Federal Court of Appeal | Cour d'appel fédérale

20230306

Docket: A-232-21

Citation: 2023 FCA 47

CORAM: **GLEASON J.A.**
WOODS J.A.
LASKIN J.A.

BETWEEN:

NORTHERN INTER-TRIBAL HEALTH AUTHORITY INC.

Appellant

and

JIANTI YANG

Respondent

Heard by online videoconference on November 22, 2022.

Judgment delivered at Ottawa, Ontario, on March 6, 2023.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WOODS J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The appellant, Northern Inter-Tribal Health Authority (NITHA), appeals from the judgment of the Federal Court (*per* Fothergill, J.) in *Yang v. Northern Inter-Tribal Health Authority*, 2021 FC 850, 336 A.C.W.S. (3d) 88. In that judgment, the Federal Court set aside the award of an adjudicator rendered under Division XIV of Part III of the *Canada Labour Code*, R.S.C. 1985, c. L-1 in *Yang v. Northern Inter-Tribal Health Authority Inc.* (16 December 2019), Saskatoon YM2707-11464 (*per* Koskie, Adjud.). In his award, the adjudicator found that the

dismissal of the respondent, Jianti Yang (Ms. Yang), was justified and awarded NITHA costs of $4,500.00.

[2] The Federal Court set the adjudicator's award aside, with costs, principally because it found that the adjudicator made a significant factual error regarding the date Ms. Yang indicated in writing that she appreciated her employment was in jeopardy.

[3] The adjudicator found that this indication was contained in a set of notes that Ms. Yang made to herself shortly following a meeting held in December 11, 2017, during which her manager outlined various performance failures to Ms. Yang. This was incorrect. The 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. Ms. Yang's employment was terminated a few months later in July 2018.

[4] Since the adjudicator relied on what he incorrectly found were notes Ms. Yang made in December 2017 in support of his determination that NITHA had adequately warned Ms. Yang that her employment was in jeopardy, the Federal Court held that the adjudicator's award was unreasonable. The Federal Court also pointed to what it found were two other errors in the adjudicator's award, which also led it to conclude that the award should be set aside.

[5] In the judgment under appeal, in addition to setting the award aside, the Federal Court retained jurisdiction over the remedy for the dismissal in the event the parties were not able to settle the issue. In so ruling, the Federal Court implicitly, if not explicitly, held that Ms. Yang's termination was unjust.

[6] For the reasons set out below, I agree with the Federal Court that the adjudicator's error regarding the date Ms. Yang made her written statement, indicating she knew her employment was in jeopardy, was of such significance that the error renders the adjudicator's award unreasonable. However, I find that the Federal Court erred in retaining jurisdiction over the remedy for the respondent's complaint of unjust dismissal, largely because it is impossible for this Court or the Federal Court to satisfy itself that the only possible conclusion that the adjudicator could have reached was that the dismissal was unjust.

[7] I would accordingly allow this appeal in part, set aside a portion of the judgment of the Federal Court, and, making the order that it ought to have made, in addition to setting aside the award of the adjudicator, would remit Ms. Yang's unjust dismissal complaint for redetermination in accordance with these reasons, the whole without costs.

I. Background

[8] It is useful to commence by reviewing the relevant factual background, which is set out at some length in the adjudicator's award. For purposes of this appeal, it is necessary to highlight only the facts below.

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

[14] 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".

[15] Although the two emails sent to Ms. Yang provided details regarding the grounds for NITHA's dissatisfaction with Ms. Yang's performance, neither specifically warned Ms. Yang that her employment was in jeopardy if her performance did not improve. From the materials before this Court (and those that were before the Federal Court), it is not possible to determine what, if anything, the testimony before the adjudicator indicated was verbally communicated to

Ms. Yang about her employment possibly being in jeopardy because, as is usual in a labour case, there is no transcript of the proceedings before the adjudicator.

[16] 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."

[17] 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.

[18] In terms of Ms. Yang's lack of cooperation, several co-workers testified before the adjudicator. The adjudicator noted at paragraph 96 of his award that personal relations between Ms. Yang and her co-workers had "been deteriorating beyond repair".

II. The Adjudicator's Award

[19] As already mentioned, the adjudicator found Ms. Yang's termination was justified. He determined that, even though it was not necessarily required to do so, NITHA had established each of the five grounds for termination set out in the termination letter.

[20] The adjudicator's award principally examined the grounds of incompetence and Ms. Yang's inability or unwillingness to adequately carry out the tasks required of her. In respect of these issues, the adjudicator quoted at length from the decision of the Saskatchewan Court of Appeal in *Radio CJVR Ltd. v. Schutte*, 2009 SKCA 92, 331 Sask. R. 141 [*Schutte*], identifying it as the leading authority outlining the applicable principles.

[21] *Schutte* involved a civil action for wrongful dismissal in which the Saskatchewan Court of Appeal was faced with a case where the employee repeatedly failed to carry out tasks he was expected to perform. The case turned more on that employee's unwillingness to carry out the tasks expected of him as opposed to his inability to do them. Quoting from the decision of the Saskatchewan Court of Queen's Bench in *Graf v. Saskatoon Soccer Centre Inc*., 2004 SKQB 282, 250 Sask. R. 161 at para. 28, the Saskatchewan Court of Appeal articulated the test for just cause applicable to the facts in *Schutte* in paragraph 21 in the following terms:

> It is […] 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 [*sic*] *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.

[22] The adjudicator found that NITHA had established each of the foregoing points in respect of Ms. Yang.

[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 on the final of the above-listed factors, namely, 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.

[25] The adjudicator found that NITHA gave Ms. Yang a sufficiently clear warning for two reasons: first, because Ms. Yang appreciated her job was in jeopardy as was demonstrated in what he incorrectly characterized as notes she made to herself in December 2017; and, secondly, because the possibility of job loss could be inferred from the two emails NITHA sent to Ms. Yang in December 2017 and May 2018. The two points were intertwined in the adjudicator's reasoning.

[26] Citing from the decision of the Saskatchewan Court of Queen's Bench in *Parkinson v. Kemh Holdings Ltd.*, 2013 SKQB 172, 420 Sask. R. 156, where the plaintiff claimed that he did not understand the warnings given to him but the Court held that sufficient warning had been given, the adjudicator stated at paragraphs 61 and 62 of his award:

> [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.

[27] The adjudicator went on to consider Ms. Yang's additional argument that a lesser penalty than termination should have been imposed and relied on the award in *Elgin Cartage Ltd. v. McTavish*, [1997] C.L.A.D. No. 376 [*Elgin Cartage*] for the proposition that progressive discipline is not required where there is nothing to suggest that an employee's behaviour might be amenable to change through some lesser form of discipline.

[28] The adjudicator also considered an alternate argument advanced by Ms. Yang based on NITHA's internal personnel policy. Ms. Yang argued in this regard that NITHA was prevented from terminating her employment because she was unaware that she could have pursued an appeal under NITHA's Personnel Management Regulations. The adjudicator rejected this

argument for two reasons: first, because the decision of this Court in *Bell Canada v. Hallé*, [1989] F.C.J. No. 555, 17 A.C.W.S. (3d) 299 (FCA), provides that failure to follow an internal discipline process does not render a dismissal unjust if the process followed by the employer was a fair one, and the process followed by NITHA in the case at bar was fair; and, second, because NITHA's Personnel Management Regulations specifically provided NITHA discretion to depart from the procedures outlined in them.

[29] In discussing the Personnel Management Regulations, the adjudicator also noted that Ms. Yang's argument about the failure to follow the appeal process had little weight, stating as follows at paragraph 92 of the award:

> [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.

[30] The adjudicator accordingly held that NITHA had cause to dismiss Ms. Yang. The adjudicator went on to state at paragraph 99 of his award that, had he held otherwise, he would not have reinstated Ms. Yang because "[…] there were significant issues with her performance that she has shown she is not willing to improve." He based this determination on Ms. Yang's continued refusal, including during her testimony before him, to accept any responsibility for the performance issues.

[31] Additionally, the adjudicator held that, if he had found the termination unjustified and had awarded damages in lieu of reinstatement, he would have found that NITHA had not established a failure to mitigate on the part of Ms. Yang.

[32] As a result, as noted, the adjudicator dismissed Ms. Yang's complaint of unjust dismissal. He also awarded costs of $4,500.00 to NITHA.

III. The Decision of the Federal Court

[33] I turn now to discuss the decision of the Federal Court in more detail.

[34] The Federal Court premised its decision largely on the factual error made by the adjudicator as to the date Ms. Yang made the written statement that indicated she appreciated her employment was in jeopardy. Since it was a key component in the adjudicator's determination that Ms. Yang had been adequately warned of her employment jeopardy, the Federal Court found that the mistake as to the date the statement was written was sufficient to render the adjudicator's award unreasonable.

[35] In addition, the Federal Court found the adjudicator's award unreasonable because, as stated at paragraph 36 of its reasons, the Federal Court was "unable to reconcile" the adjudicator's reliance on the arbitral award in *Elgin Cartage* "[…] 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."

[36] The Federal Court further held that the adjudicator's conclusion regarding the inutility of following the internal appeal process contained in NITHA's internal Personnel Management Regulations was speculative.

[37] In light of these issues with the adjudicator's award, the Federal Court found that the adjudicator's conclusion that the dismissal was justified was unreasonable and set the award aside. However, the Federal Court did not disturb the adjudicator's determination that reinstatement was not appropriate, and this determination was not and is not challenged by Ms. Yang.

[38] The Federal Court did not comment on the costs award of the adjudicator, other than setting it aside.

[39] Instead of awarding the usual remedy of remitting the file to the adjudicator for redetermination, the Federal Court remained seized with the remedy for the unjust dismissal complaint, thereby implicitly, if not explicitly, concluding that Ms. Yang's dismissal was unjust. The Federal Court stated as follows at paragraph 39 of its decision:

> [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.

[40] The Federal Court's judgment was as follows:

> 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.

IV. Analysis

[41] With this background and procedural history in mind, I turn next to consider the parties' arguments.

[42] Before this Court, NITHA submits that the Federal Court erred in interfering with the adjudicator's award and, in fact, engaged in correctness as opposed to reasonableness review. NITHA more specifically says that the factual error made by the adjudicator was immaterial, that it was open to the adjudicator to rely on the award in *Elgin Cartage,* and that it was permissible to find that NITHA was not required to follow its internal discipline procedure. NITHA therefore requests that this appeal be allowed and the adjudicator's award be restored.

[43] Ms. Yang, on the other hand, asserts that the adjudicator's award was unreasonable but not precisely for the reasons given by the Federal Court. Ms. Yang more specifically says that the case law that the arbitrator was bound to follow requires that an employee be explicitly warned that their employment is in jeopardy before being dismissed for incompetence. Ms. Yang asserts that she was given no such warning and thus says that the only permissible conclusion for the adjudicator to have reached was that the dismissal was unjust. Ms. Yang accordingly requests that this appeal be dismissed.

[44] I disagree with both parties' positions. NITHA has failed to appreciate the significance of the factual error made by the adjudicator, and Ms. Yang has invited us to step into the shoes of the adjudicator and decide the merits of her unjust dismissal complaint. However, that is not something this Court or the Federal Court should do in a case like this, where it is impossible to say that the only reasonable conclusion available to the adjudicator would have been to conclude that the dismissal was unjust.

A. *Standard of Review*

[45] It is useful to commence the discussion of these issues by delineating the standard of review that this Court is required to apply. In this appeal, two different standards are applicable.

[46] More specifically, in terms of assessing the Federal Court's determination that the adjudicator's decision was unreasonable, we are required to determine whether the Federal Court selected the appropriate standard of review and whether it applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45, 48; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42, 462 D.L.R. (4th) 585 at para. 10. Thus, on this issue, we are required to step into the shoes of the Federal Court and are in effect called upon to reconduct the assessment of the reasonableness of the adjudicator's decision.

[47] However, a different standard applies to review of the remedy granted by the Federal Court. The selection of the appropriate remedy to be awarded in a judicial review application involves an exercise of discretion by the court: *Canada (Citizenship and Immigration) v.*

Tennant, 2018 FCA 132, 294 A.C.W.S. (3d) 299 at para. 27 (citing to *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paras. 88–89); *Canada (Attorney General) v. Jodhan*, 2012 FCA 161, 350 D.L.R. (4th) 400 at para. 75.

[48] Discretionary decisions are reviewable under the appellate standard of review such that errors of law or in principle are reviewable for correctness, whereas errors of fact or of mixed fact and law from which a legal error cannot be extricated are reviewable for palpable and overriding error: *Canada v. Greenwood*, 2021 FCA 186, [2021] F.C.J. No. 1006 (QL) at para. 89; *Canada v. Harris*, 2020 FCA 124, 165 W.C.B. (2d) 89 (WL) at paras. 20–21.

[49] The Federal Court was correct in finding that the reasonableness standard of review applies to the adjudicator's decision, it being well settled that this is the applicable standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 58 [*Vavilov*]; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, 399 D.L.R. (4th) 193 at paras. 15–18; *Hussey v. Bell Mobility Inc.*, 2022 FCA 95, 2022 A.C.W.S. 358 at para. 22; *Bank of Montreal v. Li*, 2020 FCA 22, 443 D.L.R. (4th) 688 at para. 24; *Riverin v. Conseil des Innus de Pessamit*, 2019 FCA 68, 305 A.C.W.S. (3d) 551 at paras. 18–20.

[50] For the reasons more fully set out below, I have concluded that the Federal Court correctly determined that the adjudicator's award was unreasonable, although I disagree with some of the Federal Court's reasons for that determination. However, the Federal Court made a palpable and overriding error in the remedy it awarded.

B. *Was the Adjudicator's Award Unreasonable?*

[51] Turning in more detail to the Federal Court's determination that the award was unreasonable, as already noted, the Federal Court offered three reasons for its finding that the adjudicator's decision was unreasonable. It first held that the award was unreasonable due to the factual error in the date Ms. Yang wrote the statement confirming she understood that she might be fired. The Federal Court secondly held that the adjudicator's reliance on the award in *Elgin Cartage* was unreasonable. Finally, the Federal Court held that the speculative nature of the conclusion reached in paragraph 92 of the adjudicator's reasons for his award, regarding the inutility of NITHA's internal appeal process, rendered the award unreasonable.

[52] I agree with the first of the foregoing reasons given by the Federal Court as to why the award is unreasonable but not the latter two.

[53] In discussing the import of the error made by the adjudicator as to the date Ms. Yang made the written statement showing that she appreciated that her employment was in jeopardy, it is useful to first lay out the law pertaining to terminations for an employee's failure to adequately perform the tasks they are expected to perform.

[54] The above-cited quotation from *Schutte* sets out the principles often applied by courts in civil wrongful dismissal cases where failure to adequately perform is advanced by the employer as just cause for termination. The test from *Schutte* is frequently applied in all but the most serious of cases, where termination might be justified without any advance warning. There is no suggestion that the present is such a case.

[55] The test from *Schutte* is applied by the civil courts both in cases involving employees who are incapable of performing adequately (*i.e.*, where they cannot do the job) and in situations where they are competent to perform the required tasks but repeatedly neglect to do so (*i.e.*, where they will not do the job, as was the case with Mr. Schutte). A situation of "cannot do" involves non-culpable behaviour, whereas a situation of "will not do" is generally considered culpable conduct.

[56] Thus, except in the most serious cases, in the non-unionized context, the case law requires that employees be warned that their failure to address performance deficiencies might result in termination before they may be terminated for just cause. Ellen E. Mole, in her *Wrongful Dismissal Practice Manual*, 2nd ed. (Toronto: LexisNexis Canada, 2006) vol. 1, ch. 4, one of the leading Canadian texts on employment law, states as follows at § 4.440:

> Where chronic substandard work is alleged rather than gross incompetence, the employer has a duty to warn the employee of its concerns and the possible consequences, and allow the employee time to improve his performance. The number of warnings required and the amount of time to allow for improvement will depend on the facts of each case, including the severity and consequences of the employee's unacceptable performance. The employer may be required to set out clear objectives and deadlines for the employee.

[57] In the unionized context, a slightly different approach is typically applied in cases of culpable versus non-culpable conduct. As noted at paragraph 7:35 of Donald J.M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 5th ed. (Toronto: Thomson Reuters Canada, 2022) vol. 1, one of the standard Canadian texts summarizing the arbitral case law in the unionized context:

> Arbitrators have consistently drawn a distinction between employees who are unable to fulfill the requirements of a job because of factors beyond their control, such as deficiencies in physical and mental capability (involuntary misfeasance), and those whose deficiencies are caused by things over which they have control, for example, inattentiveness, carelessness, or disregard for safety procedures (voluntary misfeasance). When the cause of the employee's failure is not a matter of choice, it is generally accepted that discipline of any kind is not a proper response.
>
> To substantiate any disciplinary sanction, an employer must establish that the poor performance was attributable, in some measure, to culpable behaviour on the part of the employee. However, employees who claim that failure to perform satisfactorily is not because of any fault or wrongdoing on their parts have the onus of establishing that fact.
>
> [Footnotes omitted.]

[58] In situations of non-culpable conduct involving incapacity or inability to perform adequately, labour arbitrators often apply a test similar to that outlined in *Schutte*. At paragraph 7:35 of *Canadian Labour Arbitration*, the authors state:

> In cases of non-culpable, deficient work performance, employers may remove certain duties, stop an apprenticeship programme, transfer to equivalent or lower-rated positions, and even terminate employees in order to maintain production, so long as certain conditions are met. Generally, to justify such non-disciplinary initiatives, an employer must have established a reasonable measure of job performance and communicated it to the employee, have given suitable instruction and supervision to enable the employee to meet the standard, have warned of the consequences if substandard performance continued, and have shown that the employee was still incapable of doing the job. Where an employee suffers a physical or mental disability, the employer will have to satisfy statutory duties of accommodation as well.
>
> [Footnotes omitted.]

[59] Conversely, where a disciplinary response to a failure to perform adequately is appropriate, depending on the severity of the conduct, labour arbitrators often require employers of unionized employees to apply progressive discipline. Particularly in non-professional settings,

progressive discipline frequently involves the imposition of increasingly severe penalties, commencing with warnings, then periods of suspension, and culminating in dismissal if the behaviour remains unchanged. The increasing sanctions are meant to warn the employee of the need to change their behaviour, failing which, they could be dismissed. Written confirmations of the sanctions typically contain explicit warnings to this effect. The relevant principles are once again summarized in *Canadian Labour Arbitration*, § 7:36, as follows:

> 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.]

[60] Many adjudicators sitting under Part III of the *Canada Labour Code* adopt an approach similar to that applied in the unionized context.

[61] In the case of non-culpable inability to perform or incompetence, most adjudicators require that an employer, among other things, establish in all but the most serious circumstances that the employee had been warned that a failure to correct their performance inadequacies may lead to termination. Howard A. Levitt, *The Law of Dismissal in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada, 2022) vol. 1, contains a lengthy chapter summarizing the case law from adjudicators under Part III of the *Canada Labour Code*. Levitt states as follows, regarding what an employer must prove to establish that a dismissal for incompetence or non-culpable inability to adequately perform in these sorts of cases:

> There is no fixed rule which defines the degree of unacceptable performance that justifies a dismissal. However, to justly terminate an employee for inculpable incompetence, the employer must meet the following criteria:
>
> 1 It must have defined the level of job performance required.

2 It must establish that the standard required was communicated to the employee.

3 It must give reasonable supervision and instructions to the employee and have afforded the employee a reasonable opportunity to meet the standard.

4 It must establish an inability on the part of the employee to meet the standard to an extent that renders that person incapable of performing the job.

5 It must establish that reasonable warnings were given to the employee and the employee was informed that failure to meet the standards could result in dismissal.

[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: see, *e.g.*, *Duffett v. Squibb Canada Inc.* (1991), 39 C.C.E.L. 37, 1991 CanLII 7038 at para. 25 (NLSC); *Higgs Transportation Inc. v. Gee*, 2018 CanLII 130101 (Zuck, Adjud.) at para. 36.

[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.

[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.

[70] In *Vavilov*, the leading authority from the Supreme Court of Canada on judicial review, that Court noted at paragraphs 100 and 126 that a factual error made by an administrative decision-maker may render a decision unreasonable when the error was made on a key point in the analysis. The majority stated as follows at paragraph 126:

> […] a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, at para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: *ibid*.

[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.

[72] However, I disagree with the other two grounds offered by the Federal Court for overturning the adjudicator's award.

[73] The adjudicator's reliance on *Elgin Cartage* for the proposition that progressive discipline is not required where there is nothing to suggest that an employee's behaviour might be amenable to change through some lesser form of discipline was not misplaced. As noted, progressive discipline (*i.e.*, increasingly severe penalties culminating in dismissal) is typically required by labour arbitrators where an employee has engaged in culpable misconduct. However, as is indicated in the above citation from *Canadian Labour Arbitration*, there is support in the arbitral case law for the notion that progressive discipline may not be required where an employee's behaviour is shown to not be amenable to change through a disciplinary response. The *Elgin Cartage* award appears to perhaps be in line with such case law. Accordingly, I see no reviewable error in the adjudicator's having referred to it.

[74] Moreover, and more importantly, to the extent that Ms. Yang's less than satisfactory performance was non-culpable, as she argued, the doctrine of progressive discipline did not apply at all. I accordingly conclude that it was reasonable for the adjudicator to have concluded that NITHA was not required to have imposed lesser sanctions before termination.

[75] Likewise, the adjudicator's comments regarding the likely inutility of following NITHA's internal appeal process do not render the award unreasonable because the comments made in paragraph 92 of the award were not central to the adjudicator's reasons. The adjudicator rather determined that the fact that Ms. Yang was unaware that she could have filed an appeal under NITHA's Personnel Management Regulations did not matter because of the holding in *Bell Canada v. Hallé* and the fact that the Personnel Management Regulations specifically provided the appellant discretion to depart from the procedures outlined in them.

[76] I see no error in either of these conclusions. At paragraph 10 of *Bell Canada v. Hallé*, this Court did hold that failure to follow an internal discipline policy does not necessarily render a dismissal unjust so long as the procedure adopted by the employer was fair, and paragraph 25.3 of the appellant's Personnel Management Regulations does provide that NITHA may deviate from them.

[77] Thus, I would set aside the adjudicator's award, although not for all the same reasons that the Federal Court did.

[78] A further point bears mention. These reasons should not be read as endorsing the adjudicator's award of costs to the appellant. As the point was not raised by the parties, I make no finding in respect of it. However, I do wish to note, as mentioned during the hearing, that the remedial authority of adjudicators sitting under Division XIV of Part III the *Canada Labour Code* is circumscribed and is premised on a finding of unjust dismissal (see, *e.g.*, *Royal Bank v. Procaccini*,1987 CarswellNat 818, 24 Admin. L.R. 319, 5 A.C.W.S. (3d) 264 (FCA)). Thus, the

large majority of adjudicators sitting under Part III of the *Canada Labour Code* have declined to award costs to successful employers, as was noted in *Bolton v. Hartley Bay Indian Band*, [2005] C.L.A.D. No. 153, 2005 CarswellNat 7581 (WL) at paras. 7–18, 24–26 (Love, Adjud.); *Bull-Giroux v. Louis Bull Tribe*, [2003] C.L.A.D. No. 557 (QL) at paras. 2–7 (Dunlop, Adjud.); *Wytenburg v. Business Express Airlines Inc.*, [2002] C.L.A.D. No. 157 (QL) at para. 88 (Nadjiwan, Adjud.); *Wilson v. Sliammon Native Council*, [2000] C.L.A.D. No. 217 (QL) at para. 18 (Love, Adjud.); *Leta v. Pine Creek First Nation*, [1995] C.L.A.D. No. 256 (QL) at para. 9 (Gray, Adjud.).

C. *Did the Federal Court Make a Reviewable Error in Respect of Remedy?*

[79] I turn finally to the issue of remedy and, as already noted, conclude that the Federal Court erred in effectively deciding the unjust dismissal complaint through its retention of jurisdiction over the remedy for the complaint.

[80] In *Canada (Citizenship and Immigration) v. Tennant*, 2019 FCA 206, 436 D.L.R. (4th) 155 (*Tennant II*), this Court reviewed the bounds of its own and the Federal Court's jurisdiction to decide issues that Parliament has remitted to administrative decision-makers. As noted in *Tennant II*, where it is appropriate for this Court or the Federal Court to decide such issues, they generally proceed by way of declaration, remission of all or part of the matter to the administrative decision-maker with directions, or, depending on the circumstances, by simply dismissing the application without further relief. All such remedies involve indirect substitution.

[81] Until relatively recently, it was thought that this Court and the Federal Court did not possess authority to proceed by way of direct substitution (see paragraph 70 of *Tennant II* and cases cited therein). However, as noted in *Tennant II*, more recently, this Court has engaged in direct substitution and occasionally itself decided issues (see, *e.g.*, *Canada v. Williams Lake Indian Band*, 2016 FCA 63, 396 D.L.R. (4th) 164, rev'd on other grounds, 2018 SCC 4, [2018] 1 S.C.R. 83; *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, 48 Admin. L.R. (6th) 71; *Canada (Attorney General) v. Burke*, 2022 FCA 44, 468 D.L.R. (4th) 165).

[82] Where either direct or indirect substitution is adopted, though, the case law is clear that the reviewing court should only exercise its discretion to decide issues that are left to administrative decision-makers in exceptional circumstances. In *Vavilov*, the majority stated at paragraphs 139 to 142:

> [139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.
>
> [140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

> [141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167, at paras. 18-19. An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, 138 O.R. (3d) 52, at paras. 54 and 88. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

(See also to similar effect, *Fono v. Canada Mortgage and Housing Corporation*, 2021 FCA 125, 333 A.C.W.S. (3d) 742 at paras. 11–13, and *Canada (Attorney General) v. Duval*, 2019 FCA 290, 313 A.C.W.S. (3d) 558 at para. 38, where this Court held that issues should be remitted to the administrative decision-maker as it could not be said that only one result was inevitable).

[83] For the reasons set out above, it is impossible for this Court or the Federal Court to determine if the respondent's dismissal was justified. Nor has there been an endless merry-go-round of decisions or any other circumstance mentioned in *Vavilov* that might provide a basis for a reviewing court to decide the merits of Ms. Yang's unjust dismissal complaint.

[84] I accordingly conclude that the Federal Court made a palpable and overriding error in effectively deciding the merits of the appellant's unjust dismissal complaint as opposed to remitting that issue to the adjudicator.

V. Proposed Disposition

[85] I would therefore allow this appeal in part, set aside paragraph 3 of the Federal Court's judgment and, provided he is available to hear the redetermination, remit to the adjudicator the issue of whether the respondent's dismissal was justified. As there was no challenge to the balance of the adjudicator's award, I would leave his remaining findings intact.

[86] In the event the adjudicator is unable to conduct the redetermination, I would have this Court remain seized of the appropriate remedy to receive further submission from the parties on the issue of whether the matter should be remitted to a new adjudicator to be named by the Minister of Labour or to the Canada Industrial Relations Board (the CIRB) in light of the amendments to subsections 242(1). (2), (3), (3.1) and (4) of the *Canada Labour Code* made in the *Budget Implementation Act, 2017, No.1*, S.C. 2017, c. 20, s. 354. These amendments provide that new complaints of unjust dismissal filed after July 29, 2019, are henceforth to be heard by the CIRB (SI/2019-76, (2019) C. Gaz. II, 5555).

[87] As success on the issues before this Court was divided and I would set aside the Federal Court's judgement in an important part, I would award no costs before this Court or the Federal Court. I would accordingly vary paragraph 1 of the Federal Court's judgment to delete the words "with costs".

[88] In closing, I wish to note that it remains open to the parties to settle all issues surrounding the respondent's dismissal. As reinstatement is off the table (and typically is the most contentious issue in cases such as this), it might well be possible for them to achieve a satisfactory resolution and thus avoid the need for a redetermination.

"Mary J.L. Gleason"
J.A.

"I agree.
Judith M. Woods J.A."

"I agree.
John B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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