Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *J. D. v Canada Employment Insurance Commission and X*, 2019 SST 51

Tribunal File Number: AD-18-662

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: January 24, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. D. (Claimant), stated that she was dismissed from her employment because she refused to perform certain procedures that the College of Alberta Dental Assistants (College), the regulating body for dental assistants, had not authorized her to perform. The Respondent, the Canada Employment Insurance Commission (Commission), initially accepted that the Claimant had not been dismissed for misconduct under the *Employment Insurance Act* and allowed her claim for Employment Insurance benefits. The employer sought a reconsideration of that decision, arguing that the Claimant was dismissed because she used a HSP in a patient's mouth, on her own initiative—an action that was outside of her scope of practice. As a result of its reconsideration investigation, the Commission changed its decision to find that the Claimant had been dismissed for misconduct. It disqualified the Claimant from receiving benefits. The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She now appeals to the Appeal Division.

[3] The appeal is allowed. The General Division ignored evidence that the Claimant was dismissed for a reason other than that claimed by the employer and rejected contrary evidence in a manner that was perverse or capricious, or without regard for the material before it, or that was without adequate reasons.

[4] I have given the decision that the General Division should have given. The Claimant is not disqualified from receiving benefits because her dismissal was for a reason other than her misconduct.

ISSUES

[5] Did the General Division erroneously find that the Claimant was dismissed for using a high-speed handpiece, without regard for evidence that she was dismissed for another reason?

[6] Did the General Division erroneously find that the Claimant used a high-speed handpiece,

a) without regard for the evidence challenging the witness statement?

b) by drawing unsupported inferences from the Claimant's lack of specific denial and her explanation that she was "only doing a quick bite adjustment"?

ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The grounds of appeal are as follows:

a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

c) The General Division 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.

Issue 1: Did the General Division erroneously find that the Claimant was dismissed for using a high-speed handpiece, without regard for evidence that she was dismissed for another reason?

[9] The General Division stated that there was no evidence to support the Claimant's statement that she was dismissed for having failed to remove a retraction cord.

[10] The Claimant stated in her initial application that she had refused to provide provisional coverage and restoration (PCR) on multiple occasions.[1] She said that she spoke to one of the

[1] GD3-12.

other dentists at the employer, G., on November 16, 2017, and that G told her she was being terminated because she did not remove a retraction cord on November 6, 2017.[2] Removal of a retraction cord is a task considered part of PCR, as defined by the College.[3]

[11] In her first statement to the Commission on April 26, 2018, the Claimant said that she was being terminated because "[t]he doctor stated that [she] had left a retraction cord in a patient's mouth." The employer's complaint letter to the College, dated November 16, 2017, states that the Claimant was using a high-speed handpiece (HSP) but also states that "when the patient [on whom the Claimant is alleged to have used the HSP] returned to have their crown cemented, [G. and B., another clinic employee] both witnessed that the [retraction] cord was left behind in the patient's mouth."[4] The Claimant's dismissal letter is dated the same day as the complaint.

[12] In other words, the Claimant did not simply "claim" that she had been dismissed because of her refusal to perform PCR (including not removing the retraction cord on November 6, 2017). She provided evidence of the basis for her belief. I find that the General Division erred under section 58(1)(c) of the DESD Act when it found that the conduct for which the Claimant was dismissed was her use of a "high-speed device" (the HSP). This finding ignored or misunderstood evidence supportive of the Claimant's assertion that she was dismissed for failing to remove the retraction cord, a PCR task.

Issue 2(a): Did the General Division erroneously find that the Claimant used a high-speed handpiece, without regard for the evidence challenging the witness statement?

[13] The General Division based its finding that the Claimant used a HSP on the basis of the evidence of two witnesses.[5] The witnesses were the employer's human resource representative (HR), and another clinic employee (B.). B. did not testify but HR and B. had signed a joint November 16, 2017, letter confirming that they both witnessed the Claimant using the HSP.[6]

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[2] GD3-14. Also see GD3-51.
[3] GD3-64.
[4] GD3-38.
[5] General Division decision at para 12.
[6] *Supra* note 4.

[14] The Claimant asserted that she was working on the patient with whom she was alleged to have used the HSP, and she provided evidence that the General Division apparently accepted to show that B. was not working in the morning. The evidence included a calendar of appointments and assignments for that day and B.'s time card.

[15] B. did not work in the morning. Such a conclusion is consistent with the documents provided, the employer did not dispute that B did not work in the morning, and B. told the College's investigator (following a complaint that the employer lodged) that she did not start work until 1:00 p.m. that day.[7]

[16] It is not disputed that the Claimant was working with G. on the day that she is alleged to have used the HSP. G. did not testify at the General Division hearing, but she was reportedly asked by the College's investigator (the Investigation) if she recalled when the incident with the HSP occurred. G. said the incident was in the morning. According to the report, this is consistent with the Claimant's prior statement to the Investigation that HR told her to "stop what she was doing" in the morning, which the Claimant then confirmed to the Investigation a second time.[8] The Claimant also testified to the General Division that there was no other assistant in the office at the time of the incident.

[17] If the incident was in the morning, as the Claimant and the dentist with whom she was working both agree, this would mean that B. could not have witnessed it and that the joint statement of HR and B. was not a truthful statement. I note that, in her response to the Claimant's appeal to the General Division, the employer sought to resolve this difficulty by stating that G. was behind schedule and that the schedule does not reflect how the day actually unfolded;[9] the employer claims that the Claimant was still working on the morning appointment patient when B. came in to work and saw the Claimant using the HSP.

[18] However, the General Division did not reach its conclusion with regard to this explanation. Instead, the General Division accepted that both HR and B. witnessed the Claimant using the HSP. The General Division relied on the fact that HR's testimony was corroborated by

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[7] Partial investigation report, GD2-14.
[8] *Ibid*.
[9] GD8-2.

the statement signed by B to the effect that B witnessed the incident despite not being in the office in the morning. This was accepted in preference to the Claimant's testimony that the incident occurred in the morning as corroborated by G's statement to the Investigation. The General Division justified this by stating that there was "no clear evidence to support the dentist's contention that the event happened in the morning," and that "specific memories of events can fade over time."[10]

[19] G. did not appear at the proceedings to either corroborate or to qualify her evidence, but there is no evidence at law that memory is unreliable and no evidence to support the conclusion that G's memory had "faded." Her statement to the Investigation appears to be clear; nothing in her statement suggests that she was uncertain that the incident occurred in the morning at the time that she made the statement.

[20] Nor is there reason to believe her memory would have faded, given the circumstances. The Claimant was dismissed on November 16, 2017, as a result of an incident on November 6, 2017. Therefore, one would not expect that G.'s discussion with the Investigation on November 17, 2017, would be the first time in the 11 days since the incident that she had tried to reconstruct events or recall details, and one would not expect her to be surprised by the Investigation questions.

[21] There is also no reason to require that G.'s corroborative statement be itself *further* corroborated, particularly where G.'s interests are more likely to be aligned with her present employer than with the Claimant. The employer chose to participate in the appeal in opposition to the Claimant and, according to the Investigation, G. appears to have supported the employer's decision to dismiss the Claimant.

[22] I find the General Division's reliance on the truth of the joint statement of HR and B. to determine that certain conduct occurred was perverse or capricious or disregarded the evidence to the contrary and, therefore, constitutes an error under section 58(1)(c) of the DESD Act.

[23] Alternatively, I find that the General Division erred in law under section 58(1)(a) in that its reasons are inadequate to support the disregard for contrary evidence including G.'s

[10] General Division decision, para. 13.

corroboration of the Claimant's testimony that the incident was in the morning, when B. could not have witnessed it.

Issue 2(b): Did the General Division erroneously find that the Claimant used a high-speed handpiece, by drawing unsupported inferences from the Claimant's lack of specific denial and her explanation that she was "only doing a quick bite adjustment"?

[24] While the General Division was of the view that G. was mistaken in recalling that the incident occurred in the morning, it accepted that G. accurately recalled and related that she had questioned the Claimant about whether the Claimant was using the HSP and that the Claimant had responded that she was doing a "a quick bite adjustment." The General Division stated that the Claimant "did not deny" that she was using the HSP and that this implied that she had been using the HSP.[11]

[25] However, HR's testimony to the General Division was that she told the Claimant to put the HSP down and that the Claimant then continued "adjusting" the crown using the slow-speed piece.[12] In an earlier statement to the Commission, HR said that she told the Claimant to stop using the HSP and to use the slow-speed piece instead.[13] This suggests that the Claimant could have done a bite adjustment without using the HSP.

[26] G. reports that she asked if the Claimant used the HSP and that the Claimant responded by telling G. that she was only doing a quick bite adjustment. Another way of looking at it is that the Claimant was asked if she did one thing, and she responded by saying what she was actually doing. Since it may have been possible for the Claimant to do the adjustment on the particular patient without using the HSP, it does not necessarily follow that the Claimant's response was "minimizing her actions"[14] or that her response was an attempt to justify the use of a HSP.

[27] The General Division did not hear testimony of G or have a transcript of the conversation between the Claimant and G. The Claimant has obvious limitations in English, and all that was available to the General Division was. G.'s recollection or paraphrase of one question and one response within what may well have been a broader conversation. In my view, the General

[11] General Division decision at para 13.
[12] Audio recording of General Division hearing at 00:58:05.
[13] GD3-27.
[14] *Supra* note 8.

Division was not in a position to determine whether the Claimant "did not deny using the high-speed hand piece" or whether any lack of specific denial could support an inference that she did use the HSP.

[28] The General Division's finding that the Claimant did not deny using the HSP and its use of this finding to support a conclusion that she did in fact use the HSP was made in a perverse or capricious manner or without regard for the material before it, under section 58(1)(c) of the DESD Act.

CONCLUSION

[29] The Claimant's appeal is allowed.

REMEDY

[30] Having allowed the appeal, I have the authority under section 59 of the DESD Act to give the decision that the General Division should have given; refer the matter back to the General Division for a reconsideration; or confirm, vary, or rescind the decision in whole or in part. The Commission has agreed that the General Division erred, but it suggests that the matter be referred back to the General Division for reconsideration.

[31] However, I find that the record is complete. I will therefore give the decision that the General Division should have given.

[32] The General Division analyzed the issues within the correct legal framework. To find that the Claimant should be disqualified from receiving benefits, it must find that the Claimant committed the alleged offence, that the offence amounts to misconduct, and that the misconduct was the reason for her dismissal.

Did the Claimant commit the alleged offence?

[33] The Claimant's use of the HSP was the stated reason for termination on the Claimant's termination letter of November 16, 2017, and this is also how the General Division characterized the misconduct. There is no suggestion that the Claimant used the HSP in a careless or incompetent fashion: the Claimant was a dentist before coming to Canada[15] and, undoubtedly, has some skill as a dentist. However, she is licenced in Alberta as a dental assistant only, and the use of a HSP in a patient's mouth is outside of her scope of practice.[16] The Claimant did not dispute that she was licenced as a dental assistant only and that she was not authorized to use a HSP.

[34] The factual dispute is about whether the Claimant actually used a HSP in a patient's mouth. To find that the Claimant used the HSP, the General Division relied on the joint statement of HR and B., as well as the fact that the Claimant did not deny using the HSP. However, I have found that the General Division erred in doing this. I accept that the Claimant worked on the patient on whom she is alleged to have used a HSP in the morning while G. was out of the room, based on the Claimant's testimony as corroborated by G.

[35] I appreciate that G.'s statement was offered about two months after the Claimant's dismissal, but her evidence was clear and I cannot presume her memory to be unreliable without evidence, as I have already explained above in paragraphs 19–21.

[36] If I were to presume anything, I might presume that G. would have refreshed her memory in the interval between the incident and when she related the events to the Investigation. I am not finding this as fact, but only to say that G's memory cannot simply be presumed to have added in the circumstances.

[37] One would ordinarily expect that, before dismissing an employee, an employer would investigate the circumstances and have some discussion with anyone that might have information related to the reason for dismissal. The employer filed the complaint to initiate the Investigation immediately following the Claimant's dismissal and, within about two weeks of dismissing the

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[15] GD3-35.
[16] GD3-64 to GD3-65.

Claimant, stated that that it was also engaged in other legal action against the Claimant.[17] Therefore, the entire period from the date of the incident to the time that G. made her statement could be characterized as a period in which legal action was either being taken or anticipated. It is difficult to believe that the Investigation would be the first time that G. had been asked to recall the events of November 6, 2017.

[38] I prefer the evidence of the Claimant as corroborated by G., to that of HR as corroborated by B, because the Claimant and G. are in a better position to recall when they were working on the particular patient. In addition, there is no reason to believe that G.'s support would be partial to the Claimant's position. To the contrary, G. appears to have supported the employer's reasons for dismissing the Claimant.[18]

[39] G. did not say that she had a patient in the morning. She said that the incident itself happened in the morning. The employer has suggested that the morning patient carried over to the afternoon and that the incident happened in the afternoon, when B was present, but this does not explain G's contrary evidence. Therefore, I accept that B. was not in the office on the morning when the Claimant is alleged to have used the HSP, and I will not rely on B.'s statement to corroborate that the incident occurred in the way HR claimed.

[40] Having found the incident to have occurred in the morning, I nonetheless find the Claimant did use the HSP to begin the adjustment of the patient's crown and that she completed it with the low-speed handpiece after she was interrupted by HR, as HR testified.

[41] In the Claimant's testimony, and in answer to HR's questioning, the Claimant denied that HR told her to "put the high-speed hand piece down." However, in describing the incident, the Claimant said only that HR told her to "stop what she was doing," so she recalled that she was doing *something* that HR asked her to stop.[19] However, the Claimant has never explained what she was actually doing at the time or what it was exactly that HR told her to "stop doing," and she has never referred to the incident in any other terms.

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[17] GD3-35.
[18] GD2-14.
[19] GD2-14.

[42] Given that the Claimant is a dentist in another country, I find it plausible that the Claimant would have felt comfortable employing a high-speed handpiece to do a quick bite adjustment. In the absence of some alternative explanation of what it was that she was told to "stop doing," I accept HR's evidence that the Claimant was told to stop using the HSP and that HR discussed this with her on November 6, 2017, at which time the Claimant questioned why she was not allowed to use the HSP when she had been placing retraction cords without certification.

[43] While G. did not witness the Claimant's use of the HSP because she was on a break, I accept the evidence of the Investigation to the extent that it documents that G. had some sort of discussion with the Claimant on the day of the incident about the fact that it was not acceptable for a dental assistant to use a HSP for any reason. According to the Investigation, when G. confirmed that the incident occurred in the morning (which evidence I have accepted), it was in response to a question about the time of day the incident "with the high-speed handpiece" occurred.

[44] For all of these reasons, I find the Claimant did use the HSP as alleged.

Does the use of the HSP amount to misconduct?

[45] To find the Claimant's use of the HSP to be misconduct, I must find as follows:

a) The Claimant used the HSP without authorization intentionally or deliberately;

b) The Claimant's use of the HSP without authorization involved a breach of the Claimant's duty or obligation that she owed to her employer; and

c) The Claimant knew or ought to have known that she could be dismissed as a result.

<u>Did the Claimant use the HSP without authorization, intentionally or deliberately?</u>

[46] Yes. The Claimant used the HSP to work on a crown adjustment on a patient. There was evidence before the General Division to establish that using the HSP was outside her scope of practice as a dental assistant.

[47] The Claimant may have believed that the employer allowed her to perform PCR, for which she also had no authorization, but that has nothing to do with whether she knew her use of the HSP was unauthorized. The Claimant did not deny that she was aware of the scope of practice or that she knew that she was not authorized to use the HSP. Whatever her motivation, her use of the HSP was plainly deliberate and intentional.

By using the HSP, did the Claimant breach a duty or obligation that she owed to her employer?

[48] Yes. The Claimant is a professional dental assistant, subject to a certain scope of practice. The employer might justifiably be concerned that her use of the HSP, which is outside the area of her presumed competence, could potentially expose the clinic to reputational harm, as well as to liability if a patient was harmed.

Did the Claimant know, or should she have known, that she could be dismissed as a result of her use of the HSP?

[49] Yes. I recognize that that the Claimant was likely more qualified than the average dental assistant because of her past training as a dentist and that she may have desired to put those skills to use. I also recognize that she was likely not acting for her own benefit but to improve the productivity of the clinic by taking on tasks reserved for dentists. According to HR, the Claimant was surprised that the employer took issue with her use of the HSP when she understood that she was permitted by the employer to perform PCR. She may have felt that there was little difference between her performance of one unauthorized task and another.

[50] However, regardless of whether she actually knew she could be dismissed, as a professional she ought to have known that there would be significant consequences if she were found to have worked outside her scope of practice, including a real possibility of dismissal. I accept that the use of the HSP involved a significant potential for harm. Regardless of the Claimant's actual competence with the HSP and regardless of whether any patient was ever harmed, the Claimant should have known that she was potentially exposing the clinic to reputational harm and legal liability.

Was the Claimant dismissed for using the HSP?

[51] I have found that the Claimant engaged in certain conduct, and I have found that it amounts to misconduct. The remaining question is whether the Claimant was dismissed for misconduct.

[52] The Claimant states that she was actually dismissed because she was refusing to perform PCR. The Claimant testified that she had been asked to perform PCR,[20] even after November 6, 2017, but that she had refused.[21] The Claimant testified that she had not been asked to place or to remove a retraction cord on November 6, 2017,[22] and she specifically denied that, on November 6, 2017, she had placed the retraction cord[23] on that was not removed from a patient's mouth as it should have been. However, she did not specifically deny that she was performing PCR before November 6, 2017.

[53] The Claimant said that "[removing the cord] is not her responsibility."[24] When asked her representative if she had ever been asked to perform PCR by another named dentist in the clinic, she said that she had,[25] and the also said that she had asked a staff team lead, R., to perform PCR in her place, and that R. had agreed.[26] The Claimant did not say that she asked R. to perform every PCR task given to her or that R. had agreed to take on every one of her PCR tasks.

[54] The employer denied that it ever asked the Claimant to perform PCR on the basis that it "would not make sense" for patient liability reasons.[27] At the hearing, HR stated again that "nobody told the Claimant to do PCR,"[28] although she did acknowledge that the Claimant had done PCR in their office. HR stated that the employer had not been aware that the Claimant did not have her PCR endorsement[29] until after the Claimant told them (during a discussion that followed the November 6, 2017, incident).

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[20] Audio recording of General Division hearing at 00:30:55.
[21] Audio recording of General Division hearing at 00:31:35.
[22] Audio recording of General Division hearing at 00:09:45.
[23] Audio recording of General Division hearing at 00:26:20.
[24] GD3-51.
[25] Audio recording of General Division hearing at 00:38:00.
[26] Audio recording of General Division hearing at 00:37:00.
[27] GD3-27.
[28] Audio recording of General Division hearing at 00:59:50.
[29] Audio recording of General Division hearing at 01:00:30.

[55] HR did not explain why the Claimant would have been performing PCR if the employer never asked or required her to do so. In addition, the employer never explained why it would have had a liability concern with the Claimant performing PCR, if it did not know that the Claimant was not approved to perform PCR.

[56] As I understand it, the employer's evidence is that it did not know the Claimant was not authorized to perform PCR and that it would not ask her to perform PCR because she was unauthorized. However, both cannot be correct at the same time.

[57] I prefer the Claimant's evidence that she was required by the employer to perform PCR. The Claimant testified that she had discussed the limits of her practice with the employer when she was hired and that she had provided a copy of her credentials. According to the evidence, some dental assistants are qualified to perform PCR,[30] and the employer testified to some surprise to learn on November 6, 2017, that the Claimant was not qualified to perform PCR. This seems to be consistent with the employer's follow-up call to the College to confirm the Claimant's credentials.

[58] The College's investigation report confirms that the Claimant did not have PCR credentials on November 6, 2017. This report also states that the Claimant completed the PCR training only in January 2018. Removal of a retraction cord is a task that is considered part of PCR, as defined by the College.[31] This evidence supports the Claimant's assertion that she was not authorized to perform PCR, as the employer has also acknowledged.[32]

[59] It is possible that the employer just assumed that the Claimant was a dental assistant authorized to perform PCR without consulting their records. Regardless of whether the employer somehow mistook the Claimant's practice limitations or whether it disregarded them, I accept that the Claimant reasonably believed the employer to be aware of her credentials and that she believed the employer required her to perform PCR. regardless of the fact that she was not authorized to do so.

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[30] GD3-39 and GD2-8.
[31] GD3-64.
[32] GD3-27.

[60] Having required the Claimant to perform PCR, I find that the employer dismissed her because it discovered that she was not authorized to perform PCR and because it became concerned about its potential liability.

[61] HR testified that PCR had nothing to do with the Claimant's dismissal. However, according to HR's testimony, she did not call the College about the Claimant's use of the HSP. HR called CADA when she learned from the Claimant that the Claimant was not authorized to perform PCR, and HR testified that she then verified that the Claimant did not have PCR credentials.

[62] I also note that the Claimant was not dismissed until November 16, 2017, ten days after the November 6, 2017, incident involving the HSP, even though HR described her use of the HSP on a patient as "dangerous." In the meantime, G.'s November 6, 2017, patient on whom the Claimant had assisted G, returned to the clinic, and the clinic discovered that the retraction cord had not been removed as required.

[63] G. did not testify or provide a statement, and no other representative of the employer provided evidence, to refute the Claimant's assertion that she discussed the reasons for her dismissal with G. or that G. had justified her dismissal on the basis that she did not remove the retraction cord on November 6, 2017.

[64] The Claimant's use of the HSP was the incident that focused the employer's attention on its exposure to liability from the Claimant's lack of PCR authorization. However, I cannot find that the Commission has established, on a balance of probabilities, that the Claimant's use of the HSP was the reason the Claimant was dismissed.

[65] I find it more likely that the Claimant was dismissed because the clinic recognized that it had allowed the Claimant to perform PCR without authorization and that it could not continue to have her perform PCR. I accept the Claimant's evidence that G. explained her dismissal in terms of her failure to remove the retraction cord from the November 6, 2017, patient. The fact that G had expected her to remove the cord and she had not, likely reinforced the employer's concerns, and resulted in the Claimant's dismissal.

[66] I accept that the Claimant performed PCR on behalf of her employer and that she was not authorized as a dental assistant to do so. However, I find that she had informed the employer of her limitations and that the employer had still expected her to perform PCR. Therefore, the Claimant did not know, nor should she have known, that the employer would dismiss her for performing PCR.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
Submissions:	Shaoli Wang, Representative for the Appellant S. Prud'Homme, Representative for the Respondent