



- (ii) Ms Bautista was to return various WABL property.
- (iii) WABL was to pay Ms Bautista outstanding holiday pay on a stated formula.
- (iv) No other money was owed, with the settlement being full and final.

[5] The settlement was also to be confidential. That term cannot now be kept because the Authority's determination of this dispute is public.

[6] The parties were directed to further mediation but did not resolve the matter between themselves.

[7] At the investigation meeting I heard from Ms Bautista and WABL's directors Sue Zhu and Frank He who each, under oath, answered questions and had the opportunity to ask additional questions and sum up their case.

#### **Was Ms Bautista paid the money due to her?**

[8] WABL says it complied by paying Ms Bautista the sum of \$2364.22, less income tax, on 19 November 2009. It says this is the correct amount of holiday pay due to her for two elements:

- (i) 18 days of accumulated annual leave and
- (ii) eight per cent on her earnings for the part-year from the date of her employment anniversary in April 2009 to the end of her employment on 18 November 2009.

[9] Ms Bautista says the payment made was less than what was due to her because WABL did not follow the formula set out in the settlement agreement for the calculation of her outstanding annual holiday pay.

[10] The formula required the amount due to be calculated on her gross earnings. WABL used the net pay figures and did not include as earnings some or all wages and commission due to Ms Bautista for certain pay periods in August, September, October and November. WABL excluded those payments from its calculations because the actual amounts of wages or commission technically due to Ms Bautista for those

periods were not actually paid to her. That money was withheld as repayment of a debt of around \$3800 that Ms Bautista had to the company.

[11] Ms Bautista does not challenge the withholding of those payments to which she had agreed in settlement of a debt for previous overpayments. However, her case is that she was technically entitled to those payments of wages and commission and they should be included in the gross earnings on which her annual leave entitlements were to be calculated.

[12] I accept her analysis. The record of settlement expressly referred to her holiday pay being calculated on her "*total gross earnings*". The fact that she had – by agreement with WABL – not actually got the nominal net earnings for some pay periods should not be accounted for in the holiday pay calculations. It was simply a matter of convenience to have the debt deduction at source (part of her wages and commission). If she had got the net pay and then paid it back to the company, the records of her gross earnings would have remained the same and been included in the calculation of holiday pay later done by the company.

[13] WABL should have included all her gross earnings in its calculations even if some of the net amounts due to be paid were offset against her debt to the company.

[14] The Authority's order to remedy this shortfall relies on Ms Bautista's calculation of what total gross earnings were due to her for the relevant period, using her bank records and information given to her by WABL.

[15] On gross earnings due to Ms Bautista for the pay periods from 20 November 2008 to 12 November 2009 of \$35,177.21 – and using the formula set out in the record of settlement – she was entitled to be paid \$135.29 for each of the 18 days annual leave due to her. The total due for that element was \$2435.22.

[16] For the part of the 2009 year from her anniversary date to the end of her employment I accept Ms Bautista's calculation that her total gross earnings were \$14,221.43. She was entitled to be paid 8 per cent of that amount, being \$1137.71.

[17] The total holiday pay due was \$3,572.93. Ms Bautista, properly, accepts that WABL is obliged to deduct PAYE income tax from that amount and forward the tax to the Inland Revenue Department.

[18] She does not know the appropriate deduction of PAYE from the gross amount due. Neither do I.

**[19] To comply with the terms of the Record of Settlement made on 18 November 2009, WABL should deduct the appropriate amount of PAYE for Ms Bautista from the sum of \$3,572.93. If the remaining amount is more than the \$2364.22 paid to her on 19 November 2009, WABL is to pay that net difference to Ms Bautista within 14 days of the date of this determination.**

**Did Ms Bautista comply?**

[20] On 19 November 2009 Ms Bautista returned a number of items of company property in compliance with the Record of Settlement. She did not return a WABL signboard – said to be about one metre by two metre wide.

[21] She knew that day or soon after that WABL still wanted the signboard but took the view that WABL could arrange to collect it from her house.

[22] That is not what was agreed. The settlement said she “*will return [WABL’s] property*”.

[23] Ms Bautista undertook in the Authority investigation meeting to return the signboard. **If she has not already done so, Ms Bautista is ordered to return the signboard to WABL by no later than 14 days from the date of this determination.**

**Is any penalty due?**

[24] Ms Bautista sought a penalty against WABL for its failure to comply with the terms of the settlement and for that penalty to be paid to her. I may have made such an order but for her own element of non-compliance with the settlement agreement. Neither do I consider WABL should pay a penalty to the Crown in this particular

case. WABL's breach was over a matter of technical interpretation. Although WABL was wrong, I do not consider its actions were wilful or intentional wrongdoing warranting a penalty.

### **Costs**

[25] Neither party was legally represented so there is no issue of costs.

[26] Ms Bautista was successful in her claim and is entitled to reimbursement by WABL of her fee for lodging this matter in the Authority. **WABL is to pay Ms Bautista \$70 in addition to whatever amount it must pay her for outstanding holiday pay.**

Robin Arthur  
Member of the Employment Relations Authority