

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd.*,
2017 BCSC 2327

Date: 20171215
Docket: S162957
Registry: Vancouver

Between:

Mandalena Lewis

Plaintiff

And

WestJet Airlines Ltd.

Defendant

Before: The Honourable Madam Justice Humphries

Reasons for Judgment on Application to Strike Out the NOCC

Counsel for the Plaintiff/Respondent:

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Place and Date of Hearing:

Vancouver, B.C.
November 9 and 10, 2017

Place and Date of Judgment:

Vancouver, B.C.
December 15, 2017

[1] The plaintiff proposes to bring a class action on behalf of a class of “present and former female Flight Attendants employed by WestJet who were entitled to the benefit of the Anti-Harassment Promise”. The Anti-Harassment Promise is set out in her Notice of Civil Claim [“NOCC”].

[2] The defendant applicant applies to strike out the NOCC pursuant to Rule 9-5(1)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 on the basis that the claim is unnecessary and should be brought before the Canadian Human Rights Tribunal and the various provincial Workers’ Compensation Boards.

[3] In the alternative, the defendant seeks an order that certain paragraphs of the NOCC which deal with the remedy of restitutionary disgorgement be struck out pursuant to Rule 9-5(1)(a) on the basis that they do not disclose a reasonable cause of action as that remedy is not available to the plaintiff.

[4] In the further alternative, the defendant says the entire NOCC should be struck out as an abuse of process of the court pursuant to Rule 9-5(1)(d).

[5] In the further alternative, the applicants submit that the *Limitation Act*, S.B.C. 2012, c. 13, bars this claim.

[6] Rule 9-5(1) provides:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- a) it discloses no reasonable claim or defence, as the case may be,
- b) it is unnecessary, scandalous, frivolous or vexatious,
- c) ...
- d) it is otherwise an abuse of the process of the court.

Notice of Civil Claim

[7] The NOCC states at para. 4:

This claim is about WestJet’s ongoing breach of its employment contracts with the Proposed Class. Those contracts provide that WestJet will create and maintain a workplace free from “Harassment” (defined below), and that it will properly investigate and respond to complaints of Harassment.

[8] The NOCC states that WestJet expressly sets out an anti-harassment policy (“the Anti-Harassment Promise”) in its contract of employment which the plaintiff entered into with them. The contract assures employees that the workplace is free of harassment. The contract requires all WestJet employees to comply with a prescriptive Code of Conduct that prohibits harassment. That includes: physical or sexual assault, unnecessary or unwelcome physical contact, and any other action that may reasonably be perceived as offensive or disrespectful.

[9] The contract of employment also promises that Westjet will treat all complaints seriously, will respond promptly to ensure a quick and fair resolution, and will impose sanctions and discipline.

[10] The NOCC goes on to allege that in 2008, a female flight attendant (not the plaintiff) was sexually assaulted by one of WestJet’s pilots. WestJet investigated the complaint, found it to be substantiated, but did not dismiss or discipline the pilot. The plaintiff alleges he thus presented a continued and unacceptable risk of harm to women with whom he worked, including her.

[11] In 2010, the plaintiff alleges she was sexually assaulted by the same pilot in Maui, Hawaii. She reported this incident to WestJet and to the RCMP who referred the complaint to Maui police. WestJet’s managers met with her and told her WestJet had suspended the pilot’s “extended operations” privileges and he could no longer fly to Hawaii, which the plaintiff says was a protective measure so that the pilot would not be arrested by Maui police. She was told she would not be scheduled to work with that pilot in future and was not to speak of the sexual assault. She alleges in paras. 35 and 37 of the NOCC that, because she could not work with that pilot, her shifts were affected, she lost income, and she lost opportunities to advance as an employee.

[12] In 2015, while at WestJet annual training, the plaintiff encountered the flight attendant who had made the complaint in 2008. The plaintiff asked a question about sexual harassment training during the presentation and the 2008 complainant later contacted her. They realized they had both been assaulted by the same pilot.

[13] The plaintiff pleads that she thus became aware that WestJet's failure to properly investigate that complainant's matter in 2008 had led the pilot to be at liberty to assault others, as well as herself in 2010.

[14] The plaintiff alleges she was a victim of WestJet's systemic breach of the Anti-Harassment Promise.

[15] She went on short term disability leave due to stress and anxiety. She made repeated unsuccessful efforts to obtain her employment file. In January of 2016, she was informed she was terminated for cause due to "insubordination" based on a particular email and a phone call.

[16] The plaintiff commenced a wrongful dismissal suit which has been stayed while this proposed class action proceeds.

[17] In para. 52 of the NOCC, the plaintiff alleges she has suffered losses as a result of WestJet's breach of the Anti-Harassment Promise in its contract of employment, including the harms suffered from the assault itself, including physical, emotion and psychological trauma.

[18] The plaintiff then alleges that WestJet has operated in breach of its Anti-Harassment Promise in various ways, and says the proposed class has suffered losses as a result of those breaches.

[19] The plaintiff alleges that WestJet has benefitted from the breaches by saving costs related to setting up and implementing a proper program, and has also experienced increased profitability by protecting and promoting its reputation as an airline that does not tolerate harassment.

[20] The plaintiff seeks:

- a. A declaration that the Anti-Harassment Promise is a term of WestJet's employment contract with all employees;

- b. A declaration that WestJet has failed to implement the Anti-Harassment Promise;
- c. A declaration that WestJet has benefitted from its failure to implement the Anti-Harassment Promise;
- d. Restitution in the form of disgorgement of the monetary value of the benefits that WestJet has accrued in failing to implement the Anti-Harassment Promise, including the benefits derived from WestJet's failure to:
 - i. Ensure the workplace is free of harassment;
 - ii. Implement proactive measures to avoid creating opportunities for such harassment to occur;
 - iii. Properly investigate complaints and discipline the harassers;
and
 - iv. Remedy the effects of harassment.
- e. Additionally, or in the alternative, general damages in an amount to be determine or in a fixed amount;
- f. In the further alternative, nominal damages;
- g. Punitive damages;
- h. Prejudgment interest; and
- i. Costs.

Response to Civil Claim

[21] The Response to Civil Claim denies may of the alleged terms and conditions of its contracts of employment as pleaded, but states:

11. WestJetters are required to abide by the WestJet Code of Business Conduct (the “Code”) and the principles set forth in the Code are conditions of each WestJetter’s employment.

12. The Code outlines WestJet’s expectation that WestJetters conduct themselves with integrity both on and off the job...

13. The Code prohibits harassment and discrimination at WestJet and articulates that each WestJetter has the right to expect treatment in the workplace that is equitable and respectful. WestJet is committed to providing a safe and respectful work environment for all employees and guests.

14. WestJet promotes a culture of respect and equality. WestJet’s Respect in the Workplace Policy has the objective of ensuring all employees are aware of the seriousness with which WestJet views harassment, discrimination, sexual harassment, and misuse of authority. The Respect in the Workplace Policy provides as follows:

WestJet is committed to creating and maintaining a professional and positive working environment, free from damaging conflict and harassment, where behaviour reflects mutual respect.

15. WestJet’s Workplace Violence and Prevention Policy has the objective of facilitating an environment free from violence or threats of violence, and provides for immediate investigation into any complaint of workplace violence.

...

35. The provisions of the [WestJet Code of Business Conduct] form part of the terms and conditions of employment of all current WestJet employees, including all current flight attendants and pilots. Similarly, the provision of the respect in the Workplace Policy and the Workplace violence and prevention Policy form part of the terms and conditions of employment of all current WestJet employees.

[22] WestJet then goes on to answer the specific allegations in the NOCC, including those related to the plaintiff’s dismissal and to her allegations in regard to the incidents with the pilot and the ensuing investigations.

[23] WestJet denies any breach of an employment contract, denies any loss or damage to the plaintiff or the proposed class, denies it received any benefit from any breach, denies the plaintiff’s entitlement to restitutionary disgorgement, and also pleads that there is no independent tort or cause of action at law arising from discrimination or harassment in the workplace. The *Limitation Act* is also pleaded.

Argument of the Defendant Applicant

[24] WestJet submits that the action concerns alleged gender-based discrimination and harassment of female WestJet Flight attendants by male WestJet employees, specifically pilots. It should, therefore, be before the Canadian Human Rights Commission. Thus the NOCC discloses no reasonable cause of action, or is unnecessary, or is an abuse of process of the Court. It would be a waste of the court's resources to try this claim.

[25] WestJet says the courts have recognized that the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*"Human Rights Act"*] is a comprehensive administrative scheme for the granting and enforcement of employee rights relating to discrimination. Thus the plaintiff's claim is unnecessary. WestJet relies on *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 and *Moore v. British Columbia* (1988), 23 B.C.L.R. (2d) 105).

[26] *Macaraeg* concerned a claim for overtime hours not paid, despite a statutory requirement. The court held that the plaintiff could not pursue a civil claim, as the *Employment Standards Act* provided a comprehensive administrative scheme for the granting and enforcement of employee rights. The statutorily-conferred benefit was not enforceable through a civil action.

[27] In *Moore*, the plaintiff, who worked in the healthcare system, refused on religious grounds to comply with a supervisor's order to sign an authorization to pay a claim for abortion expenses and was accordingly dismissed. She filed a complaint under the *Human Rights Act* and also commenced an action for declaratory relief under the *Charter*. The court stated that she could obtain all appropriate relief under the *Human Rights Act*, including *Charter* relief. The chambers' judge's order striking out as unnecessary her claim for a declaration, which is a discretionary remedy, was upheld.

[28] WestJet says to use a fiction, as the plaintiff has done, to convert what is obviously a claim for discrimination into a breach of contract eviscerates the relevant administrative boards.

[29] WestJet refers to *Board of Governors of the Seneca College of Applied Arts and Technology v. Bhaduria* [1981] 2 S.C.R. 181. In that case, the plaintiff sued for damages for discrimination and for a breach of the Ontario *Human Rights Code*. The Supreme Court of Canada agreed with the defendant that the action could not proceed:

(27) ...not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use.

[30] WestJet refers to a long list of remedies that have been granted by Human Rights Tribunals which they say would cover everything the plaintiff could ever get from a court, and more. The remedies can be personal or systemic. WestJet says if the plaintiff's aim is behavioural modification for WestJet, the Canadian Human Rights Commission is the forum that will ensure that occurs, if it is warranted.

[31] WestJet points out that those who have suffered a personal injury should claim under workers' compensation legislation (*Workers Compensation Act*, R.S.B.C. 1996, c. 492, ss. 5(1), 5.1(1), 10).

[32] As for benefitting from its Anti-Harassment Promise, WestJet says all airlines are required by the *Canada Labour Code* to have an anti-discrimination policy. WestJet has gone further and incorporated it into their terms of employment, but the policy is universal. It is not a profit-making endeavour.

[33] WestJet also argues that the remedy of restitutionary damages is so fraught with difficulty and so unlikely to succeed that the plaintiff should not be allowed to pursue it. While facts as plead are presumed to be true on a motion such as this, the court can take into account that they are manifestly incapable of being proven, or are widely speculative (*Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) at p. 455); *Young v. Borzoni*, 2007 BCCA 16). Thus the claim for restitutionary damages is not a reasonable cause or action, and/or has no reasonable chance of success.

[34] WestJet's argument that the claim should be struck out as an abuse of process is an aggregate of the preceding arguments.

[35] On the issue of limitations, WestJet submits that, on the pleadings, the plaintiff knew in 2010 that she had not received a satisfactory response. Therefore she cannot claim that she only discovered the claim in 2015. The limitation period is two years, which expired before the plaintiff filed the NOCC.

The Plaintiff's Argument

[36] The plaintiff submits that she does not seek to enforce any statutorily-conferred rights, as was the case in *Seneca*. She relies only on the contract of employment. She alleges that all Flight Attendants, including herself when she worked at WestJet, are denied the benefits of the Anti-Harassment Promise in the contract.

[37] She says WestJet should be held to account in court for its contractual obligations. The preferable way to address this claim is through a class proceeding, not the Human Rights Commission. The plaintiff does not seek compensation for personal injuries, but seeks disgorgement of profit for any financial benefit that WestJet has obtained for failing to properly implement the Anti-Harassment Promise which is a term of its contract of employment.

[38] The plaintiff says WestJet has gone beyond the *Canada Labour Code*, R.S.C. 1985, c. L-2 minimum, which requires an employer to issue a policy statement on harassment and discrimination. WestJet has incorporated statutory obligations into its contract and derives financial benefit from it.

[39] The plaintiff distinguishes the cases relied on by WestJet. *Seneca* was a claim for damages for discrimination, and thus was directly within the public policy of the Ontario *Human Rights Code*; *Macaraeg* was a claim for a statutorily conferred right to overtime pay. The plaintiff says neither applies here, where the claim is based solely on an alleged breach of express provisions in the employment contract.

[40] The plaintiff referred to a number of cases dealing with wrongful or constructive dismissal in which discrimination was the foundation of the claim (*Alpaerts v. Obront* (1993), 45 C.C.E.L. 218 (Ont Ct. Gen Div); *White v. Bay-Shep Restaurant & Tavern Ltd.*, [1995] O.J. No. 3646 (Ont Ct Gen Div); *L'Attiboudeaire v. Royal Bank*, [1996] O.J. No. 178). Despite the same facts giving rise to a potential human rights claim, the courts allowed the actions to proceed. I will not go through those cases, as WestJet does not dispute the basic proposition that claims of discrimination may be pursued as part of actions for wrongful dismissal.

[41] The plaintiff argues that she need not show that the Human Rights legislation is inadequate, but in any event, she submits it is not adequate. It relies on a complaint of discrimination or a discriminatory practice, consent of the alleged victim, and has a one-year limitation period.

[42] In this case, the plaintiff argues that WestJet has failed to enforce its own policies as set out in its contract, based on ongoing, wide-ranging systemic breaches. The proposed class includes employees who may not yet even be aware of WestJet's breach, and who may not have personally experienced or observed harassment. All employees have been deprived of the benefit of WestJet's promise, and a remedy is sought on that basis.

[43] In short, the plaintiff says she should be able to choose her cause of action and remedy.

[44] As for the remedy of restitutionary disgorgement, the plaintiff says her claim rests on an allegation that WestJet benefits from not having to expend necessary funds to set up a proper anti-harassment investigative system, and from not having to fire pilots and train new ones; WestJet also benefits in its recruitment of employees because of its promise of a safe place to work.

[45] The plaintiff refers to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 (S.C.C.) for the proposition that novelty and complexity is not a basis to strike out a claim. Disgorgement has been recognized in some cases as a potential remedy for breach

of contract and such a claim should not be struck out on a summary basis (see *Attorney General v. Blake*, [2000] E.M.L.R. 949 (2000)).

[46] In *Blake*, the court acknowledged that an account of profits will be appropriate only in exceptional circumstances, but such a remedy can arise, having regard to all the circumstances. Thus, the plaintiff says, whether such a remedy can succeed can only be determined following a trial.

[47] With regard to the argument based on limitations, the plaintiff says this cannot be determined on an application such as this. The claim clearly puts in issue the continuing nature of the contractual breach as well as the discoverability of that breach.

Discussion

[48] Some of the arguments in WestJet's written submissions were not canvassed in much detail during oral submissions – for example, abuse of process. They are, as counsel acknowledged, subsumed in the more general arguments, which all turn on whether the NOCC is really a claim for breach of contract or whether it is simply a claim for discrimination or personal injury.

[49] WestJet's position is that the plaintiff's attempt to characterize the present claim as solely a claim for breach of contract is a fiction. This has some validity when the NOCC is considered as a whole. The plaintiff alleges personal injury in para. 52 of the NOCC, set out above, and in fact in para. (e) of the prayer for relief, claims general damages, which may be taken as compensation for personal injury, albeit in the alternative. Her allegations in paras. 35 and 37 of the NOCC that her shifts were affected, she lost income, and lost opportunities to advance as an employee could also be seen to relate to her claim for damages.

[50] Insofar as the NOCC purports to be a claim for damages for personal injury to an employee, it is misconceived and should be brought elsewhere, under the *Workers Compensation Act*. Insofar as it is a claim for damages for discrimination, it is also misconceived and should be brought under the *Human Rights Act*. These

potential claims arise, as noted, from subparas. 1(e) and (f) of the prayer for relief, which seeks general damages, or nominal damages. Put together with the paragraphs of the NOCC alleging specific incidents of assault, discrimination, and loss (paras. 35, 37 and 52), this has the potential to widen the action considerably beyond breach of contract. This should be clarified by appropriate amendments to the NOCC.

[51] The Supreme Court of Canada explained the rationale for striking out claims that have no reasonable chance of success in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 17-20. It promotes efficiency in the conduct of litigation and correct results.

[52] However, the test for striking out a claim is stringent. It must be plain and obvious that the pleading discloses no reasonable cause of action or has no reasonable prospect of success. The Court said at para. 21:

The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[53] If WestJet were able to show that this claim was based in an employment statute, or was a claim for discrimination or harassment, this motion would have a greater chance of success, based on *Seneca* and *Macaraeg*. The plaintiffs there were attempting to enforce a statutory right through a civil action. The plaintiff in this case is not. Her claim is for breach of contract.

[54] In a letter sent following submissions, WestJet referred to s. 10 of the *Human Rights Act* which states that it is a discriminatory practice for an employer to enter into an agreement that discriminates. In my view, while this section may widen what is considered to be discrimination, it does not create a cause of action in breach of contract that would come within the exclusive purview of the Human Rights Commission.

[55] Aside from the claims for personal injury that could be said to arise from para. 35, 37, and 52 of the NOCC and the claim for general and/or nominal damages, the rest of the NOCC, while not a model of clarity, does, at its core, rest on allegations of

breach of the WestJet employment contract, not on a statutory right or on a claim of discrimination *per se*.

[56] Such a claim is not barred by the principles in *Seneca*, *Macaraeg*, or *Moore*. It is not plain and obvious at this early stage that that specific claim does not disclose a reasonable cause of action or is bound to fail. Thus it cannot be said to be unnecessary or an abuse of process.

[57] The plaintiff's claim for restitutionary disgorgement is capable of being articulated as an arguable claim. Proof may be difficult, but I am unable to say that it is manifestly unprovable or widely speculative, as was the case in *Operation Dismantle* or *Young*. Canadian courts have accepted such a claim as an "exceptional" remedy to be awarded in appropriate cases. At this early stage, it is not plain and obvious that it is bound to fail, as difficult as proof or quantification might eventually be.

[58] The same reasoning applies to the limitation argument, once the pleadings are amended to remove the personal injury/damages aspect of the claims. The issues of discoverability and the nature of the alleged breach as a continuing one can only be properly considered at a later stage. I note that this action is in its early stages and discoveries have not yet been held.

[59] The application to strike out the NOCC is dismissed. In my view, the submissions on this motion clarified ambiguities in the NOCC for the benefit of all parties, and thus costs should be in the cause.

"The Honourable Madam Justice Humphries"