

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170425

Docket: A-340-16

Citation: 2017 FCA 82

**CORAM: DAWSON J.A.
WEBB J.A.
RENNIE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

LAURA LAVITA

Respondent

Heard at Toronto, Ontario, on April 24, 2017.

Judgment delivered at Toronto, Ontario, on April 25, 2017.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**WEBB J.A.
RENNIE J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] A single issue is raised on this application for judicial review: was it unreasonable for the Appeal Division of the Social Security Tribunal of Canada to conclude, as a matter of fact, that the respondent was available for work within the meaning of paragraph 18(1)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[2] This issue arises in the following context:

- i. The respondent was employed by the Toronto-Dominion Bank until October 24, 2013, when she took a personal, unpaid leave of absence in order to provide primary care and support to her elderly parents.
- ii. The written agreement between the Toronto-Dominion Bank and the respondent which governed the conditions of the respondent's leave of absence provided that during her period of leave she would continue to accumulate service with the Bank and would continue to receive company benefits. The agreement further provided that the intended purpose of the Bank's leave policy was to provide employees with time away from the workplace in order to address a variety of personal needs. Accordingly, "earning income from other sources over the period of the Leave is not permitted."
- iii. Once the respondent made suitable arrangements for the care of her parents, she began applying for jobs within the Bank. However, the respondent was not successful in securing a position. Before the Appeal Division, the Commission did not contest the respondent's position that she made every effort to return to work in a position at the Bank.
- iv. The respondent's leave of absence ended when her employment was terminated.

- v. Thereafter, the respondent applied for employment insurance benefits. Her claim was antedated so that her benefit period was established effective to October 27, 2013.

- vi. The Employment Insurance Commission rejected the application for benefits on the basis that the respondent had not proven that she was available for work during her benefit period as required by paragraph 18(1)(a) of the Act.

- vii. The General Division of the Social Security Tribunal concluded that the respondent was entitled to benefits.

- viii. This decision was confirmed on appeal by the Appeal Division.

[3] A claimant who establishes just cause to leave their employment and who complies with all of the requirements found in the Act is qualified to receive employment insurance benefits. However, a claimant remains under the obligation imposed by paragraph 18(1)(a) of the Act to be “capable of and available for work”.

[4] On this application for judicial review the Attorney General argues that by limiting her job search to one employer, the Bank, the respondent imposed a personal condition on her job search that unduly limited her chances of returning to the labour market.

[5] I begin my analysis with the observation that the question of a claimant's availability for work is in every case a question of fact.

[6] The Act does not define "availability". Thus, in *Canada (Attorney General) v. Whiffen* (1994), 165 N.R. 145, 113 D.L.R. (4th) 600, this Court wrote that availability "is usually described, in the case law, either as a sincere desire to work demonstrated by attitude and conduct and accompanied by reasonable efforts to find a job, or as a willingness to reintegrate into the labour force under normal conditions without unduly limiting one's chances of obtaining employment." Thus, a claimant who imposes unreasonable restrictions regarding the type of work he or she seeks is not available for work.

[7] Subsequently, in *Faucher v. Canada (Employment and Immigration Commission)* (1997), 215 N.R. 314, 147 D.L.R. (4th) 574 this Court wrote that "availability must be determined by analyzing three factors – the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market".

[8] In the present case, the Appeal Division accepted that:

- i. The respondent applied for "any and all jobs within the organization in addition to seeking out other possible positions through her extensive network of co-workers".
- ii. The respondent pursued more than 10 possible positions with the Bank in a one-year period.

- iii. The respondent did everything she could to look for work within the Bank. Once her employment with the Bank was terminated she expanded her job search to other potential employers.

[9] Based on these factual findings the Appeal Division concluded that by limiting her job search to positions within the Bank, a large corporate employer, the respondent did not unduly limit her chance of returning to the labour market so as to be unavailable. While it may well have been open to the Appeal Division to reach another conclusion, I have not been persuaded that on the facts before it the Appeal Division reached an unreasonable conclusion. The question of availability is a question of fact and the findings made in this case are entitled to significant deference.

[10] It follows that I would dismiss the application for judicial review.

“Eleanor R. Dawson”

J.A.

“I agree
Wyman W. Webb J.A.”

“I agree
Donald J. Rennie J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CANADA v.
LAURA LAVITA

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REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
RENNIE J.A.

DATED: APRIL 25, 2017

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