

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd.*,
2024 BCSC 2398

Date: 20241211
Docket: S162957
Registry: Vancouver

Between:

Mandalena Lewis

Plaintiff

And:

WestJet Airlines Ltd.

Defendant

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

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Place and Dates of Hearing:

Vancouver, B.C.
November 20-22 & 25, 2024

Place and Date of Judgment:

Vancouver, B.C.
December 11, 2024

Overview

[1] **THE COURT:** This is a certified class action in which the representative plaintiff, Ms. Lewis, claims that WestJet has systematically breached its employment contracts with flight attendants by, among other things, failing to have an anti-harassment program in place (the “Anti-Harassment Promise”).

[2] The plaintiff's claim is framed in breach of contract. She alleges that WestJet derived financial benefit from its systemic breach of the flight attendants' employment contracts by way of cost savings resulting from WestJet's failure to fulfill the Anti-Harassment Promise, and seeks disgorgement of the costs saved by WestJet as a remedy in this action.

[3] This action was certified as a class proceeding by the Court of Appeal in April 2022. The class and the class period are defined in the amended certification order as follows:

All current and former female flight attendants at WestJet Airlines Ltd., who have or had contracts of employment with WestJet during the Class Period (“Class” or “Class Members”).

The Class Period is defined as April 4, 2014 to February 28, 2021.

[4] The certified common issues are as follows:

- 1) During the Class Period, was the Anti-Harassment Promise, as defined in the Amended Notice of Civil Claim, a term of WestJet's employment contract with each Class Member?
- 2) Did WestJet fail to implement and enforce the Anti-Harassment Promise throughout the Class Period and, in doing so, breach Class Members' employment contracts?
- 3) If yes, did WestJet save costs through its deficient performance of the Anti-Harassment Promise during the Class Period?
- 4) If yes, is the Class entitled to disgorgement of the costs savings identified in (3)?
- 5) If the answer to (2) is yes, does WestJet's conduct justify punitive damages?
- 6) If yes, what amount of punitive damages should be awarded against WestJet?

[5] The application presently before the Court is the plaintiff's second application for further and better document production and other related relief. First, in light of what the plaintiff characterized as a dilatory and adversarial approach to document production by WestJet, she sought an affidavit of documents from WestJet. WestJet has subsequently agreed to provide that affidavit. Second, the plaintiff sought revisions to the nature and extent of redactions that WestJet unilaterally applied when producing certain documents, predominantly complaint files. This issue was addressed by agreement between the parties over the course of the hearing, and they intend to agree on a redaction protocol to be applied to document disclosure going forward.

[6] The only remaining issue on this application is the plaintiff's request for production of additional documents related to harassment complaints made during the class period. The class of documents the plaintiff sought was narrowed over the course of the application to be harassment complaints made to WestJet and "related files". The parties agree that the "related files" include copies of information or formal complaints, notices or reports made to WestJet regarding harassment, WestJet's responses thereto, documents relating to any recommendations arising therefrom, and documents relating to WestJet's resolution thereof.

[7] The parties also agree that WestJet will produce documents relating to allegations of harassment where the alleged harassment occurred outside the class period but was investigated during the class period, and where the occurrence took place within the class period but was investigated outside of the class period. The parties agree that production of complaints where both the occurrence and the investigation occurred outside the class period is not required.

[8] The sole remaining issue is therefore the scope of production in terms of the nature of the harassment complaint files that WestJet is required to produce. The plaintiff seeks production of harassment complaints for WestJet's entire workforce over the class period, namely complaints made by any WestJet employee. WestJet says that only complaint files for harassment complaints made by female flight

attendant class members who have not opted out against male pilots are relevant and producible in light of the pleadings and the certified common issues.

Production of Investigation Documents/Complaint Files

[9] As noted above, this is the plaintiff's second application for document production. The first application was determined earlier this year, with reasons indexed at *Lewis v. WestJet Airlines Ltd.*, 2024 BCSC 111 (“*Document Production #1*”). The background to this action and document production made to date was outlined in *Document Production #1* and need not be repeated here.

[10] In her first application, the plaintiff sought production of documents related to WestJet's investigation of individual allegations of harassment or sexual assault during the class period. WestJet took the position that no individual complaint files were relevant. The focus of that application was therefore whether the individual complaint files were relevant and producible, or not.

[11] I determined that individual harassment complaint files were relevant and ordered production, concluding as follows:

[72] As was the case in *Rumley*, no issues of individual allegations of harassment will be before the Court for determination on the merits at the common-issues trial in this action. Nevertheless, whether individual reports of harassment were made and how they were handled by WestJet may need to be considered, including as part of the factual context in which the plaintiff's claim of breach of the Anti-Harassment Promise arises. This is particularly the case in relation to common issue #2.

[73] The investigation documents captured in D11, E12, and E13 may reveal conduct and response by WestJet that shed light on the policies and procedures in place to address harassment that underpin the plaintiff's claim that the Anti-Harassment Promise was a term of their employment contract and breached by WestJet's failure to have in place or adhere to policies and procedures aimed at addressing harassment in the workplace. Findings may need to be made about whether individual reports of harassment were made and how they were handled in order to address the common issues #1 through #3.

[74] In this respect, information in the investigation documents may lead to a train of inquiry respecting the policy and procedures WestJet had in place, WestJet's capacity to implement existing policies and procedures, and whether they were, in fact, implemented or enforced during the class period. Thus, as in *Rumley* (at para. 9), the fact that reports of harassment were or were not made, and were or were not responded to, is arguably relevant to

the common issues, whereas the substantive merits of individual instances of alleged harassment themselves are not.

[75] Put differently, WestJet's knowledge of alleged instances of harassment and steps taken in response thereto—not whether individual allegations themselves were substantiated or not—are relevant to the claim pleaded and certified common issues.

[76] Accordingly, I am satisfied that the plaintiff has shown an air of reality and more than mere possibility that the investigation documents are relevant and ought to be produced. I thus order that documents D11, E12, and E13 be produced.

[12] In response to the production order, WestJet took the position that the scope of production of complaint files was limited to complaints by confirmed female class members against male pilots and has produced complaint files falling within those parameters. To date, WestJet has produced 24 harassment complaint files. Approximately half of those were not produced until September of 2024—approximately eight months after *Document Production #1* was issued, which required production within 45 days—and only two weeks before this application came on for hearing. WestJet's internal statistics suggest that significantly more harassment complaints (including sexual harassment and sexual assault) were made during the class period than have been disclosed. For example, documentation produced by WestJet suggests 16 complaints were made in Q4 2018 and 19 in Q1 2022 alone. It is unclear how many of those complaints would have been made by class members. Nonetheless, WestJet has produced only 24 complaint files for the entire class period.

[13] The plaintiff has raised various concerns regarding the completeness of WestJet's document production in the course of this application. In my view, these concerns are not unfounded. The record before me suggests that WestJet's approach to document production to date has been dilatory and, at times, potentially adversarial in nature. It is unclear why all complaint files were not produced in accordance with the timeline required by *Document Production #1*. If WestJet was unable to produce within the time required, then it was incumbent on WestJet to seek an extension of the court-ordered timeline for production. WestJet's dilatory

approach to document production was also a factor that contributed to the trial being adjourned by consent from October 2024 to October 2025.

[14] On the present application, the plaintiff says that I have already determined in *Document Production #1* that she is entitled to production of harassment complaints for the entirety of WestJet's workforce. I reject this submission. As noted above, the focus of the plaintiff's first document-production application was whether individual complaint files were to be produced at all. The plaintiff did not particularize the scope of production sought in terms of who complaints were made by or against on the prior document-production application. She did not identify that she was seeking production of complaints beyond those made by class members.

[15] The plaintiff now says that the scope of documents sought on the first document-production application was always intended to be broad—namely, all harassment complaints made by or against any WestJet employee throughout WestJet's workforce over the seven-year period. This assertion is belied by the plaintiff's correspondence following issuance of reasons in *Document Production #1*. Those reasons were issued on January 11, 2024. Shortly thereafter on January 24, 2024, the plaintiff wrote to WestJet and made a fresh demand for production of additional classes of documents under Rule 7-1(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, which demand encompassed the broader scope of production of harassment complaint files that is presently in issue.

[16] Accordingly, the issue of the scope of disclosure of harassment complaints as presently framed by the plaintiff was not before the Court on *Document Production #1*. The issue of scope of production for harassment complaint files beyond class members and male pilots is thus presently before the Court on this application as a matter of first instance.

Analysis

[17] The plaintiff brings this application for production of documents pursuant to Rules 7-1(13) and (17), seeking further and better production under Rule 7-1(11).

[18] Rule 7-1 underscores the importance of the pleadings in identifying what will be the material issues between the parties at trial. The documents must be relevant to an issue at trial. A careful analysis of the pleadings and consideration of the constituent elements of each cause of action or defence alleged is required, as the factual underpinnings of those constituent elements are the material facts in respect of which documents must be produced under Rule 7-1(1): *Barrie v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2021 BCCA 322 at para. 94.

[19] Under Rule 7-1(11), a party may demand wider disclosure of documents that relate to any or all matters in question in this action. A demand under this rule encompasses documents that meet the broader relevance test, namely documents that relate to matters in question in the action.

[20] The applicable legal principles are set out in paras. 17 to 19 of *Document Production #1* and need not be repeated at length here. Materiality and relevance are the animating principles and will be governed by the certified common issues as informed by the pleadings and subject to the principles of proportionality that apply alongside the principles that govern class action proceedings: *Jiang v. Peoples Trust Company*, 2021 BCSC 2193 at para. 22; *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 369 at para. 26.

[21] The burden on the party seeking production under Rule 7-1(11) is not high, though there must be some air of reality between the documents and the issues in the action. The court attempts to balance the burden of producing additional documents against their materiality and probative value: *Jiang* at paras. 19 to 20.

[22] Applying these principles to the case at hand, I find that neither the plaintiff nor WestJet's positions with respect to the scope of production of complaint files are consistent with the pleadings and the certified common issues.

[23] The plaintiff's claim is pleaded as a systemic breach of contract claim arising from the allegation that the Anti-Harassment Promise was a term of class members' employment contracts and that WestJet breached that term by failing to create and

maintain a harassment-free workplace. The plaintiff pleads that the Anti-Harassment Promise was a term of all of WestJet's employees' employment contracts and asserts that the Anti-Harassment Promise promised that WestJet's workplace as a whole would be free of harassment. Put differently, the plaintiff's theory is that the Anti-Harassment Promise term of class members' employment contracts was breached if WestJet failed to provide any of its employees—for example, a baggage handler, a call centre staff, or mechanic—with a harassment-free workplace. Consequently, she says harassment complaints made by any and all employees are relevant to the issue of whether class members' employment contracts were breached on account of WestJet's failure to fulfill the Anti-Harassment Promise, and therefore ought to be produced by WestJet.

[24] The central focus of the plaintiff's claim as pleaded, however, is harassment of female flight attendants by male pilots. The treatment of class members alleged throughout the amended notice of civil claim is linked to interactions between flight attendants and pilots, and the relationship of power imbalance the plaintiff pleads arises, particularly as between female flight attendants and male pilots. For example, the plaintiff pleads that:

- a) “Female Flight Attendants in particular benefit from the Anti-Harassment program WestJet promises to put in place, and are at an increased risk without the promise program”: amended notice of civil claim at para. 5;
- b) Second, WestJet has “routinely and systematically denied its female Flight Attendants the benefit of the Anti-Harassment Promise, particularly where Pilots are the harassers” and that “WestJet's female employees are left at risk and subject to Harassment without adequate recourse”: amended notice of civil claim at para. 6; and
- c) “Flight Attendants are largely young and female and Pilots are largely older and male”, and that “as a result of historic economic and operational factors (described below), female Flight Attendants are vulnerable to Harassment from male Pilots and are subject to differential treatment by

WestJet when such incidents arise": amended notice of civil claim at paras. 7 and 8.

[25] The amended notice of civil claim continues to particularize the historical, economic and operational factors that the plaintiff alleges result in female flight attendants being particularly vulnerable to harassment from pilots: at paras. 9 through 15. The claim as pleaded is predicated on and arises from the power imbalance the plaintiff alleges to have existed between flight attendants and pilots that allegedly gave rise to vulnerability and harassment of flight attendants. The plaintiff pleads that a heightened vulnerability of class members arises from this relationship. This heightened vulnerability underpinned the plaintiff's allegations regarding the need for and inclusion of the Anti-Harassment Promise in class members' employment contracts and gives rise to the breach of contract that forms the foundation of the plaintiff's claim.

[26] The amended notice of civil claim then defines the Anti-Harassment Promise at paras. 16 to 20 and pleads that WestJet has systematically breached class members' employment contracts by operating in breach of the Anti-Harassment Promise and allowing harassment to exist "where the Proposed Class members are vulnerable to and/or have experienced" conduct constituting harassment: amended notice of civil claim at para. 54. The plaintiff's penultimate pleading is illustrative of the nature of her claim, where she pleads:

[62] Despite its Anti-Harassment Promise, WestJet allows a culture permissive of Harassment to exist. While Harassment continues to be *de facto* acceptable at WestJet because it is not met with appropriate responses or discipline and complaints are not properly investigated, WestJet leaves the Proposed Class without the benefit of the protection guaranteed in their employment agreement. These failures, including the requirement that complainants remain silent about Harassment, results in WestJet protecting the Harassers, often Pilots, whom WestJet views as more economically valuable employees. The result is a workplace that endangers the safety of the Proposed Class generally, whether or not they directly experience the Harassment.

[27] WestJet acknowledges that its Code of Conduct and Respect in Workplace Policy form part of the terms and conditions of all employees' employment contracts

but denies that the Anti-Harassment Promise as pleaded in paras. 16 to 20 of the amended notice of civil claim form part of employment contracts of all class members: amended response to civil claim at paras. 35 and 37.

[28] The plaintiff characterizes the anti-harassment program as a "company wide program" and says she needs to know how it was employed throughout WestJet's operations as a whole in order to assess whether the Anti-Harassment Promise in the class members' employment contracts was breached. In the plaintiff's submission, WestJet's failure to provide a harassment-free workplace for everyone impacted class members, in breach of the Anti-Harassment Promise contained in their employment contracts. Absent production of all harassment complaints, the plaintiff says she will be unable to assess the adequacy of WestJet's anti-harassment program at large or identify systemic issue as to how WestJet responds to harassment complaints generally.

[29] In my view, the expanded scope of production of harassment complaints beyond those made by class members has not been made out on the record before me. In light of the plaintiff's pleadings and the certified common issues—which relate solely to whether the Anti-Harassment Promise formed part of the class members' employment contracts and whether it was breached—the plaintiff has not persuaded me that harassment complaints made in respect of WestJet's workforce as a whole are relevant to the matters in issue. The plaintiff has not articulated beyond bare assertions how harassment complaints for other categories of employees are relevant to the issue of whether the Anti-Harassment Promise in class members' contracts was breached.

[30] It remains unclear how the plaintiff says WestJet's alleged failure to provide a harassment-free workplace for e.g. mechanics, is relevant to whether WestJet breached the Anti-Harassment Promise in class members' employment contracts. Breach of the Anti-Harassment Promise contained allegedly in other categories of employees' employment contracts does not amount to a breach of the Anti-Harassment Promise in the class members' contracts, and no pleading of systemic

breaches of employment contracts for any other group of employees at WestJet is made on the pleadings. The only employment contracts in issue are class members' employment contracts—namely those of flight attendants—and whether some or all of the class members' employment contracts contained the Anti-Harassment Promise is an issue to be determined at the common-issues trial as framed in common issue number 1.

[31] At times, the plaintiff seemed to suggest that expanded scope of production of harassment complaints is required to enable her experts to assess WestJet's anti-harassment program and its application to class members to determine whether WestJet breached the Anti-Harassment Promise in class members' employment contracts. However, there was no evidence from the plaintiff's expert confirming this to be the case, i.e., that production of all harassment complaint files for WestJet's entire workforce as a whole is required to assess WestJet's Anti-Harassment Promise.

[32] Additionally, there are no other employees mentioned in the pleadings, and no pleading of vulnerability of other categories of employees. Vulnerability or harassment of these other categories of employees is not in issue on the pleadings or in the common issues. Nor has the plaintiff sought production of employment contracts for anyone other than class members. Further and unlike *Stanway*, on which the plaintiff relies, causation is not in issue here, and thus the wider scope of discovery that was found permissible in that case, going beyond the class period and class members, is not warranted on the same basis here.

[33] In my view, the plaintiff's conception of the scope of production of relevant harassment complaints is not supported by her pleadings. This claim is not about whether WestJet's anti-harassment program was adequate across its entire workforce. While the plaintiff pleaded by way of defining the parameters of the Anti-Harassment Promise that it was a promise made to all employees, the point of dispute on the pleadings and in the common issues as certified is whether the Anti-Harassment Promise formed part of *class members'* employment contracts, and if

so, whether WestJet breached the Anti-Harassment Promise by failing to fulfill that promise *to class members*, all of whom are or were flight attendants.

[34] This conception of the plaintiff's claim is consistent with prior decisions of this Court, which have consistently characterized it as one founded on allegations of breaches of class members—flight attendants'—employment contracts. By way of example:

- a) on WestJet's initial application to strike, the Court noted that the plaintiff's pleading "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*": *Lewis v. WestJet Airlines Ltd.*, 2017 BCSC 2327 at para. 55;
- b) on certification, this Court characterized the alleged breach of contract as "WestJet's systemic failure to meet its contractual promise to implement policies and practices that would adequately address harassment in the workplace", with the only breach pleaded being that of flight attendants' employment contracts: *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228, at para. 49; and
- c) in certifying this proceeding, the Court of Appeal specifically noted that the cause of action advanced is for breach of a specific contract with specific terms and conditions: *Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145, at paras. 63 and 66.

[35] Before the Court of Appeal, the claim was specifically rooted in breach of flight attendant class members' employment contracts. The Court of Appeal relied on this in rejecting WestJet's position that the plaintiff's claim, in substance, mirrored employers' obligations under human rights legislation. Indeed, as the Court of Appeal noted at para. 76:

[76] All of this is in aid of confirming that the substance of the appellant's particular claim, as reflected in her pleadings, in the common issues she

raised and in the evidence she intended to rely on, was based on the breach of a specific contract with specific terms and conditions.

[Emphasis added.]

[36] The specific contract referred to by the Court of Appeal is flight attendant class members' employment contracts, and the specific terms and reasons are the Anti-Harassment Promise that the plaintiff says forms part of those contracts. Indeed, common issues numbers 1 through 3 are all tied to breach of the Anti-Harassment Promise that is alleged to form part of class members' employment contracts, not that of any other employees' employment contracts. Understood in this respect, the Anti-Harassment Promise for a harassment-free workplace can only pertain to a workplace for flight attendant class members, not WestJet's workplace writ large.

[37] The plaintiff particularized the basis for expanding production of harassment complaints to those made by employees other than flight attendants (e.g. non-class members), by way of asserting that "how WestJet handled complaints involving other departments or non-pilot employees, which may reveal systemic issues beyond the pilot-flight attendant dynamic". While this may be a systemic claim, its parameters are still bound by the pleadings and the certified common issues, which are anchored in the assertion that the Anti-Harassment Promise formed part of class members' employment contracts and was breached by WestJet's failure to address and respond to conditions that permitted predominantly male pilots to harass predominantly female flight attendants.

[38] The plaintiff has not articulated how a failure to provide a harassment-free workplace for other categories of employees in workplaces where flight attendants do not work—for example, machine shops, call centres, or corporate offices—has any bearing on WestJet's alleged breach of the Anti-Harassment Promise contained in class members' employment contracts. The systemic issues in play are those pertaining to class members in light of their unique vulnerability. Systemic issues which may or may not arise for other categories of employees where not in issue in this action.

[39] In the result, I find that WestJet is not required to produce harassment complaint files for its workforce as a whole. However, I am satisfied that the scope of production is not limited by the pleadings to only harassment complaints made by class members against male pilots. While the power imbalance allegedly created by that particular relationship clearly plays a central role in the plaintiff's claim, I find that it is not limited to only those complaints. Consistent with the conception of the claim as set out above, WestJet is required to produce all harassment complaints made by class members during the class period. The scope of production is not limited to harassment complaints involving a pilot or a pilot who is the respondent, irrespective of the pilot's gender.

[40] I decline to order production of harassment complaints made for WestJet's workplace as a whole during the class period. In this respect, the plaintiff's position on the scope of production is overly broad and seeks production of documents that are not, in my view, relevant to the matters pleaded in the amended notice of civil claim and certified common issues. The plaintiff has not established an entitlement to a broader scope of production sought on the record before me on this application.

[41] With respect to opted-out class members, I find that complaint files for class members who opted out are relevant and producible, as they are still relevant to the systemic claim for breach of the Anti-Harassment Promise contained in class members' employment contracts. WestJet relied on *Doucet v. The Royal Winnipeg Ballet (The Royal Winnipeg Ballet School)*, 2019 ONSC 6982, for the broad proposition that once a potential class member opts out, their documents become irrelevant for document production purposes.

[42] I do not interpret *Doucet* in that manner. The ratio in *Doucet* does not, in my view, go as far as WestJet contends in terms of holding that once a prospective class member opts out, documents pertaining to their individual circumstances are in all circumstances irrelevant. In absence of any other authorities to that effect, WestJet is ordered to produce harassment complaint files for opted-out class members, redacted in accordance with a protocol to be agreed to by the parties.

[43] Finally, even if I had concluded that harassment complaints for WestJet's workforce as a whole were relevant, ordering production in the present circumstances would, in my view, give rise to not insignificant issues regarding notice and privacy, given the subject matter (complaints of harassment, including sexual harassment and assault) and expected content of the documents in issue. It does not appear that notice has been given to employees beyond class members that the plaintiff was seeking production of what can fairly be described as highly confidential and private employment records for non-parties.

[44] As the plaintiff concedes in her submissions, third party privacy rights are not an absolute barrier to production but are one of several interests to be considered in determining the scope of document discovery. The present circumstances are not, in my view, akin to those in *Richard v. HMTQ*, 2008 BCSC 1275, where files pertaining to individual class members were ordered produced on notice to individuals whose files were being sought and with an express confidentiality agreement. Here, the plaintiff seeks production of individual harassment complaint files of non-class members in circumstances where it does not appear notice has been given, and in the absence of a clear understanding of what measures, if any, are in place beyond the usual implied undertaking of confidentiality to protect third party private interests and ensure confidentiality of sensitive material. The parties indicated that they intended to agree on a redaction protocol, but that protocol is not presently before the Court.

[45] Finally, I note that these reasons address only production of documents in accordance with Rule 7-1. Nothing is to be taken as any form of ruling as to the admissibility or use of harassment complaint documents at trial.

Conclusion

[46] In the result, WestJet is ordered to produce all harassment complaint files for flight attendants, including potential class members who opted out, and this production is not limited to harassment complaints made against pilots.

[47] Given the holiday period, WestJet is afforded 45 days to produce any additional harassment complaint files captured by this order. The Court expects this deadline to be strictly complied with, absent WestJet seeking an extension of time and being granted same.

[48] That concludes my oral reasons.

“Hughes J.”