

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2014] NZEmpC 143  
ARC 90/13**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      TOM O'CONNOR  
   Plaintiff

AND                                AUCKLAND UNIVERSITY  
   STUDENTS' ASSOCIATION  
   INCORPORATED  
   Defendant

Hearing:                      23-25 June 2014  
   (heard at Auckland)

Appearances:                G Pollak, counsel for the plaintiff  
   B Scotland, counsel for the defendant

Judgment:                    8 August 2014

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**JUDGMENT OF JUDGE B A CORKILL**

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**Introduction**

[1]      The plaintiff, Mr Tom O'Connor, was employed as General Manager by the defendant, the Auckland University Students Association Incorporated (AUSA). Mr O'Connor claims he was unjustifiably dismissed without notice from his employment after a lengthy disciplinary process concerning seven allegations relating to events which occurred in the first half of 2012. The issues centred on whether appropriate financial information had been provided by Mr O'Connor to the Executive of AUSA, whether its financial affairs had been properly maintained, and whether there had been compliance with AUSA's Tendering Policy and Recruitment Policy. The disciplinary investigation was conducted by Ms A Williams as President of the Executive and Mr D Haines as Administrative Vice-President; but the ultimate

decision-maker was Ms Williams, advised by law firm Chen Palmer and Ms Bull an external Human Resources Advisor.

[2] In the course of the investigation, chartered accountants Grant Thornton New Zealand Limited (Grant Thornton) undertook a detailed review of the financial affairs of AUSA and its various affiliates. This review triggered the disciplinary process. Central issues included the solvency of Bacchid Benevolency Limited (Bacchid) – an associated trading entity of AUSA; and AUSA’s financial relationship with the University of Auckland (UoA).

[3] This proceeding arises by way of challenge to a determination of the Employment Relations Authority (the Authority).<sup>1</sup> The Authority dismissed Mr O’Connor’s claim. In this proceeding he alleges that the termination of his employment was substantively unjustified, and that the decision to dismiss was predetermined. Remedies for lost remuneration and compensation for stress and humiliation are sought. An application for reinstatement was not pursued at the hearing.

[4] Witnesses who gave evidence included Mr O’Connor, Ms Williams, Mr Haines and relevant Executive members who were able to provide information regarding the various allegations. Also called was Mr M Moore, co-author of a report produced by Grant Thornton. A substantial volume of documents was also provided.

[5] Many of the facts are not in dispute, although the conclusions and inferences to be drawn from them as to whether Mr O’Connor complied with his employment obligations are significantly in dispute.

### **The AUSA Executive and the role of General Manager**

[6] Students run for election at a general ballot held during the first weeks of semester two in each year. The office-holding positions are the President, Administrative Vice-President, Education Vice-President, Treasurer and Maori

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<sup>1</sup> *O’Connor v Auckland University Students’ Assoc Inc* [2013] NZERA Auckland 484.

Student Officers. The Officers are all paid an honorarium for the time spent on executive business. Other positions on the Executive have responsibility for specific portfolios, and are charged with different roles (that is sports, culture and clubs). The most senior staff member employed by the Executive was its General Manager.

[7] In 2012 the Executive consisted of 23 students between the ages of 18 and 23. Some of the students had only just concluded their secondary education and some had had no governance or management experience whatsoever. Because there was a turnover of Executive members in each year, not only was there a lack of experience with regard to significant commercial issues, but potentially there was also a lack of institutional knowledge. Having regard to those factors, there was a significant dependency by Executive members on the General Manager.

[8] In 2012, the General Manager was Mr Tom O'Connor. Mr O'Connor had a long history of management roles, including roles with two well-known large companies, and various general management roles. Immediately prior to his employment by AUSA he had undertaken a senior operational management role as Director of Operations, Human Resources for a large training organisation.

[9] The advertisement to which Mr O'Connor responded was for the position of General Manager to AUSA. The advertisement stated that overall financial management of AUSA and delivery of strategic direction would be a key element.

[10] He was duly appointed as General Manager and Secretary to AUSA under an undated individual employment agreement which recorded that his term commenced on 13 March 2006. The agreement stated that his general obligations were:

6.1 The employee will perform the work and duties referred in Appendix 1 and such other duties reasonably directed by the employer in a competent, diligent, careful and proper manner and in accordance with any instructions given by the employer. The employee may be required to perform work for or to participate in (whether as a trustee or office holder or any other capacity) any trust or board of any entity owning or controlling any business(es) in which AUSA has a beneficial interest.

6.2 The employee will act in good faith in every respect towards the employer.

- 6.3 The employee will report to the officers of the AUSA and the AUSA executive.
- 6.4 The employee will use his/her best endeavours at all times to promote the interests of the employer including maintaining and enhancing the employer's relationship with students, the University of Auckland, or other universities or with the public.
- 6.5 The employee will comply with the employer's policies, procedures and rules applying from time to time. The employer may amend, cancel or introduce further rules, policies and procedures as it considers necessary. The employee will be notified of any changes.
- 6.6 The employee will assist the employer to the best of the employee's ability in carrying on, and improving the employer's business.
- 6.7 The employee will not at any time do anything which directly or indirectly may cause or be likely to cause any loss or damage to the employer or which could detrimentally affect the employer's reputation or impair its relationship with students, the University of Auckland or other Universities or the public.
- 6.8 The employee will devote the employee's time exclusively to the discharge of the employee's duties during normal work hours and at such other times as the employee's services may reasonably be required having regard to the responsibilities of the employee's position.
- 6.9 The employee must not have any interest in a business or do anything which may result in a conflict of interest.
- 6.10 The employee agrees to undertake such travel to locations outside of Auckland necessary in connection with the employee's duties.

[11] The job description included the following:

- a) The General Manager would be responsible for the effective leadership, operation and promotion of AUSA to meet the broad strategic directions set by the President and Executive.<sup>2</sup>
- b) The General Manager was to serve the President and Executive and carry out their wishes when undertaking the duties and responsibilities of the position.<sup>3</sup>

[12] It went on to state that key result areas included commercial coordination of the AUSA entities, and financial management.<sup>4</sup>

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<sup>2</sup> Clause 1.

<sup>3</sup> Clause 4.

[13] In respect of each of these requirements, key tasks were defined. For present purposes the key tasks relating to financial management are important and are therefore set out as follows:

#### **Key Tasks**

- 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 cash-flow 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.
- Provide expert advice and management for the implementation of new concepts or improvements to the financial processes.
- Assist the Treasurer and the Finance Committee with the preparation of the annual budget for each forthcoming year.
- Ensure all individual cost 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 budget set by the Executive and/or Finance Committee.
- Co-ordinate on behalf of AUSA the annual negotiation of the Student Services Agreement/Management and Occupancy Agreement. Monitor AUSA's compliance with these agreements and ensure required reporting back to the University is undertaken.
- Take on a financial oversight and planning role with regard to the financial affairs of the Association.
- Draft, monitor, review, sign and negotiate AUSA contracts and agreements.
- Prepare and monitor budgets, authorise and review expenditure.
- Take steps to ensure the good financial management of AUSA, including such things as ensuring GST and PAYE returns are completed, the annual audit is carried out and accounts receivable are collected.

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<sup>4</sup> Clause 5.

[14] Also important was the reference to the Commercial Management of AUSA entities, which was as follows:

**Key Tasks**

- Responsible for the oversight of the Trusts and other entities owning and operating businesses for the benefit of the AUSA.
- Involvement and participation on the Trusts and Boards of the AUSA associated businesses as required by the employer.
- Manage special projects and responsibilities outside of the scope of the area of responsibility of other staff.
- To ensure that AUSA operates as a commercially viable entity.
- Ensure that there are funds available that can be contributed to existing and new student services.

[15] It is evident from the foregoing that the role of General Manager was a senior and pivotal one for the AUSA Executive, with an emphasis on monitoring the financial management of AUSA and its associated entities.

[16] As the employment agreement made clear, the General Manager had a duty to carry out the will of the Executive, which was the governance body. However, when the Executive members were undertaking their training in 2012, they were advised that all information about the management of AUSA would come from the General Manager. New members were told by Mr O'Connor that if they wanted anything from staff, they were to approach him. Thus, staff with financial responsibility such as the Finance Controller regarded Mr O'Connor in his capacity as General Manager as the conduit for any information that was to be provided to the Executive.

[17] Counsel for AUSA submitted that there were two significant implied duties which were relevant in the present context. The first was an implied duty of fidelity. This has been described as an obligation "to act at all times in his employer's best interests".<sup>5</sup> However, this duty was embedded within the employment agreement itself. It arose from cls 6.4 and 6.7. There can be no dispute that there was a significant duty of fidelity owed by Mr O'Connor, and Mr O'Connor properly

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<sup>5</sup> *PCA of New Zealand Ltd v Evans* (1987) 1 NZLEC 95,412 (HC) at 426.

accepted that his employment agreement would be breached if he did not act in the best interests of its business operation.

[18] The second submission as to implied duties related to the question of whether Mr O'Connor owed his employer a fiduciary duty both as a result of the special nature of his position and the high level of trust reposed in him, and also by virtue of his various roles as Trustee and Director. It was submitted that the existence of such a duty meant that Mr O'Connor was subject to a higher standard of trust and confidence than would otherwise be the case. There was an inevitable and substantial reliance by members of the Executive on the General Manager. I accept that these circumstances meant that there was a high level of trust in the General Manager which required him to comply with the terms and conditions of the employment agreement to a high standard. Accordingly, there was a significant contractual obligation of loyalty.

[19] It is also necessary to consider other aspects of the surrounding circumstances. Clause 6.1 of the employment agreement required Mr O'Connor to perform work for or participate in (whether as a Trustee or office holder or any other capacity) any trust or board of any entity in which AUSA had a beneficial interest.

[20] He thus held the following positions:<sup>6</sup>

- a) From approximately November 2011 to September 2012, he was the Executive Director of Bacchid. As such he had statutory obligations under the Companies Act 1993. This included a duty to act in good faith and in the best interests of the company.<sup>7</sup> As a Director he could not agree to the business of the company being carried on in a manner likely to create a substantial serious loss to the company's creditors; or cause or allow the business of the company to be carried on in a manner likely to cause a substantial risk of serious loss to the company's creditors – these being obligations to avoid “reckless trading” as it is

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<sup>6</sup> In this paragraph I consider the position with Bacchid and the Services Trust. Since this proceeding focuses on those entities it is not necessary to consider the position with regard to the other AUSA trusts.

<sup>7</sup> Companies Act 1993, s 131.

defined in the Companies Act.<sup>8</sup> Further, there was an obligation on him as Director not to agree to the company incurring an obligation unless he believed at the time on reasonable grounds that the company would be able to perform the obligation when required to do so.<sup>9</sup>

- b) As a Trustee of the Services Trust, Mr O'Connor was required to look after the Trust assets in the best interests of its beneficiary; AUSA was that beneficiary. As such, a range of trustee duties were imposed on him, including the fiduciary duties of impartiality and loyalty.<sup>10</sup>

[21] Is it necessary to conclude, having regard to these complexities, that the employment relationship was fiduciary in nature? There is no doubt that fiduciary obligations can apply in employment relationships.<sup>11</sup>

[22] Such a finding is appropriate where an employment agreement itself does not support a conclusion that an employer is entitled to place significant trust and confidence in the employee; and that the employer is thereby entitled to rely on the employee not to act in a way which is contrary to the employer's interests – these being the hallmarks of a fiduciary duty.<sup>12</sup> In this instance, however, there is no need to resort to a fiduciary analysis, because the effect of the employment agreement was clear.

[23] Clause 6.1 imposed a requirement on Mr O'Connor to perform work for or participate in (whether as a Trustee or office holder or any other capacity) any Trust or Board of any entity in which AUSA had a beneficial interest; but he was also required under cl 6.9 not to have any interest in a business or do anything which may result in a conflict of interest. To the extent that there was a tension between these two obligations, it was obviously his responsibility to manage that conflict, given the relative inexperience of members of the Executive; but if need be, it was also his responsibility to seek a determination from the Executive as to whether he should

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<sup>8</sup> Companies Act 1993, s 135.

<sup>9</sup> Companies Act 1993, s 136.

<sup>10</sup> Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [17.3.1].

<sup>11</sup> *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1987] 2 NZLR 163 (PC); *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [76].

<sup>12</sup> *Chirnside*, above n 11, at [80].



continue in a situation where there was a potentially damaging conflict. In doing so he would need to inform the Executives of all relevant facts. I return to this topic below.

[24] In short, the circumstances required Mr O'Connor to discharge the obligations of his employment agreement to a very high standard.

[25] I refer to a point made by Mr O'Connor that he was not an accountant. He said that he emphasised this when he was employed as General Manager; and it was a point which he made again at an Executive meeting of 28 May 2012, when he said he would need to obtain an updated cash-flow forecast from a staff member.

[26] Mr O'Connor was employed specifically on the basis that financial management of the AUSA and delivery of its strategic direction would be a key element of his role. This important obligation was underscored by the provisions of the agreement, and spelt out in considerable detail in the job description. Whilst Mr O'Connor may not have been formally qualified as an accountant, that did not relieve him of his contractual obligation to provide financial management and advice to a high standard.

### **AUSA and its associated trusts**

[27] AUSA is an incorporated society which was established in 1891 with the intention of "representing the students in all matters interesting to them". Prior to 1999, membership was compulsory for all enrolled students. Until then, a levy was established at a general meeting of the society, which the University Council would collect and pass on to AUSA to represent and serve student members.

[28] As a result of a law change in 1999,<sup>13</sup> students at UoA voted to make membership of AUSA voluntary. To protect its substantial assets, six independent trusts were established. The trusts return a dividend to AUSA as beneficiary of the trusts. Other sources of funding are the University itself, and its own fundraising

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<sup>13</sup> Education Act 1989, s 229B. This section was subsequently repealed and replaced by s 6 Education (Freedom of Association) Amendment Act 2011.

activities. AUSA also contracted with the UoA to provide services on its behalf, mainly for the benefit and assistance of students.

[29] The related trusts generated approximately \$650,000 per annum depending on the level of their performance. A brief overview of their activities as at 2012 are as follows:

- a) *Property Trust*: This Trust owned various commercial properties throughout Auckland and one in Hamilton. It paid an annual dividend to AUSA of \$240,000.
- b) *UBS Trust*: This Trust was the shareholder of University Bookshop (Auckland) Ltd which operated four bookshop divisions. It distributed 65 per cent of its profit to AUSA.
- c) *Media Trust*: This Trust owned and operated a student radio station, apparently operated through Campus Radio bFM Limited. It operated on a break-even basis and therefore did not distribute profits to AUSA.
- d) *The Services Trust*: This Trust was the shareholder of Bacchid, which operated cafes and provides catering services on and off the UoA campus. Its liquidity in 2012 is a central issue in this case.
- e) *John Weeks' Trust*: This Trust owned artwork, and did not distribute funds to AUSA.
- f) *The Outdoor Shakespeare Trust*: This Trust ran annual Shakespeare productions.

[30] Student trustees were appointed to each trust, but in each case there was a majority of trustees who were not students. The evidence is that AUSA (through its Executive) was unable to influence the operation of any of the first five trusts above in any way other than through the minority voices of the student representatives on each Trust Board.

[31] The UoA provided significant funding to AUSA, including the Rental Compensation Fund. Grant Thornton reported that this Fund was created under an occupancy agreement between AUSA and the UoA in 2004. It related to commercial rented areas held under lease by the University. Although the agreement was not produced, there was a consensus from the witnesses called by the parties that net rental funds (after property management costs and expenses) were made available to AUSA to fund specific student activities. The amount of the funding was to be no less than \$200,000 per annum. How the Fund would be applied was to be agreed by the Student Liaison Committee, consisting of an equal number of UoA representatives and AUSA representatives.

[32] During 2010 AUSA brought legal action against the University which culminated in a \$1 million settlement for back payment of funds due under the agreement since 2004. Settlement was achieved by way of a \$500,000 cash payment made in December 2010; a further \$500,000 was to be available to AUSA to claim in future budget periods. It appears that it was also agreed that AUSA would be entitled to accrue funding shortfalls in future years.

### **Agreement between AUSA and the University of Auckland**

[33] Several witnesses referred to a long-running issue between AUSA and the UoA with regard to “Student Union” buildings. This was exemplified by a resolution which was carried by AUSA in 2004, as follows:

THAT AUSA vehemently resist, including taking appropriate legal action, any move by the University of Auckland to assert control over the Student Union buildings which were substantially paid for by past students via union levies.

[34] Mr O’Connor said that it was stressed to him from the first week of his employment by the then President and Administrative Vice-President how important this issue was to students.

[35] The students believed that the Student Union buildings in the quad area had been funded directly or indirectly by students themselves, and that this contribution had never been recognised, because the UoA asserted it owned the building. In 2010, an agreement was reached – not produced to the Court – whereby it was

conceded the UoA was the owner of the building but that Bacchid could occupy it so long as it was solvent and was trading. The term of the agreement was for 30 years. Potentially the student body could continue to obtain income from Bacchid's operations as operated from the student buildings.

[36] When Bacchid became insolvent, the risk of AUSA losing access to the Student Union buildings became very real. Tension emerged as to the solvency of Bacchid on the one hand, and the prospect that the University would repossess the Student Union buildings on the other.

### **Chronology**

[37] Issues relating to the solvency of Bacchid precipitated the events that eventually led to Mr O'Connor's dismissal. The Court received extensive evidence relating to these events. I make the following findings in relation to that evidence.

[38] In November 2011, the General Manager of Absolute Catering (the operating arm of Bacchid) resigned, as did the company's Financial Controller. It was then discovered that Bacchid's creditors had not been appropriately or accurately represented to its Board, and that the company was \$1.4 million in debt.

[39] Mr O'Connor was asked to assume the role of Executive Director of Bacchid. This was agreed between the then President, Mr Joe McCrory, the Administrative Vice-President, Mr Sam Durbin, and the President Elect, Ms Williams.

[40] To that point, Mr O'Connor had been Chair of the Directors of the Bacchid Board, but he stood down from that role when he became the Executive Director.

[41] Those members of the Executive who took part in the decision knew in a general way that Bacchid was struggling, but they were not party to the specifics of its financial problems. Mr O'Connor was appointed because it was not believed that an external person could be found who would be willing to take on the responsibility of running the Bacchid operation on short notice. The position was intended only to last until March 2012.

[42] At the time Mr O'Connor became Executive Director his total salary was \$116,000. From the time of his appointment it increased to \$180,000, being funded by AUSA as to \$90,000 and by Bacchid as to \$90,000. It was understood that when he ceased acting as Bacchid's Executive Director, his original salary arrangements would be reinstated.

[43] Mr O'Connor then took steps from November 2011 to January 2012 to attempt to reduce Bacchid's debt. This included obtaining a temporary overdraft from the bank and negotiating the receipt of income in advance from the sales of Coca-Cola and Red Bull products.

[44] By early 2012, Mr O'Connor believed that some cafes operated by Bacchid could be sold, although in some instances it would be necessary to secure lease arrangements before doing so. He considered that, providing arrangements had been reached with creditors and there were agreed plans to reduce debt, Bacchid would be solvent and could continue to trade. This was consistent with the objective of maintaining occupancy of the Student Union buildings.

[45] By January 2012, Bacchid's bank required a guarantor in respect of the overdraft. The bank was aware that the balance sheet of the Property Trust was positive, and requested that it provide a guarantee. Mr O'Connor attempted to arrange this, but was advised by the Chairman of the Property Trust that it could not provide a guarantee for a \$400,000 overdraft, but could instead provide cash of \$220,000, conditional upon a request to that effect being made by the President of AUSA. Mr O'Connor conferred with a Director of the Bacchid Board who was apparently an accountant. The accountant advised that any funds to be paid to Bacchid should not be taken as a loan as this would not improve Bacchid's balance sheet.

[46] In early January 2012, Mr O'Connor therefore advised Ms Williams and Mr Haines that it was in the best interests of all for Bacchid not to cease trading and enter liquidation, and that, rather, it would be appropriate to sell some leases. But Bacchid would need interim support so as to pay wages and creditors. Mr O'Connor explained to Ms Williams that she would need to write to the Chair of the Property

Trust requesting a dividend as beneficiary of the Trust, so as to provide the sum which was needed.

[47] Mr O'Connor drafted a suitable email, the substance of which Ms Williams adopted. The email relevantly stated:

**AUSA Request for Property Trust Dividend**

...

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 \$618,702.00 stake/share capital in the business.

...

I am sure that with Tom O'Connor's appointment as Executive Director of the Group, he will be able to ensure profitability of the organisation so that it can also contribute a dividend for AUSA in the near future.

[48] At this stage, Ms Williams, who had occupied the office of President for only a few days, received only Mr O'Connor's oral advice. There is no evidence that she was provided with any financial statements to support the request.

[49] On 24 January 2012, a meeting of the Finance Committee of the Executive was held. It was attended by Ms Williams as President, Mr Haines as Administrative Vice-President, and Mr Bowen Liu as Treasurer. Neither Mr O'Connor nor the Financial Controller, Mr Harry Zhang, were present. The request made by Mr O'Connor was considered. As a result the following budget recommendation to the Executive was carried:

THAT the Auckland University Students' Association Finance committee resolve to invest \$220 thousand dollars received as an extraordinary dividend from the AUSA Property Trust in the BACCHID Group as capital.

[50] Ms Williams and Mr Haines understood from Mr O'Connor that if this "capital injection" was not made, Bacchid would become insolvent, and would have to cease its operations. They proceeded in reliance on his advice.

[51] The first meeting of the new Executive was held on 30 January 2012. It considered the recommendation which had been made by the Finance Committee. By this time, a document which would authorise the transfer of the funds had been prepared and signed by Mr O'Connor. It required only the signature of the AUSA Treasurer. The Property Trust had already agreed to make the advance and, according to information which Mr O'Connor later produced, approximately \$100,000 of the anticipated funds was utilised for paying creditors on 27 January 2012. There is no evidence that Executive members knew that a significant proportion of the requested sum had already been spent.

[52] Ms Williams promoted the resolution at the Executive meeting on the basis that essential decisions regarding the payment had already been made. Her understanding of the legal position was that if the resolution was passed AUSA would receive a share issue, or some other mechanism would be implemented which would ensure AUSA partly owned the company and could control its financial affairs. She did not consider that AUSA would be making a loan to Bacchid. Her understanding arose from the email which had previously been drafted by Mr O'Connor for her to send to the Chair of the Property Trust, and his advice that the transaction needed to proceed.

[53] Mr Liu gave a PowerPoint presentation. He understood the proposed resolution to be relatively straight forward.

[54] However, it is apparent that in the course of discussion there was confusion between the Officers as to whether the funds were required by Bacchid to repay debt, or whether it was to be used for capital items. Members of the Executive became concerned. A key issue was the absence of reliable information. No documents had been prepared for the Executive to consider. Mr O'Connor was not present. He was to later state that he had a conflict of interest because of his obligations to Bacchid.

[55] In the event, the resolution which the Finance Committee recommended was carried. Five persons voted in its favour, four against, and three abstained. The resolution succeeded only because the Officers were promoting it, and because it was believed there was considerable urgency. The resolution was passed in the form

proposed by the Finance Committee. A number of related resolutions were also unanimously carried. These included a request for a breakdown as to how the funds were to be spent; a statement that the payment was conditional on increased AUSA branding on Bacchid products and spaces; that a branding report was subsequently to be approved by the Executive and submitted to the Services Trust; and that a six-month financial report of Bacchid's circumstances was to be presented by 12 March 2012 following the capital injection.

[56] No security documents were executed. Mr O'Connor said that the probable reason for this was that he had a conflict of interest. It was unclear who other than Mr O'Connor had the responsibility to implement the security arrangements; but for his role with Bacchid, he accepted that he would have ensured that all relevant documentation was executed.

[57] The proposed transaction was considered by the Executive in challenging circumstances. The appointed Officials had only just taken office; other members of the Executive were attending an Executive meeting for the first time. Some had no relevant commercial experience. The Treasurer, Mr Liu, who gave the PowerPoint presentation to support the proposal being considered, was only 18 years old and in his second year of study towards a Commerce degree.

[58] Also on 30 January 2012, the Student Liaison Committee met to approve expenditure for student activities from the Rental Compensation Fund. Ms Williams explained that in previous years, UoA representatives had been reluctant to approve expenditure from the fund because there were inadequate financial controls. Ms Williams accordingly prepared a well-presented schedule of items for which she sought approval. The level of detail provided impressed, with the result that AUSA funding was approved to a level significantly greater than that which had been received in previous years. The Director of Administration, Mrs Adrienne Cleland, from the Office of the Vice-Chancellor was present. She indicated to Ms Williams that she wished to write in detail with regard to a number of issues concerning management of AUSA finances.



[59] Several days later, upon receiving and reviewing the Executive meeting minutes, Mr O'Connor discovered the conditions which the Executive had imposed with regard to the transfer of funds to Bacchid. He considered that they should have been discussed with him. At the next Executive Committee meeting, he said he was concerned at the lack of communication. At the same time he told one of the Executive members, Ms Bell, that the Executive could not just "add on conditions to a deal" where a transaction had "already gone through". He told her that Bacchid would not be able to comply with the conditions.

[60] In the weeks which followed the January meeting, members of the Executive became increasingly concerned at the lack of reliable financial information they had regarding Bacchid. Ms Williams said that, in the course of February, she met and discussed the issue with Mr O'Connor on several occasions so as to obtain an overview of the financial situation. There is no evidence that further information was provided to the Executive in respect of Bacchid's activities in February and March, including the six-month financial report which the Executive had requested be provided to it by 12 March 2012.

[61] On 27 March 2012, the Directors of Bacchid met. Minutes of the meeting were produced in evidence, and record:

- a) The AUSA payment appeared in AUSA's financial statements as a loan and in Bacchid's as a capital injection. It was thought that this meant the advance "will not make AUSA insolvent".
- b) A summary of the financial position of Absolute Catering (the operating arm of Bacchid) was only available until January. Bacchid lost money in that month, principally because of creditor issues. This was as expected.
- c) Overdraft support from Bacchid's bank was due to have expired at the end of March. Mr O'Connor reported that the bank had indicated it would provide Bacchid with overdraft facilities for a further month.
- d) GST was noted as being overdue for December 2011.

- e) There was a discussion regarding Mr O'Connor's role as Executive Director. It was noted:
- Mr Liu had requested a business plan for Bacchid; Mr O'Connor stated that it was not Mr Liu's role to do this.
  - Mr O'Connor believed he had no conflict of interest in acting as General Manager for AUSA, and Executive Director for Bacchid; however if he was "continually harassed by [Mr Liu] he [would] relinquish his role with Bacchid". He would remain in the role for the three months that it would take to replace him.
  - The Directors noted that if Mr O'Connor ceased to carry out the role, Bacchid would probably cease to operate. Mr O'Connor had built up relationships with creditors. One of the independent Directors, Mr Chris Hocquard, stated that such an eventuality would be seriously detrimental to the ongoing operations of Bacchid. Mr Hocquard was willing to talk to the Executive to explain the situation, and the detriment which would be suffered were Mr O'Connor to cease as Executive Director.
  - Mr Haines – attending his first meeting of the Board in his capacity as a Director appointed by the Executive – was asked to explain to Mr Liu that he was causing difficulties.
  - It was also agreed that Mr O'Connor would continue with efforts to ensure Bacchid's cafes had leases.
- f) Finally it was noted that Bacchid needed money to continue to trade to the end of the year in the order of \$400,000.
- g) Bacchid's budget was signed off by three Directors.

[62] At this meeting Mr Haines was provided with a copy of Bacchid's "2012 Budget set in 2011", in his capacity as a Trustee of the Services Trust and as a

Director of the Bacchid Board. However, Mr O'Connor advised him that it was a confidential document, and it was not to be shared with AUSA.

[63] The email Ms Williams sent to the Property Trust on 6 January 2012 stated that AUSA would receive a capital interest not only for the sum of \$220,000 it advanced, but also for an earlier advance it made in 2007 (unsecured to that point), both advances totalling \$618,000. Mr O'Connor said that in his role as General Manager of AUSA it would have been his responsibility to ensure that such documentation was completed, but in the particular circumstances he had a conflict of interest and so could not do anything. He said he gave share documents to the Treasurer. No other witness gave evidence to that effect. On the totality of the evidence it is unclear whether this happened and/or if it did, why the documentation was not executed.

[64] The statement in the minutes of the meeting of the Bacchid Board on 27 March 2012 to the effect that the advance was a loan as far as AUSA was concerned, and a "capital injection" as far as Bacchid was concerned, is illogical. Its status should have been common ground between the two entities. In the absence of any documentation which would indicate a common intention that the transfer was something other than a loan the only available conclusion is that the funds constituted a loan, with no terms as to interest or repayment. As will become evident later, this was also the conclusion of the Chartered Accountants who were asked to review the finances of AUSA and its various affiliated bodies.<sup>14</sup>

[65] On 27 April 2012, Mrs Cleland wrote at length to Ms Williams regarding concerns which the UoA had as to the ability of AUSA to manage its financial affairs. This was said to have been precipitated by a request for funding for AUSA's New Zealand University Students' Association and Student Job Search levies; it had been indicated that AUSA was unable to fund these activities because of a budget shortfall.

[66] In summary, Mrs Cleland stated:

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<sup>14</sup> See para [86(a)] below.

- a) AUSA's 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 it was "technically insolvent". The report had noted that "there is a significant amount of reputational risk to all of the executive members of AUSA and 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 payment." Amongst reported concerns was a severely delayed completion of audited accounts.
- c) The UoA had provided a payment of \$500,000 to AUSA in 2010, conditional on AUSA working with it to develop activity-based accounting systems that would give better visibility to AUSA executives and the UoA of expenditure against activities funded through the Services Agreement which existed between the parties. That condition had not been met.
- d) AUSA appeared to be in breach of its constitution by not providing to its members the draft 2011 accounts at the current years' AGM. In addition, audited accounts for financial years 2009 and 2010 were required to be provided by June of the following year. For both those years audited accounts remained outstanding.
- e) In 2010 the UoA stated that it no longer intended to fund certain services from 2011 onwards. Because of the concerns expressed by AUSA in late 2010 it agreed to continue to fund them for a further year so as to allow AUSA an opportunity to adjust its budget and activities. It was disturbing to note that no such adjustments had been made, and that now funding changes were being characterised as sudden and unforeseen.
- f) It was of concern to note that as at 21 March 2012 a budget for 2012 had not been confirmed although this had in the meantime been agreed by the Executive.

- g) There had been instances in the past of AUSA staff receiving cash in uncontrolled circumstances and significant amounts of cash being unaccounted for, resulting in police action in at least one case.
- h) The UoA had received reports that AUSA had neglected to pay invoices dating back to December 2011.
- i) It was a requirement of the UoA's Service Level Agreement for 2012 that audited accounts for 2011 would be provided by 1 June 2012. It appeared this condition would be breached.

[67] The letter went on to make proposals in respect of some of the issues mentioned above, conditional on AUSA committing to address in the current financial year the financial management concerns that had been outlined in the independent 2010 report. The letter concluded:

In the meantime, I suggest that you will not only need to take legal/governance advice but also to engage a competent human resources expert and practitioner to support the change process on a day-to-day basis. Following an appropriate investigatory period, these advisors are likely to evaluate with you whether a number of the following actions would be appropriate for the AUSA to implement:

- 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.

[68] Soon afterwards, Ms Williams forwarded a copy of the letter to Mr O'Connor, indicating that the issues needed to be discussed. On 2 May 2012, Mr O'Connor emailed Ms Williams stating that he had not yet seen the letter, but he had very strong views about the opinions expressed by the UoA. He considered that issues of an HR review and inferences regarding a misappropriation went back some 20 years, and that it was ludicrous for these factors to be raised as a basis for further action. He concluded his email by stating:

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.

[69] In a subsequent email exchange between Ms Williams and Mr O'Connor, Ms Williams stated that in the past the Executive had received very little information regarding AUSA's financial position; she said she was worried about this not being in line with best practice. She said that it did not really matter what Mrs Cleland thought at present; what was more important was that everyone in AUSA could be comfortable with the level of financial transparency. If the UoA was willing to help by funding that process, then it was her view the Executive would be willing to accept this.

[70] For his part, Mr O'Connor then indicated that he had written a response to each paragraph of Mrs Cleland's letter, which he wished to present to the Executive so that they could understand how "misleading, inaccurate and malicious her comments actually are". It was his view that the letter from the UoA was an initiative to obtain "informational control" that could then be used against AUSA.

[71] On 3 May 2012, there was a meeting of the Finance Committee. It was chaired by Mr Liu; Ms Williams and Mr O'Connor were present, amongst others. Information was requested as to the status of the \$220,000 paid to Bacchid in January 2012, as well as the earlier 2007 advance. It was agreed that Mr O'Connor would provide documentation to clarify the matter; he was also asked to provide

further information regarding the debt now owed by Bacchid to AUSA. It is apparent these matters had not been attended to, at that point.

[72] In 2011, the Executive had obtained advice from the law firm Chen Palmer. It is unclear from the evidence when Ms Williams sought advice with regard to the issues which were emerging in connection with its finances, but advice certainly was obtained after the receipt of the letter from Mrs Cleland. The following resolutions were carried on 14 May 2012:

- a) To seek formal access to the books, papers and accounts of the various trusts, within 48 hours.
- b) To instruct Grant Thornton to conduct an independent review of the financial affairs of AUSA and its related trusts, including the ability of those trusts to continue to provide funding to AUSA.

[73] On 15 May 2012, Ms Williams met with Mr O'Connor so as to provide him with a copy of the letter recording the various resolutions carried by the Executive. She recorded that he had informed her that Bacchid was expected to make a profit of \$180,000. She clarified that the purpose of the motions was not to focus on Bacchid's affairs, but to have better access to the financial information that already existed. The Executive wanted to know that it was discharging its responsibilities to students.

[74] She went on to state that she was worried about Mr O'Connor's concern that the Treasurer, Mr Liu, had "ulterior motives" in seeking this information. She said she knew Mr O'Connor did not want to meet with Mr Liu formally to discuss the issue. Apparently, Mr O'Connor was concerned that Mr Liu might be sharing financial information with parties beyond the Executive.

[75] After taking advice from Chen Palmer, Ms Williams sent a response to Mrs Cleland regarding the financial issues she had raised. Ms Williams outlined the formal steps initiated by the Executive. It was indicated that the work being conducted included:

- a) Seeking advice from Chen Palmer on how the AUSA and its related trusts and subsidiaries might be restructured in order to improve transparency and accountability, so as to avoid financial issues arising in the future.
- b) Seeking advice from Chen Palmer on any consequential employment issues and other policies, including those relating to conflicts of interest, delegations and health and safety.

[76] On 28 May 2012, the Executive was scheduled to meet at 6.00 pm. A number of events preceded the meeting. The first of these events related to the provision of financial information concerning Bacchid. What occurred was this:

- a) At 7.40 am, Mr O'Connor sent Mr Liu an email attaching a copy of what he described as "a cash forecast" for Bacchid. This was for the period January 2012 to December 2012. Mr Liu responded to Mr O'Connor stating that Mr O'Connor had at a previous Executive meeting stated that the cash forecast no longer gave a fair indication of the planned financial performance of Bacchid; he requested an updated cash forecast as soon as possible.
- b) At 2.21 pm Ms V Liu (an in-house accountant employed by Bacchid) forwarded a cash-flow forecast for Bacchid for the period April 2012 to July 2012. Her email said:

This is correct forecast to ASB bank.

- c) At 4.19 pm, Mr O'Connor forwarded this document to Ms Williams, Mr Liu, and Mr Haines.

The document showed that the Bank's overdraft stood at \$150,000 as at April 2012, but would be repaid in full by May 2012. It was this forecast that was considered by the Executive at its meeting that evening.



[77] The second series of events related to the status of Bacchid's overdraft from the bank. Prior to the meeting, a lawyer from Chen Palmer spoke to a bank representative who advised that it would have no difficulty in extending Bacchid's overdraft facilities for another two weeks, so as to permit AUSA to make considered decisions. A comfort letter was required, rather than a guarantee. The lawyer was told that the bank acknowledged that it was an unsecured creditor and at that point saw it as preferable for Bacchid to trade its way out of its difficulties. The bank had seen a "business plan" from Mr O'Connor, and wondered why the AUSA Executive had not. The lawyer noted that it seemed Mr O'Connor was "laying all the blame for the financial problems at AUSA's door – the bankers I spoke to seemed to think he was doing everything he could."

[78] The minutes of the meeting are brief, but an email sent by Ms Williams to Mr O'Connor afterwards summarised the main concerns which were discussed regarding Bacchid's financial affairs:

- a) In respect of the budget forecast there was significant concern regarding the cash-flow forecast which had been placed before the Executive. It showed that by May 2012, there was no overdraft – unless the information contained in the cash-flow forecast was incorrect. The Executive accepted that the document had been prepared some time ago, but if the position had changed, the presentation of out-of-date forecasts was not acceptable. Members of the Executive were alert to the issue that the cash-flow forecast was premised on the basis that two cafes would be sold. They were not confident that such asset sales – even if they did occur – would achieve the figures stated. In short, members of the Executive considered that again they were not receiving accurate and reliable information. Ms Williams' email to Mr O'Connor requested:

- A cash forecast for the year.
- Advice as to the likelihood of selling assets.
- Information as to the extent of overdraft facilities required.

- When Bacchid would expect to be clear of its significant outstanding debts.
- b) The second issue related to the letter of comfort which had been sought by the bank. Although the minutes do not record the detailed discussion which occurred at the Executive meeting, it is clear from the email sent by Ms Williams and from subsequent statements prepared by individual members of the Executive that without the bank's support, Bacchid would have to cease trading forthwith. In the absence of the letter of comfort the bank would withdraw Bacchid's overdraft.

Subsequently, Mr O'Connor stated that he had been advised by the Bank Manager that this would be the position. It was also recalled by Mr O'Connor that he said the issue was whether Bacchid could continue to pay its employees. He believed that without the letter of comfort, the options were either voluntary administration or liquidation. He did not know that the bank was willing to extend the overdraft for a further two weeks.

In the event, the Executive resolved that AUSA request an overdraft extension – as had been arranged by its lawyer – in order to obtain financial information about Bacchid. By this time, Mr O'Connor had left the Executive meeting; and it is common ground that he was unaware that the bank had agreed to extend the overdraft for a period of two weeks.

Ms Williams in her email to Mr O'Connor stated that the Executive would like to discuss with him:

- Whether during the period of the extension Bacchid could raise revenue in another way without resort to an overdraft.
- Whether Bacchid could maintain some areas of its business without the support of an overdraft.

- The Executive would also be taking advice from Chen Palmer and Grant Thornton as to whether it would provide a letter of comfort.

[79] In early June 2012, Mr O'Connor discussed with Mr Ray Cox from Grant Thornton the business plan to sell off some of Bacchid's cafes so as to produce cash to lower debt. Mr Cox advised him that if that was his intention he needed to prepare a totally revised forecast, so that the Executive could make a more informed decision regarding the proposed letter of comfort in support of a continued overdraft. He accordingly sent to AUSA Officers an email on 5 June 2012, a document which he described as a "very accurate and much more realistic cash flow". The document was described as a budget for 2012, although its projections were only for the months of June, July and August. It did not allow for the possibility of sale of any of the cafes (particularly those which had been referred to in the cash-flow considered by the Executive at its meeting on 28 May 2012, the Law School Café and the High Court Café).

[80] On 7 June 2012, Mr Moore from Grant Thornton provided a letter of advice with regard to Bacchid. The letter stated in summary:

Bacchid is currently insolvent, in that its liabilities exceed its assets and it cannot meet its debts as they fall due. Bacchid is loss making and is not viable in its current form. We consider that Bacchid's directors should seek legal advice in respect of this situation.

We consider that the achievability of the recovery plan is questionable given the lack of clarity around certain key elements of the plan, in particular it is unclear whether:

- Bacchid will be able to secure transferrable leases for the cafes it has earmarked for sale under its recovery plan;
- sale realisations will be sufficient to ensure that Bacchid is solvent;
- the remaining businesses, post asset realisations, will be viable;
- management is suitably qualified to execute the plan successfully.

Without AUSA's support (in the form of the letter of comfort to the Bank) it is unlikely the bank will continue to provide the overdraft. Given significant concerns we have in respect of the plan, the current insolvent financial position, and the fact that the business has not historically traded to budget, we consider that further support will be required from AUSA, in the form of capital and/or debt over the next year.

However, if AUSA do not provide the letter of comfort, and Bacchid is forced into a liquidation scenario, there are likely wider implications for

AUSA to consider. AUSA should seek legal advice in respect of these potential implications.

[81] Mr Moore told the Court that using unsecured funds for a “very far stretched restructuring plan” was dangerous, and that Grant Thornton was concerned that reckless trading was being undertaken.

[82] An emergency meeting of the Executive was held that day to discuss the letter of advice. In the event, the Executive resolved not to execute the letter of comfort which had been sought by the bank. The President was requested to clarify:

- The status of the space leased from the University – presumably a reference to the Student Union buildings.
- Whether security had been provided for the sums previously advanced by AUSA to Bacchid.

[83] On 13 June 2012, a further emergency meeting of the Executive was held. It resolved:

- a) That AUSA approve the provision of a letter of comfort from the Property Trust. I infer that this was addressed to the bank, and was to support Bacchid’s overdraft.
- b) That Mr Haines, who was a Director of the Bacchid Board, was directed to resign as a trustee of the Services Trust since there was a conflict of interest.
- c) That Ms Williams be appointed in his place as a trustee of the Services Trust.
- d) That Ms Bell was directed to nominate herself as Chair of the Bacchid Board. The evidence does not establish whether this happened.

[84] On 25 June 2012, Mr Hocquard on behalf of Bacchid confirmed to Mr Woolston of the bank that the Bacchid Board had agreed formally to sell four of its business assets, the Law School Café, the High Court Café, the Engineering Café

and the HSB Café. A request was accordingly made for Bacchid's overdraft to be extended for a further four weeks. The next day a listing agreement was signed with a real estate agent, a preference having been given that a single purchaser be obtained.

[85] On 26 June 2012, Mr O'Connor was advised by Mr Haines that new trustees had now been appointed to the Services Trust. He was not reappointed. It was explained that this was "... to create a distinction between the Services Trust and the Bacchid Board", and was not for any personal reasons. Mr Haines himself had resigned two weeks previously.

[86] On 6 July 2012, Grant Thornton completed and presented its independent review. The following conclusions are relevant:

- a) The provision of \$220,000 by AUSA advanced to Bacchid in January 2012 was made without proper due diligence; it risked AUSA and the Property Trust's financial stability and long-term viability by utilising valuable assets to fund a loss-making business. Grant Thornton considered the advance was a loan.
- b) The Executive and the Trustees of the Property Trust should seek legal advice in respect of their positions.
- c) There were potential personal liability risks for the Executive members who held positions on Bacchid, since the company was trading whilst insolvent and that they too should seek independent legal advice.
- d) A more rigorous and structured process of financial control and reporting needed to be implemented at AUSA to improve the quality and usefulness of the financial information produced.
- e) Management and the Executive needed to review and update AUSA's Policies and Procedures Manual in order to clearly define the roles and responsibilities of each of management, the Executive and service level heads.

- f) There was a breakdown in communication between the Executive and management and both parties should seek to rectify that situation.
- g) It was recommended that an appropriate handover procedure be developed to ensure incoming Executive members were fully appraised of the operating policies of the organisation and the key issues facing AUSA for the coming year.
- h) In a separate consideration of Bacchid's affairs, it was concluded that the company was loss-making and insolvent. Its future viability was uncertain and additional funding was likely to be required if it continued to trade.
- i) Bacchid had poor financial controls, ineffective governance and a management team lacking specific industry credentials. This resulted in poor decision-making and strategic direction, and led ultimately to a loss-making and an insolvent position.
- j) Management's proposed recovery plan for Bacchid involved Bacchid securing new transferable leases for certain cafes and then selling to pay down debt. The plan was not backed by substantive financial and supporting information, would be costly to implement (potentially requiring a significant level of additional funding support) and was not headed by the right management team with the necessary credentials.
- k) Additional financial support should not be extended to Bacchid unless a sufficient level of certainty could be placed on the recovery plan.
- l) Given that Bacchid was trading whilst insolvent, its Board should seek legal advice in respect of any decisions it might make.
- m) Included in Grant Thornton's conclusions as to internal control and governance of AUSA was reference to an issue as to whether expenses and payment authorisation procedures in respect of a National Bank Visa Card had been adhered to in accordance with AUSA's Financial Policy.

[87] As a result of the issues raised in the Grant Thornton report, Ms Williams took advice from Ms Jane Bull – a Human Resources Advisor. A formal disciplinary process was subsequently commenced as to the employment issues which arose. That process will be considered later in this decision.

[88] On 16 August 2012, Ms Williams wrote to the Directors of Bacchid seeking repayment of the sums owed to it. It was stated that AUSA had become increasingly concerned at Bacchid's financial position and its ability to repay the loan. This would have a significant impact on AUSA's financial viability. It was further noted that Bacchid's plans for recovery did not recognise AUSA as a creditor.

[89] In the course of the disciplinary process, Mr O'Connor contested Grant Thornton's advice that Bacchid was insolvent. On 22 August 2012, he said they had not taken account of the saleable value of the four going-concern businesses. Mr O'Connor stated that an unconditional contract for sale of the cafes had been executed, with a settlement date of 10 September 2012. In an email dated 3 September 2012, Mr Moore, of Grant Thornton advised that it was his understanding that the four cafes were subject to sale contracts, with an expected net realisation of \$400,000. On the basis of Bacchid's balance sheet as at 30 April 2012, the sales would be insufficient to return to a net asset balance sheet position. Further, in light of Bacchid's insolvent balance sheet and loss-making position, recovery of the AUSA debt was doubtful, and should be provided for accordingly within AUSA's accounts.

[90] On 20 September 2012, Brownes Chartered Accountants Limited (Brownes) provided a report to the Bacchid Directors. Brownes had been instructed to review information which had been provided to the AUSA Executive concerning Bacchid's solvency. In summary, Brownes concluded:

- a) As at 31 August 2012 there was an excess of liabilities over assets of more than \$700,000. However, this excluded sums owed to AUSA of \$618,000. If these were treated as loans there was no doubt that the company's liabilities exceeded its assets, and that it would be unable to pay its debts as they fell due in the normal course of business.

- b) The company was unlikely to satisfy the solvency test under the Companies Act 1993; to do so would require the sale of further parts of its business or a significant equity increase.
- c) The sale of certain enterprises to achieve liquidity would impair the company's ability to trade profitably and provide an acceptable return on capital.
- d) The unresolved question of the status of the AUSA advances only compounded the problems that the company was facing.
- e) If the company went into liquidation the Directors should be aware that there could be various claims against Bacchid.

[91] On 27 September 2012, Ms Williams wrote to Mr O'Connor. She said that following a meeting of the Bacchid Board on 25 September 2012, it was understood Bacchid was seeking to negotiate with AUSA including asking for payment to assist with redundancies and the downscaling of its operations. She stated that the interests of AUSA and those of Bacchid were in direct conflict as far as Mr O'Connor was concerned. As an employee of AUSA he owed the Association a duty of fidelity that required him to act in its best interests at all times; as a Director of Bacchid he owed fiduciary duties towards that company. In accordance with what he thought was the best interests of Bacchid, he was acting contrary to the interests of his employer. Given that conflict of interest, he was required to step down from his position as Director of Bacchid with immediate effect. This was to allow resolution of the disciplinary issues and the inherent conflicts of Mr O'Connor's roles.

[92] On 19 October 2012, Mr Hocquard wrote on behalf of the independent Directors of Bacchid to Mr Liu and the other trustees of the Services Trust. Attached to the letter was a report from Mr J Tuohey. He had assessed Bacchid's financial position and its planned sell down. In a statement of financial position as at 30 September 2012, he concluded that providing loans from AUSA to Bacchid were not recognised, there would be a surplus of a little less than one million dollars.



[93] Mr Moore stated in evidence that he considered the report had serious shortcomings. In summary the asset valuations relied on were unsupported by actual valuations; valuations had been double-counted when completing a statement of position; and no account had been taken of the costs involved in realising such assets. It also transpired that Mr O'Connor was unaware of the report in any event. It did not play any part in the circumstances which led up to his dismissal.

[94] On 31 October 2012, the shareholders of Bacchid resolved that it was insolvent, and appointed two persons from Grant Thornton as liquidators. Mr Moore confirmed that the latest six-monthly report from the liquidators of 19 May 2014 stated that by 20 April 2014 there was \$226,353 cash on hand, and that there were \$3,151,744 in unsatisfied claims from unsecured creditors.

### **The disciplinary process**

[95] Because a significant challenge is raised as to the procedural fairness of the disciplinary process, it is necessary in this judgment to describe that process in some detail.

[96] Ms Williams considered that the Grant Thornton report raised serious issues particularly as to whether Mr O'Connor as General Manager of AUSA had complied with his employment responsibilities. The Executive gave authority to Ms Williams and Mr Haines to investigate the issues arising, including staff performance issues.

[97] Advice was taken on these issues from Chen Palmer, and from Ms Bull whom the University had recommended to Ms Williams was a suitable person to provide HR advice. Initial investigations were carried out, particularly with regard to the recollections of Executive members as to what had been said in the course of the Executive meetings on 30 January 2012 and 28 May 2012. The Accounts Assistant was asked to provide details as to use of the relevant AUSA credit card.

[98] Once the information had been gathered, Ms Williams and Mr Haines wrote to Mr O'Connor on 13 August 2012. The following allegations were raised:

- a) *Capital injection to Bacchid:* That at the meeting of 30 January 2012, Mr O'Connor had provided "reckless and/or negligent advice" by encouraging the Executive to agree to make a loan to Bacchid that it might never be able to recover, that Mr O'Connor had arranged the payment before approval had been obtained from the Executive, and that he had failed to execute the conditions imposed by the Executive in respect of the payment. It was stated that this could constitute serious misconduct on the basis there was a breach of a fundamental requirement of Mr O'Connor's role, and that it could also breach cl 24.1 of his employment agreement by acting in a manner likely to damage AUSA's interests.
- b) *Letter of comfort:* It was alleged that at the Executive meeting on 28 May 2012, Mr O'Connor informed the Executive that the bank would withdraw Bacchid's overdraft if it did not urgently provide a letter of comfort; in fact the Bank Manager had advised the lawyers who were assisting the Executive that it was willing to extend the deadline by two weeks. This could constitute serious misconduct on the basis that Mr O'Connor had been dishonest in contravention of cl 24.1 of his employment agreement. Further, it was alleged Mr O'Connor advised the Executive at the same meeting that Bacchid did not have a current overdraft, whereas in fact the overdraft at the time was approximately \$100,000. That too was said to constitute serious misconduct because Mr O'Connor had been dishonest in contravention of cl 24.1 of his employment agreement.
- c) *Budget forecast:* Prior to the Executive meeting on 28 May 2012, the AUSA accountant, Ms Liu, had sent Mr O'Connor a budget forecast which he then forwarded to the Executive. She stated in her accompanying email that she was forwarding the correct forecast. The forecast appeared to indicate that Bacchid did not require an overdraft. During the meeting Mr O'Connor told the Executive that the forecast was in fact "incorrect and outdated" and implied that it could not be relied on. It was alleged that he made this statement to support his

advice to the Executive that Bacchid urgently required an overdraft or would otherwise have to cease operations. It was alleged that if true this could constitute serious misconduct because Mr O'Connor had been dishonest, in contravention of cl 24.1 of his employment agreement.

- d) *Recruitment of club assistants:* It was alleged that Mr O'Connor had employed staff without approval or involvement of the Executive in contravention of the constitution and AUSA's policies. Rule 37(i) of AUSA's constitution provided that the Executive had the power to engage "servants" and the AUSA Recruitment Policy provided that the Executive would convene a panel to review applicants and that a member of the Executive would be a part of that panel. If established, this allegation constituted serious misconduct because it was a breach of cl 24.1 of Mr O'Connor's employment agreement that he comply with AUSA's policies and procedures. It was further alleged that Ms Chanelle Lim and Ms Vivienne Mackenzie were close friends of Mr O'Connor's, and that there was accordingly a conflict of interest in his decision to employ them. It was alleged that if correct, this constituted serious misconduct because it contravened cl 6.9 of his employment agreement, which stated that he must not do anything which would result in a conflict of interest.
- e) *Agreement with IT company:* It was alleged that Mr O'Connor had breached AUSA's Tendering Policy by facilitating a contract between AUSA and Pleb Media Limited, a company owned and directed by Mr Sam Durbin who had been the Administrative Vice-President in 2011. The Tendering Policy required all contracts in excess of \$1,000 to be tendered for and that final approval be obtained from the Executive. It was alleged that, if correct, this constituted serious misconduct, first because there was a breach of cl 24.1 of the employment agreement by failing to comply with a policy, and secondly because there was a potential for a conflict of interest contrary to cl 6.9 of the employment agreement.

f) *Poor financial controls*: Reference was made to findings made by Grant Thornton that AUSA's financial information was poor and that there were inadequate control procedures in place in connection with financial matters. In particular:

- Significant transactions had been entered into by AUSA without adequate supporting financial information, such as the Bacchid advance of \$220,000.
- There were a number of incorrectly posted journal entries and a lack of account reconciliation and supporting documents for major balance sheet items.
- Significant assets and liabilities had been understated or overstated, which distorted the reported financial performance/position of AUSA.
- There were poor internal controls in place in relation to the provision of credit/collection of debts.
- AUSA had an inappropriately designated general ledger that did not adequately capture service delivery costs.
- There was a lack of clearly defined roles and responsibilities for the management team, and there were no written employment agreements as required by the Employment Relations Act 2000.
- There was a lack of clearly defined policies and procedures in place for AUSA.
- It was asserted that as General Manager, it was Mr O'Connor's role to lead and oversee AUSA's financial management.

If established, these allegations could constitute serious misconduct because there was a breach of the fundamental requirements of the General Manager's role; it could also breach cl 24.1 of the employment agreement by acting in a manner likely to damage AUSA's interest.

- g) *Expense authorisation issues:* Grant Thornton had advised that the expenses and payment authorisation procedures for the AUSA National Bank Visa Credit Card had not been adhered to, in accordance with AUSA's Financial Policy. This included incurring personal expenditure, and expenditure on behalf of Bacchid, lack of third party oversight and approval and lack of a detailed explanation regarding expenditure.

[99] A meeting was proposed to discuss these issues. When Ms Williams provided the letter to Mr O'Connor, he provided her with his own letter of the same date which raised an employment relationship problem. He said that from the beginning of the year he had become increasingly concerned regarding his role as the General Manager. He referred to:

- The decision in January 2012 that he was only to attend Executive meetings where he presented a report, each alternate week.
- That Ms Williams had negotiated issues in relation to the Rental Compensation Fund and the Student Liaison Committee alone without either the Administrative Vice-President or himself present.
- That the Executive Committee had not appointed him to the role of Returning Officer for 2012 because he was biased, this being an allegation which was without foundation in respect of a role he had undertaken for five years.
- That he had not been reappointed as a trustee to the John Weeks Trust.
- That he was removed as a trustee of the Services Trust.
- That there appeared to be issues relating to him and the reinstatement of payment of his General Manager salary by AUSA after he ceased to be an Executive Director of Bacchid.
- That there had been a breach of his privacy with regard to his employment agreement being left on a photocopier for anyone to see.

[100] A disciplinary meeting was held on 22 August 2012. This was attended by Ms Williams and Mr Haines assisted by Ms Bull for AUSA, and Mr O'Connor and his lawyer, Mr Pollak. Comprehensive written responses were provided by Mr O'Connor, and spoken to at the meeting. A transcript of the meeting was made. Mr O'Connor did not agree with some aspects of that document, and subsequently indicated where he considered amendments needed to be made.

[101] His position with regard to the various allegations was in summary:

- a) *Capital injection to Bacchid*: Mr O'Connor contested Grant Thornton's advice that Bacchid was insolvent. He considered the accountants had not taken into account the saleable value of the various going-concern businesses. He said that four of them had by this stage become the subject of an unconditional contract with a settlement date due on 10 September 2012. He agreed that he encouraged the Executive to advance \$220,000, because this was needed to continue trading, pay wages and salaries, and facilitate an opportunity to reorganise the business. It was not correct that he executed the payment before approval had been obtained. The relevant authorisation required two signatories, one from AUSA staff (which he provided) and one on behalf of the students; he understood that the document had been finally signed by the Treasurer. With regard to the conditions of transfer imposed by the Executive, he only learned of those five days after the Executive meeting when he was reviewing the minutes. The conditions imposed had not been discussed with him or raised in any other way. He had subsequently voiced his concern regarding a lack of communication and sought out information relating to branding from the Executive member who had raised the issue, but to date had not received information in that regard. The allegation was not accepted as being correct.
- b) *Letter of comfort*: Mr O'Connor said that he had advised the Executive Committee at the meeting on 28 May 2012 that the current overdraft facility with the ASB Bank would expire if a letter of comfort was not provided. He said this was in accordance with advice he had been

given by the Bank Manager, to the effect that the overdraft was available only until the end of May. He did not know that the Executive's lawyer had arranged an extension for a further period of two weeks. He only learned of this the day following the Executive meeting. He had then expressed his serious concern that a third party "that I had never heard of" had arranged an overdraft without him being advised when he had been the person dealing with the bank for the previous six months. He did not accept that the allegation was correct.

- c) *Budget forecast:* Prior to the Executive meeting on 28 May 2012, Mr O'Connor had asked Ms Liu to provide him with the most recent cash-flow she had. This was sent to him, but it had not been updated. He said that at the meeting Mr Liu stated that it looked as if Bacchid did not need an overdraft. Mr O'Connor said that he would need to get back to Ms Liu and obtain more accurate figures as he believed those which had been provided were not accurate. At a prior meeting he had produced an annual budget for Bacchid.

He had subsequently discussed with Mr Cox from Grant Thornton his business plan to sell off some Bacchid assets so as to produce cash; he had been advised that he needed to prepare a totally revised forecast, so that the Executive could make a more informed decision regarding the letter of comfort. This he did. He said that the Executive needed to keep in mind that following the departure of Bacchid's General Manager and Finance Controller, Ms Liu, who had been appointed as in-house accountant, had spent months trying to correct and set up accurate accounting records, as well as working with Grant Thornton in respect of their request for information. He did not accept that this allegation was correct.

- d) *Recruitment of club assistants:* In the first year of his employment, he had discussed with the then President and Administrative Vice-President a procedure to be adopted when engaging staff. At that time he was told that all interviews would require the Administrative Vice-President to be present. That had occurred in each subsequent

year, with the exception of 2012. In that year it was agreed with Mr Haines prior to the interviews with Ms Mackenzie and Ms Lim that he would not involve himself in their interview process as Mr Haines had a potential conflict of interest. The allegation that they were close friends of Mr O'Connor's was "preposterous". He had recruited hundreds of employees and believed he was an excellent judge of character and skills. The paramount consideration was the ability to undertake the work. The allegation, he said, was untrue and malicious.

- e) *Agreement with IT company*: There had been extensive discussions regarding AUSA's IT needs. An option to reduce expenditure on this item had been discussed after Mr Durbin had suggested that his company could provide those services for each AUSA entity for a small fee. This would involve a reduction of costs otherwise incurred in wages. Agreement had been reached on 14 May 2012. He signed on behalf of Bacchid, Mr Haines signed on behalf of AUSA, and Mr Durbin signed for Pleb Media Limited. It was intended that Campus Radio bFM Limited would sign, but it had not done so. Mr O'Connor said the allegations made were untrue.
- f) *Poor financial controls*: In response to the views of Grant Thornton, Mr O'Connor responded:
- As to significant transactions having been entered into without adequate supporting financial information, Mr O'Connor believed this had been provided. In the case of the approval of the \$220,000 to Bacchid, he had explained to the Treasurer the intended use of the funds.
  - If there were incorrectly posted journal entries and a lack of account reconciliations and supporting documents, the auditors would have referred to these, and advised him that they needed to be remedied.
  - As to the alleged understatement or overstatement of significant assets and liabilities, Mr O'Connor said this was a wide-ranging



allegation, and included the status of the funds advanced to Bacchid which was still under review.

- Regarding poor internal controls in relation to the provision of credit/collection of debts, Mr O'Connor stated that the credit controls had been consistent for the previous ten years, and no audit issue had been raised. A lack of funds precluded an opportunity to improve them. As regards to the assertion of an inappropriately designed general ledger that did not adequately capture service delivery costs, Mr O'Connor said the issue had been discussed on many occasions. He accepted the general ledger could be improved but disputed that it was inappropriate. The Financial Controller and Mr O'Connor had met on several occasions in 2011 with an external provider to consider possible improvements.
  - Regarding the assertion of lack of clearly defined roles and responsibilities for the management team, Mr O'Connor was not aware of any examples where there was no written employment agreement. No salary or wages were paid until an employee had signed a letter of appointment, and an employment agreement which referred to the relevant job description.
  - As to the assertion of a lack of clearly defined policies and procedures, Mr O'Connor attached an annual plan of policies and controls which he had presented and put forward to each Executive for five years, and which had never been approved.
- g) *Expense authorisation:* Credit card statements were provided to Mr O'Connor by the accounts department. He had always provided receipts and a signature against his claims. All such claims were for genuine business purposes. He had placed some urgent purchases for Bacchid on the card, and arranged an invoice to Bacchid on the following day. He had only once incurred a personal expenditure, in an emergency when his own card failed to operate.

[102] Following the meeting on 22 August 2012, Ms Williams and Mr Haines undertook further investigation. They provided a letter to Mr O'Connor on 24 September 2012, which contained a significant volume of documentation in support of the various allegations. A further meeting to discuss the various issues was proposed.

[103] That meeting took place on 9 October 2012, and again Mr O'Connor provided further responses with regard to each allegation. In summary he said:

- a) *Capital injection to Bacchid*: In addition to his previous response, Mr O'Connor reiterated his contention that the Grant Thornton conclusions as to solvency of Bacchid were unduly negative, whereas his were positive. He believed that his view was now confirmed as being accurate, having regard to the report from Brownes of 20 September 2012.<sup>15</sup>
- b) *Letter of comfort*: Mr O'Connor repeated his earlier response, and asked whether the allegation was now withdrawn.
- c) *Budget forecast*: Mr O'Connor repeated his previous response, and reiterated that three documents had been provided to the Executive regarding Bacchid's financial situation. The first was a budget for the Bacchid group for 2012 prepared in 2011 and provided to AUSA officers in hardcopy; the second was the cash-flow forecast which had been provided to the ASB at their request; the third was the revised forecast based on savings identified and to be achieved by the commencement of a restructure. The first document was an annual budget, the second was a cash-flow forecast, and the third was a new budget for the following three months that would show the effect of a restructuring. There had never been any intention to mislead members of the Executive.

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<sup>15</sup> See para [90] above.

The figures which had been presented then were now significantly improved, as aspects of Bacchid's operation had ceased saving a substantial sum in wages.

d) *Recruitment of club assistants:* Mr O'Connor repeated his previous response and stated:

- There had been three interested candidates.
- There was an "emergency situation", because an outgoing employee had given short notice.
- Mr O'Connor had thought that one of the candidates was possibly Mr Haines' girlfriend. Mr Haines advised that she was not and they were just friends. He was, in any event, excluded from the interview process.
- Mr O'Connor interviewed the three candidates alone, and selected the best candidates on merit. He said he was very well qualified to do so.
- He accepted that the recruitment policy was not adhered to, but this had been the case for the previous five and a half years as well.

e) *Agreement with IT company:* Mr O'Connor commented on a statement which had been prepared by Mr Haines with regard to this issue, which was attached to Ms William's letter of 24 September 2012. In that statement, Mr Haines had referred to the preparatory discussions prior to the signing of the Pleb Media Limited agreement. Mr Haines said he signed it on behalf of AUSA because Mr O'Connor had said he could not sign for two different parties; he advised Mr Haines that he should sign it for AUSA. Mr O'Connor in his response considered Mr Haines' comments to be "somewhat astonishing" and that if he was not aware of the Tendering Policy (as he had asserted) then he should have been.

f) *Financial controls:* Mr O'Connor repeated his previous response.

g) *Expenses authorisation*: Mr O'Connor responded to an analysis of the National Bank Visa Card statement which had been provided. This included evidence that the card had been utilised on spending associated with Bacchid and not repaid. In his response Mr O'Connor asserted that a minority of the purchases only had been submitted without a relevant receipt. A number of the purchases were of an online nature so that there was no receipt. He further stated:

- There was no policy regarding credit cards when he commenced employment. He had drafted one and presented it to the Executive, but such a policy had never been approved.
- Only a third of the purchases made on the card had been undertaken by him, and only a third of those had been submitted without receipts, after completing credit card identification checks. He had provided documents to the accounts department for more than five years and had never been previously advised that there was any problem with regard to receipts.

[104] In the course of a meeting which discussed these responses, an issue was raised as to whether it was appropriate for Mr Haines to be involved in the disciplinary process. Ms Williams and Mr Haines reflected on that issue, and determined that it would be cleaner for Mr Haines to have no further involvement in the process. Ms Williams became the sole decision-maker.

[105] On 18 October 2012, Ms Williams wrote to Mr O'Connor attaching further information which had been obtained with regard to two of the allegations, with any further response to be provided by 23 October 2012. That response was provided on 23 October 2012.

[106] On 26 October 2012,<sup>16</sup> Ms Williams wrote to Mr O'Connor with her preliminary decision, in light of all the information which had been submitted.

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<sup>16</sup> The letter was dated for December 2012 but Ms Williams' oral evidence was that the letter was dated 26 October 2012 and was provided to Mr O'Connor on 30 October 2012.

Ms Williams' preliminary conclusion was that each of the seven allegations were found, variously, to have substance.

[107] Ms Williams said in her letter:

- a) *Capital injection to Bacchid*: It was Ms Williams' preliminary conclusion that Mr O'Connor had encouraged the AUSA Executive at its meeting of 30 January 2012 to make a payment of \$220,000 to Bacchid that it would not be able to recover. She did not accept Mr O'Connor's view that the sale of four Bacchid assets would alter Bacchid's financial position in any way, having regard to the advice received from Mr Moore in his email of 3 September 2012, wherein he advised that the sales were not sufficient to return Bacchid to a net asset balance sheet position. Nor did she accept that the Brownes Report clearly showed Bacchid to be solvent. However, there was insufficient evidence to support the allegation that Mr O'Connor executed the payment to Bacchid before approval was obtained from the Executive, or that he failed to execute the conditions that the Executive had imposed in respect of the payment. There was some evidence to suggest that he was not in fact aware that conditions had been attached to the payment.
- b) *Letter of comfort*: It was accepted that Mr Woolston, the Bank Manager, had advised Mr O'Connor that Bacchid's overdraft facility would be available only until the end of May 2012, and that this was relayed to the Executive without Mr O'Connor being aware of the possibility of an extension for two weeks. It was also accepted that he learned of this subsequently by reason of the email sent by Ms Williams. However, based on witness statements from members of the Executive, it was concluded that Mr O'Connor had misled the Executive regarding the overdraft. The Grant Thornton Report stated that the actual overdraft was "around \$100,000". This information was not consistent with the advice tendered to the Executive by Mr O'Connor who had subsequently confirmed that he had said "you

can't assume that we have no money in the bank" and that he "only made it sound better because I believed we were able to trade out".

- c) *Budget forecast:* The preliminary conclusion was that the only documents provided to the Executive prior to the meeting of 28 May 2012 was a 2012 budget established in 2011, and a cash-flow forecast for the period January to December 2012. Mr O'Connor had advised the AUSA Executive that the budget provided by Ms Liu was "incorrect and outdated", when she herself said that it was the "correct forecast". The subsequent revised forecast 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 cash flow".
- d) *Recruitment of club assistants:* AUSA's Recruitment Policy was not followed when recruiting two persons as club assistants. Mr O'Connor had conceded that the job had not been advertised through formal channels, despite this being a requirement of the policy. Nor had there been a panel for reviewing applications. It was not accepted that the policy was not usually followed. It was acknowledged that there was insufficient evidence to support the allegation that Ms Lim and Ms Mackenzie were close friends of Mr O'Connor's.
- e) *Agreement with IT company:* The Tendering Policy had not been replaced or superseded; and was not limited to a situation where AUSA was tendering its own services. The Policy specifically referred to AUSA buying services and making purchases, which was contrary to Mr O'Connor's interpretation. Ms Williams' preliminary view was that the Tendering Policy had not been followed. Only one service provider had been considered. There was a potential conflict of interest, given that the provider was a company whose sole shareholder was the Administrative Vice-President of 2011, Mr Durbin. Further, Mr Haines had signed on behalf of AUSA, on the advice of Mr O'Connor. It was Mr O'Connor's role to be aware of AUSA's policies and to advise the Executive as to the relevant requirements. This had not occurred.

- f) *Poor financial controls*: Reference was made to Mr O'Connor's explanation that he relied on the auditors to advise each year if there was a problem with AUSA's financial systems. The information obtained by Ms Williams showed that the audit for 2009 was not completed until June 2012, and that the audit for 2010 and 2011 had only been completed in the course of 2012. She was concerned that his responses were misleading, given that the three audits had not been completed until 2012. It was therefore difficult to see how he could have relied on these reports to ensure that appropriate financial controls were in place. Ms Williams accepted Mr O'Connor's explanation regarding the adequacy of employment agreements.
- g) *Expense authorisation*: Based on the information obtained regarding the use of the AUSA National Bank Visa Card, Ms Williams' preliminary conclusion was that:
- Expense details and supporting invoices had not been submitted for approval by an Executive member before payment was made; credit card approval forms were only ever signed by Mr O'Connor.
  - The credit card expense forms lacked receipts and sufficient narrations to substantiate the amounts expended as genuine business-related expenses.
  - There were a number of expenses which had been incurred for Bacchid. Those had not been approved by the Executive against Bacchid's budget. The expenses were unlikely to be recovered given Bacchid's financial position. They had been incurred without any prospect of AUSA being able to recover them.
  - There was insufficient evidence to sustain the allegation that Mr O'Connor had incurred personal expenditure on the credit card.

[108] Having analysed the foregoing allegations Ms Williams concluded:

We explained to you in our letter dated 13 August 2012 that if one or all of these allegations were 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.

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<sup>17</sup> 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 advisor 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.<sup>18</sup> 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 advisor to the Board, it was your duty to identify and manage any conflict of interest in order [to] avoid 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.

Before I make a final decision, I would like to give you the opportunity to provide any final comments in relation to the proposed sanction and preliminary conclusions we have set out in this letter. You may either provide your response in writing or in person. If you choose to respond in writing then please do so by midday on Wednesday 1 November. If you would like to meet please let me know by Friday 26 October and I will arrange a suitable time.

[109] On 31 October 2012, Mr O'Connor provided further comments in response to Ms Williams' letter of 26 October 2012. Those comments reiterated explanations he had given previously. Mr O'Connor concluded by stating:

Given that you and some others have already decided to dismiss me there is little point in meeting yet again to go over the same ground. I have given

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<sup>17</sup> That is, allegations relating to the capital injection to Bacchid, those relating to the Tendering Policy and the Recruitment Policy, and the allegation relating to poor financial controls.

<sup>18</sup> That is, the allegations relating to the capital injection of Bacchid and to the budget forecast.



honest explanations and provided supporting documentation as best I can and yet you still find that all the allegations are established to a greater or lesser degree. There is nothing I can say that will make any difference to you and your decision.

Upon confirmation of my dismissal for alleged serious misconduct I will seek immediate legal redress, including my immediate reinstatement. This letter is the formal raising of a personal grievance. I can demonstrably show my dismissal has been predetermined, I have evidence of this, and I have not committed serious misconduct. I ask that you reconsider your decision.

[110] On 13 November 2012, Ms Williams wrote to Mr O'Connor providing her final decision. She said that she had carefully considered his comments and had reviewed each of the allegations. She confirmed her preliminary decision. She considered that AUSA could not have trust and confidence in the future, and that a lesser sanction would not remedy the situation. She was concerned by an apparent lack of understanding and appreciation of Mr O'Connor's role and responsibilities as General Manager. Nor had he appreciated the inherent conflicts caused by his role as an employee and a Director of Bacchid. This had only been addressed by AUSA as a result of her intervention. He had not accepted that he had done anything wrong or indeed that he had any part to play in relation to the proven allegations. Given the high level of responsibility and trust which members of the AUSA Executive reposed in its General Manager, AUSA could not continue to have trust and confidence in him. Ms Williams therefore confirmed AUSA's decision to terminate Mr O'Connor's employment with immediate effect, in accordance with cl 24 of the employment agreement. Regarding the raising of a personal grievance for unjustified dismissal, it was not accepted that this had been validly raised since there had been no decision at that point regarding dismissal.

## **Issues**

[111] Counsel provided full written submissions which have been of considerable assistance to the Court. The following issues require resolution in light of those submissions:

- a) Were the findings made in respect of each allegation open to Ms Williams?
- b) Was the overall conclusion as to the merits correct?

- c) Was the process procedurally flawed in any respect and in particular was there predetermination?

[112] Resolution of each of these issues arises in the context of the central issue, which is whether Mr O'Connor's dismissal was justifiable. The test of justification is set out in s 103A of the Act, which provides:

**103A Test of justification**

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is 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.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
  - (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.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
  - (a) minor; and
  - (b) did not result in the employee being treated unfairly.

[113] A full Bench of this Court considered the scope of this section in *Angus v Ports of Auckland Limited*.<sup>19</sup> There the Court said:

[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employee's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.

[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[59] Finally, in determining justification under new s 103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.

[114] In the present case, there must be a careful consideration of "all the circumstances at the time the dismissal or action occurred" as that phrase is understood in s103A(2).

### **Analysis of conclusion reached on each allegation**

#### ***Capital injection to Bacchid***

[115] The essence of this allegation is:

- a) That Mr O'Connor encouraged the AUSA Executive to make the payment of \$220,000 to Bacchid.
- b) That AUSA would not be able to recover this sum.

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<sup>19</sup> *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELC 94, 015.

[116] On the first issue, there is no doubt that Mr O'Connor encouraged the Executive to advance the funds. He recommended such a course to the President, assisting her in preparing the necessary request by email to the Chair of the Property Trust on 6 January 2012; and made a similar recommendation to the Finance Committee. Relying on the advice he gave, the Executive Officers then promoted the recommendation of the Finance Committee. At that point some members of the Executive questioned the proposal which involved a very significant sum. A proper concern was that there was no supporting documentation. The Executive Officers relied on Mr O'Connor's advice and recommendation and it was their support for the recommendation which persuaded others to vote in its favour.

[117] The recommendation was considered against a general understanding that Bacchid was struggling; that was why Mr O'Connor had been appointed as an Executive Director and why the request for a significant sum had been advanced. But the precise extent of Bacchid's difficulties was not known. Subsequently, Grant Thornton reported that the transaction was entered into without adequate supporting financial information.

[118] The second issue is that AUSA was encouraged to make an advance that it could not recover. As to this matter:

- a) The implication in Ms Williams' evidence was that Mr O'Connor urged AUSA to complete the advance when he knew, or ought to have known, that it would not be repaid.
- b) The assessment has to be made in light of the circumstances which existed at the time, and not with the advantage of hindsight.
- c) There is no doubt that the recommendation was implemented in a completely inadequate fashion:
  - There was no business plan, despite Mr O'Connor's saying that there was an interim need for funds until the business could be reorganised so as to repay creditors.

- At the Executive meeting there was confusion as to why the funds were required. Ms Williams said they were needed to reduce debt; Mr Liu said they were required for capital items. Nobody was sure. Having regard to a schedule which Mr O'Connor subsequently produced, both were in fact correct; but they could not provide relevant details.
- According to that schedule, approximately \$100,000 of the sum being sought had already been utilised, two days previously. It is not apparent that the Executive were told this. Apart from anything else, it confirms that the circumstances were urgent.
- Adequate financial documentation which would fully and accurately describe the circumstances was not provided by Mr O'Connor to support his recommendation.
- There was a vague reference to share capital being provided to AUSA. No precise information was given as to how shares in a company which was in severe financial difficulty could provide adequate security.

[119] In summary, the recommendation was made in a casual and unprofessional way. But more than that, it was made in a situation where Mr O'Connor was aware that Bacchid could not continue to trade without substantial funds being made available to it. He himself acknowledged that this was to permit Bacchid to continue trading and to pay wages and salaries pending a sale of assets so creditors could be repaid. There was an obvious risk that unless AUSA was fully protected by adequate security, it would not be repaid. Bacchid could not give that security. Mr O'Connor should have realised AUSA would not be able to recover the advance.

[120] During the disciplinary process, Mr O'Connor responded by stating that he had encouraged the Executive to "invest" the sum of \$220,000 so there could be time to reorganise the business. There is no evidence of such a plan being pursued with any sense of urgency as the circumstances required. There is a reference to a possible sell-down of Bacchid assets at the Bacchid Board meeting held on

27 March 2012, when Mr O'Connor advised Directors that he was resolving issues as to leases for individual cafes, presumably as a prerequisite for sale. By 28 May 2012 the bank was aware of the plan, although how well informed it was as to all the circumstances is unclear. In his email of 5 June 2012 to the Executive Officers, Mr O'Connor said he was currently working on a plan which would show the operation and the funding of sales of assets to clear debt.

[121] By 7 June 2012, Mr Moore stated that Bacchid management had been provided with an overview of a recovery plan, the broad basis of which was that Bacchid would secure new transferable, leases/licences at a number of its cafes, and then sell the cafes to reduce debt. Fundamentally, Mr Moore considered that the remaining business would still be loss-making. In its subsequent, more detailed report of 6 July 2012, the view was expressed by Mr Moore and his colleague that the plan was not backed by substantive financial and supporting information, would be costly to implement (potentially requiring a significant level of additional funding support) and was not headed by the right management team with necessary credentials.

[122] The evidence suggests that a listing agreement for the sale of four cafes was entered into in late June 2012, but does not clarify whether leases and licences had been arranged by then. On 22 August 2012, Mr O'Connor confirmed that unconditional contracts for sale of three/four cafes had been entered into with a settlement date of 10 September 2012. However, as Mr Moore subsequently advised, sale of the four cafes was expected to realise approximately \$400,000 of net sale proceeds, which was insufficient to establish a net asset balance sheet position. On 20 September 2012, Brownes provided a heavily qualified report, and stated that the company was unlikely to satisfy the solvency test; to do so would require either the sale of yet further parts of its business or a significant equity increase. That opinion was premised on the basis that AUSA would not insist on repayment of funds advanced by it to Bacchid which was not its position. On 19 October 2012, the Independent Directors presented a somewhat optimistic view – the assumptions of which Mr Moore emphatically rejected. Only a few days later, on 31 October 2012, liquidators were appointed.

[123] In short, the plan to dispose of assets on a going-concern basis was unsuccessful. Mr Moore predicted this in early July 2012. On the information produced to the Court, the conclusion that AUSA would suffer a significant loss as an unsecured creditor was correct.

[124] Mr O'Connor said he was also concerned that AUSA would lose the right to occupy the Student Union buildings if Bacchid became insolvent. He said this was worth a very substantial amount to AUSA because of the favourable rental arrangements which had been agreed; and because of the importance of those particular buildings, as recognised in the 2004 resolution.

[125] There is no evidence that this factor was actively considered at the time the sum of \$220,000 was requested, or indeed in subsequent months. However, I accept that members of the Executive and Mr O'Connor would have been well aware of this risk. It is inherently unlikely, however, that the Directors of Bacchid could responsibly regard this as a reason for the company continuing to trade whilst insolvent, having regard to the statutory duties they owed to creditors. Directors who breach their statutory duties potentially attract a personal liability – a fact which Grant Thornton made explicit in its letter of advice of 7 June 2012. Ms Williams was clear that there was another option open to AUSA, and indeed she was successful in negotiating a surrender of the area in question to the University on the basis that the University would pay an amount to AUSA equivalent to rent. As she put it, AUSA is now “a commercial landlord and not a purveyor of pies”.

[126] Following a careful review of a great deal of evidence which has been provided to the Court on this issue, I am satisfied that Ms Williams' decision with regard to this allegation was one which was well open to her.

[127] She concluded that, considered independently, the allegation constituted serious misconduct. This allegation had originally been put on the basis that the advice amounted to serious misconduct because it was a breach of the fundamental requirements of the General Manager's role, and because it breached the employment agreement in that Mr O'Connor acted in a manner likely to damage AUSA's interests. In the decision letter this was put on the basis that serious

concerns were raised by this allegation regarding AUSA's ability to have trust and confidence in Mr O'Connor as General Manager. This was considered to be more than a performance issue, because Mr O'Connor did not appear to have an appreciation of his obligations as the most senior employee of AUSA and the Executive's main advisor, particularly when managing the relationship between AUSA and Bacchid.

[128] I am left in no doubt that with regard to this issue Mr O'Connor failed to attain the high standards required of him as General Manager. The Executive was left to make an urgent decision on the basis of wholly insufficient financial documentation. Proper due diligence was not undertaken. It should have been apparent to Mr O'Connor that the advancing of such a substantial sum was very risky unless proper security could be given. It could not. These were his responsibilities as General Manager. This was conduct which a fair and reasonable employer could determine was sufficiently serious as to severely undermine the relationship of trust and confidence, and thus conclude that there had been serious misconduct.

***Letter of comfort/budget forecast***

[129] It is convenient to deal with the two issues which arise from the Executive meeting held on 28 May 2012 together.

[130] Before doing so it is necessary to consider several contextual matters:

- a) At the Bacchid Board meeting of 27 March 2013, Mr O'Connor advised that there was a need to "find \$400,000". That had not occurred. There is no evidence that the apparent plan to obtain transferable leases/licenses for cafes and to sell those cafes was being pursued with any vigour.
- b) At the same Board meeting, there was discussion as to Mr O'Connor's role. It was recorded that Mr Liu had been requesting a business plan for Bacchid. Mr O'Connor told Board members that he had no conflict of interest in undertaking both the role of Business Manager and



Executive Director of Bacchid, but that if he was continually harassed by Mr Liu he would relinquish his role with Bacchid. Mr Haines, in his capacity as a Bacchid Board member, was provided with a “2012 budget set in 2011”; but he was told this was a confidential document that was not to be shared with AUSA. It appears Mr O’Connor took this stance because the financial information relating to Bacchid indicated it was in serious financial difficulty, and he did not want this to be generally known. However, he was also General Manager of AUSA and answerable to its Executive. On the face of it there was a serious conflict of interest. Mr O’Connor should have been sharing financial information relating to Bacchid at the very least with the Treasurer, Mr Liu, if not the Executive itself, since it had passed resolutions seeking financial information about Bacchid as a condition of its advance.

- c) The letter from the Office of the Vice-Chancellor dated 27 April 2012 raised serious concerns as to the ability of AUSA to manage its financial affairs. In early May 2012, Mr O’Connor expressed his “very strong views” about the letter. He considered it to be misleading, inaccurate and malicious, and was an attempt to “gain information control”. Having regard to the advice which was obtained from Grant Thornton only a few weeks later, Mr O’Connor’s reaction was inappropriate.
- d) At a meeting of the Financial Committee (chaired by Mr Liu and attended by Ms Williams and Mr O’Connor as well as others) held on 3 May 2012, there was discussion regarding the payment to Bacchid of \$220,000. The Committee recorded that it was currently unsure whether the sum was a share issue or a loan. Mr O’Connor was “to provide any documentation that could clarify the situation”. Even at that point the issue of security and how it would be repaid remained unclear.

[131] In short, Mr O’Connor was increasingly taking a position the effect of which was that he knew what was best for AUSA and Bacchid, and that members of the

Executive who were inexperienced and only recently appointed should accept his views, and that the UoA was proffering advice designed to promote its own strategic purposes. I accept Ms Williams' evidence that Mr O'Connor began to distrust the Executive. It is apparent he had insufficient understanding of the obligations he held as General Manager of AUSA, the seriousness of Bacchid's position and the extent to which his position as Executive Director was becoming untenable because he was not managing adequately, or at all, an obvious conflict of interest.

[132] It was alleged that Mr O'Connor misled the Executive regarding Bacchid's overdraft when consideration was given to the provision of a letter of comfort to the bank. Mr O'Connor told members of the Executive that the bank would withdraw the overdraft if it did not urgently provide a letter of comfort and that Bacchid would have to cease its operations.

[133] A few days later, Grant Thornton in its letter of 7 June 2012 reported that as at the previous day, Bacchid's overdraft was \$105,000 overdrawn mainly due to the making of a large GST payment in May 2012 of \$81,000 for the months of March and April. There is no evidence that this information was conveyed to the Executive.

[134] When confronted at the disciplinary meeting of 22 August 2012 with these concerns, Mr O'Connor responded by stating that it had been his position that it could not be assumed Bacchid had no money in the bank having regard to its daily takings, and having regard to a substantial bond held in relation to the lease for Romford's, a function centre in Mission Bay. Mr O'Connor said in evidence that he had not attempted to mislead anyone; he was only making "it sound better because I believed we were able to trade out".

[135] Mr O'Connor's optimism was not supported by the facts. A plan for disposition of Bacchid's assets was not yet able to be implemented despite it having been mooted for some months. Mr O'Connor did not have a realistic appreciation of the realities of the situation. It was in this context that inaccurate and consequently misleading advice as to the extent of Bacchid's overdraft was provided.

[136] There was a fundamental failure to “lead and oversee AUSA’s financial management in conjunction with the Treasurer, the Administrative Vice-President and Accounts Administrator”, and to “produce a comprehensive report of all AUSA’s operations including finances ... for the Executive on a monthly basis” as provided for in Mr O’Connor’s job description, as well as other “key tasks” in that document.

[137] This conclusion was open to Ms Williams. The allegation was not substantiated as one of serious misconduct. However it is relevant for the overall assessment of the established allegations when considered cumulatively.

[138] The related problem which arose from the Executive meeting of 28 May 2012 concerned the budget forecast which was provided for Bacchid. On the one hand, a document was provided which Ms Liu had advised was the “correct forecast” and had been sent to the Bank; on the other hand, when the Treasurer commented on that document by stating that it did not look as if Bacchid needed an overdraft Mr O’Connor said he would need to revert to Bacchid’s in-house accountant, as he believed the figures in the document were not accurate.

[139] As Ms Williams put it, if the information was reliable for bank purposes, it was reliable for Executive purposes; and if it was not, given all the matters that had been discussed with Mr O’Connor in the meeting, they had nothing to go on at all.

[140] In this respect the Executive was presented with confusing and inconsistent information. Its members were understandably concerned that they were being asked to sign a letter of comfort which implied yet a further commitment to support Bacchid, against a background of a controversial decision to advance a substantial sum in January. The Executive was not being presented with either accurate and reliable information or a range of options, in a deteriorating situation, by its General Manager whose job description required him to do so.<sup>20</sup>

[141] Ms Williams reached a conclusion which a fair and reasonable employer could reach. This allegation was not held to constitute serious misconduct. This aspect of the matter featured in latter conclusions she reached as to whether there

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<sup>20</sup> As explained at para [13].

was a conflict of interest, and in the overall assessment of serious misconduct. I will return to them later.

***Recruitment of club assistants***

[142] The essence of Ms Williams' conclusions on this issue were that AUSA's Recruitment Policy, which it appears was approved in 2003, was not followed (when Ms Lim and Ms Mackenzie were employed as club assistants) in two respects:

- a) Clause 2 of the Recruitment Policy required that all positions should be advertised widely, and which did not occur;
- b) Clause 3 required a panel to be appointed to review the applications, and which also did not occur. Only Mr O'Connor was involved in the recruitment, because he asked Mr Haines to stand down.

[143] Ms Williams had also concluded that there was no evidence to support Mr O'Connor's comments that the policy was not usually followed.

[144] Mr O'Connor's response was twofold:

- a) During his employment, and after a discussion he held with the President and Administrative Vice-President in 2006, the process to be followed was that all interviews would require himself and the Administrative Vice-President to be present. On this occasion Mr Haines was asked to stand down because he was friendly with the two candidates.
- b) He did not advertise the vacancies because there was an emergency situation since one of the outgoing employees had given short notice. He interviewed three candidates, and having regard to his considerable HR experience he was well placed to make an assessment on merit.

[145] The President for 2011, Mr McCrory, told the Court that there was a certain amount of "flux" on the issue of whether the policy needed to be followed rigidly. He said there was a small pool of people who would generally apply for these

positions, and in one instance where he knew a candidate he stood down from the decision-making role. He was sure Mr O'Connor was alert to these issues. He did not think there were any problems as to how Mr O'Connor employed staff. He had worked closely with Mr O'Connor on these matters. I conclude from Mr McCrory and Mr O'Connor's evidence that although adherence to the policy was inconsistent, there was an awareness of it. It had not been revoked. It continued to be published in the AUSA Admin Policy Book. It could not be ignored.

[146] As regards the issue of urgency, Mr Haines established in the course of the investigation that the outgoing employee had given six weeks' notice around May 2012, and that the recruitment process did not commence until after the expiry of four weeks in the six-week notice period.

[147] If it was considered appropriate to ask Mr Haines as Administrative Vice-President to stand down, it would have been appropriate to arrange an alternative Executive member as the policy contemplated.

[148] Given the obligation under the employment agreement to comply with AUSA policies, it was open to Ms Williams to determine there was a breach of the policy. Urgency arose because recruitment was not undertaken in a timely way. No good reason has been given as to why advertising could not be conducted. An alternative Executive member could have been asked to participate in the process.

[149] However, I do not accept that a fair and reasonable employer could have concluded that these circumstances would justify a finding of serious misconduct. It is significant that the original allegation to the effect that the two candidates were close friends of Mr O'Connor's was not upheld. Thus the assertion of nepotism which might have supported a conclusion of serious misconduct was not established. The conclusion that the remaining aspects of this allegation constituted serious misconduct was not one which a fair and reasonable employer could have reached; but the established conduct could be considered in the overall assessment of serious misconduct.

### *Agreement with IT company*

[150] This allegation related to the Services Agreement entered into with Pleb Media Limited on 14 May 2012. Ms Williams determined:

- a) The AUSA Tendering Policy had not been complied with, because the company was the only candidate considered.
- b) Company office records showed that the company's sole shareholder was Mr Durbin, who had been Administrative Vice-President in 2011. This created a potential conflict of interest with AUSA that had not been appropriately disclosed or managed.
- c) When the document was signed, Mr O'Connor advised Mr Haines to sign on behalf of AUSA; he himself signed on behalf of Bacchid.

[151] Mr O'Connor's response to this allegation was that an IT employee had ceased to work for AUSA in 2011, and an IT employee had ceased also to be employed by Bacchid; it appeared that Campus Radio bFM Ltd also had IT requirements. A composite contract supplying services to the three entities would potentially reduce IT expenditure.

[152] Mr O'Connor told the Court that he had never adhered to the Tendering Policy process. He referred to a previous example where a new mobile phone provider was engaged; he had informed the Executive as to the desirability of a switch, but no formal resolution was required. He explained the savings that would be made, and then implemented it. He considered that the policy had become outdated, because it referred to a role (Business and Development Manager) which no longer existed.

[153] Mr McCrory, the President in 2011 stated that the policy had never been used to his recollection; Mr Durbin gave similar evidence although I treat his views as an interested party with caution.

[154] The central problem related to the fact that Mr Durbin had only recently ceased to be the Administrative Vice-President and that no transparent process took

place by way of advertising, to test the appropriateness of the offer from an apparently external provider which was under consideration. It is also to be noted that ultimately it covered two entities not three, because Campus Radio bFM Ltd did not sign it.

[155] Mr O'Connor contended that the agreement entered into was a vast improvement on the previous position.

[156] It was asserted that Mr O'Connor felt he could not sign the document for AUSA, because he was signing for Bacchid. That was a correct acknowledgment of a conflict of interest. However, he then advised Mr Haines to sign it for AUSA. He did not recommend that the issue be placed before the Executive, at a time when the Executive was obviously becoming increasingly concerned as to the adequacy and reliability of information which Mr O'Connor was providing.

[157] There is no evidence that Mr O'Connor was unaware of the policy. Indeed he was critical of Mr Haines when he said he did not know of it. The policy had not been revoked. It continued to be published in the AUSA Admin Policy Book. Ms Williams in the course of her investigation considered a previous instance where an intended licence agreement with an external provider was approved by the Executive, when Mr O'Connor was present. I find that he must have been aware of the Policy but chose not to follow it in circumstances where he should have done so.

[158] The conclusions reached by Ms Williams were those which a fair and reasonable employer could have reached.

[159] However, for the same reasons as apply in relation to the previous allegation, I do not consider that this particular failure on Mr O'Connor's part was sufficiently serious as to warrant a conclusion of serious misconduct. It was a matter, however, which could legitimately be considered in an overall assessment of serious misconduct.

***Poor financial controls***

[160] There is no doubt that Grant Thornton in its financial review concluded that there was a lack of financial control and appropriate financial reporting structures leading to poor financial decision-making at AUSA.

[161] There is also no doubt that management was responsible to the Executive for these matters; Mr O'Connor in particular was responsible for leading and overseeing AUSA's financial management in the various respects which were described in his job description.

[162] A particular concern related to the entering into of significant transactions without adequate supporting financial information. This included the advance made to Bacchid in January. Mr O'Connor said that he believed sufficient information had been provided and discussed prior to the relevant decision being made by the AUSA. But as previously discussed it is evident from what occurred at the January meeting that Executive members did not have adequate information. I have found that there was uncertainty as to precisely how the funds would be spent; there was a lack of reliable information as to how AUSA's position would be protected. Such financial information as was presented was considered inadequate so resolutions were carried requesting further financial information.

[163] Grant Thornton reviewed the way in which the decision was made, and concluded that there was inadequate supporting financial information. This was compelling evidence.

[164] A significant aspect of Mr O'Connor's response was that if there were significant issues such as were raised by Grant Thornton, then these would have been reported to Mr O'Connor by AUSA's auditors. But as Ms Williams pointed out in her decision letter, the audits for 2009, 2010, and 2011 were not completed until 2012. It was difficult to see how Mr O'Connor could therefore rely on the auditors to ensure that appropriate financial controls were in place.

[165] Mrs Cleland in her letter of 27 April 2012 stated that in 2010 an independent report into AUSA's financial position had concluded that AUSA was "technically



insolvent”. She said that the report expressed several concerns about financial management practices within AUSA and the lack, or severely delayed completion of audited accounts. These conclusions are consistent with those of Grant Thornton. Mr Moore who gave evidence on behalf of Grant Thornton was not cross-examined on those conclusions. It is apparent that the problems were long-standing.

[166] Mr O’Connor said he had submitted an “annual plan, policies and controls” to the Executive Committee for five years; these had not been approved. In so far as those matters touched on financial issues, they related to salary and wage review authorisation, motor vehicle use, AUSA credit cards and capital expenditure. The proposed policies did not relate to the quality of the financial information produced, or the adequacy of control procedures within the finance function.

[167] AUSA was an incorporated society funded by a number of related trusts, by the UoA and by its own fundraising activities. This was insufficient, however, to meet the costs of its normal level of expenses, so that it had historically been loss-making. Grant Thornton considered that this was largely due to poor control of expenditure against budget. Its adjusted balance sheet position was also insolvent. The Executive had been required to approve a budget in January 2012, although it was not supported by a cash-flow forecast prepared by management.

[168] Given the relative inexperience of Executive members, the responsibilities they carried were potentially very challenging. As previously discussed, Executive members were dependent on the General Manager discharging his financial functions competently and to a high standard. In this critical area of financial controls, there were substantial failures. The finding of serious misconduct was one which was open to a fair and reasonable employer.

### ***Credit card authorisation***

[169] Included in Grant Thornton’s summary of issues arising from credit card payment authorisations was a recommendation that a specific policy for the authorisation of credit card expenditure needed to be developed and implemented. In fact, Mr O’Connor had drafted a “Company Credit Card Policy” in 2010, but it

had not been adopted. It did not include a requirement that expense details and supporting invoices should be submitted by the General Manager for approval by a member of the Executive before the payment was made.

[170] Grant Thornton stated that this step was required under the AUSA Financial Policy because of the disciplinary allegation. It was also asserted that insufficient supporting information was being presented when claims were made, and that expenses were incurred on the credit card in favour of Bacchid.

[171] Problems with the credit card use included the absence of an express Credit Card Authorisation Policy; the somewhat flexible way in which the card was utilised by both the General Manager and Executive members and a process where invoices and receipts were submitted after the event for the purposes of obtaining an authorisation of individual transactions.

[172] However, as Ms Williams indicated in evidence, the primary issue related to the use of the credit card for items for Bacchid. This apparently related to some relatively minor amounts in December 2011 and January 2012 (totalling \$374), and in February 2012 for some bowls purchased from Farmers. The total amount involved was \$882.50 plus GST. The criticism was that this expenditure had not been approved by the Executive against the budget, and that the expenses had been approved without any prospect of AUSA being able to recover the sums expended.

[173] Whilst this assertion demonstrates yet again poor financial controls, it was not a significant matter when compared with the earlier allegations. Appropriately, it was not substantiated to the point of serious misconduct. It was a matter that could be considered by a fair and reasonable employer when making an overall assessment of the allegations, but was not a matter that could assume significant weight.

### **Overall conclusion of employer as to the merits**

[174] Ms Williams concluded that considered cumulatively, the established allegations raised serious concerns regarding AUSA's ability to have trust and confidence in Mr O'Connor in the role of General Manager. She referred to two particular allegations which she said indicated he was subject to a conflict of interest

as a General Manager of AUSA on the one hand, and as a Director of Bacchid on the other. The first such allegation related to the decision which the Executive made to transfer AUSA funds to Bacchid on 30 January 2012; and the second such allegation related to the provision of a misleading budget forecast to the Executive at its meeting on 28 May 2012.

[175] Ms Williams said that when Mr O'Connor became a Director of Bacchid there was no conflict of interest, but as Bacchid's financial situation deteriorated, a conflict became apparent. As the most senior employee of AUSA and the main advisor to the Board, she said it was Mr O'Connor's duty to identify and manage any conflict of interest, so as to avoid breaching his duty of fidelity, and to advise the Executive accordingly.

[176] In his response on these issues, Mr O'Connor stated that he had agreed to be the Executive Director for Bacchid after meeting with Mr McCrory (the then President), Mr Durbin (the then Administrative Vice-President) and Ms Williams herself (the President elect). He understood they would be comfortable with him adopting the two roles. He stepped down as Chairman of the Bacchid Board. When asked to relinquish his role as Executive Director from Bacchid, he did so, although he said at that time that he then resumed his position as the Bacchid Board Chairman; he was asked to stand down from this position and he followed this instruction. He stated that whatever he did to comply with the directions that had been given to him made no difference because Ms Williams seemed to be determined to dismiss him.

[177] Counsel for Mr O'Connor submitted that there was an inherent conflict in his role which had been there from the start; that his role at Bacchid was to be short-term and at AUSA's request; that Ms Williams did not say why she considered Mr O'Connor had failed in his duty to manage any conflict of interest; that the conflict was resolved by him being asked to step down as a Bacchid Director; and that, in reality, AUSA and Bacchid's interests were essentially the same.

[178] As to each of these points:

- a) The employment agreement indicated on the one hand at cl 6.1 that Mr O'Connor may be required to perform work for or participate in any trust or board of any entity owning or controlling any businesses in which AUSA had a beneficial interest; but on the other hand at cl 6.9 made it clear that he was not to have any interest in a business or do anything which may result in a conflict of interest. Ms Williams concluded on this point that at the time Mr O'Connor agreed to accept the Bacchid role there was no conflict; the conflict arose when Bacchid's position deteriorated.

As time went on, Mr O'Connor became very committed to resolving Bacchid's financial difficulties via the plan he had conceived. His commitment to that plan, however, clashed with his responsibilities as General Manager in a number of instances which have already been analysed. Examples are:

- In January 2012, when recommending the advance by AUSA to Bacchid, Mr O'Connor had insufficient regard for the vulnerable position in which AUSA was being placed by being requested to advance a very substantial sum to an entity which was in significant financial difficulty, and security issues were not adequately addressed. He knew he had a conflict of interest at this stage.
- At the meeting of the Bacchid Board on 27 March 2012, Mr O'Connor clearly preferred Bacchid's position to the extent that he did not want Bacchid's budget for 2012 to be shared with AUSA, and he was concerned about the Treasurer having ulterior motives when asking for information.
- At the second disciplinary meeting he said of this transaction "I didn't say I was conflicted, but knew it was inappropriate."
- At a meeting of the finance committee held on 3 May 2012, chaired by Mr Liu as Treasurer, proper questions were asked as to

the status of the advance made in January 2012. The minutes of that meeting record that even at that stage Mr O'Connor was unable to provide that information. These issues were never resolved satisfactorily.

- Mr O'Connor formed the view that by selling down Bacchid assets, Bacchid could obtain the funding it needed and then trade its way out of difficulty. He first expressed this opinion in January 2012, but on the evidence before the Court it was not until June, when the Executive insisted on proper and reliable information concerning Bacchid, that a plan was presented to the Executive. Whilst issues relating to leases had to be resolved before those assets could even be considered for sale, the business plan was not advanced with any sense of urgency as the circumstances required. Mr O'Connor appeared to believe that he would be able to resolve Bacchid's financial difficulties in due course, and that the pressure he was being put under by AUSA for better and more reliable information and answers to questions as to security did not need to be taken too seriously. He began to distrust the Executive. He adhered to this view even when Grant Thornton challenged it in early June. He decided their view was advanced from self interest and was therefore incorrect. Mr O'Connor in his role as Executive Director of Bacchid proceeded according to what he considered was best for Bacchid, without providing proper advice and information to the AUSA Executive as General Manager as he was obliged to do.
  - These issues exemplify the increasing conflict of interest which arose between the two roles.
- b) As to the submission that Mr O'Connor would occupy the role for the short term, it was initially intended that he would only adopt the role until March 2012, because of the difficulties of attracting a suitable employee to fulfil these responsibilities in the meantime. There is no evidence that any attempt was made to recruit another candidate at any

time. Mr O'Connor did not stand down in March 2012; the Bacchid Board meeting of 27 March records the discussion where he said he would do so, for otherwise he would be continually be harassed by the AUSA Treasurer. He said he would remain with Bacchid for the three months it would take to replace him. This was an issue that should have been discussed with the AUSA Executive as it would have ensured there was complete transparency, the Executive could have determined whether it was prepared to have its employee continue as Bacchid's Director.

- c) It was submitted that Ms Williams was not specific as to the respects in which Mr O'Connor failed to manage any conflicts of interest; she referred to the first and third allegations as supporting her conclusions as to a conflict of interest. They were sufficient to indicate the basis for the conclusion since the letter set out her findings on those allegations.
- d) It was submitted that the conflict was resolved by Mr O'Connor being asked to cease his role as Director of Bacchid on 27 September. By that time, the situation had persisted for approximately ten months; Bacchid's situation had steadily deteriorated over that period. The conflict was neither managed nor resolved until Mr O'Connor was asked to relinquish the Bacchid role. Given the significant obligations he held and his commercial experience, he should have raised the issues with the Executive in March as was originally intended. That he did not do so was plainly a matter that was relevant in assessing trust and confidence. I also accept the submission made for AUSA that the instruction to step down from Bacchid did not resolve the trust and confidence issues. By the time he was asked to step down, significant breaches of duty had occurred which had implications for any ongoing trust and confidence.
- e) Finally, it was asserted that AUSA and Bacchid's interests are essentially the same. This submission cannot be correct. AUSA was clearly a separate legal entity from Bacchid; the governance of each was in different hands. AUSA was a significant creditor to Bacchid.

Mr O'Connor had the view that the continued occupancy of the Student Union buildings by Bacchid was in AUSA's best interests but that was not a view held by the President, Ms Williams. At times the two entities may have had parallel interests, but in the end they had to be operated on an independent basis.

[179] In short, the conclusions reached by Ms Williams as to the significance of the conflict of interest issues were conclusions which a fair and reasonable employer could reach.

[180] I also conclude that the decision to dismiss was one which a fair and reasonable employer could make. Of the various allegations, two were established at the level of serious misconduct;<sup>21</sup> the five remaining allegations were established as to fact and had significant implications as to the trust and confidence which could be reposed in Mr O'Connor as General Manager.<sup>22</sup> The totality of the allegations indicated a wide-range of issues where Mr O'Connor as General Manager had not complied with his employment obligations.

[181] It is well established on the authorities that whether conduct is sufficiently serious to warrant instant dismissal is a matter of fact and degree which must be judged in the particular circumstances.<sup>23</sup> Ms Williams concluded that the totality of the allegations led to a conclusion that the issues were beyond being regarded simply as performance issues capable of being addressed by way of warnings or otherwise (as was provided for in the employment agreement); they amounted to fundamental breaches of the relevant employment obligations. The established breaches considered cumulatively were very serious, particularly with regard to Bacchid's financial affairs. The fracture of the employment relationship commenced with a failure to provide reliable information and advice in respect of a substantial advance, and continued thereafter. Expert advice was given by Grant Thornton in July as to

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<sup>21</sup> The capital injection and poor financial control allegations.

<sup>22</sup> The letter of comfort, budget forecast, recruitment policy, breach of tendering process and credit card authorisation allegations.

<sup>23</sup> *BP Oil New Zealand Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 (CA) at 487; and *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA) at [519].

the difficult financial position of AUSA and Bacchid; Mr O'Connor did not accept that advice, maintaining his position that the situation was redeemable.

[182] I conclude that a fair and reasonable employer could conclude that the relationship of trust and confidence was so deeply impaired that a decision to summarily dismiss the employee was appropriate.

### **Procedural fairness**

[183] The main procedural concern raised by Mr O'Connor in his challenge was to the effect that the decision to dismiss was predetermined. There were a number of aspects to this allegation.

[184] The first and most significant contention was that various statements were made to the Executive by Ms Williams which indicated that she had made up her mind to dismiss at an early point in the disciplinary process.

[185] Evidence relevant to this issue was as follows:

- a) Ms Verstappen, a member of the Executive, said that during an Executive meeting Ms Williams indicated an intention to dismiss Mr O'Connor. This happened, she said, in committee with the entire Executive present. She produced a handwritten note which she said related to the Executive meeting when this statement was made. The note was dated 18 June 2012. The note does not record a statement being made by Ms Williams to the effect that Mr O'Connor would be dismissed. Nor does the date of the handwritten note accord with the chronology. Although an Executive meeting was held on that date, the disciplinary process was far from being commenced. The Grant Thornton report had yet to be received and considered. The disciplinary process was not initiated until 13 August 2012. There was a short discussion of this topic at an AUSA Executive meeting which was held on 13 August 2012. Having heard from Ms Williams, Mr Haines and Ms Bell, all of whom attended that meeting, I conclude that no statement was made to the effect that Mr O'Connor would be dismissed



although members of the Executive were told a disciplinary process had been commenced. Unfortunately the possibility that Ms Verstappen's note related to the meeting held on 13 August 2012 rather than 13 June 2012 was not put to her, so I cannot rule it out. But as indicated it does not refer to a decision to dismiss.

- b) Ms Doud, a member of the Executive in 2010, produced an email that she wrote to Mr O'Connor on 18 August 2012 in which she recorded that at a social event on 10 August 2012, (three days before the disciplinary letter was given to Mr O'Connor), Ms Doud took part in a conversation where the other participants were Ms Williams and a former AUSA President. She understood Ms Williams to have said that she had made a decision to dismiss Mr O'Connor. She agreed, however, that she had inferred this conclusion from the conversation she heard. Ms Williams explained that the conversation was to do with changing the AUSA's relationship with the UoA. She said that she did not mean, and should not have been understood as having meant, that Mr O'Connor would have to go. I accept that evidence.
- c) Finally, Mr O'Connor said that he had heard "rumours" that he was to be dismissed. That evidence is vague and cannot be relied on to support a serious allegation of predetermination.

[186] I find that there is no evidence that Ms Williams intended to dismiss Mr O'Connor.

[187] It is next asserted that a number of serious allegations were made in the initial disciplinary letter alleging dishonesty, gross negligence and other serious misconduct; it also referred to the possibility of a summary termination of employment. The gist of the allegation was that Ms Williams was determined to adhere to the initial indication of dismissal.

[188] I am satisfied that the elaborate process which was conducted indicates that information was carefully obtained and considered, and that appropriate conclusions were ultimately reached on the basis of all the information obtained in the

investigation, from Mr O'Connor and elsewhere. Some of the initial assertions – particularly those which asserted dishonesty – were not upheld. The quantity of information that was obtained was considerable. And as the analysis which the Court has undertaken with regard to each allegation demonstrates, the conclusions reached were open to Ms Williams as decision-maker. I do not consider Ms Williams decided to dismiss Mr O'Connor because she had flagged that possibility at the outset.

[189] The next issue related to an incident where it was asserted that Mr O'Connor as General Manager had admonished Ms Williams in respect of a student incident that their relationship deteriorated thereafter and that the decision to dismiss was made as a result. The incident involved Ms Williams attempting to set fire to herself in the quad area so as to attract attention to a particular issue. It was a quintessential student stunt and Mr O'Connor subsequently reprimanded Ms Williams for this, as was appropriate. Ms Williams explained that reprimands of this nature were routine where health and safety issues arose from such student activities, and she was unsurprised by the admonishment. There is no evidence that this event altered the way in which the disciplinary process was conducted.

[190] It was asserted that the advisors who were retained to assist the Executive in connection with the issues it dealt with in the course of 2012 were appointed at the behest of the UoA and two of those advisors had previously acted for the UoA. Chen Palmer had previously acted for the Executive, and were consulted again in 2012. There was no irregularity in their appointment.

[191] Ms Bull was recommended by Mrs Cleland, and it appears may have previously undertaken work for the UoA. Ms Williams undertook her own enquiries as to Ms Bull's suitability. I have examined carefully the transcripts of the disciplinary meetings. Her role as an HR advisor to Ms Williams is uncontroversial. There is no evidence that her advice was influenced by the UoA, directly or indirectly.

[192] Mr O'Connor said that Grant Thornton had undertaken work for the UoA, and were being funded by it indirectly; consequently he did not believe it was an

appropriate firm to be reviewing Bacchid's circumstance. These issues were not explored in cross-examination with Mr Moore. There is no evidence that Grant Thornton managed its retainer on anything other than a professional basis. The emphasis of the Grant Thornton report was on the serious financial circumstances which afflicted Bacchid; and the totality of the evidence provided to the Court confirms that the conclusions of the report were correct.

[193] It also emerged in evidence that the advisors were funded from the Rental Compensation Fund; to that extent UoA representatives were involved in the decision to authorise funds to pay such advisors. However some of the funding came from other sources. These facts do not support a conclusion of procedural unfairness, in all the circumstances.

[194] The final assertion made with regard to the issue of predetermination was to the effect that it suited AUSA to terminate the General Manager's position, because a restructuring was being undertaken. A restructuring was initiated because the Executive reached the view that a regime which ensured greater accountability was desirable. A letter was sent to staff to this effect. Ultimately, ten positions were disestablished either through restructuring or through attrition, and with the liquidation of Bacchid there was a significant reduction in employed staff. The liquidation of Bacchid and the surrendering of the occupancy of the Student Union buildings for trading purposes led to different needs. Consequently Mr O'Connor was not replaced.

[195] There is no doubt that Bacchid's financial circumstances led to fundamental changes, but at the time the disciplinary process was commenced Bacchid's future and the flow-on consequences were unknown. The allegations raised against Mr O'Connor were made following a comprehensive report from an independent firm of Chartered Accountants and were genuine. I am not satisfied that the disciplinary process was commenced and undertaken so as to affect a restructuring.

[196] Standing back, I am satisfied that the disciplinary process was carried out in a procedurally fair way.

## **Conclusion**

[197] Drawing all aspects of this matter together and applying the test provided by s 103A(2), I find that the decision to dismiss Mr O'Connor was one which a fair and reasonable employer could have made in all the circumstances at the time. The serious misconduct conclusion was appropriate, and there were no significant procedural defects. The dismissal was justifiable.

## **Costs**

[198] Costs normally follow the event. The parties may be heard on that issue if they are otherwise unable to resolve this issue. Accordingly, costs are reserved.

[199] AUSA has 21 days within which to file a memorandum as to costs and disbursements; Mr O'Connor will then have a further 21 days within which to respond. Memoranda will need to include reference to the interlocutory issues which came before the Court.

B A Corkill  
Judge

Judgment signed at 12.15 pm on 8 August 2014