



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *M. H. v. Canada Employment Insurance Commission*, 2019 SST 52

Tribunal File Number: AD-18-498

BETWEEN:

**M. H.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Pierre Lafontaine

DATE OF DECISION: January 24, 2019

## **DECISION AND REASONS**

### **DECISION**

[1] The Tribunal allows the Claimant's appeal.

### **OVERVIEW**

[2] The Appellant, M. H. (Claimant), made an initial application for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission, informed him that he was not entitled to Employment Insurance benefits because he had lost his employment due to his misconduct. The Commission determined that the Claimant had committed an act of serious misconduct by forgetting a child on the school bus he was driving. The Claimant requested a reconsideration of that decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[3] The General Division determined that the Claimant was dismissed for forgetting a child on his school bus. It determined that, in acting as he did, the Claimant could normally foresee that that breach would result in his dismissal. The General Division found that the Claimant had lost his employment because of his misconduct.

[4] The Tribunal granted leave to appeal. The Claimant argues that the General Division erred in law in its interpretation of the concept of misconduct, as defined by the Federal Court of Appeal. He stresses that, in order to find misconduct, the General Division conflated the fact that an event happened with the Commission's requirement to show proof of a mental element.

[5] The Tribunal must determine whether the General Division made an error of law in its interpretation of the concept of misconduct, as defined by the Federal Court of Appeal.

[6] The Tribunal allows the Claimant's appeal.

## ISSUE

[7] Did the General Division make an error of law in its interpretation of the concept of misconduct, as defined by the Federal Court of Appeal?

## ANALYSIS

### **Appeal Division's Mandate**

[8] The Federal Court of Appeal has determined that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).<sup>1</sup>

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

[10] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

### **Issue 1: Did the General Division make an error in law in its interpretation of the concept of misconduct, as defined by the Federal Court of Appeal?**

[11] The Tribunal is of the opinion that the Claimant's appeal should be allowed.

[12] The Claimant argues that the General Division erred in law in its interpretation of the concept of misconduct, as defined by the Federal Court of Appeal. He stresses that, in order to find misconduct, the General Division conflated the fact that an event happened with the Commission's requirement to show proof of a mental element.

[13] The concept of misconduct does not imply that the breach of conduct must be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or

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<sup>1</sup> *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

intentional. In other words, there will be misconduct where the Claimant knew or should have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.

[14] It is well-established law that the burden of proof is with the employer and the Commission to show, on a balance of probabilities, that the Claimant lost his employment because of his misconduct.

[15] A finding of misconduct, with the grave consequences it carries, can be made only on the basis of clear evidence and not merely of speculation and suppositions.

[16] The General Division accepted the employer's allegation that the [Claimant] had not followed the verification rules, had lied about his version of the facts, and did not ensure a child's safety.

[17] According to the employer, the [Claimant] left the school without turning off the bus's engine and went home. It was not until he stopped his vehicle at his home that he noticed that there was a child asleep on a seat because he had to go to the back of the school bus to turn off the alarm system. He returned to the school and let the child off in front of the administration entrance without concern for the child's safety. He did not accompany the child to the entrance, leaving the child alone.

[18] According to the [Claimant], there was a snowstorm. The roads were difficult to negotiate. He let the students off in front of the students' entrance. He moved his vehicle forward about 40 feet to let the other buses that had to continue their routes pass. He then noticed that there was a sleeping child on the bus. Since he had moved his vehicle forward, he could not let the child off at that location because there was snow. As a result, he circled the school and dropped the child off in front of the administration entrance. The child quickly got off the bus, and he was not able to get off with him. However, he noted that the school secretary took charge of the child. He left the premises.

[19] The General Division considered all the evidence, including the video evidence the Claimant submitted. It found the Claimant's testimony, which includes the following, credible:

- a) He did not lie to his employer about his version of the facts.
- b) He did not go home with the child.
- c) He made sure the child was safe when the child got off the bus.

[20] The General Division determined that the only one of the employer's allegations that was proven was that the Claimant forgot a child on the bus. The General Division found that the Claimant had lost his employment due to his misconduct because he knew or should have known that another instance of forgetting could lead to his dismissal.

[21] After considering the evidence, the Tribunal is of the view that the General Division made an error of law concerning the concept of misconduct within the meaning of the EI Act [*Employment Insurance Act*] and case law from the Federal Court of Appeal. Furthermore, the General Division made its decision without regard for the material before it.

[22] The Tribunal is therefore justified to intervene and to give the decision that should have been given, in accordance with section 58 of the DESD Act.

[23] The Tribunal notes that the employer never submitted its internal investigation report about the events.

[24] The Claimant's version of facts, which the General Division deemed credible, states that, because of the snowstorm, he moved his bus forward about 40 feet before completing his check to clear the way for the other school buses that had to continue their routes. He then saw the child on the bus. To make sure the child was safe, he circled the school and let the child off in front of the administration entrance. The child quickly got off the bus, and he was not able to get off the bus with the child. However, he noticed that the school secretary had taken charge of the child. He then left the premises.

[25] The employer's instructions state that a driver must make sure that there are no passengers left onboard at the end of each route. The preponderance of evidence shows that the Claimant did complete his check on the school premises after moving his bus forward about 40 feet to make way for other buses because of the snowstorm.

[26] The Tribunal is of the opinion that the evidence before the General Division does not show that the Claimant's alleged act was conscious, deliberate, or intentional. In other words, the preponderance of evidence does not support the finding that the Claimant knew or should have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, his dismissal was a real possibility.

[27] The Claimant simply moved his bus forward about 40 feet before completing his check on the school premises to make way for the other school buses that had to continue their routes on snowy roads. After circling the school, he made sure that the school had taken charge of the child that he had let off before leaving the premises.

[28] The Tribunal is of the view that, based on the balance of probabilities and all of the evidence before the General Division, the Commission and the employer did not succeed in establishing that the Claimant had committed misconduct within the meaning of the EI Act.

## **CONCLUSION**

[29] The appeal is allowed.

[30] The Claimant did not lose his employment because of his misconduct according to sections 29 and 30 of the EI Act.

Pierre Lafontaine  
Member, Appeal Division

HEARD ON:	January 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	M. H., Appellant  Jean Mailloux, Representative for the Appellant  Manon Richardson, Representative for the Respondent