

Federal Court



Cour fédérale

**Date: 20191114**

**Docket: T-210-12**

**Citation: 2019 FC 1426**

**Ottawa, Ontario, November 14, 2019**

**PRESENT: Madam Prothonotary Mandy Ayles**

**BETWEEN:**

**JENNIFER MCCREA**

**Plaintiff**

**and**

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

**Defendant**

**and**

**CAROLYN BOWEN**

**Claimant**

**JUDGMENT AND REASONS**

[1] The Claimant, Carolyn Bowen, 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. Bowen seeks review of the determination of the Administrator of the EI Sickness Benefits Class Action dated August 8, 2019, which denied her claim for sickness benefits.

[2] For the reasons that follow, I find that Ms. Bowen 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) Applied 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.

[emphasis added]

[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 April 10, 2019, the Claimant submitted a claim to the Administrator for sickness benefits for a period of eleven weeks and one day commencing on April 13, 2004.

[13] By letter dated August 8, 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 July 4, 2011 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 did NOT apply for benefits because I was told that I had to use my sick days bank at work despite being hospitalized during my pregnancy. I therefore should be financially compensated because I would have left work early for maternity leave and applied for benefits instead of losing sick days up that I could NOT bank for use in the future causing me to lose pay from my paycheque later. Why my case needs re-examination.

[15] In reaching my determination, I have reviewed the documentation produced by ESDC in accordance with Section 8.04 of the Settlement Agreement and the written submissions filed by ESDC. The Claimant has not filed any additional written submissions, despite being afforded the opportunity to do so. As such, the only submission that I have from the Claimant are the grounds for review detailed in paragraph 14 above.

[16] For the reasons that follow, I find that the Claimant does not meet the class definition.

[17] First, the evidence before me shows that the Claimant received maternity benefits commencing the week of July 18, 2004 until the week of August 29, 2004. However, while being paid maternity benefits, the Claimant declared that she received five weeks of sick leave from her employer. As a result, maternity benefits were not paid to the Claimant for the week of September 5, 2004 to the week of October 3, 2004. The Claimant thereafter received an additional seven weeks of maternity benefits, followed by a period of parental benefits.

[18] The class definition requires that a class member suffered from an illness while in receipt of parental benefits. In this case, the Claimant is asserting an entitlement to compensation for a period of time when she was receiving maternity benefits (April 13, 2004 to June 30, 2004), not parental benefits. The evidence before me is that the Claimant's illness arose while she was still pregnant and not after the birth of her son on July 30, 2004. There is no evidence before me of a continuing illness after the birth of her son and, in any event, the Claimant's application does not seek compensation for the period after her son's birth. As the Claimant's claim for compensation does not relate to a period of time in which she was receiving parental benefits, the Claimant does not meet the class definition.

[19] Second, 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. 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 by the Claimant.

[20] To the contrary, the Claimant confirms in her written submissions that she did not apply for benefits because she was told that she had to use her sick days bank at work, although it is

unclear who provided the Claimant with this information. 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. Even if the Claimant was advised not to apply by someone other than a representative of the Defendant, the Commission or HRSDC, there is no evidence before me that the Claimant submitted an application to convert her parental benefits to sickness benefits. As such, she also does not meet the class definition on this basis.

[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 August 8, 2019 in relation to the application of Carolyn Bowen is upheld.

“Mandy Ayles”

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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 CAROLYN BOWEN

**PLACE OF HEARING:** OTTAWA, ONTARIO

**JUDGMENT AND REASONS:** MADAM PROTHONOTARY MANDY AYLEN

**DATED:** NOVEMBER 14, 2019

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For herself

FOR THE CLAIMANT