Citation: *TR v Canada Employment Insurance Commission and X*, 2024 SST 723

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	T. R.
Respondent:	Canada Employment Insurance Commission
Representative:	Louis Gravel
Added Party:	X

Decision under appeal:	General Division decision dated August 25, 2023 (GE-23-1408)

Tribunal member:	Janet Lew
Type of hearing:	In person
Hearing date:	May 2, 2024
Hearing participants:	Appellant Respondent's representative
Decision date:	June 21, 2024
File number:	AD-23-831

Decision

[1] The appeal is dismissed. The General Division made a factual error, but it does not change the outcome. The Appellant, T. R. (Claimant), is disqualified from receiving Employment Insurance benefits because he was dismissed from his employment due to misconduct.

Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Added Party, X (the Employer), had proven that the Claimant lost his employment because of misconduct. In particular, the General Division found that the Claimant stole from his Employer, which led to his dismissal. As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant denies that he stole from the employer. He acknowledges that he removed two bottles of alcohol from the Employer's premises. However, he says that, at the time, he understood that a vendor (D.) and a customer (A.) of the Employer gifted the bottles to him as Christmas gifts. He says that there was a misunderstanding and that he did not intend to steal from his Employer. The Claimant argues that the General Division made an important factual error. He says that if the General Division had not made a factual error, it would have accepted that he had not committed any misconduct.

[4] The Claimant asks the Appeal Division to allow his appeal and make a finding that the General Division made a perverse and capricious finding, or one without regard for the material before it. He also asks the Appeal Division to give the decision he says the General Division should have made. He says the General Division should have found that he had not committed any misconduct and that he is entitled to receive Employment Insurance benefits.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), agrees that the General Division made a factual error. The Commission also agrees that the Appeal Division should give the decision that the General Division should have made. However, the Commission argues that the evidence still showed that the Claimant had committed misconduct and that he should remain disqualified from receiving Employment Insurance benefits.

[6] The Employer argues that the General Division did not make any errors. The Employer also argues that the Claimant gave conflicting evidence about what the customer communicated to him. The Employer also argues that, given the overall circumstances, the Claimant had been wilfully blind, as he should have, at the very least, questioned whether he had been the intended recipient of the bottles, before removing them from the Employer's premises. The Employer asks the Appeal Division to dismiss the appeal.

Issues

[7] The issues in this appeal are:

a) Did the General Division base its decision on a factual error that the Claimant had to have been aware of the customer's intentions regarding the gifting of a bottle?

b) If so, how should the error be fixed?

Analysis

[8] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.[1]

[1] See section 58 (1) of the *Department of Employment and Social Development* (DESD) Act.

[9] For these types of factual errors, the General Division had to have based its decision on that error and had to have made the error in a perverse or capricious manner, or without regard for the evidence before it.[2]

Did the General Division base its decision on a factual error?

[10] The General Division based its decision on a factual error that it made in a perverse or capricious manner, or without regard for the evidence before it. It made a factual error about whether the Claimant had to have been aware of a customer's intentions. The evidence upon which the General Division relied could not reasonably support its finding that the Claimant was aware of the customer's intentions.

[11] The General Division determined that the Claimant had to have been aware that the customer intended to gift a bottle to the Employer. The General Division came to this determination based on the customer's statement to the Commission, and the fact that the customer texted the Employer the next day to ensure that he had received the bottle that he left.

[12] The customer reportedly told the Commission the following, that:

> He stated that he gave a bottle to E., the owner of the company every year as Christmas gift for quite a few years. He sometimes left the bottle to other staff in the office and it always got to E. after. A. was asked if there was a possibility that the claimant would had a misunderstanding that the bottle was for him. He stated that he meant to give the bottle to the owner of the company which was the reason why he texted the owner after to let him know that he dropped off a bottle**. He doesn't remember what he said to the claimant as it was a long time ago**.[3] (My emphasis)

[13] The General Division found that the Claimant should have been aware from this statement that the customer did not intend to give the bottle solely to him. The General Division found that this was not a matter of an innocent mistake or misunderstanding. The General Division found that, "The employee would have known it was not for him and that it was intended for the employer."

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[2] See section 58(1)(c) of the DESD Act.
[3] See Supplementary Record of Claim, dated May 1, 2023, at GD 3-43.

[14] The customer was unable to recall what he told the Claimant. The customer also did not suggest that he gestured or in any way communicated to the Claimant that he should deliver the bottle to the Employer.

[15] The customer had the chance to rule out any misunderstanding. He could have denied that there could have been any misunderstanding. He could have, for instance, told the Commission that he asked the Claimant to ensure that he delivered the bottle to the employer, or words to that effect. Yet, this did not occur.

[16] There was no evidence that the Claimant was aware of the history of the customer's gift-giving. Indeed, the Claimant had only been with the company for about four months and was unfamiliar with the customer's history of gift-giving.

[17] The General Division did not clearly explain how the General Division could have concluded that the Claimant should have known that the customer intended to give the bottle to the Employer. After all, the customer did not direct the Claimant to give the bottle to the Employer.

[18] The evidence that the General Division relied upon was inadequate to establish that the Claimant had to have known that the customer intended to gift the bottle to the Employer. The customer reportedly told the Commission that he could not recall what he might have said, and there was no indication from him that he had clearly communicated to the Claimant—whether by gestures or otherwise—that the bottle was intended for the Employer.

[19] The fact that the customer contacted the Employer the following day and asked whether he had received the bottle showed that the bottle was intended for the Employer. But this communication fell far short of showing that the Claimant knew or should have known at the time that the customer meant to give the bottle to the Employer.

[20] The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner. The evidence simply fell short of supporting the General Division's findings.

Remedy

[21] Once an error has been found, the Appeal Division can either send the matter back to the General Division for redetermination or it can give the decision that the General Division should have made.[4] The Appeal Division generally will give the decision that the General Division should have made, if there is a sufficient evidentiary basis, even if the parties contest or dispute the evidence. This could lead to a different outcome, or the outcome could remain the same.

[22] The Appeal Division typically returns matters to the General Division if there is insufficient evidence to allow it to make its own decision. Here, there are gaps in the evidence.

[23] For instance, while there is evidence from the Employer about what the customer purportedly did not say, there is no evidence from him as to what he might have heard the Employer actually say. Both the vendor and the customer could have been examined. They could have corroborated what each reportedly said or did in the presence of the Claimant. Other witnesses could have been called to address other issues.

[24] But memories erode with the passage of time. I am unconvinced that, if the matter were to be reheard at the General Division, that any evidence that might be elicited would be reliable, given the conflicting evidence that both the Claimant and the Employer have given to date.

[25] Besides, the Claimant does not indicate that he has any additional evidence to offer, and the Employer may not even attend the hearing. He did not attend the proceedings at the Appeal Division.

[26] So, I will come to my own assessment on the evidence. The General Division properly defined misconduct, so I will not revisit that issue. I also will not be revisiting the issue of what led to the Claimant's dismissal from his employment. The Claimant

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[4] See section 59(1) of the *Department of Employment and Social Development Act*.

has not pursued this issue at the Appeal Division, and I accept the General Division's findings that the Employer dismissed the Claimant for taking two bottles of alcohol.

[27] My focus will be on applying the law to the facts and determining whether the Claimant's conduct constitutes misconduct for the purposes of the *Employment Insurance Act*.

– When misconduct arises

[28] As the General Division pointed out, for misconduct to arise, the conduct has to be conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. Wrongful intent is not required for misconduct to arise.[5]

[29] There is misconduct if the employee knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.

– The Claimant denies that he committed any misconduct

[30] The Claimant says the evidence falls short of establishing that he knowingly or wilfully acted. He urges the Appeal Division to give the decision that he says the General Division should have made by finding that neither the customer nor vendor clearly communicated what they had intended.

[31] The Claimant knew the vendor from a previous business relationship. The vendor had gifted him bottles in that previous business relationship. On top of that, the vendor had contacted him and asked him what kind of alcohol he wanted. So, the Claimant believed that the vendor was continuing the practice of gifting him a bottle.

[32] The Claimant does not deny that the vendor said something along the lines of "a sip for you guys"[6] but said that only because there was another employee present in the

[5] See General Division decision at paras 20 to 21.
[6] See Supplementary Record of Claim dated February 27, 2023, at GD 3-23.

room.[7] The Claimant says that he did not think anything of it, as the vendor had gifted him bottles before and had recently asked him what he wanted to get. In fact, the Claimant says he "had been in conversation with the vendor about the gift for four months prior to the incident."[8]

[33] In regards to the customer, the Claimant told the Commission on February 10, 2023, that "[he had been] given a Christmas gift from a customer."[9] Later that month, the Claimant told the Commission that the customer presented a bottle but did not specifically say it was for the Employer.[10] Significantly, the Claimant did not suggest that the customer told him to take the bottle or that he clearly gave it to the Claimant.

[34] Two months later, on April 25, 2023, the Claimant reportedly said that the customer handed the bottle to him and "asked him [to] take it."[11] At the General Division hearing, the Claimant again stated that the customer clearly stated that the bottle was for the Claimant. He testified:

> … And as [the customer] got up, he did walk in with that bottle. He got up, he put it on my desk. He goes, "Here. You can have this." I said, "Oh. You know, thank you. Appreciate it." Not once did he say, "Oh, you know, give this to [the Employer]. This is from the company." He also came back the next day. I mean, he really could have just kept that bottle and gave [*sic*] it to [the Employer] the next day. [12]

[35] When the Claimant filed his appeal with the Appeal Division, he said, "No clear communication was given to the employee as to who [*sic*] the bottle was intended for."[13]

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[7] According to the Employer, the vendor stated, "here's an afternoon splash for you boys" (see GD 3-25) or "you boys have an afternoon splash" (see GD 3-41) and the vendor confirmed that he stated that it was for "them to have a splash" (see GD 3-26).
[8] See Supplementary Record of Claim dated February 27, 2023, at GD 3-23.
[9] See Supplementary Record of Claim dated February 10, 2023, at GD 3-21.
[10] See Supplementary Record of Claim dated February 27, 2023, at GD 3-23.
[11] See Supplementary Record Claim dated April 25, 2023, GD 3-39.
[12] At approximately 20:03 to 21:16 of the audio recording of the General Division hearing.
[13] See Notice of Appeal (formerly Application to the Appeal Division – Employment Insurance) at AD 1-12.

[36] The Claimant explains that it is only in hindsight, upon reviewing evidence from others, that it actually had not been that clear what the customer intended, although, at the time, he thought the customer clearly intended to give him the bottle as a gift.

[37] The Claimant says that, without a clear policy from the Employer and based on his own experience, he assumed that he could take the bottles. Both the customer and vendor physically gave him the bottles, without specifying that they were for the Employer.[14] Additionally, the Claimant notes the Employer's evidence that the Employer always gave the bottles to employees and that the Claimant would have gotten the bottles anyway. For these reasons, the Claimant says that he could not possibly have known that he faced possible dismissal from his employment.

[38] The Claimant also says that the Employer should have approached him to discuss the issue of the missing bottles as part of its investigation, instead of speaking with just the owner's brother and a salesperson. He says this is an example of "conflicting leadership where the employer is not clear with the employee on expectations or what may or may not lead to termination…"[15]

[39] The Claimant argues that dismissing him from his employment was unduly harsh, as the company did not suffer any financial damages and as he had offered to return the bottles. He says that the consequences are disproportionate to the conduct involved.

[40] The Claimant says the Appeal Division should accept that the evidence shows that there were no clear communications. He says that it was unclear what the customer and vendor each intended. So, he denies that this was a case where he knew or should have known that his conduct would violate his employer's trust or that there would be any consequences for his actions.

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[14] See Notice of Appeal (formerly Application to the Appeal Division – Employment Insurance) at AD 1-12.
[15] At approximately 11:16 to 11:25 of the audio recording of the Appeal Division hearing.

– The Employer says the evidence shows that the Claimant committed misconduct

[41] The Employer argues that the Claimant is not credible and that his evidence therefore should not be given any weight. The Employer notes that the Claimant has given conflicting statements, in an attempt to bolster his case. For instance, at the General Division, the Claimant's evidence was that the customer specifically said that the bottle was for the Claimant, whereas at the Appeal Division, the Claimant stated that no clear communication was given by the vendor or the customer as to whom they intended to give the bottles.

[42] The Employer also argues that it should have been apparent to the Claimant that the customer intended to give the bottle to the Employer. The customer asked to speak with the Employer before he produced the bottle. The Employer argues that, at the very least, this should have caused the Claimant to question whether he was the intended recipient before taking the bottle home. The Employer argues that this amounts to wilful misconduct or alternatively, conduct so reckless as to amount to wilful misconduct.

[43] The Employer also argues that when the vendor said, "Here's a splash for you boys," it should have been apparent that the bottle was meant for more than one person and not for the Claimant alone. The Employer argues that, at the very least, the Claimant should have made inquiries. The Employer argues that this too amounts to wilful misconduct.

[44] The Employer argues that, by failing to take the time to inquire and by taking the bottles home, the Claimant's conduct was sufficiently reckless as to approach wilful misconduct. The Employer argues that in either case, the Claimant knew or should have known that taking the bottles might be considered theft and, as such, would impair his relationship with the Employer and that there was a real possibility of being let go because of that.

– The Commission says the evidence shows that the Claimant committed misconduct

[45] The Commission agrees with the Claimant that the Appeal Division should give the decision that the General Division should have made. However, the Commission says that this does not change the outcome because it says two pieces of evidence showed that the Claimant's conduct was wilful:

- The Employer says video revealed what the customer said to the Claimant

[46] The Commission says that the Employer testified at the General Division hearing that he never heard the customer say anything along the lines of, "You can have this," or "You can take it" to the Claimant. The Commission argues that the Employer's testimony is consistent with the customer's follow-up with the Employer the next day. The Commission says that this evidence affects the Claimant's credibility and eliminates any possibility of a misunderstanding as to whom the customer intended to gift the bottle.

[47] Yet, the Employer never stated what he allegedly heard the customer actually say to the Claimant, despite having viewed the video "probably 25 times."[16] The Employer told the Commission that the customer asked to see him, "so that he could present the bottle to him."[17] But it is not clear from the Commission's notes whether the Employer inferred that the customer wanted to present the bottle to him, or the customer actually said that he wanted to present the bottle to the Employer.

[48] At the same time, it is questionable whether the video even involved the customer. When the Employer spoke with the Commission early on, in February 2023, he stated that he had a video of only one incident.[18] In a second conversation he had with the Commission, he confirmed that there was video of just one incident.[19]

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[16] At approximately 29:03 of the audio recording of the General Division hearing.
[17] See Supplementary Record of Claim, dated February 15, 2023, at GD 3-22.
[18] See Supplementary Record of Claim, dated February 15, 2023, at GD 3-22.
[19] See Supplementary Record of Claim, dated February 27, 2023, at GD 3-25.

[49] In the first conversation, the employer suggested the video involved the customer.[20] Two weeks later, he told the Commission the video involved the vendor.[21] Both times, the Employer stated there was video of only one incident.

[50] By late April 2023, the Employer was less clear about whether any video involved solely the vendor or might have also included the customer.[22] At the General Division hearing on August 4, 2023, the Employer testified that there was video involving both the customer and the vendor.[23]

[51] Given the Employer's conflicting evidence regarding the contents of the video, and whether it included one or both incidents, I am unprepared to place much weight on it. Clearly, the Employer was aware of the significance of the video, having viewed it upwards of 25 times. Yet, he did not preserve the evidence.

[52] Even without the actual video, the Employer could have presented a witness who could have given evidence as to the contents of that video. The Employer testified that his co-worker watched "[the video] along with us."[24] This indicated that others viewed the video. The Employer could have called the co-worker to give evidence at the General Division hearing about what they observed on the video. As it stands, there is nothing that corroborates the Employer's evidence about the video, or anything that shows the quality of the audio and the video.

- The Employer says the Claimant's actions at a luncheon show that he knew that he had acted inappropriately

[53] The Commission also relies on what the Employer said at the General Division hearing about a luncheon. The Employer described a luncheon that took place about one to two days before it dismissed the Claimant.

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[20] See Supplementary Record of Claim, dated February 15, 2023, at GD 3-22.
[21] See Supplementary Record of Claim, dated February 27, 2023, at GD 3-25.
[22] See Supplementary Record of Claim, dated April 25, 2023, at GD 3-41.
[23] At approximately 25:23 to 26:13, 37:58, and 41:46 of the audio recording of the General Division hearing.
[24] At approximately 29:03 of the audio recording of the General Division hearing.

[54] The Employer testified that he commented during the luncheon that it was peculiar that no one left bottles or gifts for the company that year. The Employer testified that the Claimant walked out without saying anything. He suggests that this shows that the Claimant was guilty of having taken those gifts and that he intended to keep those gifts for himself, as he did not speak up then.

[55] The Commission says that the Claimant did not contradict the Employer's evidence. The Commission notes that the Claimant's recollection of the luncheon was otherwise quite detailed. He recalled that he worked during the luncheon, that he was walking about, shelving, and using a computer. The Commission notes that the Claimant merely said that he did not recall that the Employer said anything about the bottles and that, if it had really happened, it was not his intent to ignore his Employer.

[56] The Commission says that the fact that the Claimant walked out of the luncheon after the Employer's comments shows that the Claimant had to have necessarily known that the bottle from the customer was meant for the Employer. The Commission says it also establishes the wilfulness in the Claimant's actions that led to the dismissal.

[57] If the Claimant's actions at the luncheon were so pivotal to dismissing him, it is curious, if not inconceivable, that the Employer would not have mentioned the luncheon when it spoke with the Commission on February 15, or 27, or April 25, 2023.[25] Had it been a mere oversight the first time, the Employer had the chance to relay this detail on the two subsequent phone calls. Yet, the first time the Employer mentioned the luncheon was at the General Division hearing in August 2023.

[58] This is not to say that the luncheon did not happen. After all, the Claimant recalled that there could have been a pizza luncheon. However, the fact that the Employer first mentioned the luncheon more than a half year later calls into question the specifics of that luncheon and what anyone might have actually said or done.

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[25] See Supplementary Record of Claims dated February 15 (GD 3-22), February 27 (GD 3-25), and April 25, 2023 (GD 3-41).

[59] The Claimant testified that he was still working during the luncheon and that he was walking back and forth, shelving, and using the computer. This is consistent with the Employer's evidence that the Claimant got up and moved away. But it does not necessarily establish that the Claimant moved away to avoid uncomfortable questions about the bottles. It may be that the Claimant simply got up to continue working and may not have realized that the Employer directed the comment to him.

[60] While the Claimant may not have contradicted the evidence that a luncheon occurred and that the Employer spoke up about the bottles, at the same time, he did not necessarily agree that the Employer asked him about the bottles. He simply did not recall.

– **My conclusions on the evidence**

[61] Neither witness was compelling nor trustworthy. Both the Claimant and the Employer gave conflicting accounts on central issues over time. (There were other minor inconsistencies too, but they were either very minor or of no significance, so I am not focusing on them.)

- Evidence regarding the video

[62] The Employer gave conflicting evidence about the video. In some accounts, he reported that the video was of the Claimant's interaction with the customer, and in other accounts, it was of the Claimant's interaction with the vendor. In his initial reports with the Commission, he stated that there was video of just one incident, but later, it concerned both incidents.

[63] The Employer relied on the video as the basis for dismissing the Claimant. So, it is remarkable that the Employer did not preserve this evidence, nor call the witness who could have given evidence about what the video contained.

[64] I am giving little weight to the Employer's evidence regarding the video. There simply is too much conflicting evidence about what the video actually contained.

- Evidence regarding the luncheon

[65] There is also the issue of the luncheon. The Employer testified that he essentially confronted the Claimant during the luncheon about the missing bottles. The Claimant reportedly got up and sat elsewhere, without responding to the Employer. The Employer suggests that this shows the Claimant tried to avoid the subject, as he was aware that he had acted improperly in taking the bottles.

[66] The Claimant agrees that he got up during the luncheon but says that he was working and walked back and forth, shelved items and used the computer. He stated that he has no recollection of the Employer saying anything about the bottles. He says that he would not have ignored his Employer.

[67] It is curious that, if this luncheon occurred in the manner described by the Employer, that the Employer first raised it at the General Division hearing. The Employer had spoken with the Commission on at least three previous occasions and yet never mentioned the lunch incident.

[68] I am giving little weight to the Employer's evidence about the luncheon. The Employer may well have asked about the missing bottles. But the evidence does not establish that the Claimant necessarily heard the Employer. There is no evidence, for instance, that shows how close the Employer and the Claimant were to each other, how crowded the lunch area was, the general noise levels, and whether there were other conversations going on between others who may have been present.

[69] The Claimant testified that he was working during the luncheon, so he may have gotten up and moved elsewhere to work. In other words, it cannot be assumed that he got up to avoid the Employer's questioning about the bottles.

[70] If the Employer wanted to discuss the bottles with the Claimant, he should not have done it in such a roundabout way during a company luncheon. He could have asked for a meeting with the Claimant, or he could have pursued the Claimant and addressed him directly at the luncheon.

- Evidence regarding the vendor

[71] When the vendor gave the bottle to the Claimant, he said that it was for “them to have a splash.” [26] The Claimant recalled that the vendor said something along the lines of “a sip for you guys”[27] and the Employer understood the vendor to say, “here’s an afternoon splash for you boys.”[28]

[72] Despite what the vendor said when he left the bottle with him, the Claimant believed the vendor intended to give him the bottle. This would have been consistent with what the vendor had done in past. The Claimant knew the vendor from his past employment. He had also received gifts from the vendor in that past employment.

[73] The vendor had also contacted him and asked him what kind of alcohol he wanted. Indeed, the Claimant says that he “had been in conversation with the vendor about the gift for four months prior to the incident.”[29]

[74] This evidence was uncontradicted.

[75] Without this context, it would have been reasonable for the Claimant to ask the vendor whether he intended to gift the bottle to him or to the Employer and the office generally. But because of the past relationship and the vendor asking the Claimant what his alcoholic preference was, the Claimant could nonetheless reasonably expect that the vendor intended to give him the bottle. Because of this, the Claimant could not possibly have known or should have known that by taking the vendor’s bottle that he faced dismissal.

[76] In short, I find that the Claimant did not commit any misconduct in connection with the bottle from the vendor.

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[26] See Supplementary Record of Claim dated February 27, 2023, at GD 3-26.
[27] See Supplementary Record of Claim dated February 27, 2023, at GD 3-23.
[28] See Supplementary Record of Claim dated February 27, 2023, at GD 3-25.
[29] See Supplementary Record of Claim dated February 27, 2023, at GD 3-23.

- Evidence regarding the customer

[77] Initially the Claimant stated that there was no indication from the customer to whom he intended to give the bottle. Two months later, in April 2023, and then at the General Division hearing on August 4, 2023, the Claimant stated that the customer explicitly stated that the bottle was for him.

[78] At the Appeal Division, the Claimant explained that he was mistaken in April and August 2023. After hearing all of the evidence, it became clear to him that he had been mistaken about what the customer had communicated. He is now of the position that the customer had not been clear as to whom he intended to give the bottle.

[79] I am giving little weight to the Claimant's evidence that the customer stated that the bottle was for him. Besides, the Claimant is now distancing himself from that evidence.

[80] I accept that there may not have been any clear communications from the customer, in that the customer likely did not explicitly ask the Claimant to deliver the bottle to the Employer, nor clearly state that he was giving the bottle to the Claimant.

[81] It is not wholly persuasive that the Claimant should have reasonably expected that he had priority to receiving a bottle from the customer.

[82] The Claimant says that he was the prime point of contact for the customer. So, he assumed that he was the natural recipient of the bottles. However, unlike the vendor, the Claimant did not have a longstanding relationship with the customer. According to the Employer, the Claimant had only known the customer for about 1.5 months.[30]

[83] The Claimant notes the Employer's evidence that the Employer would have eventually given the bottles to employees. But the Claimant was unaware of the Employer's practice at the time that the vendor and the customer left the bottles with

[30] The employer testified that the customer had only started dealing with the Claimant for about 1.5 months before the incident occurred. At approximately 14:12 of the audio recording of the General Division hearing.

him. The Claimant did not know how the Employer allocated any bottles to employees. There was no policy, and the Claimant did not make any enquiries with the Employer.

[84] Although the Claimant says that he was the primary point of contact for the customer, he had been with the company for only a brief period. Other employees may have held more seniority or might have had a longer relationship with the customer, so it might have been reasonable to expect they would have received or at least shared or received some of the gifts from customers and vendors.

[85] The Claimant knew the Employer did not have a written policy in place regarding any gifts. Without any written policy, the Claimant assumed that the Employer's practice was to allow employees to accept bottles personally. The Claimant said that this was an established practice within the industry. But the evidence on this practice was limited.

[86] The Claimant had received bottles from his past employment. However, there is no evidence as to how this practice evolved at his last employment. The Claimant indicated that receiving gifts had not been a problem at his past employment, hinting that his previous employer was aware that employees received gifts. That was not the case here.

[87] The Claimant told the Commission that the customer had initially asked for the Employer, but that the purpose of the visit was to pay invoices.[31] If the Claimant was the primary point of contact, as he says, this should have raised two questions:

i. Why did the customer ask or need to see the Employer if the Claimant was the primary point of contact? (The customer does not seem to have considered the Claimant the primary point of contact if he asked to see the Employer to attend to paying invoices.)[32]

[31] See Supplementary Record of Claim, dated February 27, 2023, at GD 3-23. See also approximately 20:03 of the audio recording of the General Division hearing.
[32] See also approximately 20:03 of the audio recording of the General Division hearing.

ii. If the customer intended to give the bottle to only the Claimant, why would the customer ask for the Employer in the first place?

[88] Had the Claimant asked these questions of himself, it would have raised sufficient doubt that the customer had intended to give the bottle directly to the Employer. But the Employer was out of town at the time. And, if the Claimant had asked the customer what his intentions were, as awkward as it may have been, the customer would have advised him that the bottle was for the Employer.

[89] By failing to ask these questions, I find on the balance of probabilities that the Claimant was either wilfully blind or so reckless to the fact that he was taking something that was not intended for him, and that he therefore breached the level of trust expected of an employee, and that there could be consequences for his actions. The Claimant was wilfully blind to the circumstances facing him.

[90] The Claimant says that he did not have any wilful intent. He had no intentions of stealing. He says it was a misunderstanding and an error on his part. However, it is unnecessary for there to be wrongful intent for an act to amount to misconduct.[33] It is enough if the act is done "consciously, deliberately, or intentionally." There is no doubt that the Claimant acted consciously in taking the bottle from the customer.

[91] As the Federal Court set out recently,

> [18] … , "misconduct" in section 30 of the EI Act has a wider meaning than in common parlance or in dictionaries. It includes any conscious contravention of a policy set by the employer. It does not require a particular level of moral blameworthiness.[34]

[92] The Employer did not have a policy on gifts at the time. The Employer did not have a policy because there had not been an issue in past with gifts. The company typically received bottles from customers and vendors during the holiday season, and the company shared or in turn gifted these to employees. The customer had also stated

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[33] See *Canada (Attorney General) v Johnson*, 2004 FCA 100.
[34] See *Hazaparu v Canada (Attorney General)*, 2024 FC 928 at para 18.

that it had never been an issue in past. Sometimes he had given bottles to other staff, and they always made their way to the Employer.[35]

[93] In other words, the act was of such a nature that the Claimant should have known that taking the bottle from the customer that was intended for the Employer breached his Employer's trust and would be likely to result in some consequences.

[94] The Claimant says that the dismissal was unwarranted and excessive, given that he had offered to return the bottles. The Employer had also suggested that it might re-hire the Claimant.

[95] While that may be, it is not the role of the Appeal Division to determine whether dismissal was excessive or justified or was the appropriate sanction. My role is limited to determining whether the Claimant's conduct constituted misconduct for the purposes of the *Employment Insurance Act*.

[96] In acting as he did, the Claimant should have known that his conduct was such that it might lead to his dismissal. The Claimant's conduct amounted to misconduct under the *Employment Insurance Act*.

Conclusion

[97] The General Division made findings that were not supported by the evidence, but the outcome remains unchanged. The appeal is dismissed.

Janet Lew
Member, Appeal Division

[35] See Supplementary Record of Claim, dated May 1, 2023, at GD 3-43.