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

Citation: *Canada Employment Insurance Commission v T. F.*, 2020 SST 479

Tribunal File Number: AD-20-12

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

T. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: June 8, 2020

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Respondent, T. F. (Claimant), is a Catholic priest. As a result of a dispute with his Bishop, he lost his position but he remains a Catholic priest. The Claimant applied for Employment Insurance benefits but the Appellant, the Canada Employment Insurance Commission (Commission), determined that he was ineligible for benefits because he was not available for work. It maintained this decision when the Claimant asked it to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which allowed his appeal. The General Division found that the Claimant was available for suitable employment. The Commission now appeals the General Division decision to the Appeal Division.

[4] The appeal is dismissed. The General Division did not make an error of law when it found that the Claimant was available for work and unable to find suitable employment.

WHAT GROUNDS CAN I CONSIDER FOR THE APPEAL?

[5] "Grounds of appeal" are the reasons for the appeal. To allow the appeal, I must find that the General Division made one of these types of errors:[1]

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[1] This is a plain-language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUES

[6] Did the General Division make an error of law when it applied section 9.001 of the *Employment Insurance Regulations* to find that the Claimant's efforts to find employment were not reasonable and customary?

[7] Did the General Division make an error of law when it found that employment outside the Catholic Church (called "outside employment") would not be suitable because it would be contrary to the Claimant's moral convictions or religious beliefs?

[8] Did the General Division make an error of law in how it applied the legal test from *Faucher v Canada (Attorney General)*[2], to interpret availability for work under section 18(1)(a) of the *Employment Insurance Act*?

ANALYSIS

[9] The *Employment Insurance Act* (EI Act) states that claimants are not entitled to be paid benefits for any working day in a benefit period on which they fail to prove that they are capable of and available for work and unable to find suitable employment.[3]

Reasonable and customary efforts

[10] The EI Act also says that the Commission may require a claimant to prove his or her availability through reasonable and customary efforts to obtain suitable employment.[4] Those efforts are described in section 9.001 of the *Employment Insurance Regulations* (Regulations).[5] Where the Commission requires a claimant to prove availability for work in this way and the claimant fails to comply, the claimant is not entitled to benefits.[6]

[11] The General Division considered whether the Claimant had proven that his efforts were "reasonable and customary". It found that he had, based on the limited availability of opportunities that the General Division considered suitable. It said this:

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[2] *Faucher v Canada (Attorney General,* A-57-96.
[3] Section 18(1)(a), EI Act.
[4] Section 50(8), EI Act.
[5] Section 9.001, Regulations.
[6] Section 50(1), EI Act.

> […] 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 [in s.9.001] 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." [7]

[12] The Commission argued that the General Division made an error of law because it did not evaluate the Claimant's job search effort against the "reasonable and customary" criteria described in section 9.001 of the Regulations.

[13] In my view, the General Division's analysis of whether the Claimant made reasonable and customary efforts was not necessary to its decision. The Commission had not exercised its discretion under section 50(8) of the EI Act to require the Claimant to prove his efforts were reasonable and customary and it did not decide to disentitle him under section 50(1).

[14] Section 9.001 of the EI Regulations outlines what it terms, "reasonable and customary efforts", but states that these criteria are "for the purposes of section 50(8) of the EI Act." Section 50(8) is discretionary. In the ordinary course, the Commission assesses a claimant's availability based on his or her declaration in the regular claim reports. In this case, the Commission also questioned the Claimant about what he was doing to find work. However, there is no evidence that it asked the Claimant to prove that he had made reasonable and customary efforts, or questioned him about any of the things set out in the section 9.001 criteria.

[15] Where the Commission requires a claimant to prove that he or she has made reasonable and customary efforts and the claimant fails to comply, the Commission must disentitle the claimant under section 50(1) of the EI Act until he fulfills the Commission's requirements. In this case, the Claimant was not disentitled under section 50(1) for failing to prove reasonable and customary efforts. He was disentitled under section 18(1)(a) of the EI Act because he was not "capable of and available for work and unable to find suitable employment."[8]

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[7] General Division decision, para 20.
[8] GD3-16.

[16] Neither section 18(1)(a) of the EI Act, nor the legal test that is used to interpret availability under section 18(1)(a), specifies that a Claimant's job efforts must meet the "reasonable and customary" criteria." Section 18(1)(a) states that a claimant must be capable of and available for work and unable to obtain suitable employment. The legal test for availability is expressed in the Federal Court of Appeal decision of *Faucher v Canada (Attorney General)*.[9] In *Faucher*, the Court identified three relevant factors that must be considered in applying section 18(1)(a). One of these factors concerns a claimant's job search. It says that the Commission must consider whether a claimant has expressed his or her desire to return to work as soon as possible through efforts to find a suitable job.

[17] Section 50(8) of the EI Act is inapplicable on the facts of this case. The General Division is free to consider whether the Claimant has engaged in the activities described in section 9.001 of the Regulations for the purpose of assessing whether the Clamant made efforts to find a suitable job. Bit it is not *required* to consider them because it did not ask the Claimant to prove his job search under section 50(8) and it did not disentitle him under section 50(1) for failing to comply.

[18] The General Division did not make an error of law when it rejected the reasonable and customary criteria as inapplicable to the kind of employment that the General Division found suitable.[10] The General Division's analysis of the section 9.001 criteria was actually unnecessary. However, since the General Division found that the reasonable and customary criteria did not apply to the kind of employment that the General Division found suitable, the "reasonable and customary" analysis did not ultimately affect its decision. The General Division accepted that the Claimant made alternate efforts to regain suitable employment and it determined that the Claimant was available for work and unable to find suitable employment under section 18(1)(a) of the EI Act.

[19] I will now consider whether the General Division made an error of law in how it defined suitable employment and analyzed whether the Claimant had been available for suitable employment.

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[9] *Faucher*, *supra* note 2.
[10] General Division decision, para 20.

Meaning of suitable employment

[20] The manner in which the General Division defined suitable employment was key to the General Division's finding that the Claimant was available under section 18(1)(a) of the EI Act. The General Division defined the suitability of employment narrowly in relation to the Claimant's particular circumstances. Many factors could play into the suitability of employment but one of those factors is whether the employment violates a claimant's moral convictions or religious convictions. According to the section 9.002(1)(c) of the Regulations, suitable employment is employment where the nature of the work is "not contrary to the claimant's moral convictions or religious beliefs.[11] The Claimant is a Catholic priest. The General Division accepted that he could not return to work within his diocese without an assignment from his Bishop, nor could he move to another diocese without his Bishop's permission. The General Division also accepted that the Claimant required the Bishop's permission to accept outside employment, and that this permission was not forthcoming.

[21] The General Division accepted that the Claimant's religious beliefs included his status of a priest as a "dispenser of the mysteries of God, and his role as a priest in carrying out the pastoral ministry."[12] It accepted that the Claimant would have risked losing his status as a priest if he were to pursue regular employment (by regular employment, I mean employment that is not self-employment) without the Bishop's permission. As a result, the General Division accepted that requiring the Claimant to take outside regular employment without the Bishop's permission was contrary to his religious beliefs. Therefore, work that is suitable for the Claimant under section 9.002(1)(c) of the Regulations, is work that does not risk his dismissal from the clergy.[13] The Commission did not challenge any of the General Division's findings of fact.

[22] The Commission did not dispute that the Claimant remained, and remains, available to return to work as soon as the Bishop or some other Catholic Church official offers him a position. However, the Commission argued that the General Division misinterpreted section 9.002(1)(c) of the Regulations. According to the Commission, the Claimant's inability to find work outside the Catholic Church was not because the nature of other work would be

[11] Section 9.002(1)(c), Regulations.
[12] General Division decision, para 15.
[13] General Division decision, para 15, 28.

contrary to his religious beliefs. It stated that the Claimant did not even apply for other work (outside of his work as an on-call driver for a rideshare company) because of restrictions placed on him by his employer. Therefore, the Claimant had been unable to prove anything in the nature of any jobs (that would otherwise have been available) that would make them unsuitable based on some moral or religious objection.[14] The Commission did not offer an interpretation of what "nature of the work" should mean beyond the suggestion that each job must be examined individually to determine if something about the work itself might be objectionable.

[23] The Commission cited case law in its arguments to the General Division and to the Appeal Division that the Claimant was not available. However, the case law is of little assistance to define the "suitable employment" for which a claimant should be available. *Bois*[15] confirms only that availability (for suitable employment) should be assessed using the *Faucher* factors. *Cornelissen-O'Neil*[16] and *De Lamerinde*[17] confirm that a claimant must engage in some sort of job search (for suitable employment), and cannot wait passively to be recalled to work.

[24] *Gagnon*[18] is more applicable. In *Gagnon*, the Court said that availability cannot depend upon the particular reasons for the restrictions on availability even if a claimant has sympathetic reasons. However, the *Gagnon* decision predated section 9.002 of the Regulations, which specifies that employment is only "suitable" if it is not contrary to a claimant's moral convictions or religious beliefs. Therefore, *Gagnon* does not bind the General Division; at least, not to the extent that the Claimant's "sympathetic reasons" involve his unwillingness to compromise moral convictions or religious beliefs.

[25] The *Leblanc* decision is similar to *Gagnon. Leblanc* stated that a claimant is not available for work where he or she is in a situation that prevents him or her from being available. Like *Gagnon*, *Leblanc*[19] predated section 9.002 of the Regulations. It has nothing to say about circumstances that prevent employment from being suitable (as opposed to available).

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[14] AD1-2.
[15] *Canada (Attorney General) v Bois*, 2001 FCA 175 (cited at GD4-3).
[16] *Canada (Attorney General) v Cornelissen-O'Neil*, A-652-93 (cited at GD4-3).
[17] *De Lamirande v Canada (Attorney General)*, 2004 FCA 311 (cited at GD4-3).
[18] *Canada (Attorney General) v Gagnon*, 2005 FCA 321 (cited at GD4-3).
[19] *Canada (Attorney General) v Leblanc*, 2010 FCA 60 (cited at AD2-3).

[26] Furthermore, *Leblanc* involved a very different situation than that of the Claimant. In *Leblanc*, personal circumstances prevented the claimant from taking advantage of employment opportunities that would otherwise have been available. He was prevented from working because his work gear was destroyed in a fire and he lost his transportation to work. In this case, the Bishop's refusal to cooperate does not mean that the Claimant is *unavailable* for regular outside employment. As a representative for the Claimant's employer, the Catholic Church, the Bishop could only *prevent* the Claimant from accessing employment in the Catholic Church. Obviously, the EI Act in not intended to disqualify claimants from receiving benefits simply because their employers will not give them work. This would defeat the purpose of the EI Act. The Claimant could not be disentitled for being "unavailable" just because his Bishop prevented him from returning to work within the Catholic Church.

[27] The Bishop's actions could not have prevented the Claimant from being *available* for work, but the General Division accepted that the Bishop's continued refusal to grant permission for the Claimant to accept regular employment outside the Catholic Church had the further consequence of making all regular outside employment *unsuitable*. This was because the Claimant would lose his status as a priest if he accepted regular outside employment without the Bishop's permission.

[28] The General Division found that the Claimant was available for *suitable* employment, even though he had not searched for any regular outside employment. In so doing, it accepted and relied on evidence of the Claimant's efforts towards reemployment within the Catholic Church and that he had been available to accept rideshare customers.

[29] The Commission submits that the Bishop's actions do not make employment outside the Catholic Church unsuitable. It argues that religious "laws"' like those that would place the Claimant's standing as a priest in jeopardy if he accepted regular outside employment, are only "a methodology for regulating the life of a believer affecting his personal choices."[20] It also said that the law cannot be "partial to individuals of the clergy."[21]

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[20] AD2-3.
[21] AD2-4.

[30] The Commission argued that the Claimant was unavailable because he was not seeking any employment, other than his existing self-employment with the rideshare company. The Commission disagrees that the Claimant's efforts (to be restored to some position within the Catholic Church) were job search efforts. Instead, it characterizes them as attempts to "address a resolution to a complaint that was made against him", which it called a "substitute to seeking suitable employment".[22] According to this view, the Bishop's refusal to allow the Claimant to work in the Catholic Church or to give him permission to take regular employment elsewhere actions would be irrelevant to the Claimant's availability. The Bishop's actions were nothing more than an unfortunate circumstance that prevented the Claimant from obtaining regular employment (like the loss of work gear and transportation in the *Leblanc* decision).

[31] I need to decide whether the General Division made an error in basing its finding that regular outside employment was unsuitable on the actions of the Bishop. Section 9.002(1)(a) of the Regulations[23] says suitable employment is employment in which the nature of the work is not contrary to a claimant's moral convictions or religious beliefs. If it were not for section 9.002, regular outside employment would likely have been suitable and the Claimant would have had to prove his availability for that employment. The Claimant may have had to give up his priesthood, or he would have had to be willing to do so. This would be the price of being available for work and collecting benefits, even though this might seem harsh.

[32] However, I agree with the General Division that the circumstances engage section 9.002 of the Regulations. The General Division did not make an error when it found that regular employment outside the Catholic Church without the Bishop's permission would be unsuitable because it would be contrary to the Claimant's religious beliefs.

[33] Outside employment that does not have the approval of the Claimant's Bishop would require the Claimant to surrender his status as a priest. Since it is against the Claimant's religious beliefs to give up his priesthood, the Catholic Church is his only possible regular employer. Within the hierarchy of the Catholic Church, the Claimant's Bishop is the one who determines if he has a position in the Catholic Church. The Claimant cannot work under his own Bishop unless

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[22] *Ibid*.
[23] And also if there were no legitimate Charter or Bill of Rights concern—but I have not had to consider this.

the Bishop gives him an assignment. He cannot work under some other Bishop unless his own Bishop grants permission. The Claimant cannot work as a priest or minister in some other faith, tradition, or denomination and still be a priest in the Catholic Church. He cannot even work in a non-religious capacity without the approval of his Bishop. To remain a priest, his ability to work for any employer is entirely dependent on his Bishop's approval.

[34] For the Claimant, being a priest is not merely an occupation, but a calling from God. Having accepted that calling, he cannot willingly surrender his priesthood. This would be contrary to his religious beliefs.

[35] I agree with the Commission that Canon law is not the law that governs Employment Insurance claimants, and that there should not be one law for Catholic claimants and another law governing other claimants. However, section 9.002(1)(c) of the Regulations is a law that governs all Employment Insurance claimants and it does not offer one law for Catholics or for any other group. What it does is ensure that the law does not force a claimant to choose between entitlement to Employment Insurance benefits and his conscience or religious beliefs. This remains true when those religious beliefs include submission to the Catholic Church and its dictates, including the rulings of a Bishop who speaks for the Catholic Church or precepts of the Canon law.

[36] The Commission also argued that the General Division misinterpreted section 9.002 of the Regulations. It argued that it is impossible to assess whether the "nature" of outside employment opportunities would have been contrary to the Claimant's religious beliefs. This is because the Claimant did not provide a job search with jobs whose "nature" was open to examination. I disagree.

[37] The Claimant satisfied the General Division that he would lose his status as a priest if he accepted regular outside employment without his Bishop's permission. In his case, the "nature of the work" that is relevant to the application of section 9.002 of the Regulations is that it is work for an outside employer. Therefore, the Claimant needed only to show that the Bishop was refusing permission to work outside the Catholic Church. In these circumstances, the General Division was not required to examine the particular circumstances of particular jobs to determine if the duties or conditions of those jobs were contrary to his moral convictions or religious

beliefs. All regular outside employment was contrary to his religious beliefs for the reason that its relevant "nature" was that it was regular outside employment.

[38] I find that the General Division did not make an error of law in how it interpreted section 9.002 of the Regulations, or by finding regular outside employment was unsuitable because the Bishop refused permission for the Claimant to accept outside employment.[24]

Meaning of "available for work"

Efforts to find regular employment

[39] The Commission argued that the General Division made an error of law by considering the Claimant's efforts "to resolve outstanding issues with his usual employer" as efforts to find suitable employment.

[40] Much of the Commission's argument was that the Claimant was not available because his job search efforts could not be classified as "reasonable and customary". However, its argument also raises the broader question of whether the claimant made adequate efforts to find work when the *Faucher* test is applied.

[41] To be available, a claimant must express a desire to return to work through efforts to find suitable employment.[25] The General Division held that the Claimant had expressed his desire to return to employment within the Catholic Church through his various efforts to be reinstated to a position within the Catholic Church.

[42] The General Division recognized that job search efforts must be appropriate to the employment that it had found to be suitable.[26] This is consistent with the approach taken by the case law generally. For example, in the case of a physically handicapped claimant, it might be reasonable for the claimant to seek only that employment in which the employer could accommodate his or her handicaps.[27] In some cases, employees with an expectation of imminent

[24] General Division decision, para. 15
[25] This is the second factor of the *Faucher* test, *supra* note 2.
[26] General Division para 28.
[27] See Canadian Umpire Benefit decision CUB 16840, for example.

recall by their employer may still be found "available" even though they have not looked for work at any other employer.[28]

[43] The General Division determined that the only regular employment suitable to the Claimant would be some kind of return to employment with the Catholic Church. It made sense that it would then consider the sorts of job search efforts that would be appropriate to this kind of employment.

[44] The General Division found that the Claimant made sustained efforts to resolve issues with his Bishop, that he filed a human rights complaint, and that he appealed to the Congregation of the Clergy in Rome. "Rome" ordered the Bishop to reverse a precept that included the termination of the Claimant's remuneration. Unfortunately, the Bishop did not interpret the order as a requirement that he reinstate the Claimant or the Claimant's pay. The Bishop has still not given the Claimant another assignment or permission to work elsewhere, although he apparently stated a willingness to negotiate a resolution of their differences. According to the General Division, the Claimant continues to make efforts to obtain work within the Catholic Church.

[45] This is not a case of an employee who simply refuses to accept that his or her employer has fired him, who demands that the employer give back the employee's job, and who could find another job somewhere else by just looking. The Claimant remains a priest in the Catholic Church in a dispute with his particular Bishop. The Claimant has a reasonable expectation that his dispute will ultimately be resolved by negotiation with the Bishop or through official channels. Furthermore, the alternative of seeking and accepting regular outside employment without the Bishop's permission would require him to give up his office as a priest, which is contrary to his moral convictions and religious beliefs.

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[28] *Canada (Attorney General) v MacDonald*, A-672-93; *Carpentier v. Canada (Attorney General)*, A-474-97. Note also section 6(4) of the EI Act, which says that employment is not suitable for a claimant if it is not in the claimant's usual occupation and is either at a lower rate of earnings or on less favourable conditions from the Claimant's usual occupation. (Section 6(5) qualifies 6(4) to allow that other work may be found to be suitable after a "reasonable interval".).

[46] I find that the Claimant's efforts to be restored within the Catholic Church are efforts to find suitable employment within the meaning of section 18(1)(a) of the EI Act, and for the purposes of establishing the second factor in the *Faucher* test.

Efforts to become self-employed

[47] After his falling out with the Bishop, the Claimant began working on-call as an independent contractor with a major rideshare company. After the Bishop stopped paying him in May 2019, he made himself available to drive clients on a full-time basis. According to the Claimant, this particular form of self-employment would not cause him to lose his status as a priest.

[48] The General Division accepted that the Claimant could be self-employed outside of the Catholic Church and remain a priest. When the General Division compared the Claimant's job search efforts to the reasonable and customary criteria, it noted that the Claimant's self-employment was also "suitable" employment for the Claimant, because it would be consistent with Canon law.[29] Therefore, when the General Division assessed the Claimant's job search efforts, it considered his self-employment efforts together with his efforts to access employment within the Catholic Church.[30]

[49] The Commission agreed that self-employment would also be suitable. However, it argued that the Claimant's efforts to obtain self-employment were not sufficient because they were not reasonable and customary.

[50] The General Division did not make an error of law by not requiring the Claimant to pursue other or additional suitable self-employment. The General Division called the Claimant's rideshare job a full-time job, by which it appears to have meant he was available to take rideshare clients on a full-time basis. In interpret this to mean "full-time availability" rather than "full-time employment", which is consistent with the Commission's position that the Claimant's self-employment was "on-call". However, the Commission seems to be suggesting that the

[29] General Division decision, para 19.
[30] General Division decision, para 27.

Claimant was not available enough, and that he should have demonstrated his availability by making more of an effort to find some other, or supplemental, self-employment.

[51] Regardless of whether the Claimant had adequately canvassed the self-employment possibilities that may have been available, the Commission is mistaken to believe that availability for work requires that a claimant make substantial efforts to become *self-employed*. There is no legal authority to support the notion that a claimant must pursue self-employment opportunities to prove his availability. In fact, claimants are considered under the Regulations to be *unavailable* for work if they are so busy developing their self-employment opportunities that the extent of their involvement is no longer minor.[31] The General Division accepted that the Claimant's availability for rideshare clients was some evidence of his desire to work and of efforts to regain employment. It also accepted that the Claimant's involvement with the rideshare helped to show that the Claimant was not unreasonably limiting the scope of his search for suitable employment. The Commission did not explain how it was an error of law for the General Division to assess the evidence in this way.

[52] I can understand why the Commission might argue that the Claimant should have done more in terms of self-employment to prove his availability. The General Division accepted that self-employment was suitable to the Claimant .and that the Claimant showed sustained efforts to seek self-employment. However, the General Division did not state that the Claimant was *required* to work at, or seek, self-employment opportunities to prove his availability. It viewed the Claimant's self-employment as evidence that supported his availability for work. The General Division said only that the Claimant's rideshare involvement required the Claimant to contact the rideshare company each day to obtain work, and that this daily contact "can be considered as assessing employment opportunities".[32]

[53] The Claimant's efforts to be reinstated to a position within the Catholic Church and his registration with a rideshare company may not be conventional job search efforts, but neither are the Claimant's circumstances conventional. I have some reservations about allowing that the Claimant's availability for work may be primarily determined in relation to a single organization.

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[31] Section 30 of the Regulations.
[32] General Division decision, para 21.

In fact, I might not have found as I did if there were no reasonable prospect for the Claimant to negotiate or litigate his return to a position within the Catholic Church. I have also taken notice that the Catholic Church is an extraordinarily large and widespread organization, with many positions suitable for Catholic priests, and offers the only positions in which they a Catholic priest may perform the office of Catholic priest. I may not have found as I did if I had not agreed with the General Division that it would be contrary to the Claimant's moral convictions religious beliefs for him to have to give up his priesthood.

[54] The General Division determined the Claimant's availability in accordance with section 18(1)(a) of the EI act and in accordance with the *Faucher* test. It did not make an error of law by finding the Claimant to have made efforts to find a suitable job.

CONCLUSION

[55] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	May 7, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	S. B., Representative for the Appellant T. F., Respondent