Employment Court of New Zealand

DQJ v Commissioner of Inland Revenue [2025] NZEmpC 10 (28 January 2025)

Last Updated: 31 January 2025

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2025] NZEmpC 10
EMPC 481/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DQJ Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	23 January 2025 (Heard at Christchurch and via Audio-Visual Link)
Appearances:	A Fechney, advocate for plaintiff S Hornsby-Geluk, counsel for defendant
Judgment:	28 January 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff worked at the Department of Inland Revenue for approximately 18 months. Their employment was brought to an end on what was expressed to be a "no faults" basis. The plaintiff filed a personal grievance claiming unjustified dismissal and unjustified disadvantage; reinstatement (along with other relief) is sought on the substantive claim in the Employment Relations Authority (the Authority). The plaintiff sought an order of interim reinstatement pending determination of their personal grievance claim. That application was declined by the Authority for reasons set out in a determination dated 4 December 2024.1

1. *DQJ v The Commissioner of the Inland Revenue Department* [2024] NZERA 723 (Member Vincent).

[2] The plaintiff filed a challenge to the Authority's determination. I directed that the challenge was to be heard promptly, and timetabling orders were made by agreement to schedule it for hearing on 23 January 2025. The challenge was pursued by way of de novo hearing and, as is usual in a case such as this, it proceeded on the basis of untested affidavit evidence and submissions.

[3] This judgment is confined to the issue of whether the plaintiff ought to be reinstated on an interim basis. It does not decide whether they were unjustifiably dismissed (or unjustifiably disadvantaged). Nor does it decide whether, if they were unjustifiably dismissed, they will be reinstated on a permanent basis; or what additional/or other relief they might be entitled to. The Court must decide whether the plaintiff has an arguable case that they were unjustifiably dismissed and an arguable case that, if they were, they will be permanently reinstated.

Framework for analysis

[4] When determining whether to make an order of interim reinstatement, the law relating to interim injunctions applies having regard to the object of the Employment Relations Act 2000 (the Act).2 In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.3

[5] The approach to applications for interim reinstatement is well established and can be summarised as follows.4 An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, or the refusal to grant, an order. The impact on third parties will also be relevant to the weighing exercise. Finally, standing back from the detail required by the earlier steps, the overall interests of justice are considered. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

2 Employment Relations Act 2000, s 127(4).

3 Section 3.

4. *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [6]- [9], citing *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]- [13].

[6] In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:5

(a) whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
(b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[7] As the Court of Appeal made clear in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, a serious question to be tried is one that is not vexatious and frivolous.6 Once that (relatively low) threshold is overcome, the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.

[8] As I have said, at this stage the Court proceeds on the basis of untested evidence. The evidence will be tested at the substantive hearing.

The facts

[9] The following emerges from the evidence at this stage.

[10] The plaintiff was appointed to a Workplace Support, Level One role at Inland Revenue on 20 March 2023. The terms and conditions of their employment were set out in an individual employment agreement based on the Inland Revenue/New Zealand Public Service Association (PSA) Collective Agreement. The plaintiff reported to a person who held the position of Team Lead, Workplace Support Level Two.

[11] It is apparent that a number of co-workers harboured concerns about the plaintiff, which they raised from a relatively early stage, and which continued to be raised until shortly before the plaintiff's employment came to an end.

5 See *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128, [2011] ERNZ 312 at [4].

6 *Brooks Homes Ltd*, above n 4, at [12].

[12] It is also apparent that the plaintiff and the Team Lead forged a very close relationship. The correspondence reflects that the Team Lead was very supportive throughout much of the plaintiff's employment, often encouraging the plaintiff to go home or stay home to sleep or recuperate, to put their health and wellbeing first and assuring the plaintiff that the workplace could cope in their absence.

[13] The Team Lead, who has sworn affidavit evidence in these proceedings on behalf of Inland Revenue, confirms that the plaintiff confided in them details of their traumatic personal life, including extensive and protracted physical, sexual and psychological abuse, and was aware of the impact of that experience on at least some of the plaintiff's behaviours.

[14] The Team Lead described themselves as acting as a "shield" for the plaintiff.

[15] The first complaint is set out in a file note made by a co-worker who details numerous concerns stemming back to the plaintiff's arrival. It appears that the Team Lead dealt with these issues at a "re-set" meeting between the plaintiff and the co- worker on 27 April 2023. In early June 2023, a co-worker drew a number of concerns about the plaintiff to the attention of the Domain Lead. The Domain Lead met with the plaintiff to discuss matters, including lateness, tiredness at work and work attire. The Domain Lead set out their expectations at the meeting, and in correspondence with the plaintiff following the meeting.

[16] Further complaints were raised by co-workers in August 2023, during a team meeting at which three staff members aired a number of "frustrations" about the plaintiff. The Team Lead summarised their concerns in an email to the Domain Lead, including standard of dress, lateness, attendance to tasks, focus on work and completion of tasks.

[17] A meeting between the plaintiff and the Team Lead followed, on 11 September 2023, and a number of expectations were discussed and confirmed in writing. The letter concluded by advising that if the plaintiff chose not to follow the expectations set out, the Team Lead would consider further action as required, including "a more formal process, potentially including a disciplinary process."

[18] The Team Lead had a further meeting with the plaintiff a week later, to clarify matters. A number of agreements appear to have been reached at the meeting, including that if the plaintiff was feeling unwell or had not had sufficient sleep to undertake a full day's work they should call in sick or take a day's leave. It was also agreed that moving forward there would be a meeting every two weeks to look at the plaintiff's achievements, areas of growth and training opportunities.

[19] In June 2024, a co-worker made a complaint against the plaintiff in respect of an altercation involving inappropriate communication. The complaint was brought to the Domain Lead's attention. Documentation before the Court indicates that the altercation was viewed as a one-off incident, and was to be dealt with informally, via a conversation with the plaintiff and a written apology.

[20] At this point in the (brief) background summary, it is convenient to note that a long-standing current staff member who worked closely with the plaintiff has sworn an affidavit (described as containing protected disclosures) detailing the undermining behaviour they consider the plaintiff was subjected to by a number of co-workers, particularly during a period when the Team Lead was on leave. The deponent says that they observed the undermining behaviour as having had a destabilising impact on the plaintiff, resulting in the "unravelling" of their mental health.

[21] In August 2024, the plaintiff advised the Team Lead that they had been charged with wilful damage involving their ex-partner's property. The Team Lead told the plaintiff that they were obliged to disclose this information to senior management and did so the same day via email to the Domain Lead.

[22] The following month (September 2024), the Domain Lead wrote to the plaintiff setting out a number of issues relating to sleeping at work, leave records, the loss of two cell phones, behaving inappropriately at work and ongoing lateness. The letter advised that:7

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

...

7 Emphasis added.

19. 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.

[23] The letter concluded with an invitation to meet with the plaintiff to hear their views "on bringing the employment relationship to an end."

[24] The plaintiff says that they were shocked to receive the letter, and they sent a number of emails directly to the Domain Lead raising a number of concerns, making various statements and observations. The plaintiff was represented by the PSA at this stage. The PSA asked the Domain Lead to delay the meeting; it appears that it was having difficulty communicating with the plaintiff. The Domain Lead agreed to delay the meeting to 23 September.

[25] The plaintiff then instructed their current representative, Ms Fechney, on 22 September. Ms Fechney wrote to the Domain Lead advising that she had been instructed and said that it would take time to meet with the plaintiff and familiarise herself with the file. She requested that the meeting be rescheduled for one of a number of days the following week. She also made a request for material relevant to her client's case. The Domain Lead responded, providing the requested material and advising that the meeting could not be delayed until the following week and must take place on 24 September. No explanation was provided as to what the urgency related to or why what on its face appeared to be a reasonable request in the circumstances could not be accommodated.

[26] Ms Fechney could not attend a meeting on 24 September but wrote to the Domain Lead on 23 September submitting that the situation appeared to her to be one of medical incapacity and advising that Inland Revenue should wait for medical advice about the plaintiff's suspected sleep apnoea, which might explain many of the identified concerns. She also challenged the basis for terminating the plaintiff's employment for frustration.

[27] The Domain Lead provided a brief response to Ms Fechney's email, referring to the reasoning contained in his earlier letter and advising that the meeting would not be rescheduled. Later that day (23 September) Ms Fechney wrote again to the

Domain

Lead noting that the approach adopted did not reflect a “no fault[s]” process, given the nature of the concerns Inland Revenue had set out in the letter of 16 September. She advised that the plaintiff had a specialist medical appointment on 9 October and said that the process should be suspended so that Inland Revenue would have the benefit of obtaining medical information about the plaintiff’s condition and how it impacted their work.

[28] On 25 September, the Domain Lead wrote to the plaintiff advising his decision to dismiss them with a payment in lieu of notice. The Domain Lead explained that:8

26. ... 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. ...
27. 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*. ...

...

30. 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.

[29] The plaintiff applied for, and was granted, legal aid. Legal aid referred the plaintiff for a psychological assessment, which was undertaken on 4 November 2024. The report is detailed and confirms a diagnosis of complex post-traumatic stress disorder (cPTSD). The report writer notes that addressing the plaintiff’s cPTSD symptoms and stabilising their emotional state would be necessary before a reliable Attention Deficit Hyperactivity Disorder (ADHD) assessment could be made. Under the heading “Note for current legal process”, the report writer observes that:

Currently, [the plaintiff’s] Complex Post-Traumatic Stress Disorder (cPTSD) presents with intense emotional dysregulation, persistent anxiety, and frequent intrusive memories, all of which significantly impact [the plaintiff’s] ability to concentrate and manage stress. [The plaintiff] also experiences chronic sleep disruptions, periodic anxiety attacks, and overwhelming mood swings, which impair [their] capacity for sustained attention and consistent productivity. Additionally, [the plaintiff] struggles with interpersonal relationships and heightened sensitivity to criticism may make work environments particularly challenging, especially in high-stress or socially demanding roles. [The plaintiff’s] impulsivity and emotional reactivity further complicate [their] ability to cope with work pressures, leading to a

8 Emphasis added.

need for a work environment that is supportive of [them] as [the plaintiff] journeys through this next part of [their] recovery.

My own reflection as a Clinical Psychologist here, is that [the plaintiff] should not be punished for the trauma [the plaintiff] has been through and how it is still impacting [them] to this day. [The plaintiff] has not known about other supports that have been around [them] both within [their] work environment and within the health systems. [The plaintiff’s] memory impairment due to trauma also means that there may have been times support was verbally offered but subsequently forgotten about. I believe that [the plaintiff] would make a passionate employee wherever [they] may work, and needs some more support from external organisations to be that employee. Boundaries at work will also be particularly important regarding how some of [the plaintiff’s] behaviour and trauma can present with an overattachment to people and sensitivity to rejection.

[30] At the time of hearing, the plaintiff was still waiting for a medical specialist’s report into sleep apnoea, having been placed on a wait list.

Serious question to be tried in relation to the claim of unjustified dismissal?

[31] The defendant submits that there is no serious question to be tried that the plaintiff’s dismissal was unjustified. In this regard it is said that the termination was in accordance with the doctrine of frustration, which can be applied to “infinitely variable factual situations”.9 While it is accepted that frustration is usually the result of a single supervening event, the test for frustration leaves open the possibility that it can apply in any situation where there is irrevocable damage to the relationship between the parties that could not have been reasonably contemplated at the time they entered into the agreement. It is argued that the plaintiff demonstrated that their “fundamental makeup” rendered them unable to meet their contractual obligations and that this amounted to frustration. The defendant submitted that the plaintiff’s performance issues were sufficiently serious, even if there was no frustration, and thus that dismissal was still justifiable.

[32] The plaintiff’s principal arguments are that the correct approach that should have been taken to dismissal was medical incapacity. It is submitted that the employment agreement between the parties had provisions for medical and performance

issues, including for absenteeism and unprofessional conduct, which

9 *Brisbane City Council v Group Projects Pty Ltd* [1979] HCA 54; (1979) 26 ALR 525 (HCA) at 536.

could have been followed rather than stepping outside the agreement and seeking to rely on the doctrine of frustration.

[33] The defendant advised the plaintiff that their employment was being terminated on a "no faults" basis, for frustration. As Mx Hornsby-Geluk observed, the Court of Appeal has accepted that the doctrine of frustration may be called to aid in employment cases.10 In *Karelrybflot v Udovenko*, the Court observed that:11

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*... We bear in mind also the observation of Bingham LJ

... 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*.

[34] In a prior judgment of the Court of Appeal, *Power Co Ltd v Gore District Council*, the following summary of approach was cited with approval:12

Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[35] Given the comprehensive nature of the terms and conditions of every employment agreement (including those implied by common law) and the statutory requirements imposed on those in employment relationships (including under s 103A and s 4), it may be said to be difficult to conceive of a case in which recourse would need to be had to the doctrine of frustration. As the Act makes clear, the steps required

10 Dawn Duncan and Gordon Anderson *Employment Law in Aotearoa New Zealand* (3rd ed, LexisNexis, Wellington, 2021) at [8.9]; *Karerybflot AO v Udovenko* [1999] NZCA 331; [2000] 2 NZLR 24 (CA); *A Worker v A Farmer* [2010] NZCA 547, [2010] ERNZ 407; *Elmsly v Health Waikato Ltd* [2002] NZEmpC 86; [2002] 1 ERNZ 85 (EmpC); see too Mark Freedland *The Personal Employment Contract* (Oxford University Press, Oxford, 2005) at ch 8.

11 *Udovenko*, above n 10, at [37] (citations omitted) (emphasis added).

12 *The Power Co Ltd v Gore District Council* [1996] NZCA 483; [1997] 1 NZLR 537 (CA), citing *National Carriers Ltd v Panalpina (Northern) Ltd* [1980] UKHL 8; [1981] AC 675 (HL), at 553.

of an employer in terminating an employee's employment must be fair and reasonable in "all the circumstances".

[36] Putting those issues to one side, and accepting that there is binding authority for the proposition that the doctrine of frustration does apply to employment relationships, it is nevertheless clear that there is a high threshold, namely impossibility of performance or radically different performance, that the doctrine is not to be lightly invoked and is to be kept within "very narrow" limits.

[37] There are a number of potential difficulties in this case which lend weight to the arguability of the plaintiff's case.

[38] First, whether the required threshold was met on the facts available to the defendant at the time the conclusion was reached that the employment agreement had been frustrated.

[39] Second whether, as Ms Fechney submitted, the employment agreement did adequately provide for an appropriate means of dealing with the defendant's concerns, including via provisions relating to medical issues, absenteeism and performance concerns.

[40] Third, whether (as Ms Fechney pointed out in her email prior to the decision to terminate being made) Inland Revenue was in reality proceeding on a "fault" rather than "no faults" basis. The factors identified in its letter of termination and the earlier letter setting out its expressed concerns, lend weight to the argument that the procedure was based on disciplinary concerns.

[41] The fact that Inland Revenue did not seek, or wait for, a medical report tends to reinforce the point, along with the knowledge it had (through the Team Lead) of the plaintiff's personal circumstances. The fact that neither the letter setting out Inland Revenue's concerns nor its letter of termination articulated *why* the employment agreement was said to be frustrated also presents difficulties for the defendant in terms of arguability.

[42] In addition, the latter point (as to the absence of a clear articulation as to why frustration was said to apply) also weighs in the plaintiff's arguments that they were not given adequate notice of the nature of the defendant's concerns, to enable them to respond, having particular regard to the obligation of good faith.13 That obligation is a fundamental aspect of any employment relationship and it is arguable that it applies even where there has been a frustrating event.

[43] Further, the defendant's view that the plaintiff's "fundamental makeup" rendered them unable to meet their contractual obligations, and that this amounted to frustration, appears not to be shared by the clinical psychologist.

[44] Having regard to the material currently before the Court, including the expressed basis on which the plaintiff's employment was brought to an end and the medical issues that had been brought to the defendant's attention, there is an arguable case that Inland Revenue went down the wrong route, and ought to have explored whether the plaintiff was medically fit to work. That is a route which is well- established at common law.14

[45] An inference might be drawn that matters came to a head as a result of the plaintiff facing criminal charges, although not referred to as causally connected to the decision-making process. In other words, it is arguable (based on inferences that might reasonably be drawn from the timeline of events) that the decision to bring the plaintiff's employment to an end was prompted by matters not drawn to the plaintiff's attention, and accordingly not ones they had a reasonable opportunity to comment on.

[46] In addition, it is arguable that there were difficulties with the approach the defendant took in respect of the speed with which the process was brought to a conclusion. In this regard, the plaintiff was represented by the PSA, who had requested an extension of time for a meeting to occur to discuss the defendant's concerns and which had been granted. There was then a change of representation one day prior to the scheduled meeting and a further request for an extension was made to allow the new representative (Ms Fechney) to be briefed, and a 24-hour extension was

13 Employment Relations Act 2000, s 4(1A).

14. *Motor Machinists Ltd v Craig* [1996] NZEmpC 225; [1996] 2 ERNZ 585 (EmpC) at 592-593; *McKean v Board of Trustees of Wakaaranga School* [2007] ERNZ 1 (EmpC) at [87].

given. It appears that no reason was given as to why the matter was regarded as urgent and a further delay was not considered manageable. Later that day, on 23 September 2024, Ms Fechney advanced a further request for a delay on the basis that medical information that may be relevant to the decision-making process was being sought.15 Suffice to note at this point that it is arguable that information relating to the plaintiff's health would have been relevant to the defendant's decision-making.

[47] What also emerges from the material before the Court is a clear picture of a very close personal relationship between the Team Lead and the plaintiff. Issues are likely to arise on the substantive claim in respect of that relationship, including the way in which sick leave/lateness and the like were handled by Inland Revenue through the Team Lead. The picture that emerges tends to add weight to the plaintiff's claim of unjustified dismissal and reinstatement.

[48] It is further arguable, as Ms Fechney submitted, that the defendant's response (termination) was disproportionate in the circumstances and that a warning would have been within the range of responses available to a fair and reasonable employer.

[49] At this stage I consider that there is an arguable case of unjustified dismissal. It is only weakly arguable that the contractual relationship ended as a result of frustration. If, as is likely, the contract was not frustrated, then it is very weakly arguable that Inland Revenue acted as a fair and reasonable employer could in terminating the plaintiff's employment. I return to the apparent strength of the argument later, as it is relevant to an assessment of the balance of convenience and where the overall interests of justice lie.

Serious question to be tried in relation to the claim of permanent reinstatement?

[50] Inland Revenue's key argument was that there was no serious question to be tried in relation to permanent reinstatement and the application should be dismissed on that basis. The plaintiff argued to the contrary.

15 Employment Relations Act 2000, s 4(1A)(c).

[51] The defendant's submissions are focussed on three main points. First, it is submitted that it is clear that the plaintiff is not capable of undertaking the requirements of the position, whether looked at through the lens of frustration or medical

incapacity.

[52] Second, it is submitted that reinstatement would give rise to serious health and safety concerns, given the interpersonal issues that are said to exist between the plaintiff and various colleagues in the workplace. Notably, the Team Lead has sworn an affidavit outlining the significant health issues they say they suffered as a result of trying to manage the plaintiff's behaviour and that they will resign if the plaintiff is reinstated.

[53] Third, it is said that there are no other work-around options available that might otherwise address the interpersonal and safety issues that the defendant's witnesses have identified.

[54] The evidence filed by deponents on behalf of Inland Revenue supports the thrust of the submissions made in respect of practicability and reasonableness. This needs, however, to be weighed in the mix with a number of other factors.

[55] Inland Revenue is a well-resourced employer, with specialist human resources capacity and (as a Public Service organisation) heightened employer obligations.16 It is better placed than many employers to appropriately manage a return to work if that is what is required.

[56] Reinstatement of a dismissed employee is invariably a challenging process for all concerned – the employer, the employee and co-workers. It often brings a complex range of issues that need to be navigated. Parliament can be taken to have understood this when mandating reinstatement as *the* primary remedy.17

[57] The difficulties in respect of reinstatement, and the likely challenges it will pose, appear to be heightened in this case, at least partly because the evidence reflects that the plaintiff is suffering from the ongoing and serious effects of family violence

16. *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [20]- [34].

17 Employment Relations Act 2000, s 125. See also (4 December 2018) 735 NZPD 8529.

manifesting in some of the behavioural issues identified by the defendant. I accept that reinstatement would present challenges for both parties to navigate. That must be viewed in context, including having regard to the clear Parliamentary intention that employers take steps to accommodate those who are suffering or have suffered from family violence, including through flexible working arrangements,18 increased leave entitlements,19 and prohibition on adverse treatment.20

[58] All of this is relevant to the threshold that must be met when seeking to argue that reinstatement is not practicable and/or reasonable. In my view 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.21 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.22 And it incentivises unlawful behaviour.

[59] Returning to the particular circumstances of this case, it is relevant to the assessment process (arguability of permanent reinstatement) that Inland Revenue now has the benefit of additional information from a clinical psychologist, including observations about how a successful return to the workplace might be achieved. As I have said, an additional medical report is pending, steps are being taken to undertake counselling and it appears (on the evidence before the Court at this stage) that the plaintiff has some insight into the challenges they confront, and an expressed commitment to their previous job and making it work.

[60] The benefits of a restorative approach to the breakdown of employment relationships have been gaining increased recognition. Such an approach has synergies with the underlying objectives of the legislation and the primacy of reinstatement as a remedy23 and may be said to align with tikanga norms and values.24

18 Employment Relations Act 2000, pt 6AB.

19 Holidays Act 2003, s 37A.

20 Employment Relations Act 2000, s 108A.

21 See the discussion in *Humphrey*, above n 4, at [48].

22. See generally Declaration Concerning the Aims and Purposes of the International Labour Organisation (10 May 1944) (Declaration of Philadelphia).

23 *Humphrey*, above n 4, at [52].

24 See *GF v Comptroller of the New Zealand Customs Service*, above n 16.

With appropriate support (which Inland Revenue appears on the evidence to be in a position to provide) there is a basis for arguing

that, while no doubt challenging, permanent reinstatement is both practicable and reasonable.

Balance of convenience

[61] This part of the analysis ultimately involves a weighing exercise in the Court's discretion.

[62] The Court has been advised that the Authority's substantive investigation is scheduled for April 2025; the defendant submits that the proximity of the Authority's substantive investigation weighs against interim reinstatement. That is because reinstatement would be very disruptive, may well lead to the resignation of the Team Lead, and permanent reinstatement (even if the plaintiff succeeds on their substantive claims) is unlikely to be ordered.

[63] As recently observed in *The Vice Chancellor of Lincoln University v Cheng*,25 I consider there to be difficulties with putting too much weight on proximity. Assuming the investigation proceeds as scheduled, a determination may not issue for some time. Depending on the outcome, there is then a right to challenge, including on a de novo basis. If that right is exercised, the process inevitably involves many more months. The passage of time is not infrequently cited as a factor telling against an order of permanent reinstatement, and is often not something within an applicant's control.26

[64] It is clear from the evidence and argument that both parties feel strongly about their respective positions. It may well be that a challenge will be pursued against any substantive determination made by the Authority. That is relevant to an assessment of likely delay and where the balance of convenience lies in the interim. The likely delay in having a substantive claim finally determined will often weigh in favour of interim orders, and does in this case.

25 *The Vice Chancellor of Lincoln University v Cheng* [2024] NZEmpC 227 at [56].

26 See, for example, *Gumbeze v Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133 at [189] – Mr Gumbeze had been absent from the workplace for approximately six years.

[65] The merits of the claim for unjustified dismissal and permanent reinstatement, insofar as they can be assessed at this stage, also weigh in favour of interim reinstatement.

[66] I have already referred to Inland Revenue's concerns as to how a return to the workplace could be managed on an interim basis, including what is said to be the likely serious impact on co-workers. It is also said that if the Team Lead did resign, there would be no-one available, on site, to take over the management role (at least, I infer, until a replacement was found).

[67] As I have said, it is not uncommon for material to be filed in applications such as this asserting that co-workers will find it impossible to work with a dismissed employee if they are reinstated, either on a temporary or permanent basis. It goes without saying that disruption within the workplace often causes a degree of angst, and it is not uncommon for emotions to run high. Organisations such as Inland Revenue are well resourced and have internal human resource capability to support it in smoothing transitions on a managed basis.27 And, as a Public Sector organisation, it is subject to heightened good employer standards which are, in my view, relevant to the assessment process and what can fairly be expected in terms of what is reasonable and practicable.28

[68] Threats of resignation are not uncommonly advanced in the context of an opposition to reinstatement, on an interim or permanent basis. Such threats must, in my view, be viewed with a degree of caution, particularly where they predate any opportunity for the employer to build a reintegration plan.29 In this case there is some contemporaneous corroborating evidence before the Court that tends to support the concern that the Team Lead may well suffer a significant health set-back if the plaintiff is returned to the workplace on an interim basis (namely correspondence to their manager pre-dating the plaintiff's dismissal). I accept that the potential impact on the Team Lead's health is relevant to an assessment of where the balance of convenience lies.

27. The position might differ where, for example, the employer is small, or has constrained resources. For a recent example see *Kavallaris v Inframax Construction Ltd* [2024] NZEmpC 212.

28 *Humphrey*, above n 4, at [45]-[49].

29 *Kavallaris*, above n 27, at [99].

[69] Also relevant is a recently undertaken psychological assessment of the plaintiff. The report is detailed and highlights a number of challenges that the plaintiff faced during their time at Inland Revenue and on an ongoing basis. The psychologist offers the opinion that a return to work in a supportive environment and in a managed way would be beneficial. Further assessment and counselling is also recommended (and was being pursued by the plaintiff at the time of the hearing; availability of mental health services appears to be an issue).

[70] I conclude that the balance of convenience weighs in favour of interim reinstatement, but on a limited basis (as I will

come to).

Overall interests of justice

[71] Jobs are important and money is often a poor substitute. In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement, both interim and permanent. The point is that, while a claim for reinstatement is to be assessed against its own factual context, attention must also be paid to the impact of such orders more generally in the overall interests of justice. As the Court pointed out in *Ashton v Shoreline Hotel*:30 "[To] award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustified dismissals." Or, to put it another way, it would create perverse incentives.

[72] Standing back the position can be broadly summarised as follows. There is clearly an arguable case for unjustified dismissal and an arguable case for permanent reinstatement. The plaintiff has recently received a diagnosis from a clinical psychologist which suggests that the concerns which led to the termination of the plaintiff's employment may stem from unresolved trauma. Inland Revenue, through the plaintiff's manager, appears to have been aware of a number of matters relating to that trauma (including extensive domestic abuse over an extensive period of time).

[73] Inland Revenue chose not to go down a route of inquiring into the plaintiff's health, and the extent to which it might be impacting on their performance and whether

30 *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 (EmpC) at 436.

some additional supports might usefully be put in place – despite its knowledge (through its manager) and despite the plaintiff's representative advising that a report was being sought. All of this lends weight to the arguability of a key point Ms Fechney advanced on behalf of the plaintiff, that Inland Revenue should pause the process to allow the medical issues to be explored.

[74] A counterfactual analysis might usefully be applied – if Inland Revenue had explored the plaintiff's health issues as it had been invited to do, and had had the benefit of the clinical psychologist's report, could it have fairly and reasonably proceeded to terminate the plaintiff's employment? If not, on what basis would it be fair and just to conclude that reinstatement was neither reasonable nor practicable?

[75] Inland Revenue submits that damages would be an adequate remedy. It is argued that the plaintiff's position was not one requiring technical skills or up to date knowledge, so there is no risk of losing skills or experience from a prolonged absence.31 I do not accept that damages would be an adequate remedy in the particular circumstances. It is clear that the plaintiff is financially stretched and that their employment status is of significant importance to them, for reasons touched on in the psychologist's report and detailed in the plaintiff's most recent affidavit.

[76] At this stage, and on the basis of untested evidence, I have concluded that the merits weigh in the plaintiff's favour. There is a seriously arguable case that the plaintiff's dismissal was unjustified and that they would be permanently reinstated to their role following a substantive investigation in the Authority.

[77] However, it is clear that any reintegration to the workplace would need to be carefully managed and adequately supported. The plaintiff is currently waiting for further medical reports and access to counselling. In the circumstances, it seems to me that a fair and just result would be to order interim reinstatement on a limited basis, namely to the payroll only.

[78] The defendant submitted that such an outcome would be undesirable because it is unlikely the plaintiff would be in a position to repay the wages if their personal grievance claim is unsuccessful. It is apparent that the plaintiff is not in a strong

31 See *Pacific Blue Employment & Crewing Ltd v B* [2010] NZEmpC 112.

financial position. However, and as I have said, they have a strongly arguable case that the defendant unjustifiably dismissed them. It would not, in my view, accord with equity and good conscience for them to be denied reinstatement on an interim basis in the circumstances.

[79] It is also submitted that the defendant, like all other government departments, has been instructed to identify costs savings. I cannot accept that the fact that Inland Revenue has been asked to save costs is of material relevance to an assessment of whether interim reinstatement ought to be ordered.

[80] I consider a return to the payroll would provide the plaintiff with the opportunity to make progress on the issues identified in the clinical psychologist's report and for further medical reports to be obtained and for counselling to occur. It will also provide a firmer basis for managing a successful return to work if that is what is ordered following the Authority's

substantive investigation, including having further clarity on how that might be achieved.

Conclusion

[81] The plaintiff's challenge succeeds. The determination of the Authority is set aside, and this judgment stands in its place. The plaintiff's application for interim reinstatement is granted pending the outcome of the Authority's substantive investigation but on a limited basis, namely a return to the payroll only.

[82] Inland Revenue is accordingly ordered to promptly return the plaintiff to the payroll as from the date on which their payment in lieu of notice period expired.

Costs

[83] Costs are reserved.

Christina Inglis Chief Judge

Judgment signed at 3.25 pm on 28 January 2025

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