

**IN THE MATTER OF AN ADJUDICATION UNDER  
DIVISION XIV-PART III OF THE CANADA LABOUR CODE**

**BETWEEN:**

**CM  
(the “Complainant”)**

**And**

**XYOLHEMEYLH CHILD AND FAMILY SERVICES  
(Currently *Fraser Valley Aboriginal Children and Family Services Society*)  
(the “Respondent”)**

**FILE # YM2707-8137**

**ADJUDICATOR**

**Sylvia Skratek**

**APPEARING FOR THE COMPLAINANT**

**M. Jeanne Meyers**

**APPEARING FOR THE RESPONDENT**

**Kristen D. Mundstock**

## **WITNESSES FOR THE COMPLAINANT**

**CM, Complainant**

**TM, Complainant's Spouse**

## **WITNESSES FOR THE RESPONDENT**

**ND, Regional Manager**

**KB, Team Leader, Mission**

**BC, Client**

**JI, Office Manager**

## **BACKGROUND**

A complaint dated February 17, 2009 was filed by CM (the “Complainant”) against Stó:lō Nation, Xyolhemeylh Child and Family Services Department (the “Respondent”, “Agency” or “Employer”) under Part III of the Canada Labour Code (hereafter “CLC”) alleging that she “...was terminated by the named employer without just cause. The named employer did not follow its own policy and procedure for resolving this dispute...”. By letter dated August 6, 2009, the Minister of Labour appointed Sylvia P. Skratek as the Adjudicator of CM’s complaint.

The Adjudicator convened a hearing in this matter on January 20, 2010 in Abbotsford, British Columbia as provided at Section 242 under Division XIV-Part III of the CLC. The hearing reconvened on May 18, 2010. At the hearing both parties had full opportunity to make submissions and present evidence to prove their respective cases. At the conclusion of the hearing the parties agreed to submit written closing arguments to the Adjudicator which were received in a timely manner.

## **STATEMENT OF THE ISSUE**

The issue raised by this appeal is whether CM was unjustly dismissed from her employment with Stó:lō Nation, Xyolhemeylh Child and Family Services Department. If so, then what is the appropriate remedy?

## STATEMENT OF THE FACTS

The Complainant was offered permanent employment effective May 1, 2006 as a Family Service Child Protection Worker for the Xyolhemeylh Child and Family Services Department. (Ex. 17, Tab 3A) Her annual Employee Performance Evaluation dated May 1, 2007 was satisfactory with an overall performance rating of 3.5 indicating that she was meeting all job requirements and in some areas exceeding job requirements. (Ex. 17, Tab 6) Her annual Employee Performance Evaluation dated August 4, 2008 was also satisfactory with an overall rating of 3. (Ex. 23) She was delegated the "...powers, duties and functions of the CFCSA identified in category C6 (Full Child Protection) of the CFCSA Delegation Matrix..." (Ex. 8)

On Friday, December 12, 2008, the Complainant and her husband attended a private Christmas party at the home of the husband's business acquaintance. The Complainant acknowledges that she had consumed four bottles of cider during the party. Approximately two or three hours into the evening, as the Complainant walked toward the bathroom she noticed that a former client of the Complainant had arrived at the party. The Complainant was uncomfortable in the presence of the former client and when the Complainant exited the bathroom she went into the den of the home in order to remove herself from the area in which the former client was situated. She informed the hostess that she would have to leave the party. The hostess of the party had witnessed the Complainant's behaviour and questioned the Complainant as to why she needed to leave the party. The hostess' husband and the hostess' father-in-law had joined the conversation in the den. It was the hostess' father-in-law who had brought the former client to the party. After the conversation in the den, the former client left the party and the Complainant rejoined the other guests at the party.

On Monday, December 15, 2008, the Complainant reported the incident at the party to her Team Leader, KB. On January 5, 2009, the Complainant informed ND of what had occurred at the party. By email dated January 5, 2009, KB reported to ND the conversation that she had with the Complainant. In her email, KB stated that:

She [CM] said that she'd been at a Christmas party on the weekend, and while she was there the hostess' father walked in with B. Connie said she was uncomfortable, as B was seated near her husband, and beside her purse. She said she went to the hostess and told

her B was an ex-client, she was a prostitute and a drug user, and had Hepatitis C, and did not belong at the party. The hostess then asked B to leave. CM asked me if what she did was appropriate, and I said no. I said it was not okay to tell someone what she told the hostess, that the best thing for her to do if she felt uncomfortable was to leave. (Ex. 15)

On January 15, 2009, the Complainant met with ND and Human Resources Manager BVG. At the conclusion of that meeting the Complainant was advised that she was suspended without pay and that a recommendation would be put forward to Operations Director SW to terminate her employment. By letter dated January 19, 2009, SW advised the Complainant that her actions “...have fundamentally breached the trust placed in you by the agency and by the public, and this conduct is incompatible with the due and faithful discharge of your duties as a Social Worker...You are, therefore, terminated with cause....effective immediately”. (Ex. 1)

## ANALYSIS

### **Position of the Respondent**

The Agency contends that the termination was just. The Agency proved through its witnesses that the Complainant revealed confidential information about a former client. Both KB and ND testified that the Complainant admitted to both of them that she had disclosed confidential information. Additionally, JI testified that she had overheard the Complainant disclose the same information. Even the Complainant acknowledged in her own testimony that she had disclosed to the hostess that an ex-client was present at the party and that she had told the hostess that either the ex-client or the Complainant would have to leave the party. Even if only the testimony of the Complainant is accepted the Agency submits that her evidence confirms that she disclosed confidential information and set in motion the events that lead to the hostess discovering private information about the former client. This breach of confidentiality is of a nature to justify the Complainant’s termination. The Agency obtains private and highly sensitive information from its clients in its delivery of services under the Act (Ex. 4) and the Act specifically states that all information gathered must not be disclosed except under specific circumstances. None of those circumstances were met in this matter. The Complainant’s behavior has exposed the Agency to potential liability and may also have jeopardized the Agency’s reputation in the community in which it serves. In order for community members to

trust and rely on the Agency, the community must be able to rely on the Agency to keep confidential information secure. Failure to do so may result in the loss of trust and cooperation of the community that the Agency is meant to serve. The Agency submits that the only acceptable action that it could take with respect to the Complainant's behavior was termination. To do anything less would be to condone the conduct. Her actions were so basically wrong and so extreme a violation of her professional responsibilities that termination was warranted and in fact necessary. Her actions amount to serious misconduct, conduct incompatible with her duties, and prejudicial to the Agency's business.

### **Position of the Complainant**

The Complainant submits that she is an honest, productive employee who was thrust into a difficult and unforeseeable situation. She had a thorough knowledge of the duty of client confidentiality but had not been practicing very long as a social worker when she was faced with an unusual situation which would have elicited questions regardless of how it was handled. There is no credible evidence that the Complainant made any statement to the hostess other than there was a former client present in the home. Even that statement was made after considerable questioning by the hostess. There is no evidence that anyone at the party even knew that the Complainant was a social worker. Under these circumstances the one statement made by the Complainant was of a *de minimus* nature. The former client testified that she did not hear the Complainant make any comments, that she did not formally complain about the incident and that when she spoke to ND she was not directed to file a formal complaint. The Respondent did not interview the hostess of the party, the hostess' husband, or the hostess' father-in-law nor did the Respondent bring forward any of these individuals to testify at the hearing. Any one of these individuals could have testified as to what the Complainant had said yet none of them were called as witnesses.

The Complainant disclosed to her supervisors that there had been an incident at the party that had made her uncomfortable. As the Complainant testified, KB indicated it was nothing of any gravity. ND acknowledged that she did make light of the Complainant's disclosure. KB did not report it to ND until early January, did not make a note of it, and assigned it a low priority. No effective investigation was conducted. The Complainant was never provided any particulars.

She was not provided with copies of witness statements. She was not provided with a copy of an investigator's report to review and respond. In fact there was no report. There are no notes of an investigation and nothing in writing was provided to the final decision maker, SW. There is no knowledge of how the decision was made since SW was not called to give evidence. The disciplinary process was entirely inconsistent with the necessary and modern approach to employment relations which requires that a contextual approach be taken and the principles of progressive discipline be engaged. In this matter, there was no assessment of the context of the alleged misconduct. There was no proof that the Complainant's behavior was a willful act that was sufficient to repudiate the contract of employment.

There is also no evidence that would suggest that there is a viable threat of future liability arising from the Complainant's alleged breach and even if there were such a threat, her dismissal would have no legal effect and would not provide a defense to the Respondent.

The Complainant seeks an award of damages in the amount of \$86,340.52 plus interest which is inclusive of a Wallace bump of four months in the amount of \$17,860 and legal costs in the amount of \$15,000.

### **Discussion**

It is well established that in a wrongful dismissal action, the onus is on the employer to show cause for the dismissal. The employer must first prove that the employee committed the alleged misconduct. Very simply put, the employer must prove wrongdoing.

In making a final determination in this matter, the Adjudicator has reviewed the principles set forth in the case law submitted by both parties and has taken those principles into consideration.

As emphasized by the Agency as set forth in *Regina v. Arthurs; ex Parte Port Arthur Shipbuilding Co.* (1967) 62 D.L.R. (2<sup>nd</sup>) 342:

If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with his duties, or prejudicial to the employer's

business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee.

But guilt must be proven by the employer and the Supreme Court of Canada in the above cited matter held that arbitrators lacked jurisdiction to reduce the penalty once it was determined that the burden had been met. If indeed, I were to find that just cause exists for the discipline of the Complainant, then this principle may be applicable. Initially however I must apply the principles contained within the Complainant's citation of *McKinley v. BC Telephone*, 2001 SCC 38, [2001] 2 S.C.R. 161 at 35:

Cases in which courts have explicitly ruled that the issue of just cause is one of fact to be put to a jury lend further support to an approach that considers the particular circumstances surrounding the alleged employee misconduct. Rather than viewing cause for dismissal as a legal conclusion that must be drawn in any case where disobedience (including dishonesty) is proven, these cases indicate that just cause can only be determined through an inquiry by the trier of fact into (a) whether the evidence demonstrated employee misconduct and (b) whether, in the circumstances, such misconduct sufficed to justify the employer's termination without notice.

The initial task for me therefore is to determine whether the evidence demonstrated that the Complainant had engaged in misconduct.

There is no dispute that the Complainant attended a private Christmas party on December 12, 2008 at the home of her husband's business acquaintance. As the Complainant testified, the party was formal attire and by invitation. There is also no dispute that at some point during the evening, a former client of the Complainant was present at the home. The evidence further demonstrated that the Complainant was shocked and surprised to find a former client in attendance at what the Complainant believed was a private formal party at the home of her husband's business acquaintance. The Complainant credibly testified that she had consumed at least four alcoholic drinks and that she quite honestly did not know how to respond to the appearance of a former client. There is no evidence that any employee of the Agency has been provided any guidance as to how they should respond when they are placed in a private situation where they could reasonably assume that they would not have an encounter with a former client. While there is evidence that an employee should be cautious in public situations such as grocery stores that is not the same as being in a confined environment within a private home. As ND

testified, an employee may have to duck out of the way in a market. But this Adjudicator wonders, how does one “duck out of the way” in a private home? The Complainant attempted to “duck out of the way” into the den of the home but unfortunately that called attention to her behaviour. When questioned by the hostess as to her reasons for her behaviour, she attempted to respond appropriately. There is no direct evidence other than the testimony of the Complainant as to what actually transpired in the conversations with the host, hostess, and the father-in-law. While the Agency has suggested that the Complainant’s testimony is less than credible, there is no other reliable testimony regarding the conversations. The Complainant is correct that the Agency could have interviewed the participants in the conversation. Presumably the interviews would have provided the Agency with an accurate picture of what had actually transpired at the party. The Agency’s suggestion that the Complainant could have called the same participants to testify on her behalf ignores the fact that the burden is on the Agency, not the Complainant, to prove the misconduct. The Agency’s obligation to prove wrongdoing or misconduct carries with it the responsibility to conduct a full, fair and objective investigation of the matter, including the consideration of any and all facts, from whatever source, that could have an influence on its decision. Its failure to do so in this matter has left a significant hole in its evidence. The investigation must be thorough and avoid reliance on hearsay and other “non-weight” evidence. Action against an employee must be taken only on a complete set of facts.

In this matter, the Agency has relied on the Complainant’s own honest attempts to determine whether she had behaved appropriately at the private dinner party. She forthrightly reported the incident on Monday, December 15, 2008 to her Team Leader, KB. The Complainant reported the incident to the Regional Manager, ND. This is the behaviour of an employee who is honestly seeking guidance and is consistent with the behaviour that would be expected of an employee who gets satisfactory evaluations that note:

The quality of work that C strives to produce is excellent as she is a conscientious worker and demonstrates core communication skills and problem-solving skills.

C is very conscientious regarding her job performance and duties. Her behaviour is consistent with ethical guidelines and she comes prepared to meetings and case conferences and presents information in a professional manner.

She is respectful of everyone she meets, both families and co-workers alike.  
(Ex. 17, Tab 6, pp. 8, 9,10)

C brings a great attitude to learning...

[C] seeks information to do the job...will exhaust all avenues to seek information...

C has risen to the newly imposed demands on the standards of work required by TL and she brings a good attitude and understanding of the reasons that the position requires the standards and new structured requirements.

...she brings drive, energy and enthusiasm to her position.

...a conscientious social worker.

(Ex. 23, pp. 5,6,7,9)

The Complainant viewed her evaluations as an opportunity to grow and build on her skills as a social worker. She was working in an environment in which there had been “significant staff turn over at the time of [her] hire, and [she] experienced 4 team supervisors in the past two years...” Additionally she had “...not been afforded a mentor to demonstrate priority setting skills...” (Ex. 23, letter from ND to Complainant) Based on these assessments, the Adjudicator concludes that the Complainant was making an extraordinary effort to succeed in her position and was willing to seek the necessary assistance and guidance as she developed her skills and knowledge. When faced with a difficult situation, she did not hesitate to ask for help and guidance. That is precisely what she was seeking in her conversations with KB and ND. Unfortunately, these conversations did not lead to the guidance that she was seeking. Instead, ND began an investigation based upon the information from KB regarding her conversation with the Complainant.

The investigation conducted by ND relied almost exclusively on hearsay evidence provided by BC. BC was not present during the Complainant’s discussions with the host, hostess and father-in-law. Presumably the father-in-law may have relayed some details of the conversation to BC however there was no evidence as to whether or not the details given to BC were accurate. ND also relied upon the conversations that the Complainant had with herself and KB however the Adjudicator cannot allow the Complainant’s honest attempts to seek guidance become the basis for her dismissal. At no time was she advised either by KB or ND that the information that she shared with them would be turned against her. If she had been so advised,

then as she stated at the hearing, she would not have sought the guidance. The Agency further relied upon the discussion held with the Complainant on January 15, 2009 that included ND and Human Resources Manager BVG. That discussion however occurred without the Complainant being provided any forewarning that anything said in that discussion could and would be used as the basis for her termination. Nor was she provided the opportunity to have anyone attend the meeting as a support person. In effect, she was up against two managers who held her future in her hands. There was no written complaint to which she could respond. There were no charges to which she could respond.

The Adjudicator notes that there are established guidelines to be followed in the event there is an allegation of an inappropriate disclosure. Specifically Exhibit 13 (which is also contained within Exhibit 11 at the last page) provides:

The impacted individual should be advised both verbally and in writing of the inappropriate disclosure.

Subsequent to investigating and responding to a complaint related to an inappropriate disclosure, a management review report must be produced outlining the inappropriate disclosure and what remedial action or processes have been and will be taken to ensure a similar inappropriate release does not occur in the future.

There was no evidence that BC was advised in writing of the alleged inappropriate disclosure nor was there any evidence that a management review report was produced. At the second page of Exhibit 13 it states that "...affected individuals must be notified, including both those persons whose information was inappropriately disclosed and those who received the information in error." The evidence at the hearing indicated that no attempt was made to have any contact with the host, hostess, and father-in-law, all of whom would have "received the information in error". The guidelines further provide a listing of the details that should be included in the review report: nature and scope of the breach; information or documents reviewed; people interviewed; documentation of process and findings; outcomes and recommendations. These details are a critical part of the investigation of an inappropriate disclosure and may not be taken lightly yet there was no evidence provided that would support a finding that the Agency had completed a detailed investigation as anticipated by the guidelines.

The Adjudicator also notes that the Agency has an established Complaints Resolution Policy (Ex. 17, Tab 2) which provides for the review of a client's complaint with written summaries, recommendations, or results at the various steps of the process. There was no evidence that the Agency adhered to this policy. In fact, BC testified that she did not file a written complaint and that after the initial phone call from ND, there was no further discussion of the matter. BC apparently did not consider whatever happened at the private dinner party to be something that warranted any further action. The Adjudicator recognizes that the Agency may choose to pursue an alleged inappropriate disclosure or alleged breach of confidentiality even without the client however if it chooses to do so, it must do so consistent with the guidelines and the policy. ND emphasized that her focus was the Complainant's conduct as a social worker but that focus must incorporate a full, fair, and objective investigation.

The Adjudicator agrees with ND that confidentiality is paramount given the services that are provided by the Agency and the Adjudicator recognizes that there are written documents affirming the critical importance of confidentiality (Exs. 5, 6, 7, 10, 11, 12) however if any action is going to be taken against an employee who has allegedly breached confidentiality it must be taken within the parameters of the guidelines and the policy. Action may not be based upon hearsay evidence provided by an individual who happened to walk by a room and overhear a conversation. In this matter, the individual could not even identify who was in the room at the time that she was passing by nor was she even certain which room she was passing (Ex. 2). Action may also not be based upon hearsay evidence from a former client who was told something by her date and which cannot be verified by the date himself. Action may also not be based upon a social worker seeking guidance from others as the Complainant did in this matter. As stated at page 67 of Exhibit 9: "When dealing with difficult cases, counselors need to 'unwind' by talking about their feelings and the stress involved. When such discussions involve clients, the discussion should take place at the office with supervisors and colleagues..." The Complainant faced a difficult situation at a private dinner party where she would have had no expectation of encountering a former client. She honestly sought feedback and guidance after the encounter. Action may also not be based upon information provided by the Complainant in her discussion with BVG and ND when she was not provided with any opportunity to review any charges and allegations against her prior to the discussion. She was simply summoned to a

meeting and interrogated. She was terrified and intimidated. She repeatedly asked to see documentation of a complaint or the allegations against her. Nothing was provided to her.

Based on all of the foregoing and given the context and circumstances of this matter, the Adjudicator finds that the Agency has not put forward evidence that demonstrated that the Complainant had engaged in misconduct and therefore further finds that CM was unjustly dismissed from her employment with Stó:lō Nation, Xyolhemeylh Child and Family Services Department.

### **REMEDY**

As provided at Section 242 (4) of the CLC:

Where an adjudicator decides ...that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

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

In this matter CM requested at the hearing that she be reinstated to the position that she held at the time of her dismissal. The Adjudicator therefore orders that CM be provided the opportunity to return to the position that she held at the time of her dismissal.

She shall be made whole for all monetary losses that she suffered as a result of the unjust dismissal. Such losses include: the actual loss of wages from January 19, 2009 through the date of her reinstatement. Calculation of the actual loss of wages shall be on a weekly rather than a monthly basis. CM shall also be compensated for any out of pocket dental and medical expenses that she has incurred as a result of the unjust dismissal. The Adjudicator hereby orders the parties to attempt to reach a resolution on the amount due to CM and if they are unable to do so within 30 days of the issuance of this decision, the parties shall submit the matter to the Adjudicator.

The Adjudicator finds that the mistakes made by the Agency in this matter do not rise to the level of bad faith as anticipated in *Wallace v. United Grain Growers Ltd.* [1997] 152 D.L.R. (4<sup>th</sup>) and therefore denies the Complainant's claim for *Wallace* damages.

The Complainant's claim for interest on the monetary losses is also denied.

The Adjudicator has reviewed CM's request for legal costs and has determined that a reasonable amount given the length and complexity of this matter is \$10,000.

Any and all references to the dismissal of CM shall be purged and removed from any and all Agency files, paper and electronic.

The Adjudicator will retain jurisdiction of this matter for the sole purpose of determining the appropriate calculation of CM's monetary losses.

***Respectfully submitted on this 30<sup>th</sup> day of July, 2010 by***

A handwritten signature in black ink, appearing to read "Sylvia P. Skratek". The signature is fluid and cursive, with a long horizontal line extending to the right.

***Sylvia P. Skratek***  
***Adjudicator***