

Federal Court



Cour fédérale

Date: 20191119

Docket: T-210-12

Citation: 2019 FC 1451

Ottawa, Ontario, November 19, 2019

PRESENT: Madam Prothonotary Mandy Ayles

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

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

Defendant

and

TRACI PANTALONE

Claimant

JUDGMENT AND REASONS

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

[2] For the reasons that follow, I find that Ms. Pantalone 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.

[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 January 31, 2019, the Claimant submitted a claim to the Administrator for sickness benefits for a five-month period (April to September 2011).

[13] By letter dated August 1, 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 May 29, 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:

- On July 18, 2011, the Claimant had an emergency caesarian section as she had developed HELLP syndrome.
- She had on-going symptoms from HELLP syndrome for months.
- During the first week after her caesarian section, the Claimant called EI to inform them that she had had an emergency caesarian section, that her daughter was still in the hospital and asked what her options were (i.e. did she have to start maternity leave or could she apply for sick leave). She was informed by EI that she had to commence maternity leave as that was her only option. She was not informed about sickness benefits.
- The Claimant followed all proper steps and should not be penalized for the fact that EI did not provide her with the proper information.

[15] On September 19, 2019, the Claimant provided the Court with a letter detailing the circumstances surrounding the birth of her child. In her letter, she states that while it is true that she did not complete an application form to apply for EI sickness benefits, she disagrees with the Administrator's finding, as she was not advised by Service Canada that she could make such an application when she called to inquire as to the options available to her. Moreover, the Claimant

submits that her phone call itself should be considered as her intention to apply for EI sickness benefits.

[16] In reaching my determination, I have reviewed, in addition to the material cited above, the documentation produced by ESDC in accordance with Section 8.04 of the Settlement Agreement and the written submissions filed by ESDC.

[17] The evidence before me is that the Claimant applied for EI benefits on May 2, 2011. She was paid eight weeks of sickness benefits, followed by 15 weeks of maternity benefits and 35 weeks of parental benefits.

[18] In order to meet the class definition, the Claimant must have applied for sickness benefits in respect of an illness, injury or quarantine suffered during the period of time that the Claimant was in receipt of parental benefit. There is no documentation before the Court, from ESDC's file or from the Claimant, to support any application having been made by the Claimant to convert her parental benefits to sickness benefits.

[19] To the contrary, the Claimant confirms in her written submissions that she did not apply for sickness benefits as a result of the advice that she received from Service Canada. 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.

[20] While the Claimant asserts that her call to Service Canada should be interpreted as evidencing an intention to apply to convert her benefits, an intention to make a conversion

application is not sufficient to meet the class definition. An actual application must have been made.

[21] As such, I find that the Claimant does not meet the class definition for the benefit period commencing in April 2011.

[22] 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.

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

JUDGMENT IN T-210-12

1. The Administrator's determination dated August 1, 2019 in relation to the application of Traci Pantalone 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 TRACI PANTALONE

PLACE OF HEARING: OTTAWA, ONTARIO

JUDGMENT AND REASONS: MADAM PROTHONOTARY MANDY AYLEN

DATED: NOVEMBER 19, 2019

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For herself

FOR THE CLAIMANT