

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 38
5341920

BETWEEN

DAVID JOHN PAYNE
Applicant

A N D

STRAVON SAFARIS
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Charlotte Clifford with Jessica Shaw, Counsel for
Applicant
Scott Wilson, Counsel for Respondent

Investigation Meeting: 13 and 14 August 2012 at Timaru

Submissions Received: 15 November 2012 from Applicant
15 November and 26 November 2012 from Respondent

Date of Determination: 22 February 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Payne) makes a significant number of claims against his former employer the respondent (Stravon). He alleges that he was unjustifiably dismissed from his employment, unjustifiably disadvantaged, that there were unlawful deductions made from his pay, that there are certain sums in the nature of reimbursing payments which have not been made, that there are breaches of express and implied terms of the employment agreement, breaches of statutory obligations, together with outstanding annual holiday and statutory holiday pay.

[2] Stravon resist all of Mr Payne's claims. In relation to the claim for outstanding leave payments, Stravon disputes quantum and pleads a set-off.

[3] There are also counterclaims advanced by Stravon against Mr Payne. Essentially, these concern two discrete issues, one relating to the unexpected deaths of certain deer, the property of Stravon, and the other relating to the sale of cast antlers by Mr Payne. There are also some minor claims brought by Stravon against Mr Payne in the nature of reimbursing claims for payments previously made by Stravon on behalf of Mr Payne.

[4] Mr Payne was employed as a game keeper farm manager on Stravon's South Canterbury property from 14 January 2005 until June 2011.

[5] The initial relationship between Mr Payne and the principal of Stravon Mr Todd Stewart was initially very good and for the bulk of the employment relationship, the two men seemed to have got on very well indeed.

[6] The salary for the position initially was \$35,000 per annum but this was increased from 1 June 2006 to \$45,000 per annum and it was that salary which applied for the balance of the employment.

[7] According to Mr Payne in about September 2010, he requested a pay slip and his evidence is that he was shocked to discover that he did not appear to be receiving what he thought he was entitled to.

[8] Mr Payne raised the matter with Mr Stewart and was asked to meet the office administrator in Christchurch. The administration of Stravon was attended to by a company called Masthead Holdings Limited (Masthead) and it was this company that was responsible for Stravon's payroll.

[9] There were two aspects of Mr Payne's pay which apparently troubled him; one was the treatment of an accommodation benefit and the other was a charge for electricity.

[10] At the meeting at Masthead just referred to, Mr Payne also sought leave records relating to his service and was told that they were not held by Masthead. He was referred back to Mr Stewart.

[11] When Mr Payne subsequently spoke with Mr Stewart and asked him to cease the *unauthorised* deductions from his salary, Mr Payne says that the relationship deteriorated and issues relating to annual leave entitlements also became

problematical. Stravon's expectation was that Mr Payne would keep those records as he was a sole charge manager and really the only person who could reasonably maintain that information.

[12] Stravon's evidence is that from early 2011, it was considering the structure of the business and in particular a transition from an ordinary farm operation to a hunting and guiding operation. Amongst other things, one of the considerations with that new kind of business was the effect of the Health and Safety in Employment (Adventure Activities) Regulations 2011 which required that hunting and guiding activities were registered and submitted themselves to safety audits. Stravon also had to consider its staffing requirements for the new business.

[13] Mr Stewart's evidence is that he spoke with Mr Payne on a number of occasions about the proposed change, the first such discussion happening on 29 March 2011, and that the thrust of those discussions was to try to interest Mr Payne in taking an enlarged role in the new structure. Stravon had become convinced that Mr Payne's existing role would need to be disestablished. Mr Payne does not accept that these discussions took place while Mr Stewart is adamant they did.

[14] The short point is that, having failed to interest Mr Payne in one of the opportunities within the new structure, and in the context of a number of intimations from Mr Payne that he would resign, Stravon confirmed to Mr Payne that his position would be disestablished and, given his refusal to consider appointment to one of the alternative positions, he would cease employment. Those particulars were conveyed to Mr Payne by letter dated 20 May 2011.

[15] Also in the course of that letter, Mr Stewart for Stravon encouraged Mr Payne to set out the details of his various claims relating to pay and the like, so that Stravon could address and resolve those matters.

[16] Mr Payne then raised a personal grievance by letter dated 29 May 2011 and Mr Payne continued to work out his notice down to 3 June 2011 at which point he was placed on garden leave for the balance of his one month's notice of redundancy.

[17] On 2 June 2011, Mr Payne had to move a mob of fallow deer from the breeding units to an area called "A Block". The manner in which he attended to that task, according to Stravon, caused a significant number of the deer to perish and

Stravon hold Mr Payne responsible for that loss. Stravon decided that it would be best if Mr Payne did not serve out the balance of his notice.

[18] Stravon say that on 13 August 2011, after the employment relationship had come to an end, they discovered that Mr Payne had been collecting and selling cast antlers and then pocketing the proceeds. Mr Payne acknowledges that this happened but said that he had Mr Stewart's specific permission, which Mr Stewart emphatically denies.

[19] Moreover, Stravon maintain that Mr Payne was responsible for the loss of six trophy stags during the period February to May 2011.

[20] Further, Stravon claim unpaid telephone expenses, flight expenses, and internet expenses, all incurred by Mr Payne and not reimbursed to Stravon as was required. In addition, Stravon complain Mr Payne damaged the chimney of the house he was provided with by shooting a shotgun into it. Mr Payne says that he did this to discourage starlings that were nesting there and that he had Mr Stewart's authority to do so, a claim Mr Stewart denies.

Issues

[21] There are a raft of issues for the Authority to determine in this matter and it would be convenient to deal with them in order.

[22] On that basis then, the Authority proposes to examine the following questions:

- (a) Was Mr Payne unjustifiably dismissed?
- (b) Were there unlawful deductions from Mr Payne's salary?
- (c) Are there irregularities in respect to Mr Payne's annual leave provision?
- (d) As a consequence of the foregoing considerations, has Mr Payne suffered an unjustified disadvantage?
- (e) Is Mr Payne liable for the loss of the nine fallow deer?
- (f) Is Mr Payne liable for the loss of the six stags?

- (g) Ought Mr Payne reimburse Stravon for the proceeds of the cast antlers?
- (h) Ought Mr Payne reimburse Stravon for telephone costs, airfares, and internet costs?
- (i) Ought Mr Payne pay a penalty to Stravon for breaches of the duty of good faith?

Was Mr Payne unjustifiably dismissed?

[23] The Authority is satisfied on the evidence it heard that Mr Payne was not unjustifiably dismissed from his employment. The Authority is satisfied that the evidence discloses a clear pattern by Stravon over a period of months to transition the farm business to a hunting and guiding facility. The law is clear that an employer is entitled to change the nature of its business so as to better use its assets or capital. What the law does not allow is for an employer, in pursuit of those legitimate business endeavours, to ignore its obligations of treating its employees fairly and justly.

[24] On the fundamental question about the reason for the ultimate redundancy of Mr Payne's position as farm manager game keeper, the Authority is simply not persuaded that there is any malice associated with the decision to remove that position or even any mixed motive, as is submitted on Mr Payne's behalf by his counsel.

[25] The evidence the Authority heard is as plain as can be that Stravon have for some years been contemplating the transition to a tourist business from a farming business and that conception had been in existence, in embryo, right from the purchase of the farm property in 2005.

[26] Certainly, on and from the beginning of calendar year 2011, the prospects of rapidly transiting from a farming operation to a tourist operation, came into sharp focus and the Authority accepts the evidence of Mr Stewart in that regard. Even Mr Payne himself seems to acknowledge in his brief of evidence (para.61) that the purchase and subsequent development of the property was for the purposes of a *tourist operation*. Indeed, Mr Payne, having made that very point, goes on to say ... *indeed that was the whole point* meaning that the tourism aspect was the whole point of the venture.

[27] In those circumstances then where there is explicit evidence (which the Authority accepts without reservation) from Stravon, and corroborative evidence from the applicant himself, that the very purpose of the venture was a tourist hunting and guiding facility, it is difficult to find a fulcrum on which to ground Mr Payne's contention that there was something sinister about the ultimate dis-establishment of his position.

[28] As His Honour the Chief Judge said in the leading case of *Simpson Farms Limited v. Aberhart* [2006] ERNZ 825:

So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court

[29] The evidence the Authority heard was that the transition from a farming operation to the tourist operation was a relatively slow process incorporating as it did a response by Stravon to a new regulatory framework created by the Health and Safety in Employment (Adventure Activities) Regulations 2011, which would apply to the proposed tourism venture as well as prospective changes to staffing.

[30] In that latter regard, Stravon had incorporated the operation of a taxidermy business into the property with effect from January 2011. The taxidermy business was operated as a separate entity but it was run as a *complimentary business* from the Stravon property.

[31] As well as developing the facility offered to hunters and guided parties, many of which come from overseas, Stravon also spent money on improving the infrastructure, planting native trees and shrubs, and undertaking an extensive deer breeding programme.

[32] As part of the remodelling of Stravon for the growth of the tourism side of the business, it was necessary to review the extent of the duties performed by Mr Payne in his role as the farm manager/game keeper.

[33] The evidence the Authority heard discloses that Mr Stewart decided:

That what Stravon needed was a position that assumed responsibility for the running of the farm as well as assuming responsibility for the regulatory requirements (including implementation of the new policies and ensuring compliance) and also had more of a role in the tourism side of the business, particularly during the hunting season. I

envisage that this new role would encompass the duties and responsibilities performed by Dale (Mr Payne). In other words a new larger role than Dale had carried out.

[34] Not only was Stravon considering a new role, which effectively incorporated Mr Payne's existing role, but it also was actively seeking to have Mr Payne take on the additional responsibilities. Despite Mr Payne's contrary evidence (which the Authority found difficult to believe) Stravon wanted Mr Payne in the new structure and wanted him particularly for the role just described. Mr Stewart's evidence is explicit on the point and his evidence, unlike Mr Payne's, was inherently credible.

[35] While Mr Payne maintained there were never discussions between himself and Mr Stewart about the proposed restructure, Mr Stewart gives evidence of no less than four such discussions and the Authority prefers his evidence to the evidence provided by Mr Payne. Mr Stewart's evidence is that he produced a proposed new employment agreement, reflecting the new arrangements, and that he discussed the proposed new position with Mr Payne for the first time on 29 March 2011. Mr Stewart left a copy of the proposed new agreement with Mr Payne. Mr Payne acknowledges that he was given a new agreement in March 2011 but his evidence completely overlooks the significance of the new agreement and the context in which it was presented despite his complaint in his evidence that his job description ... *had increased from half a page in the 2006 agreement to four and a half pages ...* .

[36] In answer to a question from the Authority, Mr Payne maintained that what was being discussed with Mr Stewart was no more and no less than *the same contract with more work* and that *the discussions were about the new employment agreement and not about restructuring*.

[37] But this evidence flies in the face of the terms of the new job description which is absolutely consistent with Mr Stewart's oral evidence about the fundamental changes that were being made in the structure and importance of the position. The Authority accepts without reservation Mr Payne's evidence that he is dyslexic and not able to read and write well but it is clear from the case that he put before the Authority that he is not without ability and/or support people to assist him, when necessary.

[38] For those reasons, the Authority is not persuaded by Mr Payne's evidence that all that was being discussed, as he understood it, was a new agreement with a whole lot more work. If Mr Payne had had difficulty in understanding what was being

proposed, he could have obtained advice, which he did to file his pleadings in the Authority, or he could have sought further assistance from Mr Stewart.

[39] Certainly, Mr Stewart's evidence is that he explained the new role to Mr Payne carefully, and the Authority accepts that evidence.

[40] What is more, it is consistent with subsequent evidence which suggest that Mr Payne was concerned about the extent of the health and safety aspects of the new role. It seems that in a telephone discussion between the two men on 12 August 2011, Mr Payne made his first suggestion that he would resign and according to Mr Stewart there was a further conversation between the two men on 13 April at which Mr Payne again confirmed his intention to leave, indicating that he would stay until the end of July. The following day, on Mr Stewart's evidence, Mr Payne indicated that he would have a resignation letter typed up and that he would go to Timaru to get this done.

[41] Then on 15 April 2011, Mr Payne provided detailed written comments on the draft employment agreement. While Mr Payne was keen for the Authority to accept that he had difficulty reading and writing, there is absolutely nothing about these comments from Mr Payne which suggest any inability to reason or indeed any lack of clarity in thinking at all. The Authority accepts that these observations may have been prepared with the assistance of someone else but there can be little doubt that Mr Payne was himself intimately involved in their preparation.

[42] As well as giving the lie to his claim that he had difficulty understanding documents that were put in front of him, it also casts doubt over his claim that he knew nothing about the proposed restructure. If he knew nothing about the proposed restructure, it is difficult to see how he could have confidently engaged with his employer about the details of the proposed new employment agreement the terms of which are about the proposed new position consequent upon the restructure.

[43] Later that same day, 15 April 2011, Mr Stewart's evidence is that he had a further discussion with Mr Payne and that he got the very clear impression from that discussion that Mr Payne was not really interested in the new position.

[44] Mr Stewart says that that observation prompted a discussion about whether Mr Payne might be interested in other roles within the restructured organisation, perhaps living off site in Timaru but that that alternative did not seem to have any attraction for him either.

[45] It follows from the foregoing observations that the Authority is persuaded by the evidence from Stravon particularly that it went to considerable lengths to try to interest Mr Payne in a continuing role. First of all, it sought to have him consider the larger role that was now contemplated because of the structural changes being made to the business and when it became apparent by mid April 2011 that Mr Payne was simply not interested in that enlarged role, Stravon sought to interest him in an alternative role at a lesser level. Again, Mr Payne could not be interested in that proposal.

[46] Certainly, the Authority thinks Mr Payne's behaviour during this period is contradictory. In his written brief of evidence for example, he denies telling Mr Stewart *that I intended to resign* (para.67) but in his oral evidence to the Authority he agreed to the proposition from the Authority that *he did originally say he would resign* and that *I did say I would leave at the end of the season*. But those oral admissions are absolutely consistent with Mr Stewart's own evidence that Mr Payne made a number of statements indicating his willingness to finish up.

[47] Nonetheless, the fact that Mr Payne then submitted an extensive commentary on the changes that he sought to the proposed employment agreement for the new position does not seem consistent with his previous intimations that he would resign but it may be that he was simply uncertain about his position and perhaps was being encouraged by an informal adviser not to throw away an existing opportunity.

[48] In any event, the Authority is absolutely satisfied that Mr Payne knew or ought to have known that his position as set out in the employment agreement and job description he signed with Stravon on 12 September 2006 was being disestablished and replaced with a new role which Stravon was keen for him to fulfil.

[49] In the result, Mr Payne was clear that he would not accept the new role, equally clear that he would not accept an alternative role within the new structure and by the end of April 2011, it became evident to Stravon. Mr Stewart refers to a discussion he had with Mr Payne on 9 May 2011 at which Mr Stewart says that Mr Payne said that he no interest in the new position, would not agree to the new agreement and Mr Payne then went on a period of sick leave certified by a doctor and there was no further discussion between the two protagonists about the intended restructure.

[50] The Authority is satisfied that the requirements of consultation were met by the process the parties undertook. The Authority does not accept Mr Payne's evidence that there was no discussion. In his oral evidence to the Authority, Mr Payne resiles somewhat from his earlier contention that there had been no consultation and said that Mr Stewart *did not sit down with me at a desk* but talked to him when he was working. In the particular circumstances of this case, that sort of approach does not seem unusual. Both Mr Stewart and Mr Payne are practical men and the notion of them sitting down on either side of a desk does not fit well with the persona of either of them.

[51] The legal requirements of consultation do not require parties to sit on either side of a desk; what they require is for there to be genuine communication about what is going on and genuine engagement between the parties.

[52] In the particular circumstances of this case, the Authority is satisfied that Mr Stewart initiated a number of discussions with Mr Payne about the proposed new position, did everything in his power to get Mr Payne to take that position and when Mr Payne clearly rejected it finally, Mr Stewart even suggested another alternative kind of position to see if he could retain Mr Payne as an employee of Stravon.

[53] Not only did Mr Stewart initiate those discussions but he also provided Mr Payne with a written employment agreement together with a draft job description setting out the proposed new arrangements. Mr Payne responded to that in writing and the evidence is that Mr Stewart then responded to Mr Payne's proposals.

[54] It is true that Mr Stewart refused Mr Payne's request that the new position be waged rather than salaried. Mr Payne was anxious to return to a waged payment basis particularly in respect to penal time and the like. The Authority is not persuaded that in refusing that suggestion, Mr Stewart was doing anything other than he was legally entitled to do. Consultation does not require agreement.

[55] Having established that Mr Payne was not interested in either of the positions offered, the Authority is satisfied that it was available to Stravon to terminate Mr Payne's services for redundancy and that that termination was not an unjustified one. The Authority is not persuaded that there was anything improper in the genuineness of the redundancy, nor that there were any failures that went to the heart of the matter in terms of the consultation undertaken by Stravon. Indeed, the

Authority is satisfied that Stravon went further than they absolutely had to at law to endeavour to retain Mr Payne's services.

Were there unlawful deductions from Mr Payne's salary?

[56] There are two issues to be dealt with under this head. The first is the question of whether there was an unlawful deduction in respect to the payment of electricity charges and the second was whether there was an unlawful deduction in relation to accommodation.

[57] Dealing with the electricity issue first, it is common ground that at the beginning of the employment relationship, Mr Payne agreed to a contribution of \$100 per month to the electricity bill for the house that he was provided with on the Stravon property. This was because Mr Payne's then wife was running an electric fence around horses belonging to her and the power used for that purpose was not considered to be domestic use.

[58] Initially the payments were made by cheque but latterly there was an agreed deduction.

[59] The Authority was provided with copies of letters written on behalf of Stravon dated respectively 8 June 2006 and 21 July 2006. The thrust of the first letter just referred to was to provide Mr Payne with a summary of the electricity payments made to date. The second letter which enclosed Mr Payne's new employment agreement for his signature reflecting the \$10,000 increase in his salary that had been agreed to between the parties.

[60] Relevantly in terms of the electricity issue, the following two paragraphs refer:

As advised in my last letter, (that is the letter of 8 June 2006), you have currently paid power up to the end of April 2006. I will deduct power for May, June and July from this payment?

When we amend our weekly automatic payment for your salary we will also deduct a weekly amount to cover the \$100 per month for power so that we will no longer have to keep a track of where we are at with these payments.

I hope this is all clear Dale. Please give me a call at the office if there is anything that you would like to discuss.

[61] Stravon say (and the Authority accepts) that there was never any approach from Mr Payne at that time in respect to those arrangements and the subsequent deduction to his weekly pay commenced in August 2006 without any response from Mr Payne. Stravon say that that deduction continued unchallenged until October 2010 when Mr Payne complained about it.

[62] Notwithstanding the fact that in the latter part of the employment relationship, Mr Payne and his wife had separated and accordingly her horses were no longer contributing to the extra power used, Stravon maintain that Mr Payne's other activities continued to use excessive electricity over and above normal domestic use. Amongst other things, Mr Payne bred dogs and ran a mob of sheep as well as having his own horse. He paid no grazing fee for any of his animals but Stravon maintained it was always the agreement that he would continue to contribute to the additional electricity cost in the manner just discussed.

[63] Mr Payne maintains that on and from the point at which the second employment agreement was signed (July 2006) the requirement for him to make a contribution to electricity usage ceased. This was because he says that his marriage had by that time come to an end and his wife's equine business had accordingly ceased to make any draw on electricity usage.

[64] But that evidence ignores the other aspects of Mr Payne's use of electricity around his house which is relied upon by Stravon and completely ignores the documentary evidence before the Authority which confirms that, as the Authority has just noted, when the 2006 employment agreement was presented for signature, it came with a covering letter referring specifically to the arrangements continuing for a contribution to electricity usage.

[65] Given that Mr Payne provided no other evidence to support his contention that the electricity arrangement had come to an end, the Authority has no hesitation in concluding that the evidence provided by Stravon is to be preferred.

[66] The second aspect which Mr Payne complained about was the arrangement in respect to accommodation. In that latter regard, the Authority has been presented with expert evidence from two witnesses concerning the appropriate treatment of the so-called accommodation benefit. The short point is that, as a matter of tax law, where, as in this case, employment is offered on the footing that accommodation is provided

by the employer as part of the employee's employment package, the value of that accommodation benefit, as it is called in tax law, is required to be declared for the purposes of tax on income. The rationale for this rule of law is obvious; an employee who is not provided with such a benefit must fund his accommodation needs from his taxable income and it would be unfair and unjust to treat workers who have the benefit of accommodation as part of their employment as not being required to declare the value of that benefit for the purposes of the payment of tax.

[67] Evidence from Peter McPherson a Chartered Accountant practising in South Canterbury was in the following terms on this aspect:

An employer is legally obligated to deduct PAYE on income paid to an employee and the market value of an accommodation benefit is to be treated as income. Accordingly, an employer must deduct PAYE on an accommodation benefit, therefore reducing the net wage received by the employee.

[68] However, Mr McPherson goes on to say that in his experience what most farming clients of his practice do is then *gross up* the employee's salary to compensate for the extra tax paid.

[69] However, Stravon did not do that and the Authority is satisfied that it was under no legal obligation to do it. There is no rule of law which requires the grossing up of payments in the way just referred to even if it is, as Mr McPherson maintains, a common practice. That assessment is confirmed by the evidence of Ms Tania Reid a legal practitioner called on behalf of the employer to give evidence. Ms Reid is employed by the same firm as counsel for Stravon but her speciality is tax. Her evidence, given by affidavit, is in similar terms to Mr McPherson's but she makes the point, as the Authority has just done, that *there is no requirement under tax law for an employer to gross up the value of an accommodation benefit provided to an employee to cover the PAYE deduction.*

[70] Ms Reid provides working examples of the effect of these tax arrangements. In practical terms a salary of \$45,000 produces a gross weekly pay of \$865.38. The accommodation benefit is sized at \$80 a week and so those two figures are aggregated to produce a total gross amount of \$945.38 per week which is the amount that Mr Payne would have paid his weekly tax on.

[71] The Authority is satisfied from the foregoing analysis that Mr Payne has not suffered any unlawful deductions from his salary. In respect to the electricity position, the Authority is satisfied that there was an agreement that he contribute to electricity usage and that continued throughout the employment notwithstanding his contention that it was somehow changed in 2006 despite the absence of any evidence to suggest that change.

[72] In relation to the accommodation benefit, all Stravon were doing was applying the law. It might be that they were a little ungenerous in not grossing up the effect of the accommodation benefit, as the Authority is satisfied many employers do in similar circumstances, but they were not under any legal obligation to do so. Mr Payne presented as an experienced farm manager and the Authority would be surprised if he had not been subjected to this kind of arrangement in previous employment. Had he wanted to ensure that payment was added to effect the grossing up of the tax cost, he could have made such a claim at the beginning of the employment.

Has Mr Payne suffered any disadvantage by unjustified action ?

[73] Although not specifically pleaded with any clarity, the Authority's understanding of Mr Payne's claim is that his allegation of unjustified disadvantage proceeds on the footing that he has suffered these unlawful deductions just discussed. Given the Authority's explicit rejection of those claims, the allegation of unjustified disadvantage must fall away.

Are there irregularities in respect to annual leave?

[74] The practical reality here is that the only person who could maintain any record of annual and statutory holiday leave taken was Mr Payne himself. He worked autonomously in a remote farm location and was not subjected to day-to-day supervision in any way. When Mr Payne inquired of Masthead about Stravon's records in respect to his annual and statutory holiday leave, Masthead indicated that Stravon imagined that Mr Payne kept his own records.

[75] In fact, it appears that, contrary to Stravon's requirements, Mr Payne did not always notify Masthead of time taken for annual or holiday leave.

[76] In respect to work on statutory holidays, the relevant provision in the employment agreement is explicit. In essence it provides that there is to be no work

performed on a statutory holiday without Stravon's consent. Stravon say in their evidence that no consent was ever given for Mr Payne to work on a public holiday.

[77] Mr Stewart thought that Mr Payne was making appropriate applications for annual leave to Masthead as he was required to do. Mr Stewart spoke to Mr Payne about this and says that Mr Payne said he was doing this. But it is clear that he was not.

[78] Mr Payne says that the only holiday leave he took was when he returned to the United Kingdom to see his brothers. He says that it was extremely difficult for him to take time off, because he was in sole charge, and that, amongst other things, he worked for at least a few hours on every public holiday. He told the Authority in his oral evidence that working with animals was a 24/7 operation and that animals did not ... *know it was a public holiday*.

[79] Stravon calculate that Mr Payne took at least 75 days annual leave during the employment while the calculations done for Mr Payne suggest that he worked seven days a week. Those calculations were done by Mr McPherson. He readily conceded in questioning from the Authority that the source of his information was Mr Payne. In the absence of any robust base information, it is difficult to place much reliance on either computation.

[80] What can be said unequivocally is that if there was no approval given to Mr Payne for any work to be performed on a statutory holiday, then he cannot be entitled to benefit from determining to work on those days. Mr Stewart has given evidence to the Authority that he was never asked to approve work on a statutory holiday. There is no evidence from Mr Payne to support his contention that he was required to work on a statutory holiday save for his bald assertion that, in effect, he was required to work every day. Not only is there no evidence that Mr Payne was required to work seven days a week (save his bare assertion) but there is also no evidence that he did actually work seven days a week.

[81] Mr Stewart accepted during the investigation meeting that during the rut (February to May) Mr Payne might well have had to work on some parts of seven days a week but for the balance of the year (from June to January) he would not have had to work even five days a week.

[82] That is the practical basis of Stravon's calculation that Mr Payne is entitled to 110 days annual leave for the whole of the employment. To derive what was owed to Mr Payne by way of annual leave, the 75 days it is said he took as annual leave over the employment must be deducted giving a leave owing figure of 35 days, together with the 8% of earnings calculation for the part year from 15 January 2011 to 20 June 2011.

[83] Certainly, this is a more generous formulation than Stravon's original calculation which was based on the argument that, because the employment agreement required formal permission to be granted before leave was accrued from one year to the next, the only annual leave to be paid out was leave for the final year of the employment.

[84] In essence, the Authority is presented with three separate calculations of Mr Payne's entitlement both to annual holiday leave and public holiday leave, one from Mr McPherson on behalf of Mr Payne, and two from Stravon. The first Stravon calculation is attached to a letter dated 13 June 2011 which Stravon sent to Mr Payne seeking to try to settle the dispute between the parties and apparently using Mr Payne's calculations of what he was entitled to for annual leave and holiday leave.

[85] The third computation, again from Stravon, is attached to the closing submissions filed by Stravon.

[86] In respect to annual leave, the Authority is inclined to prefer the second of those calculations, that is the one attached to the Stravon letter dated 13 June 2011. This apparently uses figures obtained by Stravon from Mr Payne himself and clearly, given that it is part of an offer to settle matters, was accepted by Stravon at that time anyway.

[87] The fundamental difficulty for the Authority is that there is no robustness in the underlying information. Mr Payne is quite right to remind the Authority, as he does, that in terms of s.81 of the Holidays Act 2003, Stravon is required to maintain a holiday and leave record for Mr Payne. It is apparent from the evidence before the Authority that it did not do so. Stravon blame Mr Payne. They say he was their manager on site and as he was not supervised on a day-to-day basis, he had an obligation to maintain the appropriate records in respect to his own activities. But there is nothing to suggest that Stravon required that, no paper trail, no

correspondence, no file notes to suggest that those requirements were made explicit. Nor is there anything in the employment agreement which would suggest that the onus was on Mr Payne to maintain those records.

[88] However, it is the case that it is common usage in the farming industry for the farm manager to maintain a working diary, in effect an operational diary, which ought to record day-to-day operational business but can also keep an accurate record of any time off which is taken.

[89] The Authority is satisfied that the law requires the employer to satisfy itself that there is an appropriate time and leave record in place and where there are employees working remotely, that obligation continues, notwithstanding its difficulty. Nothing in the present case suggests that Stravon ever turned their mind to the need to ensure that they had proper records of when Mr Payne was taking leave and when he was not.

[90] However, the fact that Stravon have been able to obtain the information they apparently have from Mr Payne and use for the purposes of calculation of what was owed to him pursuant to their letter of 13 June 2011, suggests to the Authority that that material, and the calculations that go with it, can be relied upon particularly when the Authority is told that that base information came from Mr Payne himself.

[91] The Authority is also reminded of s.18 of the Holidays Act 2003 which requires an employer to ensure that employees have the appropriate ability to take annual leave and other leave. Again, Stravon need to remember their obligations to ensure that employees, no matter how remote, have an opportunity to take their leave.

[92] In relation to the public holidays issue, the Authority prefers the calculation provided at Schedule A to the submissions filed on behalf of Stravon. That calculation rests on Mr Stewart's acceptance that, during part of the year (the rut) seven days a week work might be required but in the balance of the year it will not be required. In addition, it rests on evidence that Stravon held about certain public holidays which Mr Payne did not work.

[93] Because the Authority accepts the logic of Mr Stewart's position in respect to the effect of the seasons on working on public holidays and accepts his other evidence about when Mr Payne was not working on a public holiday, that summary is accepted by the Authority.

[94] Underpinning that acceptance is the contractual provision that the Authority has already referred to which requires permission from the employer before the employee works on a statutory holiday. Mr Stewart's evidence (which the Authority accepts) is that no such permission was ever sought, or granted. Mr Payne's evidence that this was an impractical provision is not accepted. If it was impractical, his obligation was to reject it before signing the agreement. But he signed the agreement with that provision in it and he was under an obligation to follow the terms of the agreement, as he was bound by it.

[95] For the avoidance of doubt, the Authority, rather than becoming immersed in the calculations, directs that counsel engage with a view to settling on the amounts due, in respect to annual leave using the computation attached to the letter of 13 June 2011, and in respect to statutory leave using the precepts set down in the schedule to Stravon's closing submissions.

[96] Leave is reserved for either party to revert to the Authority for orders if those discussions become protracted.

[97] The question of set-off raised by Stravon in relation to these sums will be dealt with in a subsequent section.

Is Mr Payne liable for the loss of the nine fallow deer?

[98] Mr Payne's duties, as identified in his employment agreement at clause 4 include an obligation to *honestly and diligently perform his duties and responsibilities* and to *use his best efforts to promote and protect the business, its reputation and goodwill*. In addition, there is an indemnity provision at clause 19 by which Mr Payne indemnifies Stravon for all costs, liabilities and expenses which it may incur because of *any unlawful, negligent, tortious, criminal, reckless or dishonest error, act or omission ...in the performance of (the employees) obligations under this agreement*.

[99] As a consequence of an incident at Stravon on 3 June 2011, nine fallow deer perished. Stravon, relying on the various clauses in the employment agreement just recited, together with a pleading of an implied duty of care seeks to recover from Mr Payne the value of the lost deer.

[100] The basic facts are also not in dispute. Mr Stewart spoke to Mr Payne about moving the deer concerned (there were 12 animals to be moved) from the breeding unit to Block A. This conversation, by common consent, took place in late May 2011.

[101] On the afternoon of 2 June 2011, Mr Stewart was mowing the grass around the homestead when Mr Payne rode past him on a quad bike and began trying to move the deer from the breeding unit up a laneway towards Block A.

[102] Mr Payne's evidence is that he told Mr Stewart that it would be *a difficult task* to move the fallow deer and asked essentially why it was necessary. He says Mr Stewart was insistent. Mr Payne's evidence was that it was best to move deer at dusk and that he endeavoured to prepare the ground work by ensuring that there were as few distractions as possible. It is common ground that deer are flighty creatures and fallow deer particularly so. Amongst other things, Mr Payne sought to ensure that Mr Drew, the taxidermist who worked from Stravon, and his family were not about, as they would have been a distraction.

[103] When Mr Stewart observed what was about to happen, he ceased mowing, turned the machine off and left the property.

[104] There is considerable factual dispute about the way in which Mr Payne attended to this task. For instance, he says he was on foot whereas before Mr Stewart departed the property, he observed Mr Payne ride past him *on his quad bike and then begin trying to move the deer from the paddock into the lane so he could get them to the A Block wilderness. I found it very unusual that Dale (Mr Payne) was riding his motorbike around at speed as he tried to get them through the gate ... making the deer run around at high speed. That is not the way to handle deer. Deer can be flighty animals and their response times are rapid.*

[105] What is clear is that Mr Payne made an attempt to move the animals first in the late afternoon of 2 June 2011. This was the event Mr Stewart observed. Mr Payne told the Authority that these animals were more easily moved at this time of the day. However when the move was unsuccessful on 2 June 2011, Mr Payne determined to leave the animals in the laneway overnight in the hope that they might find their way to Block A by themselves. He left the appropriate gates open in an effort to facilitate this.

[106] When it became clear the following day that the deer had not moved to Block A under their own steam, as it were, Mr Payne made a second attempt to move them. According to Stravon, it is his actions on the second day that caused loss.

[107] The evidence of Mr Drew the taxidermist was that on the second day he ... *heard the quad bike continually going up and down the alleyway behind the shed. I went outside and saw Dale on the quad bike herding the fallow deer and their young into the lane.*

[108] Based on the evidence the Authority has heard, the Authority has no hesitation in concluding that contrary to Mr Payne's claim, he was in fact not on foot but was on a quad bike. Further, there are other aspects of Mr Payne's account of his actions which are inconsistent with the other evidence. The language that he uses to describe his actions is completely at variance to the language used by other witnesses. For example, Mr Payne says ... *I slowly pushed the fallow deer up the lane towards the farm buildings shutting the gates behind me to prevent them running all the way back. And again I went back and tried to move them slowly up the deer lane again but they all kept turning back It was getting too dark and dangerous to continue so I left them in the lane for the night hoping they would find their way back to the A Block as everything was open.*

[109] That account is completely inconsistent with Mr Stewart's observations, albeit that Mr Stewart observed only part of the manoeuvre on the first day. Nor, for that matter is it consistent with the evidence of Mr Drew, who observed the events on the second day. For the avoidance of doubt the Authority prefers Stravon's account in part because of the demeanour of the witnesses and in part because Mr Drew's evidence is consistent, as far as is possible with the evidence of Mr Stewart who observed the beginning of the first day manoeuvre before departing the property. Further and finally, having heard the evidence of expert witnesses in relation to the management of deer, the Authority considers that the damage to these creatures as a consequence of the manoeuvre undertaken by Mr Payne is inconsistent with his evidence of what happened and much more consistent with particularly Mr Drew's recollection of these events.

[110] Mr Drew's description of what happened is consistent with Mr Payne's evidence in one respect only. That is that Mr Drew confirms Mr Payne's evidence

that the deer kept doubling back. But Mr Drew goes on to say that Mr Payne first was on his quad bike and not on foot and that he kept trying to push them forward:

under intense pressure. This happened at least fifteen times. ... I could see Dale's (Mr Payne's) frustration and anger that the deer were not flowing through the lanes.

The deer were sweating and panting with steam coming out of their mouths and their tongues were hanging out. They were panicked and exhausted. They kept hitting the electric fence out of fear and blood was oozing out of their noses and mouths as a result.

[111] Mr Drew says that he urged Mr Payne to stop but that Mr Payne refused and persevered with trying to move the deer through. Mr Drew then tried to help by working alongside Mr Payne on his quad bike with Mr Drew on his Polaris bike. Given Mr Drew's insistence that he tried to assist on his Polaris machine, it seems inconceivable that Mr Payne can be right in his evidence that he was on foot when Mr Drew maintains that the two of them were on their machines side by side trying to work the deer through the laneway.

[112] Mr Drew says that this manoeuvre also failed with the deer doubling back and more panicky than they were previously and he again urged Mr Payne to abort the mission. Mr Payne refused and instead according to Mr Drew, went and got his dogs *which made the situation even worse as the dogs got excited and started to grab the deer's throats and bite them.* Mr Drew says that the young deer were starting to perish at this point. Mr Drew says that Mr Payne threw the fallen animals into his trailer *while they were still alive* and that *he continued to chase the other deer again while the dying deer were bouncing around in his trailer.*

[113] Mr Payne's evidence is that he did not seek Mr Drew's involvement in this incident and in fact asked him to remove himself and his children.

[114] Mr Drew is adamant that his evidence on this incident is accurate and he told the Authority at one point in his oral evidence that Mr Payne's recollection of the event was *absolute nonsense.*

[115] The Authority heard expert evidence about the moving of fallow deer in particular. It is common ground that Mr Payne was an experienced deer manager but on the evidence the Authority heard, he failed to follow basic rules of animal husbandry. In particular, it seems accepted by the experts that once the manoeuvre

was clearly going wrong, as was apparent from its earliest stages, the process should have been aborted immediately, the animals should have been allowed to settle, probably for several days, and the move attempted again. Trying to move the animals again a day after the first move was unsuccessful, is simply not good practice, the Authority was told.

[116] When on the second day, Mr Payne persevered with the attempt to get the animals moved by the use of his dogs, the consensus of the expert evidence was that if deer are not used to the presence of dogs, this will exacerbate the problem and the evidence suggested that this particular group of deer were not used to the presence of dogs. Further, the expert evidence the Authority heard suggested that it was imperative that if dogs were used to assist herding deer, the dogs were under control and yet the evidence here from Mr Drew in particular was that these dogs were not under control.

[117] The Authority has no hesitation in concluding that this episode was disgracefully mismanaged by Mr Payne and that he is responsible for the deaths of those animals. Mr Payne's evidence of this aspect was simply inconsistent with that of Mr Drew's evidence and Mr Drew's evidence is preferred for the reasons the Authority has already enunciated. Given that the Authority prefers Mr Drew's recollection of what happened, it is apparent that there were a number of signal failures by Mr Payne including using his quad bike, involving his dogs, and most importantly of all, persevering when it was obvious that the animals were distressed to the point of mortality.

[118] The Authority accepts Stravon's figure that nine of the twelve animals in the herd that was moved perished and the Authority is satisfied that Mr Payne was directly responsible for that.

[119] Of that nine, five were fallow hinds and four were weaner bucks.

[120] The hinds had all been impregnated and the best view the Authority can form is that four out of five of those hinds would have given birth to offspring. On average, two of those offspring would be male and two female.

[121] Mr Donald Bennett was called before the Authority to give evidence about the value of the deer lost. Based on his figures, the Authority is satisfied that the loss to Stravon amounts to \$9,500.

[122] The Authority is satisfied Mr Payne has breached his employment agreement in respect to the management of these deer by failing to honestly and diligently perform his duties and by causing Stravon loss through negligent or reckless errors, acts or omissions, for which he must indemnify Stravon pursuant to clause 19 of his employment agreement. In that context, the law is that damages are calculated by placing Stravon back into the position it would have been had there not been a breach.

[123] In *Masonry Design Solutions v. Bettany* (2009) 6 NZELR 834, the Chief Judge held that three elements must exist in order for liability to be established vis:

- (a) *The employee's conduct must be in breach of the employment agreement;*
- (b) *The breach must cause the employer loss; and*
- (c) *The consequences of the breach must be reasonably foreseeable.*

[124] Applying *Bettany* to the present case, it is plain that Mr Payne has breached the terms of his employment agreement certainly in terms of the indemnity clause. It is equally clear that Stravon has suffered a quantifiable loss of \$9,500 because of that breach and it is difficult to imagine that Mr Payne would not have been very clear about the risks he was running in behaving in the way that he did. He was an experienced deer manager. He seems to have formed the view that moving the animals was a mistake and he says that he remonstrated with Mr Stewart but that Mr Stewart was insistent. If he thought that moving the animals was not a practical possibility, he should have refused to do so and would have been within his rights so to do.

[125] Instead, he did quite the reverse; notwithstanding his apparent belief that it was unsafe to move the animals, he proceeded to do so. And in the course of explaining himself to Mr Drew for his determination to do it he, according to Mr Drew, made this observation during the course of the manoeuvre:

Todd (Mr Stewart) wants the fucking deer out, he'll get the fucking deer out.

[126] *Bettany* is a case where a computer aided draughtsperson "...breached his employment agreement. The defendant suffered financial loss. That loss was attributable to the breaches. It was reasonably foreseeable that inadequate performance of his employment agreement to the appropriate standard by Mr Bettany would result in loss to his employer.."

[127] While Mr Payne's role had little in common with that fulfilled by Mr Bettany, the legal principles are the same. Mr Payne's employment agreement contains a clear indemnity clause together with an obligation to perform his duties honestly and diligently. Not only did the events leading to the deaths of these animals not exhibit either honest nor diligent service but Mr Payne had accepted an obligation to indemnify Stravon in respect to all costs because of negligent or reckless acts or omissions of himself in the performance of his duties.

[128] Further, it is plain as can be that Stravon suffered loss and that loss has been quantified to the Authority's satisfaction. The Authority is satisfied that the loss of these valuable animals was directly attributable to Mr Payne's actions and that he either knew or ought to have known, as an experienced farm manager, that what he did would result in loss. The sheer enormity of the loss ought to underline that very point

Is Mr Payne liable for the loss of the trophy stags?

[129] Stravon also maintain that Mr Payne was responsible for the death of six trophy red stags during the period March 2011 down to May 2011.

[130] Stravon say that Mr Payne was supposed to walk the fence lines within the property during the roar (February to May) to check and repair fences and maintain a human presence to deter deer from fighting. Stravon say that Mr Payne did not do this and that as a consequence he breached his employment agreement and the deer died.

[131] Mr Payne acknowledges that the deer did die during his watch, accepts that it was unusual but denies culpability.

[132] The essence of Stravon's argument is that, while deer losses from a variety of causes are a normal incident of the business, the loss of six trophy stags for a hunting and guiding business was both a significant loss of potential revenue and a significant departure from the norm.

[133] Stravon say that in the period from the point at which they purchased the Stravon property down to the beginning of 2011, only a handful of animals were lost. But surely that would reflect, to some extent anyway, the fact that the number of animals on the property was significantly less when the property was purchased, than

it was in 2011. Even on Stravon's own evidence, during the period from purchase up to 2011, the property was in the process of being stocked with animals and it would seem to follow that the number of animals on the property certainly in the earlier years would have been much smaller than the total number that would have been there in 2011. Accordingly, the Authority is not attracted by that argument and rejects it.

[134] However, Mr Stewart for Stravon goes on to say in his evidence that in the period since Mr Payne left the property Stravon has not lost a single animal. That is a more realistic comparison in the Authority's view.

[135] Of the stags that died during the period in question, one died as a result of being caught in vines and one had to be shot as it was found outside the fenced area and there was no way of getting it back. The other four died as a result of fighting.

[136] Mr Payne's evidence on this point is simply to assert that he did not neglect his duties but also to maintain that insofar as there was an expectation that he would walk the fence lines of the property once a day during the roar, that expectation was simply unrealistic as it would have been impossible to achieve.

[137] Despite the efforts of counsel for Stravon and the evidence before the Authority about the value of these lost animals, the Authority is simply not persuaded by the chain of causation. In essence, four of the six animals died as a consequence of fighting with their own kind and the prevention of those deaths is contingent on the assertion that these creatures fight less when they are aware of a human presence which is why walking the fence line is supposed to deter such behaviour.

[138] But the evidence the Authority heard from the experts does not definitively link the loss of the animals to the lack of a human presence and thus the reduction in fighting. Certainly the expert evidence seems to accept that that will often be the case but there is a difference between wild animals and farmed deer because the latter have more association with humans and therefore, presumably, a greater tolerance of their presence.

[139] In the end, while the Authority understands the argument that is being advanced, it concludes that Stravon is drawing a long bow in trying to sheet home to Mr Payne the untimely deaths of these six animals. Stravon's counterclaim in that regard then fails.

Ought Mr Payne reimburse Stravon for the cast antlers?

[140] The evidence before the Authority discloses that from the commencement of the second season that Mr Payne was on the property, he was collecting and on-selling for his benefit cast antlers and velvet. Mr Payne says that Mr Stewart specifically approved this undertaking. Mr Stewart's evidence to the Authority was as clear as could be that he had no knowledge whatever that this was happening.

[141] The evidence of Mr Payne's behaviour in this regard came to light in effect by accident on 13 August 2011 long after the employment relationship had come to an end. Mr Payne had collected and sold cast antlers and velvet with a total value of \$8,626.39. The evidence for the transactions underpinning that equation is before the Authority.

[142] All Mr Stewart would agree was that he had told Mr Payne that cast antlers ought not to be left on tracks as that posed a hazard to workers and hunters. His evidence was that the cast antlers were to be moved off trails but not collected. He told the Authority that the property was calcium deficient and the antler was a source of minerals for the animals.

[143] For his part, Mr Payne did not comment on the income that he had derived from the sale of these materials save to make the claim that when he sold the first lot he received a cheque in payment in his name. He says Mr Stewart told him to *go for it*, meaning presumably that Mr Payne was to pocket the proceeds, a view which Mr Stewart strongly rejects. With the exception of that alleged exchange, Mr Payne, in his evidence to the Authority, did not offer any further evidence of discussion between himself and Mr Stewart on the matter.

[144] In the absence of any explicit agreement from Stravon for Mr Payne to retain the proceeds of the sale of cast antlers and deer velvet, the Authority is clear that Mr Payne is in breach of clause 20 of his employment agreement which provides relevantly that he will *not enter into other ... business relationship or activity which could bring him ... into conflict with his ... obligations under this agreement*.

[145] Plainly, this is a straightforward breach of the duty of fidelity and an obvious breach of the conflict of interest clause in the employment agreement just referred to. What Mr Payne is doing is using property of Stravon to convert to money value and then, without accounting to Stravon for that money, he is pocketing the proceeds.

Aside entirely from the criminal aspects of that behaviour, so far as the employment relationship is concerned, it is as clear as can be that there is a breach of duty by Mr Payne. He must account to Stravon for the \$8,626.39 that he has been paid in selling Stravon property.

Can Stravon recover telephone costs, airfare costs and internet costs from Mr Payne?

[146] The Authority is satisfied that there is no basis on which Stravon ought to have to fund these costs of behalf of its departing employee.

[147] In relation to the cost of private telephone calls amounting to \$966.28 incurred by Mr Payne between July 2006 and May 2011, Mr Payne's evidence is that Stravon met those costs during the employment and that *it is absurd* that they now seek reimbursement. However, in response to a question from the Authority during the investigation meeting, Mr Payne did accept that the employment agreement does not require the employer to pay for personal calls by the employee. Furthermore, the employment agreement also provides that on the termination of the employment, any costs incurred by the employer on behalf of the employee can be recovered. That is what happened and that gives the lie to Mr Payne's claim that the employer is only now pursuing him for these various costs. They are entitled to deduct the costs from his final pay; that is the relevant provision in the employment agreement and that is what Stravon did.

[148] The Authority has no hesitation in determining that Stravon is entitled to reimbursement of \$966.28 in private telephone calls made by Mr Payne during the employment.

[149] Stravon also paid for Mr Payne's return flights to the United Kingdom in September 2008 to a total cost of \$3,681.00. In relation to this matter, Mr Payne says that Mr Stewart gave it to him as a Christmas present and that he did not say then or later that he wanted reimbursement. But that evidence is not consistent with an email from Mr Stewart to Masthead dated 25 September 2008 which says in part:

I have agreed to paying for his ticket until he can get back and pay us back after his expenses have been calculated.

[150] There is no agreement between the parties that Stravon is to meet this cost and Mr Payne should reimburse Stravon for the airfare costs. Again, the effect of the final pay made out for Mr Payne is to take account of this reimbursement item.

[151] The final aspect of this collection of reimbursing items is an amount of \$2,591.99 in respect to Mr Payne's use of the internet between December 2009 and January 2010.

[152] Mr Payne disputes that he owes this amount because he says that it was discussed by Mr Stewart and himself during the employment and *that it was sorted*. Mr Stewart's evidence (which the Authority prefers) is that there were discussions between the two men but that Mr Payne had accepted an obligation to meet the debt and had not done so.

[153] The Authority is satisfied that Mr Payne owes the money to Stravon and he ought to pay it.

Is Mr Payne liable to a penalty?

[154] Stravon asked the Authority to impose a penalty against Mr Payne for breaching the duty of good faith. The law requires that the breach of good faith be deliberate, serious and sustained. Stravon also seeks a penalty against the applicant for breaches of the express and implied terms of the employment agreement.

[155] There are a raft of individual complaints by Stravon against Mr Payne, the majority of which are the subject of comment in this determination. Some that have been mentioned only in passing, such as the shooting of a shot gun into the chimney of the house property Mr Payne was living at, in order to discourage the starlings that were nesting there, have received less comment. But all are relied upon to some extent by Stravon in identifying their complaint that Mr Payne has breached terms of his employment agreement.

[156] As Stravon acknowledge, typically the Authority and the Court have adopted the *totality* principle when one penalty is imposed for multiple breaches arising from one set of events.

[157] However, in the present circumstances Stravon maintain that the breaches had not arisen out of one set of events and therefore separate penalties are justified.

[158] The awarding of a penalty is a discretionary remedy; the Authority must be satisfied that the needs of justice require the imposing of a penalty in order to condemn the particular wrong doing that is proscribed.

[159] In the particular circumstances of this case, given that the Authority has made adverse findings against Mr Payne in every particular except his entitlement to payment of annual and statutory holiday leave, the Authority is not satisfied that the interests of justice require that a penalty issue.

[160] The effect of this determination will be that, while Mr Payne has been successful in having some awards made in respect to annual and public holiday leave, those amounts will effectively be set off against the various other sums that he now owes Stravon and the ultimate result will mean that he is heavily indebted to Stravon rather than the other way around.

[161] In those circumstances, the Authority is not persuaded that the interests of justice require a penalty to be imposed.

[162] For the avoidance of doubt, the Authority also declines to award interest in respect to any of the matters covered by this determination. Stravon seek interest whereas Mr Payne does not. Both parties have been partially successful and given that some of the payments now awarded have effectively already been received by the recipient because of the effect of the set-off when the final pay was made up, the Authority is not persuaded that interest ought to accrue on any of the awards made.

Determination

[163] The Authority is not persuaded that the evidence discloses that Mr Payne has either been unjustifiably dismissed from his employment or that he has suffered a disadvantage as a consequence of any unjustified action of Stravon.

[164] Nor is the Authority persuaded that Stravon has implemented unlawful deductions of monies from Mr Payne's salary

[165] Questions concerning the appropriate calculation of annual leave or statutory holiday leave are left to counsel on the footing that the principles set out in this determination are to inform the calculation of the amounts owing. If counsel are

unable to resolve matters by agreement, leave is reserved for either party to revert to the Authority for orders.

[166] Mr Payne is indebted to Stravon in the sum of \$9,500 for the loss of the fallow deer and is to reimburse Stravon for the cast antlers in the sum of \$8,626.39. The Authority is not persuaded that there is a causative nexus between actions or inactions taken by Mr Payne in the death of Stravon's six stags during the early part of 2011 and so there is no finding against Mr Payne in that regard.

[167] Finally, Mr Payne is to reimburse Stravon for the various costs incurred by him during the employment for which Stravon paid and they now legitimately seek reimbursement. Those amounts severally are \$966.28 for telephone calls, \$3,681.00 for return airfares to the United Kingdom and \$2,591.99 for the use of the internet.

Costs

[168] Costs are reserved.

James Crichton
Member of the Employment Relations Authority