Citation: *NZ v Canada Employment Insurance Commission*, 2025 SST 395

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	N. Z.
Respondent:	Canada Employment Insurance Commission
Representative:	Linda Donovan

Decision under appeal:	General Division decision dated January 13, 2025 (GE-24-3951)

Tribunal member:	Stephen Bergen
Type of hearing:	Videoconference
Hearing date:	April 3, 2025
Hearing participants:	Appellant Respondent's representative
Decision date:	April 17, 2025
File number:	AD-25-32

Decision

[1] I am allowing the appeal.

[2] The General Division has made an error of law and of fact, which I have corrected. The Claimant was not dismissed for misconduct. He is not disqualified from receiving benefits for that reason.

Overview

[3] N. Z. is the Appellant, I will call him the Claimant because this application is about his claim for Employment Insurance (EI) benefits. The Respondent is the Canada Employment Insurance Commission, which I will call the Commission.

[4] The Claimant was subject to some form of no-contact order with his ex-partner. He came across his ex-partner at a “venue” on June 9, 2024. The ex-partner’s companion called the police, and the Claimant was arrested. As a consequence of his arrest and release, he was placed on “house arrest.” This meant he could not go to work, and he lost his job. So, he applied for EI benefits.

[5] The Commission decided that the Claimant lost his job due to his misconduct, so it would not pay him benefits. The Claimant asked it to reconsider, but the Commission would not change its decision. When the Claimant appealed to the General Division, the General Division dismissed his appeal. He next appealed the General Division decision to the Appeal Division.

[6] I am allowing the Claimant’s appeal. The General Division made an error of fact because its findings do not follow from the evidence. It made an error of law by failing to adequately explain its decision.

Issues

[7] The issues in this appeal are:

a) Did the General Division make an error of fact by misunderstanding or ignoring the Claimant's evidence of his intentions?

b) Did the General Division make an error of law by failing to adequately explain the reasons for its decision?

Analysis

General legal principles that apply to appeals to the Appeal Division

[8] 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]

Did the General Division ignore or misunderstand the Claimant's evidence when it found that he willfully breached the no-contact condition?

[9] The employer dismissed the Claimant because he was missing work. The Claimant did not intend to miss work but he was confined to his home on "house arrest." If not for the house arrest, he would not have missed work.

[10] The Commission argued that the conduct, which resulted in the Claimant's house arrest, was the "misconduct," for which he was disqualified. The reason for the

[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).

house arrest was that the Claimant had breached the terms of a no-contact order with his ex-partner. His house arrest prevented him from working. This interfered with the duty he owed his employer.

[11] The Commission also argued that the Claimant knew or should have known that contact with his ex-partner could result in the order that prevented him from working, and that it was a real possibility that he would be dismissed if he could not show up for work.[2]

[12] The Claimant did not dispute that he was aware of the potential consequences of breaching the no-contact order. He argued that his conduct was not misconduct because he breached the order accidentally. He argued that he had not meant to contact his ex-partner.

[13] The General Division agreed with the Commission and held that the Claimant was dismissed for misconduct. It accepted that the Claimant had contact with his ex-partner and that he was placed on house arrest as a result. If found that the Claimant's contact with his ex-partner was willful, conscious, deliberate, and reckless.

[14] In supporting the General Division's decision, the Commission focused its argument on the recklessness of the Claimant's actions. It argued that the Claimant acted recklessly because he did not leave the venue immediately after running into his ex-partner. It also argued from case law that the willfulness of the Claimant's conduct may be presumed in the circumstances.

[15] When the General Division said that the Claimant's actions were willful, conscious, deliberate, and reckless, it justified its conclusion by saying that he had not provided medical evidence that he was unaware of the consequences of his actions.[3] It

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[2] These are the elements necessary to establish conduct as "misconduct" within the meaning of the EI Act. See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[3] See the General Division decision at para 23.

also itemized what appears to be the findings of fact on which it relied to find the Commission had proven misconduct.[4]

[16] The General Division made an important error of fact.[5]

[17] Whether the Claimant was aware of the consequences of his actions is relevant to other aspects of the misconduct test, but not especially relevant to whether his actions were themselves willful.

[18] Furthermore, the General Division misunderstood the significance of the evidence on which it relied. The General Division said that "he decided to try his relationship with his ex-partner again without obtaining a variation in his bail conditions." This is the only finding, of those listed by the General Division, that could possibly be relevant to whether the Claimant's conduct was willful.

[19] However, the Claimant lost his job because he had contact with his ex-partner on June 9, 2024. There was no evidence to suggest that his contact with his ex-partner on June 9 had anything to do with their talk of reconciling.

[20] The Claimant testified that he and his ex-partner had spoken to try to work things out, and that they had meant to get a bail variation.[6] There is no clear evidence of when this occurred but the Claimant testified that his ex-partner had spoken to his probation officer about it, so it is unlikely to have occurred during their contact at the venue on June 9, 2024.

[21] At the same time, the General Division failed to analyze what the Claimant said about his intentions on June 9 or consider what inferences might be drawn from his actions on June 9.

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[4] See the General Division decision at para 22.
[5] Section 58(1)(c) of the DESDA says that the General Division makes an error of fact when it, "bases its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."
[6] Listen to the audio recording of the General Division decision at timestamp: 00:43:00.

[22] The Claimant was insistent that he did not go to the venue on June 9 to meet his ex-partner again. He testified that he was in the "wrong place, wrong time."[7] He said that he "ended up running into [his ex-partner and her companion]," at, "a spot that he frequently went to on his own," and he said again that he "just happened to run into them." [8] He said that he, "lived closer to that part of town than [his ex-partner]."[9]

[23] The General Division may choose to assign little or no weight to the Claimant's evidence, or give other evidence more weight, but it cannot simply ignore it.

[24] The Commission argued that the Claimant acted recklessly because he did not immediately leave the venue. One problem with this argument is that the Commission is advancing a theory that was not expressed in the decision. The Commission is seeking to substitute its reasoning for that of the General Division.

[25] The General Division did not grapple with whether the Claimant's actions could be considered, "so reckless as to be almost willful." It did it relate its conclusion to any evidence of recklessness, let alone consider what the Claimant should have done to avoid being found in breach after he had already run into his ex-partner.

[26] The reason for this may be that it had little evidence of what occurred at that point. The Commission failed to provide specific evidence of what the Claimant did after her ran into his ex-partner, and the Claimant provided few details. Similarly, if the Claimant did not intend to meet his ex-partner, there was no evidence to suggest he was reckless to go to that particular venue on that particular night.

[27] The Commission made another argument. It said that the Claimant may be "deemed" to have acted willfully because he was found in breach of the no-contact order and given house arrest. The Commission seems to be arguing that the General Division was required by law to presume willfulness, or to put the onus on the Claimant

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[7] Listen to the audio recording of the General Division decision at timestamp: 00:45:20.
[8] Listen to the audio recording of the General Division decision at timestamp: 00:41:07, 00:43:40.
[9] Listen to the audio recording of the General Division decision at timestamp: 00:43:50.

to prove he was not acting willfully. It relies on the Federal Court of Appeal decision in *Canada (Attorney General) v Borden*.[10]

[28] I disagree that *Borden* supports the notion that I may deem the Claimant to have intended to breach his order, or to have intended the actions that were held to be a breach of his order.

[29] The Umpire that made the decision being reviewed in *Borden* held that the claimant had not "voluntarily left" his employment. It relied on evidence that the claimant did not believe he was not going to be imprisoned or that he was mistaken about the length of his imprisonment. The Court held that these were irrelevant considerations, and that the Umpire made an error because by allowing them to influence its decision.[11]

[30] *Borden* did not wrestle with whether the claimant (in that case) intended the actions that resulted in his conviction. It cited *Attorney General of Canada v. Easson* with approval, noting that that decision connected the notions of "voluntary leaving" and "dismissal for misconduct" because both are concerned with whether the loss of employment resulted from a **deliberate** action of the employee.[12] However, the *Borden* decision did not analyze or address whether the claimant's actions in that case were deliberate, or on what basis they might be found to be deliberate.

[31] Even if the *Borden* Court had stated that it was satisfied that the fact of the claimant's conviction meant that he intended his conduct, *Borden* would still be distinguishable. The claimant in *Borden* was imprisoned as a result of a Criminal Code conviction. Conviction of an offence resulting in a term of incarceration would likely be a *mens rea* offence. This would mean that the convicting court would have been satisfied that the claimant **intended** the offence.

[32] The same is not always true of no-contact orders. No-contact orders can take different forms, but I take judicial notice that some of them impose strict liability conditions. This would mean that an offender could be found in breach of the conditions

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[10] *Canada (Attorney General) v Borden*, 2004 FCA 176.
[11] The Umpire was once the final level of administrative appeal for Employment Insurance decisions.
[12] *Attorney General of Canada* v. *Easson*, A-1598-92.

through proof of the contact alone—without any proof of intent. It would not be appropriate to presume that a claimant whose actions breached a strict liability order had intended their actions. The breach finding would not have been required to consider the claimant's intent.

[33] The Claimant's testimony suggests that the particular "no-contact," in his case, was a consequence of other charges arising prior to April.[13] The General Division understood from the evidence that the no-contact order was a bail condition.[14] However, the Claimant was not clear on the nature of the order, or the process through which it was put in place. He spoke of having tried to get a "bail variation," suggesting that the no-contact order was a condition of bail. However, he also spoke about trying to vary the condition through his probation officer, which suggests that it was a condition of his probation.[15]

[34] It is also possible that the no-contact order was associated with the Claimant's bail or probation but was actually a recognizance order such as a peace bond. I take notice that a breach of bail conditions, probation conditions, or a recognizance order would likely have been *mens rea* offences (requiring proof of intent). Had the Claimant been *convicted* of breaching a condition of either bail or probation, this would be proof (or at least strong evidence) that he intended the actions resulting in the conviction.

[35] The General Division understood from the evidence that the no-contact order was a bail condition.[16] The Claimant testified that he was released on house arrest, **following a bail hearing**.[17] So it would seem that the General Division is likely correct that the house arrest was a bail condition.

[36] However, there was no evidence that the Claimant was **convicted** of a breach of his bail conditions. To the contrary, he could not have been **released on bail** if he had been convicted except possibly if he was convicted and appealed. The Claimant

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[13] Listen to the audio recording of the General Division decision at timestamp: 00:42:40.
[14] See para 22 of the General Division decision.
[15] Listen to the audio recording of the General Division decision at timestamp: 00:43:00, and 00:43:25.
[16] See para 22 of the General Division decision.
[17] Listen to the audio recording of the General Division decision at timestamp: 00:35:50.

discussed events subsequent to June 9, including a different incident in August in which he contacted his ex-partner and was sentenced. He said nothing about an appeal of his house arrest.

[37] In other words, the fact that the Claimant was arrested for breach of the no-contact order or his bail conditions, as the case may be, does not mean that there had been a judicial finding that the Claimant intended to breach the order or condition.

[38] I am **not** saying that the Commission could only prove that the Claimant's actions were willful if the Claimant had been convicted.[18] I am saying that—in the absence of evidence of a judicial finding of intent—the onus of proof remained with the Commission.

[39] The General Division could not have relied on the circumstances of the Claimant's house arrest to deem his conduct to be willful.

Did the General Division make an error of law by failing to adequately explain its decision?

[40] Even if the General Division could have decided that the Claimant acted willfully on the basis of evidence that was before it, it made an error of law because it did not explain itself. The central requirement of the General Division's reasons is that they explain how it reached its decision.[19]

[41] The General Division stated its conclusion that the evidence establishes that the Claimant's actions were willful, conscious, deliberate, and reckless, but it did not analyze the evidence that was before it. Its only justification was that the Claimant did not provide medical evidence that his actions were otherwise. The General Division did not identify the evidence it used to find that he willfully contacted his ex-partner or why it believed this had something to do with "trying his relationship" again. It did not explain how it weighed the evidence.

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[18] See *Canada (Attorney General) v. Ahmat Djalabi*, 2013 FCA 213.
[19] *McKinnon v. Canada (Employment Insurance Commission)*, 2010 FCA 250, citing *Clifford v Ontario (Attorney General)*, 2009 ONCA 670.

[42] The General Division's reasons for finding that the Claimant's actions were intentional, deliberate, or reckless are neither transparent nor intelligible. This is an error of law.

Remedy

[43] I have the power to send the matter back to the General Division to reconsider, or I may make the decision that the General Division should have made.[20] Both parties ask that I make the decision the General Division should have made.

[44] I agree.

[45] I would prefer that there was *more* evidence on which to base my decision but there is at least some evidence related to each finding that is necessary to my decision. I will substitute my decision for that of the General Division.

[46] I find that the Commission did not establish every element of the test for misconduct.

[47] For a claimant to be disqualified from EI benefits due to misconduct, the Commission must establish all of the following:

- That the conduct considered misconduct was one of the reasons the employer dismissed the claimant, and not a pretext.[21]
- That the claimant knew or should have known that the conduct could impair the performance of his duties.[22]
- That the claimant knew or should have known that it was a real possibility that they could be dismissed as a result of the conduct.[23]

[20] See section 59(1) of the DESDA.
[21] *Canada (Attorney General) v. Brissette*, A-1342-92.
[22] *Supra* note 2.
[23] *Ibid*.

- That the conduct was willful, meaning conscious, deliberate or intentional.[24] It may also include conduct that is "so reckless as to approach willfulness."[25]

[48] I agree that the employer dismissed the Claimant because he was not coming in to work. No one disputes this.

[49] I also agree that the reason the Claimant was not coming in to work was because he had been ordered to remain home unless he was accompanied full-time by a chosen chaperone. The Claimant admits that he had a no-contact order with his ex-partner, that he had contact with his ex-partner, and that he was on "house arrest" because he was arrested for breaching the order.

[50] I accept that the Claimant knew or ought to have known that a breach of his no-contact order could cause him to be unable to go into work, and that this would interfere with his ability to perform his work duties.

[51] I also accept that he knew or ought to have known that there was a real possibility he would be dismissed as a result. The Claimant knew he needed to work to keep his job. He told the Commission that he believed that the employer had a policy under which it could dismiss employees who missed more than three shifts, and that he missed more than three shifts.[26]

[52] The Claimant testified about an occasion a few months earlier, where he was unable to come in to work for about a month, and about how he had negotiated with his employer's HR department to keep him on. However, he apparently understood that the employer was making a special allowance for him. He may have hoped for a similar result on this occasion but I accept, as a commonsense inference, that he would have known that it was a real possibility that he would lose his job if he was again absent for a significant period.

[53] However, I do not accept that the Claimant acted willfully.

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[24] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[25] This language is from *Canada (Attorney General) v Tucker*, A-381-85.
[26] See GD3-24.

[54] As discussed, I do not accept that the law requires or permits me to deem the Claimant to have acted willfully or recklessly simply because he was arrested, or released with conditions, or because there was some kind of no-contact order. There is no evidence that he had been found to have intentionally breached the condition on a "beyond a reasonable doubt" standard, "a balance of probabilities," or any other standard. That means the Commission must still prove that it is more likely than not that the Claimant acted willfully.

[55] The Commission has not established that it is more likely than not that the Claimant's actions on June 9, 2024, were either willful or so reckless as to be almost willful.

[56] The Claimant testified he went to a venue after work. He said the venue was close to his home and one that he frequented. He said that he "happened" to run into his ex-partner, suggesting that he did not go there looking for his ex-partner, or with the purpose of having contact. There was no evidence to contradict the Claimant, and there is nothing implausible about his account.

[57] There is little evidence of what happened after he came across his ex-partner. He testified only that his ex-partner's friend told him she had a knife (which he took as a threat) and that she called the police. After that, the police came and apprehended him.[27]

[58] There was no evidence of how long the Claimant was in close proximity to his ex-partner. Her friend spoke to him, but there is no evidence whether his ex-partner spoke to him or that he spoke to her. There is no evidence of whether he was seeking to engage or seeking to avoid his ex-partner.

[59] There was no evidence of the nature of the "venue," or whether it was the kind of place that one could easily avoid further contact. The venue might have been a large, crowded nightclub, or a small, intimate bar. There was no evidence of how long it took for the police to arrive or why he stayed after he knew the police had been called. It is

[27] Listen to the audio recording of the General Division decision at timestamp: 00:45:20.

plausible that the Claimant may have understood that his best chance to avoid being found in breach would be to stay and explain his side of the story to the police, but this was not explored.

[60] This evidence does not establish that the Claimant willfully contacted his ex-partner in breach of the no-contact order. Likewise, it does not establish that it is more likely than not that he acted so recklessly as to be almost willful by not immediately leaving the venue.

[61] The Claimant's actions do not constitute misconduct because they were not willful in the sense required by the definition of misconduct.

Conclusion

[62] The appeal is allowed.

[63] The General Division made errors of law and fact. I have made the decision that it should have made, and I find that the Commission has not proven that the Claimant's actions were misconduct. Therefore, I have decided that the Claimant was not dismissed for misconduct.

Stephen Bergen
Member, Appeal Division