



Tikanga in the Employment Context

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The Employment Court has recently released a significant decision relating to Tikanga Māori and its relevance to an employer's obligations in employment relationships: *GF v Comptroller of the New Zealand Customs Service*.

GF was employed by the New Zealand Customs Service ("Customs") as an Assistant Customs Officer Maritime Border ("ACOM") in October 2020.

Shortly thereafter, the government introduced a vaccination programme which was rolled out to frontline workers. Customs decided that ACOMs would be captured in the initial rollout and had to be vaccinated if they were to continue in their role.

GF did not wish to be vaccinated and did not consider their work required them to be vaccinated. GF and four other workers who refused to be vaccinated were invited to a meeting. On the day of this meeting, the COVID-19 Public Health Response (Vaccinations) Order 2021 ("Vaccination Order") was passed into law and would come into force the following day.

At the end of this meeting GF was given notice that their employment was terminated on the grounds that vaccination was required for the ACOM role. This conclusion was based on a health and safety risk assessment carried out by Customs, and Customs' view that GF was an affected person under the Vaccination Order.

GF raised a personal grievance and pursued this in the Employment Relations Authority ("Authority"). GF was unsuccessful in the Authority, so challenged the Authority's determination in the Employment Court ("Court"). The issues before the Court were

that the dismissal was unjustified for several reasons, and notably that Customs "*failed to comply with tikanga/tikanga values it had voluntarily imported into its employment relationships with staff.*"

The Court noted that the employment relationship obligations are informed by a number of things:

- Obligations imposed by statute; and
- Obligations recognised by common law e.g. implied term of trust and confidence etc.; and
- Additional obligations incorporated and agreed by the parties e.g. through employment agreements, policies etc.

These obligations provide the "outer boundaries" for what a fair and reasonable employer can do in any circumstances. The Court also noted that the nature and extent of an employer's obligations may differ depending on context. They may also change over time, reflecting changes in social norms and values.

For the purposes of this article, we will focus on the Court's comments regarding Customs' failure to comply with tikanga/tikanga values.

The Court quoted a recent Supreme Court Case, *Ellis v R* [2022] NZSC 114, which noted:

"The Court is unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand in cases where it is relevant. It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is incorporated in the policies and processes of public bodies."

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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Tikanga/tikanga values were relevant in this case particularly because Customs had specifically incorporated them into its employment relationships. Further, the Judge considered it seriously arguable that the Public Service Act 2020 reinforced the relevance of tikanga/tikanga values in this case, particularly relating to the requirements of section 73 for a public service organisation:

1. to be a “good employer”; and
2. to operate an employment policy that includes recognition for the aims and aspirations of Māori.

These obligations then become relevant as to whether an employer has met both the fair and reasonable employer test and its obligations of good faith.

We note that in this case, GF was not Māori and had not asked for Customs to apply tikanga/tikanga values during the process, or even for the Court to consider its’ application in the employment relationship. However, the Court also noted that when the Public Service Act 2020 was introduced, “*Te Ao Māori was ... intended to be baked into public service operations, and not something which was only engaged with when interacting with Māori.*”

The Chief Justice summarised the Court’s main views on tikanga/tikanga values at paragraph [35]:

- *Where an employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant to assessing the fairness and reasonableness of an employer’s actions (namely an assessment of whether the s 103A target has been hit).*
- *Also relevant to the size of the s 103A target in cases involving public service employers are the heightened good employer obligations contained in s 73 of the Public Service Act.*
- *Further, where an employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant to assessing compliance with the good faith obligations under s 4 of the Employment Relations Act (the s 4 target).*
- *It is seriously arguable that where a public service employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant*

to assessing compliance with its good employer obligations under s 73 of the Public Service Act.

- *There are considerations relating to tikanga as a freestanding law, and the way in which it sits with the common law obligations that apply to employment relationships in Aotearoa, which do not need to be explored in this judgment.*

GF called a pūkenga (Mr Mair) to give expert evidence on tikanga/tikanga values. Mr Mair explained that “*the maintenance of relationships is central to tikanga, which also encompasses mana enhancing (not diminishing) conduct.*” In a case like this one, this would involve face-to-face discussions with a view to reaching consensus, ensuring the right people were present during these discussions (including those professionally close to the affected employee), design and use of an individualised process, and “*ensuring minimal damage to the relationship, including post-employment if a continuing employment relationship was not possible.*”

The Court noted that Customs took a number of steps that damaged the relationship. Among other things, Customs did not “*explore the possibility of common ground in a no-fault situation*”, did not approach the matter with GF “*on a sufficiently individualised basis, and failed to engage with them in a way that was mana enhancing*”. The process was rushed, and Customs refused to pause the process when GF requested this to enable further discussion to take place. Further, Customs did not give GF adequate time to consider the Vaccination Order before deciding to terminate their employment.

The Court held that not only did Customs fail to meet its heightened good employer obligations, it also failed to meet the “*baseline s 103A target*” of acting as a fair and reasonable employer in the circumstances. It also breached its obligations of good faith and noted “*the decision to terminate was predetermined and fatally flawed.*” GF was awarded \$25,000 compensation and three months’ lost wages. The Court also made formal recommendations to Customs on steps it should take to improve and prevent similar employment relationship problems arising.

Whether your business or organisation specifically incorporates tikanga/tikanga values into its employment relationships or not, tikanga/tikanga values may be relevant to an assessment of whether you have met your employment obligations when dealing with employees. If you have any questions about this, please get in touch and we can advise you further.