

Federal Court



Cour fédérale

**Date: 20200424**

**Docket: T-210-12**

**Citation: 2020 FC 553**

**Ottawa, Ontario, April 24, 2020**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**JENNIFER MCCREA**

**Plaintiff**

**and**

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

**Defendant**

**ORDER AND REASONS**

[1] The Plaintiff and the Defendant bring this joint motion to bring finality to this Class Action, and more particularly to: terminate the administration of the claims process in accordance with the Settlement Agreement approved by this Court in *McCrea v Canada (Attorney General)*, 2019 FC 122 [*McCrea 2019*]; discharge the Department of Employment and Social Development [ESDC] of its duties as Administrator; discharge the Monitor of the Claims Process; discharge the Class Counsel; and, terminate the Review Process for disputed claims.

[2] This Order will draw to a close the efforts of the Plaintiff, Ms. McCrea, which began even before this litigation commenced in 2012. The background to this litigation was previously described in *McCrea v Canada (Attorney General)*, 2013 FC 1278, [2013] FCJ No 1444 [McCrea 2013] (which addressed the Defendant's motion brought pursuant to Rule 220 to determine a question of law), in *McCrea v Canada (Attorney General)*, 2015 FC 592, [2015] FCJ No 1225 (QL) [McCrea 2015] (which is the Order and Reasons for the certification of this class action), and in *McCrea 2019*, (which is the Order and Reasons approving the Settlement Agreement).

I. Background

[3] Briefly, as representative plaintiff, Ms. McCrea represented others who, like herself, contributed to the Employment Insurance [EI] program, gave birth to a child, and received parental benefits while on parental leave. Ms. McCrea and some other EI recipients became ill while in receipt of parental benefits and applied to convert their parental benefits to sickness benefits during their period of illness, which would have extended their benefit period to account for the period of time they were ill. These EI recipients were denied sickness benefits.

[4] Other EI recipients, who became ill and made inquiries about sickness benefits, were advised by representatives of the Employment Insurance Commission (the relevant authority at the time) or Service Canada that they were ineligible for the sickness benefits and, therefore, they did not apply to convert their parental benefits to sickness benefits.

[5] The denial of sickness benefits was due to the interpretation and application of paragraph 18(b) of the *Employment Insurance Act*, SC 1996, c 23 (as amended) [the Act], as it read at the relevant time. Paragraph 18(b) required that a claimant for sickness benefits be otherwise available for work. Given that claimants on parental leave were in that status because they were at home caring for a young child, and they were not otherwise available for work, ESDC applied paragraph 18(b) to deny sickness benefits to claimants who became ill while on parental leave.

[6] Over the last two decades there have been many changes made to the Act to expand benefits to various categories of potential claimants. For example, on March 24, 2013, amendments to the Act came into force, which, among other provisions, amended section 18 to provide that those in receipt of parental benefits were not disentitled to sickness benefits due to their unavailability for work. This amendment ensured that after March 24, 2013, claimants in similar circumstances to the Plaintiff and Class Members would not be denied sickness benefits due to their unavailability for work. However, the 2013 amendments were not retroactive and did not benefit the Plaintiff or the Class Members.

[7] Despite these amendments and the apparent change in approach, the Defendant did not address the circumstances of the Plaintiff and Class Members at that time and the litigation progressed. The Court granted the Plaintiff's motion for certification in part in 2015. In 2018, an agreement was reached between the Plaintiff and the Defendant. The Court approved the Settlement Agreement (the Approval Order) on January 29, 2019.

[8] The Approval Order, among other things: dismissed the action and claims of Class Members against the Defendant; appointed ESDC to administer the claims process: approved a broad notice plan by ESDC to reach Class Members; approved a simple claims form, limited claims period and prompt claims determination period; provided an opt-out process; appointed a Monitor for the claims process; and, called for a Report to the Court by the Administrator and by the Monitor. A unique feature of the Settlement Agreement was the process for disputed claims to be reviewed by a Prothonotary of the Federal Court, again in a simple and prompt manner.

[9] The Settlement Agreement also amended the class definition to read:

The class includes 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 the 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.

[10] The Settlement Agreement provided a formula to determine the amount that would be paid to the eligible Class Members. In brief, they would receive the applicable weekly benefit for

the weeks that they were ill during their parental leave period, less any amount that had previously been paid for sickness benefits.

## II. The Administrator's Report

[11] ESDC is responsible for the Employment Insurance Program. ESDC was, therefore, the logical choice as Administrator of the Settlement Agreement. The Settlement Agreement and Approval Order set out the role of ESDC as Administrator, which included informing potential class members of the Settlement Agreement and the process to submit claims, processing the claim forms, issuing payments, and providing updates to managers at ESDC, Class Counsel, the Department of Justice and the Monitor.

[12] The Administrator's Report notes the efforts made by ESDC to ensure that potential claimants were aware of the Settlement Agreement and the process for making a claim. This included sending the notice as approved by the Court in the Approval Order to potential claimants and providing more general information about the Settlement Agreement and claims process. ESDC had conducted a File Review in preparation for the administration of the Settlement Agreement and had initially identified 1738 individuals who could seek benefits. An additional 150 individuals were identified as potential claimants. ESDC reached out directly to the identified claimants, in addition to providing notice via its website, twitter accounts and Facebook page, Class Counsel's website and Facebook page, and in National newspaper ads. In addition, ESDC responded to inquiries, as did Class Counsel.

[13] The Administrator's Report notes that 942 claim forms were received, which represented 1052 periods of sickness. Of the 1052 periods of sickness analyzed, 789 (or 75%) were approved for payment. These 789 approved periods of sickness correspond to 775 claimants.

[14] 263 claims (or 25% of the claims made) were denied. The most common reasons for denial were: the claimant never requested sickness benefits while on parental leave (which is a requirement to meet the class definition); the claimant had already received sickness benefits during the benefit period; sickness benefits had been paid out after a successful appeal (at the relevant time); and, sickness benefits were requested for weeks before the parental leave period.

[15] The Administrator's Report indicates that the average amount paid to individual claimants was \$4181. The specific amounts ranged from \$191 (for a one-week benefit period) to \$8130 for the maximum 15-week benefit period. In total, \$3,299, 443 was paid to eligible Class Members.

[16] As set out in the Settlement Agreement, ESDC processed and determined the claims in a prompt manner and payments were made shortly after. An internal review process was implemented to ensure accuracy and consistency. The effectiveness of ESDC's process was highlighted by the Monitor, Mr. Gordon McFee.

[17] The Settlement Agreement also provided that a claimant had a right to seek review of the ESDC determination of their claim by a Prothonotary of the Federal Court.

### III. The Monitor's Report

[18] In accordance with the Settlement Agreement, Mr. Gordon McFee was appointed as Monitor. The role of the Monitor is set out in detail in the Settlement Agreement. In summary, the Monitor was tasked with overseeing the administration of the claims, including identification and rectification of any systemic issues. Mr. McFee, a retired public servant, was well-suited to this role given his long career in social benefits policy and program development.

[19] Mr. McFee provided a comprehensive report detailing his role and the approach he took. Mr. McFee notes that he reviewed 465 payment decisions, which represents 44.2% of the claims adjudicated. This review included all the claims which were denied. Mr. McFee explains that he reviewed all the material submitted by the claimants, as well as the ESDC documents, and reached his own determination with respect to the claim before comparing it to the determination made by ESDC.

[20] Mr. McFee commends the ESDC's approach in training the analysts who processed the claims, in the development and application of ESDC's File Review Checklist and Class Action Checklist, in the thoroughness of the process, and in its accuracy. He notes that he had unhindered access to the relevant documents in order to conduct his review, while safeguarding all personal information. He also commends the professionalism of and cooperation between Class Counsel, Counsel for the Attorney General of Canada and the team at ESDC. Mr. McFee notes that the integrity of the claims process was of the highest standard.

IV. The Review Process

[21] As noted above, a unique feature of this Settlement Agreement is the review process for disputed claims. Claimants who were denied could seek a review of ESDC's decision using a simplified form, with an opportunity to make brief written submissions. Where a review was sought, ESDC provided the relevant documents to the Prothonotary.

[22] Twenty-five claimants applied for a review of their claim by the Prothonotary. Three of the disputed claims were reconsidered on consent. Three others were filed in error. Prothonotary Mandy Aylen reviewed 18 applications and issued written decisions for each application for review. These decisions are posted on the Federal Court website. In all cases, Prothonotary Aylen confirmed the decision made by ESDC.

[23] Given the novelty of this approach, at the hearing of this motion the parties provided their comments on the advantages of this review process and noted some considerations in the event that a similar approach is taken in future administrations of class actions.

[24] Prothonotary Aylen noted that a clear mechanism to discontinue or withdraw the application would have been beneficial. Prothonotary Aylen also noted that several of the applications for review were made by claimants who clearly did not fall within the class, which could signal a lack of awareness by the claimant. In addition, providing clear authority to convene a Case Management Conference in appropriate cases would have been helpful to resolve some issues more expeditiously.



[25] As Counsel for the Attorney General noted, the anticipated size of the class is a key consideration in crafting a review process. In the present case, the class size was estimated at approximately 1800 and the take-up rate turned out to be lower. Of the 1052 sickness periods analyzed, 263, or 25% were denied payment. A review was sought by 25 of the denied claimants, or 9.5%. As noted above, 18 reviews were ultimately conducted. While the number of claimants who may seek review in other cases is unpredictable, in the present case, Prothonotary Aylen considered the applications as they were filed and issued her decisions in a very timely manner.

V. The Court's Role

[26] The Court's jurisdiction and supervisory role in this Class Action continues until the Administrator has fulfilled and discharged their obligations.

[27] The Court has reviewed the Settlement Agreement, the Report of the Administrator and the Report of the Monitor and has considered the submissions of Counsel for both parties. The Court is satisfied that the Settlement Agreement has been fully implemented in a spirit of cooperation, and that the claims have been adjudicated, reviewed and finally determined.

[28] The Reports of the Administrator and the Monitor both convey that ESDC very effectively administered the claims in a timely manner, communicated with potential claimants, responded to their inquiries and advised claimants of the review process for disputed claims.

[29] The Monitor's Report praised the spirit of cooperation and commitment of the team at ESDC to reach out to potential claimants, respond to claims, and accurately determine the amount to be paid. The Monitor's review of claims confirms that those administering the claims were thorough and accurate.

[30] Although there were claimants who were dissatisfied with either not receiving the amounts expected or not being eligible for benefits, the review process, conducted by Prothonotary Ayles, ensured that claimants had an additional opportunity to question the determination by ESDC.

[31] In the event that claims are made that fall outside the claims period, which including the 30-day extension period, ended on October 3, 2019, the letter that ESDC proposes to provide to late claimants, advising them that the claims period has concluded and that their claim will not be processed, is approved as to form and content.

This action has been a long journey for Ms. McCrea and the other Class Members, with some detours and delays. However, the outcome is regarded as a success by all parties. Class Counsel diligently pursued this litigation, and among other initiatives, reached out and communicated with potential class members. Class Counsel and Counsel for the Attorney General, while effectively advancing their respective positions, consistently provided the Court with helpful submissions. The administration of the Settlement Agreement has been professional, fair and timely. The joint motion, which the Court grants, will bring this journey to its end and this action to a close.

**ORDER in file T-210-12**

**THIS COURT ORDERS that:**

1. The Joint Motion of the Plaintiff and Defendant is granted.
2. The Administration of the claims process, as set out in the Settlement Agreement, executed by the parties on August 22, 2018 and approved by the Court on January 29, 2019, is terminated;
3. The Department of Employment and Social Development and its successors are discharged from administering any further or subsequent claims related to this class action;
4. The form and content of the denial letter, which the Department of Employment and Social Development will provide to individuals who make claims after the termination of the Administration of the Settlement Agreement, is approved as to form and content;
5. The Review Process, conducted by Prothonotary Ayles of this Court, in accordance with section 8 of the Settlement Agreement is terminated;
6. Mr. Gordon McPhee, the Monitor of the Claims Process, is discharged;
7. Cavaluzzo LLP is discharged as Class Counsel in these proceedings; and,
8. No costs are awarded for this motion.

"Catherine M. Kane"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-210-12

**STYLE OF CAUSE:** JENNIFER MCCREA v HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** APRIL 21, 2020

**ORDER AND REASONS:** KANE J.

**DATED:** APRIL 24, 2020

**APPEARANCES:**

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FOR THE PLAINTIFF

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FOR THE DEFENDANT

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FOR THE PLAINTIFF

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FOR THE DEFENDANT