

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Reginald Ratahi (Applicant)

**AND** Te Whanau O Waipareira Trust Incorporated (Respondent)

**REPRESENTATIVES** Mark Ryan for Applicant  
Phillip Rice for Respondent

**MEMBER OF AUTHORITY** Vicki Campbell

**INVESTIGATION MEETING** 25 July 2006  
27 July 2006  
7 August 2006  
4 September 2006

**SUBMISSIONS RECEIVED** 14 August 2006 from Applicant  
22 September from Respondent

**DATE OF DETERMINATION** 23 February 2007

DETERMINATION OF THE AUTHORITY

**Employment Relationship Problem**

[1] Mr Reginald Ratahi was employed by Te Whanau O Waipareira Trust ("the Trust") as Chief Executive Officer on 14 March 2002. On 12 April 2006 at a meeting of the Trust Board a motion of no-confidence was moved by Mr John Tamihere, against the management of the Trust. The motion was seconded and carried. Mr Ratahi was dismissed on 14 April 2006 for failing to inform the Trust as to the existence of a statutory demand from Inland Revenue Department ("IRD") and for failing to keep the Board advised as to the extent of its indebtedness to the IRD. Mr Ratahi claims the dismissal was unjustified and seeks remedies.

[2] The Trust is incorporated under s7 of the Charitable Trusts Act 1957 and was established for the benefit of charitable purposes, particularly in the West Auckland area. The predominant aim of the Trust is to cater for the interests of Maori and their whānau in West Auckland. There are four entities operating under the Trust: a land holding company which is Waipareira Trust, WaiTech Limited which enters into contracts with the Ministry of Education and delivers on education; WaiHealth Limited which delivers health contracts; and CC1 Limited operating a call centre (although I understand this entity has now been closed down by the Trust).

[3] The Trust is governed by a Board of Trustees and is managed by a CEO. WaiTech, WaiHealth and CC1 are individually managed by a General Manager, each of whom reported to Mr Ratahi.

[4] In response to Mr Ratahi's claims, the Trust defends its decision to summarily dismiss him and says the dismissal was fully justified.

[5] I am required to scrutinise the Trust's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

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

[6] I must scrutinise the Trust's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

## **Employment terms and conditions**

[7] Mr Ratahi was subject to a written individual employment agreement. The relevant terms of the agreement include:

### **5. OBLIGATIONS OF CHIEF EXECUTIVE**

The Chief Executive shall undertake such duties and exercise such powers as set out in the said Position Description, the said Governance Document, and such other duties and powers as the Trust shall from time to time assign or vest in the Position of Chief Executive. The Trust may, after consultation with the Chief Executive, amend the Position Description but may not substantially change the range and scope of the position without mutual agreement given in writing.

Without prior written approval of the Trust, the Chief Executive shall not engage in any activity, paid or unpaid, which impinges upon, or is likely to impinge upon the proper performance and responsibilities of the Chief Executive under this contract. Where the Trust forms the view that such a situation does exist, or is likely to exist, the Trust may direct the Chief Executive to cease or refrain from such activity, and the Chief Executive shall act accordingly. For the sake of clarity the Chief Executive may not stand as a trustee of the Trust.

### **13. TERMINATION OF EMPLOYMENT**

13.1 Without prejudice to any other remedy which the Trust may have, the Trust may terminate the Chief Executive's employment summarily by notice in writing if he:

- (a) Is convicted of an offence the nature of which is injurious to the Trust's reputation;
- (b) Becomes of unsound mind;
- (c) Is guilty of gross misconduct, negligence or default or serious breach of non-observance of any of the conditions of this contract;
- (d) Becomes incapacitated by illness or injury for a continuous period of 3 months;
- (e) Becomes bankrupt or prohibited by law from being a director of a company; or
- (f) Is in breach of any warranty made by him in clause 5.3 of this contract.

### ***UNSATISFACTORY PERFORMANCE***

13.2 The Trust may dismiss the Chief Executive where performance is unsatisfactory or the Chief Executive fails or neglects or is unable to perform the duties to specified standards or to meet the expectations defined by the Performance Agreement provided for by clause 9 herein, or is in breach of any term of this contract.

*SERIOUS MISCONDUCT*

13.3 The Trust may dismiss the Chief Executive for serious misconduct without notice and without payment in lieu of notice.

...

*PROCEDURAL FAIRNESS*

13.7 Where the Chief Executive is liable for dismissal under Clauses 11.1, 11.2 or 11.3, the Trust shall observe the rules of procedural fairness, and in particular shall:

- (a) Give the Chief Executive details both verbally and then in writing of the alleged misconduct or incompetence;
- (b) Allow the Chief Executive a genuine opportunity to explain or justify the conduct in question;
- (c) Except in cases of serious misconduct, allow the Chief Executive a three month period to improve performance. [my emphasis]

[8] I am satisfied that it is more likely than not, that the references contained in clause 13.7 to clauses 11.1, 11.2 and 11.3 are not correct and should in fact, be references to clauses 13.1, 13.2 and 13.3.

[9] Key performance indicators are set down in an appendix to the employment agreement and dealt with, et al, requirements relating to Monitoring and Corporate Management. Relevant to this matter are the Key Performance indicators which include an obligation on Mr Ratahi to report on all issues and policy matters including "...major issues facing the trust". Mr Ratahi was also required to maintain ongoing communication with the Chairperson and other trustees to ensure Trustees were informed and kept up to date with key developments in the Trust.

[10] It was common ground at the investigation meeting that Mr Ratahi reported directly to the Chairperson of the Trust, Ms Evelyn Taumaunu, and he met with her on a regular basis for that purpose.

## **Background**

[11] Mr Tamihere is a member of the whānau and from 1986 to 1988 he advised the Trust Board on legal matters. From 1991 he held the position of CEO until he left in 1999 to move into Politics. Mr Tamihere returned to the Board briefly in 2000.

[12] In 2002/2003 the Trust's bank gave instructions to the Trust to sell some of its assets to secure the bank's continued commitment to the Trust. A restructure plan was presented to the Board and was accepted. The Board embarked on a debt reduction process which involved the sale of assets and a monthly debt reduction programme. It was common ground that this placed the Trust under extreme cash management difficulties as profits earned did not cover monthly debt reduction payments.

[13] In July 2004 amid public allegations of mismanagement of the Trust's affairs, a special hui was held which resulted in the Trust engaging the services of Deloitte's to review the organisation and provide a full written report. The period of review covered by the report was 1995 – 2004. The final report, dated 8 October 2004, set some guidelines and directions to

management, however, the report did not find any mismanagement of the Trust's affairs by its management team including Mr Ratahi. The report specifically dealt with the way in which financial reports were drafted and presented to the Board and recommended:

... that the CEO should include reference to key financial results and indicators in his monthly reports to the Board. This is particularly important where an organisation has cash flow issues and is operating within very tight financial constraints ... As stated above we are concerned that important issues detailed in the CFO report may not be receiving the emphasis that they require. In particular comments in the June 2004 CFO report relating to the deteriorating cash flow forecast and the need to make arrangements with creditors and the Inland Revenue Department, and the need for trustees to fully comprehend the position, should in our view have received greater comment by way of the CEO report to the Board. [my emphasis]

[14] Following receipt of the report Mr Ratahi says he and Mr Bryant implemented the recommendations made in the report and Mr Ratahi took a greater responsibility to report on financial information in his monthly report.

#### *Trustees' litigation*

[15] At the November 2005 AGM, five Trust board members were nominated and voted on to the Trust board, including Mr Tamihere. Following the AGM, the then Executive of the Trust, decided that the five members would not be entitled to take up their roles on the Trust Board. Litigation followed which resulted in the five new Trust Board members being confirmed in their Board positions. (See *Tamihere & Ors v Taumanu & Ors*, High Court, Heath J, CIV 2005-404-6958, 21 December 2005).

[16] It would be fair to say that the litigation which took place during December 2005 and the subsequent issues relating to the payment of costs for the litigation was top of mind for a number of the Trust Board members during December 2005 and January 2006.

[17] It was common ground at the investigation meeting that following the November 2005 AGM and the subsequent litigation, the Board had two distinct factions. Those that supported Mr Tamihere and those that supported Mr Ratahi.

[18] Mr Tamihere accepts that when he was voted onto the Trust Board the longer standing members on the Board were not welcoming. He felt this was because they had a view that anything bad that had happened within the Trust, was of his making. A view Mr Tamihere rejects.

#### *2005 Statutory Demand*

[19] It was common ground that during 2004 and 2005 the Trust had difficulties in paying its tax and was continually in debt to the IRD. The debt to the IRD varied at different times. In 2005 a statutory demand was served on the Trust by the IRD. On 2 September 2005, following a sell-down of some of the Trust's assets the IRD debt relating to the statutory demand was paid in full.

## **The Trust's Financial Situation**

[20] Mr Bruce Bryant is a chartered accountant. He has worked on a contract basis to the Trust from 4 April 2000, providing financial services. He reported to the CEO and to the Trust Board on matters relating to the financial affairs of the Board.

[21] The income for the Trust is derived from government contracts for service delivery. 15% of the total income derived from the contracts is paid to the Trust in equal instalments on a quarterly basis, and the balance is paid in equal instalments monthly.

[22] The quarterly instalments are paid in January, April, July and October of each year. The remaining 75% of the total income is paid in equal instalments each month in: February; March; May; June; August; September; November; and December.

[23] In addition to its usual expenditures, the Trust face a monthly IRD tax bill which accounts for \$180,000 of the total expenditure of the Trust each month. For the four months of the year in which the Trust receives the quarterly contract payments the Trust experiences no cashflow difficulties, however for the remainder of the year (eight months) the cashflow situation is extremely tight.

[24] There is very little in the way discretionary outgoings. Mr Bryant says the Trust was losing money and there were no revenue streams other than the government contracts for the provision of services through WaiTech and WaiHealth. It was Mr Bryant's view that the Trust desperately needed to increase its revenue streams. He told me that he had been trying to get Westlands Limited (the Trust are a major shareholder of Westlands) to commercialise its arrangements with the Board for some time and he had advised the Board that they needed revenue streams for cashflow, but the Board wanted capital growth. It was Mr Bryant's view that the Trust had been trading insolvent for the entire time that he had been working for the Trust.

[25] Mr Bryant explained that in his view the Trust was a classic example of being asset rich and cash poor. He says that on his appointment, Mr Ratahi inherited two principal units which had been a drain to the Trust (WaiTech and CC1), and that these had to be addressed. In addition there was unutilised space from commercial buildings. These issues became key performance indicators for Mr Ratahi to address if he was to bring the Trust to a break even point. Mr Bryant told me that at the meeting of 15 February 2006 the indicators were that the Trust was close to achieving that break even point and that was reported to the Board.

[26] Mr Bryant wrote to Mr Ratahi on 10 November 2005 and advised him of his concerns about the state of the Trust's cash shortages. Mr Bryant made recommendations for a way

forward, including obtaining a firm commitment to a regular divided stream from Westlands, advising Mr Mark Gunton (director of Westlands) that the Trust could not repay a \$200,000 loan, and submit an application for funding from public charities. Mr Bryant urged Mr Ratahi to implement his recommendations as a matter of urgency.

[27] On 30 December 2005 the financial situation was once again under the review of the Trust's bank. The bank wrote to Mr Ratahi setting out its concerns about the Trust's cashflow and overdraft excesses. Mr Peter Reid, the bank's business manager, requested Mr Ratahi's comments on the actions being taken by the Trust to balance the income and expenditure rather than having to sell assets to inject funds into the cashflow. In answer to questions at the investigation meeting Mr Ratahi told me he did not respond to this letter, he assumed the accountant would have done that. It does not seem that any formal response from the Trust was made to the bank.

### **January 2006 Board meeting**

[28] During the monthly Board meeting in January 2006, the staff members, including Mr Ratahi, were ordered to go home at about 9.30pm. This was even though they had not provided their usual reports to the Board. The minutes produced from that meeting show that the meeting was focused on how the costs of the December High Court hearing would be met and by whom. The Board meeting was adjourned until 15 February 2006.

### **2006 Statutory Demand**

[29] As already set out in this determination, the IRD debt which was the subject of a statutory demand in 2005 was paid in full on 2 September 2005. However, by November 2005 the Trust's debt to IRD had risen, once again, to beyond \$100,000.

[30] In answer to questions at the investigation meeting about how the debt had gone from zero to over \$100,000 in this very short space of time Mr Bryant explained that in December 2000 Mr Tamihere was made a payment of \$195,000 by the Trust, as part of an exit package. The date of the payment was officially recorded as being June 1999. In implementing recommendations made in a second report (referred to as the White Report), in October 2005 the Trust filed a voluntary disclosure report with the IRD, advising that the income tax due on the payment to Mr Tamahere had not been paid in June 1999. The amount of the tax due was \$82,000. A cheque in that amount was enclosed with the disclosure.

[31] As a result of the disclosure, penalties for the non-payment of the \$82,000 were remitted by the IRD in October and November 2005. The penalties were added to the Trust's normal IRD payment schedule which, including the penalties came to \$184,000. This debt

continued to rise over the following three months, as further penalties for non-payment accrued.

[32] As already set out, Mr Ratahi was responsible for the presentation of the monthly management reports to the Board, although the monthly financial reports were compiled by Mr Bryant. The financial statements produced for the investigation meeting do not show the IRD debt as a separate creditor. Rather, all creditors are combined under one generic heading with no individual breakdown.

[33] On 14 February 2006 the IRD served a statutory demand on the Trust for \$720,323.39. Mr Roger Stevens (manager of accounting services), signed for it as he was the most senior person in the office at the time. He said he could not do anything with it so he put it in his top drawer until he saw Mr Bryant and/or Mr Ratahi. He did not want it to be public. Mr Stevens could not recall when he advised Mr Ratahi of the receipt of the statutory demand. He says it could have been the next day or the day after. I am satisfied that Mr Ratahi was aware of the existence and significance of the statutory demand by the time he attended the Board meeting on 15 February 2006, although Mr Bryant was not aware of it until 16 February 2006.

[34] Mr Bryant told me the statutory demand did not come as any surprise to him. It was his view that the demand was a good way to focus the Board. Mr Bryant says when he found out about the demand, he spoke to Mr Rickey Houghton (Board Treasurer) and advised him of the receipt of the statutory demand. He advised Mr Houghton that it was serious.

[35] Mr Houghton says he did not expect Mr Ratahi to advise him straight away because in his view the Board was dysfunctional and, in any event, he was already working towards a solution. He was developing a recovery plan - Putea Hanga Hou. Mr Houghton took the view that the statutory demand was secondary to the recovery plan.

### **Putea Hanga Hou**

[36] On 8 February 2006 members of the Trust Board attended a meeting with the Trust's bankers. A cashflow document had been prepared for this meeting by Mr Stephens. The cashflow document shows income of \$400,000 from the sale of Westland shares. The Board assumed Mr Ratahi had entered into arrangements to sell Westland shares without any approval from the Board. Witnesses for the respondent pointed to the cashflow document as positive proof that this was the case.

[37] In his December 2005 letter, the banks' Business Manager, Mr Reid outlines his understanding that the Trust already had an arrangement to sell a further parcel of shares if needs be and also makes reference to an application for funding having been lodged with Pub

Charity. I have concluded that it is more likely than not that Mr Ratahi, following Mr Bryant's advice in November to act urgently to address the cashflow shortages, had taken steps to do just that. I am also satisfied that the possibility of selling Westland shares had not been discussed with the Board Chairman and no indication that it might be a possibility had been put to the Board for discussion before it was included in the cashflow statement presented to the bank.

[38] Mr Houghton says it was at the 8 February 2006 meeting with the bank that he offered to put together a recovery plan for the Trust. He says he was told to go ahead and do that, and as a result he developed the Putea Hanga Hou document. I have concluded that Mr Houghton did offer to put together a plan, however, there is no evidence to support a positive reaction from the other members of the Board. In deed, Mr Ratahi's evidence was that there was no response either positive or negative. At the time of that meeting the Trust's debt was \$4.1million.

[39] One of the options included in Putea Hanga Hou was to sell Westland shares and other assets of the Trust. Mr Houghton says the detail of the options were reflected in the cashflow document prepared for the meeting with the Bank. However, I do not accept that evidence. The cashflow document was produced prior to Mr Houghton even suggesting to the Board that he put together a recovery plan. Mr Houghton's draft paper was not completed until about 22 February 2006. I have concluded it is more likely than not that Mr Stevens put together a positive cashflow document for the bank, including proposed income from the proposed sale of shares and that he would have discussed this with Mr Ratahi and Mr Bryant prior to including it as an item.

[40] On 3 and 4 March Mr Houghton emailed his draft document to the Trust's bank manager, the IRD and Delloittes. He says that he did this so that when the Board got the opportunity to discuss the proposals he could demonstrate its credibility by showing that it was supported by two major players, being the bank and the auditors.

### **15 February 2006 Board Meeting**

[41] On 15 February 2006 the Board met as a continuation of the meeting held on 25 January 2006. It was common ground that Mr Bryant and Mr Ratahi, although invited to attend the meeting at 7.30pm were not allowed into the meeting until 9.45. Mr Bryant says the tone of the meeting was hostile and grossly unpleasant, and there was no opportunity to explain in a rational way any answers to any questions being asked of them.

[42] After tabling their reports, Mr Ratahi and Mr Bryant were asked specific questions about the amount of indebtedness to IRD. Mr Ratahi says he took a guess and advised the

debt was about 640,000 and rising. Mr Bryant confirmed Mr Ratahi's evidence and says he also confirmed the debt as being in the region of \$680,000.

[43] The minutes from that meeting show there was a lengthy debate about the finances and in answer to a specific question about the financial position of the Trust, Mr Bryant is recorded as saying "I believe we are at nearing break-even but we do have cash flow problems". I accept that the majority of the debt for the trust was historical and when he reported to the Board that the Trust was nearing break-even, he was referring to the income over expenses for that financial year only.

[44] The minutes do not disclose the extent of any discussions, but do record the topics of the discussions which took place:

- Taxation – reference to White report
- Sale of West Coast Rd & negotiations with IRD in reference to the payment
- Arrears and the true deficit position for the Trust
- Cash Flow difficulties past & present
- ...
- Financial position
- ...
- A Request was made for more information to be tabled in regards to the IRD discussion

[45] It was common ground at the investigation meeting that the fact that the IRD had issued a statutory demand against the Trust the day before, was not discussed or raised during the meeting. Mr Ratahi did not mention it, either in his report, or in answer to any questions. Mr Ratahi says he wanted to speak with Mr Bryant (who had been unavailable that day) before he made any disclosure to the Board, because the Board was already divided over the outstanding issue of costs resulting from the High Court litigation. He says that if he had made this disclosure it would escalate matters.

[46] During the latter stages of the meeting Mr Tamihere suggested that Butts Bainbridge, a local accounting firm, be approached to carry out a review on the Trusts financial structures. Following a lengthy discussion the Board agreed and asked Mr Tamihere to follow this up.

[47] The minutes of a special meeting of the Trust Board Executive on 19 February 2006 note that the executive members present, again discussed the financial situation of the trust and the need to receive further clarification, particularly in relation to IRD payments.

### **IRD Meeting – 2 March 2006**

[48] Following receipt of the Statutory demand, Mr Ratahi, Mr Houghton and Mr Bryant attended a meeting with the IRD on 2 March 2006.

[49] On 21 July 2006 Mr Stephen Whittaker, who was present at the meeting on 2 March 2006 advised Mr Tamihere:

The basic format of the meeting was that the IRD officers advised the Trust attendees of the extent of the arrears position and that this was a continuation of poor compliance behaviour. ... IRD staff indicated that it was difficult to make and maintain contact with staff at the Trust in relation to return filing and tax payments.

The Trust attendees indicated that they had a strategy to clear the Trust's arrears with IRD and other creditors. This plan was outlined by Mr Houghton – essentially it proposed to sell assets owned by the Trust (shares) and utilise the funds to clear debts. The plan was contingent upon agreement from the Trustees who had at that time not met to discuss the proposal and the time required to dispose of the shares to a third party. The plan was documented and copies were given to IRD staff present.

The outlined plan appeared acceptable to IRD staff in that if the shares were disposed of the proceeds would be sufficient to cover taxes owing. Discussion then ensued about the Trust's ability to maintain payment of current and future tax liabilities. Indications from those present were that with the goodwill of the bank this was possible.

It was further agreed at the meeting that the IRD would not proceed with the liquidation of the Trust at that time, however, the statutory demand would remain in place and able to be acted upon at a later time if required.

The Trust attendees requested a "letter of comfort", essentially a letter to the Trust Board that indicated that the plan outlined was acceptable to IRD. I agreed to provide that letter and on the request of Mr Houghton, further agreed not to detail the quantum of arrears but only that IRD confirm that the plan as outlined was acceptable to IRD. [my emphasis]

[50] True to his word, on 6 March 2006, Mr Whittaker signed a letter to the Trust confirming the IRD's support for the plan as outlined. Also as promised, no mention was made of the amount owed to IRD at that time.

[51] On that same date (6 March 2006), Ms Jill Baker, debt collections officer, also present at the 2 March 2006 meeting, wrote to Mr Bryant confirming her understanding that the total debt would be paid from the sale of shares in Westlands Limited and that a statutory negotiation period of 20 working days had commenced and would expire on 30 March 2006. Again, the total outstanding debt due to IRD is not recorded.

### **March Board Meetings**

[52] There were two Board meetings in March. The first, held on 15<sup>th</sup> was a special board meeting. The purpose of the meeting was to hear Mr Houghton's presentation of Putea Hanga Hou. The second, on 29 March 2005, was the usual monthly Board meeting.

#### *15 March Meeting*

[53] Mr Houghton said the energy and focus at the meeting was on the collective needs of the Trust and the determination to rid the Trust of its entire debt, which at that time amounted to over \$4 million of which \$1.1 million was for unspecified creditors which included the IRD. In answer to questions at the investigation meeting as to why the IRD figure was not specified separately he said "...it was all hidden, wrapped up in creditors." Mr Houghton did not see the statutory demand as an issue at that time and for that reason he did not disclose it to the Board. Mr Ratahi also, did not disclose the existence of the statutory demand to the meeting.

[54] As already stated the purpose of this meeting was for Mr Houghton to present his proposal and for the Board to take a vote as to whether his recommendations would be adopted by the Board. However, Mr Tamihere left the meeting before a vote could take place. Mr Tamihere's absence left the meeting without the necessary quorum and so a vote could not be taken.

[55] The minutes show that during the presentation by Mr Houghton the Board had "...a long discussion..." about the recommendation to sell down Westland shares. Mr Tamihere outlined his concerns that the sale of shares in Westlands would reduce the Trust's shareholding to 25% and it was his view that this was unacceptable. Also, he was not satisfied that the Board was in a position to be able to make the decisions being asked of it. Having raised those concerns Mr Tamihere excused himself from the meeting.

[56] Following Mr Tamihere's departure, the remainder of the Board members agreed that the recommendations set out in Putea Hanga Hou would be put on the Agenda and discussed at the next Board meeting to be held on 29 March 2006.

#### *29 March Meeting*

[57] On 21 March 2006 Mr Tamihere forwarded an email to all Board members, including Mr Houghton, regarding concerns he held about the disclosure of the extent of the Trust's debt, made at the meeting on 15 March 2006. Mr Tamihere questioned the integrity of the information being provided by Messers Ratahi, Bryant and Houghton and requested specific details regarding the list of creditors together with the amounts and for that information to be tabled at the Board meeting on 29 March 2006. Neither Mr Ratahi nor Mr Bryant were included on the distribution list of this email.

[58] On 23 March 2006 Mr Tamihere sent a second email to the Board, including Mr Houghton in which he requested further disclosure of information relating to the number and use of credit cards held by the Trust and its subsidiaries. Mr Ratahi was copied on this email.

[59] The minutes of the meeting on 29 March 2006 record a lengthy discussion taking place, relating to Putea Hanga Hou. Following that discussion it was accepted by the Board, in principle, that a sale of assets was necessary, but the mix of the sell down was to be discussed at a later time. The minutes record that later in the meeting, it was agreed that a special meeting would be held on 12 April 2006 for the purpose of assessing information relating to the mix of the sell down. I find that on 29 March 2006, while the details still needed to be discussed and confirmed, it was agreed that the Trust would sell assets in order to rid itself of its outstanding debt of \$4.1million.

[60] Mr Ratahi presented his report following these discussions and agreements. After presenting his report he was asked a number of questions relating to the presentation and make up of the reports. Mr Ratahi's reports were accepted as tabled and he was excused. There was no specific item addressing the extent of the IRD indebtedness in Mr Ratahi's report.

[61] It was common ground that the existence of the statutory demand and the fact that the 20 day statutory negotiation period was to expire the following day on 30 March 2006, was also not disclosed to the Board at that meeting. Mr Houghton and Mr Ratahi told me they didn't disclose the existence of the statutory demand because it was their view that recommendations in Putea Hanga Hou would fix the indebtedness of the Trust once and for all.

[62] Following Mr Ratahi's departure from the meeting Mr Tamihere tabled a paper which he had previously prepared and which was critical of aspects of the management of the Trust's financial affairs. This paper was never formally put to Mr Ratahi for his comment or explanation. Mr Ratahi conceded at the investigation meeting that he did sight the paper informally about two days following the board meeting but took the stance that it was just Mr Tamihere having a go at him again and chose to ignore it.

[63] Mr Tamihere raised issues about the Trust's situation with IRD and requested permission for him to access the Trust's IRD files in regard to the arrears and other taxation issues. Mr Houghton advised the meeting that he had met with IRD and would take the opportunity as Treasurer to follow up any matters that had been raised. However, the Board agreed that both Mr Houghton and Mr Tamihere would meet with IRD to review the Trust's files.

#### **Events leading to Mr Ratahi's dismissal**

[64] On 5 April 2006 Mr Tamihere sent an email to the members of the Board setting out further concerns about Mr Ratahi's management of the Trust. In his email Mr Tamihere sets out his understanding that Mr Ratahi had met with the IRD in March and that he [Mr Ratahi] had informed IRD that shares would be sold to meet debt commitments. Mr Tamihere also raises concerns about the amount of the debt due to IRD and advises the Board members he is aware that the Trust was "...one step away from being closed down." In his email, Mr Tamihere accuses Mr Ratahi of "...premeditatedly deceiving the Trust..." and in a similar vein to the 2004 allegations against Mr Ratahi, alleges Mr Ratahi is guilty of mismanagement.

[65] Ms Taumanu forwarded a copy of the email to Mr Ratahi on 6 April 2006. I asked Mr Ratahi what he did about the allegations set out in the email. He told me he ignored them as he had heard them all before.

[66] Mr Houghton, however, responded to Mr Tamihere's email point by point. In his response, which was also sent to all Board members, Mr Houghton confirms his confidence in the Trust's senior management and refers to his Putea Hanga Hou document as containing the remedy for the Trust's liquidity problems.

[67] Mr Tamihere and Ms Taumaunu were scheduled to meet with the IRD on 6 April 2006, however, that meeting did not go ahead. While discussing arrangements for an alternative meeting date with staff at IRD, Ms Te Hira (Board Secretary) was advised that the IRD was having issues with bounced cheques and the Trust's failure to lodge returns.

[68] Ms Te Hira immediately emailed the Board members setting out the discussions she had had with the staff at IRD. Ms Te Hira states in her email that the information about the bounced cheques made her "...gulp!" This was a surprising reaction from Ms Te Hira. On 26 January 2006, Ms Te Hira signed off two replacement cheques for the IRD. The paperwork attached to the cheques when they were signed by Ms Taumaunu and Ms Te Hira includes a statement that the new cheques are replacement cheques for PAYE payments and that the previous cheques had been dishonoured on 12 December 2005 and 16 December 2005 respectively. There was no evidence to show that Ms Te Hira, on signing the cheques, had raised any issues with Mr Ratahi or Mr Bryant about cheques being dishonoured.

[69] A copy of Ms Te Hira's email was not provided to Mr Ratahi. On receipt of Ms Te Hira's email, Mr Tamihere requested an urgent meeting with the Board to discuss the IRD issues and advised he was available that Sunday. In his email Mr Tamihere advises that he was aware that IRD had proceedings ready to file. Again, this email was not copied to Mr Ratahi.

[70] On Sunday 9 April 2006, 5 Executive Board Members attended an urgent meeting. The meeting focussed on identifying the necessary preparations for the meeting with the IRD being held the following day and set out the questions to be asked at that meeting. A motion of no confidence in the Treasurer, Chief Executive Officer and Chief Financial Officer was put to the meeting by Mr Tamihere. The motion was not carried.

[71] The Board did agree, however, to seek independent legal advice with regard to the motion of no confidence. I am satisfied that those present at the meeting understood that a successful motion of no confidence would result in Mr Ratahi's employment being terminated.

[72] The next Board meeting was set down for 12 April 2006 for the specific purpose of addressing the assets, mix and timing for sell down, to plan the whānau hui and to receive feedback.

*Board Meeting with IRD – 10 April 2006*

[73] Ms Taumanu says that it was at the meeting with the IRD on 10 April 2006 that she discovered for the first time that a statutory demand had been served on the Trust and of the arrangements made with Mr Ratahi that the debt was to be repaid from the sale of shares in Westlands.

[74] Following the meeting Mr Tamihere sent a further email to all Board members. Mr Tamihere advised the Board members that on 14 February 2006 a statutory demand was served on the Trust and points out that neither Mr Ratahi, Mr Houghton or Mr Bryant had disclosed the information to the Board on 15 February 2006. Mr Tamihere also advised the Board of the meeting held with IRD on 2 March 2006 and that this meeting had occurred without the knowledge of the Board. In his email Mr Tamihere accuses Mr Ratahi of incompetence and corruption.

[75] Mr Tamihere's email was forwarded to Mr Ratahi on 11 April 2006 by Ms Taumaunu.

[76] While it may be correct that this was the first time the existence of the statutory demand had been made clear, I have concluded that this is not the first knowledge that Mr Tamihere or Ms Taumanu had of the existence of possible legal action being taken against the Trust by IRD. Mr Tamihere, in his email on 5 April 2006 notified Ms Taumanu that the Trust was "...one step from being closed down...". Then again on 6 April Mr Tamihere advises the Board, including Ms Taumanu, that he was aware that IRD had proceedings ready to file.

#### *12th April meeting*

[77] The purpose of the 12 April 2006 meeting was to consider further, Mr Houghton's proposal for the Trust's financial recovery. This was also the understanding of the majority of Board members attending the meeting. It was common ground at the investigation meeting that Mr Tamihere had invited a large number of Kaumatua to attend the meeting. I have concluded that there was no significance in that. It was common ground that when Mr Tamihere had previously been involved with the Board, invitations to Kaumatua to attend meetings was a common occurrence and that this protocol had lapsed during Mr Tamihere's absence.

[78] The meeting commenced with Ms Taumanu confirming the purpose of the meeting as being to discuss:

- a) Sell down of Assets and discuss the options of mix and timing
- b) Prepare and Plan for a Hui and Whanau on the 7 June 2006
- c) Receive response from meeting with IRD

[79] Before the business of the meeting was able to be commenced, Mr Tamihere moved a vote of no confidence in the Management of the Trust. In support of his motion Mr Tamihere

referred to the IRD arrears and the non disclosure of the statutory demand to the Board and told those present that Management had misled the Bank into believing the Trust was selling shares (before decisions had been made or confirmed). Mr Tamihere advised that there were a range of matters needing further investigation and if that did not happen then legal action would be taken.

[80] Other Board members were then provided with the opportunity to speak to the motion, which they did. Ms Taumanu advised the meeting that the motion would be put once more, but only after Mr Ratahi had had the opportunity to respond.

[81] Mr Ratahi assured the Board that even though he had been accused of stealing from the Trust he had not stolen anything, nor had he conducted any wrong doing whilst employed as CEO. He set out the history to the financial difficulties being experienced by the Trust and advised the board members of his understanding that the IRD and Bank issues were being addressed.

[82] The motion of no confidence was once again put to the Board and was carried.

[83] At the investigation meeting the atmosphere at the 12 April 2006 meeting was described as being like a "lynch mob".

[84] Mr Joe Waru (Board member) was a late arrival at the meeting. He says when he arrived the room was full and it seemed to him there was an unusual amount of people present. Mr Waru says he walked into the discussion regarding the vote of no confidence. He said there was some heated discussion involving the Trustees and others in the room, in particular the Kaumatua, but it is not unusual to have a heated debate, so it did not seem to him to be an unusual situation.

[85] Mr Waru says Mr Tamihere was forceful, he was very clear about what he desired and the reasons why he was putting a motion of no confidence. Mr Waru told me he understands that the meeting could well be described as being a lynch mob, but he would describe it more as being heated. He said there was a lot of anger about the disclosures of the financial state of the organisation.

[86] With the exception of Mr Tamihere, it was common ground that Mr Ratahi attended the meeting on 12 April 2006 with no knowledge that a vote of no confidence was to be put, and that if it was carried, his employment would be terminated. Mr Tamihere says, given the emails that had been sent to Mr Ratahi on 5 and 11 April 2006 and the motion which had failed on 9 April 2006, which Mr Ratahi had become aware of, Mr Ratahi ought to have known very well that his employment was in jeopardy. Mr Ratahi did not consider the emails indicated he may be dismissed on 12 April 2006. He regarded Mr Tamihere's emails being Mr Tamihere having a go at him and completely disregarded them. This was despite Ms Taumanu warning

Mr Ratahi to "*beware*". I am satisfied that Mr Ratahi was conscious that Mr Tamihere would like to see him gone from the organisation, he did not know, when he went to the meeting on 12 April, that the Board as a whole would be considering his employment and that it was in jeopardy.

[87] The Board meeting ended at 10.00pm. At 10.30pm a second meeting took place where it was agreed that arrangements would be made to meet with Mr Ratahi to resolve the resolutions that had been adopted from the Board meeting earlier that evening.

[88] However, no meeting took place. Mr Tamihere drafted a letter which was then signed off by Ms Taumanu. The letter advises Mr Ratahi:

The decision to terminate your employment with immediate effect rested in regard to a statutory demand from Inland Revenue being served on the Trust Board.

This very serious matter, despite clear opportunity to disclose over a range of meetings with myself and the full Trust Board meant we were obliged to make our own investigations of Inland Revenue. They advised that yourself, Mr Bryant and Mr Houghton had met with them on 3rd March 2006. This meeting was not disclosed to the Board at its meeting of 15th March 2006.

...

Inland Revenue advised further, that payments of Waipareira cheques have been dishonoured and that our debt and dishonour history covers a significant period. These serious matters have never been reported to the Board.

### **Conflict of Interest**

[89] The Trust says that after Mr Ratahi's dismissal, it discovered further evidence of misconduct. In its statement in reply the Trust sets out the allegations that Mr Ratahi was involved in business enterprises in direct conflict of interest to his role as CEO. The allegations relate to two companies for which Mr Ratahi is a named shareholder and Director. The companies are Rescare Services Ltd (Rescare) and Stand and Deliver Ltd. The allegations did not form part of the reason for Mr Ratahi's dismissal and were based on information found after Mr Ratahi had been dismissed. I have assumed the information has been included so that it can be taken into account when dealing with the matter of remedies.

[90] Rescare provides respite care in a home environment for people returning from hospital treatment. Mr Ratahi's involvement in Rescare began prior to his employment at the Trust. At the time of Mr Ratahi's employment the Chairman of the Board was Mr Enon Delamere. His evidence at the Authority was that he knew about Mr Ratahi's involvement with Rescare and that he did not perceive that involvement to be a conflict of interest with his role with the Trust.

[91] Mr Ratahi is listed as the sole shareholder and director of a company called Stand and Deliver Limited. It was common ground at the investigation meeting that this company was operated by his brother Mr David Ratahi. Stand and Deliver provides scaffolding services to

industry. Mr David Ratahi had been declared bankrupt in 1996. For this reason he could not become a director of a company.

[92] Mr Ratahi was alleged to have used his position with the Trust to borrow money on behalf of Stand and Deliver, from a client of the Trust. A copy of an invoice prepared by Mr Ratahi was found on his computer and produced to the Authority as evidence to support this allegation. Mr Ratahi says he was contemplating raising money through a loan for Stand and Deliver from the Manukau Urban Maori Authority (MUMA), but he never did any thing about it. I am satisfied, on the balance of probabilities, the documents provided to the Authority had never been executed. However, the fact that Mr Ratahi was even contemplating using a false invoice to further his brothers business raises concerns as to his integrity.

[93] I am satisfied on the preponderance of evidence that the Board (certainly prior to November 2005), including its Chairman, Ms Taumanu, were aware of Mr Ratahi's involvement in both Rescare and Stand and Deliver and his involvement had been condoned by the Board.

[94] The contract between the parties was clear, where Mr Ratahi engaged in an activity which impinged upon his ability to carry out his job to the required standard the Trust could direct Mr Ratahi to cease or refrain from the activity. Such activities therefore, were not considered to be serious misconduct.

## **Determination**

### *Serious misconduct*

[95] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[96] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[97] Mr Ratahi was responsible directly to the Trust Board. He reported to Ms Taumanu and was under a contractual obligation to report fully to the Board on major issues facing the

Trust. The extent of the debt owed to a statutory body (IRD) and the existence of a statutory demand are two such major issues.

[98] At the investigation meeting Mr Bryant accepted that the statutory demand ought to have been reported by Mr Ratahi and that it ought to have been reported to the Board at the meeting on 15 February 2006. I do not accept Mr Ratahi's explanation that by 15 March 2006 the matter had been taken out of his hands by Mr Houghton taking on the responsibility of dealing with the issue with the Board. Mr Houghton, as Treasurer of the Board has no financial qualifications and had no reporting function to the Board. That was Mr Ratahi's responsibility.

[99] I am satisfied that Mr Ratahi, in answer to questions at the Board meeting on 15 February 2006, disclosed the extent of the IRD indebtedness even though the information was not specifically included in the financial statements tabled at the meeting. I am supported in my conclusions by the evidence of Mr Bryant who was unequivocal that Mr Tamihere asked Mr Ratahi what was owed, Mr Ratahi told him \$640,000 and rising. He said that a massive discussion followed about what made up the amount.

[100] Further, the Minutes made reference to discussion about the White report. Both Mr Ratahi and Mr Houghton maintain that the IRD arrears were as a direct result of the penalties attributed to the unpaid taxation bill on the money paid to Mr Tamihere in 2000. The White report specified the need for the Trust to pay tax on the full amount paid to Mr Tamihere. I have concluded it would be unlikely for the minutes to specifically identify the White report, if this topic had not been addressed at the meeting.

[101] An independent report, called for by Mr Tamihere at the 15 February 2006 meeting, looking at the size and scale of the Trust requirements relevant to accounting support was produced to the Trust on 3 May 2006. The report confirmed that the accounting and financial reporting of the Trust was much better than the auditors had anticipated. The report noted that the format of the financial presentation to the Board were ...provided in a timely manner, appeared to be concise and reflected the performance of the Trust.

[102] The effect of the statutory demand was very serious as was the failure to accurately report on the level of the debt to the Board. I am satisfied that Mr Ratahi and Mr Houghton took steps cover up the extent of the debt by not itemising it in the financial reports to the Board, and by asking the IRD not to detail the quantum of the debt in its communications to the Trust. The Trust was able to view Mr Ratahi's omission and actions as serious misconduct, destructive of the basic level of trust and confidence that underpins the employment relationship.

*Procedural fairness*

[103] It is well known and standard practice that an employer must tell an employee who is summonsed to a disciplinary meeting that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* (unreported) Goddard CJ, 24 June 2004 CC13/04).

[104] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR set out what the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[105] Clause 13.7 of the employment agreement reflects these minimum requirements (see paragraph 7).

[106] The vote of no confidence on 12 April followed a number of emotional emails containing speculation and accusations about Mr Ratahi's performance and integrity. Mr Ratahi's evidence was, that while he received copies of two of the emails from Ms Taumanu, he ignored them because similar accusations had been made about him in 2004, which the Deloitte's report had shown were not true. There was no indication in the emails that on 12 April 2005 Mr Ratahi would be called to account and that his job was in jeopardy.

[107] Mr Ratahi, together with the members of the Board, attended the meeting on 12 April 2006 believing the purpose of the meeting was to discuss and agree on the mix of the sell down to retire the Trust's \$4.1million debt. Instead a vote of no confidence in his management was moved and carried. This vote of no confidence then led to the belief that Mr Ratahi had to be dismissed. I do not accept this. Having passed a vote of no confidence, it was then contingent on the Board, to investigate and follow its contractual obligations. Those obligations required the Board, as a minimum, to advise Mr Ratahi verbally and in writing of the alleged misconduct and then allow him a genuine opportunity to explain or justify the conduct.

[108] Further, at neither the Board meeting where the vote of no confidence was taken, nor the second meeting which started at 10.30pm was there any discussion or agreement that Mr Ratahi should be dismissed. Indeed, the second meeting agreed that a meeting would be convened to resolve the resolution adopted at the earlier Board meeting.

[109] I conclude, pursuant to the objective test required under s103A, that a fair and reasonable employer, following the vote of no confidence, would have presented all its

information to Mr Ratahi, provided him with the opportunity to seek legal representation and provided Mr Ratahi with a full opportunity to explain. The actions of the Trust in dismissing Mr Ratahi without providing him with that opportunity is so unfair as to render the dismissal unjustified.

## **Remedies**

[110] I find the Trust was correct, in all the circumstances, to conclude Mr Ratahi's actions and omissions amounted to serious misconduct. Mr Ratahi's dismissal is unjustified purely on the grounds of procedural fairness. Had the Board followed a fair and reasonable process, including taking the steps it was contractually obliged to take, there is a high likelihood Mr Ratahi would have been dismissed. In these circumstances, I decline to make an award for lost remuneration to Mr Ratahi. (*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315; *Waitakere City Council v Ioane* [2004] 2 ERNZ 194)

[111] I am bound by section 124 of the Act to consider the extent to which Mr Ratahi's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[112] Mr Ratahi was dismissed for failing to notify the Board of the existence of the statutory demand and for not providing accurate information as to the extent of the Trust's indebtedness to the IRD. He had four opportunities to disclose the existence of the statutory demand: 15 and 29 February 2006; and 15 and 29 March 2006. His performance in this regard fell well short of what is expected of a Chief Executive Officer.

[113] In support of his decision not to disclose the existence of the statutory demand, Mr Ratahi relied on Mr Houghton's advice to him that he [Mr Houghton] would take care of things. I do not accept Mr Houghton had the authority to take on Mr Ratahi's obligation to report matters directly to the chairperson or the Board. Mr Ratahi was well aware of his obligation to report major issues to the Board, the Deloitte's report had made it clear that given the Trust's cash flow difficulties it was important for all Trustees to fully comprehend the financial position of the Trust.

[114] I have already found Mr Ratahi would have been dismissed for serious misconduct had a fair and reasonable process been followed. Therefore Mr Ratahi must be found to have contributed significantly towards the situation that gave rise to the personal grievance.

[115] I am satisfied that it is just to reduce the remedies available as a result of Mr Ratahi's conduct. Mr Ratahi is entitled to an award for contribution to his costs but no other remedy. This will acknowledge Mr Ratahi has established to my satisfaction a personal grievance based

on a claim that he was dismissed unjustifiably without rewarding him for significant blameworthy conduct.

### **Costs**

[116] Costs are reserved. Mr Ratahi and Te Whanau O Waipareira Trust Incorporated are encouraged to discuss and resolve the matter of costs between them. If they are unable to do so, Mr Ratahi should file a memorandum of costs within 28 days of the date of this determination. Te Whanau O Waipareira Trust Incorporated has a further 14 days from the date of receiving Mr Ratahi's memorandum in which to file a memorandum in response. Mr Ratahi should file anything in reply within 7 days of receipt.

Vicki Campbell  
Member of Employment Relations Authority