



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *M. H. v Canada Employment Insurance Commission*, 2018 SST 1335

Tribunal File Number: GE-17-2860

BETWEEN:

M. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Manon Sauvé

HEARD ON: May 28, 2018

DATE OF DECISION: July 16, 2018

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant is 83 years old and has driven a school bus for X for more than 28 years. On February 20, 2017, he was dismissed.

[3] On February 20, 2017, at about 12:45 p.m., the Appellant was driving some elementary school students to their school. He approached the drop-off point, and the children got off the bus to go to the entrance close to the schoolyard. The Appellant noticed that a child had fallen asleep on the bus. He dropped him off in front of the administration entrance.

[4] According to the Appellant, it was snowing that day. The roadway and the sidewalk near the school were slippery and covered in snow. While he was waiting in front of the student entrance, he moved the bus ahead about 40 feet to allow other drivers to leave the premises. That was when he noticed there was a child asleep on the bus. He drove around the school and dropped the child off in front of the administration entrance. He saw the secretary, who was waiting inside for the child.

[5] According to the employer, this was the third time the Appellant forgot a child on the school bus. On February 20, 2017, he failed to follow the safety rules, and he put the safety of a child at risk. Furthermore, the employer did not believe the Appellant's version of events. The employer believes that the Appellant went home and that that was when he noticed the child on the bus.

[6] The Commission denied the Appellant Employment Insurance benefits because he had lost his employment due to his misconduct. He was therefore disqualified from receiving benefits.

[7] According to the Commission, the Appellant committed an act of serious misconduct by forgetting a child on the school bus. Moreover, he lied to his employer and did not ensure the

child's safety. This was a negligent act, and the Appellant was aware that his act could lead to his dismissal because it was the third incident of its kind.

[8] The Tribunal must decide whether the Claimant lost his employment because of his misconduct and whether a disqualification should therefore be imposed under sections 29 and 30 of the *Employment Insurance Act* (Act).

ISSUES

[9] What are the Appellant's alleged acts?

[10] Did the Appellant commit the alleged acts?

[11] Do the alleged acts constitute misconduct under the Act?

ANALYSIS

[12] The relevant statutory provisions appear in the annex of this decision.

[13] The Tribunal's role is not to determine whether a dismissal by the employer was justified or was the appropriate action (*Canada v Caul*, 2006 FCA 251).

[14] Indeed, the Tribunal must determine what the Appellant's alleged acts are, whether the Appellant committed these acts, and whether this amounts to misconduct under the Act.

[15] The Commission has the onus of proving on a balance of probabilities that there was misconduct (*Canada v Larivée*, 2007 FCA 312).

What are the Appellant's alleged acts?

[16] The Tribunal notes that the employer alleges that the Appellant failed to follow the safety rules, lied, and did not ensure the safety of a child.

[17] The Tribunal notes that the Appellant admits that these are the acts alleged against him. However, he denies that he committed the acts in the way the employer has reported.

Did the Appellant commit the alleged acts?

[18] The employer asks school bus drivers to be vigilant about the kindergarten and elementary school students. The students tend to fall asleep on bus seats. It is important to check the seats because, since the students are small, they are hidden by the seat backrests.

[19] The employer had a security system installed to prevent children from being forgotten on the school bus. As a result, when a driver turns off the bus engine, they have to go to the back of the vehicle to turn off the alarm system. If they do not turn the alarm off, the bus horn goes off. So, they have to pass by all the bus seats. If a child is there, the driver can then spot them quickly.

[20] According to the employer, on February 20, 2017, the Appellant left the school without turning off the vehicle engine and went home. It was only when he turned his vehicle off at home that he noticed that a child was asleep on a seat because he had to go to the back of the school bus to turn the alarm system off. He then went back to the school and dropped the child off in front of the administration entrance without any concern for the child's safety. Allegedly, he did not accompany the child to the entrance and left him there alone. The school doors were locked; the child had to go in through the administration door. Since the Appellant lives close to the school, he was able to bring the child back 20 minutes later.

[21] The Commission submitted a Google Maps image to show the distance and journey time between the school and the Appellant's place of residence.

[22] According to the Appellant, there was a snowstorm on February 20, 2017. The roads were hardly passable. He dropped the children off in front of the student entrance. He moved his vehicle ahead about 40 feet to let the other buses that had to continue on their routes pass. He then noticed that a child was asleep on the bus. Since he had moved his vehicle ahead, he could not let the child off at that spot because there was snow. So, he went around the school and dropped the child off in front of the administration entrance. The child got off the bus quickly, and the Appellant was not able to get off with him. However, he did notice that the school secretary took charge of the child. He drove away.

[23] After considering all the evidence on file and the testimonies, the Tribunal finds that the act alleged against the Appellant is that he forgot a child on the bus. Moreover, the Appellant admitted to forgetting a child on the school bus.

[24] Regarding the employer's allegations that the Appellant lied and that he did not ensure the child's safety when the child got off the bus, the Tribunal is of the view that the evidence is inconclusive.

[25] The Tribunal finds that the employer's opinion as to whether the Appellant returned home with the child is insufficient to establish this fact. The Tribunal believes that it must rely on an objective assessment of the facts (*Choinière, A-471-95*).

[26] In these circumstances, the Tribunal is of the view that it is more likely that the Appellant realized he had forgotten a child while on the school premises rather than at home. In coming to this conclusion, the Tribunal relied on the Appellant's credible testimony and the video evidence submitted at the hearing. As such, the Commission has not proven that the Appellant had gone back home.

[27] The Tribunal is also of the view that the Commission has not proven that the child's safety was compromised when he got off the bus. The Tribunal relies on the Appellant's credible testimony and the fact that he has been consistent with his version of events from the start of the process with the Commission. The Tribunal also accepts that the school board's investigation report was not submitted on file. Nevertheless, the Commission seems to have relied on this report to find that the Appellant had lied to his employer and that he put the safety of the child at risk when the child got off the bus.

[28] However, regardless of whether the Appellant went home or moved his vehicle ahead 40 feet to let the school buses pass, the fact remains that the Appellant forgot a child on the bus.

[29] The Tribunal must now determine whether the act of forgetting the child on the bus constitutes misconduct.

Does the act committed by the Appellant constitute misconduct?

[30] The Tribunal notes that the employer set out at paragraph n) of its directive [translation] “that a driver must ensure that there are no more passengers on board and that nothing is left in the vehicle.”

[31] The Tribunal notes from the evidence on file and the Appellant’s testimony that he was aware of this rule.

[32] The Tribunal notes from the evidence on file that the Appellant was involved in an initial incident. On October 19, 2015, he forgot a child on the school bus. The employer reminded the Appellant of the importance of doing a security sweep to ensure that there is no child on the bus.

[33] On April 12, 2016 [sic], the Appellant forgot the same child on the school bus again. The employer reminded the Appellant that he should have done a security sweep. The employer pointed out to the Appellant that he was seen on March 31, 2016, about the school board’s regulations. The Appellant received a three-day suspension.

[34] The employer informed the Appellant that, if this happened again, it would have to resort to tougher measures, including dismissal.

[35] On February 20, 2017, the Appellant forgot a child on the school bus again. The Tribunal is of the view that this constitutes misconduct. Indeed, the Appellant knew or should have known that another act of negligence could lead to his dismissal. He failed to comply with the directive to ensure that he had not forgotten a child on the bus.

[36] In doing so, on February 20, 2017, the Appellant was not concerned with whether the bus was empty. He moved ahead into the zone where he was no longer allowed to drop a child off from the bus because of the poor weather. He was more concerned with the other buses’ routes than with the safety of his passengers.

[37] The Appellant’s explanations have not satisfied the Tribunal that he complied with the directive. If he had checked the bus before moving ahead, he would have noticed that the child was there, and he would have then been able to let him off at the right spot and not forget him.

[38] The Appellant submits that the employer dismissed him because of his age. The employer made him undergo medical examinations to be sure he was fit to work. The Tribunal is of the view that the employer followed the directive that sets out that a driver must undergo examinations. It is normal to check up on drivers' health; it is for the safety of the children.

[39] The Tribunal is of the view that the causal link between his loss of employment and forgetting a child was established. It is precisely for having forgotten a child a third time that the Appellant lost his employment (*Cartier*, 2001 FCA 274).

[40] Therefore, the Tribunal finds that, by forgetting a child a third time, the Appellant could normally have foreseen that this breach would result in his dismissal. The Appellant received two notices for similar acts of negligence, and he had a three-day suspension.

[41] Therefore, the Tribunal is of the view that the Appellant acted negligently or carelessly when he decided to move ahead 40 feet to let his co-workers continue on their routes. He was more concerned with his co-workers' routes than with making sure there were no more children on his bus. In acting as he did, he forgot a child on the school bus a third time. (*Tucker*, A-381-85).

[42] The Appellant cannot claim that he complied with the directive because he forgot a child on the bus and he was no longer able to let him off at the right spot.

[43] In this respect, the Tribunal finds that the Commission has proven on a balance of probabilities that the Appellant lost his employment because of his misconduct.

CONCLUSION

[44] The Tribunal finds that the Appellant lost his employment because of his misconduct within the meaning of sections 29 and 30 of the Act. He is therefore disqualified from receiving benefits.

[45] The appeal is dismissed.

Manon Sauvé
Member, General Division – Employment Insurance Section

HEARD ON:	May 28, 2018
METHOD OF PROCEEDING:	In person
APPEARANCES:	M. H., Appellant Jean Mailloux, Counsel for the Appellant

ANNEX

THE LAW

Employment Insurance Act

29 For the purposes of sections 30 to 33,

(a) *employment* refers to any employment of the claimant within their qualifying period or their benefit period;

(b) loss of employment includes a suspension from employment, but does not include loss of, or suspension from, employment on account of membership in, or lawful activity connected with, an association, organization or union of workers;

(b.1) voluntarily leaving an employment includes

(i) the refusal of employment offered as an alternative to an anticipated loss of employment, in which case the voluntary leaving occurs when the loss of employment occurs,

(ii) the refusal to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed, and

(iii) the refusal to continue in an employment after the work, undertaking or business of the employer is transferred to another employer, in which case the voluntary leaving occurs when the work, undertaking or business is transferred; and

(c) just cause for voluntarily leaving an employment or taking leave from an employment exists if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances, including any of the following:

(i) sexual or other harassment,

(ii) obligation to accompany a spouse, common-law partner or dependent child to another residence,

(iii) discrimination on a prohibited ground of discrimination within the meaning of the *Canadian Human Rights Act*,

(iv) working conditions that constitute a danger to health or safety,

(v) obligation to care for a child or a member of the immediate family,

(vi) reasonable assurance of another employment in the immediate future,

- (vii) significant modification of terms and conditions respecting wages or salary,
- (viii) excessive overtime work or refusal to pay for overtime work,
- (ix) significant changes in work duties,
- (x) antagonism with a supervisor if the claimant is not primarily responsible for the antagonism,
- (xi) practices of an employer that are contrary to law,
- (xii) discrimination with regard to employment because of membership in an association, organization or union of workers,
- (xiii) undue pressure by an employer on the claimant to leave their employment, and
- (xiv) any other reasonable circumstances that are prescribed.

30 (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless

(a) the claimant has, since losing or leaving the employment, been employed in insurable employment for the number of hours required by section 7 or 7.1 to qualify to receive benefits; or

(b) the claimant is disentitled under sections 31 to 33 in relation to the employment.

(2) The disqualification is for each week of the claimant's benefit period following the waiting period and, for greater certainty, the length of the disqualification is not affected by any subsequent loss of employment by the claimant during the benefit period.

(3) If the event giving rise to the disqualification occurs during a benefit period of the claimant, the disqualification does not include any week in that benefit period before the week in which the event occurs.

(4) Notwithstanding subsection (6), the disqualification is suspended during any week for which the claimant is otherwise entitled to special benefits.

(5) If a claimant who has lost or left an employment as described in subsection (1) makes an initial claim for benefits, the following hours may not be used to qualify under section 7 or 7.1 to receive benefits:

(a) hours of insurable employment from that or any other employment before the employment was lost or left; and

(b) hours of insurable employment in any employment that the claimant subsequently loses or leaves, as described in subsection (1).

(6) No hours of insurable employment in any employment that a claimant loses or leaves, as described in subsection (1), may be used for the purpose of determining the maximum number of weeks of benefits under subsection 12(2) or the claimant's rate of weekly benefits under section 14.

(7) For greater certainty, but subject to paragraph (1)(a), a claimant may be disqualified under subsection (1) even if the claimant's last employment before their claim for benefits was not lost or left as described in that subsection and regardless of whether their claim is an initial claim for benefits.