

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE WHANGANUI-A-TARA ROHE**

**CIV-2014-485-11177  
[2018] NZHC 1935**

UNDER (in part) The Trustees Act 1956  
BETWEEN TONI JAMES DAVIS WAHO  
Plaintiff  
AND TE KŌHANGA REO NATIONAL TRUST  
Defendant

Hearing: 8–23 May 2017 and 11 September 2017

Appearances: F E Geiringer and J K Mahuta-Coyle for Plaintiff  
M F McClelland QC and I Tokmadzic (until 11 May 2017 when a  
claim against first defendant was discontinued)  
M F McClelland QC (from 11 May 2017), N J Russell and  
S I Jones for Defendant

Judgment: 31 July 2018

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**JUDGMENT OF CLARK J**

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*I direct the delivery time of this judgment  
is 4.30 pm on 31 July 2018*

<b>Introduction and issue</b>	[1]
<b>Background in overview</b>	[4]
<i>Te Pātaka Ōhanga employment dispute and emergence of the Rākai list</i>	[8]
<i>Trust Board's response to the Rākai allegations</i>	[12]
<i>Mr Waho brings his concerns to the Board</i>	[21]
<i>Special meeting of the Board is arranged but cancelled</i>	[23]
<i>Ernst Young report is delivered</i>	[24]
<i>Ministers and Board meet to discuss release of report</i>	[25]
<i>Board decides Mr Waho brought Trust into disrepute</i>	[30]
<i>Events subsequent to Board's decision</i>	[33]
<i>Mr Waho files proceedings</i>	[37]
<i>Discontinuance against first defendant</i>	[38]
<b>Threshold approach to issue of 'lawfulness'</b>	[39]
<b>First limb: failure to respect confidentiality?</b>	[44]
<i>Master Agreement</i>	[50]
<i>Trust deed</i>	[54]
<i>Trustees' duties</i>	[58]
<i>Assessment</i>	[61]
<b>Second limb:</b>	
<b>making serious unfounded allegations to Minister of Education?</b>	[79]
<i>Assessment</i>	[96]
<b>Legal consequence of factual findings</b>	[97]
<b>Honorarium</b>	[99]
<b>Outcome</b>	[103]

## Introduction and issue

[1] Until he was removed in 2014 Toni Waho was a trustee of Te Kōhanga Reo National Trust, a trust dedicated to the use and retention of te reo Māori. The Trust Board decided to remove Mr Waho on the grounds he had brought the Trust into disrepute by going to Ministers, behind the Trust's back, with allegations against Trust Board members and members of the Board of the Trust's commercial arm, Te Pātaka Ōhanga Ltd.

[2] Mr Waho says he acted honourably and in accordance with his duties as a trustee. Mr Waho challenges his removal. He pleads, as he puts it, for the protection of the Court. Mr Waho brings this proceeding to obtain declarations that he did not bring the Trust into disrepute and that his removal was unlawful. Mr Waho also seeks an order for payment of the honorarium he would have received but for his removal.

[3] The key issue for my determination is whether there is an objectively supportable factual foundation for the Trust Board's assertion that Mr Waho brought the Trust into disrepute.

### **Background in overview**

[4] The Trust was established to promote the aims of the Te Kōhanga Reo movement which has been instrumental in arresting the decline of te reo Māori. Protection of te reo has been achieved primarily through early childhood education with total immersion in Māori. Collectively the centres are known as the te kōhanga reo whānau. The Trust is a registered charitable trust, governed by a trust deed and administered by the Trust Board (the Trust Board or Board). Mr Waho had been a trustee since 2006. He was one of seven trustees and also the deputy chair. Timoti Kāretu and Tina Olsen-Rātana were the co-chairs.

[5] Te Pātaka Ōhanga (TPO) is a wholly owned subsidiary of the Trust. It provides services to the Trust and to individual kōhanga reo. At the relevant time it had four directors, three of whom were also on the Trust Board: Dame Iritana Tāwhiwhirangi, (the chair), Dr Wharehuia Milroy and Druiscilla (Druis) Barrett. Dame Iritana's daughter-in-law, Lynda Tāwhiwhirangi, was the General Manager of TPO.

[6] As presented over the course of the hearing, in over 5,500 pages of documentary evidence, in the pleadings which continued to be amended during the hearing and in the oral testimony of witnesses, the factual background traces back over many years covering internal and external investigations and inquiries, suspicions and allegations and, at times, bitter disputation. In this overview I set out only the key events leading to Mr Waho's removal. Later in my judgment, when it becomes necessary to address issues that are subsidiary to the key issue, the details and facts relating to those matters will be set out.

[7] At the heart of the disagreement between Mr Waho and the Trust Board are the "Rākai allegations" or the "Rākai list", the existence of which Mr Waho felt compelled to bring to the attention of Ministers. The Rākai list contained accusations of wrongdoing against TPO officers and the Trust Board. TPO was tending towards

summary dismissal of its General Manager, Lynda Tāwhiwhirangi, when her husband, Rākai Tāwhiwhirangi, produced his allegations.

*Te Pātaka Ōhanga employment dispute and emergence of the Rākai list*

[8] Mrs Barrett wrote a lengthy letter to Mrs Tāwhiwhirangi on 27 November 2013 detailing why TPO regarded Mrs Tāwhiwhirangi's conduct to be so serious as to warrant summary dismissal. TPO's "grave concerns" that Mrs Tāwhiwhirangi had acted inconsistently with her fiduciary obligations as a director, her statutory duties, and her contractual obligations, arose out of a series of reports by Māori Television publicising corporate credit card misuse by Mrs Tāwhiwhirangi and others. The story was broadcast as a documentary programme, "Feathering the Nest". On the basis of an affidavit Mrs Tāwhiwhirangi had sworn TPO believed the allegations to be unfounded and applied to the High Court for an injunction. TPO withdrew its application when it became clear from evidence filed on behalf of Māori Television that there were issues around Mrs Tāwhiwhirangi's credit card use which she had not brought to TPO's attention. Mrs Tāwhiwhirangi swore a further affidavit acknowledging errors and providing further detail which contradicted her earlier evidence. TPO regarded the further affidavit as fundamentally undermining the position it had taken before the High Court. Critically Mrs Tāwhiwhirangi's evidence exposed TPO to legal risk and "disrepute in a public forum".

[9] An investigation was commissioned. George Reedy and Associates, chartered accountants, found Mrs Tāwhiwhirangi had used the organisation's credit card for personal or private use.

[10] The findings of the Reedy investigation (as it was termed by the parties in this proceeding) were put to Mrs Tāwhiwhirangi along with questions regarding unexplained expenditure and TPO directors met Mrs Tāwhiwhirangi in mid-November 2013 to discuss matters. At a second meeting on 27 November 2013, the day of Mrs Barrett's letter, Mrs Tāwhiwhirangi was accompanied by her husband, Rākai Tāwhiwhirangi. TPO did not fully accept Mrs Tāwhiwhirangi's explanations and it became clear during the course of the meeting that agreement was not going to be reached. Mrs Barrett's letter records the following:

- (a) Mr and Mrs Tāwhiwhirangi asked for a settlement package equivalent to some \$800,000.
- (b) Mr Tāwhiwhirangi had written information to which he referred but which he did not disclose to those in attendance at that time. The settlement package was to ensure Mr and Mrs Tāwhiwhirangi would not take further action to expose the organisation “with all this information”.
- (c) Mr Tāwhiwhirangi threatened to go to Te Karere, Māori Television and mainstream media with specific details about spending and funding issues within TPO if the organisation did not agree to various proposals in Mrs Tāwhiwhirangi’s favour.
- (d) TPO believed Mr Tāwhiwhirangi could only have come into possession of the information through Mrs Tāwhiwhirangi, and her disclosure to her husband or the media breached her obligations of confidence.
- (e) The Reedy investigation findings, Mrs Tāwhiwhirangi’s withholding of information for her own benefit, her apparent disclosure of confidential information and intention to make further disclosures, and her attempt to extort personal benefits from the organisation by threatening to make unauthorised disclosures of confidential information, raised serious concerns for TPO.
- (f) Mrs Tāwhiwhirangi was provided with particulars of the way in which it appeared she had breached her contractual obligations.
- (g) Based on the matters set out in the letter, TPO had reached a preliminary view that Mrs Tāwhiwhirangi’s conduct constituted grounds for dismissal without notice. Mrs Tāwhiwhirangi was urged to seek independent legal advice and provide her written response within a week.

[11] On 27 November 2013, the day of the meeting and of Mrs Barrett's letter, Mrs Olsen-Rātana received a call from Dame Iritana. Dame Iritana's son, Rākai Tāwhiwhirangi, had pulled into her driveway and thrown a document at her. He was angry that his wife, Mrs Tāwhiwhirangi, was being treated unfairly and he threatened to go to the media. Mrs Olsen-Rātana and Dame Iritana met shortly afterwards at the Trust's office. Dame Iritana gave Mrs Olsen-Rātana the document from her son.

*Trust Board's response to the Rākai allegations*

[12] Within 30 minutes of receiving the list from Dame Iritana, Mrs Olsen-Rātana gave the document to her fellow trustee, Mrs Barrett, who was at the offices of Chen Palmer discussing the TPO employment dispute. Mrs Olsen-Rātana then contacted Dr Kāretu, Mr Tohu and Mr Waho, three non-conflicted trustees, to inform them, by way of a "heads up", of the Rākai list.

[13] The parties dispute the import of the Rākai allegations. Mr Waho's case is that the Rākai list contained a number of allegations of wrongful acts against both the Trust and TPO. Some of the allegations were trivial in nature but many were sufficiently serious to demand a substantive response from the trustees.

[14] The defendant accepts Mr Tāwhiwhirangi handed to his mother, Dame Iritana, a document containing allegations but the defendant says Mr Tāwhiwhirangi did this in his capacity as an advocate for his wife in the course of a confidential employment process between her and TPO. The defendant's pleaded position is that the allegations are unsubstantiated and irrelevant to the employment dispute.<sup>1</sup>

[15] The Trust Board met on 10 December 2013. The minutes record no mention of the Rākai allegations.

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<sup>1</sup> The Trust's pleaded position is that the Rākai allegations are not accepted as being relevant to the employment matter between, Mrs Tāwhiwhirangi and TPO. The Trust's case, however, was run on a different footing, namely, that the Rākai allegations related to a confidential employment dispute which it was for TPO to address not the Board.

[16] The Board next met on 20 December 2013 by teleconference. Except for Dame Iritana, who was conflicted, all trustees attended. The minutes record the first item for discussion as the dismissal of TPO's General Manager. Mrs Barrett advised the Board Mr Tāwhiwhirangi had demanded \$800,000 in order to keep his list of allegations confidential. Two significant aspects of that meeting emerge from the documentary evidence and oral testimony:

- (a) The first significant point is that Mr Waho strongly opposed the direction in which his fellow trustees were heading. Trustees queried the action taken by Mrs Barrett and her fellow director with regard to the employment dispute with Mrs Tāwhiwhirangi. Although recognising the TPO directors had explored all avenues and were acting on legal advice, trustees felt the situation raised a question about whether TPO was compelled to take into account the views of the Board. There was support for ongoing negotiations with Mrs Tāwhiwhirangi. Mrs Olsen-Rātana described the process as "getting out of hand" and said trustees felt the parties should "return to the table". Mrs Olsen-Rātana said Mr Waho spoke out in opposition to any money being paid to Mrs Tāwhiwhirangi. But the trustees considered the employment process was not concluded and the parties should be left to resolve it between themselves. Mr Waho thought the suggestions were "outrageous". Mr Waho's evidence was that at this point he felt himself to be a "lonely voice in the wind". The minutes record Mr Waho "objecting to the way in which things were being done" and wanting his support for the directors' actions recorded. He exited after a lengthy discussion and heated debate before the teleconference was concluded.
- (b) The second significant point is that there is no explicit reference in the minutes to the Rākai allegations yet the Board was keenly aware of the jeopardy they posed. Dr Kāretu accepted in cross-examination that the reference in the minutes to the "huge political risk that needed to be managed" was a reference to the political harm to the Board and its operations if the Rākai list saw the light of day. And Mrs Olsen-Rātana

accepted that the recorded comments, “purchases and loans for Board members” and “car for the King” were from the Rākai list. The evidence was that many more of the items under a heading of “Other Concerns” related to the Rākai list.

[17] While there was a degree of dispute between the parties as to the views and comments expressed during the telephone conference there can be no argument that no investigation of the Rākai list was proposed or agreed on 20 December 2014.

[18] At an “In Committee” meeting on 15 January 2014 the Board discussed a press release to accompany the anticipated release of the Ernst Young report following its review of the use of public funds. There was no discussion of the Rākai allegations at the meeting.

[19] On 20 January 2014 Dame Iritana requested an urgent special meeting in two days time to table her complaint about Mrs Barrett’s penchant for undermining her and other Board members. Dame Iritana intended moving a vote of no confidence in Mrs Barrett. Dame Iritana could no longer work with Mrs Barrett as a director of TPO. When the Board met on 22 January 2014 Dame Iritana’s motion was passed but it seems the meeting was inquorate. Mrs Barrett said she challenged her removal. Minutes of a meeting on 11 February record Mrs Barrett tendering her resignation but her evidence is that she did not resign. Mrs Barrett’s status at this time, and the contested issues around her departure, were the subject of challenged testimony. As with a large number of contentious issues raised in the course of the hearing, the evidence bearing on this episode reflects the discord and mistrust within the Board at the time, but I have reached the view that the key issue before me does not require resolution of the contested evidence bearing on this particular dispute.

[20] The minutes of the Board meeting on 11 February 2014 record no discussion of the Rākai allegations. Mr Waho did not attend. The minutes record the Board’s approval and support for the leave of absence he requested the previous month. Mr Waho’s leave of absence was another of the matters of contention in the case. While Mr Waho’s leave of absence is ancillary to the ultimate issue the activities of



the Board during this time bear on Mr Waho's fidelity. It is necessary, therefore, to return to the leave of absence. I do so at [84]–[88].

*Mr Waho brings his concerns to the Board*

[21] On 10 March 2014 Mr Waho wrote to the Board. Mr Waho had legal advice the effect of which he imparted in a structured and detailed five-page letter. The letter set out what had taken place, what Mr Waho believed needed to be done, and what he wanted done. The legal advice was that some of the Rākai allegations, if substantiated, disclosed criminal activity. Suppressing the list had the potential to make the trustees accessories. Likewise, if the Board were to pay the monies demanded by Mr Tāwhiwhirangi, or fail to take steps to prevent misappropriation of trust funds, trustees would be in breach of their fiduciary obligations to protect and properly apply trust funds.

[22] Mr Waho did not believe these matters could be regarded as confidential. He saw it as essential that all of the allegations, including allegations against him, be properly investigated. He set out the steps he considered the Board needed to take in light of the trustees' collective and individual duties. One of the steps was to inform relevant Ministers of the Reedy investigation and Mr Tāwhiwhirangi's "blackmail attempt" and Mr Tāwhiwhirangi's allegations. If the Board would not agree to take the steps collectively Mr Waho believed he had no option but to report the issues to the proper authorities. For this reason he was unable to sign an agreement binding him not to divulge these matters to third parties.

*Special meeting of the Board is arranged but cancelled*

[23] A special meeting of the Board to discuss Mr Waho's letter was scheduled for 13 March 2014 but on 12 March Mrs Olsen-Rātana cancelled the meeting. Mrs Barrett had also written to the Board with a list of the matters she believed should be discussed at the meeting on 13 March. Mrs Barrett's position mirrored Mr Waho's. If not satisfied the Board intended to take the necessary action Mrs Barrett felt she would be left with no option but to raise her concerns with appropriate people outside the Board including Ministers and the Police. As some of the matters covered in Mrs Barrett's letter appeared to be identical to matters in Mr Waho's letter of

10 March, Mrs Olsen-Rātana said the Board needed an opportunity to take proper advice. A tikanga hui was arranged to discuss Mr Waho's and Mrs Barrett's letters.

*Ernst Young report is delivered*

[24] On 12 March 2014, Ernst Young delivered its report. The review had been initiated to assess the appropriateness and effectiveness within the Trust of the financial internal controls for the receipt of public funds. The Ernst Young review had taken into account supporting documentation only up until 31 December 2012.

*Ministers and Board meet to discuss release of report*

[25] The Minister of Education, the Hon Hekia Parata and the Associate Minister of Education, the Hon Sir Pita Sharples, had arranged to meet with representatives of the Board on 18 March 2014 for the purpose of discussing a public presentation of Ernst Young's findings. The Ministers proposed to issue a joint media statement. Mrs Olsen-Rātana asked trustees to confirm their availability on 18 March to meet with Ministers. Mr Waho was adamant the meeting could not proceed with the Ministers not knowing about the Rākai allegations. An attempt by Mrs Olsen-Rātana to postpone the meeting was unsuccessful.

[26] On 17 March 2014 Mr Waho sent an email to both Ministers to alert them to —

certain matters related [to] the use of funds by the Board and its commercial arm, [TPO]. I do not believe it would be honest to discuss the [Ernst Young] report with you and not reveal these other matters.

[27] Mr Waho attached to his email to Ministers his letter of 10 March 2014 to the Board.<sup>2</sup>

[28] In accordance with normal procedure Mr Waho's email was initially handled by staff. The short point for present purposes is that the Ministers went into the meeting unaware of the existence of the Rākai allegations or Mr Waho's concerns about the Board's lack of response to them. Those matters were not discussed at the meeting. Late in the evening of 18 March the Ministers proceeded to make a public

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<sup>2</sup> Outlined above at [21]–[22].

announcement to the effect the Ernst Young review had shown the Trust's financial controls to be effective.

[29] Within 24 hours there was a dramatic turnaround. It transpired that after their joint statement the Ministers became apprised of Mr Waho's letter. On 19 March the Ministers jointly issued a second media statement referring to new allegations that had been brought to their attention and which would be referred to the Serious Fraud Office (SFO).

*Board decides Mr Waho brought Trust into disrepute*

[30] The Board wrote to Mr Waho on 20 March 2014 having considered his letter of 10 March. It took the view the "general and unsubstantiated" allegations by Rākai Tāwhiwhirangi were made in the context of a disciplinary meeting. Accordingly, they were confidential. Furthermore, they were made in Mr Tāwhiwhirangi's capacity as Mrs Tāwhiwhirangi's advocate and in an attempt to defend or respond to the disciplinary allegations raised by the TPO directors. The letter concluded with the observation that Mr Waho's letter to Ministers had brought the Trust into disrepute and appeared to be in bad faith.

[31] At a special meeting of the Board on 31 March 2014 the Board agreed that, by his actions, Mr Waho had brought the Trust into disrepute but no further action would be taken. The draft minute note emailed to Mr Waho on 31 March 2014 recorded four further matters which the Board had agreed. Two require mention. The Board agreed:

that Toni return to TPO or destroy the Rākai List

all Board members agreed to sign the confidentiality clause to be redrafted by the Co-chair

[32] Mr Waho's evidence was that the minute was roughly correct except that he did not agree to sign the confidentiality agreement. Furthermore, he received a revised minute note the following day. The revised draft minute note, which was in evidence, was identical except the reference to the Board's apparent agreement as to the return or destruction of the Rākai list was omitted as having been incorrectly included in the first place.

*Events subsequent to Board's decision*

[33] Between April and July 2014 significant decisions and actions were taken. Ministers advised the Board the Government did not intend to renew the Master Agreement.<sup>3</sup> The Ministers were concerned that this agreement between the Ministry of Education and the Trust under which \$2.56 million per year was provided to the Trust was not achieving the required support for kōhanga reo. A new form of contract would be agreed. The Ministers did not wish to see participation in early learning and te reo continue to decline and would give that assurance to all kōhanga reo. The bottom line was that, once again, there were real issues of Government confidence in regard to the Trust's governance arrangements.

[34] In June 2014 the SFO completed its investigation into allegations of misuse of funds held by TPO. The investigation disclosed no criminal offending and the SFO announced it would not be taking further action.

[35] Although the SFO investigation disclosed no criminal activity an investigation by the Department of Internal Affairs found gross mismanagement in relation to credit card use, governance and financial management, directors' fees, koha and financial assistance loans. The Department was also concerned certain activities conducted by TPO did not appear to advance an exclusively charitable purpose. It issued a warning notice to TPO.

[36] At a special meeting of the Trust Board on 27 August 2014 the Board resolved by a majority:

- 1 That Mr Toni Waho has brought the Te Kōhanga Reo National Trust into disrepute
- 2 The grounds on which Toni Waho has brought the Trust into disrepute are:
  - a Failing or refusing to acknowledge and respect confidentiality in his dealings with the Trust Board

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<sup>3</sup> The Master Agreement, pursuant to which the Trust provided services for the Ministry of Education in relation to the administration of kōhanga reo is discussed below at [50]–[53].

- b Making serious allegations to the Minister of Education, now shown to be unfounded by the outcome of the Serious Fraud Office Investigation

*Mr Waho files proceedings*

[37] The resolution prompted Mr Waho to file proceedings in the High Court. In his statement of claim filed on 28 August 2014 Mr Waho sought orders under the Trustee Act 1956 either removing and replacing Mrs Olsen-Rātana as a trustee or removing and replacing all trustees. Mr Waho also applied for an interim injunction restraining the Board from removing him as a trustee without the leave of the Court and requiring the Board to inform him of all Board meetings and to allow his participation as a Board member. MacKenzie J dismissed Mr Waho’s application for an interim injunction.<sup>4</sup> Mr Waho appealed. The Court of Appeal dismissed Mr Waho’s appeal.<sup>5</sup> The balance of convenience did not favour an injunction. The majority, however, could not be confident Mr Waho did not have a seriously arguable case that he was wrongfully removed. They expected Mr Waho’s substantive claim for reinstatement to be expedited to trial.<sup>6</sup>

*Discontinuance against first defendant*

[38] On 10 March 2017, the third day of trial, Mr Waho was asked during cross-examination to confirm his understanding that, as at the end of 2017, none of the existing trustees would be on the Board. They were to be replaced. This was news to Mr Waho. This development affected the formulation of Mr Waho’s claim and the relief sought. On 11 March following legal argument occupying half a day, I granted leave to Mr Waho to amend his statement of claim and to discontinue against Mrs Olsen-Rātana who was, up to that point, the named “first defendant”.<sup>7</sup>

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<sup>4</sup> *Waho v Olsen-Rātana* [2014] NZHC 2729, (2014) 3 NZTR 24-020.

<sup>5</sup> *Waho v Olsen-Rātana* [2014] NZCA 612, (2014) 3 NZTR 24-022.

<sup>6</sup> At [42] and [51].

<sup>7</sup> It is not necessary in this judgment to engage with questions about the adequacy of discovery. I simply record that in the course of their respective legal arguments counsel address the formulation of the relief which Mr Waho sought in the early iterations of his claim and whether the imminent replacement of their current Board members was relevant and disclosable in light of the relief sought at that time.

### **Threshold approach to issue of ‘lawfulness’**

[39] The starting point is the trust deed. While there was some dispute about the validity of various iterations of the trust deed, the clause providing for removal of a trustee from office remained constant throughout the various versions. Removal from office must be in accordance with cl 6.3 which provides:

- 6.3 A Trustee may be removed from office by a 75% majority vote of the Trustees present voting at a meeting duly constituted for the purpose of considering the fitness or suitability of the Trustee in question. A meeting to consider the fitness or suitability of Trustee to continue as Trustee may be called by simple majority of the Board if:
  - 6.3.1 The Trustee has been absent without consent of the Board for three (3) consecutive meeting of the Board; or
  - 6.3.2 The Trustee has brought the Trust into disrepute.

[40] The broad question raised by Mr Waho’s application for a declaration is whether he was lawfully removed. A decision to remove a trustee is a matter for the Board’s judgment.<sup>8</sup> And, as counsel agreed, the basis upon which the Court may intervene in such a discretionary decision is limited. The principles upon which the Court may review a trustee’s decision are those which Fisher J set out in *Wrightson Ltd v Fletcher Challenge Nominees Ltd*.<sup>9</sup> The Court is not a court of appeal from the trustee’s decision. It does not consider the issue for itself and substitute its own decision for that reached by the trustee.<sup>10</sup> The Court will set aside the trustee’s decision only in limited circumstances, for example, where a trustee has acted in bad faith, failed to consider the correct question when exercising the discretion, considered irrelevant matters or reached a decision that is perverse.<sup>11</sup>

[41] But in the context of Mr Waho’s claim a threshold issue arises. Before considering whether Mr Waho should be removed, the Board was required to have before it a proper factual basis for its assertion Mr Waho had brought the Trust into disrepute. When McKenzie J declined Mr Waho’s interim injunction application he held that the question whether a trustee has brought the Trust into disrepute is an

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<sup>8</sup> *Waho v Olsen-Rātana*, above n 5, at [36].

<sup>9</sup> *Wrightson Ltd v Fletcher Challenge Nominees Ltd* (1998) 1 NZSC 40,388 (HC).

<sup>10</sup> At 41.

<sup>11</sup> At 41–42.

exercise of judgment by the trustees and therefore only reviewable on the limited *Wrightson* grounds.<sup>12</sup> The Court of Appeal held the Judge was in error. While a decision to remove a trustee is for the Board's judgment the question whether a trustee has brought a trust into disrepute is not purely a matter of discretion, or judgment. The assertion that a trustee has brought a trust into disrepute must be objectively verifiable. In the Court of Appeal's opinion the wording of cl 6.3.2 of the trust deed supports the view:<sup>13</sup>

...that the trustees must satisfy themselves that there is an objectively supportable factual foundation for asserting that a trustee has brought the Trust into disrepute before determining that question in exercise of their collective judgment. If that threshold is satisfied, then ... it is also a question for the Board's judgment or evaluation whether the trustee should be removed on the ground that he or she is unfit or unsuitable to hold office. It is a two stage process.

[42] Counsel disputed the interpretation and application of this test. I do not rehearse the competing contentions. Consistent with the Court of Appeal's two-stage process my task is to inquire into the existence of facts constituting the foundation for the Board's assertion that Mr Waho's actions brought the Trust into disrepute. Mr Waho cannot succeed in his claim if he is unable to establish the Board lacked an objectively supportable factual foundation for asserting he brought the Trust into disrepute. Accordingly, I propose to consider whether an objectively supportable factual foundation existed at the relevant time for the Board's assertion that Mr Waho brought the Trust into disrepute by —

- a Failing or refusing to acknowledge and respect confidentiality in his dealings with the Trust Board.
- b Making serious allegations to the Minister of Education, now shown to be unfounded by the outcome of the Serious Fraud Office Investigation.

[43] I turn to examine the factual unpinning for each of these two limbs.

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<sup>12</sup> *Waho v Olsen-Rātana*, above n 4, at [17].

<sup>13</sup> *Waho v Olsen-Rātana*, above n 5, at [36].

### **First limb: failure to respect confidentiality?**

[44] In his letter to the Board dated 10 March 2014, Mr Waho set out his reasons for declining to sign a confidentiality agreement. To the extent the agreement sought confirmation from the trustees they had not been the source of leaks to the media Mr Waho confirmed he was not the source of any leaks. In Court he confirmed his position under oath.

[45] As set out earlier in this judgment<sup>14</sup> the legal advice Mr Waho obtained suggested the possibility of criminal activity. Mr Waho pointed out in his letter of 10 March 2014 that obtaining the advice necessitated divulging matters to a third party. Mr Waho explained the obligation he felt to divulge matters to appropriate authorities but he had “not yet done so unilaterally”. Mr Waho did not believe these matters attracted confidentiality. He considered the Board had to inform relevant Ministers, the Police and the Serious Fraud Office “about the actions and allegations of Mrs and Mr Tāwhiwhirangi”.

[46] Mr Waho concluded his letter with the observation the Trust had little choice about how to act. The proposals that had recently found favour around the Board table and which had led to an attempt to remove and replace Mrs Barrett as a director would amount to serious breaches of trust and, possibly, criminal acts.

[47] Yet it was not Mr Waho’s refusal to sign the confidentiality agreement that gave rise to the confidentiality limb of the disrepute assertion. Dr Kāretu’s evidence was that the asserted breach of confidentiality arose from Mr Waho writing to Ministers without the approval of the Board. Dr Kāretu said this should only have been done with the Board’s approval and knowledge. That said, Dr Kāretu accepted under cross-examination that all of the trustees were under a duty to inform the Ministers of the matters in Mr Waho’s letter. Dr Kāretu’s point was that trustees should have acted together, as a Board, rather than in any individual capacity.

[48] There is no doubt, in my view, the trustees were obliged individually, and collectively, to bring the fact of the Rākai allegations to the attention of Ministers. The

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<sup>14</sup> Above at [21].



Ministers needed, and expected, to have this information. In fact the Ministers jointly, and publicly, criticised the Board's failure in this regard.<sup>15</sup>

[49] The individual and collective obligation on the trustees to inform Ministers of the very matters which the Board insisted were confidential, can be sourced to the Master Agreement between the Ministry of Education and the Trust, the trust deed, and the fiduciary duties of trustees more generally.

#### *Master Agreement*

[50] The Te Kōhanga Reo National Trust Master Agreement was signed on 12 September 2013 and was operative to June 2014. Thus, the Agreement covered the period from the time the Board learned of the Rākai allegations until Mr Waho communicated with Ministers on 17 March 2014. Pursuant to the Agreement, the Trust provides services for the Ministry in relation to the administration of, and support to, kōhanga reo. Mr Russell described the Master Agreement as one of the defendant's key sources of funding. Under the Agreement the Trust receives approximately \$2.56 million per annum from the Ministry.

[51] Importantly, the Master Agreement contained a form of "no surprises" clause. Clause 11.3 provides:

- 11.3 Where high profile issues arise in relation to any aspect of this Agreement then:
  - 11.3.1 Either party will immediately advise the other if it becomes aware of any issue about the operation or management of this Agreement, which has or may have media, political and/or public interest;
  - 11.3.2 Neither party will make or issue to the media or any member of the public any oral or written statement or comment on the operation or management of this Agreement, without prior consultation with the other party; and
  - 11.3.3 Each party will promptly advise the other if it is required by law to provide information in relation to any aspect of this Agreement.

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<sup>15</sup> Refer [70] below.

[52] Clause 11.4 provides that the obligations set out in cl 11.3 continue despite the termination or expiry of the agreement.

[53] Dr Kāretu accepted in cross-examination the Rākai list was a matter that fell within cl 11.3.1. He agreed the relevant obligation on the Board was to immediately inform the Minister of Education. Dr Kāretu was unaware of any disclosure to the Ministers in November 2013 when the Rākai list emerged. Nor, of course, was there any disclosure in December 2013, or in January or February 2014. Dr Kāretu did not dispute that the first occasion on which Ministers were advised of the issues raised by the Rākai allegations was through Mr Waho's communication with them on 18 March 2014.

#### *Trust deed*

[54] Under the trust deed an express purpose of the Trust is to liaise with the Crown and government departments and other relevant bodies for the purpose of promoting the kaupapa of Te Kōhanga Reo and its administration.

[55] Mr Geiringer correctly submitted that liaising with the Crown for the purpose of promoting the kaupapa of Te Kōhanga Reo and its administration necessarily requires a level of openness as was, for example, expected under the Master Agreement.

[56] Dr Kāretu also accepted there was a clear contractual duty on trustees to inform the Ministers of the matters set out in Mr Waho's letter as well as a moral duty. The moral duty was said to arise because Ministers were about to make an announcement as to whether or not the Trust had been misusing public funds.

[57] Mr Waho was correct in his understanding of the duty on him, and his fellow trustees, to inform Ministers of the Rākai allegations. It is not necessary, as the defendant asserts, that Mr Waho should have pleaded the Master Agreement as the source of his obligation. The fact is, Mr Waho acted consistently with the contractual obligations on the Board and the obligations on trustees under the trust deed.

### *Trustees' duties*

[58] Stemming from the role of the trustee as appointed guardian of trust property, a trustee has a duty to act in the best interests of the beneficiaries.<sup>16</sup>

[59] The principle is reflected in cl 4.3 of the trust deed which provides:

Other than expressly provided for in this Deed, at all times the Board shall act to ensure the protection of the Trust funds.

[60] The trustees were under a duty to prevent damage to the Trust from the unlawful acts of third persons.<sup>17</sup> While that duty did not require trustees to keep the relevant Ministers informed of matters bearing on the operation of the Trust and the Master Agreement between the Trust and the Crown, the fact trustees shied away from keeping Ministers abreast of matters bearing on the questionable use of Trust funds may be seen, at best, as a dubious discharge of the trustees' fiduciary obligations to the Trust.

### *Assessment*

[61] For the further following reasons I have reached the view the Board had no objectively supportable factual foundation for asserting Mr Waho brought the Trust into disrepute by "failing or refusing to acknowledge and respect confidentiality in his dealings with the Board". Trustees were under a duty to inform Ministers of the Rākai allegations. The Rākai allegations implicated not only TPO but Board members. The Board took the view the allegations were part of a confidential agreement dispute. But the allegations were plainly relevant to the Board as well as TPO. The Rākai allegations raised issues of clear public interest and would be of manifest interest to Ministers. Mr Waho was correct in apprehending a duty of disclosure to the Ministers. Mr Waho cannot have acted in conformity with his contractual and fiduciary obligations, yet by the same conduct brought the Trust into disrepute by failing to respect confidentiality.

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<sup>16</sup> Andrew Butler "Trustees and Beneficiaries" in *Equity and Trusts* (2nd ed, Thompson Reuters, Wellington, 2009) at [5.3.1(4)].

<sup>17</sup> Charles E Rounds *Loring and Rounds: A Trustee's Handbook* (Wolters Kluwer Legal & Regulatory, United States) at 569.

[62] The defendant says it was not the mere fact of Mr Waho’s communication to Ministers that breached confidentiality. It was the manner of his communication. The conduct underpinning the Board’s resolution<sup>18</sup> was Mr Waho’s decision to act alone. As Dr Kāretu put it, the bone of contention for the Board, and the reason for the Board’s action, was that Mr Waho wrote to Ministers “off his own bat, not as part of the Board”.

[63] In cross-examination it was suggested to Mr Waho that he had engaged in “sneaky little behind-the-scenes emails” and that going to the Ministers was part of a conspiracy Mr Waho and Mrs Barrett had been plotting.

[64] The imputation was unwarranted particularly in light of the evidence of Mr Waho’s candour about his intentions at the time. Mr Waho’s intentions were unambiguous. Having confirmed his availability for the meeting on 18 March Mr Waho also advised Mrs Olsen-Rātana, who was arranging the meeting, that he would not commit to withholding from Ministers the matters traversed in his letter of 10 March 2014 to the Board. In his email to Mrs Olsen-Rātana, copied to trustees, Mr Waho stated:

The [Ernst Young] report is not consistent with what we know about what has been happening with TPO and the Board. Discussing that report with ministers forthrightly will require disclosure of those issues.  
I am committed to seeking a resolution of all issues in a manner consistent with tikanga. That is why I agreed to participate in the hui. However, if the hui is not to take place until after the meeting with ministers then *I cannot commit to keeping matters hidden from the ministers that are relevant to that meeting.*  
(Emphasis added)

[65] In reply Mrs Olsen-Rātana said: “I am having real difficulty understanding your issue?” She asked Mr Waho to clarify what he meant by “things hidden” and to advise if he was conflicted. Mr Waho replied around midday on 17 March:

I do not know what you mean by “conflicted”. I am able to meet Ministers tomorrow and am committed to [doing] so.

My letter of 10 March 2014 and emails since state my position.

I remain committed to attending our hui on 23 March next.

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<sup>18</sup> Set out above at [47].

[66] Later that night Mr Waho emailed the Ministers. Mr Waho told Ministers he was alerting them to matters relating to the use of funds by the Board and TPO. Mr Waho directed their attention to the brief history of events and his concerns as set out in his letter of 10 March, attached to his email. Mr Waho acknowledged the purpose of the meeting scheduled for 18 March 2014 was to discuss the Ernst Young report but he did “not believe it would be honest to discuss the report with [the Ministers] and not reveal these other matters”. Mr Waho added:

I have been unable to convince my fellow trustees to address these concerns collectively. The meeting arranged to discuss those issues was cancelled by Tina [Rātana]. I therefore feel compelled to raise these matters with you directly.

[67] On the morning of 18 March a staff member from Dr Sharples’ office contacted Mr Waho to ascertain whether he intended to raise at the meeting the matters set out in his letter. Mr Waho advised he was content to leave it to Ministers to raise if they wished to do so. The meeting went ahead. But because Mr Waho did not propose to raise the issues at the meeting, staff did not direct Ministers’ attention to Mr Waho’s letter, and the meeting proceeded with Ministers in ignorance of its content. For his part, Mr Waho was unaware Ministers had not read his letter and were not otherwise briefed.

[68] No sinister connotation can be placed on Mr Waho’s reticence at the meeting. Mr Waho alerted Ministers to his concerns. He advised Dr Sharples’ office he would leave it to Ministers to initiate any discussion. There is no evidence of bad faith and bad faith cannot be imputed to Mr Waho’s decision to not lead a discussion of these particular issues during a meeting called by the Ministers for their ministerial purpose.

[69] The Board ought to have foreseen that the Ministers would have regarded positively a prompt communication to them of issues bearing on the governance and management of TPO. Dr Sharples’ evidence was that any allegations of financial impropriety were directly relevant to what was being discussed at the meeting on 18 March 2014. Had the information been properly drawn to his attention before the media statement, the statement would not have been issued in the form it took.

[70] On 19 March 2014 the Ministers were obliged to issue a further joint statement qualifying the announcement they made only 24 hours earlier that Ernst Young found no misuse of public monies with regard to the Trust's purchases of services from TPO:

However, there are still concerns about Te Pātaka Ōhanga, including new allegations brought to the attention of Ministers. Despite assurances given by the Trust Board that it would respond to all concerns, it has not done so.

'The Board has had many opportunities to restore public confidence in its governance and management of Te Pātaka Ōhanga, and it has failed to do so,' says Ms Parata.

[71] Mr Waho's letter was of extreme concern to the Ministers. It was of particular concern that the Board had not itself raised the issues. Dr Sharples said he and the Minister of Education were grateful to Mr Waho for raising the issues with them but they believed it was something that should have been done much earlier when the Board became aware of the allegations, not many months later.

[72] The defendant attempted to lay blame at Mr Waho's feet, for keeping Ministers in the dark. As Mr Waho was the only person at the meeting who knew he had sent his letter he was the only person who could have said something about it but he failed to do so. Therefore, it was suggested, Mr Waho was responsible for denying Ministers the opportunity to defer making a media statement pending their further inquiries.

[73] I regard as misplaced the defendant's focus on Mr Waho's failure at the meeting to direct the attention of Ministers to his letter of 10 March. The defendant's focus overlooks the only material point which is that the Board was cognisant of issues that, at the very least, the Board should have brought to the Ministers' attention. In that light, the fact the Board was unaware of Mr Waho's individual (and unsuccessful) attempt to inform Ministers is beside the point.

[74] Dr Sharples' evidence was that he did not believe Mr Waho had brought the Trust into disrepute. Dr Sharples viewed Mr Waho's actions as upholding the integrity of the kaupapa. Dr Sharples elaborated:

If anything, the fact that we knew we could rely on Mr Waho to act in a proper manner and raise these concerns with us was reassuring. It suggested that there was someone on the Board in whom we could have confidence to act

with integrity. As we said in our letter, we viewed Mr Waho's actions as a requirement of his trusteeship.

[75] Dr Sharples and the Minister of Education had been concerned about the Board's actions long before Mr Waho's letter. Correspondence from the Ministers to the Board expressing disquiet and concern predated the events leading to this litigation. It is not necessary to go into those matters. Dr Sharples made the point that the Ministerial requirement for reform was a result of issues and concerns prior to Mr Waho's letter. Mr Waho's letter was not causative of the requirement for reform.

[76] In light of the hui arranged for 23 March 2014 objection was taken to Mr Waho's representation to Ministers that the meeting arranged to discuss the issues had been cancelled. The objection, again, misses the point. Mr Waho approached Ministers because he insisted they be fully informed. The fact a hui was to be held after the meeting with Ministers did not meet the requirement to properly inform Ministers before the meeting or, at the latest, at the meeting.

[77] Nor did Mr Waho "go behind the Board's back". He was candid, possibly confrontationally so, when he advised trustees he could not commit to keeping hidden from the Ministers matters that were relevant to their meeting. The Board was on notice of Mr Waho's likely intentions. In fact, Mr Waho's silence on the topic at the meeting (for the reasons I have outlined<sup>19</sup>) presented the Board with the opportunity to raise the issues itself. It did not.

[78] Against the backdrop of the clear duty on the Board to inform Ministers of the Rākai allegations, and that Mr Waho ultimately did so, there was no objectively supportable factual foundation for the assertion Mr Waho brought the Trust into disrepute by taking the very step which trustees collectively and individually were bound to take.

**Second limb: making serious unfounded allegations to Minister of Education?**

[79] I inquire now into the existence of an objectively supportable factual foundation for the assertion Mr Waho brought the Trust into disrepute by making

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<sup>19</sup> Above at [67]–[68].

serious allegations to the Minister of Education, shown by the SFO investigation to be unfounded.

[80] When he emailed Ministers on the evening of 17 March 2014 Mr Waho attempted to bring to their attention his concerns, as set out in his letter to the Board of 10 March 2014, arising from the existence of the Rākai allegations. Mr Waho did not pass on, or repeat, the Rākai allegations. Indeed, in cross-examination, Dr Sharples confirmed he did not know the substance of the Rākai allegations at the time and he was still unaware of their substance when he gave evidence. It is established that Mr Waho did not pass on the Rākai allegations to Ministers.

[81] In closing, this limb of the defendant's case rested on the assertion Mr Waho acted without the knowledge or consent of the Board, and that he accused the Board of being aware of allegations of serious wrongdoing by Rākai Tāwhiwhirangi while actively concealing them and refusing to investigate them.

[82] That description of Mr Waho's conduct is inaccurate. Mr Waho made three substantive points in his email to Ministers on 17 March.

- (a) He wished to alert them to "certain matters" relating to the use of funds by the Board and TPO as he did not believe it would be honest to discuss the Ernst Young report and not reveal these other matters.
- (b) He directed Ministers' attention to his attached letter to the Board dated 10 March 2014 which set out his concerns.
- (c) He had been unable to convince his fellow trustees to address his concerns collectively.

[83] Mr Waho's email accurately stated the position. He had raised his concerns at the meeting on 20 December. The minutes record Mr Waho's objection to the way things were being done. Yet the topic of the Rākai allegations was not included on the agenda for a Board meeting on 11 February. Mrs Olsen-Rātana explained that Board members had the opportunity to add items to the agenda and Mr Waho did not do so.



It is necessary at this point to digress in order to deal with Mr Waho's leave of absence which he took in February 2014.

[84] In late January 2014 Mr Waho arranged a leave of absence from meetings of the Board to commit to teaching duties at his school during a teacher shortage. Under the trust deed the Board could approve a trustee's leave of absence. Missing three meetings without approval could constitute grounds for removal.

[85] In cross-examination Mr Waho was pressed about his leave of absence and whether he legitimately could have expected to be kept informed of the Board's business during this time. The implication seemed to be that Mr Waho did not evince much interest in the Rākai allegations during his period of absence and this contrasted with his claims the trustees should have been more active in addressing the allegations.

[86] The evidence satisfies me Mr Waho did indeed expect to be kept closely apprised and involved where practicable and there was agreement to do so. In particular, Mrs Olsen-Rātana emailed Mr Waho on 23 January confirming she understood Mr Waho would not be in a position to physically attend meetings until the end of April and he would try to provide his input in other ways. Mrs Olsen-Rātana wrote: "... there will be a lot of emails and teleconferences to ensure your input".

[87] As it happened Mr Waho was not even provided with the minutes of the meeting of 20 December until March 2014 when he asked for a copy. On receipt of the minutes Mr Waho realised they had been approved at a meeting in February 2014. Mr Waho had been give no formal notice of the February meeting. He had heard of the meeting informally through his friend and fellow trustee, Mrs Barrett. Mr Waho actually returned to duties in February 2014, earlier than the leave of absence approved through to April.

[88] Returning to Mrs Olsen-Rātana's evidence that she did not send Mr Waho the Board papers because he had applied for leave I regard the omission as unfortunate, to say the least. Mr Waho was expecting papers. His expectation was recognised in Mrs Olsen-Rātana's email on 23 January 2014, reassuring Mr Waho of opportunities for his input. Dr Kāretu accepted in cross-examination Mr Waho had an expectation

he was still to participate in Board business. I have little doubt the failure to keep Mr Waho informed of Board business at this critical time fuelled Mr Waho's misgivings about the Board's approach to the Rākai allegations.

[89] I turn to Mr Waho's assertion to Ministers that he had been unable to convince his fellow trustees to address his concerns collectively. The meeting scheduled for 13 March 2014 was cancelled on 12 March.<sup>20</sup> Mr Waho was critical of the late cancellation and sceptical about the reasons for doing so. Mr Waho's scepticism about the reasons for the cancellation has a foundation in contemporaneous evidence. On receipt of Mrs Olsen-Rātana's notice that "the Board has decided to cancel the meeting" Mr Waho immediately replied:

That cannot be correct. I am on the Board. I was not even told that a postponement of the meeting had been proposed. The letter from [Mrs Barrett's] lawyers notes that there have been other purported decisions of the Board that were not made by the Board. In my letter, I noted that we had collective and individual duties. I made it clear that if the Board did not fulfil these duties collectively then I regarded myself as obliged to take action individually. Tina assured me on 23 December 2013 that action would be taken. Almost three months has passed and nothing has happened. You have now cancelled our meeting without a genuine reason. In the circumstances, I believe that I may now have no choice but to take the action outlined in my letter. I will be discussing this with my legal advisers.

[90] As far as Dr Kāretu was concerned, if Mr Waho was worried about the Rākai allegations not being dealt with in a way that was satisfactory to him he should have resigned as a trustee. By advising Ministers the Board had failed to address his concerns when he knew that was not true (because a meeting was scheduled to address them) and by making his extremely serious allegations to the Ministers without any knowledge or discussion of whether they were true, Mr Waho refused the Board its chance of making that assessment for itself before writing to Ministers. Those actions are said to have caused significant damage to the Board.

[91] This element of Dr Kāretu's evidence demonstrates a real clash in perspectives. The Board's position is that Mr Waho caused damage to the Trust. Ministers, on the other hand, took a different view. They were:<sup>21</sup>

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<sup>20</sup> Refer above at [23].

<sup>21</sup> Letter dated 19 March 2014 to the Board signed by the Minister of Education and Associate Minister of Education.

... disappointed with the Board's inability to respond with the necessary urgency to the public interest in allegations of inappropriate spending in Te Pātaka Ōhanga.

[92] The Board had known about the allegations since December 2013. In my view it was fanciful for the Board to contend that, in taking action a number of months later, Mr Waho pre-empted the Board's ability to assess the truth or otherwise of the Rākai allegations.

[93] There is a further aspect of this ground for removal that needs to be addressed. The Board asserted the Trust was brought into disrepute by Mr Waho's "serious allegations to the Minister of Education now shown to be unfounded by the outcome of the [SFO] investigation".<sup>22</sup>

[94] The SFO wrote to TPO on 10 June 2014 to advise the outcome of its completed investigation. On the defendant's application I made an order suppressing publication of details of the SFO letter. I am able to record, nevertheless, that the Rākai allegations were not referred to the SFO for investigation. Further, while its limited investigation revealed no criminal offending the SFO concluded other issues appeared to be attributable to failures in corporate governance.

[95] The point of this recitation is twofold. First, the defendant's case rested on so-called serious allegations by Mr Waho to Ministers that the Board had taken no collective action in response to the Rākai allegations. I have found that the evidence establishes Mr Waho was correct in making that claim. As at 17 March 2014, the date of Mr Waho's email to Ministers, the Board had taken no collective action in response to the Rākai allegations. The second point is that the SFO did not (of course) investigate Mr Waho's assertion that the Board had failed to act. The Board was simply wrong, therefore, to resolve that Mr Waho's "serious allegations" were shown to be unfounded by the SFO investigation.

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<sup>22</sup> The resolution is set out above at [36].

### *Assessment*

[96] There is an evidential and analytical overlap with the first limb. In common, also with the first limb, there is a lack of an objectively supportable factual foundation for asserting Mr Waho brought the Trust into disrepute by making serious allegations to the Minister that were later found to be without foundation. Mr Waho's statement to Ministers on 17 March 2014 was perfectly correct. Four months had elapsed since the Rākai allegations emerged and three months had elapsed since the heated 20 December meeting. Mr Waho had been unable to get traction from his fellow trustees. Mr Waho's email to Ministers reflected the very tenor of his email to Mrs Olsen-Rātana on 13 March.<sup>23</sup> The Board had not formally taken any position with regard to the Rākai allegations much less discussed them. Months had passed. And the meeting scheduled to discuss Mr Waho's concerns was purportedly cancelled by the Board yet without reference to Mr Waho, a Board member.

### **Legal consequence of factual findings**

[97] The decision to remove Mr Waho as a trustee was made on 24 November 2014. The decision was based on the resolution of the Board on 27 August 2014. That resolution was in identical terms to the resolution passed on 31 March 2014. As I have found, there was no objectively supportable factual foundation for either of the two limbs the Board relies on for asserting Mr Waho brought the Trust into disrepute. Consequently, the threshold precondition for considering whether Mr Waho should be removed was not met. There was no objectively supportable evidence capable of justifying the Board's exercise of discretion to remove Mr Waho. It follows that the Board's decision to remove Mr Waho from office was unlawful.

[98] The plaintiff adduced evidence to support his argument the Trust had not been brought into disrepute. I have not found it necessary to engage with that evidence, for either party. Mr Geiringer does have a point however. On any view of the matter the Trust itself was not brought into disrepute. Arguably it was the Board and trustees who were brought into disrepute. The Board and the Trust have different reputations, not strictly anchored to one another.

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<sup>23</sup> Set out above, at [89].

## **Honorarium**

[99] By his statement of claim Mr Waho seeks an order for payment of the remuneration he would have received but for his unlawful removal. Counsel for the defendant submitted that, as a charitable trust receiving limited funding, the defendant should not be required to expend those funds on a former trustee who has:

- i. Alleged serious mismanagement of the Trust's and TPO's finances and the possibility of what he believed to be inappropriate payments being made to a former staff member of TPO, and now considers that notwithstanding those concerns it would be appropriate for a payment to be made to him; and
- ii. Performed no work for the Trust since his removal in November 2014.

[100] Mr Waho did not allege serious mismanagement of the Trust's or TPO's finances and I have concluded he was removed on an unlawful basis. Mr Waho's unchallenged evidence is that he was advised that for so long as he was a trustee he would be paid an annual stipend of \$29,850 per annum. The defendant's contention that Mr Waho has performed no work for the Trust since November 2014 does not, in my view, defeat his claim. But for Mr Waho's unlawful removal he would have continued to contribute to the work of the Trust and would have received the honorarium which the Trust expected to continue to pay until the end of his tenure.

[101] Mr Waho emerged from the debacle as a person of integrity and honour and in whom Ministers were confident. He had performed the important and time-consuming role of a trustee for eight years. For so long as he continued in that capacity he would have received the honorarium. There was evidence, unchallenged, of the financial hardship Mr Waho has suffered in consequence of the unexpected termination of his honorarium and the consequential impact on his health and personal life.

[102] Mr Waho's claim is only for the sum he would have received between the date of his removal until the determination of his claim. Mr Waho has been wrongly accused. He acted to prevent an apprehended breach of trust and his actions were taken in the interests of its beneficiaries. I have no doubt he should be paid the honorarium which he has been denied as a result of the actions he took in pursuance of his fiduciary duties.

## **Outcome**

[103] The evidence has satisfied me that Mr Waho acted not only with a sense of personal integrity but in conformity with the contractual and fiduciary obligation on each member of the Board to disclose to the relevant Ministers allegations of serious wrongdoing by TPO and trust Board members, and to take timely steps to address the allegations. There was no objectively supportable factual foundation for the Board's assertion Mr Waho had brought the Trust into disrepute.

[104] Mr Waho has succeeded in establishing he was unlawfully removed from office and I make a declaration to that effect.

[105] Mr Waho is entitled to payment by the defendant of the honorarium he would have received but for his unlawful removal, for the period 24 November 2014, the date of his removal, to the date of this judgment.

[106] Mr Waho is entitled to costs. If the parties are unable to agree costs counsel may submit focussed memoranda not exceeding 10 pages.

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Karen Clark J

Solicitors:  
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Chen Palmer, Wellington for Defendant