

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 445
3220719

BETWEEN LEI YANG
Applicant

AND TE WHATU ORA - HEALTH
NEW ZEALAND, TE TAI
TOKERAU (NORTHLAND)
Respondent

Member of Authority: Andrew Gane

Representatives: Simon Greening, counsel for the Applicant
David Grindle, counsel for the Respondent

Investigation Meeting: 30 April to 1 May 2024 in Whangārei

Submissions and further 22 May 2024 from the Applicant
information received: 22 May 2024 from the Respondent

Determination: 25 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 15 November 2006 Lei Yang was employed by the Northland District Health Board, now called Te Whatu Ora - Health New Zealand, Te Tai Tokerau (Te Whatu Ora). On 14 March 2023, Ms Yang's employment ended by way of dismissal.

[2] On 29 March 2023 Ms Yang lodged a statement of problem with the Authority alleging that she was unjustifiably disadvantaged by Te Whatu Ora. She said Te Whatu Ora had breached its obligations of good faith by implementing an unreasonable training and performance management process which led to her alleged unjustified suspension. She also alleged that she was unjustifiably dismissed by Te Whatu Ora. Ms Yang also applied for interim reinstatement.

[3] Te Whatu Ora denied Ms Yang's claims and opposed her application for interim reinstatement.

Interim reinstatement application

[4] In a determination issued on 27 June 2023, I declined Ms Yang's application for interim reinstatement. The reason for declining her application was set out in that determination.¹

The Authority's Investigation

[5] Ms Yang's substantive claims are now before the Authority for determination. During the course of investigating this employment relationship problem I received written statements and supporting documents from Ms Yang.

[6] For Te Whatu Ora I received written statements and supporting documents from Richard Tuff, the head of the microbiology department, Stephen McCullough, former services manager pathology, Alexander Pimm, former director provider of services, and Julie-Gayle Carpenter, people partner lead.

[7] All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged written closing submissions with the Authority.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

¹ *Lei Yang v Health New Zealand – Te Whatu Ora* [2023] NZERA 338.

Issues

[9] The issues for investigation and determination are:

- (a) Whether Ms Yang was unjustifiably disadvantaged by Te Whatu Ora's actions by:
 - (i) Unjustifiably suspending Ms Yang?
 - (ii) Carrying out a procedurally and substantively unfair training plan?
 - (iii) Investigating allegations against Ms Yang in a procedurally and substantively unfair manner in breach of natural justice principles and duties of good faith and responsiveness?
- (b) Was Ms Yang unjustifiably dismissed from her employment?
- (c) If Te Whatu Ora's actions were not justified, what remedies should be awarded, considering:
 - (i) Reinstatement under s 123(1)(a) of the Act;
 - (ii) Reimbursement of lost wages under s 123(1)(b)(i) of the Act;
 - (iii) Compensation under s 123(1)(c)(i) of the Act; and
 - (iv) Any other remedies the Authority deems reasonable?
- (d) Did Te Whatu Ora breach its good faith obligations to Ms Yang?
- (e) If so, should penalties be imposed, in what amount and should this be made payable to Ms Yang?
- (f) Should either party contribute to the costs of representation of the other party?

Background

Ms Yang's initial employment

[10] In November 2006 Ms Yang started working full-time for Te Whatu Ora at the Whangārei Hospital Medical Laboratory (the laboratory).

[11] Ms Yang is a member of the Association of Professional and Executive Employees also known as the APEX Union (the Union). Her employment fell under the collective agreement between the Union and what was then the Northland District Health Board (NDHB) for the period covering 31 May 2021 to 31 August 2023.

Laboratory services restructure

[12] In January 2020, following the identification of a number of issues within the Whangārei hospital laboratory services, Te Whatu Ora undertook a review of the laboratory operations. Following the review, the laboratory services were restructured. As a result of the organisational restructure there was a change in reporting structures and team frameworks. Prior to the restructure Ms Yang had been a multidisciplinary scientist and had infrequent interactions with the microbiology bench. After the restructure Ms Yang commenced work in February 2021 as a medical laboratory scientist working within the microbiology department.

[13] The Whangārei laboratory was based in Whangārei Hospital. The site was divided into five departments, one of which is the microbiology department. Normally 15 scientists worked in the microbiology area.

[14] The role of scientists in the microbiology department was to process and report samples using standard operating procedures (SOPs). There were seven different areas scientists work in and each area was referred to as 'benches'. The separate benches were Registration, Put-up/PCR, Urine and Faeces, Day1, Day2, Fluids, and Quality Control. Each bench has its own training for quite different routines and processes. Scientists also perform other overarching tasks for the laboratory and provide urgent results for clinicians.

[15] As part of its risk management processes in the microbiology department Te Whatu Ora ran a Datix reporting system. Datix is a web-based incident reporting and risk management software used in hospitals to report incidents.

Ms Yang 's performance

[16] On 17 February 2021 Stephen McCulloch was appointed Whangārei Hospital laboratory manager. On 7 June 2021 Richard Tuff was appointed head of the department of microbiology where Ms Yang worked.

[17] Mr Tuff stated that in his first month of overseeing the department he started to notice a number of errors being produced by Ms Yang while performing routine tasks associated with the bench reading area. Around July 2021 Mr Tuff informally discussed the errors with Ms Yang and it was agreed with Ms Yang that she would undertake some refresher training. Ms Yang's training occurred over a period of six weeks and was carried out by senior scientists.

[18] On 6 August 2021 Ms Yang received a 96% rating in her NDHB Laboratory staff performance appraisal template which was signed off by Mr Tuff. This meant she could work effectively without supervision.

[19] Around September 2021 Mr Tuff stated he had again started to notice mistakes in Ms Yang's microbiology work. Mr Tuff said he had several conversations with Ms Yang over this period concerning her standard of work. He said Ms Yang assured him that she understood these mistakes and insisted that they would not re-occur. In October 2021 Mr Tuff noted that Ms Yang had not performed the same number of tests as her peers. When discussing the matter with Ms Yang she said she was too busy with other work to perform the tests.

[20] On 8 November 2021 Mr Tuff sought advice from Julie Carpenter from the human resources department (HR), on how to support Ms Yang. In his view Ms Yang was underperforming and committing a large number of errors and experienced a volume of Datix entries that was much higher than her peers.

[21] Mr Tuff then met with Ms Yang on 15 November 2021 to discuss Ms Yang undertaking some further training. During this meeting Mr Tuff advised Ms Yang that several issues had arisen regarding her performance. Mr Tuff proposed Ms Yang undertake further training in various areas of concern. Ms Yang initially declined to take up the offer of further training. Mr Tuff said he was concerned as he thought Ms Yang's performance might affect the laboratory's ability to achieve the International Accreditation New Zealand (IANZ) inspection standards.

[22] On 16 November 2021 Ms Yang made a formal complaint to Mr McCullough about Mr Tuff's behaviour at the 15 November 2021 meeting. She stated she felt Mr Tuff's demeanour at the meeting had been threatening and intimidating.

[23] Mr McCulloch acknowledged Ms Yang's complaint. He said he responded to Ms Yang and advised he would be happy to meet with her to discuss the complaint further, however he heard nothing further from Ms Yang regarding the complaint.

14 February 2022 disciplinary letter

[24] On 14 February 2022 Mr McCollough wrote to Ms Yang inviting her to a meeting to investigate an alleged incident that had occurred between her and three colleagues in the laboratory, as well as her alleged failures to follow SOPs in the laboratory. The letter stated the meeting would provide her an opportunity to be heard and provide a response. Ms Yang sought assistance from her union.

[25] On 1 April 2022 Ms Yang and Dr Deborah Powell, her then union representative, attended a meeting with Mr McCullough and Ms Carpenter. As a result of the meeting, it was decided Te Whatu Ora would take no further action regarding the matters raised in the letter of 14 February 2022 and Ms Yang agreed to undertake further training.

Training plan

[26] On 5 April 2022, Ms Yang was informed via email that a training plan would be established. It was Ms Yang's understanding that the training plan was not punitive.

[27] Ms Carpenter described the training plan as being created to ensure that Te Whatu Ora could be sure of Yang's competency in that she could work on her own. By Ms Yang gradually increasing her independence in the seven different bench areas of the laboratory she would meet the competency requirements of her role.

[28] Ms Yang did raise concerns about her potentially being financially disadvantaged as it would not be possible for her to work on the night shift, due to a lack of supervisors and trainers during those shifts. However, when Ms Carpenter met again with Ms Yang and her representative on 1 June 2022 Ms Yang agreed to undertake the training plan as planned.

[29] Te Whatu Ora's training policies set out the various criteria for different levels of training plan.

- (a) For initial performance concerns with an employee the policy provides for a supportive improvement plan to be implemented. There is no disciplinary

sanction for not achieving the expectations set out a supportive improvement plan.

- (b) If, after completing a supportive improvement plan, there were still performance issues with an employee, the matter could be escalated to a performance management plan.
- (c) If, after completing a performance management plan, there are still performance issues with the employee, then Te Whatu Ora may initiate a disciplinary process.

[30] On 8 June 2022 Mr Tuff emailed Ms Yang a copy of her training plan. The training plan did not specify what type of training plan Ms Yang was undertaking. Ms Yang's training plan stipulated:

This plan has been carefully constructed to provide you with the support you will need to get the most out of the training, while ensuring it is good quality training from strong members of the microbiology team...
Upon completion of this program, we wish to meet and review this process.

[31] There was no indication in the training plan that any failure to meet the expectations of the training plan would result in an escalation to a disciplinary investigation or an outcome of dismissal. Ms Yang's training plan therefore fell under the category of a supportive improvement plan, rather than a performance management plan.

[32] The training began on 16 June 2022 and was scheduled to finish on 23 December 2022. Ms Yang's training plan was designed so Ms Yang would have three weeks in each bench section. As each week progressed a training sheet was completed, and feedback was provided. Ms Yang held regular weekly meetings with the technical specialists of microbiology department to discuss her progress and to achieve competency sign off from the heads of departments in each particular area.

[33] Initially training went well and Mr Tuff said Ms Yang was observed to be taking the training seriously. On 29 September 2022 Mr Tuff noted how matters were progressing and Ms Yang was on track to conclude the plan and transition back onto the roster in January 2023.

Completion of training plan

[34] On 20 December 2022 Mr McCollough wrote to Ms Yang advising she had failed to satisfactorily complete her training plan and had only managed to demonstrate competency in two of the seven sections of her training plan, Specimen Registration, and Put Up, in microbiology. She had not demonstrated competency in five of the seven sections.

[35] Mr McCollough also advised Ms Yang he had serious concerns about her ability to perform her role and she would no longer be able to return to working unsupervised in January 2023 as had been the plan.

Te Whatu Ora's disciplinary process

[36] On 21 December 2022 Te Whatu Ora invited Ms Yang to an investigation meeting on 18 January 2023 to discuss a range of issues, including her competency levels. The invitation referred to the potential outcome of the meeting being disciplinary action which included Ms Yang being issued a final warning or her dismissal.

[37] On 18 January 2023 Ms Yang attended the investigation meeting along with, her union representative David Munro, Ms Carpenter and Mr McCullough to discuss the issues identified in the letter of 21 December 2022. An outcome of meeting was that Te Whatu Ora agreed to Ms Yang's request for her training records to be reviewed by Dr David Hammer, a consultant clinical microbiologist. Ms Yang was placed on special paid leave.

[38] After reviewing Ms Yang's training records, Dr Hammer stated that although the training was appropriate, Ms Yang failed to achieve competency in any of the fields that were required to work as an independent scientist in microbiology or in an unsupervised role.

Termination of employment

[39] On 2 February 2023 Te Whatu Ora wrote to Ms Yang and communicated its preliminary decision that serious misconduct had been demonstrated in multiple areas and termination of employment was warranted in this instance.

[40] On 16 February 2023 Ms Yang's solicitor sent a letter to Te Whatu Ora in response to the preliminary decision. On 7 March 2023 Mr Pimm, Te Whatu Ora's

delegated decision maker, met with Ms Yang and her solicitor to hear directly from her before making a final decision.

[41] On 14 March 2023 Mr Pimm wrote to Ms Yang confirming the decision to terminate her employment on one months' notice.

Was Ms Yang was unjustifiably disadvantaged by Te Whatu Ora's actions?

Was Ms Yang unjustifiably suspended?

[42] Ms Yang alleges that she was unjustifiably disadvantaged by being suspended at the 18 January 2023 meeting.

[43] Ms Yang attended the meeting with her representative. The meeting notes record that:

In the interim period, [Ms Yang] was offered and accepted special paid leave until there is an outcome.

[44] I questioned Ms Yang on this issue, and she said she felt she had no choice but to agree to go on special leave.

[45] Ms Carpenter stated that after it had been agreed that Dr Hammer would conduct a review of Ms Yang's training records, she discussed with Ms Yang and her representative, whether Ms Yang would go on special paid leave until the matter was resolved. She said Ms Yang agreed to go on special paid leave.

[46] As Ms Yang agreed to go on special paid leave, I find she was not suspended and therefore not unjustifiably disadvantaged by being placed on special paid leave.

Was the training plan procedurally and substantively unfair?

[47] Ms Yang stated she was not adequately consulted about her training plan and felt she was unjustifiably disadvantaged by having her training plan imposed on her,

[48] Te Whatu Ora submits it carried out appropriate consultation with Ms Yang about her training plan and met with her and her representative before finalising the plan. In Mr Tuff's view the training plan was the most comprehensive Te Whatu Ora had ever offered in the Whangārei laboratory.

[49] I find there was a significant amount of consultation with Ms Yang by Te Whatu Ora management regarding the contents of her training plan, including numerous

meetings and email exchanges between the 1 April 2022 meeting, when Ms Yang agreed to undertake the training plan and 16 June 2022, when the plan was implemented.

[50] I find the terms and contents of the training plan were arrived at after appropriate consultation with Ms Yang and she agreed to undertake it. I do not find Ms Yang was unjustifiably disadvantaged by carrying out the training plan.

Was Te Whatu Ora's disciplinary investigation procedurally and substantively unfair?

[51] Ms Yang claims she was unjustifiably disadvantaged by Te Whatu Ora carrying out a disciplinary investigation that was both procedurally and substantively unfair.

[52] Prior to Ms Yang receiving Mr McCullough's letter of 21 December 2022, Ms Yang had not been made aware that if she failed to complete the training plan to satisfactory level, she could be subject to a disciplinary investigation and her employment could be terminated.

[53] Ms Yang stated the investigation into allegations that her communications and interactions with colleagues was inappropriate, lacked natural justice and was procedurally unfair.

[54] The matters raised in Mr McCullough's letter of 14 February 2022 should not have formed part of the disciplinary investigation. Ms Yang was advised by Te Whatu Ora that it would take no further action regarding matters raised in the letter of 14 February 2022.

[55] Other examples of Ms Yang's alleged poor behaviour amounting to serious misconduct were not properly investigated and some were sought out by email requests to colleagues by her manager. It is both unreasonable and unfair for Te Whatu Ora to rely on emails from colleagues as evidence of "not communicating in an appropriate manner".

[56] There was no formal investigation of a number of the complaints before putting the allegations to Ms Yang. One allegation had been resolved between the parties and was not subject to a formal complaint.

[57] In my view, Te Whatu Ora's disciplinary investigation was defective in several significant respects which resulted in unfairness to Ms Yang. I find Ms Yang was unjustifiably disadvantaged by Te Whatu Ora's disciplinary investigation process.

Was Ms Yang unjustifiably dismissed from her employment?

[58] Ms Yang submits that Te Whatu Ora's lack of communication regarding the consequences of not completing her training plan to a satisfactory standard and the continued failure to warn her that punitive action may occur at the conclusion of the training plan, was a breach of Te Whatu Ora's duty of good faith to her.

[59] Ms Yang submits she participated in her training plan in good faith and received mainly positive feedback. On 3 October 2022 Te Whatu Ora emailed Ms Yang to confirm that the plan was "progressing well" and that "no further meetings would be required for review purposes". Ms Yang believed she would be allowed to transition back to the roster.

[60] That outlook changed on 20 December 2022, when Mr McCullough wrote to Ms Yang advising her that only two sections of her training plan had been successfully signed off. She had not demonstrated competency in five of the seven sections. The letter advised her she would not be able to return to her shift work and could only work under supervision.

Te Whatu Ora's disciplinary process

[61] Mr McCullough then wrote the 21 December 2022 letter inviting Ms Yang to an investigation meeting on 18 January 2023 to discuss a range of issues, including her competency levels. He also referred to the fact that this could result in disciplinary action being taken, including a final warning and dismissal.

[62] This was the first time Ms Yang was advised she may face disciplinary action because of her failure to satisfactorily meet the expectations set out in her training plan.

[63] There was no indication in the training plan that any failure to meet the expectations of the plan would result in an escalation to a disciplinary investigation or an outcome of dismissal. When I questioned Ms Carpenter on the issue at the investigation, she confirmed Ms Yang's training plan fitted the policy definition for a supportive improvement plan. As stated earlier I find Ms Yang's training plan falls under the category of a supportive improvement plan and should not have been punitive.

[64] At the meeting on 18 January 2023, Ms Yang and her representative raised issues about the reasonableness of the training plan and sought for it to be reviewed. It was

agreed for the reasonableness of the training plan to be reviewed by Dr Hammer. Ms Yang agreed to go on special paid leave.

[65] Dr Hammer never met with Ms Yang and conducted a review of the matter on the papers. After reviewing Ms Yang's training records, Dr Hammer stated that although the training was appropriate, Ms Yang failed to achieve competency level:

It is my opinion that the re-training provided appeared to have been appropriate, achievable, extensive and even generous, being more than usual than that of some lesser experienced scientists."

It does not appear that re-training has had the desired results at all. I am left genuinely questioning how seriously Lei took this retraining exercise. It is both concerning and puzzling to me that, despite all the prolonged retraining, Lei has not achieved competency in any of the fields required to work as an independent scientist in microbiology and clearly not in an unsupervised role.

Preliminary view letter

[66] On 2 February 2023, Ms Yang received a preliminary view letter from Mr McCullough. Te Whatu Ora made 13 separate findings of serious misconduct against Ms Yang.

[67] Ms Yang submits that Te Whatu Ora had predetermined her dismissal. A number of findings are linked back to either a few specific incidents that occurred throughout the 6-month training plan, the allegation that the plan had not been properly completed, or Ms Yang's poor attitude towards the plan. The letter concludes by stating:

This preliminary view is based on the premise that you are unable to effectively evidence the competencies required to fulfil the role of Medical Laboratory Scientist in this organisation....You participated in and failed a structured training plan as presented and agreed between the parties. Given the outcome of the training plan this laboratory is unable to further sustain further commitment to your training. It is a requirement of your terms of employment to be able to fulfil the duties and responsibilities of a Medical Laboratory Scientist.

[68] Ms Yang sought legal advice and responded to the letter questioning the findings of competency and pointing out Te Whatu Ora's apparent failure to follow its own policies.

7 March 2023 meeting

[69] The parties met on 7 March 2023 to discuss the preliminary finding and response. Ms Yang's solicitor raised specifically with Mr Pimm the non-punitive nature of the training plan. Ms Yang's solicitor also raised the non-specificity of the complaints about Ms Yang's communications.

Termination letter 14 March 2023

[70] Te Whatu Ora's termination letter identified four issues as the basis for ultimately terminating Ms Yang's employment:

- (a) Failed the training plan.
- (b) Only signed off in two sections of the training plan
- (c) Not signed off in remaining sections of the training plan.
- (d) Communications and interactions with colleagues were inappropriate.

[71] Three of the issues relied on by Te Whatu Ora as the basis for terminating Ms Yang's employments are specifically related to her alleged failure to complete the training plan to a satisfactory level. At no time prior to receiving Mr McCullough's letter of 21 December 2022 was Ms Yang made aware that if she failed to complete the training plan to satisfactory level, she could be subject to a disciplinary investigation and her employment could be terminated. The training plan itself, which I have found to be a supportive improvement plan, is silent on the issue.

[72] Te Whatu Ora submitted that Ms Yang was not solely terminated because she failed to complete her training plan. Her employment was also terminated because she had an objectively low level of work performance that was full of errors, mistakes and wilful decisions to ignore laboratory SOPs.

Conclusion

[73] In assessing whether the dismissal and Te Whatu Ora's actions were procedurally justified, the Authority must consider the matters set out at s 103A(3) of the Act, which sets out the test for justification. The Authority must consider, on an objective basis, whether Te Whatu Ora's actions, and how Te Whatu Ora acted, was what a fair and reasonable employer could have done in all of the circumstances at the time the action

occurred.² Also relevant to the Authority's consideration are the good faith obligations in s 4 of the Act.

[74] The onus is on Te Whatu Ora to justify its actions and justification requires the consideration of both substantive and procedural fairness.

[75] Te Whatu Ora has submitted the potential risk to patients by Ms Yang's technical breaches such as failure to follow SOPs, mislabelling samples etc. are in themselves serious misconduct and potential ground for justified dismissal.

[76] Although these alleged breaches may have occurred, they should have been addressed during the training plan. These incidents raise issues regarding Ms Yang's future performance, but in themselves do not give rise for grounds to dismiss.

[77] To the extent Te Whatu Ora could claim there was a valid substantive reason for dismissing Ms Yang, I find this was undermined by the employment investigation it conducted. In my view, Te Whatu Ora's investigation was defective in several significant respects which resulted a high level of unfairness to Ms Yang, such as to make her dismissal unjustified.

[78] I found that Te Whatu Ora failed to provide adequate information to Ms Wang that participating in the training plan could have an adverse effect on the continuation of her employment and that she was unjustifiably disadvantaged by the subsequent disciplinary process.

[79] Ms Yang was not informed that the failure to complete her training plan to a satisfactory level might result in dismissal. Furthermore, as Ms Yang was effectively on a supportive improvement plan, which in line with Te Whatu Ora's policies, she should not have been subjected to disciplinary actions upon failing to complete her training plan. These were not minor procedural defects and resulted in Ms Yang being treated unfairly.³

[80] The fact that there were three instances of alleged serious misconduct that occurred whilst the training plan does not exonerate Te Whatu Ora from that failure. Te

² Employment Relations Act 2000, s 103A(2).

³ Employment Relations Act 2000, s.103A(5).

Whatu Ora accepted that there had been previous incidents where Ms Yang had failed to follow SOPs and had failed to warn her of the consequences of such behaviour.

[81] Te Whatu Ora's failure to complete a fair process was not what a fair and reasonable employer could have done in the circumstances. Those were unjustified actions and Ms Yang has established her personal grievance for unjustified dismissal on those grounds.

[82] Having heard from the parties and having assessed the evidence I determine Ms Yang was unjustifiably dismissed by Te Whatu Ora.

Remedies

[83] As Ms Yang has been successful with her unjustified disadvantage and unjustified dismissal claims I must turn to consider what remedies she may be entitled to. I may award any of the remedies provided for under s 123 of the Act.

Reinstatement

[84] Ms Yang seeks to be reinstated to the Te Whatu Ora's employment as a medical laboratory scientist.⁴ Where it is practical and reasonable to do so, the Authority must provide for reinstatement as the primary remedy.⁵ As stated by the Employment Court in *Hong v Auckland Transport*:

unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licencing unjustifiable dismissals.⁶

[85] Ms Yang submits reinstatement is reasonable and practicable. Ms Yang is currently working with no issues as a Medical Laboratory Scientist. Ms Yang has been cleared by the relevant professional body to continue working as a Medical Laboratory Scientist in the Awanui Laboratory in Timaru.

[86] Te Whatu Ora is opposed to Ms Yang's reinstatement on the grounds that it is neither reasonable nor practicable to do so. Te Whatu Ora's opposition is underpinned by significant public safety concerns which it says it cannot mitigate. It has concerns

⁴ Employment Relations Act, s 123(1)(a).

⁵ Employment Relations Act, s 125(2).

⁶ *Hong v Auckland Transport* [2019] NZEmpC 54.

about patient safety given Ms Yang's competency issues. Te Whatu Ora says further training and supervision is required.

[87] Te Whatu Ora submits that a high degree of competency is needed to ensure patient safety. Despite undertaking a support improvement plan and education plan, her incompetency continued. The evidence showed she lacked the ability to consistently maintain safe practice. The role she is currently performing at the Awanui Laboratory is limited in scope and breadth and does not compare to a laboratory scientist in a public hospital.

[88] Te Whatu Ora submits reinstatement is neither reasonable nor practicable having regard to the recurring competency issues and the impact of reinstatement upon staff and patients. In *Lee v Auckland District Health Board*⁷

Whether it is practicable to reinstate involves a balancing of the interests of the parties and the justices of their cases with regard to the past and future. Practicality is both about whether it can occur and the consequences. Reinstatement has been declined because of contributory conduct including safety issues.

[89] Te Whatu Ora submits Ms Yang experienced a volume of Datix entries that was much higher than her peers. When put together with her poor interpersonal communications, reluctance to follow SOPs, and three specific examples of incorrect process there is a reasonable basis for believing that her incompetence in the laboratory would have an adverse impact upon patient care. Ms Yang's failure to follow SOPs and adopt her own practices for testing would result in irregular and discordant results which would cause serious risk to the patients, the organisation, and the laboratory's accreditation.

[90] Te Whatu Ora claims it does not currently have the resources in Whangārei to provide indefinite training until Ms Yang is able to attain the level of competency expected of a scientist. This is in part because they recently employed three new scientists who are undergoing the early stages of training, and a new technician that requires training also and they have insufficient fully qualified and competent scientists to undertake the work.

⁷ [2013] NZERA Auckland 583 at [39].

[91] Ms Yang's inability to work the shift roster (due to competence) and having to arrange a mentor for her puts strain on other scientists and creates significant inconvenience in rostering.

[92] Te Whatu Ora claims Ms Yang's relationship with her direct manager Mr Tuff was fraught. Mr Tuff stated that he no longer had confidence in her ability to perform the role. He stated that he would explain things to her, and she would acknowledge them, but then she would not follow his instruction. He also described her as being argumentative and that her lack of accountability and blaming mistakes on other people, lead to disputes with other colleagues.

[93] Although Te Whatu Ora's investigation into Ms Yang was unfair, there were a number of uncontested complaints about her interactions with other members of staff.

[94] This employment relationship problem concerns the ability of Ms Yang to make decisions involving a high level of trust and integrity and professional judgement when carrying out the laboratory work competently. I find Ms Yang has failed to provide that level of trust and confidence.

[95] In the circumstances I find Ms Yang should not be reinstated.

Reimbursement of lost wages

[96] Ms Yang seeks reimbursement of loss of earnings for the period from the date of dismissal until she commenced employment with Awanui Laboratory on 11 December 2023.

[97] Where the Authority finds that an employee has a personal grievance, and that the employee has lost remuneration as a result of the personal grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[98] Ms Yang alleged that she had to refrain from working due to her lodging an interim reinstatement application. Te Whatu Ora submits she has not provided any evidence as to why she could not work between her termination on 14 March 2023 and her starting work on 22 August 2023.

[99] Te Whatu Ora submits Ms Yang has failed to meet her common law obligation to mitigate her loss and has failed to provide appropriate independent evidence as to why it was not reasonable for her to work in the three months following her dismissal.

[100] Ms Yang was dismissed on a months' paid notice. I agree she has failed to adequately to mitigate her lost wages or provide evidence supporting a basis for as to why, however in the circumstances I am persuaded to grant Ms Yang reimbursement of 2 months' salary.

[101] Ms Yang is entitled to recover two months' salary at the contractual rate she was paid at the time of her dismissal. The parties' representatives are to consult with each other to calculate the amount Ms Yang can recover. In the event that they cannot agree leave is granted after 14 days to return to the Authority to calculate the amount.

[102] I find Te Whatu Ora is to pay Ms Yang two months' salary for lost remuneration.

Award under s 123(1)(c)(i)

[103] I find Ms Yang has two personal grievances. One for unjustifiable disadvantage and one of unjustifiable dismissal. As the two personal grievances stem from the same factual and course of conduct and Ms Yang gave evidence as to the combined effect the conduct had on her wellbeing, I will take a global approach in considering whether remedies are appropriate.

[104] It is accepted the impact of the unjustified dismissal has had a profound and negative impact on Ms Yang. It is appropriate to assess compensation under this head globally. I am satisfied Ms Yang experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter Ms Yang is entitled to a global award to compensate the humiliation, loss of dignity and injury to feelings suffered consequent to the established personal grievances of \$25,000.00.⁸

[105] I find Te Whatu Ora is to pay Ms Yang compensation of \$25,000.

Contribution

[106] The Authority is required where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards

⁸ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.⁹

[107] Te Whatu Ora submits Ms Yang's contribution to her personal grievances was significant and her actions were both causative of the outcome and blameworthy. In particular Te Whatu Ora submits Ms Yang has not accepted responsibility for her contribution to the relationship difficulties the competency issues and diagnostic mistakes she was dismissed for which involve serious breaches of policy and the employment agreement and are blameworthy.

[108] In *Maddigan v Director-General of Conservation* the court set out the approach to determining contribution:

The approach to contribution which emerges from recent judgments of the Court can be summarised as follows:

(a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?

(b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?

(c) Third, what is a fair assessment of the extent of the contribution?

(d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[109] Ms Yang's failure to follow SOPs and adopt incorrect procedures is evidence of blameworthy behaviour that contributed to the circumstances resulting in her dismissal. There is a causal link between Ms Yang's actions and the situation that gave rise to the dismissal.

[110] The Court in *Maddigan* held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.¹⁰

[111] In consideration of all the relevant circumstance I find a reduction of 20% of remedies awarded under s 123(1)(i)(c) is appropriate to reflect the contributory conduct.

[112] I find Ms Yang's amount of compensation under s 123(1)(i)(c) of the Act is reduced to \$20,000.

⁹ Employment Relations Act, s 124.

¹⁰ *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

Penalties

Should a penalty be imposed for the breach of good faith?

[113] The statutory obligations of good faith include compliance with minimum standards of good faith behaviour between parties to employment relationships in a number of circumstances including, where the dismissal of an employee may be the outcome.¹¹

[114] Ms Yang submits Te Whatu Ora breached its obligations of good faith to her. She says that given her previous tenure of service and unblemished record of service, Te Whatu Ora misled her to the nature, scope, purpose and potential outcomes of the supportive improvement plan.

[115] I find that Te Whatu Ora did mislead Ms Yang about the supportive improvement plan. However this breach of good faith by Te Whatu Ora was not deliberate, serious and sustained, and was not intended to undermine the employment relationship. I am also satisfied the award I have granted for compensation is sufficient in all the circumstances.

[116] In addition, I find Te Whatu Ora met its good faith obligations in most of its dealings with Ms Yang, at times going beyond the obligations of a normal employer.

[117] For these reasons I decline to exercise my discretion to impose penalties for a breach of good faith

Summary of orders

[118] Te Whatu Ora unjustifiably disadvantaged and unjustifiably dismissed Ms Lei Yang. In settlement of these grievances Te Whatu Ora must pay Ms Yang:

- (a) Two months' salary for lost remuneration pursuant to section 123(1)(b) and section 128 of the Employment Relations Act 2000; and
- (b) \$20,000.00 for compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.

¹¹ Employment Relations Act, s 4.

Costs

[119] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[120] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Yang may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Te Whatu Ora will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[121] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹²

Andrew Gane
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1