



[TRANSLATION]

Citation: *DV v Canada Employment Insurance Commission*, 2021 SST 560

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: D. V.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (426065) dated July 12, 2021
(issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Teleconference

Hearing date: September 9, 2021

Hearing participant: D. V., Appellant

Decision date: September 12, 2021

File number: GE-21-1501

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that she is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost her job. The Appellant's employer, X, said that she was let go because she used the company bus for personal use without permission and because she didn't wear a protective mask despite being warned that she had to and that it compromised the safety of the children she transported.

[4] Even though the Appellant doesn't entirely dispute that this happened, she says, among other things, that some people might have been jealous that she was able to develop close bonds with the children, that she didn't wear a mask on the bus because there was plexiglass for protection, that she didn't wear a mask or wore one under her nose outside in the school zone because she didn't have to do so according to the health rules heard [translation] "on the news," and that she used the bus in moderation for personal use because her workplace (Montréal) was too far from her home (X) to go back home (about an hour's drive).

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

Issue

[6] Did the Appellant lose her job because of misconduct?

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

Analysis

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

Why did the Appellant lose her job?

[8] I find that the Appellant lost her job because she didn't properly wear a protective mask when working and because she used the bus for personal use without permission.

[9] The Appellant and the Commission agree on why the Appellant lost her job.

[10] The employer told the Commission that the Appellant had been suspended before being let go but that she hadn't changed her behaviour after being warned. It said that students' parents had filed complaints about the health measures, specifically wearing a protective mask, which she wasn't doing.

[11] Additionally, the employer told the Appellant to stop using the bus for personal trips. Even though she told the Commission that she had tried to correct the situation after her suspension, the Appellant admits that she used the bus after hours because her home was too far from her workplace.

[12] She told the Commission that she refused to wear a mask outside and that she was [translation] "within her rights." She says that, on the bus, she was protected by plexiglass that was there as a barrier and that the employer still demanded that she wear a protective mask. She refused.

[13] Although her position on masks was more nuanced at the hearing than her initial statements to the Commission where she said she refused to wear a mask, she admitted that she didn't wear a mask on the bus because there was plexiglass and that outside, near the school, she didn't always wear one or sometimes wore one under her nose.

[14] I find that the Appellant acted as the employer says she did.

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

[15] The reason for the Appellant's dismissal is misconduct under the law. A worker who is let go because of their misconduct can't get EI benefits.

[16] 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 Appellant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.⁴

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

[18] The Commission has to prove that the Appellant lost her 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 Appellant lost her job because of misconduct.⁶

[19] The Commission argues that it is obvious that the Appellant acted as she did consciously and that she committed a serious breach by ignoring the employer's instructions related to the safety of the children she transported. It says that, despite her suspension, the Appellant continued to disobey the employer's instructions, like the requirement to wear a protective mask and maintaining distancing during the COVID-19 pandemic when working with children. According to the Commission, the Appellant

² See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

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 Attorney General of Canada*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

acted in a way that undermined the relationship of trust with the employer, which led to her dismissal.

[20] The employer told the Commission that the Appellant had an impressive disciplinary record in terms of her professional behaviour. The employer says that, during the week of February 11, 2021, it received three formal complaints about the children's safety and the Appellant's behaviour in relation to the health measures.

[21] The employer also alleges that the Appellant parked the bus at a Walmart and/or used the company bus for personal use. It says that, on February 4, 2021, the Appellant parked the bus at a Walmart and that there was a confrontation with a shopper. This shopper allegedly took a photo and sent it to the employer. She also filed a complaint stating that the bus driver had treated her aggressively and had made racist comments. While this incident happened outside working hours, the employer took the complaint seriously because its name was identified on the bus. It says that the Appellant wasn't allowed to drive the bus for personal trips outside working hours.

[22] Apparently, there was another incident, on February 9, 2021. A man filed a complaint after he was shoved while shopping. Once again, the incident happened outside working hours, but because the bus was identified and the Appellant was in uniform, the man filed a complaint with the employer. The employer says that the Appellant was 40 km from her workplace with the bus at the time.

[23] Following these incidents, the Appellant was suspended without pay on February 10 and 11, 2021. Despite the employer's warnings after the incident on February 4, 2021, the bus's GPS continued to show that the Appellant was travelling with the bus outside the operating zone and after hours without permission from the dispatcher and that she was still parking the bus at a Walmart.

[24] Two weeks later, the employer received complaints related to the children's safety. Students' parents complained to the school board that the Appellant didn't wear her protective mask and hugged the children. According to the employer, the Appellant

refused to wear a protective mask when transporting the children and even outside when she was in the school zone. She was let go.

[25] The employer says that a memo was sent to all the drivers about the requirement to wear a protective mask and that all the drivers, including the Appellant, were aware that wearing a mask was mandatory.

[26] The Appellant told the Commission that, from September 2020 to February 2021, she never wore a protective mask when driving the bus. She says she usually works on travel by coach but that, because of the COVID-19 pandemic, her supervisor in the coach division suggested that she temporarily work in Montréal for the school transportation division. She accepted.

[27] Supposedly, she asked her supervisor in the coach division whether she had to wear a protective mask, and he told her it wasn't necessary because there was plexiglass on the bus. The Appellant argues that her usual supervisor found her behaviour appropriate and that he agreed with her that the rules were too strict in the school transportation division.

[28] On March 3, 2021, the Appellant told the Commission that, during the week of February 10, 2021, the employer warned her that she had to wear a mask and that she could not use the bus for personal use anymore. She then told the Commission that she had tried to correct the situation by no longer using the bus for personal use and by not going around town in the evening when there weren't any children on the bus.

[29] Even though she told the Commission that she refused to wear a protective mask, her position was more nuanced at the hearing. The Appellant testified that there was plexiglass separating her from the children on the bus and that she didn't feel it necessary to wear a mask when driving. She says she read a column from a news outlet stating that you didn't have to wear a protective mask to drive and that it wasn't recommended.

[30] Concerning the use of a mask outside in the school zone, the Appellant, who initially told the Commission that she refused to wear a protective mask, testified that she wore one sometimes, but under her nose.

[31] She also explained an incident that apparently led to some complaints. According to the Appellant, she was outside talking with another driver, the one assigned to transporting the kindergarten children, and she wasn't wearing a protective mask at the time because she didn't have to. A child then came up to her and took her hand. The Appellant argues that she develops good relationships with the children and that the complaints may come from jealous people.

[32] Additionally, she admits that the employer told her it didn't approve of her parking the company bus in a Walmart parking lot.⁷ She admits that the employer didn't permit her to use the bus for personal use.

[33] The Appellant says that, out of the blue, the employer demanded that she wear a mask.⁸ She says that her usual supervisor in the coach division understood her position but that a new boss in the school transportation division was stricter. According to her, she disobeyed the new instructions because she didn't feel that this measure was necessary.

[34] As mentioned, her version was more nuanced at the hearing, but the Appellant admitted that she didn't wear a protective mask when driving and that she didn't always wear one outside in the school zone. She says she wore one sometimes, under her nose. Because of this, there was a confrontation with the school principal, who also apparently blamed her for the fact that the children didn't always sit in the same seats on the bus, as the health rules required. The Appellant says that the school staff would gesture her to properly put her mask back over her nose. According to the Appellant, the complaints happened because of discussions with the school principal. It seems the principal even told her she was incompetent to work with children.

⁷ GD3-13.

⁸ GD3-13.

[35] The Appellant says that, the day she was let go, the employer contacted her and asked her where she was. She then said that she was parked in the Walmart parking lot.

[36] I don't have to decide whether the dismissal was an appropriate measure, but rather whether the Appellant's actions amount to misconduct.

[37] The Appellant was suspended on February 10 and 11, 2021, for using the company bus for personal use. The employer then told her to stop doing this and to wear a protective mask.

[38] On March 3, 2021, the Appellant admitted to the Commission that, on February 10, 2021, the employer told her to wear a protective mask and to stop using the school bus for personal use. But at the hearing, she instead said that the employer had never told her to wear a mask and that she had never seen the memo it allegedly sent to employees. She says that her usual boss in the coach division supported her and felt that she acted appropriately.

[39] However, I am of the view that the Appellant knew that she had to wear a protective mask and that she was warned to stop using the bus for personal use. She was suspended for the latter reason. The employer said that the bus's GPS showed movements and that the Appellant had continued to use the bus for personal trips after hours. The Appellant somewhat admitted to continuing to use the bus in the evening for personal use because she says she didn't always go back home due to the long trip. Despite some conflicting statements, on March 3, 2021, the Appellant admitted to the Commission that the employer had warned her to stop doing this during the week of February 10, 2021.

[40] Concerning the use of a protective mask, I am also of the view that the Appellant knew it was mandatory. To begin with, she was reproached by school staff, and she was seen by the supervisor when she was suspended. She told the Commission that the requirement to wear a mask came [translation] "out of the blue" and that she refused to wear a mask because she was within [translation] "her rights." In addition, on

June 23, 2021, the Appellant told the Commission that the new boss forced her to wear a mask, whereas the previous one didn't require it. The Appellant made conflicting statements about this, but I am satisfied that she was warned she had to wear a protective mask.

[41] I note that the Appellant admitted that the rules had been stricter since the arrival of a new supervisor and, given that she was suspended on February 10 and 11, 2021, I am satisfied that she could have foreseen that she would be let go if she disobeyed the employer's instructions in terms of both wearing a protective mask and using the bus for personal use. Because the new supervisor had warned her during the week of February 10, 2021, the Appellant could presume that there would be consequences if she continued to disobey instructions.

[42] Despite the Appellant's attempts to justify her refusal to wear a protective mask or the fact she didn't wear one properly (under her nose) in different ways, the employer required the use of a mask to ensure the children's safety during the COVID-19 pandemic. [Even though] the Appellant was warned during the week of February 10, 2021, the employer explained that she continued to hug the children, and three complaints were filed with the school board by students' parents. The Appellant disobeyed the employer's instruction about using the school bus after hours. She also disobeyed the instruction about wearing a protective mask, and that is why she was let go on February 24, 2021.

[43] Although the Appellant alleges that some people might have been jealous that she was able to develop close bonds or relationships with the children, what she is being criticized for is failing to wear a protective mask when she was in the school zone and, on top of that, hugging the children without meeting the government's distancing requirements. Failing to wear a protective mask in the school zone is in breach of the instructions established by the employer, which serves young children. To protect the children's health and safety, but also the health and safety of the Appellant and of the school staff members she may have to interact with, the Appellant was required to wear a protective mask properly.

[44] If the Appellant could not wear a protective mask because of a health condition, like claustrophobia or diabetes, she could see a doctor to ask for a medical certificate stating that she is exempt from wearing a mask for medical reasons. The same goes for her health. If the Appellant was feeling depressed, she could see a doctor to assess the option of a medical leave of absence. In fact, the Appellant saw a doctor before her suspension. She didn't get an exemption from wearing a mask and wasn't prescribed a medical leave of absence.

[45] The Appellant also says she read a column from a news outlet stating that you didn't have to wear a protective mask when driving and that it wasn't recommended because your glasses could fog up. So, the employer can impose rules it considers appropriate based on the Appellant's specific position. In this case, the Appellant is responsible for driving young children from an elementary school, and she was told to wear a protective mask in the school zone. The Appellant didn't wear a mask on the bus because plexiglass separated her from the children, but she also didn't wear one outside, near the school, because, according to her, [she] didn't have to. However, distancing is a rule the government imposed and, in her case, the employer demanded that she wear a protective mask in the school zone.

[46] The Appellant herself admits that her work changed because of the pandemic. I understand that the rules changed quickly during the pandemic and that this situation required a lot of adjusting.

[47] However, the Appellant has a duty to obey the rules her employer imposes. The employer told the drivers to wear protective masks to ensure the young children's health and safety. Even though she was still in contact with her supervisor in another division, she knew she had to comply with the demands of the supervisor responsible for school transportation, even though she had accepted the position on a temporary basis.

[48] I heard that the Appellant feels that she was competent as a driver and that she had done a good job for many years, but the employer didn't dismiss her based on that. The Appellant was let go for disobeying instructions related to wearing a protective

mask and using the bus for personal use. The Appellant acted as the employer says she did, and she acted wilfully. These wilful actions on her part amount to misconduct.

[49] In closing, I reiterate that the Appellant told the Commission that, after being warned during the week of February 10, 2021, she had tried to correct the situation. She said that she found these rules too strict and that she refused to wear a protective mask.

[50] I find that the Appellant's actions were wilful and that she was let go because of his [*sic*] misconduct.

So, did the Appellant lose her job because of misconduct?

[51] Based on my findings above, I find that the Appellant lost her job because of misconduct.

Conclusion

[52] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, she is disqualified from receiving EI benefits.

[53] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section