

# Transportation Notes: Proposed Discrimination Class Action by Airline Employee May Proceed

July 17, 2019

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The British Columbia Court of Appeal recently held that a proposed class action against WestJet commenced by an employee alleging that the carrier failed to prevent harassment and discrimination in the workplace could be heard by the courts.

WestJet had argued that the claim was within the exclusive jurisdiction of the Canadian Human Rights Tribunal, a statutory body set up to deal with claims relating to discrimination and harassment.

## The Claim

This action is a proposed class proceeding that has not yet been certified.

The plaintiff, Mandalena Lewis, was an employee of WestJet. Her claim is framed as a breach of her employment contract.

She alleges that her contract and that of other employees contains an “Anti-Harassment” promise. She claims that in the contract of employment WestJet assured the provision of a “safe and respectful work environment, no tolerance of harassment or discrimination, and WestJet’s responsibility to ensure the workplace is free of discrimination and harassment.”

The plaintiff claims that WestJet also committed to “treat all harassment complaints seriously, to respond to and resolve complaints quickly, to impose sanctions for breach of harassment policies, not to retaliate against complainants, and to discipline managers who do not act properly to end harassment.”

She alleges that WestJet breached its contractual obligations to its employees and benefited economically from those breaches. The claim seeks disgorgement of economic benefits accruing to WestJet because of the alleged breach of contract.

The claim also contained allegations about personal injuries sustained by employees.

## The Motion to Dismiss

In response to the claim, WestJet brought an application to strike the action on the basis that the courts lacked jurisdiction to hear the dispute.

WestJet argued the courts lack jurisdiction because the essential character of the claim involved breaches of statutory rights created by the *Canadian Human Rights Act*, R.S.C. 1985, c. H<sup>2</sup>6 (CHRA), or the *Canada Labour Code*, R.S.C. 1985, c. L<sup>2</sup>2 (CLC) and enforced by the Canadian Human Rights Tribunal.

With respect to the personal injury claims, WestJet argued these should be brought under the *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

### **The Decision of the Lower Court**

The Supreme Court of British Columbia dismissed WestJet's motion to have the claim struck, holding that the claim was for breach of contract, rather than an attempt to enforce a statutory right through a civil action.

The Court declined to strike the breach of contract claim, but ordered the claim be amended to delete allegations falling within the jurisdiction of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

### **The Issue on Appeal**

The issue before the British Columbia Court of Appeal was whether it was plain and obvious that the courts' jurisdiction to hear a breach of contract claim against an employer was ousted by operation of the *CHRA* and the *CLC*.

### **The Position of the Parties**

WestJet took the position at the motion and on appeal that the "essential character" of the claim was not for breach of contract, but for breach of statutory obligations, which should be enforced by the Canadian Human Rights Tribunal.

WestJet argued that the plaintiff's claim fell entirely within the statutory mandate of the *CHRA*. WestJet stated that the *CHRA* provides a comprehensive scheme for granting and enforcing an employee's rights relating to discrimination and harassment.

WestJet argued that the plaintiff's claim disclosed no reasonable cause of action for breach of contract that was distinct from matters falling within the statutory jurisdiction of the *CHRA*, because the contractual rights are derived from WestJet's statutory obligations.

The plaintiff took the position that the employment contract was an independent source of rights and nothing in the *CHRA* or the *CLC* ousted the courts' jurisdiction to hear the claim.

With respect to WestJet's arguments about the "essential character" of the claim, the plaintiff argued that the issue was irrelevant because ruling on the "essential character" was only necessary where only one forum can have the jurisdiction to adjudicate a dispute. In this case, the plaintiff argued that the language of the statutes did not expressly confer exclusive jurisdiction.

### **The Decision of the Court of Appeal**

The Court of Appeal upheld the lower court's decision, finding that although the contract of employment may have overlapped with or replicated the plaintiff's statutory rights under the *CHRA*, the contract of employment was a recognized source of legal rights that could be enforced in the courts.

Harris J.A. for the Court of Appeal reasoned:

*"[T]he same facts may be the source of different legal rights or legal rights sounding in different causes of action. Courts are familiar with concurrent causes of action, such as in contract and tort, which may have different substantive legal consequences yet arise from the same facts. Here, the plaintiff's suggestion is that the contract of employment is a source of legal rights even if those rights overlap or replicate her statutory rights under the CLC and the CHRA."*

The Court of Appeal held that the plaintiff's claim was not based directly on a breach of statutory obligations, as the plaintiff did not argue that WestJet's failure to fulfill the Anti-Harassment promise was, in and of itself, a discriminatory act.

The Court of Appeal further held that if Parliament had intended the CHRA to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, it would have done so expressly.

With respect to the issue of exclusive jurisdiction, Harris J.A. reasoned:

*"This case involves a claim that, given its substantive legal character, falls within the jurisdiction of the courts as well as alleging facts that could ground a complaint before the Canadian Human Rights Tribunal. The issue then is whether there is some basis to infer that the CHRA ousts the jurisdiction of the courts.*

*I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the CHRA was never enacted. If Parliament intended the CHRA to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not."*

#### **Comment**

This decision will be of note to carriers subject to federal human rights legislation in Canada, as it confirms that employees may resort to remedies outside the administrative scheme set up by the CHRA to seek redress depending on the wording of the contract of employment.

Carriers may want to review employment contracts to determine whether they are drafted in such a way so as to duplicate statutory obligations, thereby potentially making them enforceable as a breach of contract.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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