

2018 CarswellNat 1118
Canada Adjudication (Canada Labour Code Part III)

Kufuor-Boakye and WestJet Operations Corp. (Federal Mediation and Conciliation Service), Re

2018 CarswellNat 1118

**IN THE MATTER OF AN ALLEGED UNJUST DISMISSAL
Under Division XIV Part III, of the Canada Labour Code**

MR. DANIEL KUFUOR-BOAKYE (Employee) and WESTJET OPERATIONS CORP. and WESTJET
INVESTMENT CORP. Carrying on business under the name & style of WESTJET (Employer)

Kelly Williams-Whitt Adjud.

Judgment: March 16, 2018

Docket: YM2707-10793

Counsel: Joyce Mitchell, for WestJet
Jesse Kugler, for Mr. Kufuor-Boakye

Subject: Employment; Public
Headnote
Labour and employment law

Kelly Williams-Whitt Adjud.:

Introduction

1 I was appointed by the Director General of the Federal Mediation and Conciliation Service on March 9, 2017 to hear a complaint of alleged unjust dismissal by Daniel Kufuor-Boakye against WestJet Operations Corp. and WestJet Investment Corp. (WestJet). A pre-hearing teleconference with counsel for both parties was held on July 26, 2017 to discuss preliminary issues. At that time counsel for the Employer indicated that WestJet objected to the jurisdiction of a Part III adjudicator to hear the case. It was agreed that the parties would make written submissions, upon which I would make a decision with respect to the jurisdiction issue. All submissions were received by Oct 13, 2017.

2 After considering the facts and submissions by counsel, I am of the opinion that I do not have jurisdiction to hear Mr. Kufuor-Boakye's complaint. My reasons are outlined below.

Facts

3 Daniel Kufuor-Boakye was employed as a flight attendant by WestJet from April 11, 2001 until he was dismissed on January 15, 2016. While employed, Mr. Kufuor-Boakye was an active member and supporter of the WestJet Flight Attendants Association (the WPF AA). In the period leading up to Mr. Kufuor Boakye's dismissal on January 15, 2016, the WPF AA was in the midst of an organizing campaign to gain sufficient support to certify the WPF AA as the bargaining agent for WestJet flight attendants. WestJet terminated the employment of Mr. Kufuor-Boakye, alleging just-cause.

4 On January 15, 2016 Mr. Kufuor-Boakye received a letter from WestJet informing him that his employment was terminated "with cause". The letter indicates that WestJet investigated a complaint made against Mr. Kufuor-Boakye under WestJet's Respect in the Workplace policy. The concerns identified in the complaint related to harassment and defamation. The letter states:

After taking all of the evidence gathered from the investigation, including your response, into consideration, WestJet has come to the conclusion that your actions constitute a substantial violation of WestJet's Business Code of Conduct and Respect in the Workplace policies. These violations are deemed to be of a very serious and deliberate nature by WestJet Airlines and as a result the company has made the decision to terminate your employment "with cause" effective January 15, 2016.

The complaint was in relation to Mr. Kufuor-Boakye's alleged involvement in a series of online videos that were characterized by WestJet as "defamatory in nature".

5 On January 27, 2016, the WPF AA brought a complaint against WestJet to the Canada industrial Relations Board (CIRB) under section 97(1) of the *Code*, alleging that WestJet's decision to terminate Mr. Kufuor-Boakye was motivated in whole or in part by anti-union animus. On the same day, the WPF AA also filed an Interim Relief Application, under Section 91 of the *Code*, seeking Mr. Kufuor-Boakye's immediate reinstatement.

6 WestJet filed its response to the ULP and Interim Relief Application on February 1, 2016. WestJet was seeking dismissal of both WPF AA applications on the basis that there was no merit to the allegations.

7 On March 4, 2016, the CIRB rendered its decision on the Interim Relief Application, denying the WPF AA's request for Mr. Kufuor-Boakye's immediate reinstatement. Hearing dates for the ULP Complaint were subsequently set for September 13, 14 and 15, 2016.

8 On April 13, 2016, just prior to the deadline, Mr. Kufuor-Boakye filed the current alleged unjust dismissal (UD) complaint.

9 According to WestJet's submission, due to a "processing backlog" they were not notified by the EDSC Labour Program that the unjust dismissal complaint had been filed until August 2, 2016. Counsel for WestJet advised Mr. Kugler at that time that it was WestJet's position the WPF AA and Mr. Kufuor-Boakye were precluded from advancing both the ULP and the UD complaint. They also indicated they would object to a Part III adjudicator's jurisdiction to hear the complaint.

10 On August 31, 2016 the WPF AA applied to the CIRB for leave to withdraw the ULP and the Interim Relief application on a "without prejudice" basis. WestJet did not object to the withdrawal of the ULP, but objected to its withdrawal on a without prejudice basis. WestJet raised the fact that a UD complaint had been filed with the Labour Program and that WestJet intended to object to the jurisdiction of the adjudicator to hear the Complaint.

11 On September 9, 2016 the CIRB determined the Interim Relief application need not be considered as the file had been closed. The CIRB granted the WPF AA's request to withdraw the ULP, stating:

In the Board's view, the withdrawal of this ULP complaint before the Board, whether on a with or without prejudice basis, would not preclude either party from raising any argument it wishes to make regarding the applicability of section 242(3.1)(b) of Part III of the *Code* and the jurisdiction of the adjudicator appointed to hear the UD complaint.

Issue

12 The issue I must decide is if I am barred by section 242(3.1)(b) of the *Code* from accepting jurisdiction to hear the unjust dismissal complaint. Section 242(3.1)(b) states:

Limitation on complaints

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in the respect of a person where...

(b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Employer Argument

13 Counsel for WestJet argues that the section 242(3.1)(b) jurisdiction issue has already been settled by the Federal Court of Appeals in *Byers Transport Ltd. v Kosanovich* [1995] 3 FC 354 (*Byers*) and affirmed by a long line of cases that have followed it. They argue that *Byers* has an essentially identical fact scenario as the current case. In *Byers*, the employee claimed her employment was terminated because the employer assumed she was involved in a union organizing campaign. She filed an unfair labour practice complaint under Part I of the *Code*, as well as an unjust dismissal complaint under Part III of the *Code*. The Federal Court of Appeal in the *Byers* decision determined that section 242(3.1)(b) acted as a bar to the Adjudicator taking jurisdiction over the unjust dismissal complaint. The test to determine whether s. 242(3.1)(b) has been engaged is as follows:

1. Would the essence of the complaint, i.e., the factual situation complained about, be substantially the same in the other procedure for redress?
2. Does the other process provide some "real redress" which could be of personal benefit to the same complainant?

14 WestJet submits that the particulars in the ULP and Interim Relief Application make it clear that the substance or essence of the ULP is the same as the substance or essence of this case, that Mr. Kufuor-Boakye was terminated "as a result of his union activity with WPFSA". The essence of the complaint is Mr. Kufuor-Boakye's termination. The termination occurred because of his alleged involvement with defamatory videos posted online. The ULP was based on the investigation into the videos. In WestJet's opinion, the central argument in the ULP would be about proving just cause for termination, since that must be established to disprove any element of anti-union animus. If WestJet could not prove just cause in the CIRB hearing, the WPFSA could obtain an inference of anti-union animus. The Employer refers to the Board's decision in the Interim Relief Application:

36 WestJet will bear the burden of proof.

37 Currently, a stand-off exists. The WPFSA argued that Mr. Kufuor-Boakye was a well-known union organizer, a fact WestJet does not contest, and that WestJet went to the significant lengths it did in the hope of having an opportunity to discipline and/or terminate a union supporter.

38 By contrast, WestJet has set out the numerous steps to which it went in order to find out who had posted the allegedly defamatory videos. It alleged the evidence demonstrated that Mr. Kufuor-Boakye was the person who posted the videos. Mr. Kufuor-Boakye denied any involvement during the investigation meeting, other than indicating he had viewed one of the videos online.

Had the ULP complaint proceeded, the onus was on WestJet to establish just cause for termination to avoid an inference of anti-union animus.

15 In answer to the second question, WestJet counsel argues that section 97 of Part I of the *Code* is a procedure for real redress, which could be of personal benefit to the same complainant, citing *Byers*:

35 I fail to understand how it can be said that a procedure for redress of a complaint of dismissal for perceived union activity is not to be found in section 97 of the Canada Labour Code...

36 Further, it will be seen that the procedures for redress are similar in that an employee can file a complaint under both Part I (involving unfair labour practices where the complaint goes to the Canada Labour Relations Board) and Part III (involving "unjust dismissal" where the complaints go to an ad hoc adjudicator). In each case the complaint

can ultimately be heard and disposed of by the appropriate tribunal and the remedies may include reinstatement, an order for payment of lost wages during the period of non-employment...

37 I must conclude that the provisions for the filing and determination of a complaint of dismissal constituting an Unfair Labour Practice under Part I is a "procedure for redress" of a complaint for unjust dismissal where that dismissal is by reason of perceived union sympathy...

39 I believe that the complaint (i.e. the factual situation complained of) must be essentially the same in the other "procedure for redress". But I doubt that the remedies have to be as good or better under the other provision in order to oust the jurisdiction of the adjudicator under paragraph 242(3.1)(b). That paragraph does not require that the same redress be available under another provision of the Canada Labour Code or some other Federal Act. What it requires is that in respect of the same complaint there be another procedure for redress...I do not believe that for there to be a "procedure for redress...elsewhere" there must be a procedure which will yield exactly the same remedies, although no doubt that procedure must be capable of producing some real redress which could be of personal benefit to the same complainant.

40 This analysis supports the view that where Parliament has established specialist tribunals, whether under the *Canada Labour Code* or elsewhere, to deal with certain aspects of employer-employee relationships, it should not be taken to have conferred concurrent jurisdiction on ad hoc adjudicators to deal with the same matter. In my view the procedure in Part III for the filing of complaints by non-unionized employees for unjust dismissal, for hearing by an adjudicator should be seen as a residual procedure intended to provide some redress where such redress was not otherwise available. It seems to me that this is the clear meaning of paragraph 242(3.1)(b).

41 Nor need this approach create serious problems for a dismissed employee who is perhaps not sure which procedure for redress to invoke. As far as I can ascertain, one can file complaints under both Part I and Part III of the Code without incurring any expense. The critical deadline in each case is 90 days after the complainant is aware of the cause for complaint. **The Part III remedy being residual, it would be prudent for the complainant to prosecute first the Part I complaint. Only if she is unable to establish an unfair labour practices as the cause for her dismissal should she then pursue further the Part III complaint. It will be noted that in the present case the respondent did in fact file complaints under both Parts, but she failed to pursue the Part I to its conclusion by seeking a hearing before the Board. It was she who terminated her Part I redress procedure.**

[Emphasis Added]

16 WestJet further notes that while the WPF AA filed the CIRB complaint and withdrew that complaint, rather than Mr. Kufuor-Boakye, this did not mean he was denied access to the section 97 procedure for redress. Mr. Kufuor-Boakye is listed on both the ULP complaint and Interim Relief Application as Treasurer for WPF AA and is one of the designated union representatives for the CIRB's purposes. WestJet submits that Mr. Kufuor-Boakye was one of the WPF AA's "directing minds" at the time the ULP complaint was filed and when the application was made to withdraw it. They argue there is no evidence that he disagreed with the decision to withdraw. It was open to him to request the Board continue the proceeding in his name and incumbent on him to take that step. WestJet further notes that Mr. Kugler was counsel for the WPF AA in the ULP complaint and withdrawal, as well as Mr. Kufuor-Boakye individually in the unjust dismissal complaint. They submit that the union and Mr. Kufuor-Boakye were approaching the issues from a joint strategic perspective throughout.

17 WestJet submits that the conclusions in *Byers* are directly applicable to this case. Section 97 was engaged, the CIRB accepted jurisdiction, issued an interim decision with respect to reinstatement and set a hearing date. Had the complaint not been withdrawn, the CIRB "had the potential to give Mr. Kufuor-Boakye the same remedies that he would be seeking in the unjust dismissal process". Mr. Kufuor-Boakye did not withdraw the complaint on his own, but he did not object when it was withdrawn. WestJet suggests that Mr. Kufuor-Boakye was not a "hapless individual with no role to play in the strategic decisions made" in his case.

18 Finally, counsel for WestJet suggests that the express intent of s. 242(3.1)(b) is to avoid a multiplicity of proceedings. Should a Part III adjudicator accept jurisdiction, not only would the adjudicator be in violation of the mandatory nature of 242(3.1)(b), it would also constitute an *abuse of process*. WestJet argues that Mr. Kufuor-Boakye had the opportunity to challenge his termination under s. 97 of the *Code* and chose not to see it through to its conclusion. Moreover, the WPFSA withdrew the ULP only two weeks prior to the CIRB hearing, despite being notified by WestJet of the jurisdictional issue. WestJet also points out that the unjust dismissal complaint fails to disclose that another complaint had been filed with a different federal department. Had this been done correctly, as required on the form, the Part III adjudicator's jurisdiction would have been questioned at the outset. They submit these actions are indicative of an attempt to forum shop.

Employee Argument

19 Counsel for Mr. Kufuor-Boakye argues that the proper conclusion to this preliminary issue is to dismiss the motion for the following reasons:

- a) The fact situation in the ULP is different than the fact situation in the unjust dismissal. Mr. Kugler argues there are two entirely different causes of action and different legal tests that apply to the ULP and the UD respectively. The ULP and Interim Application allege the Complainant's termination was motivated, in whole or in part, by anti-union animus. In the UD complaint, the Complainant alleges he was unjustly dismissed.
- b) Mr. Kufuor-Boakye does not have a procedure for real redress open to him.
 - i. The WPFSA withdrew the ULP complaint, not Mr. Kufuor-Boakye.
 - ii. The effect of the withdrawal was to deprive Mr. Kufuor-Boakye of a procedure for redress under section 97(1).
 - iii. The WPFSA was not certified as a bargaining agent for WestJet employees and therefore Mr. Kufuor-Boakye has no statutory right to challenge their decision to withdraw the complaint.
 - iv. Mr. Kufuor-Boakye would not have been able to refile his own ULP application after the ULP withdrawal because he was beyond the 90-day deadline.

22 Counsel submits that an earlier decision of the Federal Court of Appeals, *Sagkeeng Alcohol Rehab Centre Inc. v. Abraham*, [1994] F.C.J. No. 640 (*Sagkeeng*), which upheld the adjudicator's jurisdiction, is not overruled in *Byers*. In *Sagkeeng* Justice Rothstein outlined his view of the relevant test in determining whether different proceedings give rise to a bar under section 242(3.1)(b) of the *Code*:

"Redress" is defined in the Shorter Oxford English Dictionary, 3rd ed. as meaning, inter alia:

6. To set (a person) right, by obtaining, or (occas.) giving, satisfaction or compensation for the wrong or loss sustained.

In legal terminology, satisfaction or compensation would be the remedy sought. The wrong sustained would relate to a cause of action. In the context of paragraph 242(3.1)(b), I think both cause of action and remedy are contemplated by reference to another "procedure for redress." **The other "procedure for redress" cannot be based on a different cause of action** or provide a lesser remedy than the procedure under Division XIV of the Canada Labour Code. Under Division XIV, a procedure is provided for individuals to pursue claims for unjust dismissal. A body of jurisprudence has developed in respect of this cause of action. It is not at all clear generally, and certainly not in this case, that a proceeding under the Canadian Human Rights Act, based on discrimination, involves the exact same principles, considerations and defences as a claim for unjust dismissal under the Canada Labour Code.

[Emphasis Added]

22 It is suggested by Mr. Kugler that the decisions in *Sagkeeng* and *Byers* agree with respect to the first part of the test, that the cause of action or factual situation must be the same. However, they differ with respect to the degree to which the procedure for redress must be duplicative. The Court in *Byers* comments on *Sagkeeng* as follows:

39 I have also considered carefully the decision of the Trial Division in *Sagkeeng Alcohol Rehab Centre Inc.* In that case it was argued that because one of the grounds alleged for the complaint of unjust dismissal was discrimination as prohibited by the *Canadian Human Rights Act*, there was another form of redress under that Act of Parliament which precluded the adjudicator from dealing with the complaint by virtue of paragraph 242(3.1)(b). The trial judge emphasized that he did not have evidence before him as to the nature of these allegations but he rejected the argument based on paragraph 242(3.1)(b) in part on the basis of his interpretation of the meaning of that paragraph. He held that the other "procedure for redress" referred to therein "cannot be based on a different cause of action or provide a lesser remedy" than the procedure under Part III of the Canada Labour Code. He later stated:

In my view, it must be demonstrated, by the party seeking to rely on paragraph 242(3.1)(b), that under another statutory provision, there exists a procedure for aggrieved parties to pursue a claim for unjust dismissal and obtain a remedy the same as an adjudicator could grant under subsection 242(4) of the Canada Labour Code. The applicant has not demonstrated this to be so.

While duplication of proceedings should be avoided, and paragraph 242(3.1)(b) appears to have been enacted for that purpose, (perhaps among others), **I am certain that Parliament did not intend that aggrieved parties should be forced to run the risk of their unjust dismissal claim being prejudiced by application of this provision.** For paragraph 242(3.1)(b) to apply, the alternative procedure for redress must be clearly duplicative.

While not questioning the result in that case, given the evidence before the trial judge, I have some reservations as to his analysis of the meaning of "a procedure for redress" of a "complaint" as referred to in the statute. **I believe that the complaint (i.e. the factual situation complained of) must be essentially the same in the other "procedure for redress".** But I doubt that the remedies have to be as good or better under the other provision in order to oust the jurisdiction of the adjudicator under paragraph 242(3.1)(b).

[Emphasis Added]

23 Counsel for Mr. Kufuor-Boakye argues that the fact situation in the current case is not the same as the fact situation in the ULP complaint. The ULP and Interim Application were grounded in allegations of anti-union animus, while the unjust dismissal complaint is "an entirely different factual matter and cause of action" because the adjudicator approaches the complaint from a "just cause" standard. It is submitted that the actual reasons behind Mr. Kufuor-Boakye's termination are not extensively addressed in the ULP or Interim Application.

24 Mr. Kugler further argues that the second part of the Section 242(3.1)(b) test is not met because Mr. Kufuor-Boakye does not have a procedure for redress elsewhere. Counsel suggests that a factual distinction exists between *Byers* and the current case. In *Byers* it was the Complainant who filed both the ULP and the UD complaints rather than the Complainant's union. It was also the Complainant in *Byers* who chose to withdraw the ULP complaint. In the current case the ULP was withdrawn by the WPFSA, not Mr. Kufuor-Boakye. He did not file the ULP complaint or file the Interim Application and he did not withdraw them.

25 Counsel submits this is important because the bargaining unit was never actually certified by the Board. Therefore Mr. Kufuor-Boakye is left with no remedy to pursue his claim if he is dissatisfied with the WPFSA's decision to withdraw the ULP. If the WPFSA were the certified bargaining agent, Section 37 of the *Code* would allow the member to make a complaint alleging that the union acted in a manner that is arbitrary, discriminatory or in bad faith. The result is that

Mr. Kufuor-Boakye has no redress if he is unsatisfied with the fact that the WPF AA withdrew his complaint. Referring to Justice Rothstein's comments in *Sagkeeng*, Counsel suggests that:

49 Parliament cannot have intended for a Complainant to be prejudiced in his unjust dismissal complaint as a result of a decision by a trade union which the Complainant has no mechanisms to challenge or appeal."

Evidence

26 The evidence before me includes:

a) The letter of termination addressed to Mr. Kufuor-Boakye from WestJet, which states in part:

After taking all of the evidence gathered from the investigation, including your response, into consideration, WestJet has come to the conclusion that your actions constitute a substantial violation of WestJet's Business Code of Conduct and Respect in the Workplace policies. These violations are deemed to be of a very serious and deliberate nature by WestJet Airlines and as a result the company has made the decision to terminate your employment "with cause" effective January 15, 2016.

b) An organizational chart of the WPF AA showing Mr. Kufuor-Boakye as "Interim Treasurer".

c) A letter from Dayna Schuster, Employee Relations Manager at WestJet, indicating Ms. Schuster's appointment to investigate a complaint regarding videos posted to "Caption Generator" in July of 2015. The letter suggests that the content of the videos is highly defamatory of WestJet as well as WestJet's leadership and employees. The videos allegedly refer to WestJet's ProActive Communication Team (PACT), the Flight Attendant Association Board (FAAB) and the WestJet Pilot Association (WJPA), in addition to WestJet leadership.

d) The ULP complaint and Application for Interim Relief, filed by Mr. Kugler on behalf of the Complainant WestJet Professional Flight Attendants Association. Mr. Kufuor-Boakye is listed as WPF AA Treasurer on both documents, along with the WPF AA address and phone numbers for Mr. Kufuor-Boakye, the WPF AA President, Secretary, Vancouver, Calgary and Toronto Base Chairs. The application states in part:

The "Proactive Communication Team" ("PACT") and its subgroups including *inter alia* the "Flight Attendant Association Board" (FAAB), is a company-dominated employee association that is recognized by WestJet as the representative of WestJet employees. The WPF AA does not believe that PACT is a *bona fide* trade union or representative vehicle for employee interests.

The present Application arises as a result of the termination by WestJet of a flight attendant, Daniel Kufuor-Boakye, in the midst of a WPF AA organizing drive, on January 15, 2016...

The WPF AA submits that WestJet's decision to terminate Mr. Kufuor-Boakye was motivated in whole or in part by anti-union animus. It is submitted that WestJet created an artificial veneer of "just cause" to disguise the true impetus for his dismissal, which was his involvement in organizing activities at WestJet.

The Application refers to Mr. Kufuor-Boakye as "a founding member" of the WPF AA, heavily involved in organizing activities. It details the events surrounding the investigation and subsequent termination of Mr. Kufuor-Boakye for his alleged involvement in the "Caption Generator" videos. The Application states: "Mr. Kufuor-Boakye's wrongful termination has caused him financial hardship and significant emotional distress." The Board is asked to issue an Interim Order directing WestJet to reinstate Mr. Kufuor-Boakye.

e) A written declaration from Mr. Kufuor-Boakye swearing that WestJet wrongfully terminated his employment based on false allegations regarding his involvement in a group of five videos on the Internet that depicted WestJet in a negative light. He also affirms that he is a founding member and current union representative of the WPF AA and states at paragraph 4:

I wholly dispute WestJet's allegations against me and I believe that the true reason for my dismissal was my involvement with the WestJet Professional Flight Attendant's Association (the WPFAA).

f) A written declaration from Tara Mowat, President of WPFAA, affirming Mr. Kufuor-Boakye's role with the WPFAA and the organizing activities with which he was involved. The letter also alleges that Mr. Kufuor-Boakye's termination caused a significant chill on the WPFAA's organizing drive.

g) WestJet's response to the ULP complaint. Which states:

Mr. Kufuor-Boakye's employment was terminated as a result of an internal investigation that concluded that he had committed serious violations of the Code of Conduct and the Respect in the Workplace Policy. In particular, Mr. Kufuor-Boakye posted several videos on the internet which were defamatory to WestJet and/or its leadership and employees, as well as being discriminatory and/or harassing in nature.

The videos allegedly reference FAAB and PACT and suggest that PACT has engaged in surface level bargaining with WestJet, that it is conspiring with WestJet to trick employees and keep them in the dark, among other negative characterizations of PACT and FAAB's activities. WestJet's response further details the investigation process and actions taken leading up to Mr. Kufuor-Boakye's termination.

h) The decision of the CIRB issued March 4, 2016 denying the Application for Interim Relief. The Board indicates that the conflicting facts in the case militate against interim reinstatement and require an expedited hearing into the merits of the case.

i) The unjust dismissal complaint form submitted to Employment and Social Development Canada, dated April 13, 2016 and signed by Mr. Kufuor-Boakye. Section C asks whether a complaint about this matter has been filed with another federal or provincial/territorial Government department or agency. The box marked "No" has been checked.

j) The August 31, 2016 application to the CIRB for leave to withdraw the ULP on a without prejudice basis, signed by Mr. Kugler on behalf of the WPFAA.

k) WestJet's response to the request for leave to withdraw. In the response, WestJet indicates that they do not object to the withdrawal. However, they do object to the "without prejudice basis". The response also indicates Mr. Kugler was advised of the Byer's decision and that WestJet would object to the adjudicator's jurisdiction based on section 242(3.1)(b) of the *Code*.

l) The CIRB's response granting leave to withdraw the complaint and cancelling the September 13, 2016 hearing. In it the Board declines to address the "without prejudice" issue, stating that this is not for the Board to influence or determine what impact if any a withdrawal will have on the unjust dismissal complaint of any other external proceeding.

Analysis

27 As established in the *Sagkeeng*, *Byers*, and more recent decisions (e.g. *Moir v. Gateway West Logistics*, [2017] C.L.A.D. No. 12), the questions a Part III adjudicator must answer to determine whether there is a section 242(3.1)(b) bar to jurisdiction are:

a) Is the fact situation essentially the same in both complaints?

b) Does the other process provide for some real redress which would be of personal benefit to the Complainant?

28 In answer to the first question I must conclude that the fact situation of the unjust dismissal complaint is the same as the fact situation in the ULP complaint. The incident precipitating both the ULP and the unjust dismissal complaints is Mr. Kufuor-Boakye's termination. The letter terminating Mr. Kufuor-Boakye's employment, the ULP application, and the unjust dismissal complaint all reference the videos posted on "Caption Generator". Like the Complainant in *Byers*, Mr. Kufuor-Boakye alleges from the outset that he believed his dismissal was because of his involvement in the WPFSA.

29 While I agree with Mr. Kugler that the legal question that is asked by an unjust dismissal adjudicator is different than the question asked by the CIRB in an unfair labour practice complaint, this does not make the fact situation different. The Caption Generator videos and their content are integral to the dismissal. The submissions before me indicate that the content of these videos touch on employee representation organizations and their activities at WestJet. The fact that the ULP and nature of the video content are not mentioned in Mr. Kufuor-Boakye's unjust dismissal complaint does not make the essence of the complaint different. It only means that these elements of the case have not been fully disclosed in the unjust dismissal application.

30 I must also conclude that section 97 of the *Canada Labour Code* is a procedure for real redress that was available to Mr. Kufuor-Boakye. The redress available for Part I and Part III complaints is similar. Remedies may include reinstatement, an order for payment of lost wages, and the opportunity for the parties to attempt settlement. Moreover, I am bound by the decision in *Byers* that confirms the residual nature of the Part III complaint: Per Strayer J.A. in *Byers*:

40 ... In my view the procedure in Part III for the filing of complaints by non-unionized employees for unjust dismissal, for hearing by an adjudicator, should be seen as a residual procedure intended to provide some redress where such redress was not otherwise available. It seems to me that this is the clear meaning of paragraph 242(3.1)(b).

41 Nor need this approach create serious problems for a dismissed employee who is perhaps not sure which procedure for redress to invoke. As far as I can ascertain, one can file complaints under both Part I and Part III of the Code without incurring any expense. The critical deadline in each case is 90 days after the complainant is aware of the cause for complaint. The Part III remedy being residual, it would be prudent for the complainant to prosecute first the Part I complaint. Only if she is unable to establish an unfair labour practice as the cause for her dismissal should she then pursue further the Part III complaint. It will be noted that in the present case the respondent did in fact file complaints under both Parts, but she failed to pursue the Part I complaint to its conclusion by seeking a hearing before the Board. It was she who terminated her Part I redress procedure.

42 It should also be noted that section 246 provides as follows:

246 (1) No civil remedy of an employee against his employer is suspended or affected by sections 240 to 245.

(2) Section 189 applies for the purposes of this Division

Thus the employee retains the ultimate right to sue her employer if subsection 242(3.1)(b) does not allow a proceeding before an adjudicator.

31 As in the *Byers* case, complaints in this case were filed under both Part I and Part III of the *Code*. As in the *Byers* case, the Part I complaint was withdrawn before the CIRB could hear the case and issue a ruling. While it is true that the WPFSA filed and withdrew the Part I complaint, Mr. Kufuor-Boakye was not an unwitting bystander in this process. He was, by his own admission, a key organizer and Treasurer of the WPFSA. He was being advised by the same lawyer as the WPFSA. I find it unlikely that he was not aware of, or involved in, the decision to withdraw the Part I complaint. If he disagreed with the WPFSA decision to withdraw, it was incumbent on Mr. Kufuor-Boakye to make that known to the CIRB. There is no evidence before me that he objected to the complaint withdrawal at any point in time.

32 It is also argued that Mr. Kufuor-Boakye had no redress available to him because the WPFSA was not a certified bargaining agent. Mr. Kufuor-Boakye is therefore barred from filing a Section 37 complaint against the WPFSA for

failing to fairly represent him. I agree that he is barred from a Section 37 complaint. However, this does not mean Mr. Kufuor-Boakye had no redress available to him. It is precisely because the WPFSA is not a certified bargaining agent, that Mr. Kufuor-Boakye's actions as a WestJet employee were not constrained. He was free to act independently and could have objected to the Part I complaint withdrawal. He was free to seek independent counsel or negotiate a settlement with WestJet. If he was unable to reach a settlement or establish the unfair labour practice complaint on his own, he could have then pursued the Part III complaint.

Conclusion

33 For the foregoing reasons I have concluded that the Part I complaint is substantially similar to the Part III complaint and that a procedure of real redress was available to Mr. Kufuor-Boakye which he and the WPFSA failed to pursue to its conclusion. I therefore have no legal jurisdiction and am statute barred from hearing the unjust dismissal complaint.