

In the Alberta Court of Justice

Citation: Yee v WestJet, 2025 ABCJ 87

Date: 20250513
Docket: P2390102408
Registry: Calgary

Between:

Duong Yee

Plaintiff

- and -

**WestJet, an Alberta Partnership, and its Partners; WestJet Airlines Ltd. and
222304 Alberta Corp.**

Defendant



**Reasons for Judgment of the
Honourable Justice A.P. Argento**

Introduction

[1] This is a claim for wrongful dismissal.

[2] The Plaintiff, Mrs. Duong Yee, worked for the Defendant, WestJet, an Alberta Partnership (WestJet), for eleven years. For most of that time, she worked in various accounting positions. The Plaintiff's employment was terminated for cause on December 1, 2021 after she failed to comply with the Defendant's COVID-19 Vaccination Policy (the Vaccination Policy). She was 36 years old at the time.

[3] Prior to her termination, the Plaintiff applied to be exempted from the Vaccination Policy on religious grounds. The Defendant denied the Plaintiff's request and placed her on a one month unpaid leave of absence before terminating her employment.

Evidence at Trial

[4] The Plaintiff testified at trial.

[5] The Defendant's witnesses and their positions at the relevant time were Lauren Sawchyn (Senior Manager, People Delivery), Katherine Kerry (Senior Human Resources Business Partner) and Keri Whyte (Manager, Operations Accounting).

[6] Ms. Sawchyn was involved in creating the Vaccination Policy and considering the Plaintiff's request for a religious exemption. Ms. Kerry held a senior role providing support to the Finance group where the Plaintiff worked. The Plaintiff reported to Ms. Whyte.

[7] The parties helpfully prepared a detailed Agreed Statement of Facts (Agreed Facts) which is attached as Appendix A (with document references removed). Excerpts from the Agreed Facts are referenced and summarized in this decision as necessary.

Plaintiff's Employment with WestJet

[8] The Plaintiff began working with the Defendant as a Part-Time Sales Super Agent on May 17, 2010, and signed an initial written employment agreement. (Agreed Facts, paras 5-6)

[9] The Plaintiff was promoted to different accounting positions in 2012 and 2016 and signed revised employment agreements each time. Her position was Accountant II-Operations Accounting when her employment was terminated in December, 2021. (Agreed Facts, para 7, 39)

Implementation of the Defendant's Vaccination Policy and the Plaintiff's Request for a Religious Exemption/Accommodation

[10] The following paragraphs from the Agreed Facts outline the events leading to the implementation of the Defendant's Vaccination Policy:

16. On August 13, 2021, the Government of Canada announced its intention to mandate COVID-19 vaccinations for air transportation employees by no later than the end of October, 2021 (the "**August Update**"). Further, the Government of Canada indicated that it expected Crown corporations and employers in the federally regulated sector to require COVID-19 vaccinations of all employees.

...

22. On September 8, 2021, WestJet announced that all employees are required to be fully vaccinated by October 30, 2021. Further, WestJet required all employees to provide a declaration indicating their COVID-19 vaccination status by September 24, 2021. At this time, WestJet provided an outline of how it would address employee non-compliance.

...

29. On October 6, 2021, the Government of Canada announced that, as of October 30, 2021, employers in the federally regulated air, rail, and marine transportation sectors must establish vaccination policies for their employees (the "**October Update**").

30. On October 16, 2021, WestJet formally issued the COVID-19 Vaccination Policy.

[11] The Plaintiff's request for a religious exemption from the Defendant's Vaccination Policy and the denial of her request are set out in the Agreed Facts as follows:

25. On September 16, 2021, WestJet requested that Mrs. Yee submit her COVID-19 vaccination status declaration form.

...

27. On September 20, 2021, Mrs. Yee submitted a COVID-19 Vaccine Accommodation Request Form wherein she professed her religious beliefs concerning abstention from vaccination with reference to the holy book of her religion and to which she attached documentation from her place of worship in support of her request for a religious exemption from vaccination.

28. On October 4, 2021, WestJet sent Mrs. Yee a letter declining her request for accommodation on religious grounds with regard to WestJet's mandatory vaccination requirement. The letter stated the decision was final and not subject to internal appeal.

Unpaid Leave of Absence, Warning and Termination of Employment

[12] After denying the Plaintiff's request for an exemption, the Defendant (1) placed the Plaintiff on an unpaid leave of absence and (2) warned her that failure to be fully vaccinated could lead to termination of her employment.

[13] These events are summarized in the Agreed Facts:

31. On October 22, 2021, WestJet provided a letter to Mrs. Yee titled "Re: Non-Vaccinated Leave of Absence," which summarized the August Update, the October Update, and stated its intentions to comply with both the federal mandate and occupational health and safety obligations (the "**October Letter**").

32. The October Letter stated that being fully vaccinated against COVID-19 by October 30, 2021, was a mandatory condition of employment and that Mrs. Yee would be placed on an unpaid leave of absence commencing November 1, 2021. At this time, Mrs. Yee was warned that failure to be fully vaccinated by November 30, 2021, without a WestJet approved accommodation, may result in the termination of employment for cause as early as December 1, 2021.

...

34. On November 1, 2021, WestJet placed Mrs. Yee on a one (1) month unpaid leave of absence (the "**Non-Vaccinated Leave of Absence**").

...

36. On November 24, 2021, WestJet reminded Mrs. Yee by email of her requirement to be fully vaccinated prior to November 30, 2021. In this email, WestJet warned Mrs. Yee that non-compliance with the COVID-19 Vaccination Policy would result in the termination of her employment for cause on December 1, 2021.

[14] The Defendant terminated the Plaintiff's employment for cause on December 1, 2021. The termination letter stated in part that:

As it is a condition of your employment with WestJet to follow WestJet policies, including the Policy, and you are unable to fulfill a condition of your employment, West Jet is terminating your employment with cause.

[15] The Plaintiff was informed that if she became compliant with the Vaccination Policy, she could apply for future postings with the Defendant and be eligible for reinstatement of benefits

and credit based on her previous experience if rehired within 6-12 months. (Agreed Facts, para 42)

Issues

[16] The issues in this case are:

1. Does the Court have jurisdiction to decide the Plaintiff's claim?
2. Has the Defendant met its burden to prove that the Plaintiff's failure to comply with the Vaccination Policy amounted to just cause?
 - a. Was the Defendant's Vaccination Policy reasonable and enforceable?
 - b. Was the Defendant's denial of the Plaintiff's religious exemption request unreasonable or discriminatory?
 - c. If the Defendant's denial of the Plaintiff's religious exemption request was not unreasonable or discriminatory, was there just cause to terminate the Plaintiff's employment?
3. Does the termination clause in the Plaintiff's employment agreement (Employment Agreement) limit the Plaintiff to statutory severance?
4. If the Plaintiff was wrongfully dismissed, what are her damages for termination without notice?
5. If the Plaintiff was wrongfully dismissed, did she fail to mitigate her damages?
6. If the Plaintiff was wrongfully dismissed, is she entitled to moral or aggravated damages?

[17] The Defendant's Dispute Note and Statement of Issues submitted prior to trial also alleged that the Plaintiff's Employment Agreement was frustrated. However, the Defendant did not raise this defence in its written or oral argument and therefore it will not be addressed.

Decision

Does the Court Have Jurisdiction to Decide the Plaintiff's Claim?

[18] The Defendant argues the Court does not have jurisdiction to decide the Plaintiff's claim and that she is the wrong forum.

[19] The Defendant did not bring an application prior to trial to strike the Plaintiff's claim based on jurisdiction. The Defendant raised jurisdiction at the start of trial, but the Court was not prepared to decide the issue on a preliminary basis as there was no application before it and the parties were prepared to proceed with the trial. The parties were advised the issue of jurisdiction would be addressed in closing argument.

[20] The Defendant's jurisdictional argument may be summarized as follows:

- (a) The Plaintiff does not allege or refer to a breach of contract in the Civil Claim;

- (b) The Plaintiff has not pled the necessary cause of action for a wrongful dismissal claim;
- (c) While the Civil Claim references wrongful dismissal and wrongful termination, the substance of the claim is entirely a human rights complaint based on an allegation of discrimination;
- (d) The alleged wrongful termination is that the Defendant failed to accommodate the Plaintiff, an obligation contained in human rights legislation;
- (e) As discrimination is the only cause of action pled, the Plaintiff should have proceeded in the proper forum, which was before the Canadian Human Rights Commission (the Commission).

[21] The Plaintiff initially filed a human rights complaint with the Commission, but subsequently discontinued it.

[22] The Defendant relies on the following authorities in support of its jurisdictional argument.

[23] In *Harun-ar-Rashid v Royal Canadian Mounted Police (RCMP)*, 2019 ABQB 54 (*Harun*), the plaintiff commenced an action against twelve defendants, alleging they had negatively affected his employment prospects. Some of the claims were characterized as being based on the tort of discrimination. The Court held that such claims were not actionable in tort, citing *Seneca College v Bhadauria*, [1981] 2 SCR 181, 1981 CanLII 29 (*Bhadauria*).

[24] In *Hamilton v Rocky View School Division No 41*, 2009 ABQB 225 (*Hamilton*), aff'd 2010 ABCA 217, the plaintiff alleged he was not hired because of age discrimination. The Court also cited *Bhadauria* in finding that allegations of discrimination were not actionable and were the exclusive domain of what was then known as the Alberta Human Rights and Citizenship Commission.

[25] *Fakhri v Canadian Natural Resources Limited*, 2023 ABKB 483 (*Fakhri*), involved a claim for constructive dismissal. The plaintiff's claim was dismissed summarily as there was no evidence that his employment had been unilaterally changed or otherwise indicating the claim would succeed at trial. The Court briefly referenced *Harun*, but it was not central to the decision.

[26] As noted, *Bhadauria* was referenced in both *Harun* and *Hamilton*. In *Bhadauria*, the issue was whether a new intentional tort of discrimination could be recognized in relation to an alleged failure to hire the plaintiff. The Supreme Court of Canada held that such a tort was not available and was foreclosed by the *Ontario Human Rights Code*, RSO 1970, c 318, in force at the time.

[27] Finally, the Defendant cites *Honda Canada Inc v Keays*, 2008 SCC 39 (*Keays*), and the discussion in that case as to whether punitive damages were available based on discriminatory conduct. The Supreme Court of Canada set aside the punitive damages award. In doing so, it specifically held that it did not need to reconsider *Bhadauria* and deal with the plaintiff's request for recognition of a distinct tort of discrimination.

[28] None of the Defendant's authorities involved a wrongful dismissal claim alleging discriminatory conduct, except for *Keays*. However, the allegedly discriminatory conduct did

not factor into the finding of wrongful dismissal in *Keays*. Additionally, the jurisdictional issue raised in this case was not decided in *Keays*.

[29] The Plaintiff argues this Court has jurisdiction to hear a wrongful dismissal claim under Section 9.6(1)(a) of the *Court of Justice Act*, RSA 2000, c C-30. In addition to distinguishing the Defendant's authorities, the Plaintiff also relies on cases from British Columbia and Ontario to support her jurisdictional argument.

[30] In *Lewis v WestJet Airlines Ltd*, 2019 BCCA 63, leave to appeal to SCC refused, 38600 (July 18, 2019) (*Lewis*), the British Columbia Court of Appeal refused to strike a breach of contract claim in a proposed class action by WestJet employees, even though it alleged facts that could also ground a claim before the Canadian Human Rights Tribunal.

[31] The Court stated at paras 26 and 28:

[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.**

...

[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. **(Emphasis added)**

[32] The Plaintiff also cites Ontario decisions that have upheld pleadings alleging constructive dismissal that included elements of discriminatory conduct: *Attiboudeaire v Royal Bank of Canada*, (1996), 131 DLR (4th) 445, 1996 CanLII 1411 (ON CA); *Gnanasegaram v Allianz Insurance Co of Canada* (2005), 251 DLR (4th) 340, 2005 CanLII 7883 (ON CA); *Stomp v 3M Canada*, 2023 ONSC 5180 (*Stomp*).

[33] In *Stomp*, the plaintiff alleged he was constructively terminated and sued for wrongful dismissal. The claim also alleged that the defendant failed to accommodate his disability thereby entitling him to damages for breach of the *Ontario Human Rights Code*, RSO 1990, c H 19,

s 46.1. The Court dismissed the motion to strike the claim as disclosing no reasonable cause of action. It held that the plaintiff's action was "in pith and substance" not solely based on the *Ontario Human Rights Code* (para 34), but was a claim for breach of the employment contract, stating at para 35:

[35] The duty to accommodate in the Code is inextricably bound with disability. Thus, **an allegation that an employer has failed to accommodate, is really another way of alleging that the employer is discriminating on the basis of disability. Such a claim, so long as it is tethered to an independent cause of action such as a claim for constructive dismissal, is within the purview of the court. (Emphasis added)**

[34] While this issue has typically arisen in the context of preliminary applications to strike pleadings, it has also been considered at trial: *Garner v Bank of Nova Scotia*, 2015 NSSC 122 (*Garner*); *Novakowski v Canadian Linen & Uniform Service Co*, 2015 ABQB 53 (*Novakowski*).

[35] In *Garner*, the plaintiff's action alleged age discrimination as well as constructive and wrongful dismissal. Similar to the argument raised in this case, the defendant employer submitted that the plaintiff's action was "a discrimination case 'dressed up' as a case of constructive/wrongful dismissal" and entirely founded on a breach of human rights legislation (para 20). The Court held that it had jurisdiction to deal with the plaintiff's allegations of constructive and wrongful dismissal and "to decide the discrimination issue as an integral part" of those claims (para 27).

[36] In *Novakowski*, the Court referenced the employer's obligation of general fair treatment where the plaintiff alleged his disability had not been accommodated, but held that the defendant employer had not breached this duty (paras 88-90).

[37] The Defendant's jurisdictional argument is based on its assertion that the Plaintiff has not pled a valid cause of action for wrongful dismissal and the substance of the claim is entirely a human rights claim.

[38] However, the Plaintiff has properly advanced a claim for wrongful dismissal within this Court's jurisdiction for the following reasons.

[39] First, and as acknowledged by the Defendant, the Civil Claim expressly refers to wrongful dismissal or wrongful termination. The absence of the words "breach of contract" is not fatal to the claim, nor was any authority provided suggesting otherwise.

[40] Read in its entirety and purposively, the Civil Claim clearly pleads a cause of action for wrongful dismissal, with the following paragraphs highlighted by way of example:

40. Mrs. Yee discharged her obligation to demonstrate her sincerely-held religious beliefs with which WestJet's Policy interfered in a manner that is more than trivial or insubstantial. Accordingly, **WestJet's failure to seek accommodation solutions for Mrs. Yee in favour of terminating her employment constitutes wrongful termination.**

41. The "condition" placed on Mrs. Yee's return to work as expressed in WestJet's letters and its failure to seek ways to meaningfully accommodate Mrs. Yee run afoul of the Supreme Court of Canada's decision in *Amselem*, other SCC jurisprudence, and the *Act*. **Accordingly, the termination of Mrs. Yee's employment was without cause, and the common law severance/notice period applies.**

42. WestJet had **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.

...

58. Contrary to WestJet counsel's assertion, COVID vaccination/testing was not a *bona fide* occupational requirement such that an inability to receive the COVID vaccines or undergo testing could be a ground for termination for cause. **Aside from the issue of its discriminatory behaviour toward Mrs. Yee, it was not open to WestJet to terminate Mrs. Yee without pay in lieu of notice for not receiving the COVID vaccines and declining to undergo testing. (Emphasis added)**

[41] The facts pled in support of the Plaintiff's claim are largely (although not entirely) based on allegedly discriminatory conduct in failing to accommodate her request for a religious exemption. However, what is important is that these facts are pled in support of a cause of action (wrongful termination) that is within the Court's jurisdiction. The allegations are "tethered to" a valid cause of action (*Stomp*, para 35) and are not simply standalone allegations of discriminatory conduct contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6. Furthermore, the Plaintiff seeks damages for wrongful termination, not for discrimination *per se* because it claims the Defendant has breached the *Canadian Human Rights Act*.

[42] The Defendant's authorities are distinguishable. They either involved situations where the plaintiff did not have a valid cause of action independent of the allegations of discriminatory conduct (*Bhadauria*, *Harun*, *Hamilton*) or did not address the same issue (*Fakhri*, *Keays*).

[43] By contrast, the Plaintiff's authorities are more directly on point and analogous. The Court notes in particular *Lewis* and *Stomp* as well as the decision in *Garner*. While these cases are not binding, they are persuasive.

[44] As noted in the *Wrongful Dismissal Practice Manual*, "[e]ven if the Court cannot deal with allegations of discrimination *per se*, they may be relevant to issues of the wrongfulness of the dismissal, length of reasonable notice, and aggravated and punitive damage claims". (Ellen E Mole, 2nd ed (Toronto: LexisNexis Canada Inc, 2006) (loose-leaf updated 2020, release 61, at § 5.113). The same analysis applies to this case.

[45] The Court therefore concludes that it has jurisdiction to decide the Plaintiff's claim for wrongful dismissal even though it may also engage issues that could have been determined by the Commission if the Plaintiff's human rights complaint had not been discontinued.

[46] Ultimately, the Court must decide whether the Plaintiff was wrongfully terminated or if the Defendant had just cause to terminate her employment. The underlying factual context includes her request for a religious exemption and the Defendant's denial of her request which eventually led to her dismissal. These issues are inextricably intertwined with the Defendant's allegation that it had cause to dismiss the Plaintiff for failing to comply with the Vaccination Policy.

Has the Defendant Met its Burden to Prove that the Plaintiff's Failure to Comply with the Vaccination Policy Amounted to Just Cause?

Legal Principles

[47] As the employer, the Defendant has the burden to establish just cause: *Haack v Secure Energy (Drilling Services) Inc.*, 2021 ABQB 82 at para 110 (*Haack*); *McDonald v Sproule Management GP Limited*, 2023 ABKB 587 at para 63 (*McDonald*).

[48] As set out in *Haack* at para 126, the Court must consider the following in assessing whether the employer had just cause:

- (i) The nature and extent of the employee's conduct;
- (ii) The surrounding circumstances of the employee (e.g., seniority, job description, obligations and responsibilities) and of the employer (e.g., the nature of the business, its policies and practices);
- (iii) Whether the employer's response was proportionate and, in particular, "whether the alleged misconduct is so incompatible with the fundamental terms of the employment relationship that it warrants dismissal"

[49] In *Motta v Davis Wire Industries Ltd*, 2019 ABQB 899, the Court discussed the issue of proportionality where the employer seeks to terminate for cause:

[14] The onus lies with the employer to prove just cause for the termination on a balance of probabilities where the existence and end of an employment relationship are not in dispute: *McKinley v BC Tel*, 2001 SCC 38 at para 36 [*McKinley*]. That is the case here. *McKinley* also guides the essential test for wrongful dismissal. It establishes that for termination to be justified it must be contextually proportionate to grounds proven by the employer:

...underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. *McKinley* at para 53.

[16] A broad reading of the governing law makes it clear that employees cannot be easily or casually disposed of. Firing someone is often a crushing blow to their self-worth and ability to support themselves and their family. **Dismissal for cause must be proportionate to the employee's wrongs, taken in the overall context of the employment relationship. (Emphasis added)**

[50] Willful disobedience and insubordination as grounds for dismissal were summarized by in *McDonald*:

[75] Wilful disobedience has been held to involve the wilful defiance of an employee of lawful, reasonable and clear orders or instructions of a superior, or refusal to carry out well-known and necessary policies or procedures, that effectively repudiates the essential condition of the employment relationship that employees must obey their employer's instructions: *Motta* at para 107; *Karmel v Calgary Jewish Academy*, 2015 ABQB 731 at para 16; *Wilson v KP Manufacturers (Calgary) Ltd*, 1998 CanLII 18141, 225 AR 205 (QB) at paras 10-11; *Beaudoin v Agriculture Financial Services Corporation*, 2018 ABQB 627 at para 47.

[76] Insubordination has been described more broadly as any refusal to follow instructions, and any other conduct that constitutes a challenge to persons in authority or their policies: *Hoffert v Golder Associates Ltd*, 2017 ABQB 341 at paras 91, 117.

[77] The court must assess all relevant circumstances to determine if wilful disobedience or insubordination justifies summary dismissal: *Motta* at paras 14-16; *Hoffert* at para 90; *Amos v Alberta*, 1995 CanLII 9287, 166 AR 146 (QB) at paras 42-44.

[51] The issue of cause will be considered in light of these principles.

Was the Defendant's Vaccination Policy Reasonable and Enforceable?

[52] The Plaintiff argues "[t]his case is not about a policy, nor the reasonableness of a policy". While the Plaintiff does not suggest that the Vaccination Policy was unreasonable, she takes issue with how it was applied to her.

[53] The Defendant argues that the Vaccination Policy was "reasonable, justified and enforceable" and that it acted reasonably in the circumstances.

[54] The Defendant's Vaccination Policy and how it was applied to the Plaintiff is highly relevant to the issue of just cause. The Defendant terminated the Plaintiff's employment specifically because she failed to fulfill a condition of her employment by not complying with the Vaccination Policy.

[55] To be enforceable, workplace policies must be "reasonable, unambiguous, well published, consistently enforced": *Stonham v Recycling Worx Inc*, 2023 ABKB 629 at para 61. Additionally, "the employee must know or ought to have known of the policy, including consequences of breach": *ibid*.

[56] Mandatory vaccination policies were found to be reasonable and enforceable in two constructive dismissal cases: *Parmar v Tribe Management Inc*, 2022 BCSC 1675 (*Parmar*), and *Van Hee v Glenmore Inn Holdings Ltd*, 2023 ABCJ 244 (*Van Hee*). The parties did not refer to any court decisions considering whether failure to comply with a mandatory vaccination policy was just cause for dismissal.

[57] The parties cited a number of arbitral decisions including ones where employee dismissals for failure to comply with mandatory vaccination were upheld. These decisions have been considered, but they are factually distinguishable and not binding on this Court.

[58] In this case, the Defendant's Vaccination Policy was, at least in part, responsive to the requirements imposed by the Government of Canada. These requirements stipulated that employees in the federally regulated air transportation sector had to be vaccinated by the end of October, 2021. The Vaccination Policy also stated it was aligned with the Defendant's duty under the *Canada Labour Code*, RSC 1985, c L-2, and the *Canada Occupational Health and Safety Regulations*, SOR/86-304, to take all reasonable precautions to protect its workers.

[59] The Vaccination Policy clearly set out what needed to be done by employees to comply with its terms as well as the consequences of non-compliance. It provided that employees would be accommodated in accordance with the *Canadian Human Rights Act* and the Defendant's Accommodation Policy which was updated to address COVID-19 vaccination exemption requests.

[60] The Court finds that the Defendant's Vaccination Policy was reasonable and enforceable.

Was the Defendant's Denial of the Plaintiff's Religious Exemption Request Unreasonable or Discriminatory?

[61] The focus of the Plaintiff's argument in this case is that the Defendant's conduct was discriminatory because it denied her request to be exempted from the Vaccination Policy on religious grounds and her subsequent termination was therefore wrongful.

[62] An employer's policy must not only be reasonable, but must also be applied reasonably for the employer to rely on non-compliance as a basis for just cause. This is consistent with the employer's obligation of general fair treatment noted in *Novakowski*.

[63] The Defendant argues that both the Vaccination Policy and the manner in which it implemented the policy "was reasonable and enforceable against the Plaintiff". (Defendant's Submissions, para 63) The Defendant also cites the *KVP* test (which originated from the Ontario labour arbitration decision *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co Ltd*, 1965 CanLII 1009 (ON LA)) and the requirement that the employer "demonstrate the reasonableness and fair application of the rule that is the basis for disciplining an employee": *Henrikson v WestJet, an Alberta Partnership*, 2024 CIRB 1157 at para 47.

[64] It is undisputed that the Defendant was required to accommodate the Plaintiff on protected religious grounds in accordance with the *Canadian Human Rights Act*. This duty was expressly set out in both the Vaccination Policy and the Defendant's Accommodation Policy.

[65] As indicated, the Defendant's denial of the Plaintiff's religious exemption request and the termination are inextricably linked. If the Defendant failed to properly consider the Plaintiff's request for a religious exemption, that would be relevant to assessing whether the Defendant could then rely on the Vaccination Policy to terminate the Plaintiff for cause.

[66] The Plaintiff completed the Defendant's Accommodation Request Form on September 20, 2021. The relevant questions and the Plaintiff's responses are highlighted below.

6. Explain why you are requesting an accommodation:

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

7. Describe the accommodation you are seeking:

Exemption from vaccination; from masks; from rapid testing

...

9. Describe how you are a practicing member of this religion:

I attend online worship and sermons with my church, I have a weekly bible study with my church group to continue understanding God's word, as well as my own daily prayer, worship and bible readings to commune with my heavenly father.

10. How long have you been a practicing member of this religion?

Over 3 years

11. Explain the connection between your religious belief(s), your objection to receiving a COVID-19 vaccine and the accommodation you are seeking:

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.

[67] At Question 15, the Plaintiff confirmed she had not received any other vaccinations since becoming a practising member of her religion. The Plaintiff also had to answer the following questions:

19. Do you belong to any groups (social media or otherwise) protesting or denouncing or being critical of Covid-19 measures taken by health authorities and government bodies?

Yes

20. Please describe the groups of which you are a member:

I have joined groups that are peacefully seeking a community to support our freedoms; ie. conscience, religion, beliefs; choice – Jesus came to set the captives free and that we are not to live in bondage. This can be include those being critical of the covid measures, but that is not my purpose for belonging to these groups

21. Do you have any concerns about the safety of any Health Canada-approved Covid-19 vaccines?

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 [sic] to ensure they are safe and effective, they are still in phase 3 experiment that will not be completed until trial ends late 2022.

[68] The Accommodation Request Form (Question 14) asked for documentation from a religious leader speaking to the connection between the Plaintiff's religious belief, objection to the vaccine and accommodation she was seeking. The Plaintiff attached a letter from her pastor at Bethany International Church in Denver, Colorado dated August 28, 2021. The letter noted the Plaintiff's "deeply held religious objection to medical interventions" including vaccines. It also stated that the Plaintiff had "faith that her Savior, Jesus Christ is her ultimate healing power and as such, consider the acceptance of vaccines, or testing on a healthy body as a betrayal of faith." The requested accommodations included continuing to be able to work from home 100% of the time.

[69] The Defendant's October 4, 2021 letter (the Denial Letter) explained its denial of the Plaintiff's exemption request as follows:

WestJet has carefully reviewed your request for an accommodation, including the information listed above. For the reasons stated below, WestJet declines your request for an accommodation on the basis of religion:

- The information provided or obtained in reviewing your accommodation is insufficient to establish you require an accommodation. **More specifically, the information you provided to WestJet casts doubt on religion being the grounds for your application. You have written in your application form that you consider the vaccine unsafe. It is therefore reasonable to consider that you are philosophically/personally opposed to mandatory vaccine, which means you are seeking accommodation for secular reasons, not religious.** We respect your opinion, but personal preference is not a Protected Ground. (Emphasis added)

This decision is final and is not subject to internal appeal.

[70] The Defendant's witness, Ms. Sawchyn, testified about the process that was followed in considering the Plaintiff's accommodation request. Her evidence was that:

- a) Each request was evaluated based on the information provided. The evaluation was done by a roundtable consisting of Ms. Sawchyn and her team as well as legal counsel;
- b) The Defendant tried to establish whether there was a connection between the employee's religious beliefs and the vaccine requirement;
- c) There was no checklist of what had to be included to obtain an accommodation;
- d) Employees were asked about their concerns regarding vaccine safety to help determine the connection between religious accommodation and the vaccine;
- e) She was unable to say what an accommodation request would have to include in order to be accepted as every application was different;
- f) The Defendant did not question that the Plaintiff's religious beliefs were sincere, but the conclusion that her objection was secular was based on discussions with the legal team;
- g) The Plaintiff's answer that she believed the vaccine was unsafe was not the sole reason for denying her exemption request, but what was in the denial letter was the reason;
- h) The Plaintiff was never asked to provide additional evidence in support of her accommodation request.

[71] Based on the evidence, the Plaintiff has proven that the Defendant did not properly consider her religious accommodation request for the following reasons.

[72] First, the Plaintiff's responses to the questions in the Accommodation Request Form and her pastor's letter clearly demonstrated a subjective, religious objection to vaccination. There was no evidence at trial that the Defendant questioned the sincerity or honesty of the Plaintiff's religious beliefs at any time. The principles established by the Supreme Court of Canada in *Syndicat Northcrest v Amselem*, 2004 SCC 47, require that the Plaintiff's religious beliefs be given due regard and deference if they are found to be sincere and honestly held.

[73] However, the Accommodation Request Form effectively prevented the Plaintiff from relying on this sincerely held religious belief in support of an exemption once she also expressed a safety concern. Based on the Defendant's Denial Letter, the Plaintiff could not hold both a religious objection and a safety concern. The Defendant's evidence did not explain how or why the Plaintiff could not hold both a religious objection and a non-religious objection to vaccination on safety grounds at the same time. It also did not explain why holding a non-religious objection in addition to a religious objection meant the Plaintiff was seeking an accommodation solely on non-religious grounds.

[74] Ms. Sawchyn testified that the Plaintiff's safety concern was one of, but not the only ground for refusing her request. However, she was unable to clearly articulate in evidence what those other grounds were nor were they set out in the Denial Letter. Additionally, Ms. Sawchyn could not say what the Accommodation Request Form would have to include to obtain a religious exemption.

[75] The Defendant's Denial Letter stated that the Plaintiff's safety concern "casts doubt on religion being the grounds for your application". However, the Defendant's evidence did not clearly explain why that was the case or how the Plaintiff's safety concerns somehow overrode her religious beliefs.

[76] Furthermore, notwithstanding the Defendant's stated doubt about the validity of the religious exemption, it did not request further information or ask the Plaintiff any clarifying questions. The Defendant's Accommodation Policy expressly stated that "[t]he employee may be required to provide additional evidence to demonstrate the need for an accommodation, or to assist in the identification of an appropriate accommodation." The Defendant's evidence did not indicate why this was never considered. Instead, the Plaintiff was simply advised that the decision was final and not subject to internal appeal.

[77] The Defendant could have requested further information to address its doubts, but chose not to even though its decision would ultimately lead to termination for cause. Unlike the policies in *Parmar* and *Van Hee*, the Defendant's Vaccination Policy did not provide for an indefinite leave of absence that could have preserved the Plaintiff's employment.

[78] For the reasons set out, the Defendant's refusal to grant the Plaintiff an exemption, even though it accepted the sincerity of her religious beliefs, was not a reasonable application of its Vaccination and Accommodation Policies. The Defendant's evidence did not explain why the Plaintiff's information was insufficient, why her safety concerns overrode her religious objections or what she could have done to qualify for an exemption. Furthermore, the Defendant failed to ask for additional or clarifying information and never explained its rationale in this regard, notwithstanding the ultimate consequences of its refusal.

[79] The Defendant's refusal to grant the Plaintiff's accommodation request must be considered in the context of the employment relationship. The refusal set in motion a chain of events that ultimately led to the Plaintiff's dismissal.

[80] Had the exemption been granted, the Plaintiff would not have breached the Vaccination Policy. The issue of non-compliance as just cause only arose because of the Defendant's refusal to grant a religious exemption. The Defendant was unable to demonstrate why the Plaintiff's request was denied, even though the Plaintiff's sincere religious beliefs were not questioned.

[81] The Defendant has the burden to prove just cause based on a breach of the Vaccination Policy. As the Defendant failed to properly consider the Plaintiff's request for a religious exemption under the Vaccination Policy, the Defendant cannot establish that it had just cause to terminate her employment for subsequently failing to comply with the policy.

[82] In light of this finding, it is not necessary to decide if the refusal to grant the Plaintiff's religious exemption was also discriminatory. The issue in this case is whether the Plaintiff was wrongfully terminated for not complying with the Vaccination Policy after her exemption request was denied. Whether there was discrimination *per se* would not impact the Court's conclusion that the defence of just cause has not been proven.

If the Defendant's Denial of the Plaintiff's Religious Exemption Request was not Unreasonable or Discriminatory, was there Just Cause to Terminate the Plaintiff's Employment?

[83] The Court will consider in the alternative whether the Defendant had cause to terminate even if its denial of the religious exemption under the Vaccination Policy was reasonable. Although the Plaintiff's main argument was in relation to the Defendant's failure to grant her a religious exemption under the Vaccination Policy, she also submits that her failure to comply was non-culpable behavior and could not be used to terminate her. (Civil Claim, para 58; Plaintiff's Submissions, paras 106-119).

[84] The analysis of this issue requires a review of the factors set out in *Haack*.

Nature and Extent of the Misconduct

[85] The Plaintiff did not comply with the Defendant's Vaccination Policy after her accommodation request was denied on October 4, 2021. She was placed on unpaid leave on November 1 and then terminated on December 1, 2021.

[86] There were no issues with the Plaintiff's job performance at any time. The Plaintiff's manager, Ms. Whyte, testified that the "working relationship was strong", that the Plaintiff was professional and met deadlines right up until she was placed on unpaid leave on November 1, 2021.

[87] The Plaintiff's non-compliance with the Vaccination Policy did not prevent her from doing her work before she was placed on unpaid leave. It did not put other employees or members of the public at risk as the Plaintiff was working from home exclusively from May 2021 up to her termination on December 1, 2021. There was no evidence that the Plaintiff's refusal to comply with the Vaccination Policy impacted the operation of her department or its other employees.

Surrounding Circumstances

[88] The Plaintiff was 36 and had worked for the Defendant for 11 years. Her position in the Finance group at termination was Accountant II-Operations Accounting. She was the most junior team member and did not hold a formal accounting designation. However, she had specialized institutional knowledge given her years of experience. Her training was specific to the airline industry and was hard to replace.

[89] As noted, there were no issues with the Plaintiff's job performance either before or after the Vaccination Policy was implemented.

[90] The Plaintiff's position was described in WestJet's Mobile Workforce Policy as "Mobile Home", meaning that she would be "expected to work from a Home Office..., most of the time and may work from a Company Office less than 50% of the time". Notwithstanding this designation, the Plaintiff worked exclusively from home after returning from maternity leave in May, 2021 until she was placed on unpaid leave on November 1, 2021.

[91] From the Defendant's perspective, responding to the COVID-19 pandemic generally and the Federal Government's vaccination mandate specifically, was undoubtedly difficult. Airline travel was impacted severely. The Defendant reduced its workforce significantly because of the pandemic. Safety issues were paramount and informed the Defendant's Vaccination Policy

[92] After the Defendant implemented its Vaccination Policy on October 16, 2021, the Federal Government issued regulations requiring airlines to mandate vaccinations for certain employees on October 29, 2021 (the Regulations). Paragraph 33 of the Agreed Facts states:

33. On October 30, 2021, pursuant to section 6.41(1) of the *Aeronautics Act* (RSC, 1985, C. A-2), Parliament enacted the regulation entitled *Interim Order respecting certain requirements for civil aviation due to COVID-19, no 43* ("**COVID-19 Order 43**"), which required air carriers to mandate vaccination against COVID-19 for employees conducting activities on aerodrome property, interacting in-person on aerodrome property, engaging in tasks on aerodrome property, accessing a restricted area at an aerodrome, or otherwise accessing aerodrome property. COVID-19 Order 43 also required air carriers to provide a procedure for granting exemptions to persons who abstain from COVID-19 vaccination due to sincerely held religious beliefs to the extent that it is required under the *Canadian Human Rights Act*.

[93] Aerodrome property was defined to include "any air terminal buildings, restricted areas or facilities used for activities related to aircraft operations that are located at the aerodrome".

[94] The Regulations were updated on November 30, 2021 and continued to apply where employees were accessing aerodrome property.

[95] While the Defendant needed to implement its Vaccination Policy to comply with the Federal Government mandate, the subsequent Regulations would not have prevented the Plaintiff from continuing to work remotely from home.

[96] The Defendant did not consider allowing the Plaintiff to continue working from home. When asked whether the Plaintiff could have received working notice while her replacement was hired, the Plaintiff's manager testified that it would have been possible, but this would have gone against the policy applied to everyone else.

Proportionality

[97] As described in *McDonald* at para 68, the issue of proportionality requires “an assessment of whether the misconduct is reconcilable with sustaining the employment relationship.... whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship”.

[98] When assessing cause for failure to comply with valid employer policies, many instances are relatively clearcut. This would include, for example, employee dishonesty or theft, criminal conduct or blatant violation of workplace rules endangering others.

[99] The situation presented in this case, however, does not fall into one of these categories where there would be, by any measure, a clear breakdown in the employment relationship.

[100] Having considered the evidence and the applicable legal principles, the Court concludes that dismissal for cause was not a proportional response even if the Plaintiff should not have been granted a religious exemption from the Vaccination Policy. The Court reaches this conclusion for the following reasons.

[101] First, the Plaintiff’s conduct was not insubordination or disobedience of a type where the employment relationship could not continue and the misconduct was irreconcilable with continued employment. The Plaintiff continued working after her accommodation request was denied on October 4, 2021 until she was placed on unpaid leave on November 1, 2021. She continued to meet deadlines and her manager described her performance as “professional” leading up to November 1, 2021. There was no evidence that her non-compliance with the Vaccination Policy negatively impacted the workplace, other employees or the Defendant’s trust in her ability to do her job.

[102] The Plaintiff’s refusal to comply with the Vaccination Policy did not impact her job performance. It did not endanger the Defendant’s employees or the public as the Plaintiff was working from home. While a future, partial return to work was anticipated, that was not yet implemented. The issue of cause must be assessed based on what was known and understood at the time of dismissal.

[103] Second, while the Federal Government required the Defendant to implement a mandatory vaccination policy, further clarity as to the scope of any such policy was provided on October 30, 2021 when the Regulations were issued. The Regulations only required the Defendant’s employees who were physically accessing “aerodrome property” to be vaccinated. They would not have applied to the Plaintiff while she continued to work from home. The Defendant was aware of the Regulations, but did not consider whether the Plaintiff could continue working from home as an alternative to dismissal.

[104] Next, in balancing the competing interests of the parties, it is significant that dismissal was not the only option available to the Defendant. Even though the Defendant’s Vaccination Policy stipulated that anyone failing to comply would be subject to discipline up to and including termination for cause, the Defendant did not have to proceed in this fashion.

[105] In *Van Hee* and *Parmar*, the imposition of an unpaid leave of absence was found to have struck a reasonable balance between the respective interests of the parties.

[106] In this case, the Defendant led evidence that it could not grant an indefinite leave of absence given that its workforce had already been decimated by the pandemic. Backfilling the

Plaintiff's position by hiring someone else temporarily presented further challenges at a time when there was no expiry date attached to the Federal Government's vaccine mandate.

[107] However, the Plaintiff had a further alternative which was to allow the Plaintiff to keep working from home as she had for the previous six months. This was not a situation where the Plaintiff could theoretically work from home, or the Defendant had to create a new remote position for the Plaintiff. The Plaintiff was already working from home and there was no legal impediment preventing that from continuing. The Regulations clearly stated that the Federal Government's vaccine mandate would only apply to employees accessing the Defendant's aerodrome property. Furthermore, the Defendant required all its employees to work from home as of September 17, 2021, unless they were physically required for operational effectiveness. (Agreed Facts, para 26)

[108] The Defendant's evidence was that it applied its Vaccination Policy universally as it was too difficult to apply it differently to individual groups.

[109] However, the Defendant did not demonstrate how or why it could not allow the Plaintiff to continue working from home as she had been, particularly after receiving clarity that this would not run afoul of the Regulations. It is possible that things may have changed, and that the Plaintiff would have been required to go into the office at some future date, but that was not the case as of December 1, 2021.

[110] The Court therefore concludes that dismissal for cause was not a proportionate response when the respective interests of the parties are considered and balanced as required. The Plaintiff's non-compliance did not impact her ability to continue performing her job duties effectively from home. The Defendant could have allowed her to continue working from home without compromising its legitimate safety concerns. The Defendant has not met its burden to establish just cause for the reasons noted.

Does the Termination Clause in the Plaintiff's Employment Agreement Limit the Plaintiff to Statutory Severance?

[111] The Plaintiff's Employment Agreement included the following termination clause:

Termination of Employment

WestJet may immediately terminate your employment, whether within the probationary period or after the probationary period, for just cause. If your employment is terminated for just cause, WestJet shall pay your pro rata Salary up to your last day of work, and any outstanding expenses, overtime and accrued vacation. In the circumstances of a just cause termination, WestJet will not make any further payments to you and all entitlement to benefits and perquisites shall immediately cease on your last day of work.

WestJet may terminate your employment after successful completion of the probationary period, **for a reason that does not constitute just cause**, by providing you with 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*. In addition, you would be paid your pro rata Salary up to your last day of work, and any outstanding expenses, overtime and accrued vacation pay. Your entitlement to benefits and other WestJet perquisites would cease on your last day of active employment, regardless of the reason for cessation, and regardless of whether or not advance notice is given. **You agree that provided WestJet terminates your employment without just cause in accordance**

with the provision of this paragraph, that you have no additional claim against WestJet for any additional severance or termination compensation. (Emphasis added)

[112] The Defendant argues that this identical termination clause was upheld in a recent labor arbitration decision, *WestJet, an Alberta Partnership v Employees in the service of WestJet*, 2021 CanLII 58975 (CA LA). That case involved the adjudication of a group termination conducted under the *Canada Labour Code*, but did not involve termination for cause.

[113] The Defendant also relies on *Egan v Harbour Air Seaplanes LLP*, 2024 BCCA 222 (*Egan*), and *Singh v Clark Builders*, 2025 ABKB 3 (*Singh*), in support of its position on this issue.

[114] *Egan* involved a without cause termination and did not consider whether the termination clause would apply to a with cause termination.

[115] The Defendant cites *Singh* as authority that an employer's failure to establish just cause will not prevent the employer from relying on a valid without cause termination provision if the allegations were made in good faith (at para 92). The Court in *Singh* cited decisions from Ontario in support of this point: *Simpson v Global Warranty*, 2014 ONSC 6916 at para 8; *Humphrey v Mene*, 2021 ONSC 2539 (*Humphrey*), rev'd on other grounds 2022 ONCA 531.

[116] Importantly, the *Humphrey* decision also held that whether a without cause termination provision would apply was always a question of construction and that such clauses were subject to strict construction (*Singh*, at para 136).

[117] *Singh* is distinguishable from the case at bar. The employer in that case initially plead cause, but subsequently amended its defence to remove this allegation. While the Court had to consider if there was a reasonable basis to allege just cause, ultimately it did not have to decide if cause was established. Additionally, the termination clause in *Singh* is distinguishable as it did not include important language present in the Defendant's termination clause in this case.

[118] As noted, the Defendant's without cause termination clause concludes with the following sentence:

You agree that provided WestJet terminates your employment without just cause in accordance with the provision of this paragraph, that you have no additional claim against WestJet for any additional severance or termination compensation. (Emphasis added)

[119] This wording confirms that the Plaintiff agreed she would have no additional claim in the event of a without cause termination, but only if her employment were terminated in accordance with the provisions of the paragraph. Termination in accordance with the paragraph required the Defendant to pay her the applicable statutory minimums, but that never happened. As a result, the necessary condition to trigger the without cause termination provision was never met.

[120] Accordingly, while there may be employment contracts where an employer can allege cause and also rely on a without cause termination provision, that would not be possible based on the wording of the Defendant's clause in this case.

[121] The termination clause therefore cannot serve as a defence to the Plaintiff's claim in this case.

If the Plaintiff was Wrongfully Dismissed, what are her Damages for Termination Without Notice?

[122] The Plaintiff seeks damages equivalent to 12 months salary and notes the following:

- a) The Plaintiff had 11 years of service and filled a unique position in the Defendant's accounting department;
- b) The Plaintiff did not hold an accounting designation and was trained in-house by the Defendant;
- c) The Plaintiff's position was industry-specific and not easy to fill. As a result, it was difficult for the Plaintiff to find a comparable position. Her vaccination status also prevented her from finding a new position.

[123] The Plaintiff cited the following cases in support of a 12 month notice period:

Mosey v Lally Group Ltd. (2002), 18 CCEL (3d) 186, 2002 CanLII 49620 (ON SC), aff'd 2003 CanLII 57408 (ON CA) - 12 months;

Ryshpan v Burns Fry Ltd., [1995] OJ No 1132, 1995 CanLII 7278 (ON SC) - 12 months;

Widmeyer v Municipal Enterprises Ltd (1991), 103 NSR (2d) 336, 1991 CanLII 4413 (NS SC) - 15 months;

Chann v RBC Dominion Securities Inc (2004), 34 CCEL (3d) 244, 2004 CanLII 66310 (ON SC) - 12 months.

[124] The Defendant argues that a 12 month notice period is excessive and relies on the following authorities:

Stewart v Keary Coyle Motors Ltd, 2011 NBQB 297 - 10 months;

Schalk v Sitel, 2014 CanLII 10385 (ONSCSM) - 10 months;

Peacock v Western Securities Ltd, [2010] AWLD 3883, 2010 Carswell Alta 1021 (*Peacock*) - 12 months;

Donath v Hughes Containers Ltd, 2014 ONSC 6796 (*Donath*) - 12 months.

[125] The Defendant notes the plaintiffs were 62 and 64 years old in the two cases that awarded a 12 month notice period (*Peacock* and *Donath*). In this case, the Plaintiff was 36 when she was terminated.

[126] In determining the length of reasonable notice, the relevant factors set out in *Bardal v Globe & Mail Ltd*, (1960), 24 DLR (2d) 140, 1960 CanLII 294 (ON SC), must be considered. These factors include the nature of the employment, length of service, employee's age and availability of similar employment.

[127] The authorities submitted by the parties suggest a reasonable notice range of 10-12 months. The factors weighing in favor of the Plaintiff's position are her length of service, her specialized position in the accounting department and the Defendant's acknowledgement that there were limited employment opportunities at times during the COVID-19 pandemic. The factors supporting the Defendant's position are the Plaintiff's age (36), that she was the most

junior member of the accounting department and that she did not have a formal accounting designation.

[128] The Court has considered all these factors and finds that the appropriate notice period in this case is 11 months. The Plaintiff is awarded damages equivalent to an 11 month notice period.

[129] The only evidence of the Plaintiff's annual salary was a spreadsheet setting out her 2019 T-4 earnings at \$71,550.28. The Defendant's evidence was that this likely included her benefits. There was no other evidence setting out her salary in 2021 or specifying any additional benefits.

[130] Based on the available evidence, the Plaintiff's damages for the 11 month notice period are calculated at \$65,587.72.00.

Mitigation

[131] The Defendant argues the Plaintiff failed to mitigate her damages. The Defendant acknowledged that there were limited employment opportunities at times during the COVID-19 pandemic, but claims the Plaintiff failed to take even minimal steps to obtain new employment.

[132] The Plaintiff cites *Plotnikoff v Associated Engineering Alberta Ltd.*, 2023 ABCJ 200 (*Plotnikoff*), aff'd 2024 ABKB 706 on this issue.

[133] In *Plotnikoff*, the Court cited at para 42 the two-part test an employer must meet to prove a failure to mitigate:

- a) First, that the employee failed to take reasonable steps to find alternate employment; and
- b) Second, if the employee had taken those steps, the employee would have probably found employment.

[134] The evidence on the first part of the test was limited. The Plaintiff testified that she looked for jobs, but was unqualified for any role because she was unvaccinated. She also thought she would be wasting everyone's time to put forward a submission.

[135] There was no evidence regarding the second part of the test. The Defendant did not lead any evidence setting out what alternative employment opportunities were available to the Plaintiff.

[136] Accordingly, even if the Plaintiff failed to take reasonable steps, there was no evidence demonstrating that she would have found alternate employment within the applicable notice period.

[137] The Defendant has not proven that the Plaintiff failed to mitigate her damages.

Moral Damages

[138] The Plaintiff seeks moral damages of \$21,500.00.

[139] Where the employer has acted insensitively in the manner of dismissal, aggravated damages may be awarded. As set out by the Alberta Court of Appeal in *Elgert v Home Hardware Stores Limited*, 2011 ABCA 112 at para 73 (*Elgert*), referencing *Keays*, in order to

attract aggravated damages, “such conduct must be unfair or in bad faith, in that it is ‘untruthful, misleading or unduly insensitive’”.

[140] The Plaintiff must lead proof of actual damages arising from the employer’s conduct and the distress or hurt feelings normally arising from the fact of termination are not compensable. While medical evidence may assist, it is not necessarily required: *Elgert* at para 97.

[141] The Plaintiff relies primarily on the Defendant’s refusal to grant her request for a religious exemption from vaccination, arguing that its behavior was unduly insensitive and mocking. The Plaintiff also points to the Defendant’s termination letter which concluded by stating that she could reapply for employment if she became compliant with the Vaccination Policy.

[142] The Defendant argues that the evidence does not support a finding that the Plaintiff’s termination was insensitive in any way and that the claim for aggravated damages is based entirely on the alleged failure to accommodate and discrimination.

[143] The parties had a fundamental disagreement as to whether the Plaintiff should have been granted a religious exemption from the Vaccination Policy. While the Plaintiff was wrongfully terminated, the surrounding circumstances do not attract aggravated damages. The dismissal was not conducted in an unduly insensitive or egregious manner. Furthermore, the Plaintiff led virtually no evidence explaining how the dismissal impacted her.

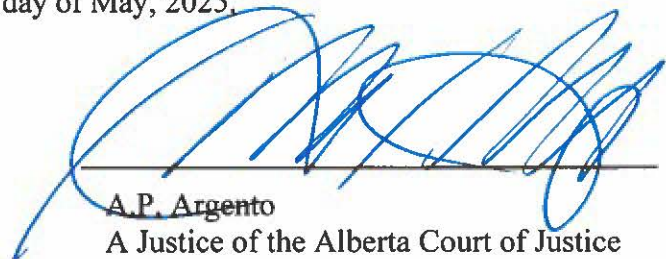
[144] The Plaintiff’s claim for moral or aggravated damages has not been proven and is dismissed.

Costs

[145] If the parties are unable to agree on costs, they can provide submissions to the Court in writing not to exceed three pages by June 9, 2025. The parties are reminded of the *Tariff of Costs* set out in this Court’s Practice Note 3.

Heard on the 24th and 25th days of February and the 11th day of April, 2025.

Dated at the City of Calgary, Alberta this 13th day of May, 2025.



A.P. Argento
A Justice of the Alberta Court of Justice

Appearances:

Counsel, Jody Wells
for the Plaintiff

Counsel, Elise Cartier and Mac Stephen
for the Defendant

Appendix A

IN THE MATTER BETWEEN:

Action No. P2390102408

DUONG YEE

(the "Plaintiff")

**WEST JET, AN ALBERTA PARTNERSHIP, AND ITS
PARTNERS: 222304 ALBERTA CORP. AND WEST JET AIRLINES LTD.**

(the "Defendants")

AGREED STATEMENT OF FACTS

INTRODUCTION

1. The Parties agree to enter this Agreed Statement of Facts and documents into evidence without requiring further proof during the hearing of this matter. At the commencement of the Trial, this Agreed Statement of Facts will be admitted into evidence as Exhibit 1. All Exhibits contained in this Agreed Statement of Facts are agreed as authentic copies of original records.
2. Nothing in these Agreed Statement of Facts and Exhibits limits or restricts the ability of any Party to argue issues of relevance and weight relating to the facts and Exhibits.
3. The Parties reserve the right to call additional evidence to elaborate or explain any of the facts and Exhibits, and enter additional exhibits in this matter.

MRS. YEE'S EMPLOYMENT WITH WESTJET

4. The Plaintiff, Duong Yee ("**Mrs. Yee**"), is an individual residing in Calgary, Alberta.

5. On or about May 17, 2010, Mrs. Yee commenced employment with the Defendant WestJet, an Alberta Partnership (“**WestJet**”) in the position of Part-Time Sales Super Agent, earning \$13.97 per hour.
6. Mrs. Yee signed an initial written employment agreement dated May 5, 2010.
7. During Mrs. Yee’s employment history, she signed revised employment agreements prior to the commencement of the following positions.
 - (a) On or about January 16, 2012, Mrs. Yee was promoted to the position of Coordinator – Accounts Payable, with an annual salary of \$43,650.
 - (b) On or about April 25, 2016, Mrs. Yee was promoted to the position of Accountant I – Fuel Accounting, with an annual salary of \$55,280.37.
 - (c) On November 14, 2016, Mrs. Yee was promoted to the position of Accountant II – Revenue, with an annual salary of \$61,624.00.

COVID-19: GOVERNMENT ORDERS AND WESTJET COMMUNICATIONS

8. On or around March 11, 2020, the World Health Organization declared the COVID-19 outbreak to be a pandemic.
9. On August 13, 2020, WestJet announced the following: “Transport Canada released an interim order on August 7, 2020, requiring guests who are not wearing a mask to present a medical certificate or be denied boarding”. At this time, WestJet required its employees and guests to wear masks when within two metres of any other person.
10. On November 25, 2020, WestJet announced that it would close the Calgary Campus to all non-operational roles from December 1, 2020 to January 12, 2021.
11. On March 15, 2021, WestJet announced that it had received 76,000 rapid-antigen COVID-19 testing kits, and that by mid-April it planned to use the kits as part of a volunteer employee screening program (the “**Program**”).
12. On April 8, 2021, WestJet announced that the Program would begin April 12, 2021
13. On April 28, 2021, WestJet announced that, effective April 29, 2021, the Program would be mandatory for anyone entering the Campus, the Russ White Hangar, or the Wide Body Hangar.
14. On June 14, 2021, WestJet provided all employees with the workplace phased return plan, which outlined an estimated date when different categories of workers could expect to return to work.
15. On July 13, 2021, WestJet provided an update to all employees that during the reopening process masks would remain mandatory, that daily antigen screening was mandatory at campus, and that access to campus required sign off.

16. On August 13, 2021, the Government of Canada announced its intention to mandate COVID-19 vaccinations for air transportation employees by no later than the end of October, 2021 (the “**August Update**”). Further, the Government of Canada indicated that it expected Crown corporations and employers in the federally regulated sector to require COVID-19 vaccinations of all employees.
17. On August 23, 2021, Mrs. Yee requested information from Michelle Chan (Director, Financial Reporting & Compliance) on how to obtain a religious exemption from antigen testing and masking. Mrs. Yee requested accommodation in the form of working from home.
18. On August 26, 2021, Michelle Chan emailed Mrs. Yee copying Keri Whyte (Accounting Manager), informing her that to review her request for religious accommodation from the requirement to undergo antigen testing and masking in the form of working from home, documentation from her place of worship was required.
19. On August 31, 2021, Mrs. Yee provided documentation from her place of worship to Michelle Chan, in support of her request for a religious exemption from antigen testing and masking. On September 1, 2021, Michelle Chan emailed Rebecca Turner (Advisor, People Delivery) stating that WestJet had received the documentation from Mrs. Yee’s place of worship, and would ask Mrs. Yee to work from home until a decision was made.
20. On September 3, 2021, and effective on September 4, 2021, WestJet announced that in compliance with the Government of Alberta orders all employees must wear a mask in all indoor public spaces unless at a workstation and at least two metres apart from any other individual. Further, this announcement strongly recommended that employees work from home, and required daily antigen testing for all those attending the campus or hangars.
21. On September 7, 2021, Rebecca Turner emailed Michelle Chan and Keri Whyte copying Katie Kerry (People Relations Manager, People Relations) directing them to advise Mrs. Yee that, given the new directive from the Alberta government and the delay in returning to the office, her masking and testing accommodation request was no longer required. The communication continued to state that details would be coming for religious exemptions from vaccination, and Mrs. Yee would be able to request an accommodation “via that channel and at that time”.
22. On September 8, 2021, WestJet announced that all employees are required to be fully vaccinated by October 30, 2021. Further, WestJet required all employees to provide a declaration indicating their COVID-19 vaccination status by September 24, 2021. At this time, WestJet provided an outline of how it would address employee non-compliance.
23. On September 9, 2021, Katie Kerry emailed Michelle Chan, Rebecca Turner and Keri Whyte stating that notwithstanding any exemption request Mrs. Yee had already made, she would be required to follow the new processes for requesting religious exemption from vaccination.

24. On September 9, 2021, WestJet notified Mrs. Yee that all employees were required to provide a declaration of their COVID-19 vaccination status by completing a form by September 24, 2021.
25. On September 16, 2021, WestJet requested that Mrs. Yee submit her COVID-19 vaccination status declaration form.
26. On September 17, 2021, WestJet announced that in accordance with the Government of Alberta health measures and restriction, all employees are required to work from home unless the employer has determined a physical presence is required for operational effectiveness.
27. On September 20, 2021, Mrs. Yee submitted a COVID-19 Vaccine Accommodation Request Form wherein she professed her religious beliefs concerning abstention from vaccination with reference to the holy book of her religion and to which she attached documentation from her place of worship in support of her request for a religious exemption from vaccination.
28. On October 4, 2021, WestJet sent Mrs. Yee a letter declining her request for accommodation on religious grounds with regard to WestJet's mandatory vaccination requirement. The letter stated the decision was final and not subject to internal appeal.
29. On October 6, 2021, the Government of Canada announced that, as of October 30, 2021, employers in the federally regulated air, rail, and marine transportation sectors must establish vaccination policies for their employees (the "**October Update**").
30. On October 16, 2021, WestJet formally issued the COVID-19 Vaccination Policy.
31. On October 22, 2021, WestJet provided a letter to Mrs. Yee titled "Re: Non-Vaccinated Leave of Absence," which summarized the August Update, the October Update, and stated its intentions to comply with both the federal mandate and occupational health and safety obligations (the "**October Letter**").
32. The October Letter stated that being fully vaccinated against COVID-19 by October 30, 2021, was a mandatory condition of employment and that Mrs. Yee would be placed on an unpaid leave of absence commencing November 1, 2021. At this time, Mrs. Yee was warned that failure to be fully vaccinated by November 30, 2021, without a WestJet approved accommodation, may result in the termination of employment for cause as early as December 1, 2021.
33. On October 30, 2021, pursuant to section 6.41(1) of the *Aeronautics Act* (RSC, 1985, C. A-2), Parliament enacted the regulation entitled *Interim Order respecting certain requirements for civil aviation due to COVID-19, no 43* ("**COVID-19 Order 43**"), which required air carriers to mandate vaccination against COVID-19 for employees conducting activities on aerodrome property, interacting in-person on aerodrome property, engaging in tasks on aerodrome property, accessing a restricted area at an aerodrome, or otherwise

accessing aerodrome property. COVID-19 Order 43 also required air carriers to provide a procedure for granting exemptions to persons who abstain from COVID-19 vaccination due to sincerely held religious beliefs to the extent that it is required under the *Canadian Human Rights Act*.

34. On November 1, 2021, WestJet placed Mrs. Yee on a one (1) month unpaid leave of absence (the “**Non-Vaccinated Leave of Absence**”).
35. While on the Non-Vaccinated Leave of Absence WestJet maintained Mrs. Yee’s access to the Employee and Family Assistance Program (“**EFAP**”), which included 24-hour access to Inkblot mental health services.
36. On November 24, 2021, WestJet reminded Mrs. Yee by email of her requirement to be fully vaccinated prior to November 30, 2021. In this email, WestJet warned Mrs. Yee that non-compliance with the COVID-19 Vaccination Policy would result in the termination of her employment for cause on December 1, 2021.

TERMINATION OF MRS. YEE’S EMPLOYMENT

37. On December 1, 2021, WestJet purported to terminate Mrs. Yee’s employment with cause citing her inability to fulfill a condition of employment (the “**Termination**”).
38. At the time of the Termination, Mrs. Yee had been employed with WestJet for eleven (11) years.
39. Mrs. Yee was in the position of Accountant II – Operations Accounting at the time of Termination.
40. At the time of the Termination, Mrs. Yee was 36 years of age.
41. WestJet provided Mrs. Yee with access to EFAP for a period of 90 days following the Termination date.
42. WestJet also informed Mrs. Yee at her Termination meeting and in her letter of Termination that if she became compliant with WestJet’s COVID-19 Vaccination Policy, she could apply for future WestJet job postings, and that if she was successfully rehired within 6-12 months of termination, she could be eligible for reinstatement of benefits and credit based on previous experience, in accordance with WestJet’s Rehiring Policy.
43. In the year 2022, Mrs. Yee earned a total income of \$0, but an amount of \$1,719 was allotted to taxable income due to a missed repayment of a Homebuyer’s Plan withdrawal.

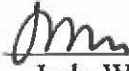
ALL OF WHICH IS AGREED AT THE CITY OF CALGARY, IN THE PROVINCE OF ALBERTA, THIS 19 DAY OF FEBRUARY, 2025.

McLENNAN ROSS LLP



Elise Cartier
for the Defendants
Plaintiff

KITCHEN WELLS LLP



Jody Wells Counsel
Counsel for the