

# *GF v Customs*

## Implications for Public Sector Employers

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# GF v Customs

- In February 2021, the Government introduced a COVID-19 vaccination programme for front line workers
- Customs rolled out a national strategy in response to the mandates. Customs identified that those performing GF's role were required to be vaccinated
- GF did not wish to be vaccinated and did not think it was necessary for their work to be performed by a vaccinated worker
- GF was invited to a meeting with others who did not wish to be vaccinated. At the conclusion of the meeting, GF's employment was terminated
- GF alleged that they were unjustifiably disadvantaged in, and unjustifiably dismissed from, their employment with Customs
- The Employment Relations Authority dismissed GF's claims and determined that Customs had acted as a fair and reasonable employer

# GF v Customs

- GF appealed the decision to the Employment Court
- On appeal, GF raised a new element to their claim and, among other things, alleged that Customs failed to comply with tikanga Māori it had voluntarily imported into its employment relationships with staff, including through its own strategies and organisational policies
- GF also alleged that Customs failed to meet its heightened employment obligations as a public service organisation
- The Employment Court invited Te Hunga Rōia Māori o Aotearoa to apply to intervene in the proceedings in recognition of the novel and evolving issues that were raised around tikanga
- Te Hunga Rōia Māori was granted intervenor status on the basis it would provide legal submissions on “the place of tikanga Māori in employment law”

# Submissions of Te Hunga Rōia Māori o Aotearoa

- Tikanga Māori is its own freestanding legal framework that is already part of the employment jurisdiction
- The relevance of tikanga Māori, and the obligations that come with it, will depend on the particular circumstances of the individual employment relationship and specific dispute at hand. This requires consideration of:
  - How it is claimed the tikanga / tikanga value is relevant to the specific employment relationship
  - Evidence regarding the tikanga / tikanga value that is said to apply
- How might it be relevant?
  - Good faith duty under s 4 Employment Relations Act 2000
  - Tikanga as part of the “special characteristics” of the relationship
  - An employee may carry their Māoritanga with them
  - As a term and condition of employment – express or implied
  - Test of justification – all of the circumstances of the case
  - Public Service Act 2020

# Findings: tikanga/tikanga values

- The Chief Judge accepted the submission of Te Hunga Rōia that it was not for the Court to decide what tikanga/tikanga values are. Rather, any consideration of tikanga/tikanga values was based on the evidence before the Court (noting the Court's ability to engage pūkenga (tikanga experts) to assist)
- At a general level, while the Employment Relations Act 2000 does not expressly incorporate tikanga Māori, the statutory framework for employment relationships does not preclude their incorporation. Chief Judge Inglis said:

*Indeed the tikanga/tikanga values identified in this case seem to me to sit entirely comfortably with an area of law which is relationship-centric, based on mutual obligations of good faith, and focussed (where possible) on maintaining and restoring productive employment relationships.*

# Findings: tikanga/tikanga values

- Despite Customs going on the front foot and incorporating a number of tikanga/tikanga values into its employment relationship, the Court found it then failed to comply with them, thus breaching its obligations to GF
- The Court did not accept Customs' submission that its organisational values were aspirational statements that should be treated as a guide, as opposed to obligations Customs were required to meet
- The Court did not accept that the tikanga / tikanga values only applied to Māori staff
- Rather, the Chief Judge highlighted and relied on the evidence of Mr Ken Mair, who opined that organisations such as Customs should ensure they have the capacity and capability to meet commitments to tikanga-compliant engagement with staff

# Findings: Public Service Act 2020

- The Chief Judge said it was “seriously arguable” that section 73 of the Public Service Act 2020 reinforced the relevance of tikanga/tikanga values in particular situations
- Section 73 applies to all Chief Executives and government departments
- It requires them to operate policies that meet the principle of being a ‘**good employer**’ and provide for the fair and proper treatment of employees in all aspects of their employment
- This specifically includes operating policies that reflect and recognise the:
  - aims and aspirations of Māori
  - employment requirements of Māori
  - need for greater involvement of Māori in the public sector

# Findings: Public Sector “heightened obligations”

- Chief Judge worked through legislative history since inclusion in State Sector Act in 1988
- History of enhanced expectations on Public Sector employers, ie. not new
- Expectations evolve over time with social norms and values
- Section 73 provides for heightened obligations, over and above s 4 good faith requirements and fairness and reasonableness obligations under s 103A Employment Relations Act
- State sector employees can expect “exemplary treatment”
- Same or materially similar requirements in Crown Entities Act, Local Government Act and Education and Training Act
- Having incorporated a number of tikanga/tikanga values into the relationship, Customs could not simply interpret and apply these as it saw fit. A flexible approach such as Customs was suggesting would not be consistent with its broader obligations as a public sector employer



# GF v Customs – to conclude

- Turning to the case at hand, her Honour found that Customs did not evidence a genuine desire to engage with GF, and the health and safety risk assessment undertaken was “generic” rather than focused on the individual
- Customs’ process was not sufficiently individualised, was unnecessarily rushed, and Customs failed to engage with GF in a way that was mana-enhancing
- Customs fell well short in meeting its obligations to GF. Finding GF had a valid personal grievance, Chief Judge Inglis awarded compensation and lost wages.
- The Chief Judge also made three recommendations under section 123(1)(ca) of the Employment Relations Act 2000, including that:

*Having committed to tikanga/tikanga values in its employment relationships, I **recommend** that Customs take steps to engage pūkenga to ensure that it has in place capacity and capability to meet its obligations*

# Key takeaways

- Obligations under 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 environment”
- Require public service organisations “to understand and act consistently with tikanga values relevant to their role as a good (public service) employer”
- Te Ao Māori “baked into public service operations” and not only engaged when interacting with Māori
- Employers will need to provide evidence of **how** they are applying tikanga/tikanga based values into employment processes

# Key takeaways

- Employers required to honour commitments they have incorporated into their employment relationship with all employees (Māori and non-Māori)
- Court rejected employer's argument that reference to te ao Māori and tikanga values in Statement of Intent simply aspirational
- These commitments will be relevant to assessing compliance with good faith obligations under s 4 ERA and whether s 103A requirements met
- Incumbent on employer to meet obligations, not to wait for advocate to raise red flag
- GF v Customs was just one example of **how** tikanga/tikanga values may be relevant in a particular situation – expect to see more in this space

# Questions

