

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 57A/10
5291231**

BETWEEN HEMIMATENGA WARENA RAU
Applicant

AND WAIKATO-TAINUI TE
KAUHANGANUI INCORPORATED
Respondent

Member of Authority: Leon Robinson

Representatives: Kalev Crossland and Giles Brant, Counsel for Applicant
John Haigh QC and Tim Clarke, Counsel for Respondent

Investigation Meeting: 2, 3, 4, 5 & 25 February 2010

Determination: 28 April 2010

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Hemimatenga Warena Rau ("Mr Rau") claims he was unjustifiably dismissed and disadvantaged in his employment with the respondent Waikato-Tainui Te Kauhanganui Incorporated ("Te Kauhanganui"). Te Kauhanganui denies the claim. Mr Rau asks the Authority to order his reinstatement and compensation. The Authority accepted counsels' advice that mediation would not contribute constructively to the resolution of the problem between the parties.

[2] The central allegation against Mr Rau is that he corresponded with a newspaper reporter such that his employment could not continue. I choose not to identify both the newspaper and the reporter in this public determination. The parties know the identities and that is sufficient. Accordingly, I shall refer to the newspaper as "the newspaper" and the reporter as "the reporter".

[3] I made a preliminary order that the pleadings not be published¹. I have heard from the parties further and that order is now made final. **The pleadings lodged in this investigation are prohibited from publication. The Authority's file may not be inspected without order of the Authority.**

The facts

[4] Te Kauhauhanganui is a governance body established by the Waikato-Tainui tribal group and is a registered society incorporated on 18 March 1999. It holds all of Waikato-Tainui's tribal assets. These assets are those which have been settled under Treaty of Waitangi claims processes with the Crown and are in excess of \$500 million. Te Kauhanganui is operated in a parliamentary style with elected delegates from marae around the tribal region. Its chairman is Mr Thomas Charles Roa ("Mr Roa"). Te Kauhanganui is presided over by an executive board called "Te Arataura". The chairman of Te Arataura is Mr Tukoroirangi Ben Maatiaha-Morgan ("Mr Morgan").

[5] Mr Rau was employed by Te Kauhanganui as its chief executive officer until he was summarily dismissed on Friday 18 December 2009. He was first employed by Waikato Raupatu Trustee Company Limited in December 2002 as its chief executive but accepts that he has now employed by Te Kauhanganui. The parties have assured the Authority that Te Kauhanganui was Mr Rau's employer at the time he was dismissed.

[6] The terms and conditions of Mr Rau's employment with Te Kauhanganui are those set out in a written individual employment agreement signed on 13 December 2005.

[7] On 7 November 2009 the newspaper published an article written by the reporter. The article reported that Mr John Heremia ("Mr Heremia") and Mr Taitimu Maipi ("Mr Maipi") were directors of a company Ururangi Limited that received funds from Tainui to operate the Maori King's office. Mr Heremia was the principal of Te Wharekura of Rakaumanga. The article reported that Mr Heremia and Mr Maipi had

¹ AA57/10, 9 February 2010

been “singled out by the auditor-general’s office over undeclared payments to the principal”. It further reported that the Maori King’s office “has an annual budget of \$1 million, five times more than the annual amount given to Te Arikinui Dame Te Atairangikaahu during her reign”. The article caused Tainui embarrassment and that is not disputed. It is referred to as “the article” hereafter.

[8] On 28 November 2009 Mr Roa directed Mr Morgan to investigate leaks of information to the media. Mr Morgan commenced preliminary enquiries. He was formally authorised by Te Arataura on 2 December 2009 to conduct an investigation into allegations that Mr Rau was responsible for the leaking of information to the media.

[9] On 3 December 2009 Mr Morgan delivered this advice to Mr Rau:-

I am writing to raise with you a serious concern which I have in relation to your employment as Chief Executive Officer of Waikato Tainui Te Kauhanganui Inc (Te Kauhanganui).

My concern is that you may have committed an act of serious misconduct. In particular, I am seeking an explanation from you in relation to the following allegations:

In October and/or earlier November 2009 you spoke to [the reporter], a reporter at [the newspaper], in relation to Mr John Heremia and Mr Taitimu Maipi and an investigation by the Auditor-General's office relating to payments made by the Te Wharekura o Rakaumanga School to Mr Heremia. Following your contact with [the reporter], an article appeared in [the newspaper] (on or about 7 November 2009) which was critical of the principal of the School (Mr Heremia) and a member of Te Arataura (Mr Maipi) and which was generally adverse to the interests of Tainui. You also attempted to persuade [the reporter] to pass the story on to another reporter so as to lessen the risk that the disclosure could be traced back to you.

These actions were in breach of firstly your obligations of loyalty and to act in the best interests of Te Kauhanganui, secondly the Employee's confidentiality Deed dated 13 December 2005, thirdly the media policy of Te Kauhanganui, and fourthly an agreement in a deed of settlement dated 31 May 2004 (clause 3(k)) that you would keep the Chair advised from time to time of all such important matters, including emerging problems, risks, and potentially good or bad publicity.

This is a very serious matter which, in the absence of a satisfactory explanation from you, goes to the heart of the essential trust and confidence which Te Kauhanganui must have in you as CEO. Therefore, I request that you attend a meeting at 9am Thursday 10 December 2009. The purpose of the meeting will be to provide you with a full opportunity to provide any explanation or response in relation to the above allegations. I encourage you to seek advice and to bring representation with you to the meeting. Please confirm your attendance and who your representative will be.

I enclose the following information relevant to the allegation:

- 1. Article from [the newspaper] dated 7 November 2009 and headed "School-probe due in charge of King's office".*
- 2. Statement by Potaka Maipi dated 27 November 2009.*
- 3. My file note regarding a discussion with [the reporter] on 2 November 2009.*
- 4. The media policy of Te Kauhanganui;*
- 5. Schedule B of your employment agreement, "Employee's Confidentiality Deed."*
- 6. Copy of clause 3(k) of Deed of Settlement dated 31 May 2004;*
- 7. Copies of relevant telephone records.*

Because of the seriousness of the allegations, you may in the absence of a satisfactory explanation face disciplinary action up to and including summary dismissal.

This is a highly confidential matter and is not to be discussed with anyone except for the purpose of taking legal advice.

[10] The enclosed statement by Mr Potaka Maipi ("Potaka Maipi") was this:-

Statement Potaka Maipi, 27 November 2009

After I have received a phone call from the kings office that [the newspaper] Reporter [the reporter] was chasing a story that tied The Chairman and the Principal of Te Wharekura o Rakaumanga to the Kings Office, I sent an email on the 28th/10/2009 at 7pm to [the reporter], after two phone calls to her officeline, I left her a message to give me call on my cellphone.

The following morning, around 8am (29 October 09) [the reporter] phoned me on my cellphone (XXX) she apologized for taking so long to return my calls and emails, she was also apologetic about the story she was currently writing about the Kings Office and its link to Rakaumanga Wharekura. I asked her for more detail and she said "its what I just told you" She said she "felt uncomfortable about the story" and that "she understood why I was concerned" about the angle chosen. My response "my main concern is the angle and who gave you the information to chase the story, I said "did Hemi Rau give you the information" there was pause, I said "that confirms my suspicions that Hemi Rau you the information" [the reporter] paused again, then replied "not only did he (Hemi) give me the information but he suggested that I pass the story on to another reporter preferably a 'pakeha' so that the source could not be traced back to him (Hemi). I began to explain the situation and bring to her attention that Hemi Rau had recently been removed from the Maori Kings office and that he had a bee in his bonnet with those that had replaced him as trustees

I said "there are two sides to this story" She then replied by saying "I may go back to my editor and attempt to re-write the story" as she was unaware why Hemi had given her such a strongly angled story, she did say "Hemi was determined to publicly put the spotlight on the integrity of the two new trustees", namely Taitimu Maipi and Barna Heremia. We continued to speak around the story and how Hemi was cunning In his approach to sell her the story, but I sensed that she was chuffed she had a 'good' story and it was given from the CEO of Tainui, I said this isn't news to me, "Hemi has been leaking stories to reporters" on the tribe and tribal members for years. We ended the conversation on a good note but I did say I may pass this information on as it is defamatory on people that I respect.

#To give a background to my relationship with [the reporter], I am a senior reporter with over 12 years experience and currently head of the Maori Television Waikato Daily News branch. In May of this year I met [the reporter]

whilst covering a story in central Hamilton, I asked her that if she needed any help to give me a call as she was new to the area. Since that day we have kept a professional, friendly relationship meeting on 5 or 6 occasions while on the 'job' We speak monthly on the phone or send the odd email to each other.

Potaka Maipi BA

signed

[11] The enclosed file note by Mr Morgan was this:-

Discussion with [the reporter] on 2nd November 2009

1. On Monday 2nd November [the reporter], a reporter from [the newspaper], left a message on my answer phone.

2. The message said that she had talked to Hemi who informed her that the Kings office was no longer under his authority as CEO.

3. I rang her back at about 2.45pm and asked whether Hemi Rau had been giving her any information and that if he had it was totally inappropriate.

4. She informed me that she had received information from an informant but would not disclose the person's identity.

5. She would not confirm or deny whether Hemi was the informant.

6. She told me that she had also received information from a Board member

7. I explained to [the reporter] that any breach of confidentiality by Board members or the CEO was a very serious matter

8. [the reporter] then asked me whether Hemi Rau had any authority over the 'Office of the King'

9. I replied that Hemi Rau did not have any authority over the Office of the King and that the board had made the decision to establish the Office of the King as an independent entity. I also said to her that the decision had been made some time ago by the board that I had reported it to the Tribal Parliament.

10. About five minutes after I had finished my call with [the reporter] - Hemi rang

11. I did not pick up the call

12. He then sent me a text message at 2.56.41pm: W/Times rang re: Kings Office, unsure wat she wanted, just mentioned yr name.

13. I have saved this text as a matter of record.

[12] The copies of relevant telephone records included this summary:-

Summary of phone calls to reporters: Hemi Rau

<i>Date</i>	<i>Time</i>	<i>To Whom</i>
<i>24 March 2009</i>	<i>11.03pm (txt)</i>	<i>[the reporter] Mob (021 XXX XXXX)</i>
<i>24 March 2009</i>	<i>12.14pm</i>	<i>[the reporter] Mob (021 XXX XXXX)</i>
<i>30 March 2009</i>	<i>12.24pm</i>	<i>New Zealand Herald (021 XXX XXX)</i>
<i>28 April 2009</i>	<i>2.50pm (txt)</i>	<i>NZ Herald (021 XXX XXX)</i>
<i>06 October 2009</i>	<i>12.05pm</i>	<i>[the reporter] Mob (021 XXX XXXX)</i>
<i>02 November 2009</i>	<i>3.30pm</i>	<i>[the reporter] Mob (021 XXX XXXX)</i>

[13] Mr Rau did not immediately read the papers. He said to Mr Morgan "Is this you and me". He also said that he did not talk or give any information to the reporter. That statement was not correct because Mr Rau had in fact spoken to the reporter. He knew that he had when he told Mr Morgan that he had not.

[14] Mr Rau consulted lawyers and gave the papers to them.

[15] Te Arataura by resolution authorised Mr Morgan to conduct enquiries.

[16] On 10 December 2009 Mr Rau attended an investigation meeting with Te Kauhanganui's representatives Mr Morgan, Ms Rukumoana Schaafhausen and the lawyers and others. Mr Rau's lawyer spoke on his behalf. The particular allegations against Mr Rau were specified as this:-

Mr Rau either contacted or was contacted by [the reporter] and gave her the story which linked the appointment of Mr Heremia and Mr Maipi as directors of Ururangi Ltd with the Auditor-General's report on undisclosed payments.

In particular, that Mr Rau informed [the reporter] that the two directors were appointed to the company which receives funds from Waikato-Tainui to operate the King's office.

Mr Rau also asked [the reporter] to pass the information to a Pakeha reporter to hide the source of her information.

The information provided by Mr Rau was contrary to the interests of Kingitanga and Te Kauhanganui.

[17] Mr Rau's lawyer terminated the meeting and said Mr Rau would not answer oral questions but would respond in writing.

[18] The parties' lawyers corresponded thereafter.

[19] Mr Morgan prepared an Investigation Report into allegations of serious misconduct by Mr Rau, dated 15 December 2009. This report was presented to Te Arataura and Mr Rau.

[20] A formal disciplinary meeting was held at the Hamilton on 18 December 2009 at which Mr Rau was given the opportunity to respond to Mr Morgan's Investigation Report. Mr Rau attended with his lawyer and the lawyer presented Mr Rau's response.

[21] The Arataura board deliberated for two hours. It made two resolutions:-

Resolution 1

The Board concludes that Mr Rau contacted or was contacted by [the reporter] and gave her the story in the article in [the newspaper] dated 7 November 2009 entitled "School-Probe Duo in Charge of King's Office", which linked the appointment of Mr Heremia and Mr Maipi as directors of Ururangi Limited with the Auditor General's report on undisclosed payments. In particular, that Mr Rau informed [the reporter] that the two directors were appointed to the company which receives funds from Waikato-Tainui to operate the King's Office. Mr Rau also asked [the reporter] to pass the information to a Pakeha reporter to hide the source of her information.

Resolution 2

That Mr Hemi Rau's actions were contrary to the interests of Kingitanga and Te Kauhanganui and constitutes serious misconduct.

[22] At the conclusion of the meeting Mr Rau was summarily dismissed. He was paid three months salary. Te Kauhanganui confirmed his dismissal in writing by letter dated 21 December 2009.

The merits

[23] This investigation has attracted considerable interest beyond the immediate parties. Mr Rau's dismissal and his claim before the Authority have attracted media attention in the Waikato region. Both parties have vehement support. If I detect it correctly however, I suspect that much of the public interest is not premised upon the merits of the subject matter of the dismissal itself but rather, falls according to generally held views about Te Arataura's executive management and in particular, its management of tribal funds.

[24] Mr Rau in giving evidence before the Authority expressed personal views about Te Arataura's financial management. He also made statements which were distressing for some. I refused to permit the subject matter of those expressed personal views to

feature in any material way in the Authority's investigation. This is not the forum for such a debate.

[25] But I acknowledge absolutely the depth of feelings so very obviously pervading the background of this employment relationship problem. There will always be very deep feelings about the management of tribal resources amongst the Tainui people because those resources are derived from the compensation paid by the Crown to the Tainui people for the loss of land, loss of life and the destruction visited upon Waikato/Tainui's ancestors. The people are quite rightly passionate about tribal affairs and the management of its resources.

[26] I turn now to the critical issue. There is only one issue that concerns the Authority. That issue is whether Te Kauhanganui lawfully dismissed Mr Rau. The lawfulness of that decision is determined by a test which has been prescribed by Parliament at section 103A of the *Employment Relations Act 2000* ("the Act"). The Authority is bound to apply that test in reaching its determination. The statutory test is this:-

103A. Test of justification

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.

[27] I make it clear that it is not this Authority's task to find whether the alleged misconduct by Mr Rau is proved. Rather, the Authority is required to investigate and consider the way that Te Kauhanganui inquired into what it believed Mr Rau had done or might have done and the conclusion that it reached that there had been serious misconduct by him. As well, the Authority is required to investigate the conclusion by Te Kauhanganui that dismissal was the appropriate final outcome from its inquiry.

[28] I issued a witness summons to the reporter to attend the Authority's investigation meeting to give evidence. I did not do that to force her to reveal her informant for the article. I summoned her out of fairness to her, to give her an

opportunity if she wished to take it, to respond to adverse comments about her before I made findings concerning her. The reporter answered her summons. She attended the investigation meeting and gave evidence. She also answered questions by the lawyers.

[29] By section 68 of the *Evidence Act 2006*, a journalist is not compellable where they have promised their informant not to disclose the informant's identity. I do not make a finding as to whether such a promise was made by the reporter to her informant.

[30] I also note that the *Evidence Act 2006* may not directly apply to this Authority because it has a much wider jurisdiction to take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[31] Whether or not that section applies, I considered it desirable in terms of exercising the Authority's powers reasonably to observe and recognise the important public policy considerations behind such a privilege. I told the reporter that I would deal with her on the basis of section 68 of the *Evidence Act 2006*. I told her I did not require her to reveal her information and further, that she was not required to answer any question that she do so.

[32] I also invited the newspaper to make any comment it wished to the Authority. I have received comments from the deputy editor and provided those comments to the parties. The newspaper advises it is comfortable with the reporter's handling of matters. It points out that while Potaka Maipi made a note of his conversations, the reporter did not and relies only on her memory. It points out too, that the editor recalls meeting Mr Rau only once in late 2003 but they have not spoken since.

Te Kauhanganui's investigation and the evidence gathered

[33] In his investigation report dated 15 December 2009, Mr Morgan expressed his considered views in his investigation report as this:-

2. *After considering the evidence and Mr Rau's explanation, I have formed the view that Mr Rau is the source of the leak of information to [the newspaper] and that he asked [the reporter] to pass the information to a Pakeha reporter so that he could not be traced as the source of the leak. In my view, Mr Rau's actions are contrary to the interests of Kiingitangi(sic) and Waikato-Tainui and constitute serious misconduct.*

[34] It was this investigation report that Arataura had before it when it deliberated on 18 December 2009 having heard from Mr Rau through his lawyer and then passing its resolutions. The investigation report had annexed to it the article, file notes of Mr Morgan's discussions with various persons, the letter handed to Mr Rau dated 3 December 2009 and attachments, Potaka Maipi's statement of 12 December 2009, a statement from Ms Patience Te Ao Arataura board member ("Ms Te Ao") and the correspondence between the lawyers.

[35] Mr Morgan had carried out his investigation between 12 November 2009 and 12 December 2009. He spoke to Potaka Maipi, the reporter, one Mr S² an experienced journalist whom the reporter had apparently confided in and Ms Patience Te Ao a Te Arataura board member ("Ms Te Ao").

[36] Ms Te Ao had been present on 26 November 2009 when Mr Morgan had spoken to the reporter on speakerphone in his car. Ms Te Ao provided a written statement³ of what she had heard on 26 November 2009. Her statement materially records of that conversation:-

Mr Morgan rang [the reporter] three times and each time it went to her voicemail so he left her a message for her to call him back. By approximately 8.55am I was about to return to my meeting when [the reporter] returned Mr Morgan's call. Mr Morgan began thanking [the reporter] for the discussion they had together the previous day and said that he appreciated her confirming Mr [X] as her informant in leaking both issues in regards to 1) ... 2) ... and Mr Hemi Rau's involvement in leaking of information 2 weeks prior on the story of "the office King". [The reporter]'s response was "Mr Morgan I want to clarify for the record that I did not confirm either men that you have named as my informants, "However you are not wrong in what you are saying". Mr Morgan replied to [the reporter] saying that she had confirmed the two men named when they met on the 25th of November. [The reporter] replied saying I cannot

² I choose not to identify Mr S as I consider it unnecessary and undesirable. I do not wish his professional reputation to be damaged any further. The parties know who he is.

³ dated 15 December 2009 following her return from her mother's tangi.

personally confirm these names for you as professionally I must protect my source of information however again she said to Mr Morgan that he was not wrong in what he was saying about the two people that he had named.

[37] Potaka Maipi provided his statement dated 27 November 2009.

[38] Mr Morgan met with the reporter at 8.21am on 3 December 2009 at the Coffee club café Te Rapa. He made a file note of the discussion he had with the reporter. He recorded:-

I then handed [the reporter] a signed copy of the statement by Potaka Maipi dated Nov 27. [The reporter] proceeded to read it. I said I only had one primary question and asked [the reporter] if Hemi Rau had asked her to pass information about the King's office to a Pakeha reporter so that it would not be sourced to him as outlined in Potaka's statement,

[The reporter] said Yes, Hemi did.

[39] On 5 December 2009 Potaka Maipi informed Mr Morgan of a call the reporter made to him at 9.45am on 3 December 2009. He recorded the detail of the conversation in a statement dated 12 December 2009 as follows (affidavits refers to the written statements):-

On the 3rd of December 2009 at 0945 [the reporter] called me on my cell phone to confirm she had read my affidavit and that she was "sweet with it" she continued to say "bro I cant do anything because your(sic) telling the truth and I was dumb enough to tell you in the first place which I regret" She asked me if I would "please not show anyone else" [The reporter] was really concerned that other people would see it, she said if my affidavit gets out then she would be "fucked, I just hope and pray like hell no one else would see it" she said Hemi would also get a copy as he was accused to be the leak "but he would not want anyone else to see the affidavit either". Shocked by her call I said "are you not worried about your job" at the paper, she responded by saying "nah I will just pass it off as it was a conversation with a friend."

I am adamant that [the reporter] told me that Hemi Rau was the person who leaked her confidential information to her and I believe her denial of her giving me this information in her counter affidavit is a lie and I am prepared to swear under oath that both of my affidavits are true.

Potaka Maipi (Signed)

[40] The reporter wrote a letter dated 7 December 2009 for Mr Rau's lawyers in which she declared that Mr Rau *"did not leak the story about the restructuring of the King's office"*. That letter from the reporter was provided to Te Kauhanganui by Mr

Rau's lawyers in a letter dated 7 December 2009. The substantive responses from Mr Rau were these paragraphs:-

5. *Our client categorically denies that he is the source of the leak. He did speak to the reporter, [the reporter]. [The reporter] already knew the factual situation and requested our client to confirm this. Our client declined to make any comment on the record.*

6. *Our client is correctly reported in the article published in [the newspaper] on 7 November 2009 as declining to comment. Our client did confirm that his office was no longer responsible for the King's Office. Our client is designated to speak to the media in relation to management and operational matters. This is an operational matter. This comment falls within this authorisation.*

7. *Our client correctly referred the reporter to Mr Morgan as the King's Office was outside his authority. What in effect happened was that Mr Rau said that he did not have authority and directed the reporter to Mr Morgan. It is also clear from the article that Mr Morgan had already confirmed this information to [the reporter].*

[41] Te Kauhanganui's lawyers provided Mr Morgan's notes of his conversations with Mr S to Mr Rau's lawyers under cover of letter dated 9 December 2009 and confirming a meeting with Mr Rau on 10 December 2009.

[42] At the meeting on 10 December 2009 Mr Rau's lawyers provided a letter to Te Kauhanganui's lawyers which materially stated:-

10. *When [the reporter] contacted Mr Rau, [the reporter] already knew that Mr Heremia and Mr Maipi were directors of the King's office. In this regard the file note telephone discussions with [Mr S] (prepared by Mr Morgan) appear to confirm that it was [Mr X] who gave the information. Therefore, it cannot be said that Mr Rau leaked the information.*

11. *When Mr Rau was speaking with [the reporter] on or about 2 November 2009 he was asked if Mr Heremia and Mr Maipi were directors of the King's Office. Mr Rau did confirm that they were directors of the King's Office. He did not want to go on the record because it was for Mr Morgan to go on the record which Mr Morgan subsequently did.*

14. *The information about Mr Maipi and Mr Heremia being on the Board was public information. Confirming to the reporter that public information that those two persons are directors of Ururangi Limited is not a leak or anything like it. However, as a courtesy to Mr Morgan he did not wish to be on the record as confirming that. It was Mr Morgan's place as Chair to make comment on the record on the appointments.*

15. *We note Mr Rau can comment on matters of management and operations. The comments made by Mr Rau are clearly matters of management and operation. He no longer manages the Office of the King and he confirmed (off the record) who did.*

21. *Two final matters. It is alleged that Mr Rau said to [the reporter] that Mr Rau attempted to persuade [the reporter] to pass the story to a pākehā reporter so as to lessen the risk that the story would be traced back to him. This seems to be taken from Mr Potaka Maipi's file note dated 27 November 2009 recording what occurred on 29 October 2009, some one month after the alleged discussion. This appears to be taken from the quote given by Mr Potaka Maipi about what [the reporter] said as:*

Not only did he (Hemi) give me the information but he suggested that I pass the story on to another reporter preferably a "pākehā" so the source could not be traced back to him (Hemi).

22. *[The reporter] denies the correctness of this statement. Mr Rau denies the statement. But in any event the statement is internally inconsistent. The suggestion that the matter be referred to a pākehā journalist is so the source could not be traced back to Mr Rau. Mr Rau maintains he was not the source. [The reporter] says that Mr Rau is not the source. Mr Morgan has evidence that it was [Mr X] who was the leak. If he was not the "leak" why would Mr Rau require protection?*

23 *What is more, it is a strange suggestion that a journalist with a story give that story to another journalist. The whole allegation has a sense of unreality about it and is made by the son of Mr Taitimu Maipi.*

24. *The text message referred to in Mr Morgan's file note of 2 November 2009 states "[the newspaper] rang re: King's Office, unsure what she wanted, just mentioned your name".*

25. *Mr Rau was doing his duty to inform the Chair of the inquiry. As far as Mr Rau was concerned it was more than mere public information that had been disclosed to the tribal Parliament and widely known about the appointment of Mr Maipi and Mr Heremia as directors of the King's Office. We note that Mr Morgan refused to take the call of Mr Rau and presumably had that call been taken more detail would have been given. Mr Rau quite properly gave Mr Morgan a "heads up".*

[43] Te Kauhanganui's lawyers responded in a letter dated 10 December 2009. Mr Rau was asked to answer particular questions.

[44] The questions were answered in a lawyer's letter of 15 December 2009.

[45] Mr Morgan concluded that Mr Rau was "the source of the leak and that he had tried to cover up the source of the leak" for the following stated reasons:-

- (a) *First, that is what [the reporter] told me when I showed her Potaka Maipi's statement.*
- (b) *I have also had a conversation with [Mr S]. [Mr S] told me that [the reporter] had confided in him and had told him that Mr Rau was the source of the leak.*
- (c) *Potaka Maipi has provided a detailed statement in which he says that [the reporter] admitted to him that Mr Rau was the source of the leak.*
- (d) *More recently, Potaka Maipi had another discussion with [the reporter] in which she phoned him after I had shown her Potaka's statement. She commented that his statement was accurate, but said that she hoped Potaka would not show his statement to anyone other than Mr Rau because it would put her in difficulty with her employer, [the newspaper], for having revealed her source of information. This would explain her statement of 7 December 2009, in which she now denies having revealed her source of information.*
- (e) *Patience Te Ao, Deputy Chair of Te Arataura also overheard my telephone conversation with [the reporter], in which [the reporter] admitted that Mr Rau was the source of the leak. Patience was in my car at the time listening to the discussion with [the reporter] via my hands free speaker. It is also important to note that Patience was particularly attentive to the discussion as amplified in her statement.*

[46] Mr Morgan rejected Mr Rau's responses. Mr Morgan did not accept Mr Rau's stated denials as being the source of the leak and his affirmative response that his admitted correspondence with the reporter was merely confirmatory of what was already in the public domain. Mr Morgan concluded that the reporter could not have independently linked the auditor-general's report with the directors of Uruangi Ltd and she was given that information from Mr Rau because she had confirmed the same to Potaka Maipi, Mr S and to himself both directly and again in Ms Te Ao's presence. Mr Morgan was also mindful that it was not publicly known that Te Ururangi was funded from Waikato-Tainui and the reporter had to have been explicitly told the same. Mr Morgan was also doubtful of Mr Rau's confirmatory stance because it was inconsistent with his text message that he did not know what the reporter wanted. Mr Morgan was also suspicious that Mr Rau had not provided a full and accurate account of his conversations with the reporter.

[47] Mr Rau's lawyers sent a letter from the reporter this time on the newspaper's letterhead dated 15 December 2009 to Te Kauhanganui's lawyers. The reporter wrote:-

I would like to state that Hemi Rau did not provide the information that linked the appointment of John Heremia's and Tim Maipi's roles in the story about the auditor-general's report and their appointments as directors of Ururangi Ltd.

After receiving a tip-off from a separate person I searched the company's website for information on Mr Maipi and Mr Heremia. I found that only one company involved both men, Ururangi Ltd. I went back to the person who had tipped me off and asked what Ururangi Ltd was, that person told me that it was the company that received money from the tribe for the King's Office. Once again I must reiterate that I cannot disclose who this source was. The story about the restructuring of the king's office was held for approximately 10 days before it ran in the paper on (sic).

[48] On being provided with Potaka Maipi's statement of 27 November 2009 by Mr Morgan on 3 November 2009 the reporter wrote:-

He then picked up an envelope which had been sitting on a bag on a chair next to him. He held it for a little while and then gave it to me and told me to read it. As I read the letter I became(sic) very anxious because I realised that Potaka Maipi was stating that I had told him that Hemi Rau was my source. As a journalist I know that outing my own sources is wrong but to out somebody else's is beyond comprehension. I became very angry.

[49] Mr Rau was provided with the information detailed above to respond to when he met with Te Arataura on 18 December 2009. Mr Rau's lawyer addressed Te Arataura on his behalf. The lawyer took the Te Arataura board members through the lawyers' correspondence. The lawyer argued that the reporter had advised Mr Rau was not the source of the article. He said that Potaka Maipi's statements were hearsay and that Te Arataura required the reporter present before it and put directly to her that she was not telling the truth. He emphasised the reporter's statements in the letter she wrote of 15 December 2009 denying Mr Rau provided information that linked the directors of Ururangi Ltd with the auditor's general's report. The lawyer emphasised that Mr Rau denied the allegations against him. Mr Rau himself told the Arataura board he was not the leak. He said he could not understand what his motivation to do such a thing would be.

[50] The Arataura board resolved that *Mr Rau contacted or was contacted by [the reporter] and gave her the story in the article in [the newspaper] dated 7 November 2009 entitled "School Problem Duo in Charge of King's Office", which linked the appointment of Mr Heremia and Mr Maipi as directors of Ururangi Limited with the Auditor General's report on undisclosed payments. In particular, that Mr Rau informed [the reporter] that the two directors were appointed to the company which*

receives funds from Waikato-Tainui to operate the King's Office. I now examine whether a fair and reasonable employer would have arrived at the same resolution.

[51] An employer is not required to conduct a trial. The allegations against Mr Rau were very very serious indeed. Mr Rau was accused of committing a very treacherous and egregious act.

[52] In considering the reasonableness of Te Kauhanganui's conclusion I accept that the appropriate standard of proof is the civil standard on the balance of probabilities and not the standard beyond reasonable doubt. I accept that as a matter of law the evidence in support must be as convincing in nature as the charge is grave. This is what lawyer's call the *Honda* standard. The civil standard of proof must be applied flexibly to take account of the gravity of the matter⁴.

[53] Having regard to the nature of the allegations against Mr Rau, direct evidence was always unlikely. The reporter was not going to participate for Te Kauhanganui's purposes to reveal her source or give up Mr Rau's identity if in truth he had corresponded with her as alleged. That is because journalists protect their sources and the law recognises and protects such relationships as being in the public interest⁵.

[54] As well, the correspondence as alleged is conducted covertly, in secret and evidence of its transaction is very unlikely. Accordingly, I accept that in such circumstances the quality of the evidence to be gathered by an employer is unlikely to be direct and explicit.

[55] I think it also true that the reporter's subsequent correspondence must be regarded in the proper context. It is a very serious matter indeed for a reporter to reveal their sources. This reporter always had an interest in denying she had disclosed her sources after it was suggested that she had. It was not in her interest to admit to being indiscrete. If in fact the reporter had been indiscrete and unprofessional, she was never going to disclose that she had been. Accepting that as I do, I consider that

⁴ Whanganui College Board of Trustees Limited v Lewis [2000] 1 ERNZ 397 at 403 (CA).

⁵ Section 68 *Evidence Act 2006*

her subsequent written statements denying indiscretion by herself were entirely predictable. I therefore consider that Te Kauhanganui was entitled to regard her statements neutrally.

[56] These factors inform the nature of the evidence required of Te Kauhanganui in justification of its decision to summarily terminate Mr Rau's employment. But the evidence against Mr Rau must be sufficiently compelling if it is going to warrant his immediate dismissal. I have concluded that it was.

[57] Potaka Maipi gave evidence in his statement of 27 November 2009 to Te Kauhanganui that on 29 October 2009 he and the reporter were discussing her then current story about the King's Office and its link to Te Wharekura o Rakaumanga. Potaka Maipi informed Te Kauhanganui that the reporter said to him in that conversation "*not only did he (Hemi) give [her] the information but he suggested that [she] pass the story on to another reporter preferably a 'pakeha' so that the source could not be traced back to him(Hemi)*". This I consider is the first significant piece of evidence put before Te Kauhanganui.

[58] Mr Morgan himself presented evidence to Te Kauhanganui that at 8.21am on 3 December 2009 he presented Potaka Maipi's statement of 27 November 2009 to the reporter and when he asked her if Mr Rau had asked her to pass information about the King's office to a Pakeha reporter so that it would not be sourced to him as outlined in Potaka Maipi's statement she said to him "*Yes, Hemi did*". This I consider is the second significant piece of evidence put before Te Kauhanganui. It also operated to directly corroborate the evidence given by Potaka Maipi.

[59] Next there is the evidence Potaka Maipi gave to Te Kauhanganui of a conversation he and the reporter had at 9.45am on 3 December 2009. That statement presented evidence to Te Kauhanganui that the reporter had directly confirmed to him what she had told him on 29 October 2009, that she asked him not to disclose his statement of 27 November 2009 and that she had said Mr Rau would not wish the statement to be seen either. This was further evidence corroborating what Potaka Maipi had been told on 29 October 2009 about Mr Rau.

[60] I consider Potaka Maipi's evidence of his discussions with the reporter as very critical. I accept that Potaka Maipi is the son of Mr Taitimu Maipi. But I do not consider that Te Kauhanganui was not entitled to rely on his statements by virtue of that fact alone. It is true that Potaka Maipi himself suffered consequences in his own employment arising out of his interactions with the reporter. I can see no reason why Te Kauhanganui could not rely on his evidence.

[61] There is also the evidence of Ms Te Ao of the conversation she was present to overhear as between Mr Morgan and the reporter on Mr Morgan's speakerphone. She was present to hear the reporter say twice to Mr Morgan "that he was not wrong in what he was saying" as concerns inappropriate communications by Mr Rau. Ms Te Ao impressed me as a very reliable witness. I accept that Mr Morgan's own notes of this particular conversation are deficient in this material respect. But Te Kauhanganui was entitled to rely on Ms Te Ao's statement.

[62] There is also Mr Morgan's evidence of conversations he had with Mr S the substance of which is that the reporter confided in Mr S as to Mr Rau being the source of her information. In particular, Mr Morgan provided Te Kauhanganui a statement of a conversation he had with Mr S on 3 December 2009 after he had met with the reporter. Materially:-

I called [Mr S] about 8.46am reiterating that I had the authority to investigate the matter of the media leaks to [the newspaper] and that I had just met with [the reporter]. I told him that [the reporter] had confirmed just 10 minutes ago that Hemi had asked her to pass the information about the office of the King to a Pakeha reporter so that the story would not be traced back to him as outlined in Potaka Maipi's statement. I said to [Mr S] that [the reporter]'s expression changed from a very relaxed state to one of anxiety, when I handed her Potaka's statement to read.

I said to [Mr S] that I could believe that [the reporter] would confess and do in Hemi. I told him that when I mentioned the opportunity to secure an exclusive interview with the King, [the reporter] melted and became very pliable.

[Mr S] said that was a smart move and also said that [the reporter] had told him the exact same information regarding Hemi, that [the reporter] said that Hemi was leaking information.

I told [Mr S] that my job was to protect the integrity of the tribe.

[63] If the statements are correct, then the reporter called Potaka Maipi soon after she had met with Mr Morgan having been shown Potaka Maipi's statement. One would have thought that having refuted absolutely the disclosures said to have been made by her, that she would have been contacting Potaka Maipi to communicate her justified displeasure/anger. I asked her this question directly. She told the Authority that she did not challenge Potaka Maipi in the conversation. That evidence is compelling in my view. I have absolutely no doubt that if Potaka Maipi had misrepresented her in such a fundamental erroneous/dishonest way, she would have remonstrated with him in very unmistakable terms. Her own evidence is that she did not. That she did not do so is telling in my view.

[64] It is principally for this reason I am not persuaded by her protests that she has been misrepresented by either or both Potaka Maipi and Mr Morgan. Indeed, while Potaka Maipi was somewhat excitable and clearly agitated as he recalled events giving his evidence to the Authority, I regarded his evidence nonetheless quite convincing. But that is my assessment of the evidence before the Authority.

[65] What is critical however is the evidence before Te Kauhanganui and the view that it took at the time. Te Kauhanganui was entitled to reject the reporter's general refutations having regard to the view I accept that such denials are rightly regarded in a neutral way. Te Kauhanganui also had Mr Rau's denials and his affirmative defence that the information in contention was already in the public domain. These denials, if honest, are deserving of serious consideration indeed and only compelling evidence could properly overcome them.

[66] Mr Rau was not honest with Mr Morgan on 3 December 2009 when he said he had not spoken to the reporter. He also did not contact or inform Mr Morgan of the further conversation he had with the reporter at 3.30pm on 2 November 2009, having sent a text message to Mr Morgan that he did not know what the reporter wanted. He did know after he spoke to the reporter at 3.30pm but he did not inform Mr Morgan any further. Mr Rau told the Authority that he rang the reporter at 3.30pm because he was concerned for her as a junior reporter. He said he suggested to the reporter she

should not do the story on the Maori King. He said he asked her why she was doing the story and told her it wasn't good for "us" and it wasn't good for her. Mr Rau did not revert to Mr Morgan about this further discussion and what he then knew of the reporter's intentions. I find that he did not tell his employer what he tells the Authority now.

[67] I regret to say that Mr Rau did not behave appropriately, to the standard to be expected of him when he misrepresented the situation to Mr Morgan on 3 December 2009. That was not a good start for an investigation into his fidelity. It would not have instilled any confidence in Mr Morgan as he proceeded.

[68] I find that Mr Rau did not provide Te Kauhanganui a specific explanation in respect of the allegation that he suggested the reporter refer the story to a pākehā reporter. He simply offered blanket denials but at the investigation meeting he suggested a different context. When it was put to him at the Authority investigation meeting that he had offered no such explanation to his employer he said he wasn't asked and later he agreed that he had not.

[69] I agree with the criticism made of Mr Rau that he did not at any stage provide his employer with a full, detailed account of his entire correspondence with the reporter. I consider that he was obliged to do so because of the very serious nature of the allegations against him and because it was clear to him how serious his employer regarded the matter. He was also obliged to do so because he held a very senior position of trust with Te Kauhanganui.

[70] Te Kauhanganui was also entitled to accept that the reporter had told Potaka Maipi that Mr Rau was "determined to publicly put the spotlight on the integrity of the new trustees".

[71] I find that Mr Rau was not as forthcoming as he should have been with his employer. He was obliged to act in good faith, to be active, responsive and communicative.

[72] It is my considered view that Te Kauhanganui was entitled to reject Mr Rau's denials and accept the evidence proffered by Mr Morgan and Potaka Maipi of serious misconduct by Mr Rau as apparent from the reporter's indiscretions and to a lesser extent but no less meritorious the evidence of Ms Te Ao and that relating to Mr S. I consider that the evidence was in combination sufficiently compelling to overcome Mr Rau's denials. I take that view considering it the same view that a fair and reasonable employer would also have taken of the same evidence before it. I conclude that Te Kauhanganui through Te Arataura was justified after hearing Mr Rau's explanation and comments on Mr Morgan's Investigation Report and considering all the evidence, in being satisfied that Mr Rau was responsible for the leak.

[73] There are objections raised that Mr Morgan ought not have participated in Te Arataura's deliberations. As well, there are criticisms that other Arataura members ought to have been excluded from the deliberations. I do not accept those criticisms because I accept as the courts do, that an employer inquiring into allegations of misconduct will indeed be a judge in its own cause because it has an interest in the outcome. Each member of Arataura was only one out of eleven. It was the majority which passed the resolutions. I do not accept that there was any bias or predetermination in Te Arataura's deliberations.

[74] I am satisfied that Te Kauhanganui carried out a full and fair investigation into the allegations against Mr Rau. He was given a full and fair opportunity to explain his actions and to respond to the allegations. He was represented by counsel throughout the investigation and attended meetings on 10 and 18 December 2009 to be heard. Te Arataura had a full report from Mr Morgan, the lawyers' correspondence and heard submissions from Mr Rau's lawyer. Te Arataura reached its decision after that full and fair process.

[75] **I am satisfied that Te Kauhanganui had evidence to justifiably believe and did honestly believe that Mr Rau had committed the conducted alleged against him in resolution 1 passed by Te Arataura.**

[76] Mr Rau was employed as the chief executive officer. That was a senior position involving considerable and necessary trust. Te Kauhanganui is entitled to have and repose a high degree of trust in Mr Rau. I consider that Mr Rau had an almost fiduciary duty to Te Kauhanganui by virtue of the position he held.

[77] Mr Rau was paid a salary in consideration of his loyal and faithful service to his employer Te Kauhanganui. While Mr Rau accepted he was required to serve his employer faithfully, I was surprised to hear him resist my invitation to him to accept that he was also required to serve his employer loyally. It is plain that Mr Rau has concerns about his employer's management of financial matters. It is distressing to some to hear his views about the Maori King's use of tribal funds.

[78] But it is undeniable that Mr Rau was employed to serve his employer faithfully and loyally. He was obliged to serve his employer's interests at all times and to act towards it always in good faith.

[79] Mr Rau's established actions were contrary to his obligations of fidelity and to act in Te Kauhanganui's best interests. As well, his actions were contrary to media policy, a confidentiality deed of 13 December 2005 and an agreement that he would keep Te Arataura chair advised of important matters including emerging problems, risks and good and bad publicity.

[80] Mr Rau's actions caused embarrassment to Waikato/Tainui and to Kiingitanga. I accept that the principal object for which Te Kauhanganui was established was to support and protect the Kiingitanga.

[81] I accept that having found the allegations against Mr Rau established, his conduct was properly regarded as serious misconduct because it deeply impaired and was destructive of the basic confidence and trust that was an essential element of the employment relationship.

[82] I am satisfied that Te Kauhanganui was entitled to take the view that Mr Rau's established conduct constituted serious misconduct in accordance with

Resolution 2. I find that a fair and reasonable employer would have decided that Mr Rau's actions amounted to serious misconduct.

The decision to dismiss

[83] Mr Rau was provided an opportunity to address his employer about penalty after it had communicated its decision finding serious misconduct. His lawyer submitted that summary dismissal was not warranted.

[84] I accept that Te Kauhanganui gave consideration to a penalty less than dismissal. Mr Morgan gave evidence that Te Arataura considered various options including a final warning, summary dismissal without pay, and immediate dismissal with payment in lieu of notice.

[85] I accept that the finding of serious misconduct against Mr Rau rendered the continued employment relationship untenable. I find that it was reasonable for Te Kauhanganui to conclude that it could no longer trust Mr Rau.

[86] **I consider that in the particular circumstances summary dismissal was available to Te Kauhanganui as a fair and reasonable employer.**

The claim for unjustifiable disadvantage

[87] I do not understand this claim to be seriously advanced. I do not accept that there was an improper incentive offered to the reporter such as would amount to an action by Te Kauhanganui. **I make no orders in relation to this claim.**

The determination

[88] **For all the foregoing reasons, I find, on an objective basis, that Te Kauhanganui's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. Te Kauhanganui justifies its decision to summarily terminate Mr Rau's employment.**

[89] **I find that Mr Rau does not have a personal grievance for either unjustifiable disadvantage or unjustifiable dismissal. There will be no formal orders by the Authority.**

The costs

[90] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Haigh/Mr Clarke is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Crossland is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.

[91] I thank the lawyers for their assistance in this investigation. Their contribution has been immensely helpful to the Authority.

Leon Robinson
Member of Employment Relations Authority