Court Of Appeal Certifies WestJet Sexual Harassment Class Action



In *Lewis v. WestJet Airlines Ltd.*[1], the British Columbia Court of Appeal certified a class action concerning the alleged workplace sexual harassment of female flight attendants at WestJet Airlines. The decision reversed a 2021 Supreme Court of British Columbia decision declining certification[2].

The Supreme Court of British Columbia was prepared to certify the plaintiff's claim for breach of contract as a common issue but declined certification on the basis that the claim failed the preferable procedural criterion. The certification judge held that the action was better suited for the Canadian Human Rights Tribunal (CHRT). Our summary of the case and analysis of the Supreme Court of British Columbia decision can be found here.

The Court of Appeal determined that the certification judge's preferability analysis failed to consider all of the factors under section 4(2) of British Columbia's *Class Proceedings Act* (CPA)[3] and that a class action was in fact the preferable procedure for resolving the claim. The Court's decision suggests that, at least in British Columbia, the preferability analysis may turn on access to justice concerns regarding a procedure's jurisdiction to respond to the claim as pled, and the availability of the remedy sought.

What you need to know

- **In British Columbia, to be preferable, an alternative procedure must be responsive to the claim as pled and be capable of providing the relief sought**. For claims related to discrimination or harassment that allege breach of contract, a class proceeding may be preferable to a proceeding before a tribunal that may not have jurisdiction to consider contractual claims or award monetary compensation.
- **Non-monetary systemic remedies are not a substitute for monetary compensation.** The Court of Appeal disagreed with the certification judge's contention that systemic remedies directed at policy change and behaviour modification would achieve the claimant's objective, which is to secure monetary relief for class members.
- **A class action may be certified against an employer who fails to meet certain contractual commitments without evidence of loss**. The Court of Appeal accepted the appellant's argument that a remedy of disgorgement of profits for breach of contract was available without proven damages, despite the claim involving

individual allegations of discrimination and harassment. Notwithstanding that no losses were pled, the Court certified this claim because, consistent with *Atlantic Lottery Corp. Inc. v. Babstock*[4], the plaintiff sought disgorgement as a remedy for breach of contract, rather than attempting to plead disgorgement as an independent cause of action. At the merits stage, proving entitlement to this "exceptional relief" for breach of contract will require the plaintiff to demonstrate that other remedies would provide inadequate redress[5].

- **The Ontario courts may have reached a different outcome under the amended *Class Proceedings Act, 1992***. In Ontario, for a claim to be certified as a class action, the plaintiff must demonstrate that the common issues "predominate" over the individual issues and a class action would be "superior" to any other alternative. These new criteria may lead to a more stringent analysis of the preferable procedure requirement at the certification stage.

The Court of Appeal's decision

The Court of Appeal overturned the decision of the Supreme Court of British Columbia and certified all but one proposed common issue. The Court of Appeal's decision demonstrates the centrality of the preferability analysis at certification, which in British Columbia (and in the other common law provinces other than Ontario) includes weighing and considering concerns about access to justice and jurisdiction[6]. The Court of Appeal held that the certification judge erred by:

- failing to properly address the preferability provision of the CPA;
- impermissibly recasting the appellant's claim; and
- finding that a CHRT proceeding was preferable to a class action from an access to justice perspective.
- The certification judge's decisions on disgorgement and certifying aggregate damages were upheld.

Preferable procedure analysis

The main issue on appeal was whether the certification judge erred in deciding that a class proceeding was not the preferable procedure for the plaintiff's action. The plaintiff appealed on the basis that 1) the certification judge failed to consider the required statutory and common law factors for preferability and 2) the CHRT does not have jurisdiction to address the appellant's contractual claims.

WestJet argued that the certification judge appropriately focused her analysis on whether other means of resolving the claims were less practical and efficient, and whether the administration of the class proceeding would pose greater difficulties than other avenues for resolving the claims.

The Court of Appeal disagreed, finding that the certification judge erred by failing to consider the required statutory factors under the preferability analysis. An emphasis on certain factors did not relieve the certification judge from the requirement to weigh and consider the other factors. The Court further found that proceedings before the CHRT raised distinct procedural and substantive access to justice issues (including delay and uncertainty about limitations, jurisdictional, and evidentiary issues), which made a class proceeding the preferable procedure.

Characterizing this claim

The Court of Appeal also held that the certification judge erred by mischaracterizing the appellant's claim as one of systemic harassment, rather than breach of contract. The CHRT does not address breach of contract claims, which would preclude the CHRT from determining whether WestJet adhered to the anti-harassment contractual

commitments made to employees. While some of WestJet's contractual commitments were statutory obligations, determining the actual content of the contract would require a factual inquiry that the CHRT does not have the jurisdiction to conduct.

Moreover, the Court of Appeal noted that the "forward-looking" systemic remedies that the CHRT grants (i.e., workplace education and training programs) do not capture the substance of the appellant's claim for monetary relief for past breaches of contract[7]. Although the CHRT can provide redress for a discriminatory practice, any monetary compensation awarded under the *CHRA* is limited to proven losses[8], which the appellant did not claim.

Given that the CHRT did not have jurisdiction to address contractual claims or award monetary relief, the Court of Appeal held that a proceeding before the CHRT could not be the preferable procedure for effectively resolving the substance of the appellant's claim. Rather, a proceeding before the CHRT would "address a different claim and provide markedly different relief"[9].

Claim for disgorgement and common issues

The Court of Appeal certified all of the plaintiff's proposed common issues, including disgorgement, with the exception of the claim for aggregate damages. This aligns with the Court of Appeal's prior decision not to strike out the plaintiff's claim for failing to disclose a proper cause of action[10].

Practical implications

The Court of Appeal's decision serves as a reminder that employers may be liable for breaching contractual commitments related to harassment and discrimination that are incorporated into employment agreements. While an employer's harassment and discrimination policies may mirror their statutory obligations under human rights legislation, this statutory context may not preclude an employee from bringing a claim for breach of contract, including seeking disgorgement through a proposed class action.

Moreover, the preferable procedure analysis may favour whatever proceeding can maximize access to justice, which will determine what remedies are available to claimants. Employers should bear in mind that both systemic remedies, geared toward policy change and behaviour modification, and monetary compensation may be ordered to address claims related to discrimination and harassment.

Proactive approaches to workplace sexual harassment and discrimination remain important. Systemic change provides the best defence against liability. Employers should continue to update and monitor adherence to their harassment and discrimination policies, including their enforcement and complaints investigation processes.

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