



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. F. v Canada Employment Insurance Commission*, 2019 SST 1654

Tribunal File Number: GE-19-3701

BETWEEN:

T. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Paul Dusome

HEARD ON: November 26, 2019

DATE OF DECISION: December 12, 2019

DECISION

[1] The Claimant has shown that he was available for work. This means that he is not disentitled from being paid benefits.

OVERVIEW

[2] Claimants have to be available for work to be paid regular employment insurance (EI) benefits. Availability is an ongoing requirement; claimants have to be searching for a suitable job. The Commission decided that the Claimant was disentitled from being paid EI benefits from the beginning, June 3, 2019, because he was not available for work.

[3] I must decide whether the Claimant has proven¹ that he was available for work. The Commission says that the Claimant, a Roman Catholic priest, was not available because he could not return to the previous employer. It also said that he was restricted from seeking employers outside his religious order. He therefore had declared himself unavailable for work. In addition, the Claimant had not provided evidence that he was making active and sustained efforts to find suitable employment. The Claimant disagrees and states that the bishop in his diocese had wrongfully suspended him. Then the Bishop stopped paying his salary. The church does not provide him with housing, so he is paying all his own personal expenses. He has been an ordained priest for 26 years. That is his life's work. He does not want to give up his status as a priest. Under church law, he must obtain permission from the bishop to take employment with a secular employer, or he will lose his status. The bishop will not give him permission, or assign him a clerical position. The Commission's position requires that he choose between giving up his status as a priest, or giving up EI benefits.

[4] In this unusual situation, the issue arises of what is suitable employment for the Claimant in his circumstances. Does his status as a priest, his religious beliefs, and church law have an impact on the outcome of this appeal? Has he placed undue restrictions on his job search? Has he proven that he is making reasonable and customary efforts to find a suitable job?

¹ The Claimant has to prove this on a balance of probabilities, which means it is more likely than not.

PRELIMINARY MATTERS

[5] The facts and issues in this case raise the possibility of a challenge under the *Canadian Charter of Rights and Freedoms* to the interpretation and application of the employment insurance legislation. The Claimant has been told of the Tribunal's process to deal with a Charter challenge. The process would involve delay, as the federal government must be notified of the challenge, and the case must be assigned to a designated Tribunal member. Extensive documentation is needed to proceed with the challenge. The Claimant would be best served by having legal representation to handle the challenge. For reasons of delay and cost, the Claimant elected to proceed with the appeal as it is, rather than proceed with a Charter challenge.

[6] The Claimant submitted post-hearing documents. The Tribunal sent copies to the Commission on November 28, 2019, with a deadline of December 10, 2019, to respond to those documents. The Commission submitted no response up to the release of this decision.

ISSUE

[7] Was the Claimant available for work?

ANALYSIS

Reasonable and customary efforts to find a suitable job

[8] Two different sections of the law require claimants to show that they are available for work;² the Commission disentitled the Claimant from being paid benefits under both. In making its decision, the Commission did not consider the issue of what is a suitable employment in the Claimant's circumstances. I will first consider that issue, and then consider whether the Claimant has proven that his efforts to find such employment are reasonable and customary.³

² Subsection 50(8) provides that, for the purpose of proving that a claimant is available for work and unable to obtain suitable employment, the Commission may require the claimant to prove that he or she is making reasonable and customary efforts to obtain suitable employment. Paragraph 18(1)(a) of the *Employment Insurance Act* provides that a claimant is not entitled to be paid benefits for a working day in a benefit period for which he or she fails to prove that on that day he or she was capable of and available for work and unable to obtain suitable employment.

³ Subsection 50(8) of the *Employment Insurance Act*.

What is a suitable job in this situation?

[9] The law sets out criteria for me to consider when deciding what is a suitable employment. Suitable employment is defined in part in the *Employment Insurance Act* with reference to the personal circumstances of the claimant⁴. Since the decision in *Whiffen*, Parliament amended the Act to add explicit criteria for determining what constitutes suitable employment. The relevant criterion in this case is that the nature of the work is not contrary to the claimant's moral convictions or religious beliefs⁵.

[10] Employment (excluding self-employment) outside the Church without the permission of the Bishop is not suitable employment for the Claimant. Such employment would be contrary to his religious beliefs.

[11] The Claimant has been involved in the Roman Catholic Church ministry for 35 years. He has been a member of the clergy for 27 years, and has been an ordained Roman Catholic priest for 26 years. He is a secular diocesan priest, rather than a member of a religious order. This has been his life's calling, which he wishes to continue. He has worked with the Diocese of X since 1992. He has worked in Church-related roles for charitable organizations, such as the Sudbury General Hospital, and then at the Canadian Conference of Catholic Bishops in Ottawa from 2013 to 2018. He needed and obtained the previous Bishop's permission to work with the Conference. He then returned to work with the Diocese on September 1, 2018. The Diocese issued a Record of Employment (ROE) showing a last day paid of May 17, 2019. The reason given was "Non compliance (disobedience) to the employer (Bishop) frustrating the employment contract."

[12] When the Claimant returned to work with the Diocese in September 2018, there was a new bishop (Bishop A) who did not know him. In May 2018, Bishop A assigned the Claimant to work in Sudbury starting on September 1, 2018. A month prior to the start date for that assignment, Bishop A rescinded the appointment, with no reasons given. He did not assign the Claimant to any other work, but continued his pay. Bishop A demanded that the Claimant attend

⁴ *Canada (Attorney General) v. Whiffen*, A-1472-92.

⁵ Paragraph 9.002(1)(c) of the *Employment Insurance Regulations*.

a treatment centre to deal with a complaint that he was “toxic, angry and threatening”. Bishop A refused to disclose any information about the complaint, or the process to be followed. In August 2018, Bishop A made a number of public false or misleading statements about the Claimant on electronic media, in widely circulated letters and in person. He spoke in person to members of the parish to which the Claimant’s appointment had been cancelled. The Claimant had worked in that parish in the past, so was known to the parishioners. A canon lawyer wrote to the Bishop in October 2018 at the Claimant’s request. Among other matters, she stated that the Claimant had the right to see any documentation that led to the Bishop’s decision. The Bishop did not respond to the letter and has not allowed the Claimant to see any documents relating to his decision. Bishop A did in November 2018 permit another priest to verbally tell the Claimant about the 25-year-old allegations that the Claimant was “toxic, angry and threatening” by a complainant who had worked in the diocese. The complainant had been disciplined by the diocese for work-related issues. The Claimant had not been disciplined respecting the complainant’s allegations. Bishop A accepted the complaint at face value, without investigation. The Claimant obtained a medical opinion to contradict the complainant’s allegation that he was “toxic, angry and threatening”. He gave Bishop A a copy of a summary of that opinion in early April 2019. In late April, Bishop A issued a precept demanding a copy of the full report, with no restrictions on who could see the report, or where it might be distributed. The precept also ended the Claimant’s remuneration, with no reasons given. The Claimant filed a complaint with the Ontario Human Rights Tribunal. He also appealed in June 2019 to the Congregation for the Clergy in Rome against the actions of Bishop A. The Congregation ordered Bishop A to rescind his April 2019 precept. He did so on October 1, 2019. On the same day, he wrote to the Claimant to confirm rescinding the precept. He further stated, “I cannot continue to provide you with remuneration that is reserved for those who assume an ecclesiastical office.” Bishop A is continuing to enforce part of the precept he just rescinded, and justifies it on the basis that the Claimant does not have an ecclesiastical office. Bishop A decides whether the Claimant will have an ecclesiastical office. The Bishop added that the diocese would provide \$1000.00 per month as “a reasonable and just sustenance in accordance with diocesan policy”. He also added that he remained open to meeting to discuss appropriate actions to resolve their differences. It is not necessary to relate more of the details of the disagreement between the Claimant and Bishop A. The above background information is relevant to assessing the issue of suitable employment.

[13] The Claimant now finds himself in the position of having to wait for Bishop A to give him an assignment within the diocese, or permission to move to another diocese, or permission to take employment outside the Church. From the Bishop's letter to the Claimant dated October 1, 2019, these options are on hold indefinitely. It has been more than one year since the cancellation of the Claimant's assignment. The Claimant remains a priest in good standing, willing and able to fulfill all the duties of his office. He only lacks an assignment or permission, which leaves him at the mercy of Bishop A. The other options would be to take secular employment without Bishop A's permission, and face dismissal from the clergy, or to leave the clergy of his own accord.

[14] The Claimant testified that Church law prohibits priests from engaging in employment outside the Church without the permission of their Bishop. The Canons submitted by the Claimant do not expressly say this. However, the Canons do support that statement. They provide a number of defined activities that clerics are not allowed to engage in, or to engage in only with the approval of ecclesiastical authority. These include public office, business or trade, or offices entailing an obligation to render accounts. The Canons also provide that the primary focus of the cleric is on faithfully and tirelessly fulfilling the duties of a pastoral ministry. The Claimant is therefore not free to take any outside employment unless he gets Bishop A's permission. The Claimant testified that this prohibition has been interpreted as not applying to self-employment, so that he can take work with Uber without risking his status in the Church. But that interpretation is not certain. The Claimant testified that if he takes outside employment without the bishop's permission, he could be dismissed. One of the Canons submitted by the Claimant covers dismissal by administrative decree, and other methods. Once dismissed, it is very difficult to be readmitted to the priesthood. A Canon submitted by the Claimant allows readmission of a cleric only through a rescript from the Holy See. The other option for engaging in employment would be to leave the clergy. The Claimant is not willing to give up his life's work.

[15] The test in this case for determining what is suitable work is that "the nature of the work is not contrary to the claimant's moral convictions or religious beliefs." Requiring the Claimant to take outside employment (as opposed to self-employment) without the Bishop's permission, with possible dismissal from the priesthood, would be contrary to his religious beliefs. He has

been a Roman Catholic priest for 26 years. He remains in good standing, ready to return to his work as a priest as soon as the Bishop gives him an assignment. Unlike an ordinary employee, he cannot transfer to another branch of the current employer without Bishop A's permission. Being a priest is his vocation and his calling. He wants to continue in this work. The Canon says that clerics "are bound in a special way to pursue holiness", and "they are the dispensers of the mysteries of God in the service of His people." In pursuit of this perfection (as the Canon phrases it), "they are first of all to fulfill faithfully and tirelessly the duties of the pastoral ministry." The Claimant's religious beliefs include his status as a priest as a dispenser of the mysteries of God, and his role as a priest in carrying out the pastoral ministry. Requiring him to take employment outside that approved by the Bishop would be contrary to his religious beliefs. It would put him at risk of him being dismissed, and losing his status as a priest. Bishop A's actions to date support an inference that he would dismiss the Claimant if the opportunity arose. As a result, any employment not approved by the Bishop is not suitable employment for the Claimant in these circumstances. This result is not based on a solely subjective view of the circumstances from the Claimant's perspective. The result is also objective, in that other Roman Catholic priests dealing with a similar situation, and subject to the Canons of the Church as reviewed above, would find themselves subject to the same constraints respecting suitable employment. They too would come under the limitation on suitable employment, that the nature of the work is not contrary to the claimant's moral convictions or religious beliefs. These considerations also distinguish this situation from the usual case in which a claimant is free to take up a variety of occupations, but limits himself to a narrower range of jobs than what is suitable employment in the circumstances.

Were the Claimant's efforts reasonable and customary?

[16] The law also sets out criteria for me to consider when deciding whether the Claimant's efforts were reasonable and customary.⁶ The requirements of section 9.001 of the *Employment Insurance Regulations* must be read together with subsection 50(8) and paragraph 18(1)(b) of the *Employment Insurance Act*⁷. All of those provisions speak of suitable employment. "Suitable employment" is the governing factor in each of those provisions. I have to look at whether his

⁶ Section 9.001 of the *Employment Insurance Regulations*.

⁷ *M.R. v. Canada Employment Insurance Commission*, 2015 SSTAD 1270.

efforts were sustained and whether they were directed toward finding a suitable job. I also have to consider the Claimant's efforts in the following job-search activities: assessing employment opportunities, preparing a resume or cover letter, registering for job search tools or with online job banks or employment agencies, attending job search workshops or job fairs, networking, contacting employers who may be hiring, submitting job applications, attending interviews and undergoing evaluations of competencies. However, those activities have to be considered in the context of suitable employment.

[17] The Commission says that the Claimant did not do enough to try to find a job. The Claimant disagrees. He says that the efforts he was making were enough to prove that he was available for work. I find that, once the matter of what is suitable employment for the Claimant is taken into account, the Claimant has shown himself to be making reasonable and customary efforts to find suitable employment.

[18] The first criterion in assessing whether efforts are reasonable and customary is whether the efforts are sustained. The Claimant's efforts have been sustained, within the confines of suitable employment for him. He has been attempting to resolve the issues with Bishop A since August 2018, when the Bishop cancelled his assignment and has refused since then to give him any further assignments or permission to work in employment outside the Church. The Claimant's attempts to resolve the issues are aimed at obtaining suitable employment by obtaining an assignment or permission from the Bishop. The Claimant tried unsuccessfully to resolve the issues directly with the Bishop. He then filed a complaint with the Ontario Human Rights Tribunal, and filed an appeal to the Congregation for the Clergy in Rome. That appeal resulted in an order from Rome to Bishop A to reverse his precept. The Bishop reversed his demand for a psychological report, but did not restore the Claimant's remuneration. Instead, he provided a smaller living allowance. It is clear from the Bishop's letter to the Claimant on October 1, 2019, that the Bishop continues to refuse to give further assignments or permission to work elsewhere. The Claimant's efforts continue.

[19] The Claimant has also made sustained efforts to obtain suitable work through his efforts with Uber. The work with Uber is self-employment. Such work is consistent with a Canon submitted by the Claimant, that some practice of common life is highly recommended to clerics.

Self-employment is suitable work, as found above. The Claimant is not an employee of Uber. He is an independent contractor. He has been driving for Uber since September 2018. He increased to driving full-time since May 2019, when the Bishop ended his remuneration. This position requires him to be in contact with Uber on every workday to seek and to take work. That alone shows sustained efforts not only to seek suitable work, but also to obtain it on a daily basis.

[20] The second criterion in assessing whether efforts are reasonable and customary is whether the claimant's efforts to obtain suitable employment have been directed at a list of specific activities in paragraph 9.001(b) of the *Employment Insurance Regulations*. The Claimant does not meet this criterion on its express terms, with one exception. However, he does satisfy the criterion, for the reasons outlined below. The Claimant testified that he has not done the activities on that list in relation to finding employment outside the Church. What he has done is attempt to resolve the issue with Bishop A, so that he may have employment within the Church, or outside with the Bishop's permission. Those efforts have not succeeded to date. He has also worked as an Uber driver since September 2018, shifting to full-time work in May 2019 when his Church pay ended. The work requires him to be in contact with Uber on a regular basis to seek and to take work. These efforts do not fall under any of the express terms set out in the subparagraphs in paragraph 9.001(b) of the *Employment Insurance Regulations*. The exception is subparagraph (i), "assessing employment opportunities". The Claimant's daily contact with Uber for work can be considered as assessing employment opportunities. In light of the particular circumstances of this case, the limits on suitable employment for the Claimant set out in the *Employment Insurance Regulations*, and the language of section 9.001 focusing on efforts to obtain suitable employment, the list of activities as set out does not apply to the Claimant's situation, as he cannot be looking for the traditional employment these activities target, without violating his religious beliefs. This conclusion applies to both reasonable and customary efforts.

[21] This conclusion is supported by the *Canadian Bill of Rights*⁸. That law recognizes that there exist various human rights and fundamental freedoms, such as freedom of religion. These rights and freedoms do not allow discrimination by reason of race, national origin, colour,

⁸ *Canadian Bill of Rights*, S.C. 1960, c. 44, sections 1 and 2.

religion or sex. Unlike the *Canadian Charter of Rights and Freedoms*, the *Canadian Bill of Rights* applies only to federal legislation. It requires that those laws be interpreted so as not to discriminate on the above grounds. The rule for interpreting federal law is set out in section 2:

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular...

The application of the requirements of paragraph 9.001(b) to the Claimant would authorize the abridgment or infringement of his freedom of religion by requiring him to participate in the activities with respect to obtaining regular employment outside the Church, and to take a job that was offered. The EI legislation must therefore be interpreted to reduce those requirements relating to reasonable and customary efforts to a level that the Claimant can meet within the ambit of suitable employment for him in his circumstances.

[22] The third criterion in assessing whether efforts are reasonable and customary is whether they are directed at obtaining suitable employment. The Claimant meets this criterion. Suitable employment in this case is employment within the Church, or outside with Bishop A's permission, or self-employment. The Claimant is pursuing these options by his attempts to resolve the issues with Bishop A, and by his self-employment work with Uber.

[23] As a result of these findings, the Claimant is not disentitled to EI benefits under subsection 50(8) of the *Employment Insurance Act*.

[24] The Claimant has proven that his efforts to find a job were reasonable and customary, given the very unusual circumstances in this case.

Capable of and available for work and unable to find suitable employment

[25] I must also consider whether the Claimant has proven that he is capable of and available for work and unable to find suitable employment.⁹ The Claimant has to prove three things to show he was available under this section:

1. A desire to return to the labour market as soon as a suitable job is available

⁹ Paragraph 18(1)(a) of the *Employment Insurance Act*.

2. That desire expressed through efforts to find a suitable job
3. No personal conditions that might have unduly limited his chances of returning to the labour market¹⁰.

[26] I have to consider each of these factors to decide the question of availability,¹¹ looking at the attitude and conduct of the Claimant.¹²

Did the Claimant have a desire to return to the labour market as soon as a suitable job is available?

[27] The Claimant has shown a desire to return to the labour market as soon as a suitable job is available. He testified that he would return to work as a priest as soon as possible when the Bishop clears him to do that work. That testimony is confirmed by his dealing with Bishop A, both directly, and by appeal to outside authorities, to be able to get a clerical job. His desire to return to the labour market is also shown by his taking, expanding and keeping work with Uber.

Has the Claimant made efforts to find a suitable job?

[28] The Claimant has made enough efforts to find a suitable job. Those efforts to find a new suitable job included his efforts in dealing with Bishop A, and his work for Uber. These efforts were enough to meet the requirements of this second factor because there was little the Claimant could do beyond those efforts. He could not pursue regular employment outside the Church without risking his status as a priest, and violating his religious beliefs. He was occupied full-time with self-employment with Uber. It would be unreasonable to require the Claimant to pursue other self-employment.

Did the Claimant set personal conditions that might have unduly limited his chances of returning to the labour market?

[29] The Claimant did not set personal conditions that might have unduly limited his chances of returning to the labour market. I find that the restrictions in this case on what is suitable

¹⁰ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹¹ *Faucher v Canada Employment and Immigration Commission*, A-56-96 and A-57-96.

¹² *Canada (Attorney General v Whiffen)*, A-1472-92 and *Carpentier v The Attorney General of Canada*, A-474-97.

employment are not personal conditions within the meaning of this factor. Generally, unreasonable restrictions imposed by a claimant regarding things such as type of work, desired salary or geographical area of work, are personal conditions that show that the person is not available. It is not an unreasonable restriction for the Claimant to limit himself to the narrow suitable employment as found above, when not so limiting himself carries the risk of loss of his status as a priest, and violates his religious beliefs. He has further proven that he is not setting personal conditions or unreasonable restrictions on seeking suitable work by taking and maintaining self-employment with Uber.

[30] The Commission, in its conversation with the Claimant on September 23, 2019, advised him “that generally, if a claimant cannot continue work in their profession due to losing certification/licence/permit, they cannot prove their availability unless they can prove that they are seeking employment in other fields for which they are qualified.” This statement is in error in two respects. First, it is wrong in fact. The Claimant did not lose his “certification/licence/permit”. He has full status as a priest, and remains in good standing. The only barrier to working as a priest, or outside the Church, is Bishop A, who will not give him an assignment of clerical work or permission to work outside the Church. Secondly, the statement shows that the Commission failed to consider the issue of suitable employment for the Claimant, specifically, whether employment outside his field was contrary to his moral convictions or religious beliefs.

[31] The Commission also relied on a court decision in support of its position respecting personal conditions that might unduly limit return to the labour market¹³. The decision notes that availability is an objective question, and whether a claimant is sufficiently available for suitable employment “cannot depend upon the particular reasons for the restrictions on availability, however these may evoke sympathetic concern.” The problem with reliance on this court decision is that the Commission did not consider the issue of what was suitable employment in this case. It referred to suitable employment, and reproduced section 9.002(1) of the *Employment Insurance Regulations* in its Representations. That section of the Regulations was enacted in 2012, after the court decision relied on by the Commission. That section modifies the

¹³ *Canada (Attorney General) v. Gagnon*, 2005 FCA 321.

broad statement from the court decision. The Commission did not assess the Claimant's circumstances under that section of the Regulations, despite being aware of his circumstances. It characterized the matter as the Claimant choosing to "outline the substance of his complaint against his employer and demonstrated that his efforts are focused on re-entering the ministry; from which [he] seems barred for the foreseeable future.", and dismissed that as irrelevant to the question of availability. It simply assumed that the Claimant was free to take any employment, without addressing the issue of suitability. As discussed above, in this situation, the Claimant's status as a priest in good standing together with his religious beliefs and paragraph 9.002(1)(c) of the Regulations restrict what is suitable employment in this case. That restriction does not amount to a personal condition or restriction under the third heading considered here. That conclusion is also supported by the *Canadian Bill of Rights*, as discussed above.

[32] Considering my findings on each of the three factors together, I find that the Claimant did show that he was capable of and available for work and unable to find suitable employment.¹⁴

CONCLUSION

[33] I find that the Claimant is not disentitled from receiving benefits. This means the appeal is allowed.

Paul Dusome

Member, General Division - Employment Insurance Section

HEARD ON:	November 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	T. F., Appellant

¹⁴ Paragraph 18(1)(a) of the *Employment Insurance Act*.