IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2023] NZERA 370
3184159

	BETWEEN	ROBERT WHITLEY Applicant
	AND	FIRSTLIGHT FROZEN LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Mike Harrison, advocate for the Applicant Adam Simperingham and Monique Rowe, counsel for the Respondent
Investigation Meeting:	27 and 28 April 2023 at Gisborne
Submissions received:	28 April, 1 May, 12 May and 12 July 2023 from Applicant 28 April, 11 May and 12 July 2023 from Respondent
Determination:	13 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Robert Whitley was employed as a food sales representative for the respondent, Firstlight Frozen Limited (Firstlight), for some 21 years. In late 2021, Firstlight began implementing a policy that required its staff to be vaccinated.

[2] Mr Whitley refused to confirm his vaccination status to his manager, Mr Owen, one of the directors of Firstlight. Mr Owen made several attempts to speak with Mr Whitley, but Mr Whitley did not welcome these inquiries, and raises a claim that Mr Owen bullied him.

[3] In the end, Firstlight implemented a policy requiring its staff to be vaccinated against Covid-19. Mr Whitley continued to refuse to confirm his vaccination status to Mr Owen or to Firstlight.

[4] He was shortly thereafter dismissed by Firstlight, in accordance with its policy.

[5] Mr Whitley raises a claim of unjustified dismissal, and unjustified disadvantage, for what he characterises as bullying by Mr Owen.

[6] He also raises several other claims for wage arrears for work done but not paid for, for public holiday entitlements, and entitlements to notice and paid leave which he says are outstanding. The matters have come before the Authority for resolution.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Mr Whitley, Ms Anne Heywood, and Mr Simon Whitley, and on behalf of Firstlight, from Mr Richard Owen and Ms Maria Langdon. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[9] The issues requiring investigation and determination were:

(a) Was the applicant unjustifiably dismissed?

(b) Did the applicant suffer an unjustified disadvantage in relation to the way the respondent's vaccination policy was implemented?

(c) Did the applicant suffer a breach of good faith?

(d) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
- Compensation under s123(1)(c)(i) of the Act

(e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to his grievance/s?

(f) In relation to his wage arrears claims, the applicant seeks remedies of

i. underpaid wages for hours worked but not paid for;
ii. payment for time-and-a-half for public holidays worked;
iii. payment for alternative holidays;
iv. partial/incorrect payment for Boxing Day 2021;
v. holiday pay on any arrears;
vi. a penalty for breach of s. 130 of the Act;
vii. a penalty for breach of s. 81 of the Holidays Act 2003 (Holidays Act);
viii. a penalty for breach of good faith.

(g) Should either party contribute to the costs of representation of the other party.

Background

[10] Mr Whitley was an experienced food sales representative. He had worked for Firstlight for some 21 years, including having left the company during this time before returning to employment with Firstlight at a later point. His son, Mr Simon Whitley, also worked for Firstlight.

[11] Firstlight Frozen sells a wide range of frozen foods and beverages for retail resale. Popular products include cold canned drinks, frozen chips, hotdogs, and prawns, condiments, and frozen ice-cream and confectionary. Due to the nature of the products sold, summer is the busiest time of year in the business, and winter is the off-season.

[12] Mr Whitley gave evidence of the work he did and his usual hours of work. Mr Whitley was contracted to work 45 hours per week Monday to Friday, and was rostered on to work certain Saturday mornings. He was paid for this work. His employment agreement also provided that he would be paid by the hour for work done in excess of 45 hours per week.

[13] He gave evidence that, in addition to this, he worked on an on-call basis, saying that his mobile phone number was made available to customers, including by being sign written onto a Firstlight branded vehicle. He said that customers would call him up after

5pm or on Saturdays particularly Saturday afternoons, to ask for urgent deliveries and he would comply.

[14] He gave evidence that he would occasionally do delivery and sales runs as far as Opotiki, and that during these trips, he would also work more than the usual hours he was paid for.

[15] Mr Whitley also raised concerns about additional hours worked over the Rhythm and Vines festival, being a three-day music festival held in Gisborne each year, between 29 and 31 December. This would involve 5 days work for Mr Whitley, as he would be involved in preparation work the day before the festival opened to the public, orders and deliveries during the festival, and tidy-up work the day after the festival, although both Mr Whitley and Mr Owen indicated this last day was not necessarily a full day of work.

[16] Due to the date of the festival, Mr Whitley would expect to work on New Years Day each year. In 2016, he also worked on the observed Boxing Day holiday. He was paid as normal for the work he did on those days.

[17] Mr Whitley had pointed out to Mr Owen that this was tiring work, which took him away from his family over the summer holiday period, and did not allow him to benefit from the public holidays that fell during this period. Mr Owen acknowledged this, and in exchange Mr Whitley was provided with a week of paid special leave each year, to be taken at Mr Whitley's discretion during the summer. Mr Whitley and Mr Simon Whitley confirmed that this week's holiday had been a regular fixture during January or February to spend with family.

[18] Ms Langdon, who for several years was responsible for payroll, confirmed that when she first joined Firstlight, she was made aware of Mr Whitley's yearly special leave allocation. Mr Whitley would simply let her know when he intended to take this leave, and she would ensure he received his normal salary for that week and that the time was recorded as special leave.

[19] She noted that Mr Whitley was paid via a weekly salary, so he was not expected to routinely work on public holidays but would receive his usual salary instead. Ms Langdon explained there would be an exception to this if Mr Whitley had been rostered to work on a Saturday that was also a public holiday. This would be recorded and he

would receive time-and-a-half and an alternative holiday accordingly. This did not happen very often, as most public holidays fell on a Monday, and Mr Whitley shared the Saturday morning rostered work with other staff.

[20] In regards to the public holiday of New Years Day that fell during the Rhythm and Vines work period (eg the day after the festival when there was tidy up work to do), Ms Langdon explained that work on this particular public holiday was not recorded for Mr Whitley, because there was a specific agreement that he would receive a full paid week off in exchange. The same applied to the 2016 Boxing Day holiday. This was a special arrangement that Mr Whitley had reached with Mr Owen. Her view was that this appeared a reasonable trade, as Mr Whitley would expect to work on one public holiday over this period, and instead of receiving one alternative holiday plus (up to) an additional half day's pay, instead he would receive his normal salary for the time worked, plus 5 days paid leave at a time of his choice.

[21] In addition to the Rhythm and Vines period, Mr Whitley gave evidence that he worked on other public holidays as well. He suggested that the public holidays he was likely to work would be the regional anniversary day and Waitangi Day, both of which were in the summer high season, as well as Labour Day which fell at the start of summer. He gave evidence that he did not work on the other public holidays, which were in the off season when there was less demand.

[22] Mr Whitley has no records to demonstrate the additional hours (in excess of 45 hours per week) he says he worked, or the additional public holidays he says he worked. He relies generally on what he says is an indicative noting down of his hours of work during November and December 2021, which notations he took on the advice of his sister, Ms Heywood, essentially taken as the parties were already in dispute.

[23] Mr Owen, a director of Firstlight, gave evidence about the work performed by Mr Whitley. Mr Owen had worked with Mr Whitley throughout Mr Whitley's time at Firstlight, and was effectively an 'owner operator'.

[24] In response to Mr Whitley's claim for additional payment for additional hours worked in relation to clients calling after hours (late in the evening and at weekends), Mr Owen did not accept those claims. He said that Mr Whitley was never expected to work any additional hours, and that he had often told Mr Whitley it was a good idea to make sure he did not answer, or turned off, his phone, at the end of his working day.

Mr Whitley did not dispute this but expressed the view that good customer service should take precedence.

[25] More directly, Mr Owen did not accept that Mr Whitley worked any regular or significant additional hours sufficient to justify a wages arrears claim. Some phone records for Mr Whitley's mobile phone were provided, albeit over a limited period of time, which showed very few calls being made to Mr Whitley's phone after hours, the latest one being at 11 minutes past 5 on a weekday. In addition, Mr Owen and Ms Langdon gave evidence that Mr Whitley was not required to work strictly to a 45-hour work week, but had the freedom to take personal appointments during the day, which he did. Mr Whitley accepted this. It was Mr Owen's view that Mr Whitley was employed on a salaried basis which gave him some genuine flexibility in his hours of work, and especially during the winter months when the working days might be naturally shorter, and that Mr Whitley (quite appropriately) took the benefit of this flexibility.

[26] In response to the claim for unpaid time-and-a-half rates and alternative holidays accrued in relation to work done at the Rhythm and Vines festival, Mr Owen also resisted that claim. He said he was aware that Mr Whitley worked on one (and on one year, two) public holidays over this time. This was part of the reason why he had been happy to agree to Mr Whitley's request for paid time off in respect of this work, and how they had come to agree on a week's paid special leave. Mr Owen pointed out that work done at the festival was done between 7 am and 11 am on those days, as the venue was shut to vendors after 11 am, so he would not have expected Mr Whitley to be working much after 12 on any of these days. His view was that a week's paid leave was sufficient to cover any statutory holiday obligations over this time.

[27] In respect of the other public holidays on which Mr Whitley said he routinely worked, Mr Owen said that this was not at his request, as the business was closed on those days. Copies of rosters support this. Mr Owen also said that in his view, there was no particular increased demand that he would anticipate around Labour Day, as it was too early in the season.

[28] Having canvassed the pattern of Mr Whitley's work, there was discussion about how his employment came to an end.

[29] In around October 2021, Firstlight was considering its stance in relation to the vaccination of its employees. This was triggered by the then-current Omicron Covid-19 wave, and the on-going higher Alert Levels in Auckland and parts of Waikato. Mr Owen gave evidence that multiple of Firstlight's customers had inquired about Firstlight's vaccination policies. Mr Owen gave evidence that multiple staff in the Gisborne office had also disclosed to him that they had reason to feel more vulnerable due to their own health situation.

[30] On 12 October, Mr Whitley wrote to Mr Owen. The letter began by stating "I write with regard to the matter of First Light Frozen and their position. That is, all staff members should be vaccinated for Covid-19. I understand if staff members do not comply, essentially this may result in termination of employment". The letter went on to ask a series of what appear to be rhetorical questions including reference to "duress" and "the Nuremburg Code".

[31] On 18 October 2021, Mr Owen wrote to Mr Whitley. The letter thanked Mr Whitley for his letter, and described him as a valued member of Firstlight. The letter stated that the business was "still in a consultation stage", and that "We believe that as a prudent employer in an essential service industry we must ensure that we protect all staff and the community, hence the conversation that we are having with you and the rest of the employees in the business". The letter discussed a range of topics including referring Mr Whitley to the covid19.govt.nz site for more information, indicating that "Long term working from home is not sustainable for the business", and offering to pay for Mr Whitley to visit his own GP to discuss the vaccine. The letter concluded by asking Mr Whitley to advise if he had or was going to receive the Covid-19 vaccine, so the business could plan for its traditionally busy Christmas period.

[32] Mr Owen attempted to discuss the issue of vaccination status with Mr Whitley multiple times, and Mr Whitley refused the topic. He stated that Mr Owen subjected him to "constant harassment" over Mr Owen's "wanting to mandate the Covid-19 vaccination[1]". Mr Whitley complains further that Mr Owen made "nasty" comments that: "None of the staff want to work with you with you being un-vaxxed" and "Customers will not let you in their shops because you're un-vaxxed"[2].

[1] At paragraph 27 of Mr Whitley's witness statement.
[2] At paragraph 9(f) of Mr Whitley's witness statement.

[33] On 18 October 2021, Mr Whitley wrote again to Mr Owen. He declined to advise his vaccination status. I note that Mr Whitley had previously been fairly open in discussing his negative views on vaccination with his colleagues. He was and remained even at the time of the investigation meeting, unvaccinated. Nevertheless, he refused to confirm this formally to Mr Owen and Firstlight.

[34] He complained that Mr Owen had tried to "bully" him "into a medical procedure, with the threat of losing my job."

[35] On 15 November 2021, Firstlight promulgated its vaccine policy. The policy was accompanied by a three-page letter setting out Firstlight's reasons as to why the policy was needed. The letter confirmed:

a. As of Monday 17 January 2021, all roles within the company would need to be performed by vaccinated persons.

b. This was not a directive or a requirement. The letter reminded employees that employees were free to choose whether they were to be vaccinated, and described this as "your absolute right".

c. Mr Owen advised that he would inquire of staff individually if they were vaccinated, and this information "would be kept private and only recorded on your employment file",

d. Firstlight offered time off work for the purposes of doctor's consultation and vaccination.

[36] On 29 November 2021, Mr Owen and Mr Whitley met to discuss the impacts of the policy for Mr Whitley's employment. Both were represented.

[37] On 17 December 2021, Firstlight wrote to Mr Whitley. Firstlight considered Mr Whitley's views that he could safely perform his job by using additional PPE and working remotely. Mr Owen explained why it was not considered this would be appropriate, especially given his job required travel and face-to-face client contact. Firstlight concluded "we are not comfortable for you to operate in a heightened level of risk without a Covid-19 vaccination. We have considered whether we have any redeployment options available for you, and unfortunately, we do not have any positions that do not require Covid-19 vaccination following our risk assessments."

[38] The letter concluded by advising that if Mr Whitley remained unvaccinated by Monday 17 January 2022, "we currently take the preliminary view that we will have to terminate your employment on this date. We will pay you four week's notice as required by law".

[39] On 30 December 2021, Mr Whitely was placed on garden leave. He was asked to return his company property, including keys, company vehicle, laptop, and phone. Ms Langdon helped him leave and drove him home.

[40] Mr Whitley says this came as a shock to him, and he didn't really understand what was meant by "garden leave" until he was able to ask Ms Langdon about it privately in the car, when she explained it meant being put on paid leave or words to that effect. Mr Whitley says he found this unexpected, stressful, and humiliating. Mr Owen explained that, as Mr Whitley had not yet advised he had been vaccinated, there was now insufficient time for him to become vaccinated before the given date of 17 January, so he needed to be placed on paid leave in the interim.

[41] On 14 January 2022, Ms Langdon visited Mr Whitley's house to give him a letter confirming the termination of his employment as of 17 January 2022. Mr Whitley says he was offended that she did not come inside to speak with him, and Ms Langdon says that this was because she thought at the time he did not want to speak with her, and she did not want to further intrude.

[42] Mr Whitley was paid an additional four weeks salary, being more than his contractual 2 weeks notice[3]. Following his dismissal, Mr Whitley suffered an injury, and was placed on ACC as of 30 March 2022. Due to the nature of his injuries, he has been unable to work since.

Analysis

[43] The first question is was Mr Whitley unjustifiably dismissed? I must assess Firstlight's actions in dismissing Mr Whitley against the test of justification set out at section 103A of the Act, that is, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[3] As per clause 10.1 of the employment agreement.

[44] In reaching my conclusion, I must consider:

a. did Firstlight sufficiently investigate before taking action;
b. did Firstlight raise concerns that it had with Mr Whitley before taking action;
c. did Mr Whitley have a reasonable opportunity to respond;
d. did Firstlight genuinely consider Mr Whitley's explanation or comments.

[45] I may also take into account any other factors I think are appropriate.

[46] Mr Whitley's position is that his dismissal was unjustified at least in part because the policy which required him to be vaccinated to continue working, was not properly promulgated due to a lack of consultation. Mr Whitley says: "He [Mr Owen] never put out a draft policy for feedback and consultation before publishing the Vaccination Policy. Nor did Richard [Mr Owen] involve me in the risk assessment.[4]"

[47] The evidence shows that Firstlight and Mr Owen did consult with Mr Whitley about the vaccination policy. Beginning in October, Mr Owen began discussions with staff issues around vaccination and associated health and safety matters. Mr Whitley understood this, because it was on 12 October that he wrote to Mr Owen asking a number of rhetorical questions about vaccination. Mr Owen and Firstlight responded in a careful and serious manner, by letter on 18 October, talking about the business still being in a consultation stage, and talking about the business's position on relevant alternatives such as working from home/remote working. This letter set out what Mr Owen considered were "the issues we face as a business", talked about being a prudent employer in an essential service industry, and asked Mr Whitley to advise Mr Owen of his vaccination status to assist with planning for the summer season.

[48] The letter did not, as is acknowledged by Mr Owen, put forward a specific draft policy for comment.

[49] However, Mr Whitley took this as an invitation for comment, and immediately wrote back on the same day. He started by suggesting there was some lack of clarity in the name of the relevant vaccine, and accused Mr Owen of trying to "bully" him "into

[4] At paragraph 30 of Mr Whitley's witness statement.

a medical procedure. Again, the letter contained a number of rhetorical statements about vaccination, rather than engaging with the specifics of the business raised by Mr Owen. The letter concluded with Mr Whitley stating "you have already pre-determined an outcome in regards to my employment…".

[50] Mr Whitley also gives evidence that during the month of October, Mr Owen repeatedly attempted to discuss vaccination matters with him, to the extent that Mr Whitley describes these attempts at conversation as amounting to "bullying". Mr Whitley was clear in his evidence that he had no wish to engage in these conversations and did not engage (with the obvious exceptions of his written correspondence).

[51] In these circumstances, I do not accept that it is accurate to say that Mr Whitley was not consulted about Firstlight's policy before it was promulgated on 15 November 2021. Mr Owen made multiple attempts to do so both verbally and in writing. Mr Whitley avoided engaging in meaningful in-person conversations, and when Mr Owen engaged with him fulsomely in writing on 18 October, Mr Whitley did not respond to the information provided about Firstlight's business, but accused Firstlight of pre-determining "an outcome in regards to my employment".

[52] The policy that was promulgated on 15 November 2021 contained content consistent with the previous correspondence. It stated that "Commencing Friday 17th January 2021[5], all roles within the company must be performed by an individual who is fully vaccinated by a New Zealand Government approved Covid 19 Vaccine."

[53] The policy was accompanied by a three page letter from Mr Owen. The letter stated: "we attach a copy of our Covid 19 company policy and encourage all staff to read it thoroughly. Should you have any questions, please do not hesitate to come and talk to me.".

[54] The letter indicated that Mr Owen would approach staff individually and ask them for proof of vaccination status, which information would be kept private. The letter concluded by saying: "Should you have any questions, please do not hesitate to contact me."

[5] This is a typographical error, as the relevant date was 17 January 2022 and the parties proceeded on that basis.

[55] Mr Whitley continued to take the stance that he would not formally disclose his vaccination status to Mr Owen. In the end, the parties met offsite, in the offices of Firstlight's lawyers, on 29 November 2021 to discuss the policy and what it might mean for Mr Whitley's ongoing employment.

[56] The outcome of this meeting was set out in Firstlight's letter of 17 December 2021. In this letter, Firstlight summarised various alternative options to vaccination put forward by Mr Whitley and explained why it did not believe these options were viable. The letter ended by advising Mr Whitley "you will not be exempt from the Covid 19 policy" and "If you chose to remain unvaccinated, Firstlight Frozen currently takes the preliminary view that we will have to terminate your employment on" Monday 17 January 2022".

[57] When compared with the test of justification, the evidence shows that Firstlight did investigate before taking action. Mr Owen gave evidence he spoke with staff and received comment from customers, as well as receiving information as to the government alert levels and taking professional advice. He attempted to consult with Mr Whitley, however, Mr Whitley was not willing to engage in conversation about vaccination issues. On this basis, Firstlight promulgated its vaccination policy. This was not improper, and in these circumstances, nothing flows from the failure to put a formal draft of this policy to Mr Whitley for comment, rather than the more general seeking of views.

[58] Mr Owen and Firstlight clearly communicated to Mr Whitley that, if he chose to remain unvaccinated, his job would be at risk, and that Firstlight considered this to be a safety issue. They met with Mr Whitley and his representative to discuss, and the outcome letter clearly records that Firstlight considered Mr Whitley's explanations and alternative proposals. These were not in the end accepted by Firstlight, but this does not suggest that Firstlight did not genuinely consider his position.

[59] It is in this context that Mr Whitley raises claims that Mr Owen bullied him, by repeatedly asking him about his vaccination status. Mr Whitley also says that, despite raising this as a concern by letter dated 18 October 2021, Firstlight and Mr Owen never responded to this complaint which remains outstanding.

[60] This is a complicated matter. Mr Owen accepts that he did ask Mr Whitley repeatedly about vaccination matters, as this was in the context of consulting and

discussing with all staff (not just Mr Whitley) as part of consulting on and implementing the vaccination policy. Mr Whitley accepts that he was not willing to talk to Mr Owen about these matters and kept rebuffing him. In these circumstances, I do not accept that it is accurate to characterise Mr Owen's attempts to start a discussion as "bullying". There is also an element of "double counting" here in Mr Whitley's stance, as he says both that Mr Owen repeatedly kept trying to talk with him about vaccination matters, while at the same time saying that he was never consulted about the company's vaccination policy. These two claims are not consistent.

[61] In these circumstances, I decline to find that Mr Owen or Firstlight bullied Mr Whitley. There is insufficient evidence of repeated or on-going mis-treatment, with the issues complained about occurring over a short period of time, related to the same topic, and in circumstances where a long-term and much valued employment relationship (on both sides) was breaking down. This claim is not made out. No orders are made.

[62] In the end, as Mr Whitley was not prepared to abide by Firstlight's policy, his employment came to an end. He himself was aware from an early stage that this might be the outcome, and was under no illusions about the possible result of his stance. I note that Mr Whitley maintains that his formal stance was that he never confirmed whether or not he was vaccinated, rather than openly advising he was not vaccinated. However, for Firstlight's purposes, this amounted to the same thing, as a refusal to confirm did not satisfy its policy, and this was clearly conveyed to Mr Whitley. He understood this, and chose not to engage further.

[63] For all the above reasons, I find that the termination of Mr Whitley's employment was justified. Mr Whitley's claim of unjustified dismissal is not made out. No orders are made.

[64] Having reached this conclusion, I will also consider how the termination of Mr Whitley's employment was carried out. Mr Whitley was placed on garden leave, beginning on 30 December 2021. This was not provided for in his employment agreement. In addition, there is no indication that the prospect of "garden leave", being enforced leave with pay, had been mentioned to Mr Whitley before it was imposed on him. It is not mentioned in the correspondence or in the policy itself. Being suddenly sent away from the workplace and prevented from returning is an obvious disadvantage

in Mr Whitley's employment, and there is no evidence that he was warned or consulted about this proposal in advance.

[65] Accordingly, I find that placing Mr Whitley on garden leave when there was no contractual or policy provision for such an action, and no consultation or forewarning, amounts to an unjustified disadvantage in Mr Whitley's employment.

[66] Mr Whitley suffered no financial loss, as he remained on paid leave until his employment was terminated as of 17 January 2022. However, he gives evidence that he found this shocking, distressing, and humiliating to be sent home suddenly, particularly during the working day when other staff were around. I accept this evidence. He is entitled to receive compensation for this unjustified action and the effect on him.

[67] This must be balanced by the fact that the garden leave continued for only 18 days leaving up to the ending of his employment. I consider that, viewed in the round, an award of $10,000 is appropriate. Orders are made accordingly.

[68] I have considered if this award needs to be reduced to take into account any contributing behaviour by Mr Whitley in accordance with section 124 of the Act. I find the answer is no. Mr Whitley was not aware of "garden leave", and when confronted with a request that he leave the workplace earlier than he had expected (and earlier than the date of 17 January consistently mentioned in correspondence to him), he responded courteously, appropriately, and in good faith. No reduction is made.

Arrears Claims

[69] There are a number of arrears claims, and I will work through them in turn.

Underpaid wages for hours worked but not paid for

[70] This is a claim that, going back six years, Mr Whitley routinely worked more than his contracted 45 hours per week, and that, he needs to be paid for hours worked in excess of 45 each week, in accordance with clause 4.6 of his employment agreement.

[71] There are no particular time records or other documents that would shed light on this claim. Mr Whitley relies on his own recollection, including that he answered phone calls after hours, and the notes that he took of his hours in November 2021, to support his claim that, for (at least) the last 6 years of his employment, he worked an

additional 5 hours every week, which requires payment. The records of his actual hours that Mr Whitley kept in November and December 2021 show that in the four weeks before he went on garden leave, in two of those weeks, he worked 10 hours more than his contracted 45 hours. On this basis, he asks the Authority to extrapolate that he routinely worked an extra 5 hours each week over the last six years.

[72] Mr Owen refutes this, on the basis that Mr Whitley worked on a more flexible basis, and was effectively able to work less when it was not busy without reduction in his salary. Mr Owen also points out that he was not aware that Mr Whitley was routinely working extra hours, and he did not ask Mr Whitley to do so. Mr Owen said to the contrary, he encouraged Mr Whitley (and all staff) not to answer phones or respond to customers after hours, and all customers were told (on the ordering sheets) what Firstlight's office hours were when they could call.

[73] Mr Whitley faces an evidential difficulty, in that he cannot show that he routinely worked the hours he claims for. In addition, there is some acceptance on his part that the business did have seasonal changes in work demand, and that he was willing to "go the extra mile" to help customers who rang outside hours even though Mr Owen had told him he could chose not to. Finally, in my view it is relevant that Mr Whitley did not ask for additional payment, or raise issues about his hours with Mr Owen during his employment, when the matter could have been dealt with in a practical way. This claim only came about when it was clear that his employment was going to end in January 2022 as per Firstlight's policy.

[74] Although as a salaried employee, Mr Whitley was not required to complete hourly time sheets, Firstlight has produced some 675 pages of evidence showing the entries that Mr Whitley made into its invoicing system, which are time and date stamped. This may be seen as a rough proxy for when Mr Whitley was working. Having considered these records, they do not show that Mr Whitley was routinely entering data into the invoicing system before his contracted start time of 7.30 am or after his contracted finishing time of 5.00 pm. There are times, once every two or three months, when Mr Whitley was entering invoices into the system at 6.30 am or 7.00 am, which is in advance of his contracted start time. However, the invoicing data shows that on the days following these early starts, Mr Whitley then began entering invoices into the system around 10.00 or 11.00 am. This tends to support Mr Owen's evidence, that Mr Whitley had some flexibility over his time, and he utilised that as needed.

[75] On balance, taking into account all these matters, I cannot be confident that Mr Whitley did in fact work the extra hours he claims consistently each week over the entire course of the six years he claims. It is more likely that he worked with a degree of flexibility that was consistent with his experience and the high degree of trust that Mr Owen placed in him as a long-serving employee. Therefore, I cannot award him additional wages. This claim is not made out.

Claim for short-paid notice

[76] This claim was discussed at the investigation meeting and arises from Schedule 3A, clause 3, which requires that where an employee's employment is terminated because of a failure to meet the employer's vaccine requirements, their employer must give the employee the greater of either 4 weeks' paid written notice of the termination, or the paid notice period specified in the employee's employment agreement. The pay records show that Mr Whitley received a payment of 4 week's notice on 16 January 2022. This is a payment that is in excess of the two week's notice required at clause 10.1 of Mr Whitley's employment agreement, and meets the requirement of 4 week's notice set out at clause 3 of Schedule 3A of the Act. No orders are made.

Payment for time-and-a-half for public holidays worked

[77] This claim is best described in two parts. First, a claim for payment for work done on public holidays relating to the Rhythm 'n Vines festival. Second, a claim for payment for work done on other statutory holidays throughout the year.

[78] I will discuss the claim related to the Rhythm 'n Vines festival first. There is no dispute between the parties as to the days Mr Whitley worked during this festival. This was a five-day work period, commencing on 28 December and ending on 1 January each year. Each year, this meant that Mr Whitley worked on a public holiday, being New Year's Day. This means that each year, Mr Whitley became entitled to: 1 alternative holiday, being a paid day off work to be taken at another time[6]; and (up to) an additional half-day's pay representing the "half" component of the time and a half rate he was entitled to receive for work done on a statutory holiday[7] in addition to the day's pay he has already received.

[6] Section 56 of the Holidays Act 2003.
[7] Section 50 of the Holidays Act 2003.

[79] I pause to note that there was evidence that 1 January was not necessarily a full days' work, however for the purposes of comparison, I will assume Mr Whitley would be entitled to the maximum half day's additional pay.

[80] Mr Whitley received instead 1 week's special leave, being 5 days off work at his normal rate, to be used at his convenience. One of these 5 days satisfies the requirement for an alternative holiday (being a day off work on full pay) in exchange for working on New Years Day. Mr Whitley was not paid an additional half day's pay to account for the "half" portion of the time-and-half pay he needed to receive in exchange for working on a public holiday. However, he did receive 4 days pay without needing to attend work. This 4 days pay is demonstrably in excess of Mr Whitley's legal entitlement to half a day's pay.

[81] There was one year (2016) where Mr Whitley worked on Boxing Day as well[8]. In that year, Mr Whitley would have been entitled to receive 2 alternative holidays, and the equivalent of two half days (or 1 full day) of additional pay. Mr Whitely again received 5 days paid leave.

[82] Two of these 5 days satisfies the requirement for an alternative holiday (being a day off work on full pay) in exchange for working on Boxing Day and New Years Day. Mr Whitley was not paid an additional 1 day's pay to account for the "half" portion of the time-and-half pay he needed to receive in exchange for working on two public holidays. However, he did receive 3 days pay without needing to attend work. This 3 days pay remains demonstrably in excess of Mr Whitley's legal entitlement to 1 days pay.

[83] Without this special leave arrangement, Mr Whitley would have been entitled to 1 day's paid leave and half a days pay (or less, if he had worked for less than his usual 9 hours on that day) in a normal year. Instead, he received 5 days paid leave. Even in the 2016 year, he would have been entitled to 2 day's leave and 1 day's pay, and he received 5 days paid leave. This is as specifically agreed with Mr Owen, and Mr Whitley was happy to receive the benefit of a full week's paid summer holiday until his employment ended acrimoniously. I am not persuaded that Mr Whitley has received less than his legal entitlements. No orders are made.

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[8] The applicant states that he worked on Boxing Day every year, but this is resisted by the respondent, a nd the evidence provided as to the applicant's standard work patterns over this time supports the respondent's view. I do not find that the applicant worked Boxing Day each year.

[84] Mr Whitley also raises a claim for work which he says was done on other public holidays. There is evidence from Firstlight's invoicing system showing that Mr Whitley entered customer orders into the invoicing system on six public holidays during the period in question. These are as follows:

a. 28 March 2016 – Easter Monday – 10 entries into the invoicing system from 4.43 pm to 5.33 pm (50 minutes);
b. 25 April 2019 – ANZAC Day – 1 entry at 1.37 pm (1 minute);
c. 3 June 2019 – Queen's Birthday – 27 entries from 8.18 am to 4.12 pm (7 hours and 54 minutes);
d. 27 January 2020 – Anniversary Day – 1 entry at 8.11 am (1 minute)
e. 1 June 2020 – Queen's Birthday – 26 entries from 9.42 am to 6.16 pm (8 hours and 34 minutes);
f. 29 January 2021 – Anniversary Day – 5 entries from 11.11 to 2.38 pm (3 hours, 27 minutes).

[85] Mr Whitley says that on 25 April 2019, he worked for approximately 45 minutes. On 27 January 2020, despite there again being only a single invoice entry, he estimates he worked for 4 hours, on the basis this order would have involved a round trip from Gisborne to Opotiki.

[86] Mr Owen says these orders would have been small run outs that Mr Whitley took it upon himself to do on a statutory holiday as opposed to leaving it for a trading day. The work would have involved entering the order, picking the order, and delivering the order. Mr Owen estimates that the process would have involved 30 to 45 minutes of work on each occasion. The respondent reaffirms that there was no expectation for Mr Whitley to perform this work on a statutory holiday and that he could have left the orders to process on the next trading day.

[87] Given the records that show Mr Whitley was at work and entering invoices into the system on these six public holidays, I find that Mr Whitley was working on those six days, for the duration of the relevant timestamps. I also accept the statements of both Mr Whitely and Mr Owen that Mr Whitely most likely worked 45 minutes on 25 April 2019. I also accept the statement of Mr Whitely that he worked for 4 hours on 27 January 2017, as he as provided a reasonable accounting of his time.

[88] Mr Whitley has been paid the equivalent of his normal salary on those days. Accordingly, he is due the "half" portion of the time-and-a-half rate that applies to hours actually worked on a public holiday.

[89] Mr Whitley's equivalent hourly rate was $28.61. Half of this is $14.16. Accordingly, I find that the following wages are owing to Mr Whitley:

a. 28 March 2016 – Easter Monday – 4.43 pm to 5.33 pm being 50 minutes at $14.16 = $11.80 gross;
b. 25 April 2019 – ANZAC Day – 1.37 pm being 45 minutes at $14.16 = $10.62 gross;
c. 3 June 2019 – Queen's Birthday – 8.18 am to 4.12 pm being 7 hours and 54 minutes at $14.16 = $111.86 gross.
d. 27 January 2020 – Anniversary Day – 1 entry at 8.11 am being 4 hours at $14.16 = $56.64 gross;
e. 1 June 2020 – Queen's Birthday – 9.42 am to 6.16 pm being 8 hours and 34 minutes at $14.16 = $121.15 gross;
f. 29 January 2021 – Anniversary Day – from 11.11 to 2.38 pm being 3 hours, 27 minutes at $14.16 = $48.85 gross.

[90] Mr Whitley has been short-paid for work done on public holidays by $360.92 gross. Orders are made for payment to him accordingly.

Payment for Alternative Holidays;

[91] For reasons discussed above, I decline to award any alternative holidays for work done by Mr Whitley as a result of work done over the Rhythm 'n Vines festival, as I have found he has already received paid leave in respect of this time.

[92] I have also found that Mr Whitley worked on 6 public holidays, as set out above. For working on a public holiday, Mr Whitley is entitled to a paid alternative holiday as set out in section 56 of the Holidays Act. Mr Whitley's weekly pay as at the ending of his employment was $1,287.60. Dividing this by 5 gives a daily rate of $257.60. (I have chosen to discount the occasional Saturday work for the purposes of standardising this calculation.)

[93] Multiplying this daily rate by the 6 days in question, Mr Whitley is therefore entitled to the sum of $1,545.60 gross. Orders are made accordingly.

Partial/incorrect payment for Boxing Day 2021

[94] This is a dispute over the rate of payment for work done on a particular public holiday. On this day, Mr Whitley worked for 4 and a half hours. The wage records show that Mr Whitley worked on Boxing Day 2021 for 4.5 hours. This is confirmed in a text from Mr Whitley at the time. He was paid at his equivalent hourly rate of $28.61[9] for 4.5 hours (being $128.61), and then this sum was multiplied by 1.5, giving a total payment of $193.14.

[95] This payment complies with section 50 of the Holidays Act, which requires that when an employee works on a public holiday, they must be paid the portion of the employee's relevant daily pay or average daily pay that relates to the time actually worked on the day, plus half that amount again.

[96] It is important to note that when an employee works on a public holiday, they are entitled to be paid at the rate of time and a half for the hours that they actually work. They are not entitled to be paid for a full day if they do not work a full day. Mr Whitley was paid for the 4.5 hours he actually worked on this day, calculated at the rate of 1.5 times his usual hourly rate. He is not entitled to payment for the balance of the day that he did not work. The pay given to Mr Whitley for working a part day complies with the Holidays Act. No further payments are ordered.

Holiday pay on any arrears

[97] I have found that Mr Whitley is owed arrears of pay in relation to work done on public holidays, and alternative days. These sums attract holiday pay at the rate of 8% as per sections 23 and 27 of the Holidays Act. Mr Whitley is owed a total of $1,906.52 in arrears. Eight percent of this amounts to $152.52 gross. Orders are made accordingly.

[98] For the avoidance of doubt, there is no other indication that Mr Whitley's annual leave owing on termination has been paid incorrectly.

Penalties for breaches of s. 130 of the Employment Relations Act and s. 81 of the Holidays Act

[9] This rate is arrived at by dividing Mr Whitley's salary by 52 weeks to get a weekly rate, and then dividing the weekly rate by 45, being the number of hours Mr Whitley was contracted to work during a week. Mr Whitley's statement of problem adopts this method.

[99] Mr Whitley has claimed that penalties should be awarded for Firstlight's failures to keep wage and time records, and holiday and leave records. Specifically, Mr Whitley claims in his statement of problem that Firstlight did not keep track of his hours (and days and dates) of work as required by law in respect of the additional hours Mr Whitley claims he routinely worked. Mr Owen points out that Mr Whitley was a salaried employee who worked standard hours as set out in his employment agreement, and that on those occasions when the invoicing records show Mr Whitley worked additional hours, these hours were worked without Mr Owen's knowledge or consent. I note that Mr Whitley was an experienced and trusted employee, and had the ability to access Firstlight's premises and systems after hours if he chose, so he would not have needed to alert Mr Owen in order to perform additional work.

[100] The practical difficulty Firstlight faces is that, while Mr Whitley may be primarily a salaried employee, his employment agreement also contained a clause that required Firstlight to pay him an additional hourly rate for work done in excess of 45 hours per week. It is not clear how Firstlight was recording Mr Whitley's hours of work in order to comply with this contractual obligation. This suggests that Firstlight is in breach of its obligations to record any hours of work additional to those set out in clause 3.1 of Mr Whitley's employment agreement, as required by section 130(1C) of the Act.

[101] The claim for a breach of section 4B of the Act (failure to keep records in sufficient detail to demonstrate that the employer has complied with minimum entitlement provisions) and section 81 of the Holidays Act (failure to properly keep holiday and leave records, stem from this same concern.

[102] On this basis, I find that Firstlight has breached section 130 of the Act, and is therefore liable for a penalty. While it might be said that the Holidays Act has also been breached, the failure is, in my view, a single one – failure to record additional hours of work in light of a contractual commitment to make additional payments for hours worked in addition to the agreed 45 hours per week on the agreed days. I shall therefore approach this from the perspective of a single globalised breach.

[103] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited*

and Warrington Discount Tobacco Limited,[10] *A Labour Inspector v Prabh*[11] and *A Labour Inspector v Daleson Investment*.[12] Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[104] The Court has found a failure to provide minimum standards directly disadvantages employees. There is potential for disadvantage here, in that the employee would not be able to take advantage of the clause entitling them to additional pay for additional work.

[105] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[13], or failed to take reasonable steps to fulfil their legal obligations.[14] Here, there is strong evidence that any failure was not intentional. Mr Whitely did not alert his employer to when he worked additional hours, making it very difficult for Firstlight to comply with its own obligations.

[106] With respect to the breaches severity I note the judgement of the Court in *Preet* suggests failures to keep records be assessed at 50%.[15] I note the loss in this case may be said to be relatively minor, in that I have identified 6 public holidays on which Mr Whitley performed some work for which he needs to be paid, but I declined to find that he was working significant hours over and above his contractual 45 hours per week once the variations in the entries into the invoicing system have been taken into account. This suggests a significant reduction should be applied.

[107] There is no evidence of similar previous conduct by Firstlight, and finally I have to be cognisant of issues such as consistency and proportionality.

[108] Having weighed these factors I conclude the respondent should be required to pay a penalty of $4,000. The final issue is then to whom the penalty should be paid. In this case, the lack of these additional records have made it difficult for Mr Whitley to

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[10] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143
[11] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110
[12] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12
[13] *Parton v Fifita*, TT 1815/00 DC Auckland, quoted in *MBIE v Sumich*, Auckland TT 4088383
[14] *El-Agez v Comprede Limited*, TT 4121553, at para 18
[15] See *Preet,* at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

advance his claim further than he has already done. He should therefore share in the penalty and I consider half appropriate. Orders are made accordingly.

A penalty for breach of good faith

[109] Mr Whitley raises a claim for breach of good faith, and seeks a penalty in respect of it. Mr Whitley says that the breach of good faith arose out of what Mr Whitley says was "Mr Owen abused my generous nature and good work ethic by deliberately exploiting me in pressuring me to work all the additional hours and on call hours without any compensation. This was unethical and in breach of his obligation of good faith.

[110] I have found above that Mr Whitley's claim for working a significant number of additional hours is not made out. In addition, I have not found that Mr Owen pressured Mr Whitley into working more. Rather, Mr Owen gave evidence that he told Mr Whitley (and other staff) not to answer phone calls from clients after hours, and that he was happy to allow Mr Whitley to have flexibility when work pressures permitted. The variation in start times shown when Mr Whitley entered customer orders into the invoicing system supports Mr Owen's evidence on this. On this basis, I decline to find that any breach of good faith occurred, that was significant enough or sustained in nature such that it could be said to justify a penalty award. No orders are made.

[111] Mr Whitley also states at paragraphs 56 and 57 of his statement of problem that Firstlight acted in breach of good faith by failing to provide him with access to information relevant to the continuation of his employment, before that decision was made, and failed to provide him with an opportunity to comment on such information. I have found above that Firstlight did consult with Mr Whitley about the termination of his employment. The key letters from Firstlight outline this, and actively respond to Mr Whitley's questions and suggestions. In the end, Firstlight did not accept or adopt Mr Whitley's suggestions for alternative ways he could perform his role, and his employment came to an end. However, this does not amount to a breach of good faith. This claim is not made out, and in any event, it is effectively a duplication of Mr Whitley's claim of unjustified dismissal which has already been considered above. No orders are made.

Orders

[1] Firstlight Frozen Limited is ordered to pay to Robert Whitley:

a. The sum of $10,000 without deduction as compensation for compensation for humiliation, loss of dignity, and injury to feelings in accordance with section 123(1)(c)(i) of the Act.
b. The sum of $360.92 gross., being unpaid "time and a half" rates for work done on public holidays;
c. The sum of the sum of $1,545.60 gross, being unpaid alternative holidays owing on the termination of employment;
d. The sum of $152.52 gross, being annual holiday pay on arrears at the rate of 8%;
e. The sum of $4,000 in penalties is awarded, with half ($2,000) to be paid to the Crown Account and half ($2,000) to be paid to Mr Whitley.

Costs

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

[113] If they are not able to do so and an Authority determination on costs is needed the applicant 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 respondent would 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.

[114] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[16]

Claire English
Member of the Employment Relations Authority

[16] Please note the Authority's Practice Note on costs, effective from 2 May, available at https://www.era.govt.nz/assets/Uploads/practice-note-2