

NOTE: This determination is subject to an order referred to at [5] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 365
3329400

BETWEEN

DQJ
Applicant

AND

COMMISSIONER OF INLAND
REVENUE
Respondent

Member of Authority: Lucia Vincent

Representatives: Ashleigh Fechny, advocate for the Applicant
Susan Hornsby-Geluk, counsel for the Respondent

Investigation Meeting: 15 and 16 April 2025 in Christchurch

Submissions and further information received: 5 and 26 May 2025 from the Applicant
19 May 2025 from the Respondent

Determination: 24 June 2025

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] DQJ says the Commissioner of Inland Revenue (IR) unjustifiably dismissed her from her dream job. This happened at a time in her life when she was building her career (and life) after trauma had impeded her ability to pursue one. She seeks to be reinstated on a permanent basis and has claimed financial remedies.

[2] Although IR acknowledges DQJ's trauma and the workplace challenges associated with it, it says this was unknown at the time, and that DQJ was (and is) fundamentally incapable of performing her role. This resulted in the employment relationship becoming frustrated –

bringing it to an end without fault on either side. Alternatively, it says IR can justify dismissal on medical grounds.

[3] IR resists reinstatement, saying the relationship cannot successfully be reinstated, including because DQJ cannot perform key aspects of the role - such as starting at 8:00am (or any other time reliably), and that reintroducing DQJ into the workplace would adversely and severely impact others, making reinstatement neither reasonable nor practicable.

[4] The parties have been unable to resolve their employment relationship problem and have asked the Authority to resolve it for them.

Non-Publication Order

[5] A permanent non-publication order protects the names and identifying details of DQJ, the Team Lead and colleagues A and C.¹ I refer to these people by a randomly generated letter sequence or a title to preserve their anonymity.

[6] Both parties referred to difficulties following widespread media attention about the case. Although the non-publication order does not extend to others mentioned in this determination, I have used titles rather than names for consistency.

How did the Authority investigate?

[7] At an interim stage the Authority did not reinstate DQJ.² DQJ challenged that determination successfully - the Employment Court interim reinstated DQJ to the payroll pending a substantive investigation by the Authority.³

[8] The substantive investigation meeting occurred on 15 and 16 April 2025. Witnesses gave evidence under oath or affirmation. Written submissions followed.

[9] As permitted by s 174E of the Employment Relations Act 2000 (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.

¹ *DQJ v The Commissioners of Inland Revenue* [2025] NZERA 237.

² *DQJ v The Commissioner of the Inland Revenue Department* [2024] NZERA 723.

³ *DQJ v The Commissioner of Inland Revenue* [2025] NZEmpC 10.

What were the issues?

[10] The issues for determination by the Authority were:

- (a) Did IR unjustifiably dismiss DQJ?
- (b) Alternatively, did IR unjustifiably disadvantage DQJ?
- (c) If IR unjustifiably dismissed DQJ, what remedies (if any) should the Authority award, such as reinstatement, remuneration lost and compensation?

What happened?

DQJ and IR had an employment agreement

[11] DQJ started working for IR in a Workplace Support (L1) role on 20 March 2023, within the Workplace Support Services team. The terms and conditions of her employment were as set out in an individual employment agreement based on the IR/PSA Collective Agreement for the term 1 December 2022 to 28 February 2025 (CA).

[12] A letter dated 7 March 2023 made DQJ an offer of permanent employment, enclosing the job expectations and terms of employment. Under hours of work, it says:

Your hours of work will be 7 hours 35 minutes per day (37 hours 55 minutes per week), to be worked Monday to Friday, within the agreed nine hour band of 8.00am to 5.00pm.

[13] Other clauses in the CA include:

- (a) Clause 4.6 grants an employee 65 days' pay if IR approves employment ending on medical grounds.
- (b) Clause 5.1.2 refers to work hours as described in any letter of offer consistent with the clauses in the CA.
- (c) Clause 5.2 describes flexitime to support employees balancing personal and family/whānau commitments with their daily work so long as operational needs are met. Clause 5.1.2 notes any variation to hours can be agreed on a case-by-case basis between the employee and their leader to establish a pattern of hours to be generally worked along with any occasional or short term changes that do not require agreement.

- (d) Clause 6.8 sets out sick leave entitlements and IR's policy that where there is a genuine need to be absent from work, employees should take reasonable time off. There is also a clause about IR's ability to ask for a medical examination for reasonable cause.
- (e) Clause 6.11 sets out support for family violence (including where it occurred prior to employment).⁴ It refers to employees contacting their leader or another person to identify any practical measures or actions that could support them at work such as changing the span or pattern of working hours. Clause 6.11.1 refers to family violence leave.

The Workplace Support Services team supports all IR staff

[14] The Workplace Support Services is a team within IR that supports all IR staff and is responsible for 20 buildings across the country. Despite that, the team is not large, with ten staff in DQJ's immediate team reporting to the same Team Lead she does.

[15] Generally, sites with a staff population of a certain number require in person support (with the remainder being remotely supported). IR says it is important for DQJ and others in her team to provide in person support between 8:00am and 4:00pm each day at those sites. IR does not expect the team to provide support outside these hours.

[16] DQJ's role of Workplace Support (L1) requires her to be responsible for her site in the city in which she is based, with the addition of one remote site. In addition to being onsite to support IR staff with facility, administration, and technology matters, the role takes care of any building security issues such as letting contractors in and inducting them to site. The job description describes the role's purpose:

... to improve the customer experience by enabling our people to gain maximum benefit from IR's facilities and work tools, providing them with first contact workplace and/or technology-related services, guidance and support.

[17] DQJ reports to her Team Lead, Workplace Support (L2) (Team Lead), who is based at a different site (in the same city). IR has other employees in the Workplace Support Services team based elsewhere who report to a different Team Lead. DQJ's Team Lead reports to the

⁴ Consistent with ss 72C to 72J of the Holidays Act 2003 (for family violence leave) and Part 6AB of the Act (for flexible working short-term of up to ten days for people affected by family violence).

Domain Lead who is responsible for national operations and managing facilities. He is based in a different city.

IR has policies on flexible working and family violence leave

[18] IR's flexible working policy refers to the default position that roles are treated as flexible unless there is a genuine business reason for them not to be. Any employee may request flexibility that may include working within a wider work window if that is appropriate for the role. The policy also refers to requesting a variation to an employment agreement under Part 6AA of the Act as an option in addition to requesting it under the policy or an employment agreement. It notes IR being open to considering flexibility does not mean all requests can be accommodated – decisions are informed by the nature and circumstances of the flexibility sought, wider parameters of the team/organisation and operational requirements for customers who are a priority.

[19] The workplace administrative policy refers to family violence leave, supporting the provisions in the CA. If an employee requires any support or assistance, they are encouraged to discuss what support they may wish to request with their people leader. Support may include temporary changes to the employee's working arrangements, access to EAP or leave.

Issues arose early in the employment relationship

[20] Regrettably, from IR's perspective, issues arose early on with DQJ's work. For example, evidence from the Team Lead and Domain Lead say DQJ was repeatedly late, had lost her licence (so could not drive fleet cars or between offices), wore work attire a colleague considered inappropriate, spent time on personal calls, had trouble completing tasks and went to sleep while at work more than once.

[21] A document provided by IR shows a colleague's record of the period during which they observed these issues. This colleague (colleague A) had been acting as DQJ's Team Lead while the usual Team Lead was on leave. Colleague A reported being reduced to tears because of having to manage these issues with DQJ.

[22] When the Team Lead returned from leave, the Team Lead says she started at square one coaching DQJ. She had a training plan that included the basics of office work, turning up on time, professional dress and how to speak in an office environment. She also arranged a meeting

on 27 April 2023 between DQJ and colleague A to reset the relationship – sending a follow up email about agreed actions like respecting one another.

IR set expectations for DQJ

[23] The Team Lead took further leave in May/June 2023 during which IR's Domain Lead met with DQJ on 1 June 2023 to address concerns that continued to arise during that period when another colleague had been acting as Team Lead (colleague B). DQJ was supported by a PSA delegate. A senior HR advisor also attended. A meeting request recorded the reasons for meeting as not being formal nor with any disciplinary outcome – they were to discuss the following concerns:

1. Often being late to work
2. Coming to work tired
3. Sleeping at your desk
4. Inappropriate workplace attire
5. Being distracted by personal issues and the impact of this on your work productivity
6. Your driver license suspension – I would like to clarify the status of this, both in the past and going forward.

[24] The Domain Lead recalled the meeting being difficult. A file note records they discussed DQJ's regular lateness, failing to keep the Team Lead informed of her whereabouts when arriving at work, tiredness at work, Driver's licence suspension, work attire, and upcoming Court appearance. The file note records agreements reached, for example, that:

- (a) DQJ "... to arrive at work at 8am sharp everyday"
- (b) DQJ to inform her Team Lead of any lateness and updates on arrival time.

[25] The Domain Lead emailed a copy of the notes with an opportunity for feedback to DQJ's representative, along with a copy of dress guidelines. DQJ's representative responded to the notes with further comments that included highlighting the flexi time policy. Records of arrival times were exchanged that showed DQJ's ongoing lateness.

Concerns continued to arise

[26] Concerns continued to arise from IR's perspective. The Team Lead experienced difficulty managing DQJ. A file note of these difficulties included observing that DQJ had trouble completing tasks and took personal calls and messages.

[27] On 25 July 2023, the Team Lead found DQJ asleep at work after another colleague told her she had observed DQJ asleep on her keyboard. She was taken to the sick bay and a friend called to collect her.

[28] The Team Lead met with three of DQJ's colleagues on 8 August 2023 (colleague A, colleague C and colleague D) because they had raised concerns about DQJ. These included that DQJ continued to be habitually late for work, had asked a colleague for money, wore inappropriate clothes at work, appeared groggy, struggled to perform tasks competently, disappeared and behaved differently towards them when the Team Lead was absent, and additional work created by DQJ not having a licence.

[29] An email from colleague D to the Team Lead on 16 August 2023 expressed concern about overhearing DQJ calling her mother a "C****" during a personal call and attempting to involve him in the conversation.

IR addresses concerns with DQJ and sets further expectations

[30] The Team Lead wrote to DQJ to invite her to a meeting on 11 September 2023 to discuss ongoing concerns about her workplace conduct. These concerns included continued lateness to work, falling asleep at her desk, getting distracted on personal calls, her license (or lack of) and impact of behaviour on the wider team.

[31] The Team Lead met with DQJ and a Senior HR Advisor on 11 September 2023. Notes from that meeting record a discussion about IR's concerns. The Team Lead provided further information about concerns raised by members of DQJ's team – colleague A, colleague C and colleague D. Concerns included some felt frustrated dealing with DQJ and were reduced to tears on a few occasions, and different behaviour observed by team members when the Team Lead was absent (such as being late every day by half an hour while the Team Lead was on leave, without notifying anyone). The notes record DQJ became emotional during this meeting. DQJ provided responses to some of the concerns such as saying she suffered from insomnia. The meeting finished with the Team Lead outlining expectations and a desire to help DQJ work on her relationship with the team.

[32] The Team Lead wrote to DQJ in a letter dated 15 September 2023 summarising what was discussed during their meeting. The letter said to DQJ that:

Going forward you are instructed to:

- be on time to work and ready to start your day at 8am.
- use your access card to swipe into work when you first arrive at work.
- be attentive at work and do your work with care.
- work to the best of your abilities.
- make sure you get sufficient rest outside of work hours, so that you do not fall asleep during work hours.
- be professional and responsive.
- act in good faith and with honesty.
- act professional in all interactions with customers, service provides and colleagues within (IR), and take responsibility for your actions.
- avoid any activities, work, or non-work, that may harm the reputation of our organisation or of the Public Service
- do not take personal work calls during paid work time. You can take personal calls during breaks and at lunch time, but please make sure you do not disturb others around you.
- behave reasonably and be respectful towards others and
- maintain appropriate use of language/tone around others and not involve them in your personal matters.

[33] The letter finished by saying that: “If you choose not to follow these expectations, I will consider whether further action is required, this may lead to (IR) following more formal process, potentially including a disciplinary process.”

[34] The Team Lead sent an email on 21 September 2023 clarifying concerns raised by DQJ in a meeting about the letter. This included agreeing that if DQJ was feeling unwell or had not had sufficient sleep to undertake a full days work, she could call in sick or take a day’s leave. It acknowledged that DQJ would obtain her licence on 1 February 2024. The Team Lead planned to meet every two weeks moving forward about progress with DQJ.

[35] At this stage, and throughout her employment despite the letter indicating a more formal process could follow if she did not meet expectations, DQJ says she did not appreciate the seriousness of the concerns or consequences should she not meet expectations.

Issues continued to arise

[36] During the period October to November 2023 the Team Lead says DQJ suffered from a range of health issues. The Team Lead says she spent a lot of time coaching her about how to organise her life in healthy and responsible way. IR referred DQJ to EAP for counselling and budget advice services.

[37] The Team Lead says DQJ started to make some improvements for a period such as her dress standards, performing her duties and no longer falling asleep at work. However, DQJ

regressed when she fell asleep during a team meeting on 18 October 2023. Further, at no time did DQJ manage to attend work on time in any consistent way.

[38] The Team Lead says the tasks performed by DQJ's role required her to be there between 8:00am and 4:00pm – core business hours. Others had to perform DQJ's tasks if she did not arrive at 8:00am. By contrast, DQJ says most people did not arrive at work until 8:30am and she was available by phone if someone wanted to see her before then.

[39] The Team Lead says colleague C covered DQJ as part of their role but had asked to move sites and did not want to work with DQJ because they felt unsafe. This resulted in the Team Lead stepping in on a regular basis. When the Team Lead was on leave, they say DQJ often would not attend work at all, further alienating DQJ and upsetting the team who would be left covering for her in the Team Lead's absence.

[40] The Team Lead described herself as a “human shield” for DQJ because her team struggled to work with her and grew increasingly reluctant to work closely with her due to her failure to meet the same standards they did and her tendency to react in an explosive manner. The Team Lead described DQJ's fixation on colleague A who DQJ believed undermined her. Colleague A did not wish to work with DQJ (like others in the team). This resulted in the Team Lead picking DQJ's work up (as well as her own job), working long hours, feeling stretched “extremely thin” and greatly stressed.

[41] The Team Lead recalled that although DQJ made some improvements in some areas (except for attendance), things worsened again in May 2024. During June 2024 while the Team Lead was away on leave, DQJ fell asleep at work again. Colleague A reported this when the Team Lead returned from leave. Another colleague – colleague E, had observed it and told colleague A who had been acting as Team Lead at the time.

[42] The Domain Lead dealt with the complaint from colleague E who emailed a complaint to HR at the time. The email says the altercation between them and DQJ was “extremely hostile.” They say DQJ called them a “bitch” loudly, then confronted them and asked them if they had said anything to colleague A while she was acting Team Lead. They told DQJ they had reported to colleague A what they had been asked about: when DQJ arrived at work and if she fell asleep at her desk. DQJ then called them a “narc” and said “I bet you have no friends,

you seem like the type to have no friends.” They said the behaviour almost resulted in triggering a PTSD attack (for colleague E).

[43] The Domain Lead intended to meet with DQJ about the complaint. Due to extended periods of time off, this did not occur until later. When they met, DQJ acknowledged making the comments in the complaint and agreed to provide a written apology (which she later did).

[44] The Team Lead says DQJ told her she called colleague E a “cunt” and a “narc.” She says colleague E moved sites to be away from DQJ.

[45] The Team Lead also recalled that during mid-June 2024, DQJ required unexpected leave suddenly, due to needing to appear in Court on charges.

[46] On 27 June 2024, DQJ fell asleep at work again during a live training session in front of the whole team.

[47] On 13 August 2024, DQJ’s mother contacted the Team Lead to say she was unwell. When DQJ returned to work on 19 August 2024, she told the Team Lead she had been in the cells after being arrested. An email from the Team Lead to HR at the time records this.

IR formally approached concerns resulting in the employment relationship ending

[48] On 16 September 2024 the Domain Lead wrote to DQJ setting out concerns around the high number of leave days, being found asleep at work, gaps in the system around leave, losing two cell phones, behaving inappropriately at work and ongoing lateness. Supporting the lateness concern, the letter attached a door access report that was said to show DQJ had arrived late to work 77% of the time in the past 11 months (since October 2023) and by more than 10 minutes 45% of the time.

[49] The letter summarised accommodations made for DQJ such as the support provided by the Team Lead and EAP. It described concerns that included the negative impact of DQJ’s absences and conduct on the team (especially the Team Lead) and productivity. It appeared to IR that DQJ was not fully committed to her job nor able to be trusted to be capable of the proper performance of the duties in her role.

[50] Under the heading “Next Steps” the letter said: ⁵

I am now considering, on a no faults basis, calling a halt to the employment relationship.

You are employed to perform a role, and we rely on you to do so. I consider that IR has been supportive of you and your leave requests throughout your short employment, however, I am concerned that it may have now reached a point where the relationship may not be sustainable, and I am concerned that you may not be able to reliably attend work now or in the future.

I am concerned that the employment relationship has become frustrated due to your ongoing history of absences, poor time management and several inappropriate behaviours at workplace. I also consider that you are not making yourself ready, willing and available to attend work on a regular basis.

[51] The letter asked to meet with DQJ on 19 September 2024 to hear her “... views on bringing the employment relationship to an end.” Although it could not think of any suitable redeployment options (given the nature of the issues), IR was open to hearing alternatives. It sought feedback from DQJ. IR would then decide whether to terminate DQJ’s employment (which would be on notice and paid in lieu).

[52] The Domain Lead and DQJ exchanged emails that included aspects of DQJ’s feedback. This included DQJ saying IR was not wrong in everything it had said/most of what was said was true. DQJ refuted aspects of the letter, asked about who the work colleagues were mentioned in the letter, minimised the extent of the impact on others of her absences, denied support provided by IR (except from the Team Lead), pointed out that there were medical certificates and that she had worked long hours. DQJ also claimed colleague A had “got to you” and that she felt bullied and harassed by her team.

[53] DQJ sent the Domain Lead messages on Teams. These included concerns around colleague A attending the meeting and although DQJ understood arriving on time was an important part of the role and took responsibility for being late, she could not provide anything to say that she would be on time in future.

[54] The PSA asked to delay the meeting. It was rescheduled to 23 September 2024.

[55] On 22 September, Ms Fechny became involved and sought a further delay. It was rescheduled to 24 September 2024. Ms Fechny could not attend on that day but sent an email on 23 September 2024 submitting the situation was, “... in essence, a medical incapacity process,” and that IR should wait for medical advice about DQJ’s suspected sleep apnoea,

⁵ Numbering removed.

which would explain many of the concerns (such as sleeping at work, lateness etc). Ms Fechney challenged the basis for terminating the contract for frustration or any other grounds.

[56] The Domain Lead responded by email that same day referring to its reasoning in its letter for following the process it was. The meeting was not rescheduled again.

[57] Ms Fechney emailed the Domain Lead again (on the same day), saying that while the process had been handled on a “no fault” basis, the approach taken suggested otherwise (given the concerns raised about DQJ’s absences and work performance). She reiterated her view the underlying reasons for the concerns was sleep apnoea, for which DQJ had a specialist appointment for on 9 October 2024, and that the process should be suspended until after that so that IR could have the benefit of obtaining medical information about DQJ’s condition and how it impacted her work.

[58] On 25 September 2024, IR wrote to DQJ with its decision to dismiss on notice. IR responded to many of the issues raised, including its view it was not appropriate to adopt a medical incapacity process. The letter concluded with the following outcome:⁶

... we have now reached a point where the relationship is not sustainable. I cannot trust you to reliably attend work now or in the future. Your absences have also meant that you are not able to perform your role to the expected standard, which impacts on your ability to do your job and comes at a cost to the business. There is a clear pattern of you not being able to perform your role consistently, and not meeting our expectations of you, and I consider that you are not meeting your obligations as an employee as a result.

I consider that the employment relationship has become frustrated due to your ongoing history of high absences, your unwillingness to engage appropriately on matters which we continue to raise with you, and your ongoing issues related to not following our expectations. Your responses have not provided me with any assurance that my concerns will resolve, and the business is no longer able to accommodate your pattern absences or the impact of you not being able to perform your role to the required standard over a long period of time.

...

Ultimately, based on all the information available to me, I consider that calling a halt to the employment relationship, on a no faults basis, is appropriate given all the circumstances.

Team Lead’s health adversely impacted by managing DQJ

[59] Throughout the employment relationship the Team Lead provided DQJ with considerable support in terms of time, training, pastoral care and cover for the issues that arose. At the time of DQJ’s dismissal, the Team Lead recalls having become severely stressed,

⁶ Numbering removed.

stretched extremely thin, and ultimately paying the price with her health being negatively impacted in a severe way. IR says this was because the Team Lead went well beyond what could be reasonably expected of any manager and it ultimately proved unsustainable – making it imperative it does not place the Team Lead nor anyone else in a position of having to manage DQJ again.

[60] Shortly before and after IR terminated the employment relationship, DQJ contacted the Team Lead a number of times. This included phone calls and messages the Team Leader considered inappropriate and ultimately led to her contacting the Domain Lead seeking to resign. Some communications contain emotive and extreme statements that caused the Team Lead immense stress, adversely impacting on her health. Although her health has stabilised since, the Team Lead says she cannot manage DQJ if she returns to work and would resign.

DQJ acknowledges some issues in context

[61] DQJ recalls she had a really good relationship with her Team Lead and great relationships with people in the office. She acknowledges she was not the perfect employee and definitely struggled with attendance and being late. She says she did not think it was serious or urgent although recalled it being raised with her in September 2023. She says as it was not raised again, she thought IR were happy enough with her work (until receiving a letter shortly before her dismissal). She acknowledged at times falling asleep at her desk and having quite a few sick days. But she did not think things were as serious as they turned out to be and thought she did her job really well.

[62] DQJ suggests concerns from others have been exaggerated (such as the amount of additional work the Team Lead says she picked up due to DQJ's absences) and that she has been unfairly maligned (particularly by colleague A who set her up to provoke the comments she made about colleague E). She explains away aspects of her behaviour (such as falling asleep in colleague A's car between sites due to the heating in car making it too hot). She suggests the Team Lead lulled her into a false sense of security, failed to manage properly and that these shortcomings should not be sheeted home to her. She refers to her and the Team Lead's relationship going beyond professional to one of friendship, explaining the frank and personal nature of some of their interactions.

Flexibility operationally problematic

[63] IR says although DQJ essentially worked flexibly in the way she performed her role, she did not make a formal request, and the flexibility did not work operationally. By contrast, IR says it detrimentally impacted DQJ's team and productivity. IR says flexibility cannot be accommodated within the Workplace Support Services team given operational requirements, and certainly not in the way DQJ did it (on an ad hoc basis without any reliable starting time or attendance). IR points to the service window of 8:00am and 4:00pm as being a key requirement to its operations. DQJ disagrees, saying no colleagues complained about her being late. She believes she could successfully perform the role flexibly because for example she is always available by phone, and that contractors could be let in by someone else or arranged differently (IR refutes that and says it creates an unacceptable security issue).

Family violence leave not requested

[64] DQJ did not discuss flexible working arrangements or family violence leave with her Team Lead. DQJ says she disclosed her history of family violence to the Team Lead who should have brought relevant entitlements to her attention.

[65] Whilst the Team Lead acknowledges DQJ mentioned an historical abusive partner in passing, she says she did not understand it to have impacted on DQJ in the way now claimed. DQJ appeared to accept this, acknowledging being unaware at the time her trauma could contribute to the issues that had arisen.

Medical information provided

[66] Since being dismissed, DQJ engaged with the sleep clinic and undertook more tests. DQJ now acknowledges sleep apnoea is unlikely to be the cause of the issues raised with her by IR.

[67] The ADHD & ASD Assessment Report undertaken by a registered clinical psychologist for DQJ dated 8 November 2024 (report) refers to DQJ's complex trauma history, emotional vulnerability, current mental health challenges and other safety considerations involving past family violence.

[68] The report confirms DQJ meets the criteria for complex post-traumatic stress disorder (cPTSD). Currently, DQJ's cPTSD presents with a number of symptoms that significantly impact her ability to concentrate and manage stress. She experiences chronic sleep disruptions, periodic anxiety attacks, and overwhelming mood swings, which impair her capacity for sustained attention and consistent productivity. Her struggles with interpersonal relationships and heightened sensitivity to criticism may make work environments particularly challenging, especially in high-stress or socially demanding roles. Her impulsivity and emotional reactivity further complicates her ability to cope with work pressures.

[69] IR says that although DQJ's behaviour can be somewhat explained by the cPTSD diagnosis and how it manifests in work environments, it is concerned about DQJ returning to the workplace given her symptoms give rise to health and safety concerns for herself and others. IR also says the report indicates DQJ is not currently fit for work.

[70] The report endorses DQJ as someone who would make a passionate employee wherever she may work, but would need more support from external organisations to be that employee. Boundaries at work would be particularly important, as would a supportive work environment as she journeys through the next part of her recovery. The report recommends engaging in part-time or flexible roles, along with vocational support, to ease her transition back to a professional setting, among other recommendations.

[71] DQJ has undertaken some of the recommendations made in the report. Mx Hornsby-Geluck highlights that over the course of approximately six months since being away from the workplace, DQJ has spent approximately 14.5 hours implementing a small number of the recommendations. DQJ says this is partly due to delays in the health system and feels optimistic about her progress.

[72] No further medical information has been provided by DQJ about her current fitness for work or otherwise.

Additional witnesses have different views of DQJ

[73] Two additional witnesses gave evidence in the substantive investigation meeting. Both work for IR. They had different views about DQJ's work and impact on others.

[74] Witness A says she sat close to DQJ and did not observe concerns like others did. For example, she had no issue with DQJ's work attire, did not see her fall asleep, and was willing to let contractors in if DQJ was running late. Witness A says she did not observe the Team Lead any more stressed by managing DQJ. She indicated there was a group of staff at the site in which DQJ worked who want to see her return. Witness A believed some members of DQJ's team bullied her.

[75] Witness B says he worked in the same building as DQJ. He observed concerning behaviours by DQJ that impacted negatively on others. For example, he noticed DQJ would be missing without others knowing where she was, as well as being late. He observed DQJ's unreliability causing difficulty for staff who may have needed to wait for something to be done or for others to cover for her. Witness B has provided pastoral care to colleagues A and C, noting their anxiety about the prospect of DQJ returning to work and concerns about their safety should she do so.

Did IR unjustifiably dismiss DQJ?

[76] In *A Worker v A Farmer* [2010] NZCA 547 the Court of Appeal proceeded on the basis that the doctrine of frustration could apply to employment contracts, reflecting the position taken in *Karelrybft v Udovenko* [2000] 2 NZLR 24 (CA). The parties proceeded on that basis in the Authority but disagree about whether the doctrine applies.

[77] Frustration of contract is a rarely invoked doctrine, perhaps because it requires something exceptional not captured by contract. The Court of Appeal put it this way:⁷

Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example (*Halsbury's Laws of England*, 4 ed. Vol 16, para 283). We bear in mind also the observation of Bingham LJ (as he then was) in *J. Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] Lloyds Rep 1, 8 that:

Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

⁷ *A Worker v A Farmer* [2010] NZCA 547 at [17].

[78] IR refers to the classic definition of the doctrine of frustration:⁸

... (F)rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *No haec in foedera veni*. It was not this that I promised to do... It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must as well be such a change in the significance of obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

[79] Mx Hornsby-Geluk highlights New Zealand case law invoking the doctrine in cases of medical incapacity,⁹ and case law overseas that suggests the doctrine of frustration does not require a single one-off supervening event and:¹⁰

... can occur in a range of situations which have resulted in irrevocable damage to the relationship between the parties and which significantly change the nature of rights and/or obligations from what the parties could reasonably have contemplated at the time of entering into the agreement.

[80] DQJ says the employment agreement between IR and DQJ was not frustrated: IR dismissed DQJ for fault in circumstances where the employment agreement between the parties required IR to follow a fair process to address any concerns such as absenteeism and unprofessional conduct. DQJ highlights clauses for example that consider ending employment on medical grounds if excessive sick leave is linked to ongoing medical issues, and a disciplinary process including warnings to address concerns about punctuality and unprofessional conduct.

[81] IR maintains the doctrine of frustration applied because DQJ fundamentally could not meet her contractual obligations. Alternatively, IR says it could fairly and reasonably dismiss DQJ when it did because of medical incapacity, even though absenteeism was for multiple (medical) reasons rather than one.¹¹

[82] Did the doctrine apply to DQJ and her employment with IR? I have concluded it did not for the following reasons.

⁸ *Davis Contracts Ltd v Fareham Urban District Council* [1956] AC 696 (HL) at 729.

⁹ Such as *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 at [591] and *Taylor v Air New Zealand Ltd* [2004] EMHNZ 806.

¹⁰ At [17] of IR's submissions, referring to *Brisbane City Council v Group Projects Pty Ltd* [(1979) 26 ALR 525 (HCA) at 536 and *Edwinton Commercial Corp v Tsauliris Russ (Worldwide Salvage and Towage) Ltd (the Sea Angel)* [2007] EWCA CIV 547 2 Lloyd's Rep 517 at [111].

¹¹ Referring to *Lang v Eagle Airways Ltd* [1996] 1 ERNZ 574 (CA).

[83] IR says it terminated DQJ's employment for frustration – a “no fault” termination. I accept Ms Fechney's submission that there was a degree of “fault” attributed to DQJ in the way IR expressed the reasons for termination including references to what IR considered to be DQJ's unacceptable behaviour. This casts doubt on whether IR really considered it a “no fault” termination as claimed.

[84] Most significantly however, I do not accept what happened between IR and DQJ rendered performance of the employment agreement something radically different to what was agreed or intended at the outset. Well established principles of employment law, IR's obligations under the Act, and the employment agreement (express and implied terms), adequately addressed how IR could approach the concerns it had about DQJ such as her ongoing lateness and conduct at work, including formally. Although IR and DQJ's Team Lead could be considered generous in their initial informal approaches with DQJ to address their concerns, that swiftly changed once IR dismissed for frustration without first attempting a different process that could have had a different result.

[85] Alternative processes may have included the medical incapacity process proposed during the process (that was rejected), a formal performance management process involving progressive warnings, or a disciplinary process addressing specific concerns raised. I find IR ought to have adopted one or more of these alternative processes rather than rely on frustration to bring the employment relationship to an abrupt end without yet having made any formal attempts to address the concerns that may have resulted in an outcome short of dismissal.

[86] The Authority assesses an employer's justification of a dismissal by determining on an objective basis if IR acted how a fair and reasonable employer could in all the circumstances at the time. In making this assessment, the Authority must consider whether IR met minimum procedural and good faith requirements, such as whether before dismissing DQJ:¹²

- (a) Having regard to resources, IR sufficiently investigated the allegations against DQJ;
- (b) IR raised its concerns with DQJ and gave her information relevant to its (proposed) decision to end her employment;

¹² Act, 103A(3) and 4(1A)(c).

- (c) IR gave DQJ a reasonable opportunity to respond to its concerns and relevant information; and
- (d) IR genuinely considered DQJ's explanations (if any) to the allegations and any response to the information provided.

[87] Although there were considerable difficulties in the employment relationship between DQJ and IR, I do not accept it was at the point that a fair and reasonable employer could justifiably dismiss DQJ when IR did. On a substantive basis, I find IR acted prematurely and without justification by dismissing DQJ. I also find IR did not follow a fair process and that these failures were more than minor.¹³

[88] That is not to say there was nothing to address. IR had reached a point (and arguably had for some time reached a point) where it could fairly and reasonably address the ongoing concerns it had with DQJ's conduct. If for example, IR had followed a medical incapacity process, it could have followed a fair framework for addressing such an issue that generally includes gathering relevant medical information, allowing a reasonable opportunity for recovery, considering relevant factors in determining timeframes for keeping a role open and a degree of engagement with or attempts to facilitate a return to work.¹⁴

[89] IR suggests it could justify its decision to dismiss on the basis of medical incapacity. I do not accept IR could when it did not follow a fair framework in addressing such an issue. IR did not explore the possibility far with DQJ when her advocate raised it. While DQJ has not been diagnosed with sleep apnoea since, following the process may have paved the way for a discussion about wider issues and resulted in the medical information subsequently provided about her mental health that presents challenges in terms of DQJ's current capacity for work. This type of process takes some time but was more appropriate than the one adopted.

[90] If instead IR had followed a performance management process, it is possible that the issues around DQJ's fitness for work would have come to light earlier too. If medical issues had resolved, then IR could have worked with DQJ to set standards of performance for her to achieve within a reasonable timeframe and followed a fair process in addressing any repeated

¹³ Act, 103A(5).

¹⁴ See for example, the principles set out by the Employment Court in *Lal v The Warehouse Ltd* [2017] NZEmpC 66, at [33]-[36]. Applied in *Lyttelton Port Company Limited v Arthurs* [2018] NZEmpC 9.

failures to achieve those standards such as progressive warnings, before considering dismissal.¹⁵

[91] In short, IR did not do what a fair and reasonable employer could in all the circumstances at the time it terminated DQJ's employment. IR unjustifiably dismissed DQJ. DQJ has a personal grievance for unjustified dismissal and is entitled to a consideration of remedies under s 123 of the Act.

Is reinstatement practicable and reasonable?

Reinstating principles

[92] Reinstatement is a primary remedy. If the Authority determines DQJ has a personal grievance, and reinstatement is practicable and reasonable, then it must reinstate her to her former position (or a position no less advantageous), irrespective of whether it provides for any other remedy.¹⁶

[93] What does the phrase "practicable and reasonable" mean? The Employment Court has described it like this:¹⁷

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[94] The Court has indicated an employer will need to work hard to show reinstatement is not practicable and reasonable:¹⁸

The fact that reinstatement is prescribed as the primary remedy, and that it has long been acknowledged by the Courts that money is a poor substitute for the loss of a job, means that the threshold is a high one. As has previously been observed, routinely declining orders of reinstatement in the face of unlawful action monetises the employment relationship. That, in turn, serves to undermine the dignity of workers, contrary to fundamental precepts of employment law. And it incentivises unlawful behaviour.

¹⁵ See the principles discussed by the Employment Court in *Greetham v Lawter (N.Z.) Ltd* [2020] NZEmpC 174 at [67] referring to *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659 (EmpC) endorsed by *Yan v Commissioner of Inland Revenue* [2015] NZEmpC 36.

¹⁶ Act, ss 123(1)(a) and 125.

¹⁷ *Christieson v Fonterra Co-operative Group* [2021] NZEmpC 142 at [39] (footnotes omitted).

¹⁸ *DQJ v The Commissioner of Inland Revenue* [2025] NZEmpC 10 at [58] (footnotes omitted).

[95] Is permanently reinstating DQJ to her role with IR practicable and reasonable? Despite the primacy of reinstatement as a remedy, the importance of being reinstated to DQJ, and the resources of IR (a good employer), I have concluded reinstating DQJ is neither practicable nor reasonable for the following reasons.

DQJ's fitness for work doubtful

[96] DQJ cannot currently return to work without changes to how she or the role works. The report outlines the significant challenges DQJ is likely to face to successfully performing her role at IR in any capacity, including on a part time or flexible basis. DQJ has shared details with IR and the Authority about her history of family violence and the trauma she still experiences because of it. She would likely require considerable specialised support both internally and externally to successfully reintegrate into her team and to perform her role successfully at IR. Whilst IR may be in a better position than most organisations to support someone in DQJ's situation to recover and return to work in a supportive environment, I am not confident the report provides a comprehensive enough framework for how that could be done successfully, whether it can realistically be achieved, and how long such a process would be likely to take.

[97] Without more medical information about how DQJ could return to work at her role at IR successfully, I am not confident it would be successful within a reasonable timeframe. Based on the information in the report and DQJ's progress to date on implementing the recommendations in the report, I am concerned that permanently reinstating DQJ would be setting her and IR up to fail as well as risk the health and safety of DQJ and others in her team. That is neither reasonable nor practicable.

[98] IR says several symptoms DQJ experiences as a result of her trauma create risks for DQJ and IR staff because of how it manifests (and has manifested) in her behaviour at work. It is unnecessary to go into the detail except to say that I accept there is sufficient risk that makes it unreasonable to try to reimpose the working relationship particularly without a much better understanding from a medical perspective, about how the behaviour of concern could be effectively managed. I am not prepared to reinstate DQJ while such risks remain, and consider it impracticable and unreasonable at this point to wait for further information, given the time it has taken to get to this point.

[99] It is not insignificant that for the period on the payroll while interim reinstated and since receiving the report in November 2024, DQJ has not made substantial progress implementing the recommendations contained in the report, nor obtained further medical opinion. I appreciate some of that may relate to delays from providers. However, it also tends to indicate it would take DQJ much longer to complete the recommendations and provide further relevant information than could be considered reasonable.

DQJ struggles to show up for work at a consistent time each day

[100] Unfortunately, as DQJ acknowledges, she cannot consistently and reliably arrive at work at 8:00am each day, even when she has previously promised she would. This is not a case of occasional lateness or a short term arrangement to start later. DQJ's attendance record prior to being dismissed that she was late 77% of the time in the preceding 12 months even when she was trying to get to work at 8:00am. DQJ acknowledged during the investigation meeting that she could not promise to consistently and reliably arrive at work at 8:00am each day in future - she did not wish to set herself up to fail. Whilst that in some ways is remarkably honest, it is particularly problematic for a role that IR says (and DQJ previously agreed) requires reliable work attendance from 8:00am each day from an operational perspective.

[101] It is not unreasonable for an employer to require an employee to reliably report for work at a certain time for operational reasons. DQJ's inability to consistently and reliably arrive at work at 8:00am each day (or another time) is, I find, another major stumbling block to the likelihood of any successful return to work and undermines the practicality of reinstatement.

[102] DQJ says she is entitled to flexible working arrangements. It is unclear exactly what flexible working arrangements she thinks could realistically work. She observes that she previously worked flexibly (without formal arrangements in place) and is of the view that this did not pose any problems (or at least that no colleagues complained). DQJ's views do not recognise the significant concerns IR and her Team Lead raised with her about the flexibility she seems to be suggesting, and that her unreliable attendance formed a primary plank for her dismissal (albeit unjustified). I accept DQJ is entitled to make a request for flexible working arrangements and to have that request considered. I do not accept IR must agree to those arrangements if there is a good ground to refuse.

[103] IR says the role (and DQJ's team) cannot work flexibly due to the need to provide a service to staff and contractors between 8:00am and 4:00pm each day. Given the nature of the work undertaken by the role and small size of the team, I accept genuine operational reasons exist for the role and IR's team to provide support during the working window of 8:00am and 4:00pm and failing to do so would detrimentally impact on performance and staff (among other things). Even if there could be a degree of flexibility (such as starting an hour or two later), DQJ has previously acknowledged she would have still have difficulty consistently arriving at a later start time as well.

[104] I am reinforced in this view given the lack of insight DQJ has into how her previous attendance impacted on her Team Lead, colleagues in her team, and staff who relied on her to provide in person support. Whilst some staff may be more relaxed than others (such as witness A, who is not part of DQJ's team), it is clear others are not (particularly her team). DQJ's Team Lead and her colleagues were required to take on additional work created covering for DQJ at short notice and in managing her absences. Whilst DQJ is optimistic about being able to change her behaviour with external assistance and asks for IR to provide a supportive work environment while she does that (initially without the threat of formal processes and consequences), DQJ would require considerable assistance from her Team Lead (or another manager) to make those changes, as well as create additional work created by any hours DQJ could not work. There is little in the report to suggest DQJ's behaviour could change within a reasonable timeframe given the significant history of unreliable attendance with the benefit of the Team Lead's support.

Impact on DQJ's Team Lead and colleagues

[105] DQJ's Team Lead says she felt broken by the experience of managing DQJ and would resign if she returned to work. I accept that the effect of managing DQJ had a significant and detrimental impact on the Team Lead whose health has only recovered since being relieved of the responsibility of managing DQJ. Whilst threats of resignation must be treated with a degree of caution, the Team Lead previously played a critical role in supporting DQJ. The potential impact on the Team Lead's health of managing DQJ (or on someone else in her place) is another reason why I consider reinstatement is neither practicable nor reasonable.

[106] IR says even if the Team Lead stays, it cannot allow her to continue to manage DQJ from a health and safety standpoint. That is reasonable. I also accept that IR has no appropriate

locally based managers based in the city in which DQJ works and that the issues requiring to be managed need somebody on the ground who can at short notice go to her site to cover her work if she is absent. Whilst the Domain Lead at times managed concerns remotely with DQJ, that was not on an everyday basis which at times fell to colleagues who acted as Team Lead, such as colleague A. Given the difficulties between DQJ and her colleagues, it would not be a suitable short term solution and could not be considered a reasonable long term alternative either.

[107] Regrettably, DQJ's relationships with the Team Lead, Domain Lead and her colleagues are significantly damaged including by her behaviour after she was dismissed. It is my view that the relationships between DQJ and her team became dysfunctional primarily because of DQJ's behaviour, and that this would be extremely difficult to turn around, not least because DQJ does not have insight into how her actions have contributed to that breakdown. For example, DQJ believes she could relatively easily repair her relationships with the Team Lead and her colleagues, showing she does not appreciate the impact of her actions on others who do not share her optimism and have disclosed a high level of anxiety and concern about her return. Previously attempted repairs have not worked. For example, the Team Lead early on arranged a low key "fresh start" for DQJ and colleague A – the fresh start did not last long, soon deteriorated and has now reached a heightened level of concern from colleague A for her personal safety (as well as from colleague C). These are not easy fixes. Even if the relationships were repairable, it would in my view require more than what could be considered reasonable.

Conclusion on reinstatement

[108] For the foregoing reasons I find reinstating DQJ neither practicable nor reasonable. I decline to permanently reinstate her.

[109] I now turn to consider whether DQJ is entitled to consideration of financial remedies.

Should the Authority award DQJ financial remedies?

No remuneration lost

[110] An employee is entitled to reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.¹⁹ If the Authority

¹⁹ Act, s 123(1)(b).

determines an employee has a grievance and they have lost remuneration as a result, then the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration. Despite that, the Authority may in its discretion order the employer to pay to an employee by way of compensation a sum greater than that.²⁰

[111] The Court of Appeal took a principled approach to exercising the discretion, describing it as requiring moderation with contingencies and a counterfactual analysis allowing for the possibility that an employee may not have remained employed.²¹

[112] Because DQJ was reinstated on an interim basis, she has not lost any remuneration to date as a consequence of her grievance. She does not claim future earnings. If I had been asked to make such an award, I would have awarded remuneration lost to the date of determination based on how long a medical incapacity or performance management process may have taken, and would not consider any further award warranted.

Compensation

[113] DQJ asks for compensation of \$35,000. She described the impact of her dismissal as devastating. She felt angry and hated herself. She cried for her younger self. She had not thought past her dream job – her reason for living. Aspects of the impact of DQJ's dismissal on her mental health were supported by the report.

[114] In the circumstances, and after considering the evidence, what has been awarded in other cases and trends generally,²² I award DQJ \$30,000 under s 123(1)(c)(i) of the Act.

Contribution?

[115] For the purposes of financial remedies, I do not accept DQJ contributed to the decision that IR made to rely on frustration of contract and the situation giving rise to the grievance in terms of section 124 of the Act. Even if she had, I would have considered the consequences of not being reinstated to adequately recognise any contribution.

²⁰ Act, s 128.

²¹ *Sam's Fukuyama Food Services Limited v Zhang* [2011] NZCA 608 at [26].

²² Such as *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162].

Costs

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

[117] If the parties are unable to resolve costs, and an Authority determination on costs is needed, DQJ 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 IR 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.

[118] 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.²³

Lucia Vincent
Member of the Employment Relations Authority

²³ [Practice Direction of the Employment Relations Authority](#)