

Federal Court



Cour fédérale

Date: 20190917

Docket: T-210-12

Citation: 2019 FC 1181

Ottawa, Ontario, September 17, 2019

PRESENT: Madam Prothonotary Mandy Ayles

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA**

Defendant

and

APRIL DALRYMPLE

Claimant

JUDGMENT AND REASONS

[1] The Claimant, April Dalrymple, brings this application for review of claims decision determination pursuant to Section 8 of the Settlement Agreement reached in the context of this class action proceeding and approved by the Honourable Madam Justice Kane in her Order and

Reasons dated January 29, 2019. Ms. Dalrymple seeks review of the determination of the Administrator of the EI Sickness Benefits Class Action dated July 4, 2019, which denied her claim for sickness benefits.

[2] For the reasons that follow, I find that Ms. Dalrymple does not meet the class definition and accordingly, the determination of the Administrator is upheld.

I. Background

[3] The background to the underlying class action is described in detail in *McCrea v Canada (Attorney General)*, 2013 FC 1278, [2013] FCJ No 1444 [*McCrea 2013*], *McCrea v Canada (Attorney General)*, 2015 FC 592, [2015] FCJ No 1225 (QL) [*McCrea 2015*] and the Order and Reasons of Madam Justice Kane dated January 29, 2019.

[4] In summary, the class action involved a claim by the representative Plaintiff that she and other individuals who became ill while in receipt of parental benefits were unlawfully denied sickness benefits under the *Employment Insurance Act*. The class action was certified but with a modified class definition. The Court refused to expand the class definition to include persons who, during the relevant period, were “advised orally or in writing by the defendants, the Commission or HRSDC, that they did not qualify for sickness leave because they were on parental leave or not otherwise available to work at the time of their sickness leave application, on which advice and representations they relied in not applying for sickness leave”.

[5] For the purpose of this application, the details of the Settlement Agreement, its implementation and the application for review process are key.

[6] Section 4.02 of the Settlement Agreement defines the class as follows:

All persons who, during the period from March 3, 2002 to, and including, March 23, 2013:

- i) Applies for and were paid parental benefits under the EI Act or corresponding types of benefits under Quebec's An Act Respecting Parental Insurance;
- ii) Suffered from an illness, injury or quarantine while in receipt of parental benefits;
- iii) Applied for sickness benefits in respect of an illness, injury or quarantine referred to in ii; and
- iv) Were denied a conversion of parental benefits to sickness benefits because:
 - a) the person was not otherwise available for work; or
 - b) the person had not previously received at least one week of sickness benefits during the benefit period in which the parental benefits were received.

[7] Pursuant to Section 5.01 of the Settlement Agreement, any person who can establish that they meet the class definition and received less than 15 weeks of sickness benefits during the benefit period in which the original application to convert to sickness benefits was made is eligible for an Individual Payment (as defined in the Settlement Agreement).

[8] The Settlement Agreement provides that certain persons who have been identified through the File Review Project are deemed eligible class members. For persons who are not identified through the File Review Project, it must be established that they meet the class definition. Section 5.03 of the Settlement Agreement provides:

Claimants who were not identified as a Class Member through the File Review Project will be eligible where it is established that they meet the class definition based on evidence in ESDC's file of

the application to convert to sickness benefits in either the: (a) SROC; (b) the checklist for conversion that was in use during the class period; or (c) another record made by ESDC. Alternatively, ESDC shall consider documentary evidence provided by the person that establishes they made an application to ESDC for a conversion.

[9] Section 7 of the Settlement Agreement provides for a claims administration process for persons seeking to make a claim for benefits under the Settlement Agreement. The Administrator processes all claims and renders written determinations to claimants.

[10] Pursuant to Section 8 of the Settlement Agreement, a claimant may seek a review of the Administrator's determination by the Federal Court where the Administrator determines that a claim is not established and denies the claimant an Individual Payment.

[11] Section 8.05 of the Settlement Agreement provides that a designated Prothonotary of the Federal Court shall determine whether the claimant is an Eligible Class Member (as defined in the Settlement Agreement) or not and thereafter either uphold the Administrator's determination or reverse the Administrator's determination and refer the claim back to the Administrator for calculation and processing of the Individual Payment to the claimant.

II. The Administrator's Determination

[12] On March 15, 2019, the Claimant submitted a claim to the Administrator for sickness benefits for a period of 17 weeks from November 15, 2009 to March 5, 2010 and May 1, 2010 to June 26, 2010.

[13] By letter dated July 4, 2019, the Administrator transmitted its determination to the Claimant denying her claim. The Administrator stated:

After a thorough review of your file, we have determined that you are **not** eligible for an Individual Payment in accordance with the approved Settlement Agreement for the Employment Insurance (EI) claim commencing June 28, 2009 because you do not meet the class action definition as you did not apply for EI sickness benefits while in receipt of EI parental benefits or corresponding types of benefits under Quebec's An Act Respecting Parental Insurance (QPIP).

III. Analysis

[14] In her Application for Review of Claims Decision Determination form, the Claimant seeks a review of the Administrator's determination on the following grounds:

I was determined not eligible, because I did not apply for sickness, but I did apply twice for sickness benefits in June/09 and in June/2010 both called into a customer service agent and both times told it did not apply to me. Both times I trusted their judgment and decisions.

[15] I have reviewed the additional written submissions filed by the Claimant, the documentation produced by ESDC in accordance with Section 8.04 of the Settlement Agreement and the written submissions filed by ESDC.

[16] As detailed above, in order to meet the class definition, the Claimant must have "applied for sickness benefits in respect of an illness, injury or quarantine" during the period of March 3, 2002 to March 23, 2013. The evidence before the Court demonstrates that the Claimant applied for regular EI benefits on June 29, 2009 and thereafter received 15 weeks of regular benefits, followed by 15 weeks of maternity benefits and 20 weeks of parental benefits. However, there is no documentation before the Court, from ESDC's file or from the Claimant, to support any application to convert to sickness benefits having being made.

[17] To the contrary, the Claimant confirms in her written submissions that she spoke with EI representatives and was told that she was not eligible for sickness benefits. As a result, the Claimant “didn’t second guess their direction and apply because I was told it didn’t apply to me”. As noted above, persons who were advised by the Defendant, the Commission or HRSDC, that they did not qualify for sickness leave because they were on parental leave or not otherwise available for work at the time of their sickness leave application, on which advice and representations they relied in not applying for sickness leave, do not form part of the class as certified by the Court.

[18] I note that the Claimant’s Application for Review of Claims Decision Determination form states that she did in fact “apply” twice for sickness benefits. However, speaking with an EI representative regarding an application to convert to sickness benefits does not constitute making an application to convert within the meaning of the Settlement Agreement.

[19] The Claimant further asserts that she “didn’t even know back then you could make a[n] application like an actual application for sickness that you could file” and that she “didn’t know any better that I could have paper filed” and that she “didn’t know any better that I could have paper filed”. I do not find that the Claimant’s knowledge regarding hard copy applications in any way modified the Claimant’s obligation to actually submit an application for conversion to sickness benefits in order to meet the class definition. Even if the Claimant was unaware of her ability to make a hard copy/paper application, the Claimant admits in her written representations that in June of 2009, she was aware of the need to complete an on-line form to submit her application for regular EI benefits (which form she completed on her personal computer while on the phone with an EI representative).

[20] Accordingly, I find that the Claimant did not submit an application to convert her benefits to sickness benefits and therefore does not meet the class definition.

[21] Having found that the Claimant does not meet the class definition, I find that the Claimant is not an Eligible Class Member (as defined in the Settlement Agreement). The Administrator properly applied Sections 4.02 and 5.03 of the Settlement Agreement and accordingly, the Administrator's determination is upheld.

[22] There shall be no award of costs on this application.

JUDGMENT IN T-210-12

1. The Administrator's determination dated July 4, 2019 in relation to the application of April Dalrymple is upheld.

“Mandy Ayles”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-210-12

STYLE OF CAUSE: JENNIFER MCCREA V. HER MAJESTY THE QUEEN
IN RIGHT OF CANADA and APRIL DALRYMPLE

PLACE OF HEARING: OTTAWA, ONTARIO

JUDGMENT AND REASONS: MADAM PROTHONOTARY MANDY AYLEN

DATED: SEPTEMBER 17, 2019

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FOR THE CLAIMANT