

VANCOUVER

COURT OF APPEAL FILE NO. CA45034

MAY 22 2018

**COURT OF APPEAL
REGISTRY COURT OF APPEAL**

BETWEEN:

MANDALENA LEWIS

RESPONDENT
(PLAINTIFF)

AND:

WESTJET AIRLINES LTD.

APPELLANT
(DEFENDANT)

APPELLANT'S TRANSCRIPT EXTRACT BOOK

Appellant: WESTJET AIRLINES LTD.

Respondent: MANDALENA LEWIS

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Lewis v. WestJet Airlines Ltd.

INDEX

APPELLANT'S

TRANSCRIPT EXTRACT BOOK (i)

DESCRIPTION	DATE	TRANSCRIPT PAGES
Submissions for the Plaintiff by Ms. Brooks	November 9, 2017	47
Submissions for the Plaintiff by Ms. Brooks	November 9, 2017	52
Submissions for the Plaintiff by Ms. Brooks	November 9, 2017	60

Submissions by Ms. Brooks

1 to her remedies under the Canadian Human Rights
2 Commission or the Workers' Compensation Board.
3 And in that sense -- and this is at paragraph 50
4 of the written argument. You know, we really say
5 that, you know, WestJet is saying that the
6 plaintiff has tried to avoid the statutory regime,
7 but, in fact, it's WestJet who's trying to avoid
8 its contractual promises and obligations. WestJet
9 has sought to characterize the plaintiff's claim
10 as solely one relating to gender based
11 discrimination and injury for harassment, to
12 restrict her remedies to the *Canadian Human Rights*
13 *Act* or under the *Workers' Compensation Act*. But
14 contrary to the -- to WestJet's characterization
15 of the plaintiff's claim, her claim is not
16 appropriate for determination under the *Canadian*
17 *Human Rights Act* or the *Workers' Compensation Act*
18 and -- and we provide four reasons for that.
19 First, it's a breach of contract.

20 THE COURT: Where are you right now, sorry, in your --

21 MS. BROOKS: I'm sorry, paragraph 47.

22 THE COURT: Oh, right. Yup.

23 MS. BROOKS: So, first, the plaintiff's claim is for
24 breach of contractual promises WestJet made to the
25 proposed class to prevent and address harassment
26 in the workplace. Second, the plaintiff is not
27 seeking to enforce statutorily conferred rights or
28 recover benefits guaranteed by the *Canadian Human*
29 *Rights Act* or the *Workers' Compensation Act* and
30 those statutory regimes are not a barrier to her
31 claim. Third, the plaintiff is seeking
32 compensation for being deprived of the benefit of
33 the contract, a contract that applies to all
34 female flight attendants, and as a collateral to
35 address the systemic and ongoing breaches of the
36 contract. And that's a claim that we say is best
37 addressed through this class proceeding. And,
38 further, the plaintiff says it's not open to
39 WestJet to dictate to the plaintiff the forum for
40 her proceeding and she ought to be able to choose
41 the cause of action and remedy that she thinks
42 best suit her objectives. And, finally, the
43 plaintiff isn't seeking compensation for any
44 personal injuries and the *Workers' Compensation*
45 *Act* has no application. She's seeking
46 disgorgement of profit for any financial benefit
47 that WestJet has obtained for failing to properly

Submissions by Ms. Brooks

1 wishing to work within the airline industry that
2 has some of the issues that we identified earlier,
3 it gives WestJet contractual remedies against its
4 employees. So if an employee was found to have
5 committed harassment that could be termination for
6 -- for cause and WestJet can then rely on the
7 contract in the event that the employee sues
8 WestJet for wrongful dismissal. WestJet would no
9 doubt argue that the employee had been filed --
10 fired for reasons allowed in the contract. So it
11 can't be said that WestJet could enforce the very
12 same contractual provisions against its employees
13 but its employees can't enforce them against
14 WestJet.

15 And in cases where an employee has -- an
16 employer has incorporated or enhanced its
17 statutory obligations into an employment contract,
18 an employee has the right to enforce the terms of
19 the contract. As in the wrongful or constructive
20 dismissal cases, even though the conduct in
21 question may relate to harassment or
22 discrimination, both types of actions are based in
23 breach of contract, not on statutory obligations.
24 The reason the wrongful dismissal cases are
25 analogous is that, like those cases, they are not
26 suing on harassment *per se*. And the plaintiff
27 here isn't suing for harassment or injuries
28 arising from harassment. Yes, harassment is
29 evidence that's required to support her breach of
30 contract claim that there has been systemic
31 breaches of the system that WestJet promised to
32 put in place to protect its employees, but she's
33 not suing for harassment or discrimination.

34 Now, arguably, like the other conduct that
35 WestJet regulates, WestJet may have promised more
36 than expected to discharge its obligations under
37 the *Human Rights Act* or the *Canadian Labour Code*.
38 Its promises we reviewed includes specific rights
39 and responsibilities for managers, team leaders,
40 regional advisors, all of the employees,
41 procedures for both bringing informal and formal
42 complaints, processes relating to how those
43 investigations will be carried out and what
44 specific remedies for the complainants are
45 available, and a commitment to taking corrective
46 actions against the harasser, and none of these
47 specific steps that are set out in its procedure

Submissions by Ms. Brooks

1 including harassment. So under s.40 it states:
2
3 Subject to subsections (5) and (7) any
4 individual or group of individuals having
5 reasonable grounds for believing that a
6 person is engaging or has engaged in a
7 discriminatory practice may file with the
8 Commission a complaint in a form acceptable
9 to the Commission.

10
11 So here the plaintiff has not alleged any
12 discriminatory practice. Indeed, it's difficult
13 to see how WestJet could claim that this regime
14 would be appropriate when her claim does not even
15 satisfy the test for making a complaint. She is
16 not bringing a claim for the experience of sexual
17 assault that she had in her workplace. That
18 evidence -- that fact as plead is evidence of
19 WestJet's breach. There is no discriminatory
20 practice that she alleges in her claim. She says
21 that WestJet failed to implement its system and
22 she doesn't allege that that was on the basis of
23 any discrimination. She simply says WestJet made
24 a promise to do certain things to regulate
25 workplace conduct and it failed to do those
26 things. She does -- nowhere in her claim does she
27 say that that failure was discriminatory.

28 And, in fact, to require her to make that
29 additional allegation would be imposing on her an
30 additional burden, that now she has to prove in
31 addition to the breach of contract that she was
32 promised that it was also discriminatory for
33 WestJet to do that. WestJet would have her go to
34 the Human Rights Tribunal and have to incur that
35 additional burden when she simply says fix your
36 system. Your system failed and we're entitled to,
37 in this case, her remedy of disgorgement as a
38 result of the cost savings to the company in
39 failing to implement their system. So the
40 plaintiff could not avail herself based on the
41 claim that she wishes to make of the systemic
42 failure to implement their promise in the Human
43 Rights regime.

44 Further, there are some other references that
45 my friend made about you can bring a group and
46 other people. It's important to note that this is
47 designed to deal with specific instances of