THE UNIVERSITY OF WAIKATO
TE WHARE WĀNANGA O WAIKATO

EMPLOYMENT LAW CLASS

The challenges in front of us

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Judge Joanna Holden[1]

This paper identifies and discusses five emerging issues that the Employment Court is facing:

- employment status, particularly with the development of the gig economy;
- the issue of non-publication of names in employment proceedings;
- the impact of the COVID-19 pandemic on employment;
- employment standards and issues involving vulnerable migrant workers; and
- the role of tikanga Māori in employment law.

What is an employee in the modern world?

In the past few years, the Court has seen a marked increase in the number of cases where workers come to the Court seeking a declaration that they are or were employees. This is usually, but not exclusively, the result of an arrangement which was framed at the outset as an independent contracting arrangement.

The cases reaffirm the importance of substance over form when it comes to determining the status of the parties.

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[1] Judge of the Employment Court of New Zealand. I would like to record my thanks to Michael Kilkelly, Judges' Clerk, for his assistance with this paper, noting that I bear responsibility for any errors.

The test in itself is well-settled. Section 6 of the Employment Relations Act 2000 (the Act) requires the Court to determine the real nature of the relationship between the parties and, in so doing, must consider all relevant matters, including any matters that indicate the intention of the parties; and is not to treat as a determining matter any statement by the persons that describes the nature of the relationship. *Bryson v Three Foot Six* states that all relevant matters will include:[2]

a) the written and/or oral terms of the agreement between the parties;

b) the intention of the parties;

c) how the relationship operated in practice;

d) the common law tests; and

e) where relevant, industry practice.[3]

Once these relevant matters have been investigated, the Court must undertake a balancing exercise to determine the real nature of the relationship. It is this aspect of the exercise where more difficult questions begin to arise. The application of the common law tests, or assessment of the other factors, is relatively straightforward. What is more difficult is deciding what weight is to be given to each factor. There is no hard and fast rule as the enquiry is intensely fact specific.

Frequently, the conflict that arises is between the intention of the parties at the outset and any written terms, and the way the relationship operated in practice. In some of the cases, the parties go into the relationship with the understanding and intention that it is a contracting arrangement. It would be an error to see the benefits of such an agreement as flowing one way. Although a contractor sacrifices the protections of employment law such as minimum wage protections, holiday pay, sick leave, the right to collectively bargain, and the right to bring a personal grievance, they potentially gain the benefits of, amongst other things, controlling their own time, setting their own prices, owning their own equipment, delegating the work, and claiming tax benefits. Often

[2] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] ERNZ 372.

[3] Although see the comments made by Chief Judge Inglis on this factor in *Leota v Parcel Express Ltd* [2020] NZEmpC 61, [2020] ERNZ 164 at [53]-[59].

importantly, they do not have the same duty of fidelity an employee has and can work for several principals, frequently in competition. Often, they are happy with the characterisation of the relationship as one of a contractor while the contract subsists, but when it is ended, they seek to challenge that characterisation so they can access the personal grievance procedures and remedies.

It also is clear, however, that, in some cases, the perceived benefits fall heavily in favour of the putative employer, who is effectively indemnified against wage claims, personal grievances and industrial action. This is of particular concern in industries where the workforces are made up of migrant workers and unskilled labourers. In such relationships there can be significant imbalances of power and understanding.

In some cases, the Court has found that, despite an agreement and an intention to the contrary between the parties, an employment relationship existed. In *Leota v Parcel Express Ltd*, Mr Leota's lack of English language skills and his naivety were noted as factors weakening the weight to be ascribed to the intention factor.[4] In *Barry v C I Builders Ltd*, Mr Barry had been out of work for a number of years and was very keen to return to the workforce.[5] As such, he was willing to accept work on the terms offered to him.[6] Chief Judge Inglis cited the UK Supreme Court's judgment in *UBER BV v Aslam* where Lord Leggat said:[7]

> Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in

4 *Leota*, above n 3, at [17].
5 *Barry v C I Builders Ltd* [2021] NZEmpC 82, [2021] ERNZ 321 at [15] and [21].
6 *Head v Commissioner of Inland Revenue* [2021] NZEmpC 69 at [162] also noted this inherent inequality of bargain position where the plaintiffs wanted work and had no real choice but to sign the documentation. However, intention was found to favour the IRD. See also *Head v Commissioner of Inland Revenue* [2021] NZCA 483.
7 *UBER BV v Aslam* [2021] UKSC 5 at [76].

> which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker.

In other cases, the intention of the parties has been seen to point away from an employment relationship. In *Chief of Defence Force v Ross-Taylor* the plaintiff had, on a number of occasions, rejected an offer to enter into an employment relationship and elected to continue as a contractor.[8] She was a doctor who had experience of different employment arrangements and gained significant financial advantages by being a contractor, rather than an employee. It was when the Defence Force ended the contract that she sought to have the arrangement recharacterised.

In *Arachchige v Rasier New Zealand Ltd*, Mr Arachchige was said not to have been vulnerable or lacking in understanding of the arrangement he entered into.[9] In fact, he had sold his taxi business in order to take up a contract with Uber. He was satisfied with the nature of that relationship until it ended.

The cases raise questions as to what extent vulnerability and inequality of bargaining power undermine the contractual intention of the parties to an agreement. While the presence of such factors may not be of as significant consequence at contract law, the risk that the relationship may later be put under the s 6 spotlight would seem to require the principal to be aware of the imbalances that may present themselves at the formation stage. After all, "acknowledging and addressing the inherent inequality of power in employment relationships" is one of the objects of the Act.

A principal who wanted to be sure they were entering into a valid contracting arrangement would need to turn their mind to the dynamics of the contract negotiation. Is it really a negotiation? Or is the worker simply accepting a role on terms dictated almost exclusively by the principal?

The assessment should not end there. Relationships, both in contract law and employment law, are subject to change over time. It is often the case that the way they operate in practice differs substantially to what was agreed. The recent cases, applying

8 *Chief of Defence Force v Ross-Taylor* [2010] NZEmpC 22, [2010] ERNZ 61.
9 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230 at [46].

the "real nature of the relationship" test, have made clear that because a label was agreed at the outset it is not the beginning and end of the enquiry.

Cases such as *Arachchige* and *Head v Commissioner of Inland Revenue* involved relationships where the way the business operated in practice was largely in line with the contracts that had been formulated. *Leota* and, in particular, *Barry* are cases in which the way the relationships went on to operate in practice differed significantly from what had been agreed.

For businesses, it is a matter of assessing whether the contractor label accurately describes the relationship they have with a particular worker. This question is one which needs to be raised not just at the outset. If a 'contractor' ends up working a 40-hour week for a principal over many months, without working for anyone else, that may suggest the real nature of the relationship is not one of principal and contractor.

The contractor/employee issue is being challenged further by the advent of the "gig economy", based on flexible, temporary, or freelance jobs, often involving connecting with clients or customers through an online platform. This term encompasses a large range of situations and work structures, but typically gig work will have the following qualities:[10]

> Gig workers typically face irregular work schedules, driven by fluctuations in demand for their services. In most positions, the worker provides some or all of the capital equipment used directly in their work – from a bicycle for food delivery, to more complex and expensive transportation or computing equipment in other jobs. Many gig workers also provide their own place of work: at home, in their car or elsewhere. Most jobs are compensated on a piecework basis, with payment defined according to specific tasks rather than per unit of time worked. Finally, gig jobs are usually understood to be organised around some form of digital mediation, like a web-based platform.

Section 6 has so far proved to have the flexibility to adapt to changes in the way the workforce operates. That can be seen in the way in which it has dealt with labour hire

[10] Andrew Stewart and Jim Stanford "Regulating work in the gig economy: What are the options?" ELLR 1 at 2.

arrangements. The gig economy presents a new challenge. This is because it fundamentally changes the way work is offered/accepted and performed.

However, s 6 requires employment status to be considered in a very binary way. Either a worker is an employee, with the accompanying benefits, obligations, protections and responsibilities, or they are not. There are now questions as to whether this black and white distinction is an accurate reflection of the modern landscape. Other jurisdictions have adopted new approaches, such as the adoption of a third "worker" category in the United Kingdom.[11]

It also should not be underestimated the uncertainty and potential exposure that arises. A determination that a person treated as a contractor is, in fact, an employee has significant consequences, particularly in respect of holiday pay entitlements, which can go back many years.

Some of these questions are illustrated by the Ministry of Business, Innovation and Employment's discussion document which highlights a "grey zone".[12] Those falling in this zone are said to operate their own businesses and may use their own equipment, but depend on one firm for most of their income and have little control over their daily work. These workers do not enjoy the choice and flexibility commonly associated with self-employment and they do not have the same legal protections as employees.

The potential legislative solutions suggested are, of course, a matter for Parliament. In the meantime, the Court continues to apply s 6 and the relevant tests in a changing environment.

Non-publication – the balance between open justice and fairness to litigants

The issue of non-publication has recently received an increased focus in judgments, extrajudicial writing and legal articles.

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11 "Workers" in the United Kingdom are entitled to the minimum wage, paid rest breaks and holiday pay, among other rights and protections, but are not generally protected against unfair dismissal.

12 Ministry of Business, Innovation and Employment "Better protections for contractors: Discussion document for public feedback" (November 2019).

This is the result of a perception that the public availability of decisions of the Employment Relations Authority and the Employment Court are unfairly proving detrimental to the future employment prospects of participants. People say that employers and recruiters are conducting internet and/or database searches of potential employees and that evidence of previous employment disputes may lead to a perception of the person involved as being troublesome, a poor team player, and/or a litigation risk.[13] Some have suggested that the mere naming of a person in a decision, even as simply a witness, leads some recruiters and/or employers to effectively blackball them.

I am unaware of comment from recruitment agencies or employers as to the truth of these perceptions.

It must also be noted that, if this is the case, the counterfactual is also likely to be true. In particular, small and medium-sized employers and businesses operating in small communities may face unwanted negative publicity which may not always be deserved and may have an effect on their bottom line and goodwill.

The difficulty that arises is reflected in speeches given by the former Chief of the Authority James Crichton, and echoed by Chief Judge Inglis, who said:[14]

> I remain unclear as to how it can logically be said that a person who has asserted their legal right to bring a grievance against their employer, or who has appeared as a witness, deserves to have their future employment prospects compromised in this way. It might be said to lead to a particularly perverse result.

[13] See for example Susan Hornsby-Geluk "Should court give name suppression in employment cases?" (24 March 2021) Stuff <https://www.stuff.co.nz/business/opinion-analysis/300258613/should-court-give-name-suppression-in-employment-cases>; Alastair Espie "Why workers should have the right to remain private" (28 September 2021) BusinessDesk <https://businessdesk.co.nz/article/opinion/why-workers-should-have-the-right-to-remain-private>.

[14] Christina Inglis, Chief Judge of the Employment Court of New Zealand "Developing themes in employment law - Placement of the goalposts in a changing world" (New Zealand Industrial & Employment Relations Conference, Auckland, March 2019).

The current leading case in respect of non-publication in the employment jurisdiction is *Crimson Consulting Ltd v Berry*.[15] That case reconciles the previous standard, set in *H v A Ltd*,[16] with the Supreme Court's decision in *Erceg v Erceg*.[17]

H v A Ltd is a full Court decision of the Employment Court issued a short time before the Supreme Court's *Erceg* judgment. The majority in the Employment Court made several observations, touching on the special jurisdiction of the Court, noting that the Court had been given broader discretionary powers than were present in the criminal or ordinary civil jurisdictions. The Court stated that it was not only a civil proceeding, it was also private litigation, not a public law case. The essence of the majority's approach can be found in the following paragraph:

> [78] We agree that non-publication of names or other identifying particulars in employment cases will be "exceptional" in the sense that such orders are and will be made in a very small minority of cases. However we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.

The decision was followed shortly afterwards by the decision of the Supreme Court in *Erceg*, in which the Supreme Court applied a strict approach to what could also be classed as private litigation. The Court found that "specific adverse consequences that are sufficient to justify an exception to the fundamental rule" of open justice had to be identified to justify an order for non-publication. The Court stated that the standard is a high one.

In *Crimson Consulting*, Judge Corkill addressed the perceived tension between *H v A Ltd* and *Erceg*. He found that, while the language used in the Supreme Court's decision was more elaborate, there was not any material difference in the two approaches. He stated:

> [96] In short, an applicant for a non-publication order under the Act is not required to establish exceptional circumstances, though the standard for

[15] *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.
[16] *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38.
[17] *Erceg v Erceg* [2016] NZSC 135.

> departing from the principle that justice should be administered openly is high. The party seeking such an order must show specific adverse consequences which would justify a departure from the fundamental rule. A case-specific balancing of the competing factors is required. The position may be different at the interim stage.
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> [97] I do not consider that the *H v A Ltd* approach as confirmed by the Court of Appeal in *A Ltd v H* has been overruled impliedly by the judgment in *Erceg*.

In line with this high standard, the cases in which the Court has granted non-publication orders have tended to involve what could be described as 'orthodox' issues, with orders over medical information, in respect of sexual misconduct allegations, where there is potential for harm to children, and where there are serious mental health concerns.

More recently, the Court also has begun to recognise that harmful implications for future employment prospects may, in some circumstances, meet that standard. In *FVB v XEY*[18] interim orders were made. There was evidence in that case of the significant detrimental impact publication of the names of the parties would have on the applicant's future employment, regardless of the outcome of the substantive case. The Court noted that the principle of open justice will hold less weight at an interim stage than a later stage in the proceeding. This is because the Courts are cautious about permitting public opinion to form, and potentially reputational damage to occur, based on allegations. It was recognised that the balancing act would be different once substantive findings had been made.

In another interlocutory judgment, *JGD v MBC Ltd*,[19] Chief Judge Inglis accepted that there was potential for serious, long-term damage to the plaintiff's reputation and job prospects if their name and identifying details were published and became searchable on the internet and, accordingly, widely publicly available, including to prospective employers either in the short, medium or long term. She accepted too that there was the potential for damage for the employer defendant's reputation. The Chief Judge noted that it does not sit comfortably within the legislative framework that a party may

[18] *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441.
[19] *JGB v MBC Ltd* [2020] NZEmpC 193, [2020] ERNZ 447.

approach the Authority or the Court for vindication of their employment rights and, at the same time, attract publicity that will either further damage their employment relationship or create a barrier to future employment. Again, the Court recognised that it was possible that the landscape would change once the substantive issues were determined.

These cases recognise both the principle of open justice but also the purpose of the employment institutions in promoting successful employment relationships.

One limit on the potential for non-publication was recognised in the recent *AJH v Fonterra Co-operative Group Ltd*,[20] where a person sought retrospective non-publication orders over decisions that had been issued approximately ten years earlier. The Court recognised that an order of non-publication should not be made if it would be futile, noting that the previous decisions involving the applicant had been available for ten years and were referenced on websites, in textbooks and in several legal databases. In that case too, the Court noted that the claims of disadvantage for future employment were vague and speculative. It recognised that inferences may be required to draw a line between assumed internet searches and failure to obtain new employment, but that more evidence of that line would be needed than had been supplied by the applicant in that case before a non-publication order was justified.

Several issues arise around non-publication in the employment jurisdictions. The first is that it is difficult to know to what extent published decisions are actually having the perceived effect. It is unlikely that a rejected job applicant will be told that their application has been rejected because of their previous involvement in employment litigation. While the material on this subject says that it is "well-accepted" that this practice occurs, there is little empirical evidence on the matter, including on the extent to which this happens. Further, assuming such practices may occur, relying on anecdotal evidence of the practice may not be enough to demonstrate *specific* adverse consequences of non-publication for the applicant.

[20] *AJH v Fonterra Co-operative Group Ltd* [2021] NZEmpC 111.

Another issue is whether a standard that allows for more widespread non-publication orders might displace a legitimate interest that prospective employers have in a prospective employee's history of interpersonal and disciplinary matters. Employers are implored to do due diligence on prospective employees. They use different tools to determine whether an applicant for a job is suitable, such as interviews, reference checking, and, on occasion, psychometric testing. The issue then is to what extent should a prospective employer be prevented from knowing findings about an applicant made by the Authority or Court?

Different considerations may apply in claims for arrears of wages or other monies due to an employee, where it is hard to imagine any legitimate basis for refusing to later employ a person who has simply sought their statutory or contractual entitlements.

None of this prevents Parliament from acting on concerns that have been raised about publication. Pursuant to recent changes to the Residential Tenancies Act 1986 the Tenancy Tribunal is to suppress the names of parties who were "wholly or substantially" successful in the proceedings, "unless the Tribunal considers that publication is in the public interest, or is justified because of the party's conduct or any other circumstances of the case."[21] Such orders must be made (barring a public interest exception) for a successful party and may also be applied for by an unsuccessful party; in which case, the Tribunal is to have regard to the public interest and the interests of the parties. This amendment demonstrates that Parliament recognised the issue of tenants who brought claims to the Tenancy Tribunal later being blackballed by other landlords such that intervention was required.

Employment law applies even in a COVID-19 environment

The COVID-19 pandemic and the resulting lockdowns put employment law, particularly the obligation on employers in such circumstances, into the spotlight. Over the past year there has been a large volume of news articles and interest in issues such as the obligation to pay minimum wage, health and safety obligations, vaccination

[21] Residential Tenancies Act 1986, s 95A(1).

requirements, force majeure clauses, COVID-19 related redundancies, temporary wage reductions and how to 'police' employees who are working from home.

Somewhat surprisingly given this interest, the Court has yet to see many COVID-19 related claims.

The only decision of note so far has been the Full Court's decision in *Gate Gourmet New Zealand Ltd v Sandhu*, which dealt with the question of whether the Minimum Wage Act 1983 required the minimum wage to be paid to employees of an airline caterer (an essential service) who were not required to work by their employer.[22] These employees were instead paid 80 per cent of their wages, which, for the employees concerned, fell below the statutory minimum wage.

The Court recognised that the COVID-19 pandemic, and response from the Government, meant that employers, employees, unions and other stakeholders in the employment framework, including government departments, were confronted with circumstances that are unique in the history of New Zealand and which required everyone to respond to urgently. While acknowledging the pressure that this placed on all those involved, the Court noted that the pandemic, and the Government's response, did not act to suspend employee rights or employer obligations.

On the issue before it, the majority found that because no work had been performed, the Minimum Wage Act was not engaged. The Court was not asked, and did not deal with, whether there was a breach of the employees' employment agreements.

Chief Judge Inglis dissented. She said that she would have found there to be a breach of the Minimum Wage Act as s 7(2) only allowed deductions where the reason for the work not being performed is the employee's default, illness or injury.

Leave to appeal has been granted in the Court of Appeal.

The *Gate Gourmet* case is illustrative of just how difficult the questions being asked of employment lawyers and academics during these lockdowns are.

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22 *Gate Gourmet New Zealand Ltd v Sandhu* [2020] NZEmpC 237, [2020] ERNZ 561.

The Court currently has two other COVID-19 related matters before it; one on the issues around the mandatory vaccination of border workers; and another on the issue of holiday pay being used to "top-up" wages during the lockdown.

It is somewhat surprising that so few cases have so far made it to the Court, and it is unclear why that is. It could be that there are still cases to be determined by the Authority. It is also possible that the "team of five million" mentality has filtered into workplaces and employment relationships, with employees willing to accept action such as wage reductions or mandatory use of leave entitlements as recognition of their contribution to the downturn created by the lockdowns. They also may be concerned for their job security.

In the early days of the pandemic, economists were predicting a massive recession and spikes in unemployment ranging from 10 per cent to as high as 30 per cent. In such conditions, it is easy to see why an employee might think twice before sticking their head above the parapet to complain about wages or restructures.

If this is the case, it will be interesting to see if this response changes in respect of the current lockdown where the situation we now face is less of an unknown quantity.

A focus on enforcement of employment standards for vulnerable employees

The Court continues to see an unfortunate number of cases involving the exploitation of vulnerable migrant workers. The majority of these are brought by the Labour Inspector and deal with large sums of unpaid wages and breaches of minimum standards. Often the directors and decision-makers within these businesses are from similar migrant backgrounds to the exploited employees.

Labour Inspector v New Zealand Fusion International Ltd is illustrative of a number of the practices seen across these cases. Migrant workers at a holiday park paid premium "bonds" of $45,000 to secure their roles before they emigrated from China. They began working seven days without the required visas, which Ms Guan, the sole director and shareholder of the company, used as an excuse not to remunerate them. Ms Guan claimed that the provision of accommodation and food offset any payment. The Chief

Judge made declarations of breach, ordered penalties of $300,000 and each employee was awarded at least $69,000 by way of compensation orders. New Zealand Fusion and Ms Guan were prohibited from entering an employment relationship for 18 months.[23]

Other similar recent cases include:

- *Labour Inspector v Parihar* – Penalties totalling $200,000 ordered against a couple who employed six Indian nationals on temporary visas in Hamilton liquor stores and failed to meet minimum code obligations. One of the affected employees was owed well over $100,000 in minimum wage and holiday pay arrears.[24]
- *Labour Inspector v Jeet Holdings Ltd* – Penalties totalling almost $300,000 were ordered against a group of companies and their director (who also received a banning order) who operated a chain of Indian restaurants. Compensation orders totalling almost $75,000 were ordered in favour of the affected employees who were all migrant workers.[25]

These cases illustrate the strong punitive powers provided to the Court under Part 9A of the Act. The general deterring effect of such penalties forms a part of the assessment of such penalties in order to make clear that the Court would have no tolerance for the exploitation of migrant workers. Employers must learn and implement basic employment standards.[26]

Concerns around employment standards are not just limited to claims brought by the Labour Inspector. For example, in *Talbot Agriculture Ltd v Wate* a migrant worker who was waiting on the confirmation of his work visa, worked on an unpaid basis for a number of months before being dismissed.[27] Work visas tying a migrant worker to a specific role create a difficult environment for those workers in seeking to assert their rights under employment law. There is at least the perception that any resulting loss of employment could jeopardise their immigration status with significant consequences.

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23 *Labour Inspector v New Zealand Fusion International Ltd* [2019] NZEmpC 181.
24 *Labour Inspector v Parihar* [2019] NZEmpC 145.
25 *Labour Inspector v Jeet Holdings Ltd* [2021] NZEmpC 84.
26 *Labour Inspector v Matangi Berry Farm Ltd* [2020] NZEmpC 74.
27 *Talbot Agriculture Ltd v Wate* [2020] NZEmpC 28.

The Court is attempting to be alive to situations where this is the case, for example, in *ANZ Sky Tours v Wei*, Judge Beck indicated that in some cases, if an employee is required to seek a variation to their visa, a delay between breach and the subsequent resignation might not defeat a claim of constructive dismissal.[28]

These cases present a challenge for the employment jurisdictions as a whole as they often take place within insular migrant communities where language barriers and cultural practices can mean it is difficult for an employee to understand their rights and take the actions required. The overlay of immigration issues also often increases the vulnerability of employees.

The Court has been looking at different ways in which it can reach out to such communities and play an educative role, rather than simply being the net at the bottom of a cliff. This has included recently engaging with experts and representatives of some of the affected communities.

Tikanga Māori is New Zealand law[29]

It now is clear Tikanga Māori has a place in New Zealand law that goes beyond cases dealing with Māori parties or Māori issues. In *Ellis v R*[30] tikanga was not raised by the parties; it was the Supreme Court that proactively sought submissions on the issue, including inviting Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to intervene and make submissions.

The appellant, Mr Ellis, was Pākehā and had no strong connection to Māori culture. The arguments at the hearing were not premised on legislation incorporating tikanga or Te Tiriti principles.

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28 *ANZ Sky Tours Ltd v Wei* [2021] NZEmpC 76.

29 This part of the paper draws on the paper of Christina Inglis, Chief Judge of the Employment Court of New Zealand "The lens through which we look – Employment Law and Practice – Part 1 – What of tikanga?" (Victoria/Otago University – Employment Law Class, May 2021).

30 *Ellis v R* [2020] NZSC 89.

While the substantive *Ellis* decision has not been released, the Court's approach provides a clear indication that courts should be actively considering what role tikanga Māori should play in the cases before them.

So what is tikanga in the legal context?

Justice Williams describes tikanga as the "first law" of New Zealand, which was overtaken by the "second law", being the economic and contractual state law of the European settlers. He hypothesises a third law blending these two traditions, predicated on the first law being perpetuated to change the nature and culture of the second law.[31]

So how does that apply in our jurisdiction?

The Employment Court has had limited interaction with tikanga in practice. In the cases it has considered tikanga, Māori parties were involved, or governance structures were in place based on tikanga. The Public Sector Act 2020 includes that the Public Service Commissioner and departmental chief executives must operate an employment policy that promotes diversity and inclusiveness and that recognises the aims and aspirations of Māori, their employment requirements, and the need for greater involvement of Māori in the public service.[32] The Employment Relations Act 2000, however, does not incorporate tikanga or Te Tiriti principles. Its only reference to tikanga is in sch 1B, dealing with mutual obligations during collective bargaining in the health sector.

One of the key principles of tikanga is whanaungatanga – interconnectedness, kinship and connection. Māori society is traditionally one focussed on collective action and responsibility, as opposed to the more individualistic approach of the Western tradition. The contractual underpinnings of the employment relationship (ie, the master/servant dynamic) do not have a parallel in tikanga and pre-European Māori life. It is a concept unfamiliar to Māori custom. As such, there will be little in the way of tikanga dealing specifically with that sort of relationship.

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31 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1.

32 Public Sector Act 2020, ss 14(2)(b), 73(3)(d), 75(1).

There are, however, parallels between whanaungatanga and the collectivism of collective bargaining.

On a more conceptual level, also, there may be significant alignments between good faith, which is required in employment relationships, and tikanga principles.[33]

Tikanga principles and practices might also be reflected in employment practices at the time of termination or, subsequently, in dispute resolution. In considering remedies, Māori principles and concepts around disputes such as utu (reciprocity) and mana are about restoring the dignity of the person to where it had been previously. This may require thinking that goes beyond a purely monetary approach and might factor into the Court's consideration when reinstatement is sought.

In summary, the Act contains concepts that are aligned to tikanga concepts and the Employment Court will need to be proactive and responsive in addressing those concepts in its interpretation of employment law.

There are challenges, however. The Judges' backgrounds are in what Justice Williams might refer to as the second law; there are few representatives, and indeed parties, who appear before the Court who are knowledgeable about tikanga. The short point is that there is limited expertise and experience on these matters amongst the current participants before and in the Employment Court. The value that new lawyers, who have recently studied at New Zealand universities will be able to bring to the evolution of employment law in this regard is immense. You should not underestimate that value.

[33] *OCS Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2006] ERNZ 762 at [95]-[96]; Ani Bennett and Shelley Kopu's "Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty and employment law obligations" [2020] ELB 114.