

Insights / Employment

The evolving role of tikanga Māori in Employment Law



by: Amanda Douglas - Partner, and Sarah Hood, Solicitor



In recent years, we have seen an increasing exploration of the role of tikanga Māori across all areas of our legal system.

The growing role that tikanga plays in employment law, specifically, has also been explored by the Employment Court, in a number of key cases in 2023, including *GF v Comptroller of the New Zealand Customs Services*^[1] and *Pact Group v Robinson*.^[2] Those cases provide employers with some helpful guidance on the role that tikanga plays in employment processes.

GF v Comptroller of the New Zealand Customs Service

At issue, in *GF v Comptroller of the New Zealand Customs Service*, was whether an employee (**GF**) was unjustifiably dismissed and / or disadvantaged, when her employment was terminated for failing to get vaccinated against COVID-19.

In addition to whether Customs met its general employment obligations, the Employment Court considered the tikanga values that Customs had incorporated into its employment relations framework. Customs' Code of Conduct explicitly referenced "mana" as being an expected characteristic of the employment relationship. Similarly, Customs' Whanonga Pono (Guiding Principles), included tikanga values, which were explicitly referenced in GF's employment agreement.

As a result, the Court found that Customs had incorporated tikanga values into its employment relationships, meaning that they were relevant to all staff and not just its Māori employees. The Court further found that, where an employer incorporates tikanga into their employment relations framework, the extent to which these requirements are complied with, will be relevant to assessing whether the employer has acted fairly and reasonably, and / or in good faith.

The Court also concluded that Customs had heightened obligations to ensure that its employment process complied with tikanga, because of its obligations, as a government department, under the Public Service Act 2020.

Ultimately, the Court said that the way in which Customs dealt with GF was not mana-enhancing and that it had failed to comply with its tikanga obligations. It had as also failed in its general obligations to act as a fair and reasonable employer and in good faith. This included because Customs failed to engage with the GF in a sufficiently individualised manner and was pre-determined in its decision making.

Pact Group v Robinson

In *Pact Group v Robinson*, an employee (**R**) alleged that she had been unjustifiably dismissed after her employment was summarily terminated, at the end of a disciplinary process. The decision to terminate her employment was based on findings that she had falsified her timesheets and made fraudulent claims for payment.

Notably, during the disciplinary meeting, which occurred via Zoom, R:

- made it clear to her employer that she considered the lack of face-to-face communication (due to the meeting occurring via Zoom) to be inadequate and that it gave rise to cultural concerns;
- provided her employer with documentation which she believed would assist in understanding her cultural perspective;
- advised her employer that the way in which it had dealt with matters had left her feeling *stripped of her mana and culturally disadvantaged*. She also noted that the *mishandling of [her] mana had resulted in feelings of shame*; and
- noted her personal circumstances (in partial explanation of the allegations against her), including that, she was her mother's carer and that she was also personally suffering from a health condition.

The Employment Court carefully considered the points that R had raised, and how the employer had dealt with them, before concluding that R had been unjustifiably dismissed. The Court said that it was relevant that R is Māori and had raised concerns about the impact of the employment process on her mana. There was nothing to suggest that these cultural concerns were seriously considered or explored by the employer or factored into the way in which the employer responded. Rather, the Court said that "it is apparent that the process was hurried and conducted in a distanced, impersonal way that undermined, rather than maintained, [R]'s mana".

The Court further noted that the employer did not request further information about R's personal challenges and that, while there may be instances in which it is fair and reasonable to conduct a disciplinary meeting via Zoom, and to decline an in-person meeting request, this was not the case here.

Potential impacts of Coalition Agreements on Tikanga Māori in Employment

The new Government's Coalition Agreements sets out National, ACT and New Zealand First's commitment to progress a number of priority policies; these may have a significant impact on tikanga, if they eventuate. This, very broadly, includes an overhaul of any legislation containing the principles of Te Tiriti o Waitangi and clearly defining, in legislation, what those principles are.

What impact these measures are likely to have on employment law, should they be implemented, remains to be seen. However, if they are passed into legislation, they could, over time, filter down into the courts and influence the way in which tikanga is applied, including in the employment jurisdiction. So, watch this space.

What does this mean for Employers?

As it currently stands, and pending any potential law changes implemented under the new Government, the key things that employers need to keep in mind when it comes to tikanga Māori and employment processes are that:

- Employers have a responsibility to act in accordance with tikanga-based values that they incorporate into their employment relationships, including through workplace policies and employment agreements.
- Where the cultural needs of employees are identified, employers should turn their minds to what an appropriate process might require. What constitutes an appropriate process will likely need to be determined on a case by case basis.
- Tikanga regulates the behaviour of Māori and non-Mā This means that tikanga may play a role in employment processes involving non-Māori employees, as well as Māori employees.
- Employers need to ensure that they engage with staff in relation to any cultural needs that they may have. An employer is unlikely to have acted fairly or reasonably if rejects the validity of cultural concerns, without seeking to engage further with employees in relation to them.
- Employers who are captured by certain legislation, including the Public Service Act 2020, may have heightened obligations when it comes to tikanga and employment processes.

If you or your entity have any questions in relation to how tikanga Māori or any of your current workplace policies may affect any processes that you are undertaking, please contact our specialist team for further information or advice.

[1] *GF v Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101

[2] *Pact Group v Robinson* [2023] NZEmpC 173

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