P2390102408

IN THE MATTER BETWEEN:

DUONG YEE

PLAINTIFF

and

WESTJET, AN ALBERTA PARTNERSHIP AND ITS PARTNERS,
WESTJET AIRLINES LTD. AND 2222304 ALBERTA CORP.

DEFENDANTS

WRITTEN SUBMISSIONS OF THE DEFENDANTS

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INTRODUCTION

1. The Plaintiff's employment was terminated for just cause due to non-compliance with WestJet's COVID-19 Vaccination Policy (the "**Vaccine Policy**"). Notwithstanding this, the Plaintiff asserts that the COVID-19 Pandemic and the Vaccine Policy are not relevant to this action. With respect, the law is clear that the context of the COVID-19 Pandemic and the manner in which WestJet implemented its vaccination policy are surrounding circumstances which must be evaluated in a determination of whether WestJet had just cause to terminate the Plaintiff's employment.

2. Instead, the Plaintiff focuses entirely on her termination being the result of discrimination, and a failure of WestJet to accommodate her religious beliefs. The only cause of action pled and advanced by the Plaintiff is discrimination in breach of the *Canadian Human Rights Act.* The appropriate cause of action for wrongful dismissal, breach of contract, is not advanced by the Plaintiff. The Plaintiff's claim is in the wrong forum. WestJet submits that the Alberta Court of Justice has no jurisdiction to adjudicate or award a remedy for discrimination, and that the Civil Claim should be dismissed in its entirety due to lack of jurisdiction.

3. WestJet submits that its COVID-19 Pandemic response, which includes the Vaccine Policy, was reasonable given the global public health emergency at the time, the amount of information WestJet had from the Federal Government regarding the requirement to implement a COVID-19 vaccination policy that applied to its entire workforce, it's occupational health and safety obligations, and the devastating business and operational impact COVID-19 had already wreaked on WestJet. The context of COVID-19 is essential in evaluating the Plaintiff's claim.

4. WestJet's position is consistent with the overwhelming majority of decisions that have arisen from mandatory vaccination policies during the COVID-19 pandemic. In fact, the Canadian Labour Relations Board has already determined that WestJet's Vaccine Policy was reasonable, justified and enforceable in the circumstances.[1]

5. The Plaintiff was not compliant with the Vaccine Policy, and was warned in writing at least three times that her employment would be terminated for just cause if she remained non-

[1] *Henrikson v WestJet, an Alberta Partnership*, 2024 CIRB 1157, **TAB 13 of the Defendants Book of Authorities** ("**BOA"**) at paras 1 & 70. [*Henrikson*]

compliant with the Vaccine Policy. WestJet had just cause to terminate the Plaintiff's employment.

6. In the event this Court determines that WestJet did not have just cause to terminate the Plaintiff's employment, the Plaintiff's employment agreement has a clear and unambiguous termination clause, which limits her to statutory minimums prescribed by the *Canada Labour Code,* upon without cause termination. The Plaintiff is contractually barred from an award of 12 months' reasonable notice.

7. Finally, the Plaintiff asserts an entitlement to moral damages. The Plaintiff fundamentally misunderstands and misapplies the law with respect to when moral damages are appropriate, and failed to call the evidence at trial required to substantiate such a claim. WestJet was sensitive, professional, transparent and courteous during the Plaintiff's termination meeting on December 1, 2021, and there is no support for the assertion that aggravated or moral damages should be awarded in the circumstances.

ARGUMENT

1. The Plaintiff is in the Wrong Forum

8. While there is a robust statutory framework for unjust dismissal claims under the *Canada Labour Code*, federally regulated employees may also bring civil actions. WestJet is not contesting the jurisdiction of the Alberta Court of Justice to hear wrongful dismissal cases, where they properly plead a cause of action which supports a wrongful dismissal claim.

9. It is uncontroversial that an action for wrongful dismissal is for breach of contract. As the Alberta Court of King's Bench stated in *Harris v. Robert Simpson Co.:*

> It must always be kept in mind that the action in wrongful dismissal is an action for breach of contract. As a result the basis of the award for damages is the same basis as is governed by the law of contracts.[2]

10. The Plaintiff does not allege or even refer to breach of contract in her Civil Claim or in the Closing Submissions. The Plaintiff has not brought an action for breach of contract or pled the necessary cause of action for a wrongful dismissal claim. Instead, the Plaintiff has brought

[2] *Harris v. Robert Simpson Co*., 1984 CanLII 1236 (AB KB) at para 7.

what is in substance and form a human rights complaint and asserted it should be adjudicated as a wrongful dismissal. This is clear from a review of the Civil Claim, where the Plaintiff states:

- "WestJet's condition on Mrs. Yee's return to gainful employment [was] discriminatory in effect if not also intent."[3]
- "While occupational health and safety figure into the accommodation equation, WestJet is not at liberty to discriminate against Mrs. Yee on an *Act*-protected ground which was easily accommodated in a way that protects health and safety."[4]
- "Accordingly, WestJet's failure to seek accommodation solutions for Mrs. Yee in favour of terminating her employment constitutes wrongful termination."[5]
- "…its failure to seek ways to meaningfully accommodate Mrs. Yee ran afoul of the Supreme Court of Canada's decision in *Amselem,* other SCC jurisprudence, and the *Act*."[6]
- Under the heading *General Damages: Notice Period*, the Plaintiff states "WestJet has no justification for terminating Mrs. Yee for cause because it failed to adhere to its duty at law to reasonably accommodate Mrs. Yee, either by permitting her to continue working remotely, as she had successfully done since May 2021, or by some other method."[7]
- "WestJet had a duty to accommodate employees such as Mrs. Yee who are unable to comply with a policy requirement to receive either COVID vaccines or COVID testing as a result of their religion, religion being a protected ground pursuant to the *Canadian Human Rights Act*."[8]

11. While the Plaintiff references the words "wrongful dismissal" or "wrongful termination" the substance of her claim is entirely that of a human rights complaint based on allegations of discrimination; the concept of wrongful termination itself is tied to WestJet's failure to accommodate the Plaintiff. The duty to accommodate is an obligation of employers enshrined in human rights legislation, and WestJet's purported failure to accommodate the Plaintiff is squarely in the purview of a human rights commission. The Civil Claim even seeks general damages for the duration of the reasonable notice period, which is a remedy only available to

[3] Civil Claim at para 33.
[4] Civil Claim at paras 39.
[5] Civil Claim at para 40.
[6] Civil Claim at para 41.
[7] Civil Claim at para 42.
[8] Civil Claim at para 52.

a human rights commission as compensation for the pain and suffering caused by discrimination.

12. At trial, the majority of the Plaintiff's testimony was regarding her religious beliefs and commitment to Christian faith. WestJet does not dispute the Plaintiff has religious beliefs.[9] WestJet does, however, dispute that the Plaintiff has provided this Court any evidence to support a civil claim for wrongful termination. At no point has the Plaintiff pled facts or argued that WestJet breached her employment contract, that the Vaccine Policy was unenforceable or unreasonable, or in support of the value of her damages as a result of breach of her employment contract. Nowhere in the Closing Submissions is there an assertion that WestJet did not have just cause to terminate the Plaintiffs employment; that is a glaring deficiency for a purported wrongful dismissal claim where the employer asserts it had cause to terminate. The Plaintiff did not even submit case law or argument to establish the appropriate period of reasonable notice.

13. The Plaintiff asserted in both opening and closing submissions that this case is not about the Vaccine Policy, the reasonableness of a policy, or the COVID-19 Pandemic.[10] Instead, the Plaintiff limits the parameters of her action entirely to a claim of discrimination.[11]The Plaintiff articulated this during her direct examination when she stated, "I was dismissed from my employer for discrimination due to my inability to vaccinate because of my religious abstention and so I'm seeking wrongful dismissal."[12]

14. The law is abundantly clear that discrimination is not a tort, or a civil cause of action within this Court's jurisdiction. Authority to adjudicate allegations of discrimination in the workplace is squarely within the jurisdiction of a human rights commission.[13]

15. The Alberta Court has recognized this as being the law in several decisions binding on this Court. In *Harun-ar-Rashid v Royal Canadian Mounted Police (RCMP) et al.,* the plaintiff commenced an action against twelve separate defendants alleging that they all had negatively

[9] Trial Transcript pages 11-21.
[10] Trial Transcript page 4 at lines 21-22.
[11] Trial Transcript page 4 at lines 22-25.
[12] Trial Transcript page 11 at lines 26-28.
[13] See Canadian Human Rights Act, R.S.C., 1985, c. H-6 at ss 2,7,40 & 41. (**TAB 3 of the Defendant's BOA**)

affected his employment prospects.[14] Seven of the defendants applied to strike the Statement of Claim, five of the defendants applied for summary dismissal, and one defendant applied for dismissal. Justice Mandziuk granted the application to strike the Statement of Claim because it disclosed no reasonable claim.[15]

16. While the court in *Harun* recognized that discrimination on the basis of race, ethnicity, and colour were not expressly pleaded, it was "reasonable to conclude that at least part of the plaintiff's cause of action against some or all of the Defendants relates to discrimination."[16] The Court confirmed that "it is well established in law that discrimination on grounds prohibited under human rights legislation is not a tort."[17]

17. Accordingly, Justice Mandziuk found that "on the most liberal reading of the Statement of Claim, a tort action for damages and other relief based on discrimination or something of that ilk that has its proper redress under the scheme in the Alberta Human Rights Act, and not in the Alberta Court of Queen's Bench. This action is therefore doomed to fail."[18]

18. In *Hamilton v. Rocky View School Division No. 41*, the plaintiff alleged that he suffered from discrimination on the basis of geographic origin and age when he was not hired for a teaching position with Rocky View School Division.[19] The plaintiff had brought a human rights complaint alleging employment discrimination on the basis of age.[20] The Court of Kings Bench considered the courts jurisdiction to deal with discrimination actions, stating:

> The Supreme Court of Canada has held that allegations of discrimination are not causes of action that can support a civil action. Rather such complaints must be made pursuant to the relevant Human Rights legislation.[21]
>
> … Alberta courts have no jurisdiction in matters of discrimination within the exclusive domain of the Human Rights and Citizenship Commission. Mr.

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[14] *Harun-ar-Rashid v Royal Canadian Mounted Police (RCMP) et al*., 2019 ABQB 54 (**TAB 12 of the Defendant's BOA**) ["*Harun*"].
[15] *Harun* at para 7.
[16] *Harun* at para 35.
[17] *Harun* at para 36.
[18] *Harun* at para 39.
[19] *Hamilton v. Rocky View School Division No. 41, 2009 ABQB 225. Aff'd in Hamilton v. Rocky View School Division No. 41, 2010 ABCA 217* (**TAB 11 of the Defendant's BOA**) ["*Hamilton*"] at para 1.
[20] *Hamilton* at para 7.
[21] *Hamilton* at para 21, citing *Elkow v Sana*, 2006 ABQB 851.

> Hamilton's claim for a remedy for discrimination is denied by me because I do not have jurisdiction to hear it.[22]

19. In *Fakhri v Canadian Natural Resources Limited*, the court considered an application for summary dismissal where the plaintiff had claimed constructive dismissal.[23] The Court referred to the *Harun* decision confirming a claim based on prohibited grounds are within the ambit of the Human Rights Commission, rather than a civil claim.[24]

20. The Alberta authority summarized above flows from the Supreme Court of Canada decision in *Seneca College v. Bhadauria*, where the Supreme Court of Canada held that the Ontario Court of Appeal erred in supporting a tort action of discrimination. The case is sufficiently summarized in the headnote, which states:

> "Discrimination by way of repeated denial of an employment opportunity on the alleged ground of racial origin does not give rise to a common law tort, especially when the Ontario Human Rights Code provides for an administrative inquiry and remedial relief and allows a wide appeal to the court on both law and fact. It was open to the plaintiff to invoke the procedures of the code and her failure to do so did not entitle her to sue at common law or to found a right of action on alleged breach of code."[25]

21. The Supreme Court of Canada weighed in again on the proper forum for claims of discrimination in the employment context in *Honda v Keys,* as follows*:* "if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend — namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself."[26]

22. The Plaintiff submits that the above cases are distinguishable from the case at bar because they claim discrimination and provide no other cause of action. The Plaintiff's Closing Submissions acknowledge "[t]here is no question that claims for nothing other than discriminatory treatment absent any cause of action belong at the human rights tribunals."[27]

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[22] *Hamilton* at para 24.
[23] *Fakhri v Canadian Natural Resources Limited*, 2023 ABKB 483 (**TAB 9 of the Defendant's BOA**) ["*Fakhri*"].
[24] *Fakhri* at para 10.
[25] *Seneca College v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 SCR 181 (**TAB 23 of the Defendant's BOA**)
[26] *Honda Canada Inc. v. Keays*, 2008 SCC 39 (CanLII), [2008] 2 SCR 362 (**TAB 14 of the Defendant's BOA**) ["*Honda*"] at para 63.
[27] Plaintiff Closing Submissions at para 18.

The cases relied upon by the Plaintiff demonstrate that a cause of action separate from discrimination must be present to support a civil claim.[28] However, nowhere in the Civil Claim or Closing Submissions does the Plaintiff particularize how there is a cause of action separate from discrimination, as alleged. The Plaintiff's acknowledgement of the state of the law is fatal to her claim; discriminatory termination for her religious beliefs is the only cause asserted by the claim. There is no standalone cause of action once discrimination is removed.

23. In addition to the assertions enumerated above in the Civil Claim, the Plaintiff again confirmed in her Closing Submissions that the only reason WestJet terminated her employment was because it purported to discriminate against her on the basis of her religious beliefs, stating:

    a) "…there is only one lawful conclusion at which this Court can arrive: the Defendant wrongfully dismissed Mrs. Yee for discriminatory reasons."[29]

    b) "[t]he Defendant took no steps to accommodate Mrs. Yee's protected characteristic, which is discrimination, and proceeded to fire her, which is wrongful dismissal."[30]

    c) "[t]here can be no question that the discriminatory termination of Mrs. Yee's employment constitutes wrongful dismissal."[31]

24. The Plaintiff further claims that WestJet ceded jurisdiction of this action to this Court. With all due respect, this is inaccurate. In response to the Plaintiff's Canadian Human Rights Complaint, and prior to the Civil Claim being filed, WestJet made a preliminary objection to the complaint on the basis that it would more appropriately be addressed under the *Canada Labour Code* by the Canadian Industrial Relations Board ("**CIRB**").[32] At no point has WestJet stated that this Court, or any civil court for that matter, has, or ought to have jurisdiction of a claim entirely based on an allegation of discrimination.

25. WestJet respectfully submits that this Court should not usurp the jurisdiction of a human rights commission by awarding damages for discrimination. The only cause of action pled by the Plaintiff in the Civil Claim is discrimination, and the Plaintiff should have proceeded with that

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[28] *Lewis v WestJet Airlines Ltd.*, 2019 BCCA 63 at paras 29-30, 43-46; see also *L'Attiboudeaire v Royal Bank of Canada* [1996] OJ No 178, 1996 CanLII 141 at paras 8-10.
[29] Plaintiff Closing Submissions at para 56.
[30] Plaintiff Closing Submissions at para 64.
[31] Plaintiff Closing Submissions at para 106.
[32] Joint Book of Exhibits TAB 2

complaint in the proper forum, being the Canadian Human Rights Commission. There is no portion of the Civil Claim that can stand absent claims of discrimination, and accordingly it must be dismissed in its entirety for lack of jurisdiction.

2. WestJet's COVID-19 Vaccination Policy was Reasonable, Justified and Enforceable

26. If this Court concludes that it has jurisdiction to hear any part of this Civil Claim, which is not admitted and expressly denied, then WestJet submits that it had just cause to terminate the Plaintiff's employment for non-compliance with the Vaccine Policy.

27. Contrary to the Plaintiff's assertion, the impact of COVID-19 on WestJet, and the reasons and methodology for implementing and applying the Vaccine Policy, are entirely relevant to evaluating this claim. An abundance of case law has confirmed that the reasonableness of a COVID-19 policy and the steps taken by an employer must be evaluated in the context of the pandemic, with the knowledge and understanding the employer had at the material time.[33] Separation of the COVID-19 pandemic from the circumstances leading to the termination of the Plaintiff's employment is unsupported at law.

28. To determine whether WestJet had just cause to terminate the Plaintiff's employment, this Court is therefore required to first assess whether the Vaccine Policy was reasonable, justified, and enforceable in the circumstances.

29. In *Henrikson v WestJet*, *an Alberta Partnership*, the CIRB confirmed that the WestJet Vaccine Policy was reasonable, justified and enforceable.[34] The same Vaccine Policy applied to both the Plaintiff in this case, and the plaintiff in the *Henrikson* decision.

30. In *Henrikson* the CIRB noted that when an employee is dismissed for non-compliance of a policy the concept of just cause requires that the policy be reasonable.[35] The obligation is on

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[33] *Parmar v. Tribe Management Inc.,* 2022 BCSC 1675 (**TAB 20 of the Defendant's BOA**) ["*Parmar*"] at para 99; see also *Van Hee v Glenmore Inn Holdings Ltd*., 2023 ABCJ 244 (**TAB 30 of the Defendant's BOA**) ["*Van Hee*"] at para 79; *CUPE, Local 1866 and WorkSafe New Brunswick (Smith), Re*, 2023 CarswellNB 1 (**TAB 5 of the Defendant's BOA**) ["*WorkSafe*"] at para 105; *Henrikson; Central West LHIN & CUPE, Local 966*, 2023 CANLII 58388 (ON LA). (**TAB 4 of the Defendant's BOA**) ["*Central West LHIN*"] at para 86; *Lakeridge Health v CUPE, Local 6364*, 2023 Canlii 33942 (ONLA) (**TAB 15 of the Defendant's BOA**) ["*Lakeridge Health*"] at para 171; *Bunge Hamilton Canada v. United Food and Commercial Workers Canada, Local 175*, 2022 CanLII 43 (ON LA) (**TAB 1 of the Defendant's BOA**) ["*Bunge Hamilton Canada*"].

[34] *Henrikson* at paras 1 & 70.

[35] *Henrikson* at para 46.

the employer to demonstrate the reasonableness and fair application of the policy that is the basis for discipline.[36] The test, known as the *KVP* test, requires that the policy meet the following conditions in order to be relied upon for the purposes of discipline:

a) It must not be inconsistent with the collective agreement;

b) It must not be unreasonable;

c) It must be clear and unequivocal;

d) It must be brought to the attention of the employees affected before the company can act on it;

e) The employee concerned must have been notified that a breach of the rule could result in discharge; and

f) It should have been consistently enforced by the company from the time it was introduced.[37]

31. The *KVP* test, which originated in a union context, has repeatedly been adopted by the courts and the CIRB.[38] According to the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., when a workplace policy affects personal rights the *KVP* test can be used to balance the interests of the employer and the impact on the employee.[39]

32. The CIRB in *Henrikson* applied the *KVP* test and found that WestJet's interest in having the Vaccine Policy, which ensures the health and safety of all employees, outweighed the employee's interest in personal autonomy.[40] Additionally, the CIRB determined:

a) the Vaccine Policy was clear and unequivocal;

b) employees were provided with advance notice of the requirements of the Vaccine Policy;

c) employees were informed of the consequences of non-compliance, including discipline up to and including termination for cause;

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[36] *Henrikson* at para 47.
[37] *Henrikson* at para 69.
[38] *Henrikson* at para 47; *WorkSafe* at para 70; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*., 2013 SCC 34 ["*Irving*"] (paras 25-26); see also *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd*., 1965 CanLII 1009 (ON LA).
[39] *Henrikson* at para 59.
[40] *Henrikson* at para 50.

d) there were "no less intrusive means available to meet the respondent's obligations to health and safety";

e) that it was reasonable to require all employees, including those assigned to work from home, to comply with the Vaccine Policy.[41] The CIRB noted that there was a reasonable prospect that employees would return to the workplace for the performance of their duties as circumstances surrounding COVID-19 changed;[42] and

f) that "the respondent introduced the vaccination policy to meet its obligations to health and safety and to comply with its regulatory and legislative obligations. The respondent had a duty to protect the health and safety of employees in the workplace in response to the COVID-19 pandemic. In addition, the respondent had experienced devastating losses to its operations and its workforce as a result of the COVID-19 pandemic, and it implemented the vaccination policy as part of its efforts to recover its operations."[43]

33. Contrary to the Plaintiff's assertion, WestJet submits that the finding in *Henrikson* is representative of the overwhelming majority of case law arising out of the COVID-19 pandemic.[44] As stated by Arbitrator Goodfellow in *Central West LHIN*, "there is nothing about vaccination that takes non-compliance outside of the disciplinary realm. No COVID-19 case law supports that proposition and, most recently, Lakeridge specifically rejected it. So do I."[45]

34. In addition to relying heavily on jurisprudence that pre-dated the COVID-19 pandemic, the Plaintiff relies on *Humber River Hospital v Teamsters Local Union No. 419,* which has been criticized for applying fitness to work cases and the concept of medical consent to COVID-19 vaccination policies.[46] In *London Health Sciences Centre v Unifor Local 27*, Arbitrator Wright distinguishes *Humber River Hospital* as follows:

> … It is generally true that an employee cannot be disciplined for exercising their right to withhold consent to provide personal medical information or undergo a medical procedure or examination. However, the extraordinary challenge posed by the COVID-19 global pandemic requires a different analysis. The pandemic and the response to it changed the world, and they continue to do so. Under the circumstances, I find the fitness to work cases discussed above, and the other related authorities referred to by the Arbitrator in *Humber River Hospital*, to be distinguishable from

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[41] *Henrikson* at para 57-60; see also *WorkSafe* at para 103-105.
[42] *Henrikson* at para 57
[43] *Henrikson* at para 55.
[44] Plaintiff's Closing Submissions at para 119; see also *London Health Sciences Centre v Unifor Local 27*, 2024 Canlii 48714 (ON LA) ["*London Health Sciences Centre*"] at para 36.
[45] *Central West LHIN* at para 154.
[46] *Humber River Hospital v Teamsters Local Union No. 419*, 2024 CanLII 19827 (ON LA) (**TAB 20 of the Plaintiff's BOA)** ["*Humber River Hospital*"].

> cases that deal with discipline arising from the breach of a reasonable COVID-19 mandatory vaccination policy, especially in the hospital sector.[47]

35. Arbitrator Wright found that a breach of the mandatory vaccination policy provided grounds for discipline on a just cause basis.[48]

36. In *CUPE, Local 1866 and WorkSafe New Brunswick (Smith), Re*, several employees were placed on an unpaid leave of absence for failing to adhere to their employer's vaccine policy.[49] The employees filed grievances, and the vaccine policy was assessed in accordance with the *KVP* test. Arbitrator Doucet found that the employer's COVID-19 vaccination policy was "a reasonable and lawful response to the uncertainty created by the pandemic based on the information that was available at that time."[50]

37. The jurisprudence requires that when assessing the reasonableness of a policy, one must consider the circumstances that existed at the time of implementation, and not at the time the grievance was filed or the date of the hearing.[51] Arbitrator Doucet warned against the dangers of hindsight, stating:

> The "mandatory vaccination policy" was reflective of the knowledge and the situation that existed at the time it was implemented. Some might say that "hindsight is always 20/20" meaning that it's easier to analyze and evaluate a situation when we're looking back on it, than when we're in the present moment. While this may be true in some cases, it is also important to remember that hindsight is not always accurate. In fact, sometimes our view of the past can be distorted by our current understanding of the situation.[52]

38. Although it is extraordinary for an employer to enact workplace policies that impact an employee's bodily integrity, Arbitrator Doucet found that "in the context of the extraordinary health challenges posed by the COVID-19 global pandemic, such policies can be deemed as *prima facie* reasonable."[53] The COVID-19 pandemic was an unprecedented public health emergency, which required governments and businesses to take extreme measures to combat the spread of the virus.

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[47] *London Health Sciences Centre* at para 45.
[48] *London Health Sciences Centre* at para 55.
[49] *WorkSafe* at para 3.
[50] *WorkSafe* at para 101.
[51] *WorkSafe* at para 87.
[52] *WorkSafe* at para 116.
[53] *WorkSafe* at para 98.

39. While the employees in *WorkSafe* worked from home and there were limited cases of workplace transmissions, Arbitrator Doucet found that this did not detract from the reasonableness of the policy, and that a "precautionary approach is reasonable when dealing with a situation such as the one presented by the COVID-19 pandemic."[54]

40. The arbitrator in *Bunge Hamilton Canada v. United Food and Commercial Workers Canada, Local 175*, also determined that the employer's decision to require all employees, regardless of the work location, to comply with the COVID-19 vaccination policy was reasonable.[55] The arbitrator concluded that requiring the employer to apply different vaccination policies to different employees would cause significant operational disruptions.[56]

41. Ultimately, in *Bunge Hamilton Canada*, the arbitrator found that it was reasonable for the employer to implement a COVID-19 vaccination policy that restricted access to the worksite, and placed unvaccinated employees on unpaid leave "pending a final determination of their employment status up to and including termination of employment."[57]

42. In *Parmar v Tribe Management Inc*., the Court determined that mandatory vaccination policies do not force employees to be vaccinated. They force employees to "make a choice between getting vaccinated and continuing to earn an income, or remaining unvaccinated and losing their income."[58] While the court was sympathetic to the difficulty of this decision, it nevertheless found that mandatory vaccination policies are generally a reasonable infringement on personal freedoms.[59] Ultimately, the Court in *Parmar* found that the mandatory vaccination policy was reasonable, and dismissed the plaintiff's constructive dismissal claim.

Impact of COVID-19 on WestJet

43. As demonstrated in the jurisprudence, this Court must evaluate the reasonableness of the Vaccine Policy within the context of the unprecedented global public health emergency

[54] *WorkSafe* at para 115.
[55] *Bunge Hamilton Canada* at para 21
[56] *Bunge Hamilton Canada* at paras 28.
[57] *Bunge Hamilton Canada* at para 31.
[58] *Parmar* at para 154.
[59] *Paramar* at para 150.

occurring at the time of implementation. At trial, all three of WestJet's witnesses testified to the devastating effect COVID-19 had on WestJet's operations and employees.

44. Ms. Sawchyn testified that 95% of WestJet flights were down, travel restrictions were being implemented around the world and across the country, and WestJet was forced to reduced its workforce from 14,000 employees to 4,500.[60] Further, she stated that many people did not believe WestJet would survive the financial impact of the pandemic, and that it was one of the most challenging things she had to navigate in her career.[61] Ms. Sawchyn explained how difficult decisions needed to be made in real-time with no information or guidance from the Federal Government, and that members of her team describe the impact of working at this time as "traumatic."[62]

45. Ms. Sawchyn also testified about the effect of transmission rates, and how the virus caused mass absenteeism in an already massively reduced workforce. Ms. Sawchyn recalled one instance where the Operation Control Centre, which Transport Canada requires be staffed appropriately in order for WestJet to operate, had so few available employees due to high levels of transmission that WestJet was on the verge of being required to shutdown its entire operation.[63]

46. Ms. Kerry provided similar evidence regarding the impact of COVID-19, such as claiming how "it is hard to overstate how devastating it was, how traumatic for employees, individual contributors and leaders alike."[64] Ms. Kerry further claimed that WestJet was "fighting for its life as business dropped off overnight."[65] Even before travel restrictions were implemented, people did not want to travel.[66]

WestJet Acted Reasonably in the Circumstances

47. On August 13, 2021, the Federal Government issued a news release titled "Government of Canada to Require Vaccination of Federal Workforce and Federally Regulated Transportation

[60] Trial Transcript at page 41 lines 4-15.
[61] Trial Transcript at page 41 lines 10-12; 19-21.
[62] Trial Transcript at page 41 lines 16-19; Trial Transcript at page 42 lines 23-27
[63] Trial Transcript at page 42 lines 2-12
[64] Trial Transcript at page 114 lines 9-10
[65] Trial Transcript at page 114 lines 19-20; Trial Transcript at page 110 lines 16-17.
[66] Trial Transcript at page 110 lines 16-18.

Sector" (the "**August News Release**").[67] The August News Release outlined that the Government of Canada would be mandating COVID-19 vaccination for all air transportation employees by the end of October 2021.

48. WestJet's understanding of the August News Release was that it needed to ensure COVID-19 vaccination for its entire workforce.[68] WestJet was provided with no guidance from the Federal Government on how to comply with the upcoming regulations, and was notified about the vaccination requirements at the same time as the general public.[69] This context is essential when considering the reasonableness of the Vaccine Policy, and the manner in which WestJet rolled it out to its workforce.

49. On September 8, 2021, WestJet notified all employees that in order to comply with the anticipated regulations coming into effect as early as the end of September, it was implementing the Vaccine Policy.[70] Ms. Sawchyn testified that the purpose of this communication was to inform all employees that they would be subject to the Vaccine Policy, the process for attesting vaccination status, and to outline the consequences for non-compliance which included termination of employment as early as December 1, 2021.[71]

50. In addition to the government mandates, WestJet was committed to maintaining as safe an operation as possible for guests and employees.[72] Ms. Sawchyn confirmed that the Vaccine Policy was not solely a response to the August News Release or the regulations implemented by the Federal Government; WestJet's COVID-19 pandemic measures were also implemented as a business decision for a safety-first organization taking steps to address the widespread public concerns regarding transmission rates during air travel,[73] and to comply with WestJet's occupational health and safety requirements prescribed by the *Canada Labour Code.*

51. On October 29, 2021, the Federal Government issued a news release titled "Government of Canda provides further details on new requirements," which WestJet was required to comply

[67] Joint Book of Exhibits TAB 3.
[68] Trial Transcript at page 43 lines 37-39.
[69] Trial Transcript at page 43 lines 37-39; Trial Transcript at page 44 lines 5-8.
[70] Trial Transcript at page 44 lines 31-39.
[71] Trial Transcript at page 45 lines 38-40; Trial Transcript at page 46 lines 1-3.
[72] Trial Transcript at page 46 lines 26-27.
[73] Trial Transcript at page 50 lines 34-41; Trial Transcript at page 51 lines 2-12; Trial Transcript at page 54 line 27-34; Trial Transcript at page 55 lines

with by October 30, 2021 (the "**October Order**").[74] WestJet had already implemented the Vaccine Policy after the initial August News Release, and was never provided with a draft of the October Order prior to it's public release by the Federal Government.[75]

52. While the October Order relaxed the language previously used by the Federal Government with respect to ensuring every employee was vaccinated against COVID-19, and only required individuals accessing aerodrome property to be vaccinated, the Vaccine Policy already implemented by WestJet required all employees to be vaccinated (subject to accommodation for human rights reasons). Ms. Sawchyn testified that despite this difference between the August News Release and the October Order, WestJet did not consider changing the Vaccine Policy. This is because the federal regulations were only one of several reasons WestJet implemented the Vaccine Policy.

53. In *Henrikson*, the CIRB determined that it was reasonable to require all employees, including those assigned to work from home, to comply with WestJet's Vaccine Policy.[76] The CIRB noted that there was a reasonable prospect that employees would return to the workplace for the performance of their duties as circumstances surrounding COVID-19 changed.

54. Several plaintiffs in COVID-19 termination cases have argued that an indefinite unpaid leave of absence would be a reasonable alternative to termination of employment. However, this argument ignores the reality of WestJet's COVID-19 pandemic experience. The pandemic was an unpredictable time, and WestJet needed the flexibility to potentially assign its employees to different areas of the business. For this reason, requiring WestJet to implement different vaccination policies depending on work location would have compromised the operation.[77] As summarized by Ms. Sawchyn, it would have been "difficult for the continuity of our business at that time."[78] When assessing the Vaccine Policy, this Court must remember that it does not need to be perfect, it must only be reasonable.[79]

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[74] Trial Transcript at page 72 lines 21-22, 39-41; Trial Transcript at page 73 lines 1-2.
[75] Trial Transcript at page 74 line 28-32.
[76] *Henrikson* at para 57-60; See also WorkSafe at para 100.
[77] Trial Transcript at page 75 lines 18-19.
[78] Trial Transcript at page 75 lines 21-22.
[79] *Parmar* at para 99.

55. The possibility of placing unvaccinated employees on an indefinite leave of absence was considered and dismissed by the CIRB in *Henrikson.*[80] Also, in *Fraser Health Authority v British Columbia General Employees' Union*, the arbitrator found that there was no entitlement "to an unpaid leave of absence of indefinite length where an employee is legally prohibited from working and, due to their personal choices, has no foreseeable prospect of return."[81]

56. WestJet had also experienced a number of large-scale workplace transmissions including the instance Ms. Sawchyn referred to at trial, where WestJet was almost shutdown by Transport Canada due to staffing shortages in the Operation Control Centre. WestJet had to do whatever it could take to reduce COVID-19 transmission within its workforce, and mandatory vaccination of all employees was a reasonable step towards that goal.

57. The Plaintiff does not argue or assert that the Vaccine Policy itself was unreasonable or unenforceable. However, the Plaintiff's Closing Submissions make generalized statements about whether or not "abstention from vaccination is non-culpable behaviour", and that "there is no jurisprudence from the courts lending any real certainty to the matter."[82]

58. WestJet disagrees with the Plaintiff's contention; there is clear jurisprudence demonstrating that a mandatory vaccination policy which ultimately leads to termination of employment, can and will be reasonable.[83] In *Henrikson*, the CIRB addressed whether termination was an excessive response to an employee's non-compliance with WestJet's Vaccine Policy, concluding that:

> … in providing written warnings and a one-month suspension, the respondent followed a meaningful process of progressive discipline in response to the complainant's failure to comply with the vaccination policy. The respondent repeatedly notified the complainant of the consequences for non-compliance and provided him with opportunities to decide whether to remain unvaccinated

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[80] *Henrikson* at para 86.
[81] *Fraser Health Authority v British Columbia General Employees' Union*, 2022 CanLII 25560 (BC LA) (**TAB 10 of the Defendant's BOA**) ["*Fraser Health Authority*"] at para 24.
[82] Plaintiff's Closing Submissions at para 107.
[83] *Fraser Health Authority* at para 29; *Henrikson* at para 91; *Lakeridge Health* at paras 185-186; *Parmar* at para 154; *Poulos v Treasury Board (Regional Development Corporation)*, 2022 CanLII 37635 (NB LA) (**TAB 22 of the Defendant's BOA**) ["*Poulos*"] at para 102; *The Worker v. The District Managers*, 2021 BCHRT 41 (**TAB 29 of the Defendant's BOA**) ["*The Worker*"] at paras 2-4.

> or continue his employment. Despite the progressive discipline, the complainant did not change his behaviour and remained non-compliant.[84]

59. The preponderance of arbitral case law has found four weeks to be a reasonable period of time for an employee to be place on unpaid leave for non-compliance with a mandatory vaccination policy.[85] In *Lakeridge*, Arbitrator Herman noted that four weeks strikes a balance between "the need to terminate employees relatively quickly in order to restaff vacant positions, and the entitlement of employees to have a reasonable period of reflection before termination occurs."[86]

60. As found in *WorkSafe*, mandatory vaccination policies ought to be deemed *prima facie* reasonable. Furthermore, in both *Bunge Hamilton Canada* and *Henrikson*, it was reasonable for employers to require all employees to adhere to the mandatory vaccination policy rather than applying it only to a specific cohort of employees.

61. Given the changing nature of the pandemic, there was no way of knowing with certainty when remote employees would return to the office. At the time, there had been several attempts to have employees, such as the Plaintiff, return-to-work but changes to public safety delayed these changes.

62. The Vaccine Policy was communicated to the employees well before it was implemented to give employees an opportunity to schedule their vaccinations and maintain compliance. This is evident from the numerous WestJet communications provided to employees and was admitted to by the Plaintiff during cross-examination.[87] WestJet also put an enormous amount of information on the internal COVID microsite for employees to access, if they had questions or concerns related to WestJet's COVID-19 response.[88]

63. Ultimately, WestJet submits that in accordance with the findings in *Henrikson,* this Court should conclude that the Vaccine Policy, and the manner in which WestJet implemented the Vaccine Policy, was reasonable and enforceable against the Plaintiff.

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[84] *Henrikson* at para 86.
[85] *Central West LHIN*; see also *Lakeridge Health* at paras 197-199.
[86] *Lakeridge Health* at para 198; *Henrikson* at para 87.
[87] Trial Transcript at page 27 lines 15-18 & page 29 lines 7-9.
[88] Joint Book of Exhibits TAB 24.

3. WestJet had Just Cause to Terminate the Plaintiff's Employment

64. It is trite law that employers may discipline employees, up to and including termination for cause, for failing to comply with reasonable workplace policies.[89] The Vaccine Policy is reasonable and enforceable against the Plaintiff, and prescribed termination of employment for just cause in cases of non-compliance. WestJet submits that it has established just cause to terminate the Plaintiff's employment for non-compliance with the Vaccine Policy.

65. The modern test for just cause termination was enunciated by the Supreme Court of Canada in *McKinley v BC Tel,* where the Court outlined the requirement for a contextual analysis in assessing whether an employer has met the burden of providing just cause on a balance of probabilities, as follows:

a) Cause is a question of fact;

b) The assessment of cause is objective, contextual, and proportionate;

c) the assessment of cause entails three steps:

i. determining the nature and extent of the alleged misconduct;

ii. considering the surrounding circumstances, including [but not limited to] the employment history, the employee's role and responsibilities, the type of business or activity, the policies and practices, and the level of trust reposed in the employee; and

iii. determining if the response to the alleged misconduct is balanced, having regard to the facts; the question is whether the alleged misconduct is so incompatible with the fundamental terms of the employment relationship that it warrants dismissal.[90]

66. In *Smith v Vauxhall Co-Op Petroleum Limited,* the Alberta Court of King's Bench dismissed a claim for wrongful termination after concluding the plaintiff had been properly dismissed due to breach of workplace policies, as well as dishonesty.[91] In finding that the workplace policies applied to the plaintiff, the Court explained:

> The common law requires that an employee obey the lawful orders and instructions of their employer, including the employer's workplace policies:

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[89] *Bunge Hamilton Canada* at paras 14, 30-31; *Poulos* at para 102.
[90] *Smith v Vauxhall Co-Op Petroleum Limited*, 2017 ABQB 525 ["*Smith*"] (**TAB 26 of the Defendant's BOA**) at para 15 citing *McKinley* at paras 31-38.
[91] *Smith* at paras 96 & 138.

> see Randall Scott Echlin and Matthew L.O. Certosimo, *Just Cause: The Law of Summary Dismissal in Canada* (Aurora: Canada Law Book, 1998) (loose-leaf updated 2013, release 15) at 16-17.
>
> For workplace policies to be considered enforceable, and thus constitute an express or implied term of the employment contract, they must be "reasonable, unambiguous, well published, consistently enforced, and [the employee must know] or ought to have known of [the policies' contents], including the consequences of breach": *Foerderer v Nova Chemicals Corp*, 2007 ABQB 349 at para 67.[92]

67. These submissions have already reviewed the *KVP* test, and its application to the Vaccine Policy. The requirement to comply with the Vaccine Policy was clearly a term of employment for the Plaintiff, as the Vaccine Policy, and the requirement to be vaccinated, was reasonable, unambiguous, well published, consistently enforced, and the Plaintiff was aware that continued non-compliance with the policy would result in the termination of her employment for just cause.

68. As in *Henrikson,* the Plaintiff was notified by WestJet numerous times about the implementation of the vaccination policy, its requirements, and the consequences for non-compliance, as follows:

    a) On September 8, 2021, the Plaintiff received an email from WestJet Communications titled "Mandatory vaccination update and declaration required."[93] This email stated that effective October 30, 2021, all employees will be required to be fully vaccinated against COVID-19, and failure to be fully vaccinated may lead to termination as early as December 1, 2021.[94]

    b) Additional reminders were provided by WestJet Communications to all employees on September 16, 2021 and September 28, 2021.[95]

    c) On October 4, 2021, WestJet provided the Plaintiff with a letter declining her accommodation request. Additionally, this letter informed the Plaintiff that since her accommodation request had been declined she was expected to be fully vaccinated by October 31, 2021. The letter reiterated previous warnings that a failure to comply with the Vaccine Policy would lead to an unpaid leave of absence from November 1, 2021 to November 30, 2021. Failure to be fully vaccinated by November 30, 2021, would lead to termination for cause.

    d) On October 22, 2021, WestJet provided the Plaintiff with a letter confirming her continued non-compliance with the Vaccine Policy, and informing her that she would

[92] *Smith* at paras 28-29.
[93] Joint Book of Exhibits TAB 13 at page 112.
[94] Joint Book of Exhibits TAB 13 at pages 112-113.
[95] Joint Book of Exhibits TAB 13 at pages 114 & 118.

be placed on an unpaid leave of absence commencing November 1, 2021. Additionally, this letter warned her that failure to comply would result in termination for cause on December 1, 2021.[96]

e) On November 24, 2021, WestJet provided a final letter requesting the Plaintiff comply with the Vaccine Policy by November 30, 2021, and that failure to do so would result in termination for cause on December 1, 2021.[97]

69. During cross-examination, the Plaintiff agreed that she had been informed by WestJet that she would be terminated for just cause if she remained non-compliant with the Vaccine Policy.[98] Furthermore, the Plaintiff agreed that her request for exemption from the Vaccine Policy had been denied, she remained non-compliant with the Vaccine Policy, she had already been placed on an unpaid leave of absence for non-compliance, and had been reminded several times in writing that she would be terminated for cause on December 1, 2021.[99]

70. As set out in *McKinley,* the assessment of cause is objective, contextual, and proportionate. In applying the *McKinley* test the Court should look to COVID-19 termination cases, which evaluate the misconduct associated with non-compliance with a mandatory vaccine policy in the specific and unique circumstances in which the termination arose. As outlined above, there is clear jurisprudence demonstrating that a mandatory vaccination policy which ultimately leads to termination of employment, can and will be reasonable.[100] Given the Vaccine Policy, which prescribed termination for just cause in cases of non-compliance, is reasonable and enforceable, WestJet clearly had just cause to terminate the Plaintiff's employment in the circumstances. This was expressly confirmed in *Henrikson.*[101]

WestJet did not Discriminate against the Plaintiff

71. If this Court finds that it has jurisdiction to adjudicate the Plaintiff's claims that she was terminated due to discrimination, which WestJet does not admit and expressly denies, then it submits that the Plaintiff was not discriminated against on the basis of religious belief as alleged.

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[96] Joint Book of Exhibits TAB 14 at page 127.
[97] Joint Book of Exhibits TAB 14 at page 130.
[98] Trial Transcript at page 29 lines 7-8.
[99] Trial Transcript at page 29 lines 32-37; Trial Transcript at page 32 lines 29-31.
[100] *Lakeridge Health; Central West LHIN; Fraser Health Authority*; *Poulos; The Worker.*
[101] *Henrikson* at paras 89-91.

72. An evaluation of the methodology that WestJet utilized to evaluate all religious exemption requests, including the Plaintiff's, is necessary to determine whether WestJet can reasonably rely upon the Plaintiff's non-compliance with the Vaccine Policy as grounds for just cause termination.

73. Under WestJet's Accommodation Policy and Procedure, "the company will accommodate personnel pursuant to the *Canadian Human Rights Act*."[102] Ms. Sawchyn testified that this was an existing policy that was updated to account for COVID-19 by providing a procedure for non-medical accommodations.[103]

74. The WestJet accommodation process was a thorough and robust process, which did not aim to discriminate against employees, and which evaluated each and every request for accommodation on a case-by-case basis. The round-table evaluation process of each employee's accommodation request was consistent and universally applied. Although the Plaintiff takes issue with the involvement of legal counsel in the decision-making process, WestJet submits that such participation demonstrates WestJet was consulting subject-matter experts on the duty to accommodate, and human rights law. The involvement of legal counsel in decisions where termination of employment was contemplated for non-compliance is entirely reasonable and to be expected.

75. At trial Ms. Sawchyn confirmed that the purpose of question eleven in the questionnaire was to assist WestJet in determining how the employee's religious beliefs were connected to vaccinations.[104] Nevertheless, WestJet reviewed the entire questionnaire and supporting documents to determine whether an employee required accommodation under the Accommodation Policy and Procedure.[105] WestJet received 107 religious accommodation requests, and approved seven.[106]

76. During the Plaintiff's direct examination, she expressed her religious beliefs and provided this Court with a detailed account of her Christian faith. WestJet does not dispute the sincerity of Ms. Yee's beliefs, but notes that very little of this information was provided in the

[102] Trial Transcript at page 51 lines 36-38.
[103] Trial Transcript at page 51 lines 1-22.
[104] Trial Transcript at page 63 line 37-38.
[105] Trial Transcript at page 63 line 40-41.
[106] Trial Transcript at page 66 line 11-13; Trial Transcript at page 67 line 6.

Accommodation Request Form or the supporting documents (the "**Accommodation Request**").[107]

77. As stated in the Accommodation Policy and Procedure and the WestJet correspondence titled "COVID-19 Vaccine Accommodation Request Form" dated September 20, 2021, it is the responsibility of the employee to advise WestJet of the need for accommodation and to present evidence in support of that need.[108] During cross-examination, the Plaintiff confirmed her understanding that the Accommodation Request was her opportunity to provide a full explanation of the reasons why she required accommodation.[109]

78. In the Accommodation Request Form, WestJet asked for an explanation as to why the Plaintiff was requesting an accommodation.[110] Her response is as follows:

> *Based on sincerely held beliefs as a bible believing Christian, the vaccine is a betrayal of my faith to my healer, Lord and Saviour Jesus Christ.*[111]

79. The Plaintiff claims that it is a betrayal of her faith, but fails to provide an explanation of how or why. While the Plaintiff attached a letter from her Pastor, when evaluated in its totality with the Accommodation Request Form, WestJet did not find a sufficient connection between the Plaintiff's Accommodation Request and religious beliefs. Like the Plaintiff's Accommodation Request Form, the letter heavily relied on biblical passages and statements with little explanation.

80. For example, the letter states that "[b]eing a person of strong Christian morals, it is against her deep, sincerely held religious convictions to accept the injection or application of any foreign substance into her body." This statement is not supported by how Christian morals are tied to vaccinations. Again, the letter claims that vaccinations are "contrary to her conscientious held religious beliefs," but fails to demonstrate how this is based in religion and not a non-secular belief.

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[107] Joint Book of Exhibits TABS 15 and 19.
[108] Joint Book of Exhibits TABS 17 at page 139.
[109] Trial Transcript at page 30 lines 8-10.
[110] Joint Book of Exhibits TAB 19 at page 000143.
[111] Joint Book of Exhibits TAB 19 at page 000143.

81. WestJet asked the Plaintiff to explain the connection between her religious beliefs, her objection to receiving the COVID-19 vaccine, and the accommodation she is seeking.[112] Her response stated:

> *Jesus is my healer, I do not cannot rely on the use of vaccinations or medicines created artificially in order to prevent sickness. Jesus speaks of seeking out a doctor when one is sick, not well. I have no need of a vaccine in order to maintain my health.*[113]

82. The Plaintiff failed to demonstrate a connection between her faith and a need to be accommodated pursuant to the Vaccine Policy. In cross-examination, the Plaintiff confirmed that her request for accommodation was based on the belief that she did not need the vaccine in order to prevent getting sick.[114] While she may believe that she does not need vaccinations to prevent illness, this is not an Act-protected belief unless it can be sufficiently tied to her religion.

83. When WestJet asked the Plaintiff which specific religious beliefs or practices demonstrate that her inability to receive the COVID-19 vaccination, she cited a number of bible passages with no further explanation.[115] Finally, the Plaintiff expressed her safety concerns regarding the Health Canada approved COVID-19 vaccination by stating:

> *Yes, many reports of adverse reactions and death in the last 4 months of covid vaccines alone compared to last 17 years of all vaccines according to VAERS. -Severe reactions include: Inability to conceive, heart attacks, miscarriages, strokes, bloodclots, paralysis of arms and legs, reproductive dysfunction. -No long term safety has been completed to ensure they are safe and effective. -mRNA is a new technology and side effects completely unknown -Never been licensed for human use when 0 long term studies have been competed to ensure they are safe and effective, they are still in phase 3 experiment that will not be completed until trial ends late 2022.*[116]

84. As confirmed by Ms. Sawchyn throughout her testimony and contained in WestJet's Accommodation Response Letter dated October 4, 2021, the Plaintiff's non-secular concerns related to the safety of the vaccinations, and her inability to demonstrate a connection between

[112] Joint Book of Exhibits TAB 19 at page 000144.
[113] Joint Book of Exhibits TAB 19 at page 000144.
[114] Trial Transcript at page 31 lines 5-7.
[115] Joint Book of Exhibits TAB 19 at page 144.
[116] Joint Book of Exhibits TAB 19 at page 146.

her religious beliefs and a need for accommodation contributed to WestJet's conclusion that the Accommodation Request was made for non-secular reasons.[117]

85. However, Ms. Sawchyn was consistent in her testimony that the People Delivery Team, in conjunction with the Legal Team, examined each Accommodation Request in their totality to determine whether there was sufficient evidence to approve religious accommodation under the *Canadian Human Rights Act*.[118] No single question or answer was determinative.[119]

86. In cross-examination, the Plaintiff confirmed that her safety concerns related to the COVID-19 vaccinations were "serious."[120] On re-direct, the Plaintiff again confirmed that part of her decision not to comply with the Vaccine Policy was non-secular when she stated "it's also my logical mind that tells me that it's unsafe [to get vaccinated]."[121]

87. The COVID-19 case law from human rights tribunals, the proper forum for the Civil Claim, supports WestJet's denial of the Accommodation Request. In *Mackenzie Kure v. University of Lethbridge*, the Tribunal confirmed that "a complaint in the grounds of religious belief must establish that the belief is linked to a tenet of a religious faith that calls for a particular line of conduct."[122] The Tribunal cited to its previous decision in *Pelletier,* for the following proposition:

> … an individual must do more than identify a particular belief, claim that it is sincerely held, and claim that it is religious in nature...They must provide a sufficient objective basis to establish that the belief is a tenet of a religious faith (whether or not it is widely adopted by others of the faith), and that it is a fundamental or important part of expressing that faith.[123]

88. Although the Tribunal accepted that the complainant was a Christian and had sincerely held beliefs, the information provided failed to show how her beliefs required abstaining from vaccinations.[124] Without such information, the belief is not protected under human rights

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[117] Trial Transcript at page 65 lines 10-16; Joint Book of Exhibits TAB 21.
[118] Trial Transcript at page 65 lines 10-16; Trial Transcript at page 98 lines 4-6.
[119] Trial Transcript at page 101 lines 24-30.
[120] Trial Transcript at page 31 lines 18-23.
[121] Trial Transcript at page 36 lines 11-13.
[122] *Mackenzie Kure v. University of Lethbridge* (unreported) – December 4, 2023 ["*Mackenzie Kure*"] (**TAB 17 of the Defendant's BOA**) at para 6.
[123] *Mackenzie Kure* at para 6, citing *Pelletier v 1226309 Alberta Ltd. o/a Community Natural Foods*, 2021 AHRC 192 ["*Pelletier*"] at para 36.
[124] *Mackenzie Kure* at para 7.

legislation even when the complainant makes reference to biblical passages in support of their religious beliefs.[125] The complaint for discrimination based on religious grounds in M*ackenzie Kure* was dismissed.

89. *Sheppard v Canadian Natural Resources Limited*, is a Section 26 Decision which reviewed the Director's dismissal of a complaint alleging discrimination in the area of employment on the grounds of religious beliefs.[126] In *Sheppard*, the complainant's request for a religious accommodation from the COVID-19 vaccination was denied because as it failed to demonstrate a link between the belief and a tenet of religious faith.[127]

90. The Commission relied on the test cited above in *Pelletier*, and held there was "an absence of evidence to demonstrate that religious beliefs within the meaning of the *Act* were a factor in the employer's decision to deny the exemption."[128] Even with the low bar set for a review under section 26, the Commission upheld the Directors decision to dismiss the complaint as there was no reasonable prospect of success.[129]

91. The same conclusion was reached by the Tribunal in *The Worker v. The District Managers,* where the complainant alleged religious discrimination when his manager informed him that he had to wear a COVID-19 mask pursuant to government mandates.[130] While the complainant claimed that wearing a mask dishonours God, the evidence suggested that the employees complaint stemmed from a rejection of government mandates.[131] The employee's opinion that masks are ineffective is not a belief protected from discrimination on the basis of religion. As such, the Tribunal was satisfied that the complaint did not contravene the *Human Rights Code*.[132]

92. The Plaintiff sought an exemption from vaccinations, testing, and masks in her Accommodation Request. While WestJet does not contest that the Plaintiff is a Christian, the Plaintiff was unable to provide WestJet with sufficient information in her Accommodation

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[125] *Mackenzie Kure* at para 7.
[126] *Sheppard v Canadian Natural Resources Limited*, 2024 AHRC 37 ["*Sheppard*"] (**TAB 25 of the Defendant's BOA**) at para 2.
[127] *Sheppard* at para 12.
[128] *Sheppard* at para 30.
[129] *Sheppard* at paras 29, 31 & 33.
[130] *The Worker* at para 2.
[131] *The Worker* at para 11
[132] *The Worker* at para 12.

Request to demonstrate a link between her beliefs and her religious faith. As stated above, reference to biblical passages are insufficient for establishing the connection between belief and a tenet of religious faith.

93. While the Plaintiff is entitled to her opinions, the belief that she did not need to be vaccinated to prevent illness, and that her "logical mind" tells her that vaccinations are unsafe are not beliefs protected under human rights legislation. The Plaintiff's compliant does not satisfy the test for discrimination and would have no prospect of success at the Tribunal. WestJet was therefore reasonable in denying the Plaintiff's Accommodation Request, and did not discriminate against the Plaintiff.

4. The Termination Clause in the Plaintiff's Employment Agreement Applies

94. The Plaintiff has a clear and unambiguous termination clause in her employment agreement, which upon termination for a reason that does not constitute just cause limits the Plaintiff to "advance working notice, or pay in lieu of notice and severance pay in accordance with the statutory minimums provided for in the *Canada Labour Code.*" The Plaintiff contractually agreed that "provided WestJet terminates your employment without just cause in accordance with the provisions of this paragraph, that you have no additional claim against WestJet for any additional severance or termination compensation."[133]

95. In *WestJet, an Alberta Partnership v Employees in the service of WestJet,*[134] and *Egan,* termination clauses were found to be enforceable in federally regulated workplaces to which the unjust dismissal scheme in the *Canada Labour Code* applies. *Employees in the service of WestJet* featured the adjudication of a group termination conducted under the *Canada Labour Code.* The employees in the group termination had their employment terminated due to the COVID-19 pandemic. The Adjudicator found the exact same termination clause language as was included in the Plaintiff's employment agreement to be enforceable against the employees.[135]

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[133] Joint Exhibit Book TAB 10 at page 78.
[134] *WestJet, an Alberta Partnership v Employees in the service of WestJet*, 2021 CanLII 58975 ["*Employees in the service of WestJet*"] (**TAB 32 of the Defendant's BOA**).
[135] *Employees in the service of WestJet* at para 86.

96. A very similarly worded termination clause to the Plaintiff's version was upheld in *Egan v Harbour Air,* where the British Columbia Court of Appeal stated:

> [63] In this case, the Termination Clause requires Harbour Air to give Mr. Egan "appropriate notice and severance in accordance with the requirements of the Canada Labour Code". This language clearly incorporates the notice requirements in s. 230(1) and the severance requirements in s. 235(1). In Mr. Egan's circumstances, those provisions provide "some other period of notice": either a minimum of two weeks' working notice or a prescriptive two weeks' wages in lieu of notice, as well as five days wages in severance pay. **In my opinion, there is no ambiguity in the parties' intentions to displace common law notice with the statutory requirements of the Code.** I therefore conclude that the Termination Clause is sufficiently clear to rebut the presumption of common law reasonable notice.[136] (*emphasis added*)

97. The *Egan* decision was very recently followed by the Alberta Court of King's Bench in *Singh v Clark Builders.*[137] In *Singh,* the Court considered the *Interplay of Allegations of Just Cause & Without Cause Termination Provisions,* concluding that "[a]n employer's failure to establish just cause will not disentitle the employer from enforcing an otherwise valid without cause termination provision provided the allegations of just cause are made in good faith,"[138] and that "it would be unfair to preclude employers from relying on a without cause termination provision" when they are unable to prove just cause.[139]

98. In reaching that conclusion the Court in *Singh* had cited to *Humphrey v Mene*, for the proposition that "[w]here an employer alleges cause and fails, or withdraws its cause allegation, or repudiates an employment agreement through acts which constitute constructive dismissal, the employer is not precluded from subsequently invoking a without cause termination provision for the purpose of calculating the employee's damages."[140]

99. The Termination Clause in the Plaintiff's Employment Agreement is valid and enforceable, and in the event this Court determines that WestJet did not have just cause to terminate the Plaintiff's employment (in which case her employment was terminated without cause), the Plaintiff is limited to the statutory minimums provided by the *Canada Labour Code.*

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[136] *Egan* at para 63.
[137] *Singh v Clark Builders*, 2025 ABKB 3 ["*Singh*"] at para 160.
[138] *Singh* at para 92.
[139] *Singh* at para 96.
[140] *Singh* at para 90, citing *Humphrey v Mene*, 2021 ONSC 2539 at para 136.

5. The Plaintiff's Reasonable Notice Period

100. If this Court finds that the Plaintiff's termination clause is unenforceable, then WestJet submits that the 12-month reasonable notice sought by the Plaintiff is excessive and not supported by the Bardal factor analysis. The Plaintiff has not adduced any case law or argument in support of the contention that a reasonable notice period of 12 months should be awarded.

101. At the time of her termination the Plaintiff was 36 years of age, and had been employed by WestJet for 11 years. The Plaintiff was also the most junior member of her team, had no direct reports, and worked in a supporting role. While the Plaintiff's title was "Accountant", she has no designation and her duties are more analogous to an accounting clerk or bookkeeper. WestJet submits that in accordance with the cases cited below, a reasonable notice period of 10 months is supported by law.

Case	Relevant Factors	Reasonable Notice Period
Stewart v. Keary Coyle Motors Ltd, 2011 NBQB 297 (**TAB 28**)	o Accounts Receivable Clerk o 10 years of service o 48 years old o Terminated without cause because of a lack of available work for the position	The Plaintiff received 10 months
Schalk v Sitel, 2014 CanLII 10385 (ON SCSM) (**TAB 24**)	o Senior Customer Service Representative dealing with complex complaints o 9.5 years of service o 47 years old o Limited opportunities for similar employment given the plaintiff's personal characteristics	The Plaintiff received 10 months
Peacock v. Western Securities Ltd., 2010 CarswellAtla 1021 (**TAB 21**)	o Office Manager/Office Administrator o 13 years of service o 62 years old o Unable to find full-time employment opportunity, but mitigating damages with short-term temporary employment	The Plaintiff received 12 months
Donath v. Hughes Containers Ltd., 2014 ONSC 6796 (**TAB 7**)	o Accounts Receivable/ Payroll Administrator o 14 years of service o 64 years old o Termination occurred as a result of company downsizing	The Plaintiff received 12 months

102. Furthermore, while the Civil Claim seeks "benefits at approximately 18% of salary", the Plaintiff did not adduce any evidence at trial in support of the contention that she was entitled

to benefits valued at 18% of her base salary. The Plaintiff did not call evidence at trial about her compensation or benefits, and WestJet's evidence that Mrs. Yee's total compensation, inclusive of benefits, was $71,550 in 2019,[141] was uncontradicted by the Plaintiff.

6. Moral Damages are Not Appropriate

103. The Plaintiff misapplies the law on moral damages. This Court enunciated when aggravated damages, which are moral damages, are payable in a wrongful dismissal claim in *Starling v Independent Living Resource Centre of Calgary*, as follows:

> In *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112, the Alberta Court of Appeal set aside a $200,000.00 aggravated damages award made by a jury. The applicable principles set out by the Court at paras 72-77 and 97 may be summarized as follows:
>
> - Distress or hurt feelings ordinarily resulting from the fact of termination are not compensable" (para 72: citing *Honda* at paras 54-57). (emphasis added)
> - "Damages resulting from the manner of dismissal (as opposed to the fact of dismissal) are available, however, if damages arise out of the conduct of the employer in the course of termination" (para 73).
> - Insensitive methods used by an employer during termination may result in aggravated damages (para 74).
> - Aggravated damages must be supported by proof of actual damages from the employer's conduct in the manner of the dismissal (para 75).
> - Medical evidence is not necessarily required, but a Plaintiff must provide more than a "scintilla of evidence" (para 97).[142]

104. Plaintiff's claim for moral damages is entirely founded on WestJet's alleged failure to accommodate and discrimination. The Plaintiff focuses on WestJet denying the Plaintiffs Accommodation Request months prior to her termination, rather than the actual manner of dismissal, which is the termination meeting itself.

105. The Plaintiff agreed during cross-examination that she knew exactly why her employment was being terminated on December 1, 2021, and that everything during the termination meeting was professional and courteous.[143] The Plaintiff's employment was terminated in a

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[141] Joint Book of Exhibits TAB 30.
[142] *Starling v Independent Living Resource Centre of Calgary*, 2023 ABPC 31 ["*Starling*"] (**TAB 27 of the Defendant BOA**).
[143] Trial Transcript at page 32 lines 37-40.

private virtual termination meeting, after which she was extended access to benefits and mental health supports for a period of 90 days.[144] WestJet took steps to ensure that the termination meetings which took place on December 1, 2021, were sensitive, professional, and confidential.[145]

106. The evidence does not support in any way that the manner of termination was insensitive, or that the Plaintiff was misled or confused about why her employment was being terminated. As outlined above, the Plaintiff agreed during cross-examination that she had been reminded several times in writing that she would be terminated for cause on December 1, 2021.[146] There is simply no evidence to substantiate that WestJet attacked the Plaintiff's reputation by declarations made at the time of dismissal, misrepresented the reason for the termination (the Plaintiff agreed she was aware as to why her employment was being terminated), or that WestJet misled, lied to or was unduly insensitive on December 1, 2021.[147]

107. The law is also clear that "[t]he normal distress and hurt feelings resulting from dismissal are not compensable."[148] The Plaintiff did not offer more than a "scintilla of evidence" that she was emotionally or medically impacted by the manner of her termination, and she did not call any evidence to satisfy "proof of actual damages from the employer's conduct in the manner of the dismissal."[149]

108. Furthermore, as outlined above in the jurisdiction section, the Plaintiff seeks an award of moral damages based entirely on her claims of discrimination. General damages for discrimination are within the jurisdiction of a human rights commission, and are not appropriate for a moral damages award in a civil court.[150]

7. The Plaintiff Failed to Mitigate

109. If this Court finds that the Plaintiff is entitled to reasonable notice, WestJet submits that she failed to mitigate her damages, and therefore the reasonable notice period must be reduced.

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[144] Joint Exhibit Book TAB 23 at page 162; Trial Transcript at page 115 lines 2-14.
[145] Trial Transcript at page 113 lines 38-41; Trial Transcript at page 114 lines 1-22.
[146] Trial Transcript at page 29 lines 32-37.
[147] *Honda* at para 59.
[148] *Honda* at para 56.
[149] *Starling* at para 64.
[150] *Honda Canada Inc. v. Keays,* 2008 SCC 39 (CanLII), [2008] 2 SCR 362.

WestJet acknowledges that there were periods of time during the COVID-19 pandemic when there were limited employment opportunities. Regardless, the Plaintiff failed to take even minimal steps to obtain comparable employment and reduce her financial losses.

110. While the Plaintiff claimed to have "looked for new employment," she admitted during cross-examination that she did not apply for suitable jobs,[151] and decided that even applying for positions was "wasting everyone's time."[152]The Plaintiff testified in direct examination that she was led by the Holy Spirit to homeschool her children.[153] WestJet cannot be expected to bear the cost of the Plaintiff's voluntary decision to leave the workforce to homeschool her children. The Plaintiff's mitigation efforts are clearly lacking.

ORDER SOUGHT

111. For the foregoing reasons, WestJet respectfully requests that this action be dismissed with costs to WestJet.

McLennan Ross LLP

Per: 

Elise Cartier and Mac Stephen
Counsel for the Defendants

[151] Trial Transcript at page 20 lines 32-41.
[152] Trial Transcript at page 20 lines 40-41.
[153] Trial Transcript at page 21 lines 4-8.