COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lewis v. WestJet Airlines Ltd*.,
2019 BCCA 63

Date: 20190221
Docket: CA45034

Between:

Mandalena Lewis

Respondent
(Plaintiff)

And

WestJet Airlines Ltd.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia,
dated December 15, 2017 (*Lewis v. WestJet Airlines Ltd.*, 2017 BCSC 2327,
Vancouver Registry S162957).

Counsel for the Appellant:	D. Dear, Q.C. J. Mitchell
Counsel for the Respondent:	K. Brooks
Place and Date of Hearing:	Vancouver, British Columbia January 21, 2019
Place and Date of Judgment:	Vancouver, British Columbia February 21, 2019

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Tysoe

Summary:

Ms. Lewis brought an action for breach of contract against her employer, WestJet, for failing to fulfil an "Anti-Harassment" promise contained in her and other employee's contracts of employment. The promise incorporates WestJet's various policies relating to human rights and discrimination. The claim is a proposed class action that has not yet been certified. WestJet appeals the order dismissing its application to strike Ms. Lewis's notice of civil claim on the basis that the courts lack jurisdiction to hear the dispute because the essential character of the claim is based on a breach of statutory rights protected by the Canadian Human Rights Act and the Canada Labour Code, which are properly within jurisdiction of the Canadian Human Rights Tribunal. Held: appeal dismissed. It is not plain and obvious that the action does not disclose a cause of action within the court's jurisdiction. The contract of employment is a recognized source of legal rights grounding remedies for a breach in the courts, and nothing in the relevant statutes ousts the jurisdiction of the courts in this case. The essential character test is inapplicable because neither statute has an exclusive jurisdiction clause applicable to this case.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The issue in this appeal is whether it is plain and obvious that the courts' jurisdiction to hear a breach of contract claim against an employer is ousted by operation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*], or the *Canada Labour Code*, R.S.C. 1985, c. L-2 [*CLC*].

[2] The appellant, WestJet, argues the courts lack jurisdiction to hear the dispute because the essential character of the claim engages alleged breaches of statutory rights created by the *CHRA* and the *CLC* and enforced by the Canadian Human Rights Tribunal. The respondent in this Court but plaintiff in the action, Ms. Lewis, argues the employment contract is an independent source of rights and nothing in the statutes ousts the courts' jurisdiction expressly or by implication. She says the "essential character" test is irrelevant to the issue on appeal because it applies only where it is clear that only one forum can have the jurisdiction to adjudicate a dispute and a decision must be made to assign jurisdiction to one forum at the expense of another.

[3] The issue has been advanced as a true jurisdictional question. This is not a case in which it is argued that, despite having jurisdiction to hear the case, the court should decline jurisdiction in favour of a more appropriate forum.

[4] The chambers judge declined to strike the breach of contract claim, but ordered the notice of civil claim be amended to delete allegations falling within the jurisdiction of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

[5] For the reasons that follow, and largely for the reasons submitted by Ms. Lewis, I would dismiss the appeal.

Background

[6] The issue on appeal arises in the following context.

[7] The action is a proposed class proceeding. It has not yet been certified.

[8] WestJet is a federally regulated employer. WestJet and its employees fall under the jurisdiction of the *CHRA* and the *CLC*. They are also subject to provincial workers compensation legislation in the various provinces which, as is common ground, ousts the jurisdiction of the courts in respect of certain workplace injuries. The effect of the *Workers Compensation Act* on this action, as originally pleaded, is not in issue on appeal.

[9] WestJet is not a unionized employer. It does not have a collective agreement. The provisions in the *CLC* about resolving work-related grievances related to a collective agreement have no application to this case.

[10] WestJet enters individual contracts of employment. In her claim, the plaintiff alleges her contract and that of other employees contains what she calls an "Anti-Harassment" promise. That promise includes WestJet assuring the provision of a safe and respectful work environment, no tolerance of harassment or discrimination, and WestJet's responsibility to ensure the workplace is free of discrimination and harassment. Also included in the alleged promise are commitments to treat all harassment complaints seriously, to respond to and resolve

complaints quickly, to impose sanctions for breach of harassment policies, not to retaliate against complainants, and to discipline managers who do not act properly to end harassment.

[11] The plaintiff alleges that WestJet has breached these contractual obligations and benefited economically from its breaches. She seeks disgorgement of economic benefits accruing to WestJet from its failure to fulfil its side of the contract.

[12] Since this is a pleadings motion, the critical document is the plaintiff's notice of civil claim. Nonetheless, WestJet in its response admits that it has policies addressing discrimination and harassment in the workplace. It pleads its Code of Business Conduct that prohibits harassment and discrimination, the principles of which form part of each employee's conditions of employment. Also forming part of each employee's conditions of employment are the provisions of WestJet's Respect in the Workplace Policy and its Workplace Violence and Prevention Policy.

[13] WestJet denies the allegations of material fact about its alleged breach of contract, pleading that it fulfils its obligations to enforce its policies, investigate complaints, and enforce sanctions or discipline as required. It also denies benefitting economically from the alleged contractual breaches.

[14] Finally, the notice of civil claim contains allegations about the plaintiff being subject to harassment and WestJet's response to her complaints. WestJet disputes these allegations, pleading detailed allegations of fact in response, including allegations underlying its position that the plaintiff was terminated for cause arising from a long history of performance issues. The allegations and response are, at this stage, only pleadings. As with the more general allegations, nothing in these reasons should be interpreted as a comment on the substantive merits of the action or the defence to it.

Analysis

[15] WestJet contends that the true nature of the dispute depends on its substance or essential character and not its legal characterization. The pleading of

breach of contract is merely a drafting technique that disguises the reality that the true substance of the case is about alleged discrimination, sexual and other harassment, and WestJet's alleged failure as an employer to provide a workplace that complies with its statutory obligations under the *CLC* and the *CHRA*. In its factum it says this:

> 33. All of the features cited by the Plaintiff are statutory obligations for an employer's sexual harassment policy under the *Canada Labour Code*:
>
> **Policy statement by employer**
>
> 247.4 (1) Every employer shall, after consulting with the employees or their representatives, if any, issue a policy statement concerning sexual harassment.
>
> **Contents of policy statement**
>
> (2) The policy statement required by subsection (1) may contain any term consistent with the tenor of this Division the employer considers appropriate but must contain the following:
>
> (a) a definition of sexual harassment that is substantially the same as the definition in section 247.1;
>
> (b) a statement to the effect that every employee is entitled to employment free of sexual harassment;
>
> (c) a statement to the effect that the employer will make every reasonable effort to ensure that no employee is subjected to sexual harassment;
>
> (d) a statement to the effect that the employer will take such disciplinary measures as the employer deems appropriate against any person under the employer's direction who subjects any employee to sexual harassment;
>
> (e) a statement explaining how complaints of sexual harassment may be brought to the attention of the employer;
>
> (f) a statement to the effect that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purposes of investigating the complaint or taking disciplinary measures in relation thereto; and
>
> (g) a statement informing employees of the discriminatory practices provisions of the *Canadian Human Rights Act* that pertain to rights of persons to seek redress under that *Act* in respect of sexual harassment.

[16] As it points out, under the *CHRA*, WestJet is not permitted to enter contracts with its employees that do not contain prohibitions against harassment or do not

require WestJet to be diligent in protecting against harassment. WestJet cites sections 7, 10, and 14 of the *CHRA* bearing on discrimination:

> **Employment**
>
> 7 It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination.
>
> **Discriminatory policy or practice**
>
> 10 It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice, or
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> **Harassment**
>
> 14 (1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> **Sexual harassment**
>
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

[17] In short, as WestJet puts it:

> 37. … an employer is prohibited from drafting or implementing policies, practices or employment contracts that would:
>
> i. allow for any harassment to occur in the workplace;
>
> ii. tend to allow any harassment to occur in the workplace;

iii. directly or indirectly allow for differential treatment of an employee based on a prohibited ground (including sex); or

iv. fail to protect individuals from harassment.

[18] There is substance to WestJet's suggestion that the plaintiff's claim calls into question whether it has failed to fulfil its human rights obligations under the governing statutes. It is possible that what is pleaded to be a breach of contract is conduct that, if true, fails to fulfil WestJet's obligations under the *CLC* and the *CHRA*.

[19] Moreover, the terms of the Anti-Harassment promise may reasonably be seen as derived from, and intended to implement, WestJet's statutory obligations. Without deciding the point, it also may be that WestJet has expressly incorporated into the contracts of employment alleged terms that correspond exactly to, and go no further than, its statutory obligations. In my opinion, however, standing alone, this is not sufficient to demonstrate that the court does not have jurisdiction to hear the plaintiff's claim.

[20] In addressing the issue of jurisdiction, it is important to keep certain principles in mind. First, some statutes deal expressly with jurisdictional issues by conferring exclusive jurisdiction on one forum at the expense of another. For example, the British Columbia *Labour Relations Code*, R.S.B.C. 1996, c. 244, ss. 99-100, allocates jurisdiction either to the Labour Relations Board or the Court of Appeal depending on the nature of the issue. The *CLC*, as a further example, confers exclusive jurisdiction on arbitrators to adjudicate disputes arising from the interpretation and application of collective agreements: *CLC*, ss. 57-60. Exclusive jurisdiction is important for the discussion of the "essential character" test, which I discuss below.

[21] Second, the same facts may be the source of different legal rights or legal rights sounding in different causes of action. Courts are familiar with concurrent causes of action, such as in contract and tort, which may have different substantive legal consequences yet arise from the same facts. Here, the plaintiff's suggestion is

that the contract of employment is a source of legal rights even if those rights overlap or replicate her statutory rights under the *CLC* and the *CHRA*.

[22] Third, as a general rule, if a right arises solely from statute, a claimant will have to look to the mechanisms provided for, or contemplated, by the statute to vindicate those rights: *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 at para. 73. *Macaraeg* involved an attempt to enforce statutorily conferred rights through a civil action. In those circumstances, this Court held that a civil action for relief based on a breach of the statutory obligation could not be maintained because doing so would frustrate legislative intention.

[23] WestJet contends that the plaintiff's claim falls entirely within the statutory mandate of the *CHRA*. It says the *CHRA* provides a comprehensive administrative scheme for the granting and enforcement of employee rights relating to discrimination and harassment. The complaint process for individuals raising discriminatory practices is designed to be efficient and inexpensive and to provide remedies to address systemic practices both of omission and commission. It says the plaintiff has no reasonable cause of action for breach of contract that is distinct from matters falling within statutory jurisdiction. As I understand the argument, this is because the contractual rights originate in, or derive from, WestJet's statutory obligations to create a working environment that respects employee's statutorily conferred and created human rights.

[24] The key contention advanced by WestJet is that this case raises an issue about the choice of forum between the courts and a statutory adjudicator. It says, in these circumstances, the critical question is whether the "essential character" of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature. In advancing this argument, WestJet relies on the Supreme Court of Canada decision *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners,* 2000 SCC 14 [*Regina Police*], and argues that the

test in that case is determinative in applications to strike pleadings for want of jurisdiction. According to WestJet, if the "essential character" of a dispute, as pleaded in the notice of civil claim, arises from within a statutory jurisdiction outside of the Courts, the claim should be struck.

[25] There are a number of problems with this argument.

[26] First, a contract is a recognized source of legal rights grounding remedies for breach in the courts. It is no answer to say, as suggested by WestJet, that the common law does not recognize the tort of discrimination. This is so because the plaintiff alleges a breach of contract not a tort. Here, there is no dispute that the relationship between WestJet and its employees is governed by contracts of employment that incorporate terms and conditions relating to harassment and discrimination. Indeed, WestJet acknowledges that it relies on these contracts to enforce discipline, sanction employees, and, where necessary, justify dismissal for cause. It is not merely a fictitious argument to contend that, although the alleged facts involve discrimination and harassment, the wrong alleged is a breach of contractual rights not breaches of statutory obligation. The underlying subject matter may be the same, but gives rise to different legal wrongs and arguably different relief.

[27] In this respect, the plaintiff's case does not appear to me to be different from a case in which one party agrees to convey property that meets legislated building code standards, but fails to do so. The building code standards have been expressly incorporated into the contract, the standards have not been complied with, but the claim still sounds in contract. The alleged wrong remains the breach of the agreement.

[28] Perhaps more relevant are cases of constructive dismissal. WestJet accepts that the courts have jurisdiction to address alleged breaches of contract amounting to constructive dismissal even though the facts pertinent to that issue engage discrimination or harassment within the meaning of human rights legislation. It says that these cases are simply an exception to the general propositions it advances. I

do not agree. In my opinion, a constructive dismissal case is a particular type of a breach of contract claim. I see no distinction in principle between this case and a constructive dismissal case over which the courts have jurisdiction.

[29] This view of the matter finds support in decided cases. In *Alpaerts v. Obront* (1993), 46 C.C.E.L. 218 (Ont. C.J.), Spence J. refused to strike a statement of claim that alleged constructive dismissal arising from sexual harassment and resulted in the plaintiff's inability to continue with employment. The defendants contended that the claim properly should be brought under Ontario's *Human Rights Code*, R.S.O. 1990, c. H.19. The judge distinguished *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [*Seneca*], as follows:

> [5] With respect to the Ontario *Human Rights Code* as a barrier to the plaintiff proceeding in Court, the defendants rely on the decision in *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, 22 C.P.C. 130 and on certain other cases. In *Seneca*, the Court determined that "the Code forecloses any civil action based directly upon a breach thereof" and "any common law action based on an invocation of the public policy expressed in the Code". In *Seneca*, the plaintiff had no cause of action apart from the Code, but, in the instant case, the plaintiff alleges facts which disclose a cause of action for constructive dismissal, which distinguishes *Seneca*.

[30] I agree with this reasoning. The plaintiff's civil action, in this case, is not based directly on the breach of statutory rights like *Seneca* or *Macaraeg*; the plaintiff does not argue that WestJet's failure to fulfil the Anti-Harassment promise is, in and of itself, a discriminatory act.

[31] A similar result to *Alpaerts* was reached in *White v. Bay-Shep Restaurant & Tavern Ltd.* (1995), 16 C.C.E.L. (2d) 57 (Ont. S.C.J.), in which Pitt J. concluded that it was incidental to a wrongful dismissal claim that the wrongful acts on which it depended would also breach human rights legislation: at para. 4.

[32] Accepting that the plaintiff is pleading a case in breach of contract that is a recognized independent cause of action and an independent source of rights, the question becomes whether the court's jurisdiction has been ousted by the enactment of the *CHRA*. It is here that WestJet relies on *Regina Police* because the case raises

an issue about choice of forum and, accordingly, engages the "essential character" test.

[33] This point raises the second problem with WestJet's argument. In my opinion, the argument presupposes what it has to demonstrate; namely, that this case gives rise to an exclusive jurisdiction choice of forum issue.

[34] *Regina Police* stipulates that the "essential character" test is to be used in cases where there is a clear jurisdictional contest between competing fora. In that case, the issue arose by operation of competing statutes. Either an employment dispute fell under the procedures of the *Trade Unions Act*, R.S.C. 1985, c. T-14, which confers exclusive jurisdiction on an arbitrator, or the dispute fell within the jurisdiction of the *Police Act*, R.S.B.C. 1996, c. 367, which confers exclusive jurisdiction to the police complaint commissioner for disciplinary proceedings. Under the relevant statutes, jurisdiction was exclusive: it could only exist in one forum. If the matter arose out of a dispute involving the collective agreement, an arbitrator would have exclusive jurisdiction. If it involved discipline, the *Police Act* ousted an arbitrator's jurisdiction. It was in this context—in the face of express competing exclusive jurisdictions—that the Court confirmed the use of the "essential character" test as a means of allocating jurisdiction to one rather than another forum.

[35] The Court stated:

> [26] Before proceeding to an analysis of the ambit of the collective agreement, it is important to recognize that in *Weber* this Court was asked to choose between arbitration and the courts as the two possible forums for hearing the dispute. In the case at bar, *The Police Act* and Regulations form an intervening statutory regime which also governs the relationship between the parties. As I have stated above, the rationale for adopting the exclusive jurisdiction model was to ensure that the legislative scheme in issue was not frustrated by the conferral of jurisdiction upon an adjudicative body that was not intended by the legislature. The question, therefore, is whether the legislature intended this dispute to be governed by the collective agreement or *The Police Act* and Regulations. If neither the arbitrator, nor the Commission have jurisdiction to hear the dispute, a court would possess residual jurisdiction to resolve the dispute. I agree with Vancise J.A. that the approach described in *Weber* applies when it is necessary to decide which of the two competing statutory regimes should govern a dispute.
>
> [Emphasis added.]

[36] *Regina Police* is an application of the principles laid down in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. As explained by the Court:

> [39] To summarize, the underlying rationale of the decision in *Weber*, *supra*, is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.

[37] *Weber* involved the scope of the court's jurisdiction in cases involving labour disputes based on collective agreements. The legislation in issue, Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, Schedule A, s. 45(1), contained a mandatory arbitration clause, which prevented bringing civil actions based solely on the collective agreement. The issue necessarily involved the scope of that clause, which expressly ousted the court's jurisdiction. The question was whether, in the circumstances of the case, s. 45(1) of the *Labour Relations Act* ousted the court's jurisdiction to resolve tort and *Charter* disputes.

[38] McLachlin J., as she then was, writing for the majority, held s. 45(1) conferred on the arbitrator exclusive jurisdiction to hear all disputes arising from the labour relations regime. In doing so, she examined the effect on a court's continuing jurisdiction where both the express wording of the particular statute (at para. 45) and the mandatory arbitration clause (at para. 41) deprived the courts of concurrent jurisdiction. Taking those factors together with the purpose of the model of exclusive arbitration in resolving disputes arising from collective agreements, she rejected models of concurrent or overlapping jurisdiction in favour of exclusive jurisdiction.

[39] After finding the arbitrator had exclusive jurisdiction, she articulated the essential character test focusing on the facts giving rise to a dispute rather than its legal characterization. In that context, she concluded the essential character of the dispute fell within the scope of the collective agreement: at para. 78.

[40] The essential character test is applicable where there is a jurisdictional contest between statutorily created bodies, as in *Regina Police*, or between the courts and a statutory adjudicator, as in *Weber*. The jurisdictional conflict arises from the competing exclusive jurisdictions. In those circumstances, the test is deployed to assign jurisdiction to one exclusive forum or another. The purpose of the test is not to oust jurisdiction but to assign jurisdiction to one of the mutually exclusive fora. The existence of a jurisdictional contest must be demonstrated before the test is applicable. It is not a means to create a contest.

[41] *Ferreira v. Richmond (City)*, 2007 BCCA 131, also applied the essential character test to assign jurisdiction to an arbitrator under the collective agreement for claims involving harassment and workplace supervision concerns. In *Ashraf v. SNC Lavalin ATP Inc*., 2015 ABCA 78, the essential character of the dispute fell within the exclusive statutory jurisdiction of Alberta's Workers' Compensation Board. *Macaraeg* involved an attempt to imply statutory rights into an employment contract to create jurisdiction in the courts in circumstances where the legislature did not intend those rights to be enforced by court action. In all of these circumstances, it was insufficient to cast a claim in the language of tort or other causes of action to create jurisdiction in the courts when that jurisdiction was ousted by statute.

[42] *Moore v. British Columbia (Govt.)* (1988), 23 B.C.L.R. (2d) 105 (C.A.), turned on which of two fora was the more appropriate, rather than whether one lacked jurisdiction.

[43] This is not a case of exclusive jurisdiction. It does not involve competing statutory jurisdiction like *Regina Police*. It does not involve mandatory arbitration under a collective agreement like *Weber* and *Ferreira*. It no longer involves issues within the exclusive jurisdiction of the Workers' Compensation Board. The cases relied on by WestJet do not demonstrate that the combined effect of the *CLC* and *CHRA* is to oust the jurisdiction of the courts in relation to an otherwise recognized cause of action (breach of contract) either expressly or by necessary implication. Nor do they support the proposition that where the court's jurisdiction is not ousted, and

no necessary jurisdictional issue is raised, the court should nevertheless treat a breach of contract claim as if it is in reality an attempt to enforce statutory rights.

[44] This case involves a claim that, given its substantive legal character, falls within the jurisdiction of the courts as well as alleging facts that could ground a complaint before the Canadian Human Rights Tribunal. The issue then is whether there is some basis to infer that the *CHRA* ousts the jurisdiction of the courts.

[45] I am unable to discern a basis to oust the jurisdiction of the courts in a case alleging breach of an employment contract engaging discrimination or harassment. Neither statute has an exclusive jurisdiction clause applicable to this case. The breach of contract claim could be advanced even if the *CHRA* was never enacted. If Parliament intended the *CHRA* to oust the court's jurisdiction over matters otherwise subject to its jurisdiction, I would expect it to do so expressly. It has not.

[46] Further, I am not persuaded that it is plain and obvious that the *CHRA* ousts the jurisdiction of the courts by necessary implication. Recognizing that the legislation creates an administrative regime that is intended to be flexible, efficient, and expeditious, suggests that Parliament intended to create statutory rights capable of being vindicated by an administrative tribunal. Alone, this is not enough in my view to support an argument that by creating such a scheme Parliament intended to deprive plaintiffs of access to the courts they would otherwise enjoy.

[47] 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 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.

[48] I have proceeded to analyze the issues in the case on the assumption that the Anti-Harassment 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.

[49] 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.

[50] I turn to an additional ground of appeal. WestJet points out that the only relief available to the plaintiff (or the class, should the action be certified) is restitutionary disgorgement. The premise of the claim is that WestJet has benefited from its breach of contract principally because it has saved money. It has not incurred costs of implementing the promise, or the costs of sanctioning or replacing offenders who would have been suspended or dismissed if the promise had been kept. The plaintiff acknowledges that proving conventional expectation damages for herself or other class members is impractical, especially since many prospective class members have not been harassed or directly the victim of contractual breaches and want to remain employed and not plead constructive dismissal.

[51] WestJet argues correctly that restitutionary disgorgement is an exceptional remedy available in limited circumstances where expectation damages cannot be proven. If certain particular criteria can be satisfied a court may be justified in depriving a defendant of the benefit it received from its breach of contract. Here, the principal problem is, WestJet argues, that even if restitutionary disgorgement were available in principle, the existence of any quantifiable benefit is so speculative and incapable of proof that principles of proportionality compel preventing the claim from advancing. I do not wish to be drawn into a discussion of whether it might be possible to quantify restitutionary damages or whether it will be possible to prove those circumstances that would justify resorting to the remedy. As I see it, that claim may stand or fail on the evidence the plaintiff can adduce if the action is certified. Moreover, the issue raises matters that bear primarily on whether the action should

be certified. The issue may be relevant to questions of preferability rather than whether it is plain and obvious that the action does not disclose a reasonable cause of action.

[52] WestJet's argument does not satisfy the plain and obvious test and I would not accede to it. Nothing I say here has any bearing on other contexts in which the issue might arise.

[53] There are two final issues to address. First, WestJet argues that the action is an abuse of process, because the pleadings are not *bona fides,* are oppressive and designed to cause WestJet increased expense. Support for these contentions is said to be found in the highly speculative allegations about WestJet's cost savings from attempting to avoid its statutory obligations, the efficiencies of proceeding under the *CHRA* will be lost, and injecting issues to do with WestJet's finances are aimed at making the action unnecessarily expensive and time consuming to defend.

[54] The judge declined to strike the claim as an abuse of process, although her stated ground was that the cases relied on by WestJet in its substantive argument did not apply to render the action unnecessary or abusive. That decision is discretionary and we should show deference to it. To the extent that WestJet's argument goes further to capture contentions that the action is speculative and oppressive, I can only say that, at this stage, on the pleadings it is not plain and obvious that the action is an abuse of process. The action is based on a contract claim that may provide relief different from that available under the *CHRA.* Given the plaintiff has a choice of forum, I cannot conclude that it is plain and obvious, simply on the pleadings and at this stage, that the action is an abuse of process. I offer no opinion on whether it might become apparent in the future, as the case develops, that the action is an abuse of process.

[55] Lastly, WestJet contends the action should be struck because it is plainly and obviously barred by a limitation period. WestJet says that the limitation period runs from the date of breach and its running is not postponed on the basis of "discoverability". The judge declined to strike the claim observing that the issues of

discoverability and the nature of an alleged continuing breach can only properly be assessed at a later stage in the proceeding.

[56] One difficultly I see with WestJet's argument is that the breach of contract is alleged to be a continuing breach. Whether that is maintainable and how the operation of the limitation period affects that allegation is an issue that, in these circumstances, should not be answered solely on the pleadings. It strikes me as an issue, together with any potential discoverability issue, that is better dealt with in a proper factual matrix. In that context, a court would have a more secure foundation to determine to what extent the metes and bounds of the action, if it survived for this plaintiff at all, would be affected by limitations issues. Accordingly, I would not give effect to this ground of appeal.

Conclusion

[57] In the result, I would dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Tysoe"