VICTORIA UNIVERSITY/OTAGO UNIVERSITY

EMPLOYMENT LAW CLASS

The lens through which we look:

Employment Law and Practice

Part 1

What of tikanga?

11 May 2021/27 May 2021

Chief Judge Christina Inglis[1]

It is fair to say that we have tended to view employment law and practice through a largely single focussed lens. Workplaces in Aotearoa are not, and have never been, one dimensional - nor are employers and employees. To a degree, the Employment Relations Act 2000 (the Act) recognises this, including by requiring the Court to measure the justification for an employer's actions against the yardstick of what a fair and reasonable employer could have done in all of the circumstances.

What might fairly and reasonably be expected within an employment relationship in Aotearoa in 2021? And might it be time to refresh our imbedded approaches to dispute resolution? Might tikanga Māori have a role to play?

Can I begin my presentation by making it clear that I claim no expertise in tikanga Māori. My purpose is not to try to set out a roadmap for a possible way forward but to encourage further thought and reflection about the possibilities that tikanga has to offer in employment law and practice.[2]

The Supreme Court has recently dipped its toes into the issue in *Ellis v R*,[3] described as a landmark moment in New Zealand legal history, although the reasons for the decision have yet to be released.

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1 Chief Judge of the Employment Court, New Zealand. I would like to record my thanks to Michael Kilkelly, Judges' Clerk, for his assistance in the preparation of this paper. Any mistakes are mine, not his.

2 Noting the need to avoid a temptation to equivocate tikanga principles to Pākehā legal concepts and labour issues.

3 *Ellis v R* [2020] NZSC 89. See also Meriana Johnsen "Supreme Court hears why appeal of deceased sex offender Peter Ellis should go ahead" (25 June 2020) Radio New Zealand <www.rnz.co.nz>.

Peter Ellis was a childcare worker. In 1993, he was convicted of a number of child sex offences; three of which were subsequently quashed. A second appeal against the remaining convictions was dismissed by the Court of Appeal in 1999. In 2019, Mr Ellis was granted leave to appeal against those remaining convictions by the Supreme Court but passed away before the appeal could be heard. The issue for the Court was focussed on whether or not Mr Ellis' appeal should still be heard given his death. Following argument at the original hearing, the Court sought further submissions from counsel on whether tikanga was relevant to any aspects of their decision on:[4]

- whether the appeal should continue;
- if so, what aspect of tikanga; and
- if relevant, how tikanga should be taken into account.

All of this is interesting, including for present purposes:

- tikanga was not raised by the parties. Submissions on the matter were sought by the Supreme Court independent of any request from the parties to do so;
- the Court invited Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) to intervene and make submissions;
- Mr Ellis was Pākehā and does not appear to have had a strong connection or affinity with Māori culture;[5]
- the arguments presented do not appear to have been premised on legislation which incorporates the Treaty of Waitangi or legislated for the application of Treaty principles and/or tikanga.

Until the substantive decision is released, the approach to the application of tikanga and its relationship to the common law remains to be seen.[6] That should not however hold up the conversation. Might tikanga Māori principles be appropriately engaged in the broad range of cases coming before the Employment Court or does the Court need to wait until a case presents

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4 Supreme Court of New Zealand "Peter McHugh McGregor Ellis v The Queen (SC 49/2019)" (press release, 11 June 2020).

5 It is this aspect of the Court's approach which distinguishes itself from previous cases such *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 or *R v Mason* [2012] NZHC 1849 that engaged with tikanga in the context of proceedings which involved Māori parties.

6 At a panel featuring counsel involved in the case, the idea of a two distinct but interwoven "threads" as sources of law – tikanga and the common law – was widely discussed.

itself for determination where one or other or both parties are Māori? Might tikanga Māori principles have a much earlier role to play, within the employment relationship itself?

What is tikanga Māori? Read "Lex Aotearoa" for the answer.[7] There tikanga is described as the first law that existed in Aotearoa prior to colonisation:[8]

> …to understand tikanga one must first understand the core values reflected in its directives. It must be remembered that tikanga Māori is law designed for small, kin-based village communities. It is as much concerned with peace and consensus as it is with the level of certainty one would expect of normative directives that are more familiar in a complex non-kin-based community. In a tikanga context, it is the values that matter more than the surface directives. Kin group leaders must carry the village with them in all significant exercises of legal authority. A decision that is unjust according to tikanga values risks being rejected by the community even if it is consistent with a tikanga-based directive.

Tikanga encompasses the interplay of custom, spirituality, lore, procedure, rules and behaviours deeply embedded in the social context.[9] In simple terms, it has been described as setting out accepted rules as to how certain things should be done and ensuring that what is being done meets the standard of being tika (right) and pono (true to the culture and looking right).[10]

The second law is described as the law brought to New Zealand by European settlers which was substantially based on economic factors - contracts, not kinship; and which largely side-lined tikanga.

The third law is hypothesised as the intertwining of the first law (tikanga) with the second law. It does not envision a binary approach requiring each New Zealand lawyer to be well trained in conflict of law principles. Instead, it envisions a hybrid approach:[11]

> The recognition of custom in the modern era is different. It is intended to be permanent and, admittedly within the broad confines of the status quo, transformative. For that reason, I consider that this modern period represents a third law, different both from the first law of Aotearoa and the second law of New Zealand, the latter so intent on destruction of its predecessor. This third law is predicated on perpetuating the first law, and in so perpetuating, it has come to change both the nature and culture of the second law. And it is at least arguable therefore that the resulting hybrid ought to be seen as a thing distinct from its parents with its own new logic. I do not have time to trace every subcategory of law in which a Māori dimension can be found, but it is worth tracking the big ones. They provide excellent

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

8 At 3.

9 "Tikanga" Māori Dictionary <www.maoridictionary.co.nz>.

10 Hirini Moko Mead *Tikanga Māori: Living by Māori Values (Revised Edition)* (Huia Publishers, Wellington, 2019) at 14-15.

11 Williams, above n 7, at 12. For an understanding of how this third law is developing see also Joseph Williams, "Decolonising the law in Aotearoa: Can we start with the law schools?" (FW Guest Memorial Lecture, University of Otago, Dunedin, 22 April 2020).

> examples of the tensions in this new fused system: the push/pull of what is after all a very human process of law-making and nation-building – or perhaps law-making as nation-building.

I suggest that the Employment Court, and those appearing before it, have yet to really grapple with tikanga, much less its potential. In the cases which have touched on the role of tikanga, most have involved Māori employers and employees with governance structures based on tikanga.[12] It appears that the Employment Court has never engaged with tikanga in cases where one of more of the parties were not Māori – in other words, tikanga has not been engaged with as a thread of New Zealand's common law but rather only as a term or reasonable expectation of a Māori-oriented employment relationship.

The lack of deeper or wider engagement may be underpinned, at least to some extent, by the way in which the legislative framework is crafted. In this regard, the only mention of tikanga is in sch 1B of the Employment Relations Act (which deals with mutual obligations during collective bargaining in the public health sector).[13] And that is also the only point at which the Treaty of Waitangi is mentioned. This can be contrasted with other areas of the law. For example, the Oranga Tamariki Act 1989, where the purpose and principles reference mana tamaiti, whakapapa and whanaungatanga,[14] or the Resource Management Act 1991 with its requirement that particular regard be given to kaitiakitanga.[15] In both of those jurisdictions, elements of tikanga have been built into the legislative framework.

The slim pickings in this jurisdiction, in terms of the volume of caselaw, may also be contributed to by the very low number of cases coming through to the Court involving Māori. The statistics are of considerable concern. They raise serious questions for the employment institutions to reflect on, seek to find answers to, and then address. All of this is pressing, but for another paper.

The apparent disconnect with tikanga in the employment sphere may also be explained by the fact that the concept of employment, as we understand it, did not exist in pre-colonial Māori society.[16] Tikanga Māori emphasises a form of collectivism which contrasts with the individualistic approach of the Western system.[17] The traditional common law concept of the

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12 A summary of those cases is annexed as Appendix 1.
13 Employment Relations Act 2000, sch 1B cl 10.
14 Oranga Tamariki Act 1989, ss 2, 7 and 13.
15 Resource Management Act 1991, s 7(a).
16 Brian Easton "Economic history - Early Māori economies" (11 March 2010) Te Ara- the Encyclopedia of New Zealand <www./teara.govt.nz/>
17 Eddie Durie "The Land and the Law" Jock Phillips (ed) *Te Whenua Te Iwi, The Land and the People* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) 78.

master-servant relationship lacks compatibility with such a worldview. But the common law has moved past the master-servant conception of employment. Where the common law goes may well be informed by tikanga. That would require us to take a more holistic view, rather than searching for specific protocols or corresponding Māori concepts dealing with employment relationships. We may not have to look far. It is, for example, immediately apparent that a number of tikanga values have remarkable synergies with those underlying present-day employment relationships.[18] The importance placed, particularly by whanaungatanga, on relationships and interconnectedness may have particular relevance in the ongoing development of the law, which has for some time been redefining, and refocusing away from, the old paradigms of employment relationships and a strictly contractual approach.[19]

Employment law concepts and practices such as good faith may be seen to have close alignments with tikanga. But while the Court has made it clear that good faith obligations require an employer to have some level of cultural awareness, (for example in *OCS Limited v Service and Food Workers Union Nga Ringa Tota Inc*, Judge Shaw found that a good employer would have been alert to the cultural sensitivity of Samoan workers when attempting to introduce new technology[20]), it may be said to require more. In this regard, it is notable that the concept of good faith in employment relationships is broad; it is not strictly defined.[21] It has been observed that:[22]

> The Employment Relations Act 2000 does not refer expressly to a definition of good faith; rather simply stating that it is broader than the "implied obligations of trust and confidence" and requires responsiveness and communication between the parties, with a directive to be active and constructive in that relationship. Accordingly, the legislation leaves a wide berth of interpretation.
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> Te Ao Māori, through Tikanga Māori, provides a constructive response to that "berth of interpretation". As Tikanga Māori has at its heart relationships and values, both critical components of an employment relationship, it provides a foundation in which both employees and employers may measure their compliance with the duty of good faith.
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> Importantly, it would be an error to limit the application of the duty of good faith in a way that is consistent with Te Ao Māori to only those Māori organisations and/or employees that whakapapa Māori. Such principles are not restricted to Māori and as

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18 See Law Commission *Māori Custom and Values in New Zealand* (NZLC SP9, 2001) at 28-40 for a discussion of these 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; See also Christina Inglis, Chief Judge of the Employment Court of New Zealand "Defining good faith (and Mona Lisa's smile)" (paper presented to the Law @ Work Conference, Auckland, 30 July 2019).

20 *OCS Limited v Service and Food Workers Union Nga Ringa Tota Inc* [2006] ERNZ 762 at [95]-[96].

21 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Carter Holt Harvey Ltd* [2002] 1 ERNZ 597.

22 Bennett and Kopu, above n 19, at 116.

> a result should not be offered as an "alternative" to "normal" processes. Rather, values and perspectives of good faith that are consistent with Tikanga Māori are beneficial for all; acknowledging and enhancing both employee and workplace. What will be required, however, is a shift in perspective for all those in leadership to represent and apply such values in an authentic manner.

A number of areas in which tikanga may be of particular relevance are identified, including mediation, disciplinary investigations, end of employment and performance review/management. What is noteworthy, but probably not surprising, is that none of these potentially fertile areas for the weaving in of tikanga are focussed on the adversarial components of employment law settings. Rather they lie at the "dispute resolution" stage.

In situations like redundancy and performance management, a good faith approach currently requires substantive justification and procedural fairness. However, these concepts do not directly address the impact felt by the individual on their mana. Mamae (hurt) and whakamā (shame) are almost always consequences of such actions. It has been suggested that where employers are taking actions such as confirming a redundancy, there is still an opportunity, and perhaps an obligation, to do so in a manner which minimises any negative impact on the mana of that person; avoiding default approaches such as impersonal letters and being aware of the fact that a decision of this sort will likely impact not just the individual but the collective.[23]

Mediation is often referred to as the most tikanga compatible approach to conflict resolution. Solutions which reflect Māori values are described as tending to be both more creative and long-lasting whilst preserving future relationships between the parties.[24] While parties to employment relationship disputes are able to request that Mediation Services provide a Māori mediator and that the mediation take place on a marae, ought we to be thinking more broadly - not simply at how mediation can better accommodate Māori but if and how tikanga principles might be inbuilt in the same way as the well-established common law principles of fairness and reasonableness?

And might remedies be looked at through a refreshed lens, more closely interrogating how mana and ea (balance) might be restored and why that might be important? Might the measure for the unjustified loss of a job be seen in much more than purely financial terms?

Employment relationships are generally regarded as one of the most important relationships a person has in their lives. They are dynamic, as is the law which regulates them. The

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23 At 116.

24 Carwyn Jones "Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes" 4 VUWLRP 24.

empowering statute injects much flexibility into the legal framework. That enables the law to be applied in a way which responds to developments in the way we work, and the society in which work is undertaken.

All of this is a long way of suggesting that in relation to employment law and practice, in Aotearoa 2021, it may be time to replace the monocle with a fresh pair of spectacles.

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EMPLOYMENT LAW CLASS

The lens through which we look:

Employment Law and Practice

Part 2

Judicial Diversity

11 May 2021/27 May 2021

Chief Judge Christina Inglis

If we are thinking of changing the monocle for a fresh pair of spectacles, what might that mean for the judiciary itself?

It is now, I hope, well accepted that it is important that the judiciary reflects the society it serves. As Lady Hale said at a recent international conference, diversity on the bench - across all Courts - is vitally important for:[25]

- democratic legitimacy; and
- better decision making.

At the same conference, our Chief Justice emphasised the need to have different voices heard on each bench in each court, including the appellate courts. That, she suggested, is a key component of developing a broad judicial understanding of the complex circumstances of the law and of recognising the people coming before the courts.[26] Others have expressed the concern in terms of legitimacy, that a legal system is challenged when those whose role it is to create and enforce the law systematically underrepresent the more disadvantaged sectors of society.[27]

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25 Lady Hale, Former President of the Supreme Court of the United Kingdom (panel discussion at the International Association of Women Judges' 15th International Biennial Conference: Celebrating Diversity, 9 May 2021).

26 Helen Winkelmann, Chief Justice of the Supreme Court of New Zealand (panel discussion at the International Association of Women Judges' 15th International Biennial Conference: Celebrating Diversity, 9 May 2021).

27 Eli Wald "A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why" (2011) 24 Geo J Legal Ethics 1079 at 1101.

What might attract a broader range of people to consider a judicial career? Lady Hale emphasised the need for an open and transparent merit-based appointment system; coupled with encouraging lawyers from all walks of legal life and background experience to think about a judicial life; applying the concept of legal merit in the broadest form.

This echoes what I think is a growing awareness that legal ability is not simply reflected in an academic transcript of grades[28] and that the path is not the same for everyone - for some it is well manicured, brightly lit and inclines gently to a clearly-defined end point. For others the track is obscured, riddled with potholes, steep and slippery. Many come from a background that does not have university study, a legal career and a role as a judge as a well-defined pathway. All of this suggests that further thought might usefully be given to the structures and the related ideological underpinnings which underlie the traditional career path of a lawyer.[29]

In doing so, it is important to view judicial diversity, not simply as an endpoint, but as the outcome of a dynamic process that stretches all the way back to high schools and the career choices that those from diverse backgrounds feel empowered to make. Understanding where the barriers lie and devising creative solutions are likely to be key pieces of the puzzle.[30]

In discussing Māori underrepresentation in the legal profession, Keely Gage (a student at Victoria University) recently wrote in the Employment Law Bulletin that:[31]

> It is hard to aspire to be something that you cannot see.

The story she tells about her pathway as a law student will resonate with others:[32]

> For any new graduate, joining the legal profession is nerve-wracking, but this is even more so as a young Māori person. Many of my Pākehā peers have to look no further than their own family to find someone they can share experiences with, ask advice of, and gain institutional knowledge and connections from. They know someone who was, at some point, in their exact position.
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> It is an isolating feeling to know before you have even entered the workforce that, statistically speaking, the chances of working with, or for, someone like you are extremely low. … The legal profession is a high stress environment already but the added layer of isolation due to underrepresentation can weigh heavily on Māori.

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28 Imogen Little "Socio-economic Diversity in New Zealand Law Schools: A Case for Adopting a More Nuanced Approach to Admission Schemes" [2020] 3 NZ L Rev 335 at 350-351.

29 See Joseph Williams, "Decolonising the law in Aotearoa: Can we start with the law schools?" (FW Guest Memorial Lecture, University of Otago, Dunedin, 22 April 2020).

30 See for example, Brian Opeskin "Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary" in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, Sydney, 2020) 83 at 107; Little, above n 28 (for an analysis of these issues as they relate to law schools).

31 Keely Gage "Māori underrepresentation in the legal profession" [2020] ELB 86 at 86.

32 At 87.

Deputy Chief Judge Caren Fox of the Māori Land Court has previously identified the following as barriers to the career progression of wāhine Māori:[33]

- Barriers within the structure and culture of the profession;
- Gender perceptions;
- Working arrangements and motherhood;
- Confidence to act and/or to be at the table (a feeling she later describes as a form of imposter syndrome); and
- Lack of role models and role modelling for wāhine Māori, (the counter-factual position being that wāhine Māori in senior roles are required to be all things to all people.)

Much is currently being done to address the judicial diversity deficit. None of it is straightforward but encouraging those who may not have thought of judging as a potential career path is an important part of the equation. So, can I leave each of you with one introspective question to ponder:

> Have you thought of the possibility of a judicial career and if not, why not?

You might, after honest (rather than self-doubting) reflection, find that the particular cocktail of attributes, skills and life experience that you have would suit you very well to the judging role.

The role of a judge is one I can genuinely commend – it is endlessly interesting, it is a privilege and it provides an opportunity to serve the community in a meaningful way.

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[33] Caren Fox "Mana wāhine – strategies for survival – Māori perspectives" (speech to Hui-a-Tau Conference, 5 September 2015). See too Georgia Neaverson "Are Māori lawyers well-represented in NZ firms?" (13 March 2021) NZ Lawyer www.thelawyermag.com.

Appendix 1: A brief history of the Employment Court's engagement with tikanga

Te Whānau a Tākiwira te Kōhanga Reo v Tito [1996] 2 ERNZ 565

This is the earliest case (at least according to the search databases) in which our Court engaged with tikanga. It is an example of a significant intersection between 'Western' labour law and customary practice.

Facts - Two women were employed by a kōhanga reo (Māori language early childhood education) which was operated on a "whānau model" requiring key decisions to be made by consensus. This consensus was to be reached via "wānanga" - extensive discussion where everyone has an opportunity to korero before a vote is held; the discussion is continued, usually until a unanimous outcome achieved. It was contended that a decision was taken during a wānanga to terminate the employment of the two women. There was a factual dispute as to whether the women had been involved in, and agreed to, the outcome of the wānanga.

Issue/s - The kōhanga reo argued that the dismissal took place in accordance with tikanga and that, as a result, the Court was prevented from investigating it further. The issue was summarised broadly as to whether the Act (then the Employment Contracts Act 1991) or tikanga prevailed in assessing the fairness of a dismissal.

Held - The tikanga process was "not sacrosanct; it is no more than a process, like any other process, that an employer may choose". The fact tikanga was used did not protect the wananga from being examined to determine fairness.

The Court also found that there was no evidence the women consented to the outcome of the wānanga. It commented that to rely on certain practices in respect of the dismissal, the employer should have engaged in similar methods to deal with the ensuing dispute, which they had not.

Skipwith-Halatau v Ngāti Kapo (Aotearoa) Inc EmpC Auckland AEC72/97, 18 July 1997

A decision on interim reinstatement that briefly touches on tikanga. The Judge noted that although the defendant operated on a tikanga Māori basis, it operated within the statutory structure of an incorporated society and there was no question that Ms Skipwith-Halatau was an employee under the Act (then the Employment Contracts Act). It was said that:

> "That is not to say that employment law jurisprudence does not take account of and allow for the special characteristics of any employment relationship including, in this case, the expectation of the parties that tikanga Māori will be the basis of the parties' dealings with each other."

The decision was made not to fully reinstate the plaintiff (effectively placing her on garden leave) as there was significant discord between her and the leaders of the employer (who she considered illegitimate). The Judge took into account the negative impact reinstatement, and the intending conflict that would likely ensue, could have on members of the iwi and visually impaired Māori and Pasifika supported by the defendant.

Good Health Wanganui v Burberry **[2002] 1 ERNZ 668**

Facts - The defendant was a Māori woman employed by a Māori mental health services provider. She requested leave to attend a kapa haka festival she had been attending for 17 consecutive years; she had an organisational role at the festival. Leave was declined the day before the festival. The defendant attempted to organise family to cover her duties but could not. She took two days off work to attend without permission. She was then dismissed at a meeting for which she had little warning.

Held - The refusal of leave was found to be unreasonable and unlawful; therefore, no lawful instruction was disobeyed and there was no substantive justification for the dismissal. The Judge was critical of the employer's attempts to frame issues as cultural only when it suited their purposes. She stated that as a Māori employee with a Māori employer, they should have been alive to the need for an appropriate procedure:

> "The onus should not have been on the defendant to have asserted her mana Māori, or to plead for her cultural identity to have been recognised."

The Judge also criticised the cultural inappropriateness of the way the defendant was escorted to her office and told to pack up and leave. Her calmness in that scenario was recognised as an example of her whakamā (shame or embarrassment) at her treatment. Loss of mana and standing in her community was taken into account in assessing remedies.

Rerekura v Nicole Presland t/a Te Kōhanga Reo ki Papatoetoe **[2003] 2 ERNZ 22**

Concerned a dismissal that occurred as a result of physical fight. The procedural fairness of the dismissal came into question including a very emotionally charged hui which

took place in the aftermath of the incident. The Judge found that this first hui did not constitute a fair and reasonable enquiry into the incident. The plaintiff was not informed of her right to a representative although elders did speak on her behalf; she declined the opportunity to speak. A second hui was held soon after which confirmed a decision to dismiss. The plaintiff was not invited to it and never received an opportunity to address the decision-makers. An unjustified dismissal was found to have occurred as a result. In assessing remedies, loss of mana was taken into account.

ABC01 Ltd (Formerly Primary Heart Care Ltd) v Dell [2012] NZEmpC 190

The plaintiff's primary submission in this case was that the Employment Court had no jurisdiction because the issues in the proceedings were related to Māori sovereignty. The Judge reviewed the case law at that time and concluded that the Employment Relations Act 2000 was validly enacted and was applicable to the parties.

The most relevant authority was the decision of Heath J in *R v Mason* where the Court noted that it had become accepted that at the time of the Declaration of Independence in 1835 and the signing of the Treaty of Waitangi in 1840, existing customary practices had the character and authority of law.[34] That case faced a similar challenge to the validity of the Crimes Act 1961. In response to that argument, Heath J found that Parliament had enacted legislation conferring exclusive powers to try crimes in the courts. It followed that the customary system had been extinguished. He found it was not possible to regard the customary system as continuing parallel to the existing system (it is important to note that the term "customary system" refers only to tikanga practices that could be equated to the criminal trial process as set out by statute, not to tikanga in general[35]).

A similar finding was reached, in reliance on *Mason*, in respect of employment legislation.

Taiapa v Te Rūnanga O Tūranganui A Kiwa Trust t/a Tūranga Ararau Private Training Establishment [2013] NZEmpC 38, [2013] ERNZ 41

The plaintiff argued that, in making a decision to summarily dismiss him for serious misconduct, the employer (a Māori organisation run in accordance with tikanga) should

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34 *R v Mason* [2012] 2 NZLR 695, [2012] NZHC 1361.

35 At [38]. Heath J accepted that his findings did not exclude the possibility of custom playing a meaningful role within the existing statutory system.

have taken into account the tikanga surrounding the identification and treatment of both physical and spiritual maladies. While appearing to accept that it may have been reasonable to expect such an organisation to take tikanga into account, the Court found neither the plaintiff nor his representative had taken adequate steps to communicate his sickness to the employer.