



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *Canada Employment Insurance Commission v D. B.*, 2020 SST 418

Tribunal File Number: AD-20-251

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**D. B.**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: May 19, 2020

## DECISION AND REASONS

### DECISION

[1] The Tribunal allows the appeal.

### OVERVIEW

[2] The Respondent, D. B. (Claimant) lost his job. The employer stated that the Claimant lost his job because of culpable absences under its attendance management program. The Claimant explained that he did not know where he stood on the attendance program before his dismissal, though he had repeatedly asked his employer. The Appellant, the Canada Employment Insurance Commission (Commission), concluded that the Claimant had lost his employment due to his own misconduct. The Claimant requested reconsideration but the Commission maintained its original decision. The Claimant appealed to the General Division.

[3] The General Division found that the Claimant did not know where he stood on his attendance because, despite his requests, his employer did not update him on where he stood before his dismissal. It found that the Claimant could not have known that the employer was likely to dismiss him when he called in sick in August. The General Division concluded that the Commission did not prove that the Claimant lost his job because of his misconduct.

[4] The Appeal Division granted leave to appeal to the Commission. It puts forward that the General Division ignored evidence before it and erred in law in its interpretation of sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[5] The Tribunal must decide whether the General Division ignored evidence before it and erred in law in its interpretation of sections 29 and 30 of the EI Act.

[6] The Tribunal allows the Commission's appeal.

## ISSUE

[7] Did the General Division ignore evidence before it and err in law in its interpretation of sections 29 and 30 of the EI Act?

## ANALYSIS

[8] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

- (a) the General Division: failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

### **Did the General Division ignore evidence before it and err in law in its interpretation of sections 29 and 30 of the EI Act?**

[9] The General Division had to decide whether the Claimant lost his job because of his own misconduct in accordance with sections 29 and 30 of the EI Act.

[10] The General Division found that the Claimant did not know where he stood on his attendance because despite his requests, his employer did not update him on where he stood before his dismissal. It found that the Claimant could not have known that the employer was likely to dismiss him when he called in sick in August. The General Division concluded that the Commission did not prove that the Claimant lost his job because of his misconduct.

[11] The Commission submits that the General Division ignored evidence before it when it found that the Claimant's unapproved absences were more of a factor in his

dismissal than lateness. The Commission puts forward that the evidence shows that the Claimant lost his job for lateness as well as for unapproved absence.

[12] The Commission further submits that the warning letter proves that the Claimant knew that any four incidents of lateness or absences would result in termination. The Claimant's attendance records shows that he had three (3) absences in May and was late two (2) times before his dismissal on August 23, 2019. therefore, he should have known that dismissal was a real possibility when he called in his absence late on August 23, 2019.

[13] Before the General Division, the Claimant acknowledged that he had trouble meeting the attendance and lateness requirements. The attendance report confirms this. The Claimant did not dispute that he missed the days shown on the attendance report or that he was late calling in sick.

[14] The Tribunal finds that the General Division ignored the evidence before it when it concluded that the employer relied on five highlighted entries in the attendance report to dismiss the Claimant under the attendance management program.

[15] In the employer's response to the Claimant's grievance, it did not limit itself to the highlighted entries in the attendance report. The employer specifically mentioned in its response that a combination of lateness and full day absences resulted in the Claimant's termination.<sup>1</sup>

[16] Furthermore, the Claimant had previously received a 5-day suspension under the attendance management program in March 2019. The employer told the Claimant, and the Claimant acknowledged in writing, that if he had any combination of four incidents under the program, including lateness or unapproved absences, he would be dismissed.<sup>2</sup>

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<sup>1</sup> Exhibit GD3-44.

<sup>2</sup> Exhibit GD3-30.

[17] The Tribunal also notes that the attendance management program considers late arrivals to be culpable absenteeism.<sup>3</sup> The Claimant's attendance record indicates excessive culpable absenteeism in accordance with the program.

[18] The General Division determined that the Claimant could not know that he would be dismissed on August 23, 2019, because the employer did not inform him whether his two (2) sick days taken immediately prior to him going on sick leave were approved. Even if that were the case, the attendance report shows another unapproved absence on May 8, 2019, and two (2) late entries on August 1 and 7, 2019. Therefore, the Claimant should have known that dismissal was a real possibility when he called in his absence late on August 23, 2019.

[19] Case law has established that being late or absent from work without notifying the employer or without giving them valid reasons suggests wilful or wanton disregard for the employer's interests and for the standards of behaviour that the employer has a right to expect of an employee.

[20] In view of the above-mentioned errors, the Tribunal will render the decision that should have been rendered pursuant to section 59(1) of the DESD Act.

[21] The Tribunal finds that the Commission has met its burden of proving the Claimant's misconduct. The evidence established on a balance of probabilities shows that the employer dismissed the Claimant because of his numerous late arrivals and unapproved absences after he had previously received a 5-day suspension under the attendance management program in March 2019.

[22] For the above-mentioned reasons, the Commission's appeal is allowed.

## **CONCLUSION**

[23] The Tribunal allows the appeal.

Pierre Lafontaine  
Member, Appeal Division

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<sup>3</sup> Exhibit GD3-43.

HEARD ON:	May 13, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Angèle Fricker, representative of the Appellant  D. B., Respondent