

Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty and employment law obligations

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Tikanga Māori—integrated and mainstream in the modern law

Tikanga Māori has long been incorporated into New Zealand's legislation and common law. Justice Joseph Williams, in his seminal paper, "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law", describes New Zealand law in a third stage of evolution. He refers to this as the "Third Law of Aotearoa/New Zealand": "The third law proceeds on the basis that tikanga Māori is not foreign and separate but rather integrated and mainstream."¹

Clash of the first law and second law and rise of the third

There can be no argument that the New Zealand legal system severely damaged and largely sought to extinguish Tikanga Māori, the first law of Aotearoa/New Zealand, from the middle of the 19th century. From the 1970s onwards there was a slow turning of the tide. There was incorporation of some of the remnants of Māori custom into legislation and the growth of case law interpreting the principles of the Treaty of Waitangi.

Justice Williams observes:²

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 ...

Employment law and Tikanga Māori

The focus in Tikanga Māori on values and the importance of relationships is also foundational for employment law.

It is only a matter of time before the courts apply Tikanga Māori principles in employment cases. This has been recently addressed by Chief Judge Christina Inglis who states:³

Active consideration of, and appropriate response to, cultural values and norms might be seen as part of the good faith requirement, and may have a bearing (for example) on how

1. Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 33.

2. At 1.

3. 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, 5–6 March 2019).

disciplinary investigations and procedures are to be carried out and later assessed by the Authority/Court. A cookie cutter approach to such matters may well become an increasingly high-risk strategy.

As a result, an employer with an eye to the future will build capacity to incorporate Tikanga Māori values into their workplace.

Matters related to the integration of Te Ao Māori in the workplace have been addressed by the courts in *Good Health Wanganui v Burberry*⁴ where Judge Shaw, in considering appropriate cultural procedure, stated that “the onus should not have been on [the plaintiff] to assert her mana Māori or plead for her cultural identity to be recognised.”⁵

This followed his statement regarding the importance of Māori matters being an integrated part of the workplace, rather than a simple annexure.⁶

Employment law is primarily focused on the employment relationship – and the rights and duties that flow from that relationship. Tikanga Māori recognises that respect for relationships is a core value when exercising legal authority. If these values are not respected, any decision is unlikely to be sustainable. Justice Williams explains:⁷

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.

We see this situation daily in the New Zealand workplace. An employer may seek to enforce a “policy” or “instruction” with an employee. But if this is done without respecting the workplace and wider relationships (whanaungatanga), leadership and capability of the employee (mana) and the employee’s human dignity and value (tapu), then that instruction is likely to “be rejected by the community” in the workplace because it will be seen as unjust. This is the yeast that ferments many a personal grievance.

Tikanga Māori core values are akin to, and if used properly, enrich employment law principles. These are terms that are now common and every day in our society:⁸

- whanaungatanga or the source of the rights and obligations of kinship;
- mana or the source of rights and obligations of leadership;
- tapu as both a social control on behaviour and evidence of the indivisibility of divine and profane;
- utu or the obligation to give and the right (and sometimes obligation) to receive constant reciprocity; and
- kaitiakitanga or the obligation to care for one’s own.

Justice Williams further notes:⁹

So whanaungatanga might be said to be the fundamental law of the maintenance of properly tended relationships.

The reach of this concept does not stop at the boundaries of what we might call law, or even for that matter, human relationships. It is also the key underlying cultural (and legal) metaphor informing human relationships with the physical world – flora, fauna, and physical resources – and the spiritual world – the gods and ancestors.

...

The important point in terms of the whanaungatanga value is that wrongs were not seen as individual wrongs. They were seen as the responsibility of the perpetrator’s wider kin group. And the more serious the wrong, the wider the kin net that became hooked into the compensation equation. Equally the victim was not just the individual involved but his or her kin group, the parameter for which was set by the status of the victim and the seriousness of the wrong.

Good faith consistent with Tikanga Māori

Simply put, the focus should be a values-based humanistic approach to employment relationships. Employers and employees can apply this enriched perspective of good faith in creative ways. Some examples include:

- *employment mediation conferences*
- The ultimate purpose of an employment mediation is to be the restoration of mana, to achieve a balance of all considerations and to achieve a consensus (if possible). All parties should strive to prevent it from being an adversarial process. In the words of Sir Kim Workman, criminal justice reformer:¹⁰

When there had been a dispute that had affected the spirit and mauri (life force), the question was how to bring it back into balance. Regardless of what level or who was involved, there is the same fundamental principle, that of “whakahoki mauri” or restoring the balance. Apparent here is the notion of healing.

- If the employee, employer and organisation are Māori, request to the Ministry of Business, Innovation and Employment to provide a Māori mediator. Begin and end the mediation with karakia and mihi (if the parties have that capacity – if you do not get cultural support). Recognise that the parties are usually blood relatives, will always have a family connection (and likely be working next to each other at the Marae for their lifetimes), so the restoration of the whanaungatanga relationship should be a key goal.
- *disciplinary investigations*
- Recognise that not only the employee is affected by

4. *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 (HC).

5. At [58].

6. At [57].

7. Justice Williams, above n 1, at 2–3.

8. At 3.

9. At 4–5.

the investigation process. The entire family and wider whānau group are affected by what happens to the employee. Treat the employee with dignity, be mindful always of their mana and the mana of others in the workplace. If appropriate and if the employee consents, consider inviting the whānau to be involved in the investigation meetings, and ask the employee and their whānau to offer solutions that will resolve the issue and also repair relationships (in the workplace and wider whānau or community).

- Where there is a reintegration of either/both the employee and/or the complainant back into the workplace, consider the wider implications on a decision to maintain separation between the parties and the barriers this poses to enabling a “wholeness” to the parties and consequently to the wider workplace. Seek ways in which the mamae (hurt) can be addressed and where resolution can be achieved. Again, the focus is on restoration of mana and whanaungatanga for all parties involved.
- Seek to have meetings and deliver findings of investigations, for example, at meetings – kanohi ki te kanohi (face to face). This allows time, respect, conversation and opportunity to nurture the employment relationship. Delivering a decision via letter or email can be seen as impersonal and uncaring and should always be the last resort.
- *end of employment*
- Mamae (hurt) and whakamā (shame) are matters for all people which do not cease at the end once a decision to terminate has been delivered or a settlement reached. But these are things that run deep in Te Ao Māori from both a personal, collective and intergenerational perspective. In most instances, it is still possible to allow an employee to leave the organisation in a way that minimises a negative effect on their mana and as a result, the mana of their collective. Your final parting comments or ways should reflect an organisation that is one of mana; respectful, honouring and honourable. Seek to find a positive experience in which the employee has enhanced that relationship and bring that to the forefront when you part ways. If circumstances permit, farewell the employee in an appropriate way that acknowledges their contribution to the organisation. In parting, an embrace, or a positive and encouraging word, again, maintains the focus on the restoration of mana.
- *policies/values*
- The concept of tikanga comes from the word “tika” which means what is “right” or “correct” – so the focus is on acting in accordance with what is culturally proper or appropriate. Yes, it outlines the ways Māori seek to do

things, but it is also a code of conduct; a moral compass so to speak. As a result, Tikanga Māori core values make great workplace values and are commonly used in organisations in lieu of or incorporated into a “Code of Conduct” or “Values Statement”.

- When writing policies or processes, consider how the policy may be drafted to include restoration, reconciliation and the protection of dignity. This may be simple redrafting of the language used or a commitment to a workplace that acknowledges the importance of Tikanga Māori and the practical ways in which it will incorporate the same.
 - *performance review and performance management plans*
- Frame at least some of your key performance indicators as values-based goals. Focus on relationships in the workplace and relationships connected to the workplace (eg, customers, suppliers, stakeholders).
- Consider encouraging employees to provide feedback on how they are upholding those values and workplace relationships and focus on areas where they need development or support. Bear in mind that an employee evidencing an adherence to such values should ultimately result in a minimisation of workplace and relationship concerns.

Conclusion

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.

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.

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 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.

10. Sir Kim Workman in Frank Neill “We can learn from traditional Māori practices” (2020) 943 LawTalk, quoting Ronald W Nikkel “Justice Between Us” (Conversatio Morum, 7 November 2011).