

CITATION: Westgate v. WestJet Airlines Ltd., 2022 ONSC 4190
COURT FILE NO.: CV-20-00641083-00CP
DATE: 20220718

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
MICHAEL WESTGATE)	
Plaintiff)	
- and -)	
)	
WESTJET AIRLINES LTD.)	<i>Don Dear, Q.C. and Iain W. Bailey for the</i>
Defendant)	Defendant
)	
)	HEARD: In writing

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,¹ on May 15, 2020, Michael Westgate, who was an employee of WestJet Airlines commenced a proposed employment law class action against WestJet by Statement of Claim. WestJet now brings a motion to have the proposed class proceeding dismissed for delay pursuant to s. 29.1 of the Act. For the reasons that follow, WestJet’s motion is granted.

B. Facts

[2] In 2020, Michael Westgate, who was an employee of WestJet Airlines, retained Randy Ai of Randy Ai Law Office, to commence a proposed employment law class action against WestJet. The action was commenced by Statement of Claim issued **May 15, 2020**.

[3] WestJet retained Don Dear, QC of McLennan Ross LLP, Calgary, Alberta, and on **June 24, 2020**, Mr. Ai advised Mr. Dear that it would not be necessary for WestJet to deliver a Statement of Defence pre-certification.

[4] In the summer of 2020 into the fall, Mr. Ai and Mr. Dear discussed whether the matter could be mediated, but nothing was resolved, nor were arrangements made for a timetable for the certification motion or for completion of one or more other steps required to advance the proceeding.

¹ S.O. 1992, c. 6.

[5] On **October 1, 2020**, pursuant to the *Smarter and Stronger Justice Act, 2020*² amendments to the *Class Proceedings Act, 1992* came into force. For present purposes, the relevant sections of the amended act are 29.1, and 39, which state:

Mandatory dismissal for delay

29.1 (1) The court shall, on motion, dismiss for delay a proceeding commenced under section 2 unless, by the first anniversary of the day on which the proceeding was commenced,

- (a) the representative plaintiff has filed a final and complete motion record in the motion for certification;
- (b) the parties have agreed in writing to a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding, and have filed the timetable with the court;
- (c) the court has ordered that the proceeding not be dismissed and has established a timetable for service of the representative plaintiff's motion record in the motion for certification or for completion of one or more other steps required to advance the proceeding; or
- (d) any other steps, occurrences or circumstances specified by the regulations have taken place.

Notice

(2) If a proceeding is dismissed for delay under subsection (1), the court shall order that the solicitor for the representative plaintiff give notice of the dismissal by,

- (a) publishing the notice and a copy of the order on the website of the solicitor or of the law firm or other entity through which the solicitor practices law;
- (b) sending the notice and a copy of the order to every class member who has contacted the solicitor to express an interest in the proceeding; and
- (c) taking any other steps to give notice that the court may specify.

Same

(3) Section 20 applies, with necessary modifications, with respect to a notice required to be given under subsection (2).

Costs

(4) The solicitor for the representative plaintiff shall bear the costs of giving notice under subsection (2), and shall not attempt to recoup any portion of the costs from the class or any class member, or from the defendant.

{*****}

Transition

39 (1) Except as otherwise provided by this section, this Act, as it read immediately before section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force, continues to apply with respect to,

² S.O. 2020, c. 11, Sched. 4.

- (a) a proceeding commenced under section 2 before that day;
- (b) a proceeding under section 3 or 4, if the motion for certification was made before that day; and
- (c) any other proceeding under this Act that may be prescribed, in the prescribed circumstances, including a proceeding commenced under this Act on or after that day.

Same

(2) Section 29.1 applies, with necessary modifications, to a proceeding referred to in clause (1) (a), except that the reference in subsection 29.1 (1) to the day on which the proceeding was commenced shall be read as a reference to the day on which section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020* came into force.

[6] As it appears, pursuant to the transition provisions of the amended Act, Mr. Westgate had a deadline of October 1, 2021, to satisfy the conditions of s 29.1 (1) for the prosecution of his class action or the court shall, on motion, dismiss the proposed class actions for delay.

[7] On **November 4, 2020**, Mr. Westgate sent an email message to Mr. Dear advising that he would be retaining a new lawyer and he would not proceed to mediation. Mr. Dear responded to Mr. Westgate with a copy to Mr. Ai advising that it was inappropriate for Mr. Westgate to be communicating when he had legal counsel.

[8] On **November 11, 2020**, Mr. Ai apologized for Mr. Westgate's communication, which had been sent without Mr. Ai's knowledge. Mr. Ai requested a follow-up telephone conversation with Mr. Dear, which occurred later that day. Mr. Ai advised that he anticipated resolving the matter of his instructions from Mr. Westgate as to the prosecution of the proposed class proceeding.

[9] On **December 29, 2020**, Mr. Ai sent an email to Mr. Dear stating that he had been retained by a new representative plaintiff and that the matter could move forward toward mediation "hopefully by Spring 2021".

[10] On **January 19, 2021**, Mr. Dear informed Mr. Ai that WestJet was not willing to consent to the proposal to replace Mr. Westgate and to proceed to mediation with a new proposed representative plaintiff.

[11] On **January 29, 2021**, Mr. Westgate sent an email message to Mr. Dear and advised that he would oppose being replaced as representative plaintiff and that he had terminated Mr. Ai's retainer. He stated that if WestJet wanted to negotiate terms to resolve the matter, it would have to do so directly with him as the representative plaintiff.

[12] After January 29, 2021, the action went dormant. There was no standstill agreement. A certification motion was not delivered before October 1, 2021. No timetable was agreed to by the parties.

[13] On **April 5, 2022**, Mr. Dear sought the appointment of a judge to case manage the outstanding proposed class proceeding because he had instructions to bring a motion to have the action dismissed pursuant to s. 29.1 of the amended *Class Proceedings Act, 1992*.

[14] On **April 5, 2022**, Mr. Ai wrote Mr. Dear and also to the court advising that he no longer represented the Plaintiff as Mr. Westgate ended the solicitor-client relationship with Mr. Ai's law firm.

[15] On **April 11, 2022**, Mr. Dear wrote the court requesting the scheduling of a motion to

dismiss the action pursuant to s. 29.1 of the amended *Class Proceedings Act, 1992*.

[16] On **April 12, 2022**, Mr. Ai wrote Mr. Dear as follows:

I have provided Mr. Michael Westgate with a Notice of Intention to Act in Person, so that I can be removed from the record as counsel for Mr. Westgate. Once Mr. Westgate executes this document, I will serve and file it. So far, I have not received a response. Previously, Mr. Westgate indicated he was interested in retaining new counsel, but I have not yet been served with a Notice of Change of Lawyer. In the meantime, I have forwarded all the documents/correspondence/emails to Mr. Westgate that you have sent to me, in relation to the upcoming motion.

[17] On **May 2, 2022**, I was assigned as case management judge, and I had my judicial assistant schedule an initial (virtual) case management conference for May 30, 2022.

[18] On **May 25, 2022**, Mr. Ai wrote to my judicial assistant with copies to Mr. Westgate and Mr. Dear as follows:

I understand a virtual case management conference before Justice Perell has been scheduled for Monday, May 30, 2022 at 9:00 a.m. (Eastern Time). Please be advised that Mr. Westgate has terminated the solicitor-client relationship with my law firm. Mr. Westgate is copied on this email. Mr. Westgate has previously indicated to me that he wishes to secure new counsel to represent him and/or to represent himself in this matter. I have provided Mr. Westgate with a Notice of Intention to Act in Person for him to sign so that I can get off the record, but so far he has not signed or returned the document to me.

[19] On **May 30, 2022**, the case management conference proceeded. Mr. Dear attended. Mr. Westgate did not attend nor did any counsel attend on his behalf. At the conference, I issued the following file direction:

1. This is a case management conference in a proposed class action that was commenced in 2020. The plaintiff alleges that the Defendant WestJet has breached employment contracts and the *Canada Labour Code*.
2. WestJet wishes to bring a motion pursuant to the *Class Proceedings Act, 1992*, as amended to have the action dismissed for delay.
3. The Plaintiff did not attend the case management conference.
4. I schedule a motion in writing returnable on July 15, 2022 for the dismissal of the action for delay.
5. The Defendant shall serve a copy of its motion materials and a copy of this Direction on the plaintiff.
6. The parties shall file their materials in accordance with the *Rules of Civil Procedure* and on Ontariocourts.caselines.com.

[20] WestJet served a copy of my file direction as directed.

[21] WestJet filed its motion materials, including a factum in accordance with the *Rules of Civil Procedure* and on Ontariocourts.caselines.com. The motion materials included a Bill of Costs.

[22] Mr. Westgate did not file any material to contest the motion to have his action dismissed for delay pursuant to s. 29.1 of the *Class Proceedings Act, 1992*. No material was filed to contest the bill of costs.

C. Discussion and Analysis

[23] WestJet's motion for a dismissal for delay was unopposed.

[24] On the facts set out above, WestJet's motion was uncontestable in any event. The statute's marginal note "Mandatory dismissal for delay" captures the essence of s. 29.1 of the amended *Class Proceedings Act, 1992*. If the plaintiff does not satisfy the terms of s. 29.1 to keep his or her class action alive, the court must terminate it.³ In the immediate case, the Plaintiff did not do what was necessary to keep his proposed class action alive, and WestJet is entitled to the relief it requests.

[25] Mr. Westgate's action is dismissed for delay.

[26] Randy Ai Law Office shall forthwith:

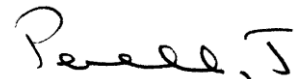
- a. publish on www.employmentlawyer-toronto.com (Randy Ai Law Office's website) a notice indicating that this action has been dismissed, together with a copy of the dismissal Order; and
- b. send a copy of a notice indicating that this action has been dismissed, together with a copy of the Order dismissing this action, to every putative class member who has contacted Randy Ai Law Office to express an interest in the action.

[27] Randy Ai Law Office shall bear the costs of sending the aforementioned notices pursuant to section 29.1(3) of the *Class Proceedings Act, 1992*.

[28] Mr. Westgate shall pay WestJet its costs of this motion and of the action, in the amount of \$39,218.47, all inclusive, on a partial indemnity basis payable within 30 days of this Order.

D. Conclusion

[29] Order accordingly. I have signed the Order.



Perell, J.

Released: July 18, 2022

³ *Lamarche v. Pacific Telescope Corp.*, 2022 ONSC 2553; *Bourque v. Insight Productions*, 2022 ONSC 3257.

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