Citation: *X v Canada Employment Insurance Commission and CS*, 2023 SST 1710

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	X
Representative:	Chaylene Gallagher
Respondent:	Canada Employment Insurance Commission
Representative:	Josee Lachance
Added Party:	C. S.

Decision under appeal:	General Division decision dated June 9, 2023 (GE-22-3226)

Tribunal member:	Stephen Bergen
Type of hearing:	Teleconference
Hearing date:	November 8, 2023
Hearing participants:	Appellant Appellant's representative Respondent Respondent's representative
Decision date:	November 28, 2023
File number:	AD-23-621

Decision

[1] I am dismissing the appeal.

[2] The General Division made errors in how it determined that the Employer dismissed the Claimant for misconduct. I have corrected those errors to make the decision that the General Division should have made.

[3] Like the General Division, I find that the Claimant should not be disqualified from receiving benefits. He was not dismissed for misconduct for the purposes of the *Employment Insurance Act* (EI Act).

Overview

[4] The Appellant is X, which is a broker for cellular service products. I will call it the Employer, which describes his interest in this appeal. C. S. is the Added Party. He claimed Employment insurance (EI) benefits so I will call him the Claimant. The Respondent is the Canada Employment Insurance Commission (Commission).

[5] After the Employer dismissed the Claimant, he applied for EI benefits. The Commission originally denied his claim, finding that the Employer dismissed him for misconduct. When the Claimant asked the Commission to reconsider, it changed its decision. It found that the Claimant`s actions were not misconduct and decided that the Claimant was not disqualified.

[6] The Employer appealed to the General Division, but the General Division dismissed his appeal. It is now appealing to the Appeal Division.

[7] At the General Division, the Employer's Director of Operations (N.H.) testified on behalf of the Employer. When I refer to the Employer, I am referring to the Employer more broadly, or to its position as advanced by its legal counsel.

Preliminary matters

[8] The Claimant did not appear at either his General Division appeal, or to make arguments on his own behalf at the Appeal Division.

[9] The Claimant was an Added Party at the General Division. The General Division made multiple attempts to courier him the Notice of Hearing for different hearing dates, but the notice could not be delivered. The General Division also made multiple attempts to contact the Claimant by email and by telephone. His phone was out of service. Ultimately, the General Division went ahead with the hearing in his absence.

[10] The Appeal Division tried to call the Claimant on July 20, 2023, before sending the Notice of Hearing on August 17, 2023, by courier. The Notice was returned as undeliverable. The Appeal Division tried to call the Claimant on September 5, 2023, at the phone number that was on the file. The Appeal Division used the same contact information as was used by the General Division. Unlike the General Division (which found that his phone number was out of service), the Appeal Division was able to leave a message, and asked the Claimant to call back.

[11] The Appeal Division tried to reach him again on November 8, 2023, just before the hearing began. It left a message to say that the hearing was proceeding, and inviting the Claimant to join.

[12] The Claimant has never contacted either the General Division or the Appeal Division. In accordance with Rule 9(2) of the *Social Security Tribunal Rules of Procedure*, the Appeal Division heard the appeal in the absence of the Claimant.

Issues

[13] The issues in this appeal are:

a) Did the General Division make an error of fact by finding that the Claimant's mental health condition meant that his conduct was not willful.

b) Did the General Division make an error of law by finding that the Claimant did not breach a duty to the Employer because it did not stop him from doing his work?

c) Did the General Division make an error of fact by failing to consider evidence that the Claimant's lateness conduct was escalating?

d) Did the General Division make an error of fact by drawing an unsupported inference from the text message evidence?

e) Did the General Division make an error of fact by finding that the Claimant could not have known he would be dismissed for the conduct described as customer fraud?

f) Did the General Division make an error of fact by failing to consider all the reasons for which the Employer dismissed the Claimant?

g) Did the General Division make an error of fact by failing to consider the effect of all the misconduct together?

Analysis

[14] The Appeal Division may only consider errors that fall within one of the following grounds of appeal:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division made an error of law when making its decision.
d) The General Division based its decision on an important error of fact.[1]

[1] This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[15] This appeal is about whether the Employer dismissed the Claimant for misconduct. The *Employment Insurance Act* (EI Act) does not define "misconduct." However, the courts have defined misconduct as follows:

- The claimant must have engaged in the action or inaction that is said to be the basis for their misconduct.
- The claimant's conduct must be wilful. Wilful conduct may include deliberate or even reckless conduct.[2]
- The claimant's conduct was such that the claimant knew or should have known that
    - their conduct impaired the performance of the duties they owed to the employer;[3] and
    - as a result of the conduct, the claimant's dismissal was a real possibility.[4]

[16] The burden of proof is on the Commission (or the party alleging misconduct) to show on a balance of probabilities that a claimant's actions were misconduct according to the above definition. It must also show that the employer dismissed them because of that misconduct.[5]

Chronic lateness conduct

– Willfulness

Error of fact

[17] The General Division found that the Claimant's lateness was not willful. After noting that the Employer was aware that the Claimant had behaved "erratically," the General Division stated that lateness due to a health condition is not willful conduct. It gave no other reason for finding that the Claimant's lateness was not willful.

---

2 *Canada (Attorney General)* v *Secours*, A-352-94; McKay-*Eden* v *Her Majesty the Queen*, A-402-96.
3 *Mishibinijima* v *Canada (Attorney General)*, 2007 FCA 36.
4 *Ibid.*
5 *Minister of Employment and Immigration* v *Bartone*, A-369-88.

[18] This was an error of fact. The decision suggests that the Claimant's actions were not willful because of his mental condition. This is unsupported by the evidence.

[19] The record suggests that both the Claimant and his Employer had some concerns about his mental health. However, there was no evidence whatsoever that his mental health condition prevented him from coming in to work on time, or notifying the Employer that he would not be at work or on time.[6]

[20] The Commission argued in support of the General Division decision. While it acknowledged that the General Division may have made an error in considering the effect of the Claimant's mental health condition. However, it asserted that the decision was still correct. It said that the General Division relied on other evidence that supported its decision.

[21] The Commission is correct. The General Division could still have decided that the Claimant`s conduct was not misconduct even if it was found to willful. Willfulness is only part of what the Employer had to prove to establish misconduct.

[22] The General Division also found that the Employer had not proven other parts of the test. It found no evidence that the Claimant's lateness "stopped him doing his work." It implicitly found that the Claimant neither knew, nor should have known, that dismissal was a real possibility as a result of his conduct.

– **Duty to the Employer**

Error of Law

[23] The General Division said that there was no evidence that the Claimant's chronic lateness "stopped him doing his work." The General Division was trying to use plain language to explain that the Claimant's conduct did not breach a duty that he owed to his Employer.

---

[6] See *Canada (Attorney General) v Bergeron* 2011 FCA 284.

[24] The Employer argued that the General Division failed to apply the legal test for misconduct.

[25] I agree that the General Division made an error of law by failing to apply the correct test.

[26] When the General Division said that the claimant's lateness had not stopped him from doing his work, it focused on the Claimant's performance only. However, the courts have confirmed that misconduct may be founded on a breach of an employer policy alone, without regard to the reasonableness or even legality of the employer's policy.[7] In *Cecchetto*, the Court was explicit: "[T]he term "misconduct" in this context refers to the employee's violation of an employment rule."[8]

Understanding the employment consequences of misconduct.

[27] The General Division made errors of fact when it considered the Claimant's understanding of possible consequences.

[28] For a claimant's conduct to be misconduct, they must have known (or should have known) that dismissal was a real possibility as a result of their conduct.

[29] The General Division acknowledged the existence of the Employer's lateness policy. It noted that the policy warns that employees may be dismissed for violating the policy. It also recognized that the Claimant received a warning on March 18, 2021, in which his employer repeated that he could be dismissed for lateness.

[30] However, the General Division found that the Employer had tolerated the Claimant's lateness for over a year without additional warnings.9 From this, it concluded that the Claimant was not aware that his dismissal was a real possibility.

---

[7] See for example *Karelia v. Canada (Human Resources and Skills Development)*, 2012 FCA 140, *Guerrier v. Canada (Attorney General)*, 2020 FCA 178.

[8] *Cecchetto v Canada (Attorney General*), 2021 FC 102 at para 24.

[9] See para 51 of the General Division decision. This is clearly a reference to the excel spreadsheet at GD7-317-328 and how it showed "all sorts of occasions" of lateness and no-shows." Listen to the audio recording of the General Division hearing at timestamp 43:15.

Errors of fact

[31] The Employer argued that the General Division ignored evidence or that it drew inferences unsupported by the evidence.

[32] The Employer emphatically denied condoning the Claimant's behaviour. It directed me to the notes of the "location manager" as proof.[10] However, those notes say little about whether the Employer tolerated the Claimant's behaviour. They identify some relatively recent incidents in which the Claimant was particularly late of failed to show up, but they do not help to prove the Employer would not tolerate the Claimant's lateness. The employer did not tell the Claimant that his behaviour was unacceptable or warn him of consequences if the behaviour continued.

Evidence of escalating conduct

[33] At the same time, some evidence showed that the Claimant's no-shows had escalated from where he had initially been "minutes late" to where he was "absent without approval" just before he was terminated.[11]

[34] A significant escalation of the Claimant's late/no-show behaviour would have been relevant to the question of whether the Employer was condoning the Claimant's behaviour. The Employer may not have always required the Claimant to be punctual, but this would not necessarily mean that it was condoning the more extreme "no-show" behaviour.

[35] The General Division made an error of fact because it did not consider the manner in which N.H. distinguished the Claimant's recent conduct from the former, less serious, conduct.

[36] I recognize that the General Division may ordinarily be presumed to have considered all the evidence before it. However, the evidence of escalating behaviour

---

[10] See GD3-44.
[11] Termination letter, also listen to the audio recording of the General Division hearing at timestamp 43:30.

was of sufficient importance that the General Division ought to have brought it into its analysis.[12]

Significance of text message exchange

[37] The General Division also erred in fact when it relied on an excerpted portion of a text message exchange to infer that the Employer took a "lax approach to the Claimant's attendance issues." The text message excerpt does not support an inference that the Employer took a lax approach to attendance.

[38] The text exchange to which the General Division referred, occurred over the course of April 27, 2022 - a single day.[13] The Claimant began the exchange by informing the Employer that he was very stressed and would not be coming in. The rest of he exchange details how the Employer responded to how the Claimant was feeling and his need for time off. It does not show how Employer responded, or would respond, in a situation where the Claimant was simply late or not coming, and not giving the Employer notice or explanation.

Fraudulent activity

[39] The Employer insisted that the primary reason it dismissed the Claimant was that its sole customer, T, would no longer support the Claimant with a valid representative identification (Rep ID). The Claimant was a sales representative for the Employer, selling T's products. The Employer said that the Claimant could not do his job at all if he could not sell T products.

[40] T suspended the Claimant's Rep ID on January 30, 2022[14]. As the General Division noted, T later reinstated the Claimant who returned to his work duties. According to the Employer, the Claimant's reinstatement required him to follow the

---

[12] *Villeneuve v. Canada (Attorney General*), 2013 FC 498.
[13] See GD7-249.
[14] GD3-28.

"ethics policy."[15] On April 21, 2022, T contacted the Employer with new allegations of ethics policy violations. It asked the Employer to do a full investigation.

[41] The General Division found that the Employer had not shown that the Claimant willfully performed fraudulent acts (in relation to his interactions with customers). It said that there was insufficient evidence about the fraud allegations. It also said there was no verbal or written warning about the fraud.

[42] At the Appeal Division, the Employer said that it did not characterize its concerns involving T as concerns of "fraud" but rather that the Claimant had breached its ethics policy. Regardless of how the conduct is characterized (and the Employer told the General Division about an RCMP investigation that was "all about fraud."[16]), I accept that the General Division considered the Employer's "ethics concern" with how the Claimant represented T with customers both when it used the word "fraud," and when it said there was insufficient evidence.

[43] The Employer has an Ethics Code that warns that employees who participate in "suppressing or distorting product knowledge" will be terminated immediately.[17] The alleged conduct breach appears to fall within this part of the Ethics Code.

[44] The evidence shows that the Employer warned the Claimant in connection with the breach of ethics that occurred around January 30, 2022. New ethical breaches of the same type are alleged in the April 21, 2022, letter from T, as well as an internal communique of the Employer dated September 8, 2022. The employer accepted that fraud and/or breaches of ethics were continuing, including breaches on March 13, April 17, and April 21, 2022.[18]. Another email speaks of the suspension of the Claimant's rep ID. [19]

---

[15] Excerpted at GD3-62. See para 4(g).
[16] Listen to the audio recording of the General Division hearing at timestamp 31:40.
[17] GD7-261-262, 275.
[18] See GD3-78.
[19] *Ibid.*

[45] I appreciate the Employer's position that T, its only customer, had concerns about the Claimant's conduct and that the Claimant would not be able to perform his duties if those concerns were substantiated. While T's concerns are apparent, there was no evidence before the General Division to substantiate those concerns.

[46] Unsubstantiated conduct cannot support a finding of misconduct. There is no presumption that an employee has engaged in conduct that they are accused of, or for which they are being investigated.

[47] N.H. told the General Division that T had done an investigation and that it told the Employer to do its own investigation. There was some suggestion of an ongoing investigation by the RCMP, as well. However, there was little evidence of what is, or was, involved in any of those investigations. If any of the investigations had produced its findings or determination, it was not in evidence.

[48] Nor did the evidence show the Claimant had actually lost T's support (or his Rep ID) because of his conduct leading up to the April 21, 2022, letter. According to N.H., its customer T, "basically said that it could no longer support [the Claimant]."[20] However, it was unclear what N.H. was referring to. He could have been describing T's response to the alleged breach in March or April 2022. However, he could also have been describing the circumstances that led to T pulling support for the Claimant in January 2022.

[49] Likewise, the September 7, 2022, employer correspondence does not contain sufficient information to allow me to determine whether it is referring to a new suspension or whether it is again speaking of the initial suspension in January 2022.

[50] T clearly stopped "supporting" the Claimant for his actions on or before January 30, 2022. And the employer is clear that it was then advised by T to terminate the Claimant. However, the Employer did not terminate the Claimant at that time. It reinstated the Claimant and T allowed him to continue working with its products.

---

[20] Listen to the audio recording of the General Division hearing at timestamp 35:40.

[51] Furthermore, the final letter from T did not say that it would no longer support the Claimant or that it was suspending his Rep ID. Instead, T asked the Employer what it was doing to coach the Claimant.

[52] Even if T had suspended or revoked the Claimant's credentials immediately prior to the Claimant's dismissal, the Employer would have to prove that the conduct underlying the suspension was misconduct.

[53] The Employer said that the Claimant needed T's approval and authorization to work for the Employer. In my view, the need for T's approval is analogous to an employer requirement that its employee have a certain licence or certification to work. The courts have accepted that employees may be dismissed for misconduct where they lose a required licence. However, the underlying conduct in these cases was willful and reckless of consequences.[21] The courts do not need to find misconduct where an employee loses a required licence innocently.[22]

[54] The General Division did not accept that the Employer had proven any customer fraud since January 2022, when it warned the Claimant. It found that there was insufficient evidence of misconduct related to the April 21, 2022, allegation of fraud (or ethics), or that he had not been warned that he might be dismissed.

[55] The Employer may have meant the General Division to understand that it dismissed the Claimant for the conduct causing T to suspend him in January 2022 (even though it waited until May 2022 to do so).

[56] But, even if that were the case, the General Division did not make an error in finding that the Claimant could not have known he might be dismissed. The Employer's termination letter confirmed that it coached the Claimant on January 15, 2022, and warned him that this kind of conduct was unacceptable and would result in termination (if it occurred again, presumably).[23]

---

[21] See *Canada (Attorney General) v. Cartier*, 2001 FCA 274.
[22] See *Canada (Attorney General) v. Church,* 2003 FCA 456.
[23] GD7-307.

[57] In other words, the Employer was giving the Claimant another chance after the first ethical breach in January 2022. The General Division could not have found that the Claimant should know he would be dismissed for conduct that occurred a few months earlier, when the Employer had already responded to that conduct with a warning.

[58] The General Division reviewed the available evidence, but it was not satisfied that the Employer had substantiated its allegations of fraud or ethical breaches. In doing so, it made no error. It neither overlooked nor misunderstood any significant evidence.

[59] It is up to the General Division to weigh and evaluate the evidence. This includes the sufficiency of the evidence. I am not permitted to reweigh or re-evaluate the evidence even if I might have reached a different conclusion.[24]

Other Misconduct for which the Claimant was dismissed

[60] The General Division recognized that the Employer dismissed the Claimant for violating the Employer's attendance policy and for fraudulent activity with customers. In deciding that these were the reasons the Employer had dismissed the Claimant, the General Division said that it was relying on the Employer's evidence and that it had chosen to accept N.H.'s sworn testimony. As a result, the General Division did not consider whether any other misconduct was an operative reason for the Claimant's dismissal.

[61] The General Division's narrow focus on the customer fraud allegation and lateness conduct was understandable. The Employer emphasized its concerns with customer fraud because of how this impacted the Employer's relationship with T and whether the Claimant could work at all. The Employer also emphasized the Claimant's chronic lateness.

[62] Furthermore, the Employer took pains to ensure that the General Division understood that the Claimant's dismissal was unrelated to any concern with drug

[24] See for example: *Hideq v Canada (Attorney General)*, 2017 FC 439, *Parchment v Canada (Attorney General)*, 2017 FC 354, *Johnson v Canada (Attorney General)*, 2016 FC 1254, *Marcia v Canada (Attorney General)*, 2016 FC 1367.

possession. It said that it had already decided to dismiss the Claimant before it knew anything about that. The Employer also said that the Claimant was not dismissed for poor sales performance.[25]

[63] However, the Employer did not say that it had no reasons for dismissing the Claimant beyond the Claimant's attendance and the behaviour resulting in the investigation by T.[26] It is clear from N.H.'s testimony and the representations of counsel at the General Division, that the Employer dismissed the Claimant for other kinds of misconduct as well.

[64] N.H. testified about the other reasons for the Claimant's dismissal. These included the Claimant's breach of its Time Clock policy by repeatedly failing to punch-in and punch-out,[27] breaching its policy on misrepresentations on time adjustments,[28] theft of company property,[29] and misuse of company property.[30]

[65] The law says that an employer may also have reasons for dismissing the Claimant beyond the misconduct it alleges. It is sufficient for the Employer to show that the misconduct is an "operative" cause of the termination.[31] If any of the other alleged behaviours are also misconduct, and may be considered an "operative" cause for the dismissal, they must also be considered.

[66] The General Division made an important error of fact because it misunderstood L. H.'s testimony and failed to consider its evidence that it dismissed the Claimant for additional forms of misconduct. The Employer's other reasons for dismissing the Claimant are detailed below.

---

[25] Listen to the audio recording of the General Division hearing at timestamp 1:06:35.
[26] See the General Division decision at paras-24 and 25.
[27] Listen to the audio recording of the General Division hearing at timestamp 40:15.
[28] Listen to the audio recording of the General Division hearing at timestamp 49:55.
[29] Listen to the audio recording of the General Division hearing at timestamp 52:00.
[30] Listen to the audio recording of the General Division hearing at timestamp 50:35.
[31] See *Canada (Attorney General)* v *Brissette*, A-1342-92. See also *Mishibinijima v Canada (Attorney General),* 2007 FCA 36; *Nelson v Canada (Attorney General)*, 2019 FCA 222; *Canada (Attorney General) v Bergeron*, 2011 FCA 284.

– **Forgetting/failing to punch-in**

[67] The General Division made an error by failing to consider evidence that the claimant's failure to punch-in may have been one of the operative reasons for his dismissal.

[68] N.H. testified that the Claimant had a pattern of repeatedly forgetting to "punch-in" and he referred to the Employer's policy about failing to punch-in.[32] The policy states that "continuous failure to properly use the Punch Clock may result in disciplinary action."[33]

[69] The General Division had alluded to the Employer's Time Clock policy but only in its discussion of the lateness issue.

[70] The General Division also reviewed the spreadsheet evidence representing the many occasions on which the Claimant failed to punch-in or out. [34] However, it did not fully appreciate its significance. The General Division considered this evidence in the context of lateness only, as "evidence of multiple late arrivals."[35] It did not consider how it supported the Employer's claim that the Claimant failed to comply with the Employer's Time Clock policy.

[71] The Employer's position was that the Claimant failed to punch-in and repeatedly requested adjustments. Its counsel stated that the spreadsheet was evidence of 216 times in which the Claimant had failed to punch-in or punch-out. [36]

[72] The General Division did not fully understand the significance of the spreadsheet evidence. It made an error of fact by failing to consider whether the Claimant's chronic failure to punch-in, as per the Time Clock policy, was an operative cause of his dismissal.

---

[32] Listen to the audio recording of the General Division hearing at timestamp 40:15.
[33] GD7-272/301.
[34] Spreadsheet is found at GD7-325.
[35] See the General Division decision at para 48.
[36] Listen to the audio recording of the General Division hearing at timestamp 16:00.

– « Misrepresentation of time adjustments

[73] The General Division found that one of the reasons the Employer dismissed the Claimant was because of alleged fraudulent activity with customers. It did not consider whether misrepresentation of time adjustments (which the Employer has termed "time fraud") may have also been an operative cause of the Claimant's dismissal.

[74] In its termination letter, the Employer referred to one of the Claimant's requests to adjust his log-in times as fraud. It said that he only arrived at work on April 14, 2022, in mid-afternoon, but asked for an adjustment to 9:30.[37] The spreadsheet evidence was also relevant to the claim that the Claimant misrepresented adjustments to the Claimant's punch-in times.

[75] This type of misconduct is described in Employer policy addressed to employees who, "purposely submit [ting] inaccurate adjustments to Time Clock ". information."[38].

[76] The General Division made an error of fact by not considering that the Employer's concern with the Claimant's time adjustment requests was one of the reasons that it dismissed the Claimant.

– Theft of company property

[77] The General Division also failed to consider whether the Employer's concern with the Claimant's failure to return company property was an operative cause of his dismissal.

[78] However, the Employer had not abandoned its position that the Claimant had essentially stolen, by refusing to return on request, a Pixel cellphone, and a Galaxy e-watch, under its policy prohibiting removing company property without authorization.[39]

[79] On a side note, the General Division understood the Employer's concern to be with stolen IMEI "serial numbers." While the nature of the property is not important if the

---

[37] This was also mentioned in its notes at GD7-250.
[38] See GD3-63.
[39] Listen to the audio recording of the General Division hearing at timestamp 50:35.

Claimant did in fact steal from the Employer, the General Division appears to have misunderstood the nature of the property.

[80] N.H. referred to these devices as IMEI serial numbers, but it appears that he was describing the devices by using their specific IMEI identifiers. The evidence suggests that he was talking about the theft of the electronic devices that bear those IMEI serial numbers.

[81] A Samsung Elite Ambassador Program contract confirms that the Claimant took possession of a Galaxy Watch 4 device.[40] A separate agreement with the Employer confirms that the Claimant had possession of a Pixel 4XL device.[41]

[82] In addition, N.H. testified that the devices have specific serial numbers called IMEI's. He did not seem to understand the General Division members questions about serial numbers but he referred to the unreturned property as "the two that [the Claimant] was in possession of – the Pixel 4XL and the Galaxy watch IV … the two IMEI's."

[83] The General Division made an error of fact by not considering that the Employer dismissed the Claimant in part for his failure to return company property.

– **Misuse of company property**

[84] The General Division did not consider whether the Claimant's "misuse of company property" may have been another operative cause of his dismissal.

[85] The Employer's policy states as follows:

> "[O]utside employment or activities may not involve [the employer's] property or information. This includes but is not limited to the use of company equipment or facilities, information or research, our company name or any other assets.[42]

[40] See GD7-227.
[41] See GD7-222.
[42] GD7-265

[86] The Employer claimed that the Claimant was using his company computer to produce or alter vaccine passports and other identification[43]. It discovered copies of his friends and his own personal information including Covid documents and drivers' licences on this company computer.

[87] Regardless of whether the Claimant's activities were illegal, the Employer's policy appears to prohibit the Claimant from using his company computer for outside activities.

[88] The General Division made an error of fact by not considering that the Employer dismissed the Claimant in part for his misuse of company property.

– **Conduct considered collectively**

[89] When the Employer was arguing that the General Division made an error in how it considered the Claimant's misconduct, it said that the Claimant's various behaviours were all misconduct because they were contrary to the Employer's policy. The Employer also argued that the General Division did not consider the Claimant's misconduct **collectively** as breaches of policy.

[90] I do not need to consider this argument here, because the General Division considered only two areas of misconduct: chronic lateness and customer fraud. I found that it made no error in finding that the Employer had not established misconduct related to customer fraud. Therefore, there is no point in considering how the two areas of misconduct may have interacted.

Summary

[91] I have found errors in how the General Division assessed the Claimant's lateness that could affect the decision. I have also found that the General Division made an error by finding that the Employer had dismissed the Claimant only for lateness and because of the customer fraud investigation.

---

[43] GD7-252.

[92] That means that I must decide how to remedy the General Division decision.

Remedy

[93] I must decide what I will do to correct the General Division errors. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[44]

[94] Both the Employer and the Commission believe that I have evidence on all the issues I need to decide and that I should make the decision the General division should have made.

[95] I agreed that the information is before me that will allow me to make the decision. I will make the decision that the General Division should have made.

Misconduct for which the Claimant was dismissed.

[96] For reasons that I have already identified, I find that the Employer dismissed the Claimant for multiple reasons. Specifically, the employer dismissed the Claimant because of:

a) customer fraud allegations,
b) chronic lateness,
c) breaches of the Time Clock policy involving failure to report as required,
d) breaches of Time Clock policy by misrepresenting his time worked for adjustments,
e) theft of company property, and,
f) misuse of company property for outside activities.

[97] I will now consider each of these areas of misconduct separately.

– Consideration of misconduct collectively

[98] However, I will briefly address the Employer's argument.

---

[44] See section 59(1) of the DESDA.

[99] I do not think it is helpful to reduce all kinds of potential misconduct to "breaches of employer policy." In most cases, an employer will not be able to establish that a claimant should have known they would be dismissed for behaviour contrary to policy X, on the basis of behaviour contrary to policy Y or because they had been warned about some contravention of Y.

[100] The Employer referred to *Bellavance* and *Maher* to support its position that different breaches at different times can amount to misconduct, and that the nature of the misconduct must be considered in light of the claimant's entire employment file.[45]

[101] In *Bellavance*, the claimant was dismissed for multiple incidents. The Board of Referees restricted its analysis to only one.[46] The Court rejected that approach, finding that the Board should have considered the different misconducts allege. The *Bellavance* case might only mean that all the misconduct must be considered, and not that all conduct must be considered conjunctively.

[102] Furthermore, the different breaches of the employers' code of conduct in *Bellavance* seemed to have occurred in pursuit of a particular purpose or incidental to that purpose. They were more like "parts of a whole" than are the various breaches in the present appeal.

[103] *The Maher* decision was concerned with what the claimant ought to have known about the consequences of his conduct. It essentially said that an employee who already has a number of strikes against them should expect that their employer would be more likely to dismiss them for any additional infraction.

[104] However, the "entire file" that *Maher* said should have been considered, was comprised of instances of the same conduct for which the employee was eventually

---

[45] *Canada (Attorney General) v Bellavance*, 2005 FCA 87, *Canada (Attorney General) v Maher*, 2014 FCA 22.

[46] The Board of Referees was the first level of appeal under a former Employment Insurance administrative appeal scheme.

dismissed. He had a record of failures to report and prior warnings for failing to report, so he ought to have known that another failure to report might result in termination.

[105] *Maher* does not support the notion that misconduct may be found based on the cumulative effect of different kinds of misconduct. At least, not where a claimant's breach of one employer policy would not necessarily have led them to believe that they would be dismissed for some other breach of a different policy.

[106] There may be circumstances in which a claimant ought to know that they would be dismissed for one kind of behaviour because they were warned or warned or disciplined for another kind of behaviour. However, this would depend on other factors, such as whether there is some close relationship between the different behaviours, or whether the employer explicitly communicated a connection between consequences for the behaviours.

[107] Having said that, I will be mindful of whether similar kinds of conduct ought to be considered together.

– **Customer fraud**

[108] I found no error in how the General Division found that there was insufficient evidence of customer fraud, or of an ethics violation associated with customer fraud.

[109] I agree that the Employer has not proven that the Claimant engaged in the conduct that it describes as customer fraud.

– **Chronic lateness**

[110] The General Division accepted that the Claimant had been chronically late, but it found that the Employer tolerated his activity to such an extent that the Claimant could not have known that he would be dismissed.

[111] Like the General Division, I find that the Employer generally tolerated the Claimant's lateness. This is relevant to whether the Claimant should have known that dismissal was a real possibility.

[112] The *Gagné* decision cited by the General Division supports the principle that an employer's tolerance of employee behaviour an important factor in deciding whether the Claimant knew or should have known that the dismissal was a possibility.[47] In *Gagné*, the Court accepted that certain behaviour contrary to the employer's policy was not misconduct because it occurred in the plain sight of supervisors and with the direct knowledge of the supervisors. The Court upheld the Umpire's decision that the claimants could not have known that they would be dismissed for their conduct.[48]

[113] The Employer agreed to adjust the Claimant's entries 216 times in the year prior to his dismissal. The Employer said it was only concerned with the late/no-shows in the termination letter. This behaviour occurred over the course of a full year.[49] When the General Division member observed that the spreadsheet showed "all sorts of occasions" (of lateness) the Employer emphatically agreed, saying that there had been a fair number of warnings over that period.[50]

[114] When N.H. was explaining the spreadsheet, he testified that the Employer wanted to compensate its employees for their time.[51] It would adjust the time entries if an employee had only failed to punch-in or out. If the employee had actually worked more hours than recorded, it would make sense for the Employer to adjust those entries and to pay him for all the time he actually worked.

[115] However, N.H also stated that the Claimant was "forgetting" so frequently that the employer could not fail to see the trend. He said that the Employer would return the adjustment requests to the store manager so that they could follow up with verbal or written warnings, and eventually termination.[52] The Employer asserted - also with reference to the period covered by the spreadsheet – that the Claimant had received many verbal and written warnings.

---

[47] Canada (*Attorney General) v Gagné,* 2010 FCA 237.
[48] The Umpire was the second level of appeal under the former appeal scheme.
[49] Listen to the audio recording of the General Division hearing at timestamp 42:50.
[50] Listen to the audio recording of the General Division hearing at timestamp 43:40.
[51] Listen to the audio recording of the General Division hearing at timestamp 39:25.
[52] Listen to the audio recording of the General Division hearing at timestamp 40:00.

[116] I accept that the Claimant received many warnings from March 2, 2021, to April 28, 2022 (the period covered by the spreadsheet evidence).

[117] I recognize that N.H was vague about the nature of the many warnings related to the spreadsheet evidence. There is clearly an intersection between allegations that the Claimant failed to punch-in, that he was late for work, and that he misrepresented his time when he asked for adjustments.

[118] Some of the warnings may well have been for failing to punch-in only (rather than for being late), in circumstances where the Employer understood and accepted that he had not actually been late. In addition, the Employer was apparently suspicious about the Claimant's time adjustments. Some of the warnings may have been cautions to not misrepresent his time when requesting adjustments.

[119] Nonetheless. I accept that a significant number of the warnings between March 2021 and April 2022 were for lateness.

[120] I say this because the Employer argued that the Claimant had been warned about his lateness many times, but produced specific evidence of only one warning from March 2021 that was specific to lateness. In addition, its argument about "many warnings" was made with reference to the significance of the spreadsheet evidence to the lateness conduct.

[121] Furthermore, those lateness warnings appeared to have no consequences.

[122] There is no evidence that the Employer took any disciplinary action for lateness prior to the Claimant's dismissal. It appeared to have allowed all of his Time Clock adjustments – at least until April 14, 2022, so that it could pay him for time that - if he was late - he had not worked.

[123] There is no doubt that the Employer had a general expectation that its employees including the Claimant would show up for work on time. At the same time, I find that the Employer tolerated the Claimant's lateness over a significant period.

[124] That brings me to the question of whether the Employer's tolerance for the Claimant's lateness extended to the lateness conduct in the week of April 25 to April 29, 2022. N.H testified that the Claimant's conduct had escalated immediately prior to his dismissal, to where he did not come into work at all and did not notify the Employer.[53]

[125] The termination letter refers specifically to lateness or no-show behaviour on April 7 and April 14, and in the week of April 25 to April 29, 2022, as well as to his conduct.

[126] According to the operation manager's notes, the Claimant was late on April 7 and April 14, but he did not show up for work on April14 and April 25 until mid-afternoon or at all on April 29.[54] As both the Employer and the Claimant acknowledge, it was rare for the Claimant to miss a day of work.[55]

[127] . I accept that there had been an escalation in the lateness behaviour to where the Claimant was absent without notice on two days in the week before his dismissal. As I noted earlier, I accept that the Employer generally tolerated the Claimant's lateness. However, I do not accept that it condoned the more recent behaviour where the Claimant was absent without notice. Failing to show up without notice is no longer the same behaviour as tardiness.

[128] At the same time, I am unable to find that the Claimant ought to have known that he would be dismissed for his late or absent behaviour in his final week.

[129] I do not reach this conclusion lightly. A reasonable person might be presumed to know that they could be dismissed for not coming in to work and not notifying the employer. The difficulty in this particular case is that I must consider a reasonable person, *in the Claimant's circumstances*. That means I have to consider what a reasonable person would do if their mental health was compromised.

---

[53] Listen to the audio recording of the General Division hearing at timestamp 44:50.
[54] See GD3-44-45.
[55] See GD7-244, GD3-44.

[130] In this case, the Claimant's was likely experiencing some kind of mental problems just before the Employer dismissed him. He demonstrated unusual, if not bizarre, behaviour that occurred or escalated in his final week

[131] The location manager's notes acknowledge that the Claimant was having problems, as follows:[56]

> Friday, April 29: The Employer acknowledged an inexplicable midday message from the Claimant. In his text, the Claimant did not even acknowledge he was supposed to be at work.
>
> Thursday, April 28: The Employer expressed concern for the Claimant because the Claimant passed out at work.
>
> Wednesday, April 27: The Employer noted that the Claimant's text messages were hard to understand and that his behaviour was uncharacteristic. This was the day that the Claimant requested a day off for his mental health. The Employer recognized "decline of his mental health."
>
> Tuesday, April 26: Employer described the Claimant's texts as incoherent and confused. It described the Claimant's voice as shaky and said that he seemed troubled. The Claimant told the Employer that the police responding to his 911 call made him feel like he was crazy. This was after the Claimant reported a store intrusion that did not actually occur.
>
> Monday, April 25: The Employer describes the Claimant as "panicked" and noted that his voice as shaky. The Claimant insisted that he could not work Mondays although he was scheduled for work that day.

[132] The Claimant's conduct seems to have been unusual for him, as well as bizarre. He exhibited what may have been delusional behaviour on April 26 when he reported the store intrusion. He also acknowledged that he was having mental health issues on

---

[56] See GD3-44-45.

April 27, as did the Employer. And, he had difficulty functioning when he came in on April 28.

[133] The Claimant's absence without notice in his final week of work was willful, in the sense that his failure to do so was deliberate. The evidence does not suggest that he was incapable of deciding whether or not to go in to work.

[134] Nonetheless, the Claimant's behaviour suggested that he was experiencing some kind of mental health problems. I find that these problems, particularly in the last week or two of his employment, affected his ability to appreciate that missing shifts might mean he would be terminated.

[135] The Claimant would likely have recognized his jeopardy if the Employer brought it to his attention. However, there is no evidence that the Employer established a bright line between the Claimant's past lateness, which it had tolerated, and what was going on in the last week or two of his work – which it would not tolerate. Instead of warning him, the Employer seemingly accepted that he was ill. It expressed only concern for his health, allowed him a day off in the middle of the week and suggested he come in late one morning.

[136] I find that the Claimant's absences without notice in his final week were not misconduct, so much as they were evidence of a decline in mental fitness. While his failure to come to work as scheduled is a willful breach of a duty that he owed his Employer, I cannot find that he ought to have known that termination was a real possibility.

[137] Neither the Claimant's chronic lateness nor its eventual escalation are misconduct in the circumstances.

– **Time Clock policy - failure to punch-in**

[138] I am satisfied that the Claimant failed to punch-in, as required by the Time Clock policy, multiple times between March 2021 and the end of April 2022.

[139] I am also satisfied that the Employer has a policy requiring its employees to punch-in and stating that employees who continuously fail to do so may face disciplinary action. Based on the spreadsheet evidence, the Claimant breached the policy. Therefore, it breached its duty to the Employer.

[140] However, I find that the Claimant could not have known he would be dismissed for his continuing failure to punch-in or out.

[141] The Employer said the spreadsheet showed 216 adjustments. These represented 216 occasions on which the Claimant had either failed to punch-in or failed to punch-out. These occurred over a long period and extended until shortly before the Employer dismissed the Claimant. L.H. testified that the matter would return to the store manager so that the manager could follow up with verbal or written warnings, and eventually termination.

[142] I accept that the Employer tolerated the Claimant's poor track record of punching in. In these circumstances, the Claimant was unlikely to believe that termination was a real possibility for failing to punch-in.

[143] This conduct does not meet the definition of misconduct.

– **« Time Clock policy - misrepresentation of adjustments to time»**

[144] The Employer testified that it suspected what it calls "time fraud", based on a pattern of repeated failures by the Claimant to punch-in.

[145] The Employer pointed to only one instance of "time fraud," in which the Claimant asked for an adjustment so that he could be paid for time that he did not work. According to the Employer, the Claimant asked the Employer to adjust his time to 9:30 on April 14, 2022, but the Employer said that he only started work in the mid-afternoon.[57]

[57] See GD3-27, termination letter, and GD3-45.

[146] "Time fraud" is one of the stated causes for the Claimant's dismissal, and I have already found it to be an operative cause. The Employer dismissed the Claimant within about two weeks of the April 14, 2022, incident in which the Claimant misreported his time. It referred to this incident in its termination letter, among the other reasons given for the dismissal.

[147] I find that the Claimant's request to adjust his time on April 14, 2022, was wilful.

[148] I also find that the Claimant breached a duty to the Employer by violating the Employer's Time Clock policy[58].The policy states that purposely submitting inaccurate adjustments to Time Clock may result in disciplinary actions, including termination.

[149] The Claimant violated the policy by submitted inaccurate information. However, I do not need to consider whether this amounted to a fraud on the Employer. The Employer permitted the Claimant to make many adjustments. I have no way of knowing whether the Employer may have chosen not to police the adjustments because – for example - it had employees who regularly adjusted their time entries to offset other work outside their regular hours that could not otherwise be captured in the system.

[150] The Claimant had made many such adjustment requests in the past; as many as 216 according to the Employer. Despite the number and frequency of forgotten punch-ins associated with time adjustment requests, the Employer simply paid the Claimant as per the Claimant's requests. It did so, even though it acknowledged that it saw a pattern that it could confirm that "some" of those entries were falsified.[59]

[151] The Employer was aware of a suspicious pattern in the Claimant's adjustment requests and had apparently confirmed other unspecified misrepresented time adjustments (other than the one on April 14, 2022). Therefore, it is implausible that its many warnings to the Claimant over the period of the spreadsheet did not include cautions about his adjustment requests. It does not make sense that the Employer

---

[58] See GD3-63.
[59] Listen to the audio recording of the General Division hearing at timestamp 17:20.

would have warned the Claimant about being late to work, without also warning him about making misrepresentations to collect pay to which he was not entitled.

[152] However, none of the Employer's warnings resulted in any disciplinary action or escalated in any way. If the Employer hoped to rely on its policy, it might have reset its expectations of the Claimant by disciplining him or by issuing a formal warning. There is no evidence that the Employer did anything like this, in respect of the April 14, 2022, incident, or before the April 14, 2022, incident.

[153] The Employer had tolerated the Claimant's behaviour over a long period of time. Therefore, the Claimant could not reasonably have expected that he would be dismissed without warning for doing the same thing.

[154] I find that the Claimant's misrepresentation of time was not misconduct.

[155] At the Employer's request, I have also considered the Claimant's lateness in conjunction with the two types of Time Clock policy violations. The nature of the conduct in these areas is intertwined, as is the evidence of much of it.

[156] I do not find that the Claimant's past conduct in any of these areas would lead the Claimant to believe that he would be dismissed for other related conduct. To the contrary, I find that the manner in which the Employer continued to tolerate one of these types of breach of duty, could have led the Claimant to believe it was likely to tolerate related breaches.

[157] The Employer was aware that the Claimant was often tardy and was likely aware that this was at least one of the reasons he did not punch-in as required. The Employer was also aware that the Claimant sometimes submitted inaccurate adjustments.

[158] The Employer may have repeatedly warned the Claimant as it claims. If so, the Claimant obviously and transparently ignored them over a period for about a year. There is no evidence that the Employer did anything to impress upon the Claimant that it took seriously his breach of the Time Clock punch-in policies, his lateness, or impropriety in his adjustment requests.

[159] Instead, the Employer taught the Claimant that his behaviour had no consequences. Despite the employer's concerns that the Claimant's requests for adjustments were actually requests to be paid when he was not working, it continued to pay him for the adjustments he requested.

– **Theft of company property**

[160] The Employer has a policy that a Claimant will be terminated immediately if an employee removes company property without proper authorization.[60] However, the watch and phone were intended for his use (or for him to use as a demonstrator) while he was an employee. He had proper authorization to take the devices off the premises, according to the agreements that the Claimant signed for each device. These agreements state that he was obligated to return them **on termination**.[61] The Claimant could not have breached those agreements by failing to return the devices before he was terminated.

[161] The Employer states that he asked for the Claimant to return the Galaxy watch or the Pixel phone before he was terminated. However, the fact that the Claimant did not respond before the date of his termination does not prove that he intended to keep them.

[162] More importantly, he could not be expected to know that he was in danger of termination if he did not return them on request. The specific agreements under which he was given the devices, state the consequences for failing to return the devices. An employee who does not return a device in good working order must pay for it. The agreements do not say that the consequence is termination.

---

[60] See GD3-80.
[61] See GD7-222 and GD7-227.

– **Misuse of company property**

[163] The Claimant had some images on his work computer that concerned the Employer. It suspected that the Claimant was using the computer to do something illegal.

[164] The evidence shows that the Claimant had images of some documents including vaccine passports and a driver's licence. I accept that these images were likely unrelated to his work requirements. Therefore, I accept that he willfully used his computer for some activity unconnected with work. This is contrary to Employer policy, so he has breached a duty he owes to his Employer.

[165] However, I do not accept that the employer has shown he has done anything illegal. The mere presence of images of identification documents of the Claimant or other people is not a crime in itself.

[166] I find that the Claimant could not have known that dismissal was a real possibility. Whatever the Employer's suspicions, there is nothing about the actual images on the Claimant's computer to suggest the Claimant should have known the Employer would treat his use of his computer as justification for dismissal.

[167] The Employer's policy does not specify any consequence for when an employee uses company property for non-work purposes. Nor was there evidence of any prior occasion on which the Claimant used company property for activities unrelated to work, or was warned for doing so.

[168] I find that the Claimant's misuse of company property is not misconduct. He could not have known that he would be dismissed for having some personal images on his work computer.

Conclusion

[169] I am dismissing the appeal. The General Division made errors in how it reached its decision. I have corrected those errors in coming to my decision, but I have reached the same decision as the General Division.

[170] The Employer has not established that it dismissed the Claimant dismissed for misconduct, as it is defined for the purposes of the EI Act.

Stephen Bergen
Member, Appeal Division