy, written in 2008, describes circumstances in which employees had their employment terminated for taking items of nominal (less than \$1.00) value, including items that are destined for the garbage or are otherwise not sellable to customers.

[11] On Friday, March 14, 2025, the Grievor finished working her 8:00 AM to 2:15 PM cashier shift. After signing out, she changed and then went into the retail section of the store and picked up some things she wanted to buy. According to the evidence, she picked up bread, croutons, a package of steaks that she had the butcher prepare for her, a loaf of pre-made garlic toast, bananas, and 3 packages of caesar salad dressing. She then proceeded to the checkout area, picked up a reusable bag from a rack, and went to the SCO. A large portion of the Grievor's actions in the store was recorded on the store's CCTV system. I will analyze and explain what I interpret from the video below.

[12] It is not in dispute that the Grievor, while scanning the salad dressing packages, scanned one of them and proceeded to place all three in a reusable bag she had picked up and paid for. The two unscanned salad dressing packages had a retail price of .79 cents each. These dressing packages are sold near the salad section of the store and are offered at no cost when a customer buys a ready-made salad on the following basis: With each small salad purchased, one free dressing package is included. When a large salad is purchased, two packets of dressing are included. The evidence established that when these salad dressing packets are checked out, they are to be scanned individually, which incurs a cost. If an eligible salad is scanned, the system will then automatically credit back the amount for the eligible number of free salad dressing packets. The Grievor, in her evidence, agreed that she was aware of the obligation to scan each item individually, either in her role as a cashier or when checking herself out at the SCO. The evidence was also clear that the Grievor did not purchase a salad on March 14, 2025, and therefore none of the salad dressing packets would have been free if she had scanned them all.

[13] Mr. Dan Pavlova, the store manager, testified that on Friday, March 14, 2025, he was approached by an employee, who was never named in this hearing, who told him she suspected the Grievor of stealing. Mr. Pavlova testified that the employee said they saw the Grievor with a salad, but afterward, there was no salad. Upon hearing this information, Mr. Pavlova let the Grievor finish her shopping and then checked the CCTV cameras. He did not notice anything at the time, but he contacted the Loss Prevention department's investigators with the information he had received from his employee. Mr. Pavlova did not hear back from Loss Prevention until Monday, the 17th of March. Loss Prevention indicated that there was video evidence of the Grievor not properly scanning salad dressings. Mr. Pavlova, having realized this for the first time, proceeded to suspend the Grievor pending the conclusion of the investigation. Loss Prevention met with the Grievor, along with a union steward and the assistant store manager, on March 19, 2025 (Mr. Pavlova's day off) to discuss the allegations of failing to scan the salad dressing with the Grievor. Her responses, which were reduced to writing, were entered into evidence. Mr. Pavlova returned to work on March 20, 2025. He testified that he watched the video again. He reviewed the Grievor's employment history, but he had not reviewed the investigation report as it was not completed yet. He testified that he spoke with his Assistant Manager, Sue Strong, about the Grievor's meeting with Loss Prevention. Mr. Pavlova's evidence in both Direct and Cross-Examination was effectively that it would not matter what the Grievor had said in the meeting with Loss Prevention, he was satisfied that she stole the salad dressings and deserved to be fired. Thus, Mr. Pavlova asked the Grievor to attend the workplace on March 22, 2025, where he met with her and issued a termination notice, which he had authored and signed. His evidence from that encounter was that the Grievor took the notice, did not offer an apology, showed no remorse and said she would contact the union.

[14] The Grievor testified that she was tired after her shift, was in a rush to catch her bus and get home and was distracted because the checkout area was very busy. Her evidence was that these factors led her to make a simple mistake when she did not scan two of the three salad dressing packages she left the store with. This admission contrasts somewhat with her statements during the Loss and Prevention investigation, which occurred before her dismissal. She was interviewed by Loss Prevention on March 19, 2025, and despite being presented with the allegation of scanning one salad dressing but taking three, she responded by saying that to the best of her ability, she scans everything and that "I wouldn't put something in my bag and walk out with it". She also made a statement when asked whether she violated the Employer's

Purchase and Theft policies to the effect of “I have not violated anything.” She added that she relied on other staff to help if she put extra items in her bag. After viewing the video for the first time during preparation for this hearing, she testified that the above factors (tired, in a rush, distracted) led her to make the mistake that resulted in only one of the three salad dressings being scanned. Now that she had viewed the video, she was apologetic in her testimony and admitted that she had breached the Employer’s Employee Purchase Policy, but reiterated that she had not stolen anything.

[15] Josh Demers, manager of human resources, testified on behalf of the Employer. He met with the Grievor at the Step 2 process meeting on May 6, 2025, following her termination. His evidence was that the Grievor deflected and spoke of how busy the SCO was, which, in his view, was a means of justifying her simple mistake. His evidence was that she was not apologetic and provided no credible explanation for what she did. As a cashier, he said, she was trained and had extensive experience in scanning and bagging items, and in ensuring that everything that left the store was paid for.

Submissions

[16] The Union did not challenge the evidence that the Grievor scanned one salad dressing and placed three of them in her bag without paying for the other two. They also did not challenge the seriousness of theft in the retail sector, nor did they, to their credit, argue that the value of the items at issue here was a relevant factor to how theft should be addressed, if the Employer proved its case. Their skillful submissions and argument focused on the Grievor’s conduct being a mistake caused by fatigue, a time crunch and distraction and that those factors provided a reasonable explanation for the Grievor’s conduct. They submit that the case law is consistent, that it is the Employer’s onus to show clear and cogent evidence that the Grievor not only violated the policy but also had the intent, or *mens rea*, to do so; failing which, in their submission, the conduct is non-disciplinary or at the very least does not warrant termination given the Grievor’s 3-year discipline-free record.

[17] The Union also argued that the Employer’s investigation and decision-making process was pre-determined since the evidence established that the decision maker, Mr. Pavlova, had not reviewed the Grievor’s interview answers or the Loss and Prevention report before making his decisions. His evidence was that he simply watched the video and made his determination based on what he saw. The Union did not argue that this rendered the Employer’s decision

void, but argued that the decision was made without full information, which ought to have changed the outcome.

[18] The Union reiterated that the Grievor was not shown the video before her dismissal and that, as such, the investigation and Stage 2 meetings constituted an ambush in which the Grievor was expected to recall minor details and to apologize for something she did not recall doing. The Union argues that, upon review of the Grievor's evidence, she was apologetic once she confirmed she had made the alleged scanning mistake, and that this should mitigate the decision and penalty imposed.

[19] Lastly, the Union argues that I should draw an adverse inference from the Employer's failure to call Sue Strong, the Assistant Manager, to give evidence in this hearing.

[20] The Union advanced and relied on 6 cases for my consideration: *OPSEU v Ontario (LCBO)*, 2011 CarswellOnt 7911; *Metro Ontario Inc. and Unifor Local 414 (Muscat)* 2017 CarswellOnt 4024, *Prince Albert Safeway and RWDSU, Local 496 (Aramenko)* 2021 CarswellSask 299 *Sobeys Capital Inc. and UFCW, Local 401 (B.(A.))* 2017 CarswellAlta 1416, *Extra Foods No 8566 (Squamish) v U.F.C.W., Local 1518* 2000 CarswellBC 2979, *Canada Safeway Ltd. v. U.F.C.W., Local 401* 2003 CarswellAlta 1938.

[21] The Union relies on *OPSEU v LCBO supra* for the same proposition that most of the other Union cases stand for. That is, in order to conclude a Grievor engaged in theft, (at para 121):

there must be clear and cogent evidence, on the balance of probabilities, the grievor had a dishonest intention when... the act was committed.

In reaching this conclusion, Arbitrator Abramsky referred to another case, *Great Atlantic & Pacific Co. of Canada v U.F.C.W Duhamine Grievance*) [2001] O.L.A.A. No. 18 (Ont Arb) (Stephens), which held that:

The judicial mind must be "satisfied that the alleged act...was in fact committed, but it need not be satisfied to the extent of moral certainty as in a criminal case. Evidence that creates only a suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as lead the

tribunal...acting with care and caution, to the fair and reasonable conclusion that the act was committed.

[22] Furthermore, the Union refers me to *Metro Ontario Inc. and Unifor Local 414 (Muscat)*, where Arbitrator Luborsky writes (para. 71) that the Employer's onus is such that:

it must show on a balance of probabilities that the Grievors intended to act dishonestly as an essential element of the offence of sweethearting (as distinguished from being under a mistaken belief or reasonable misunderstanding as to their obligations), which is a subjective test that very much relies upon an assessment of the Grievor's credibility..

That credibility assessment is engaged when the Grievor provides their explanation of the conduct. In determining the Grievor's credibility, Arbitrator Luborsky refers to the principles from the seminal decision in *Faryna v Chorney (1951)* 1951 CarswellBC 133 that (para 10):

the real test of the truth of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions

[23] *Extra Foods No. 8566 (Squamish) v U.F.C.W. Local 1518* was advanced by the Union for the premise that an explanation of an honest mistake in these types of cases may be enough to establish that the Grievor had no guilty mind or intent (para 34):

The essence of her explanation is that an honest mistake occurred and that she had no guilty mind or intent to commit the crime alleged of her. Again, on the basis of all the evidence before me, I find that her explanation is believable. Whether it is true or not, I am persuaded that it may well be correct and the arbitral authorities are clear that she is not obliged to establish the truth of her explanation, provided she is able to convince an arbitrator that her account may reasonably be true.

And lastly, in *Canada Safeway Ltd. v U.F.C.W. Local 401*, *supra*, Arbitrator Sims sets out the critical issue in these types of cases (para 72):

As in the Extra Food case cited by the Union, the critical issue is the greivor's intent at the time. Was this, as she now alleges, a dumb, ill thought out mistake or was it a deliberate and dishonest flouting of the Employer's policies.

[24] The Employer's submissions focused on the Grievor's conduct, her experience as a cashier in a position of trust, her relatively short service, and the need for employers in this sector to be able to apply and enforce strict policies to deter employee theft. Their argument was that the video objectively showed intent to take the two salad dressings, that her explanation throughout was not believable, that her responses to the allegations were not remorseful or apologetic, and that she did not take immediate steps to offer to pay for the items.

[25] The Employer referred me to 11 cases: *Canada Packers Inc. and U.F.C.W. Local 114P*, 1989 CanLII 9266 (ON LA), *Re DeHavilland Inc. et al. and Canadian Auto Workers, Local 112* (1999), 83 LAC (4th) 157, *Extra Foods No 8566 (Squamish) v U.F.C.W., Local 1518* 2000 CarswellBC 2979, *Bombardier Aerospace and C.A.W.-Canada, Loc. 112 (Hussey) (Re)*, 2004 CanLII 94664 (ON LA), *Winners Merchants Intl. LP and U.N.I.T.E. H.E.R.E. Ontario Council, Local 152 (K.(S.)) (Re)*, 2006 CanLII 93316 (ON LA), *Real Canadian Superstore (Fortino's Supermarkets Ltd.) v United Food and Commercial Workers, Canada Local 175*, 2008 CanLII 61227 (ON LA), *Powerstream Inc. v Power Worker's Union, Canadian Union of Public Employees, Local 1000*, 2012 CanLII 97854 (ON LA), *Georgian Bay General Hospital and OPSEU, Local 367 (J. (K.)) Re* 2014 CarswellONT 5923, *Unite Here Local 75 v Four Points Sheraton Meadowvale*, 2016 CanLII 106869 (ON LA), *Toronto (City) v Canadian Union of Public Employees, Local 79*, 2019 CanLII 78856 (ON LA), *Ontario Power Generation v Power Workers' Union*, 2024 CanLII 46732 (ON LA).

[26] *Toronto (City) v Canadian Union of Public Employees, Local 79*, *supra*, *Extra Foods No 8566 (Squamish) v U.F.C.W., Local 1518*, *supra* and *Ontario Power Generation v Power Workers' Union*, 2024, *supra* were each advanced to support the Employer's argument that once the prima facie conduct had been established, there was a shifting of onus to the Grievor to provide a reasonable explanation for why the conduct occurred. Arbitrator Stout summarized this premise in *Ontario Power Generation v Power Workers' Union*, *supra*. He wrote that in cases like this one, where allegations are quasi-criminal in nature, the Employer must prove both the conduct and the guilty intention before the onus shifts to the Grievor to provide a

reasonable explanation that might mitigate the finding of intention (para 50):

OPG must prove the “actus reus” or guilty act, which would be the unlawful gain and the “mens rea” or guilty intention. The jurisprudence is clear that if on a particular set of facts, it appears that a fraudulent act has occurred, then the evidentiary onus shifts to the grievor to provide a reasonable explanation for what occurred and raised a reasonable inference that there was an absence of intent to steal.

[27] Employer counsel relied on a number of the decisions cited above to establish that the retail food sector is distinctive. Even where an employee was long-serving with no disciplinary record, the theft of relatively small-value merchandise would often result in a dismissal being upheld. In *Real Canadian Superstores, supra* Arbitrator Barrett considered a balancing of factors articulated by Prof. Harry Arthurs in *Re Canadian Broadcasting Corp. and CUPE* [1979] 23 L.A.C. (2nd) 227, to uphold the dismissal of a 17-year, discipline-free employee who stole a 69-cent bun. Arbitrator Barrett did so because, in considering the factors (reproduced here), she determined that the balance tipped against the Grievor due to a lack of acknowledgement of the seriousness of her conduct and a lack of a forthright admission of guilt.

1. bona fide confusion or mistake by the grievor as to whether he was entitled to do the act complained of;
2. the grievor’s inability, due to drunkenness or emotional problems, to appreciate the wrongfulness of his act;
3. the impulsive or non-premeditated nature of the act;
4. the relatively trivial nature of the harm done;
5. the frank acknowledgement of his misconduct by the grievor;
6. the existence of a sympathetic, personal motive for dishonesty, such as family need, rather than hardened criminality.
7. the past record of the grievor;
8. the grievor’s future prospects for likely good behaviour, and
9. The economic impact of discharge in view of the grievor’s age, personal circumstances, etc.

[28] The Employer relied on *Winners Merchants Intl. LP and U.N.I.T.E H.E.R.E. Ontario Council, supra*, to support their argument that the retail value of items that are taken in these

types of cases is not a factor that arbitrators give much consideration to, given the Employer's vulnerability to theft and shrinkage in the workplace. The Employer also advances *Winners*, supra, for its discussion about what constitutes a bona fide acceptance and apology for the Grievor's misconduct. The issue in that case was about an employee opening a moisturizer bottle and taking one pump of lotion from it. The Grievor maintained it was a spontaneous action after the pump on the bottle accidentally unlocked. After reviewing the evidence, Arbitrator Levinson found that it was neither accidental nor spontaneous, and so the "apology" rang hollow because the Grievor was apologizing for her spontaneous act, not for what Arbitrator Levinson found to be her true misconduct.

Decision

[29] The issue to be resolved is whether the Employer had just cause to discipline the Grievor for her misconduct. If the Employer can prove just cause, then the decision is whether dismissal is a just and reasonable penalty in these circumstances.

[30] The jurisprudence advanced by both the Employer and the Union is consistent in cases of theft. If the quality and quantity of the evidence is such that a decision maker acting with care and caution, arrives at the fair and reasonable conclusion that the act was committed with intent, then the evidentiary onus shifts to the grievor to provide a reasonable explanation for what occurred and raise a reasonable inference that there was an absence of intent to steal.

[31] I have reviewed the video of the Grievor's actions many times, both in the hearing and afterward, and the following is what I observed. The Grievor is first seen at the bottom of the screen, entering the produce and salad section of the store. She is carrying a few items in both of her hands. She proceeds to the pre-made salad section. She pauses, briefly walks by the salads, then comes back and is seen reaching for the top shelf where (as I understand from the Employer's evidence) the salad dressing packets are. She finds the type she wants and grabs a few (at this point, you cannot tell how many). Notably, she does not touch or pick up any salad, pre-made or otherwise. Afterward, she moves directly behind her, to the middle of the produce section, where the bananas are set out on a counter stand. She looks at a few bunches of bananas on the far right of the stand, then moves to the far left and selects a bunch. As the Grievor was giving evidence while watching the video, she testified that she

moved down to the left of the stand to select organic bananas because the regular bananas were not ripe yet. It was put to her on cross-examination that she coded in regular bananas rather than organic bananas (which cost more per kilogram) when she checked out. She did not have a plausible explanation for this. After picking up the bananas, she proceeds to the store's check-out area, her arms quite full of items.

[32] The Grievor proceeds to the checkout area of the store. To get there, she passes the customer service/lottery ticket counter, where a clerk is helping a customer. The SCOs are directly adjacent to that counter. There are six SCOs. They are all empty and she is the only person in the entire SCO area. If you walked past the SCO area, you would arrive at the first attended checkout #1. The Grievor picks up a reusable Metro bag next to the customer service counter, enters the SCO area and proceeds to the SCO that is opposite and furthest away from the customer service counter. The Grievor's back is now facing the customer service counter and the clerk working there. Notably, the SCO she is at is the closest to the cashier at checkout #1, who is helping a customer, but as the Grievor arrives, the attendant seems to be speaking with the Grievor. The attendant's normal position while helping customers is to have their back to the Grievor. The Grievor proceeds to place her items on the right shelf of the SCO while chatting with the attendant at checkout #1. The Grievor then places her bag on the left side, where the platform (based on the evidence) can detect changes in weight, but not the actual weight of each item. The system is designed to expect a change in weight after an item is scanned and will not let a customer proceed with scanning more items until the system registers that expected increase in weight.

[33] The Grievor commences scanning her items. I must say at the outset, for someone who has worked for 3 years as a cashier for about 15-25 hours a week, the manner in which she proceeds seems curious. I would have expected that a person who works in a repetitive function, such as a grocery store checkout, would complete the process fast, efficiently and somewhat automatically. But that is not what I observe. The first item she scans is a loaf of bread, which she scans with her right hand and promptly places in the reusable bag held by her left hand on the left side of the SCO. This looks like a normal process. But then the next item she scans is a green bag, which I understand from the evidence is a branded bag of caesar croutons and is listed on the receipt that was entered into evidence. She moves that green bag with her right hand, appears to scan it and makes a motion to place it in the

shopping bag in the same fashion she did with the bread. But then she pauses and rather than place it in the bag she moves it to her left hand, holds it and then reaches back to her right to pick up what the evidence established were the three salad dressing packets.

[34] There are two odd points to this. The first is that it would be normal, if not automatic, to place that crouton bag into the shopping bag in the same fashion as the bread. The second is that reaching back for the salad dressings seems very inefficient. On her own evidence, the Grievor confirmed that every item needs to be scanned individually, so it makes no sense to take the extra step of gathering all three in her right hand when she would simply have to put them down to scan them individually. But there is more. She now has the green bag in her left hand, three salad dressing packets in her right hand and seems to stack them or hold them all together above the scanner in both hands. She then looks like she will scan everything, but decides to place the salad dressings back down on the bottom right of the scanner without scanning them. She then moves the green bag to the left side of the SCO and places it in the shopping bag. I can't think of any reason anyone would check out in this fashion, especially someone who makes their living scanning and checking customers out on a routine basis. After reviewing this evidence in detail, I conclude that she was about to place the croutons and all three dressing packets in her shopping bag (without scanning and paying for the salad dressings), but that she became spooked by someone or something and placed the dressings back down on the unscanned side of the SCO.

[35] The Grievor's next motion after bagging the croutons is to take a look over her right shoulder in the direction of the clerk at the customer service counter. She then picks up her package of steaks, sitting on the empty SCO to the right of the SCO she is using, with her right hand, and then she turns back to take a longer look over her left shoulder. This motion appears to me to show that she was worried that someone might be watching her. It is certainly not the actions of someone who is in a rush to leave the store and catch her bus home, as she had testified. In testimony, she said the extended look over her left shoulder was to call over the customer service clerk so that she could enter her staff discount (which, as per policy, employees are not allowed to enter themselves). What makes this statement hard for me to accept is that this extended look happens well before she is finished scanning her items, and that if she were calling her colleague over from a position behind her and to the right, why would she turn her head back and over her left shoulder?

[36] After looking over both shoulders, she scans the steaks with her right hand, passes them to her left and then touches the salad dressing packages as if to pick them up. But at that moment, the clerk at checkout #1 turns to speak to her, and she immediately takes her hands off the salad dressing packets, moves the steaks into her right hand, and places them in the shopping bag. The salad dressing packets remain on the bottom right of the SCO scanner, and it is curious why (similar to after the croutons) she wouldn't scan and bag them then. But she doesn't. The checkout #1 clerk is still facing towards her and appears to be chatting with the Grievor. Rather than picking up and scanning the salad dressings, the Grievor reaches past them to grab her next item, a loaf of garlic toast, with her right hand. She scans it quickly and places it in her shopping bag. She does so quickly and without hesitation as the checkout #1 clerk chats with her, which is the only time during her checkout when it appears the Grievor could possibly be distracted. Again, this is curious since one of the Grievor's explanations for her misconduct is that the area was busy and she was distracted and yet the only time it appears that there was potential for distraction, she scans through two items perfectly and quickly.

[37] The Grievor then reaches for the banana bunch that is on the right side of the SCO. She places them on the scanner, punches in a code that, I understand, she likely had memorized, and then places them in the shopping bag on top of the steaks. As stated above, she was questioned during cross-examination about using the code for regular bananas, which are lower-priced, even though she testified that she picked organic bananas because of their ripeness. She had no reasonable answer and then became a bit evasive in re-direct as to whether they were, in fact, organic bananas or she was just mistaken as she watched the video. The Employer argues that this fraudulent act is more evidence of her not being trustworthy.

[38] After scanning the bananas and bagging them, the Grievor picks up all three salad dressing packets (the only items left to scan), passes two of them to her left hand, and scans the one in her right hand. There is no sign that she tried to scan the one packet in her right hand more than once (although, in evidence, she testified that doing so would be a policy violation). She then passes the scanned packet to her left hand, consolidates all three into her right hand, and places them all into the shopping bag at once underneath the package of steaks.

[39] During the various scans, alerts would appear on the screen quite regularly, reminding the customer (in this case, the Grievor) to place an item in the bagging area. I heard a lot of evidence on current and future scanner technologies and their ability to detect item weight. This was in response to some statements the Grievor made about the scanner detecting if items went into the bagging area that were too heavy, with the idea that, if three salad dressing packets were put in versus one, the machine would have alerted her. I did not take much from this evidence other than that the scanners did not yet have this ability on March 14, 2025 and that the alerts were there as reminders to be careful when scanning and that they certainly would have been a reminder to the Grievor, an experienced cashier, to double-check that everything was scanned and bagged properly.

[40] After bagging all of the items, the customer service clerk comes over, makes some inputs on the screen (presumably entering the staff discount code), and then the Grievor is seen paying for her items. After that, in another peculiar fashion, the Grievor does not move toward the exit of the store. Rather, she gets a cart, places her shopping bag in it, turns and goes back towards the customer service desk, leaves her items in the cart, and then goes back into one of the aisles. Then she returns to the customer service desk. There is nothing in any of these motions that reveals to me that she is in a rush to get anywhere. She testified that after check-out, she realized she needed change for the bus (she would get that from customer service) and forgot to get her coffee (which she got from the aisle she went down). Pausing to get a coffee is not, to me, indicative of someone rushing to catch her bus.

[41] After carefully reviewing all the evidence presented to me, I have concluded that the Grievor intended to take the salad dressings without paying for them. There are two moments in my review of the video where it appears to me that the Grievor is about to move the dressing packages into her shopping bag (prior to actually doing so the third time) without scanning and without paying for them. The first is when she scans her croutons through. Her motions are too unusual to ignore. She scans through the croutons, almost bags them, then brings them back to the unscanned side, picks up the salad dressings with the croutons, and motions to bring them all the way back to the left to bag the croutons with the dressings. But she stops. She appears hesitant and nervous throughout and then puts the dressings back on the right (unscanned side of the SCO). The second is when she scans through her steaks. Again, her motions make no sense, and it appears she is about to put the dressings through to the bag

area with the steak when the counter #1 clerk turns toward her, and she abandons the idea, leaving the dressings on the scanner again. What I see is that when she finally does pick up the salad dressings to scan them, rather than doing so one at a time from the right side of the SCO to the left, she moves two unscanned packets into her left hand. For an experienced cashier who knows that each item needs to be scanned individually, who testified she was good at her job and whom the Employer agreed had no performance issues, this seems highly unusual and not, in my view, a mistake.

[42] The Grievor's explanation for not scanning those two items is that she was tired, in a rush, the area was busy, and she became distracted. The problem I have with this being a believable excuse is that she was the only person in the SCO area for almost the entire time. In her stage 2 meeting, she made a point of saying to Mr. Demers that if he had seen the video, he would know how busy it was and that it was lined up. Not only was there no lineup, but of the 6 SCOs in her immediate area, every one of them was empty during her entire transaction except for the Grievor's. I am also mindful that the one time she could have been distracted was when the checkout #1 attendant spoke to her, but here, she scanned her garlic toast without issue or delay. Furthermore, as I described above, I see no evidence of the Grievor being in a rush. On the contrary, she takes her time scanning items, reorganizing them, picking them up, and putting them back down. None of that conduct appears to me to be that of a person in a rush, especially from someone who makes their living scanning items and checking people out. An experienced cashier could I expect, move through the scanning process very quickly if needed. Lastly, when she goes back into the store to get a coffee rather than walking out, it tells me she is not in a rush to get anywhere. The Grievor may indeed have been tired, but, as the evidence shows, she worked from 8:00 AM until 2:15 PM that day. I am not persuaded that this schedule would cause a normally healthy person to not be aware of what they are, or are not, scanning. In summary, I don't find the Grievor's explanation credible. What is required, as the case law referred to me states, is an explanation that is believable because it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions (*Faryna v Chorney, supra*). I do not find that the Grievor's explanation hits that mark.

[43] In addressing the common mitigating factors an arbitrator considers for substituting a lesser penalty, I have considered the Grievor's length of service and employment record. While

a discipline-free record is commendable, the relatively short service of just under 3 years part-time is offsetting and does not tip the scales toward substituting a lesser penalty. Similarly, the evidence presented to me reveals that the Grievor has secured another part-time cashier position in the service industry, so the economic impacts do not appear unusual for someone losing their part-time employment. Lastly, in considering her acknowledgement, the Grievor was reluctant to apologize for anything until she had seen her conduct in the video. While I understand her position of not apologizing for something she does not recall doing, it paints a picture of someone who doesn't think they can do anything wrong and says to the Employer, "I don't believe you". The location of this incident is at an SCO that any member of the public can use. If I made such a mistake and was confronted outside the store for not scanning something properly, I would be horrified and apologetic, and I would immediately offer to bring the item back in and pay for it to make restitution. Certainly, my first reaction would not be to think the store was wrong and that they needed to prove it. Only after viewing the video and during her evidence before me did the Grievor apologize for the scanning discrepancy. But, much like in *Winners, supra*, she only apologizes for a mistake she says she made, not for what I have determined was intentional conduct. As was stated in *Winners, supra*, an apology like this rings hollow.

[44] I will address the Union's remaining argument of adverse inference. Ms. Strong was mentioned in evidence a few times, but the only mention of any first-hand knowledge that she had was in respect of the investigation meeting on March 19, 2025, with Loss Prevention. The Loss Prevention investigators met with Grievor on March 19, 2025 and Ms. Strong and a Union Steward attended. The notes from that meeting were entered into evidence through Sean McPherson, a Corporate Security Investigator with Loss Prevention. The only challenge raised in the hearing to what was said, and by extension those notes, was not about the accuracy of what they contained, but rather about what the Grievor alleges was missing, such as an offer to pay the Employer back for the salad dressings. The only other potential involvement of Ms. Strong is her presence in the background of the video around the time of the salad dressing transaction. The video clearly shows that Ms. Strong does not engage with the Grievor before, during, or after the transaction. She is engaged with another person and is not looking toward the Grievor. An Arbitrator can draw an adverse inference where a witness who should have important information for a case is within one party's control and is not called to give evidence. Where they are not called without a reasonable explanation, an adverse inference that their

evidence would be detrimental to the controlling party may be drawn. In this case, I have no indication before me that Ms. Strong had any important information that other witnesses, including the Union Steward, did not have. On this basis, I find no adverse inference in the decision by the Employer not to call her to give evidence. Had the Union thought she had evidence that would undermine the Employer's case and bolster theirs, I am not aware of any reason they could not have called her as a witness themselves. Similarly, if they believed there was a problem with the accuracy of the investigation notes, they could have called the Union Steward, who also attended the investigation meeting, to provide evidence of any alleged discrepancies.

[45] A number of arbitrators have stated in other proceedings that the retail store industry is distinctive in that the opportunity, due in part to a lack of direct supervision and the temptation for employees to commit dishonest acts, is great. As a result, employees can be held to a high standard, and acts involving trivial sums or small amounts of produce may result in discharge. In this case, the value was less than \$2.00. The Grievor was in a position of trust as a cashier, and her conduct and lack of acknowledgment lead me to conclude that her employment relationship with the Employer is irreparably harmed. Therefore, dismissal is just and reasonable.

Dated at Toronto, Ontario, this 14th day of May 2026.

Peter Dailleboust, Sole Arbitrator