

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd.*,
2024 BCSC 2397

Date: 20241128
Docket: S162957
Registry: Vancouver

Between:

Mandalena Lewis

Plaintiff

And:

WestJet Airlines Ltd.

Defendant

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

K. Brooks, K.C.
J. Harman

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I.W. Bailey
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Place and Dates of Hearing:

Vancouver, B.C.
November 18-20, 2024

Place and Date of Judgment:

Vancouver, B.C.
November 28, 2024

[1] **THE COURT:** This is a certified class action in which the representative plaintiff, Ms. Lewis, claims that WestJet has systematically breached its employment contracts with flight attendants by, among other things, failing to have an anti-harassment program in place in the workplace (the “Anti-Harassment Promise”).

[2] Two related applications are presently before the Court. WestJet seeks to strike portions of the plaintiff's amended notice of civil claim filed May 27, 2019. In response to that application, the plaintiff applies to amend the amended notice of civil claim and has provided a draft proposed form of further amended notice of civil claim.

[3] The parties agree there is little utility in addressing the amended notice of civil claim upon which WestJet's application to strike was predicated given that the plaintiff accepts the need for amendment and has since delivered a proposed further amended notice of civil claim. Accordingly, the focus of this application is thus properly on the further amended notice of civil claim in its draft form, not the amended notice of civil claim. In light of this, these reasons will focus the analysis within the context of the plaintiff's application to amend, as that application puts the current draft proposed further amended notice of civil claim squarely before the Court and crystalizes the issues raised by the parties in their respective applications.

[4] WestJet consents to many of the proposed amendments. 15 paragraphs remain in issue. The disputed paragraphs plead facts about the alleged sexual assault of a female flight attendant in 2008, the alleged sexual assault of the representative plaintiff in 2010 by the same pilot, and circumstances surrounding the plaintiff's discovery of the 2008 assault. It also pleads facts about the plaintiff's attempt to obtain her employment file from WestJet and circumstances leading up to the eventual termination of her employment in January of 2016.

[5] The plaintiff says the disputed paragraphs largely plead material facts in support of a systemic claim for breach of class members' employment contracts and are necessary to provide the historical narrative for the claim.

[6] WestJet says the disputed paragraphs do not plead material facts and rather are an attempt to maintain or reinvigorate in the pleadings claims that do not form part of the claim as presently conceived or the common issues as certified. WestJet advances three reasons for this:

- a) The disputed pleadings plead conduct regarding alleged 2008 and 2010 assaults that undisputedly falls outside the class period;
- b) The disputed pleadings raise allegations of personal injury resulting from conduct that also falls outside the scope of this action; and
- c) The circumstances surrounding the plaintiff's termination of employment are individual issues that are not in issue in this proceeding. Rather, they are raised in a separate individual claim by the plaintiff that has presently been stayed.

Nature of Claim

[7] The sufficiency of the plaintiff's pleadings has been an issue in this action since the outset of the litigation. WestJet brought initial applications to strike the notice of civil claim in 2017. In reasons indexed at 2017 BCSC 2327 [*Lewis 2017*], aff'd 2019 BCCA 63, Justice Humphries found that while not a "model of clarity", the notice of civil claim at its core rested on allegations of breach of the WestJet employment contract, but also noted that insofar as the notice of civil claim purported to claim general damages for personal injury, it was misconceived, and references to such injuries arising from allegations of assault and discrimination should be brought elsewhere and the pleadings clarified by amendment: at paras. 49-50, 55.

[8] An amended notice of civil claim was filed in May of 2019. This was the version before the Court on the certification application and remains the current filed version of the plaintiff's claim.

[9] In November 2020, shortly before the certification hearing, the plaintiff delivered a revised form of certification order that removed all claims predating April 4, 2014, which was two years prior to the filing of the claim, to address WestJet's concern with limitation defences. As the certification judge found, by limiting the class period to two years prior to the filing of the notice of civil claim, the plaintiff avoided any limitations issue in relation to the claims of class members: *Lewis v. WestJet Airlines Ltd.*, 2021 BCSC 228 at para. 32.

[10] This proceeding was certified as a class proceeding by the Court of Appeal in April 2022. The certified class included present and former female flight attendants employed by WestJet between April 4, 2014, and now February 28, 2021. The certified common issues in this action are:

- 1) During the Class Period, was the Anti-Harassment Promise, as defined in the Amended Notice of Civil Claim, a term of WestJet's employment contract with each Class Member?
- 2) Did WestJet fail to implement and enforce the Anti-Harassment Promise throughout the Class Period and, in doing so, breach Class Members' employment contracts?
- 3) If yes, did WestJet save costs through its deficient performance of the Anti-Harassment Promise during the Class Period?
- 4) If yes, is the Class entitled to disgorgement of the costs savings identified in (3)?
- 5) If the answer to (2) is yes, does WestJet's conduct justify punitive damages?
- 6) If yes, what amount of punitive damages should be awarded against WestJet?

[11] In its present form, the plaintiff's claim is for breach of class members' common law employment contracts. The draft further amended notice of civil claim provides a summary of the claim at paras. 4-6:

4. This claim is about WestJet's breach of its common law employment contracts with the Class. The Plaintiff does not advance a claim for breach of any statutory rights or obligations. The Plaintiff does not advance a claim for non-contractual losses or harm. The plaintiff does not seek general or compensatory damages. The Plaintiff seeks disgorgement as a remedy for WestJet's breach of contract.
5. Between April 4, 2014 and February 28, 2021 (the "**Class Period**"), WestJet's employment contracts provided that WestJet would create and

maintain a workplace free from "Harassment" (defined below), and that it would properly investigate and respond to complaints of Harassment (the "Anti-Harassment Promise"). WestJet's Anti- Harassment Promise is critically important in the context of the airline industry, in which female Flight Attendants have historically faced and continue to face unwelcome sexual advances and attention. In a workplace in which there are heightened risks, WestJet's Anti-Harassment Promise enhances the airline's ability to attract female applicants for Flight Attendant positions, and provides WestJet the reputational benefit of being able to assert that its workplace is safe for women. Female Flight Attendants in particular stand to benefit from the Anti-Harassment program WestJet promised to put in place, and are at an increased risk without the promised program.

6. This claim asserts that despite their employment contracts, WestJet routinely and systemically denied the Class the benefit of the Anti-Harassment Promise, particularly when Pilots are the harassers. Instead of, as promised, having the benefit of a workplace free from Harassment and the benefit of a robust response to Harassment, WestJet's female employees were left at risk and subject to Harassment without adequate recourse. The plaintiff says WestJet fostered a corporate culture that overlooked and effectively tolerated Harassment, encouraged silence, failed to properly investigate complaints of Harassment, and resolved complaints by protecting the harassers. WestJet's conduct breaches a fundamental term of the contractual rights of the Class.

[Bolded emphasis in original; underlined emphasis added.]

[12] As set out in these paragraphs, the plaintiff's claim, which forms the basis of the certified common issues, is a systemic claim for breach of class members' (female flight attendants) common law employment contracts, and specifically the Anti-Harassment Promise she alleges was a term thereof, by failing to provide a harassment-free workplace during the class period of 2014 to 2021. It is undisputed that the plaintiff is not claiming for damages for personal injury, that the claim as pleaded does not give rise to any individual claims, and that there will be no individual issues trials following the common issues trial.

[13] Further, in light of the plaintiff narrowing the class period to avoid limitations defence, no pre-2014 claims were considered at the certification hearing or certified. The plaintiff agrees that WestJet's response to individual instances of harassment that occurred outside the class period is not part of the claim. In this respect, the plaintiff confirmed that she will not be seeking discovery or leading evidence at trial about the 2008 and 2010 assaults.

[14] The disputed paragraphs in issue on this application are contained in part 1 of the draft further amended notice of civil claim and generally pertain to the representative plaintiff's alleged sexual assault by a pilot in 2010, her discovery that another flight attendant was allegedly assaulted by the same pilot two years earlier, the impact of this discovery on her mental health, her attempts to obtain her employment file from WestJet, and events leading up to her eventual termination in 2016. The paragraphs in issue are as follows:

The Plaintiff was Contractually Entitled to the Benefit of the Anti-Harassment Promise

22. The plaintiff was hired by the defendant as a Flight Attendant in March 2008 and entered into an employment contract with WestJet whereby WestJet was bound to honour the Anti- Harassment Promise.
23. In August 2008, a female WestJet Flight Attendant (the "**2008 Complainant**"), reported being sexually assaulted by one of WestJet's Pilots, (the "**Pilot**") who admitted to sexual conduct.
24. The Pilot continued to work in a supervisory role.
25. Approximately a year and a half later, on January 24, 2010, the plaintiff was sexually assaulted by the same Pilot during a layover in Maui, Hawaii.
26. She reported the sexual assault to the First Officer, her manager at WestJet, and the Flight Attendants' Association Board for WestJet.
27. The plaintiff informed WestJet that she had reported the sexual assault to the RCMP and the Maui police, who opened an investigation file. She provided WestJet with the police file number and the name and phone number of the prosecutor.

WestJet's Retaliation against Plaintiff to hold WestJet Accountable

28. The plaintiff and the 2008 Complainant connected at a WestJet training in April 2015. They shared their experiences of being sexually assaulted by the Pilot, revealing that WestJet's failure to address the 2008 Complainant's report had allowed the Pilot to continue assaulting others, including the plaintiff in January 2010. For the plaintiff, this revealed widespread Harassment in WestJet's workplace and WestJet's ongoing and systemic failure to implement and enforce its Anti-Harassment Promise.
29. On September 25, 2015, the plaintiff requested from WestJet a copy of her employment file. The request was made pursuant to WestJet's policy, which states that when an employee requests a copy of their employment file it will be delivered to them within 30 days. The plaintiff's interest in reviewing her file was, in part, to better understand what steps WestJet took in response to her sexual assault complaint.

30. Follow-up requests for her employment file were repeated on October 15, October 18, December 2 and December 8, 2015.
31. On December 12, 2015, the plaintiff went on short term disability leave due to the stress and anxiety she was experiencing relating to her learning about the Pilot's prior history of sexual assault.
32. While on leave she continued her efforts to obtain her personal employment file and made repeated requests for the same on December 29, 2015 and January 12, 2016.
33. On January 12, 2016, without warning, WestJet wrote the plaintiff and informed her that her employment was terminated for cause due to "insubordination" and referred to two incidents:
 - (a) the plaintiff wrote an email to a manager on January 12, 2016 at 9:57 a.m. in which she again demanded production of her employment file, and the email included an expletive; and
 - (b) the plaintiff disconnected a call to a WestJet manager that she had inadvertently dialed on the afternoon of January 12, 2016.
34. WestJet's termination letter advised that this "disrespectful conduct toward leadership" coupled with a "complete review of the discipline" on her employment file resulted in the decision to terminate her employment for cause. The plaintiff had no history of discipline for "insubordination", so a review of the file could not have provided any additional basis for termination for cause on that basis.
35. WestJet failed to properly respond to the plaintiff's complaint of harassment in breach of the Anti-Harassment Promise, ultimately terminating the plaintiff's employment in an act of retaliation in January 2016. WestJet failed to take the complaint seriously and failed to provide the plaintiff with adequate supports, instead instructing her to remain quiet about the assault. The plaintiff's mental health state deteriorated as she came to more fully appreciate, as of 2015 that WestJet did not adequately respond to complaints of harassment, nor take proactive steps in the workplace to prevent harassment from occurring. She increasingly felt unsafe, unsupported and silenced.
36. The plaintiff's dismissal was retaliation in breach of the Anti-Harassment Promise for her efforts to hold WestJet accountable for the failure to properly address the Pilot's history of sexual assault and to prevent harassment in the workplace. WestJet's treatment of the plaintiff during the Class Period constituted a breach of the Anti-Harassment Promise.

[Bold emphasis in original.]

Analysis

[15] Pursuant to Rule 6-1(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [Rules], leave of the court or consent of the parties is required to amend a pleading after a notice of trial has been filed. WestJet does not consent to the

amendments in paras. 22 to 36 of the plaintiff's draft further amended notice of civil claim. The plaintiff thus requires leave of the Court in respect of those paragraphs.

[16] The threshold on an amendment application is low. However, and even allowing for liberality in amendments, amendments that are useless or violate the pleadings rules will not be permitted: *Totzauer Holdings Ltd. v. Nanaimo Forest Products Ltd.*, 2014 BCSC 2185 at para. 18, citing *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.* (1982), 30 B.C.L.R. (2d) 45, 1982 CanLII 227 (B.C.S.C.); see also *Armstrong v. Camroux*, [1994] BCJ No 2351 (QL), 1994 CanLII 406 (B.C.S.C.).

[17] Pleadings play a critical role in the litigation process in defining the issues of fact and law to be determined at trial. The pleadings also give notice of the case to be met and determine the parameters of relevance to guide the litigation process so that discovery of documents, examination for discovery, effective case management, and other interlocutory procedures may proceed in an orderly manner: *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 at para. 35 [Valeant]; *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 20.

[18] The foundational nature of pleadings and the important role they play in litigation was affirmed by the Court of Appeal in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 [Mercantile], where Justice Voith said this:

[21] Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

[22] Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540, at paras. 22–23. They enable the parties and the court "to ascertain with precision the matters on which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182, at para. 55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75–76.

[23] For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to

fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143, at paras. 15–22; *Shoolestani v. Ichikawa*, 2018 BCCA 155, at para. 30; *Weaver v. Corcoran*, 2017 BCCA 160, at para. 63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated 2021) at 3–6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924, at paras. 17–18, aff'd 2016 BCCA 52.

See also *Valeant* at para. 38.

[19] Pursuant to Rule 3-1(2), a notice of civil claim must, among other things, set out:

- a) a concise statement of the material facts giving rise to the claim;
- b) the relief sought by the plaintiff against each named defendant; and
- c) a concise summary of the legal basis for the relief sought.

[20] Material facts are those that are essential to give rise to a complete cause of action: *Valeant* at para. 36. As the Court of Appeal said in *Mercantile*:

[45] What constitutes a material fact is well understood. Material facts are the elements essential to formulate a claim or a defence. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, Justice Binnie said:

[54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. ...

[46] This Court adopted a similar definition of material facts in *Young v. Borzoni*, 2007 BCCA 16, at para. 20:

[20] ... "Material fact" is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.*, 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

[47] In *Jones v. Donaghey*, 2011 BCCA 6, at para. 18, the Court said:

[18] Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in

issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts. ...

[21] Taken together, proper pleadings confine the ambit of both discovery and the issues to be addressed at trial, thereby enabling the parties to focus their resources and tailor the evidence to be elicited on discovery and then adduced at trial on the material issues, and ignore those which are merely collateral or do not assist in proving or disproving the material facts in issue on the pleadings. In order for this purpose to be achieved, the material facts relied on in support of each cause of action must be stated with certainty and precision, in their natural order, to disclose the causes of action being advanced: *Sahyoun* at para. 16.

[22] The requirement that the statement of material facts be concise means that it must include everything that is necessary but nothing more: *Lu v. Shen*, 2020 BCSC 490 at para. 46, *aff'd* 2021 BCCA 95. Pleadings are not designed to tell a story and should not include unnecessary narrative: *Mercantile* at para. 44.

[23] Here the plaintiff advances a systemic breach of contract claim and accordingly, the further amended notice of civil claim must set out a concise statement of the material facts that give rise to that claim. Namely:

- a) That a valid contract existed between class members and WestJet;
- b) The Anti-Harassment Promise was a term of class members' employment contracts with WestJet;
- c) WestJet breached class members' employment contracts by failing to fulfill the Anti-Harassment Promise; and
- d) Facts entitling the plaintiff to a remedy for the breach, usually damages, but here disgorgement of cost savings allegedly enjoyed by WestJet from its failure to fulfill the Anti-Harassment Promise.

[24] A notice of civil claim must also comply with Rule 3-7: Rule 3-1(2)(g). Rule 3-7(1) provides that a pleading must not contain the evidence by which the facts alleged in it are to be proved. The distinction between what constitutes evidence and what constitutes a material fact is important. The material facts relevant to a pleading and what evidence may be relevant at trial are two different things: *Mercantile* at para. 49. The rule against pleading evidence is thus aimed at avoiding the recital of a catalogue of evidence which tends to obfuscate the actual factual allegations being put forward: *British Columbia (Director of Civil Forfeiture) v. Lam*, 2023 BCSC 159 at para. 55.

[25] Under s. 40 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA], the *Rules* apply to class proceedings to the extent that they do not conflict with the CPA. There is not conflict between the CPA and the *Rules* regarding the rules and principles for pleadings and amendments. The *Rules* thus apply to the further amended notice of civil claim in the same manner as any other pleading.

[26] Section 12 of the CPA also provides broad jurisdiction for the court to "at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination", and in doing so, may impose terms on the parties as it considers appropriate.

[27] This is consistent with the court's jurisdiction in relation to amendment of pleadings in complex proceedings. As the Court of Appeal noted in *Valeant*, some degree of flexibility is required in the application of the general rules governing pleadings in complex cases to respond to the necessities of the case: at para. 38. A significant degree of discretion is thus vested in the case management judge to control the evolution of the pleadings over the course of the litigation. Paragraph 39 of *Valeant* reads as follows:

[39] In short, the principles governing pleadings have to be applied functionally in the context of the case, in order to foster the interests of justice and what is fair and convenient between the parties. There is, therefore, a significant degree of discretion vested in a case management judge to identify whether pleadings are sufficient to promote their purpose in the context of the particular case, and to control their evolution as the litigation unfolds.

[28] Nonetheless, post-certification pleading amendments which have the effect of reconstituting the action or bringing about a fundamental change to its nature, as certified, are inappropriate: *Coburn and Watson's Metropolitan Home v. Bank of America Corporation*, 2016 BCSC 2021 at para. 28 [Coburn].

[29] The majority of the amendments as noted above are consented to. The issue is with respect to paras. 22 to 36 of the draft further amended notice of civil claim. Those pleadings are grouped under two headings, and I will treat them accordingly.

Paragraphs 22-27 – The Plaintiff is Contractually Entitled to the Anti-Harassment Promise

[30] Dealing first with paras. 22 to 27, which fall under the heading dealing with whether the plaintiff is contractually entitled to the Anti-Harassment Promise. Paragraph 22 pleads facts pertaining to commencement of the plaintiff's employment with WestJet in 2008 and that she entered into an employment contract with WestJet in which WestJet was "bound to honour the Anti-Harassment Promise". The facts pleaded in this paragraph are somewhat duplicative of those pleaded in paras. 1 and 5, but I conclude that it is sufficiently compliant with the rules pertaining to pleadings. Leave to amend is granted with respect to para. 22.

[31] Despite its subheading, the balance of this section of the further amended notice of civil claim has little to do with the plaintiff's alleged contractual entitlement to the Anti-Harassment Promise. Rather, paras. 23 to 28 plead facts pertaining to two sexual assaults that occurred in 2008 and 2010, allegedly by the same pilot, on the plaintiff and another female.

[32] The plaintiff conceded in oral submissions that the 2008 and 2010 sexual assaults fall outside the class period and that she does not need and will not attempt to prove that the 2008 or 2010 assaults occurred at trial. This concession is aptly made given the claim is limited to WestJet's conduct within the class period. In my view, the facts pleaded in paras. 23 to 27 of the further amended notice of civil claim regarding the 2008 and 2010 alleged assaults are not material facts in respect of the

claim for a systemic breach of the Anti-Harassment Promise by WestJet during the class period.

[33] At times, these paragraphs also stray into pleading evidence, though to a lesser extent than the related paragraphs of the current amended notice of civil claim. However, the fact that this is now a more concise pleading of the evidence does not make it any less so the case. Indeed, counsel for the plaintiff conceded that these paragraphs were close to the “blurry” line between the pleading facts and evidence, and submitted that maintaining paras. 22 to 27 was simply to be cautious in face of some perceived future strategic moves by WestJet. This provides no reason, in my view, to permit an amendment that is not compliant with Rule 3-7.

[34] The plaintiff also made a bare assertion that the pleadings regarding the plaintiff's alleged 2010 sexual assault are material to common issue number 4 regarding punitive damages and to establish entitlement to disgorgement. No authority was provided in support of this assertion. Moreover, and more importantly, common issue number 4 regarding punitive damages flows from common issue number 2 such that the conduct giving rise to the punitive damages must have occurred in the class period.

[35] Leave to amend is therefore refused with respect to paras. 23 to 27 of the draft further amended notice of civil claim.

Paragraphs 28-36 – WestJet’s Retaliation against the Plaintiff

[36] Turning now to paras. 28 to 36, which deal with allegations of retaliation against the plaintiff. The materials fact in support of a systemic breach of contract claim as certified are found in paras. 37 to 39 of the further amended notice of civil claim, where the plaintiff pleads:

- a) that WestJet operated in breach of the Anti-Harassment Promise and allowed harassment to exist in circumstances where class members were vulnerable to and experienced various types of conduct, including unwelcome sexual advances and physical contact (at para. 37);

- b) WestJet knew that harassment was occurring in the workplace, and many female flight attendants had made complaints about conduct that contravened the Anti-Harassment Promise (at para. 38); and
- c) despite having this knowledge, WestJet failed to appropriately investigate and impose meaningful consequences in response to harassment (at para. 39) or take appropriate corrective action to prevent harassment from occurring (at para. 40).

[37] The further amended notice of civil claim also pleads that

- a) class members who reported harassment were encouraged to stay silent and told they would be disciplined if they shared information with other female workers (at para. 40); and
- b) that WestJet engaged in various forms of retaliation against complainants, including against the plaintiff, which in turn included unwanted discipline and termination (at para. 42).

[38] I am satisfied that the plaintiff's pleading of the fact that in 2015, she learned that another female flight attendant had allegedly been assaulted by the same pilot she alleges assaulted her is a material fact in relation to the claim for breach of the Anti-Harassment Promise. However, as presently drafted, para. 28 does not concisely state this material fact and instead, impermissibly pleads evidence and straying into argument. The plaintiff indicated that para. 28 replaces paras. 42 to 45 of the current amended notice of civil claim, which paragraphs largely plead evidence, not material facts. The fact that para. 28 is now a more concise pleading of evidence than the paragraphs it replaces does not make it permissible. Leave is refused for para. 28 in its present form.

[39] With respect to paras. 33 to 36, whether or not the plaintiff's termination was for cause—or conversely an act of retaliation—is not in issue in this action. No common issue was certified regarding whether the plaintiff's termination was retaliatory, and doing so would be an entirely individual issue engaging the entirety

of the plaintiff's employment history. Moreover, the plaintiff has filed a separate individual action regarding her termination, which has been stayed pending determination of this action. I agree with WestJet that that action is the proper venue for determination of individual issues arising out of the plaintiff's allegations of assault and wrongful termination of her employment.

[40] Further, in light of the pleadings and within the context of the certified common issues, the facts pertaining to the plaintiff's attempt to obtain her employment file, leave of absence, and eventual termination are not, in my view, material facts in the context of the systemic breach of contract claim, but rather constitute evidence through which the plaintiff may attempt to prove the material facts pleaded in paras. 40 and 42 of the draft further amended notice of civil claim, or alternatively, the individual claims raised in her separate action. In my view, facts surrounding the plaintiff's request for her file and termination may be permissibly pleaded as particulars of the allegation of retaliation, but as drafted, impermissibly stray into pleading evidence (see e.g. paras. 29, 30, 34, and 36) and argument (see e.g. paras. 29, 34, and 35). Many of the assertions made in these paragraphs are also duplicative (see e.g. paras. 35 and 36).

[41] Further, in paras. 31 and 35, the plaintiff pleads that she went off on short-term disability leave "due to the stress and anxiety she was experiencing relating to learning about the Pilot's prior history of sexual assault" and that her "mental health state deteriorated as she came to more fully appreciate" that WestJet had not adequately responded to harassment complaints. These aspects of the further amended notice of civil claim plead facts pertaining to individual psychological injury, not material facts in support of the systemic breach of contract claim as certified. In this respect, WestJet's concern that the disputed amendments are an attempt to reinvigorate claims that were struck by Justice Humphries and not certified is well-founded: see e.g. *Lewis 2017* at para. 50.

[42] The plaintiff asserts that whether she suffered adverse mental health effects upon learning that WestJet was not fulfilling the Anti-Harassment Promise is a

material fact that must be pleaded in support of her claim for punitive damages. As noted above, no legal authority was provided in support of this submission. In my view, when considered in the context of the claim as conceived by the plaintiff at certification and subsequently certified, these assertions may constitute evidence to be adduced in support of the plaintiff's claim for punitive damages, but are not material facts as defined in the jurisprudence set out above, and the plaintiff has failed to persuade me otherwise. For example, whether or not the plaintiff went on short-term disability leave "due to the stress and anxiety she was experiencing relating to learning about the Pilot's prior history of sexual assault" is not an issue in this action, nor is it germane to the certified common issues. It may form part of the plaintiff's individual claim against WestJet that is presently stayed, but the plaintiff has not satisfied me that these assertions constitute material facts in the context of the present action as certified.

[43] The plaintiff's response also rested on the assertion that these pleadings were in the amended notice of civil claim, which was before the judge on certification, so should be left in. I do not find this submission persuasive. Pleadings are not fixed as of the date of certification. Indeed, the plaintiff adduce no law to this effect.

[44] Further, given the evolution of how the plaintiff has conceived her claim from an initial filing through certification to present, I find that maintaining the disputed paragraphs in the pleading as presently drafted is similar to a post-certification amendment whose effect would be to reconstitute the action or bring about a fundamental change to its nature, which was described as inappropriate in *Coburn* at para. 28. In the present circumstances, the plaintiff is seeking to maintain pleadings of facts that are no longer material given the systemic nature of her claim, certified common issues, and concessions she made in order to render the matter suitable for certification as a class proceeding. The plaintiff's claim as certified is fundamentally different in material respects from that which was initially advanced. Thus, the fact that certain allegations were in the pleadings from the outset and before the certification judge is of little assistance in this respect.

[45] Further, I am satisfied that the broad jurisdiction afforded under s. 12 of the *CPA* used in conjunction with the *Rules* regarding pleadings permit me to refuse amendments that are non-compliant with the *Rules* regardless of whether the offending paragraphs were present in the pleading at certification, in order to ensure that the pleadings are consistent with this Court's prior orders and the certified common issues. This is especially the case given the key role pleadings play in litigation, and I find that this is precisely the type of order that a case management judge may make in exercise of powers under s. 12 of the *CPA*, consistent with the applicable provisions of the *Rules* to ensure the orderly progression of a claim to a determination on the merits: see e.g. *Hoy v. Medtronic Inc.*, 2002 BCSC 1648 at para. 41. This is particularly the case where, as here, the proposed amendments would have the effect of broadening the scope of the claim beyond the proper balance of the claims and common issues that were certified.

[46] In the result, I find that paras. 28 to 36 of the draft further amended notice of civil claim in their present form do not comply with Rules 3-1(2) or 3-7(a). Leave to amend as in their present form is refused.

[47] A pleading that complies with Rule 3-7 and is limited to a concise statement of material facts for the systemic breach of contract claim the plaintiff advances is permissible.

Conclusion

[48] In conclusion, then, WestJet's application to strike the paragraphs of the amended notice of civil claim is dismissed.

[49] The plaintiff's application to amend in the form of the draft further amended notice of civil claim is granted with respect to those amendments that are proceeding by consent and para. 22.

[50] Leave to amend is refused with respect to paras. 23 to 27.

[51] Leave to amend is also refused with respect to paras. 28 to 36 in their present form. The plaintiff is at liberty to seek further amendments in respect of these paragraphs in accordance with these reasons, i.e., to plead a concise statement of material facts in the absence of evidence or argument.

[SUBMISSIONS ON COSTS]

[52] THE COURT: In my view, the application resulted in divided success, and costs of both applications will be in the cause.

“Hughes J.”