

Tikanga values applied to assess employer's dismissal of unvaccinated employee

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A recent Employment Court judgment has held that individualised assessment and consultation was required before an employer could justifiably dismiss an employee on account of their vaccination status: *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101. The judgment also included novel discussion of tikanga values in employment relationships and of the heightened employment obligations of public service organisations. Further, the decision flagged that the range of financial remedies awarded in the employment jurisdiction to compensate employees for injury to feelings needs to be increased to account for inflation.

Factual background

GF was employed by the New Zealand Customs Service (Customs) as an Assistant Customs Officer Maritime Border (ACOM) at a South Island port in October 2020. The ACOM role had been created by Customs in the early stages of the COVID-19 pandemic as a temporary additional staffing resource to manage and reduce the risk of COVID-19 at New Zealand's maritime border.

As part of the development of the ACOM role, and to inform Customs' overall COVID-19 response, an initial health and safety risk assessment for the maritime environment was carried out in September 2020. That risk assessment was generic, acknowledging risks may differ at different ports. Vaccination was not considered as a control in the risk assessment.

The COVID-19 vaccine arrived in New Zealand in February 2021. Frontline workers were the first group eligible to become vaccinated.

Consistent with other border agencies, Customs adopted the approach of "educate, expect and support" to encourage employees to become vaccinated. At the time, the Government was encouraging employers to encourage and/or require vaccination of frontline workers.

Customs used a cross-agency assessment tool to inform its decisions regarding which of its workers would be captured by the initial vaccination programme roll out. It categorised captured workers as "Tier 1" workers. Customs considered ACOMs fell within Tier 1 and had to be vaccinated to continue in their role. It did not consult with its employees regarding its decisions about which roles would be Tier 1. ACOMs

had not previously been required to participate in mandatory regular COVID-19 testing, however, Customs acknowledged that it had “cast a wide net” in terms of the vaccination requirement.

In mid-February 2021, Customs began communicating with its employees about vaccination. GF was certain they did not wish to receive the vaccination. The communications Customs circulated were not clear that vaccination was compulsory (rather than strongly encouraged) for Tier 1 employees. GF considered that most of the communications about vaccination were directed at those considering vaccination and simply did not apply to them.

Only later, in March 2021, did it become clear to GF that Customs considered vaccination was mandatory for ACOMs and that their job could be in jeopardy. GF's employment advocate wrote to Customs on 31 March and noted that GF's work did not have the same health and safety risks as all Customs' border workers.

Although Customs' communications contained references to individualised risk assessments, the Court found that Customs had not conducted an adequate individualised risk assessment for GF's role.

Customs produced a new risk assessment on 19 April 2021 which had been updated to consider the impact of vaccination. It stated that the risk rating pre-controls was high, and post-controls was medium. It referred to a suite of controls such as PPE usage, as opposed to considering vaccination in isolation. The risk assessment was not port specific.

Ultimately, on 21 April 2021, Customs proposed termination of employment and invited GF to attend a meeting to discuss the outcome of the process.

Shortly before that meeting, the [COVID-19 Public Health Response \(Vaccinations\) Order 2021](#) became law. The Order required affected persons (including port workers) to be vaccinated to perform their roles. In addition to its internal process, Customs sought to rely on the Order as justification for GF's dismissal. Customs provided the Vaccination Order to GF during the termination meeting, however, the Court found that Customs did not consult with GF about the potential application of the Order because the meeting was not framed in a manner which enabled feedback and discussion.

Customs proceeded with the meeting and advised GF that because GF had not met the vaccination requirements and in view of the Vaccination Order, and because there were no redeployment options available, GF's employment would be terminated.

The Employment Relations Authority determined that GF was not unjustifiably dismissed or disadvantaged. GF challenged the Authority's determination to the Employment Court.

Issues

The Employment Court considered the following questions:

- Had GF been unjustifiably disadvantaged under s [103A](#) of the Employment Relations Act?
- Had GF been unjustifiably dismissed under s [103A](#) of the Employment Relations Act?
- Had Customs failed to comply with tikanga/tikanga values it had voluntarily imported into its employment relationships with staff?
- Had Customs failed to meet its obligations as a public service organisation as set out in the Public Service Act 2020?

Decision

The Court found that GF had been unjustifiably disadvantaged and unjustifiably dismissed as a result of Customs' failures to meet the standards of a fair and reasonable employer set out in s [103A](#) of the Employment Relations Act. In particular, the Court held:

- Customs failed to carry out an adequate and individualised health and safety risk assessment for GF's role.
- Customs' conclusion that GF was a Tier 1 worker was not one a fair and reasonable employer could have reached and Customs' reasons for characterising certain roles as Tier 1 workers with reference to the cross agency-guidance was unclear.

- Customs failed to properly consult with GF regarding its view that GF was a Tier 1 worker.
- To the extent that Customs relied on the Vaccination Order in dismissing GF, Customs had failed to meet its obligations to consult with GF prior to terminating employment as the final meeting was not framed in a manner that promoted or enabled feedback or discussion on the application of the Order to GF.
- Customs failed to meet its statutory good faith obligations, including by failing to be sufficiently active and communicative with GF, despite being a large organisation with significant resources at its disposal.

GF was awarded \$25,000 in compensation for humiliation, loss of dignity, and injury to feelings and three months' lost wages.

Because the Employment Court decided Customs' actions were not justifiable under the "base line standard" contained in s 103A, it was not necessary for it to determine whether in the alternative, Customs had failed to meet a tikanga enhanced standard and/or a public sector employer enhanced standard.

The Court did nevertheless discuss the potential application of tikanga and s 73 of the Public Service Act.

Tikanga

The Court considered whether Customs' incorporation of tikanga/tikanga values into its employment relationships affected the obligations Customs owed to GF. GF is not Māori. However, GF considered that tikanga was relevant to their employment relationship with Customs. The Employment Relations Act does not expressly incorporate or exclude tikanga.

The Court was clear its role was not to decide what tikanga is or what tikanga values are. Instead, it would be informed by the evidence of tikanga experts, which was given in this case by Mr Mair. Mr Mair explained that the maintenance of relationships is central to tikanga, which also encompasses mana enhancing (not diminishing) conduct. Mr Mair's evidence was not challenged by Customs.

The Court also noted that the tikanga values discussed as part of the case sat comfortably with employment law's relational focus. The Court did not accept that tikanga was only relevant to Māori employees, given tikanga had been specifically incorporated into Customs' employment relationships.

Analysing the facts from a Te Ao Māori perspective, the Court considered that Customs failed to act in accordance with tikanga because among other things, it did not approach the employment relationship issue with GF on a sufficiently individualised basis, it failed to engage in a mana enhancing way, it did not take adequate steps to ensure that the right people were involved, and the process was unnecessarily rushed.

Enhanced requirements of public service employers

The other issue discussed by the Court related to the question of whether s 73 of the Public Service Act 2020 (the PSA) placed heightened employment obligations on Customs.

Section 73 of the PSA came into force on 7 August 2020. It requires a Chief Executive of a Government department (such as the New Zealand Customs Service) to operate an employment policy that complies with the principle of being a good employer, make that policy available to its employees, and to ensure the department's compliance with that policy.

Section 73 explains that a "good employer" means an employer which operates an employment policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment.

Section 73 also lists ten categories of policy provisions that should be included in the required policy so to ensure fair and proper treatment of employees. That list included, relevantly for this case, a provision to ensure recognition of the aims and aspirations of Māori, and the employment requirements of Māori, and the need for greater involvement of Māori in the public service.

Considering the statutory requirements under the PSA, the Chief Judge observed:

“Although it does not need to be decided, I also consider it seriously arguable that s 73 of the Public Service Act 2020 reinforces the relevance of tikanga/tikanga values in this case. That provision requires a public service organisation, such as Customs, to be ‘good employer’, and to operate an employment policy containing provisions for the recognition of the aims and aspirations of Māori. More generally, I consider that relevant provisions of the Public Service Act place heightened good employer obligations on public service organisations and this too is relevant to an assessment of whether the s 103A fair and reasonable employer target has been met and to an assessment of whether the s 4 (good faith) obligations have been met.”

Compensation bands updated

In 2018, the Employment Court developed and adopted a banding approach to guide monetary awards for successful claimants for compensation for humiliation, loss of dignity, and injury to feelings. The bands were set as:

- Band 1 (low level damage or injury): awards up to \$10,000;
- Band 2 (mid-level damage or injury): awards between \$10,000 and \$40,000; and
- Band 3 (high level damage or injury): awards above \$40,000.

In this decision, the Court updated the bands to account for inflation applying the Reserve Bank calculator. The new bands were set as follows:

- Band 1 (low level damage or injury): awards up to \$12,000;
- Band 2 (mid-level damage or injury): awards between \$12,000 and \$50,000; and
- Band 3 (high level damage or injury): awards above \$50,000.

Key takeaways for employers

- When considering a potentially unjustified action, the Court will review an employer's actions in the circumstances, which will include the circumstances of the affected employee and could include the resources available to the employer. Put another way, one size is unlikely to fit all.
- Government departments should be aware of their obligations under s 73 of the Public Service Act and may be subject to increased scrutiny in light of this decision.
- Where an employer decides to incorporate tikanga/tikanga values into employment relationships, the extent to which such commitments have been met will be considered relevant to an assessment of whether the employer's actions were fair and reasonable.
- The remedies awarded to successful claimants for compensation for humiliation, loss of dignity, and injury to feelings may be increased to account for inflation.

Last reviewed on 19 August 2023