Citation: *DD v Canada Employment Insurance Commission*, 2024 SST 28

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. D.
Respondent:	Canada Employment Insurance Commission
Representative:	Josée Lachance

Decision under appeal:	General Division decision dated March 10, 2023 (GE-22-3119)

Tribunal member:	Stephen Bergen
Type of hearing:	In person
Hearing date:	December 1, 2023
Hearing participants:	Appellant
Decision date:	January 9, 2024
File number:	AD-23-346

Decision

[1] I am dismissing the appeal.

[2] The General Division made an important error of fact. I have corrected this error and made the decision that the General Division should have made.

[3] I have reached the same decision as the General Division, but for different reasons. The Claimant is disqualified from receiving benefits because his employer dismissed him for misconduct.

Overview

[4] D. D. is the Appellant. This appeal is about his claim for Employment Insurance (EI) benefits, so I will call him the Claimant. His employer dismissed him for recording conversations with other employees without their consent, and for refusing to destroy the recordings when asked to do so.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant's employer dismissed him for misconduct. As a result, the Commission disqualified him from receiving EI benefits. It would not change its decision when the Claimant asked it to reconsider.

[6] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal, so he appealed to the Appeal Division.

[7] I am dismissing his appeal. The Claimant is correct that the General Division made an important error of fact. I have corrected the error and made the decision that the General Division should have made. However, I still reach the same result as the General Division. The employer dismissed the Claimant for misconduct.

Preliminary matters

[8] Some of the materials provided by the Claimant to the Appeal Division, such as a letter from the employer's lawyer with attached documents, was new evidence not

available to the General Division.[1] Likewise, some of what the Claimant told me at his Appeal Division hearing strayed into areas of new evidence.

[9] With limited exceptions, the Appeal Division does not consider new evidence. It may only consider evidence that was before the General Division.[2]

[10] None of the new evidence was general background information, nor was it provided to assert that the General Division process was unfair. Rather It was provided to challenge the General Division's findings of fact. This does not satisfy any of the possible exceptions.

[11] I will not be considering any of this new evidence.

Issue

[12] Did the General Division make an important error of fact by misunderstanding the evidence of the employer's privacy policy?

Analysis

General Principles

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

- The General Division hearing process was not fair in some way.
- 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).
- The General Division made an error of law when making its decision.[3]
- The General Division based its decision on an important error of fact.[4]

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[1] See AD7.
[2] See *Sharma v Canada (Attorney General),* 2018 FCA 48.
[3] 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).
[4] 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).

Important error of fact

[14] The General Division made an important error of fact. It ignored or misunderstood the employer's privacy policy that was in effect at the time the Claimant was dismissed.

[15] The Claimant recorded conversations of other employees without their consent on November 17 and 18, 2020. The employer informed the Claimant that he had breached their privacy policy and asked him to destroy these recordings on December 3, 2020.

[16] The Claimant was off on medical leave beginning November 12, 2020 (before he received the calls that he recorded), and he was away from work for some time as it turned out. He contacted the employer about his return to work in November 2021.

[17] The employer repeated its demand that the Claimant destroy the recordings on each of January 26, 2022, January 31, 2022, and February 15, 2022. Each demand warned that he could be terminated for refusing. The employer finally terminated the Claimant on February 28, 2022.

[18] The employer's privacy policy had an effective date of January 1, 2006. However, there were two versions of the employer's privacy policy before the General Division. Each version had a different effective date.

[19] One version of the policy describes itself as a March 19, 2010, revision.[5] This version did not specifically prohibit recording other employees without consent, or suggest any consequences for such recording.

[20] The closest the March 19, 2010, version comes to such a prohibition is its "Consent" section. According to this version, a person's knowledge and consent is required before personal information can be collected, used, or disclosed from a person.

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[5] GD3-58-63.

[21] However, this section of the policy appears to be primarily concerned with the privacy obligations of the employer. It specifically describes how the **employer** will collect information or obtain consent. Furthermore, the section is found between two other sections that constrain the employer's actions. The preceding section explains the purposes for which the **employer** may collect personal information from customers and employees. The section that follows speaks of how the **employer** will limit its collection of information and its use, disclosure, and retention.[6]

[22] I do not accept that the Consent section of the March 2010 policy addresses the situation where one employee records their conversation with another employee.

[23] The second privacy policy version in the file is the December 15, 2021, version.[7] This is the version that incorporates a prohibition on recording conversations of employees without mutual consent.

[24] The General Division relied on the second version of the privacy policy dated December 15, 2021, which it says the Claimant signed. Evidently, the General Division did not notice that there were two versions of the employer's privacy policy in the file.

[25] The Claimant made the recordings in November 2020. The second version of the privacy policy dated December 15, 2021, could not have existed at the time that the Claimant made the recordings or at the time that the employer first told him that he had violated the employer's privacy policy.

[26] The only privacy policy before the General Division that could have applied at the time of the recordings is the March 19, 2010, version.

[27] Likewise, the December 15, 2021, policy version could not have existed when the Claimant signed to acknowledge the Rules of Conduct, Driver Reference Guide, and its included Employee Manual. The Claimant's signature is found on only two forms.

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[6] See GD3-59.
[7] See GD3-43-48.

Even though these two forms are found in the file immediately following the December 2021 policy version, they are not properly associated with that policy.[8]

[28] One of the signed forms states that it was "Revised April 10, 2014," which the Claimant signed May 13, 2014. The other from is associated with the March 2, 2009, revision, that he signed May 12, 2014.

[29] In addition to its reliance on the December 2021 policy version, the General Division also relied on its understanding of the Claimants admissions from his testimony. It said that the Claimant knew the employer had a privacy policy that said he could not record other employees without their consent.[9]

[30] However, this is a mischaracterization of the Claimant's testimony, which likely arose as a result of its misunderstanding of the employer policy that was in effect at the time of the recordings.

[31] At the General Division hearing, the member instructed the Claimant on what the December 15, 2021, policy said about recording without consent. It told the Claimant that he had signed it, and then asked if he was aware of it. The Claimant responded, "if I signed it, then I was aware of it."[10]

[32] In other words, the General Division put certain facts to the Claimant as though they were true, based on a misunderstanding of the evidence. When the Claimant responded that he would have been aware of the policy, he qualified his response by saying "…**if he signed it.**" However, he did not admit to signing a policy that prohibited recording without consent. Nor could the evidence before the General Division support such a finding (since that policy did not exist when he signed).

[33] The General Division found that the Claimant knowingly violated company policy by making the recordings, and that he knew that this could cause him to lose his job. Both findings were dependent on the General Division's mistake about the contents of

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[8] See GD3-50.
[9] See General Division decision at para 58.
[10] Listen to the audio recording of the General Division hearing at timestamp 51:20.

the policy actually in effect, and on the effect of this mistake on the General Division's interpretation of the Claimant's testimony.

[34] The Commission concedes that the General Division relied on the wrong policy. However, the Commission argues that this does not mean the General Division made an important error of fact. It refers to other documents in evidence from which the Claimant's privacy obligations could be inferred. It suggests that the General Division also relied on that other evidence to reach the same conclusion.[11] It also argues that the General Division decision was not just based on the Claimant's misconduct in making the recordings, but in refusing to destroy them.

[35] I do not accept these arguments.

[36] First, the General Division's reasons do not indicate it relied on any other evidence to find that the Claimant violated the employer's privacy policy. It relied on the employer's privacy policy only, citing the December 15, 2021, version.[12]

[37] Secondly, it is not obvious that the other file documents referenced by the Commission's submissions were meant to restrict employees from recording their own private conversations with other employees.

[38] I have already explained the context of the "Consent" section found in the applicable policy version.[13] This section of policy appears to govern the employer's actions. It does not speak to the conduct of employees.

[39] The other document that the Commission refers to is the termination letter. The letter includes a reminder of the obligation of employees to treat as confidential any "confidential or proprietary" information obtained in the course of employment.[14]

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[11] See AD6-6.
[12] See par 63 of the General Division decision. The General Division took this citation from the policy found at GD3-43-48 that the General Division refers to in para 13 of its decision.
[13] At para 21, above.
[14] See GD3-35.

[40] The recordings concerned the Claimant's assigned shifts, routes, paid hours, and his assigned truck. It is unlikely that he, or any employee, would understand from the termination letter language, that they must keep quiet about any discussions they had about the terms or conditions of their employment.

[41] The language suggests that intellectual property, trade secrets, and other information of that nature, should be kept confidential. No one has suggested that the discussions involved that sort of thing.

[42] As to the question of the Claimant's insubordination, I accept that the Claimant disregarded the employer's demand to destroy the recordings. However, I do not agree that this evidence required the General Division to find that the Claimant was dismissed for misconduct.

[43] The General Division understood that the employer justified its demand and its warning about termination on how the Claimant breached its privacy policy.[15] If the General Division found that the Claimant did not breach a duty to the employer by recording the conversations, it would be open to it to find that his refusal to comply with the demand did not breach a duty owed to the employer - depending on the context. Not every refusal of an employer direction is misconduct.[16]

Summary

[44] The General Division decision was based on errors of fact.

[45] It misunderstood the evidence about the employer's privacy policy and the Claimant's testimony. This affected its finding that the Claimant had violated the employer's privacy policy by recording other employees without their consent.

[46] This error may have affected its conclusion that the Claimant's refusal to destroy the recordings was also misconduct.

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[15] See para 61 of the General Division decision.
[16] *Astolfi v. Canada (Attorney General),* 2020 FC 30.

Remedy

[47] 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.[17]

[48] The Claimant has asked that I make the decision the General division should have made. The Commission suggests that I return the matter to the General Division for reconsideration.

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

Meaning of misconduct

[50] For a claimant to be disqualified for misconduct, they must first be dismissed for that conduct. The employer's termination letter stated that it dismissed the Claimant for two reasons. It said the Claimant violated its privacy policy by recording other employees without their consent, and that his refusal to comply with a demand to destroy the recordings was insubordination.

[51] The Commission has the burden of proof to show that the employer dismissed the Claimant for the conduct alleged to be misconduct, and that the conduct is properly characterized as misconduct.

Was the Claimant dismissed for the conduct alleged to be misconduct?

[52] I accept that the employer dismissed the Claimant for the reasons set out in the termination letter, at least in part. I acknowledge that the Claimant had raised other concerns with his employer's practices in the past and that he said that the employer wanted to get rid of him. However, he provided few details, and he did not deny that the employer terminated him because he refused to destroy the recordings.

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

[53] The employer may have had additional reasons for dismissing the Claimant, but the law requires only that the misconduct be an operative reason for his dismissal – it does not have to be the only reason.[18]

Did the Claimant's conduct meet the legal definition of misconduct?

[54] To find the Claimant's conduct to be misconduct, I must find that the Claimant engaged in the conduct *wilfully*.[19] This means that his conduct must either be intentional or so reckless as to be nearly willful. I must also find that the Claimant knew or ought to have known that he was breaching a duty he owed to the employer, and that dismissal was a real possibility as a result. [20]

[55] I will now consider whether the Commission has established that the Claimant's conduct (either the recording, or the refusal to destroy the recording) meets the definition of misconduct.

– **Violating employer policy by recording without consent**

[56] I accept the following unchallenged evidence as fact.

a) The Claimant recorded his supervisor, K. C., and another manager, J.B., without their consent.

b) The recordings were inadvertent; the result of a cellphone application on the Claimant's personal cellphone that recorded all conversations except calls from "safe" numbers.

c) These calls were initiated by K. C. and J.B. on November 17, 2020, and November 18, 2020, respectively.

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[18] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.
[19] *Ibid*.
[20] See *Canada (Attorney General) v Nolet*, A-517-91; *Canada (Attorney General) v* Lemire, 2010 FCA 314.

d) At the time that the Claimant received these calls, he was at home, and he was not on company time.

e) The Claimant deleted the recordings of both calls, which caused them to be sent to his device's recycle bin.

f) The Claimant believed that his employer had engaged in logbook tampering and he had raised this with the employer in the past.[21] The Claimant further believed that the employer was not paying its drivers all of the hours to which they were entitled.[22]

g) The Claimant discussed his concern about unpaid hours in the call recorded with K. C. This was not the first time he raised this concern with the employer.[23]

h) The employer suspended the Claimant for having threatened the employer in his first call with K. C.[24]

i) The Claimant recovered the conversations from the recycle bin and forwarded a copy to the employer's CEO to prove that his remarks were taken out of context. After reviewing the Claimant's comments, the CEO reversed the Claimant's suspension.

j) The employer wrote the Claimant on December 3, 2020, to state that the Claimant's recordings breached its privacy policy. The employer instructed him to destroy the recordings and disclose anyone with whom he shared them. For simplicity's sake, I will refer to the employer's direction as a direction to "destroy the recordings."

k) The Claimant went on a medical leave beginning November 14, 2020. On November 23, 2021, the Claimant was reminded that he needed to destroy the recordings before returning to work.

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[21] See GD3-77, GD3-90.
[22] GD3-90.
[23] Listen to the audio recording GD11 at timestamp 18:55 and 20:15.
[24] Listen to the audio recording GD11 at timestamp 22:30.

l) The employer changed its privacy policy in December 2021. After making the changes, it sent letters repeating its demand that the Claimant destroy the recordings. These letters were dated January 26, 2022, January 31, 2022, February 15, 2022, and February 11, 2022. Each demand letter added the warning that the Claimant's failure to comply would result in his termination.

m) The employer terminated the Claimant on February 28, 2022. In its termination it said that the Claimant violated the employer's privacy policy by making the recordings. It also said that the Claimant was insubordinate for refusing to destroy the recordings as required by the employer.

[57] I also accept that the March 19, 2010, version of the employer's privacy policy was the version in effect at the time that the Claimant recorded the conversations. This version did not prohibit employees from recording other employees without their consent.

[58] The employer revised its policy on or about December 15, 2021. I accept that the revised policy prohibits employees from recording conversations with other employees without their consent.

[59] The evidence in the record does not establish that the Claimant's recordings of his telephone conversations with K. C. and J.B. in November 2020, violated any formal policy of the employer then in effect. Likewise, the evidence does not establish that the Claimant was subject to an implied policy or term of employment that prohibited him from recording incoming calls in the privacy of his own home and on his own time.

[60] The Commission has not shown that the Claimant breached any employer policy or any other duty that he owed to the employer by recording the conversations. Because of this, it was not misconduct for the Claimant to record the conversations, as misconduct is defined in the case law for the purpose of the EI Act.

– **Refusal to destroy recordings**

[61] The Claimant's refusal to destroy the recordings was one of the operative causes for his dismissal. The termination letter clearly stated that the employer was terminating the Claimant for insubordination because he refused to destroy the recordings when asked to do so.[25]

[62] The first requirement for misconduct is that it must breach a duty owed by a claimant to their employer. Therefore, I will begin with an analysis of whether the Claimant owed the employer a duty to obey its demand that he destroy the recordings.

[63] The Claimant argued that the employer called him at home, on his own time, and on his personal phone, and that the employer had no expectation of privacy. He argued that the recordings were his personal property and that the employer had no right to demand their destruction. In essence, he was arguing that he did not owe the employer a duty to comply with this particular direction.

[64] I appreciate the Claimant's point. One would expect that there would be some limit on what an employer may ask of its employees.

[65] The employer justified its demand that the Claimant destroy the recordings by asserting that the recordings breached the employer's policy. I have already found that the employer policy did not prohibit recording in November 2020 when the Claimant made the recordings.

[66] After the Claimant made the recordings (but before he was dismissed), the employer brought in a December 2021 version of its privacy policy. This version specifically prohibiting employees from making recordings without consent. However, it did not obligate an employee to destroy existing recordings that predated the December 2021 version of the privacy policy.

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[25] See GD3-71

[67] The Claimant's duty cannot be found in the employer's policy. If he owes a duty to destroy the recordings, it must be found elsewhere.

[68] The question is whether the Claimant's refusal to disobey the employer's demand is misconduct, absent any policy requirement or term of employment. This is related to the question of whether the employer's own conduct can be considered when deciding if a claimant's conduct is misconduct.

The employer's policies, directions or actions are relevant to the Claimant's misconduct.

Legal authority

[69] In the *Astolfi* decision, the Federal Court found that a claimant's actions could not be found to be misconduct without some consideration of the employer's conduct.[26]

[70] In the facts of *Astolfi,* a claimant had a bad experience with his employer. He and the employer had a meeting, in which the employer lost his temper. The employer yelled at the claimant and pounded on his desk. As a result, the claimant decided to work from home. When the employer ordered him to return to work in the office, he refused. The Claimant was no longer comfortable working in the same office with the employer.

[71] Leading up to the Court's consideration in *Astolfi,* the Commission had originally decided that the claimant lost his job because of his misconduct. The claimant appealed to the General Division, which dismissed the appeal. The General Division stated that the employer's conduct was irrelevant. When the claimant appealed again to the Appeal Division, the Appeal Division refused to grant leave to appeal because it found no error in the General Division's decision.

[72] However, the Federal Court found that the Appeal Division decision was unreasonable. The Court acknowledged that there had been other court decisions in which employer's conduct was stated to be irrelevant, but it rejected the notion that this

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[26] *Supra note 16.*

was always the case. It said that employer conduct needed to be considered in the "full context."[27]

[73] The Court in *Astolfi* could decide as it did because it was able to distinguish its facts. In other words, it viewed its own facts as significantly different from the facts in those other cases. The Court focused on how the employer conduct (that influenced the claimant's conduct) occurred **before** the claimant engaged in what was alleged to be misconduct. In the other cases, the employer's conduct arose **after** the claimant's misconduct.[28]

[74] This Tribunal has defined "employer conduct" to include the imposition of rules and policies by the employer. It has also found that a claimant breached their duty to the employer based on the bare fact of disobedience to an employer's rule or policy.[29] The Tribunal has repeatedly found that the employer's conduct is not relevant, and it has gone so far as to state that neither the reasonableness, fairness, nor lawfulness of an employer's policies are relevant to the question of misconduct.[30] These decisions suggest that where a claimant is fired for disobeying an employer policy his disobedience will be considered a breach of his duty to the employer - and that is the end of the matter.

[75] In these decisions, the Tribunal has followed court decisions in which employer conduct was said to be irrelevant.[31] It has generally declined to apply the *Astolfi* decision.

[76] The Tribunal is aware that *Astolfi* is a binding authority that it cannot ignore. In each case where the Tribunal distanced itself from *Astolfi* decision, it did so by

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[27] *Ibid*, at paras 33-34.
[28] *Supra* note 16, at paras 31-32.
[29] See for example, *Canada Employment Insurance Commission v AL*, 2023 SST 1032.
[30] *Ibid* at paras 22 and 36. However, in *Canada Attorney General of Canada V. Bedell,* A-1716-83, the Federal Court of Appeal implies that the nature of the employer's direction may have some limits. The Court found the claimant's actions to be misconduct because she "willfully refused to comply with her employer's *lawful* direction *respecting her work as an employee*.
[31] See for example *Canada (Attorney General) v McNamara* 2007 FCA 107; *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Dubeau v Canada (Attorney General)*, 2019 FC 725; *Canada (Attorney General) v Caul*, 2006 FCA 251.

distinguishing the particular facts of its own case from the facts on which *Astolfi* was decided.

[77] In one decision, a Tribunal member followed the lead of *Astolfi.* It distinguished its facts from *Astolfi* in the same way that *Astolfi* distinguished its own facts from the court decisions that had said employer conduct was irrelevant (such as *Caul* or *Paradis*[32]*).* The member found that the employer conduct was not relevant in that case because it occurred *after* the claimant's misconduct.[33]

[78] Many of those Tribunal's decisions in which employer conduct was discounted involved employer conduct that was represented by the employer's policy of general application. The Tribunal has found that this kind of "policy" conduct is significantly different from employer conduct that specifically targets the claimant, as it had in *Astolfi*.[34]

[79] In a few cases, the Tribunal has accepted the relevance of employer conduct and it has even found claimant conduct was not misconduct based largely on the behaviour of the employer. In each of these cases, the employer's conduct occurred **before** the claimant's conduct that was said to be misconduct (as in *Astolfi*). But, in addition, the employer conduct in these cases specifically targeted to the claimant or uniquely affected the claimant.

[80] In one case, the employer's conduct forced a claimant to choose between disobedience, or suffering significant and (seemingly) unavoidable health consequences.[35] In another case, the employer was forcing a substantial financial cost on the claimant.[36]

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[32] *Ibid.*
[33] *MC v Canada Employment Insurance Commission*, 2023 SST 300
[34] See for example, *DN v Canada Employment Insurance Commission,* 2023 SST 1133; *MB v Canada Employment Insurance Commission*, 2023 SST 1147; *EC v Canada Employment Insurance Commission*, 2020 SST 363.
[35] See *NL v Canada Employment Insurance Commission*, 2022 SST 307.
[36] See *Canada Employment Insurance Commission v AK*, 2020 SST 155.

[81] The caselaw suggests that employer conduct may be relevant where it occurs before (and likely influenced) the alleged misconduct, and also where it singles out or uniquely affects a claimant. A claimant's refusal to obey an employer's orders is less likely to be characterized as misconduct when obedience would involve unavoidable harm or loss.

Consistent treatment under the law

[82] In this case, the Claimant was disqualified because the employer dismissed him for misconduct. However, Claimants may also be disqualified if they voluntarily leave their employment without just cause. As the Federal Court of Appeal noted in *Easson*, "the two notions [misconduct and voluntary leaving without just cause] are logically and practically linked." [37]

[83] If employer conduct may never be considered, this would mean that claimants could be treated differently under the law depending on whether they quit or were dismissed for misconduct.

[84] There may be circumstances in which an employer policy, order, or direction, is such that a claimant would have no reasonable alternative to quitting. The claimant might still qualify for benefits if they quit to avoid some outrageous working condition or order. But if the employer fired the claimant for refusing to comply before they had a chance to quit, they would likely be disqualified from receiving benefits.

[85] To illustrate; the *Employment Insurance Act* (EI Act) identifies a number of circumstances that are relevant to "just cause" (for voluntary leaving). Some of these circumstances clearly involve the employer's conduct, such as "practices of an employer that are contrary to law" or "working conditions that constituted a danger to health or safety." If an employer is unwilling to modify its demands and insists on compliance, the claimant may have just cause for leaving their employment.

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[37] *Attorney General of Canada* v *Easson*, A-1598-92; see also ***Canada (Attorney General) v Eppel*** A - 3- 95.

[86] ***If*** *the employer asked a claimant to do something illegal or required them to work at duties or under conditions that risked their health or safety*, this would – in my view - be relevant to whether their refusal should be considered misconduct.

[87] I accept that the nature and effect of an employer's direction to a claimant may be relevant. It cannot be ignored in all cases where the misconduct is the claimant's refusal to comply with the employer's orders.

Relevance of employer's conduct in this case

[88] I accept that the employer's conduct in this case, s relevant to whether the Claimant's refusal to destroy the recordings may be characterized as misconduct.

[89] The employer's conduct in the month prior to the employer's (December 2020) demand to destroy the recordings likely influenced the Claimant's refusal.

[90] On the day following the first recording of K. C., J. B. called to suspend the Claimant for what he understood the Claimant to have said in his conversation with K. C. The Claimant later learned that he was alleged to have made a threat in that call. In his defence, the Claimant gave the CEO of the employer copies of the recordings. The recording established that his remarks had been taken out of context, and it resulted in his reinstatement.

[91] His abrupt suspension based on an unsupported accusation, combined with how he successfully defended his job using his recordings, provides important context for his actions. The recordings were the Claimant's shield from the accusation that he had threatened the company. In my view, it would be reasonable for him to be suspicious of the employer and possessive of his own copy.

[92] My decision that the employer's conduct is relevant is consistent with *Astolfi* and with the way the Tribunal has distinguished or applied *Astolfi* in its past decisions: The employer's direction to destroy the recordings predated the Claimant's refusal. It was not a policy or a direction with general application, nor was it supported by any policy or

direction of general application; It was an active and specific demand targeting only the Claimant, and his specific circumstances.

Does the employer conduct relieve the Claimant from obeying its direction to destroy the recordings?

[93] The employer's conduct was relevant and likely influenced the Claimant`s decision. However, it does not relieve the Claimant from following the employer's direction to destroy the recordings.

[94] As noted earlier, there are only a few cases in which the Tribunal has found that a claimant did not engage in misconduct because of the employer's conduct. In those cases, the employer conduct harmed or risked harm to the claimant.

[95] The employer's direction to the Claimant to destroy the recordings did not put him at risk of physical harm. Nor did it force him to participate in anything illegal or even unethical. The employer was not forcing him to choose between his job on the one hand, and his health or finances on the other. There was no evidence that the employer's direction created or contributed to circumstances in which the Claimant would have had no reasonable alternative to quitting (if the employer had not terminated him first).

[96] The Claimant's experience with the employer may have made him leery of future job action, but the employer's direction did not take away the Claimant's ability to defend himself. It is highly unlikely that the employer would reimpose his suspension or fire him based on its earlier accusation, just because the Claimant no longer had a copy. The employer could not deny that the recordings ever existed. It knew that the Claimant had submitted a copy of the same recordings in a claim or complaint in another administrative forum.[38]

[38] See GD3-92: The Claimant told the Commission that he had "cases" with the Canadian Human Rights Commission (CHRC) and a case with the Canada Industrial Relations Board (CIRB). He told the employer that he submitted the recordings to the CHRC. See GD3-39.

[97] If the Claimant was concerned about losing his job, it should have been quite clear to the Claimant that the risk of disobeying the direction to destroy the recordings outweighed the risk of actually destroying them. The employer had explicitly and repeatedly warned the Claimant that it was considering terminating him for not complying.

[98] Furthermore, the destruction of the Claimant's copy of the digital recordings was of little or no prejudice to the Claimant. It would not have cost him anything and it would have been simple and virtually effortless for him to confirm he had done so.

[99] Nor would the information be irretrievably lost. The employer demanded that the Claimant destroy his own copy of the recordings, but not every existing copy. If the Claimant anticipated using the recordings for some legitimate purpose such as evidence in another legal proceeding, he would likely have been able to obtain another copy. He had submitted the recordings to the CHRC, and to the Industrial Relations Board (IRB).[39] He could get a summary of the recording evidence from the CHRC report (if not a copy of the recording), and he would be able to recover a copy of the actual recording from the public record, if the CHRC referred the matter to the Canadian Human Rights Tribunal. The IRB has a public process, so his recordings would be part of the public record and would be accessible.

[100] I accept that the recordings were the Claimant's personal property. I also accept that the employer could not force him to destroy the recordings or to disclose those with whom he had discussed their contents. However, that does not mean that the Claimant could refused to destroy the recordings – and keep his job as well.

[101] Perhaps an employer direction that was purely arbitrary, capricious, retaliatory, or unrelated to the employment, would have some bearing on whether the claimant owes a duty to obey that direction. However, there is no suggestion that this was true of the employer's direction in this case. In fact, the employer may well have had good reasons for insisting that the Claimant destroy his copy of the recordings.

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[39] Listen to the audio recording of the General Division hearing at timestamp 1:04:00

[102] The CEO of the employer had listened to the recordings. He likely appreciated the delicacy of at least one of the matters discussed. The recording reveals that K. C. presented the Claimant with the employer's offer to address some of the Claimant's working condition and pay demands. These include a willingness to pay the Claimant for time that had not previously been paid. The discussion implies that the employer would offer this concession to the Claimant as a special case, and that it was not one it had offered to other employees.[40]

[103] The employer did not explain its motivation for demanding the destruction of the recordings. However, if the recordings suggest that the employer was open to giving the Claimant some kind of preferential treatment or concession (as they appear to), one can imagine why the employer would not want other employees to hear them.

[104] Regardless of whether this describes any part of the employer's motivation, the importance the employer attached to its concern was, or should have been, obvious to the Claimant.

[105] I cannot say for certain what the Claimant's motivation was in refusing to follow the employer's direction. Beyond his assertion of an abstract private property interest, he has never explained why he refused to destroy the recordings. In the apparent absence of a reasonable explanation, the employer might reasonably have had some concern that the Claimant intended to use the recordings in some way that was contrary to its own interests.

[106] As I have already noted, one of the elements of misconduct is that it must be conduct that breaches a duty owed by the Claimant to their employer. I find that the Claimant owed his employer a duty of loyalty and that his refusal to confirm the destruction of his copies was incompatible with that duty. The Claimant demonstrated that he had lost trust in his employer, and it likely conveyed to the employer that it could not trust him either. This breached the fundamental employee/employer relationship

[40] See GD3-93. Also, listen to the audio recording at GD11 at timestamp 0:20:20.

(which the Claimant understood to be grounds for disciplinary action[41]). Furthermore, I find that the breach was "sufficiently serious," to be misconduct.[42]

– **Was the Claimant's refusal willful?**

[107] The Claimant's refusal was willful. He clearly, explicitly, refused to confirm that he had destroyed the recordings. This was a deliberate and intentional rejection of the employer's direction.

[108] There is some indication in the file that the Claimant was suffering from depression at various times, including when he made the recordings.[43] However, I do not accept that this factored into his refusal. His refusal was not the result of a momentary incapacity or lapse of judgement. He said that his depression "is something [he] can deal with as he is a high functioning person," in November 2021.[44]

[109] He could have destroyed the recordings at any time between the employer's first request in December 2020 and its multiple demands in January and February of 2022. He has maintained to this day that he was justified in refusing the employers direction to destroy the recordings.

– **Should the Claimant have known that refusing to destroy the recordings could lead to his dismissal?**

[110] I accept that the Claimant knew that his refusal could lead to his dismissal.

[111] The employer first told him he needed to destroy the recordings shortly after they were created and after the Claimant went on leave. When he tried to come back to work in November 2021, the employer immediately reminded him that it insisted on the destruction of the recordings, and that he could not return to work without doing so. Over the weeks that followed, the employer repeatedly warned him that it would terminate him if he did not comply.

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[41] See GD3-75.
[42] *Canada (Attorney General) v Langlois,* A-94-95, A-94-96.
[43] See GD3-21.
[44] See GD3-54.

[112] The Claimant conceded that he refused to do so, and he admitted that he was not surprised that the employer dismissed him as a result.

– **Did the employer terminate the Claimant for his misconduct?**

[113] I have already found that the employer terminated the Claimant for his refusal to comply with the employer's direction. The termination letter states this explicitly. I appreciate that the Claimant believes the employer wanted to get rid of him regardless, but he did not deny that his refusal to destroy the recordings was at least one reason he was terminated.

[114] The employer dismissed the Claimant for misconduct.

Conclusion

[115] I am dismissing the appeal. The General Division made an important error of fact. I have substituted my own decision and corrected the mistake, but I have reached the same result as the General Division.

Stephen Bergen
Member, Appeal Division