IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 380
5332042

	BETWEEN	CANESHA LISA MALLON Applicant
	AND	CLS CAPITAL LINK SERVICES PTY LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Applicant in person Nicolas Yanni, advocate for Respondent
Investigation Meeting:	30 August 2011
Determination:	2 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The matter investigated and to be determined by the Authority is the justification under the Employment Relations Act 2000 for the dismissal of the applicant Ms Canesha Mallon by the respondent CLS Capital Link Services Pty Limited.

[2] There is no dispute that Ms Mallon was given notice of termination of her employment while talking on the telephone to Mr Naim Ibraheim, the International Account Manager of CLS's parent company in Australia.

[3] Ms Mallon had been employed by CLS in June 2010 as "a casual Customer Service." No issue arises from the reference to "casual" as Mr Nicolas Yanni, a director of CLS and its advocate, accepted that the company was required to justify the dismissal of Ms Mallon, which was purportedly on the grounds of lack of work for her to do.

[4] I find that the dismissal cannot be justified because even if a redundancy situation had genuinely arisen there was a complete failure by the employer to consult with Ms Mallon before deciding to end her employment. I find that redundancy was not directly causative of the employer's decision to dismiss, which was communicated to Ms Mallon in the following circumstances.

[5] Ms Mallon claimed payment from CLS for the public holiday of Labour Day in 2010. To support that claim she printed off information from the Department of Labour website about the entitlement of employees to pay on public holidays. The information included advice that "these public holidays are separate from and additional to annual holidays". She gave the information to Mr Yanni who sent it to Mr Ibraheim, drawing his attention to the following in Ms Mallon's employment agreement that provided for her remuneration to be at an "inclusive" rate:

> *3(a) Your hourly rate will be $14 and is inclusive of all leave entitlements, overtime penalty rates ……*

[6] When CLS questioned her Labour Day claim Ms Mallon provided more information before being called to Mr Yanni's office to talk by telephone to Mr Ibraheim who was in Australia. He insisted that she was not entitled to be paid for the public holiday as she was receiving 8% on top of her weekly pay for "all leave" entitlements. When Ms Mallon pointed out that New Zealand and Australian employment laws were different and maintained she was entitled to the payment, Mr Ibraheim responded by telling her to immediately start a period of two weeks notice terminating the employment.

[7] Despite this disagreement, in her next pay Ms Mallon was paid for Labour Day. She raised a grievance with Mr Ibraheim by email on 1 November, advising that under employment law there must be a good reason for a dismissal and pointing out she had been given no reason at all. She sought reinstatement and compensation for lost wages. Mr Ibraheim responded with the advice that CLS did not have enough work to employ her. When Ms Mallon attended work the following day she found access to her computer had been blocked and she was told to finish and leave the office immediately.

[8] Later Ms Mallon received a message from Mr Yanni who advised that she could collect from CLS a cheque for $767, being two weeks pay in lieu of notice as provided for in the employment agreement. She went to the office and was told she

had to sign a form stating that this was her final pay and that nothing more was owed to her by CLS. She declined and was not given the final pay cheque. Ms Mallon noted that there was no requirement in her employment agreement to sign such an acceptance or acknowledgement upon receiving her final pay.

[9] After her dismissal Ms Mallon attempted to arrange for mediation with the company, but CLS rejected this primary dispute resolving process which was expressly provided for under the employment agreement. In it CLS had agreed that where any employment dispute with Ms Mallon was unresolved;

> *……the parties shall refer the matter to mediation; both parties will participate in mediation process in good faith and ensure that the dispute resolution procedures are carried out quickly and reasonably.*

[10] The lack of good faith and contempt of Mr Ibraheim for the agreement CLS had entered into with Ms Mallon and for her grievance and reasons for raising it, were obvious from what he said during the telephone conference with the Authority and Ms Mallon and also from the way CLS participated in the Authority's investigation.

[11] Later Ms Mallon discovered that despite her payslips from CLS showing the deduction of PAYE from her pay each fortnight, no money had been sent to the Inland Revenue Department. Consequently when Ms Mallon was provided with a personal tax summary by the Department in July 2011 she was advised $1,686 arrears of tax were owed by her.

[12] This was Ms Mallon's first job after leaving school and it is clear she suffered considerable anguish at the time of the dismissal, from the abruptness with which it was carried out, the apparent lack of justification for it, and from being required to acknowledge her final payment as being in full settlement of all claims, and also from the later discovery that PAYE had not been sent to the IRD and that she owed a considerable sum to the Department for tax.

[13] I accept the evidence of Ms Mallon and it is not disputed by Mr Yanni who was involved in the discussion, that when notice was given by Mr Ibraheim he did not say that there was no work available to Ms Mallon any longer. He expressed no reason at all for giving her notice. Ms Mallon did not ask for a reason but thought it was because she had asked to be paid for a public holiday and had challenged Mr Ibraheim on her rights. Not unreasonably she regarded the lack of work explanation as just an excuse to get rid of her. Ms Mallon confirmed to the Authority

that there had been no meeting to discuss the possibility of redundancy or to look at any alternatives that were available or to share information about the work situation with her.

[14] I find that redundancy was however in the wind in the workplace. After she noticed a downturn in work Ms Mallon had asked Mr Yanni whether she should cut down her hours or even work only three days a week. She had also asked, she said, whether she should find another job. That background can only be relevant to the question of remedies for the personal grievance, as I find the immediate reason for the dismissal was the claim Ms Mallon made to have upheld her legal entitlement to be paid for a public holiday.

Determination

[15] I determine therefore that Ms Mallon was unjustifiably dismissed according to the test required to be met under s 103A of the Employment Relations Act (as it was in 2010). The actions of CLS and how CLS acted was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[16] To remedy her grievance Ms Mallon is entitled to recover the amount of two weeks wages for the notice period provided by the employment agreement. During the investigation meeting Mr Yanni wrote a cheque for the amount and gave it to Ms Mallon. It was made out to cash and I will assume it has since been drawn on.

[17] In case it was not, I make an order for the company to pay $767 to Ms Mallon but only in the event, provided it was outside of Ms Mallon's control, that the cheque was not cleared or there were no funds to pay Ms Mallon.

[18] She also claimed to be reimbursed $5,040 as lost wages for a period of three months following her dismissal. In my view because of a reduction in work there was a strong likelihood that this employment would not have lasted beyond the end of the year, or about 6 weeks after Ms Mallon was dismissed. She has been paid for the period of notice which covers two of those weeks and I will therefore award a further four weeks as reimbursement of lost wages. That amount is $1,680.

[19] Ms Mallon is I find also entitled to compensation for hurt feelings, humiliation and loss of dignity which she undoubtedly suffered because of the way she was dismissed and the underlying insufficient reason for that decision. I consider the

appropriate award is $3,250, which is to be paid to Ms Mallon by the company pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000. There was no contributory fault on the part of Ms Mallon and the remedies are therefore not subject to reduction.

[20] Ms Mallon is entitled to interest on the 4 weeks lost wages, which I fix at the regulatory rate of 5%. This is to be paid on the sum of $1,680, from the date Ms Mallon lodged her claim in the Authority, 14 January 2011, until the principal amount has been paid in full.

A Dumbleton
Member of the Employment Relations Authority