

Federal Court



Cour fédérale

**Date: 20210818**

**Docket: T-78-20**

**Citation: 2021 FC 850**

**Ottawa, Ontario, August 18, 2021**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**JIANTI YANG**

**Applicant**

**and**

**NORTHERN INTER-TRIBAL HEALTH  
AUTHORITY**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Jianti Yang seeks judicial review of a decision made by T.F. (Ted) Koskie, appointed as an adjudicator [Adjudicator] pursuant to s 242 of the *Canada Labour Code*, RSC 1985, c L-2 [Code]. The Adjudicator dismissed Ms. Yang's complaint of wrongful dismissal.

[2] The Adjudicator reasonably found that Ms. Yang's employer had communicated its expectations and concerns about her performance, and had provided her with guidance and training to assist her in meeting the requirements of her job. However, the Adjudicator's inference that Ms. Yang understood her job to be in jeopardy was not supported by the evidence, and was premised on a significant factual error. The Adjudicator's decision was therefore unreasonable.

[3] The application for judicial review is allowed and the decision of the Adjudicator is set aside. The parties are in a better position than this Court to formulate an appropriate remedy. If the parties are unable to agree, then the Court will remain seized of the matter in order to determine the remedy.

## II. Background

[4] Ms. Yang was employed by the Northern Inter-Tribunal Health Authority [NITHA] from January 5, 2015 until her termination on July 4, 2018. The NITHA is a federally-funded organization that provides "third level" health support services to its partners, the Prince Albert Grand Council, the Meadow Lake Tribal Council, the Peter Ballantyne Cree Nation and the Lac La Ronge Indian Band. The partners provide "second level" services to 33 First Nation communities, which provide "first level" services to approximately 55,000 individuals.

[5] The NITHA is composed of two units: a community service unit and a public health unit [PHU]. Ms. Yang was employed as an epidemiologist in the PHU. At the time she commenced

her employment, Ms. Yang's supervisor was Dr. Nnamdi Ndbuka, the Medical Health Officer. In 2016, Ms. Grace Akinjobi, the PHU Manager, became her supervisor.

[6] A performance evaluation completed by Dr. Ndbuka on June 19, 2015 was generally positive, noting Ms. Yang's collaboration with other members of the PHU, her confidence in compiling reports, and her proficiency with statistical software and analysis. However, the evaluation also noted that Ms. Yang was experiencing challenges with verbal communication that adversely affected her ability to engage with the agency's partners. Dr. Ndbuka recommended that Ms. Yang's probationary period be extended.

[7] A subsequent performance evaluation completed by Dr. Ndbuka on March 2, 2016 was brief, but indicated that Ms. Yang was meeting job requirements and often exceeded them.

[8] On December 1, 2017, Dr. Ndbuka sent an e-mail message to Ms. Yang in which she noted a significant decline in Ms. Yang's work performance over the preceding four months. Dr. Ndbuka specifically mentioned concerns regarding data errors in Ms. Yang's reports, despite the fact that Ms. Yang had been given detailed instructions and opportunities for further training. Dr. Ndbuka stated that Ms. Yang's level of performance was "unacceptable", and indicated that she would be invited to a meeting to discuss the concerns with her supervisor and Human Resources [HR].

[9] Ms. Yang responded to the e-mail message the same day. She addressed some of the criticisms of her work, and indicated that she would provide further explanation at the upcoming

meeting. On December 3, 2017, Ms. Yang sent an e-mail message to the NITHA's Manager of HR, Ms. Tara Campbell, in which she indicated that she was upset by what she perceived to be unwarranted criticism of her work.

[10] On December 11, 2017, Ms. Yang met with Ms. Akinjobi and Ms. Campbell. Following the meeting, Ms. Yang sent Ms. Campbell an e-mail message in which she said that she had learned a lot about what she should and should not do.

[11] On December 13, 2017, Ms. Akinjobi sent an e-mail message to Ms. Yang summarizing their recent discussion. Ms. Akinjobi reiterated her concerns regarding Ms. Yang's performance, and asked her to identify what she could do to improve the quality of her work and what the NITHA could do to help. Ms. Akinjobi also gave Ms. Yang recommendations on how to improve her performance.

[12] On May 4, 2018, Ms. Akinjobi sent another e-mail message to Ms. Yang in which she noted that her performance had not improved despite further training. Ms. Akinjobi also noted that Ms. Yang had not responded to the request that she identify what she could do to improve her performance. Ms. Akinjobi concluded the message as follows: "in view of the above, I will have to move this conversation to a higher level".

[13] The next day, Ms. Yang sent an e-mail message to Ms. Campbell in which she said the following: "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".

[14] The NITHA terminated Ms. Yang's employment by letter dated July 4, 2018. The letter informed Ms. Yang that she was terminated for just cause, including: an accumulation of two or more reprimands; unwillingness or inability to complete assigned work; incompetence; unwillingness to cooperate with co-workers; and inability to do work of acceptable quality as defined by the employer. Ms. Yang's termination was effective immediately. The NITHA paid Ms. Yang the equivalent of six weeks' pay and accumulated leave and benefits.

[15] Ms. Yang submitted a complaint of unjust dismissal to Employment and Social Development Canada. The Adjudicator heard the complaint from March 25 to 29, 2019, and issued his decision on December 16, 2019.

### III. Decision under Review

[16] The Adjudicator considered two questions: whether Ms. Yang was unjustly dismissed, and whether the NITHA was required to follow its own Personnel Management Regulations [Regulations] with respect to reprimands and termination.

[17] The Adjudicator cited *Radio CJVR Ltd v Schutte*, 2009 SKCA 92 for the proposition that each case is to be decided on its own facts, and the onus falls on the employer to prove that the employee's conduct was sufficiently serious to justify dismissal. The Adjudicator noted that, in order to demonstrate just cause based on incompetence, the employer must demonstrate that it: (a) communicated the standard of competence required for the role to the employee, (b) gave

suitable instruction and supervision to enable the employee to meet the standard, and (c) warned the employee that failure to meet the standard would result in dismissal.

[18] The Adjudicator was satisfied that the e-mail messages of December 1, 2017 and May 4, 2018 demonstrated the NITHA had informed Ms. Yang of what was required to perform her role, and that she needed to improve her performance. The Adjudicator also found that the e-mail messages of December 1, 2017 and May 4, 2018 constituted sufficient warning that Ms. Yang's employment was in jeopardy. According to the Adjudicator, even though the e-mail messages did not explicitly state that Ms. Yang could be terminated if her performance did not improve, this was implicit and could be objectively inferred from the messages and Ms. Yang's responses.

[19] Based on the five month period between December 2017 and May 2018 when Ms. Yang's performance did not improve, and her refusal to accept responsibility for her poor performance, the Adjudicator concluded that Ms. Yang's behaviour was not amenable to change. The NITHA was therefore not required to follow a system of progressive discipline.

[20] The Adjudicator cited *Bell Canada v Hallé*, [1989] FCJ No 555 (FCA) for the proposition that an employer need not follow its own disciplinary and dismissal policies, so long as the procedure actually undertaken does not cause injustice. The Adjudicator noted that s 25.3 of the Regulations specifies that certain steps in the disciplinary process may be bypassed, depending on the circumstances. The Adjudicator concluded that internal appeals would only have afforded Ms. Yang more time, given the absence of any improvement in her performance.

[21] The Adjudicator therefore held that Ms. Yang's dismissal was justified. The Adjudicator also remarked that, if he had found Ms. Yang's dismissal to be unjust, reinstatement would not be appropriate given the significant performance issues and the deterioration of her relationship with her employer and co-workers. Finally, the Adjudicator held that there was insufficient evidence to demonstrate she had failed to mitigate her losses.

[22] The Adjudicator awarded \$4,500 in costs, payable by Ms. Yang to the NITHA.

#### IV. Issue

[23] The sole issue raised in this application for judicial review is whether the Adjudicator's decision was reasonable.

#### V. Analysis

[24] Pursuant to the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the presumptive standard of review is reasonableness. Recent cases concerning decisions of adjudicators made pursuant to s 242 of the *Code* have confirmed that the presumption is not rebutted in this context (*Vallières v Royal Bank of Canada*, 2020 FC 957 at para 10 [*Vallières*]; *Sky Regional Airlines Inc v Trigonakis*, 2021 FC 513 at para 49).

[25] A court reviewing a decision against the standard of reasonableness will intervene only if “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100). These criteria are met if the reasons allow the court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[26] When considering complaints of unjust dismissal, adjudicators should undertake a contextual analysis, rather than adopt a categorical approach based on rigid rules (*Vallières* at para 13). The contextual analysis requires an adjudicator to consider the nature of the alleged misconduct, its seriousness, and its impact on the employment relationship (*McKinley v BC Tel*, 2001 SCC 38 at paras 56-57).

[27] An adjudicator must consider whether the employer engaged in a meaningful process of progressive discipline (*Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at para 51). While it is open to the adjudicator to find that progressive discipline was not necessary in the circumstances, “few situations give the employer the right to dismiss an employee without relying on progressive penalties or warnings” (*Vallières* at para 13, citing *Bird v White Bear First Nation*, 2017 FC 477 at para 42 and *Payne v Bank of Montreal*, 2013 FCA 33 at para 48).

[28] In this case, the Adjudicator reasonably found that the NITHA had communicated its expectations and concerns about Ms. Yang’s performance, and had provided her with guidance



and training to assist her in meeting the requirements of her job. However, the Adjudicator's inference that Ms. Yang understood her job to be in jeopardy was not supported by the evidence, and was premised on a significant factual error. It was therefore unreasonable.

[29] Neither the e-mail message dated December 1, 2017, nor the one dated May 4, 2017, explicitly warned Ms. Yang that she would be terminated if her performance did not improve. This was acknowledged by the Adjudicator, but he nevertheless concluded that Ms. Yang had been given implicit warning, and it could be objectively inferred that her job was in jeopardy:

[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.

[30] Central to this analysis was an undated message from Ms. Yang that the Adjudicator mistakenly described as notes she prepared following the meeting that took place on December 11, 2017. Ms. Yang wrote in this message: "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."

[31] However, the parties agree that this undated message was written by Ms. Yang in response to the e-mail message she received on May 4, 2018, not the meeting that occurred on December 11, 2017. The e-mail message of May 4, 2018 stated that, in light of Ms. Yang's failure to improve her performance, it would be necessary to "move this conversation to a higher level".

[32] There was no subsequent conversation at a "higher level". Without further notice, Ms. Yang's employment was terminated on July 4, 2018.

[33] The remaining document on which the Adjudicator based his conclusion that Ms. Yang understood her job to be in jeopardy was the e-mail message she sent following the meeting that occurred on December 11, 2017. Ms. Yang wrote in this message: "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." Nothing in this message suggests that Ms. Yang understood her employment to be at risk.

[34] The jurisprudence relied upon by the Adjudicator confirms that, absent exceptional circumstances, an employer must give explicit warning before dismissing an employee for incompetence. In *Mitran v Guarantee RV Centre Inc*, 1999 ABQB 276, the Alberta Court of Queen's Bench ruled that when the employer "relies on incompetence as the ground for dismissal, it will bear the onus of showing that clear warnings were given ...". In *Parkinson v Kemh Holdings Limited*, 2013 SKQB 172, the Saskatchewan Court of Queen's Bench found a written warning to be sufficient because it contained the words (in larger font): "Failure to

refrain from any of these actions will result in dismissal” (at para 28). No comparable warning was ever given to Ms. Yang.

[35] The Adjudicator cited the decision of a labour arbitrator in *Elgin Cartage Ltd v McTavish*, [1997] CLAD No 376 (which he mistakenly attributed to a court) for the proposition that where an employee’s behavior is not amenable to change by some lesser form of discipline, the policy reason for applying a system of progressive discipline does not apply. The Adjudicator then listed a number of factors that, in his view, supported the conclusion that Ms. Yang’s behaviour was not amenable to change.

[36] I am unable to reconcile this aspect of the Adjudicator’s analysis with binding jurisprudence confirming that few situations will give an employer the right to dismiss an employee without relying on progressive discipline or explicit warnings. In this additional respect, the Adjudicator’s decision was unreasonable.

[37] Finally, the Adjudicator’s conclusion that, in the absence of improvement, internal appeals would only have afforded Ms. Yang more time was speculative. Adherence to the Regulations, which required reprimands to be delivered formally by letter and to include an explicit warning, may have helped to avoid the ambiguity surrounding the NITHA’s communications to Ms. Yang respecting her performance.

I. Conclusion

[38] The application for judicial review is allowed and the decision of the Adjudicator, including the costs award against Ms. Yang, is set aside.

[39] The parties do not take issue with the Adjudicator's finding that, if Ms. Yang's complaint of wrongful dismissal were upheld, then reinstatement would not be appropriate given the deterioration of her relationship with her employer and co-workers. The parties are in a better position than this Court to formulate an appropriate remedy. If the parties are unable to agree, then the Court will remain seized of the matter in order to determine the remedy.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed with costs.
2. The decision of the Adjudicator dated December 16, 2019, including the costs award against the Applicant Jianti Yang, is set aside.
3. If the parties are unable to agree, then the Court will remain seized of the matter in order to determine the remedy.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-78-20

**STYLE OF CAUSE:** JIANTI YANG v NORTHERN INTER-TRIBAL  
HEALTH AUTHORITY

**PLACE OF HEARING:** BY VIDEOCONFERENCE BETWEEN SASKATOON,  
SASKATCHEWAN AND OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 30, 2021

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** AUGUST 18, 2021

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