

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 63
3211399

BETWEEN WAYNE JOHN BASHER
 Applicant

AND BIG CHILL DISTRIBUTION
 LIMITED
 Respondent

Member of Authority: Natasha Szeto

Representatives: Liz Lambert, representative for the Applicant
 Angela Evans, counsel for the Respondent

Investigation Meeting: 29 August 2023 at Napier

Submissions and further 13 October and 2 November 2023 from the Applicant
evidence received: 2 October, 27 October and 9 November 2023 from the
 Respondent

Date of Determination: 5 February 2024

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Wayne Basher was employed as a truck driver with Big Chill Distribution Limited (Big Chill) on 7 March 2011. He was based at the Hastings Depot. In 2021, Mr Basher was a Line haul Driver, driving the route between Hastings and Putāruru. Mr Basher was dismissed on 24 January 2022 for failing to be vaccinated under Big Chill's internal vaccination policy. His last day of employment with Big Chill was 21 February 2022.

[2] Mr Basher says he was unjustifiably dismissed because Big Chill's decision to dismiss him was unfair and Big Chill did not follow a fair and reasonable process. He also says Big

Chill coerced its staff into getting vaccinated, and breached both his individual employment agreement and its duty of good faith to him by disclosing his personal medical information. Mr Basher seeks compensation, lost wages, the loss of a driver performance bonus and penalties.

The Authority's investigation

[3] An investigation meeting was held in August 2023 in Napier. The Authority received statements from Mr Basher and his wife Karen Basher. For Big Chill, Nicola Silke (General Counsel), and Perry Thomas (Truck Driver) provided written witness statements. All four witnesses attended at the investigation meeting and answered questions from me under oath or affirmation. After the investigation meeting, a further affidavit was provided by Kiri Clark (People Experience Manager, Big Chill) and Mr Basher provided an affidavit in response. Both parties filed written submissions.

[4] As permitted by s174E of the Employment Relations Act 2000 (the Act), this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified the orders made. It has not recorded all the evidence and submissions received, however all information provided has been considered.

Issues

[5] The issues identified for investigation and determination are:

- (a) Whether Mr Basher was unjustifiably dismissed from his employment on the basis of a COVID-19 vaccination mandate, including whether a fair and reasonable process was followed;
- (b) Whether Mr Basher is within time to raise a personal grievance under s103(1)(j)(ii) of the Act, for alleged contravention of section 92 of the Health and Safety at Work Act 2015 (HSWA) which prohibits coercion or inducement;
- (c) If Big Chill is found to have acted unjustifiably, whether Mr Basher should be awarded remedies including compensation, lost wages, and damages for the loss of a driver performance bonus;
- (d) Whether Big Chill breached Mr Basher's individual employment agreement;

- (e) Whether Big Chill breached the statutory duty of good faith by breaching Mr Basher's privacy;
- (f) If there have been breaches of Mr Basher's employment agreement or the Act, whether penalties should be awarded.

Mr Basher's role at Big Chill

[6] Big Chill is part of the Freightways businesses of over 5,000 personnel. Mr Basher was employed by Big Chill as a Storeman / Driver on 7 March 2011. His role initially involved driving a small truck around town for deliveries and working in the store sorting freight. In 2021, his role changed to a Line haul Driver, driving between Hastings and Putāruru. This sometimes involved a trailer swap, where Mr Basher would swap trailers with a driver coming down from Auckland. His role also involved pre-loading the truck and helping in the coolstore.

[7] In early 2021, Big Chill started thinking about introducing a vaccination mandate. Big Chill says New Zealand had lost control of its borders. The group health and safety managers at Freightways had talked about a Freightways-level policy and individual businesses were looking at mandates for vaccination policies. There was some pressure from third party customers in that a number of businesses required their own staff and external contractors to be vaccinated, so third-party requirements became part of the equation for business continuity.

[8] On 22 February 2021, Big Chill sent an online survey to its staff asking questions about whether Big Chill staff should be vaccinated. Mr Basher responded to the survey.

[9] From May 2021 until August 2021, Big Chill says it was operating under Alert Level Four COVID-19 restrictions. In June 2021, Mr Basher was working the night shift. He did not do many around-town deliveries and primarily his job involved working overnight for between 9 and 14 hours. He continued the Hastings to Putāruru run which was approximately four hours. He used a toilet en route to the depot to avoid interacting with people at the Big Chill Putāruru Depot as Big Chill had a requirement that there could not be more than two staff in the staffroom at the same time. When freight was being unloaded, Mr Basher would spend one to 1.5 hours sitting in his truck. Mr Basher said Big Chill took a very strict approach to isolation, and required truck drivers to sit outside the gate rather than going into the depots. Forklifts were used to unload the freight for health and safety reasons.

COVID-19, the Protection Framework, and Big Chill policy

[10] When Big Chill sent the staff survey out on 22 February 2021, it did not initially plan to introduce a vaccination mandate. That position was re-evaluated in late 2021 when national health authorities were urging the New Zealand population to become vaccinated as the Pfizer vaccination became more widely available.

[11] In September 2021, Big Chill responded to the introduction of COVID-19 protocols under the alert-level system by introducing a one-time gross allowance of \$75.00 and lottery for fully vaccinated staff to be drawn on 10 December 2021 to encourage employees to be vaccinated. Its focus was on courier drivers and line haul drivers as that was how freight got down the country and there needed to be controls, given the heightened risk.

[12] On 22 October 2021, the New Zealand Government announced the introduction of a new COVID-19 Protection Framework to replace the Alert Level system.

[13] Certain public-facing roles at Big Chill were covered by the COVID-19 Vaccination Orders, but Big Chill now started considering an internal business-wide mandate for vaccination under its own policy. By November 2021 customers and receivers were asking for Big Chill's vaccination policies. At that time, there were no government regulations about risk assessments for COVID vaccinations. WorkSafe guidance covered generally what needed to be taken into account in creating a risk assessment, but did not provide a template for a COVID risk assessment. Big Chill decided to carry out a risk assessment of all roles. Managers and health and safety reps in each depot were consulted about the risk assessment.

[14] At this time, Mr Basher's view was that Big Chill as a business, and his role in particular, did not meet the criteria for introduction of a vaccination policy. Mr Basher said his role was not forward-facing, in that he did not meet customers on a regular basis and because the depots were over 100 square metres, he could ensure separation distances were kept. Mr Basher said he asked verbally and in emails multiple times for an individual risk assessment for his role.

[15] On 19 November 2021, Big Chill emailed its workers a package of material under the subject: "COVID-19 VACCINATION 2021 CONSULTATION". Big Chill said it wanted input before it made any decisions about vaccination in the workplace. The email attached:

- (a) Big Chill Consultation – Covid-19 Vaccinations 2021 (consultation document)

(b) Freightways Covid-19 Measures Policy

(c) Frequently Asked Questions

[16] The consultation document included a summary of the health and safety risk assessment Big Chill had carried out. Big Chill did not send out the detailed health and safety risk assessments that had been carried out for each role. Mr Basher provided feedback on 29 November 2021.

[17] On 26 November 2021, in the intervening period, the COVID-19 Response (Vaccinations) Legislation Act 2021 introduced Schedule 3A into the Act.

[18] Big Chill collected feedback from the consultation process from personnel and reviewed it. Feedback was collated, there were discussions, and the feedback was reflected in a summary document that was presented to staff. After the consultation process had been worked through, individual feedback was destroyed in line with the company's data retention processes.

[19] On 20 December 2021 Big Chill notified staff of the outcome of the consultation into its approach to vaccination. The Big Chill Consultation – COVID-19 Vaccinations 2021 – Outcome (outcome document) states:

Outcome

We have decided that all of Big Chill's roles are now confirmed as High Risk. This means that, on health and safety grounds, we are implementing mandatory vaccination as a condition of employment/contracts for service for all roles. This mandate will cover all existing employees and contractors, and new hires.

We have also decided to mandate COVID-19 vaccinations for third parties entering Big Chill sites, including all customers, and new hires.

[20] All staff had been deemed category four - high risk - under a C-19 (COVID-19) Risk Assessment. The outcome document summarised and responded to key feedback, and set out a timeframe that required staff to have their first vaccination by 31 December 2021 and second vaccination by 30 January 2022 to align with the Government COVID-19 Vaccination Orders as well as the time required between vaccinations.

[21] The outcome document also states:

What happens if an employee or contractor decides not to get vaccinated?

If you decide not to get vaccinated, you are undecided, or you believe there may be reasons why you are unable to be vaccinated, we encourage you to talk to us before 31 December 2021.

If an employee was unvaccinated on 31 December 2021, we would work through any options with them. Redeployment to a role that is not High Risk is one option. Right now, we have not identified any roles that are not High Risk, however would reassess that at the time. Any options or alternatives that they (or we) can think of would be carefully considered. Termination of employment, on notice, based on the employee being unable to do their role on health and safety grounds, would be a last resort.

[22] The outcome document advises how vaccination status would be recorded and privacy upheld, and provides information on medical exemptions and how staff can obtain support and advice.

[23] Sometime prior to the end of the year, the Hastings Depot put up a list of employee names or initials where employees could put a tick next to their name if they were fully vaccinated. On 23 December 2021, there was an incident between Mr Basher and Mr Thomas over whether Mr Basher's initials were ticked on this list.

[24] On 27 December 2021, Mr Basher wrote to Big Chill setting out why he refused to be vaccinated. He refers to his employment agreement dated 7 March 2011 and notes there is no express provision within his agreement that he must undergo a medical procedure in order to carry out his role as Storeman/Driver. He also issued a hazard notice to Big Chill under s 83 of the Health and Safety at Work Act 2016 (HSWA). From 29 December 2021 to 17 January 2022 Mr Basher was on medical leave.

[25] Big Chill responded to Mr Basher's letter on 29 December. Big Chill excused him from having his first dose of the vaccination by 31 December 2021 because it wished to continue the consultation, and Mr Basher was on leave. On 5 January 2022, Big Chill acknowledged Mr Basher's medical certificate and invited him to a meeting to discuss his concerns and any alternatives or information about Mr Basher's situation that he wanted Big Chill to consider.

[26] On 14 January 2022 Mr Basher and Big Chill met over Zoom. Big Chill said it was not going to tell Mr Basher he had to get vaccinated, but it had come to the conclusion that it would be a business requirement for all staff to be vaccinated on the basis that all roles were high risk.

[27] Big Chill said:

The business has determined that they ...have introduced a mandatory vaccination policy. If you don't comply with that, accordingly you will likely receive notice of termination and the opportunity to get vaccinated.

[28] No other employment options were discussed. Between 14 and 19 January 2022, Big Chill said it reviewed Mr Basher's role against the health and safety risk assessment as requested by him. In a letter dated 19 January 2022, Big Chill stated:

The key points you raised were as follows: - That we needed to conduct our health and safety risk assessment on a one-to-one basis and consult on a one-to-one basis. We explained that we assessed each role within the business, and that we gave employees the opportunity to provide individual feedback as part of the consultation...

...You raised that you had asked for an independent risk assessment of your role. Your role as line haul driver was scrutinized as part of the detailed risk assessment carried out by the Health and Safety Committee, the results of which have been shared with all staff prior to Christmas. However, we have taken the opportunity here to review your role again against our health and safety risk assessment and your reasons. You said the bulk of your time at work is spent alone driving, you are not public facing you can minimize contact with others and not work in close proximity.

Your role involves driving between communities (i.e. Hastings, Putaruru and Palmerston North) and working in cool store environments (i.e. when you are loading and unloading at the depots) where there is limited air flow and you work alongside other store people and drivers. These were important risk criteria that we used in our risk assessment. Furthermore, if Big Chill cannot operate because of the spread of COVID 19, we cannot meet our supply chain requirements as an essential service for New Zealand. This criteria applied to all of our roles, including yours.

All of our line haul drivers (including yourself) interact with other employees. In your case, you drive between the Hastings, Putaruru and occasionally Palmerston North depots each week. When loading/unloading goods you are in close proximity with store employees and other drivers at each depot for up to 2 hours at a time. The nature of the loading/unloading process from truck to depot (and vice versa) means that you cannot always minimize contact because you may be required to load and unload goods from your truck alongside each other. There are also occasions when other Big Chill drivers may need to travel as a passenger in your truck. We consider your role as a Line Haul driver remains in the High-Risk category identified in the Risk Assessment.

[29] Big Chill also said it had given consideration to alternatives to terminating Mr Basher's employment. One of these alternatives was operating in isolation, which Big Chill considered could not be accommodated because Mr Basher would need to assist with the loading and unloading process in the warehouses. Mr Basher was invited to provide further feedback. Big

Chill advised Mr Basher that he would be provided with notice of termination if he did not become vaccinated by 21 January 2022.

[30] On 21 January 2022 Mr Basher provided further feedback regarding Big Chill's obligations under HSWA and the risks associated with the Pfizer vaccine.

[31] On 24 January 2022 Mr Basher was given notice of termination in writing in accordance with Schedule 3A of the Act. Mr Basher was given four weeks' paid notice, but not required to work in that time as he could not safely perform his duties unvaccinated. He was advised that if he received the vaccination prior to 21 February 2022, the notice would be withdrawn and his employment would continue. Big Chill recorded that Mr Basher's role is high risk and mandatory vaccination is required for health and safety reasons. Big Chill stated that it had discussed deployment within the business and changes to Mr Basher's role to limit the role just to driving but those options were not possible for the reasons provided in the 19 January 2022 email.

[32] During Mr Basher's notice period the parties continued to discuss Big Chill's vaccination policy mandate. Mr Basher emailed Big Chill to advise it had not complied with s 83 of HSWA. On 10 February 2022, Mr Basher requested a copy of the risk assessment and the Board meeting minutes "in order to Mandate the company".

[33] Mr Basher's employment ended on 21 February 2022 as he had not had his first vaccination.

[34] On 25 February 2022, Mr Basher again requested a copy of the risk review assessment and copy of the minutes of the Board meeting that he had requested on 10 February 2022.

[35] On 22 March 2022, Mr Basher raised a personal grievance with Big Chill for breach of contract and unfair dismissal. On 17 April 2022, he set out the basis for his personal grievance. Mr Basher lodged a Statement of Problem in the Authority on 1 February 2023.

Relevant law

[36] When the Authority considers justification for Big Chill's actions, including the decision to dismiss Mr Basher, it does so by applying the test of justification in s 103A of the Act. In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether

Big Chill's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[37] The Authority must also consider whether the employer's process for making and carrying out the decision to terminate employment was fairly conducted. The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made.¹

[38] The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[39] The context of the COVID-19 pandemic and its impacts are also relevant circumstances in terms of whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time.²

[40] The circumstances at the time of Mr Basher's dismissal include that there was an additional obligation on employers to provide reasonable written notice of the date by which Mr Basher was required to be vaccinated, provide written notice of termination, exhaust all other reasonable alternatives that would not lead to termination of employment, and cancel the termination if Mr Basher became vaccinated during the notice period.³

[41] Big Chill could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act, in particular, because it was proposing to make a decision that would have an adverse effect on the continuation of Mr Basher's employment. The allegation of breach of good faith in this case focuses on an alleged breach of privacy in that Mr Basher says Big Chill improperly disclosed his personal medical information.

[42] Big Chill says that it justifiably dismissed Mr Basher following a substantively and procedurally fair health and safety risk assessment which concluded Mr Basher's role required

¹ Section 4 (1A) of the Employment Relations Act 2000.

² *Wilson-Grange Investments v Guerra* [2023] NZEmpC 39.

³ Schedule 3A clause 4 of the Employment Relations Act 2000.

vaccination. Because Mr Basher decided not to become vaccinated and Big Chill had ensured all other reasonable alternatives had been exhausted, the only option was terminating Mr Basher's employment.

Analysis

Unjustifiable dismissal

[43] The first question is whether Mr Basher was unjustifiably dismissed. I must assess Big Chill's actions in dismissing Mr Basher against the test of justification set out at s 103A of the Act.

[44] Big Chill says it was substantively justified in dismissing Mr Basher because he was required to be vaccinated to carry out his role under its vaccination policy as recorded in the outcome document. It refers to the statutory test of justification in s 103A(2) of the Act, and says that the COVID-19 context is relevant in assessing what a fair and reasonable employer could do.⁴

[45] Mr Basher says Big Chill was not justified in introducing a vaccination policy. He says his role was wrongly assessed as being covered by the vaccination policy because no proper risk assessment was carried out for his role. He also says even if driver roles were covered by the vaccination policy, Big Chill did not consider the way he carried out his role, or workarounds for his role, and therefore did not exhaust all other reasonable alternatives that would not lead to termination of his employment.

[46] Big Chill was obligated to genuinely engage and consult with Mr Basher regarding the potential impacts of the risk assessment and vaccination policy in terms of Mr Basher's employment, and as to reasonable alternatives. It was required to provide him with access to relevant information and give him a reasonable opportunity to respond to the relevant information, which it needed to genuinely consider prior to making a decision in terms of s 4(1A)(c) of the Act.

[47] In terms of s 103A, a fair and reasonable employer could be expected to have genuinely considered and responded to any reasonable proposals made by the employee and actively considered any reasonably available alternatives to dismissal.

⁴ Above n2.

Risk assessment

[48] Mr Basher says the risk assessment carried out by Big Chill was inadequate and led Big Chill to conclude his role was covered by the vaccination policy when it was not.

[49] The risk assessment is central to the inquiry about fairness because there is a direct line from the risk assessment, through the development and implementation of Big Chill's approach to vaccination and vaccination policy, to Mr Basher's dismissal. If Big Chill has not followed a fair and reasonable process there may be significant flaw such that its decision to dismiss Mr Basher was unjustifiable.

[50] Big Chill gave evidence to the Authority of the way its health and safety risk assessments were developed. It was conscious of the need to have a robust process involving the branch. As recorded in its consultation document, Big Chill used the guidance to businesses developed by WorkSafe on assessing COVID-19 risks and how to carry out a health and safety assessment. It advised staff that the senior leadership team and health and safety representatives had carried out a full health and safety risk assessment to identify the COVID-19 health and safety risks for all roles.

[51] The consultation document that was sent to all staff did not attach the detailed risk assessments for each group of roles. It stated that Big Chill had assessed "similar roles in groups" and provided "a summary of our reasons for each group". The three groups identified in the consultation document were "Sales", "Drivers", "Stores/Operations" and "Administration/Corporate".

[52] In relation to the "Drivers" group, Big Chill summarised the risk assessment in three bullet points:

- Work involves regularly accessing customer sites and interactions with third parties on sites.
- Travel between communities.
- Working in cool store environment where there is limited air flow alongside other people.

[53] There was also a separate comment in italics:

Some third parties will also prohibit unvaccinated drivers accessing their site due to Public Health Response Order or own risk assessments.

[54] Big Chill said it had not sent out the full health and safety risk assessments to all staff, because it wanted to make sure that only information relevant to people's roles was circulated and that confidential or commercially sensitive information around other roles was not. Big Chill wanted to inform, but not overwhelm. It wanted information to be manageable and digestible to avoid staff having more questions than the information warranted. Big Chill expected that some people would have more concerns or questions - especially challenges to the risk assessment being level four across the business.

[55] Mr Basher responded to the consultation document on 29 November. He focused mainly on Big Chill's assessment of his role being a "high risk position". He had used the WorkSafe assessment tool and come to the conclusion that his job "appears to fit into the low risk category".

[56] Mr Basher stated: "...before you mandate the vaccines on my position, I ask to have a full risk assessment, by an independent person, to show the hazards you are claiming my role has". In evidence to the Authority, Mr Basher said he asked for a risk assessment to be done by an independent person because he wanted someone who could look particularly at his role and it did not matter to him if it was someone within the company or external.

[57] I accept in its consultation document, Big Chill at least implied a full health and safety risk assessment had been carried out, because it said in internal communications as well as within the consultation document for the vaccination policy that the risk assessment was a summary. But Big Chill accepted it could have been clearer in its consultation document that a full health and safety risk assessment had been carried out for each role.

[58] Big Chill did not agree that Mr Basher's role required an individual risk assessment. The step that Big Chill took in either ignoring or declining to provide Mr Basher with more information around the health and safety risk assessment for the drivers to justify its assessment of his role as "high risk" was not a step that a fair and reasonable employer could take. Giving Big Chill the benefit of the doubt, I accept that it may have been diverted by the HSWA claims that Mr Basher was making, and focused on responding to his request for an individualised risk assessment for his role. But the evidence showed that Big Chill had carried out a full health and safety risk assessment for the drivers' roles which consisted of four pages of factors with risk ratings and possible control measures. It had completed a Risk Assessment Worksheet recording the description of the work, risk description and outcome of risk

assessment/decisions, ascribing the likelihood and consequences of risk for drivers as being ‘4’ across the board and therefore “high risk”. Big Chill therefore had significantly more information in its possession regarding the risk assessment and risk rating for Mr Basher’s role, than what it provided to Mr Basher.

[59] Big Chill declined to carry out an individual risk assessment for Mr Basher because it had already carried out a comprehensive risk assessment for all driver roles. However, it did not advise Mr Basher of that and it should have. Big Chill could also have genuinely considered carrying out an individual risk assessment for Mr Basher’s role, particularly because Mr Basher’s case was one of the only cases of non-vaccination and it had visibility with the senior leadership team. Given the downstream consequences on Mr Basher’s employment, I consider a fair and reasonable employer could have genuinely engaged with him on the risk assessment, even in the context of a business that was continuing to respond to the impacts of a global pandemic.

[60] At the investigation meeting, Big Chill suggested that the full health and safety risk assessments may have contained sensitive or confidential information. Having reviewed the health and safety risk assessments, I am not convinced there was any such information, however it would have been possible for Big Chill to make any necessary redactions to the documents before providing them to Mr Basher. The evidence before the Authority suggests that Mr Basher had to ask for the full risk assessment more than once after he had been given notice of termination of his employment.⁵ A fair and reasonable employer could have provided the health and safety risk assessment for drivers to Mr Basher, even without a specific request, and considered the possibility of redaction if there were concerns about sensitive or confidential information.

[61] For this reason, I consider Big Chill failed to provide relevant information to Mr Basher prior to terminating his employment. The assessment of Mr Basher’s role as a category four “high risk” role – therefore requiring mandatory vaccination as a condition of employment – and his decision not to be vaccinated, ultimately led to his dismissal.

⁵ On 10 February 2022 and 25 February 2022.

[62] Big Chill's failure to provide Mr Basher with the full health and safety risk assessment and engage with him on the risk assessment of his role was a more than minor technical flaw, and had the effect of undermining the overall fairness of the process Big Chill followed.

[63] Because Big Chill did not properly engage with Mr Basher on his concerns about the risk assessment, it also could not genuinely engage with him on reasonable alternatives to ending his employment.

Disciplinary / Termination Process

[64] Big Chill says it continued to consult with Mr Basher after the consultation document was released, between 27 December 2021 and 21 January 2022.

[65] In a meeting on 14 January 2022, Big Chill says it gave Mr Basher further opportunities to engage over his decision not to become vaccinated. Mr Basher said that management had come to the meeting on 14 January 2022 predetermined to dismiss him.

[66] In a letter of 19 January 2022, Big Chill set out its views on alternatives to vaccination and/or termination of employment and why these alternatives were not possible. Big Chill said it had taken the opportunity to review Mr Basher's role again against the health and safety risk assessment and his reasons. Big Chill says that its decision to re-apply its health and safety risk assessment was evidence that it considered whether Mr Basher could carry out his role unvaccinated on the basis it was not high risk (as an alternative to termination).

[67] However, based on the evidence before the Authority, the review that Big Chill carried out as recorded in the 19 January 2022 letter was little more than a perfunctory paper-based exercise that essentially came to the same conclusion as the outcome document had - Mr Basher's role is high risk because it involves driving between communities, working in cool store environments and interacting with other employees. Big Chill did not consider the points Mr Basher raised in his earlier feedback such as his ability to work more than one metre away from staff, and the majority of his work being by himself "not forward facing towards customers and public". Big Chill did not consider how Mr Basher carried out his work for Big Chill through changing Alert levels, prior to vaccinations becoming widely available.

[68] Before the Authority, Mr Basher articulated that his role as a driver was different in small ways to other drivers including:

- (a) He did not have interactions with other colleagues, or - if he did - the interactions were no longer than 15 minutes.
- (b) He did not work in a coolstore with limited air flow. There was limited air flow in the coolstore, but he did not work in it. The depot Mr Basher worked in was bigger than 100 square metres.
- (c) Mr Basher did not agree that it was his responsibility as the driver to check or supervise the loading of the freight. Mr Basher said it was the loader's responsibility to ensure that the freight was loaded correctly. He disagreed that he had interactions with Big Chill staff loading or unloading the freight at other depots.

[69] Mr Basher did not respond to Big Chill's review as recorded in the 19 January 2022 letter because he understood at that point, his role was going to be terminated and it would not make a difference. There is some validity to Mr Basher's view that Big Chill had already determined all roles in the company were high risk.

[70] I find that on the evidence before the Authority, Big Chill did not genuinely engage and consult with Mr Basher specifically in relation to the health and safety risk assessment for his role.

Schedule 3A considerations

[71] Clause 3 of Schedule 3A of the Act deals with the termination of employees for vaccination-related reasons. Clause 3(1)(b) applies to an employee whose employer has determined the employee must be vaccinated to carry out the work of the employee. Schedule 3A applied to Big Chill and Mr Basher. This provision came into force on 26 November 2021 prior to Big Chill's decision to dismiss Mr Basher.

[72] I find that Big Chill met the notice requirements of Schedule 3A(3) of the Act. However, the requirement under clause 3(4) of Schedule 3A of the Act requires further scrutiny. That clause states:

Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

Redeployment

[73] Big Chill recorded in its letter of 19 January 2022 that it considered the possibility of redeployment, but there were no possible roles given the decision that all roles in the workplace should be vaccinated.

[74] Mr Basher accepted redeployment within Big Chill was not an option because all positions within the business had been assessed at a level four “high” risk, which under the company approach to COVID-19, required vaccination.

[75] Big Chill said that Mr Basher had not raised any redeployment options with it. While it was not Mr Basher’s responsibility to raise redeployment options, I find that redeployment was not a reasonable alternative that would not lead to termination in Mr Basher’s case because all roles at Big Chill had been assessed as high risk and there was no role that he could be redeployed into.

Operating in Isolation

[76] Big Chill recorded in its letter of 19 January 2022 that it considered the possibility of Mr Basher “operating in isolation”. Mr Basher told the Authority that he did not go into other businesses as part of his role, just into other Big Chill depots, for example Palmerston North and Putāruru. Mr Basher accepted he could not go into other depots or congregate with staff from other depots when he was doing line haul driving. Mr Basher said when COVID-19 first broke out and before vaccinations were available in New Zealand, he had stopped sorting freight as part of the line haul drive work and his income had accordingly gone down because he was working shorter hours without the need to sort freight. He also said that during level two to four lockdowns, he was still able to perform his duties as the night-run driver to Putāruru.

[77] Mr Thomas also worked as a line haul driver for Big Chill. Mr Thomas’s role was an overnight driver from 6:30 pm till approximately between 4:30 or 7am the next day and he also drove the Hastings to Putāruru route driven by Mr Basher. The run involved a driver bringing an identical truck and trailer unit down from Auckland and there would be a swap of the trailer units. Where Mr Thomas differed from Mr Basher is that in his view a professional driver is ultimately responsible for the freight and needs to supervise the freight loading and unloading process. This can take five to ten minutes or up to three-quarters of an hour. Mr Thomas said that in March 2020, drivers were under strict guidelines to use surface sprays in the trucks, to wear masks in the depots, and very rarely had another person in the truck cab with them.

[78] Big Chill says that Mr Basher could not work autonomously in his role, because he had to leave truck doors open to the depot, directly supervise the loading of the truck for health and safety reasons, and potentially use the shared facilities. In its letter of 19 January 2022, Big Chill recorded that all driving roles often need to assist with loading and unloading processes.

[79] I find the evidence that Line haul Drivers needed to supervise the loading and unloading of the truck to be the most compelling reason potentially bringing Mr Basher (and other drivers) into close proximity with other workers for an extended period of time. However, given Big Chill's failure to engage with Mr Basher on the risk assessment for his role, and the conflict in the evidence before the Authority, I am unable to reach a conclusion about whether operating in isolation was a reasonable alternative to dismissal.

Rapid Antigen Testing

[80] Mr Basher raised with Big Chill that he takes his temperature every morning as a protection measure. Big Chill's response was that vaccination lowers the risk of getting and spreading the virus.

[81] There was no evidence before the Authority that the use of Rapid Antigen Tests (RATs) was discussed during the disciplinary process. At the investigation meeting however, Mr Basher said when he carried out work for another company delivering to other businesses, he considered there to be minimal risk if some basic health and safety measures were taken such as the use of RATs. Mr Basher said that if staff were not tested regularly, it was impossible to know whether people had caught and transmitted COVID-19, irrespective of their vaccination status. Mr Basher said that at no time during his employment with Big Chill was there regular testing at the Hastings Depot.

[82] Big Chill had ordered its own supply of RATs in bulk, but the supply was requisitioned by the Government at the border. At the relevant time there were not enough RATs for staff to undergo regular testing. There were also "sensitivities" around what guarantee RAT testing could give to customers about COVID-19 not being brought into their businesses irrespective of the accessibility of the tests.

[83] I accept Big Chill's evidence that RATs were not readily available at the relevant time, and there was some concern about the efficacy of the tests in terms of delayed positives.

Regular RAT testing was not a reasonable alternative that would not lead to termination in Mr Basher's case for these reasons.

Medical exemption

[84] Although it was not raised during the disciplinary process, at the investigation meeting the issue of a medical exemption was discussed.

[85] Some employees at Freightways were put forward for medical certificates for exemptions, but it happened rarely – if at all – at Big Chill. There was no specific medical or legal advice offered to staff around this time. The company's focus was on sanitising, cleaning and segregating.

[86] Mr Basher says his managers at Big Chill knew he had a personal medical reason why he would not be vaccinated. However, Mr Basher also says he did not consider getting a formal Government exemption because the Government had publicly stated exemptions were not being issued and it had been reported in the media that even nurses were applying and were not getting exemptions.

[87] On the evidence before the Authority, I find Mr Basher did not formally raise medical reasons with Big Chill. Neither party genuinely considered medical exemption was a realistic prospect for Mr Basher, and in the circumstances I find that medical exemption was not a reasonable alternative to dismissal.

Annual leave or leave without pay

[88] The evidence shows that taking annual leave or leave without pay was not formally raised and recorded during the disciplinary process.

[89] Mr Basher said he asked his manager at the time to be stood down on leave without pay, but he was turned down. Mr Basher said he was aware of other companies that had stood drivers down while vaccination policies and mandates were in place. Mr Basher said that he had approximately 11 to 12 weeks of annual leave owing to him at the time of his termination but going on annual leave was never raised with him as an option. During the March 2020 lockdown, Mr Basher had taken a combination of annual leave and leave without pay, as he was away overseas on holiday at that time.

[90] Kiri Clark, People Experience Manager (who was not employed by Big Chill at the time of Mr Basher's dismissal) gave evidence that the 14 January 2022 discussion shows Mr Basher did not ask Big Chill to consider him taking leave without pay as an alternative to his employment ending. She also says at the time of his dismissal, Mr Basher had 10 days' long service leave, 2 days alternative holidays, and 16.5 days of annual holidays. Ms Clark said that after approximately 5.5 weeks, Mr Basher would have exhausted his paid leave and Big Chill would have to consider termination at that time. Ms Clark said leave would not have been a viable alternative because of the specialist truck driving skills Mr Basher had in his sole charge role as an overnight line haul driver. Having Mr Basher on leave would have delayed Big Chill finding permanent cover when it needed certainty about who could perform this role.

[91] While there was no documentation to support that Mr Basher had asked to be put on leave or stood down, I am not persuaded by Big Chill's view that it was Mr Basher's responsibility to raise this as an option, or that it was not viable for Mr Basher to have used his accumulated leave before being stood down on leave without pay as a reasonable alternative to having his employment terminated. Making arrangements for temporary cover may have been inconvenient, but I accept Mr Basher's evidence that it was never an issue for staff to take extended leave and Big Chill's Auckland depot had sent down other drivers previously to provide cover, or the owner's son had provided cover. Based on the evidence before the Authority, using Mr Basher's existing leave entitlements, and then potentially taking leave without pay were matters that were not even considered or discussed with Mr Basher prior to his dismissal and they could have been.

Summary on Schedule 3A

[92] Based on the information before the Authority, I find that Big Chill did not exhaust all reasonable alternatives to termination in Mr Basher's case because the parties did not consider Mr Basher taking leave (including without pay).

[93] While I am sympathetic to Big Chill's submission that such temporary arrangements could not have continued indefinitely, the obligation on Big Chill to exhaust all other reasonable alternatives that would not lead to termination was an onerous one. In the context of the rapidly evolving COVID-19 situation, it would have been fair and reasonable for Big Chill to have genuinely considered offering Mr Basher leave as an alternative to dismissal.

Summary on unjustifiable dismissal

[94] I have found that Big Chill did not follow a fair and reasonable process in terms of the risk assessment for Mr Basher's role, nor did it consider leave as a reasonable alternative to termination. It follows that Big Chill unjustifiably dismissed Mr Basher from his employment.

Personal grievance under s 103(1)(j)(ii)

[95] Mr Basher says he raised a separate personal grievance for "coercion" with his manager "from early on". This was in relation to the lottery and bonus system being run by Big Chill in September and November 2021, which Mr Basher said was pushing people to make decisions that they may not have otherwise made. Mr Basher also said that putting everybody's initials on a list was a coercion tactic designed to pressure people into becoming vaccinated. In submissions, Mr Basher says he raised coercion in the Zoom meeting on 14 January 2022 which was 56 days after Big Chill sent out the consultation pack on 19 November 2021. Mr Basher also says he raised coercion in an email to Big Chill on 27 December 2021, and in a Zoom meeting with Big Chill on 14 January 2022.

[96] Big Chill says Mr Basher did not raise a personal grievance under s 103(1)(j)(ii) within 90 days of the date on which the action alleged to amount to a personal grievance occurred. It says the relevant actions occurred in September and November 2021, and Mr Basher did not raise coercion under s 103(1)(j)(ii) with Big Chill until 17 April 2022. Even on this date, Big Chill says Mr Basher raised s 103 (1)(j)(ii) among "various sections of law". Big Chill did not receive further information about the nature of the complaint until it received the statement of problem on 7 February 2023 – more than a year after Mr Basher's dismissal - which included a claim for illegal coercion in relation to vaccination incentives. Big Chill does not consent to a grievance being raised out of time. It says in any case, no personal grievance has been made out under s 103(1)(j)(ii).

[97] The law around raising personal grievances is clear and settled. An employee must raise a personal grievance with their employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee.⁶ A personal grievance can only be raised outside that time with the employer's consent, or with the leave of the Authority which can only be granted in exceptional

⁶ Section 114(1) and (2) of the Employment Relations Act 2000.

circumstances. No action can be commenced in the Authority more than three years after the personal grievance was raised.⁷

[98] The case law supports that the grievance process is designed to be informal and accessible.⁸ A grievance may be raised orally or in writing and there is no particular formula of words that must be used. Each communication in a series should be examined as to whether it might raise a grievance, but the totality of communications might also constitute raising a grievance.⁹

[99] The grievance raised must be in the nature of a complaint under s 103 of the Act, and the employee must take reasonable steps to make the employer aware of the substance of the complaint to enable the employer to address it.¹⁰ The employer must know what it is responding to, be given sufficient information to address the grievance, and be able to respond to the complaint on its merits with a view to resolving the complaint informally and as soon as practicable. It is not necessary for the employee to state how they would like the matter resolved. Raising an employment relationship problem might constitute raising a personal grievance.¹¹

[100] Employers and employees have a mutual good faith obligation to be active and constructive in maintaining a productive employment relationship in which the parties are communicative.¹²

[101] Applying the law to the facts of this matter: the actions Mr Basher relies on are the vaccination incentives offered by Big Chill which were introduced in September and November 2021. Mr Basher says he raised coercion in the email of 27 December 2021, the Zoom meeting of 14 January 2022 and the email of 21 January 2022.

[102] I have reviewed the email of 27 December 2021. Mr Basher states:

You've gone through a process of 'consultation' with the workforce that at its best can be described as foolish and time wasting and at worst as cynical and criminal. This process has completely ignored the serious risk that Big Chill Distribution Ltd has introduced and coerced its workforce into accepting, at the risk of losing our jobs.

⁷ Section 114(6) of the Employment Relations Act 2000.

⁸ *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132 at 36.

⁹ Above n8.

¹⁰ *Creedy v Commissioner of Police* [2006] 1 ERNZ 517 (Emp C).

¹¹ *Clark v Nelson Marlborough Institute of Technology* [2008] 8 NZELC 99, 483 (Emp C).

¹² Section 4(1A)(b) of the Employment Relations Act 2000.

[103] In this email, Mr Basher did not mention s 92 of HSWA or s 103(1)(j)(ii) of the Act. He did not use the words “personal grievance”.

[104] I have reviewed the transcript of the 14 January 2022 meeting. Mr Basher states:

You’ve coerced your staff into supplying a \$70 voucher for them to go and put this toxin in their body. You’ve done a \$500 thing. That’s all coercion in your company to convince your staff to do something. It’s illegal. The whole lot.

[105] In the meeting, Mr Basher did not mention s 92 of HSWA or s 103(1)(j)(ii) of the Act. He did not use the words “personal grievance”.

[106] Mr Basher raised “coercion” in his email of 21 January 2022 to Big Chill in relation to the same issue of Big Chill offering a \$75 individual payment as well as a \$500 lottery draw for vaccinated staff. In this email, Mr Basher mentioned s 92 of HSWA but not s 103(1)(j)(ii) of the Act. He did not use the words “personal grievance”.

[107] In his email of 17 April 2022, Mr Basher notified Big Chill of his intention to file a personal grievance in the Authority. While he provided the wording of s 103(1)(j)(ii) of the Act, he did not specifically mention coercion or give Big Chill any specific details about how he alleged he had a grievance under that section.

[108] On the evidence before the Authority, Mr Basher raised a personal grievance under s 103(1)(j)(ii) of the Act with Big Chill out of time, because the actions complained of occurred in September and November 2021 and the personal grievance was not raised until the Statement of Problem was lodged in the Authority on 7 February 2023.

[109] While Mr Basher raised coercion, and s 103(1)(j)(ii) in earlier communications (as referenced above), I find that Mr Basher was raising the spectre of coercion in a general sense and there was no clear link between any alleged actions of Big Chill and the impact on Mr Basher that he says constitutes a grievance. There was no clarity in his complaint such that Big Chill was made aware of the substance of the complaint and could take steps to address it.

[110] Timeliness in raising a personal grievance is more than a technicality – it goes to the heart of the statutory framework. One of the core reasons that grievances must be raised within time is to make the employer aware of the substance of the complaint to enable them to resolve

the complaint informally and as soon as practicable with its employee. Mr Basher has not raised a personal grievance under s 103(1)(j)(ii) of the Act within time.

[111] For the sake of completeness, I record that there was insufficient evidence before the Authority for a personal grievance under s 103(1)(j)(ii) to be successful in this case. The legal basis for the claim is misconceived – it requires not just a general coercion or inducement, but that coercion or inducement is in relation to a function, power or role under HSWA.¹³ This critical element is missing from Mr Basher’s allegations and the evidence before the Authority. Mr Basher has not established that the bonus and lottery were coercion or inducement as opposed to incentives or encouraging measures as Big Chill argues. Nor is there any link between the actions of Big Chill, and a contravention in relation to a function, power or role under HSWA.

Breach of contract / individual employment agreement

[112] Mr Basher says the introduction and implementation of the vaccination policy was a breach of his individual employment agreement because his employment agreement does not expressly state he has to be vaccinated to be employed and Big Chill cannot introduce a mandatory vaccination policy when his employment agreement does not provide for one.

[113] Big Chill relies on paragraph 26 of Mr Basher’s individual employment agreement dated 7 March 2011 that permits Big Chill to amend its policies, which it did when it introduced the vaccination policy. The provision states:

Company Policy

The company has standard staff policies, which at the company’s discretion, may change from time to time. As these policies become relevant to you, you must ensure you understand and observe these policies. A copy of the staff policies are held in the National Operations Managers [sic] office and is available at all times.

[114] Big Chill says it was entitled to introduce new company policies under Mr Basher’s individual employment agreement, and it considered available guidance in developing its own health and safety risk assessment by applying specific risks and controls to individual roles.

¹³ *Bullen v Fliway Transport Limited* [2023] NZERA 406.

[115] Mr Basher signed his individual employment agreement and had been operating under it since 2011. I find that Big Chill did not breach Mr Basher's individual employment agreement by introducing the vaccination policy.

Breach of good faith, breach of privacy

[116] Mr Basher says Big Chill shared his personal medical information on a workplace noticeboard, which amounts to a breach of the duty of good faith.

[117] Mr Basher said that a list of people who had been vaccinated was put up in the staffroom (or smoko room) at the Hastings Depot, which was accessible to people at Big Chill and some external contractors. Staff names were on the list and they were expected to tick beside their name if they had been vaccinated. The list of names was later replaced with a noticeboard that was put up in the hallway outside the smoko room which contained people's initials. Mr Basher took issue with the names or initials on the noticeboard because he said that the requirement to tick once you had been vaccinated disclosed medical information that was private. Mr Basher told the Authority there were approximately ten staff on the site and no other staff with his initials. The board disclosed his medical information because his initials were the only ones that were not ticked.

[118] Big Chill was conscious that information about people's vaccination status would need to be managed in accordance with privacy principles, including that there would need to be rules around collection and sharing only with people who needed to know the information. It specifically addressed the privacy of vaccination information in its outcome document. Big Chill says there is no evidence it disclosed Mr Basher's personal medical information on the facts – Big Chill did not publicly record the information, and Mr Basher was not required by Big Chill to record his status on the list or whiteboard. There was also evidence before the Authority that Mr Basher himself disclosed his vaccination status to Mr Thomas and others in the workplace.

[119] Based on the evidence before the Authority, I do not accept that Big Chill breached its obligation of good faith to Mr Basher by disclosing his personal medical information. Although Mr Basher felt there was a long-term attack on him for being unvaccinated, he had to accept that Big Chill did not direct him to use the list. I find that Big Chill's employees were not required to tick their names or initials – it was entirely voluntary and was not required by Big Chill.

[120] If there had been an inadvertent privacy breach because of the mere presence of the noticeboard¹⁴, I would not have found the breach was attributable to Big Chill. Even if there had been an inadvertent privacy breach, I do not consider it would have met the threshold for a penalty to be imposed under s 4A of the Act, which requires the failure to be deliberate, serious, and sustained or intended to undermine an employment relationship. There is no evidence of any of these factors in this case.

Findings

[121] I find:

- (a) Mr Basher has made out his claim for a personal grievance in that his dismissal was unjustified when the test in s 103A of the Act is applied together with the additional obligations on employers to exhaust all reasonable options set out in Schedule 3A of the Act before deciding to terminate an employee's employment because of their vaccination status.
- (b) Mr Basher has not raised a personal grievance under s 103(1)(j)(ii) of the Act in accordance with s 114(2) of the Act as it is out of time.
- (c) Big Chill did not breach Mr Basher's individual employment agreement.
- (d) Big Chill did not breach its obligation of good faith to Mr Basher by disclosing his personal medical information.

Remedies

[122] Mr Basher seeks:

- (a) Compensation for hurt and humiliation, personal, emotional and family harm under s 123(1)(c) of the Act.
- (b) Compensation for lost wages and driver performance bonuses under s 123 (1)(b) and s 123(1)(c)(ii) of the Act.
- (c) Penalties for breaches of the Act and good faith.

Compensation

[123] Mr Basher seeks compensation under s 123(1)(c)(i) of the Act.

¹⁴ *Evans v Kesington Hairdressing and Beauty Limited* [2012] NZERA Auckland 49.

[124] Big Chill says that scant evidence or information has been given about the impacts on Mr Basher. To the extent that the Authority considers it appropriate to make any award, Big Chill points to cases where similar evidence of harm has been provided as falling between \$5,000 and \$10,000, which is within Band 1 of the compensation bands set by the Employment Court.¹⁵

[125] Mr Basher says he suffered hurt, humiliation, stress and personal financial loss. He refers to his “11 years of service” to Big Chill and says he struggled with the way he has been treated.

[126] In June 2022, after Mr Basher left Big Chill he said he applied for a few jobs but never heard back or never got an interview. Most asked about vaccination status. He was looking for a long-term position because he liked to build a career in his work.

[127] Mr Basher eventually got a transport role with Blue Ice. He signed a contract on 12 June 2022, and started employment with them on the 13 June 2022. Mr Basher said his role at Blue Ice was pretty much exactly the same as his role at Big Chill had been, driving from Hastings to Palmerston North and back every night, servicing trucks, scheduling, repairs and maintenance. The contract provided to the Authority shows that Mr Basher was paid a variable salary per week depending on whether he completed five or six runs.

[128] Mrs Basher gave evidence to the Authority that Mr Basher was dealing with his health issues privately. Following his termination, Mr Basher was still trying to wrap his head around what had happened. Mrs Basher saw him applying for jobs and when he obtained the job through Blue Ice, Mr Basher felt like he was back on the up and up. At the time of the investigation meeting, Mr Basher was no longer working for Blue Ice as the business had sold.

[129] Mr Basher says the impact of losing his role at Big Chill has personally been terrible on him. He said that his career is something he has enjoyed and had a fair bit to do with building the company from the beginning. He said his whole life had been tipped upside down when he was terminated. He struggled to find a new position; many businesses were scared of employing new people during COVID times.

¹⁵ *GF Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101.

[130] Based on the evidence before the Authority I consider the most compelling factors in terms of impact on Mr Basher were his long service with Big Chill, and the fact that – prior to his dismissal – he appears to have been a high performer, and valued employee. I am relatively confident that – had it not been for the extraordinary COVID-19 times – Mr Basher would still be employed at Big Chill. I am satisfied that Mr Basher has suffered loss of dignity and injury to feelings for the way he was unjustifiably dismissed from his employment with Big Chill. For these reasons, and considering awards in other cases, I consider compensation of \$15,000 is appropriate.

Reimbursement

[131] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies that reimbursement will normally be limited to “the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration”. However, s128(3) allows that the Authority “in its discretion” may award a greater sum where appropriate.

[132] When deciding whether to apply my discretion and award more than three months ordinary time remuneration my starting point is that there is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind the actual loss merely represents the upper award) this should be assessed based on to the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.¹⁶ I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis).¹⁷

[133] Big Chill says Mr Basher started new employment on 13 June 2022 and the Authority should not award more than three months' lost wages particularly because there is scant evidence of attempts to gain new employment.

¹⁶ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

¹⁷ *Telecom New Zealand Ltd v Nutter* [2004] NZCA 127/03, 2 NZELR 83 at 73.

[134] In the circumstances, I consider this is an appropriate case to order reimbursement of 3 months' ordinary time remuneration. Mr Basher earned a variable amount every week. I have based my calculation of three months' ordinary time pay on Mr Basher's bank account records for the last three full months of his employment with Big Chill prior to his termination which I consider to be representative of his remuneration. During this period, Mr Basher earned an average of \$1,163.94 per week, totalling \$13,967.28 for 12 weeks.¹⁸ I consider an award of that amount to be appropriate and that is ordered to be paid.

Contribution

[135] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Basher may have acted in a way that contributed to the situation that gave rise to his grievance.¹⁹

[136] Big Chill submits that contribution is not relevant in these circumstances. I do not ascribe any responsibility to Mr Basher and I find no evidence of contribution.

Damages - Driver performance bonus

[137] Mr Basher said that he should be awarded damages in respect of a driver performance bonus he was entitled to be paid.

[138] The driver performance bonus was available to encourage good driver behaviour. For the five to six years prior to his dismissal, Mr Basher had been awarded Driver of the Year which entitled him to a \$2,000 bonus plus \$200 paid per month. This was paid to the top nine drivers in the company, of which he had been one. Mr Basher provided evidence in the form of his bank account records that suggest he was paid a 'Driver Program Bonus' for three months in 2017, nine months in 2018, seven months in 2019 (with an end of year bonus being paid in June 2019), two months in 2020 (with an end of year bonus being paid in June 2020), and four months in 2021.

[139] Mr Thomas gave evidence that the bonus system which was paid monthly finished at the end of 2021 or just after Mr Basher left Big Chill. Ms Clark gave evidence that October 2021 was the last month where bonuses were paid to staff, and the programme was cancelled

¹⁸ Mr Basher was paid separate weekly amounts into his account fortnightly. Calculations are based on Mr Basher's bank account records for the period 3 November 2021 to 26 January 2022, excluding the Driver Programme Bonus paid on 26 November 2021.

¹⁹ Section 124 of the Employment Relations Act 2000.

in November 2021. Mr Basher says he was never advised the driver performance bonus was being cancelled, and he had a legitimate expectation it was ongoing. However, based on the bank record evidence provided by Mr Basher, it appears that his last bonus (for October 2021) was paid in November 2021. This is consistent with the evidence of Mr Thomas and Ms Clark about the cancellation of the programme.

[140] I accept Big Chill's evidence that the driver performance bonus programme was discretionary and Mr Basher could not expect he was entitled to either a monthly payment or for a lump-sum bonus payment for winning Driver of the Year. There was no contractual entitlement to be paid a monthly or yearly bonus and there is some doubt in my mind that Mr Basher would have – in any event – become entitled to further monthly or yearly payments, even if he had remained employed by Big Chill and even if the programme had not been cancelled. Due to the considerable uncertainty, I decline to award Mr Basher any damages in respect of the monthly or yearly driver performance bonus.

Penalties

[141] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties under s 133 of the Act.

[142] Having concluded that Big Chill did not breach its statutory duty of good faith or Mr Basher's individual employment agreement, the matter of penalties does not fall to be considered.

Orders

[143] Mr Basher's claim that he was unjustifiably dismissed from his employment with Big Chill has been successful and remedies are appropriate.

[144] I order that within 28 days of the date of this determination:

- (a) Big Chill is to pay Mr Basher for lost wages for a period of three months following his dismissal under s123(1)(b) of the Act in the amount of \$13,967.28.
- (b) Big Chill is to pay Mr Basher compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$15,000.

Costs

[145] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[146] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁰

Natasha Szeto
Member of the Employment Relations Authority

²⁰ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (updated February 2024) at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf> Employment Relations Authority (era.govt.nz)