Dispatch

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EC considers tikanga / tikanga values and "good employer" obligations

In a recent judgment the Employment Court considered the relevance of tikanga/tikanga values in the employment jurisdiction and the existence of heightened obligations on public service employers.[1]

The applicant, GF, was employed by Customs as an Assistant Customs Officer Maritime Border and was dismissed due to not being vaccinated against COVID-19. In determining whether this dismissal was justified in terms of the s 103A test (i.e. whether the employer's actions were what a fair and reasonable employer could have done in all the circumstances), the Chief Judge held that as Customs had incorporated tikanga/tikanga values into its employment relationships, those values were relevant to the s 103A test. To assist her in considering these matters, the Chief Judge granted leave to Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to be heard as an intervener in the case.

Vaccination dismissal

Once the COVID-19 vaccine arrived in New Zealand, Customs took proactive steps to encourage staff to get vaccinated, but initially communicated that vaccination was not compulsory. GF had decided not to get vaccinated and, having been advised that it was not compulsory, did not read subsequent communications issued by Customs relating to vaccination. GF gave evidence that they felt marginalized and disengaged due to Customs' communications strategy which lauded employees who chose to get vaccinated.

The Court held that Customs did not evidence a genuine desire to engage with GF, undertaking a tick-box exercise in relation to their employment, and failed to adequately or appropriately communicate with GF in a respectful, considered, individualized manner that respected their mana.

The Chief Judge stressed that it was up to Customs as a large organisation with significant resources at its disposal, and as a public service organisation with *"heightened good employer obligations, including via its undertaking to deal with staff in accordance with tikanga/tikanga values"*, to meet its obligations to GF. Although the Chief Judge acknowledged the context, the speed at which matters were unfolding, and the pressurized environment, she did not consider that these displaced the obligations owed to GF.

Overall, the approach taken by Customs to GF's employment was not *"sufficiently individualised"*, was unnecessarily rushed, and Customs failed to engage *"in a way that was mana enhancing"*. Consequently, the dismissal was unjustified.

Being a "good employer"

Of particular relevance in this case to public service employers, is the Chief Judge's reference to, and reliance on, public service organisations being subject to "heightened" good employer obligations. In particular, s 73 of the Public Service Act 2020 which requires public service chief executives to operate an employment policy that complies with the principle of being a "good employer".

The Chief Judge held that the heightened good employer obligations will be relevant to an assessment of whether a public service employer has complied with the good faith requirements under s 4 and the test of justification under s 103A. This decision appears, on its face, to hold public service employers to a higher standard than private sector employers. While it has always been true that large, well-resourced employers will be scrutinised to a greater degree for their actions than small, less well-resourced employers, this decision indicates that the courts will consider public service employers to have even more heightened obligations, and we can expect to see more reliance on this in future cases.

It is worth noting that the same, or materially similar, requirements appear in other legislation, including the Crown Entities Act 2014, the Local Government Act 2002, and the Education and Training Act 2020. The heightened obligations therefore are likely to apply beyond core public service organisations to crown entities, local authorities (i.e. regional, city and district councils), and the education service (including school boards).

Tikanga / tikanga values

Arguably the most interesting feature of this case was how the Court grappled with the issue of tikanga/tikanga values and their role in employment law. Although the Employment Relations Act does not expressly incorporate tikanga/tikanga values, the Chief Judge considered that the statutory framework for employment relationships does not preclude their incorporation. Rather, the values identified *"sit entirely comfortably with an area of law which is relationship-centric"* and based on mutual obligations of good faith.

Customs had voluntarily incorporated tikanga/tikanga values into its employment relationships with employees by referring to it in its organisational principles and the Chief Judge therefore needed to consider their relevance to the s 103A test. The Chief Judge was not persuaded by Customs' argument that its organisational principles were not themselves tikanga but instead were a guide, or broadly expressed aspirational principles, as opposed to obligations that Customs was required to meet. Rather, she agreed with the submission of counsel for GF that it is not for the employer to decide that the values it has chosen to incorporate into its employment relationships are not tikanga and can be applied / interpreted as it chooses. She also accepted the submission of Te Hunga Rōia Māori o Aotearoa, that where the evidence demonstrates a commitment to act in accordance with tikanga/tikanga values, an employer should be obliged to do so. In short:

> *"…at a minimum Customs was obliged to acknowledge and consider tikanga/tikanga values that it itself had introduced into the employment relationship. This required Customs to consider how applicable tikanga/tikanga values should inform its conduct in dealing with employment relationship issues and to then act accordingly."*

Further, the Chief Judge did not accept the suggestion from Customs that tikanga is only relevant to Māori staff:

> *"It cannot be right that, after having incorporated a commitment to certain values into the employment relationship with* all *staff, Customs can then say they are only relevant to some staff."*

Nor did the Chief Judge consider it adequate for Customs to respond to an alleged failure to act in accordance with relevant tikanga/tikanga values incorporated into the employment relationship by claiming to be "on a journey" to understand what they mean.

Of interest and in addition to the above, the Chief Judge noted that she considered it to also be *"seriously arguable"* that section 73 of the Public Service Act 2020 reinforced the relevance of tikanga/tikanga values in this case. She explained that the obligations imposed under the Public Service Act go further than requiring public servants to *"tweak job advertisements and existing recruitment policies to encourage Māori to apply, and then to create a Māori-friendly*

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[1] ***GF v Comptroller of the New Zealand Customs Service*** **[2023] NZEmpC 101 [30 June 2023].**

working environment." Rather, those obligations require public service organisations *"to understand and act consistently with tikanga/tikanga values relevant to their role as a good (public service) employer"* and in particular, to honour any commitments they have incorporated into their own employment relationships to act consistently with applicable tikanga/tikanga values.

Ultimately, she referred to Te Ao Māori, the Māori world view, as being *"baked into public service operations"* and not something only engaged with when interacting with Māori.

Recommendations

The Chief Judge used her discretion, as invited by GF's counsel, to issue Customs with a number of broad recommendations, a power not often exercised by the Court. These included a recommendation that Customs engage pūkenga (tikanga experts) to better understand the obligations it has committed to by incorporating tikanga/tikanga values into its employment relationships, and a recommendation to take advice and training on the s 73 heightened good employer obligations.

Conclusion

This case puts all public service organisations on notice that they will likely be held to a higher standard and that the "good employer" obligations factor into the s 103A fair and reasonable employer test. Further, where tikanga/tikanga values are incorporated into the employment relationship, this needs to be given more than lip-service and organisations need to ensure they are living by the values they espouse.

It would be prudent for all public service employers, and any employer that has incorporated tikanga/tikanga values into its employment relationships, to take steps to fully understand their employment obligations and the commitments that they have made.

Finally, when implementing these values, organisations would do well to remember, as stressed by the Chief Judge in this decision, that each employment relationship is distinct, and an individualised approach should always be taken. Even when managing a situation involving a number of employees (in Customs' case, 64), the approach for each employee must be customised and a 'one-size-fits-all' or template approach will not be sufficient.

If you would like further information about the implications of this case, please get in touch with one of our team