

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 673  
3125894

BETWEEN

AARON MITCHELL  
Applicant

AND

BREADS OF EUROPE (2015)  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Paul Mathews, advocate for the Applicant  
Robert Thompson, advocate for the Respondent

Investigation Meeting: 12 October 2022 at Christchurch

Submissions Received: 19 October 2022 from the Applicant  
26 October 2022 from the Respondent

Date of Determination: 19 December 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Aaron Mitchell was employed by Breads of Europe (2015) Limited as a baker from mid-September 2018 until November 2020. Breads of Europe (2015) Limited is a duly incorporated company carrying on the business of baking and baking retail. I shall refer to the company from hereon as Breads of Europe or the company.

[2] Mr Mitchell comes to the Authority to resolve employment relationship problems which arose during the period of his employment.

[3] He says money was unlawfully deducted from his pay in increasing amounts. Alternatively, if the Authority was to conclude that he had consented to money being deducted

from his wages then Mr Mitchell says that the amount deducted each week was unreasonable and inconsistent with any written consent to deductions and there were other underpayments over the period of employment.

[4] Mr Mitchell says that he was not able to take a meal break at any time during his employment but the time for one was deducted from his wages. He says that he was instructed to put on his timesheets that a break had been taken in the event wage and time records were audited.

[5] Mr Mitchell resigned on 1 December 2020. He says that his resignation was a constructive dismissal or that alternatively or additionally he was unjustifiably disadvantaged because of the deductions made without established basis for them and the failure to provide a meal break to him in his employment.

[6] Mr Mitchell says that there were breaches of good faith and misleading conduct about the overpayment, failure to provide information in a timely manner, and failure to be open and communicative.

#### *Remedies claimed*

[7] During the Authority investigation meeting Mr Mitchell withdrew claims for alleged underpayment of wages during the Covid lockdown which was also referred to as a breach of the Wages Protection Act 1983 and a claim for a failure to provide a safe workplace from harassment.

[8] Breads of Europe agreed at the Authority investigation meeting to reimburse money deducted from Mr Mitchell from in or about March 2020 in the sum of \$3,216 gross.

[9] There were some changes to the remedies claimed because of the above. Some other changes were identified in final submissions.

[10] Reimbursement for money during the Covid lockdown in the sum of \$924 is no longer sought as that claim was withdrawn. A penalty that was claimed for a breach of the Wages Protection Act 1983 was linked to that claim and therefore does not fall for consideration.

[11] It is accepted that a payment made to Mr Mitchell in May 2021 after the relationship ended of \$852.91 gross is a holiday payment and should be deducted from the amount claimed by way of reimbursement for six days of annual leave and two days in lieu of \$1,536 gross.

[12] A claim for payment of \$6,573.75 for unpaid meal breaks is no longer sought because Mr Mathews said the more appropriate approach would be to focus on the compensatory claim for an unjustified disadvantage in the statement of problem.

[13] Mr Mitchell claims reimbursement of wages for a period that he took unpaid leave from 27 October 2020 to 1 December 2020 in the sum of \$3,600 gross based on the minimum hours of work in his employment agreement of 30 per week at his hourly rate of \$24 per hour.<sup>1</sup> During this period requests were made of the employer about the basis for, and consent to the deductions, together with pay records. Mr Mitchell says that information was never supplied about the basis for the deductions and that the supply of other information was unnecessarily delayed.

[14] Mr Mitchell seeks in respect of the unjustified constructive dismissal twenty-six weeks reimbursement of lost wages and compensation. Compensation is also sought for the disadvantage claims. A Kiwi Saver employer contribution of 3% and holiday pay on the monetary awards was claimed belatedly in a memorandum dated 11 October 2022 from Mr Mathews to the Authority.

*Breads of Europe's reply*

[15] Breads of Europe say in its statement in reply that the deductions were not unlawful.

[16] The company does not accept that there were actions or omissions on its part that were unjustified and caused disadvantage and does not accept that Mr Mitchell was unjustifiably constructively dismissed.

[17] Breads of Europe do not agree that there is a basis for a penalty for a breach of good faith.

---

<sup>1</sup> Clause 12.1 of Mr. Mitchell's individual employment agreement with Breads of Europe.

**The investigation process**

[18] The Authority held an investigation meeting in Christchurch on 12 October 2022. At the investigation meeting the Authority heard evidence from Mr Mitchell and his partner, who I shall call Sheree. Sheree has a similar last name to one of the representatives and this will prevent confusion. The Authority heard evidence from Brian Cook who is the sole director of Breads of Europe.

[19] Written submissions were provided on behalf of both parties shortly after the investigation meeting.

**The issues**

[20] The Authority needs to determine the following issues:

- (a) Did Mr Mitchell consent to the deductions from wages?
- (b) If there was written consent to deductions were deductions made in accordance with that consent?
- (c) What is the legal approach to a constructive dismissal?
- (d) What were the reasons for Mr Mitchell's resignation?
- (e) Was Mr Mitchell's resignation caused by breaches of duty to Mr Mitchell?
- (f) If there were breaches by Breads of Europe, then were they of a serious nature that would mean it was reasonably foreseeable that Mr Mitchell would not be prepared to continue to work for Breads of Europe?
- (g) If the relationship is found to have ended by virtue of a constructive dismissal, then was the dismissal unjustified?
- (h) Alternatively, was Mr Mitchell unjustifiably disadvantaged by the deductions and failure to provide information about the overpayment?
- (i) Was Mr Mitchell disadvantaged because he was not provided with meal breaks?
- (j) If grievances for unjustified disadvantage or dismissal are made out, what remedies should be awarded to Mr Mitchell and are there issues of contribution or mitigation?

- (k) Is there money owing to Mr Mitchell in addition to what Breads of Europe agreed to reimburse for other deductions?
- (l) Is there money owing for arrears of holiday and alternative days?
- (m) Should Kiwi Saver employer contributions and holiday pay be awarded on the monetary awards.
- (n) Should there be an award for a penalty for a breach of good faith?

**Did Mr Mitchell consent to deductions from his wages?**

[21] A consent form for deductions was provided on 12 November 2020 to Mr Mathews. The form stated that Mr Mitchell authorised Breads of Europe to take the amount of “2.5 hours each week” from wages to repay an overpayment of \$5,380.82 and appears to have been signed by Mr Mitchell. The date of signature is 4 March 2020. Another form was provided by Breads of Europe that referred to a loan of \$600 was supplied at the same time but was not signed and did not specify a deduction amount.

[22] At the top of both forms is the same date of 1 March 2020. There is an extract from the company business account that shows a payment to Mr Mitchell on 27 February 2020 of \$660 in the applicant’s bundle of documents and the reference for that payment is “loan”. Mr Mitchell accepted that he had been given a loan by Mr Cook of or about that amount. He also accepted that he had been assisted with a car purchase by Mr Cook but said that money had been repaid earlier.

[23] Mr Mitchell did not recall signing a form about an overpayment of \$5,380.82 and said that he would not have signed something that he owed that amount of money without talking to Sheree first.

*Recollections about a meeting in late February or early March 2020*

[24] Mr Mitchell and Mr Cook recall meeting at Breads of Europe in late February or early March 2020. Mr Cook says that was a meeting where the overpayment was discussed, and the agreement was signed.

[25] Mr Mitchell recalled at the meeting being told that Mr Cook’s ex-wife, who had been responsible for payroll and some office administration, had overpaid him in wages and Kiwi Saver and that he was not the only staff member to whom this had happened. He remembered

being shown something by Mr Cook but said that he had no real appreciation of what any overpayment was. Mr Mitchell said he probably nodded and agreed. The main thing that he could recall from the meeting was that Mr Cook said he would pay him that day and he was given a fuel card to go and fill the car up. Mr Mitchell said he was very relieved as there was not enough petrol in the car and his wages had not been paid as usual the previous day which was a Thursday.

[26] Mr Mitchell had arrived for the meeting with Sheree however Mr Cook would not permit her to be present at the meeting.<sup>2</sup> It was unfortunate that Sheree was not permitted by Mr Cook to be present at the meeting. Mr Mitchell has a medical condition from birth that has impacted on his understanding of numbers and documents. Furthermore, he does not like confrontation and tries to avoid it. It is likely that he would not argue with Mr Cook and relied mainly on Sheree to identify issues such as whether he had been paid properly. Mr Mitchell has a degree of vulnerability.

#### *Conclusions about the consent form*

[27] Mr Mitchell did not go so far as to suggest that the signature on the consent form to deductions was a forgery. He recalled at the meeting in February/March 2020 a discussion about an overpayment that was different to the loan advanced of about \$600 about the same time. That there was such a discussion about overpayment was consistent with Mr Mitchell's evidence about a later discussion with the then office person Megan in October 2020 about his pay and that deductions were being made equivalent to ten hours of wages per week. In answer to a question at the Authority investigation meeting he accepted that his memory may not be as good as it could be.

[28] I conclude viewed in the round that it is more likely that Mr Mitchell did provide written consent to deductions for an overpayment.?

#### **Were the deductions made in accordance with any agreement?**

[29] The evidence supported deductions from 1 March to 27 May 2020 were made at the equivalent of two and a half hours wages per week. From 3 June to 26 August 2020 deductions were made at three hours per week, from 3 September to 17 September 2020

---

<sup>2</sup> I do not need to set out reasons stated by Mr Cook as to why Sheree does not attend the meeting.

deduction were five hours per week, and from 1 October 2020 to 27 October 2020 at ten hours per week.

[30] Mr Thompson submits that Mr Mitchell knew ten hours were being deducted because of his discussion with Megan in October 2020 and that amounted to consent that Mr Mitchell could have withdrawn. The evidence supported Mr Mitchell remained unclear about the basis for the deductions, whether he had consented to them and what was being deducted each week. The pay slips do not show the deductions made and the corresponding time sheet was required to be considered with the pay slip to assess any deductions to hours. I do not find in those circumstances that knowledge equates to consent. In any event, shortly after his conversation with Megan, he raised concerns with Breads of Europe and asked for information.

### **What is the legal approach to a constructive dismissal?**

[31] In some circumstances a resignation may amount to a dismissal. Judge Williamson stated in *Wellington Clerical Union v Greenwich*:<sup>3</sup>

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[32] Three situations were listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:<sup>4</sup>

- (a) Where the employee is given a choice of resignation or dismissal;
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) Where a breach of duty by the employer leads a worker to resign.

[33] Mr Mitchell relies on the third situation that a breach or breaches of duty caused him to resign.

[34] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused

---

<sup>3</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

<sup>4</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

by a breach of duty on the part of the employer, examining all the circumstances of the resignation, not simply its communication. The Authority needs to assess whether the breach of duty, if one is found, by the employer was of sufficient seriousness to make the resignation reasonably foreseeable.<sup>5</sup>

[35] Mr Mitchell has the burden of establishing that the resignation was a dismissal.

### **What are the reasons for the resignation?**

[36] Before the date of resignation on 1 December 2020 there had been an exchange on 27 October 2020 between Mr Cook and Mr Mitchell at work. It upset Mr Mitchell and brought matters to a head. Mr Mitchell went home and told Sheree what had happened and the deductions that Megan had told him about from his wages.

[37] Sheree then emailed Mr Cook in the evening of 27 October 2020 putting Mr Mitchell's name on the email. She asked in the email amongst other matters for a written statement of the "apparent overpayments". Sheree stated in her email that there was no paperwork given to Mr Mitchell and he had no idea what hours were owed. The email referred to Mr Mitchell not attending work the following day as he would be seeing a lawyer. Mr Mitchell did not return to work again at Breads of Europe.

[38] Mr Mathews and Mr Thompson were instructed, and there was considerable email traffic. Additional concerns were raised.

[39] In an email to Mr Thompson dated 20 November 2020, Mr Mathews wanted to know amongst other matters how Breads of Europe intended to remedy the issue of the deductions made. In the same email he attached a copy of the statement of problem to be lodged in the Authority that could be taken as the raising of personal grievances.

[40] The balance of the pay records were provided on 30 November 2020 to Mr Mathews. Sheree spent several hours going through the timesheets and payslips to reconcile hours worked and payments received.

[41] There were emails between Mr Mathews and Mr Thompson on 30 November 2020. Mr Thompson instructed Mr Mitchell to attend a meeting the next day at 1pm. Mr Mathews

---

<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

indicated that his client was available between 12.30 and 5pm on 1 December 2020. The meeting was arranged to be held at 1pm on 1 December 2020 at Mr Thompson's office, to discuss Mr Mitchell's concerns.

[42] At 12.19pm on 1 December 2020 Mr Mathews advised Mr Thompson in an email, amongst other matters, that based on an analysis of the additional pay records it was established that Mr Mitchell had either been underpaid or had unlawful deductions of 175.25 hours. Mr Mathews set out the underpayments and stated:

On the basis of this new information, my client simply cannot continue his employment with your client. Your client has destroyed all trust and confidence. My client made a very reasonable offer to try and resolve the matter when it first came to light. Since then your client was obliged to work with some urgency to rectify the situation. Having 175.25 hours of pay deducted without his knowledge has caused tremendous stress and financial strain on Aaron and his wife. You can take this email as Aaron's resignation and the raising of a grievance for constructive dismissal.

[43] Mr Thompson responded the same day and advised that his client and Megan had arrived at his office for the meeting and were waiting until 1.25 pm until Mr Mitchell checked his emails. Mr Thompson set out that he considered Mr Mitchell had resigned prematurely and without giving his client an opportunity to remedy the situation.

[44] The Authority asked Mr Mitchell, when he gave his evidence, about the reasons for resignation. He responded that he could not go back with all that was going on and without knowing about the underpayments. He said that whole thing was "a mess."

[45] I conclude that the reasons for resignation were those set out in Mr Mathew's email dated 1 December 2020, as confirmed in Mr Mitchell's evidence.

### **Was the resignation caused by breaches of duty to Mr Mitchell**

#### *Deductions made at higher rate than consent was given for*

[46] Breads of Europe deducted greater amounts from Mr Mitchell's wages than he had consented to. The amounts deducted became unreasonable. This breached s 5A of the Wages Protection Act 1983. Mr Mitchell was likely unaware of the deductions and the extent of them until October 2020 when it had become noticeable in his pay.

[47] Mr Thompson advised in an initial series of emails sent on 11 November 2020 to Mr Mathews, that his client would not make any further deductions until the matter was resolved. He stated that would allow Mr Mitchell to return to work. There was an email sent that referred to possibly pursuing any amounts owed elsewhere, nevertheless Mr Thompson expressed a preparedness to resolve the matter and stop any deductions if Mr Mitchell returned to work. What delayed that was the provision of wage and time records which is an issue I shall come to.

*Basis for deductions remained unclear*

[48] In an email to Mr Mathews dated 18 November 2020 Mr Thompson advised as follows:

My client holds the view that the overpayment was discussed. My client instructs that some weeks he didn't work and received a large random amount and other weeks he might have worked two days and still received an estimated \$1,200. Please see the attached records. I believe that this will assist.

[49] Mr Cook said in his evidence that the information about the overpayments was in a spreadsheet when he talked to Mr Mitchell in early March 2020. He said that Megan had picked up mistakes his ex-wife had made in payments to Mr Mitchell. Mr Cook said that it made sense to him at the time he talked about it to Mr Mitchell that there had been an overpayment. Mr Cook accepted when questioned at the Authority investigation meeting that whilst he did explain the overpayment to Mr Mitchell, potentially he would not have tested it fully with him. He accepted that he had not tested Megan's working with his ex-wife.

[50] That there could have been a spreadsheet to show overpayments is supported by a text message that was provided to the Authority sent to Mr Mathews by Mr Cook's ex-wife dated 8 July 2022. The text message provided as follows:

Hi Paul

I'm just trawling through my laptop and have found this spreadsheet that I'd saved. It looks like Brian, or possibly Megan, made it and I must have thought something was up and kept it. I had it filed in a folder called 'work concerns.' I can see at a glance that they considered he hadn't worked when in my conversations with Aaron, he had. Because I'd been forced out of the office at this stage, I had to follow up with Aaron via text when I used to speak with him directly in the factory. The text I sent earlier will corroborate this.

[51] Other text messages appear to support that there were occasions when Mr Mitchell did not fill in a timesheet and he confirmed his hours after a call from Mr Cook's ex-wife.

[52] Mr Cook said that he had no reason to conclude that Mr Mitchell did not understand what he was agreeing to when he consented to deductions. I could not be satisfied that Mr Mitchell had any real level of understanding about the basis for the deductions when he signed the consent form. No clear basis for the deductions was provided from 27 October to 30 November 2020. No clear basis was provided at the time of the Authority investigation meeting.

[53] The meeting on 1 December 2020 provided an opportunity to discuss this matter and for Mr Mitchell to respond to any basis for the deductions. If there was no basis for deductions established, then Mr Mitchell was entitled to be repaid any money deducted and that could have been discussed. If there was a basis for deduction then the level of these could have been discussed. Mr Cook suggested in his evidence that Megan must have decided on the level of increased deductions. I was unable to conclude who decided about or knew what deductions were being made. What is established is that any deduction beyond two and a half hours of wages was not consented to and the level of deduction became unreasonable.

#### *Further underpayments*

[54] Sheree concluded in addition to the deductions attributed to the \$5,380.82 there was additional underpayments.

[55] Mr Mathews provided figures for the underpayments by email to Mr Thompson and the Authority on 11 October 2022, by way of memorandum. There was agreement that the figure in the memorandum of \$4035 gross was overstated because 165.5 hours at Mr Mitchell's hourly rate of \$24 is \$3,972. During the Authority investigation meeting, Breads of Europe agreed to reimburse \$3,216 leaving a balance claimed for underpayments over the duration of the employment, of \$756.

[56] Sheree agreed in questioning that some of her calculations were incorrect. The proposed meeting for 1 December 2020 provided an opportunity for discussion about all matters. There was a possibility that some of the underpayments claimed include a deduction made for a meal breaks after a policy about meal breaks came into force in August 2019. My assessment of the time sheets and corresponding pay slips was that if Mr Mitchell did not state

that he had taken a meal break on his timesheets one was not deducted before August 2019. Even after that it is not clear that if meal breaks were not recorded on a timesheet they were still deducted from wages after that date. These matters could have been clarified.

*Meal breaks*

[57] Mr Mathews raised issues on behalf of Mr Mitchell on 17 November 2020, that he had not, in two years of employment, had a meal break but these were deducted from his pay. I could not be satisfied that these issues about breaks had previously been raised by Mr Mitchell.

*Employees advised of changes to rest breaks and meal breaks in the Act*

[58] Mr Cook produced a letter dated 26 July 2019 from his ex-wife that he said had been provided to employees. It set out that it was compulsory for employees of Breads of Europe to take an unpaid 30-minute break if they work over four hours because of recent changes to the law. A new form of timesheet was required to be filled from 5 August 2019 that had room to fill in for rest and meal break times. The policy stated there was a requirement to fill in the amount of the rest breaks and to sign that the meal break had been taken. The meal break would be deducted. It was stated that if the form had not been signed that a break had been taken then the time would still be deducted. If there was a reason for not taking a break, then that was required to be put in writing. The policy provided Breads of Europe would be closely monitoring breaks by way of the time sheet entries.

[59] This new time sheet system was in place from 5 August 2019. Timesheets prior to that had nowhere to record the taking of a meal break. From the second week of August 2019 Mr Mitchell would usually put in his time sheet that he had taken a meal break. The times that he set out he had his meal break varied. The regularity with which Mr Mitchell recorded meal breaks changed in August 2020 and I will address this at a later point.

[60] Mr Thompson submits that it is reasonable to conclude that Mr Mitchell took breaks at the times he wrote that he did. Recording of different times for breaks if they were not in fact taken could be seen as less likely.

*Was Mr Mitchell able to take a meal break?*

[61] Mr Mitchell maintained that he could not and did not take a 30-minute break over the entire period he worked. Mr Cook did not accept that was the situation.

[62] Mr Mitchell said that he had a quick cigarette and coffee about twice a day. A pie, pizza, or sausage roll was available for employees' lunches from the bakery. Sometimes Mr Cook would buy staff food from elsewhere for their lunch. Mr Mitchell worked with pastry and said he was not able to leave it. He said that he would eat as he was working and wrote down his meal break simply because he was instructed to do so.

[63] Mr Cook said that there was the ability to take breaks when convenient and at times when it suited the production. He said that this was possible because there were sections of baking and different times for different stages. Further, that two of the bakers left the workplace during the meal break and got something to eat.

[64] The evidence did not sufficiently satisfy me that there was no opportunity to take a meal break.

*Monitoring in accordance with the policy*

[65] The meal break issue was raised for the first time on 17 November 2020. For the ten full weeks worked within the 90-day statutory time frame, Mr Mitchell only entered meal breaks on one week's timesheet. He was on annual leave for another of the weeks.

[66] Breads of Europe is a small business and the evidence supported that in the main Mr Cook left office administration to others. Mr Cook said that he tried to monitor breaks as the policy provided. There is no evidence that there was monitoring of the timesheets over the period in question before this issue was raised. Had there been such monitoring, the ability or not to take a break could have been discussed. A fair and reasonable employer could be expected to comply with its own policy and carry out some monitoring to ensure the taking of breaks. Prior to this time Mr Mitchell would record more regularly on his timesheet that he had had a meal break.

[67] Mr Thompson said that this issue could be discussed at the meeting on 1 December 2020 along with the issues about a negative working environment. That would have been sensible.

*Provision of full wage and time records*

[68] Wage and time records were requested by Mr Mathews on 29 October 2020. There was an exchange of emails on 11 November 2020 during which Mr Thompson advised that the

wage and time records could be viewed at the work premises. In submission he said that this satisfied the requirements of s 130(2) of the Act. That section requires upon request provision immediately of either access to or a copy of the wage and time records. Mr Mathews wanted his client to be provided with the records so that an analysis could be undertaken.

[69] Copies of partial records were provided on 18 November 2020 and a list of deductions was supplied at the same time. In an email to Mr Mathews addressing why only some records were disclosed, Mr Thompson advised that they were the records relevant to the deductions. Mr Thompson submits they showed that Mr Mitchell had been paid for days he had not worked.

[70] Full records were then supplied on 30 November 2020.

[71] I accept that there was some delay in providing either access to, or copies of, pay records. Mr Mathews was advised by Mr Cook and then Mr Thompson that Breads of Europe is a small business and that Mr Cook had been busy because of Mr Mitchell's absence. Further, that the volume and configuration of the wage and time records made it difficult to send by electronic means. The wage and time records were provided in full by 30 November 2020. There was no request to extend the time arranged for the meeting on 1 December 2020 and in the letter advising of the resignation there was an analysis of the wage and time records. It was therefore able to be completed before the 1 December 2020 meeting and could have been discussed.

**If there were breaches of a serious nature was it was reasonably foreseeable that Mr Mitchell would not be prepared to continue to work for Breads of Europe?**

[72] The most significant breach of duty concerned deductions made at a level not consented to and the failure to provide the basis for the deductions. There was agreement by Breads of Europe to stop the deductions when concerns were raised, until the matter had been resolved so that Mr Mitchell could return to work. The evidence appeared to support the possibility of a spreadsheet at some point and that an overpayment may have been concluded on an incorrect basis because Mr Mitchell worked, but there was no corresponding timesheet.

[73] Mr Thompson offered a meeting to discuss the issues. Mr Mitchell wanted to have the full wage and time records before that took place. These were supplied on 30 November 2020 and a meeting had been arranged for 1 December 2020 to discuss the issues about the deductions, as well as other concerns raised

[74] There were some issues about negative aspects in the workplace that needed to be discussed and resolved, but the evidence supported in the main that Mr Cook and Mr Mitchell had got on well together. They shared similar music tastes. Mr Mitchell's considerable skills and experience as a baker were valuable to Breads of Europe. Mr Cook had assisted Mr Mitchell with a house move, car purchase and a loan.

[75] There had been reference to Mr Mitchell resigning from time to time during the November 2020 communications, but I do not find Breads of Europe could or should have foreseen that Mr Mitchell would resign after the full wage and time records had been supplied and before the 1 December 2020 meeting which had been agreed to. There was no request to adjourn the meeting to a different date. Mr Mitchell was represented at the time of his resignation.

[76] It was premature for Mr Mitchell to resign and conclude that Breads of Europe could not be relied upon to perform its obligations in the future, without having the meeting on 1 December 2020 to see if concerns could be resolved. The meeting presented an alternative to resignation.

[77] I do not find that Mr Mitchell has established that his resignation was in fact a dismissal.

### **Unjustified disadvantage claims**

[78] Section 103(1)(b) of the Act defines an unjustified disadvantage grievance as any grievance that an employee may have against the employee's employer or former employer because of a claim:

...

- (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or

....

[79] The components of a claim for unjustified disadvantage require an action that is unjustifiable. Whether an employer's action is justifiable is objectively assessed against what a fair and reasonable employer could have done in all the circumstances at the time the action

occurred. The unjustified action must also affect the employee's terms and conditions of employment to their disadvantage.

#### **Increase in deductions and failure to provide on request the basis for the deductions**

[80] A fair and reasonable employer could be expected to have only made deductions from wages at the level consented to and not at the unreasonable level of deductions in this matter. Information about the basis for concluding an overpayment should have been readily available and provided quickly. The 1 December 2020 proposed meeting must be weighed, but even taking that into account the delay of about five weeks in providing the basis for the overpayment when it was causing concern and anxiety to Mr Mitchell was unreasonable. Breads of Europe did not meet the requirements of a fair and reasonable employer in those respects and Mr Mitchell was disadvantaged as a result.

[81] Mr Mitchell has established an unjustified disadvantage grievance about the unreasonable deductions without consent and the failure to confirm the basis for concluding an overpayment.

#### **Meal breaks**

[82] The unjustified action about meal breaks that falls within the period of 90 days from the raising of the grievance, is the failure by Breads of Europe to monitor the taking of breaks as set out in the meal and rest break policy. None had been recorded for several weeks by Mr Mitchell. Such monitoring could have confirmed whether there were impediments to taking a break and if so these could have been addressed. This disadvantaged Mr Mitchell accordingly.

[83] Mr Mitchell has established an unjustified disadvantage grievance in this respect.

#### **Remedies for grievances**

[84] Mr Mitchell is entitled to a consideration of remedies for the two grievances.

## **Deduction's grievance**

### *Reimbursement of wages at minimum contractual rate for the period away from the workplace before resignation*

[85] There is a claim for reimbursement for the period between 27 October and 1 December 2020 when Mr Mitchell remained away from the workplace and waited for the information about the deductions and the wage and time records and was not paid. It is likely that in addition to issues of deductions and pay, Mr Mitchell also remained upset about what he considered to be the negative interactions. The absence was not supported by medical certificates that gave the Authority insight into causation. In that regard I note that Mr Mitchell returned to work having been told by Megan about the deductions. It was only after the upsetting change that he did not return.

[86] Communications between employer and employee in an ongoing relationship are usually best undertaken face to face rather than by emails between representatives whilst an employee remains away from the workplace. In this matter both parties were represented by experienced advocates. There were issues that need to be discussed and resolved. It was clear from 11 November 2020 that there were to be no further deductions to wages and there was a willingness to resolve issues.

[87] In the circumstances, subject to any issues of contribution, I conclude it appropriate to order reimbursement of lost wages for a period of two weeks only from 28 October 2020 to 11 November 2020. That is the sum of \$1440 gross.

### *Compensation*

[88] Mr Mitchell felt that the information was being hidden and that Breads of Europe had been stealing from his wages. The evidence supported that he suffered sleepless nights and became depressed. He said that he was unable to return to work until he had the information to analyse it.

[89] I do weigh that Mr Mitchell was concerned about other issues in the workplace aside from the deductions. The award needs to be related to the grievance. Subject to issue of contribution I consider that a compensatory award of \$5000 is appropriate. It is in line with other compensatory awards for unjustified actions.

*Contribution*

[90] I do not consider there was blameworthy conduct on the part of Mr Mitchell with respect to the deduction grievance.

**Failure to monitor meal breaks in accordance with rest and meal break policy***Compensation*

[91] Much of the evidence from Mr Mitchell to support a compensatory award was focussed on having deductions made for meal breaks that were not taken. The evidence has not enabled me to conclude there was no ability to take a break. My assessment of the timesheets and pay slips support meal breaks were likely not deducted until August 2019 unless referred to on a timesheet and even after August 2019 deductions appear somewhat random.

[92] Any compensation awarded must reflect the grievance found established. I accept there must have been some loss of dignity and injury to feelings that could have been alleviated by a monitoring of meal breaks because it would have created a pathway for discussion. An award of \$800 is appropriate.

*Contribution*

[93] I do not conclude blameworthy conduct on the part of Mr Mitchell.

**Is there money owing to Mr Mitchell in addition to what Breads of Europe agreed to reimburse for other deductions?**

[94] The total claim for deductions is 165.5 hours at \$24 per hour. That is a total of \$3,972. Breads of Europe agreed to pay \$3,216 on the basis that amount was attributed towards the \$5,380.82 over payment. That leaves \$756 as the outstanding claim. I asked both parties in a notice of direction dated 16 November 2021 to co-operate in completing a reconciliation of the pay record, because it would provide a good basis to investigate alleged over and underpayment of wages and deductions.

[95] Sheree provided Mr Mathews with her workings for under payments and these appear in the bundle of documents. Mr Mathews refers to these as uncontested. There was no alternative analysis provided.

[96] I have checked the amounts claimed and the timesheets and payslips. On one timesheet the hours worked for another employee appeared to have been added rather than Mr Mitchell's. I also weigh that some meal breaks that were recorded on timesheets would show as deductions.

[97] To deal with these issues in a non-technical manner that is broadly fair to both parties it suffices to reduce the claim by \$100. Mr Mitchell is entitled therefore to the sum of \$656 gross being other deductions for which he was not reimbursed.

[98] Mr Mathews can return to the Authority if an order about the agreed payment of \$3,216 is required.

### **Is there money owing for arrears of holiday and alternative days?**

[99] An amount of \$683.09 gross is sought for holiday pay and two days in lieu. The claim is reduced to take account of a payment made after the relationship ended. It was clarified that this was a payment of holiday pay by Breads of Europe. No holiday and leave records were provided. Whilst Sheree was still able to assess what was owing, I conclude under s 83 of the Holidays Act 2003 that she may have been prevented from bringing an accurate claim. On that basis I rely on the evidence put forward under s 84 of the Holidays Act 2003.

[100] Mr Mitchell is entitled to the amount claimed therefore in the sum of \$683.09 gross, being holiday pay and payment for a day in lieu.

### **KiwiSaver contribution and holiday pay**

[101] Although belatedly asked for I grant the amendment sought to remedies, to the extent that it is appropriate, for an award of KiwiSaver employer contributions and holiday pay to be made with respect to the monetary awards.

### **Penalty for a breach of good faith**

[102] A penalty is sought of \$8000 for a breach of good faith on the basis that there was deception in increasing deductions without these being clear on the pay slip and failing to provide an explanation.

[103] A penalty is available under s 4A(a) of the Act if the penalty was deliberate, serious and sustained. Mr Mathews submits that the deductions made satisfy these elements.

[104] Mr Mathews submits that Mr Cook was not distanced from payroll matters and ignorant to the level of deductions as he stated he was in evidence. Someone in a position of authority in Breads of Europe clearly had knowledge of the increases to the deductions. The evidence did not enable me to conclude who that was. The failure to make these deductions clear on the payslips delayed detection by Mr Mitchell. The failure to provide a clear basis for the deductions, quickly upon request, exacerbated the situation. The breach was deliberate, serious, and sustained. I conclude a breach of good faith.

[105] The basis for a penalty essentially mirrors the personal grievance claim about deductions for which compensation has been awarded. In this matter whether there was an overpayment remains unclear. The reason for an increase in the amount deducted to unreasonable and unconsented to levels is unclear. The conduct is such that a penalty is called for.

[106] I have considered the matters in s 133A of the Act in determining the amount of penalty. The impact on Mr Mitchell was serious. He had a degree of vulnerability. Breads of Europe did agree to a meeting that could have clarified and resolved the issues at a much earlier time. It has now agreed after some time to reimburse money deducted. I weigh that Mr Cook's ex-wife who had dealt with the pay roll no longer worked at the business. The subsequent breakdown in communication unfortunately appears to have contributed to the situation.

[107] Taking all factors into account I conclude it appropriate to award a penalty of \$3000 and order payment of that penalty to the Crown.

### **Orders made**

[108] Breads of Europe is ordered to pay to Aaron Mitchell compensation in the sum of \$5,800 without deduction under s 123(1)(c)(i) of the Act for the two grievances of unjustified disadvantage established.

[109] Breads of Europe is ordered to pay Aaron Mitchell the sum of \$1,440 gross being reimbursement of two weeks wages lost under s 123 (b) of the Act because of the established grievance relating to the deductions.

[110] Breads of Europe is ordered to pay to Aaron Mitchell the sum of \$656 gross for other deductions made to his wages.

[111] Breads of Europe is ordered to pay the sum of \$683.09 gross for holiday pay and a day in lieu.

[112] Breads of Europe is ordered to pay a KiwiSaver employer contribution of 3% on the combined monetary awards of \$2,779.09 which is \$83.37.

[113] Breads of Europe is ordered to pay holiday pay on the combined monetary awards of \$2,779.09 which is \$222.33 gross.

[114] Breads of Europe is ordered to pay a penalty of \$3000 to the Crown within 28 days of the date of this determination.

### **Costs**

[115] I reserve the issue of costs.

[116] If costs cannot be resolved, then Mr Mathews may lodge and serve a costs submission within 14 days from the date of this determination. Mr Thompson will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[117] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.<sup>6</sup>

**Helen Doyle**  
**Member of the Employment Relations Authority**

---

<sup>6</sup> Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at [https://www.era.govt.nz/assets/Uploads/practice-note-2.of lost wages](https://www.era.govt.nz/assets/Uploads/practice-note-2.of%20lost%20wages)