



No. S-162957
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MANDALENA LEWIS

PLAINTIFF

AND:

WESTJET AIRLINES LTD.

NOTICE OF APPLICATION

Name of applicant: The Plaintiff, Mandalena Lewis

To: The Defendant, WestJet Airlines Ltd.

TAKE NOTICE that an application will be made by the Plaintiff, Mandalena Lewis to the presiding Justice at the Courthouse at 800 Smithe Street, Vancouver, British Columbia on May 31, 2017 at 9:45 a.m., for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. An order that the Defendant produce all documents in its possession or control that are material to the issues relevant to certification including, without limiting the generality of the foregoing:
 - a) Employment contract for Mandy Lewis, along with any documents relating to the terms and conditions of that contract;
 - b) Any and all contracts or templates relating to standard terms and conditions for all flight attendants;
 - c) Any and all correspondence, emails, records, documents, notes or other information relating to any complaints of harassment by Pilot M, including the 2008 and 2010 complaints of sexual assault by Pilot M;
 - d) Any and all correspondence, emails, records, reports, documents, notes or other information (internal or external) relating to the administration and effectiveness of the Anti-Harassment Promises including but not limited to the WestJet HR Policy & Procedure Review carried out by Ernst & Young LLP on July 22, 2016, along with

the entirety of the report, and the Canadian Human Rights Commission 2015 review of Westjet's Respect in the Workplace Policy and Procedures;

- e) Any and all documents, presentations, reports or manuals prepared for manager/team leaders with respect to ensuring that all staff are aware of the Respect in the Workplace Policy and Procedures; and
- f) Any and all training documents, workplace assessments and communication strategies relating to the Respect in the Workplace Policy and Procedures.

PART 2: FACTUAL BASIS

1. The Plaintiff brings this claim on her own behalf and seeks to become the representative plaintiff of a certified class of present and former female Flight Attendants employed by WestJet who were entitled to the benefit of the Anti-Harassment Promise as defined in the Notice of Claim (the "Proposed Class").
2. The Plaintiff says that WestJet owed contractual duties to the Proposed Class, and in breach of those duties, WestJet derived substantial financial benefit. Specifically, the Plaintiff says WestJet has committed an ongoing breach of its employment contracts with present and former female Flight Attendants who were entitled to the benefit of the Anti-Harassment Promise defined in the Notice of Civil Claim.
3. WestJet's employment contracts with the Proposed Class provide that WestJet will create and maintain a workplace free from harassment, and that it will properly investigate and respond to complaints of harassment. The Plaintiff asserts that despite WestJet's Anti-Harassment Promise, WestJet has routinely and systematically denied the Proposed Class the benefit of the Anti-Harassment Promise.
4. Instead of having the benefit of a workplace environment free from harassment and the benefit of a robust response to harassment, as promised by contract, the Proposed Class is at risk of and subject to harassment without adequate recourse. A Flight Attendant need not have experienced harassment or injury from harassment to have been deprived of the benefit of the contract, and therefore be a member of the Proposal Class.
5. To be clear, the Plaintiff's claim is not for personal injury suffered as a result of harassment. The claim is not for a breach of any human rights legislation. The claim is not seeking legal redress for discrimination. Instead, the Plaintiff claims that WestJet's conduct breaches a fundamental term of the contractual rights of the Proposed Class and that WestJet has derived significant benefit both from making the Anti-Harassment Promise and in its breach. The Plaintiff claims any profits earned from breaching the contract should be returned to the Proposed Class.
6. Pursuant to the Order of the Honourable Madam Justice Humphries made November 22, 2016 the parties have exchanged lists of documents relevant to certification and the Plaintiff has made further requests for production of documents:

- (a) On January 18, 2017, the Plaintiff delivered her List of Documents relevant to certification;
- (b) On February 1, 2017 the Defendant delivered their List of Documents relevant to certification.
- (c) On March 3, 2017 the Plaintiff demanded production of further documents from the Defendant, largely based on documents requested in the Order sought above;
- (d) On March 17, 2017 the Defendant advised that it took the position that all documents relevant to certification had been produced.

Affidavit of R. Singh #2, Exhibits C and D

- 7. As a result of the Defendant's objections the Plaintiff makes this application for further production.

PART 3: LEGAL BASIS

Demand for Documents

- 1. Pursuant to section 40 of the *Class Proceedings Act*, RSBC 1996 c 50 (the "CPA"), the Rules of Court apply to class proceedings, to the extent they do not conflict with the CPA.
- 2. Accordingly, the document production procedures set out in the Rules apply to a potential class action before certification has been granted.

Samos Investments v. Pattison, 2001 BCSC 440; *Kimpton v. Canada*, 2002 BCSC 67; *Bryar Law Corp. v. Samsung Electronics*, 2010 BCSC 1661; *Hoy v. Medtronic*, 2000 BCSC 1105; *Matthews v. Servier Canada Inc.* (1999), 65 BCLR (3d) 348 (SC); *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2007 BCSC 1663; *Cantlie v. Canadian Heating Products Inc.*, 2014 BCSC 228

- 3. The Plaintiff seeks an order requiring the Defendant to comply with the demands for further documents pursuant to Rules 7-1(13).

Test for Certification

- 4. Section 4 of the CPA sets out the requirements for certifying a proceeding as a class action:
 - 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
 - (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class,

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

(a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;

(b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Evidence Required to Meet the Certification Test in this Case

5. The Plaintiff submits the following categories of documents are relevant to certification:

(a) Employment contract for Mandy Lewis, along with any documents relating to the terms and conditions of that contract;

(b) Any and all contracts or templates relating to standard terms and conditions for all flight attendants;

(c) Any and all correspondence, emails, records, documents, notes or other information relating to any complaints of harassment by Pilot M, including the 2008 and 2010 complaints of sexual assault by Pilot M;

(d) Any and all correspondence, emails, records, reports, documents, notes or other information (internal or external) relating to the administration and effectiveness of the Anti-Harassment Promises including but not limited to the WestJet HR Policy & Procedure Review carried out by Ernst & Young LLP on July 22, 2016, along with the entirety of the report;

- (e) Any and all documents, presentations, reports or manuals prepared for manager/team leaders with respect to ensuring that all staff are aware of the Respect in the Workplace Policy and Procedures; and
- (f) Any and all training documents, workplace assessments and communication strategies relating to the Respect in the Workplace Policy and Procedures.

The Documents are Necessary to Establish the Common Issues and an Identifiable Class

6. At this stage the Plaintiff anticipates the some of the proposed common issues will include:
 - (a) Is there a common employment contract between the class members and WestJet?
 - (b) Does the employment contract include a binding Anti-Harassment Promise?
 - (c) What terms and conditions are included in the Anti-Harassment Promise?
 - (d) Has WestJet failed to meet the Anti-Harassment Promise in relation to the Proposed Class in particular by, among other things:
 - (i) Failing to provide a harassment-free workplace; and
 - (ii) Failing to properly investigate and impose meaningful consequences in response to harassment.

7. To establish commonality, evidence that the acts alleged actually occurred is not required. However, the factual evidence sought goes to establishing whether these questions are common to all the class members. For example, the common issues ask whether the Anti-Harassment Promise is owed to all members of the class and whether WestJet breached its Anti-Harassment Promise on a class-wide basis. To that end, the Plaintiff seeks production of documents to establish that WestJet's conduct is systemic in nature.

Pro-Sys Consultants v. Microsoft [2013] 3 SCR 477

8. The documents are necessary to inform the court at the certification hearing of the systemic and ongoing breaches of the contract made by WestJet, which are common to the Proposed Class and not specifically an individual problem. The majority of the documents produced by the Defendant relate to the employment file of the Plaintiff, including her complete performance history with WestJet. The requested documents are relevant to ensure the completeness of the picture.

9. The documents are also necessary to establish an identifiable class of 2 or more persons as set out in section 4(1)(b) of the CPA.

PART 4: MATERIAL TO BE RELIED ON

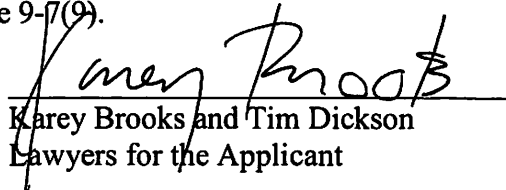
1. Affidavit of Rose Singh No. 2 sworn March 31, 2017; and
2. The pleadings in this action.

The applicants estimates that the application will take 2 hours.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this Notice of Application, you must, within five business days after service of this Notice of Application or, if this application is brought under Rule 9-7, within eight business days after service of this Notice of Application:

- (a) file an Application Response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application; and
 - (ii) has not already been filed in the proceeding; and
- (c) serve on the applicant two copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed Application Response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: March 31, 2017


 Karey Brooks and Tim Dickson
 Lawyers for the Applicant

To be complete by the court only:

Order made

[] In the terms requested in paragraphs _____ of Part 1 of this notice of application

[] With the following variations and additional terms:

Date:

Signature of [] Judge [] Master

Appendix**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- [proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts