

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20260130**

**Docket: A-259-24**

**Citation: 2026 FCA 20**

**CORAM: RENNIE J.A.  
GLEASON J.A.  
LOCKE J.A.**

**BETWEEN:**

**WESTJET, AN ALBERTA PARTNERSHIP**

**Applicant**

**and**

**T.H.**

**Respondent**

Heard at Calgary, Alberta, on October 20, 2025.

Judgment delivered at Ottawa, Ontario, on January 30, 2026.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**RENNIE J.A.  
LOCKE J.A.**

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] WestJet seeks to set aside the decision of the Canada Industrial Relations Board (the Board), rendered on July 30, 2024 by Mark Asbell, K.C., an external Board adjudicator, in *T.H. and WestJet, an Alberta Partnership*, 2024 CIRB 1149 (the Decision). In the Decision, the Board found that WestJet unjustly dismissed the respondent.

[2] In reaching this determination, the Board found that, although the respondent made comments to a co-worker about her breasts and often asked invasive questions to several co-workers about their and their children's sexual development that he knew or should have known were unwelcome, the respondent's conduct "did not rise to the level of being sexual harassment" (Decision at para. 130).

[3] This conclusion is unreasonable because it is at odds with well-established case law defining sexual harassment. The Decision is also flawed because the Board made contradictory findings as to whether the respondent's impugned questions and comments were sexual in nature. As the Decision was premised in large part on the unreasonable finding that the respondent had not engaged in sexual harassment, the Decision must be set aside and the respondent's complaint remitted to Mr. Asbell, if he is still available, or to another Board adjudicator, if he is not available, for redetermination in accordance with these reasons.

I. Review of the Relevant Facts and of the Decision

[4] The respondent was a long service employee, who had worked for WestJet for 23 years. He had a discipline-free record and received commendations for his work over the course of his career. At the end of his tenure, the respondent worked in a small department. The department was a close-knit one, where the respondent, a co-worker, K.S., and previous co-workers shared details about their personal lives.

[5] The respondent testified that he came from a family that was very open, where sex and sexual development were regularly discussed. He claimed he was very interested in childbirth, female sexual development, details of breast-feeding, and related issues and admitted that he often raised these matters with female co-workers.

[6] When K.S. joined the department, two of the respondent's previous co-workers, G.P. and A.S., warned K.S. about the respondent and their interactions with him. K.S., G.P. and J.D., another former co-worker of the respondent, testified before the Board about these interactions. These included the respondent's repeated comments and questions about the sexual development of the three women, their children, and the respondent's children. In addition, K.S. claimed that the respondent commented on the size of her breasts. The three women testified that they sometimes told the respondent that his comments were unwelcome and at other times indicated their displeasure by their reactions, including by walking away from the respondent to avoid unwelcome discussions. Despite this, the respondent failed to correct this unwelcome behaviour and downplayed his co-workers' concerns. In addition, J.D. and G.P. detailed conversations they previously had with the respondent, where he described showering with his daughters when they were younger, that J.D. and G.P. found troubling.

[7] Further, all three testified about incidents where the respondent reacted aggressively, including by speaking loudly, slapping his fists on a table, and lunging towards them when he became upset with them. The respondent also had personal habits that the three women found disconcerting, including picking the skin off his face and eating it when he became stressed.

[8] In April 2021, K.S. had a conversation with the respondent that led K.S. to complain to her manager. During that conversation, the respondent described his daughter's sexual development and commented on her body. The manager referred the matter to WestJet's People Department, which led to K.S.'s making a formal harassment complaint against the respondent. It was investigated by two investigators, who concluded in their report that the respondent:

- solicited information from his colleagues about their sexual development and their children's sexual development;
- asked female colleagues intrusive and inappropriate questions of a sexual nature;
- shared an inappropriate level of detail regarding intimate details of his family dynamic;
- demonstrated physical intimidation and aggressive body language and posturing; and
- retaliated against female colleagues.

(Decision at para. 82)

[9] Following receipt of the report, WestJet terminated the respondent's employment for cause for engaging in harassment and sexual harassment and for the respondent's failure to follow WestJet's Code of Business Conduct, Respect in the Workplace, and Workplace Violence Prevention Policies (collectively, the Policies).

[10] In the Decision, the Board found that there was no need to make credibility determinations because there was little meaningful difference between the version of the April 2021 conversation offered by K.S. and that offered by the respondent and his wife. In addition, for the older events that went back several years, the Board noted that WestJet's witnesses had

discussed the case with each other before being interviewed by the investigators and that, given the passage of time, it was impossible to determine what exactly had been said by the respondent. However, the Board largely accepted the version of events offered by WestJet's witnesses.

[11] In this regard, the Board found that the respondent had engaged in the aggressive behaviour that was described by the three women but concluded that it was not serious enough to warrant termination (Decision at paras. 118–119). The Board also found that the respondent had:

- [solicited] information from female colleagues on their sexual development and the sexual development of their female children;
- [asked] female colleagues intrusive and inappropriate questions of a sexual nature; and
- [shared] an inappropriate level of detail within the workplace regarding intimate details of his family dynamic.

(Decision at para. 120)

[12] The Board noted that:

[w]hile he never engaged in sexual touching or innuendo towards co-workers and there was never a suggestion that anyone was concerned about that, his lack of boundaries and his inability to recognize the detrimental impact his choice of topics and conversation had on his co-workers – especially in relation to his own children and theirs and his co-workers' own sexual development – created an uncomfortable and unwelcoming environment and were inappropriate in the workplace.

(Decision at para. 122)

[13] The Board found that the respondent's behaviour was:

... inappropriate, too personal and outside the normal boundaries. While the intent behind his comments may have been to ascertain and learn what to expect regarding his children's development, his refusal or inability to stop when receiving verbal cues or direct comments that his comments were unwelcome is troubling.

(Decision at para. 123)

[14] Despite these findings, the Board concluded that the respondent's conduct did not amount to sexual harassment, noting that the respondent's "... questioning and interactions upset various people because he did not know or appreciate boundaries, not because he was engaging in harassment" (Decision at para. 130). The Board held as follows:

There is a big difference in both context and ramifications. None of his comments were sexual in nature or intent, and no one took his comments in a sexual manner whatsoever. He was not soliciting information for a sexual purpose but was instead soliciting information and having discussions relating to the "miracle of birth," childhood development, puberty and adolescent development. While comments about changes to a girl's body while developing are unusual, especially coming from a man in a workplace, they were not overtly sexual.

(Decision at para. 130)

[15] Considering that the respondent's conduct did not amount to sexual harassment, the mitigating factors of the respondent's long service and unblemished record, and the fact that he appeared to suffer from mental health challenges, the Board determined that termination was an excessive response from WestJet. The Board concluded that WestJet should have instead imposed a five-day suspension. Both parties agreed that reinstatement was not appropriate, and

the Board remained seized with determining the quantum of damages to be awarded to the respondent.

## II. The Parties' Arguments

[16] WestJet submits that the Board's decision is unjustified in light of the applicable legal and factual context and because the Board did not follow a rational chain of analysis. More specifically, WestJet says that the Board failed to follow the law on sexual harassment, reached inconsistent determinations on whether the respondent's unwelcome comments were sexual in nature, failed to consider the Policies and the respondent's lack of remorse or understanding, erred in declining to make a credibility assessment and in considering the respondent's mental health in the absence of evidence, and failed to consider the seriousness of the respondent's conduct. WestJet submits that these errors, either singly or cumulatively, require intervention by this Court, which it asks to substitute its views for those of the Board and to conclude that WestJet had cause to terminate the respondent's employment. In sum, WestJet submits that the respondent's conduct was so egregious that termination was the only appropriate response.

[17] The respondent, on the other hand, submits that WestJet is inappropriately asking this Court to engage in correctness review and to second guess the Board's findings, which is not the role of this Court under the deferential reasonableness standard of review we are bound to apply. The respondent more specifically says that it was open to the Board to find that the respondent's conduct was not sexual in nature and that it reasonably considered the applicable jurisprudence on sexual harassment. The respondent adds that it was reasonably open to the Board to decline to

make credibility findings and that the Board reasonably considered the Policies, the respondent's level of remorse and understanding, and the seriousness of his conduct. The respondent therefore argues that this application should be dismissed.

### III. Analysis

[18] Sexual harassment constitutes workplace misconduct that may warrant summary dismissal, depending on the severity of the conduct and other relevant circumstances. Employers in many Canadian jurisdictions have an obligation to develop and maintain workplace harassment and violence prevention policies, and employers may be liable for failure to take reasonable steps to prevent workplace harassment: see, for example, *Canada Labour Code*, R.S.C. 1985, c. L-2 [*Canada Labour Code*], para. 125 (z.16) and *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130, s. 10. See also, *Occupational Health and Safety Code*, Alta. Reg. 191/2021, s. 390; *The Saskatchewan Employment Act*, S.S. 2013, c S-15.1, s. 3-21.1; *Workplace Safety and Health Regulation*, Man Reg 217/2006, s. 10.1; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, para. 32.0.1 (1); *Loi sur les normes du travail*, R.L.R.Q. c. N-1.1, s. 81.19; *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2, para. 9(1)(b) and *General Regulation - Occupational Health and Safety Act*, N.B. Reg. 91-191, s. 374.4; *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, subs. 13(4) and *Workplace Health and Safety Regulations*, N.S. Reg 52/2013, s. 27.2; *Occupational Health and Safety Regulations*, 2012 N.L.R. 5/12 s. 24.1; *Occupational Health and Safety Act*, R.S.P.E.I. 1988, c O-1.01, subs. 12(3) and *Workplace Harassment Regulations*, P.E.I. Reg. EC710/19, subs. 4(1). See also, *Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC), [1987] 2 S.C.R. 84 at p. 95;

*Canadian Pacific Railway Company v. Sauvé*, 2024 FCA 171 [*Sauvé*] at paras. 22–24; *Poliquin v. Devon Canada Corporation*, 2009 ABCA 216 [*Poliquin*] at para. 46; *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 645 at para. 31; *Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577(C.A.) at para. 20.

[19] Sexual harassment has been defined by the Supreme Court of Canada as being “...unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment”: *Janzen v. Platy Enterprises Ltd.*, 1989 CanLII 97 (SCC), [1989] 1 SCR 1252 [*Janzen*] at p. 1284. Sexual harassment includes a wide range of misconduct, ranging from sexual assault to comments of a sexual nature that the maker knows or should know are unwelcome.

[20] According to Donald J.M. Brown, David M. Beatty & Adam J. Beatty, *Canadian Labour Arbitration*, 5th ed (Toronto: Thompson Reuters Canada, 2019) [Brown & Beatty] at § 7:33, “[o]vert sexual advances, touching, peeping, viewing and/or distributing pornographic material in the workplace, as well as lewd, demeaning and other unwelcome comments or behaviour are all considered to be forms of sexual harassment” (emphasis added). To similar effect, Arjun Aggarwal, in *Sexual Harassment in the Workplace*, 2nd ed. (Toronto: Butterworths, 1992) at p. 7, defines sexual harassment as follows:

Sexual behaviour that a person finds personally offensive may be considered sexual harassment. Such behaviour may be subtle or obvious, verbal or non-verbal. Its scope may cover a wide range of behaviour that runs the gamut from patting women's bottoms when they walk down the hall; to pinching; to repeated, intrusive, insistent arms around the shoulder, couched in friendliness, but with a hidden agenda underneath; to an atmosphere contaminated with degrading

comments, jokes, or innuendos, and/or reference to women's bodies, to male prowess, and questions about women's sex lives; to public displays of derogatory images of women; to the requirement that women dress in costumes that leave them the target of sexual comments and propositions from the general public; all the way to the explicit propositions that require women to engage in sexual relations or be terminated or lose deserved promotions.

(Emphasis added)

[21] As noted by the Supreme Court of Canada in *Janzen* “[s]exual harassment is a demeaning practice ... that constitutes a profound affront to the dignity of the employees forced to endure it ... [which] attacks the dignity and self-respect of the victim both as an employee and as a human being” (at p. 1284).

[22] The *Canada Labour Code* applies to WestJet and its employees and defines harassment in subsection 122(1) as follows:

**Definitions**

**122 (1)** In this Part,

...

***harassment and violence*** means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment; (*harcèlement et violence*)

**Définitions**

**122 (1)** Les définitions qui suivent s'appliquent à la présente partie.

[...]

***harcèlement et violence*** Tout acte, comportement ou propos, notamment de nature sexuelle, qui pourrait vraisemblablement offenser ou humilier un employé ou lui causer toute autre blessure ou maladie, physique ou psychologique, y compris tout acte, comportement ou propos réglementaire. (*harassment and violence*)

[23] From the foregoing, it is apparent that the maker of offending comments need not have been motivated by the desire to engage in sexual relations with those to whom the comments are made for the comments to constitute sexual harassment. Nor does a determination of sexual harassment require that the maker of a series of offensive comments appreciate they are inappropriate or that the person to whom they are directed object to them, provided that, when viewed objectively, the impugned comments are of a sexual nature and are offensive: see, for example, *Calgary (City) v. Canadian Union of Public Employees Local 37*, 2019 ABCA 388 at paras. 36, 43–44; *Laurie and Bell Media, Re* (2020), 2020 CarswellNat 5204 (Can.Adjud. (CLC Part III)) at paras. 197–200.

[24] Indeed, lewd comments and demeaning comments based on gender or sexual orientation have been found to constitute sexual harassment in the absence of any sexual intent on the part of the maker: see, for example: *Sterling Crane and IUOE, Local 955 (Cormier), Re*, 2024 CanLII 46844 (Alta. Arb.) at para. 140; *Alberta Justice and Solicitor General and AUPE (869395), Re*, 2023 CarswellAlta 160, [2023] A.W.L.D. 1215 at para. 79; *Brown & Beatty* at § 7:33. Likewise, distribution of pornography in the workplace, in and of itself, has been held to constitute sexual harassment: *Poliquin* at paras. 55–60; *Brown & Beatty* at § 7:33.

[25] I turn now to consider the various arguments raised by WestJet and conclude that only those related to the Board's conclusion that the respondent had not engaged in sexual harassment afford a basis for intervention.

[26] In this regard, I agree with the parties that the Board’s decision is reviewable under the reasonableness standard of review and that, accordingly, the Decision is entitled to deference: see, e.g., *Essai v. Toronto-Dominion Bank*, 2024 FCA 65 at paras. 7–9; *Northern Inter-Tribal Health Authority Inc. v. Yang*, 2023 FCA 47 [*Northern Inter-Tribal Health Authority*] at paras. 46–48 *Amer v. Shaw Communications Canada Inc.*, 2023 FCA 237 at para. 50.

[27] Despite this, I find that the Board’s determination that the respondent had not engaged in sexual harassment is unreasonable for two reasons.

[28] First, as WestJet correctly notes, the Board made inconsistent key findings on the nature of the respondent’s conduct. At paragraph 120 of the Decision, the Board stated that the respondent had asked female colleagues “intrusive and inappropriate questions of a sexual nature”. Yet a few paragraphs later, the Board found that “[n]one of [the respondent’s] comments were sexual in nature or intent” (Decision at para. 130). These two findings are flatly contradictory and are on a key issue that was central to the determination that the respondent had not sexually harassed his co-workers, the lynchpin of the Decision. This inconsistency is sufficient to render the Decision unreasonable as it constitutes a logical flaw central to the Board’s reasoning, which typically renders a decision unreasonable: see, e.g., *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*] at paras. 102–104; *Nowlan v. Canada (Attorney General)*, 2022 FCA 83 at paras. 27, 38.

[29] Second, the Board’s conclusion that the respondent’s repeated comments and questioning of co-workers about their sexual development and that of their female children, as well as his

comments about a co-worker's breasts, did not amount to sexual harassment contradicts the well-established case law on sexual harassment. These comments and questions were sexual in nature, were made repeatedly, and the respondent knew or should have known that they were inappropriate and unwelcome. In accordance with the relevant case law, the respondent therefore sexually harassed the women to whom these comments and questions were addressed. The failure to follow established case law, or, at the very least to provide a rational analysis for the departure, renders the Decision unreasonable: *Vavilov* at para. 112; *Canada (Attorney General) v. Poupart*, 2022 FCA 77 at para. 49; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100 at para. 33; *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 at para. 15.

[30] The foregoing conclusions require that the Decision be set aside because the respondent's impugned comments meet the definition of sexual harassment, and it was unreasonable for the Board to have concluded otherwise.

[31] However, as noted, none of the other grounds raised by WestJet affords any basis for intervention.

[32] Contrary to what WestJet asserts, the Board did not ignore the Policies, the seriousness of the respondent's conduct, or his lack of remorse. A review of the Decision demonstrates that the Board was well-aware of these issues and considered them. That said, these issues are all aggravating factors that may justify a more severe disciplinary response: David Harris, *Wrongful Dismissal*, 8th ed (Toronto: Thomson Reuters, 2025) [Harris] at § 5:60; Brown & Beatty at

§ 7:33. These factors will accordingly need to be re-weighed when the respondent's complaint is remitted to the Board for redetermination.

[33] On the credibility issue, the Board largely accepted the version of events offered by the respondent's former co-workers, and where there was a difference in the versions offered, they were largely immaterial to the assessment of the severity of the respondent's conduct. I therefore do not see that the Board made a reviewable error in failing to make a credibility determination.

[34] Likewise, I see no error in the Board's conclusion that the respondent appeared to suffer from mental health challenges. The respondent testified as to the diagnosis which he received, which testimony the adjudicator was free to accept or reject. Thus, contrary to what the applicant asserts, there was not an absence of evidence on this point.

[35] I turn finally to the appropriate remedy. While this Court possesses discretion to direct a determination on the merits of a complaint such as this where it finds that the Board's decision is unreasonable, this discretion should not be lightly exercised. As noted by the Supreme Court of Canada in *Vavilov*, "... it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons" (at para. 141). Here, there is no forgone conclusion as to what the appropriate outcome is since dismissal is not necessarily warranted in every instance of sexual harassment: *Harris* at § 5:60; *Brown & Beatty* at § 7:33. It is therefore for a Board adjudicator and not for this Court to redetermine the respondent's complaint.

[36] WestJet submits that the respondent's complaint should be remitted to a different adjudicator for redetermination. I would decline to do so as there is no transcript of the proceedings before the Board, and the evidence stretched over several days. It therefore would be a considerable hardship to the respondent to be required to start over. I thus conclude that the most appropriate course is to remit the respondent's complaint to Mr. Asbell, if he is available, or to another Board adjudicator, if he is not, for redetermination in accordance with these reasons. I note that this is often the conclusion reached in similar cases: see, for example, *Sauvé* at para. 56; *Northern Inter-Tribal Health Authority* at paras. 85–87; *Jog v. Bank of Montreal*, 2020 FCA 218 at para. 17.

IV. Proposed Disposition

[37] I would accordingly grant this application for judicial review, set aside the Decision, and remit the respondent's complaint to Mr. Asbell, if he is still available, or to another Board adjudicator, if he is not available, for redetermination in accordance with these reasons. In the circumstances, I would decline to make a costs award.

“Mary J.L. Gleason”

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J.A.

“I agree.

Donald J. Rennie J.A.”

“I agree.

George R. Locke J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-259-24

**STYLE OF CAUSE:** WESTJET, AN ALBERTA  
PARTNERSHIP v. T.H.

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**CONCURRED IN BY:** RENNIE J.A.  
LOCKE J.A.

**DATED:** JANUARY 30, 2026

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