

IN THE MATTER OF:

A COMPLAINT OF ALLEGED UNJUST DISMISSAL UNDER DIVISION
XIV - PART III, SECTION 240 OF THE *CANADA LABOUR CODE*,
R.S.C. 1985, c. L-2

BETWEEN:

Jianti Yang,

COMPLAINANT,

- and -

Northern Inter-Tribal Health Authority Inc.,

RESPONDENT.

ADJUDICATOR'S DECISION
December 16, 2019

T. F. (TED) KOSKIE, B.Sc., J.D.

REPRESENTATIVES:

Davin R. Burlingham, for the Complainant, Jianti Yang

Carl M. Nahachewsky, for the Respondent, Northern Inter-Tribal Health Authority
Inc.

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1. INTRODUCTION

[1] Jianti Yang (“Yang”) lodged a complaint¹ (the “Complaint”) pursuant to section 240 of the *Canada Labour Code*, Part III (the “Code”) alleging that Northern Inter-Tribal Health Authority Inc. (“NITHA”) unjustly dismissed her from her employment effective July 4, 2018.

[2] NITHA took issue with the Complaint.

[3] Yang asked that the Complaint be referred to an adjudicator.

[4] The Minister of Labour (Canada) appointed me to hear and determine the Complaint.

2. FACTS

[5] NITHA is a Federally-funded² organization created through a partnership of the Prince Albert Grand Council, Meadow Lake Tribal Council, Peter Ballantyne Cree Nation and Lac La Ronge Indian Band (the “Partners”). They formed it to deliver “Third Level” health support services to the Partners, who provide “Second Level” services to thirty-three First Nation communities, who provide “First Level” services to approximately 55,000 individuals.

[6] NITHA³ is essentially comprised of two units—Community Service and Public Health.

¹Exhibit G-1, Yang Complaint dated July 5, 2018

²Through Indigenous & Northern Affairs Canada, First Nations Inuit Health Branch (“FNIHB”)

³Its Executive Director is Tara Campbell (“Campbell”)

[7] The Public Health Unit ("PHU") is supervised by the Medical Health Officer,⁴ who reports to Campbell. It is staffed by, *inter alia*, a Manager,⁵ Public Health Nurse,⁶ Communicable Disease Control Nurse,⁷ HIV Project Coordinator,⁸ Environmental Health Advisor,⁹ Program Administrative Assistant,¹⁰ and Epidemiologist.

[8] Third-Level services include, but are not limited to, health promotion and monitoring, communicable disease prevention and management, immunization and advisory support. In conjunction with same, NITHA has a reporting responsibility¹¹ to the Partners and INAC concerning, *inter alia*, childhood immunization coverage ("CICR"), school age immunization coverage of HPV, HIV/AIDS, influenza immunization, communicable diseases and environmental health.

[9] Yang:

- a) is fifty years old;
- b) graduated in 1991 from Dalian Medical University in China and after that worked as a physician in China;
- c) came to Canada in 1996 as an international student;

⁴Dr. Nnamdi Ndubuka ("Ndbuka")

⁵Grace Akinjobi ("Akinjobi")

⁶Carrie Gardipy ("Gardipy")

⁷James Piad ("Piad")

⁸Tosin Adebayo ("Adebayo")

⁹Treana Cottingham ("Cottingham")

¹⁰Deanna Brown ("Brown")

¹¹Yearly, quarterly and upon request

- d) received her Bachelor's degree in Statistics in 2005 from the University of Guelph;
- e) graduated in 2009 from the University of Alberta with a Master's degree in Public Health; and
- f) worked on contract from March 2010 to May 2011 as an Epidemiologist in the Five Hills Health Region.

[10] On October 18, 2014, Yang applied to NITHA for the position of epidemiologist within its PHU.¹²

[11] On December 8, 2014, NITHA made an offer,¹³ in writing, to hire Yang. The offer contained, *inter alia*, the following terms:

- a) a start date of January 5, 2015;
- b) a six-month probationary period from January 5, 2015, to June 5, 2015; and
- c) NITHA policies and past practice and Federal labour standards laws will “guide” items not covered by the offer.

Yang accepted the offer the same day.

[12] The Epidemiologist job description provides, in part:

POSITION MANDATE:

¹²Exhibit E-1, Tab 3, E-mail from Yang to NITHA dated October 18, 2014

¹³Exhibit E-1, Tab 2, Letter from NITHA to Yang dated December 8, 2014

The Epidemiologist is responsible for a broad range surveillance, health status and epidemiological research projects within the NITHA Partnership regions. Focuses on the systematic collection, analysis and interpretation of health data in the process of describing and monitoring a health event. . . . Within NITHA this position works in collaboration with other Public Health Unit Staff.

POSITION DUTIES (but not limited to):

1. Preparation and analysis of health status indicators.
2. Health Status Report preparation and completion in collaboration with the Mental Health Officer.
3. Participates in the selection of health indicators for health status reporting as part of NITHA's public health team and at the provincial level, as a member of committees and working groups.
4. Epidemiologic Monitoring-provide information to support community needs assessments, baseline and ongoing health status assessments.
5. Communicates and informs NITHA partners, their agencies and communities of health status and disease risk.

...

ACCOUNTABILITIES:

...

4. Participates as an effective member of the NITHA PHU.

[13] Yang commenced employment on January 5, 2015. NITHA reviewed its HR Employee Handbook¹⁴ with her.¹⁵

[14] When Yang commenced employment, she reported to Ndbuka. Sometime later in 2016, that changed to the PHU Manager.¹⁶

[15] Yang took the following sick leave:

¹⁴Exhibit G-3, NITHA Personnel Management Regulations

¹⁵Exhibit E-1, Tab 8, Employment Checklist signed February 11, 2015

¹⁶Until July 2017, the incumbent was Jacqueline Valois ("Valois"). Valois was then replaced by Akinjobi

- a) eighty hours (10.6 days) from March 29, 2015, to March 26, 2016;¹⁷
- b) ninety-six hours (12.8 days) from March 29, 2016, to March 30, 2017;¹⁸
- c) 145 hours (19.1 days) from April 2, 2017, to March 31, 2018;¹⁹ and
- d) 33.5 hours (4.5 days) from April 1, 2018, to July 4, 2018.²⁰

[16] The sick leave, along with time off with short term disability coverage, was needed for, *inter alia*:

- a) part of March to May 15, 2016, due to a broken tail bone;²¹
- b) roughly June and July 2016, due to a pelvic fracture;²² and
- c) February 28 to May 21, 2017, due to surgery.²³

[17] Ndubuka completed Yang's first performance evaluation on June 19, 2015.²⁴ It said, in part:

Janet has ability to undertake new task/assignment on short notice. Very committed to her duties and strives to meet deadlines. Janet has been able to generate several reports on specific program areas. Eg: HIV, TB, Hepatitis C, NITHA population projections.

¹⁷Exhibit E-1, Tab 60

¹⁸Exhibit E-1, Tab 91

¹⁹Exhibit E-1, Tab 130

²⁰Exhibit E-1, Tab 184

²¹Exhibit E-1, Tabs 21 - 23

²²Exhibit E-1, Tabs 14 - 18

²³Exhibit E-1, Tabs 29 - 31

²⁴Exhibit E-2, Tab 389

Janet collaborated effectively with other unit members in the area of data analysis and interpreting statistical information. She worked with TB nurses and Tobacco Project Coordinator on smoking rates.

Janet is very confident in compiling reports. Has the ability to organize reports in a streamlined manner that is easy to follow. Eg: The NITHA Executive Summary report which she compiled within the 2 weeks of assuming duty.

Janet is very confident in the use of statistical software to perform her duties.

Has clear understanding of statistical analysis and interpretation. Able to seek new ways of solving problems related to data analysis. Eg: She engaged one PAGC staff to sort NITHA population data.

...

Janet has strengthened the capacity of the Public Health Unit in various ways. She has a wealth of knowledge and strong skill set in biostatistics and epidemiology. She is able to work independently to achieve and exceed her deliverables, provided that she understands the task. However, Janet has significant verbal communication challenge that impact on her ability to effectively participate in meetings and engage external partners. Her reports require additional significant review (grammatically) before it can be finalized.

[18] On March 2, 2016, Ms. Yang received her second performance evaluation.²⁵ The evaluation said the following:

Considers the accuracy, thoroughness and effectiveness of work performed.–Meets normal requirements.

Demonstrates understanding by doing work effectively.–Consistently exceeds requirements.

Understands all aspects of the job.–Consistently exceeds requirements.

Works to improve self, gain knowledge and work more effectively.–Consistently exceeds requirements.

[19] On December 1, 2017, Ndubuka sent an email to Yang setting forth a variety of concerns with her declining performance over the prior four months.²⁶ The email:

a) gave specific examples of problems with Yang's performance, including data

²⁵Exhibit E-2, Tab 388

²⁶Exhibit E-1, Tab 42. In Cross Examination, Ndubuka said it would be more correct to say his concerns began in late 2016.

errors,²⁷ dealing with external contacts and a lack of representation of NITHA on working groups;

- b) said that he had taken time to give Yang instructions regarding specific reports, but that she continued to perform below expected standards;
- c) outlined the various measures taken by Ndubuka to enhance Yang's performance, which included:
 - i) providing approvals for specific professional development opportunities including English language courses, Microsoft Excel training and statistical training programs;
 - ii) a document entitled Guideline for Formatting Reports—created by Ndubuka—that Yang failed to use consistently when creating reports; and
 - iii) training Yang on the use of Microsoft Excel formulas in calculating rates and other variables; and
- d) specifically states, in part:

Despite these initiatives, I am yet to observe any palpable gains in the organization's investment in your professional development.

...

Your current performance level is not acceptable and is a great concern to me as the unit lead and also to the unit members. It is pertinent that we continue to maintain high professional standards in the way we do business as a 3rd level organization.

In view of the above, I would like to suggest that we have a crucial conversation with yourself, your supervisor, and HR to determine way forward.

[20] Yang replied to Ndubuka's email on the same date, stating the following:

²⁷Ndubuka testified these errors were significant and said they were not just “typos,” but matters of misinterpretation and inaccuracy.

Every time, when you gave me the tasks, I would use my full energy to finish it.

On June 2017, when I came back, you ask me to compile the HIV and AIDS report from 2007 to 2016. Then I did. But you also want the HIV report now. I think it is not my mistake. Before I compile 2005 to 2015 report, I collected the HIV and AIDS data. You did not say that I did wrong. Moreover, in the HIV and AIDS report, where can you say that my data is wrong?

What I did wrong is not including the case in 2016 in the report because I asked James why the patient chart is missing, he cannot explain to me.

About the Vaccination data, Grace asked me and Deanna to do the summary. Deanna has made some mistakes and I pointed the mistake to her. So she does not want to sit together with me to check the data again.

I want also a meeting to explain these.²⁸

[21] On December 3, 2017, Yang sent an email to Campbell, who was then NITHA's Human Resources Manager.²⁹ Her email states, in part:

After I received the mail from Dr. Ndubuka, I was very upset. This email includes many unreal points.

...

With me working at NITHA, I am more familiar with my work. I found that there are many mistakes in the Micro Strategy. For example, the Micro Strategy shows that there are only 37 cases co-infected with HIV and HCV. But from the patient charts, I found that there are 54 cases.

...

As an epidemiologist, I think it is necessary to give the true data. This brought me trouble. I have worked for NITHA for almost 3 years, I have deep feeling with NITHA. So for the reputation of NITHA and quality of work in the future, I think the mistakes in the Micro Strategy must be corrected.

[22] On December 11, 2017, Campbell and Akinjobi met with Yang to discuss their performance concerns. Immediately following the meeting, Yang sent an email to Campbell stating:

Thank you very much for this morning's meeting. From the meeting, I really learned a lot. I know what I should do and should not do. But I hope Grace can write down for me

²⁸Exhibit E-2, Tab 312

²⁹Exhibit E-1, Tab 43

in case I forget in the future.³⁰

[23] On December 13, 2017, Akinjobi sent Yang an email outlining what they discussed at the meeting on December 11, 2017.³¹ The email:

- a) reiterated much of what was indicated in the December 1, 2017, email, in addition to commenting on Yang's response to the December 1, 2017, email;
- b) repeated the following two important questions asked of Yang at the meeting:
 - i) what she can do to improve the quality of her work in supporting the day-to-day work in PHU; and
 - ii) how NITHA can help her attain same; and
- c) listed a variety of recommended ways that Yang could improve her performance.

[24] NITHA maintains that Yang made "multiple errors or is unable to correctly analyze or compile data in relation to at least 5 different Health Status reports and refuses to do other reports falling within the job description of the Epidemiologist" during the five-month period of December 11, 2017, to May 4, 2018. It pointed to thirty-three (33) instances of errors in Yang's work.

[25] On May 4, 2018, Akinjobi sent an email to Yang:

- a) advising her performance had not improved at all since their meeting on December 11, 2017;
- b) saying they asked her questions about her plans to improve her work at the

³⁰Exhibit E-1, Tab 44

³¹Exhibit E-1, Tab 47

December meeting, but that she had not given them any sort of answer;

- c) advising her performance concerns include, but are not limited to a lack of collaboration with team members, data errors and mistakes in the graphs produced by Ms. Yang;
- d) noting that, in spite of the training provided to her, she has not observed any noticeable improvement in her performance; and
- e) stating "in view of the above, I will have to move this conversation to a higher level."³²

[26] On May 5, 2018, Yang sent an email to Campbell in response to the May 4, 2018, email from Akinjobi.³³ In the email, Yang states that she has done a lot of thinking about Akinjobi's email over the weekend and that she feels disappointed. She went on to list a variety of reasons why she believed that Akinjobi's criticisms were unjustified.

[27] On July 4, 2018, NITHA gave Yang a termination letter.³⁴ It stated the reasons for her termination for just cause include, but are not limited to documented evidence of:

- a) an accumulation of two or more written reprimands;
- b) unwillingness or inability to carry out work assigned by the employer or its delegate;
- c) incompetence;

³²Exhibit E-1, Tab 45

³³Exhibit E-1, Tab 46

³⁴Exhibit G-2

- d) unwillingness to work cooperatively with other employees; and
- e) inability to carry out work of acceptable quality as defined and assigned by the employer or its delegate.

[28] Yang's termination was effective as of July 4, 2018. NITHA paid her \$10,113.51—comprised of six weeks of earnings at \$3,371.17 bi-weekly—plus accumulated annual leave, TOIL and benefits to which she was entitled.

[29] Yang testified:

- a) since the termination of her employment with NITHA, she has not worked and has not received any income;
- b) she has applied for over one hundred (100) job postings for epidemiologists, bio statisticians, data analysts, research assistants and research coordinators;
- c) she participated in twenty-three (33) interviews, but did not receive any offers.

Yang provided documentary evidence of three interviews,³⁵ one request for references,³⁶ two rejections³⁷ and one rejection letter following an interview.³⁸

[30] Yang maintains her dismissal from her employment with NITHA was unjust and that she is entitled to lost wages of \$87,650.31, less the payment in lieu of notice of \$10,113.51. Yang also submits that she is entitled to reinstatement to her former position with NITHA and that I should award her costs of this proceeding.

³⁵Exhibit C-1, pp. 000034, 000035 and 000038

³⁶Exhibit C-1, p. 000036

³⁷Exhibit C-1, pp. 000037 and 000039

³⁸Exhibit C-1, p. 000033

[31] As of July 4, 2018, Yang's annual salary was \$87,650.31.

3. DISPUTE

[32] The issues herein are as follows:

- a) Did NITHA unjustly dismiss Yang?
 - i) What is the effect of NITHA's Personnel Management Regulations³⁹ (the "Regulations") on Yang's dismissal?
- b) If NITHA did not terminate Yang's employment for just cause, should I reinstate her to her former employment with NITHA?
- c) If Yang should not be reinstated, what is the appropriate amount of compensation that she should receive?
- d) Did Yang appropriately mitigate her losses?

4. DECISION

[33] I find NITHA justly dismissed Yang.

[34] I dismiss the Complaint.

[35] I order Yang to pay NITHA costs fixed at \$4,500.00.

³⁹Exhibit G-3, Northern Inter-Tribal Health Authority Inc. Personnel Management Regulations dated November 2002

5. REASONS

5.1 CODE

[36] The relevant provisions of the *Code* are:

Complaint to inspector for unjust dismissal

240(1) Subject to subsections (2) and 242(3.1), any person

- (a) who has completed twelve consecutive months of continuous employment by an employer, and
- (b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

Time for making complaint

(2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

Extension of time

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

...

Reference to adjudicator

242(1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

Powers of adjudicator

- (2) An adjudicator to whom a complaint has been referred under subsection (1)
 - (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
 - (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
 - (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).

Decision of adjudicator

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been

referred under subsection (1) shall

- (a) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and
- (b) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

Limitation on complaints

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

- (a) that person has been laid off because of lack of work or because of the discontinuance of a function; or
- (b) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

Where unjust dismissal

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

- (a) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;
- (b) reinstate the person in his employ; and
- (c) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

5.2 NITHA PERSONNEL MANAGEMENT REGULATIONS

[37] The relevant provisions of the Regulations are as follows:

25.0 STAFF DISCIPLINARY ACTION

- 25.1 A performance discrepancy occurs when the actual performance or behaviour of an employee is unprofessional and/or different from what is planned or expected as outlined in the employee's job description and if the employee has not attained the minimum expected standards of performance.
- 25.2 NITHA's approach is based on teaching, coaching and helping an employee to improve future performance and behaviour.
- 25.3 The steps in this procedure may be progressive, repetitive or bypassed depending on the severity of the performance discrepancy, time factor and circumstances in question.
- 25.4 The objective of this policy is to ensure fairness and equity for both the employer and employee.

- 25.5 This policy outlines the process and individuals involved at various levels. An employee may be disciplined, demoted and/or terminated for the following reasons:
- i. Incompetence and/or incapacity towards the performance of duties in accordance to the employee's job description;
 - ii. Disruptive influence at work and/or community;
 - iii. Abandonment of position without just cause and without notifying his/her supervisor;
 - iv. Accumulation of two or more reprimands;
 - v. Unexcused or continuous absenteeism/tardiness;
 - vi. Unwillingness to carry out work assigned by the employer or their delegate;
 - vii. Refusal or neglect to obey any lawful order of his/her supervisor;
 - viii. Unwillingness to work co-operatively with other employees;
 - ix. Performance of any action that creates an unsafe situation;
 - x. Performance of any action that is either disrespectful or brings disrespect to NITHA;
 - xi. Breach of confidentiality.

The following disciplinary process shall apply:

...

25.7 LETTER OF REPRIMAND

- 25.7.1 A letter of reprimand from the ED will be given to the employee stating the infraction and containing a warning against repetition of this infraction.
- 25.7.2 At the discretion of the ED, any letter of reprimand may be considered as a warning if so stated.
- 25.7.3 A copy of the letter will be kept in the employee's personnel file which is signed and dated by the employee and employer.
- 25.7.4 After two years from the date of the written reprimand, an employee can request its removal from his/her file.

...

25.9 TERMINATION FOR CAUSE

- 25.9.1 Termination for "just cause" notice shall state the effective date as well the reasons for termination.
- 25.9.2 An employee may be terminated by NITHA at any time for "just cause"

- 25.9.3 "Just cause" shall include, but is not limited to documented evidence of: an accumulation of two or more written reprimands, absenteeism, insubordination, unwillingness or inability to carry out work assigned by the employer or its delegate, incompetence, unwillingness to work co-operatively with other employees, inability to carry out work of acceptable quality as defined and assigned by the employer or its delegate, neglect of employer's interest, falsifying records or reports, job abandonment, theft or fraud committed against the employer, conviction of an indictable offence related to employment, breach of code of ethics, breach of oath of confidentiality, reporting to work under the influence of alcohol or drugs, for consuming drugs or alcohol during working hours, performance of any action that creates an unsafe situation, or performance of any disrespect towards NITHA.
- 25.9.4 Notice of termination for just cause must be hand delivered or delivered by registered mail.
- 25.9.5 All documentation regarding termination for just cause will be kept in the employee's personnel file.

30.0 APPEAL PROCESS

- 30.1 Any employee who is adversely affected by a decision of NITHA may within five (5) working days, launch an appeal to the ED. The appeal shall be in writing and shall contain all the particulars that would aid the ED in arriving at a decision. When considering the appeal, the ED shall in writing convey a decision to the affected employee. This written information shall contain the reason(s) for arriving at the decision.
- 30.2 The ED must respond with his/her decision to the employee within ten (10) working days of receiving the notice of appeal.
- 30.3 Any employee who is not satisfied with the decision of the ED, may in writing appeal to the NITHA Health Directors who will then make their recommendation to the NITHA Board. This appeal must be within ten (10) working-days immediately following the ED's decision. The NITHA Health Directors shall obtain the employee's personnel file, the employee's first appeal and the ED's written decision. The NITHA Health Directors with the assistance of legal counsel, shall hear representation from the employee, the employee's immediate supervisor and render a decision within ten (10) working days upon completion of this process and make a recommendation to the NITHA Board.
- 30.4 With respect to appeals related to evaluations, reprimand, suspension, demotion, transfer or work assignments; the decision of the NITHA Board shall be final.

5.3 ANALYSIS

5.3.1 DID NITHA UNJUSTLY DISMISS YANG?

[38] The requirements that an employer must establish to constitute dismissal for cause depend on the facts of each case. In *Schutte v Radio CJVR Ltd.*,⁴⁰ the Saskatchewan Court of Appeal outlined the principles of dismissal for just cause:

In *Riehl v. Westfair Foods Ltd.*, [1995] 8 W.W.R. 51 (Sask. Q.B.), Klebuc J., as he then was, summarized the law in this area, and applied it to the case before him, as follows:

[16] The principles of law applicable to dismissal for just cause have been well defined in numerous case authorities and fully canvassed by Howard A. Levitt, *The Law of Dismissal in Canada*, 2d ed. (Aurora: Canada Law Book Inc., 1992), I. Christie, G. England and W.B. Cotter, *Employment Law in Canada*, 2d ed. (Toronto: Butterworths, 1993) and David Harris, *Wrongful Dismissal*, (Toronto: Carswell, 1990). Mr. Justice Wimmer of this Court in *Smith v. General Recorders Ltd. et al.*(1994), 121 Sask. R. 296, succinctly stated the general principles applicable to dismissal for cause at p. 302:

There is no compendium of employment misdemeanours which alone or in combination will justify the summary dismissal of an employee. Each case stands to be decided according to its own facts. Clearly though, it is not enough that an employer is displeased by the employee's performance. There must be some serious misconduct or substantial incompetence. The position is summarized in paras. 4.3 and 4.4 of Butterworths' *Wrongful Dismissal Practice Manual*, volume 1:

Given that dismissal for just cause is an exception to the employee's usual rights, it is clear that summary dismissal can be utilized only for serious misconduct or breaches of a fundamental kind. The question whether misconduct is serious enough to justify dismissal will be a question of fact to be assessed individually in each case.

The onus of proving the existence of just cause falls upon the employer, and it must be proved beyond a balance of probabilities.

⁴⁰2009 SKCA 92, 331 Sask R 141 at paras 18 to 21.

[17] The essential criteria for establishing just cause based on incompetence is outlined by Brown and Beatty, *Canadian Labour Arbitration*, 2d ed., (Toronto: Canada Law Book, 1988), at p. 412, as follows:

. . . Generally, it has been said that to substantiate a non-disciplinary termination in such circumstances, the employer must establish the level of job performance it required, that such a standard was communicated to the employee, that it gave suitable instruction and supervision to enable the employee to meet the standard, that the employee was incapable of meeting the standard of that job or other positions presumably within her competence, and that it warned the employee that failure to meet the standard would result in her dismissal

[19] While it appears that the standard of incompetence necessary to warrant the discharge for cause is a severe one, note must be made of the fact that the severe standard only applies where the firing has been of an abrupt nature. In my view the threshold of incompetence necessary to warrant dismissal for cause is significantly lower where the dismissal is preceded by many warnings indicating the employee's performance was unsatisfactory. See: *Matheson v. Matheson International Trucks Ltd.*, *supra*. I now turn to applying the law to the facts before me.

Although the phrase "incompetence" is used in this passage, it is clear that the complaints about the employee's performance were more of the nature of negligence or lack of diligence. Such complaints are not negated, as Foley J. asserts, by the employer's contemporaneous expression of the view that the employee is capable of doing better, and urging him to apply himself more diligently.

While, at the same time, it is clear that the standard of deficiency necessary to constitute grounds for summary dismissal is stringent where there is no misconduct such as dishonesty or gross insubordination, it is also true, in my view, that the standard is less stringent where, as in this case, the employee has been given repeated notice that his performance is deficient, considerable assistance to help him improve, and clear warning that failure to do so will result in the termination of his employment.

The test to be applied was stated by Klebuc J. (as he then was) in *Graf v. Saskatoon Soccer Centre Inc.*, 2004 SKQB 282, [2005] 4 WWR 522 (Sask. Q.B.) at para. 28:

It is also well established that where an employer relies on a series of inadequacies or inappropriate conduct short of dishonesty as grounds for summarily dismissing the employee, the employer must have previously informed the employee of his or her inappropriate conduct or inadequate performance and have warned the employee that she or he must correct the noted problems within a reasonable specified time or face dismissal. The essential elements of the requisite warning are set out in *Wrongful Dismissal Practice Manual*.... They essentially provide for the following:

- (a) the employer must provide reasonable objective standards of performance for the employee in a clear and understandable manner;

- (b) the employee must have failed to meet the employer's reasonable standard of performance;
- (c) the employer must give the employee a clear and unequivocal warning that she or he has failed to meet the requisite standard, including particulars of the specific deficiency relied on by the employer;
- (d) the warning must clearly indicate that the employee will be dismissed if he or she fails to meet the requisite standard within a reasonable time.

[39] Yang cites a number of cases relating to the factors that must be considered when determining whether an employee has been dismissed with cause. One is *Leung v Doppler Industries Inc.*⁴¹ There, the Court stated the following:

Just cause is conduct on the part of the employee incompatible with his or her duties, conduct which goes to the root of the contract with the result that the employment relationship is too fractured to expect the employer to provide a second chance.

The onus is upon the defendant to prove cause. In this case I find the defendant has not met that onus. Both David and Colin Chalk agreed the plaintiff performed her duties well until the November incident. There is little or no evidence they communicated dissatisfaction to her of her performance, or that they established a standard to be met within a time frame. There is little evidence that her performance deteriorated after November 1991. Both brothers were keen to have her return to work when she walked out in November. In all the circumstances, I find cause is not established for Ms. Leung's dismissal from the company's employ.

[40] *Leung* is factually distinct from this matter. In *Leung*, there were no problems with the employee's performance. That is why there was no communication of dissatisfaction with her performance. In this situation, there is evidence of problems with Yang's performance. They are outlined in the December 1, 2017, and May 4, 2018, emails.

[41] Another is *Oxebin v Mosquito, Grizzly Bear's Head, Lean Man First Nation*.⁴² The relevant passage therein is as follows:

In their text on wrongful dismissal and employment law, Neuman and Sack address the

⁴¹[1995] BCWLD 1123, 10 CCEL (2d) 147 at paras 26-27.

⁴²[2016] CLAD No. 282. at para 53.

common law imposition of a need for progressive discipline before termination of employment.

Many courts have insisted that, except in the case of misconduct so serious that it precludes continuing the employment relationship, employees are entitled to progressive discipline in the form of a clear warning and a reasonable opportunity to mend their ways. An employer cannot treat matters of which it was previously aware, but which it never brought to the employee's attention, as cumulative cause for dismissal. Dismissal without prior warning is often found to be wrongful, even in the absence of a formal progressive discipline policy established by the employer

In this case, it was found that there was no progressive discipline and that the employer simply terminated the complainant's employment without any consultation with him.

[42] NITHA relies on four pieces of evidence to support its position that it justly dismissed Yang from her employment:

- a) the e-mail from Ndubuka to Yang dated December 1, 2017;
- b) the meeting on December 11, 2017, to address Yang's performance deficiencies and discuss recommendations for improvement;
- c) the five-month period from December 11, 2017, to May 4, 2018, in which Yang's performance did not improve; and
- d) the e-mail from Akinjobi to Yang dated May 4, 2018.

[43] The termination letter dated July 4, 2018, stated the reasons referred to above as the basis for Yang's termination.

[44] Yang submits that it would not be appropriate for NITHA to refer to any alleged deficiencies in Yang's work before August 1, 2017, which is the beginning of the four-month period referred to in Akinjobi's December 1, 2017, email. She specifically points to her performance evaluations dated June 19, 2015, and March 2, 2016, in which she received positive feedback regarding her performance. My decision in this matter will not turn on the fact that Yang had good performance reviews in 2015 and 2016, as her

performance deficiencies are well documented in the email exchanges from December 1, 2017, to May 4, 2018.

[45] Yang does not provide any case law or argument to persuade me that NITHA was condoning her performance prior to August 1, 2017. She simply suggests that because her performance evaluations were positive in 2015 and 2016, it is not possible that her performance could have declined by August 1, 2017.

[46] The difficulty with this argument is that the entire PHU staff testified that other employees were covering for Yang and doing some or all of her tasks in the early stages of her employment and during her periods of absence due to illness. This largely disposes of any weight to be given to the performance evaluations in 2015 and 2016. I find her performance evaluations were, in part, based on work done by other employees who were completing work that was her responsibility. This was therefore not a situation of good performance that declined. The PHU staff testified they found it increasingly difficult to work with and help Yang. They stopped covering for her. When that occurred, Yang's performance deficiencies became apparent, particularly from and after August 2017.

[47] Yang argues that NITHA's December 1, 2017, and May 4, 2018, emails should have contained warnings to caution her that she was being reprimanded and at an increased risk of suspension or termination. She argues neither email provided sufficient warning. In addition, she argues that "nothing in the letter would be sufficient to indicate that [risk of losing her job] to her." Yang testified that following the December 1, 2017, email and December 11, 2017, meeting, she had no idea that her job was in jeopardy.

[48] The Court in *Schutte* says that the fourth element of the essential warning that must be given to the employee has to say clearly that the employee will be dismissed if she fails to meet the appropriate standard of performance in the requisite time.

[49] The email from Ndubuka to Yang dated December 1, 2017, was the first formal

written notice of Yang's poor job performance. The email specifically pointed out areas upon which Yang needed to improve. In addition, it said that a meeting would take place with her, her supervisor and HR "to determine a way forward." The wording of this email shows a willingness by NITHA to help Yang as best as it could to facilitate better job performance within her role as Epidemiologist. However, the email itself does not specifically state that Yang could be dismissed if she failed to meet the appropriate standard of performance in a specified amount of time. The May 4, 2018, email said that the previously discussed problems with Yang's job performance had not improved and that Akinjobi would "have to move this conversation to a higher level."

[50] Despite Yang's assertion that the December 1, 2017, email did not give her sufficient warning that she was at risk of losing her job, her notes to the email seem to suggest the opposite. In her notes responding to Akinjobi's concerns with her lack of collaboration with team members, Yang states:

You told me that "still have to coordinate report development". But I never receive the feedback on time. Only receive the sentence which you want to fire me.⁴³

[51] Although the December 1, 2017, and May 4, 2018, emails failed specifically to state a written warning saying that she would be terminated if her performance did not improve, Yang clearly interpreted those emails as putting her employment in jeopardy. On December 11, 2017, after the meeting, Yang sent an email to Campbell in which she stated:

Thank you very much for this morning's meeting. From the meeting, I really learned a lot. I know what I should do and should not do. But I hope Grace can write down for me in case I forget in the future.

[52] The email sent by Yang signifies that she understood that there were components of her work that needed improvement. However, from December 11, 2017, to May 4, 2018, NITHA has pointed to thirty-three instances of errors contained

⁴³Exhibit C-1, p. 000002

in work prepared by Ms. Yang.⁴⁴ The errors that occurred during this five-month period were the types of errors that NITHA brought to Yang's attention in the December 1, 2017, email under the "data errors" issue.

[53] The December 1, 2017, email states that Yang's current performance level was not acceptable. This conveyed her performance was not at the level it should be for her to continue working for NITHA as an Epidemiologist. Nonetheless, NITHA gave Yang an opportunity to correct her performance issues and gave her support in doing so.

[54] I will discuss below whether these emails provided sufficient warning to Yang, or if a warning was even necessary.

[55] The Saskatchewan Court of Queen's Bench addressed the duty to warn in *Riehl v Westfair Foods Ltd.*⁴⁵:

The theoretical basis of the duty to warn where allegations of misconduct or incompetence are involved is succinctly set out by Christie et al. in *Employment Law in Canada*, at pp. 643-45, where the author quotes *Brown v. Sears Ltd.* (1988), 88 N.S.R. (2d) 426 (T.D.), at p. 430:

This theory [the "corrective" theory], universally applied by collective agreement arbitrators and statutory adjudicators, requires that the employer, prior to invoking dismissal, warn the employee of his/her faults and give the employee a reasonable chance to improve. Not only does the employee obtain the benefit of a second chance, but also the efficiency of the company increases because, assuming that the worker does improve, the company will have avoided the costs of recruiting and training a replacement. Today, most courts apply the "corrective" theory in determining whether or not there is "cause" for summary dismissal in exactly the same way as do arbitrators and adjudicators

There are numerous recent cases in which summary dismissal has been held to be without "cause" by reason of the employer having failed to warn the employee clearly and unequivocally that repeated acts of misconduct would result in discharge. No warning is expected, however, where extremely serious misconduct is involved.

⁴⁴Exhibit E-1, Tabs 210, 211, 213-216, 218, 220, 224 & 225; Exhibit E-2, Tabs 268, 270, 271, 279, 302, 304, 315, 318, 319, 352-357, 360, 361, 363, 364, 366-371, 373, 375, 377-381 & 383-385

⁴⁵[1995] 8 WWR 51, 132 Sask R 161, 56 ACWS (3d) 522 at para 33.

Where summary dismissal is for repeated instances of incompetent work performance, it has been held that the employer must show that

...

- (1) it has established reasonable objective standards of performance; (2) the employee has failed to meet those standards; (3) the employee has had warning that he has failed to meet those standards and that the employee's position with the employer will be in jeopardy if he continues to fail to meet those standards; and (4) that reasonable time was afforded to correct the situation.

[56] Based on the steps outlined in *Riehl*, NITHA must show that it established reasonable objective standards of performance. I find NITHA did establish reasonable objective standards of performance by giving Yang a formatting guide to help her in developing a standardized approach to the preparation and formatting of her reports. In addition, NITHA specifically listed the aspects of Yang's performance that required improvement. From the emails, she clearly knew what they were asking of her. There is evidence that Yang failed to meet those standards by consistently having errors in her reports.

[57] This leads me to the third component of the analysis. The evidence—such as the December 1, 2017, and May 4, 2018, emails—establishes Yang had sufficient warning she was failing to meet the performance standards. Though the emails do not specifically state that she could be terminated if her performance did not improve, they infer termination could occur—they stated that her performance was not acceptable and NITHA would move the conversation to a higher level. NITHA gave Yang five months from the date of the first email to correct her performance issues, but she did not improve her performance. There is also no evidence showing that Yang improved her performance in the two months after the May 4, 2018, email and until her termination.

[58] The analysis above also mirrors the test outlined in *Schutte*.

[59] The Court in *Mitran v Guarantee RV Centre Inc.*⁴⁶ discussed whether the lack

⁴⁶1999 ABQB 276, [1999] 12 WWR 635 at paras 93-96.

of warning vitiates the employer's dismissal of the employee for cause:

Citing *Edwards v. Irwin* (1993), 47 C.C.E.L. 138 (Ont. Gen. Div.), R.S. Echlin and M.L.O. Certosimo, in *Just Cause: The Law of Summary Dismissal in Canada* (Aurora: Canada Law Book, 1998) looseleaf - Jan. 1998, state the general principle regarding warnings as follows (p.144):

It would be somewhat imprecise to state that an employer invariably has a duty to warn an employee, as a precondition to summary dismissal. Whether an employee has been warned is not, in itself, determinative of the respective parties' rights; rather, a warning is one of the factors taken into account in determining whether an employer was justified in a dismissal.

In some cases, it is clearly necessary that the employer provide a warning to the employee of the possibility of dismissal if the employee's conduct does not improve. In *Bogden v. Purolator Courier Ltd.* (1996), 182 A.R. 216 (Alta. Q.B.) the court reviewed the law regarding the necessity of a warning where the cause for the dismissal is incompetence (p.227):

Here, to a large extent, the employer bases its dismissal of the plaintiff on the plaintiff's incompetence. In order to establish that an employee's incompetence is grounds for dismissal, an employer must show more than mere dissatisfaction with the employees work and it is not enough to show that the employee was careless or indifferent. To establish cause on the basis of incompetence the employer must show:

- 1) The level of job performance that it required and that the level required was communicated to the employee.
- 2) That it gave suitable instruction to the employee to enable him to meet the standard.
- 3) That the employee was incapable of meeting the standard.
- 4) That there had been a warning to the employee that failure to meet the standard would result in his dismissal (*Van Houwe v. Intercontinental Packers Ltd.* (1987), 59 Sask. R. 178 (Sask.Q.B.)).

Thus, it is clear that if a defendant relies on incompetence as the ground for dismissal, it will bear the onus of showing that clear warnings were given, as well as opportunities to redress the conduct which was the subject of the warnings.

Outside of the ground of incompetence, however, a warning may not be necessary. For instance, where dismissal is on the grounds of theft or fraud, no warning is necessary: *Saumer v. Genie Office Services Ltd.* (1991), 37 C.C.E.L. 276 (Alta. Q.B.); *Durand v. Quaker Oats Co. of Canada Ltd.*, supra.

[60] The Saskatchewan Court of Queen's Bench addressed the issue of warnings in

Parkinson v Kemh Holdings Ltd.:⁴⁷

As stated in *Duffett v. Squibb Canada Inc.* (1992), 95 Nfld. & P.E.I.R. 61, 39 C.C.E.L. 37 (Nfld. T.D.), at para. 25:

Warnings are sufficient where they refer to the areas of employer concern, and where, objectively, it could be implied that the employee's job is in jeopardy unless the employer's concerns are satisfied. There is no requirement that the warnings be in writing however it must be given in clear terms and the employee must understand and appreciate the significance of the warning.

The verbal and written warnings in this case satisfy this sufficiency test. As stated in *McKinley*, courts are to take a contextual approach to evaluation of cause. Here, the warnings and their surrounding circumstances all point to a finding that the plaintiff knew or ought to have known that if he did not modify his behaviour, his job was in jeopardy.

[61] In *Parkinson*, the complainant received a verbal warning and a written warning regarding his actions. The written warning specifically referenced the problems with the complainant's actions and stated that failure to refrain from the actions would result in dismissal. The complainant's argument was that he did not understand that the warning meant he could lose his job.

[62] It is clear from the wording of the emails sent to Yang that the performance concerns were so significant that her job was in jeopardy if her performance did not improve. In addition, Yang's response to these emails clearly showed that she knew that there were significant problems with her performance and she was at the risk of being fired. Using the reasoning in *Parkinson*, the warnings given to Yang, and their surrounding circumstances (the meeting and her responses), all point to a finding that Yang knew or ought to have known that if she did not improve her performance, her job was in jeopardy. It could be objectively inferred that Yang's job was in jeopardy unless her performance improved to the standard required by NITHA.

[63] Yang argues that, until the email on December 1, 2017, she had no way of knowing that her reports were of unacceptable quality and that she was in danger of losing her job. She also submits that NITHA could have given her proper notice and

⁴⁷2013 SKQB 172, 420 Sask. R. 156 at para 29.

support in fixing what they say was a problem with excessive errors in her work. I find that the performance concerns NITHA communicated to Yang in 2017 and 2018 provided sufficient notice to her of areas that she needed to improve upon. There is also evidence that NITHA was giving Yang the resources necessary for her to improve her performance.

[64] Yang argues that she is entitled to relief because NITHA purported to terminate her employment for just cause when the circumstances do not support such a course of action. NITHA argues that progressive discipline does not apply where the employee cannot or will not modify her behaviour.

[65] The Court in *Elgin Cartage Ltd. v McTavish*⁴⁸ stated the following:

Progressive discipline is generally intended as a method of correcting or changing employee behavior. In this case there is nothing to suggest that [the employee's] behavior was amenable to change by some lesser form of discipline, and thus the policy reason why an employer might use another lesser penalty as part of a system of progressive discipline does not apply."

[66] NITHA refers to six pieces of evidence that show Yang's behaviour was not amenable to change, thereby justifying the deviation from the doctrine of progressive discipline:

- a) Yang took little or no responsibility for her errors produced on reports from December 1, 2017, to May 4, 2018;
- b) Yang's inquiries relating to data analysis and reporting that fell within her job description showed that she failed to improve even with the assistance of other Public Health Unit employees;
- c) on July 5, 2015, NITHA assessed Yang during her probationary period as unsatisfactory for "deals effectively with external contacts"—NITHA states that

⁴⁸[1997] CLAD No 376 at page 10.

this part of Yang's duties as Epidemiologist never improved, even until May 4, 2018;

- d) NITHA tried to support and help Yang in professional development, statistical training and her job description tasks, which did not improve from August 1, 2017, to May 4, 2018;
- e) NITHA set out ways for Yang to improve her performance during the meeting on December 11, 2017–Yang said that she understood what she should do and should not do, but her performance did not improve from December 1, 2017, to May 4, 2018; and
- f) Yang's response to the second notice of declining performance (May 4, 2018, email) contained the same attitude of having little or no responsibility for her continued errors and substandard performance.

[67] Yang's responses to the criticisms of her performance show that she believed that there were not any issues with her performance. In fact, she seems to have an excuse for nearly every instance of an error in her work. She blames other employees and problems with Micro Strategy for the errors in her work. Her reluctance to take responsibility for her poor performance signifies that her performance was not amenable to change. I therefore accept NITHA's submission and find NITHA did not have to follow a system of progressive discipline in Yang's termination.

[68] The progressive discipline doctrine is also relevant in the discussion of the Regulations.

[69] In summary, NITHA communicated reasonable and objective standards of performance to Yang in a clear and understandable matter. The emails sent to her pointed out specific areas for her to improve. The meeting in December 2017 also focussed on her performance issues and gave her recommended ways to improve. From December 11, 2017, to May 4, 2018, there are thirty-three documented instances

of errors in her work that directly relate to the problems communicated to her in the emails and meetings. As such, Yang failed to meet the reasonable standards of performance.

[70] NITHA notified Yang she had been repeatedly failing to meet its performance standards despite NITHA's efforts and the length of time Yang had been provided to improve. The warning emails, analyzed in the context of Yang's response thereto, clearly show that she knew that her job with NITHA was in jeopardy.

[71] Yang's view was that it was not her fault her performance was unacceptable, but that other employees/managers were to blame. Yang had little to no responsibility for her continued errors. Therefore, progressive discipline does not have to be followed because it is proven that her behaviour was unamenable to change.

[72] The next step in the just cause analysis is a consideration of how the Regulations affected Yang's dismissal.

5.3.1.1 Do the Regulations have any effect on Yang's dismissal?

[73] Yang says that NITHA did not strictly follow the Regulations during the events leading up to and including her termination, and therefore NITHA could not dismiss her for just cause. To decide whether Yang was dismissed for just cause, I will address the implication, if any, of NITHA's argued departure from the Regulations.

[74] The relevant sections of the Regulations have been set out above.

[75] Yang argues that she did not know that she had a right to appeal the reprimands (as indicated in the Regulations) contained in the December 1, 2017, and May 4, 2018, emails. In addition, she submits that Akinjobi had already decided to terminate her employment by May 4, 2018, and, therefore, the second email on May 4, 2018, did not constitute a proper warning. At paragraph forty-four of her brief, Yang states:

If the point of a reprimand and warning is to give the employee proper notice of problems with her job performance and, more importantly, give the employee an opportunity to fix those problems, the second reprimand did not accomplish that.

[76] In *Bell Canada v Hallé*,⁴⁹ the management of Bell Canada had directives that were to give staff a procedure to be followed before dismissing a “management” employee who was exhibiting unsatisfactory performance. The adjudicator allowed the employee’s complaint on the sole ground that Bell Canada had dismissed her without precisely following the procedure prescribed by the company’s internal directives. The decision was appealed.

[77] After hearing the appeal, the Federal Court of Appeal stated the following, at paragraph ten, in terms of employer policy directives:

I would say that the respondent's dismissal, assuming it to be otherwise justified, cannot be regarded as unjust solely because the applicant did not follow the dismissal procedure described in its internal directives to the letter. . . . The applicant can therefore depart from it without giving rise to any objection, unless the departure causes an injustice.

. . .

The adjudicator should have considered whether the applicant had any basis for complaint about the respondent's performance and whether this provided grounds for dismissal. If the adjudicator had answered these questions in the affirmative, he should then have considered whether the procedure leading to dismissal of the employee was fair. However, his duty was then to make a judgment on whether the dismissal procedure used by the employer, taken by itself, was fair or unfair regardless of the procedure described in the directives; and if the adjudicator concluded that the procedure used in the case at Bar was unfair in itself, and that because of this the dismissal had been unfair, he should then in determining the compensation to which the respondent was entitled as a consequence of the dismissal have taken into account the fact that, though premature, the dismissal was not entirely groundless.

[78] Paragraph eleven of Yang’s written response argues NITHA’s failure to follow the exact terms of its Regulations caused an injustice to Yang. The response also argues “she did not know that she was under threat of termination following the December 2017 reprimand, because the letter contained no warning that she was in such jeopardy.”

⁴⁹[1989] FCJ No 555, 29 CCEL 213 at para 5.

[79] Yang's interpretation of *Hallé* is flawed. In *Hallé*, the FCA considered whether the procedure leading to the dismissal of the employee was fair, despite the procedure described in the directives. The response argues at paragraph eleven: "an injustice has been done to Yang because she was entitled to a degree of procedural fairness, but was not granted the opportunity to exercise it." NITHA's failure to follow the exact procedures outlined in the Regulations does automatically mean she suffered an injustice. The FCA explicitly states that fairness of the procedure leading to the dismissal of an employee can be assessed without strict regard to the policy manual. Therefore, it does not matter that they did not give Yang an opportunity to appeal the reprimands, because fairness of the process can be determined apart from the procedure in the Regulations.

[80] Following the guide in *Hallé*, I must first consider whether NITHA had any basis for complaint about Yang's performance and whether this provided grounds for dismissal. Based on the evidence, there were clearly various problems with Yang's performance. NITHA clearly addressed these performance issues in their December 1, 2017, and May 4, 2018, emails. Yang's performance concerns were also the purpose of the meeting held on December 11, 2017, with her, Akinjobi and Campbell. Based on the job description of the Epidemiologist, the deficiencies with Yang's work would have directly affected her ability to complete the Epidemiologist's duties successfully. Her inability to complete the work assigned to her at the level required by NITHA provides grounds for dismissal.

[81] The next step in the *Hallé* analysis is to consider whether the procedure leading to the dismissal of Yang was unfair to her. The analysis of the fairness of the procedure must be taken by itself, no matter the procedure outlined in the Regulations. The FCA in *Hallé*⁵⁰ also gave a useful comment respect to what constitutes an employer's right of just dismissal:

The employer still has a right of "just" dismissal, which undoubtedly means, as I have had occasion to observe, "dismissal based on an objective, real and substantial cause,

⁵⁰*Bell Canada v Hallé* at para 18.

independent of caprice, convenience or purely personal disputes, entailing action taken exclusively to ensure the effective operation of the business." In all cases of complaints by dismissed employees pursuant to s. 61.5, the adjudicator must ascertain whether the employer simply acted within the limits of his "right of just dismissal", and it is for the employer to persuade him of this.

[82] The evidence adduced by NITHA to support its assertion that Yang was dismissed for just cause were the December 1, 2017, and May 4, 2018, emails and the five months of unimproved performance that followed the December 11, 2017, meeting. The performance issues outlined in the emails show that the errors in the reports were negatively impacting the operation of NITHA. In some instances, Yang would complete and send reports to NITHA's Partners, only to receive an email from Yang shortly after advising of mistakes in her report. These types of performance deficiencies would make NITHA's reliability questionable in the eyes of NITHA's Partners, which is something that NITHA wanted to avoid.

[83] Yang suggested Akinjobi was discriminating against her because she did not have any problems before Akinjobi was hired. Yang refers to her requests for time off and Akinjobi's delayed responses to such requests. Yang also refers to times that flowers were purchased for other employees, but none were given to her when she was sick. The evidence surrounding the flowers is explained by the fact that Yang was not a part of the social club at that time, which is something she acknowledges. As for the delay with responding to time off requests, Akinjobi testified that she did not purposely delay her response to such, she simply replied to the requests when she had time to do so. Neither of these instances are sufficient to establish that Yang was terminated because of purely personal disputes.

[84] Yang also failed to represent NITHA at relevant provincial and First Nations epidemiologist working groups. As such, she did not establish contacts as she should have in her role as Epidemiologist. This failure is one of the many instances of her performance being below the acceptable level.

[85] Yang argues there were no issues with her performance before Akinjobi beginning employment with NITHA. She specifically refers to her second performance

evaluation in which NITHA assessed her performance as either meeting normal requirements or consistently exceeding requirements. She argues, at paragraph forty-nine of her brief, that NITHA could have given her proper notice and support in fixing what they called excessive errors. I find the emails, meetings, professional development opportunities, in house training on the use of Microsoft Excel and the Guideline for Formatting Reports were all instances of notice and support that NITHA provided to Yang, all trying to help her with becoming successful in her role as Epidemiologist. These efforts were largely to no avail, as there is no evidence showing that Yang's performance improved.

[86] Based on the evidence, the dismissal of Yang was based on objective, real and substantial cause communicated to her in two emails and at a meeting, with no improvement of performance. The assertions by Yang that NITHA failed to follow the procedures outlined in the Regulations, thereby causing an injustice, are not supported by the analysis included in *Hallé*.

[87] It is important to note that section 25.3 of the Regulations gives NITHA the authority to bypass steps in the disciplinary action procedure "depending on the severity of the performance discrepancy, time factor and circumstances in question." Yang suggests, at various points in written submissions, that NITHA did not strictly follow their own policy with respect to her termination.

[88] Any failure by NITHA to strictly follow the procedures outlined in the Regulations is not fatal to the decision that Yang was dismissed with cause. I find this for two reasons. First, *Hallé* states that an employer can depart from its policy directives unless the departure causes an injustice to the terminated employee. The analysis of whether an injustice was created is to be conducted by considering the actual procedure taken by the employer, despite the procedure outlined in the policy directive. If there was no injustice caused to the employee by the procedure that they followed, then the employer is justified in not following the precise procedure outlined in the directive. Second, NITHA can exercise its discretion in the steps to be taken in the termination of Yang's employment by virtue of section 25.3 of the Regulations.

[89] Another important consideration with respect to the Regulations is that section 25.9.3 lists what just cause includes. This list is not exhaustive, but more important, the list specifically states “or” before the last example of just cause. Yang makes submissions with respect to each ground in the termination letter, derived from Section 25.9.3 of the Regulations. She seems to suggest that in order for NITHA to prove successfully that they dismissed her for cause, NITHA must satisfy all five of the grounds referred to in the termination letter.

[90] It can be argued that NITHA does satisfy all five grounds for the following reasons. First, Yang received two or more written reprimands. These were in the form of emails and it is clear from Yang’s response to these emails, including the stress and anxiety that she felt, that she knew her job was in jeopardy. Second, Yang was unwilling to carry out work assigned by the employer or its delegate. There is evidence that she specifically refused to write reports on certain topics even though they were in her job description. Third, Yang displayed incompetence in the tasks that they asked of her. This is evidenced by the number of errors in her work and lack of understanding of statistical analysis. Fourth, Yang showed an inability to work cooperatively with other employees. This is evidenced by the testimony from her coworkers. Fifth, Yang showed an inability to carry out work of acceptable quality as defined and assigned by the employer or its delegate. Again, the errors in her work, her lack of collaboration with team members and her failure to establish contacts outside NITHA negatively affected the quality of work she was doing and therefore made her work unacceptable.

[91] However, even if NITHA did not establish, on a balance of probabilities, all five grounds referred to in the termination letter, Yang’s argument fails because of the wording of Section 25.9.3 of the Regulations. NITHA does not have to establish all of the matters listed in that section because of the word “or.” Any one of the grounds listed in that section would be sufficient, for the purpose of the Regulations, to establish just cause. NITHA exceeded the requirements of the Regulations by listing, and providing evidence to support, all grounds that applied to Yang’s performance.

[92] Based on the reasoning above and the FCA's analysis in *Hallé*, Yang's assertion that she was dismissed without cause because they did not give her an opportunity to appeal the reprimands has little weight. At best, the appeal process would have afforded Yang more time. However, in the absence of any evidence indicating that her performance improved from August 1, 2017, until her termination on July 4, 2018, appealing the reprimands would not have changed Yang's situation.

[93] As discussed in *Hallé*, the failure by the employer to follow its policy directives only matters if the procedure that was actually followed created an injustice to the employee. Yang was given adequate support and recommendations, along with a significant amount of time to improve her performance. Despite the support and time to improve, Yang did not take steps to improve her performance that ultimately led to her dismissal for cause on July 4, 2018. NITHA was justified in terminating Yang, even though the procedure used did not strictly comply with the procedure established in the Regulations.

5.3.2 IF NITHA DID NOT TERMINATE YANG'S EMPLOYMENT FOR JUST CAUSE, SHOULD IT REINSTATE HER TO HER FORMER EMPLOYMENT?

[94] In light of my findings above, it is not necessary for me to deal with this issue.

[95] It is worthy of note, however, the situations in which the denial of reinstatement would be desirable were stated in *Hummelle v. Montana Tribe*:⁵¹

1. The deterioration of personal relations between the complainant and management or other employees;
2. The disappearance of the relationship of trust which must exist in particular when the complainant is high up in the company hierarchy;
3. Contributory fault on the part of the complainant justifying the reduction of his dismissal to a lesser sanction;
4. An attitude on the part of the complainant leading to the belief that reinstatement

⁵¹[2005] C.L.A.D. No. 247 at para 119.

- would bring no improvement;
5. The complainant's physical inability to start work again immediately;
 6. The abolition of the post held by the complainant at the time of his dismissal;
 7. Other events subsequent to the dismissal making reinstatement impossible, such as bankruptcy or lay-offs.

[96] Based on the testimony from many of Yang's former coworkers in the PHU, it appears that the personal relations between her and everyone else have been deteriorating beyond repair. Similarly, the fact that Yang blamed much of her incompetence on others in the organization deteriorates the trust between her and other NITHA employees. The trust component is less of a factor because Yang is not significantly high up in NITHA's hierarchy.

[97] There was contributory fault on the part of Yang because she did not take responsibility for the issues with her performance. She insisted on blaming other employees for her poor performance. She also did not improve in her performance, despite NITHA's efforts to help her. Yang's attitude in this regard shows that, if I reinstated her, the same sorts of problems would exist and she would not take the appropriate steps to improve her performance.

[98] From the evidence, it appears that Yang could start working again immediately. The position still exists and though it is currently filled, Yang could continue with the same position that she held before. There are not any other events, such as bankruptcy or layoffs, that would make reinstatement impossible.

[99] Taking to account the factors discussed above, had I not found NITHA was justified in terminating Yang, I would have found that reinstating Yang would not be appropriate because there were significant issues with her performance that she has shown she is not willing to improve.

5.3.3 IF YANG SHOULD NOT BE REINSTATED, WHAT IS THE APPROPRIATE AMOUNT OF COMPENSATION THAT SHE SHOULD RECEIVE?

[100] In light of my findings above, it is not necessary for me to deal with this issue.

[101] It is worthy of note, however, had I not found NITHA was justified in terminating Yang, she would have been entitled to an award of compensation.

5.3.4 DID YANG APPROPRIATELY MITIGATE HER LOSSES?

[102] In light of my findings above, it is not necessary for me to deal with this issue.

[103] It is worthy of note, however, that, as stated in *Red Deer College v. Michaels*,⁵² NITHA had the onus of proving Yang has not done whatever is reasonable, or in her power, to avoid the loss. It appears that NITHA simply called into question the amount of interviews that Yang took part in. However, NITHA did not lead any evidence, as Yang suggests, in relation to the number of positions she could have applied for, but did not.

[104] Yang provided evidence showing that she was applying to jobs across Canada, was invited for some interviews, but did not receive any offers. The burden of proving that Yang did not appropriately mitigate her losses is on NITHA. Had I not found NITHA was justified in terminating Yang, I would have found there was not enough evidence to prove that she did not mitigate.

Dated at Saskatoon, Saskatchewan, on December 16, 2019.



T. F. (TED)KOSKIE, B.Sc., J.D.,
ADJUDICATOR

⁵²[1976] 2 SCR 324.