Citation: *GP v Canada Employment Insurance Commission*, 2024 SST 922

# Social Security Tribunal of Canada
## Appeal Division

# Decision

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| **Appellant:** | G. P. |
| **Respondent:** | Canada Employment Insurance Commission |
| **Representative:** | J. Murdoch |

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| **Decision under appeal:** | General Division decision dated November 22, 2023 (GE-23-2805) |

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| **Tribunal member:** | Stephen Bergen |
| **Type of hearing:** | In writing |
| **Decision date:** | **July 31, 2024** |
| **File number:** | AD-24-48 |

## Decision

[1] I am allowing the appeal.

[2] The employer did not dismiss the Claimant for misconduct, and she is not disqualified from benefits.

## Overview

[3] G. P. is the Appellant. I will call her the Claimant because this application is about her claim for Employment Insurance (EI) benefits.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim because it found that the employer dismissed her for misconduct. The Claimant disagreed and asked the Commission to reconsider, but it would not change its decision.

[5] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed her appeal, so she has appealed the General Division decision to the Appeal Division.

[6] I am allowing the appeal. The General Division made an important error of fact and errors of law. I have made the decision it should have made. I find that the Claimant was not dismissed for misconduct, so she is not disqualified from receiving benefits.

## Issues

[7] The issues in this appeal are:

a) Did the General Division make an important error of fact by ignoring evidence that the Claimant had a mental health condition?

b) Did the General Division make an error of law by failing to consider whether the Claimant's conduct was influenced by the employer's conduct?

c) Did the General Division make an error of law by failing to adequately explain how it weighed the evidence?

d) If the General Division made an error or errors, how should the error be fixed?

# Analysis

## General Appeal principles

[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]

## Important error of fact

– **Evidence of mental health**

[9] The Commission concedes that the General Division should have considered the Claimant's mental health issues when it determined that she acted willfully.

[10] I agree.

[11] As I noted when I granted leave to appeal, there was at least some evidence before the General Division that the Claimant had mental health difficulties, including the July 31, 2023, doctor's note confirming that she has been off work for stress and depression.[2] The General Division did not refer to this evidence.

[12] The employer dismissed the Claimant for complaining, or a bad attitude that was characterized by complaining. The Claimant's mental health is relevant to whether 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).
[2] See GD3-49 and GD3-51: also see GD3-10 and GD3-52.

Claimant was consciously or intentionally choosing to act in the way she was alleged to be acting.

[13] The General Division made an important error of fact. It found that the Claimant's actions were deliberate without considering the evidence of her mental health.

## Error of law

– **Failure to consider the employer's conduct**

[14] The Claimant argued that she should not lose her benefits because the employer disliked her and would not give her a chance. She also said that she had acted atypically because of the extreme stress she experienced on the job.[3] At least part of that stress, was due to harassment from customers, and sexual harassment from one customer in particular. She said that she did not feel safe at work.[4]

[15] The General Division did not analyze whether any of the employer's actions may have contributed to or influenced the misconduct that led to her dismissal. Misconduct is usually defined by the employee's actions alone, and not by the actions of the employer.[5] However, according to the Federal Court of Appeal in the *Astolfi* decision, the employer's conduct cannot always be disregarded.[6]

[16] I asked the parties for further submissions on whether *Astolfi* applied. The Claimant did not respond, but the Commission provided an additional submission on July 24, 2024.

[17] In *Astolfi*, the Court suggested that employer conduct may be relevant to the question of the Claimant's intention, where the employer's actions precede the conduct that is said to be misconduct, and where the misconduct resulted from those actions. In

[3] See AD1-5 and AD1B-2.
[4] See GD3-49.
[5] See *Paradis v. Canada (Attorney General),* 2016 FC 1282.
[6] See *Astolfi v. Canada (Attorney General)*, 2020 FC 30.

other decisions, the Appeal Division has said that it is also relevant whether the employer's actions targeted the employee specifically.[7]

[18] The Commission submitted that *Astolfi* had no application because the Claimant's harassment complaint had been "resolved" (and so did not influence the Claimant) and because the Claimant was dismissed for on-going conduct over an extended period.[8]

*Employer conduct*

[19] The General Division noted that the Claimant considered the employer to be difficult and unsupportive, particularly in response to her complaint that customers were harassing her.

[20] The Claimant talked to the Commission about her harassment concerns and how the employer had not done anything in response. From the manner in which she described the June 12 conversation to the Commission, I infer that she meant to communicate that this conversation had included some discussion about these concerns in particular.[9]

[21] There was evidence that the Claimant experienced customer harassment, and that one contractor in particular had been making suggestive comments and inappropriate gestures that she considered to be sexual harassment. The Claimant said she had to hide when the customer came into the store, and that she felt totally unsafe.[10] She said she reported her concerns to the employer, but she believed that it was not doing anything about it.[11] She later said the employer told her that they had "talked" to the contractor that was sexually harassing her, and that it wouldn't happen again.[12] The Claimant testified that the previous owner of the business had responded

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[7] *DD v Canada Employment Insurance Commission,* 2024 SST 28; *DN v Canada Employment Insurance Commission*, 2023 SST 1133; *MB v Canada Employment Insurance Commission*, 2023 SST 1147.
[8] See AD8-1.
[9] See GD3-52.
[10] *Supra* note 4.
[11] *Supra* note 9.
[12] Listen to the audio recording of the General Division hearing at timestamp 20:10 (Part 2 recording).

differently to this sort of complaint. The previous owner had banned customers from the store for harassing staff, or had called the authorities.[13]

[22] The Commission says that the General Division focused on how the Claimant felt unsafe in the workplace and says that this is not relevant to the case because the Claimant did not voluntarily leave her employment.[14] I appreciate what the Commission is saying: The *Employment Insurance Act* (EI Act) specifically identifies "unsafe working conditions" as a relevant factor to consider in the context of evaluating whether a claimant had just cause for quitting.

[23] However, there is another way to look at it. The Claimant felt unsafe because her harassment concerns were not taken seriously by the employer. The employer's actions or refusal to act may have influenced the Claimant's conduct that is alleged to be misconduct.

[24] In my view, the General Division made an error of law by failing to examine how the employer's actions may have caused the Claimant to feel safe, and failing to examine whether this influenced the Claimant's conduct. The General Division did not consider whether the Federal Court of Appeal decision in *Astolfi* has any application in the case.

[25] Before concluding that the Claimant intentionally acted in such a manner as to interfere with her duties, the General Division ought to have considered whether the manner in which the employer dealt with her harassment concerns was relevant to the intentionality of her conduct. The Claimant was depressed and feeling stressed, and was apparently concerned that the employer would not protect her from further harassment.

[26] The Commission asserts that the Claimant's harassment concern was resolved, but the Claimant did not consider it resolved. The Claimant believed the employer was dismissive of her concerns and was not acting to provide a safe working environment. If

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[13] Listen to the audio recording of the General Division hearing at timestamp 22:15 (Part 2 recording).
[14] See AD4-6.

her perception of the employer's actions was reasonable in light of the employer's actions, then it is plausible that the employer's response may have affected her ability to keep from expressing the same concerns to others.

*Employer conduct which preceded the Claimant's conduct*

[27] The Claimant admitted that the employer had warned to keep her frustrations to herself.[15] However, the incident which resulted in her June 13, 2023, dismissal, was her conversation with a co-worker friend on June 12, 2023. Apparently, other staff reported to the employer that she was complaining.

[28] As discussed earlier, there was evidence that the Claimant was upset by how customers treated her. She said she reported to her employer that a customer was sexually harassing her, but that the employer was not doing anything about it.[16] The employer dismissed the Claimant after another employee, or employees, overheard her talking about it.

[29] The Commission argues that the final incident on June 12 followed a period of 6 - 8 months of "poor attitude." I agree that the employer represented the final incident as a continuation of the behaviour for which it had warned her on March 15, 2023 (and maintained that there were multiple incidents and cautions). Nonetheless, I accept that her dismissal was a consequence of the June 12 conversation. Thus, the employer's response to the Claimant's harassment report, which the Claimant considered to be dismissive of her safety concerns, predated the conduct for which she was dismissed.[17]

*Employer discipline targeted to the Claimant specifically*

[30] In addition, the evidence suggests that the employer terminated the Claimant in response to her particular circumstances, and not to simply enforce a policy of general application.

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[15] See GD3-40.
[16] *Supra* note 9.
[17] Listen to the audio recording of the General Division hearing at timestamp 21:00 (Part 2 recording).

[31] The General Division found that the Claimant was dismissed for complaining to her fellow employees.[18] It also said that her actions were in violation of the employer's "rules."[19]

[32] The employer provided a number of documents intended to guide employee behaviour. Its Code of Conduct identifies the specific behaviours that it meant to either encourage or discourage. The Code speaks of criminality, absenteeism, insubordination, and performance standards. It requires employees to be courteous, considerate, to acknowledge and thank those who come into their area, and not to be insulting or use, "rude, abusive or obscene language."[20] Presumably, the employer expects all employees to follow the Code.

[33] The employer identified the Claimant's behaviour as "insubordination." This is a reference to what the employer described as "on-going" complaints to the public, customers, and staff, about how staff do not like working for the employer.

[34] The Claimant was warned for having an "on-going poor attitude and disruption of both customers and team members," three months before the Claimant was reported for a June 12, 2023, conversation.[21] The Claimant said that this warning involved a broader discussion with several staff members in which the other staff shared her concerns. She said that she did not know why she was singled out to get a warning.[22]

[35] According to its termination paperwork, the employer considered her June 12 conversation with a co-worker to be another manifestation of her poor attitude and disruptive behaviour.[23]

[36] I do not accept that the Claimant breached the employer's Code of Conduct by "insubordinate" behaviour. The employer's policy defines insubordination as **willfully**

[18] See para 18 of the General Division decision.
[19] See para 26 of the General Division decision.
[20] See GD3-35 and 36.
[21] See March 15, 2023, warning, GD3-29.
[22] See GD3-12.
[23] See GD3-28.

**failing or refusing** a good faith directive of management.[24] In this case, there is insufficient evidence to infer that the Claimant spoke to her friend in deliberate defiance of the employer's warning about her poor attitude or that she even considered that her behaviour could be construed in that way.

[37] The employer may choose to label behaviour insubordinate, but the evidence suggests that the employer dismissed the Claimant for "complaining," or manifesting a poor attitude by complaining—and not for defying the employer.

[38] From the documents provided by the employer, it is apparent that it expects its employees to maintain a positive attitude. Outside of its Code of Conduct, the employer provided other document excerpts from some other publication. They have the corporate logo, and the employer seems to refer to them as part of a corporate policy manual. The documents describe the importance the employer attaches to its employees presenting with a positive attitude.[25]

[39] In my view, those exhortations to maintain a positive attitude are more motivational or aspirational. They are not clear directives or firm rules. This is not actually surprising since having a "positive attitude" is a subjective concept. It would be difficult for an employer to draw a bright line between what it considers to be an acceptable attitude and one which is unacceptable. The documents do not attempt to do so.

[40] This means that the Claimant's termination was not a straightforward enforcement of policy. Instead, it appears that it was the employer's reaction to whatever reports it received about what she said on June 12, 2023. From what was reported, it interpreted her comments as "complaints" and determined that her complaints demonstrated she did not have a positive attitude. If the employer asked the Claimant herself to explain her comments, it did not record what she said.

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[24] See GD3-35.
[25] See GD3-31.

[41] The employer's actions have the appearance of an individual and targeted response. They were not a response to a clear breach of its general policy.

*Summary on application of Astolfi*

[42] The General Division should have considered how *Astolfi* applied to the facts of this case. There was some evidence of employer conduct that could have influenced the Claimant's conduct. That employer conduct preceded the Claimant's conduct and was targeted to the Claimant.

– **Inadequate reasons**

[43] In the Claimant's original application to the Appeal Division, she said that she did not think the decision was fair, and she then revisited evidence by which she disputes that she was fired for the reason given by the employer. In other words, she does not accept the General Division's findings of fact, which implies that disagrees with its conclusion or that she can't understand how the General Division weighed the evidence to decide as it did.

[44] Reasons may be so inadequate as to be an error of law. While the General Division must weigh the evidence as it sees fit, and may have to assess credibility in the process, it must explain how it weighed the evidence. When it prefers some evidence over other evidence, or *someone's* evidence over that of *someone* else, it must explain why it is doing so.

[45] The General Division acknowledged that the Commission and the Claimant do not agree on why the Claimant was let go and that the Commission relied on the employer's evidence that she was complaining to other employees. Its own decision also relied on the employer's evidence without explaining why it was doing so.

*Multiple warnings*

[46] The General Division stated that it accepted that the Claimant was given warnings but did not comply with the rules.[26] It said that she continued to complain knowing that her behaviour was not conforming to the employer's expectations.[27]

[47] The General Division apparently accepted the employer's version of events, including its claim that she received multiple warnings for complaining.[28] The Claimant had insisted that she had only received one warning before June 13, and said that she could not recall any other occasion when the employer had spoken to her about her attitude, other than the March 15 incident.[29]

[48] The General Division did not explain why it chose to believe the employer.

*Engaging in more than one private conversation*

[49] The General Division said that the Claimant admitted to having private conversations (plural) that the employer did not like, but the Claimant's evidence concerned only one private conversation.[30]

[50] The Claimant's application described the March 15 incident, but did not describe this as a private conversation. She characterized it as a conversation amongst a group of co-workers in which she participated. She later told the Commission that "these conversations happened with groups of people. It wasn't just her." This does not necessarily mean that the Claimant participated in other similar conversations. The Claimant could have been talking about other conversations she witnessed or learned about. Later in the same discussion with the Commission, the Claimant talks about getting in trouble for her "private conversation" (singular).

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[26] See para 11 and 18 of the General Division decision.
[27] See para 26 of the General Division decision.
[28] See GD3-25,26,28,29, and 42.
[29] Listen to the audio recording of the General Division hearing at timestamp10:40 (Part 2 recording).
[30] Contrast para 3 of the General Division decision with GD3-12 and GD 40.

[51] The idea that she had more than one private discussion complaining could not have been based on the Claimant's evidence.

*Admissions of complaints*

[52] The General Division said that the Claimant "did not deny" she was critical of the employer, which suggests that she implicitly admitted she was critical, or that she "could not" deny she was critical. It did not say how it reached this conclusion.

[53] However, it was likely related to evidence from the employer asserting that she had "admitted" to making complaints about "company, policies, etc. with customers and staff."[31]

[54] At one point in the General Division hearing, the member introduced a question by telling her that one of the issues was that she complained about the new management. It is possible that the General Division was referring to this exchange when it said that she did not deny being critical—because she did not interrupt to challenge its assumption.

[55] However, the General Division asked the Claimant if she and the employer had a meeting about "that," without pausing for a response. The Claimant agreed that there was a meeting with the employer and that she had been upset that the employer was not dealing with important issues.[32] According to the employer's own documents, the Claimant was entitled to raise her concerns with the employer. The General Division did not ask the Claimant what she said about the employer outside that meeting, and this was not the question to which she responded.

[56] It is also inaccurate to say that the Claimant reported that others were "*also* critical." She said that everyone was "upset" about the Christmas bonus but that she was the only person singled out and spoken to.[33] She told the Commission that she was

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[31] See GD3-26.
[32] Listen to the audio recording of the General Division hearing at timestamp 3:20 (Part 2 recording).
[33] Listen to the audio recording of the General Division hearing at timestamp 3:40 (Part 2 recording).

"venting" in a private conversation, and that other people had similar conversations,[34] but she did not say who or what she was venting about, or much else about the substance of that conversation.

[57] In every instance where the Claimant's evidence differed from that of the employer, the General Division preferred the evidence of the employer or drew an inference which favoured the employer's version of events. It did not adequately explain why it did so. This is an error of law.

## Remedy

[58] I must decide what I will do to correct the General Division errors. I can make the decision that the General Division should have made, or I can send the matter back to the General Division for reconsideration.[35]

[59] The Claimant did not express a preference, but the Commission suggests that I should make the decision that the General Division should have made because all the evidence is in the file.

[60] I accept that the record is sufficiently complete that I may make the decision.

### Was the conduct alleged to be misconduct the reason for the Claimant's dismissal?

[61] For a claimant to be disqualified for misconduct, they must first be dismissed for that conduct. The employer stated that the Claimant was terminated due to on-going poor attitude, which it said was disruptive to customers and team members. It also identified this behaviour as "insubordination," referring to the Claimant's on-going complaints to the public, customers, and staff about how the staff do not like working for the employer.

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[34] *Supra* note 15.
[35] See section 59(1) of the DESDA.

[62] As I have already noted, the evidence suggests that the employer dismissed her for complaining; not for “insubordination” which is a deliberate disregard for a proper employer direction.

[63] The employer and the Claimant agree that the Claimant was warned for “complaining” at least once, and that the employer dismissed her on June 13, 2023, after a final incident. However, they disagree on whether the employer warned or coached the Claimant about complaining **more** than once.

[64] The Claimant testified that she only had one meeting with the employer, which was in response to her dissatisfaction with how the employer managed a Christmas bonus situation. She testified that all the employees were upset and talking about this, and she did not know why she was singled out. She said she remembers signing the written warning but felt she had to sign. The employer told her that it did not mean she agreed with what it said. [36]

[65] This is consistent with what she told the Commission. She said that she had received one written warning and had no recollection of any verbal warnings.[37]

[66] The employer terminated the Claimant on June 13, 2023, because it was reported that she was complaining to a co-worker on June 12, 2023. The Claimant says that she was having what she believed to be a private conversation with a co-worker friend which included some discussion of how the employer responded to her reports of customer harassment.

[67] The Claimant told the Commission that she felt totally unsafe at her workplace.[38] She testified that she had reported harassment from a customer multiple times to her floor manager, and that it had gone on for some time.[39] She said that the harassment included both comments and gestures. She wrote the Commission about one of the comments saying, “It was Christmas and the man pointed out my reindeer antler

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[36] Listen to the audio recording of the General Division hearing at timestamp 10:40 to 11:20 (Part 2).
[37] *Supra* note 9.
[38] *Supra* note 4.
[39] Listen to the audio recording of the General Division hearing at timestamp 19:05 (Part 2).

headband and said, ‘oh sexy little deer if I had you in my sights I’d shoot you.’”[40] She testified that one time the customer had stood behind her “making a gesture” while she was bent down to access a shelf.[41]

[68] The Claimant said that the employer responded to her report of harassment as though it was a joke.[42] She also said that nothing was done in writing until a witness came forward to confirm her report.[43] She told the Commission that this resulted in an incident report. There was no investigation, but that the employer told her they had talked to the customer and that it would not happen again.[44]

[69] I accept that the Claimant was harassed by customers and, in particular, that a customer had made suggestive comments or gestures to her that caused her to feel unsafe at work. I accept that the Claimant was not satisfied with how the employer responded to her complaint.

[70] The employer characterized the Claimant as a chronic complainer who had been repeatedly warned but had a bad attitude. It told the Commission that the Claimant had been “struggling for a year” and that there were several conversations about how she would not stop complaining about work conditions.[45] It sent a cover letter email to the Commission in which it noted again that there had been “multiple” face-to-face coaching sessions between July 2022 and March 2023 (before the warning).

[71] The discipline report that determined she should be terminated spoke of her complaining as an on-going problem but also stated that she was complaining on June 12, 2023, in particular.[46]

[72] I accept that that the Claimant had a discussion with a co-worker on June 12, 2023, which was reported to the employer. I accept that the employer considered her to

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[40] *Supra* note 4.
[41] Listen to the audio recording of the General Division hearing at timestamp 20:40 (Part 2).
[42] Listen to the audio recording of the General Division hearing at timestamp 21:00 (Part 2). (It is not clear if this is the same customer.)
[43] Listen to the audio recording of the General Division hearing at timestamp 19:50 (Part 2).
[44] Listen to the audio recording of the General Division hearing at timestamp 20:00 to 20:15 (Part 2).
[45] See GD3-25
[46] See GD3-28.

have been complaining, and I accept that she had been warned about complaining on March 15, 2023. The Claimant and the employer's evidence agree on this much.

[73] However, I am not satisfied that the Claimant had a "bad attitude" generally, or that complaining was characteristic behaviour for her. In this, I prefer the evidence of the Claimant who testified that the March meeting with the employer was her only meeting about complaining, and who could not recall any other time when the employer raised this with her.

[74] The employer's evidence was represented by the Commission's notes of what the employer said to it. The employer did not detail any of the prior discussions and was vague about the nature of other incidents of complaining or bad attitude. Although the employer asserted that there were witnesses to the behaviour, it did not produce any witnesses or witness statements.

[75] To contrast, the Claimant testified. She could be, and was, challenged on her evidence in the oral hearing, and her testimony remained consistent with what she had earlier told the Commission.

[76] Having said that, the incident on June 12, 2023, was at least part of the reason the employer dismissed her. The employer may have had other reasons for dismissing the Claimant which the Commission has not proven, but the law requires only that the misconduct be an operative reason for his dismissal. It does not have to be the only reason.[47]

[77] I find that the employer dismissed the Claimant for complaining on June 12, 2023. This conduct was at least part of the reason she was dismissed.

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[47] See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

**Was the Claimant's conduct misconduct for the purposes of the EI Act?**

[78] To find the Claimant's conduct to be misconduct, I need to find that the Claimant satisfies all the criteria or elements of misconduct that have been established in case law.

[79] I need to find:

1) that the Claimant knew or ought to have known that he was breaching a duty he owed to the employer;[48]
2) that she engaged in this conduct *wilfully*.[49] This means that his conduct must either be intentional or so reckless as to be nearly willful, and;
3) that the Claimant and that dismissal was a real possibility as a result.

[80] The Commission has the burden of proof. It must prove each of the above elements of misconduct on a balance of probabilities. In other words, it must prove that it is more likely than not that each element is satisfied.

– **Did the Claimant breach a duty that she owed to the employer?**

*Does "complaining" about the employer constitute a breach of a duty owed to the employer?*

[81] The employer's policy documents do not speak specifically to whether an employee is permitted to complain or criticize the employer to co-workers. However, the documents do suggest that the employer expects its employees to maintain a positive attitude. Its document about company "culture and values" also states that employees should bring their concerns or grievances to their manager, but this is not framed as a rule. It is said to be for the purpose of reaching a resolution and it is prefaced by the employer's desire that its employees should enjoy their jobs and be enthusiastic.

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[48] See *Canada (Attorney General) v Nolet*, A-517-91; *Canada (Attorney General) v* Lemire, 2010 FCA 314.
[49] *Ibid*.

[82] Regardless of any statement of policy, any employer will have an obvious interest in maintaining the morale of its employees. An employee who persistently complains about the employer, workplace or working conditions to other employees, or in the hearing of other employees, is likely to have a negative impact on morale.

[83] In this case, the Claimant was warned about her attitude in connection with some complaint or complaints. The Claimant admits that she received the warning after she said to other staff that it would have been wise for the employer to have told staff what was happening with their bonuses. The warning says that the employer must have "happy staff" and that other avenues are open to address concerns or frustrations. From this, I infer that the warning was for complaining, which is consistent with the reason given for her dismissal.

[84] The employer warned the Claimant to change her attitude, by which it meant that she was to refrain from complaining. It had given her a warning, and she had a duty to follow the employer's direction.

[85] If she complained to a co-worker at work on June 12, 2023, where she could have known she might be overheard by other co-workers, she breached a duty to the employer.

*Has the Commission proved that the Claimant was complaining about the employer?*

[86] If the employer dismissed the Claimant for complaining, the Commission must still show that she was in fact complaining. And it must show that she knew or ought to have known that her complaining was breaching a duty that she owed to the employer.

[87] I wrote the Commission on July 23, 2024, to ask a question. As a preface to my question, I noted the following:

> *There is some evidence from the Claimant that she was dismissed following a final incident in which she was overheard expressing some dissatisfaction with how the employer responded to her report of harassment or sexual harassment from a customer or customers.*

[88] On reflection, this was an inaccurate statement of what is found in the evidence. The Claimant has not disputed that she was overheard, and she seems to acknowledge that she was talking about her report of sexual harassment. In the same discussion, she told the Commission that the employer was not doing anything about it.

[89] In my letter to the Commission, I presumed that the Claimant expressed "dissatisfaction" with the employer's response in her conversation with the co-worker. On closer review, this goes beyond what the evidence says.

[90] The Commission's notes do not state what the Claimant actually said about the conversation. The Claimant did not deny having a conversation with a co-worker at work on June 12, 2023. Her remarks to the Commission were in the context of a discussion in which the Claimant was asked about the final incident, so I accept that the Claimant meant to communicate that the June 12, 2023, conversation was about her issues with customer harassment and the employer's response.[50] However, she did not admit to being dissatisfied with the employer.

[91] The employer said that he received reports about the Claimant's conversation. It asserted that the Claimant was "openly discussing and complaining about the Company Policy meeting that took place that day." The employer says that this has been "fully corroborated," although it is not clear whether it was the substance of the June 12 discussion that was fully corroborated, or her "on-going" complaints.[51]

[92] In another written statement, the employer appears to say that the June 12, 2023, was "corroborated by three staff members" but it is unclear. It also says the witnesses stepped forward regarding "on-going continued behaviour with customers."[52] Once again, I cannot be sure of what the witnesses knew about the Claimant's conversation on June 12 specifically, or whether the employer was claiming they had observed the Claimant's behaviour in general.

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[50] *Supra* note 9.
[51] See GD3-28.
[52] See GD3-26.

[93] Whether a statement or statements may be considered a “complaint” contrary to the interests of the employer is a subjective question. I understand that the employer’s opinion is that the Claimant’s discussion on June 12, 2023, involved such a complaint. However, the evidence is thin.

[94] The employer has not identified the words used by the Claimant, or even stated the gist of her conversation. The Commission’s investigation did not ask the employer to relate the particulars of her remarks and it did not obtain many details from the Claimant. While the employer asserts that there are three witnesses, it is not clear what they saw or heard. No attempt was made to talk to them or obtain their statements. The Commission has neither identified what it was that the Claimant actually said, nor outlined the context in which she said whatever it was that she said.

[95] Case law suggests that an employer’s **opinion** that conduct is misconduct is not determinative of the issue. In *Critchlow v Canada (Attorney General),* the Court said this:

> A finding of misconduct, with the grave consequences it carries, can only be made on the basis of **clear evidence and not merely of speculation and suppositions,** and it is for the Commission to convince the Board, the pivotal body in the resolution of unemployment insurance disputes, of the presence of such evidence **irrespective of the opinion of the employer**.[53]

[96] Similarly, the employer’s opinion (based on its assertion of undisclosed third-party reports from staff) is an insufficient basis for finding that her June 12 conversation amounted to a complaint, or the kind of complaint that amounted to a breach of her duty to the employer.

[97] It is likely that the Claimant said something about the employer’s response to how she was harassed. From her other evidence, it seems clear that she does not think

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[53] See *Critchlow v Canada (Attorney General*), A-562-97.

the employer took appropriate action. However, we don't know what she said on June 12, or its context.

[98] Because the Claimant asserted that she believed her conversation was private and none of the employer's business, the Commission argues she knew the statements she was making violated employer policy.[54] I cannot agree. I don't think it necessarily means anything more than what she said. She thought her conversation was private.

[99] A person may discuss any number of personal matters that they would not wish their employer to know. This does not suggest that they know they are doing something wrong by having the discussion. Even if the Claimant's conversation had centered on her harassment experiences and continued feelings of insecurity in the workplace, she likely would not have wanted the employer to know what she said, if she had talked about how her mental health or personal relationships were affected.

[100] We don't know that she said something that the employer would consider a complaint, or that it was like enough to the what the employer had warned her about, that she should have known the employer would consider it to be the same sort of behaviour. The employer is within its rights to prohibit certain speech in the workplace that is averse to its interests. However, it cannot expect its employees to say nothing at all to anyone about anything.

[101] The Commission has not proven that it is more likely than not that something the Claimant said in conversation with her co-worker friend on June 12, breached a duty she owed to her employer. The evidence does not establish that the Claimant was speaking about her employer, work, or workplace in such a way that she knew or ought to have known that she was breaching a duty.

*Was the Claimant's conduct willful?*

[102] There is no evidence to suggest that the Claimant complained between her warning in March and her dismissal in June. If she was a chronic or intractable

[54] See AD6-4.

complainer, as the employer's evidence implies, she managed to restrain herself in the intervening months (although she was off work on a stress leave for at least some of that time).

[103] However, the Claimant had a conversation with her co-worker at work on June 12, 2023. The employer decided to terminate her employment because of that conversation. It is not necessary for me to decide whether whatever she may have said in that conversation was willful, because I have found that the Commission has not proven the substance of that conversation.

[104] However, if the Commission had satisfied me that she was complaining in such a way as to breach her duty to the employer, and that she knew or ought to have known as much, then that complaint would also have been willful.

[105] It would not matter that the Claimant regarded her conversation as a private conversation. She had the conversation at work, with a co-worker, where she might have anticipated it could be overheard by customers or other staff. Willfulness can include recklessness. Had she been complaining about the employer, she was reckless as to whether customers or staff could overhear her conversation, to the point that it was almost willful.

[106] I appreciate that the Claimant was also experiencing some mental health issues with stress and depression which she attributed to her work in part. She says that she was working with her doctor to adjust her medication. I also appreciate that her experience with customer harassment had been upsetting or unsettling, that she felt unsafe at work, and that she did not perceive her employer as supportive.

[107] The Commission said that I should not take judicial notes that depression is characterized by negative emotions and thoughts, and that depression may be experienced in many ways. I expect the Commission is correct that depression may manifest in many ways. However, I consider that it is so notorious that a diagnosis of depression involves negative emotions and thoughts, that it cannot reasonably be

doubted. Depression may also incorporate other symptoms, but I accept that depression is characterized by negative emotions and thoughts.

[108] I recognize that the Claimant was diagnosed by her physician with psychological conditions, and that her doctor was adjusting her medications. I understand that certain psychoactive or other medications may alter consciousness, impair judgment, and/or affect impulse control. However, there was no medical evidence that the Claimant's mental health issues caused her to lose her job. There is no evidence that the Claimant's mental health, or the stress or trauma induced by the harassment, or her medications or medication adjustments, were such as to affect her choice to engage in conversation on a particular subject.

[109] The Claimant's depression may have resulted in negative emotions and thoughts, but that does not mean her ability to control those emotions and thoughts was so impaired that she could not help but express them in the workplace. I accept the Commission's position that I cannot take notice that the Claimant's complaint or complaints was involuntary.

[110] I have accepted that the employer's conduct may provide context that is relevant to whether the Claimant's conduct was intentional.[55] Therefore, I have considered how the Claimant was harassed at work and how she felt unsupported and even unprotected by the employer's response to her report.

[111] The Claimant may not have said anything about what had happened (or anything that could be understood to be critical of the employer), had she believed that the employer cared about her safety and was taking her concern seriously. Certainly, a dismissive response to a serious concern could have caused the Claimant to be dissatisfied at work, or increased her dissatisfaction as the case may be. She would be more likely to voice dissatisfaction if she actually were dissatisfied.

[112] However, none of this means that the employer's response to her report caused the Claimant to discuss her concerns with a co-worker at work. If the employer had

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[55] *Supra* note 6.

dismissed her for absenteeism because she refused to come to work until the employer made the workplace safe, that would be one thing. She could have felt that she had no alternative but to stay away from work. But I cannot accept that she had no alternative but to *complain*.

[113] I don't need to decide if the Claimant's actions were willful. But, if the Commission had shown me that the Claimant was complaining to another employee at work about the employer, after the employer had warned her to stop complaining, I would have found that it was so reckless of her to do so that it was willful.

*Should the Claimant have expected she would be dismissed for complaining on June 12?*

[114] The employer warned the Claimant on March 15, 2023. The warning stated that it was a "Level 3 - Last Chance" warning, and the next level of discipline on the form was "Level 4 - Termination." The warning is stated to be for "on-going poor attitude and disruption," and not for complaining. However, the Claimant acknowledged in her benefit application that the warning was because she expressed an opinion of how the employer ought to have communicated about the Christmas bonus issue, which is a form of complaint, or may be perceived as one.[56] She also told the Commission that the employer warned her to keep her frustrations with work to herself, and that she could be dismissed if it happened again.[57]

[115] After her March 15 warning, the Claimant knew or ought to have known that the employer did not want her to criticize its actions or policies and that she could be dismissed if she complained about the employer (whether in the workplace, to a co-worker or customer, or where a co-worker or customer could overhear her).

[116] As I have already said, the evidence does not satisfy me that the Claimant was complaining about her employer on June 12. However, if I had found that she was complaining as alleged (namely; to a co-worker, at work, and where she could be

[56] See GD3-12.
[57] *Supra* note 15.

overheard), then I would also find that she knew there was a real possibility that the employer would dismiss her as a result.

### Summary

[117] I have found that the Commission did not establish the nature of the Claimant's conduct sufficiently to prove that she breached a duty she owed to her employer. As a result, the Commission has not proven that the employer dismissed her for misconduct, as it is defined for EI purposes.

## Conclusion

[118] I am allowing the appeal. The General Division made an error of fact by not considering relevant evidence. It made errors of law because it did not analyze the effect of the employer's conduct in light of *Astolfi* might apply, and because it did not give adequate reasons for its decision.

[119] I have made the decision the General division should have made. The employer did not dismiss the Claimant for misconduct, and she is not thereby disqualified from receiving benefits.

Stephen Bergen
Member, Appeal Division