

Federal Court



Cour fédérale

Date: 20190904

Docket: T-210-12

Citation: 2019 FC 1132

Ottawa, Ontario, September 4, 2019

PRESENT: Madam Prothonotary Mandy Ayles

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

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

Defendant

and

HEATHER DERBECKER

Claimant

JUDGMENT AND REASONS

[1] The Claimant, Heather Derbecker, 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. Derbecker seeks review of the determination of the Administrator of the EI Sickness Benefits Class Action dated May 22, 2019, which denied her claim for sickness benefits.

[2] For the reasons that follow, I find that Ms. Derbecker 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 profession of the Individual Payment to the claimant.

II. The Administrator's Determination

[12] On February 21, 2019, the Claimant submitted a claim to the Administrator for sickness benefits for a period of 63 weeks from December 2011 to March 2013.

[13] By letter dated May 22, 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 November 6, 2011 because a review of your EI file shows no evidence that you requested sickness benefits while in receipt of parental benefits as required by Section 5.03 of the Settlement Agreement.

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 had my first cancer surgery when my infant son was five weeks old. Because that surgery showed cancer had spread to my lymph nodes, I had a second surgery when my son was 9 weeks old. The day he turned 4 months, I started a 52 week chemo treatment. I spent my entire maternity leave fighting stage 3 cancer.

I was instructed on 2 separate occasions NOT to apply for EI sickness benefits. First, I was told by the human resources department of my employer St. Joseph's Healthcare London not to apply, that I should only apply to EI for maternity/parental benefits. Secondly, when I contacted EI by phone, I was told that applying for sickness benefits would end my maternity leave benefits because I could not be in receipt of two benefits at the same time and I was told not to apply.

[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. I have no documentation to support any such application being made.

[17] To the contrary, the Claimant confirms in her application and written submissions that she specifically did not make an application as a result of the advice that she received from her employer and an EI representative. 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. Accordingly, I find that the Claimant does not meet the class definition.

[18] 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.

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

JUDGMENT IN T-210-12

1. The Administrator's determination dated May 22, 2019 in relation to the application of Heather Derbecker 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 HEATHER DERBECKER

PLACE OF HEARING: OTTAWA, ONTARIO

JUDGMENT AND REASONS: MADAM PROTHONOTARY MANDY AYLEN

DATED: SEPTEMBER 4, 2019

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FOR THE CLAIMANT