File No. YM2707-11464

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
March 15, 2024

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. BACKGROUND

[1] Jianti Yang ("Yang") lodged a complaint[1] (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.

[5] After hearing the matter, I rendered a decision on December 19, 2019, that:

a) found NITHA justly dismissed Yang;
b) dismissed the Complaint; and
c) ordered Yang to pay NITHA costs fixed at $4,500.00.

[6] Yang brought an application to the Federal Court of Canada ("FCC") seeking judicial review of my decision.

[7] On August 18, 2021, the FCC rendered a judgment[2] that held:

a) Yang's application for judicial review be allowed with costs;

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

[2] *Yang* v *Northern Inter-Tribal Health Authority*, 2021 FC 850, 336 A.C.W.S. (3d) 88.

b) my decision, including the costs award against Yang, be set aside; and

c) if Yang and NITHA are unable to agree, then the FCC will remain seized of the matter in order to determine the remedy.

[8] NITHA appealed the FCC judgment to the Federal Court of Appeal ("FCA").

[9] On March 6, 2023, the FCA allowed the appeal, in part,[3] and remitted the Complaint to me for redetermination of the issue of whether Yang's dismissal was justified. As there was no challenge to the balance of my award, the FCA left my remaining findings intact.

[10] I would be remiss if I did not point out that the FCA stated that its reasons should not be read as endorsing my award of costs to NITHA. As the point was not raised by the parties, the FCA made no finding in respect of it. However, the FCA did note, in *obiter*, that my authority is circumscribed and premised on a finding of unjust dismissal. It observed a large majority of adjudicators have declined to award costs to successful employers.

2. APPEAL DECISION

[11] Within my decision of December 19, 2019, I said:

> [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.

[3] *Northern Inter-Tribal Health Authority Inc.* v *Yang*, 2022 FCA 47

The FCA found this to be incorrect. The parties agreed before the FCA that this note was not made by Yang "shortly following a meeting held in December 11, 2017, during which her manager outlined various performance failures to Ms. Yang." Rather, "[t]he parties agree that the evidence before the adjudicator showed that Ms. Yang indicated in writing that she appreciated her employment was in jeopardy in an email she sent to NITHA's human resources manager after receiving an email from her manager in May of 2018 in which her performance deficiencies were further outlined."

[12] The FCA held:

> [62] In the instant case, the adjudicator held that NITHA was required to provide Ms. Yang with a warning that her employment could be in jeopardy if her performance did not improve. The requirement to so warn Ms. Yang was not in issue before the adjudicator and is not in issue before this Court; similarly, it was not in dispute before the Federal Court.
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> [63] It is certainly easiest for an employer to prove that an adequate warning has been given if it is done in writing. However, the absence of a written warning is not fatal if the employer can otherwise establish that a sufficient warning was given . . . .
>
> [64] Where no written warning is given, a key fact in making a determination regarding the adequacy of a warning would be the presence of contemporaneous evidence from the employee demonstrating that they appreciated that their employment was in jeopardy.
>
> [65] The written statement made by Ms. Yang is of such nature and was a critical part of the adjudicator's reasoning as to the sufficiency of the warning given to Ms. Yang. The mistake as to the date the written statement was authored is central to the soundness of the adjudicator's conclusion because Ms. Yang may not have been warned until shortly before her employment was terminated. If that were the case, she might well have been afforded much less time to improve her performance than the adjudicator thought she had been given, which, in turn, might well impact the conclusion as to the presence of just cause for the dismissal.
>
> [66] Without a transcript, this Court has no way of knowing what may have been communicated verbally to Ms. Yang about her employment jeopardy before she wrote the statement to NITHA's human resources manager. Nor can we appreciate what Ms. Yang understood or should have understood about her job jeopardy merely from the text of the two emails sent to her. These emails have to be read and understood in their context, which is something this Court cannot do.
>
> [67] Thus, contrary to what NITHA asserts, I cannot conclude that the two emails sent to . . . [Yang] provided a sufficiently implicit warning to Ms. Yang. Without the context of the witness' testimony, it is impossible to conclude that these emails were sufficiently clear so that Ms. Yang must be taken to have understood the seriousness of the situation and that her employment was in jeopardy.

> [68] On the other hand, I cannot conclude that insufficient warning was given to Ms. Yang, as she would have me conclude. The two emails have to be understood in the context of the testimony given, and it is impossible for a reviewing court to make that assessment. Coupled with other events and things said to Ms. Yang, it is possible that the emails might have been sufficiently explicit to have brought home the seriousness of the situation to her such that she should have appreciated her employment was in jeopardy. However, without knowledge of the testimony, it is impossible for this Court or the Federal Court to determine whether such a conclusion should be made.
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> [69] Because the date Ms. Yang's statement was written was a critical step in the adjudicator's reasoning, it follows that his decision is unreasonable and must be set aside.
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> ...
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> [71] In the instant case, the adjudicator's conclusion, as noted, was not based on the evidence before him because a key part of his chain of reasoning was wrong. I therefore agree with the Federal Court that the error as to the date Ms. Yang made the key written statement renders the adjudicator's award unreasonable.

3. FACTS

[13] When the redetermination hearing convened, I gave the parties the opportunity to call witnesses and tender such further evidence as they considered to be relevant and probative. They both declined to do so. Rather, they chose to rely on the evidence already tendered in the first hearing.

[14] I therefore intend to rely on facts as set out in my award, except as corrected by FCA and as further stated herein. So as to provide context to same, I will reference the FCA's summary of the "relevant factual background" found from my decision and interject my supplemental findings.

[15] At paragraph nine (9), the FCA said:

> NITHA is a federally funded 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. It provides third-level health services to its partners, who, in turn, provide health services to 33 First Nations communities in Saskatchewan. The third-level health services provided by NITHA include health promotion and monitoring; communicable disease prevention and management; immunization; and advisory support.

[16] The thirty-three (33) First Nation communities provide services to approximately fifty-five thousand (55,000) individuals.

[17] At paragraph ten (10), the FCA said:

> Ms. Yang is an epidemiologist, originally from China, who received her medical training in that country. She came to Canada as an international student in 1996 and obtained a bachelor's degree in statistics and a graduate degree in public health. She was hired by NITHA in December 2014 for the position of epidemiologist. Her responsibilities included preparation of various reports, selection of health indicators for reporting as part of NITHA's public health team and at the provincial level, and conduct of epidemiological monitoring.

Yang commenced employment on January 5, 2015. The evidence clearly established that NITHA considered the position of epidemiologist as a cornerstone to its services. By providing critical information and scientific insight and guidance, the role was essential to its public health programs, policies and initiatives that help protect the health of approximately fifty-five thousand (55,000) individuals. All components needed to regularly work with and rely upon this person.

[18] At paragraph eleven (11), the FCA said:

> Ms. Yang initially received two satisfactory performance appraisals–one shortly following the end of her probationary period in June 2015 and the other in March 2016. However, the adjudicator found that, unbeknownst to her managers, Ms. Yang was not completing all the tasks required of her and was receiving substantial assistance from co-workers.

A significant number of NITHA's key staff–Carrie Gardipy, the Public Health Nurse, James Piad, the Communicable Disease Control Nurse, Deanna Brown, the Program Administrative Assistant, Tosin Adebayo, the HIV Project Co-ordinator, and Treena Cottingham, the Environmental Health Advisor–testified about their frequent interactions with Yang that cumulatively covered her entire period of employment. They were *ad idem* that:

a) Yang was not meeting their needs and expectations;

b) they genuinely wanted to work with and assist Yang and, hence, covered for her and did some or all of her tasks in the early stages of her employment;

c) when their help did not bring about change and improvement, they stopped covering for her.

It was clear these key employees did not see an improvement throughout the course of Yang's employment that engendered a confidence in her ability to fulfil her responsibilities.

[19] This largely disposes of any weight to be given to the performance evaluations in 2015 and 2016. Because of these interactions, I am satisfied Yang either knew or ought to have known that at least her colleagues were of the view her performance was substandard. Had Yang's superiors been aware of her actual level of performance, I am satisfied the 2015 and 2016 evaluations would have been considerably different.

[20] At paragraph twelve (12), the FCA said:

> By late 2017, NITHA developed concerns regarding Ms. Yang's performance and competence. These included problems with the accuracy and completeness of her reports and her inability or, conversely, possible unwillingness to take on tasks required of her. NITHA provided additional training to Ms. Yang in an attempt to assist her in improving her performance.

As previously stated, 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.

[21] At paragraph thirteen (13), the FCA said:

> In December 2017, Ms. Yang's manager sent her a detailed email, summarizing his concerns with Ms. Yang's performance. Shortly thereafter, a meeting was held between Ms. Yang, her manager and NITHA's human resources manager, during which the concerns were further discussed. Following the conclusion of this meeting, Ms. Yang sent NITHA's human resources manager an email in which she stated that she then

appreciated what was expected of her.

[22] In his e-mail of December 1, 2017, NITHA's Medical Health Officer, Dr. Nnamdi Ndubukah ("Ndubuka") advised Yang of several significant concerns with her current work. He advised that program leads within the Public Health Unit had lost faith in Yang's ability to support them in their work, and that most of them had encountered errors within Yang's work. He advised further that issues with Yang's work prevented the timely publication of documents, and that Yang had sent incorrect data to entities external to NITHA. Ndubuka testified that his concerns were not just conveyed by e-mail. In fact the e-mail summarized what was a more expansive in-person meeting he had with Yang.

[23] Ndubuka's discussion with and e-mail to Yang were a clear indication to Yang that her current levels of performance were unacceptable. NITHA had created various opportunities for Yang to bring her performance up to the standard that was required of her by NITHA, through access to various training programs and the provision of documentation for Yang to reference in assembling work products. Documentation provided at the initial hearing indicates that in the month of December 2017, there were several communications between NITHA and Yang wherein NITHA indicated to Yang that her performance was unacceptable and wherein Yang acknowledged that she had room for improvement–"I really learned a lot. I know what I should do and should not do", as stated in Yang's email to NITHA's Executive Director and former Human Resources Manger, Tara Campbell ("Campbell") on December 11, 2017. As stated, in addition to telling Yang where she was falling behind the expected standard, NITHA also provided her with resources to assist her in addressing the concern with her performance.

[24] At paragraph fourteen (14) and sixteen (16), the FCA said:

> Dissatisfaction with Ms. Yang's performance continued. In May 2018, Ms. Yang's new manager sent her a second detailed email in which the ongoing performance issues were set out. These included lack of collaboration with team members, data errors, and mistakes in graphs produced by Ms. Yang. The email noted that, despite the prior

> meetings and training, Ms. Yang's performance had not improved and stated that, in view of this, her manager was required "to move [the] conversation to a higher level".
>
> . . .
>
> Following receipt of her second manager's detailed email, Ms. Yang sent the appellant's human resources manager an email in which she expressed dissatisfaction with her manager. She wrote: "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."

[25] NITHA's Public Health Unit Manager, Grace Akinjobi ("Akinjobi"), sent an email to Yang on May 4, 2018, indicating that her performance had not improved between December 2017 and the present time, and that there was no indication that Yang had taken any serious steps towards making improvements. Yang sent an email the next day to Campbell with a clear indication that she understood the potential consequences, stating that she did not "receive feedback on time" and instead she was only told that there was a desire to fire her.

[26] In addition to the discussions that took place in December 2017 and the email from Akinjobi to Yang in May 2018, evidence was tendered that there had been various meetings with Yang between December 2017 and May 2018 with the same theme of Yang's unacceptable performance and ways to improve. The exact words exchanged during these meetings are not in evidence, however the evidence persuaded me that it had been reinforced to Yang that her performance was, and continued to be, unacceptable. No later than May 5, 2018, Yang acknowledged that her continued employment with NITHA was in peril.

[27] At paragraph seventeen (17), the FCA said:

> NITHA terminated Ms. Yang's employment in July 2018. In the termination letter, NITHA gave five reasons for the termination: (1) the accumulation of two or more written reprimands (which under NITHA's internal Personnel Management Regulations was stated to constitute cause for termination); (2) unwillingness or inability to carry out work assigned; (3) incompetence; (4) unwillingness to work cooperatively with other employees; and (5) inability to carry out work of acceptable quality as defined and assigned by NITHA or its delegate.

[28] On July 4, 2018, NITHA gave Yang the termination letter.

4. DISPUTE

[29] The issues herein are as follows:

a) Did NITHA unjustly dismiss Yang?

b) If NITHA did not terminate Yang's employment for just cause, what is the appropriate amount of compensation that she should receive?

5. DECISION

[30] I find NITHA justly dismissed Yang.

[31] I dismiss the Complaint.

[32] I order neither party shall pay costs to the other.

6. REASONS

6.1 DID NITHA UNJUSTLY DISMISS YANG?

[33] On Appeal, the FCA said:

> 23. Before the Federal Court and this Court, the parties did not and do not challenge the adjudicator's findings that: (1) NITHA had set reasonable objective standards of performance for Ms. Yang in a clear and understandable manner; (2) Ms. Yang had failed to meet those standards; (3) there was no challenge to the adequacy of the training provided to Ms. Yang; and (4) NITHA had clearly told Ms. Yang that she failed to meet the requisite standard and had provided her particulars of the specific deficiencies that needed to be remedied.
>
> 24. Where they part company is . . . whether NITHA provided Ms. Yang a sufficiently clear warning to indicate to her that she would be dismissed if she failed to

meet the requisite standard within a reasonable time.

. . .

[62] In the instant case, the adjudicator held that NITHA was required to provide Ms. Yang with a warning that her employment could be in jeopardy if her performance did not improve. The requirement to so warn Ms. Yang was not in issue before the adjudicator and is not in issue before this Court; similarly, it was not in dispute before the Federal Court.

[63] It is certainly easiest for an employer to prove that an adequate warning has been given if it is done in writing. However, the absence of a written warning is not fatal if the employer can otherwise establish that a sufficient warning was given . . . .

[64] Where no written warning is given, a key fact in making a determination regarding the adequacy of a warning would be the presence of contemporaneous evidence from the employee demonstrating that they appreciated that their employment was in jeopardy.

[65] The written statement made by Ms. Yang is of such nature and was a critical part of the adjudicator's reasoning as to the sufficiency of the warning given to Ms. Yang. The mistake as to the date the written statement was authored is central to the soundness of the adjudicator's conclusion because Ms. Yang may not have been warned until shortly before her employment was terminated. If that were the case, she might well have been afforded much less time to improve her performance than the adjudicator thought she had been given, which, in turn, might well impact the conclusion as to the presence of just cause for the dismissal.

[66] Without a transcript, this Court has no way of knowing what may have been communicated verbally to Ms. Yang about her employment jeopardy before she wrote the statement to NITHA's human resources manager. Nor can we appreciate what Ms. Yang understood or should have understood about her job jeopardy merely from the text of the two emails sent to her. These emails have to be read and understood in their context, which is something this Court cannot do.

[67] Thus, contrary to what NITHA asserts, I cannot conclude that the two emails sent to the respondent provided a sufficiently implicit warning to Ms. Yang. Without the context of the witness' testimony, it is impossible to conclude that these emails were sufficiently clear so that Ms. Yang must be taken to have understood the seriousness of the situation and that her employment was in jeopardy.

[68] On the other hand, I cannot conclude that insufficient warning was given to Ms. Yang, as she would have me conclude. The two emails have to be understood in the context of the testimony given, and it is impossible for a reviewing court to make that assessment. Coupled with other events and things said to Ms. Yang, it is possible that the emails might have been sufficiently explicit to have brought home the seriousness of the situation to her such that she should have appreciated her employment was in jeopardy. However, without knowledge of the testimony, it is impossible for this Court or the Federal Court to determine whether such a conclusion should be made.

[34] Yang was aware that her responsibilities included, in part, the collection and interpretation of health data in collaboration with other staff in the Public Health Unit. Yang was aware that the results of her work were distributed to and used by

organizations and professionals that worked with NITHA and the communities and their staff within the scope of NITHA's work, being thirty-three (33) First Nations representing approximately 55,000 people.

[35] At paragraph 59 of the decision of the FCA, a portion of *Canadian Labour Arbitration*, being §7:36, is quoted. The entirety of the quoted section is reproduced below:

> Employees who are able, but for some reason unwilling, to meet the requirements of a job may be disciplined by their employers. Not doing enough, or performing badly, impose unjustifiable costs on an employer. As in any discipline case, the employer must prove some culpable behaviour on the part of the employee. Where for example, an employer's property was damaged accidentally, and there was no evidence to support a finding of lack of care, it would not be proper to impose any discipline. Similarly, before an employer can discipline employees who make mistakes or work at a slower pace than their co-workers, the employer must set a standard that is both clear and reasonable, must communicate it to staff, must provide whatever supervision and training is necessary to perform at an acceptable level, and must warn those who are failing to measure up.
>
> Generally, arbitrators have taken the view that in order to satisfy the burden of proof, an employer does not have to show the same standard of misconduct that is embraced in the common law concept of negligence. Employees who suffer a number of accidents, for example, can be disciplined for accident-proneness. Where an employer can prove that some damage or disruption occurred within the grievor's area of responsibility, the onus may shift to the employee to explain the circumstances. Professional and public employees are typically held to an even higher standard of care.
>
> The severity of the discipline that may be imposed on the employees who under-perform depends on how far they fall short of the requirements of the job, and on the seriousness of the consequences. The extent of volition in the employee's performance is also an important consideration. Reckless and negligent behaviour is treated as more culpable than errors of judgment and acts of inadvertence. Intentional failure to conform to the requirements of a job is considered most serious of all. Minor momentary lapses and isolated deficiencies typically warrant the mildest of penalties. Some mistakes and misadventures may not merit any discipline at all.
>
> Heavier sanctions can be imposed when there is a pattern or history of poor work and/or when issues of safety are at stake. Other factors that arbitrators look in determining what level of punishment corresponds to a particular situation include: the period of time the employee was in the job; the extent to which other persons were responsible for the damage or shortfall; and whether the employer had tolerated the way the work was done. Attempting to conceal or cover up culpable behaviour is considered especially serious and may support a finding that a relationship of trust cannot be restored.
>
> The most difficult cases are those in which the consequences of relatively minor acts of misconduct are extremely serious, such as when there is loss of life. As a general principle, arbitrators have expressed the opinion that before an employer decides to terminate someone for not doing their job properly, they must establish that the employee is unlikely to respond to some lesser sanction such as a suspension or a

transfer or demotion to another position.

[Footnotes omitted, as in decision of the FCA]

[36] Several principles can be drawn from the above-quoted text. First, it is appropriate to hold professional and public employees to a higher standard of care. Second, the severity of discipline may depend on both how far an employee falls from the requirements of the job and on the seriousness of the consequences. Third, heavier sanctions may be imposed in such a situation where there are issues of safety.

[37] In the final paragraph of the quoted text, authors Brown & Beatty state that especially difficult cases are those where relatively minor acts of misconduct have extremely serious consequences.

[38] In application to the present matter, there are several facts to acknowledge. Yang was the sole epidemiologist at NITHA. Her work at NITHA was important for the organization, and it was important for the communities relying on material and programs from NITHA. Important health care decisions were made based on Yang's work. Responses to ongoing health events were informed in part by the work that was being done by Yang.

[39] From an outside perspective, Yang appears to be a highly qualified individual, with an extensive education in both China and Canada. She had previous work as an epidemiologist. The standard and expectations were high not just because of Yang's background and experience, but because they had to be, given the extensive reliance on NITHA from its affiliated organizations and the affected communities.

[40] A failure on Yang's part could have potentially serious consequences. This was clearly communicated to Yang in the email to her from Ndubuka of December 1, 2017, wherein he stated that "we continue to maintain high professional standards in the way we do business as a 3rd level organization." The communications between Yang and Ndubuka and other members of NITHA during December of 2017 indicate that Yang

took seriously the issues that were being raised, and though she tried to deflect the blame for problems that others had with her work, it is evident that she knew the repercussions.

[41] Ultimately, the capacity of NITHA to accept substandard work from its epidemiologist was limited. When other staff members refused to further cover for deficiencies resulting from Yang's work, and it became apparent that her work was not meeting requirements, NITHA took action to address the concerns. One of the first steps was to discuss with Yang the need for improvements. This produced no change.

[42] It is apparent that NITHA's work is relied upon in making significant health decisions. NITHA does not have the luxury of tolerating an ineffective employee where that employee is responsible for producing information that is used to make health decisions for tens of thousands of people. When it became apparent that Yang was incapable of producing the quality of work that was required of NITHA and its reliant entities, the only path forward was to end her employment with the organization.

[43] When the events from December 2017 and May 2018 are considered, it can be concluded that Yang understood that her position was in jeopardy. It is further concluded, based on the ongoing conversation between Yang and others at NITHA during this time, that while the potential termination of Yang's employment was only explicitly acknowledged on May 5, 2018, this was a realization that could have been anticipated by a reasonable person in Yang's position. Yang had been warned of her performance on several occasions during these months, and had made no improvements. I find that, under the circumstances, if Yang did not know her position was in jeopardy from as early as December 2017, she ought to have known.

[44] Even as the issue was presented to Yang in December 2017, with the statement from Ndubuka to Yang that her "current performance level is not acceptable and is a great concern," there was no ambiguity that Yang had to improve her performance in order to maintain her position. The plain language meaning of a "performance level that

is not acceptable" is that the work being done by Yang had to improve in order for performance to reach an acceptable level, and for her employment with NITHA to continue.

[45] It is also apparent that NITHA was satisfied that no further actions taken against Yang would have any influence over her performance. Yang had been given a period of five months, between December 2017 and May 2018, during which to make the required changes to bring her performance up to the required standard, but she had failed to make any improvements. The further warning in May 2018 had also produced no improvements, and NITHA was satisfied that Yang was not capable of making the changes necessary to satisfy the required standard of NITHA, as reflected in the termination letter of July 4, 2018.

[46] I therefore find NITHA had just cause to terminate Yang's employment.

6.2 IF NITHA DID NOT TERMINATE YANG'S EMPLOYMENT FOR JUST CAUSE, WHAT IS THE APPROPRIATE AMOUNT OF COMPENSATION THAT SHE SHOULD RECEIVE?

[47] In light of my findings above, I need not deal with this issue.

Dated at Saskatoon, Saskatchewan, on March 15, 2024.

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