Citation: *RD v Canada Employment Insurance Commission*, 2021 SST 944

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. D.
Representative:	A. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (434298) dated October 1, 2021 (issued by Service Canada)

Tribunal member:	Raelene R. Thomas
Type of hearing:	Teleconference
Hearing date:	November 17, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	December 6, 2021
File number:	GE-21-2068

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant lost his job as Health Care Aide (HCA) in a long term care residence. The Claimant's employer said that he was let go because he physically lifted a resident with his arms instead of using a mechanical lift. It said that lifting a resident in that way was a violation of its policy.

[4] The Claimant says that he did lift the resident with his arms but that he had been told many times in the past to lift a resident using his arms and was not disciplined. He said that other staff also lifted residents with their arms and did not lose their jobs. The Claimant said he thinks he was dismissed because the employer discriminated against him.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[6] I have to decide if the Claimant lost his job because of misconduct.

Matter I have to consider first

I will accept the documents sent in after the hearing

[7] At the hearing, the Claimant's Representative said that the Commission initially approved the Claimant for regular EI benefits then it changed its decision to deny the

[1] Section 30 of the *Employment Insurance Act* (EI Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Claimant regular EI. The Claimant later applied for and was approved for sickness EI benefits. The Claimant's Representative said that the Commission should not be able to rescind its initial approval for regular EI benefits.

[8] After the hearing, the Claimant's Representative submitted screen shots from the Claimant's My Service Canada Account to show that he had been approved for regular EI benefits. I am accepting those documents into evidence because the documents contain the history of the Claimant's applications for EI benefits.

[9] The Commission was sent a copy of the documents. At date of writing this decision the Commission has not made any submissions on the documents.

Issue

[10] Did the Claimant lose his job because of misconduct?

Analysis

[11] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[12] I find that the Claimant lost his job as a HCA because he physically lifted a resident with his arms and the employer decided that was a violation of its policies. My reasons for this finding follow.

[13] The Claimant and the Commission don't agree on why the Claimant lost his job. The Commission says that the reason the employer gave is the real reason for the dismissal. The employer told the Commission that the Claimant had lifted a resident with his arms and that was against the employer's policy. All residents were to be lifted using a mechanical lift device. It told the Commission the Claimant was aware of the policy through annual training on the policy and using the lifts. The policy said that

anyone who violated the policy could be disciplined up to and including dismissal. The employer told the Commission that the Claimant also admitted to lifting residents with his arms in the past.

[14] The Claimant disagrees. The Claimant's Representative says that the real reason the Claimant lost his job was because his co-workers were abusive towards him. When he reported the harassment to management he would be moved to another unit but the harassment would continue. This happened throughout his employment.

[15] The Claimant testified that he does not do things as fast as most people and many times the people he worked with have gone to management saying that he was slow, that he wasn't doing his job. He said his co-workers would call him stupid, lazy or an idiot. He would report the harassment to "LB" who is one of two Resident Care Managers at the facility. He would not report the harassment to the other Resident Care Manager "MQ" because MQ was close friends with a co-worker who really had it out for him.

[16] The Claimant testified that when he would bring his concerns to management they would say that they would look into it. He would be moved to another unit. But, the harassment would continue.

[17] The Claimant explained that he took about a month off work on sick leave due to the stress caused by the harassment. When he returned to work he was called into a meeting with an administrator to discuss his absenteeism. He was five minutes late for the meeting because no one told him about the meeting until after it had started.

[18] The administrator asked him why he was off work. He replied that it was due to the harassment he was experiencing from his co-workers. The administrator asked if the harassment was over. The Claimant replied that he did not know if it was over because he did not know the results of management's looking into his complaints. The Claimant testified that he was told to "be a man" after this meeting.

[19] The Claimant's Representative, who is his spouse, said that the Claimant has been diagnosed with Autism Level 1 and Social Communication Disorder. This means

that the Claimant requires time to process any statements or questions that are put to him before he can respond. He also presents with “flat-affect” which means that he shows little emotion. The Claimant’s Representative said that due to his conditions the Claimant was not capable of telling a lie. She was aware of the abuse and harassment that occurred in the work place because he would tell her about when he arrived home from work.

[20] The Claimant’s Representative said that the Claimant filed a grievance on his dismissal and that she and the Claimant attended grievance meetings with the employer and a union representative. At one meeting, the employer’s representative said that the Claimant had admitted to lifting residents with his arms in the past. However, the Claimant’s Representative said that the Claimant was not given the opportunity to explain that the times when he had lifted residents in the past with his arms were at the direction of a Licensed Practical Nurse (LPN) or a Registered Nurse (RN) who supervise the staff in the units. The Claimant’s Representative said the Claimant would not question a direction he received from a person he perceived to be his supervisor.

[21] The Claimant’s Representative said that the employer also said at the grievance meeting the Claimant showed no remorse when he was interviewed about the incident. The Claimant’s Representative said that the Claimant would not be able to show remorse even though he may have felt remorse because of the flat-affect caused by the Autism.

[22] The Commission interviewed the employer who said that the Claimant’s lack of remorse did not factor into the decision to terminate him. The employer said the Claimant was terminated because he lifted a patient without using the proper procedure for lifting. The Commission asked if the employer was aware the Claimant had been diagnosed with Autism. The employer told the Commission that it became aware of the diagnosis as part of the grievance procedure.

[23] I do not think that the Claimant was dismissed because of his Autism or that the employer discriminated against him on the grounds that he is disabled. The employer was aware that the Claimant was being harassed at work. It took some action,

transferring him to another unit, in response to his complaints about harassment. That the employer said in a grievance meeting the Claimant did not show any remorse does not demonstrate discrimination even if the lack of remorse is due to the flat-affect caused by Autism. There is no evidence to support that the employer dismissed the Claimant because he has Autism.

[24] I think that the Claimant was dismissed because the employer viewed lifting a patient with his arms as a violation of its policy which it said required that he use a mechanical lift.

[25] The Claimant testified that he and another HCA had finished bathing resident in the resident's bed. They were changing the bed linens which required that the sheets used during the bath be removed and a sheet be placed over the mattress and a draw sheet be placed over that. The Claimant said that he thought it would be easier to lift the resident with his arms while the sheets were being removed and replaced by his co-worker. The resident was not removed from the bed and remained above the bed during the lift.

[26] The Claimant said that a LPN in charge of the floor that day reported to management that he lifted a resident with his arms. He said the LPN was a casual employee for the past year who would work on the unit three or four times a month. He testified that this LPN had refused it the past to help him use the mechanical lift and had also refused to help him get a resident who had fallen up off the floor.

[27] The Claimant testified that he was allowed to finish his shift that day and was suspended. The Claimant later attended an interview with management and was dismissed a few days later. He admitted that he lifted the resident with his arms. The letter of termination says that the Claimant was dismissed for lifting a resident without a lift and for having lifted another resident in the same way. The employer considered this a violation of its "Safe Lifting with Care Policy" (SLWCP) and dismissed the Claimant for violating that policy.

[28] I find that the conduct that led to the Claimant losing his job was his lifting a resident with his arms which was a violation of the employer's Safe Lifting with Care Policy.

Is the reason for the Claimant's dismissal misconduct under the law?

[29] No, the reason for the Claimant's dismissal isn't misconduct under the law.

[30] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[2] Misconduct also includes conduct that is so reckless that it is almost wilful.[3] The Claimant doesn't have to have wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[4]

[31] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[5]

[32] The Commission has to prove that the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.[6]

[33] The Commission says that there was misconduct because the Claimant acted wilfully when he lifted a resident improperly. The employer told the Commission that it has zero tolerance for any violation of the policy. The employer said that employees were required to review the employer's safe lifting procedure annually. The Commission says according to the policy the consequences for breaching the policy

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[2] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to court decisions that apply to the circumstances of this appeal.
[3] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[4] See *Attorney General of Canada v Secours*, A-352-94.
[5] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.

would result in an investigation and may result in progressive discipline up to and including termination.

[34] The Commission noted that the employer told it the Claimant had attended training on the policy in 2020. By the Commission's reckoning, it thought the Claimant would have attended the annual re-training at least ten times during his employment. As such, the Commission said the Claimant would have been aware of the consequences for non-compliance with the employer's safe lifting policy. The Commission said that the Claimant's breach of the employer's safety policy is misconduct within the meaning of the EI Act because he knew he would place his job in jeopardy if he disregarded the policy.

[35] The Claimant and the Claimant's Representative say there was no misconduct because the Claimant had been instructed in the past to lift residents without the lift by the LPNs and RNs who were in charge of the units where he worked. No other employee who lifted a patient with their arms had been disciplined or dismissed from their job. The Claimant's Representative said that there was no report from the investigation of the incident. She thought that an investigation would have included an assessment of the risk to the resident, but there was nothing said about that.

[36] The Claimant testified that he has been employed as a HCA for the past 10 years. The facility where he works has two units on each floor. Each unit has 12 residents. There is one HCA assigned to each unit and one LPN assigned per floor. The two HCAs cover both units on a floor and the LPN or RN is supervisor for both units on the floor. Another HCA works four hours a day to help with bathing. HCAs are responsible for resident care, including bathing, dressing, feeding, portering, lifting and toileting residents. HCAs will also do housekeeping, dishes and laundry.

[37] The Claimant said that there is one mechanical lift per unit. It is portable and can be moved from room to room. To use the lift you put a sling under the resident and then use pulleys by remote control to lift the resident. The Claimant said that you have to have two people present before you can put the sling under a resident. The Claimant

explained that the lift is used when a resident is transferred from a bed to a chair, from a chair to a bath tub, or any time a resident is moved from one place to another.

[38] The Claimant testified that he read the SLWCP when he was hired. He has not read it since then. The Claimant's Representative noted that the policy provided by the employer was last updated August 2017 so the Claimant had not read that policy.

[39] The Claimant said that the annual training was on how to use the lift and to place the slings. The training showed them how to use the lift to transfer a resident from one place to another. The policy was not shown to anyone as part of the annual training. They were not told what would happen if they did not use the lift when required.

[40] The Claimant testified that he had training on how to physically lift a resident when he was in school learning to be a health care aide.

[41] The Claimant explained that all the residents are supposed to have signage in their rooms about lifting, whether they can be left alone, if the resident is at risk of falling, etc. He said that not every resident kardex has that information. The Claimant said most of the signage is out of date by a year or so.

[42] The Claimant could not recall what signage was in the room of the resident who he lifted. The Claimant could not recall where the mechanical lift was at the time he lifted the resident.

[43] The Claimant testified that he was aware that the lift was to be used to lift residents from place to place and that staff usually did use the lift. He said that he had physically lifted residents many times. The Claimant testified that he would physically lift a resident when he was told to do so by a supervisor. He said that it was common practice to not use the lift when doing a bed bath because the resident was not being transferred to another place and would remain in their bed once the bathing was done.

[44] I find that the Commission has not proven that there was misconduct, because the Claimant could not know, nor could he have reasonably known, that his conduct could lead to his dismissal.[7] My reasons for this finding follow.

[45] First, I do not think that the evidence supports the employer's statements to the Commission that it had "zero tolerance policy" against physically lifting residents.

[46] The employer gave the Commission two documents: the SLWCP and "Mechanical Lifts Policy." I have read both.

[47] The employer told the Commission that the Claimant's lifting the resident was a very serious infraction and it had a zero tolerance policy for these types of things. In my opinion, a "zero tolerance policy" implies that there is a set disciplinary action for every violation and that there is no discretion in applying those actions.

[48] The employer's SLWCP states that all breaches of the SLWCP or its Mechanical Lifts policy will result in an investigation, and may result in progressive discipline up to and including termination of employment. These statements mean that the employer had some discretion in deciding whether to terminate the Claimant. As a result, I find that the employer's policy does not support its statement that it has a zero tolerance policy.

[49] In making this finding, I am mindful that it is not my role to determine whether terminating the Claimant's employment was the appropriate response. I am, instead, finding that the employer's statements about zero tolerance are not borne out by the evidence in the file.

[50] Second, I do not think that the Claimant violated the SLWCP or the Mechanical Lifts Policy.

[51] The SLWCP states that each resident is assessed on admission which includes an "evaluation of the assistance required to transfer safely from one surface to another."

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

It says that only trained and competent staff will use mechanical lifts when performing resident transfers. Two staff are required to operate a mechanical lift.

[52] The SLWCP and the Mechanical Lifts Policy defines a mechanical lift as a device which supports all or part of a resident's weight during the transfer process. A "surface" is a "place which a resident is lifted from or to such as the bed, floor, wheelchair, commode or bath tub."

[53] In this case, the Claimant lifted a resident while the sheets of the resident's bed were being changed. The resident was not moved from one surface to another. The resident remained above their bed while being lifted. There was no transfer of the resident from one surface to another. As a result, I find that the Claimant did not violate the SLWCP or the Mechanical Lifts policy.

[54] Finally, I think that the Claimant could not know, nor could he have reasonably known that he could lose his job for physically lifting the resident.

[55] As noted above, there is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.[8]

[56] I accept the Claimant's testimony that physically lifting residents was a common practice. He said that he had lifted residents many times at the direction of his supervisor. At the time he lifted the resident, a co-worker was assisting him in caring for the resident. There is no evidence that the co-worker was also disciplined for observing and not reporting the Claimant's actions. The employer's SLWCP and Mechanical Lifts Policy both speak to using a mechanical lift when transferring a resident from one surface to another. That is not what happened in this instance.

[57] The evidence tells me the Claimant did not violate the employer's policy because the resident was not being transferred while being physically lifted, physically lifting residents was common practice and the lifting of residents was often done at the

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

request of supervisory staff. In light of this evidence, I find it was reasonable for the Claimant to think that he was performing his duties correctly, was not violating any employer policy and reasonably could not know that he could be dismissed for physically lifting a resident.

[58] This means that the Commission has not met its burden of proving, on a balance of probabilities, that the Claimant lost his job due to his misconduct.

So, did the Claimant lose his job because of misconduct?

[59] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct.

Conclusion

[60] The Commission hasn't proven that the Claimant lost his job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[61] This means that the appeal is allowed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section