



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *H. H. v Canada Employment Insurance Commission*, 2019 SST 1438

Tribunal File Number: GE-19-3231

BETWEEN:

**H. H.**

Appellant (Claimant)

and

**Canada Employment Insurance Commission**

Respondent (Commission)

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**General Division – Employment Insurance Section**

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DECISION BY: Solange Losier

HEARD ON: November 25, 2019

DATE OF DECISION: November 27, 2019

## **DECISION**

[1] The appeal is allowed. This means that the Claimant is not disqualified from receiving employment insurance benefits.

## **OVERVIEW**

[2] The Claimant worked at a long-term care home for approximately twenty years as a personal support worker. She discovered a resident who had fallen in the dining room while she was warming her dinner during her dinner break. She alerted her coworker twice for help who came to attend to the resident. The resident was uninjured. The Claimant left the immediate area to finish her dinner break because she had already missed over 30 minutes. The employer dismissed her employment because she did not follow their falls policy which requires her to remain with the resident. The Claimant applied for employment insurance benefits after her dismissal.

[3] The Commission decided that the Claimant lost her employment due to her misconduct and was not entitled to receive employment insurance benefits from December 16, 2018. The Claimant disagrees because she did not commit the conduct as described by the employer. She was not aware that she could be dismissed for her conduct.

## **PRELIMINARY MATTER**

[4] This hearing was first scheduled to be heard on October 21, 2019. The Claimant requested an administrative date change and it was rescheduled to November 6, 2019. However, the interpreter failed to attend the hearing on this date, so the matter had to be adjourned due to exceptional circumstances. It was rescheduled on consent to an in-person hearing on November 25, 2019 and an interpreter attended on that date.

## **ISSUE**

[5] The issue is whether the Claimant was dismissed from her employment due to her own after she allegedly breached the employer's policy after a resident fell.

## ANALYSIS

[6] Claimants are disqualified from receiving benefits where they lose their employment because of misconduct.<sup>1</sup> Misconduct is not defined in the Act, however misconduct must “be conscious, deliberate or intentional”.<sup>2</sup> The Commission must prove that the Claimant lost his employment due to her misconduct.<sup>3</sup>

### **Issue 1: Why was the Claimant dismissed from her employment?**

[7] The parties agree that the Claimant was dismissed from her employment on or around December 19, 2018 or December 20, 2018.

[8] The Claimant was dismissed for an incident that occurred at work on December 13, 2018. It was alleged that the Claimant failed to attend to a fallen resident and stay with her until additional help arrived. This breached the employer’s policy on falls and violated the resident bill of rights.

### **Issue 2: Did she commit the conduct and breach the employer’s policy on falls or resident bill of rights?**

[9] No, I find it was more likely than not, that the Claimant did not commit the conduct and breach the employer’s falls policy or resident bill of rights. I preferred the Claimant’s testimony over the employer’s statements to the Commission because I found it more credible and probable for the following reasons.

[10] The employer told the Commission on August 6, 2019 that the Claimant was not offered any compensation or her job back (GD3-31). I asked the Claimant why she testified that she was offered around \$15,000.00, or her job back and if she had any evidence to support it. The Claimant produced an original letter at the hearing dated in June 2019 from her union representative on behalf of the employer advising that she could have either \$20,000.00 as

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<sup>1</sup> Section 30 of the *Employment Insurance Act*

<sup>2</sup> *Canada (Attorney General) v. Lemire*, 2010 FCA 314

<sup>3</sup> *Minister of Employment and Immigration v. Bartone*, A-369-88

compensation, or she could get her job back. She said that she declined both offers and her case is still with the union.

[11] The employer told the Commission they had video evidence in their possession of the Claimant ignoring the fallen resident, but failed to submit this evidence supporting their version of events (GD3-25). I note that the employer provided a very specific description of the events to the Commission, but that version is disputed by the Claimant because she maintains that she attended to the resident and sought out help twice after confirming she was conscious. The Claimant has never seen the video and confirms that she only briefly left the area to call her colleague down the hall. She did not leave the resident until her colleague arrived to attend to the resident. This occurred within five minutes.

[12] The employer told the Commission that she violated the residents bill of rights, but they failed to submit a copy of it, or identify what resident right was violated (GD3-25).

[13] The employer submitted a copy of their falls prevention policy (GD3-32 to GD3-33). The Claimant does not recall reviewing or receiving a copy of the falls policy during her employment. She recalls receiving training on resident falls twenty years ago during her orientation. I find that there was insufficient evidence to show that she was aware of this policy, or that she even had any training on the policy.

[14] Based on the employer's fall policy, the Claimant was required to call for help from her colleague and nurse, as well as to stay with the resident to provide comfort until help arrives (GD3-32 to GD3-33). She testified that she did both of these things, only leaving the resident briefly to call out to her colleague down the hall. The Claimant is not equipped with any walkie talkie devices or telephones, but the registered nurses have them.

[15] I note that the Commission provided no specific reasoning for preferring the employer's version of events over the Claimant's version, particularly since the conduct itself was disputed and video evidence from the employer was available, but not provided.

[16] Therefore, I find that the Commission has failed to prove that the Claimant committed the conduct as described by the employer. For the above reasons, I find that Claimant's testimony was credible and her version of events seem more probable.

**Issue 3: Is this misconduct?**

[17] It is not necessary to determine whether the Claimant's conduct was misconduct based on the *Employment Insurance Act* because I have already found that she did not commit the conduct as described by the employer.

**CONCLUSION**

[18] The appeal is allowed.

Solange Losier

Member, General Division - Employment Insurance Section

HEARD ON:	November 25, 2019
METHOD OF PROCEEDING:	In person
APPEARANCES:	H. H., Appellant  Amy Brubacher, Legal Representative for the Appellant