

[3] Ms Ellis says that she was unjustifiably dismissed from her employment on 20 October 2008 for poor performance.

[4] Ms Ellis seeks reimbursement of lost wages from 20 November 2008, having been paid four weeks in lieu of notice, until 1 January 2009, compensation in the sum of \$8,000 and costs.

[5] The Oaks do not accept that Ms Ellis was unjustifiably dismissed and say that she continued to fail to perform in her role and after being warned informally and formally and on her last day of employment did not engage in an appropriate manner with the General Group Manager HRM, Linda Monteith, who had flown over from the Oaks head office on the Sunshine Coast, and Mr Kennedy, about performance issues that they had with her. The Oaks says also that, following the termination of Ms Ellis' employment, some other issues came to light that would have resulted in a disciplinary investigation being undertaken had she still been employed.

Issues

[6] The following are the issues that the Authority is required to determine in this matter:

- Was Ms Ellis' dismissal justified applying the statutory test for justification in s.103A of the Employment Relations Act 2000;
- If Ms Ellis was unjustifiably dismissed, then what remedies is she entitled to and are there issues of contribution and mitigation;
- If the Authority does go on to award remedies to Ms Ellis, was the subsequently discovered conduct such that it should be taken into account in determining remedies under s.123 of the Employment Relations Act 2000?

Was Ms Ellis' dismissal justified applying the statutory test for justification in s.103A of the Employment Relations Act 2000?

[7] Section 103A of the Employment Relations Act 2000 requires the Authority to determine, on an objective basis, whether a dismissal was justifiable by considering whether what an employer did, and how an employer acted, were what a fair and

reasonable employer would have done in all the circumstances at the time of a dismissal.

[8] The reasons for Ms Ellis' dismissal were set out in a letter dated 21 October 2008 to Ms Ellis which letter confirms her termination of employment. The reasons set out in the letter are that Ms Ellis was dismissed for poor performance in the circumstances at the time the dismissal occurred.

[9] Ms Ellis was provided with an individual employment agreement when she commenced at the Oaks. There is a dispute as to whether or not Ms Ellis signed that agreement. For my purposes I accept that the individual employment agreement contained Ms Ellis' terms and conditions of employment. There is no formal warning process set out in the agreement for conduct that does not amount to serious misconduct. The key responsibilities of Ms Ellis' position were set out in a fairly lengthy job description and Ms Ellis accepted in her evidence during the Authority's investigation meeting that her responsibilities were accurately set out in Mr Kennedy's written statement of evidence.

[10] Mr Pine and Ms Ashcroft, in their respective submissions, referred to the leading Employment Court case about performance of *Trotter v. Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 where the then Chief Judge Goddard sets out a list of questions, not necessarily exhaustive, to be asked when considering dismissal for poor performance. I accept that those questions are relevant in terms of determining, on an objective basis, the justification of a dismissal for poor performance.

[11] The first part of Ms Ellis' employment up to the end of May 2008 appeared to be relatively incident-free. After that initial period, I find that the Oaks did become dissatisfied with her performance. I have to consider and make findings about the particular exchanges between Mr Kennedy and Ms Ellis including the formal warning and the events in October 2008. In doing so I will assess what was known by Ms Ellis about the dissatisfaction by the Oaks in her performance, whether the standard required to be achieved was fairly set out for her and whether within a reasonable time objectively assessed she did/did not attain the required standard.

28 May to 4 June 2008

[12] Mr Kennedy attended at the Oaks Shores property during the week commencing 28 May 2008. He said in his evidence he had concerns to talk about

with Ms Ellis in terms of her performance as hotel manager. He also met and talked to some other staff about concerns he had with their performance. Mr Kennedy said in evidence that his primary concern that he wished to address with Ms Ellis was the state and maintenance of the Oaks Shores property. It is accepted that there were a number of issues discussed with Ms Ellis at that time. Ms Ellis did not receive a copy of the follow up memorandum that Mr Kennedy sent to Ms Monteith about the discussions he had with Ms Elis and other staff during that week.

[13] Ms Ellis, when the matters in the memorandum were put to her could recall some of the issues being discussed. She said that there was discussion about her not approving invoices and that she was to approve invoices from that point on, repairs and maintenance being actioned by staff or her managing staff when tasks were not completed, cleaning issues in terms of the rooms, rooms left off line without follow up and failing to manage debtors. Ms Ellis said there was no discussion as set out in the memorandum about rosters or reservations made by ski companies. I find that it is more likely than not when I consider the memorandum and the concerns set out there as having been raised by Mr Kennedy with other staff that there was also discussion with Ms Ellis about her staff including discipline, hours of work and clothing standards. I also find it likely that there was discussion about improvement in occupancy levels and business generally and this in all likelihood included some discussion about the reservation system Hiram. I am satisfied, that, at the end of that discussion, it would have been clear to Ms Ellis that there were some concerns about some aspects of her management in terms of the property.

20 June 2008

[14] Mr Kennedy returned to the Oaks Shores on 20 June 2008. He was concerned about Ms Ellis' performance and he discussed various matters with her including issues about housekeeping, maintenance and staff. Ms Ellis was not advised before the meeting that it was disciplinary in nature and that disciplinary action could follow. She was not advised that she could have a representative at the meeting. I do think it more likely than not, though, that Ms Ellis was advised at the end of the meeting that she would be given a warning. The email that was sent to Ms Ellis with the warning attached refers to an earlier discussion and Mr Kennedy's evidence, which I prefer on this matter, was that he had a clear recollection of this.

[15] The warning provided to Ms Ellis had an outline of the following performance issues as below:

- Overall cleanliness of the property – rooms not being inspected thoroughly (to standard);
- Maintenance of the property, lights blown and not replaced throughout the building;
- Unable to control her staff's performance (not accessible to staff);
- Debtors' control for the property not being performed as instructed;
- Controlling labour costs, staffing and reception versus revenue – rosters;
- Personal presentation of staff unacceptable/inappropriate not addressed;
- Guest complaints regarding staff (customer service) not addressed;
- Not visiting/faxing I sites weekly as requested –Awareness of property;
- Not taking responsibility for all issues in her building;
- Not taking responsibility for operational issues and allowing staff to approve invoices.

[16] The warning also set out the performance which was required to rectify the issues. The date of the next review of Ms Ellis' performance was recorded to be 4 July 2008 and was to be ongoing after that time. Ms Ellis was also advised that ongoing performance issues would result in further disciplinary action up to and including termination of her employment.

[17] Ms Ellis would not sign the warning because some of the matters in the warning she said had not been discussed with her. Mr Kennedy advised, however, that the warning would continue in place.

[18] Ms Ellis produced evidence to establish that she had performed the requirements set out in the warning. Mr Kennedy, in his evidence, accepted that she did undertake some of the requirements, but said that she did not undertake all of the

actions that had been set out as requirements to rectify the performance issues. The actions required to rectify the various issues are either very specific in terms of what was required, such as writing a letter to a housekeeping company which Ms Ellis, I am satisfied, complied with or quite general such as taking ultimate responsibility for all ongoing issues for the building and ensuring room inspections are done periodically and thoroughly.

[19] Whilst compliance with the matters to rectify the issues by Ms Ellis can be established in terms of the more specific matters, objectively assessed it is more difficult for an objective assessment to be reached in terms of the concerns about maintenance, staff dress and housekeeping inspections. These matters in all probability would have required a subsequent visit and physical inspection.

[20] Unfortunately, Mr Kennedy did not attend Queenstown on 4 July 2008 as set out in the warning to undertake a review of Ms Ellis' performance and did not attend the property again until October 2008. In saying that I accept that Mr Kennedy had time constraints and would have had to travel from elsewhere to undertake a performance review. I also accept that there was telephone contact between Ms Ellis and Mr Kennedy every few weeks and I am satisfied this would have inevitably included discussion about matters contained in the warning.

[21] Mr Kennedy in evidence said that staff were still not dressed appropriately, debtors were not controlled, there was no visit to the information sites and that Ms Ellis did not take ultimate responsibility for the ongoing issues. He also said that there were numerous complaints about the cleanliness of the property sent to head office and then forwarded to Ms Ellis. Ms Ellis in her evidence did not agree that the performance requirements were not met. She also said that there were issues replacing the maintenance and housekeeping manager positions.

[22] A fair and reasonable employer would want to assess as part of an ongoing process of performance review whether the requirements for performance in the warning were met. Ms Ellis did not receive anything in writing from Mr Kennedy until October 2008.

[23] I accept Mr Pine's submission that the process leading to the issue of the warning was not a fair process in the sense that Ms Ellis did not understand a warning could be a consequence of the meeting with Mr Kennedy and was not advised to have

a representative with her. Nevertheless, from the point of the issue of the warning I accept Ms Ellis would have been in no doubt that there were some concerns about her performance.

[24] Mr Kennedy denied that he told Ms Ellis that he was avoiding going to Queenstown between the date of the warning and October because he did not want to terminate her employment. I formed the view however given Mr Kennedy's acknowledgment that there were always *issues* at Queenstown, he may have unintentionally given Ms Ellis the impression that he did not enjoy visiting the Oaks Shores property.

3 October 2008

[25] On 3 October 2008, Mr Kennedy returned to Oaks Shores for the first time since 20 June 2008. He had an informal discussion with Ms Ellis following which a report was prepared and shown to Ms Ellis before it was forwarded to Ms Monteith. Ms Ellis made some changes to the report. The report covered issues that Mr Kennedy set out as an outline of discussions held with Ms Ellis and him on Friday, 3 October 2008. It covered discussions about staff appearance, rude staff, room cleaning, guest behaviour, garden beds and body corporate issues, talking to owners and restaurant issues.

[26] I find that the copy of the report that Ms Ellis saw did not have the final sentence that was in the report forwarded to Ms Monteith and the Corporate Services Manager, Leanne Summers. That sentence provided *Claire is well aware of where this is heading and has expressed the same to me. I told her I would be addressing this in approx 2 weeks.*

[27] Ms Ellis, in sharp contrast to Mr Kennedy's evidence in the paragraph above, denies that she had been warned that her employment may be terminated during the meeting on 3 October 2008 for performance reasons. Indeed, her evidence was that she thought Mr Kennedy was happy with the improvements and that the report backed up her view on that. I find that if there was discussion of Ms Ellis's employment being at risk it was more than likely to have been on the basis that Mr Kennedy was at some distance from that and that was at the Head Office level.

[28] The report refers to some of the same issues that were in the warning. What is not clear though when it is read is whether Ms Ellis' performance in relation to

the issues was seen to be at fault. For example the room cleaning issues seem to be directed at the cleaners and some of the other matters seem to be criticisms about other people which Ms Ellis was required to action and ensure that there was not a repeat. There is no suggestion for example that the action taken by Ms Ellis in terms of one of the employees was unsatisfactory and/or that more was required. The report simply recorded what was said and Ms Ellis was set some tasks. I do not find that the report set out or logically followed on to state what performance requirements Ms Ellis had met in terms of the warning in June 2008 and what requirements she had failed to meet. The report itself was not I find a disciplinary action as may have been expected if there was no improvement from June 2008.

20 and 21 October 2008

[29] On 20 October 2008, Mr Kennedy attended again at Oaks Shores but this time was accompanied by Ms Monteith from the Sunshine Coast. Mr Kennedy and Ms Monteith undertook an inspection of the Oaks Shores property. Ms Ellis was not expecting a visit because there had been no announcement of one taking place. Both Mr Kennedy and Ms Monteith met and talked with Ms Ellis at about 5pm on the evening of 20 October 2008. There was a discussion about some of the concerns as a result of the inspection and some concerns about Ms Ellis' performance in that regard and also the CEO's concerns regarding the performance of the Oaks Shores and reports of poor management and cleanliness of the property.

[30] It is accepted that Ms Ellis did raise that she had not received adequate training and support. I find that Mr Kennedy had formed the view that Ms Ellis had had more training with the former Oaks Shores manager, Mr Coppens, than in fact she had. Ms Ellis did receive a week's training and coaching with Mr Kennedy at an earlier part of her employment. Ms Ellis also had some support from members of the Operational Support Committee if there were issues she was unclear on and Mr Kennedy was also available to answer queries.

[31] To the extent that Ms Ellis said in her evidence that she considered the discussion regarding the overall performance of the Oaks Shores was not a performance review in respect of her role, I am satisfied that there were some specific issues discussed that could fairly be described as dissatisfaction with Ms Ellis' performance.

[32] Ms Ellis, for example, did accept that there were discussions about the issues set out in the letter of termination including the overall cleanliness and maintenance of the Oaks Shores and some particular matters in terms of one of the apartments. Ms Ellis did have some explanations in terms of those matters. Mr Kennedy thought that the conversation with Ms Ellis was repetitive and that there was no real acknowledgment by Ms Ellis' in terms of the matters raised and progress in terms of going forward. The meeting ended at 7pm.

[33] There is a dispute as to whether Mr Kennedy and Ms Monteith, who wanted to talk further the following day, set a specific time for doing so. Mr Kennedy said that a time for the meeting was set for 9am. Ms Ellis said that there was no actual time for meeting specified but she advised that she had to go to the council in the morning. I find, in circumstances where Ms Monteith knew she was catching a flight from Queenstown in order to return to the Sunshine Coast at about midday, that the evidence of Mr Kennedy about the setting of a particular time to meet was more likely.

[34] When Mr Kennedy and Ms Monteith arrived at the Oaks Shores before 9am Ms Ellis was heading out to drop her child at school. Ms Ellis' evidence was that she returned back to the Oaks Shores probably shortly after 10am, although she then relieved a staff member for his break and then went to housekeeping to attend to some matters. I heard by telephone call during the investigation meeting from the then hotel manager of the Oaks Club, Margaret Pollock that on that morning Ms Ellis had a cigarette with her and said she had stopped in to kill some time before returning to the Oaks. Ms Ellis said that she was at the Club to drop off some paperwork. She said that whilst she may have said something to Ms Pollock like she *would be glad when [Ms Monteith] is gone* she did not accept that she said words to effect as stated by Ms Pollock that she had stopped in to kill time prior to Ms Monteith leaving for the airport. Ms Ellis said that she was only at the Club for 10 minutes and Ms Pollock said probably 20-30 minutes leaving between 10 and 10.15am.

[35] When Ms Ellis was located by Mr Kennedy and Ms Monteith she was asked to continue the previous night's discussions. She became concerned and asked whether it was a disciplinary meeting. Ms Ellis was advised that it was a disciplinary meeting and she asked for a support person. I accept Ms Ellis telephoned a partner at a law

firm who advised that the meeting should be adjourned with a further time and date set.

[36] There is an important difference in the evidence as to what occurred at that point. I accept that Ms Ellis returned to Ms Monteith and Mr Kennedy and explained that she was unable to organise a support person. Mr Kennedy gave evidence that Ms Ellis stood behind the desk in the manager's office and repeated *you cannot talk to me* and *I will not talk to you*. Ms Ellis said that she advised that she had been told by her lawyer that she should not talk to Mr Kennedy and Ms Monteith any further and that they should not talk to her regarding the issues.

[37] It was at that point that I am satisfied Ms Monteith advised Ms Ellis that if she was not going to complete the discussions from the previous evening then her position would be terminated. I do not conclude that Ms Ellis intended to advise Mr Kennedy and Ms Monteith that they could not talk to her generally, but was referring to the advice she had received from her lawyer that they should not talk to her regarding the issues until she could have some representation available. That may not have been as clear to Mr Kennedy and Ms Monteith at that particular point in time given that I find there were heightened emotions on her part.

[38] Ms Ellis was told to gather her belongings and leave the property and she went into the adjoining restaurant to talk to a friend in there. Mr Kennedy went to look for Ms Ellis after a few minutes and asked her to leave the property. I think it likely that Ms Ellis objected to this because she advised she was in a private area because the restaurant was separately leased. Mr Kennedy, I find, repeatedly asked Ms Ellis to leave the property and then advised that he would call the Police if she did not leave.

[39] Ms Ellis then did leave the property and Ms Monteith prepared a letter which was sent to Ms Ellis confirming the termination of her employment and the reasons for that. Ms Ellis was paid one month's salary in lieu of notice and her holiday entitlements. Although there was some suggestion that Ms Ellis began working at Queenstown Airport two days after her employment was terminated, I do not find that to have been the case. Ms Ellis explained that she had a casual on-call arrangement at Queenstown Airport and simply undertook those casual duties after her employment terminated.

[40] The Oaks says that after 21 October a number of issues came to light as a result of an investigation by head office. The Oaks says that it became aware that Ms Ellis had employed an immigrant illegally on the basis that she would provide him with back pay once his work permit came through. Ms Ellis denied that she had employed anyone illegally at the Oaks Shores and there was no other satisfactory evidence on that matter.

[41] There was also an issue put forward that Ms Ellis and her sister may have colluded regarding a fraudulent insurance claim. Ms Ellis denied this matter and in the absence of other evidence I accept her evidence on that matter.

[42] The third issue was that the Oaks became aware that Ms Ellis had apparently been deleting charges relating to telephone calls, internet and cleaning for a guest who had a lock up unit for several months. The Oaks quantified its losses at \$8,831.94. As I understand that matter, which was denied by Ms Ellis, the Police investigated but it did not go any further than that. I held a telephone discussion during the investigation meeting with Mark Dwyer who is in the position of Operational Support based in the head office on the Sunshine Coast. He had provided a statement of evidence. I also heard from Ms Ellis about that matter. Ms Ellis said that she had discretion about crediting telephone and internet charges. There is a dispute as to whether she raised this issue with Mr Kennedy. I accept that the Oaks would have wanted to talk to Ms Ellis about this matter had she remained in employment and that it may well have taken the form of a disciplinary investigation.

Conclusions

[43] I am satisfied that the Oaks became dissatisfied with Ms Ellis' performance as a hotel manager. I accept that it is for an employer to determine the standard of performance that it requires from its employees and I find that the issue raised with Ms Ellis were those of genuine concern to the Oaks and could be said to generally fall within her role and responsibility.

[44] The review however of her performance leading up to and including the meeting on 20 and on 21 October 2008 was not the actions of a fair and reasonable employer. A fair and reasonable employer would have followed on from the 20 June 2008 warning to review Ms Ellis' performance against the targets clearly set for her.

Some of those targets it is clear that she had met. In that way Ms Ellis would have known whether she had achieved or not the required standard.

[45] There was then no further disciplinary action on or following the 3 October 2008 meeting which would make it clear to Ms Ellis that her performance continued to be of concern and her position was therefore at risk on that basis. There was throughout the process from 20 June 2009 no consistent reference back to previous concerns in terms of whether they had been addressed or not although I accept Ms Ashcroft's submission that there were some similar concerns raised after 20 June 2008. I accept that Ms Ellis may well have been aware in October in an informal sense that her employment was at risk of termination, at least at head office level, but that was not set out in the report. A fair and reasonable employer would clearly state why it is at risk and what is required in terms of performance standards if that is not to be an outcome. The 3 October report did not go that far objectively assessed.

[46] There was no advance notice given of the disciplinary meeting on 20 and 21 October 2008, the issues to be discussed and no suggestion that Ms Ellis have representation. When Ms Ellis refused to participate in the meeting on 21 October 2008 without representation her employment was terminated. Ms Monteith I accept had to catch a flight to Australia which was a difficulty but a fair and reasonable employer would have adjourned the meeting in these circumstances, put the concerns in the letter of termination in writing to Ms Ellis and set another date for a meeting so that Ms Ellis could properly respond to the concerns in the knowledge that her continued position at the Oaks was at risk with a representative. In the absence of a fair process the decision reached to dismiss Ms Elis for poor performance was not justifiable.

Determination

[47] I find that Ms Ellis was unjustifiably dismissed from her employment at the Oaks because the decision to dismiss her was not one that a fair and reasonable employer would have reached in all the circumstances. Ms Ellis is entitled to remedies.

Lost Wages

[48] Ms Ashcroft submits that there was no evidence of adequate mitigation of loss between 21 October and 1 January 2009 when Ms Ellis started her own business. She asked me to put to one side Mr Pine's submissions in reply setting out positions applied for. I heard evidence about mitigation and Ms Ashcroft also questioned Ms Ellis about this. I do not need to and have not placed reliance on the submission in reply in that regard. Ms Ellis applied for limited positions in the hospitality industry at a managerial level following her termination before making a decision to start her own business. Ms Ellis said in her evidence she had applied for two or three positions. Ms Ellis said that she felt in a difficult position to obtain employment and receive a liveable wage. I would not have awarded Ms Ellis more than three months lost wages but in the circumstances I am satisfied that she did make some attempt to mitigate her loss during the summer months and I will take the one month payment into account. Ms Ellis is entitled to reimbursement of lost wages between 20 November 2008 and 1 January 2009. That is a period of six weeks. Subject to any findings I may make about contribution or any other reduction because of after discovered misconduct that is, based on a salary of \$65,000, a figure of \$7500 gross.

Compensation

[49] Ms Ellis said that she was placed under stress as a result of the dismissal. I accept that it happened in an unexpected and more dramatic way rather than the more measured way a relationship usually ends for performance reasons. Ms Ellis said that she ended up doing a role that she would normally not have done when she went into business in partnership doing property maintenance and management. Subject to any finding I shall make about contribution and any after discovered misconduct I award the sum of \$5000.

Contribution

[50] The Authority is required to consider whether Ms Ellis contributed to the situation that gave rise to the personal grievance and if she did reduce any remedies accordingly. I make no significant reduction in terms of Ms Ellis's performance as such. The Oaks could have followed a fair and reasonable process in terms of performance and I do not find a strong causal connection between Ms Ellis' actions and the failure of the Oaks to do so in this case. I do however find some clearer

blameworthy conduct on the part of Ms Ellis on the day that her employment was terminated that in my view is sufficiently proximate to the way in which her employment was terminated. I find on the balance of probabilities that Ms Ellis did take her time before returning to the Oaks and that there was a measure of deliberateness in doing so. Even when she arrived at the Oaks she did not go straight away and find Ms Monteith and Mr Kennedy. I find that this led to a measure of frustration at her approach and the importance that she placed on the concerns the company had in her management role. That in turn in my view contributed to the grievance, the termination. I have balanced that conduct however in terms of contribution because it would have been unlikely that a representative could have been obtained at such short notice and that the meeting would in all probability still not have been able to proceed. The remedies I have awarded above are to be reduced by 20%.

After discovered conduct

[51] I accept that the matters discovered about deletion of charges raise some very real questions and would require investigation had Ms Ellis remained on in her employment. The awards in this case are modest and I have not and would not have awarded lost wages in excess of three months. I make no further adjustment.

Orders

[52] I make the following orders taking contribution into account.

- (i) I order Oaks Hotels and Resorts NZ Limited to pay to Patricia Claire Ellis the sum of \$6000.00 gross being reimbursement of lost wages under s.123(1)(b) of the Employment Relations Act 2000.
- (ii) I order Oaks Hotels and Resorts NZ Limited to pay to Patricia Clair Ellis the sum of \$4000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[53] I reserve the issue of costs. Mr Pine has until 25 March 2010 to lodge and serve submissions as to costs and Ms Ashcroft has until 8 April 2010 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority