

Federal Court



Cour fédérale

Date: 20191003

Docket: T-210-12

Citation: 2019 FC 1258

Ottawa, Ontario, October 3, 2019

PRESENT: Madam Prothonotary Mandy Ayles

BETWEEN:

JENNIFER MCCREA

Plaintiff

and

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

Defendant

and

COURTNEY SWINIMER

Claimant

JUDGMENT AND REASONS

[1] The Claimant, Courtney Swinimer, 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. Swinimer seeks review of the determination of the Administrator of the EI Sickness Benefits Class Action dated May 21, 2019, which denied her claim for sickness benefits.

[2] For the reasons that follow, I find that Ms. Swinimer has not established that she meets the eligibility requirement for an individual payment as set out in Section 5.01 of the Settlement Agreement 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 February 7, 2019, 2019, the Claimant submitted a claim to the Administrator for sickness benefits for a period of 24 weeks from November 23, 2008 to May 10, 2009.

[13] By letter dated May 21, 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 December 9, 2007 because you were already paid a maximum of 15 weeks of sickness benefits during your benefit period.

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 not paid sickness benefits I was denied and went in front of a board of directors. I was told when I applied that I would be receiving at least 15 weeks and possibly 17 weeks. When speaking to an agent they told me they did not have my records that far back as well and then they appeared on my online account a few weeks later with incorrect information.

[15] In her additional written submissions, the Claimant further asserts:

Upon receipt of the initial email I received from Cavalluzzo law I contacted Service Canada in request of documents pertaining to my EI claim in 2008-2009 and at that time was directed that they had no records available as it was too far back. I also checked online nothing was available. I was denied sickness benefits while on a maternity parental claim. I appealed the decision and it went in front of a board of referees and I was still denied. A few weeks past and then all of a sudden there was a record on my account online. Service Canada really made no attempt to find my complete EI file. Ultimately I received EI Maternity and parental benefits but not sickness benefits. I do not know why their document states "sickness".

I have attached a copy of a tax slip from my account for 2009 the amounts do not match the information that is provided as Service Canada records.

[16] The Claimant bears the burden of establishing that she meets the class definition and received less than 15 weeks of sickness benefits during the relevant period of time. It is this latter requirement that is at issue on this application.

[17] The EI Payment History record produced by the Crown states that the Claimant received 15 weeks of maternity benefits and 33 weeks of parental/childcare benefits, followed by 15 weeks of sickness benefits from November 23, 2008 until March 1, 2009. The Claimant asserts that notwithstanding the Crown's documentation, she was not in fact paid any sickness benefits as her claim for sickness benefits was denied, as was her appeal of her claim for sickness benefits. However, I have no documentation to refute the EI Payment History record produced by the Crown.

[18] I find that the tax slip produced by the Claimant does not support the Claimant's assertion. I agree with the Claimant that the total amount of benefits received for the 2009 tax year as reflected on the tax slip (\$5,499.00) does not align with the payment documentation produced by the Crown (which, for 2009, shows total benefits paid (all in the form of sickness benefits) in the amount of \$3,807.00). However, this inconsistency – which appears to show that the Claimant received even more benefits than the Crown's document reflects – does not, *prima facie*, support the Claimant's assertion that she received no sickness benefits over the relevant period of time.

[19] As I have no evidence before me to refute the EI Payment History record, I find that the Claimant has not met her burden of establishing that she received less than 15 weeks of sickness benefits during the relevant period of time.

[20] Based on the evidence before me, I find that the Claimant is not entitled to an individual payment pursuant to the terms of the Settlement Agreement. The Administrator properly applied Section 5.01 of the Settlement Agreement and accordingly, the Administrator's determination is upheld.

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

JUDGMENT IN T-210-12

1. The Administrator's determination dated May 21, 2019 in relation to the application of Courtney Swinimer is upheld.

"Mandy Aylen"

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 COURTNEY SWINIMER

PLACE OF HEARING: OTTAWA, ONTARIO

JUDGMENT AND REASONS: MADAM PROTHONOTARY MANDY AYLEN

DATED: OCTOBER 3, 2019

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FOR THE CLAIMANT