Citation: *DR v Canada Employment Insurance Commission*, 2025 SST 399

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. R.
Respondent:	Canada Employment Insurance Commission
Representative:	Dennis Kopitas

Decision under appeal:	General Division decision dated November 25, 2024 (GE-24-2472)

Tribunal member:	Solange Losier
Type of hearing:	Videoconference
Hearing date:	February 21, 2025
Hearing participants:	Appellant Respondent's representative
Decision date:	April 21, 2025
File number:	AD-24-845

Decision

[1] D. R.'s appeal is allowed. The General Division made an error of law.

[2] I have substituted with my own decision. He is not disqualified from getting benefits from November 12, 2023, because his conduct did not amount to wilful misconduct.

Overview

[3] D. R. is the Claimant. He was working full-time as a security guard and stopped working due to a shortage of work at his work site. He applied for and received Employment Insurance regular benefits (benefits). A benefit period was established effective on June 4, 2023.

[4] The Canada Employment Insurance Commission (Commission) retroactively decided that he voluntarily left his job without just cause from November 12, 2023.[1] It said that he voluntarily left when he failed to resume his employment. This resulted in a notice of debt for an overpayment of benefits.[2]

[5] The General Division decided that the Claimant hadn't voluntarily left his job, but instead that he was dismissed from his job due to misconduct.[3] It found that he was dismissed for failing to work two shifts or contact his employer by the end of November 15, 2023 (the deadline set out in the warning letter).[4] It concluded that he was disqualified from getting benefits.[5]

[6] The Claimant applied to the Appeal Division and argued that the General Division made several reviewable errors in its decision.[6]

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[1] See Commission's initial and reconsideration decision at pages GD3-24 to GD3-25 and GD3-70.
[2] See Notice of Debt at pages GD3-26 to GD3-28.
[3] See General Division decision at pages AD1A-1 to AD1-17.
[4] See paragraph 36 of the General Division decision.
[5] See section 30(1) of the *Employment Insurance Act* (EI Act).
[6] See section 58(1) of the *Department of Employment and Social Development* (DESD Act).

[7] I have found that the General Division made an error of law.[7] I substituted with my own decision. The Claimant was dismissed from his job, but he is not disqualified from getting benefits because his conduct did not amount to wilful misconduct.

Preliminary matter

[8] New evidence is evidence that the General Division didn't have before it when it made its decision. The Appeal Division generally doesn't accept new evidence.[8] This is because the Appeal Division isn't the fact finder or rehearing the case. It's a review of the General Division's decision based on the same evidence.[9]

[9] There are some exceptions where new evidence is allowed (i.e., general background information only; if it highlights findings made without supporting evidence or shows that the Tribunal acted unfairly.)[10]

[10] As part of the Claimant's application to the Appeal Division, he submitted a list of job applications he made.[11] I find that this is new evidence that was not before the General Division.

[11] I am not accepting the new evidence (the job applications) because it doesn't meet any of the exceptions in law. Also, the Claimant's job searching activities is not relevant for the purposes of this appeal. The only issue under appeal is the Claimant's disqualification to benefits based on section 30(1) of the *Employment Insurance Act* (EI Act)—voluntary leave or misconduct.[12]

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[7] See section 58(1)(b) of the DESD Act.
[8] See *Tracey v Canada (Attorney General),* 2015 FC 1300 at paragraphs 29 and 34; *Parchment v Canada (Attorney General),* 2017 FC 354, at paragraph 23.
[9] See *Gittens v Canada (Attorney General),* 2019 FCA 256, at paragraph 13.
[10] See *Sharma* v *Canada (Attorney General),* 2018 FCA 48 and *Sibbald v Canada (Attorney General),* 2022 FCA 157, at paragraphs 37–39.
[11] See pages AD5-8 to AD5-21.
[12] See sections 112(1) and 113 of the EI Act and page GD3-70.

Issues

[12] I have focused on the following issues:

a) Did the General Division incorrectly apply section 49(2) of the EI Act—the "benefit of the doubt" provision?

b) Did the General Division ignore or overlook the Records of Employment in the file?

c) If so, how should the error or errors be fixed?

Analysis

[13] An error of law can happen when the General Division doesn't apply the correct law or when it uses the correct law but misunderstands what it means or how to apply it.[13]

[14] An error of fact happens when the General Division bases its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.[14] Put another way, if the General Division makes a finding of fact that is important to its decision, but gets the facts wrong, ignores or overlooks important evidence, then I can intervene.

[15] Any of these types of errors would allow me to intervene in the General Division decision.[15]

– Did the General Division make an error of law by relying on the benefit of the doubt provision?

[16] Yes. The General Division made an error of law by applying the benefit of the doubt provision (s. 49(2) of the EI Act) as part of its assessment of the legal issue. That is a discretionary provision only applied by the Commission.

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[13] See section 58(1)(b) of the DESD Act.
[14] See section 58(1)(c) of the DESD Act.
[15] See section 59(1) of the DESD Act.

[17] Section 49(2) of the EI Act says:

> The Commission shall give the benefit of the doubt to the claimant on the issue of whether any circumstances or conditions exist that have the effect of disqualifying the claimant under section 30 or disentitling the claimant under section 31, 32 or 33, if the evidence on each side of the issue is equally balanced.

[18] Paragraph 35 of the General Division's decision states that "when the evidence for a claimant quitting versus being dismissed are roughly equal, the benefit of the doubt must be given to the claimant because the burden of proof is on the Commission."

[19] Before the Appeal Division, the Claimant argued that the General Division erred because it didn't give him the benefit of the doubt.

[20] The Commission agreed that the General Division may have misunderstood the benefit of the doubt provision in s. 49(2) of the EI Act but maintains that the outcome of the appeal would not have changed because the provision doesn't apply and had no impact in this case.[16]

[21] The Commission explained that the provision shouldn't be applied by the General Division, because it's only for them to apply.

[22] The General Division didn't cite s. 49(2) of the EI Act, but I think it was applying the "benefit of the doubt" in paragraph 35 of its decision when it was assessing the legal issue.

[23] I agree with the Commission in part, that whether the legal issue is voluntary leave, or misconduct, they both result in the same outcome—a disqualification to benefits under s. 30(1) of the EI Act. However, the legal test set out for a voluntary leave case is different from the legal test for misconduct. The case law is also different. The assessment of the legal issue is an important step, and I can't just focus on the outcome (i.e., disqualification to benefits).

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[16] See page AD4-5.

[24] The Commission has maintained before the Appeal Division that the correct legal issue is "voluntarily leaving for refusing to resume an employment" and not misconduct, which suggests that it doesn't agree with the General Division's determination of the legal issue—even though it agrees with the outcome to impose a disqualification to benefits.

[25] I find that the General Division made an error of law in its decision when it concluded that the Claimant's evidence about quitting versus misconduct was "roughly equal" and that the benefit of the doubt "must" be given to the Claimant.[17] In doing so, it was applying s. 49(2) of the EI Act. The benefit of the doubt is a discretionary provision applied by the Commission when it decides that the evidence is equally balanced. It isn't for the General Division to apply.

– **Did the General Division ignore or overlook the Claimant's Records of Employment (ROEs) in the file?**

[26] No. The General Division didn't overlook the ROEs in the file, it just didn't refer to them in its decision. I can presume that it considered all of the evidence in the file, including the ROEs.

[27] There were three ROEs before the General Division:[18]

ROE #1	Issued August 1, 2023	Code: other/at the employee's request[19]
ROE #2	Issued December 13, 2023	Code: quit/abandoned employment[20]
ROE #3	Issued July 22, 2024	Code: shortage of work/end of contract or season[21]

[17] See section 58(1)(b) of the DESD Act.
[18] See page GD3-17. The Commission notes identify that it prepared an "Interim ROE" based on the information provided by the Claimant so that his claim could get established. His employer had not yet issued one at the time he applied for benefits.
[19] See ROE #1 issued August 1, 2023, at pages GD3-18 to GD3-19.
[20] See ROE #2 issued December 13, 2023, at pages GD3-20 to GD3-21.
[21] See ROE #3 issued July 22, 2023, at pages GD8-3 to GD8-4.

[28] The Claimant argues that General Division erred because it ignored or overlooked important evidence, specifically ROE #3 issued on July 22, 2024. He says that ROE #3 proves that his job ended due to a "shortage of work."

[29] The Commission agrees that the General Division didn't consider ROE #3 but says that the outcome would have been the same anyway (i.e., disqualification to benefits). It submits that only the circumstances that existed at the time he left his job in November 2023 are relevant.[22]

[30] The Commission says that ROE #3 wasn't relevant anyway because it was issued months after the Claimant separated from his employment. It was only issued after he initiated a legal claim against his employer, and they settled at the Ontario Labour Relations Board (OLRB).

[31] I was not persuaded that the General Division erred by ignoring or overlooking any of the ROEs in the file. Let me explain.

[32] The General Division decision didn't expressly refer to any of the ROEs in its decision, but it doesn't have to refer to every piece of evidence in the file. I can presume that it has considered all of the evidence before it.

[33] Case law holds that an administrative tribunal charged with fact-finding is presumed to have considered all the evidence before it and is not required to mention every piece of evidence in its reasons.[23] In this case, there is no basis to set aside the presumption.

[34] The General Division had to decide what caused the separation from his job on November 16, 2023. That is the week he was disqualified from getting benefits.

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[22] See page AD4-5.
[23] See *Simpson v Canada (Attorney General)*, 2012 FCA 82, at paragraph 10; *Lee Villeneuve v Canada (Attorney General)*, 2013 FC 498, at paragraph 51.

[35] The relevant period of time is when the Claimant separated from his job, not several months after he resolved his dispute at the OLRB resulting in the issuance of ROE#3.

[36] The General Division had to assess the evidence and come to its own conclusion about what happened at the relevant period.[24] The record shows that ROE#3 and the minutes of settlement (settlement) from the OLRB were part of the file.[25]

[37] The General Division concluded that the Claimant was dismissed from his job on November 15, 2023, due to his own misconduct.[26] It did make a minor factual error because the Claimant was dismissed, "effective November 16, 2023."[27]

[38] The General Division wrote to the Claimant in advance of the hearing explaining its jurisdiction. It explained that it wasn't bound by the settlement and that it had to apply the EI Act.[28]

[39] This is consistent with the case law. The Federal Court of Appeal (FCA) has confirmed that the Tribunal is not bound by how an employer and an employee, or a third party might characterize the grounds on which an employment has been terminated.[29] The General Division correctly recognized its narrow role.[30]

[40] I can presume that the General Division was aware of the ROEs in the file, even if it didn't explicitly refer to them in its decision.

[41] I find that the General Division didn't ignore or overlook any important evidence, including any of the ROEs in the file.[31] The General Division correctly considered the relevant period—the period that he separated from his job in November 2023.[32] It wasn't

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[24] See paragraph 31 of the General Division decision.
[25] See pages GD8-3; GD7-1 to GD7-4 and GD11-1 to GD11-4.
[26] See paragraph 36 of the General Division decision.
[27] See dismissal letter at page GD6-11.
[28] See pages GD9-1 to GD9-3.
[29] See *Canada (Attorney General) v Morris*, A-291-98; *Canada (Attorney General) v Boulton*, A-45-96 and *Canada (Attorney General) v Perusse*, A-309-81.
[30] See *Cecchetto* v *Canada (Attorney General),* 2023 FC 102, at paragraph 46.
[31] See section 58(1)(c) of the DESD Act.
[32] See paragraph 36 of the General Division decision.

bound by ROE #3 because it was issued several months after he was already separated from his employment and in response to a settlement he had with the employer.

– The Claimant argues that the General Division made other reviewable errors

[42] The Claimant argued that the General Division made several other reviewable errors. Since I've already found that the General Division made an error of law that allows me to intervene. I don't have to consider any other alleged errors at this point. I will now consider how to fix the error.

Fixing the Error

– To fix the error, I will substitute with my own decision

[43] There are two options for fixing an error by the General Division. I can either send the file back to the General Division for reconsideration or give the decision that the General Division should have given.[33] If I substitute with my own decision, I can make any necessary findings of fact.[34]

[44] If the parties have had a full and fair opportunity to present their evidence before the General Division, then it would normally be appropriate to substitute with my own decision.

[45] The Claimant says that I should substitute with my own decision. He believes there were too many errors made to send it back to the General Division. He submits that if I substitute with my own decision, I should find that the Commission failed to prove their case whether the issue is voluntary leave or misconduct.

[46] At the same time, the Claimant doesn't think that he got a full and fair opportunity to present his case on all relevant issues.

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[33] See section 59(1) of the DESD Act.
[34] See section 64(1) of the DESD Act.

[47] The Commission says that I should substitute with my own decision and decide the Claimant voluntarily left by refusing to resume his employment. It submits that the disqualification to benefits should be maintained from the week of November 12, 2023.

[48] To fix the error, I will substitute it with my own decision. The record is complete. I am satisfied that the parties had a full and fair opportunity to present his case on all relevant issues. While the Claimant doesn't agree with the General Division's decision, that doesn't mean that he didn't have a full and fair opportunity to present his case.

What is the legal issue—is it misconduct or voluntary leave?

[49] Sometimes the facts of a case can make it challenging to establish whether the legal issue is "voluntary leave" or "misconduct." The Commission identified the same challenge when it provided its written arguments to the General Division.[35]

[50] Section 30(1) of the EI Act imposes a disqualification to benefits where a person has voluntarily left their job without just cause or lost their job due to misconduct.[36]

[51] Section 29(b.1)(ii) of the EI Act says that voluntarily leaving an employment includes the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed.

[52] I asked the parties what they thought the legal issue was in this case: voluntary leave or misconduct?

[53] The Claimant argues this was neither a voluntary leaving, nor misconduct case because the Commission has failed to prove either one.

[54] The Commission argues that the legal issue is voluntary leave based on section 29(b.1)(ii) of the EI Act. It says that the Claimant voluntarily left his job when he refused to resume his employment.

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[35] See pages GD4-1 to GD4-11.
[36] See section 30(1) of the EI Act.

– **Did the Claimant voluntarily leave his job by refusing to resume his employment?**

[55] No. The Claimant didn't voluntarily leave his job. He didn't have a choice to stay employed. The evidence shows that the employer made the decision to formally end his employment on November 16, 2023.[37]

[56] I was not persuaded by the Commission's submission that the legal issue in this case was voluntary leave. My reasons follow.

[57] The FCA in *Canada (Attorney General) v Peace* decision says that "under subsection 30(1), the determination of whether an employee has voluntarily left his employment is a simple one. The question to be asked is as follows: did the employee have a choice to stay or to leave?"[38]

[58] The employer's letter shows that it made the decision to end his employment—but characterized it as a "job abandonment resignation" instead.[39] The employer may have had their own reasons for characterizing it that way, but it's clear that it was the employer who initiated the separation on November 16, 2023, not the Claimant.

[59] In my view, s. 29(b)(ii) of the EI Act requires some level of specificity. In order to find that a person voluntarily left their job by refusing to resume their employment, there has to be a date that they are supposed to or expected to return to work. Following that, there has to be evidence that they failed to do so.

[60] I see no evidence that the Claimant refused to resume his employment, or that he was supposed to resume work at a specific date.

[61] I would also add that I found no evidence there were shifts available on the "spares list" for him to work, or that he was directed by the employer to work a specific shift and failed to do so.

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[37] See page GD6-11.
[38] See *Canada (Attorney General) v Peace*, 2004 FCA 56, at paragraph 15.
[39] See dismissal letter at pages GD3-31 and GD3-38.

[62] The warning letter sent by the employer didn't identify a specific return to work date or shift he had to work.[40]

[63] I am not bound by the findings made by the Employment Standards Officer during its Ministry of Labour (MOL) investigation, but it also found that the Claimant didn't abandon his job. It found there was no evidence to show that he was scheduled to work on any date and that he failed to appear for one or more shifts.[41]

[64] The legal issue in this case isn't voluntary leave, it is misconduct. The employer dismissed the Claimant on November 16, 2023, so he didn't have a choice to stay employed.

[65] I find that section 29(b)(ii) of the EI Act does not apply in this case. I see no evidence that the Claimant refused to resume his employment and was supposed to resume at a specific date and failed to do so.

[66] I will now consider whether the Claimant lost his job due to his own misconduct based on the meaning of the EI Act and relevant case law.

Misconduct

– The legal test for misconduct

[67] The EI Act says that a person who is dismissed for misconduct is disqualified from getting benefits.[42]

[68] Misconduct is not defined in the EI Act, but the FCA in *Mishibinijima v Canada (Attorney General)* has a settled definition and defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[43] It also includes conduct that is reckless that is almost wilful.[44]

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[40] See page GD6-11.
[41] See MOL decision at pages GD3-40 to GD3-49.
[42] See section 30(1) of the EI Act.
[43] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[44] See *McKay-Eden* v *Her Majesty the Queen*, A-402-96.

[69] There is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[45] In other words, misconduct is any action that is intentional and likely to result in loss of employment.

[70] In *Bellavance*, the FCA decided that a deliberate violation of the employer's policy is considered to be misconduct.[46]

– **When and why was the Claimant dismissed from his job?**

[71] I find that the Claimant was dismissed from his job on November 16, 2023, for two reasons.[47]

[72] First, the Claimant was dismissed because he didn't maintain active on the spares list during his lay-off, which required him to work two shifts per month.

[73] Second, I find it is more likely than not, that the Claimant was dismissed as retaliation for initiating a claim against his employer at the MOL.

[74] Let me explain why I think this is the case and give some context leading up to his termination on November 16, 2023.

[75] The Claimant was working full-time as a security guard. He was laid off from his job site on June 2, 2023, and asked his employer for his ROE. The employer was reluctant to give him one because they maintained that they would find other work for him, and that he would be put on the spares list. The file shows that the Commission had to establish an interim ROE, so that he could get benefits.[48] The employer didn't issue that particular ROE until August 1, 2023, identifying the reason as "other/at the employee's request."[49]

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[45] See *Mishibinijima,* at paragraph 14.
[46] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87, at paragraph 6.
[47] See dismissal letter at pages GD3-31 and GD3-38.
[48] See page GD3-17.
[49] See pages GD3-18 to GD3-19.

[76] The Claimant filed a claim with the MOL against his employer on August 23, 2023, for pay in lieu of notice, wages and vacation pay, etc.[50] As of November 30, 2023, the MOL was still actively investigating.[51]

[77] On March 8, 2024, a few months after the Claimant's dismissal, the Employment Standards Officer determined that the employer had contravened the *Employment Standards Act* and issued an order against the business.[52] The employer was required to pay him termination pay, and vacation pay amounting to $1,767.44.[53] But things didn't end there because the employer appealed that decision to the OLRB.

[78] On July 17, 2024, the Claimant and the employer ended up resolving their dispute at the OLRB. Their settlement is part of this file record.[54] The employer agreed to pay the amount above, issue ROE #3 identifying the reason he stopped working in June 2023 was due to a "shortage of work." There was no admission of any wrongdoing.

[79] So, I find that the Claimant was dismissed for two reasons. He was dismissed for not maintaining active on the spares list and working two shifts a month. I also think the employer retaliated and dismissed him because he had an ongoing legal dispute with them since he was laid off in June 2023.

[80] The next step requires me to assess whether the Claimant's conduct amounted to misconduct based on the EI Act and relevant case law.

– **Does the Claimant's conduct amount to wilful misconduct?**

[81] No. I find that the Claimant's conduct, failing to maintain active on the spares list and working two shifts a month is not wilful misconduct for the following reasons.

[82] The Claimant maintained that he didn't receive the November 8, 2023, warning letter sent by the employer requesting a reply by November 15, 2023, or face

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[50] See page GD3-45.
[51] See MOL letter at page GD6-10.
[52] See MOL decision at page GD3-40 to GD3-49.
[53] See page GD3-49.
[54] See OLRB minutes of settlement at pages GD7-1 to GD7-4 and pages GD11-1 to GD11-4.

dismissal.[55] I accept this to be true. I note that the General Division also accepted the same in its decision.[56]

[83] I preferred the Claimant's evidence over the employer's evidence on this issue. The employer told the Commission that they sent the Claimant "multiple letters and attempts of correspondence to reach the client without response." It told the Commission it would send them the documents.[57]

[84] The employer sent the Commission three sets of documents: the employment agreement, correspondence between the employer and the Claimant and the notice of change in workforce letter (lay-off letter dated May 29, 2023). The Commission outlined the specific documents they received from the employer.[58]

[85] I looked at the documents, specifically the email exchange between the employer and Claimant.[59] They were communicating between May 30, 2023, to June 1, 2023. The Claimant was asking his employer for his final pay after his lay-off, his ROE, two weeks of pay in lieu of notice and his vacation pay. The employer replied, maintaining that he was "still employed," that they were looking for an alternative placement and that he should look for open shifts, as well as indicate his availability.

[86] The Claimant indicated that he would work with the employer, but while receiving Employment Insurance. Again, the Claimant restated to his employer that he needed the above. The employer maintained that he was still employed. The Claimant's final email noted that he would have to proceed by filing a claim with the MOL.[60]

[87] The above email exchange tells me that the Claimant was actively engaged in emailing with his employer after his lay-off. However, I see no evidence that the

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[55] See warning letter at page GD6-11.
[56] See paragraph 66 of the General Division decision.
[57] See pages GD3-22 and GD3-50.
[58] See pages GD3-52 and GD3-53 to GD3-66.
[59] See pages GD3-61 to GD3-66.
[60] See page GD3-61.

employer sent the Claimant any other emails or other correspondence roughly between the dates of June 2023 until its warning letter dated November 8, 2023.

[88] So, I don't believe the employer when it told the Commission that it sent him "multiple letters and attempts of correspondence to reach the client without response." They provided no evidence to support that.

[89] It seems to me that the evidence shows that several months went by without any communication from his employer, and that's consistent with the Claimant's version of events—which I find is credible.

[90] The employer also provided no evidence to the Commission that the November 8, 2023, warning letter was sent to the Claimant's email.[61]

[91] I believe the Claimant when he says he didn't get the November 8, 2023, warning letter. And I can't see that he would have ignored such an important email from his employer, especially since he responded immediately when he got the dismissal letter on November 19, 2023, and denied resigning from his job.[62]

[92] I find it more likely that the employer didn't email him the warning letter knowing that it would lead to his separation from employment. Put simply, if he didn't get it, then he couldn't comply with their direction and respond by the deadline.

[93] I don't have jurisdiction to address or sanction the employer's actions because there are other forums to do that. My role is to assess whether the Claimant's conduct amounted to wilful misconduct in the context of the EI Act and relevant case law.

[94] I can only speculate, based on the evidence before me, that the employer may have been motivated to end his employment, especially since he had filed a claim at the MOL for outstanding issues related to his lay-off. And I think that's what led them to dismissing him on November 16, 2023.

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[61] See GD6-11.
[62] See page GD3-32.

[95] So, what did the Claimant do or not do? The employer says he didn't maintain active on the spares list, which required him to work two shifts per month.[63]

[96] The Claimant doesn't dispute that he didn't update the employer with his availability and didn't pick up two shifts per month from the spares list during his lay-off period.[64]

[97] I looked at the employment agreement in the file.[65] It shows that the Claimant acknowledged that after working full-time at a site, the employer retained the right to return him to the spares list.[66] Following that, I looked at the employer's policy and procedures manual (policy).

[98] Section 4.2.5 of the policy under "work status," says that employment may be offered on a full-time, regular part-time, job sharing or casual basis, depending on the requirements and/or availability for work.[67]

[99] Section 4.2.6 of the policy under "maintain contact" says:[68]

> Employees employed on a casual basis or between assignment must maintain contact with the Operations Centre or local Operations Assistant at least once every two weeks to confirm availability. Failure to accept offered work three (3) times or maintain contact may be considered as being unavailable for work and may result in disciplinary action up to an including termination.

[100] There is no mention of the spares list, or the requirement to work two shifts per month to maintain active in the policy. The requirement to maintain contact at least once every two weeks to confirm availability is for employees who are considered "casual."

[101] The policy says that a failure to accept offered work three (3) times or failure to maintain contact is a breach and could lead to termination. But I see no evidence that

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[63] See page GD3-22.
[64] See paragraph 73 of the General Division decision.
[65] See pages GD3-53 to GD3-59.
[66] See page GD3-54.
[67] See page GD6-12.
[68] See page GD6-12.

the Claimant was offered work three times and refused it, so he didn't breach the policy there.

[102] The lay-off letter (dated May 19, 2023) indicates that the employer would reach out to him "over the next week" to discuss potential new opportunities available and/or becoming available" but that didn't happen at any point. The letter also directed him to "pick up a minimum of two shifts per month in order to remain active in the system."[69]

[103] After reviewing the employment agreement, the policy and the lay-off letter, I don't find that the Claimant's conduct (failing to maintain contact every two weeks or pick up two shifts per month on the spares list) amounts to wilful misconduct in any way. He didn't wilfully breach the policy or the employer's direction. While he could have been more proactive and provided his availability for shifts, he had problems with the system used by the employer (Track Tik).

[104] The Claimant's circumstances are somewhat unique because he was engaged in a legal claim against his employer and the MOL was investigating that claim (initially finding in his favour, which ended up being appealed by the employer and settled at the OLRB).[70] I think this played a part in how things unfolded with his employment.

[105] Did the Claimant know or ought to have known his conduct would lead to his dismissal? No, I don't think he knew or ought to have known the consequences because he didn't get the November 8, 2023, warning letter from the employer. There was no evidence that it was emailed or sent to him. While the policy mentions dismissal, it doesn't specifically talk about the spares list. And the lay-off letter that does direct him to pick up shifts from the spares list doesn't mention any consequences for not complying.

[106] For the above reasons, I find that the Claimant's conduct does not amount to wilful misconduct based on the EI Act.

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[69] See page GD3-60.
[70] See pages GD3-40 to GD3-49.

Conclusion

[107] The Claimant's appeal is allowed. The General Division made an error of law by applying s. 49(2) of the EI Act.

[108] I have substituted with my own decision. The Claimant was dismissed from his job, but his conduct did not amount to wilful misconduct. He is not disqualified from getting benefits.

Solange Losier
Member, Appeal Division