



# New Zealand Employment Relations Authority Decisions

You are here: [NZLII](#) >> [Databases](#) >> [New Zealand Employment Relations Authority Decisions](#) >> [2023](#) >> [2023] NZERA 248

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

---

## Caesar v Brak Burns Limited [2023] NZERA 248 (17 May 2023)

Last Updated: 24 May 2023

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

I TE RATONGA AHUMANA TAIMAHI

TĀMAKI MAKĀURĀU ROHE

[\[2023\] NZERA 248](#)

3173646

BETWEEN	JULIUS CAESAR Applicant
AND	BRĀK BURNS LIMITED First Respondent GARETH NEEDHAM Second Respondent

Member of Authority: Marija Urlich

Representatives: Nathan Santesso, for the Applicant  
No appearance for the Respondents

Investigation Meeting: 3 May 2023

Determination: 17 May 2023

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] Mr Caesar worked for Brak Burns Limited (BBL) as a sous chef from 14 February 2022 until 31 March 2022. He says he has not been paid for every hour worked and not paid holiday pay due when his employment ended. He seeks arrears for those sums. He also says he was unjustifiably constructively dismissed and seeks remedies for associated losses. In addition, Mr Caesar seeks findings that BBL has breached duties owed to him and an award of penalties, a portion of which is to be paid to him. A finding is also sought that Mr Needham is a person involved in breaches of employment standards under s 142W of the Act.

[2] On 19 July 2022 Mr Needham filed a document challenging jurisdiction for the Authority to consider a claim against him personally for a range of reasons including he was not a person involved in any breaches of employment standards. At the time of Mr Caesar's employment Mr Needham held the position of Senior Manager – People,

[3] On 22 July 2022 BBL filed a statement in reply. It accepts it has had difficulty paying wages but denies it failed to provide information in relation to those wages. It says it was a good employer but faced significant issues including the COVID-19 lockdowns and ending of related government support.

[4] The parties have attended mediation.

### **The Authority's investigation**

[5] BBL and Mr Needham did not attend the investigation meeting. They were aware of the investigation meeting and have had a fair opportunity to attend or provide information to the Authority which is relevant to the investigation and determination of this employment relationship problem. Directions dated 14 December 2022 (the directions) and the notice of investigation meeting were served on the address for service provided in the statement of reply and challenge to jurisdiction application. In the directions the Authority identified the issues to be investigated and determined, proposed timetabling for filing relevant information and an investigation meeting date. The parties were invited to file any comment to the proposal within a specified timeframe. Additionally, the direction included BBL were to file documents related to Mr Caesar's employment including wage and time records, holiday and leave records, payslips and final pay details. The proposed timetable was confirmed. BBL and Mr Needham did not comply with the directions. For completeness the parties were served with a new notice of investigation meeting which included a date change.

[6] On 3 May 2023, shortly after the scheduled start time of the investigation meeting at my direction an Authority officer rang Mr Young, advocate for BBL and Mr Needham on the telephone numbers provided to the Authority in the statement of reply and challenge to jurisdiction. Mr Needham told the Authority officer he did not intend

1 Refer page 6 letter of offer Julius Caesar 24 December 2021.

to attend and understood Mr Young was handling the matter on his behalf. Mr Young, in answer to the Authority officer's inquiry apologised for his non-attendance and sought an opportunity to file submissions, particularly related to the claim against Mr Needham. The investigation meeting then commenced some 35 minutes after the scheduled commencement time. Mr Caesar gave unchallenged evidence under affirmation to the Authority. His account of events is supported by records of communications he exchanged with his managers at the relevant time which have been provided to the Authority.

[7] On 4 May 2023 the Authority provided a timetable for BBL and Mr Needham to file submissions, as requested by Mr Young. BBL and Mr Needham provided no response to this proposal or filed submissions or further information.

[8] It is appropriate to move to determine this matter. 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 information received.

### **Issues**

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

- a. Was Mr Caesar unjustifiably constructively dismissed?
- b. If so, is he entitled to a consideration of remedies including:
  - i. Lost wages under [s 123\(1\)\(b\)](#) of the Act;
  - ii. Compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act;
- c. Should any remedy awarded be reduced (under [section 124](#) of the Act) for blameworthy conduct by Mr Caesar which contributed to the circumstances which gave rise to his grievance?
- d. Are arrears of wages due and owing?
- e. Are arrears of holiday pay due and owing?
- f. Is an award of penalties warranted against BBL for breach of statutory obligations to pay wage and holiday pay and/or

breach of clause 7.1 of the parties' employment agreement and/or breach of [s 130\(2\)](#) of the Act and any portion of such to be paid to Mr Caesar?

- g. Is Mr Needham a person involved in breaches of employment standards including failure to pay wages and holiday pay entitlement when due and failure to provide wage and time records on request?
- h. Should either party contribute to the costs of representation of the other party?

### **The parties' employment agreement**

[10] Mr Caesar and BBL entered a written employment agreement (the employment agreement) on 24 December 2021. Clause 7 of the employment agreement is titled 'Remuneration Details' and includes Mr Caesar was to be paid fortnightly into his nominated bank account.<sup>2</sup>

### **Discussion**

*Was Mr Caesar unjustifiably constructively dismissed?*

[11] An employee may be constructively dismissed by their employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.<sup>3</sup>

[12] If the dismissal is caused by breach of duty the questions for consideration are then whether the breach of duty by the employer caused the employee's resignation and

<sup>2</sup> Individual Employment Agreement Julius Caesar 24 December 2021 clause 7.1.

<sup>3</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [\[1985\] 2 NZLR 372](#), (1985) ERNZ Sel Cas 136 (CA).

if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.<sup>4</sup>

*(i) Did BBL breach the terms of the employment agreement causing Mr Caesar to resign?*

[13] Failure to pay wages in full when due and owing is a serious breach of the duty owed to Mr Caesar as an employee.<sup>5</sup> BBL breached this duty because it did not pay Mr Caesar when it agreed it would under the terms of the parties' employment agreement. The breach is ongoing. Mr Caesar's first missed pay day, 18 March 2021, was the second of his employment with BBL. He immediately raised the missed pay with Mr Needham who said the pay depended on the government COVID-19 subsidy and would be paid by 1 April 2023. Mr Needham then said BBL would pay half the wages in cash. Mr Caesar declined this offer. He said he was concerned it may negatively impact on his immigration status.<sup>6</sup> Mr Caesar also asked Mr Needham to put in writing that the pay had been missed and when it would be paid. Mr Needham agreed to do this by the following Monday. The written confirmation was not provided.

[14] Mr Caesar's evidence was he did not return to work for BBL after 31 March 2021 because he had not been paid for work performed, he was anxious and unwell with the stress of the unpaid wages and he was not confident that he would be paid because BBL had not done what it said it would. He communicated his concerns to BBL including telling BBL representatives (Mr Needham and his immediate managers) its ongoing failure to pay his overdue wages was making him unwell and as a consequence of this he was unable to work. Despite this BBL did not remedy its breach. On 9 May Mr Caesar wrote to BBL raising a personal grievance in respect of the unpaid wages. He did not return to work and started a new job on 23 May. Mr Caesar's employment ended by way of resignation on or about 9 May because of BBL's breaches of duty in failing to pay his wages. Objectively assessed, a reasonable employer would have considered Mr Caesar to have resigned by at least that date. <sup>7</sup>

<sup>4</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [\[1994\] NZCA 250](#); [\[1994\] 2 NZLR, 415](#), [\[1994\] 1 ERNZ 168 \(CA\)](#) at [\[172\]](#).

6 At this time Mr Caesar held a work visa with a condition that he only work in Auckland for Burgered Restaurants Auckland.

7 *Urban Décor v Yu & Anor* [\[2022\] NZEmpC 56.](#)

(ii) *If so, was Mr Caesar's resignation reasonably foreseeable given the nature of the breaches?*

[15] Yes. The failure to pay in the circumstances of this matter was a breach of duty of sufficient seriousness to make it reasonably foreseeable Mr Caesar would resign. Mr Caesar raised his concerns about the first missed pay with his manager and continued to raise his concerns, he told BBL the situation was causing him to become unwell to the extent he did not attend work from 31 March. From 31 March he continued to ask about his pay and on 9 May raised a personal grievance.

[16] I am satisfied Mr Caesar made it clear to BBL that his personal circumstances were such that he could not work without pay and that he did not agree to further delay in payment of the wages which were due and owing. The steps he took to end the employment relationship on or around 9 May were foreseeable.

[17] Mr Caesar was unjustifiably constructively dismissed.

#### *Remedies in relation to the personal grievance*

[18] Mr Caesar has established a personal grievance for unjustified constructive dismissal. He is entitled to a consideration of the remedies sought.

#### *Reimbursement*

[19] Mr Casear seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. I am satisfied the appropriate period of claim runs from 9 May 2022 until 23 May 2022 when he started a new job.

[20] After reviewing the evidence of loss and Mr Caesar's attempts to secure employment, the Authority is satisfied he is entitled to an award of \$2,325.00 (gross) being two weeks' pay calculated at the agreed rate of pay and hours of work.<sup>8</sup>

#### *Compensation for humiliation, loss of dignity and injury to feelings*

[21] Mr Caesar said his dismissal and the circumstances leading up to it was an extremely difficult time and he felt anxious and depressed.

8 Mr Caesar's employment agreement provided he would work at least 37.5 hours per week worked at an hourly rate of \$31, 7 weeks lost wages = \$8,137.50.

[22] The Authority is satisfied Mr Caesar has experienced harm under each of the headings in section 123(1)(c)(i) and has quantified the harm suffered having regard to the spectrum of harm and quantum of compensation particularly with regard to other awards of compensation. Having regard to the particular circumstances of this case, an award of \$14,000 under section 123(1)(c)(i) is appropriate.

#### *Contribution*

[23] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[24] Mr Caesar did not contribute in a blameworthy way to the circumstances which led to his employment ending. It is not unreasonable for an employee to request payment for wages due and owing.

[25] There are no deductions from the monetary remedies for reasons of contribution.

*Are arrears of wages due and owing?*

[26] Mr Caesar is entitled to be paid by BBL for hours worked at the agreed rate of pay, which was \$31 per hour.<sup>9</sup>

[27] BBL is ordered to pay Mr Caesar wage arrears totalling \$4,965.60 (gross) because the evidence establishes between 27 February 2022 and 1 April 2022, he worked 159.87 hours for BBL for which he should have been paid at the rate of \$31.00 per hour and these arrears remain unpaid. The payment is to be made within 21 days of the date of this determination.

*Are holiday pay arrears due and owing?*

[28] As an employee Mr Caesar was entitled to holiday pay upon the termination of his employment.<sup>10</sup> Mr Caesar's holiday pay remains outstanding. He is entitled to be paid holiday pay on the wage arrears calculated at eight per cent of total gross earnings.

<sup>9</sup> Refer letter of offer and written individual employment agreement 24 December 2021.

<sup>10</sup> [Holidays Act 2003, s 27.](#)

[29] BBL is ordered to pay Mr Caesar \$484.67 (\$397.25 + \$87.42) in holiday pay entitlements within 21 days of the date of this determination.

*Should interest be ordered on the arrears?*

[30] The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement.

[31] It is appropriate where a person has been deprived of the use of money to make an award for interest. Mr Caesar is entitled to an award of interest on the wage arrears awarded including the holiday pay component.

[32] BBL is ordered to pay interest, using the civil debt interest calculator, within 21 days of this determination, as follows:<sup>11</sup>

(i) Interest on the sum of \$5,450.27 calculated from 1 April 2022 until the date payment is made in full.<sup>12</sup>

[33] Interest is payable in accordance with Schedule 2 of the [Interest on Money Claims Act 2016](#).

**Is Brak Burns Limited liable for a penalty?**

[34] As found above BBL's failure to holiday pay when due and owing is a breach of statutory duty and the failure to pay wages is a breach of the parties' employment agreement. Mr Caesar seeks penalties for these breaches. He also seeks a penalty for failure to provide a wage and time record on request.<sup>13</sup> The request was made in writing by his representative by email dated 19 May 2022.<sup>14</sup>

[35] The maximum penalty which may be awarded against a company is \$20,000.<sup>15</sup> There are two statutory breaches and a breach of the employment agreement. The arrears breaches are sufficiently interrelated to warrant globalisation. In considering

<sup>11</sup> [www.justice.govt.nz/fines/civil-debt-interest-calculator](http://www.justice.govt.nz/fines/civil-debt-interest-calculator).

<sup>12</sup> Total wage arrears of \$4,965.60 plus total holiday pay arrears of \$484.67 = \$5,450.27.

<sup>13</sup> [Employment Relations Act 2000, s130\(1\)\(4\)](#).

<sup>14</sup> For completeness the request made included leave records as well as wage and time. The penalty is sought in respect of the wage and time record request.

<sup>15</sup> [Employment Relations Act 2000, s 135](#).

whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in [s 133A](#) of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.<sup>16</sup>

*(i) Failure to pay holiday pay and wage arrears*

[36] BBL's action in failing to pay Mr Caesar's holiday pay when his employment ended is a breach of statutory obligations. Failure to pay wages when they were due and owing under the terms of the parties' employment agreement is a breach of that agreement and amounts to a statutory breach under [s134](#) of the Act. In the statement in reply BBL says its inability to pay wages resulted from the impact of the COVID-19 pandemic compounded by the withdrawal of government support in November 2021. Not much weight can be put on the factors BBL asserts in mitigation because these factors were known to it when it entered an employment relationship with Mr Caesar in late December 2021. BBL has taken no steps to mitigate these breaches.

[37] BBL's actions must be seen as intentional and its culpability high. As the employer it was responsible for payments of wages and holiday pay and the failure to do so is a serious breach. At all relevant times, as demonstrated by Mr Needham's position title and the responses Mr Caesar received to his repeated inquiries concerning his late wages and requests for related information, that they were being escalated "to HR", BBL has had access to professional support and advice. On the information before the Authority the subject failures were intentional actions in breach of obligations owed by BBL to Mr Caesar to pay wage arrears and holiday pay when due and owing.

[38] There is compelling evidence of direct loss suffered by Mr Caesar as a result of BBL's breach and he has spent time and resources seeking to enforce statutory obligations. As a worker dependant on a visa which restricted his ability to work to BBL he was particularly vulnerable

[39] There is no specific evidence before the Authority of any financial difficulty BBL may have in paying any penalty though it is accepted BBL is no longer trading and has been negatively impacted by the COVID-19 pandemic.

16 *Nicholson v Ford* [\[2018\] NZEmpC 132](#) and *Labour Inspector v Daleson Investment Ltd* [2019].

[40] Standing back and including comparison to other cases and the relevant matters listed in [s 133A](#) of the Act, a fair penalty is \$8,000. BBL is ordered to pay half the penalty to Mr Caesar to compensate him for the inconvenience and resources expended in pursuing the payment of statutory and contractual entitlements. The penalty is to be paid within 21 days of the date of this determination.

*(ii) failure to provide wage and time records on request*

[41] In its statement in reply BBL "...denies it failed to provide information in relation to wages". No information to support this has been provided. Mr Caesar's evidence was the wage and time records were not and have not been provided following the request made on 19 May 2022. His evidence is accepted. BBL has not provided the wage and time records on request and has not provided an adequate explanation as to why. It is liable to a penalty. What level of penalty is appropriate?

[42] The failure of BBL to provide the records on request has hindered Mr Caesar's ability to bring his claim – he has not had the benefit of those records to calculate his arrears claims and has had to use his own resources to do so which will likely have caused delay. BBL has been found by the Authority previously to have engaged in similar conduct.<sup>17</sup> In that case it was ordered to pay a penalty of \$5,000 for failure to provide to the Labour Inspector on request employment records including wage and leave records.<sup>18</sup>

[43] Standing back and including comparison to other cases and the relevant matters listed in [s 133A](#) of the Act, a fair penalty is \$4,000. BBL is ordered to pay half the penalty to Mr Caesar to compensate him for the inconvenience and resources expended in pursuing the payment of a statutory entitlement. The penalty is to be paid within 21 days of the date of this determination.

**Is Mr Needham a person involved?**

[44] Under [s 142Y\(2\)\(a\)](#) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or Court) and, to the extent the employer is unable to pay the money owing. If such an application is made the Authority must be satisfied there has been default in

payment,

17 *A Labour Inspector v Brak Burns Limited & Anor* [2023] NZERA 19.

18 At [25]

that the default involves a breach of employment standards and that the person against whom recovery is sought was involved in the default.<sup>19</sup> Employment standards include the requirement to pay holiday pay under the [Holidays Act 2003](#) and any provision of the [Wages Protection Act 1983](#). An officer of an entity in breach of employment standards may be a person involved in such a default.<sup>20</sup>

[45] The first matter the Authority must be satisfied of is whether there has been default in employment standards. Any failure to make either full or part payment of wages is an unlawful deduction within the meaning of [s 4](#) of the [Wages Protection Act 1983](#).<sup>21</sup> An unlawful deduction has occurred here because BBL failed to pay Mr Caesar wages under the terms of his employment agreement. When employment ends annual holiday pay must be paid in the final pay.<sup>22</sup> BBL has not paid Mr Caesar's final annual holiday pay which has been due and owing from at least 9 May 2021.

[46] Mr Needham's involvement in the breach is now to be considered.<sup>23</sup> He was not a director or shareholder of BBL.<sup>24</sup> Mr Needham held himself out to Mr Caesar as holding a position which involved dealing with employees of BBL about their employment. Whether the primary facts of BBL's breaches of employment standards were in his knowledge is another matter and on the information before the Authority not established.<sup>25</sup> For these reasons I am not satisfied Mr Needham is a person involved in a breach of employment standards under s 142W of the Act.

### Summary of orders

[47] The Authority orders as follows:

Within 21 days of the date of determination Brak Burns Limited is ordered to pay Julius Caesar the following sums:

(i) \$14,000 under s 123(1)(c)(i);

(ii) \$2,325.00 (gross) under s 123(1)(b);

<sup>19</sup> [Employment Relations Act 2000, s 5](#).

<sup>20</sup> [Employment Relations Act 2000, s 142W\(3\)](#).

<sup>21</sup> *Spotless Services (NZ) Limited v Service and Food Workers Union Nga Ringa Tota Inc* [2008] NZCA 580 at [78].

<sup>22</sup> [Holidays Act 2003, s 27](#).

<sup>23</sup> [Employment Relations Act 2000, s 142W](#).

<sup>24</sup> [2020] NZERA 412 [4].

<sup>25</sup> *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [7].

(iii) \$5,450.27 (gross) in wage and holiday pay arrears;

(iv) \$12,000 penalty half of which is to be paid to Julius Caesar and half to the Crown; and

(v) Brak Burns Limited is to calculate and pay interest on total arrears.

### Costs

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

[49] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Caesar 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 Brak Burns Limited 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.

[50] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. 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.<sup>26</sup>

Marija Urlich

Member of the Employment Relations Authority

<sup>26</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).

---

NZLII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#)

URL: <http://www.nzlii.org/nz/cases/NZERA/2023/248.html>