

[2] By early 2010 all claims by Mr Busch, the original applicant, had been disposed of, as had claims by ZWGL (counterclaim applicant)² for compliance orders. This left counterclaims for damages, interest and penalties. Submissions on aspects of those counterclaims were received from the counterclaim applicant in January 2010, some two months after the final investigation meeting. In those submissions the counterclaim applicant correctly noted prior agreements that some issues were reserved.

[3] Submissions for the counterclaim respondent followed in late March 2010 however they were accompanied by advice that Mr Busch sought the re-opening of the investigation in order to provide further evidence on the issues addressed in submissions. A formal application followed pursuant to s 160 (1) (a). This was opposed by ZWGL. Correspondence and memoranda were exchanged and several conference calls held before Mr Busch decided, in early May, to withdraw that application.

[4] On 26 May 2010, the counterclaim applicant exercised its right of reply to the submissions which Mr Busch had lodged in March 2010. After the provision of reply submissions Mr Drake (who with the assistance of Ms Laurene Holley had been acting for ZWGL throughout the investigation) withdrew as Counsel for ZWGL. Mr Barter is now on the record as the representative of the counterclaim applicant.

[5] These delays were consistent with the way in which the entire investigation had unfolded to that point. The Authority's process has had to accommodate changes in representation, successive amendments to the parties' respective claims, piecemeal presentation of particulars and of evidence, and several adjournments. Mindful now of the potential for confusion (especially given that Mr Barter was instructed after submissions were lodged) I set out in some detail what is reserved and what falls to be determined here.

² Because all Mr Busch's claims have been withdrawn, ZWGL and Mr Busch are described herein as "counterclaim applicant" and "counterclaim respondent" respectively.

Issues

[6] In its second amended statement in reply (dated September 2009) ZWGL asserted that the employment agreement between the parties included the following implied or incorporated terms:

“(a) The parties to the employment relationship must act in good faith and in a co-operative, not in a disruptive way towards each other.

(b) The applicant owed to the employer an obligation of confidence, trust and fair dealing.

(c) The applicant owed a duty of fidelity and good faith to act at all times in his employer’s best interests.

(d) The applicant owed a duty of care to perform his work for his employer in a manner consistent with how a competent licensed operator of a wildlife park...would act and not to act in a reckless or negligent way that was likely to expose his employer to suffer serious financial harm.

(e) The applicant owed a duty to not convert, steal or interfere with his employer’s right to possession during the period of employment and, on termination of the employment, the duty required the applicant to return to the employer all of the said property then held by the applicant.”

[7] ZWGL went on to counterclaim that the following actions were breaches of the implied terms of the employment agreement:

“4. While employed by the first respondent the applicant breached the employment agreement, as follows:

(i) On 17 May the applicant directed, in his capacity as licensed operator for the Park, that all Interactive Tours had to be immediately stopped. From the date the Interactive Tours were stopped until his employment was terminated the applicant took no

steps to have the Interactive Tours resumed. As a result of the Interactive Tours having been stopped the first respondent lost revenue, and profit, of approximately \$537,000.00. The applicant had no justification for stopping the Interactive Tours. He caused the Interactive Tours to be stopped knowing that the loss of revenue would cause the park to suffer financial loss, and did this with the objective of deriving personal gain from his actions.

- (ii) *During the 12 months immediately preceding the date of the applicant's dismissal, the applicant unlawfully converted, stole or locked away to deprive the first respondent possession of the property specified in Schedule A to this second amended statement in reply. The items of property had been in the lawful possession of the first respondent and...were usually kept in or around the Park's maintenance workshop or elsewhere within the Park's grounds. All or a substantial number of the items of property converted, stolen or locked away by the applicant are held by him in the house he was permitted to occupy while he was an employee.*
- (iii) *While employed by the first respondent the applicant assaulted, intimidated and threatened other staff members, and threatened to carry out acts of sabotage against the Park. As a result of his actions and threats the first respondent was required to incur security costs and related expenses which it would not otherwise have incurred. These expenses totalled \$96,378.50.*
- (iv) *The applicant, without authorisation, unlawfully converted, stole or locked away to deprive the first respondent possession of five vehicles causing the Park's day-to-day operations to be disrupted and additional expenses for the first respondent. The vehicles...are also specified in Schedule A...*
- (v) *On or about 20 May 2008 the respondent agreed to allow a business trading as Match Photographers to come into the park to take photos of one of the tigers in consideration for the payment of*

\$3,712.50 (GST inclusive.) Without authorisation of the first respondent and in breach of the duty specified in paragraph 2 (ii) (c) above the applicant presented Match Photographers with his personal invoice and requested payment of the payment Match Photographers had agreed to pay to the first respondent be paid to him instead. The applicant received the said amount from Match Photographers but did not account to his employer for the money he so received and he had refused to pay that sum to the first respondent.”

[8] The remedies sought included applications for compliance orders, (for return of items alleged to be in Mr Busch’s possession) damages, interest on the monies owed, and penalties. As already noted, the applications for compliance were addressed, with urgency, on 4 November 2009 in Authority determination AA 257B/09. Orders were made in respect of some of the items for which they were sought. These items were listed at Schedule B to that determination, a copy of which is attached here also.

[9] Findings were also made in respect of an item (a bandsaw) which was taken by Mr Busch but then sold, precluding the use of a compliance order as a remedy.

[10] In its submissions of 5 January 2010 the counterclaim applicant set out its view of the position regarding the issues for determination in the following way:

“1.1 The following issues are to be determined at this stage of the proceeding:

- Determination of whether the counterclaim respondent is liable for breach of contract by having caused the interactive tours to be stopped on 16 May 2008 and not taking any steps to have them resume during the remaining period of his employment, and*
- Determination of whether the counterclaim respondent is liable for breaches of contract and, if so, determination of the quantum of damages in respect of*

- *causing his employer to have to incur extraordinary security expenses and costs during 2008;*
- *causing his employer to incur costs for equipment hire and materials to be replaced which would not have been necessary if the breaches of contract had not occurred; and*
- *taking for his own use money payable to his employer by Match Photographers;*
- *taking for his own use a new band saw which was...bought by the Park's insurer.*

1.2 The remaining issues, which are to be determined at a later stage and accordingly are not addressed in these submissions, are:

- *Quantum of damages in respect of the losses from the interactive tours being stopped; and*
- *Damages for costs yet to be quantified [for] the repair or replacement of vehicles, firearms, tools, equipment and other items of property which, in its determination dated 4 November 2009, the Authority ordered the counterclaim respondent to return; and*
- *Costs for the entire proceeding, including the urgent application for reinstatement, and all substantive and interlocutory steps since then."*

[11] The assertions contained in 1.2 above were consistent with procedure agreed by the parties³ prior to the investigation meetings of 25 and 29 September and 20 October 2009. This was that:

- (i) in respect of the claim relating to the cancellation of the interactive tours, only the question of liability should be determined at this

³ Telephone conference 23 September 2009

stage. In the event of a finding that Mr Busch was liable for damages both parties reserved the right to provide further evidence as to quantum, and

- (ii) Leave was reserved for the counterclaim applicant to pursue claims which had yet to be quantified in respect of damages for loss of use of items for which compliance orders were sought.

[12] I now proceed to determine:

- (i) whether Mr Busch is liable for damages in respect of the cancellation of the interactive tours;
- (ii) whether damages are owed in respect of the bandsaw which was taken by Mr Busch for his own use;
- (iii) whether damages are owed in respect for loss of use of various items set out in Schedule B;
- (iv) whether there were breaches of implied terms, and whether damages are owed, in respect of:
 - 1. provision of increased security at the Park,
 - 2. the alleged withholding of monies from Match Photographers;
- (v) whether interest should be awarded in respect of any damages payable, and
- (vi) whether penalties are in order.

(i) Interactive Tours

[13] Interactive tours involve young, hand raised animals that have been conditioned from birth for interaction with human beings. Such tours had been conducted at the Park for several years before they were stopped and were a

significant source of revenue for the Park. In early May 2008 Mr Busch had approached Patricia Busch (his mother and director of ZWGL) with a request for funds for declawing some young lions so that they could be used for interactive tours. Mrs Busch told the Authority that at that time she received this request she had no reason to think the tours would not continue as they had been doing for some time.

[14] Soon after, on 16 or 17 May 2008, Mr Busch directed that bookings for interactive tours were to cease. Mrs Busch alleges that Mr Busch told her he was no longer willing for such tours to be run because there was nothing in it for him. Other staff (including building and maintenance workers Andrew Ward and John Davis, and animal handler Martin Ferreira) reported that Mr Busch told each of them in separate conversations that he had cancelled the tours with the intention of damaging the business. Mr Ward stated that he had heard Mr Busch say that if he could not regain control of the Park he would make sure that no-one else did.

[15] Pursuant to the Biosecurity Act 1993 the Ministry of Agriculture and Forestry (MAF) is responsible for the licensing of animal containment facilities (including zoos) and their operators.⁴ During 2008 MAF had raised a number of issues with the Park on matters ranging from animal welfare and containment to maintenance and upkeep of the facilities. Some were the subject of recommendations for improvement. Others led to a more formal requirement for “corrective action” to be taken. MAF also noted what was becoming a serious issue for the management of the Park: the breakdown in the relationship between Mr Busch, the licensed operator of the Park and his mother, the managing director.

[16] Upon being told that Mr Busch was no longer scheduling interactive tours, Mrs Busch checked with MAF as to whether they had any outstanding concerns that the Park needed to address before tours could resume. By early June MAF had confirmed that no corrective actions were outstanding at that time. Mrs Busch proceeded to write to her son telling him that the cancellation of tours was having a serious effect on the revenue of the Park. On 16 July she wrote again asking when the interactive tours would be able to be restarted. She received no response to these communications.

⁴It is common ground that Mr Busch was at all material times the licensed operator of the Park pursuant to the Biosecurity Act 1993.

[17] At no time did Mrs Busch issue Mr Busch with a direct instruction to restart the tours. In her evidence she said she acknowledged that a decision about this matter fell within his discretion as licensed operator however she did not accept that Mr Busch had a legitimate reason for cancelling the tours.

[18] Containment facilities are also subject to Standards approved by the Environmental Risk Management Authority pursuant to the Hazardous Substances and New Organisms Act 1996. Standard 154.03.04 Containment Facilities for Zoo Animals (“the standard”) defines operator as:

“The person who has overall responsibility for the facility, its maintenance and operation in terms of section 40 of the Biosecurity Act 1993.”

[19] At 4.2 the standard provides:

“The operator is responsible for the operation of the containment facility and ensuring that mechanisms are in place for resourcing the zoo.”

[20] It is also relevant that at 6.1 the Standard provides:

“By appropriate enclosure design, supervision by trained staff and high standards of management, the operator of the zoo must ensure, as far as possible, that animals, staff, visitors and the public are protected from injury or zoonoses...”

[21] Mr Busch told the Authority that the decision to cancel the interactive tours was one that was open to him in his capacity as licensed operator of the Park. Mr Busch says that he had ultimate responsibility for the safe running of the Park and the decision he took was reasonable in light of concerns he held in relation to health and safety issues at the time.

[22] He told the Authority that these concerns included the fact that the animals were now getting older. He said the area designated for interactions required improvements and also that tours were being done outside designated areas. He said

the older animals needed particularly skilled handling and other handlers at the Park (who were doing some tours on their own) lacked the necessary experience and training. Mr Busch said his concerns were vindicated, at about the time he cancelled the tours, when a volunteer was bitten by one of the animals.

[23] There is no dispute that early on in the Park's history Mr Busch was accustomed to bringing animals out into open areas without any assistance and with members of the public (including small children) present. However, by early 2008 it was accepted that interactive tours required two handlers: one to look after the animal and the other to look after the public.

[24] In some parts of Australia and South Africa animals up to two years old are used in interactive tours but in the U.K. the upper age limit was six months. At the time Mr Busch stopped the tours most of the cats at the Park were well over a year old and animals of up to five years old were being used for interactive tours.

[25] On a couple of occasions after May 2008 Mr Busch authorised interactive tours for selected participants. He has not explained why these tours were permitted when others were not, except to say that the tours went ahead in part because the customers concerned had been very upset when initially told they could not have a tour. Otherwise, he took no steps to resume the tours before his employment ended. He told the Authority that the safety issues needed to be resolved before that could happen.

[26] Mr Holland, Mr Busch's successor as licensed operator, was engaged by the Park in October 2008. He told the Authority that no licensed operator acting in his employer's best interests would have stopped the tours. Mr Holland agreed that the aging of the animals was potentially an issue but in his view, some tours could still have continued with the younger animals. He told the Authority that he believed the area used for the tours was, with some improvements, suitable.

[27] Mr Holland also argued that if Mr Busch's concerns about interactive tours were genuine he should have taken steps to address the matters which were causing those concerns. Mr Busch said that this was made more difficult by the fact that his mother had ceased to include him in the management of the Park. He claimed to have

been stripped of any authority over Park staff in a way that made it impossible to supervise or train other animal handlers. He also said that he had been shut out of financial decision making and prevented from authorising essential expenditure on maintenance.

[28] The counterclaim applicant does not dispute that in the latter half of 2008 limits were placed on Mr Busch's authority. He was relieved of "signing authority" and financial decisions were made without input from him. Certain members of staff (including Mr Ward and Mr Davis) were told to take direction not from Mr Busch but from either Mrs Busch or those she engaged to help her run the business: management consultant Barry Nalder and operator Glen Holland.

[29] Mr Busch says that the net effect of these restrictions was to severely handicap him in his ability to meet the overall responsibilities that went with being the licensed operator.

[30] Once Mr Holland took over as licensed operator, restarting the tours was a priority for him. However he found that there were issues that needed to be addressed first, such as the risk of animals escaping. He reported to MAF about these containment issues and consulted with them about what needed to happen for the tours to recommence. In order to minimise risk to staff, animals and the public the following changes were made to the protocols for the tours:

- (i) restrictions were to be placed on the contact between animals and public;
- (ii) electric shock collars were to be fitted on the animals;
- (iii) volunteers were not to be used and participating staff were to be at an experienced level;
- (iv) gates on the interactive area were to be kept locked during interactions, as were the main gates of the park;

- (v) office staff were to be informed that a tour was to commence and office doors locked;
- (vi) any member of the public who was not involved in the interactive tour was required to leave the interactive area, and
- (vii) other animals (specifically deer if grazing in the enclosure) had to be removed from the interactive area.

[31] Mr Holland restarted the tours, with MAF approval, in December 2008. They continued until May 2009 when a tiger fatally mauled a keeper at the Park. I have had no evidence as to whether they have subsequently been restarted.

Determination

[32] This issue has not been straightforward to determine. On the one hand, I accept unreservedly the evidence of counterclaim applicant witnesses who reported that Mr Busch told them that he had cancelled the tours because he was not getting anything out of them. Although he denies it, I accept that this was in fact part of his reason for acting as he did. For an employee to take action which is contrary to his employer's interests without good cause is clearly a breach of his obligations.

[33] The difficulty is that in the winter of 2008 there were several other matters standing in the way of the interactive tours. The evidence of Mr Busch, the relevant MAF reports and even the evidence of Mr Holland himself all combine to cast serious doubt on the assertion that that the Park could have safely offered interactive tours between May and December of that year.

[34] Mr Holland acknowledged that when he took over as licensed operator he had concerns which he addressed before MAF approval was sought to restart the interactive tours. Important changes were made to the protocols for the tours before this approval was given. Even then, as it turned out, the tours ran for a relatively brief period before stopping once more upon the tragic fatality at the Park in 2009.

[35] I conclude that those same matters (if not others also) needed to be addressed during the period in question (May to October of the same year.) Unless and until they were, it was not consistent with the obligations of a licensed operator for tours to be authorised.

[36] It could of course be argued that Mr Busch was in breach of his obligations to his employer by failing to put in place the changes required for interactive tours to go ahead. However, by May 2008 Mr Busch no longer had full authority at the Park and was unable to action even relatively minor changes of the sort Mr Holland put in place in December. From May Mr Busch could not be held responsible for the management of the Park or for failing to implement arrangements that would have enabled tours to go ahead.

[37] I have come to the conclusion that it was more likely than not the right decision to stop the tours even if it was (at least in part) for ulterior motives. Counterclaim applicant witnesses all conceded that the licensed operator was entitled to cancel tours if there was a valid reason to do so. It follows that there can be no question of liability for the cancellation. The counterclaim applicant's claim for damages fails.

(ii) Bandsaw

[38] The Authority's determination of 4 November 2009 contained the following:

“[68] Item [44E]⁵ is a Bandsaw. An item of this description is listed in the depreciation schedules [of the group of companies operating the Park] from 2005 onwards. ZWGL staff members told the Authority that the original bandsaw was damaged and CDL made an insurance claim in relation to it, whereupon its insurers arranged for credit at a local retailer where the replacement item was to be obtained. Mr Busch does not deny that he used the credit and uplifted a new bandsaw from the retailer. He retained it for his own use before selling it and keeping the proceeds. Mr Busch's evidence was that the original bandsaw was his and so therefore was the replacement item however it is not in dispute that the claim was made under a policy which

⁵ All references to item numbers are as set out in Schedule B.

covered [the group of companies operating the Park] but not Mr Busch or any other individuals.

*[69] The evidence supports a finding that Mr Busch took a bandsaw that was in fact the property of CDL.⁶ However given Mr Busch's evidence that he had now sold it and used the proceeds, an order for compliance would have no practical effect. **In the circumstances, I decline to order compliance and note that the breach will be capable of being remedied by damages, to be set out in a subsequent determination.***

[39] The counterclaim applicant has provided evidence of the replacement value paid by the insurance company for the bandsaw that had been damaged. I am satisfied that the insurer paid the amount of \$10,657.78 for it to be replaced.

[40] Although, as set out in the determination of 4 November 2008, CDL is the rightful owner of the bandsaw (and the money paid by the insurance company) ZWGL submits that:

“In accordance with the established principles of bailment the counterclaim applicant is the appropriate entity to claim damages in respect of the bandsaw being the bailee of the item.”

[41] I was not provided with full argument or authorities to support this assertion. However, Counsel for ZWGL had advised that where relevant they had instructions not just from the counterclaim applicant but also from CDL and the other companies involved in the running of the Park. In other words, CDL supported payment of the relevant damages to ZWGL in the first instance.

[42] **On that basis I am satisfied that Mr Busch should pay damages of \$10,657.78 to ZWGL in respect of the bandsaw.**

⁶ Country Developments Limited, one of the group of companies which operated the Park.

(iii) Hire and replacement of other equipment

[43] There can be no question that Mr Busch breached his obligations towards his employer by withholding property that should rightfully have been in the possession of ZWGL. I am satisfied that damages should be awarded for loss of use where invoices support the claims about the costs incurred. The Authority was supplied with invoices relating to expenses the Park incurred in replacing missing equipment and materials during the period before compliance orders were made in November 2009. On the basis of these invoices, the totals claimed were:

Equipment hire	\$8,216.83
Assets replaced	\$7,073.69
Cost of materials	\$4,006.74

[44] However these figures were based on costs associated with loss of the use of the original list of items which the counterclaim applicant sought to have returned. Orders were not made in respect of the full list.

[45] Damages are potentially available in respect of:

- (i) loss of use of items for which orders were made (listed in Schedule B), and
- (ii) one additional item: the digger. There is no dispute that the digger was returned to the counterclaim applicant but not until costs had been incurred for hire of a replacement.

[46] The following damages are therefore due to ZWGL. References are to numbering on Schedule B. All figures are GST inclusive:

Item	Invoiced cost of equipment hire
3 and 4 (trailers)	\$223.36
8A (excavation equipment)	\$6,029.00
36 (ladder)	\$158.25

Item	Invoiced cost of replacement
16 (Chainsaw)	\$1,331.56
27 (Laser Level)	\$1,279.11
31 (Compressor)	\$333.33
37 (Hoop brackets)	\$1,076.04
42 (Pole brackets)	\$311.50

[47] **Total damages payable for costs associated with loss of the use of items set out on Schedule B are therefore: \$10, 742.15**

(iv) Security expenses

[48] The counterclaim applicant alleges that even before May 2008 Mr Busch behaved in ways that intimidated and threatened Park staff, including Mrs Busch. It was the evidence of counterclaim applicant witnesses that he was prone to irrational, unpredictable and aggressive behaviour. As well, towards the end of May, Mr Busch entered the office area and despite protests from the administrative worker present, removed files such as animal records which he later refused to return.

[49] None of this was raised with him as an employment issue. Instead, following the incident in which Mr Busch uplifted records, fulltime security was engaged. At night a guard was stationed outside Mrs Busch's home to protect her when she was sleeping. During the day a guard was stationed outside the enclosure where materials were stored to ensure that items there were not removed. Witnesses for the Park told me that although the park had always had some security expenses it had never engaged security guards before 2008.

[50] The same witnesses also deposed that to maintain internal security at the Park during 2008 it was necessary for locks to be replaced and cameras installed. This they said was in response to Mr Busch having taken items that should have remained in the possession of ZWGL. Total damages of \$96,378.50 were claimed (for locks, cameras and guards) with invoices produced in support.

[51] Submissions made on Mr Busch's behalf in respect of this issue were very brief. It was argued first, that the counterclaim applicant over stated concerns about threats of violence and intimidation. Secondly, it was asserted that:

“Security was in fact engaged to keep Mr Busch from accessing company records. It is telling that the incident that seems to have been the catalyst for engaging security guards was Mr Busch's attempt to retrieve records from Mrs Busch's office. Mr Busch considers that pursuant to the terms of the 2006⁷ agreement he had a right to access certain company information and that security was engaged to prevent that access.”

Determination

[52] As previously recorded in earlier determinations, I am satisfied that some staff at the Park genuinely felt unsafe in Mr Busch's presence. However some witnesses who had worked with him for some time had long held the view that he was volatile and aggressive. The fact of his previous conviction for a violent offence had also been in the public domain well before the events of May 2008.

[53] Because of this I am not persuaded that the principle reason for engaging security at the time in question was to protect or reassure other staff during the working day. I conclude that security services were engaged to make Mrs Busch feel more secure at night when she was alone in her home (not an employment related matter) and in response to Mr Busch having removed animal records (records which the licensed operator needed access to.)

[54] As for the locks and cameras it was acknowledged by witnesses for the park that this was not the first time expenses of this type had been incurred. I was not satisfied that the level of expenditure was beyond what might have been incurred in the normal course of events.

⁷ The “2006 agreement” sets out terms surrounding Mrs Busch acquiring a controlling interest in the Park.

[55] I am not satisfied, therefore, that the security costs were damages arising out of a breach of the employment agreement. That claim for damages fails.

(v) Match photographers

[56] There is no dispute that Match Photographers were given permission to photograph lions at the Park nor that the shoot proceeded with Mr Busch liaising with the photographers as necessary on the day. He then presented Match Photographers with an invoice in his name and received payment of \$3,712.50 (GST inclusive.) Mr Busch does not deny retaining this payment but says he used it to purchase items for the Park.

[57] Mrs Busch says that permission to photograph the lions was given in consideration of a fee to be paid to the Park, not Mr Busch, and he was never authorised to take receipt of the payment or to utilise it for any expenditure in the Park. For their part Match Photographers have declined to pay anything more or to have any further involvement in the matter. ZWGL therefore claims damages of **\$3,712.50** in respect of the Match Photographers' fee.

[58] I am satisfied that the fee from Match Photographers was due to the counterclaim applicant, not to Mr Busch personally, and that he was not authorised to take receipt of that fee. He was in breach of his duties by retaining it. The counterclaim applicant has established that Mr Busch owes damages of **\$3,712.50**.

(vi) Interest

[59] The recently amended clause 11 of Schedule 2 of the Employment Relations Act provides as follows:

“Power to award interest

(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgement is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or any part of the money for the whole or any part of

the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.”

[60] The Authority thus has a discretion to order interest on the damages at the prescribed rate, which is 8.4% per annum.

[61] The causes of action for which damages have been awarded in this determination did not all arise on the same date. The Authority was provided with evidence as to when the causes of action arose in respect of the Match Photographers' payment (20 May 2008) and in respect of the bandsaw (4 June 2008.) This evidence is accepted as is the proposition that interest should accrue from the date each cause of action arose.

[62] In respect of cost of replacement of items on Schedule B, it is accepted that most straightforward approach (as suggested by ZWGL) is for interest to accrue from the date of Mr Busch's dismissal (3 November 2008.)

(vii) Penalties

[63] As indicated earlier in this determination, ZWGL seeks penalties in respect of Mr Busch's breaches of the implied terms of his employment agreement.

[64] No reasonable explanation has been put forward by Mr Busch for his appropriation of the payments in respect of either the bandsaw or the visit by Match Photographers. I am satisfied that these actions were deliberate and that they amount to serious breaches of his employment obligations. Had it been open to me to do so, I would have had no hesitation in awarding penalties of \$5,000.00 in respect of each of these breaches and would furthermore have ordered that these penalties be payable directly to ZWGL. However, it is not open to the Authority to do so, for the following reasons.

[65] ZWGL first lodged a counterclaim against Mr Busch on 1 April 2009. This was set out in the first Statement in Reply to Mr Busch's personal grievance claim. That claim related to the loss of revenue from the cancellation of the interactive tours, loss of use of various items, and the costs of security. Damages were the only form of

relief sought and full particulars were not provided of the items which were alleged to have been taken. There was no mention, in that Reply, of the Match Photographers' payment.

[66] On 15 July 2009 the counterclaim applicant lodged an amended Statement in Reply which provided further particulars of the items which were alleged to have been misappropriated. It also introduced claims for compliance orders and for penalties. There was still no mention of the claim for the Match Photographers' payment.

[67] On 29 September 2009 a second amended Statement in Reply was received with yet more particulars of missing items and also with particulars of the alleged breach relating to the Match Photographers payment.

[68] Although the Authority may impose a penalty upon an employee who had breached an implied term of his or her agreement⁸ claims for the recovery of penalties are time limited as set out in section 135 (5) of the Employment Relations Act 2000:

“An action for the recovery of a penalty under this Act must be commenced within 12 months after the earlier of—

(a) the date when the cause of action first became known to the person bringing the action; or

(b) the date when the cause of action should reasonably have become known to the person bringing the action.”

[69] As described in paragraph [61] above, the cause of action in respect of the Match Photographers arose on 20 May 2008. A penalty was not sought in respect of that breach until September 2009, outside the 12 month time limit. The cause of action in respect of the bandsaw arose on 4 June 2008 but a penalty was not sought until July 2009. Again this is outside the 12 month time limit.

[70] Although there has been some suggestion from the Court⁹ to the effect that a discretion might be exercised to extend the time limit in section 135 ZWGL did not

⁸ *Panel Holdings Ltd v Paki* 3/8/07, ERA Auckland AA232/07

raise this argument. The claims for penalties in respect of the Match Photographers' payment and the bandsaw must therefore fail.

[71] As set out in paragraph [62] it has already been accepted that interest on damages in relation to items which were appropriated should accrue from the date of dismissal (November 2008.) However, this does not necessarily mean that the several causes of action in respect of the misappropriation arose on that date. Tools, vehicles, equipment and materials were taken at various times during 2008. Some have been returned and some have not, and issues may remain even now regarding whether Mr Busch has fully complied with the orders for the return of items set out in Schedule B.

[72] Those issues led to the decision to reserve the question of further damages. In the same way and for the same reasons the question of penalties is reserved in respect of the breaches associated with the appropriation of tools materials and equipment.

(viii) Summary of orders

[73] Mr Busch is now ordered to pay to the counterclaim applicant, ZWGL, the following sums as damages for breach of implied terms of the employment agreement:

- (i) **\$10,742.15** damages for loss of use of items set out in paragraph [44], plus interest at **8.4%** per annum from **3 November 2008** until the date of payment;
- (ii) **\$3,712.50** damages in respect of the Match photographers' payment, plus interest at **8.4%** per annum from **20 May 2008** until the date of payment, and
- (iii) **\$10,657.78** damages in respect of the bandsaw plus interest at **8.4%** per annum from **4 June 2008** until the date of payment.

⁹ *NZ Timber Industry IOUW v FL Anderson Ltd* [1989] 3 NZILR

(ix) Costs

[74] The question of costs is reserved along with the questions relating to further damages and penalties in respect of ongoing loss of use of items on Schedule B.

Yvonne Oldfield

Member of the Employment Relations Authority