NZ ASIAN LAWYERS WĀNANGA

Tikanga

Employment law and practice

in

Contemporary Aotearoa New Zealand

2023 and Beyond

23 November 2023

Chief Judge Christina Inglis[1]

Tēnā koutou kua tae mai ki tēnei hui
Tēnā koutou tēnā koutou
Tēnā koutou katoa

When Mai Chen approached me to speak at this event my immediate thought was that she had gone quietly mad. I feel I can say that long distance, in this pre-recorded, protected environment. It seemed odd to have someone like me speaking about such an important and weighty topic, that I am not an expert in – very far from it.[2]

But I began to wonder whether it was at least conceivable that Mai had not gone completely mad and that perhaps I could add some minor value because of my vantage point, namely from a position lacking expertise but finding myself increasingly grappling with issues of when and how tikanga might sit with the legal framework of the courts and, more specifically, employment law.

So, while it is certainly regrettable that we cannot all be replica Justice Whatas, the truth is that no judge and no practitioner in Aotearoa can sit on the side-lines; we must all engage and build our understanding or be left to fossilise.

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[1] Chief Judge of the Employment Court, New Zealand. I would like to record my thanks to Jessica Iggo, Judges' Clerk, for her assistance in the preparation of this paper. Any mistakes are mine.

[2] I made a similar point about expertise when previously speaking on the topic: Christina Inglis "The lens through which we look: What of tikanga and judicial diversity?" (paper presented to Victoria University and the University of Otago employment law classes, May 2021).

Passing the parcel of possibilities

The where and how questions are not straightforward. The path is littered with dire judicial, extra-judicial, academic and expert warnings about the minefield we need to navigate: we must take care not to overreach; we must not treat tikanga as if it only has legitimacy within the common law system, or graft it onto seemingly analogous Western legal concepts; it is not the Court's role to state what tikanga is or what it is not; and it is not up to the Court to develop tikanga.

I have been reflecting on whether this terrifying minefield might go some way to explaining the emergence of an approach that I have detected in some (certainly not all) cases coming before the Employment Court. I refer to it as the "pass the parcel of possibility" technique of adversarial practice.

A party thinks that there is a vague possibility that tikanga might, somehow, be relevant to their case. They gather together some possibilities – ea, mana, utu, whanaungatanga perhaps, wrap them all up in a haphazard way and then toss the bulging parcel of possibility into the lap of the hapless Judge, who is then expected to unpack the parcel and make sense of its contents. That is both unhelpful and inappropriate. As Te Aka Matua o te Ture (the Law Commission) points out in its most recent Study Paper *He Poutama*, the obligation to take care of and uphold the mana of tikanga should be a guiding principle for engagement with it.[3] While that observation was directed at the Court's engagement with tikanga, I would have thought that it applies, by logical extension, to practitioners too.

There are, of course, cases that are more obvious than others – I regard the relatively recent *GF v Customs* case as falling into this category.[4] There the employer, a public sector organisation with statutory obligations under the Public Service Act 2020, had chosen to incorporate tikanga/tikanga values into its employment relationship framework with all employees. The difficulty was that the employer was on a self-described journey to understand what those values meant in practice, referring to them as a guide or broadly expressed aspirational statements. A pūkenga was called to give evidence and Te Hunga Rōia Māori o Aotearoa was invited to intervene and made submissions, which the Court found helpful.

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[3] Law Commission *He Poutama* (NZLC SP24, 2023) at 241: this is also referred to as the promotion of manaakitanga.

[4] *GF v Comptroller of New Zealand Customs Service* [2023] NZEmpC 101.

The Court found that the employer had fallen short in the way in which it had engaged with a (non-Māori) employee who had chosen not to be vaccinated, including in light of the obligations flowing from the tikanga values it had incorporated into the relationship (although that point was not determinative); the Court also noted that it was seriously arguable that public sector organisations had obligations to engage with tikanga in light of their statutorily imposed "good employer" obligations under the Public Service Act (which the Court described as heightened obligations). That issue, as well as grappling with the sort of circumstances in which tikanga might be determinative, will need to be worked through in future cases.

A similar procedural path was followed in a recent full Court matter (*Spiga*[5]) involving the approach to be taken to non-publication in our jurisdiction, engaging issues as to whether, given the special features of employment law and practice, a different approach to that adopted in the courts of general jurisdiction was appropriate. Again, Te Hunga Rōia Māori applied for, and was granted, leave to intervene and arrangements were made for a court-appointed pūkenga to provide a report. Judgment is pending in that case and I will not say more about it.

Resourcing challenges

While I will not say anything more about *Spiga*, what I will say is that at a transitionary period such as we appear to be in at the moment, when we are building our understanding of the nature, scope and extent of tikanga's engagement with employment law as it has traditionally been understood in the Court, resourcing becomes a significant issue.

Te Hunga Rōia Māori cannot, of course, intervene in every employment case which might engage tikanga/tikanga values. Nor, as Justice Glazebrook pointed out in *Ellis*,[6] is it in the least bit feasible to expect that the sort of resource-intensive approach taken in that case (involving a hui with tikanga experts and a written report to the Court) can be applied across the board.

The resourcing concern is particularly acute in the employment jurisdiction, where the very people who might have legitimate tikanga issues to raise and rely on in their claims, are those who may well have recently lost their job, have no other source of income, have commitments

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5 See *MW v Spiga Ltd* [2023] NZEmpC 46 for a brief description of the plaintiff's challenge and where the Court granted an interim non-publication order.

6 *Ellis v R* [2022] NZSC 114 at [125].

to meet and for whom an 0800 advertisement for no-win-no-fee representation shines like a bright beacon of hope.[7]

The current daily rate for costs in the Employment Relations Authority sits at $4,500. It would take someone on the minimum wage almost 6 weeks to pay for that, presuming they were working and had no other financial commitments to meet during that time (such as rent, food, power, medical costs, clothing).[8]

So there is a need to be realistic – I think our Court can be expected to do more work, drawing in the necessary resources where appropriate, exercising its information and evidence gathering powers,[9] to meet the underlying objectives of our legislation. The reality of our "customer base", those who we serve, and the nature of our jurisdiction (which I come on to) emphasise the desirability of building our Court's capacity so we can understand the framework for identifying and sourcing the support needed to answer, on a case-by-case basis, the tikanga when and the tikanga how questions. How fortunate then, to have the Commission's paper to help build our capacity.

An excellent time to reflect: employment law and practice in Aotearoa 2023 and beyond

From my perspective the reinvigorated focus on tikanga in the courts is timely.

That is because we are in the midst of what a number of academic commentators have been calling a crisis in the discipline of employment law.[10] The crisis relates to the state of confusion in many jurisdictions as to what employment law is aimed at achieving and how it might do

7 Christina Inglis "Employment Litigation Costs" (paper presented to ADLSI seminar, August 2016) at 3, noting that it would cost an employee on the then minimum wage 8.5 weeks of wages to pay for one day in the Employment Relations Authority.

8 An employee on the minimum wage earns $22.70/hr, which (according to www.paye.net.nz) comes to an after-tax take home pay of $18.90/hr, assuming no Kiwisaver or student loan contribution. The Employment Relations Authority daily tariff is $4,500 for the first day of any matter. See Andrew Dallas "Practice Note 2: Costs in the Employment Relations Authority" (29 April 2022).

9 Employment Relations Act 2000, s 189(2).

10 See, for example, discussions in Joanna Conaghan "Gender and the Labour of Law" in Hugh Collins, Gillian Lester and Virginia Mantouvalou *Philosophical Foundations of Labour Law* (Oxford University Press, Oxford, 2018) 271 at 272; and Guy Davidov *A Purposive Approach to Labour Law* (Oxford University Press, Oxford, 2016). See too Gordon Anderson, Douglas Brodie and Joellen Riley *The Common Law Employment Relationship: A Comparative Study* (Edward Elgar Publishing Ltd, 2017) at 42; Jeremias Prassl *Humans as a Service – The Promise and Perils of Work in the Gig Economy* (Oxford University Press, Oxford, 2018); Zoe Adams *The Legal Concept of Work* (Oxford University Press, Oxford, 2022); and Frances Flanagan and Stephen Clibborn "Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?" (2023) 45(3) Sydney Law Review (advance).

so. We are not immune from the crisis, as a review of the caselaw over the last few years reflects.

Who, amongst the millions of workers in Aotearoa, is entitled to the protection of our employment laws and who, perhaps more importantly, is not; and why not? How far does the notion of the labour market flexibility stretch? What is the nature and scope of managerial prerogative, including to control the flow of remunerated work?

One leading UK academic has observed:[11]

> This set of developments shakes our "relational structure pillar of social inclusion" [of labour law] to its foundations, and indeed leads us to investigate the state of those foundations. It prompts the question of what underlying fissures in this part of labour law's philosophical underpinnings have been opening up such large breaches in its worker-protective apparatus.

It seems to me that the timing is ripe to reflect on what employment law in Aotearoa New Zealand in late 2023 is all about – what are its foundational pillars? What might fairly and reasonably be expected within an employment relationship in this country between employers and employees in (now) 2023, as we move into 2024 and beyond? And what dispute resolution mechanisms might appropriately be deployed?

It is apparent that some see the way in which we (the institutions) operate as tending to promote a positional, entrenched approach which does not sit comfortably with their conception of dispute resolution; a way of doing things that can be bruising, rather than restorative of equilibrium, and inclined to leave lasting damage – to mana, reputation, future job prospects, health, financial and industrial stability. It is fair to say that we have, collectively, built up a complex, expensive, opaque set of mechanisms over the years, largely based on traditional adversarial models from other courts, to assist, manage and resolve employment disputes and problems.[12]

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11 Mark Freedland "Reinforcing the Philosophical Foundations of Social Inclusion: The Isolated Worker in the Isolated State" in Hugh Collins, Gillian Lester and Virginia Mantouvalou *Philosophical Foundations of Labour Law* (Oxford University Press, Oxford, 2018) 322 at 326.

12 Christina Inglis "Spokes in the wheels of justice – employment law and practice: how can we contribute to a smoother ride?" (paper presented to ELINZ Conference 2022, 19 August 2022) at 2.

All of this may be said to raises questions about fitness for purpose and, more fundamentally, about what this jurisdiction's reason for being is, and what its foundational pillars are. Getting the answers to these sorts of questions right is important. In large part that is because:[13]

> Perhaps more than any other field of law, employment law is the one that has the most obvious, continuing, daily impact on people's lives. It is from employment that, directly or indirectly, the great majority of New Zealanders derive their economic security.

Finding answers to the sort of questions I have posed may well engage tikanga.

Why? As the Commission's paper suggests, tikanga is likely to be relevant in areas where it already operates "naturally" or by "statutory incorporation".[14] The fit[15] may well be seen as natural in our jurisdiction even though there is only one statutory reference to tikanga in the Employment Relations Act 2000,[16] and none in its predecessor Act (the Employment Contracts Act 1991). But the absence of statutory incorporation has not been an impediment to the Employment Court engaging with tikanga over time, the first recorded case being in 1996.[17] The Court's willingness to engage with tikanga, while admittedly somewhat patchy and yet to be fully developed in terms of scope and application, reflects what I perceive to be a natural fit of tikanga with the operation of employment law.

Some relationship-focused aspects of the legislative framework, which may be said to reinforce the natural synergies between employment law and tikanga/tikanga values, include ss 3 (the objects of the Act), 4 (the duty of good faith), 157 (the role of the Authority in resolving employment relationship problems), 159 (the duty of the Authority to consider mediation), 188 (the Court's role in relation to jurisdiction, including to reinforce the primacy of mediation as a method of dispute resolution), and 189 (the Court's equity and good conscience jurisdiction) of the Act.

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13 Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2017) at 1 (footnotes omitted).

14 Law Commission *He Poutama*, above n 3, at 231.

15 To use the term generally, and noting the Commission's concern that tikanga not be "shoehorned into an English legal framework", rather it must be seen as a complete system of law: Law Commission *He Poutama*, above n 3, at 223.

16 In the context of collective bargaining in the public health sector, requiring parties (where appropriate) to consider ways in which they may take into account tikanga Māori in the bargaining: Employment Relations Act 2000, sch 1B cl 10.

17 *Te Whānau a Tākiwira te Kōhanga Reo v Tito* [1996] 2 ERNZ 565 (EmpC).

It is almost certainly a natural fit in circumstances such as *GF v Customs*, where the employer has chosen to incorporate into the employment relationship tikanga/tikanga values. It may also be said to operate naturally in respect of public sector employers who are under heightened "good employer" standards.[18] But I see the natural fit as likely emerging more generally, from the fundamental nature of employment relationships, what underpins them and the synergies between tikanga values on the one hand and the values which underscore employment relationships on the other. Those deep-seated values have been baked into our statutory framework and are now very well established at common law.

It might be said that tikanga is engaged at a framework level in our area of the law – informing the way in which we understand the overarching obligations that apply to all employment relationships in Aotearoa. Some commentators have, for example, suggested that tikanga provides an "enriched perspective" through which to view good faith.[19] Alternatively, it might be seen as a foundational pillar, connected, but freestanding. More generally, how might tikanga inform what the interests of justice require in employment law, where the Court is statutorily required to exercise its jurisdiction consistently with equity and good conscience?[20]

At a case-specific level – is tikanga relevant in seeking to resolve this particular case, within this particular relationship? What tikanga values are at the forefront? What weight will they carry in the case?

On the general, overarching, level the key point is that employment law (in Aotearoa) is firmly relationship, behaviour and values-centric. As the majority pointed out in the Supreme Court's very important judgment in *FMV v TZB*, the "theme" of the Employment Relations Act is "relationships, not contracts", fortified by overarching duties of broadly crafted good faith obligations (described as "the real focus under the current Act") and the Act's intended "levelling effect" (redressing the inherent imbalance of power between the parties).[21]

The Commission's paper notes that tikanga claims based on tikanga values are likely to arise in employment law.[22] Tikanga values/norms which are likely to be of particular relevance in

18 See *GF*, above n 4, at [32]: observing that it was seriously arguable that public service organisations were required to understand and act consistently with applicable tikanga/tikanga values.

19 Ani Bennett and Shelley Kopu "Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty and employment law obligations" [2020] ELB 114 at 115.

20 Employment Relations Act 2000, s 189.

21 *FMV v TZB* [2021] NZSC 102 at [45]–[52].

22 Law Commission *He Poutama*, above n 3, at 227.

the employment jurisdiction (both at what might be called a foundational/framework level and case specific level) include:

- **Whanaungatanga,** which has been identified as an underlying structural norm within tikanga[23] and which focuses upon the maintenance of properly tended relationships. It means that impacts are felt not on not only an individual level, but also at the broader collective level (whānau, hapū and iwi).[24]

- **Mana**, which can also be understood as a driver of reciprocity in relationships, giving rise to an obligation to uphold the mana (authority, esteem) of others.[25] Arguably, each party is bound to do so in the discharge of other obligations such as good faith.

- **Utu**, "the action undertaken for reciprocity", is connected to mana and is also vital in regulating relationships through maintaining balance.[26] Utu can govern processes that achieve reciprocity, or assign responsibility and accountability both for praiseworthy or blameworthy actions. In an employment context, utu to address a hara (wrong) may require a process, a penalty, adverse findings, recommendations, a settlement. Utu is also present in terms of payments of salaries or wages.

- In relation to disputes, these norms connect, whereby utu is necessary to return to a state of **ea** (the state achieved when the matter is resolved or settled), where the relationship is restored or peaceful outcome secured.[27] Achieving that state of ea can often be done through conflict resolution in the form of he hohou te rongo[28] or muru.[29] (In our jurisdiction the statute effectively makes early mediation compulsory, to be undertaken before progressing to an investigation by a specialist Authority member through to the Court, which is intended to be a more formal, legal process).

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23 Law Commission *He Poutama*, above n 3, at 62.
24 *Ellis v R*, above n 6, at [134].
25 Law Commission *He Poutama*, above n 3, at 66.
26 At 66.
27 At 67; and *Ellis v R*, above n 6, at [185].
28 A process that seeks a resolution to a transgression (of individual and collective mana) that has occurred, captured in the construct 'he hohou te rongo' – to find or make peace: Wiremu Doherty, Hirini Moko Mead and Pou Temara "Tikanga" (paper presented to Te Aka Matua o te Ture | Law Commission, Te Whare Wānanga o Awanuiārangi, 2023) at 55. See too 72 for an example of he hohou te rongo occurring in recent times.
29 Muru has been described as a form of restorative justice. The process of muru includes kōrero and the outcome involves a judgement and compensation for harm: see Law Commission *He Poutama*, above n 3, at 95. See too *Ellis v R*, above n 6, at n 60 of the Statement of Tikanga: a "ritual plundering and restorative justice process that entails the redistribution of wealth".

- A breach of employment obligations, for example a breach of good faith by an employer, risks the diminution of mana (of the individual employee and of the collective) and can lead to **whakamā** (often translated as shame, but its dimensions are multiple, encompassing both psychological and spiritual implications; not merely an individual matter).[30]

What might all of this mean for the Court's traditional approach?

I think it likely means a shift in focus; certainly upskilling and a renewed reflection on employment relationship behaviours and the way in which conflict resolution is appropriately to be approached. This is unlikely to be easy.

Dealing with values is tricky – particularly for legal practitioners and judges who prefer the comfort of black letter law and a clear pathway through to an answer. Values have a habit of being hard to articulate, pin down and apply; they have a habit of developing over time and can mean different things to different people and in different contexts.

I perceive the way in which the foundational concept of good faith in our Act has tended to be dealt with over time as reflective of some of the challenges we will likely face engaging with tikanga going forward.

I say that because while good faith is a fundamental cornerstone of the Act, it has received remarkably little attention at a substantive level and, again, tends to feature as a hastily wrapped parcel of possibility. It is often dealt with as a tack on, rather than a pleading of central importance. It is often tipped on its head, with parties viewing the presence of bad faith as a necessary ingredient to establishing an absence of good faith in the employment relationship.

Good faith is, of course, more about doing what is right (what is tika) than avoiding wrong-doing – and actively supporting the employment relationship. But operating in an amorphous values-laden space – where one size does not fit all and where the relational context is key – has traditionally presented significant challenges to the employment institutions and practitioners. I suspect that is why there has been such a pronounced focus on procedural error in our jurisdiction over the years, procedure being seen as the guiderails for conduct. It might be said that that largely misses the point of the underlying statutory scheme and the foundations of employment law itself.

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[30] Law Commission *He Poutama*, above n 3, at 76.

For all those practising in a values-laden/relationship-centric area of the law such as employment, we have work to do.

As the Commission suggests,[31] we must learn from how tikanga values have applied within Māori communities for many hundreds of years. That is, I think, necessary if we are going to do justice, rather than damage, to tikanga/tikanga values in employment law and practice in our Court, and if we are to meet the imperatives of our values-laden/relationship-centric area of the law in our country in contemporary times.

Where does all of this lead?

Employment law is about supporting employment relationships within a framework of good faith and mutual obligations. Critical to our understanding of employment law in Aotearoa is an appreciation that the legislation is primarily focussed on forbidding 'rational' employer action (in the economic sense) and protecting vulnerable workers.[32]

It is against this backdrop that our traditional notions through the courts have been evolving – we have moved away from looking at the employment relationship, and difficulties emerging with it, through a contractual lens; we are less inclined to see the key participants as vertically orientated masters and servants; there is a growing appreciation that workers are not mere commodities, that there is a right to work and that right is one which is to be actively protected, and that the employment relationship is one built on reciprocity.

We, like many overseas jurisdictions, are in a state of uncertainty. It is at times of uncertainty that I think it is particularly useful to return to basic principles.

Foundational principles that could be said to underpin our employment law include:

- recognising and supporting dignity (as opposed to domination, alienation and exploitation), good faith and mutuality of obligations in employment relationships;

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31 See Law Commission *He Poutama*, above n 3, at 213: "There is a risk of tikanga being misunderstood, misapplied and assimilated unless engagement between state law and tikanga is undertaken carefully. There is a need above all to be mindful of tikanga as an integrated system of concepts sourced from and practised within Māori communities."

32 Noah D Zatz "Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination" in Hugh Collins, Gillian Lester and Virginia Mantouvalou *Philosophical Foundations of Labour Law* (Oxford University Press, Oxford, 2018) 156 at 169.

- addressing (redressing) the inherent inequality of power between employees and those who engage them;
- avoiding the commodification of labour;
- supporting and restoring, where possible, employment relations both at a particular and at a general level and promoting early, party-centric, appropriate resolution of difficulties.

Against this backdrop the importance of questions as to who is within and who is outside the protective scope of the legislation falls into stark relief; and it may be said that consideration of the underlying foundational principles – the raison d'etre for employment law itself – leads to the answer.[33]

The Employment Court has a broad, and exclusive, jurisdiction. It is obliged to act in equity and good conscience and to further the underlying purposes of our empowering legislation. Our legislation is values-laden, designed to support productive, successful, good faith employment relationships. The legislative framework provides a space for tikanga – it is not excluded;[34] rather tikanga may be seen as a natural 'fit' with the operation of employment law.

Room for engagement may be said to arise at two levels. The case specific level: what are the specific tikanga values at the forefront of the specific case? Second, a foundational/framework level – in terms of the way in which we understand the framework, the foundational underpinnings to it, and the obligations that sit within it. What, for example, is generally required of a fair and reasonable employer in contemporary Aotearoa New Zealand and what is required of an employee? What is relevant to the exercise of the various discretions conferred on the Employment Relations Authority or the Court in a particular matter; and to the way in which Mediation Services delivered by the Ministry of Business, Innovation and Employment, conceives of and delivers its services?

In other words, just as we have moved away from looking at the employment relationship through a contractual lens, might we be moving to the use of a multi-focal lens which has, as one of its key gradients, tikanga values?

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33 See *Courage v Attorney-General* [2022] NZEmpC 77; *E Tū Inc v Raiser Operations BV* [2022] NZEmpC 192; and *Pilgrim v Attorney-General* [2023] NZEmpC 105 for discussions of the purposive approach. See too Davidov, above n 10.

34 *Ellis v R*, above n 6, at [98] and [117] per Glazebrook J.

I think that our best prospect of success, in terms of the incremental development of the law in our jurisdiction to achieve "clarity, coherence, and functionality",[35] is to have a firm grasp of what contemporary employment law in Aotearoa New Zealand 2023 is designed to achieve and how it is designed to meet those objectives, both generally and specifically. It is inevitable, in my view, that tikanga will shed valuable light on both.

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[35] Hugh Collins "Contractual Autonomy" in Alan Bogg and others *The Autonomy of Labour Law* (Hart Publishing Ltd, Oxford, 2015) 45 at 66; see also *Ellis v R*, above n 6, at [194].