[TRANSLATION]

Citation: *AL v Canada Employment Insurance Commission*, 2021 SST 250

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. L.
Representative:	Richard Benoît
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (414741) dated March 17, 2021 (issued by Service Canada)

Tribunal member:	Normand Morin
Type of hearing:	Teleconference
Hearing date:	May 11, 2021
Hearing participants:	Appellant Appellant's representative
Decision date:	May 21, 2021
File number:	GE-21-531

Canada

Decision

[1] The appeal is allowed. I find that the Appellant has proven her availability for work while attending a course of instruction.[1] This means that she is entitled to receive Employment Insurance (EI) benefits as of September 28, 2020.

Overview

[2] From July 10, 2020, to September 20, 2020, inclusive, the Appellant worked part-time as a clerk for the employer X (X or employer). She stopped working for that employer because of a shortage of work.[2]

[3] On October 5, 2020, the Appellant applied for benefits (regular benefits). A benefit period was established effective September 27, 2020.[3]

[4] Before she stopped working on September 20, 2019, and before applying for benefits on October 5, 2020, the Appellant started attending a full-time course at the Cégep[4] de Saint-Hyacinthe, leading to a general college diploma (DEC), that is, a non-specific DEC. For the fall 2020 session, classes began on August 24, 2020, and ended on December 23, 2020. For the winter 2021 session, classes began on January 25, 2021, with an end date of May 24, 2021.

[5] On January 14, 2021, the Canada Employment Insurance Commission (Commission) informed her that it could not pay her EI benefits as of September 28, 2020, because she was attending a course of instruction on her own initiative, and she had not shown that she was available for work.[5]

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[1] See section 18(1)(a) of the *Employment Insurance Act* (Act).
[2] See GD7-2 and GD7-6.
[3] See GD3-3 to GD3-12.
[4] Collège d'enseignement général et professionnel [general and vocational college].
[5] See GD3-63.

[6] On March 17, 2021, after a request for reconsideration, the Commission informed the Appellant that it was upholding the January 14, 2021, decision about her availability for work.[6]

[7] The Appellant submits that she has been available for work since September 28, 2020. She says that she looked for a part-time job. The Appellant argues that, for the past several years, she has been studying full-time while working part-time. She explains that she worked after her layoff on September 20, 2020, and continues to do so. On April 2, 2021, the Appellant challenged the Commission's reconsideration decision. That decision is now being appealed to the Tribunal.

Issues

[8] I must decide whether, since September 28, 2020, the Appellant has been available for work while attending a course of instruction.[7]

[9] To decide this, I must answer the following questions:

- Has the Appellant shown a desire to return to the labour market as soon as a suitable job is offered?
- Has the Appellant expressed that desire through efforts to find a suitable job?
- Has the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?
- Do the principles related to returning-to-studies cases—such as the attendance requirements of the course, the claimant's willingness to give up their studies to accept employment, whether the claimant has a history of being employed at irregular hours, and the existence of "exceptional circumstances"—prove the Appellant's availability for work?

[6] See GD2-3, GD3-73, and GD3-74.
[7] See section 18(1)(a) of the Act.

Analysis

[10] Two sections of the *Employment Insurance Act* (Act) indicate that claimants have to show that they are available for work.[8] Both sections deal with availability, but they involve two separate disentitlements.

[11] First, a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that, on that day, the claimant was capable of and available for work and unable to obtain suitable employment.[9]

[12] Second, to prove availability for work, the Commission may require the claimant to prove that they are making reasonable and customary efforts to obtain suitable employment.[10]

[13] I point out that, in this case, I will not be looking at whether the Commission required the Claimant to prove reasonable and customary efforts to obtain suitable employment.[11]

[14] In its representations, the Commission indicated that it could require the Appellant to prove that she was making reasonable and customary efforts to obtain suitable employment under section 50(8) of the Act.[12]

[15] In response to a request from the Tribunal, the Commission clarified that its decision was not based on section 50(8) of the Act.[13] It specified that its decision was instead based on the Appellant's significant restrictions due to her studies and on her searching for only a part-time job.[14]

[16] To determine whether a claimant is available for work, I have to consider the specific criteria set out in the Act for determining whether their efforts to obtain suitable

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[8] See sections 18(1)(a) and 50(8) of the Act.
[9] See section 18(1)(a) of the Act.
[10] See section 50(8) of the Act.
[11] See section 50(8) of the Act.
[12] See GD4-6.
[13] See GD6-1.
[14] See GD6-2.

employment constitute reasonable and customary efforts.[15] According to these criteria, efforts must be 1) sustained, 2) directed toward obtaining suitable employment, and 3) compatible with nine specific activities that can be used to help claimants obtain suitable employment.[16] These activities include assessing employment opportunities, registering for job search tools or with online job banks or employment agencies, contacting prospective employers, and submitting job applications.[17]

[17] The criteria for determining what constitutes suitable employment are the following: 1) the claimant's health and physical capabilities allow them to commute to the place of work and to perform the work; 2) the hours of work are not incompatible with the claimant's family obligations or religious beliefs; and 3) the nature of the work is not contrary to the claimant's moral convictions or religious beliefs.[18]

[18] The notion of "availability" is not defined in the Act. Federal Court of Appeal (Court) decisions have set out criteria for determining a person's availability for work and whether they are entitled to EI benefits.[19] These three criteria are:

- 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
- not setting personal conditions that might unduly limit the chances of returning to the labour market[20]

[15] See section 9.001 of the *Employment Insurance Regulations* (Regulations).
[16] See section 9.001 of the Regulations.
[17] See section 9.001 of the Regulations.
[18] See section 9.002(1) of the Regulations.
[19] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.
[20] The Court established or reiterated this principle in the following decisions: *Faucher*, A-56-96; *Bois*, 2001 FCA 175; and *Wang*, 2008 FCA 112.

[19] The Court tells us that a person who is enrolled in a full-time course is presumed not to be available for work. This presumption can be rebutted only in exceptional circumstances.[21]

[20] Availability for work is also measured by four principles related to returning-to-studies cases that can rebut the presumption of non-availability.[22] These principles are:

- the attendance requirements of the course
- the claimant's willingness to give up their studies to accept employment
- whether the claimant has a history of being employed at irregular hours
- the existence of "exceptional circumstances" that would enable the claimant to work while attending their course[23]

[21] Whether a person attending a full-time course is available for work is a question of fact that must be determined in light of the specific circumstances of each case but based on the criteria set out by the Court.

[22] In this case, the Appellant has met the above criteria since September 28, 2020. She has shown that her efforts to find a job after that date were reasonable and customary.

Issue 1: Has the Appellant shown a desire to return to the labour market as soon as a suitable job is offered?

[23] Since September 28, 2020, the Appellant has shown her desire to return to the labour market as soon as a suitable job is offered.

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[21] The Court reiterated this principle in *Gagnon*, 2005 FCA 321.
[22] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.
[23] The Court established or reiterated these principles in the following decisions: *Lamonde*, 2006 FCA 44; *Cyrenne*, 2010 FCA 349; *Wang*, 2008 FCA 112; *Gagnon*, 2005 FCA 321; *Rideout*, 2004 FCA 304; *Boland*, 2004 FCA 251; *Loder*, 2004 FCA 18; *Primard*, 2003 FCA 349; and *Landry*, A-719-91.

[24] I find that, even though the Appellant is attending a course, her intention is also to remain in the labour market.

[25] The Appellant says that she started attending a full-time course on August 24, 2020. She says that she is attending this course by personal choice and that it was not approved under an employment or skills development program.[24]

[26] In the claimant reports she completed for the period from September 27, 2020, to November 14, 2020, the Appellant reported not being ready, willing, and capable of working each day, Monday through Friday during each week of that period.[25] In her claimant reports for the period from November 15, 2020, to November 28, 2020, the Appellant indicated that she had worked three hours during the second week of the report (week of November 22 to 28, 2020) and that she was attending school or a training course. She reported being ready, willing, and capable of working each day, Monday through Friday during each week of [the] report.[26]

[27] At the hearing, the Appellant said she had reported not being available for work Monday through Friday in her claimant reports (reports for the period from September 27, 2020, to November 14, 2020)[27] because she was available part-time, specifically evenings and weekends.[28]

[28] The Appellant explains that her studies are a priority for her and that she will not give them up to work full-time.[29] She indicates that she plans to finish her full-time course in or before May 2022 (for example, December 2021).[30]

[29] The Appellant explains that she was laid off on September 20, 2020, because the building where the employer had its place of business closed.[31] Repairs had to be made

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[24] See GD3-32 and GD3-67.
[25] See GD3-18 to GD3-31 and GD3-36 to GD3-51.
[26] See GD3-52 to GD3-60.
[27] See GD3-18 to GD3-31 and GD3-36 to GD3-51.
[28] See GD3-61, GD3-62, GD3-71, and GD3-72.
[29] See GD3-61 and GD3-62.
[30] See GD3-61, GD3-62, GD3-71, and GD3-72.
[31] See GD7-2 and GD7-6.

to the building's structure.[32] She says that, if it were not for that problem, she would have continued working for the employer.[33]

[30] According to the Appellant, after her layoff in September 2020, she returned to work for that employer but at other establishments than the one she worked at during the period from July 2020 to September 2020. She worked a few days for the employer during the period from November 24, 2020, to December 6, 2020.[34] The Appellant started working for the employer again in February 2021.[35]

[31] The Appellant's representative argues that the Appellant applied for benefits because she had stopped working due to a shortage of work. According to the representative, the Appellant's course of instruction has nothing to do with her availability for work, since she would have continued working if the building she worked in had not closed.

[32] I find that, after she was laid off on September 20, 2020, the Appellant did not stop showing her desire to find work.

[33] I have no reason to doubt that the Appellant has wanted to work and to remain in the labour market since September 28, 2020.

[34] I accept the Appellant's explanation that she reported not being available for work in her claimant reports for the period from September 27, 2020, to November 14, 2020, because she was available for part-time work, not full-time work.

[35] I find that, even though the Appellant chose to attend a full-time course, this situation has not affected her desire to return to the labour market as soon as a suitable job is offered since September 28, 2020.

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[32] See GD7-2.
[33] See GD2-8 and GD2-9.
[34] See GD2-8, GD2-9, and GD7-5.
[35] See GD2-8 and GD2-9.

Issue 2: Has the Appellant expressed that desire through efforts to find a suitable job?

[36] I find that the Appellant has expressed her desire to return to the labour market through efforts to find a suitable job since September 28, 2020. In addition to her efforts to find a job, she was able to return to the employer she had worked for from July 10, 2020, to September 20, 2020.

[37] The Appellant indicates that she is available for work and capable of working under the same or better conditions (for example, hours, type of work) as she was before she started her course or program.[36]

[38] According to the Appellant, for the past five years or so, that is, since Secondary IV, she has worked part-time jobs while studying.[37]

[39] The Appellant explains that she is available to work part-time, specifically evenings and weekends.[38] She mentioned wanting to work 15 to 30 hours per week and focusing her search on this.[39] The Appellant says that she can work more hours or full-time when she has no classes, during the summer or the holidays.[40]

[40] The Appellant explains that she looked for a part-time job after she lost her job on September 20, 2020.[41]

[41] The Appellant says that she intensified her search in early January 2021, after the Commission refused to pay her benefits.

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[36] See GD3-34, GD3-35, GD3-69, and GD3-70.
[37] See the Records of Employment showing that the Appellant had periods of employment for different employers from 2018 to 2020—GD7-2 to GD7-7.
[38] See GD3-61, GD3-62, GD3-71, and GD3-72.
[39] See GD2-8, GD2-9, GD3-71, and GD3-72.
[40] See GD2-8 and GD2-9.
[41] See GD3-35, GD3-64, and GD3-70.

[42] The Appellant indicates that she made the following efforts:

- signing up for job search websites (for example, government sites, *Indeed*, *Jobillico*) to be informed of job opportunities[42]

- applying or giving her name to or checking with the following potential employers: her local integrated health and social services centre (CISSS) (X CISSS and X CISSS), X gas station, pharmacies, convenience stores, grocery stores, supermarkets (for example, IGA, Metro), retailers (for example, Dynamite, Bouclair, Dollarama), restaurants (for example, Tim Hortons, St-Hubert, Mr. Puffs)[43]

[43] The Appellant explains that most employers look for full-time employees, when she wants to work part-time.

[44] The Appellant indicates that she worked for the employer X during the period from November 24, 2020, to December 6, 2020.[44] She says that she started working for that employer again in February 2021.[45]

[45] The representative argues that the Appellant is entitled to benefits even though she works part-time.

[46] According to the representative, the Commission's argument that the Appellant has to be available for full-time work to be entitled to benefits has no merit. He points out that, if that were the case, many people who work part-time would be denied their right to benefits. The representative argues that it is not in the spirit of the Act, and it was not Parliament's intent, to unjustly deprive someone of their benefits because they work part-time.

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[42] See GD3-71 and GD3-72.
[43] See GD2-8, GD2-9, GD3-61, GD3-62, GD3-71, and GD3-72.
[44] See GD2-8, GD2-9, and GD7-5.
[45] See GD2-8 and GD2-9.

[47] In this case, I find that the Appellant made “reasonable and customary efforts” in her “search for suitable employment,” that is, sustained efforts directed toward obtaining suitable employment and compatible with nine specific activities that can be used to help claimants obtain suitable employment.[46]

[48] Therefore, to assess the Appellant’s availability for work, I am taking into account the specific circumstances of her case, namely that, for the past several years, she has been working part-time while studying full-time.

[49] Although section 9.002(1) of the Regulations describes the criteria for determining what constitutes suitable employment,[47] it does not otherwise or more clearly define the expression “suitable employment.”

[50] I point out that, in addition to the criteria in the Regulations[48] for determining what constitutes suitable employment, the Act also sets out characteristics describing what constitutes employment that is “not suitable.”[49]

[51] These characteristics indicate, among other things, that employment is not suitable employment if it is not in the claimant’s usual occupation.[50] Section 6(4)(c) of the Act also says that this employment in a different occupation, or that is not suitable, includes conditions less favourable or lower earnings than those that a claimant could reasonably expect to obtain, taking into account the conditions and earnings the claimant would have had if they had remained in their previous employment. Section 6(5) of the Act broadens the types of jobs that can be suitable, since the provisions of section 6(4)(c) of the Act no longer apply after a reasonable interval.

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[46] See section 9.001 of the Regulations.
[47] The criteria are the following: 1) the claimant’s health and physical capabilities allow them to commute to the place of work and to perform the work; 2) the hours of work are not incompatible with the claimant’s family obligations or religious beliefs; and 3) the nature of the work is not contrary to the claimant’s moral convictions or religious beliefs.
[48] See section 9.002(1) of the Regulations.
[49] See sections 6(4) and 6(5) of the Act.
[50] See section 6(4)(c) of the Act.

[52] Based on the characteristics set out in the Act to describe what constitutes employment that is not suitable,[51] I am of the view that suitable employment is, among other things, employment that is in the claimant's usual occupation (for example, same earnings and working conditions).[52]

[53] With this in mind, I find that the fact that, for the past several years, the Appellant has been working part-time while studying full-time amounts to employment in her usual occupation, since it is her usual employment.

[54] I note that the Records of Employment the Appellant provided show that she had several periods of employment with different employers from 2018 to 2020, while she was studying full-time.[53]

[55] I am of the view that, in the Appellant's case, suitable employment is employment that is in her usual occupation, that is, part-time employment. It is similar to the employment she previously had and continues to have, while she is attending a course.

[56] The Court also tells us that the notion of "suitable employment" is defined in part with reference to the personal circumstances of the claimant.[54]

[57] Therefore, to assess the Appellant's availability for work, I am taking into account the specific characteristics of her case, namely that she is working part-time while studying full-time.

[58] I find that, when the Appellant was laid off on September 20, 2020, she made efforts to find a job with conditions similar to the ones she had before her layoff.

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[51] See sections 6(4) and 6(5) of the Act.
[52] In English, sections 6(4)(b) and 6(4)(c) of the Act use the expression "claimant's usual occupation," which can also be translated as "*occupation habituelle d'un prestataire*."
[53] See the Records of Employment showing that the Appellant had periods of employment for different employers from 2018 to 2020—GD7-2 to GD7-7.
[54] The Court established this principle in *Whiffen*, A-1472-92.

[59] I do not accept the Commission's argument that the Appellant is not showing a sincere desire to return to the labour market as soon as possible and is not making efforts to find a suitable job because she is not applying for full-time jobs.[55]

[60] I note that the Act does not specifically require a claimant to be available for full-time work. In addition, the Appellant's usual employment is part-time employment.

[61] I find that, since September 28, 2020, the Appellant's availability for work has led to concrete and sustained efforts to find employment with potential employers.

[62] I find that, since September 28, 2020, the Appellant has fulfilled her responsibility of actively seeking suitable employment to be able to receive EI benefits.

Issue 3: Has the Appellant set personal conditions that might have unduly limited the chances of returning to the labour market?

[63] I find that, since September 28, 2020, the Appellant has not set personal conditions that unduly limited her chances of returning to the labour market.

[64] I find that the Appellant's decision to attend a full-time course has not hurt her job search.

[65] The evidence on file shows that, for her fall 2020 (August 24, 2020, to December 23, 2020) and winter 2021 (January 25, 2021, to May 24, 2021) academic sessions, the Appellant devoted and continues to devote 15 to 25 hours per week to her studies.[56] She indicates that all of her course obligations occurred and continue to occur outside of her normal work hours.[57]

[66] The Appellant explains that she is available to work 15 to 30 hours per week.[58] She says that she can work more hours or full-time when she has no classes.[59]

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[55] See GD4-11.
[56] See GD2-8, GD2-9, GD3-32, GD3-67, GD3-71, and GD3-72.
[57] See GD3-34 and GD3-69.
[58] See GD2-8, GD2-9, GD3-71, and GD3-72.
[59] See GD2-8 and GD2-9.

[67] In her statement to the Commission on March 16, 2021, the Appellant indicated that she did not want a job that paid minimum wage or that was more than 15 minutes away from her home.[60]

[68] On this point, when she testified, the Appellant explained that her salary at X was the minimum wage, although she wanted her salary to be a little higher. She also specified that the establishments she worked in for the employer were 15 or more minutes away from her home by car.

[69] I find that, by choosing to attend a full-time course, the Appellant set personal conditions. However, I find that they are not conditions that unduly limit her chances of returning to the labour market.

[70] Objectively, despite attending a full-time course, the Appellant remains in the labour market. The Appellant is working under conditions similar to the ones she had before her layoff on September 20, 2020.

[71] I find that the Appellant did not limit her employment prospects after this layoff either. The Appellant looked for a job with conditions that would allow her to continue her course.

[72] In my view, the Appellant has not unduly limited her chances of returning to the labour market.

[73] I find that, since September 28, 2020, the Appellant has not set personal conditions that unduly limit her chances of returning to the labour market.

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[60] See GD3-71 and GD3-72.

Issue 4: Do the principles related to returning-to-studies cases—such as the attendance requirements of the course, the claimant's willingness to give up their studies to accept employment, whether the claimant has a history of being employed at irregular hours, and the existence of "exceptional circumstances"—prove the Appellant's availability for work?

[74] Among the principles related to returning-to-studies cases that can show a claimant's availability for work while attending a course, I note that the Appellant has a history of being employed at irregular hours while attending a full-time course. I find that this is an exceptional circumstance that allows the Appellant to prove her availability for work during her course.

[75] The Appellant argues that, for the past several years, she has been able to work part-time while studying full-time.[61]

[76] The Appellant explains that she can work more hours or full-time when she has no classes.

[77] The representative argues that the Commission never specifically asked the Appellant whether she had previously worked while attending a course, which it should have, in his opinion.[62] The representative notes that, if the Commission had asked the Appellant this question, it would have been very clear that she had always worked part-time while studying.

[78] I find that the Appellant has a work-study history showing that she is able to balance part-time work with her full-time studies.

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[61] See the Records of Employment showing that the Appellant had periods of employment for different employers from 2018 to 2020—GD7-2 to GD7-7.
[62] See the document called [translation] "Course or training program"—GD8-1 to GD8-3.

[79] I find the Appellant's testimony that she wants to continue working while attending her full-time course to be persuasive. Her testimony is also supported by compelling evidence showing her work-study history.[63]

[80] A decision by the Tribunal's Appeal Division (Appeal Division) indicates that the law does not require that a claimant have a history of full-time employment while attending school to rebut the presumption that, as a full-time student, they are unavailable for work under the Act.[64]

[81] That decision was about a claimant (student) with a history of full-time study and part-time employment indicating that she was working approximately 14 to 18 hours per week and looking for a part-time job of 16 to 20 hours weekly.[65]

[82] In that decision, the Appeal Division found that the nature of the claimant's previous employment—part-time employment—and the fact she had shown her ability to maintain part-time employment over the long term, while simultaneously attending full-time studies, were an exceptional circumstance sufficient to rebut the presumption of the claimant's non-availability.[66]

[83] Another decision by the Appeal Division indicates that a claimant (student) was able to rebut the presumption that he was not available for work by showing his history of part-time employment and full-time study.[67]

[84] In that decision, the Appeal Division found that the student had given persuasive testimony about his consistent efforts to pick up as many shifts as possible during the school breaks, in addition to being able to work close to full-time hours.[68]

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[63] See the Records of Employment showing that the Appellant had periods of employment for different employers from 2018 to 2020—GD7-2 to GD7-7.
[64] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[65] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[66] See the Appeal Division decision in *JD v Canada Employment Insurance Commission*, 2019 SST 438.
[67] See the Appeal Division decision in *YA v Canada Employment Insurance Commission*, 2020 SST 238.
[68] See the Appeal Division decision in *YA v Canada Employment Insurance Commission*, 2020 SST 238.

[85] Although I am not bound by the Tribunal's decisions, I consider its findings persuasive in showing that a person can rebut the presumption that they are not available for work while attending a full-time course if the person can show that they have experience simultaneously studying full-time and working part-time (work-study history). As a result, I adopt the same approach in this case.

[86] Therefore, I do not accept the Commission's argument that the Appellant has failed to rebut the presumption of non-availability while attending a full-time course because the facts show that she is unable to work full-time while attending her courses.[69]

[87] I find that the Appellant has rebutted the presumption that a person who is enrolled in a full-time course is not available for work. The Appellant has a work-study history showing that she is able to balance part-time work with her full-time studies.

[88] I find that the Appellant presents an exceptional circumstance that allows her to rebut the presumption that a person who is enrolled in a full-time course of instruction is not available for work.

Conclusion

[89] I find that the Appellant has shown that, since September 28, 2020, she has been available for work within the meaning of the Act. The Appellant can receive EI benefits as of that date.

[90] This means that the appeal is allowed.

Normand Morin

Member, General Division – Employment Insurance Section

[69] See GD4-7.