

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 484
5406651

BETWEEN

TOM O'CONNOR
Applicant

A N D

AUCKLAND UNIVERSITY
STUDENTS ASSOCIATION
INCORPORATED
Respondent

Member of Authority: K J Anderson

Representatives: G Pollak, Counsel for Applicant
B Scotland, Counsel for Respondent

Investigation Meeting: 19 and 20 June 2013 at Auckland

Date of Determination: 21 October 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Tom O'Connor claims that he was unjustifiably dismissed on 13 November 2012. He asks the Authority to find that he has a personal grievance and award him the remedies of reinstatement to his previous position and compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[2] The respondent, Auckland University Students Association Incorporated, rebuts the claim of Mr O'Connor and says that his dismissal was justifiable on the ground that he was involved in serious misconduct to a degree that led to a substantial loss of trust and confidence in his ability to carry out his role as General Manager.

[3] The Authority received evidence from Mr O'Connor along with two witnesses for him: Ms Antonia Verstappen, and Mr Sam Durbin. For the Auckland University

Students Association (AUSA) there is evidence from Ms Catherine Bell, Mr Daniel Haines and Ms Arena Williams. The Authority also received a substantial number of documents from both parties. All of the material evidence available to the Authority has been closely considered albeit it may not be specifically referred to in this determination.

Background

[4] AUSA is a registered incorporated society. Until 1999, the membership of AUSA was compulsory for all students enrolled at the University of Auckland (the University). In 1999, due to a change in the law, students of the University voted to make the membership of AUSA voluntary. In order to protect the substantial assets of AUSA (at that time) the organisation was split into five independent trusts. The trusts return a dividend to AUSA; being the substance of its income.

[5] The five trusts are:

- John Weeks Trust (responsible for the art collection);
- UBS Trust (University Book Shop);
- Property Trust (which has a modest commercial/industrial property portfolio);
- Media Trust (student radio station 956FM); and
- Services Trust.

[6] Each trust has student representation on its respective Board,, but in every instance the Board comprises a majority of external representatives which gives it essential stability and independence from the student executive.

The management of AUSA

[7] AUSA has an executive body (the Executive). This comprises 23–25 students aged between 18 and 23 years. Interested students campaign for election via a general ballot during the first two weeks of the University second semester each year. The office holding positions are: President, Administrative Vice President, Education Vice President, Treasurer and Maori Student Officer/s. The officers receive an

honorarium for the time they spend on executive business. The other members of the Executive have responsibility for specific portfolios, i.e. sport, culture and clubs.

The role of General Manager

[8] AUSA employs a General Manager. This was Mr Tom O'Connor. He commenced his employment with AUSA in March 2006, having previously held a number of senior management roles within various companies during his career.

[9] Mr O'Connor had the responsibility of implementing the strategic direction that was decided by the Executive. He had the direct responsibility for a number of staff employed by AUSA. Mr O'Connor was assisted by the Administrative Vice President, Mr Daniel Haines¹, in regard to staff and general administration matters.

[10] Given the annual turnover of the Executive of AUSA, the role of General Manager gives stability to the governance/management of AUSA and its general operations, via the respective trusts. The General Manager is also responsible for negotiating contracts and agreements on behalf of AUSA.

[11] In his evidence to the Authority, Mr Haines explained that the AUSA Executive is "significantly" more dependant on the General Manager than most companies might be in regard to their Chief Executive Officer; for example. This is because the Executive members are all students, often just out of secondary school, and they are only appointed to a position for a period of one year. The Executive members often have little governance or management experience and they require substantial training to fulfil the respective roles they hold. Mr Haines attests that:

There is a lack of continuity of institutional knowledge, and much leadership is required from the General Manager to ensure that the Executive has all the information and skills it needs to act as a proper governor of what is multi-million dollar business interests.

The Bacchid issues

[12] One of the trusts established by AUSA is the Services Trust. In his role as General Manager Mr O'Connor was the chair of the Trust and along with three external trustees and two AUSA representatives, had some responsibility for its affairs. The Services Trust was the sole shareholder in a limited liability company:

¹ The position that Mr Haines held at the material times was Administrative Vice President. He is currently the President of AUSA.

Bacchid Benevolency Limited (Bacchid)². This company operated Absolute Catering, which operated a number of cafés, bars and a restaurant; off and on the University premises. Absolute Catering employed approximately 80 staff.

[13] The evidence of Mr Haines is that in November 2011, the General Manager and Financial Controller of Absolute Catering resigned. Mr O'Connor also refers to the resignation of the General Manager but does not mention the resignation of the Financial Controller in his evidence, but nothing can be read into this. What is relevant, is that upon the departure of the people that held the two senior positions, it was discovered that Bacchid had \$1.4m of debt and this situation had not been appropriately and/or accurately presented to the Bacchid Board of Directors.

[14] The evidence of Mr O'Connor is due to the resignation of the General Manager and the Financial Controller, and the subsequent discovery of the amount of accumulated debt that Bacchid had incurred, he was asked by (the then) President of AUSA, Mr McCory, (the then) Administrative Vice President, Mr Sam Durbin and, (the then) President elect, Ms Arena Williams, to assume the role of Executive Director of Bacchid. It appears that in fact, Mr O'Connor put the proposal that he assume the role of Director of the Bacchid group as the situation was that Bacchid could either employ a new General Manager, on an annual salary of approximately \$140,000, or, Mr O'Connor could assume the duties in addition to those he was currently carrying out as the General Manager of AUSA.

[15] The evidence of Mr Haines is that the Bacchid Board appointed Mr O'Connor as the Executive Director as it believed that it would not be possible to find an external person who would be willing to take on the responsibility for the company, at such short notice.

[16] The precise date that Mr O'Connor assumed the role of Executive Director of Bacchid is unclear, but it appears that it was in late November or early December 2011.

[17] The evidence of Mr O'Connor is that as a result of being appointed to the role of Executive Director of Bacchid, the salary paid to him as General Manager of AUSA, was reduced by \$26,000 to \$90,000, and the salary from the Bacchid group was reduced from \$140,000 to \$90,000. The effect being that the total annual salary

² The company was placed into liquidation from 31 October 2012.

paid to Mr O'Connor was \$180,000. This was also conditional upon him assuming the role of General Manager of Absolute Catering; hence he was performing two General Manager roles.

[18] It appears to have been agreed that the extra duties assumed by Mr O'Connor would only be an interim measure and albeit a finite timeframe was not set, it was understood that Mr O'Connor would revert back to only being the General Manager for AUSA, with his salary being adjusted accordingly.

The Bacchid finances

[19] The evidence of Mr O'Connor is that in early 2012 he negotiated terms with the Bacchid creditors. Mr O'Connor also sought an overdraft from the ASB Bank and some additional funding from various providers of services to AUSA, including the Property Trust; and he negotiated the receipt of income in advance from beverage suppliers. The work of Mr O'Connor to reduce the Bacchid level of debt was acknowledged by Mr Haines. However, as Mr Haines attests, these efforts were not successful overall.

[20] The evidence of Mr Haines is that the AUSA executive was first made "fully aware" of the financial status of Bacchid on 30 January 2012; at the first scheduled Executive meeting of the year.

The injection of \$220,000

[21] The evidence of Mr Haines is that Mr O'Connor "had placed an item on the agenda" asking the Executive to approve the movement of \$220,000 from the Property Trust, via AUSA, to Bacchid, as a capital injection to the company. Mr O'Connor did not attend the Executive meeting on 30 January 2012. Given the importance of the decision that was subsequently made by the Executive to approve this financial transaction, and the relative youth and commercial inexperience of the students, it is quite extraordinary that Mr O'Connor did not attend this meeting, albeit there was a public holiday. I also note that Mr O'Connor makes no mention of this event in his evidence to the Authority.

[22] Nonetheless, the evidence of Mr Haines is that Mr O'Connor had participated in earlier discussions with AUSA officers, including Mr Haines and Ms Arena Williams, the new President. Mr Haines says that Mr O'Connor told the AUSA

officers that if the capital transfer (\$220,000) did not take place, Bacchid would become insolvent and would have to close down. Also, as evidenced from an email dated 6 January 2012 from Ms Williams to the AUSA legal advisers, it would appear that the decision to make the capital injection had, at least in principle, been contemplated. Ms Williams informs an AUSA legal adviser that:

I have been advised by Tom O'Connor that you require further information from the AUSA President about AUSA's plans for the extra dividend from the Property Trust that we have requested. I can confirm that AUSA intends to use the \$220k from the Property Trust as a capital injection into the Bacchid Group Services Trust. The Bacchid Group Services Trust will then give AUSA a \$618,702 stake/share capital in the business.

[23] According to the evidence of Mr Haines, in 2007 Bacchid borrowed \$600,000 from AUSA, as a loan, to undertake the refurbishment of the Shadows Bar. While the loan was being repaid at regular intervals, as of 16 August 2012, Bacchid owed \$435,000 to AUSA. Mr Haines attests that the Executive understood that the \$220,000 was a capital injection and AUSA would be issued with shares in Bacchid, rather than the amount being a loan, as this would have had the result of showing that Bacchid was financially insolvent as it would not have been able to repay its debts. But as was subsequently revealed, Bacchid's days were numbered in any event.

More financial concerns

[24] It appears that in March 2012 AUSA, via the student liaison committee, requested funding from the University to meet its commitments to the New Zealand Students Association and Student Job Search; as evidenced in a comprehensive letter from the office of the Vice Chancellor dated 27 April 2012. In this letter the Director of Administration highlights a number of concerns that had arisen for the University "in recent years" pertaining to the ability of AUSA to manage its financial affairs. These concerns (paraphrased to some extent) included:

- (a) That AUSA audited accounts for the 2008 financial year included a "Fundamental Uncertainty" statement that questioned AUSA's ability to continue as a going concern;
- (b) In 2010 an independent report into AUSA's financial position concluded that AUSA was "technically insolvent". The report noted that: "... there is a significant amount of reputational risk to all of the

Executive members of AUSA to the UoA, if AUSA's insolvent position became publicly known or if one of its creditors took legal action against AUSA in an effort to obtain the payment". The report expressed several concerns about financial management practices within AUSA and the lack, or severely delayed completion of, audited accounts;

- (c) The University provided a payment of \$500k to AUSA in 2010, conditional on AUSA working with the University to develop activity based accounting systems that would give better visibility to AUSA executives, and the University, of expenditure against activities funded through the Services Agreement. That condition had not been met;
- (d) AUSA appears to be in breach of its constitution by not providing its members with the draft 2011 accounts at this year's AGM. In addition, audited accounts for the financial years 2009 and 2010 were required to be provided by June of the following year in both cases. The preparation of the accounts for both of these years remains outstanding;
- (e) In 2010, the University explicitly stated its intention to no longer fund certain services from 2011 onwards. Because of concerns expressed by AUSA in late 2010, it agreed to continue to fund them for one more year, to allow to AUSA to adjust its budget and activities. It is disturbing to hear that no such adjustments had been made and that the funding changes are being characterised as sudden and unforeseen;
- (f) It was of great concern to learn at the student liaison committee meeting that a budget for 2012 had not been confirmed at that time. It is pleasing to note however that a budget has since been agreed by the Executive;
- (g) There have been instances in the past of AUSA staff receiving cash in uncontrolled circumstances and significant amounts of cash going missing, resulting in Police action in at least one case. It is disturbing to hear therefore that payments for lockers are being requested in cash when alternative payment mechanisms are available;

- (h) The University has reports that AUSA has been neglecting to pay invoices dating back to December 2011;
- (i) A requirement of the University's Service Level Agreement for 2012 is for (AUSA) audited accounts for 2011 to be provided by 1 June 2012. It appears this condition will be breached.

[25] The Office of the Vice Chancellor (OVC) informed that in order to assist AUSA to be "a progressive and sustainable student organisation that delivers high quality services to students", it was prepared to amend the 2012 Services Agreement to include funding of the NZUSA and SJS levies. However, this was conditional on AUSA committing to address "...in this financial year, the financial concerns outlined in the Independent 2010 Report".

[26] The OVC also suggested that AUSA needed to take legal/governance advice and engage a competent human resources expert/practitioner to support "... the change process on a day-to-day basis". It was suggested that professional advisers would be likely to evaluate a number of actions that would be appropriate for AUSA to implement; including:

- Rescinding financial delegations from the Executive to staff;
- Delegating financial approvals to an AUSA executive (probably the treasurer) or alternatively to a statutory manager reporting to the Executive;
- Identifying the support that staff members require in order to prepare a full and viable budget for 2013;
- Requiring staff to provide the 2013 budget in a timely manner and to an explicit deadline;
- Insisting that such a budget clearly identifies all sources of income, including payments from sponsors and vendors, related party trusts and cash;
- Establishing regular financial reporting to the Executive to include:
 - rolling forecasts to provide assurance debts can be met as these fall due;
 - financial performance by student activity;
- Addressing any staff performance issues arising from the non-completion of a budget and/or the non-adherence to the approved budget;

- Reviewing the structure of the trusts;
- Addressing any conflicts of interest;
- Developing a dividend policy consistent with Trust Constitutions and building this into future budgeting and reporting processes as appropriate;
- Reviewing and if appropriate adding or amending the policies through which the Executive expects AUSA staff to deliver against AUSA objectives. These might include but should not be limited to financial management, delegations, health and safety, and regular performance and financial reporting.

[27] The OVC acknowledged that a significant amount of work will need to be done and this will require resources which AUSA may not have available and the University was willing to suggest independent advisers who might be able to assist, and also would consider requests for additional funding to get the work completed.

[28] Via an email dated 1 May 2012, Ms Williams sought a meeting with Mr O'Connor to discuss, among other things, the letter from the OVC and the implications of accepting the recommendations made. Mr O'Connor responded by an email the next day. He informed that he had "very strong views" about the letter from the OVC.

[29] Mr O'Connor informed that:

The issues of an HR review and references to misappropriation go back some 20 years and for them to use these as reasons to have an audit is ludicrous. It should not even be contemplated ...

[30] Remarkably, given the overall circumstances, Mr O'Connor then informs that:

As you might gauge from my comments I am incredibly pissed off with their condescending and malicious approach to the AUSA business which should at all times be off limits to the University.

[31] Ms Williams wrote to Mr O'Connor on 15 May 2012 informing him that the Executive requested access to the books, papers and accounts of the John Weeks Trust, the AUSA Property Trust and the AUSA Outdoor Shakespeare Trust, for the purpose of establishing AUSA's overall financial position. Mr O'Connor was also informed that the Executive has decided that the Treasurer will request access to the books, papers and accounts of the AUSA Services Trust and the AUSA Media Trust,

and that all of the trusts mentioned should make the information sought available within 48 hours.

[32] Also, and of particular relevance to subsequent events, Mr O'Connor was informed that the Executive had decided to engage Grant Thornton, Accounting Consultants (the Consultants) and acting on behalf of AUSA, they would have access to the material requested.

[33] The evidence of Mr O'Connor is that he did not know exactly when the Executive involved Grant Thornton, but it is established that as of 15 May 2012, or thereabouts, Mr O'Connor was made aware that Grant Thornton had been instructed by the AUSA Executive. Mr O'Connor co-operated with the Consultants and took the necessary actions to ensure that the material they requested was made available.

The Grant Thornton Report

[34] Grant Thornton provided to AUSA an *Independent review* document (the report) dated 6 July 2012. Because the content of this report raised significant concerns for the AUSA Executive, that became relevant to the dismissal of Mr O'Connor, it is appropriate to record significant aspects of the executive summary from the report:

- (a) The current executive is taking proactive steps to understand the present and future financial performance/position of AUSA. However we are concerned, particularly in regard to Bacchid, that the Executive is making key financial decisions on limited and unreliable financial information, which could ultimately put AUSA's long term viability at risk.
- (b) Lack of financial control and appropriately structured financial reporting procedures are leading to poor financial decision making at AUSA.
- (c) AUSA has an insolvent adjusted balance sheet position with net liabilities of \$249k. AUSA needs to improve profit levels and cash generation to help improve its financial position. In particular, AUSA should focus on paying down its overdraft to reduce its financing costs.
- (d) The ability of AUSA to break even during FY12 and achieve a cash neutral position is dependant upon its ability to implement tighter cost controls and manage its cash position. A challenging budget has been set for FY12 requiring significant cost reductions to be achieved. In the medium term, challenges faced by UBL could impact on UBL's ability to maintain historic levels of dividends to AUSA.

- (e) The Property Trust has raised concerns regarding the level of funding being provided to AUSA. AUSA has subsequently approached the Property Trust to provide a letter of comfort to ASB Bank in respect of Bacchid and to fund the purchase of Shadows Bar. These additional funding requirements could lead to a situation where the Property Trust is required to sell quality assets to support AUSA. This may adversely impact on the Property Trust's ability to fund AUSA in the future.
- (f) Bacchid is loss making and insolvent. Its future viability is uncertain and additional funding is likely to be required if it continues to trade. The Directors of Bacchid should seek legal advice in respect of this situation.

[35] In regard to the Bacchid situation the Report goes on to inform that:

- Financial and operational management of Bacchid is concerning. Poor financial controls, ineffective governance and a management team lacking specific industry credentials have resulted in poor decision making and strategic direction at Bacchid. This has ultimately led to Bacchid's loss making and insolvent position which should be reviewed in direct comparison to AUSA's professionally run and performing property and book shop assets.
- Management's proposed recovery plan for Bacchid involves Bacchid securing new transferable leases for certain cafés that it then intends selling to pay down debt, and an operational restructuring of the business to return it to profitability.
- In our view, this plan if not backed by substantive financial and supporting information, will be costly to implement (potentially requiring a significant level of additional funding support) and not headed by the right management team with the necessary credentials to implement the operational changes required
- Additional financial support should not be extended to Bacchid unless a sufficient level of certainty can be placed on the recovery plan (through the provision of more reliable financial and supporting information). Appropriate conditions and milestones should be attached to any level of support to control and monitor the progress of an agreed plan.
- Given Bacchid is trading whilst insolvent, Bacchid's Board should seek legal advice in respect of any decisions it makes.

[36] Under a heading: "Internal control and governance" the Report informs:

- (a) The Executive is responsible for setting AUSA's annual budget. In theory a draft budget is prepared for the following year each July and finalised and approved in November, for recommendation to the following years Executive. This process was not undertaken in FY11 and FY12's budget was prepared in April 2012. Budget setting is a "top-down"

process. There appears to be a lack of communication between Management, the individual cost centre heads and the Executive during the budget setting process. There is also a lack of performance monitoring throughout the year to control costs against budget, which has contributed to cost overruns.

[37] In regard to the financial control of all areas of AUSA, the content of the Report is quite critical. The Consultants found that the Executive has overall financial control of all areas of AUSA, but in practice, this role is largely delegated to management. Also it is stated that management is responsible to the Executive; however the Consultants understood that there is no formal document setting out the roles and responsibilities of the management team or any specific performance measures.

[38] Specifically the Consultants inform that:

There seems to be a lack of regular and adequate financial reporting to the Executive. We have found that the quality of the financial information produced at AUSA is poor and that there is lack of adequate control procedures within the finance function. In particular we found:

- Significant transactions were being entered into by AUSA without adequate supporting financial information (for example the Bacchid advance of \$220k in January 2012);
- A number of incorrectly posted journal entries and a lack of account reconciliations and supporting documents for major balance sheet items;
- Significant assets and liabilities are being understated/overstated ie the rental compensation fund receivable, liabilities to clubs and affiliates and the carrying of the Bacchid loan. This has considerably distorted the reported financial performance/position of AUSA;
- Poor internal controls in relation to the provision of credit/collection of debts;
- Inappropriately designed general ledger that does not adequately capture service delivery costs. For example, directly attributable wage/salary costs and overhead costs are not allocated by cost centre. Therefore, the accounts do not reflect the true cost of running a particular service/cost centre and this makes budgeting, cost control and service level reporting more difficult;
- Lack of clearly defined roles and responsibilities for the management team including no employment agreements; and

- Lack of clearly defined policies and procedures.

The audit for 2009 has yet to be completed and progress is unsatisfactory. This is due to failures on the part of the auditors, where staff changes have occurred, but also on the part of Management, who has been unable to provide sufficient supporting information to answer all the queries and support certain transactions. In our opinion the lack of timely audit sign-off is a significant control issue.

[39] In regard to the financial performance of AUSA for the period ended 30 April 2012, the Consultants reported that:

AUSA has historically been loss making and its normal levels of funding (received from UoA, its related trusts and its own fund raising activities) is not enough to meet the costs of its normal level of expenses. This is largely due to poor control of expenditure against budget.

[40] The Consultants also found that:

AUSA's ability to continue as a going concern and meet its liabilities as and when they fall due is dependant upon continued support from the UoA, the Rental Compensation Fund, AUSA's related trusts and its Bank via the provision of the overdraft.

The investigation process adopted by AUSA

[41] The evidence of the President of AUSA, Ms Williams, is that the Grant Thornton Report raised some serious issues that required appropriate exploration. As a result, the Executive instructed Ms Williams and Mr Haines to investigate the issues raised by the Report; and any staff performance issues that may exist. Ms Williams attests that the Executive were largely of the belief that Management may have failed to provide adequate financial information, with the result that the Executive had been unaware that the situation was potentially as bad as the Report suggested.

[42] In addition to asking the Executive members to complete a questionnaire, requesting that each member record their recollection of the meeting on 30 January 2012, at which the decision was made to inject \$220,000 into Bacchid, Ms Williams and Mr Haines also revisited past meeting minutes, email correspondence and policy and procedure documents. Ms Williams says this was all done in an attempt to understand what may have gone wrong and what the relevant facts might be.

[43] Ms Williams attests that when the relevant information had been gathered it began to appear that Mr O'Connor may have been responsible for some actions that could amount to serious misconduct. Ms Williams says that this is because Mr O'Connor, as the General Manager, was "ultimately responsible" for the day-to-day financial performance and operation of AUSA, and for providing the Executive with sound and appropriate advice for its decision making.

Disciplinary meeting – allegations

[44] Via a letter from Ms Williams dated 13 August 2012, Mr O'Connor was invited to attend a disciplinary meeting to discuss "eight" allegations.³ In summary, the allegations are:

(1) **Injection to Bacchid**

It is said that as a result of Mr O'Connor's advice, AUSA agreed to make loans to Bacchid that may never be recovered. And that this potentially places AUSA's continued financial liability into question. It is also alleged that Mr O'Connor executed the payment of \$220,000 to Bacchid, from AUSA, before he had obtained approval from the Executive. And further, Mr O'Connor failed to execute the conditions that the Executive placed over the payment to Bacchid. Mr O'Connor is informed that:

As General Manager, your role is to lead and oversee AUSA's financial management and to take steps to ensure the good financial management of AUSA. As a result of your reckless and/or negligent advice, AUSA's continued financial viability is potentially in danger. If this allegation is true, this could constitute serious misconduct on the basis that it is a breach of a fundamental requirement of your role. It could also breach clause 24.1 of your employment agreement by acting in a manner likely to damage AUSA's interest.

Mr O'Connor was provided with a copy of the Grant Thornton Report and statements from members of the Executive who were present at the meeting on 30 January 2012, when the loan of \$220,000 was approved.

³ In fact, because of a mistake in the numbering used, there were seven allegations.

(2) **Letter of comfort**

It is alleged that Mr O'Connor told the Executive that the ASB Bank would withdraw Bacchid's overdraft if the Executive did not urgently provide a letter of comfort and that Bacchid would close down. However, it is said that the ASB Bank manager had advised AUSA's legal adviser that the Bank was actually willing to extend the overdraft deadline by a further few weeks. Mr O'Connor was informed that if the allegation is proved to be true, serious misconduct may have been committed on the basis that he had been dishonest in contravention of clause 24.1 of his employment agreement.

It was further alleged that Mr O'Connor advised the Executive at a meeting on 28 May 2012, that Bacchid did not have a current overdraft. However, the advice from Grant Thornton was that at the time, Bacchid had an overdraft of approximately \$100,000. Mr O'Connor was advised that serious misconduct may have been committed, namely: dishonesty.

(3) **Budget forecast**

Reference is made to a budget forecast from the AUSA accountant, as forwarded by Mr O'Connor to the Executive. This forecast appears to have indicated that Bacchid did not require an overdraft. It is alleged that when Mr O'Connor was asked about this at the Executive meeting on 28 May 2012, he informed the Executive that the forecast was "incorrect and outdated" and it could not be relied upon. It is alleged that because Mr O'Connor informed the Executive that Bacchid urgently required an overdraft or it would close, that advice was misleading, or at worst, dishonest, when compared with the accountant's forecast.

(4) **Recruitment of club assistants**

It was alleged that Mr O'Connor employed people at AUSA without the approval or involvement of the Executive, in contravention of AUSA's constitution and policies.

Specifically it is alleged that the two people mentioned are close friends of Mr O'Connor and that his decision to employ them constitutes of conflict of interest.

(5) **Agreement with an IT company – Pleb Media Limited**

It is alleged that Mr O'Connor entered AUSA into an ongoing contractual relationship with Pleb Media Limited, to provide IT services to AUSA and Bacchid, without observing AUSA procedures.

(6) **Poor financial controls**

Reference is made to the findings in the Grant Thornton Report in regard to poor financial information being provided and inadequate control procedures. Mr O'Connor is informed that as the General Manager, it is his role to lead and oversee the financial management of AUSA; and he could be in breach of his employment agreement by acting in a manner likely to damage AUSA's interest.

(7) **Expense authorisation**

It is alleged that there are a number of irregularities identified in the Grant Thornton Report regarding Mr O'Connor's use of the AUSA's Visa card that Mr O'Connor has the use of. These irregularities are set out for Mr O'Connor's information.

[45] In conclusion, Mr O'Connor is informed that the purpose of the disciplinary meeting is to give him the opportunity to provide any explanations he may wish AUSA to consider. It is conveyed to Mr O'Connor that:

If one or all of these allegations is proven, this may constitute grounds for the summary termination of your employment on the basis that AUSA can no longer have trust and confidence in you. It is important that you understand the seriousness of the situation and do not treat this meeting lightly. You are encouraged to bring along a support person or representative with you.

[46] The letter of 13 August 2012 inviting Mr O'Connor to a disciplinary meeting was hand delivered to him by Ms Williams and Mr Haines. Coincidentally, Mr O'Connor had a letter of the same date to give to them. This letter raised a number

of concerns that Mr O'Connor wished to have addressed by AUSA. None of those concerns were directly connected to the allegations that he had been called upon to respond to.

Mr O'Connor's response to the allegations

[47] Mr O'Connor provided a written response to the allegations. As the Authority understands it, this was presented to AUSA at a meeting held on 22 August 2012, at which Mr O'Connor had legal representation. In summary, the response was as follows:

(1) **Injection to Bacchid**

Mr O'Connor informed that the advice from Grant Thornton that Bacchid was insolvent is not correct as the Consultants had not taken into account the sale value of the going concern businesses operated by Bacchid; three of which had been sold with a settlement date of 10 September 2012. Mr O'Connor informed that he had a positive view of the Bacchid business and his aim was to protect the funds invested by AUSA and the livelihoods of the employees and creditors of Bacchid.

Mr O'Connor confirmed that he had encouraged the investment of a further \$220,000 into Bacchid on the basis that this money was required to continue trading and pay the wages and salaries of the staff, until the business could reorganise and be in a position to repay creditors and pay a dividend to AUSA.

Mr O'Connor denied executing the payment of the \$220,000 before the Executive had approved it. He explained that the authorisation required two signatures; one from AUSA staff and the other from "the students" (presumably the Executive). Mr O'Connor says that he was not required to attend the meeting (30 January 2012) and was not on site at the conclusion of the meeting⁴, hence he signed his authorisation with the intention that the final authorisation would be made when approval from AUSA to authorise a signature was given. Mr O'Connor

⁴ It was a public holiday – Auckland Anniversary Day

informed that his understanding was that the AUSA authorisation was finalised by the Treasurer.

In regard to the conditions attached to the transfer of the funds, Mr O'Connor says that he only discovered these later in that week (Friday) when he reviewed the Executive meeting minutes. But these conditions were never discussed with him until he raised them at the next Executive meeting.

(2) **Letter of comfort**

Mr O'Connor denied that he advised the Executive that the overdraft facility with the ASB Bank would expire if a letter of comfort was not provided. Mr O'Connor says that he had been advised by the ASB Bank Manager that the overdraft facility would finish at the end of May 2012. The Executive were informed of this. Mr O'Connor informed that he did not know that the legal adviser for AUSA had arranged a two week extension of the overdraft facility or that AUSA had engaged the law firm involved; having only discovered this the day after the Executive meeting (31 January 2012).

(3) **Budget forecast**

Mr O'Connor informs that the cash flow information he received from the Bacchid accounts manager was not up to date. He says he informed the Executive meeting on 28 May 2012 that he would need to obtain more current figures from the accounts manager. However, Mr O'Connor also explains that at a prior Executive meeting he had produced the Bacchid annual budget with cash flow information that was "about four weeks old". And at the request of a Grant Thornton consultant, a revised forecast had been prepared based on an analysis of actuals against the budget, with the result that the forecast was "very accurate" with a realistic cash flow that could be depended upon to make the changes necessary to create a profitable business. Mr O'Connor informs that the information provided was the latest available at the time.

He also asked AUSA to consider the effect of the departure of the Bacchid General Manager and Financial Controller in November 2011

and the circumstances whereby the assistant accountant had been appointed to fill the role of accountant, and she had to spend months trying to correct and set up accurate accounting reports in addition to working with the Grant Thornton people.

(4) **Recruitment of club assistants**

Mr O'Connor informed that the allegation that the two appointees mentioned were close friends of his was "preposterous". Mr O'Connor explained that Mr Haines, in his role as the Administrative Vice President, would normally also be involved with interviewing potential staff. But in this case, Mr Haines had explained that the two people concerned were his friends and it was agreed that he would not be involved in the interview process.

(5) **Agreement with IT company**

Mr O'Connor explained that during 2011 there had been discussions about the IT role following the departure of two people (one from AUSA the other from Bacchid) involved with the IT function and also the requirements of the radio station. Possibilities were discussed in regard to saving money in the 2012 year. Mr O'Connor informed that Mr Sam Durbin had made an approach with an idea that his company (Pleb Media Limited) could save the respective organisations a "substantial amount" of money. Mr O'Connor says that he arranged to meet with the radio station manager, Mr Haines and Mr Durbin to discuss the merits of a contract position serving the needs of the three entities. Subsequently, a contract was signed by Mr O'Connor on behalf of Bacchid and signed by Mr Haines on behalf of AUSA. The radio station manager took a copy of the contract for reviewing. Mr O'Connor provided a copy of the contract.

(6) **Poor financial controls**

Mr O'Connor defended his provision of financial information and his financial management generally. In particular, he points to the credit controls being consistent for the last 10 years and the absence of any concern being raised in the annual audit process. Mr O'Connor also informed that he was not aware of any employee not having an

employment agreement and he explained that new employees were not paid their salary or wages until he was in receipt of a signed employment agreement.

In conclusion, Mr O'Connor presented an annual plan, policies and controls that he had presented to the Executive for the period 2010 to 2013 that he says had never been approved for commencement by the Executive.

(7) **Expense authorisation**

Mr O'Connor informed that all transactions on the credit card are for genuine business purposes, albeit he accepts that the narration could have been "light". And there had never been an issue over the past five years. Mr O'Connor accepts that he did place some "urgent" purchases for Bacchid on the credit card but he arranged an invoice for Bacchid the next day and to his knowledge, these had been paid for. Mr O'Connor explained that there was one occasion that he incurred a personal expense in an emergency, when his personal card failed to work as it had not been properly activated by the Bank. He says he immediately advised the accounts department and he settled the amount when the credit card statement was available.

The disciplinary meeting

[48] The disciplinary meeting took place on 22 August 2012 with Ms Williams, Mr Haines and a human resources professional advising AUSA. Mr O'Connor had his lawyer present. Mr Haines took notes of the meeting. Mr O'Connor is critical of the content of the notes and he says that when he was given a copy he did not consider them to be even "reasonably accurate". Mr O'Connor says the notes were "hopelessly confused and inaccurate". The evidence of Mr Haines is that Mr O'Connor believed that there were some inaccuracies in the notes and Mr O'Connor had made some corrections. It is the view of Mr Haines that there was nothing critical or substantive changed and he believes that his notes accurately record the discussion that occurred at the meeting. Given that Mr O'Connor has not brought anything in particular to the notice of the Authority, it appears that there is nothing arising from the meeting that may have resulted in any unfairness to Mr O'Connor.

[49] Following the meeting on 22 August 2012, AUSA undertook further investigations and via a letter dated 24 September 2012, Ms Williams and Mr Haines provided further information pertaining to the allegations. Some of this information was said to contradict certain explanations given by Mr O'Connor and he was invited to attend a further disciplinary meeting.

Meeting – 9 October 2012

[50] Mr O'Connor provided a further comprehensive response to the allegations from AUSA. On the basis of concerns, apparently raised by Mr O'Connor, it was accepted by AUSA that in order to ensure that there was no irregularity in regard to the continued involvement of Mr Haines, he agreed to remove himself from any further involvement with the disciplinary matter concerning Mr O'Connor. The result being, that Ms Williams, in her role as President of AUSA, became the sole decision-maker.

[51] As evidenced from a letter to Mr O'Connor dated 18 October 2012, it was agreed that AUSA would provide further information relating to the AUSA tendering policy and the timing of financial control audits for the last three consecutive financial years. Mr O'Connor was invited to consider the new information and provide any additional comments by 23 October 2012. He was informed that:

Once we have given you the opportunity to put forward any explanations or additional information, we will then consider the information we have available and reach preliminary views as to whether or not any of the allegations are substantiated or not. We will give you the opportunity to comment on these preliminary views, and on any proposed outcome, before any final decisions are made.

[52] Mr O'Connor responded via a letter dated 23 October 2012.

The preliminary conclusions reached by AUSA

[53] The evidence of Ms Williams is that she wrote to Mr O'Connor on 26 October 2012, informing him of her preliminary decisions in regard to the allegations that had been the subject of the disciplinary process. However, the letter produced to the Authority is dated 4 December 2012. Mr O'Connor says that he received this letter on or about 30 October 2012 and I accept that this is so, as evidenced by his response on 31 October 2012. Given the gravity of the matters being decided upon, one would have expected AUSA to have included the correct date in the letter. Nonetheless, it is

established that Mr O'Connor received and responded to the preliminary view reached by AUSA on each of the allegations. In summary, Ms Williams addressed the seven allegations as follows:

Allegation 1: Capital injection to Bacchid

[54] It was accepted that there was insufficient evidence to support the allegation that Mr O'Connor had executed the payment of \$220,000 to Bacchid before approval was obtained from the Executive. It was also accepted that Mr O'Connor did not fail to execute the conditions that the Executive had placed over the payment to Bacchid, and in fact, there was evidence that Mr O'Connor was not aware that there were any conditions attached to the payment. However, the preliminary conclusion reached by Ms Williams was that Mr O'Connor encouraged the AUSA Executive to make a payment of \$220,000 to Bacchid that AUSA would not be able to recover.

Allegation 2: Letter of comfort

[55] Ms Williams informed Mr O'Connor that:

It is alleged that on 28 May 2012 you told the Executive that the ASB Bank would withdraw Bacchid's overdraft if the Executive did not urgently provide a letter of comfort and that Bacchid would close down. You stated in your letter dated 22 August 2012 that the ASB Bank manager advised you that Bacchid's overdraft facility would finish at the end of May and that you relayed this to the Executive. We accept this, and further accept that you were not aware of the possibility of an extension until the next day when you were advised of it by email from Arena Williams.

It is further alleged that on 28 May 2012, you also advised the Executive that Bacchid did not have a current overdraft. Based on the witness statement from members of the Executive, my preliminary conclusion is that you misled the AUSA Executive regarding the overdraft. In the meeting of 22 August 2012 you stated that, "you can't assume that we have no money in the bank", and that you "only made it sound better because I believed we were able to trade out". Grant Thornton's report dated 6 July 2012 stated that Bacchid's actual overdraft at the time was around \$100,000.

Allegation 3: Budget forecast

[56] Ms Williams informs that:

It is alleged that you advised the AUSA Executive on 28 May 2012 that the budget forecast provided to them was "incorrect and outdated", when Virginia Liu had advised that this was the "correct forecast". Based on Virginia's email to you, witness statements from

members of the Executive, and Dan Haines' timeline of documents received, my preliminary conclusion is that this allegation is proven. I am satisfied that the only documents provided to the Executive prior to the meeting was the "2012 Budget set in 2011" and Bacchid "Cashflow Forecast – Jan 12 to Dec 12". My initial conclusion is that you did not present a "totally revised forecast" on the day. Dan Haines states that further information was not provided until 5 June 2012. Even then, this document was only a set of financials and you were not able to provide a plan that would project when money would come and go out of the accounts and when Bacchid would have a positive cashflow.

Allegation 4: Recruitment of Club assistants

[57] Ms Williams informs that:

It is alleged that you have employed people at AUSA without approval or involvement of the Executive in contravention of AUSA's policies. It is further alleged that [L] and [M]⁵ are close friends of yours and as such there is a conflict of interest in your decision to hire them. My preliminary conclusion is that AUSA's recruitment policy was not followed in recruiting [L] and [M] as Club assistants. In our meeting dated 22 August 2012, you admitted, for example, that the job was not advertised through formal channels. Clause 2 of AUSA's recruitment policy requires that "all positions should be advertised widely" – "through a job internet site, the AUSA website, Craccum, Next Week, New Zealand Herald and Student Job Search". Furthermore, clause 3 requires that a panel be appointed to review the applications. This did not occur and you were, in fact, the only one involved in their recruitment. There is no evidence to support your comments that this policy is not usually followed. There is insufficient evidence to support the allegation that [L] and [M] are close friends of yours.

Allegation 5: Agreement with IT company

[58] Ms Williams informs that:

It is alleged that you have entered AUSA into an ongoing contractual relationship with Pleb Media Limited to provide IT services to both AUSA and Bacchid without following correct AUSA procedure. It is further alleged that Pleb Media Limited is owned by Sam Durbin the AVP in 2011 and as such there is a potential conflict of interest in your decision to enter into an agreement with this particular company. You advised on 23 October 2012 that you did not believe that the AUSA tendering policy was valid, refers to positions that no longer exist and only applies when AUSA is tendering its services. My view is that this is not correct. The policy has not been replaced or superseded. The fact that the business and development manager no longer exists does not alter this. The policy specifically refers to AUSA buying services and to purchases, which is contrary to your interpretation. Based on the statement from Dan Haines and your own comments, my preliminary view is that AUSA's Tendering Policy

⁵ For privacy reasons it is not appropriate to identify these two people.

was not followed. In our meeting of 22 August 2012, you acknowledged that Pleb Media was the only company considered. The Companies Office record for Pleb Media clearly shows that it is owned by Sam Durbin, the AVP in 2011. My view is that this posed a potential conflict of interest to AUSA that has not been appropriately disclosed or managed. While you did not sign the agreement on behalf of AUSA, you advised Dan to sign it. This was in conflict with your duty as AUSA's most senior employee and adviser to the Executive. Your role requires you to have knowledge of AUSA's policies and to advise the Executive on the requirements of these. My preliminary view is that you failed to do so in this instance.

Allegation 6: Poor financial controls

[59] Ms Williams informs that:

Grant Thornton advised AUSA in their report dated 6 July 2012 that AUSA's financial information is poor and that there are inadequate control procedures in place within finance. Based on Grant Thornton's report, and our subsequent investigations, my preliminary conclusions are that:

- (a) Significant transactions have been entered into by AUSA without adequate supporting financial information (for example, the Bacchid advance of \$220,000 in January 2012);
- (b) There are a number of incorrectly posted journal entries and a lack of account reconciliations and supporting documents for major balance sheet items;
- (c) Significant assets and liabilities are being understated/overstated, i.e. the rental compensation fund receivable, liabilities to clubs and affiliates and the carrying value of the Bacchid loan. This has considerably distorted the reported financial performance/position of AUSA;
- (d) There are poor internal controls in place in relation to the provision of credit/collection of debts;
- (e) That AUSA has an inappropriately designed general ledger that does not adequately capture service delivery costs. For example, directly attributable wage salary/costs and overhead costs are not allocated by cost centre. Therefore, the accounts do not reflect the true cost of running a particular service/cost centre and this makes budgeting, cost control and service level reporting more difficult; and
- (f) There is a lack of clearly defined policies and procedures in place for AUSA.

At our meeting of 22 August 2012 you advised that you relied on the auditors to tell you each year if there was something wrong with AUSA's financial systems. The information we have been provided shows that the audit for 2009 was not completed until June 2012, and the audits for 2010 and 2011 have only been completed this year. I am concerned that your response on 22 August 2012 was misleading

given that the audits for 2009, 2010 and 2011 weren't completed until this year, and therefore it seems difficult how you could have relied on these reports to ensure that appropriate financial controls were in place. As General Manager, responsibility for ensuring that appropriate financial controls are in place is your ultimate responsibility.

There is no evidence to support the allegation that there is a lack of clearly defined roles and responsibilities for the management team or that they have no written employment agreements. We accept your comments that when people start with AUSA they are provided with 2 x job descriptions, 2 x contracts, bank documents and a tax form, and that they are not paid unless all documents are returned.

Allegation 7: Expense authorisation

[60] Ms Williams informs that:

In Grant Thornton's report dated 6 July 2012, they advised AUSA that the expenses and payment authorisation procedures for the AUSA's National Bank Visa in your possession may not have been adhered to in accordance with AUSA's financial policy. Based on their report, copies of recent card expense forms, the spreadsheet breakdown of your credit card transactions, and an email from [Z], accounts assistant to Daniel Haines, AVP, dated 6 September 2012, my preliminary conclusions are that:

- (a) Expense details and supporting invoices have not been submitted by you for approval by an Executive member before the payment is made and the credit card approval forms are only ever signed by you;
- (b) The credit card expense forms lack receipts and sufficient narrations to substantiate the amounts incurred/expensed [sic] as genuine business related expenses; and
- (c) A number of expenses have been incurred on the credit card for Bacchid. This is not an expenditure approved by the Executive against the budget. The amounts identified for Bacchid seem to have been recharged to Bacchid by the finance team, but these expenses are unlikely to be recovered given Bacchid's financial position. It is my view that you incurred these expenses without any prospect of AUSA being able to recover these amounts.

There is insufficient evidence to sustain the allegation that you have incurred personal expenditure on the credit card.

Preliminary decision

[61] Mr O'Connor was advised that he had previously been notified (13 August 2012) that if one or all of the allegations were proven, this may constitute grounds for

the summary determination of his employment, on the basis that AUSA could no longer have trust and confidence in him. Ms Williams then informs that:

My initial finding is that all of the allegations are substantiated to some extent as noted above. My preliminary view is that your conduct in respect of allegations 1, 4, 5 and 6 on their own constitute serious misconduct. Taken cumulatively, my view is that the allegations raise serious concerns regarding AUSA's ability to have trust and confidence in you in the role of General Manager. I am concerned that you do not appear to have an appreciation of your obligations as the most senior employee of AUSA and as the main adviser of AUSA Executive, particularly when managing the relationship between AUSA and Bacchid. In my view this is not a performance issue.

You have identified that you were subject to a conflict of interest in your roles as General Manager of AUSA and as a director of Bacchid, particularly in relation to allegations 1 and 3. You have advised that AUSA as your employer has allowed this to occur. I have considered this, and my preliminary view is that this is not accepted. When you became a director of Bacchid there was no conflict of interest situation. However, as the financial situation of Bacchid has deteriorated, a conflict has become apparent. This has led to what I believe is a breach of your duty of fidelity to your employer. My view is that as the most senior employee of AUSA and the main adviser to the Board, it was your duty to identify and manage any conflict of interest in order that [sic] breaching your duty of fidelity and to advise the Executive accordingly. My preliminary conclusion is that you have failed to do this.

It is my preliminary decision therefore that you should be summarily dismissed from your employment with AUSA.

[62] In conclusion, Mr O'Connor was informed that before a final decision was made, he was being given the opportunity to provide any final comments in relation to the proposed sanction and preliminary conclusions set out in the letter. Mr O'Connor was invited to either provide his response in writing or in person and, if in writing, he should do so by midday on Wednesday, 1 November. Alternatively, if Mr O'Connor wished to meet, then he was to notify by Friday, 26 October and a suitable time would be arranged.

Mr O'Connor's response to the preliminary decision

[63] On 31 October 2012, Mr O'Connor responded to Ms Williams' preliminary conclusions. In regard to allegation 1, Mr O'Connor informed that it had been his view "from the beginning" that Grant Thornton's opinion was "targeted at a negative outcome" and that on a number of occasions their view had "been proved demonstrably wrong" in their analysis of the Bacchid business.

[64] Regarding allegation 2, Mr O'Connor informed that:

If the ASB Bank manager advised me or the financial controller that the OD [overdraft] facility would expire on a given date I had no reason not to believe him as it had happened on each occasion prior to that. I have never misled the Executive Committee regarding the financial position of Bacchid. If the OD was \$150k and it was used up then it would be natural to build up the cash in hand to the same amount (\$150k) to ensure we did not breach the agreement with the ASB Bank. The alternative would have been to ignore the need for the \$150k and have [the] bank demand their funds back when we did not have any money. I cannot understand why you chose not to see that. Please do not forget that you knew full well that an extension of the OD facility had been arranged by solicitors, Chen Palmer, yet you failed to have even the courtesy to advise me of that fact but you did let the whole Executive Committee know that and let them think I was lying to them? This has not been in accordance with obligations of good faith and has had the effect of bringing me into disrepute to achieve a predetermined outcome.

[65] Concerning allegation 3, Mr O'Connor recounted his earlier explanation on this matter. In regard to allegation 4, Mr O'Connor explained that the process he used had been followed for the past 5½ years and the situation could have been "easily remedied" by requesting that he follow the process that existed in 2005. Mr O'Connor espoused the view that the original allegation was "mischievous and meant to damage my credibility".

[66] In response to allegation 5, Mr O'Connor denied that he advised/directed Mr Haines to sign the Pleb Media Limited contract on behalf of AUSA. By implication, as the Authority understands it, Mr O'Connor appears to deny that he failed to notify AUSA regarding a potential conflict of interest (due to the involvement of Mr Durbin) in that Mr Durbin had been previously involved on the AUSA Executive.

[67] In regard to allegation 6, pertaining to poor financial controls, Mr O'Connor responded to each of the six subsections outlined in Ms Williams' preliminary conclusions, albeit these responses are rather lacking in substantive detail.

[68] Finally, in regard to allegation 7, the response of Mr O'Connor is brief in that he asserts that there is no evidence to suggest that there has been any wrongdoing.

[69] The general summary from Mr O'Connor is that he believed the preliminary decision to dismiss him was predetermined, probably from early 2012. Consistent with this view, Mr O'Connor concludes his response by indicating that there was little

point in meeting again and that upon confirmation of his dismissal he would be seeking immediate legal redress.

The dismissal

[70] Mr O'Connor did attend a meeting with Ms Williams and the HR adviser for AUSA on 13 November 2012. His evidence is that Ms Williams read the following letter:

Dear Tom,

FINAL DECISION

Thank you for your letter dated 1 November 2012 in response to my preliminary decision in relation to the allegations against you.

I have carefully considered your comments and have reviewed each of the allegations. I have decided to confirm my decision that allegations 1, 2, 3, 5, 6, and 7 are established. Further, I confirm my preliminary conclusion that allegations 1, 2, 3, 5, 6, and 7 constitute serious misconduct.

I have given a great deal of thought as to whether AUSA can have trust and confidence in you as a result of these proven allegations. My conclusion is that AUSA cannot have trust and confidence in you going forward, and that a lesser sanction would not remedy this situation. In particular, I am concerned by your apparent lack of understanding and appreciation of your role and responsibilities as General Manager towards your employer and how you have seriously failed in these. Further, you have not appreciated the inherent conflicts caused by your role as an employee and as a director of Bacchid, and indeed this was only addressed by AUSA given my intervention. You do not accept that you have done anything wrong or indeed that you had any part to play in relation to the proven allegations.

You have been employed to be the AUSA's key adviser on all matters, and this position requires a very high level of responsibility and trust given the nature of the AUSA Executive and student politics in general. As a result of these findings, AUSA cannot have trust and confidence in you.

I therefore confirm AUSA's decision to terminate your employment with immediate effect from the date of this letter in accordance with clause 24 of your employment agreement. Your final pay will be paid into your bank account in due course. You are to return all AUSA property and information in your possession or control as soon as possible, and to hand over all keys, access cards, mobile phones etc to me.

You state in your letter that you wish to raise a personal grievance for unjustified dismissal. We do not accept your letter of 1 November

2012 as raising a personal grievance given that no decision regarding dismissal had been reached at this stage.

[71] Mr O'Connor says that his actions could not be characterised as serious misconduct and that a fair and reasonable employer could not have dismissed him given all the circumstances.

Analysis and conclusions

[72] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test⁶:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[73] Then, in applying the test, the Authority must consider⁷:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[74] While the Authority understands that Mr O'Connor does not take any real issue with the procedural aspects of the investigation and disciplinary process adopted by AUSA, for reasons of completeness, I record that I am satisfied that the above requirements of s.103A(3) have appropriately been met.

[75] In applying the test provided by s.103A(2) of the Act in regard to the circumstances pertaining to the dismissal of Mr O'Connor, the first matter for the Authority to consider is:

⁶ Section 103A(2) of the Act

⁷ Section 103A(3) of the Act

Could AUSA, as a fair and reasonable employer, reasonably conclude that the alleged actions and/or inactions of Mr O'Connor constituted serious misconduct?

[76] In determining this question, the Authority must be cognisant that a personal grievance action is not an appeal to the Authority from the employer's findings of fact. Rather, the inquiry into the question is whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal⁸. As stated by Chief Judge Goddard in *Travers-Jones*:

In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.

[77] The dismissal of Mr O'Connor was on the grounds that AUSA concluded that six of the seven allegations that Mr O'Connor was required to answer were proven to constitute serious misconduct. Nonetheless, it is apparent from the overall evidence that the major area of concern for AUSA was the management of its financial affairs. In particular, but not exclusively, the financial arrangements pertaining to Bacchid, the most prominent of these being the decision of AUSA to make the payment of \$220,000 based on the recommendation of Mr O'Connor.

[78] While AUSA has never at any time attributed the overall financial status of Bacchid to any particular fault on the part of Mr O'Connor, it has to be observed that he was actively involved in its affairs from 2007 when he became a director of the Bacchid Board. Indeed, the evidence of Mr O'Connor is that his appointment to the Board was "a fundamental aspect" of his employment. And further, 20% of his overall remuneration came from his Bacchid Board participation.

[79] The schematic diagram of the overall structure of AUSA and its business interests (as at 2010) graphically shows that Mr O'Connor, via his role as General Manager, was the Chairman of the Services Trust and the Chairman of the Bacchid Board. It seems reasonable to assume, as it appears that AUSA eventually did, that Mr O'Connor would have, or should have had, some reasonable knowledge of the overall financial affairs of Bacchid, including the fact that in 2007 Bacchid borrowed

⁸ *Chief Executive of the Ministry of Maori Development v. Travers-Jones* [2003] 1 ERNZ 174

\$600,000 from AUSA but as of 16 August 2012, it still owed \$435,000. With the capital injection of a further \$220,000 in January 2012, as of 6 July 2012, Bacchid owed AUSA \$676,000⁹. While it can be accepted that the main motive of Mr O'Connor in recommending that AUSA inject the capital sum of \$220,000 into Bacchid, was to save the 80 or so jobs involved, among other things; any sensible analysis would have concluded that this was effectively sending good money after bad, so to speak, and it is astonishing that Mr O'Connor would not have been aware of the consequences for AUSA in regard to committing it to more financial risk. In fact, the evidence is that, by late 2011, subsequent to the departure of the General Manager and Financial Controller of Bacchid, it was discovered that Bacchid had \$1.4m of debt. It seems incomprehensible that it could have even been considered that AUSA should inject further capital into the Bacchid business structure. Quite simply, apart from the admirable desire to protect the livelihood of a reasonable number of people, it was not financially rational for Mr O'Connor to make a recommendation to inject a further \$220,000 into a company that was struggling to stay solvent, if not already insolvent, let alone have any hope of returning to AUSA the money it already owed.

[80] But the problems associated with Bacchid were not the only area where Mr O'Connor was found wanting in regard to his financial management duties. And here it is timely to have a look at Mr O'Connor's responsibilities as the General Manager of AUSA. It was made clear to Mr O'Connor from the beginning, as evidenced by the advertisement for the role that: "overall financial management of AUSA and delivery of the strategic direction will be a key element". But more relevant is Mr O'Connor's job description. One of the key result areas is "Financial management" (clause 5) and listed among the "personal competencies" is:

- Financial planning and managerial experience is essential.

[81] And among the "essential skills and abilities" required is:

- Willingness to accept responsibility and accountability for the attainment of performance and financial goals.

[82] There is a comprehensive coverage of financial management key tasks including:

⁹ Page 15 of the Grant Thornton report

- Ensure effective accounting and information systems are in place which provide accurate and timely information for the effective management and control of the AUSA.
- Lead and oversee AUSA's financial management in conjunction with the treasurer, the administrative vice president and accounts administrator.
- Monitor and manage the cashflow situation of the AUSA.
- Produce a comprehensive report of all AUSA's operations including finances and resource management for the Executive on a monthly basis.
- Ensure all individual costs centres have their own budgets approved by Finance Committee in February and that they report on a monthly basis to Finance Committee on their income and expenditure.
- Ensure all costs centres are operating within the budgets set by the Executive and/or Finance Committee.
- Take on a financial oversight and planning role with regard to the financial affairs of the Association.

[83] A significant factor in regard to Mr O'Connor's dismissal, relating to the Bacchid circumstances, is that Mr O'Connor appeared unable to appreciate the seriousness of the situation and his personal responsibilities. Remarkably, Mr O'Connor's stance has been that the financial consultants, Grant Thornton, had, effectively, got it wrong and that they had an eye towards the business that might come from the liquidation of Bacchid rather than looking towards its success. Mr O'Connor appears to have subscribed to the view that the sale of assets would be of significant assistance in regard to correcting the situation. But that perspective was completely at odds with the stark commercial reality of the situation. Grant Thornton reported the financial position of Bacchid thus:

Bacchid is currently insolvent. It has net liabilities of \$1.2m (including the capitalised loan from AUSA of \$619k). It is under significant pressure from its creditors; terms are stretched and arrears total nearly \$800k. Bacchid's overdraft was \$105k overdrawn as at 6 June 2012 (limit of \$150k) and it can't meet its debts as they fall due.

[84] The Grant Thornton report then considers the future financial performance/position of Bacchid:

Bacchid's management has proposed a recovery plan that involves it securing new transferable leases for certain cafés, which it then plans to sell to pay down debt. However there are concerns regarding the

achievability of the recovery plan, in particular, whether new transferable leases will be obtained and the consideration that could be obtained from the sale of such leases.

[85] Grant Thornton then expresses the view that:

The future viability of the business is uncertain and we consider that if Bacchid continues to trade AUSA will be required to provide further funding in the form of capital and/or debt. If Bacchid is forced into a liquidation event, there are likely wider implications for AUSA to consider. AUSA should seek legal advice in respect of these potential implications.

[86] According to the Grant Thornton report (p.15), the financial position of AUSA was also less than satisfactory:

AUSA has a reported net asset position of \$1.1m as at 30 April 2012. However, after providing for Bacchid (\$676k), the rental compensation fund (\$660k) and debtors (\$48k), AUSA has an insolvent adjusted balance sheet with net liabilities of \$294k.

[87] And with some prescience, Grant Thornton concluded that Bacchid's future viability is uncertain and recoverability of the amounts owed by Bacchid is doubtful. Grant Thornton summarised the financial circumstances of AUSA (as at 30 April 2012) as follows:

AUSA's ability to continue as a growing concern and meet its liabilities as and when they fall due is dependent upon continued support from the University of Auckland, the rental compensation fund, AUSA's related trusts and its bank via the provision of the overdraft.

[88] Three of the allegations against Mr O'Connor are related, directly or indirectly, to the circumstances pertaining to Bacchid. In regard to a fourth allegation "poor financial controls", the attention of Mr O'Connor was drawn to his assertion that he relied upon the auditors to inform him each year if there was anything amiss with the AUSA financial systems. But AUSA's concern was that audit for the 2009 financials was not completed until June 2012 and the audits for 2010 and 2011 were also not completed until 2012.

Summary of the financial concerns

[89] It is clear from the Grant Thornton report and from the concerns expressed by the Office of the Vice-Chancellor of the University of Auckland (27 April 2012), that the financial affairs of AUSA had not been competently managed for some time and that a serious situation had developed. Mr O'Connor has suggested that he did not

have the particular financial management skills or qualifications and he relied upon financial reports prepared for him by others. It has to be accepted that this may well be so. But as General Manager, Mr O'Connor had the final responsibility for ensuring that the AUSA Executive was provided with accurate, timely and reliable financial information, as well as competent advice based on that information. This is particularly so given that the reality of the situation was that the Executive consists of young students with little or no commercial experience. And furthermore, there is very little continuity relating to the main office-holding positions, given that there is a fundamental renewal each university year. Indeed, given the fluidity of the AUSA Executive structure, it is remarkable that AUSA should be engaging in commercial affairs to the extent involved at all. But notwithstanding this observation, the role of General Manager brings with it a unique responsibility to ensure that the financial affairs of AUSA are given the attention that such an operation clearly demands.

[90] I accept that Mr O'Connor failed to meet the requirements associated with his role as General Manager in regard to the financial management of AUSA and that this was a serious breach of his duties. It follows that I find that AUSA was entitled to treat this breach as serious misconduct of such degree that there was a substantial loss of trust and confidence, thereby warranting the dismissal of Mr O'Connor.

The remaining allegations

[91] Given the above findings, the Authority is not required to closely analyse the substance of the three remaining allegations¹⁰. I simply make the observation that, taken on their own, it is arguable whether the general findings of AUSA were entirely supported by the overall evidence. But in any event, these matters would seem to be performance management issues rather than matters that could reasonably be treated as serious misconduct.

Predetermination

[92] Mr O'Connor is of the view that his dismissal had been predetermined and certain evidence has been relied upon to suggest that this is so. While I accept that there may have been certain comments made about the general concerns of AUSA officers pertaining to the performance of Mr O'Connor, following the release of the

¹⁰ Recruitment of Club assistants;
Agreement with IT company; and
Expense authorisation

Grant Thornton report, I conclude that there is no substantive evidence to show that there was any predetermination or unfairness visited upon Mr O'Connor in regard to his dismissal.

Determination

[93] I find that on the basis of the information available, following a fairly conducted investigation, AUSA was entitled to conclude that serious misconduct existed due to Mr O'Connor failing to properly fulfil his responsibilities relating to the financial management of AUSA.

[94] The Court of Appeal in *W&H Newspapers Ltd v. Oram*¹¹ confirmed that there may be more than one correct response open to a fair and reasonable employer where serious misconduct is found to exist. And given the overall employment background of Mr O'Connor and the stage that he had reached in his working career, his dismissal may seem to be a harsh sanction. However, the issue for the Authority to determine is whether it was open to AUSA, acting fairly and reasonably, to have concluded that dismissal was the appropriate response in the circumstances.

[95] I find that having conducted a proper investigation and having met the other essential criteria set out in s.103A(3) of the Act, the dismissal of Mr O'Connor was what a fair and reasonable employer could have done in all the circumstances; hence the dismissal was justifiable.

Costs

[96] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file a memorandum with the Authority. The applicant has a further 14 days to file a memorandum in response.

K J Anderson
Member of the Employment Relations Authority

¹¹ [2000] 2 ERNZ 448