CLASS ACTIONS, EMPLOYMENT CONTRACTS & REMEDYING HOSTILE WORKPLACES

LEWIS V WESTJET AIRLINES LTD, 2022 BCCA 145

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Several class actions have been filed in recent years regarding alleged workplace bullying and harassment. These actions typically seek a global award of compensatory damages. The Lewis v WestJet class action is novel in that it seeks disgorgement of monies saved by the employer in failing to adhere to its contractual obligation to maintain a safe and healthy workplace, free of harassment and bullying. If this action succeeds, it could significantly change the current legal landscape by delineating a separate gains-based remedy for victims of workplace bullying and harassment, as well as providing a remedy for employees who never were individually bullied or harassed, but were nonetheless denied a contractually guaranteed harassment-free workplace.

Ces dernières années, plusieurs recours collectifs ont été intentés concernant des allégations d'intimidation et de harcèlement en milieu de travail. Habituellement, on sollicite des dommages-intérêts compensatoires pour l'ensemble des plaignants. L'affaire Lewis v. WestJet est un recours collectif d'un genre nouveau, car les plaignants réclament la restitution des montants que l'employeur a économisés en manquant à son devoir contractuelle de garantir un milieu de travail sécuritaire exempt de harcèlement et d'intimidation. Si les plaignants ont gain de cause, cela pourrait amener un changement judiciaire important en créant une nouvelle catégorie de recours, à part, fondée sur les gains réalisés, pour les victimes d'intimidation et de harcèlement au travail, et pour les employés qui, sans avoir été eux-mêmes intimidés ou harcelés, ont été privés du milieu de travail libre de harcèlement que garantit leur contrat.

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1. Introduction

In recent years, several class actions have been filed regarding alleged workplace bullying and harassment.[1] These actions typically seek a global award of compensatory damages, which is intended to be distributed among the individual class members who were victimized by the misconduct in question. The *Lewis v WestJet* class action, the subject matter of this comment, is atypical—indeed, quite novel—in that a claim for compensation, in the form of a global damages award that, in turn, would be distributed among the class members, is *not* being advanced. Rather, the claim seeks *disgorgement* of monies saved by the employer in failing to adhere to its *contractual* obligation to maintain a safe and healthy workplace, free of harassment and bullying. If this action ultimately succeeds, it could significantly change the current legal landscape by delineating a separate gains-based remedy for victims of workplace bullying and harassment, as well as providing a remedy for employees who never were individually bullied or harassed, but were nonetheless denied a contractually guaranteed harassment-free workplace.

Following the Court of Appeal for British Columbia's decision in *Lewis v WestJet Airlines Ltd*,[2] this vigorously contested class proceeding, previously grounded, is now cleared for takeoff. Immediately after the proposed action was filed in the British Columbia Supreme Court, WestJet

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1 See, for example, *Canada v Greenwood*, 2021 FCA 186 (systemic non-sexual bullying and harassment within the RCMP); *Heyder v Canada (Attorney General)*, 2019 FC 1477 (sexual harassment and discrimination within the Canadian Armed Forces); *Tiller v Canada*, 2020 FC 321 (bullying and harassment of women who worked with—but were not employed by—the RCMP, and RCMP volunteers); and *Merlo v Canada*, 2017 FC 533 (police officers and civilian employed by the RCMP).

2 2022 BCCA 145 [*Lewis* BCCA Certification].

unsuccessfully challenged that court's jurisdiction to hear the dispute,[3] a decision confirmed by the Court of Appeal for British Columbia.[4] The Supreme Court of Canada ("SCC") refused WestJet's application for leave to appeal.[5] Following this protracted litigation, and with the jurisdictional issue finally determined in Ms Lewis's favour, the application for certification could finally be heard.[6]

The British Columbia Supreme Court refused to certify the action.[7] Ms Lewis successfully appealed that refusal to the Court of Appeal for British Columbia.[8] WestJet never applied to the SCC for leave to appeal that latter decision—perhaps surprisingly, in light of its prior determined opposition to this class action—and thus this action will now proceed on its merits.

2. *Lewis v WestJet*—The Pre-Certification Decisions

On April 4, 2016, Ms Lewis, a former WestJet flight attendant, filed a proposed class action[9] against WestJet on behalf of a class consisting of current and former WestJet flight attendants.[10] The claim, as it now stands, is solely for restitutionary relief[11] and punitive damages. Ms Lewis's

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3 *Lewis v WestJet Airlines Ltd*, 2017 BCSC 2327 [*Lewis* BCSC].

4 *Lewis v WestJet Airlines Ltd*, 2019 BCCA 63, leave to appeal to SCC refused, 38600 (18 July 2019) [*Lewis* BCCA].

5 *Ibid.*

6 The original Notice of Civil Claim was filed on April 4, 2016, and the commencement of the trial in this matter (assuming the action is not otherwise settled or abandoned, and actually proceeds to trial) is still several years off. Whatever the trial outcome might be, the record to date suggests that a further appeal—regardless of result—would be likely. The wheels of justice do sometimes turn at a glacial pace.

7 *Lewis v WestJet Airlines Ltd*, 2021 BCSC 228 [*Lewis* BCSC Certification].

8 *Lewis* BCCA Certification, *supra* note 2.

9 *Lewis v Westjet Airlines Ltd* (Notice of Civil Claim), online (pdf): <jfklaw.ca> [perma.cc/AY5B-TB45]. An amended Notice of Civil Claim was filed on May 27, 2019.

10 The class is now defined as follows: "All current and former female flight attendants at WestJet Airlines Ltd., who have or had contracts of employment with WestJet … [from] April 4, 2014 to the date of certification": *Lewis* BCCA Certification, *supra* note 2 at para 23.

11 The principal remedy sought in this action is disgorgement, described by Justice Horsman in the initial certification decision as follows: "… It is alleged that WestJet made contractual commitments to establish policies and practices that were adequate to provide class members with a harassment-free workplace, and failed to do so. The plaintiff seeks the remedy of disgorgement of profits, calculated as the cost savings to WestJet in failing to develop and implement adequate anti-harassment policies and practices": *Lewis* BCSC Certification, *supra* note 7 at para 2.

fundamental assertion is that WestJet breached its *contractual* obligation to its flight attendants to maintain a harassment-free workplace.[12] This obligation is said to be found in what Ms Lewis characterized as WestJet's "Anti-Harassment Promise" by which, among other things, WestJet promised that it would provide a safe and respectful work environment for all employees; not tolerate any harassment; take harassment complaints "seriously", including meting out disciplinary sanctions up to and including dismissal; and would ensure that WestJet managers proactively implemented and enforced the company's anti-harassment policies.[13] Ms Lewis asserted that, in particular, WestJet failed to adequately address sexual harassment by older male pilots against younger female flight attendants.[14]

Workplace harassment can, of course, form the basis of a human rights complaint. Section 14(1) of the *Canadian Human Rights Act*,[15] the human rights statute that governs federal jurisdiction private sector workplaces, prohibits "harassment" and section 14(2) prohibits "sexual harassment".[16] Clearly, Ms Lewis could have filed an individual human rights complaint against her alleged harassers and WestJet, as could have any other flight attendant, but she did not do so. In *Seneca College of Applied Arts &*

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12 In her Amended Notice of Civil Claim (at para 4), Ms Lewis specifically disavows "a claim for breach of any statutory rights or obligations", and states that she "does not advance a claim for non-contractual losses or harm" and "does not seek general or compensatory damages": See *Lewis* BCCA Certification, *supra* note 2 at para 11.

13 The elements of WestJet's "Anti-Harassment Promise" are set out in paras 16-20 of the Amended Notice of Civil Claim, filed May 27, 2019. It is reproduced in *Lewis* BCSC Certification, *supra* note 7, Appendix A.

14 Ms. Lewis alleges that she was personally assaulted by a pilot, and that WestJet failed to properly address her complaint; she was later dismissed and filed a wrongful dismissal action, which is currently stayed: *Lewis* BCSC, *supra* note 3 at paras 10-17.

15 RSC 1985, c H-6 [*CHRA*].

16 Neither "harassment" nor "sexual harassment" is defined in the *CHRA*. In *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1284, 59 DLR (4th) 352, the SCC defined the latter conduct as follows: "Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job- related consequences for the victims of the harassment." The *Canada Labour Code*, RSC 1985, c L-2, s 122(1) [*Canada Labour Code*] (Part II—Occupational Health and Safety) defines "harassment and violence" as meaning "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment". Complaints regarding harassment and violence can be filed with the Head of Compliance and Enforcement appointed under section 122.21(1) of the *Canada Labour Code*.

Technology v Bhadauria,[17] the SCC held that Ontario's human rights statute constituted a comprehensive code for addressing human rights complaints and, as such, "foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any common law action based on an invocation of the public policy expressed in the Code."[18] Accordingly, Ms Bhadauria's tort claim for "discrimination" and breach of Ontario's human rights statute—arising from her repeated unsuccessful attempts to secure a teaching position with the college—was dismissed. Over a quarter century later, the SCC reaffirmed its view that discrimination "cannot constitute an actionable wrong".[19]

In light of the *Seneca College* deferral principle (i.e., the courts should not adjudicate discrimination claims, and should defer adjudication to specialized statutory human rights tribunals), WestJet applied to have Ms Lewis's proposed class action struck out on jurisdictional grounds. Ms Lewis responded that her claim was simply one for breach of contract—a matter undeniably within the court's jurisdiction. Justice Humphries noted that while the Notice of Civil claim was "not a model of clarity", the claim "at its core, rest[s] on allegations of breach of the WestJet employment contract, not on a statutory right or on a claim of discrimination *per se*",[20] and thus was not bound to fail. As previously noted, WestJet unsuccessfully appealed this decision to the Court of Appeal for British Columbia,[21] and its further application for leave to appeal to the SCC was also dismissed.[22]

Although the Court of Appeal acknowledged that WestJet was bound, by statute, to maintain a harassment-free workplace, it nonetheless characterized the claim as being fundamentally the same as a building contract claim, where the alleged breach relates to building code standards that were incorporated into the contract.[23] Justice Harris, speaking for the 3-Justice Appeal Court Panel, concluded:

> While I am sympathetic to the argument that WestJet finds itself subject to the court's jurisdiction because it has incorporated its statutory human rights obligations into its employment contracts, that does not avoid the fact that these

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17 [1981] 2 SCR 181, 124 DLR (3d) 193 [*Seneca College* cited to SCR].

18 *Ibid* at 195.

19 *Honda Canada Inc v Keays*, 2008 SCC 39 at para 64 [*Honda*].

20 *Lewis* BCSC, *supra* note 3 at para 55.

21 *Lewis* BCCA, *supra* note 4; for a further analysis of the Court of Appeal's decision, see Kenneth Wm Thornicroft, "Contracting out of the *Bhadauria* Exclusive Jurisdiction Doctrine: *Lewis v WestJet Airlines Ltd*" (2019) 77:3 Advocate 371.

22 Kenneth Wm Thornicroft, "Reframing Workplace Discrimination as a Breach of the Employment Contract: *Lewis v WestJet Airlines Ltd*" (11 February 2020), online: *Canlii Connects* <canliiconnects.org> [perma.cc/3S92-2HWR].

23 *Lewis* BCCA, *supra* note 4 at para 27.

> obligations are now terms of the contracts and can be relied on as such both by WestJet and its employees. Nor can I see that recognizing the general principle that a plaintiff can choose his or her forum frustrates the statutory objectives of the statutory human rights scheme.
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> I have proceeded to analyze the issues in the case on the assumption that the AntiHarassment promise mirrors WestJet's statutory obligations. I have not found it necessary to consider whether the promise exceeds statutory standards. If that were so, the argument that the court has jurisdiction would be strengthened. I have also not found it necessary to engage with those arguments premised on the preferability of one forum to another.
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> In the result, I am not persuaded that the judge fell into error in concluding that it was not plain and obvious that the court did not have jurisdiction to hear the plaintiff's claim.[24]

3. *Lewis v WestJet*—The Certification Decisions

In British Columbia, as in other provinces, class proceedings must be certified in accordance with the provisions of a class proceeding statute.[25] British Columbia's *Class Proceedings Act*,[26] like other provincial class action statutes, states that the court must certify the class action if certain criteria are satisfied including: i) there is a legitimate cause of action; ii) there is an identifiable class of two or more persons; iii) there are one or more common issues among the class members; iv) a class action is the preferable procedure for addressing the common issues (versus, say, individual lawsuits, or a complaint filed with an administrative tribunal); and v) there is an unbiased representative plaintiff who can fairly and adequately represent the class members' interests.[27]

A) The BC Supreme Court Refuses Certification (2021 BCSC 228)

Justice Horsman (now Horsman, JA), although satisfied that most of the certification criteria were met,[28] nevertheless dismissed the application,

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24 *Ibid* at paras 47–49.

25 All provinces have enacted class proceedings statutes, each of which contains essentially similar criteria regarding the certification of a class action. Prince Edward Island was the last province to enact class proceedings legislation—the *Class Proceedings Act* was given Royal Assent on November 17, 2021 and was proclaimed into force on June 1, 2022.

26 RSBC 1996, c 50 [*Class Proceedings Act*].

27 *Ibid*, s 4(1).

28 Justice Horsman held that the Amended Notice of Civil Claim disclosed a presumptively legitimate cause of action (i.e. "WestJet's systemic failure to meet its

principally because she did not accept that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues".[29] Justice Horsman concluded that the preferable procedure was a complaint under the *CHRA* taking into account access to justice, judicial economy, and the need for incentivizing behaviour modification.[30] Finally, Justice Horsman observed that current WestJet employees had other possible adjudicative options open to them, namely, collective bargaining,[31] or former flight attendants could pursue "individual or a multi-plaintiff action".[32]

B) The BC Court of Appeal Grants Certification (2022 BCCA 145)

Ms Lewis appealed Justice Horsman's refusal to certify based on a human rights complaint being the preferable procedure, and also her refusal to allow the "aggregate damages quantification" issue to proceed as a common issue. WestJet appealed Justice Horsman's decision that would have allowed (had certification been granted) the availability of

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contractual promise to implement policies and practices that would adequately address harassment in the workplace"), and that Ms Lewis was a suitable representative plaintiff: *Lewis* BCSC Certification, *supra* note 7 at para 49. Justice Horsman was prepared to certify the following common issues: i) Is the Anti-Harassment Promise a term of WestJet's employment contracts with the proposed class?; ii) Did WestJet breach the Anti-Harassment Promise?; iii) Did WestJet generate cost savings by failing to implement the Anti-Harassment Promise?, and if so; iv) Is the class entitled to disgorgement of those savings?; and finally v) Should punitive damages be awarded and, if so, in what amount? Justice Horsman was not prepared to certify a proposed common issue regarding the total amount of money that should be disgorged to the class, especially since she had significant concerns about how the total savings would be allocated: *ibid* at para 114.

29 *Class Proceedings Act*, *supra* note 26, s 4(1)(d).

30 *Lewis* BCSC Certification, *supra* note 7 at paras 158-166; *ibid* at paras 167-172: Justice Horsman believed that a *CHRA* complaint process would proceed "more efficiently and with less cost"; *ibid* at paras 173-174: Justice Horsman noted "The direct remedies available from the [Canadian Human Rights Tribunal] would require WestJet to not simply pay out the costs of effective anti-harassment policies, but to actually implement the policies."

31 WestJet was an entirely non-union firm when the class action was originally filed, but now both its pilots (in 2017) and flight attendants (in 2018) are unionized. As noted by Justice Horsman in *Lewis* BCSC Certification, *supra* note 7 at para 58: issues relating to bully and harassment of flight attendants could be addressed in a collective agreement or, possibly, through grievance arbitration; in light of the SCC's decision in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 [*Horrocks*], to the extent that bullying and harassment are addressed in the flight attendants' collective bargaining agreement (for example, an employer commitment to provide a harassment-free workplace), a grievance arbitrator would presumptively have *exclusive* jurisdiction over any grievance relating to such conduct. See also: *Hudson v Canada*, 2022 FC 694 [*Hudson*].

32 *Lewis* BCSC Certification, *supra* note 7 at para 175.

disgorgement to proceed as a common issue. The appeal court overturned Justice Horsman's decision, and certified the action with respect to all of the common issues that Justice Horsman would have otherwise allowed to proceed (including whether disgorgement was a potentially available remedy). The appeal court rejected Ms Lewis's argument that Justice Horsman erred when she refused to certify, as a common issue, the quantification of the "saved costs" that should be disgorged, if a disgorgement remedy were ultimately ordered.[33]

Justice Voith, writing for the 3-Justice Appeal Panel, emphasized that Ms Lewis's claim was based on a "single cause of action", namely, the terms and conditions of WestJet's various anti-bullying and anti-harassment policies that were said to be incorporated into the flight attendants' employment contracts, and that "the Amended Claim repeatedly and unequivocally eschews reliance on any statutory breach or duty of care and it disclaims any right to general or compensatory damages."[34] This latter observation was critical, inasmuch as Justice Horsman's analysis was predicated on a *statutory* remedy (i.e., a *CHRA* complaint) being the preferable procedure.

In Justice Voith's view, although Justice Horsman was very much alive to the discrete contractual nature of Ms Lewis's claim, she nonetheless erred by addressing the claim through a human rights complaint lens when she considered "whether the remedies available from the [Canadian Human Rights Tribunal; the "CHRT"] would address the substance of the claims of the class members".[35] While bullying and harassment of flight attendants by WestJet pilots, and WestJet's alleged failure to properly address such conduct when it was brought to its attention, could form the basis of a *CHRA* complaint, the CHRT has no jurisdiction regarding claims for *breach of contract*.[36] That being so, Justice Horsman's consideration of whether the CHRT could grant remedies for the type of conduct alleged by Ms Lewis was misplaced: " … the certification judge erred in principle in mischaracterizing the appellant's claim as being about systemic harassment at large, and as measured against statutory standards, rather than as a claim that was based on a breach of the specific contractual commitments that were alleged to have been made by WestJet to class members."[37]

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[33] However, the appeal court also noted: "… it remains open to the trial judge, at the close of the common issues trial, to conclude that the statutory requirements for an aggregate award are met and to make such an award": *Lewis* BCCA Certification, *supra* note 2 at para 160.

[34] *Ibid* at para 18.

[35] *Lewis* BCSC Certification, *supra* note 7 at para 145.

[36] *Lewis* BCCA Certification, *supra* note 2 at para 78.

[37] *Ibid* at para 84.

Justice Voith further held that Justice Horsman, by focusing on the "systemic remedies" that the CHRT could order (for example, mandating employee education and training programs), failed to appropriately recognize that Ms Lewis was not advancing a *forward-looking* claim, and was not seeking any systemic remedies. Rather, Ms Lewis's claim concerned *past* conduct (i.e., breach of the "Anti-Harassment Promise") which, in turn, allowed WestJet to reduce its operating costs: "[Ms Lewis] seek[s] a monetary remedy on behalf of class members based on WestJet's alleged past failure to adhere to its contractual obligations during the Class Period [and] this is to be achieved through disgorgement of the monies WestJet saved as a result of its purported failure to adhere to the AntiHarassment Promise."[38] Justice Voith also observed:

> … there is no equivalence between systemic remedies that are forward-looking and directed to changing an offending party's existing practices and a monetary award that compensates class members for past breaches of contract during the Class Period. Such systemic remedies would not address the claim being advanced by the appellant or provide an effective remedy for that claim.[39]

Justice Voith emphasized that *CHRA* remedies are predicated on proof of discriminatory conduct, whereas in the *Lewis v WestJet* action—as pleaded—whether individual flight attendants were actually bullied or harassed is irrelevant. The focus of the claim is not whether *individual class members were victims of discriminatio*n; rather, the focus is whether WestJet breached its *contractual duty to maintain a workplace free of harassing and bullying behaviour* and, if so, to what extent did this breach allow WestJet to reduce its operating costs.[40]

Finally, Justice Voith concluded that rather than enhancing access to justice, a *CHRA* complaint process was likely a significantly *less* accessible dispute resolution process compared to a class action. Some of the identified deficiencies of the *CHRA* complaint process included: i) some class members would likely be barred from pursuing a complaint (due to limitations issues and/or because they were not actually bullied or harassed); ii) the CHRT's lack of jurisdiction to grant the disgorgement remedy sought; iii) a class action avoids the need for individual flight attendants to testify in order to potentially obtain a monetary remedy; and iv) the matter would be further delayed if it were to proceed under the *CHRA*.

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38 *Ibid* at para 94.

39 *Ibid* at para 101.

40 *Ibid* at paras 107-109.

4. The Employer's Obligation to Maintain a Dignified Workplace

Lewis v WestJet establishes a potentially broad exception to the *Seneca College/Honda* deferral principle since many—and most large—employers have codes of conduct, and other policies in place governing acceptable workplace behaviour.[41] An employer will usually have just cause to dismiss an employee who breaches these workplace policies.[42] An employee who has been subjected to bullying and harassment (sexual or otherwise) may have a valid claim for constructive dismissal.[43]

Surely, holding employers to their contractual obligations—stemming from their own workplace rules and policies—to take all reasonable steps to ensure that employees are not victimized by bullying and harassment cannot be a novel proposition. Further, requiring an employer to honour its promise that bullying and harassment will not be tolerated is consistent with the *Bhasin v Hrynew* "good faith" principle, where the SCC held "that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily".[44] The SCC also observed that "a contracting party should have appropriate regard to the legitimate

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41 Federally regulated employers are required to have a "workplace harassment and violence prevention policy": SOR/2020-130, s 10(1); similar obligations are contained in many provincial occupational health and safety or human rights statues (for a summary, see The Canadian Institute of Workplace Harassment and Violence, "Workplace Bullying & Harassment Legislation/Policies by Province" (January 2021), online: *Canadian Legislation* <instituteofworkplacebullyingresources.ca> [perma.cc/J7FA-R6AG]).

42 See, for example, *Hall v Boise Alljoist Ltd*, 2006 NBCA 111; *Thomas v Saskatchewan Indian Gaming Authority Inc*, 2021 SKCA 164; *Render v ThyssenKrupp Elevator (Canada) Limited*, 2022 ONCA 310 at para 70: "I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand … Although some may perceive it to be benign and all in good fun, those on the receiving end of personal 'jokes' do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed."

43 See, for example, *Deol v Dreyer Davison LLP*, 2020 BCSC 771; *Humphrey v Mene*, 2021 ONSC 2539 (the constructive dismissal finding was not challenged on appeal: *Humphrey v Mene Inc*, 2022 ONCA 531); and *Alberta Computers.com Inc v Thibert*, 2021 ABCA 213. In *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 at para 82 [*Matthews*], the court noted: "… courts have frequently examined whether employers treated their employees with good faith in constructive dismissal cases by, for example, ensuring employees were safeguarded from bullying, intimidation, and harassment from managers and other employers".

44 2014 SCC 71 at para 63 [*Bhasin*]. In an earlier decision, *McKinley v BC Tel*, 2001 SCC 38 at para 73, the court held that "the parties to an employment contract are

contractual interests of the contracting partner."[45] It hardly seems incongruous to require employers to undertake appropriate investigative and corrective action when informed about possible breaches of their workplace conduct policies. Employees who have been bullied and harassed undoubtedly have "legitimate" expectations that their employer will take affirmative steps to investigate and rectify the situation, especially when they have promised to do so.

It has long been recognized that an employee, even if not characterized as a fiduciary, is nonetheless bound by a duty of good faith and loyal service *vis-à-vis* their employer, and is liable for reasonably foreseeable compensatory damages suffered by their employer if they breach that implied duty. In appropriate cases, the faithless employee may also be held liable for punitive damages.[46] Although employers also have a good faith obligation toward their employees, the scope of this obligation is considerably narrower than that owed by employees, generally being limited to an obligation to act in good faith when terminating an employee.[47] In *Matthews*,[48] the SCC specifically refused to create a "reciprocal" good faith obligation binding employers in all their dealings with employees.[49] However, where evidence demonstrates that an employer's contractual promise to provide a harassment-free workplace was, in fact, a mere chimera—since the employer never took effective steps to implement or enforce its promise—one might reasonably characterize the promise as having been made in bad faith, in turn justifying a separate damages award.[50]

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subject to obligations of good faith and fair dealing. These obligations subsist throughout the relationship up until and including its termination."

45 *Bhasin*, *supra* note 44 at para 65.

46 *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2008 SCC 54.

47 For example, the employer must not engage "in conduct during the course of dismissal that is 'unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive'": *Honda*, *supra* note 19 at paras 57-58.

48 *Supra* note 43.

49 *Ibid* at paras 85, 86: "It might be that, as argued by various parties in this appeal, a duty of good faith will one day bind the employer based on a mutual obligation of loyalty in a non-fiduciary sense during the life of the employment contract, owed reciprocally by both the employer and employee. I recognize, however, that whether the law should recognize this is a matter of fair debate … In light of the comment in *Bhasin* (at para 40) that the common law should develop in an incremental fashion, I would decline to decide whether a broader duty exists during the life of the employment contract in the absence of an appropriate factual record."

50 See *ibid* at paras 39, 45: "So long as damages are appropriately made out and causation established, a breach of a duty of good faith could certainly give rise to distinct damages based on the principles in *Hadley*, approved in this setting in *Keays* (at paras 55-56), including damages for mental distress. Punitive damages could also be available in certain circumstances."; in *Salager v Dye & Durham Corporation*, 2018 BCSC 438, the

5. Proving The Claim

It is important to stress that the claim advanced in *Lewis v WestJet* is *not* one seeking individualized compensation for specific transgressions by one or more WestJet employees toward other WestJet employees. It is not a claim for compensatory damages; rather, it is breach of contract claim seeking a restitutionary remedy, namely, disgorgement.[51] The claim asserts WestJet employees' contracts included a term that WestJet would ensure its employees would not be subjected to bullying and harassment. The remedy sought is novel—disgorgement of the monies WestJet saved by failing to ensure that its contractual obligations regarding the maintenance of a healthy workplace were met. Although disgorgement is generally available in most intellectual property disputes (by statute and under the common law),[52] and for breach of fiduciary duty,[53] the presumptive remedy for breach of contract is damages.[54]

Although WestJet is now a unionized firm, this claim is not being pursued as a grievance under a collective bargaining agreement since, for the most part, the events and conduct in question precede the flight attendants' successful union organizing drive.[55] If this civil action

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court awarded both aggravated ($25,000) and punitive ($25,000) damages against a former employer that breached its good faith obligations embedded in a settlement agreement; see also *Galea v Wal-Mart Canada Corp*, 2017 ONSC 245—$250,000 for moral damages and $500,000 for punitive damages; see also *Karmel v Calgary Jewish Academy*, 2015 ABQB 731—$200,000 in aggravated damages for "bad faith dealings".

51 As explained in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 24 ["*Atlantic Lottery*"], disgorgement, unlike unjust enrichment (another gains-based remedy), does not require the plaintiff to prove they suffered an economic loss or deprivation. However, disgorgement is an "alternative remedy" and a form of "exceptional relief", not a free-standing cause of action: see *ibid* at paras 27, 61.

52 See, for example, *Cinar Corporation v Robinson*, 2013 SCC 73 and *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 76 [*Strother*].

53 See, for example, *Canadian Aero Services Ltd v O' Malley et al*, [1974] SCR 592, 40 DLR (3d) 371; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129, and *Strother*, *supra* note 52.

54 *Atlantic Lottery*, *supra* note 51 at para 50.

55 The class claim spans the period from April 4, 2014 to the date of certification. On July 31, 2018, the Canadian Industrial Relations Board certified the Canadian Union of Public Employees as the collective bargaining agent for WestJet's "cabin crew members/ flight attendants": see *Canadian Union of Public Employees v Westjet* (31 July 2018), 11308-U, online: Canada Industrial Relations Board <decisialexum.com> [perma.cc/GXX2-97XG]. After protracted negotiations, a five-year collective bargaining agreement ("CBA") was concluded, which runs from March 1, 2021 to December 31, 2025 ("Collective Agreement Between Westjet, an Alberta Partnership and CUPE Local 4070" (1 March 2021), online (pdf): *Cupe4070* <www.cupe4070.ca> [perma.cc/AEN2-TW95]). Article 5 of the current CBA addresses "Discrimination or Harassment". A breach of this provision is

is to succeed, the plaintiff will have to demonstrate that: i) there was a contractual promise regarding bullying and harassment (and provide evidence regarding the scope of that contractual promise in relation to such unacceptable conduct); ii) WestJet breached this promise; iii) WestJet's failure to honour its promise resulted in ascertainable cost savings; and iv) disgorgement of those cost savings is an appropriate remedy. Since the class action seeks the remedy of disgorgement of profits, and not unjust enrichment, there is no burden on the plaintiff to demonstrate that the flight attendants suffered any economic deprivation as a result of WestJet's breach of contract.[56]

Employer workplace policies and codes of conduct can have contractual force such that a breach gives the party not in breach a contractual remedy (for example, an employer may have just cause for dismissal; an employee may have a claim for damages).[57] In order to succeed in the class action, the WestJet flight attendants must prove that the fundamental elements of the "Anti-Harassment Promise" actually formed part of their individual employment contracts. As noted by Justice McLachlin (later CJC) in *Rahemtulla v Vanfed Credit Union*, "if the terms of the policy manual are to be binding, it must be concluded that they have contractual force [and] the usual elements of a contract must be established: a concluded agreement, consideration, and contractual intention".[58] However, in *Rahemtulla*, Justice McLachlin held that the employer's policy manual did *not* have contractual force, and other decisions have reached similar conclusions.[59]

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grievable, and such a grievance, if not resolved, could result in an arbitration. A grievance arbitrator would have *exclusive* jurisdiction (ousting the jurisdiction of the Canadian Human Rights Tribunal) to hear and decide that grievance: see *Horrocks*, *supra* note 31; see also *Ashraf v Jazz Aviation*, 2022 FCA 13 and *Hudson, supra* note 31). The current CBA does not contain any provision addressing workplace disputes arising after certification, but prior to the commencement of the CBA: see *Lewis* BCSC Certification, *supra* note 7 at para 58. Flight attendants hired after July 31, 2018, but prior to the date of certification (April 19, 2022), are clearly entitled to participate in the class action; flight attendants hired after the date of certification have no right to participate in the class action. The status of flight attendants hired after certification, but prior to the commencement of the CBA (March 1, 2021), is unclear—their only viable remedy may be an individual civil action provided such an action is not statute-barred.

56 *Atlantic Lottery*, *supra* note 51 at para 24.

57 See, for example, *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004), 246 DLR (4th) 65, 192 OAC 126 (CA); *Poliquin v Devon Canada Corporation*, 2009 ABCA 216; and *Boucher v Wal-Mart Canada Corp*, 2014 ONCA 419.

58 51 BCLR 200, [1984] 3 WWR 296 at para 18 (SC) [*Rahemtulla*].

59 See, for example, *Neudorf v Sun Valley Co-op Ltd*, 94 Man R (2d) 204, [1994] 9 WWR 23 (QB); *Singh v British Columbia Hydro and Power Authority*, 2001 BCCA 695; *Duguay v Mudjatik Thyssen Mining Joint Venture*, 2010 SKPC 183; *Cheong v Grand Pacific*

As the Court of Appeal for British Columbia noted in the certification decision, although "WestJet's alleged conduct would likely constitute discriminatory conduct under the [*CHRA*] … the [Canadian Human Rights Tribunal] does not address breach of contract claims [and] its role is not to determine whether WestJet adhered to the specific terms of the contracts it had with its employees."[60] The flight attendants cannot simply assert that the anti-harassment provisions contained in federal human rights legislation[61] are deemed provisions incorporated into their employment contacts. The Court of Appeal for British Columbia, in *Macaraeg v E Care Contact Centers Ltd*,[62] held that statutory terms (employment standards provisions in that case) cannot, as a matter of general legal principle, constitute implied contractual terms enforceable by an ordinary civil action. Accordingly, it will fall to the flight attendants to prove that the provisions of the Anti-Harassment Promise, standing alone, were express or implied[63] (other than being implied by statute) contractual terms of their employment with WestJet.

In order to prove a breach of contract, the flight attendants must demonstrate that WestJet *systematically* failed to implement and enforce the Anti-Harassment Promise. The essential elements of proof might include evidence that WestJet did not undertake appropriate staff education and training; failed to properly investigate allegations of bullying and harassment; did not provide adequate channels for employees to report inappropriate behavior; and failed to meaningfully discipline employees who engaged in improper workplace conduct.

The disgorgement remedy sought is predicated on a determination that WestJet generated substantial cost savings by failing to implement and enforce its Anti-Harassment Promise. The question of whether a

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Travel & Trade (Canada) Corp, 2016 BCSC 1321; *Valle Torres v Vancouver Native Health Society*, 2019 BCSC 523; and *Reotech Construction Ltd v Snider*, 2022 BCSC 317.

60 *Lewis* BCCA Certification, *supra* note 2 at para 78.

61 *CHRA, supra* note 15, s 14 contains provisions dealing with both harassment and sexual harassment. *Canada Labour Code, supra* note 16, ss 125(1)(z.16), (z.161), (z.1612), (z.163) also set out various employer responsibilities regarding workplace bullying and harassment.

62 2008 BCCA 182 [*Macaraeg*]. Although *Macaraeg* is binding in British Columbia, its correctness has been questioned in Alberta (*Walter v Western Hockey League*, 2018 ABCA 188), Saskatchewan (*Balzer v Federated Co-operatives Limited*, 2018 SKCA 93), Manitoba (*Hutlet v 4093887 Canada Ltd et al*, 2015 MBCA 82), and Ontario (*McCracken v Canadian National Railway Company*, 2010 ONSC 4520); *Macaraeg* has been followed in Nova Scotia (*Fredericks v 2753014 Canada Inc*, 2008 NSSC 377).

63 See *MJB Enterprises Ltd v Defence Construction (1951) Ltd*, [1999] 1 SCR 619 at para 27, [1999] 7 WWR 681 [*MJB Enterprises*] regarding the implication of terms into a contract.

disgorgement remedy *should* be ordered has been certified as a common issue. As the SCC observed in *Atlantic Lott*ery, disgorgement is:

> … available for breach of contract only where, at a minimum, other remedies are inadequate. Circumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff's loss is 'impossible to calculate' or where the plaintiff's interest in performance is not reflected by a purely economic measure.[64]

The starting point in determining whether disgorgement should be ordered may be a consideration of the "legitimate interest a gain-based award serves to vindicate".[65] In this regard, although individual employees who were bullied and harassed may have individual damages claims, they may be reluctant to pursue them for fear of retaliation or loss of employment.[66] Even when individual claims are pursued, it must be recognized that the overwhelming majority of claims are settled. Settlements of harassment cases invariably include non-disclosure agreements which can limit the scope for system-wide behavioural change (since the extent of the problem remains hidden); perpetrators are protected by confidentiality provisions, potentially leaving other employees vulnerable to similar behaviour.[67] In this case, disgorgement would provide a considerably more expansive

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64 *Supra* note 51 at para 59.

65 *Ibid* at para 57.

66 In a 2018 study, Forum Research Inc reported that over one-half of all Canadian employees either experienced or witnessed workplace bullying. However, only about half of those employees reported the matter to management; only about one in four identified bullies were actually sanctioned for their misconduct: see Forum Research Inc, "1 in 2 Canadians have experienced bullying in the workplace" (19 November 2018), online: *The Forum Poll* <poll.forumresearch.com> [perma.cc/Q38Z-RH3R]. In a similar vein, a 2018 Statistics Canada study reported that 19% of women and 13% of men reported being harassed or otherwise bullied at work within the past year, but very few actually formally complained (4% of women; 1% of men): Darcy Hango & Melissa Moyser, "Harassment in Canadian workplaces" (17 December 2018), online: *Statistics Canada* <www150.statcan.gc.ca> [perma.cc/NZ69-ALG2]. A more recent study commissioned by the Time's Up Legal Defense Fund and the National Women's Law Center Fund LLC reported that "More than seven in 10 survivors who experienced workplace sexual harassment faced some form of retaliation, including termination, being sued for defamation, and denial of promotions": Jasmine Tucker & Jennifer Mondio, *Coming Forward: Key Trends and Data from the TIME'S UP Legal Defense Fund* (Washington, DC: The National Women's Law Center, 2022) at 4, online (pdf): <nwlc.org> [perma.cc/5TXB-4ANW]; see also Canadian Labour Congress, "Harassment and Violence in Canadian Workplaces: It's [Not] Part of the Job" (April 2022), online: *Western Center for Research & Education on Violence Against Women & Children* <canadianlabour.ca/national-survey-reports-widespread-harassment-and-violence-in-workplaces/> [perma.cc/UT7B-MLNJ].

67 This is precisely what Ms. Lewis says happened to her: see *Lewis* BCSC Certification, *supra* note 7 at paras 16-17.

remedy than individual damages awards, and would create a stronger economic incentive for WestJet, and other employers, to take meaningful action to rectify a hostile workplace.

And what about employees who were never personally targeted? If WestJet systematically failed to enforce its "Anti-Harassment Promise", all of its employees were denied the benefit of their contractual right to a harassment-free workplace. Empirical evidence shows that employees who witness bullying and harassment, but who were not personally bullied or harassed, nonetheless suffer adverse physical and psychological effects.[68] A disgorgement remedy, unlike damages based on individualized injury and economic loss, can provide a measure of compensation for those employees who might otherwise be denied recovery if they were obliged to pursue individual damages claims or human rights complaints.[69] In such circumstances, as stated in *Atlantic Lottery*, "an award that appears to be measured by a defendant's gain … [could] serve a compensatory purpose that distinguishes it from disgorgement and which therefore tends to support recovery".[70]

6. Concluding Remarks

Assuming disgorgement is an appropriate remedy, a later determination regarding the amount to be disgorged will be required. This latter matter has *not* been certified as a common issue. Presumably, *all* members of the class (including those who were never bullied or harassed) will ultimately share in any "disgorgement fund" (although perhaps not equally[71]),

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[68] See, for example, Maarit A-L Vartia, "Consequences of workplace bullying with respect to the well-being of its targets and the observers of bullying" (2001) 27:1 Scandinavian J Work, Environment & Health 63; Gary L Cooper, Helga Hoel & Brian Faragher, "Bullying is detrimental to health, but all bullying behaviours are not necessarily equally damaging" (2004) 32:3 British J Guidance & Counselling 367; Marjan Houshmand et al, "Escaping bullying: The simultaneous impact of individual and unit-level bullying on turnover intentions" (2012) 65:7 Human Relations 901; and Denise Salin & Guy Notelaers, "The effects of workplace bullying on witnesses: violation of the psychological contract as an explanatory mechanism?" (2020) 31:18 Int J Human Resource Management 2319.

[69] See *Lewis* BCCA Certification, *supra* note 2 at para 109; since the injuries suffered by employees who were not actually bullied or harassed may not be readily quantifiable, disgorgement may be appropriate because their loss is "'impossible to calculate' or [their] interest in performance [of the contract] is not reflected by a purely economic measure": *Atlantic Lottery*, *supra* note 51 at para 59. Of course, it must first be demonstrated that there was a breach of contract regarding the "Anti-Harassment Promise", since disgorgement is a remedy for actionable wrongs, not a free-standing cause of action.

[70] *Supra* note 51 at para 58.

[71] *Lewis* BCSC Certification, *supra* note 7 at para 114: Justice Horsman identified several apportionment matters that would have to be addressed, including determining relative allocation as between i) full- and part-time employees; ii) employees who were

since entitlement is not based on proof of *individual* harm.[72] In terms of quantifying the disgorgement fund, presumably it will take the form of an aggregate notional amount reflecting the costs WestJet *would have incurred* in: i) designing and implementing programs to eradicate workplace bullying and harassment; ii) staff training costs; and iii) developing and implementing dispute resolution systems (including investigative and other administrative costs). It must be recognized, however, that even if the flight attendants prove WestJet generated cost savings, quantifying those savings, and determining how those monies should be distributed among class members, are questions fraught with uncertainty. The Court of Appeal for British Columbia's response to these matters was simple, albeit not particularly illuminating:

> These first two issues [i.e., whether there were cost savings that should be disgorged to class members] do not, however, assist in determining what part or share of the total amount that WestJet saved through its alleged breach of contract to all of its employees should go to class members. Instead, an additional and critical inquiry is necessary and it is proposed common issue 5 that addresses this necessary question. The answer to common issue 5 would be in the nature of an "aggregate award" for class members. The further question of how that aggregate award would then be distributed to individual class members would be for another day.[73]

Despite confirming Justice Horsman's refusal to certify the "quantification" of the cost savings as a common issue, the Court of Appeal left open the possibility that the common issues trial judge might nonetheless determine the amount of the disgorgement fund.[74] This will be no easy task, and even after the quantification issue has been determined (itself a

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harassed versus those who were not; iii) employees employed for the full duration of the class claim period versus those not so employed; and iv) whether some portion of the total cost savings be reserved for employees not included in the class. In *Baroch v Canada Cartage*, 2015 ONSC 40, the court certified an "aggregate damages" claim as a common issue. Several years later, the claim was settled for $22.25 million with the funds to be distributed to class members without any class member being "required to do anything to prove their entitlement to a payment from the settlement proceeds": *Baroch v Canada Cartage,* 2021 ONSC 7376 at para 19, although it is not clear from the decision how the funds will be distributed among the 7,400 class members.

72 *Lewis* BCCA Certification, *supra* note 2 at para 107.

73 *Ibid* at para 155.

74 See *ibid. Ibid* at 160: "…it remains open to the trial judge, at the close of the common issues trial, to conclude that the statutory requirements for an aggregate award are met and to make such an award". Determining how the cost savings should be distributed to class members will undoubtedly be problematic—Justice Horsman in *Lewis* BCSC Certification, *supra* note 7 at para 114, identified several difficult issues with respect to individual allocation among class members.

potentially intractable exercise), difficult questions will remain regarding how the fund should be allocated among class members. Nevertheless, and for a variety of reasons, human rights complaints have not been effective tools for eradicating what appears to be pervasive workplace bullying and harassment.[75] A new approach is needed. Perhaps the avenue being pursued in *Lewis v WestJet* can prove to be a more effective avenue for addressing hostile workplaces.

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75 Government of Canada, "Publicentre—Harassment and Sexual Violence in the Workplace—Public Consultations What We Heard" (02 November 2017), online (pdf): <www.canada.ca> [perma.cc/B6V2-Q8ZD]. The shortcomings of the existing human rights regime as a mechanism to effectively address workplace bullying and harassment are discussed in Bethany Hastie, *Workplace Sexual Harassment: Assessing the Effectiveness of Human Rights Law in Canada* (Vancouver: University of British Columbia, 2019), online (pdf): <commons.allard.ubc.ca> [perma.cc/Z6BR-QX68].