ORDER PROHIBITING PUBLICATION OF ANY NAMES OR IDENTIFYING PARTICULARS AS SET OUT AT PARAGRAPH [193]

IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 101
EMPC 317/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	GF Plaintiff
AND	COMPTROLLER OF THE NEW ZEALAND CUSTOMS SERVICE First Defendant
AND	OFFICIAL ASSIGNEE Second Defendant
AND	TE HUNGA RŌIA MĀORI O AOTEAROA Intervener

Hearing:	1-5 August 2022, 28-30 November 2022 and 31 January 2023 (Heard at Auckland and Wellington)
Appearances:	M Dew KC, S Kopu and J Hansen, counsel for plaintiff H Kynaston and H Khan (1-5 August 2022) and K MacKinnon (31 January 2023), counsel for first defendant R Donnelly and AM Anderson, counsel for intervener No appearance for second defendant (appearance excused)
Judgment:	30 June 2023

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The New Zealand Customs Service (Customs) is a government department, predominantly focused on supporting the safety and security of New Zealand's borders. There are a variety of roles within Customs, including officers who work at international airports and at the ports.

[2] By 2019 COVID-19 was a known threat. It had not yet entered New Zealand. The government was concerned to take steps to keep COVID-19 from breaching the borders and to "stamp it out" if a breach occurred. This approach required additional resources across government agencies, including Customs, and a number of border protection workers were employed on fixed term employment agreements. They were known as Assistant Customs Officers Maritime Border (ACOMs). GF was appointed to an ACOM role at a South Island port in October 2020.

[3] The government introduced a vaccination programme which was rolled-out to front line workers, including those working in managed isolation facilities. The roll-out was informed by a cross agency assessment tool that had earlier been developed (the 18 February 2021 Guidance). The 18 February 2021 Guidance was used by Customs to inform decision-making around which of its workers would be captured in the initial roll-out, identified as "Tier 1" workers. Customs considered that ACOMs fell within the Tier 1 group, and had to be vaccinated if they were to continue in their role.

[4] Customs was well aware that there may be some resistance to the roll-out amongst staff. It adopted a three-pronged strategy – educate, expect and support. The strategy had a national focus across Customs, and it was a strategy that was being advanced within other public sector border agencies.[1]

[5] GF was not what was later described as "vaccine hesitant". GF did not wish to be vaccinated and did not consider it necessary that their work be performed by a vaccinated worker. Ultimately, GF and four other ACOMS from the same port who

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[1] Border Executive Board Report, Implementing the COVID-19 Vaccine Roll-out to Border Workers, issued 19 February 2021.

had also chosen not to be vaccinated were invited to a meeting. At the conclusion of the meeting GF was given notice of termination of their employment.

[6] GF pursued a claim in the Employment Relations Authority. The Authority dismissed the claim. It found that Customs had acted as a fair and reasonable employer in the circumstances. GF challenged the determination by way of de novo hearing.

[7] In summary GF alleges that, while Customs was operating in a novel and challenging environment, it failed to meet the standard required of a fair and reasonable employer in a number of ways – it failed to appropriately engage with GF on issues which impacted on their employment;[2] it carried out a deficient health and safety risk assessment and proceeded to rely on it; it mischaracterised GF as falling within the Tier 1 group; it predetermined the outcome of a process which was marred with procedural errors; and it failed to comply with tikanga/tikanga values it had voluntarily imported into its employment relationships with staff. Further, it is said that, as a public service organisation for the purposes of the Public Service Act 2020, Customs had heightened obligations on it, which it failed to meet.

[8] Customs strongly opposed the plaintiff's claim. It submitted that it was entitled to take a cautious approach to issues relating to health and safety within the context of a developing pandemic and that it was operating in a highly pressurized environment. It said that it provided an adequate opportunity for engagement and that it was GF who refused to effectively participate. It disagreed with the contention that it was required to meet a higher standard in employment matters, either by virtue of having incorporated tikanga/tikanga values as part of the way it undertook to engage with staff or by virtue of being a public service organisation. It did not accept that the process leading to GF's dismissal was flawed and, to the extent that there were any procedural deficiencies, they were said to be minor and did not result in GF being unjustifiably dismissed or disadvantaged. Lastly, it said that regardless of the process, the decision to dismiss was ultimately correct from both a health and safety and legal perspective, and that it would have been unlawful to allow GF to continue working.

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[2] The plaintiff accepts that Customs engaged in good consultation with employees who were on the vaccination fence, but not employees who had decided not to be vaccinated.

[9] As will be apparent from this necessarily brief overview, the challenge raised a number of relatively novel issues. I granted leave for Te Hunga Rōia Māori o Aotearoa to intervene and be heard on that aspect of the case involving tikanga and was greatly assisted by its submissions.[3]

[10] I note, for completeness, that the hearing spanned three separate dates. At the conclusion of the hearing in August 2022 I directed the parties to attend mediation with a mediator with expertise in restorative practices.[4] The mediation occurred in accordance with my direction but did not resolve matters. The hearing accordingly reconvened at the end of November 2022 and then in January 2023.

[11] In summary, I have concluded that GF was unjustifiably dismissed and suffered unjustifiable disadvantage. Customs did not act as a fair and reasonable employer in all of the circumstances at the relevant time, and breached its obligations of good faith to GF. Customs failed to follow a fair and reasonable process, failed to adequately engage with GF in accordance with the applicable requirements, and the decision to terminate was predetermined and fatally flawed. In addition to falling short of the base-line standard, I have also concluded that Customs did not meet what I refer to as the heightened good employer obligations imposed on it under s 73 of the Public Service Act; having gone on the front foot and incorporated tikanga/tikanga values into its employment relationship, it then failed to comply with them, breaching its obligations to GF.

The framework for analysis

[12] I start with the framework for analysis, and then move to the facts and how I see the facts of this case fitting within the applicable framework.

[13] Employment relationships are subject to the law. Parties to employment relationships owe obligations to one another. Those obligations arise in a variety of different, sometimes overlapping, ways. Many obligations are well-established, both as to how they are expressed and as to their content. But the way in which employment

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3 *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 41.
4 Employment Relations Act 2000, s 188A(2).

relationships are viewed, and the obligations that apply, develop over time. Of central relevance to all of these obligations, and how they are to be applied in particular situations, is one fundamental point. The relationship, not the contractual form that is said to describe it, is central.[5]

[14] The obligations that attach to any particular employment relationship at any particular time are informed by a number of things: obligations imposed by statute (such as, but not limited to, the Employment Relations Act 2000 and minimum standards legislation); obligations recognised at common law (including, but not limited to, trust, confidence and fair dealing);[6] and additional obligations imported into the relationship by the parties (via, for example, express contractual terms and incorporated policies and procedures, while noting that parties to employment relationships are prohibited from contracting out of obligations imposed by statute).[7]

[15] The central question in a case such as this, involving an allegation of unjustified dismissal and disadvantage for the purposes of s 103A of the Employment Relations Act 2000, is whether what Customs did was what a fair and reasonable employer could have done in all of the circumstances at the time.[8] The outer boundaries for justified employer action in terms of s 103A (the target) are set by the nature and extent of the applicable obligations. The nature and extent of the applicable obligations may differ depending on the particular context. And more fundamentally, the applicable obligations may change over time, reflecting developments in social norms and values.[9]

[16] What is the relevance of tikanga/tikanga values to the fair and reasonable employer target in this case? While the Employment Relations Act does not expressly incorporate tikanga/tikanga values, I agree with Te Hunga Rōia Māori that the statutory framework for employment relationships does not preclude their incorporation. Indeed the tikanga/tikanga values identified in this case seem to me to

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5 *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466, [2021] ERNZ 740 at [46].

6 See *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275, [1992] 1 ERNZ 711 (CA) at 722.

7 *Weir v Fuji Xerox New Zealand Ltd* [1998] 1 ERNZ 140 (EmpC).

8 Employment Relations Act 2000, s 103A(2).

9 Christina Inglis "Defining good faith (and Moana Lisa's smile)" (paper presented to Law @ Work Conference, Auckland, 30 July 2019).

sit entirely comfortably with an area of law which is relationship-centric, based on mutual obligations of good faith, and focussed (where possible) on maintaining and restoring productive employment relationships.[10]

[17] As the Supreme Court recently observed:[11]

> [19] The Court is unanimous that tikanga has been and will continue to be recognised in the development of the common law of Aotearoa/New Zealand *in cases where it is relevant.* It also forms part of New Zealand law as a result of being incorporated into statutes and regulations. It may be a relevant consideration in the exercise of discretions and it is *incorporated in the policies and processes of public bodies*.

[18] I consider that tikanga/tikanga values are relevant in this case in the sense referred to by the Supreme Court, particularly given that Customs incorporated tikanga/tikanga values into its employment relationship with its employees.[12]

[19] 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. It is convenient to set out why I have reached this view at this juncture.

Heightened employment obligations on public sector employers

[20] The purposes of the Public Service Act are contained in s 3, which include to set out the shared purpose, principles and values for the public service and the people working in it. Public service chief executives are responsible (to the Commissioner)

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10 As Williams J pointed out mana, whanaungatanga and kaitiakitanga are relational values, and principles of law that pre-date the arrival of the common law in 1840: *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [297].

11 *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239 (emphasis added and footnotes omitted).

12 At [117]. The Supreme Court observed that tikanga will not assist when it is contrary to statute or binding precedent, no such issue arises in this case.

for upholding public service principles when carrying out their responsibilities and functions.[13]

[21] The Public Service Act requires a chief executive of a public service organisation such as Customs to be a "good employer"[14], requiring (amongst other things) the chief executive, in employment policies and practices, to foster a workplace that is inclusive of all groups.[15]

[22] Section 73 of the Act defines a "good employer" as an employer who operates an employment policy containing "provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment". It refers to a number of specified requirements that *must* be complied with in order to meet the Public Service Act good employer standard, some of which are notably not of broader application to non-public service employers: requiring the operation of an equal employment opportunities programme is one such example; s 73(3)(d), which is of particular relevance in this case, is another. In this regard s 73(3)(d) provides that, for the purposes of s 73, a good (public service) employer is a public service employer who operates an employment policy containing provisions for the:

> (d) recognition of -
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> (i) the aims and aspirations of Māori; and
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> (ii) the employment requirements of Māori; and
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> (iii) the need for greater involvement of Māori in the public service

[23] I understood Mr Kynaston, counsel for Customs, to argue that s 73(3)(d) was directed at building capabilities "generally" or at a "base" level and did not apply in individual circumstances, particularly in this case because GF is not Māori. I prefer a broader reading. GF's individual employment agreement makes express reference to the statutory good employer obligation,[16] and I consider a broader reading to be consistent with what appears to be the underlying purpose of the provision.

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13 Public Service Act 2020, s 12(2)(a).
14 Section 73.
15 Section 75(1)(b), referred to in s 73(2).
16 The reference in the individual employment agreement (at 44) is to State Sector Act 1988, s 58, which is (as later explained) an earlier iteration of Public Service Act 2020, s 73.

[24] Section 73(3)(d) materially mirrors the wording of s 56(2)(d) of the earlier State Sector Act 1988. That provision had introduced the "good employer" standard to the state sector generally, having initially been enacted for the then newly formed State Owned Enterprises.[17] Clive Matthewson MP, who opened the second reading of the State Sector Bill 1987, explained the good employer provision in the following way:[18]

> However, chief executives have some constraints put on them, *because, as they are in the State services, they are different from private sector employers.* The constraints relate to the requirement to be a good employer. *The Bill does not pay lip-service to that idea, but provides legal requirements for it*.

[25] An early judgment of the High Court took the view that a term of trust, confidence and mutual responsibility could be implied into the relationship between the State and employees of government departments, and that s 56 of the State Sector Act simply reinforced existing common law obligations rather than creating new ones.[19] That approach was later followed by a judgment of the Employment Court in *Matthes v New Zealand Post Ltd (No 3)*, where Judge Travis held:[20]

> I am not satisfied, in the absence of more compelling authority, that the plaintiffs are correct in saying that the duty to be a good employer is more onerous than an employer's general obligation to act fairly.

[26] I respectfully prefer the approach adopted by Chief Judge Goddard in *Rankin v Attorney-General.* There he observed that:[21]

> [123] As the State sector is involved [as employer] the primary concept is that of the good employer. The policy behind the legislation is clear. The relationship between the Crown and employees is of necessity one of high trust and confidence. *Exemplary conduct is required of State employees and in return they can expect exemplary treatment*.

[27] There is force in the reciprocity point made in *Rankin*,[22] and I respectfully agree with Chief Judge Goddard's summation of the policy of the legislative

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17 See State Owned Enterprises Act 1986, s 4(2).

18 (16 March 1988) 487 NZPD 2715 (emphasis added).

19 *Anderson v Attorney-General* HC Wellington CP152/89, 4 September 1989.

20 *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC) at 890. See too *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [55] fn 8: "the weight of authority currently appears to be against [a more exacting standard for the public service]."

21 *Rankin v Attorney-General* [2001] ERNZ 476 (EmpC) (emphasis added).

22 I have doubts as to whether the standard is one of "exemplary treatment" (or, conversely,

enactment of the good employer requirement for state sector employers. It is tolerably clear from the material I have already referred to that express recognition was being given to the fact that public service employers were different from private sector employers and were expected to be held to heightened standards of conduct. This was explained by the Court in *Armstrong v Attorney-General*:[23]

> [T]he statutory duty is to put in place a personnel policy that will ensure that the extrastatutory but none the less legal duty to treat employees fairly and properly is duly discharged at all levels and in all aspects of employment. *It is a duty to instil an employment culture that is acceptably exemplary.*

[28] And it is significant in my view that the employment standards expressed in s 4 of the Employment Relations Act, requiring all employers to act in accordance with good faith, and the fair and reasonable employer standards referred to in s 103A of the Employment Relations Act, are expressed differently to those contained in the more recently enacted s 73 of the Public Service Act.[24]

[29] Section 14 of the Public Service Act reinforces the point. Section 14 deals with the Crown's relationship with Māori, providing that the role of the public service includes supporting the Crown in its relationship with Māori under te Tiriti o Waitangi. This is to be achieved via a number of routes, including through public service chief executives (including the Chief Executive of Customs) having responsibility for operating an employment policy that meets the requirements of s 73(3)(d).

[30] The underlying purpose of s 14 was explained during the first reading by the Hon Chris Hipkins MP, who said:[25]

> The current Act is silent on the Crown's relationship with Māori, and that is something we are changing. *We're requiring chief executives to operate as a good employer, recognising the aims and aspirations of Māori, the employment requirements of Māori, and the need for greater involvement of Māori in the Public Service. The bill puts this right. It explicitly recognises the role of the Public Service in supporting the Crown in its relationship with Māori under the Treaty of Waitangi*, something that, again, successive Governments have signed future Governments up to a range of new

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exemplary conduct) but the point does not need to be decided in the context of this case.

23 *Armstrong v Attorney-General* [1995] 1 ERNZ 43 (EmpC). The decision was overturned on appeal but not on this point: *Attorney-General v Armstrong* [1996] 1 ERNZ 344 (CA). See too *NZ Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 (EmpC) at 269.

24 Employment Relations Act 2000, ss 4 and 103A.

25 (21 November 2019) 743 NZPD 15351 (emphasis added).

> commitments that we will have to uphold and fulfil. So, to carry out this role, Public Service leaders will be responsible for developing and maintaining the capability of the Public Service to engage with Māori and to understand their perspectives.

[31] The Hon Grant Robertson MP also emphasised the government's commitment to "making sure that Te Ao Māori, the Māori world view, is understood and *is part of how our Public Service operates*."[26] Te Ao Māori was, in other words, intended to be baked into public service operations, and not something which was only engaged with when interacting with Māori.

[32] The obligations imposed under the Public Service Act cannot sensibly be read as simply requiring public service employers to tweak job advertisements and existing recruitment policies to encourage Māori to apply, and then to create a Māori-friendly working environment. Rather it is seriously arguable that the obligations imposed are broader, extending to requiring public service organisations to understand and act consistently with tikanga/tikanga values relevant to their role as a good (public service) employer. In my view, in the particular circumstances of this case, it is clear that s 73 requires Customs, as a good public service employer, to honour a commitment it has incorporated into its employment relationship with all employees (Māori and non-Māori) to act consistently with applicable tikanga/tikanga values.

[33] I note for completeness that while in *FGH v RST* the Employment Court found that s 73 did not impose an enhanced standard on the public service employer in that case, the finding centred on the "good and safe working conditions" standard provided for in s 73(3)(b).[27] The earlier iteration of s 73(3)(b) (namely s 56(2)(a) of the State Sector Act) had been considered in *French v Chief Executive of the Department of Corrections.* There the Court observed that s 56(2)(a) "does not require the maintenance of a *significant margin of quality*."[28] The Court went on to observe that: "[t]here are other "good employer" requirements [in s 56(2)] that cannot be said to reflect implied terms and conditions of all employment contracts and therefore,

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26 (21 November 2019) 743 NZPD 15356 (emphasis added).

27 *FGH v RST* [2022] NZEmpC 223 at [216]–[217]. The Court found that the Health and Safety at Work Act 2015 imposed comprehensive obligations in respect of workplace health and safety, which were generally accepted as necessary, and which were met by the public service employer through the policies it had in place; no issue of an "enhanced standard" accordingly arose.

28 *French v Chief Executive of the Department of Corrections* [2002] 1 ERNZ 325 (EmpC); cited with approval in *FGH*, above n 27, at [215].

arguably, still set a higher standard for State employment."[29] *FGH* and *French* are, accordingly, distinguishable from the present case.

[34] Finally, I observe that if s 73 adds nothing to the standards that otherwise apply to all employers in New Zealand, it is largely redundant. That is unlikely to have been intended by Parliament.[30]

[35] In summary, I consider that:

- Where an employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant to assessing the fairness and reasonableness of an employer's actions (namely an assessment of whether the s 103A target has been hit).

- Also relevant to the size of the s 103A target in cases involving public service employers are the heightened good employer obligations contained in s 73 of the Public Service Act.[31]

- Further, where an employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant to assessing compliance with the good faith obligations under s 4 of the Employment Relations Act (the s 4 target).

- It is seriously arguable that where a public service employer operates an employment relations framework which purports to incorporate tikanga/tikanga values, the extent to which such commitments have been met is relevant to assessing compliance with its good employer obligations under s 73 of the Public Service Act.

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29 *French v Chief Executive of the Department of Corrections*, above n 28, at [99].

30 See, for example, *County Council of the County of Cork v Whillock* [1993] 1 IR 231 (SC).

31 See too *Mazengarb's Employment Law* (online ed, LexisNexis) [PSA73.2]: "The nature and extent of the good employer obligation has been extended under the Public Service Act 2020, with an emphasis on avoiding discrimination and prejudice, multi-culturalism, and the promotion of diversity and inclusiveness."

- There are considerations relating to tikanga as a freestanding law, and the way in which it sits with the common law obligations that apply to employment relationships in Aotearoa, which do not need to be explored in this judgment.[32]

Admissibility issues

[36] Issues arose as to the admissibility of evidence Customs wished to call. The proposed evidence related to a number of incidents at other ports. These incidents were said to be relevant to the matters at issue in these proceedings, including the health and safety risk assessment Customs says it undertook in respect of GF's role. Ms Dew KC, counsel for GF, objected to this evidence on two grounds. First she submitted it was irrelevant because Customs was required to undertake an individualised health and safety risk assessment of GF's role in the particular port they worked at – what was happening in other ports in other parts of the country was irrelevant to the adequacy or otherwise of the required assessment. Second, the proposed evidence was inadmissible hearsay. It was agreed that the evidence would be provisionally allowed, with argument and a ruling to follow.

[37] The evidence related to incidents that none of the witnesses were in a position to give direct evidence on. Customs submitted that this Court is not bound by the hearsay rules in the Evidence Act 2006 so the evidence should be admitted. In the alternative it was submitted that if the hearsay rules apply, then the hearsay exceptions apply. It was said that the evidence was reliable and the witnesses who would otherwise be in a position to give the proposed evidence were unavailable, in the sense that the cost of calling them would be significant.

[38] The starting point is s 189(2) of the Employment Relations Act, which provides that the Court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. In other words, the Employment Court is not bound by the strict rules of evidence applying in some other courts. Indeed it is notable that the Evidence Act does not refer

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[32] See *Trans-Tasman Resources Ltd*, above n 10; and *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601.

at all to the Employment Court. Rather, s 189(2) of the Employment Relations Act reflects a:[33]

> [C]lear Parliamentary intention that the Employment Court be empowered to undertake a much fuller inquiry than would be possible under strict rules of evidence. It follows that it is not enough that the Court be satisfied that a brief of evidence contains a hearsay statement and that none of the exceptions in the Evidence Act applies.

[39] But the fact that this Court is not bound by strict rules of evidence does not mean that parties are permitted to call any evidence they like. As has been acknowledged in a number of judgments, the rules contained within the Evidence Act may well be of assistance,[34] including in assessing whether proposed evidence meets the relevance threshold, to protect the broader interests of justice and preventing hearings becoming "bogged down".[35]

[40] While I accept Ms Dew's submission that s 189 does not enable the Court to admit any evidence a party wishes to call, however objectionable, I do not agree that natural justice presents a "hard limit" which the Court cannot encroach on. Nor do I accept that the approach adopted by the Court of Appeal in *Professional Conduct Committee v Health Practitioners Disciplinary Tribunal* (*PCC*) applies in this Court.[36] My reasons for reaching this view follow.

[41] *PCC* involved an appeal relating to the way in which the Health Practitioners Disciplinary Tribunal had approached an issue of admissibility in proceedings before it. The Tribunal's powers are contained in the Health Practitioners Competence Assurance Act 2003.[37] Schedule 1, cls 5 and 6, provide that the Tribunal "must observe the rules of natural justice at each hearing"[38] and explicitly states the Evidence Act "applies to the Tribunal in the same manner as if the Tribunal were a court within

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33 *Lyttleton Port Company Ltd v Pender* [2019] NZEmpC 86, [2019] ERNZ 224 at [52].

34 See *Cruickshank v Chief Executive of Unitec Institute of Technology* [2012] NZEmpC 33 at [7]; *Lyttleton*, above n 33, at [53]; *Courage v Attorney-General (No 4)* [2022] NZEmpC 23 at [6]; and *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14].

35 *Courage*, above n 34, at [7].

36 *Professional Conduct Committee v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435, (2020) 25 PRNZ 571 [*PCC*].

37 Health Practitioners Competence Assurance Act 2003, sch 1 cl 6(1).

38 Schedule 1 cl 5(3).

the meaning of that Act."[39] The Court of Appeal held that evidence which would not be admitted under the Evidence Act was not necessarily inadmissible,[40] but that the Tribunal must commence its assessment by applying the admissibility rules contained within that Act. It said that if the criteria for admissibility were not met the Tribunal could then go on to consider whether to exercise its discretion to nevertheless admit it. However, the discretion to admit was subject to the natural justice "hard limit" contained within in cl 5(3).[41] In referring to the admissibility of hearsay statements the Court of Appeal said:[42]

> We observe that, where in circumstances such as these hearsay statements would be inadmissible under the Evidence Act, there may be little room to admit them under the cl 6(1) residual discretion. That conclusion follows from the close link between the natural justice right to challenge one's accusers and the need to exclude unfairly prejudicial evidence as expressed in s 8(1) and (2) [of the Evidence Act]. In other circumstances, the discretion may be of more significance for the Tribunal.

[42] In summary, the Tribunal was required to undertake a two-stage inquiry, considering admissibility under the Evidence Act, then assessing whether to exercise its discretion to admit subject to the "hard limit" of natural justice.

[43] As will be immediately apparent, the statutory framework applying to the Tribunal (and which was applied by the Court of Appeal) differs markedly from s 189. The plaintiff accepts that point but submits that the "hard limit" identified by the Court of Appeal is an important guide for exercising discretion in this jurisdiction.

[44] I do not think it necessary or appropriate to place a "natural justice" gloss or limitation on the discretion contained within s 189 which Parliament did not see fit to impose, unlike the approach adopted under the Health Practitioners Competence Assurance Act. In exercising its discretion to admit or allow evidence to be called and/or information to be given the Employment Court will need to identify and weigh a number of considerations, as appropriate in the particular case and under the overarching umbrella of equity and good conscience. Depending on the

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39 Health Practitioners Competence Assurance Act 2003, sch 1 cl 6(5).
40 *PCC*, above n 36, at [46].
41 At [46].
42 At [46].

circumstances, a relevant consideration will likely be whether the opposing party will have a fair opportunity to respond to the proposed evidence. And the weight to be given to this factor may be impacted by the relative power and resources of the parties. The point was made in *Lyttleton* by way of example involving a hypothetical self-represented employee leading hearsay evidence:[43]

> Depending on the circumstances, the Court might conclude that it was consistent with equity and good conscience to allow such evidence to be given. That might, in part, be informed by the fact that the well-resourced employer was best placed, if it took issue with the employee's version of events, to lead relevant evidence through its own witnesses.

[45] The applicability of *PCC* was recently considered in *Pilgrim v Attorney-General.* There Judge Corkill concluded that a two-stage analysis of the sort applied in *PCC* is not required in this jurisdiction.[44] In this regard he observed that:[45]

> Case law to date has not found a rigid two-step approach is essential on each occasion when admissibility may be considered. In some instances that may be helpful, but at the end of the day the Court must consider the evidence should be admitted "as in equity and good conscience it thinks fit."

[46] I respectfully agree with Judge Corkill's approach.

[47] Returning to the evidence in this case, I accept that it is (in the broad sense) relevant to the issues for determination. Given my findings in respect of Customs' health and safety risk assessment obligations (which I will come to), it is not of direct relevance. The plaintiff's ability to challenge the evidence was compromised – the witnesses who could have given direct evidence were not able to be cross-examined and it remained unclear why they could not have been called. While I accept that issues of cost would have arisen, Customs is a large and well-resourced organisation and concerns about undue financial impact could have been addressed via alternative arrangements, for example giving evidence via affidavit or AVL. Weighing these factors I am not satisfied that it is in the interests of equity and good conscience to admit the evidence and I put it to one side.

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43 *Lyttleton Port Company Ltd v Pender*, above n 33, at [54].
44 *Pilgrim v Attorney-General (No 6)* [2022] NZEmpC 145, [2022] ERNZ 622 at [71], fn 10.
45 At [72].

The facts and how they sit within the analytical framework

[48] I deal with the facts in detail because they are central to understanding what went on in this case and why GF says that Customs fell short in terms of meeting its obligations.

[49] It is convenient to start with the basis on which Customs decided to terminate GF's employment. The grounds were set out in a letter dated 30 April 2021. The overarching ground was that there was a genuine health and safety reason to require employees in ACOM roles to be vaccinated and that Customs had followed a fair process prior to reaching that view. The view (that ACOM roles required vaccination) was said to be based on two things. First, a health and safety risk assessment to assess "high-risk" work and how that assessment related to GF's work. Second, that GF was an "affected person" under the relevant vaccination order, which was passed into law, and drawn to GF's attention, the day termination occurred.

[50] The ACOM role was designed to "assist with the temporary additional staffing required to manage and reduce the risk of COVID-19 entering New Zealand via the maritime pathway, and to meet additional requirements of the COVID-19 Public Health Response (Maritime Border) Order 2020…."[46] As part of the development of the ACOM role, and to inform its overall COVID-19 response, an initial health and safety risk assessment for the maritime environment was carried out, dated 15 September 2020 (the September 2020 risk assessment).

[51] Ms Mason, the Manager of Health, Safety and Wellbeing, oversaw the September 2020 risk assessment, which was self-described as "generic in scope". It was expressed to cover all maritime border work, including ACOM work. Relevantly the assessment noted that "every maritime port environment is different therefore, the risks and the control measures may differ slightly." It also noted that the ratings contained within the assessment were indicative "at a generic level". The generic risk ratings were assessed as reducing from 12/high to 6/medium (residual risk: unlikely, moderate) with controls in place. Vaccination was not considered as a control.

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[46] Personal Appointment Letter attached in sch 1 of GF's Offer of Employment dated 21 September. 2020.

[52] While evidence was given that the September 2020 risk assessment was reviewed and updated regularly according to government advice and Customs' experiences, the details of the reviews and updates were not before the Court. Rather, the only substantive risk assessments before the Court were the September 2020 assessment and an assessment dated 19 April 2021.[47]

[53] A number of ACOM fixed term positions were advertised for the particular port to which GF was assigned. GF was appointed as an ACOM, commencing employment on 15 October 2020. At this date COVID-19 Public Health Response (Required Testing) Amendment Order (No 2) 2020 was in place. That order extended earlier orders to all ports where ships arrived from outside New Zealand, and the definition of affected person to any person "who belongs to a group; and … who carries out work in any capacity (whether paid or unpaid) at the place".[48] On 25 November 2020 a third order (the COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020) was enacted.

[54] In summary these orders (referred to as Mandatory Testing Orders) required testing and medical examinations for specified groups of affected persons at all airports and ports.[49] The 25 November 2020 order further extended the group of affected persons required to test and undergo medical examinations to include persons spending more than fifteen minutes enclosed in an affected ship and "all other port workers (other than excluded port persons) who interact with persons required to be in isolation or quarantine under COVID-19 order".[50] GF was never required to undergo testing or a medical examination during their time as an ACOM.

[55] At the beginning of 2021 a Border Executive Board was set up, which Customs chaired. Notes from a meeting on 4 February 2021 record that the Chair provided an overview of a proposed plan to roll-out COVID-19 vaccination to border workers and their household contacts; that issues and concerns around the potential risk to the

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47 As Ms Mason accepted in cross-examination. There was one further document before the Court purporting to be a risk assessment, but it was more accurately described as a diagrammatic representation and not a full risk assessment.

48 COVID-19 Public Health Response (Required Testing) Amendment Order (No 2) 2020, cl 4.

49 COVID-19 Public Health Response (Required Testing) Amendment Order (No 2) 2020, cl 3.

50 COVID-19 Public Health Response (Required Testing) Amendment Order (No 3) 2020, Explanatory note.

COVID-19 elimination strategy arising from border staff refusing vaccinations were raised, but that the Ministry of Health considered that the "risk [posed by unvaccinated border staff] had already been minimised to a very small degree with measures such as ongoing testing, use of PPE etc. all of which should continue to be applied as before." The position of these workers was then juxtaposed with the tougher approach required at quarantine facilities "due to higher risk." Aspects of employee wellbeing and safety were discussed as useful motivators to encourage and drive the uptake of vaccinations amongst staff, and it was agreed that vaccination requirements would be incorporated in the terms of agreement for any new employees joining the border workforce.

[56] I pause to note that GF's employment on a fixed term agreement had pre-dated the decision to incorporate vaccination requirements in employment agreements and no steps were subsequently taken to seek to vary GF's employment agreement to include a vaccination requirement.

[57] Customs began taking proactive steps to "educate, expect and support" its workers to be vaccinated, including via Microsoft Teams meetings which staff were invited, but not required, to attend. Customs was well aware that some staff were what was described as "vaccine hesitant", and it is apparent that much of the focus was on encouraging staff to seek further information and support for their decision-making with a view to encouraging them to get vaccinated.

[58] On 5 February 2021 the Comptroller of Customs sent out a lengthy email to all staff entitled "Comptroller's Weekly Update." Amongst other things it noted that border and MIQ workers and their families would be part of the first cohort to be offered the vaccine and that Customs was "working on the best ways to enable you to ask any questions and get the answers needed for your own reassurance."

[59] This communication was followed five days later (10 February 2021) by one to ACOMs at the port GF worked at from IH, Supervising Customs Officer. They noted that border workers, including Maritime Border Officers, were regarded as Tier 1 workers and if Maritime Border Officers were not already on that list, they would be. No explanation was provided as to how the Tier 1 assessment had been arrived at,

and nor was the ACOM role specifically referred to. IH went on to note that vaccination was not compulsory.

[60] A group email entitled "Staff Update – COVID vaccine" followed on 12 February 2021, noting an announcement that morning that the first COVID-19 vaccine would be arriving in New Zealand and that border and MIQ workers would be offered it from 20 February. The email encouraged staff to be vaccinated when they were given the opportunity and advised that Teams sessions would be run outlining the vaccination process and providing links to resources for staff who had questions. Emails such as this were printed out and left on the table in the staff office in the port where GF worked. GF did not read any of these documents; they considered the documents irrelevant because they had already made a decision not to be vaccinated. And at this point in time GF had been advised by Customs that there was no requirement to be vaccinated.

[61] GF's line manager, the Supervising Customs Officer (referred to as SupCo), sent a parallel communication to staff (including GF) on 12 February, attaching some information regarding the vaccine but noting: "Remember this is voluntary with no current negative consequences regarding being able to work."

[62] At 11.59 pm 14 February Auckland was placed in Alert Level 3. This prompted another "Comptroller's Update on COVID-19 vaccine" email to all staff. The Comptroller emphasised the desirability of staff having accurate information in respect of the vaccine and vaccination being a key tool in reducing the risk of catching and spreading the virus. A FAQ document was attached.

[63] On 17 February a further all-of-staff communication went out, again encouraging staff to be vaccinated. It said that "the frontline staff included in the initial Phase 1 rollout are those who have been tested under the [Mandatory] Testing Order." As I have already observed, GF had never been tested, either on a regular or random basis. Nor had another ACOM at the port GF worked at who gave evidence (and who I shall refer to as SW). I infer that, at this point, Customs did not regard GF as being part of the initial roll-out.

[64] The next day (18 February) Mr Waugh, the Group Manager, Maritime/Customs lead, wrote a lengthy email to staff headed "Update" with no further descriptor. On page two of his update Mr Waugh moved into the vaccination programme, noting that maritime staff were part of the Tier 1 group of border workers who would receive the vaccination first. He said that: "the vaccination is part of the programme to secure the maritime border to eliminate the risk of COVID-19, and our expectation is that all our staff will be vaccinated to ensure that border resilience. I do understand though that there will be some of you who are unsure or uncomfortable about this or who do not want a vaccination, so I encourage you to talk to your team members, SupCo's and CCO's [Chief Customs Officer]." GF did not recall reading this document but did recall it being a topic of some conversation at work. GF spoke to a colleague, but not a SupCo or CCO.

[65] I pause to note that at the hearing Customs emphasised the volume of information being distributed to staff, and what it contained, to show the status of the vaccination programme within Customs and what GF knew or ought to have known as the process unfolded. There are difficulties with that. GF was not vaccinated and was not vaccine hesitant. GF had made a decision that they did not wish to be vaccinated and did not have any questions that they wanted answered; nor did GF feel in need of support in respect of their decision-making. In other words the way in which Customs was communicating on the vaccination issue was not seen as relevant to GF's situation, or one GF could usefully engage in. And Customs was well aware that there were a group of ACOMs at the port GF worked at who were unvaccinated and who held strong views about the issue.

[66] On 18 February a Health and Safety Risk Assessment Vaccination Guidance: Approach for Border Work (the 18 February Guidance) was developed. It was a cross agency tool. It included a risk matrix to be applied for assessing risk for border workers covered by the Mandatory Testing Orders. As the Guidance noted, the work done by those workers already required them to undertake mandatory COVID-19 testing and went on to state: "it is implicit that the work, therefore, is at the higher end of risk exposure both for themselves; other workers and to the wider community." Again, I note that GF was not required to undertake testing at this, or indeed any other, time during their employment.

[67] The Guidance also made it clear that it was the work, not the role, that had to be assessed in applying the risk matrix. As Ms Funnell, Deputy Chief Executive of People and Capability at Customs, readily accepted, it was up to each agency to conduct a risk assessment process in respect of the work a worker performed. The point was also confirmed by Ms Mason. In other words, the 18 February Guidance was not itself a risk assessment; it was guidance on how to carry out the required risk assessment, and providing it was to be specific to the role performed by a person covered by the Mandatory Testing Order. All of this is reflected in a flowchart (Vaccination Process for all Employers of Tier 1A Workers) appended to a Cabinet Paper dated 19 February. At this point in time it was still apparent that Customs did not regard GF as a person whose work was covered by the Mandatory Testing Order, as they were not subject to regular testing, and Customs had not explicitly advised GF otherwise.

[68] On 20 February 2021 GF's line manager, together with IH, sent a joint message to the staff at the port GF worked at entitled "Urgent – [port] Vaccine date preferences", marked as being of "high importance". This was the first time vaccination-related correspondence had been head-lined for staff in this way. GF read this email. The email asked ACOMs at the port for confirmation as to who was "opting in" for the vaccine and noted that: "if you are opting out – you need do nothing and [m]ay delete this email 😊." GF did nothing other than delete the email.

[69] On 22 February the Minister for the Public Service approved the publication of the COVID Workforce Vaccinations Guidance (the 22 February 2021 Guidance). This provided more general guidance for public service agencies in respect of their employees as opposed to the previous border-worker specific guidance. It set out guidelines for agencies working with staff who were not vaccinated and stated:

> Where an employee is not intending to be vaccinated (for any reason), undertake a health and safety risk assessment to determine whether the work can be done safely by non-vaccinated employees. Factors to assess:
>
> - Nature of the work done by the employee or category of employees, e.g. is it covered by the mandatory testing order?
>
> - Risk of exposure (to and from the employee) using the latest advice from the Ministry of Health

- Effectiveness of other options to mitigate the risk of exposure
- Whether reasonable adjustments can be made to accommodate the employee (akin to disability)

The assessment may determine that the employee cannot perform all of the duties of their current role. In this case, consider options such as (not an exhaustive list):

1. Offer redeployment to suitable alternative duties within the agency
2. Offer temporary redeployment to suitable alternative duties in a different agency…
3. Provide paid special leave for a reasonable time (to be determined based on legal advice)

[70] On 5 March Customs sent out two emails to "All Staff" entitled "Teams Live Event 1 (and 2, respectively) COVID-19 vaccination process – next steps". While GF was a recipient of these emails, they said that it was unlikely that they would have opened them because they would not have seen the stated subject matter as related to their situation. That is because they were unvaccinated; were not intending to be vaccinated; and had 14 days earlier been advised by their line manager that they need not do anything further.

[71] As it happened, the email *did* relate to GF's situation. In this regard the email stated that a live Q and A event was being hosted on the vaccination process and next steps for border workers and, in particular, "we want to answer questions you may have on *what will happen if you aren't vaccinated*."[51] Mr Kynaston described the email as reflecting an approach of welcoming engagement by those who were not vaccinated. If that was the purpose of the email it was not sufficiently communicated to staff such as GF who (I accept) did not register that it had any relevance to them.

[72] The educate, expect and support approach was again evident in a lengthy email to all staff sent later on 5 March, simply entitled "Comptroller's Weekly Update – 5 March 2021". GF could not recall whether they read this update. The email reiterated a recognition of frontline border staff who had willingly supported the vaccination roll-out, thereby "helping to keep your families and New Zealand communities safe". It went on to state that if staff had any concerns about the vaccine their doctor may be

[51] Emphasis added.

a good port of call, or Ms Mason. It was also said that staff could talk to their line manager if they had any concerns they would like to raise. As GF said, they did not have concerns about the vaccine that they wished to have answered, and the letter suggested that it was concerns about the vaccine – not broader concerns, for example about potential job security – that staff were being encouraged to raise.

[73] By this time Customs had reached the view that ACOMs were covered by the Mandatory Testing Order. On 5 March Mr Foster attended a meeting with Ms Mason and the Chief Advisor Employment Relations to discuss the application of the risk assessment to various roles, including the ACOM role. They agreed that all ACOMs were subject to assessment because of the work they undertook.

[74] At this point in the chronology it is worth making an observation. By this time Customs was well aware that there were a number of workers who were not vaccinated, and was well aware that a number of workers (including at the port in which GF worked) could not be regarded as vaccine hesitant. It did not, however, take sufficient steps to ensure that staff attended the live Q and A session; that they were made aware of the importance of the matters to be covered; or that relevant information was effectively drawn to their attention via other means. As I have already said, GF did not consider that the event was relevant to their situation and they did not attend the session; nor did they read a print out of the session when it was left in the staff common room. The Authority member described this as an example of GF "studiously" avoiding engagement.[52] I have formed the view, after having had the advantage of seeing and hearing GF give evidence over a relatively extended period of time, including under cross-examination, that it was more nuanced than that.

[75] The reality is that GF felt isolated from a process directly focussed on a very personal, and voluntary, decision. GF was clearly upset about the messaging that Customs adopted from the outset, as lauding staff members who had chosen to be vaccinated (as having taken appropriate steps to protect their families, workmates and the community). Far from encouraging engagement with affected staff such as GF, the communications strategy left them feeling marginalised and disengaged. While

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52 *GF v New Zealand Customs Service* [2021] NZERA 382 at [41] (Member Beck).

acknowledging the difficulties that Customs was confronted with, I see this as a failure by it (as a well-resourced employer with the additional obligations I have referred to) to adequately or appropriately communicate with GF, including in a respectful, considered, individualised manner that respected their mana.

[76] There were further difficulties with the way in which Customs communicated with GF during this time, which require a return to the chronology.

[77] The Teams presentations took place as scheduled on 9 and 11 March. The presentations involved a number of graphics and discussion points, which various managers (including Ms Funnell) talked through. A key aspect of the presentation was a risk assessment, which was shown to staff in diagrammatic form. It was explained that the risk assessment had been applied to determine which staff were in Tier 1, and accordingly who would need to be vaccinated to continue in their role. The presentation concluded that all staff who interacted with people arriving in New Zealand (essentially those covered by the Mandatory Testing Order) should be vaccinated.

[78] The evidence as to what this risk assessment diagram was based on was confused. As I have said, as at this date there was only one relevant risk assessment before the Court and it was the September 2020 risk assessment. That assessment was generic, did not purport to assess the effect of vaccinations on risk and had noted that every port environment, and the relevant controls, differed.

[79] Ms Mason's team had provided the risk assessment diagram for the presentation. She described it as being a "summary view". While I understood her to accept that the diagram appeared to replicate the same inherent and residual risk ratings contained within the September 2020 risk assessment (which had not factored in vaccination), she did not accept that there was a correlation between the two. The September 2020 risk assessment was said to be directed at the risk to the individual, looking at all possible controls; the March 2021 presentation was directed at the risk to public health as a whole and the effect vaccination in particular would have. Ms Mason said that the risk assessment diagram presented to staff on 9 and 11 March was based on Customs' own risk assessment, but neither she nor Ms Funnell was able to

identify what that assessment was. I note also that while Ms Mason gave evidence-in-chief that there was a new finalised risk assessment produced five days later (on 16 March) no such document was before the Court. Indeed she accepted in cross-examination that there may have been no other iterations of the September 2020 risk assessment until the risk assessment of 19 April 2021 was produced, which I come to shortly.

[80] The risk assessment presented to staff in diagrammatic form showed two bubbles, being pre and post vaccination. The inherent risk pre vaccination was shown as high. Post vaccination was shown as medium. At the hearing questions arose as to the accuracy of the matrix shown to staff. Ms Funnell gave evidence that the chart contained a formatting error and that a later risk assessment in December 2021 was more accurate, in that it showed risk levels with no controls, pre vaccination, and post vaccination (the December 2021 risk assessment post-dated termination of GF's employment). She accepted that the notes which accompanied the presentations for staff on 9 and 11 March were also incorrect. Other witnesses for Customs gave evidence that the table shown to staff during the presentation was correct but the table had become corrupted when being sent or printed. I note that if the error arose on printing the same error would presumably have been evident in the copy of the presentation left in staff common rooms after the Teams event for staff to read.

[81] During the presentation Customs confirmed that the risk assessment did not assess risk to the individual worker; rather it represented "the risk to the wider New Zealand community of COVID-19 transmission through the border." This sits uncomfortably with the guidelines for risk assessment contained within both the 18 and 22 February 2021 Guidance. More specifically, the 18 February Guidance referred to the risk of exposure and infection specific to the work undertaken; the 22 February Guidance referred to the need to assess the risk of exposure to and from the employee.

[82] At the presentation Ms Funnell talked about a process that would commence on 15 March to work out which staff were not vaccinated. She made reference to a range of reasons why a staff member might not be vaccinated, including because they did not consider they should have been categorised as Tier 1. She made it clear that

mischaracterisation of staff as Tier 1 was possible as "we cast a wide net". She also made the point that staff who felt they had been mischaracterised as Tier 1 could, if Customs agreed, simply be removed from the list of staff needing to be vaccinated.

[83] Ms Funnell went on to refer to staff who had made a firm decision not to be vaccinated, and that Customs would endeavour to ensure that they had all the information they needed to make a decision. She said:[53]

> We will need to put a time limit on how long people can consider their decision to be vaccinated – and we are still working through how long that will be. It will be weeks rather than months.
>
> *For those staff* whose GPs tell us they are exempt, and those *who definitely decide they don't want the vaccination in the time limit, we will then undertake a health and safety assessment. That assessment will look at the work the person does, and the proximity they have to people arriving in New Zealand. The assessment will consider if other mitigations will reduce the risk or if changes could be made to the work. If that is possible, then the person can remain in their role*.
>
> If the work can't be done safely, then we will need to look at alternative options. This could include redeployment within Customs, or outside of Customs. We are still working through what might be possible beyond that, and that will depend on the numbers we have and what work is available for people to be deployed to.

[84] At this point in time it is clear that Customs was well aware that some staff it considered to be Tier 1 may not have been correctly categorised, because it had "cast a wide net". It is also clear from the Guidance that the risk assessment process was to be directed at an individualised health and safety assessment for the particular person in their particular role having regard to the particular work they did, together with an individualised assessment of whether any risk could appropriately be mitigated. If the risk could not appropriately be mitigated, the focus was on retaining employment. No mention was made of the possibility of termination in the presentation. Nor was the possibility of termination highlighted in answers given to questions arising out of the Q and A sessions, and which were made available to staff. It is apparent from the evidence that as at the dates of the presentations and the live Q and A sessions GF firmly believed that their work did not fall into the category of work for which they should be required to be vaccinated.

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[53] Emphasis added.

[85] While Ms Funnell had made it clear that an individualised health and safety assessment would be done for unvaccinated workers I am not satisfied on the evidence before the Court that this step occurred, for reasons which will become apparent.

[86] During the presentations Ms Funnell had said that Customs would be having a "private conversation" with staff who had been identified as being unvaccinated to understand why. The expectation was that those conversations would occur within two weeks of the presentations. GF did not attend the presentations and had not been required to do so. That meant that GF was not aware that they would be approached for a private conversation about their vaccination status. That had ramifications because Mr Foster, Manager Human Resources Service Delivery, said (and I accept) that he rang GF in late March but could not get through. He did not leave a message. He rang again sometime later, this time leaving a message saying that he had called, but not saying what he had been calling about. It was unclear why additional steps were not taken during this time to engage on a one on one basis with GF. In the event, the private conversation foreshadowed by Ms Funnell did not take place.

[87] GF said that the first time they realised that their job was in jeopardy was when they read a newspaper article on 26 March entitled: "Unvaccinated border workers to be barred from frontline roles." It was at this point that they decided to instruct an employment advocate.

[88] GF's employment advocate wrote to Customs on 31 March. The advocate advised that they had been engaged to facilitate good faith conversations regarding the vaccination and potential changes to their client's employment. It was also noted that, while unions had been in consultation with various government departments about the issue, their client preferred individual representation in light of their individual views and needs. The advocate noted that GF's work did not have the same health and safety risks as all Customs border workers and GF did not believe that their role should be considered analogous to them. In the first instance confirmation was sought that the Minister of Health's media release did not apply to them and that GF's role would not be impacted. Confirmation was also sought that any information that may be seen to impact GF's role be provided to them, through their representative, before being released to the media (to avoid any unnecessary stress and anxiety, and to align with

the good faith obligations to provide information contained within the Employment Relations Act). Finally, it was made clear that if, at any stage, there was a potential that GF's role may be impacted, they be consulted through their advocate.

[89] Four points clearly emerged from the 31 March communication sent on behalf of GF. First, that there was an issue from GF's perspective as to whether their work required vaccination. Second, that the Minister's public announcement that border roles would be terminated if the worker undertaking that role was unvaccinated had come as a shock and was causing GF stress and anxiety, and that clarification was being sought as to the scope and effect of the Minister's public announcement. Third, that Customs was being asked to provide *any* information that may be seen as relevant to a potential impact on GF's role. Fourth, that GF was wanting to actively be consulted, on an individual basis, in respect of their role.

[90] No substantive response was provided to GF's 31 March letter until 21 April, some three weeks later. When a response did come it contained notice of a proposal to terminate GF's employment.

[91] Returning to the chronology, on 8 April the Prime Minister publicly announced that front line border workers, including those working at ports, must be vaccinated or start being moved into "low risk" roles by Monday 12 April. GF was shocked when they read this; Customs said that the announcement came as a surprise to it too and they had not been made aware of this decision prior to its release. Customs sent an email to all staff the next day, referring to the Prime Minister's statements. The email said that:[54]

> We know that while most Tier 1 Customs Officers have been vaccinated, not all will have been by Monday. We do have a set process in place that we will continue to follow. *These last few weeks, our People and Capability team have reached out to Tier 1 unvaccinated staff* to provide support and information to assist them to exercise their right to informed consent.
>
> During next week, we will be planning *follow up conversations* with those staff who we understand remain unvaccinated. *These conversations will commence from Monday 19 April, and will enable us to confirm, up to date vaccination status, and allow us to review the health and safety risk assessment for the specific work of the individual employee.*

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[54] Emphasis added.

> This will help us to determine whether the employee can safely continue to do their work, if unvaccinated. Where the staff member continues to decline vaccination, we will be able to conduct a redeployment search internally and, as necessary, across the wider sector.

[92] The email prompted GF's advocate to write to Customs' line manager on 12 April seeking an urgent update and flagging concerns about predetermination of outcome, absent any input from, or further engagement with, GF.

[93] Customs did not respond to the concerns or the request for an urgent update. Rather, on 15 April, Mr Foster sent a nationwide email to all staff who were assumed to be unvaccinated, including GF, advising that:

> We will now be moving into the next phase of the programme by meeting with you to discuss next steps. You will shortly receive a meeting invite and information in order to begin this process.

[94] By 19 April Customs' maritime border risk assessment had been updated to include vaccination. The residual risk ratings remained at "High" pre-controls, and were identified as "Medium" post-controls. However, and as counsel for GF pointed out, the assessed reduction in residual risk was attributed to a suite of controls (for example PPE usage) and not solely to vaccinations. Customs relied on this conflated reduction in residual risk in their communication with staff. No risk assessment was undertaken for different ports, including the port where GF and other affected ACOMs worked.

[95] On 19 April GF's advocate sent a second follow-up email request to Customs, through GF's line manager, for an urgent update and referenced Customs' good faith obligations and the continuing stress and anxiety ongoing correspondence about vaccination was causing GF. The line manager responded the same day advising that the matter was with senior management and that GF's correspondence would be forwarded on. Mr Foster gave evidence that he immediately responded to the line manager asking them to remind GF of the Comptroller's email from 9 April outlining Customs' process. There is no evidence this follow-up occurred. Even if the line manager had referred GF to the 9 April email it would not have addressed the concerns raised on GF's behalf, as it was generic in nature. GF's request for an urgent update went unanswered and Customs' substantive response did not come until 21 April.

[96] The way in which Customs' substantive response to GF's concerns was couched is revealing. The letter proceeded on the basis that GF's role could only be done by a vaccinated worker; Customs had considered "other work options" for GF and had been unable to identify any; and, because Customs had assessed that GF's role should be performed by a vaccinated worker and GF was not vaccinated and Customs had not been able to identify or agree any suitable redeployment options, it concluded that there was a need to consider terminating GF's employment.

[97] The letter noted that border agencies and the Ministry of Business, Innovation and Employment had determined that from 1 May "all work assessed as having a high risk of exposure to COVID-19 should be done only by workers who are vaccinated. Customs supports this approach." It said, under "Other work options", that Customs had been "considering other work options for you, including whether your role could change to ensure your work has an acceptable risk of exposure to COVID-19. We have also been considering whether there are any suitable redeployment opportunities for you. At this stage we have not identified or agreed any other suitable work options for you."

[98] Under the heading "Possible termination of your employment" Mr Foster wrote:

> For the above reasons – because we have assessed that your role should be performed by a vaccinated worker, because you are not vaccinated and because we have not identified or agreed with you any suitable redeployment options – we believe we need to consider terminating your employment.
>
> We want to stress that this is a proposal only, we have not made any decisions and we are willing to consider any alternatives that you or we identify. We also will not make any decision until you have had an opportunity to provide your views and suggestions, and to discuss those with us.

[99] While emphasising that termination was only a proposal, the letter went on to seek confirmation from GF as to their vaccination status, noting that "it is not too late to get a vaccination" and that "[i]f you do get a vaccination, within the timeframes we set, *you would be able to remain working in your position*."[55]

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[55] Under the heading "Please let me know if we have your vaccination status wrong". Emphasis added.

[100] Also notable is the fact that, although the 9 April email to GF had stated that there would be an individualised health and safety assessment undertaken, the letter of 21 April was a generic one. It said nothing about GF's individual circumstances and did not refer to any risk assessment undertaken in relation to GF's work.

[101] Customs referred to not having been able to verify if GF was vaccinated but did not refer to the fact that Customs had never had a direct conversation about the issue with GF; it referred to not having agreed with GF about any suitable redeployment options but did not refer to the fact that it had not directly sought to do so. In any event, such discussions put the cart before the horse – namely, there was no initial discussion about whether GF's work *did* require a vaccinated worker.

[102] The letter also referred to Customs having engaged with three unions throughout the vaccination programme and said that if GF was a union member the union would be well placed to support them in the process – three weeks previously GF had advised Customs, through their advocate, that they were individually represented.

[103] Mr Foster was cross-examined on why the letter was generic and why it came three weeks after the request for engagement with GF. I understood him to say that it was a very busy time, with 63 other affected staff with individual needs, not just workers at that particular port, with whom Customs was in the process of engaging with. He said that he had asked GF's line manager to respond earlier, and that did not happen. In any event, Mr Foster said that he considered that the communication was sufficient to set out what Customs was doing and why. I cannot accept this having regard to the applicable requirements on Customs as GF's employer. What was required was individualised engagement in a timely manner, and the provision of information relevant to GF's role, including an explanation as to why Customs had formed the view (it said provisionally) that the work GF did at the particular port needed to be done, from a health and safety perspective, by a vaccinated worker. Nor do I accept the evidence that the letter was sufficient to respond to some aspects of the advocate's earlier information request, most particularly in relation to the potential impact on GF's role.

[104] Ms Funnell was also cross-examined on Custom's response to the request for information contained in the letter and why the detailed risk assessments, which Customs said it was relying on, were not provided. Her responses disclosed a narrow reading of the request, including that the request for information was limited to information which might be released to the media. As s 4 of the Employment Relations Act makes clear, an employer is under a positive obligation to provide information in circumstances where an employee's employment may be impacted. Plainly the situation GF found themselves in fell within this category.

[105] Six points were noted under the final heading of the 21 April letter as matters Customs would like to achieve at the proposed meeting, namely:[56]

> 1. Confirm your vaccination status
>
> 2. Confirm the work undertaken in your role
>
> 3. Discuss *the draft individual assessment of the risk exposure to COVID-19 in your work*, and hear from you
>
> 4. Discuss potential options for your work, including redeployment
>
> 5. Discuss the proposal to terminate your employment and discuss any views or suggestions you have
>
> 6. Clarify next steps.

[106] Mr Foster went on to set out the "proposed outcomes" of the meeting as being that:[57]

> We agree how we'll manage the risks of COVID-19 to ensure that work assessed as having a high risk of exposure to COVID-19 is done only by workers who are vaccinated.
>
> Possible outcomes include:
>
> We have agreed a way in which your role could change to ensure your work has an acceptable risk of exposure to COVID-19; or
>
> We have agreed on how your role will change, *that may require moving you temporarily to a different role or agreed on next steps to explore this further*; or
>
> We decide to terminate your employment for the reasons expressed and discuss the next steps with you.

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[56] Emphasis added.
[57] Emphasis added.

[107] It is clear from the way in which the letter was drafted that, by this time, Customs was well advanced in its consideration of issues relating to GF. Customs had concluded that all work assessed as having a "high risk" of exposure to COVID-19 should be done only by workers who were vaccinated. Because GF was not vaccinated the question of whether GF's work did in fact carry a "high level" of risk was engaged. But it is tolerably clear that Customs had already answered this question to its own satisfaction because the letter went on to state that Customs (without GF's input) had been unable to identify how GF's role could change to ensure an acceptable risk of exposure to COVID-19. All of this appears to have been predicated on a personalised risk assessment for GF's role, which was said to be in draft and which Customs wished to discuss with GF at the meeting, but which had not been made available to GF.

[108] GF's advocate replied to Mr Foster's letter asking for the health and safety assessment which had led Customs to conclude that GF's role needed to be filled by someone who was vaccinated. Mr Foster responded advising that he would be fully discussing the health and safety assessment for the work at the meeting but would provide a copy of the assessment later that day.

[109] A risk assessment was provided in an email sent at 4.22 pm on 21 April. It was not, as Ms Dew pointed out, individualised (either as to the work that GF undertook in their role or, less specifically, as to the work of an ACOM at the particular port). Rather, it simply asserted that factors making COVID-19 infection 'possible' were present in GF's work, without detailing what that work was or which particular aspects of it engaged these factors. It was a two-page document which textually described the conclusions and included a risk assessment diagram on page two. It is notable that the diagram was presented in similar format to, but was materially different from, the risk assessment that had been shown to staff at the presentations of 9 and 11 March. The placement of the bubbles pertaining to pre and post vaccination risk levels had changed to reflect a more significant risk pre vaccination. Ms Mason's explanation of this change was that new variants of the virus affected the risk ratings at this point in time. While acknowledging the limitations of the risk assessments (namely they are time-specific, not dynamic and take time to produce), I note that the added risk of new variants did not appear to be reflected in the 19 April assessment released two days earlier.

[110] On 26 April GF's advocate provided a written response to Customs' letter for the purposes of providing feedback on the "possible termination of employment". The letter raised many concerns surrounding the health and safety risk assessment Customs was purporting to rely on, the process it had gone through to produce it, and predetermination. The advocate suggested a joint mediation session and that, if required, GF could be placed on paid special leave until this could be arranged. GF received a response the following day advising that Customs was unwilling to attend mediation.

[111] On 29 April GF attended the meeting with four other ACOMs from the same port who similarly took issue with Custom's position and who were represented by the same advocate. The way in which the meeting unfolded became a focus during the course of the hearing.

[112] Mr Waugh was the decision-maker and attended the meeting on 29 April. Mr Foster was also present at the meeting, along with Custom's external legal adviser. GF's line manager was not present, nor was any other person from the particular port (other than GF and the other ACOMs at the meeting) who could substantively contribute to any discussion about the day-to-day work of ACOMs, including their work in the physical location they worked in.

[113] Shortly before the meeting the COVID-19 Public Health Response (Vaccinations) Order 2021 was passed into law (Vaccination Order), to come into force the following day. It provided that "affected persons" (which included a person working at an affected port) had certain duties: they must not carry out certain work unless vaccinated; they were to allow their employer to access Ministry of Health records of their vaccination status; and were required to notify their employer of any change to their vaccination status.[58] The Vaccination Order also placed duties upon employers of affected persons to ensure the work was only done by vaccinated people.[59]

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58 COVID-19 Public Health Response (Vaccinations) Order 2021, cls 7 and 11.
59 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 8(1).

[114] There was no proposal by Customs that the meeting be deferred to provide time to reflect on the Vaccination Order and its potential impact; rather the meeting proceeded as scheduled. The ongoing employment of five workers was at stake, each having been advised that termination was a possible outcome. I infer from the transcript that it was not a lengthy meeting.

[115] While the meeting occurred against the backdrop of Mr Foster advising that he would be fully discussing a detailed health and safety assessment for GF, that did not occur. As a review of the transcript of the meeting shows, Mr Foster talked (without interruption and apparently reading from notes) about general points relating to the virus and the risks associated with any exposure, and the impact of vaccination. He observed that "when you put this into a risk matrix, risk of death for an individual can be rated no less than major. So, when you put this into our own risk matrix, you will see that vaccination as an additive controls lowers the risk considerably." He then made the point that Customs was required to take all reasonable and practicable steps to minimise harm, that vaccination was an additional control, and that "we also considered whether any adjustments to your work could be made that would enable you to remain in your current role, but we have concluded that this is not possible given the core nature of your work and the inter-operability that is needed to work in the border environment." That, he said, was the basis for the risk assessments that Customs and other border agencies had undertaken.

[116] He then moved on, without apparent pause, to refer to the Vaccination Order and made two points. First, that it was a duty of an affected person not to carry out work unless vaccinated and that each of the five workers were "affected persons" and so not able to carry on work unless vaccinated. Second, that Customs, as an employer with obligations under the Vaccination Order, must not allow an affected person to carry out work unless satisfied that the affected person was vaccinated. Again, he moved on, without pause, to say that:[60]

> So, given what I have just talked about, the risk assessment, given the vaccines order, we need to work through together how we can comply with the risk assessment and the public health order and as I say we have already tried to look at the type of work and found that we are not able to make a change. *So, what we would like to be able to do is to consider redeployment*. Now we

[60] Emphasis added.

> have looked across the country for redeployment opportunities … we just do not have internal redeployment opportunities in [port], and we have looked and considered but we do not have the opportunities there. But what we would like to do is to utilise the Public Service Commission… which would enable us to look for redeployment opportunities in other agencies…
>
> If we are not able to redeploy then we may need to consider if termination of your contract and stand down would be a way forward for us. If we were to propose that then I would like to pause now and hear from you your views and feedback on redeployment, termination of the contract and stand down.

[117] It is notable that this was the first point in the meeting that Mr Foster made it clear that he would pause and hear the employees' views about what he had had to say. It is notable too that he made it clear that what he wanted to pause and hear their views on was limited to three things: redeployment, termination and stand-down.

[118] It is not surprising that GF considered that decisions about their employment had been predetermined and that Customs had a mind-set that did not invite a conversation or input into issues related to the health and safety assessment, or whether they were an affected person for the purposes of a Vaccination Order that they had only just had drawn to their attention. A similar point was made by GF's advocate at this stage of the meeting. They said there had not been enough communication about the risk assessment; that there were questions about what category GF fell into in light of the work they did; but that it sounded as though a decision had been made and they would need more information on redeployment. The rest of the meeting was largely taken up with a discussion about redeployment options.

[119] Mr Foster gave evidence that he was "absolutely open" to a discussion about health and safety and that he and Mr Waugh had "sat there hoping to have a full and frank discussion" about those issues. I find it difficult to accept this evidence, and it is not supported by a close reading of the transcript. I think it likely that if there had been a genuine desire to engage with GF about the health and safety assessment; whether they were a Tier 1 worker; and whether they were an affected person for the purposes of the Vaccination Order, the leadup to the meeting and the meeting itself would have been approached in a very different way. Rather the meeting focused on next steps, being redeployment, termination and stand-down, reflecting that Customs had already reached a decision that the ACOMs at the meeting could not continue to

work in their role at the particular port. GF and SW's perception of the meeting as something of a 'tick box process' was well open to them in the circumstances.

[120] In the event GF declined to participate further in the meeting, giving evidence that they considered that the decision had been made and there was no point in engaging with it further.

[121] For completeness, I note that Customs' legal adviser interjected following the discussion on redeployment, to confirm that there were no redeployment options and that was why termination was being proposed, in light of the "1 May deadline." They went on to state: "… where we are at now is that there is a proposal to terminate your fixed term employment and so one of the main purposes of this meeting was to get your feedback on that proposal to terminate your employment before Customs makes its final decision on that."

[122] Mr Kynaston submitted that these statements made it clear that Customs had not made a decision and was seeking feedback. There are difficulties with that. The legal adviser only linked the proposal to terminate, and the purpose of seeking feedback, with redeployment. That missed out a significant step – namely issues that had been identified as to the health and safety assessment and whether GF's work did fall within the Vaccination Order. Further, the way in which Customs had conducted the meeting reasonably led to the conclusion that it was not interested in these matters because it had already reached a concluded view that GF could not continue to do the work they had been engaged to do on a fixed term employment agreement. Even if what the legal adviser said could be interpreted as emphasising that their client was open to discussing issues other than redeployment and termination, the predetermination dye had already been cast.

[123] Mr Kynaston also submitted that it behoved GF and/or GF's advocate to raise issues or demand more time if that was what was required, and that it was relevant that GF had said that they had nothing to add to their advocate's earlier correspondence and that GF's advocate essentially said the same thing. I do not doubt that many lawyers acting on GF's behalf would have raised the very issues Mr Kynaston refers to, and/or demanded more time, or deferral of the meeting to absorb the potential

impact of the Vaccination Order and make informed submissions on it. But I do not think that the fact that a different approach was adopted by and on behalf of GF materially assists Customs.

[124] Customs is a large organisation with significant resources at its disposal, including in terms of human resources and access to legal advice and support. In addition (and as I have said) it is a public service organisation with heightened good employer obligations, including via its undertaking to deal with staff in accordance with tikanga/tikanga values. While I accept that GF had obligations to be responsive and communicative, and to act in good faith towards their employer, it was up to Customs to ensure that it met its obligations, whether or not the employees it was dealing with, or the advocates representing them, raised red flags that others might have raised or waved them with the same degree of vigour.

[125] The haste to bring matters to a conclusion because of the 1 May deadline was not adequately explained. It remained unclear why Customs could not slow the process down, particularly when the Vaccination Order had only been issued on the day of the meeting. Customs would have been well aware of the pressure this put on GF. It also remained unclear why Customs declined to pause the process to attend mediation, and why it declined to take up GF's offer of going on special paid leave to enable issues to be worked through. There was some suggestion in the evidence that new (vaccinated) workers would need to be employed and that there were accordingly financial constraints in delaying the process with GF. I was not drawn to this evidence, not least because it stood in contrast to the offer to look at redeployment opportunities through the Public Service Commission which, I infer, would have taken some time and would have occurred while GF remained employed by Customs.

[126] As was recently explained in *Guerra*, a case which involved actions taken by an employer in the face of the COVID-19 pandemic:[61]

> An employer's actions are to be measured against those that a notional fair and reasonable employer could have taken. That may usefully be conceived of as a target. The bullseye of the target is "employer best practice" and the outer circles of the target comprise "acceptable action". Towards the outer edges of the target lie the danger zones. Anything off the target is not what a

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61 *Wilson-Grange Investments v Guerra* [2023] NZEmpC 39 at [41]–[42].

> fair and reasonable employer could have done. The size of the target will depend on "all of the circumstances at the time", as s 103A(2) expressly states.
>
> It will generally be helpful to adopt a multi-layered approach to an assessment of what the relevant circumstances are in any particular case and, accordingly, where the outer edges of the target lie. Plainly "all" of the circumstances covers more than external pressures on an employer, and circumstances change over time. In this case, the pandemic and its impact, including the impact of government-imposed lockdowns and the speed with which things were happening, were relevant to the target the plaintiff was required to hit if it was found to be acting as a fair and reasonable employer. Also relevant to the target the plaintiff was required to hit was the impact on Mr Guerra of a substantial reduction in his pay – he too had financial obligations to meet. And, in terms of timing, by the second lockdown there had been more of a breathing space, and time for a more considered approach. In other words, what could be regarded as fair and reasonable at the outset changed over time.

[127] The context in which the employment relationship problem with GF was unfolding, including the fact that Customs was moving at pace and that things were pressurized, is relevant to an assessment of whether Customs acted as a fair and reasonable employer in all of the circumstances, and whether it met its broader obligations of good faith to them. Also relevant was the likely impact on GF – it was, after all, their job that was on the chopping block in the context of a no-fault situation. And, while Customs had obligations to others, including other staff and the public, those obligations did not displace the obligations owed to GF, even having regard to the significant pressures Customs was operating under at the time.

Tikanga and the employment relationship

[128] I return to the submissions in respect of the role of tikanga/tikanga values in this case.

[129] A number of Customs' documents were before the Court which are relevant to the employment relationship. Te Pou Tokomanawa forms part of Customs' 2019-2023 Statement of Intent, Rautaki Mana Ārai - Customs' Strategy, and is included in Customs' employee induction materials. Te Pou Tokomanawa is said to reflect Te Tiriti o Waitangi principles of partnership, protection and participation, which "provide the foundations" for what Customs does. The foundations are expressed as kotahitanga, kaitiakitanga and manaakitanga. The Whanonga Pono are referred to as Customs'

values which "underpin all that we do at Customs."[62] The four values incorporate the following: "Te Ara Tika - We do what's right", explained by "Whāia te ara tika. Mā te tika o te mahi I roto I te pono me te aroha. Ka eke ki ngā taumata o te ora (Following the right path in whatever we do. Integrity, honesty, and passion will contribute to success)"; "Kaitiakitanga - We are guardians", which is underpinned by "Ārai paenga, manaaki tāngata, haere whakamua (Screening and protecting borders, caring for people now and in the future)"; "He Tāngata - We value people", which is supported by the whakataukī "He aha te mea nui o te Ao? He tāngata, he tāngata, he tāngata (What is the most important thing in the world? It is the people, it is the people, it is the people)"; and "Pae Tawhiti - We look forward", supported by the whakataukī "Ko te pae tawhiti whāia kia tata, ko te pae tata whakamaua kia tīna (We seek to bring distant horizons closer, and sustain and maintain those that have been arrived at)."[63] The above reflects Customs' explanation as to the content of the values referred to.

[130] Customs' Code of Conduct outlines four standards: being fair; impartial; responsible and trustworthy. It refers to the Customs' "Story", stating that "this Code of Conduct sets the minimum standards for how we actively demonstrate our purpose, our beliefs, our focus, our spirit and our character," and makes express reference to "mana" as being an expected characteristic within the employment relationship. The Code of Conduct states that all Customs employees will be guided by the standards of behaviour referred to in it when "making decisions and taking actions".[64] It reiterates that "valuing diversity makes the organisation stronger" and that managers are responsible for modelling the standards of behaviour in the Code of Conduct.[65] The plaintiff's individual employment agreement incorporated by reference the Whanonga Pono and Te Pou Tokomanawa,[66] and refers to the employment agreement as being a "critical element of our Rautaki Mana Arai Customs' Strategy, and underpins the principle that people are at the heart of what we

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62 Statement of Intent at 4.

63 Te Hunga Rōia Māori submitted that in order to explain a singular tikanga concept, as expressed in te reo Māori, in English a significant level of detail is required. Literal translations do not adequately convey the deeper meaning of tikanga. This point was illustrated by reference to the discussion of whakamā in *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 (EmpC). In the present case evidence was given providing a fuller explanation than simple literal translations.

64 Code of Conduct at 2.

65 Code of Conduct at 4.

66 Individual employment agreement at 1 (following the title page) and 3.

do."[67] In other words, and as Ms Funnell accepted in evidence, the strategy forms part of the expectations of employees.

[131] Te Hunga Rōia Māori made the point, which I accept, that it is not for the Court to decide what tikanga is or what tikanga values are. While the Court may consider tikanga, it does so on the basis of evidence before it.[68] Depending on the circumstances, the Court may need to seek a report from a tikanga expert/a pūkenga. It may generally be appropriate to do so where tikanga is relevant to part of a fundamental issue in dispute before the Court and where there is a lack of expert evidence as to the tikanga being raised, there is a dispute as to the tikanga that applies, or the Court considers it necessary to fully and properly consider the matters being raised. I accept too that the Court must be cautious in cases involving complex tikanga evidence, creating a need for appropriate mechanisms and processes to safeguard tikanga and ensure it is properly considered.

[132] In this case the plaintiff called a pūkenga (Mr Mair) to give evidence. Customs did not call any expert evidence, did not seek to question Mr Mair's expertise and did not cross-examine him.

[133] In summary I understood Customs' position to be as follows. Its organisational principles, which find expression in relevant employment documentation before the Court, were designed to incorporate an a "Te Ao Māori perspective". The principles are not themselves tikanga and are to be interpreted and applied in any given context. The principles are a guide, being broadly expressed aspirational statements, not obligations Customs was required to meet.

[134] Customs went on to submit that it had acted in accordance with its Whanonga Pono and Te Pou Tokomanawa, by engaging respectfully, meaningfully, and face-to-face with GF virtually, via Teams and at the 29 April meeting. It also said its approach to vaccinations generally aligned with specific tikanga values, such as kaitiakitanga (although did not detail how this was so). Customs refuted the suggestion that

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67 Individual employment agreement at 3.

68 Citing *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843, [2022] 3 NZLR 601 at [37] in support. See too the cautions expressed in *Ellis v R,* above n 11.

tikanga/tikanga values applied more generally in the circumstances of this case. In this regard it was said to be relevant that GF had not asked Customs to apply tikanga, GF was not Māori and there were no particular circumstances which might otherwise require the application of tikanga.

[135] Mr Mair expressed the opinion that, where an organisation such as Customs has committed to tikanga/tikanga values, those commitments must be viewed through a Te Ao Māori lens, requiring more than simple translations that seek to embed tikanga in Pākehā concepts. Meeting its commitments required an understanding of the applicable tikanga/tikanga values, and ensuring that appropriate capacity and capability was in place within the organisation to facilitate substantive tikanga-compliant engagement with staff.

[136] The evidence was that in order to uphold tikanga/tikanga values in the workplace effort must be applied and sustained from beginning to end. Mr Mair explained that the maintenance of relationships is central to tikanga, which also encompasses mana enhancing (not diminishing) conduct. It was said that, in a case such as this, tikanga would involve face-to-face discussions with the affected employee with a view to reaching consensus; ensuring that the right people were present at such discussions, including those who were professionally close to the affected person (in this case GF's line manager, who knew GF and knew the work that GF did); designing and implementing an individualised process for the affected employee; and ensuring minimal damage to the relationship, including post-employment if a continuing employment relationship was not possible. Te Hunga Rōia Māori explained that Custom's role as kaitiaki could also involve providing post-termination care and counselling.

[137] I accept the submission advanced by Ms Kopu, co-counsel for GF, that it is not for Customs to decide that the tikanga/tikanga values it chose to incorporate into its employment relationship via Whanonga Pono, Te Pou Tokomanawa and relevant employment documentation they are expressed in, are *not* tikanga and can effectively be interpreted and applied as Customs sees fit. Mr Mair's evidence reinforced the point. I agree with Te Hunga Rōia Māori's point that, where the evidence demonstrates a commitment to act in accordance with tikanga, an employer should be obliged to do

so. In other words, the flexible-guideline approach adopted by Customs is not appropriate. Nor would such an approach, in my view, be consistent with its broader obligations as a public sector employer which I have already touched on.

[138] I also agree with Ms Kopu that at a minimum Customs was obliged to acknowledge and consider tikanga/tikanga values that it itself had introduced into the employment relationship. This required Customs to consider how applicable tikanga/tikanga values should inform its conduct in dealing with employment relationship issues and to then act accordingly.

[139] I was not drawn to the submission that tikanga is only relevant to Customs' Māori staff. That sits uncomfortably with the way in which Customs has chosen to incorporate tikanga/tikanga values into its employment relationships generally. It cannot be right that, after having incorporated a commitment to certain values into the employment relationship with *all* staff, Customs can then say they are only relevant to some staff. Further, there are difficulties with on the one hand contending that tikanga/tikanga values did not apply to GF, but on the other hand for witnesses to emphasise (as I understood them to do) that Customs had acted in accordance with tikanga in the process it followed with GF. In this regard Ms Kopu described Customs as seeking to retrospectively characterise its approach as consistent with its broader obligations in respect of tikanga, when in reality nothing different or additional was done.

[140] Nor was I drawn to the submission that it was for GF to request that Customs act in accordance with the tikanga/tikanga-based values it had incorporated into its employment relationships. The point was well made in *Daniels v Maori Television Service*[69] where a former Chief of the Employment Relations Authority observed that Māori Television could be expected to follow its own undertakings, with or without a request by its employees for it to do so. (For completeness I note that, where an employee has raised an issue of tikanga and/or tikanga values, this may well, as Te Hunga Rōia Māori submitted, be a relevant consideration).

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[69] *Daniels v Maori Television Service* (2005) 7 NZELC 98,019 (ERA) at [132] (Member Dumbleton).

[141] Finally, I do not consider it adequate to respond to an alleged failure to act in accordance with relevant tikanga/tikanga values incorporated into the employment relationship to say (as was suggested in evidence) that Customs is "on a journey" to understand what they mean.

[142] It will be apparent from my factual findings that Customs fell short. A number of steps that were taken damaged, rather than sustained, the relationship. It did not approach the employment relationship issue with GF on a sufficiently individualised basis, and failed to engage with them in a way that was mana enhancing; the process was unnecessarily rushed; Customs did not take adequate steps to ensure that the right people were involved, to support discussion and explore the possibility of common ground in a no-fault situation; it declined to pause the process when GF asked for this to occur to enable further discussion to take place and did not provide GF with adequate time to consider the newly introduced Vaccination Order.

The grounds for termination

[143] I return to the two grounds for termination. I have already dealt with the evidence relating to the health and safety assessment and the problems I see with it. I am not satisfied, based on the evidence before the Court, that Custom's conclusion that GF was a Tier 1 worker was one a fair and reasonable employer could have reached; nor (in any event) was it a conclusion that was reached after a proper process which complied with each of Customs' obligations as employer. The first ground falls away.

[144] The second ground (the Vaccination Order) is also problematic. Customs formed the view that GF was an "affected person" for the purposes of the Vaccination Order and was accordingly prevented by law from working as an ACOM from 30 April 2021. Customs accepted that it was obliged to consult with GF prior to terminating on this ground but submitted it had done so. It will be apparent that I do not accept this – GF only learnt of the Vaccination Order one day prior to it coming in to force; GF was provided with a copy of the Vaccination Order the afternoon of the meeting; the meeting was not framed in a manner that promoted or enabled feedback or discussion on the application of the Vaccination Order, despite GF's advocate

expressing that they did not believe the Vaccination Order applied to GF's work. Customs did not pause the process, as it should have, to provide an opportunity for GF to consider matters and make submissions.

[145] The dismissal was accordingly unjustified on this ground also. I return to the Vaccination Order when considering remedies.

[146] Even putting to one side the incorporation of tikanga/tikanga values into the employment relationship, Customs' status as a public service organisation and what I have described as its heightened good employer obligations, I have concluded that Customs failed to hit the baseline s 103A target. It failed to act as a fair and reasonable employer and those failures led to GF being unjustifiably disadvantaged and dismissed.

[147] In summary:

- Customs failed to meet the stripped back fair and reasonable employer standards set out in s 103A of the Employment Relations Act, including by reaching a predetermined view of the outcome, failing to appropriately engage with GF, and failing to carry out an adequate and individualised health and safety assessment for GF's role in circumstances where it was under an obligation to do so.

- Customs failed to meet its statutory obligation of good faith to GF contained within s 4 of the Employment Relations Act, including by failing to be sufficiently active and communicative with them.

  In addition:

- Customs failed to act as a fair and reasonable employer having regard to broader relevant circumstances for the purposes of s 103A, which included the heightened obligations on it flowing from tikanga/tikanga values it had incorporated into the employment relations framework with its staff (including

GF) and the heightened good employer requirements imposed under s 73 of the Public Service Act.

- Customs failed to meet its statutory obligation of good faith contained within s 4 of the Employment Relations Act having regard to its failure to actively engage with the tikanga/tikanga values it had incorporated into the employment relations framework with GF and the heightened good employer requirements on it as a public sector organisation.

Remedies

[148] Where the Court determines that an employee has a personal grievance it may, in settling the grievance, provide for one or more of a number of remedies, including reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance;[70] and the payment to the employee of compensation by the employer, including for humiliation, loss of dignity and injury to feelings and loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.[71] The Court may also make recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring, where satisfied that any workplace conduct or practices are a significant factor in the personal grievance.[72]

[149] The Court is required, under s 124, to consider (both in terms of the nature and extent of any remedies) the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[150] I deal with each remedy in turn before considering whether a reduction for contribution is required.

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70 Employment Relations Act 2000, s 123(1)(b).
71 Section 123(1)(c).
72 Section 123(1)(ca).

Breach of good faith

[151] The plaintiff asks the Court to record a finding that Customs breached its good faith obligations. While there is provision in the Act for the Court to impose penalties for breach of good faith, this was not sought by the plaintiff.[73] Customs drew attention to the dynamic concept of good faith, saying this must be informed by the context of the COVID-19 pandemic and the vaccinations environment. I do not disagree with the submission in broad terms – plainly the context is relevant. But the context in this case does not justify or adequately explain Customs' breaches.

[152] The Act does not confer on the Court a power to make a formal declaration of breach of good faith. It is however appropriate to formally record a finding that Customs breached its obligations of good faith to GF in this case, and in the manner I have already described.

Compensation for humiliation, loss of dignity and injury to feelings

[153] The stepped approach to assessing non-pecuniary loss under s 123(1)(c)(i) is now well-established,[74] and was referred to by counsel for both parties in submissions.

[154] I am satisfied that GF experienced harm under each of the heads identified in s 123(1)(c)(i). GF felt side-lined and unheard, was subject to a process that they did not feel part of (rather, felt excluded from) and was not properly engaged with or listened to. The harm occurred in the context of a personal decision and a no-fault situation. GF was negatively impacted by the way in which Customs hurried the process and was upset and disillusioned by the failure to engage with them on the matters relevant to Customs' decision-making and which GF had strong views about. The extent of harm suffered was exacerbated by the communications strategy adopted by Customs throughout the process.

[155] GF was plainly impacted by Customs' failures, as amply demonstrated by their evidence in Court. GF said this was compounded by the messaging to other staff

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73 Employment Relations Act 2000, s 4A.
74 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

following GF's dismissal, which was seen as implying that GF and other unvaccinated staff had let the team down. This was particularly upsetting for GF who had previously felt pride in protecting the border and being a team player. GF reported feeling humiliated due to the loss of income and needing to rely on WINZ payments; having to explain their abrupt dismissal to others; feeling blamed for their employment status; and feeling lonely throughout the process and ignored and devalued by their employer. The harm suffered by GF was corroborated by SW, who also shared feelings of rejection following a rushed process by what was described as an "indifferent" employer.

[156] Ms Dew submitted that the circumstances of this case fell within the upper end of band 2.[75] A compensatory figure of $30,000 was sought having regard to the circumstances.

[157] Mr Kynaston submitted that if relief under s 123(1)(c)(i) was to be awarded, the harm fell within or very near band 1. It was submitted that many of the feelings GF subscribes to Customs' actions were not of Customs' making, including the financial pressures they experienced and the sudden nature of their dismissal given GF would not have been unable to work past 30 April 2021 in any event. Customs says that the circumstances surrounding GF's dismissal do not carry the same degree of stigma since it was a 'no fault' dismissal, in contrast to poor performance or misconduct. Customs submitted that the post-employment conduct relied on was neither retaliatory nor clearly likely to harm GF.

[158] There must be a link between the grievance and the loss; if the loss is not sufficiently connected to the grievance it cannot be compensated for under s 123.[76] That is because remedies are directed at addressing the losses sustained as a result of the breach giving rise to the grievance.[77] I accept that while the way in which GF's departure was advised to staff could have been better, I do not see that as sufficiently connected to the grievances raised. I do consider that the sudden end to the

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75 See also *Waikato District Health Board v Archibald*, above n 20, at [62]. Band 1 – low level loss/damage injury; band 2 – mid-level loss/damage injury; band 3 – high level loss/damage injury.

76 *Richora Group Ltd v Cheng*, above n 74, at [47], [48] and [51].

77 At [51].

relationship, in the way in which I have described, is relevant. It came at the end of a process which was abrupt, and impersonal, and which left GF feeling disengaged. I do not accept that GF's employment had to be drawn to a close as at 30 April, for reasons I have already referred to. And, while GF was under financial pressure prior to termination of their employment (which I infer from the evidence Customs knew about), I cannot accept that the loss of work in these circumstances did not cause an additional overlay of stress. Nor do I accept that the harm sustained by GF was lessened because of the no-fault basis for their dismissal.

[159] Mr Kynaston submitted that relevant to any award was the relatively short period of time GF had been employed, and the fact that their employment was for a fixed term. I expressed reservations about such an approach in *Richora*, observing that:[78]

> [58] A number of variables might operate to undermine such an assumption. The impact of an unjustified dismissal on a short-term employee may be less than it would be on a long-term employee, but it may not. Where, as here, the unjustified action occurs against the context of a working relationship of significant importance to the employee with high levels of reliance, respect and trust (the deference with which Ms Cheng regarded Mr and Mrs Li being reflected in the way she addressed them - as older brother and older sister), and where Ms Cheng had devoted herself to the company and saw benefits in the relationship for her husband's business endeavours, the impact may be more severe than (for example) a case involving a disengaged long-term employee already looking for alternative work at the time the unjustified action occurred.
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> [59] The point is that while a claim of substantial humiliation, loss of dignity and injury to feelings, sustained after a very short working relationship, may well warrant close scrutiny, the degree of harm cannot be measured by reference to timeframe alone. Accordingly, I do not think it appropriate to automatically adopt a sliding scale of award having regard to length of employment. A more informed and case-specific approach is required.

[160] In this case, while the term of employment was relatively short, I have no doubt that GF was substantially affected by their employer's breaches giving rise to their grievances. It was a no-fault situation, engaging a very personal decision.

[161] I have considered the range of compensatory awards in the Authority and the Employment Court over the last four years. Recent compensatory awards of the Court

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78 *Richora Group Ltd v Cheng*, above n 74, at [58] and [59].

falling within the middle of the middle band have included consequences similar to those suffered by GF. Upper middle band cases tend to involve serious and ongoing health consequences.[79] I consider that this case sits comfortably within the middle of the middle band.

[162] While I approach the quantum of compensation on the basis submitted for by counsel, it may be that the quantum attaching to the bands ought to be adjusted for future cases. The bands were first articulated five years ago (in 2018).[80] There is an obvious need for them to remain current. In this regard I note that the Court of Appeal (United Kingdom) has very recently revisited the "Vento bands", which similarly serve as a guideline for compensatory awards in employment cases.[81] An adjustment to the *Archibald* bands applying the Reserve Bank's inflation calculator (rounded-up), would lead to the following: band 1 $0-$12,000; band 2 $12,000-$50,000; band 3 over $50,000.

[163] No issues of financial capacity or third-party interest were identified by either party as relevant to an award under s 123(1)(c)(i). The primary focus was a submission advanced by Customs that any compensatory award ought to be reduced having regard to GF's contribution to the loss they sustained. Contribution is a separate inquiry, as s 124 makes clear.

[164] Subject to contribution, which I come to later, GF is entitled to remedies for non-pecuniary loss under s 123(1)(c)(i) of $25,000.

Lost wages

[165] GF was employed on a fixed term contract which was due to expire on 31 December 2021. Termination occurred some eight months before that time.

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79 See, for example, *CBA v ONM* [2019] NZEmpC 144, [2019] ERNZ 382; *JCE v Chief Executive of the Department of Corrections* [2020] NZEmpC 46, [2020] ERNZ 92; *Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219, [2020] ERNZ 495; *Henry v South Waikato Achievement Trust* [2023] NZEmpC 20; and *Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174, [2022] ERNZ 847.

80 *Richora*, above n 74, at [67].

81 *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871, [2003] ICR 318.

[166] Section 128(2) provides that, subject to s 128(3) and s 124 (contribution), the Court must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration. The Court may, however, in its discretion order an employer to pay a sum greater than that to which an order under s 128(2) may relate.[82]

[167] In assessing lost remuneration in the context of a fixed term contract which had eight months to run, it is helpful to apply a counterfactual analysis.[83] This involves considering contingencies that might have, but for the unjustified dismissal, resulted in termination and making allowance for those. In this case the counter-factual involves asking whether it is more likely than not GF would have continued to work to the end of their fixed term contract. Customs says no - GF was an affected worker for the purposes of the Vaccination Order and could not have worked past 30 April.

[168] The Vaccination Order prevented an "affected person" from carrying out certain work unless they are vaccinated.[84] Clause 4 provides that an "affected person" is "a person who belongs to a group (or whose work would cause them to belong to a group)". Schedule 2 provides the "Groups of affected persons", the relevant ones being: 4.1 Government officials who spend more than 15 minutes in enclosed space on-board affected ships; 4.2 Government officials who board, or have boarded, affected ships; 4.3 Government officials who transport persons to or from affected ships; and 4.4 Government officials (other than those specified above) who work at an affected port and who interact with persons required to be in isolation or quarantine under a COVID-19 Order.

[169] I understood the argument for GF to be that a person should only be considered an "affected person" when they perform specific acts or tasks referred to in the sch 2 groups *in the normal course of their work.* GF was not required to perform tasks relevant to a sch 2 group in the normal course of their work, and accordingly GF argued they did not fall within the affected person categorisation for the purposes of the Vaccination Order. Customs submitted that the key question for the purposes of

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82 Employment Relations Act 2000, s 128(3).
83 *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.
84 COVID-19 Public Health Response (Vaccinations) Order 2021, cl 7.

determining whether someone is an "affected person" is whether their role requires that they *might realistically undertake any of the specified tasks* in the relevant sch 2 groups.

[170] The wording of the Vaccination Order and how it might apply in a situation such as this is not clear cut, and there are arguments both ways. However, I agree with Mr Kynaston that the underlying purpose of the Vaccination Order, and what it was designed to achieve, favours a broader construction. There was a realistic possibility that GF would be required to undertake tasks covered by the Vaccination Order, and the Vaccination Order was intended to ensure that, in those circumstances, the person would be vaccinated. As the High Court has observed in relation to the Vaccination Order:[85]

> A risk minimisation approach is appropriate. None of the measures by themselves — physical distancing, PPE, regular testing and vaccination — guarantee that the virus will not get into the community. Subsequent events have shown that. But there is a strong public interest in doing everything that can reasonably be done to minimise the risk of such an outbreak, or its spread. A precautionary approach is justified.

[171] But even accepting that GF could not have continued to work in the ACOM role, I do not accept that it leads to a conclusion that GF lost no income as a result of the grievance. A counter-factual analysis requires consideration as to what timeframes might otherwise have played out prior to termination and whether, but for GF's disengagement, they might have taken up the offer of exploring redeployment options.

[172] I have already held that GF should have been given an opportunity to consider the Vaccination Order and its possible ramifications. That may have involved placing GF on special leave (something GF had suggested but which was declined). I have also referred to GF's request for facilitated discussions. When asked, Ms Funnell had difficulty explaining why further discussions could not have occurred after the meeting, and prior to termination. And I have rejected other evidence suggesting that budgetary constraints meant that placing GF on gardening leave to provide more time for engagement was not an option. It was clear that by the time the offer to explore redeployment was made GF had lost trust in Customs. From GF's perspective, there

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[85] *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012, [2022] 2 NZLR 26, [2021] ERNZ 1025 at [110].

were also issues with the redeployment options being offered by Customs. As a result, GF felt unable or unwilling to explore redeployment, coming as it did at this point in the process. I consider that but for the grievance, redeployment may have been pursued. All of this is relevant to the counterfactual.

[173] In the circumstances I consider that lost wages equivalent to three months' remuneration is appropriate. In reaching this conclusion I have considered the residual discretion in s 128(1)(3) but have reached the view that there is an insufficient basis for exercising it in GF's favour.

Official Assignee

[174] Having concluded that GF is entitled to three months' lost wages it is necessary to deal with issues relating to the Official Assignee. GF was adjudicated bankrupt by the High Court on 22 February 2019. Section 101 of the Insolvency Act 2006 deals with the status of a bankrupt's property on adjudication. It provides that all property belonging to the bankrupt vests in the Official Assignee; and the powers that the bankrupt could have exercised in, over, or in respect of any property for the bankrupt's own benefit also vest in the Official Assignee.

[175] It is well established that the definition of "property" is wide and includes the right to bring or continue a cause of action in respect of property – so it is up to the Official Assignee, not the bankrupt, to decide to continue, or not continue, with a cause of action. A common law exception has been developed relating to rights of action which are personal to a bankrupt.[86] Such actions do not vest; they remain with the bankrupt.

[176] In this case a difficulty arises because GF's claim carries both features: property that vests in the Official Assignee and property that is personal to the bankrupt. The parties were at odds over the applicable approach. Both parties accepted that the potential remedies for GF's unjustifiable dismissal claim are both

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[86] *Heath v Tang* [1993] 1 WLR 142, [1993] 4 All ER 694 (CA); and *Official Assignee v Dowling* [1964] NZLR 578 (SC).

personal (compensation for hurt and humiliation) and property (lost wages).[87] The parties were divided on the implications of this, including whether the claim can thus be called a "hybrid claim".

[177] Counsel for GF submits that GF's claim can be considered a hybrid claim and that the appropriate approach was that taken by Associate Judge Bell in *Robinson v Whangarei Heads Enterprises Ltd*.[88] In that case, it was considered open to a bankrupt plaintiff who does not have the co-operation of the Official Assignee to sue on such a claim if the Official Assignee is unwilling to do so, joining the Official Assignee as a co-defendant:[89]

> …Given that the Official Assignee would pursue any claims in part as constructive trustee for Mr Robinson, it seems open to follow the usual procedure where a person claiming an equitable interest does not have the cooperation of the person with legal title. That is, to allow the beneficiary to join the legal owner as one of the defendants.

[178] Having joined the Official Assignee as a second defendant, an application of this approach would provide a pathway for GF to pursue the hybrid claim.[90]

[179] Customs submitted that the Court should not apply the *Robinson* approach. It argued that *Robinson* can be distinguished on the basis that it related to a breach of a shareholders' agreement instead of employment obligations. It also suggested that the approach is wrong in law, amounting to a misapplication of the "hybrid claim" principles set out in *Ord v Upton*.[91] Customs submitted that the correct approach was that applied by this Court in *Young v Bay of Plenty District Health Board (No 2)*.[92] There Mr Young raised a personal grievance for unjustifiable dismissal, seeking reinstatement, compensation for hurt and humiliation, and lost wages. The Official Assignee applied to discontinue the claim, but the Court declined the application, discontinuing only the remedies vested in the Official Assignee (lost wages) but proceeding with reinstatement and compensation. An application of this approach

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87 *Ord v Upton (as trustee to the property of Ord)* [2000] 1 All ER 193 (CA).
88 *Robinson v Whangarei Heads Enterprises Ltd* [2015] NZHC 2945.
89 At [26].
90 *GF v Comptroller of the New Zealand Customs Service* [2022] NZEmpC 71. Customs reserved its position in relation to the issue.
91 *Ord*, above n 87.
92 *Young v Bay of Plenty District Health Board (No 2)* [2013] NZEmpC 131, (2013) 11 NZELR 478.

would enable GF's claim to proceed but would preclude the recovery of lost wages unless pursued by the Official Assignee.

[180] In this case the Official Assignee has not objected to GF pursuing a full hybrid claim and nor has the Official Assignee taken issue with an application of the *Robinson* approach. While Customs is correct that the *Robinson* decision was not related to the employment context, I consider that the approach fits comfortably with this Court's equity and good conscience jurisdiction and ought to be applied in this case.[93] The lost wages award is accordingly not set aside. It is for the Official Assignee to determine the amount of the award owed to it by GF.

Contribution

[181] I turn to consider whether GF contributed to the situation giving rise to the grievance such that a reduction for contribution ought to be made to the remedies which would otherwise be ordered in their favour.[94]

[182] I do not accept (and I did not understand Customs to be submitting) that GF's decision not to be vaccinated is relevant to assessing contribution. That is because it was a decision that GF was perfectly entitled to make. Rather, I understood Customs to submit that GF's failure to engage with it in its roll-out of the programme, and GF's refusal to continue working with it to search for external redeployment opportunities, contributed towards the situation that gave rise to the grievance.

[183] I have already dealt with the difficulties I perceive in the way in which Customs went about things. It was Customs' obligation to engage with each of its staff, particularly those who were potentially impacted by the roll-out, and while it did a very effective job in terms of engaging with many employees (as counsel for GF acknowledged) it failed to adequately engage with others, such as GF. As an employee, GF was, as Mr Kynaston rightly pointed out, under an obligation to be responsive and communicative, and to engage with their employer in good faith. And,

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93 Employment Relations Act 2000, s 189(1).
94 Section 124.

as Te Hunga Rōia Māori observed, when tikanga/tikanga values are incorporated into an employment relationship by an employer, good faith obligations may require an employee to engage with tikanga – it is reciprocal.

[184] The reality was, however, that the way in which Customs chose to communicate with staff about the vaccination roll-out, and its focus on those who were vaccine hesitant, led to a sense of marginalisation and disengagement by some who did not fall into this group, notably GF. As I have already found, based on the evidence before the Court, I am not satisfied that GF wilfully turned a blind eye to attempts to engage with them and I cannot safely conclude that they otherwise failed to meet their reciprocal obligations such that a reduction for contribution would be appropriate.

[185] Customs submitted that GF's losses could have been minimised if GF had taken up its offer of looking into redeployment opportunities. When determining contribution, it is necessary to consider the reasonableness or otherwise of the employee's alleged contribution at the time it occurred. The offer to explore redeployment came at the final meeting which had left GF's relationship with, and trust of, their employer at a very low ebb. I do not consider that it would be fair and just to reduce the amount that would otherwise be ordered in GF's favour to reflect a failure to take up Customs' offer for assistance in the particular circumstances in which the offer was made.

[186] It follows that I am not satisfied that GF contributed to the situation and accordingly I decline to reduce the remedies I would otherwise order in their favour.

Section 123(1)(ca) recommendations

[187] Where satisfied that any workplace conduct or practices are a significant factor in the personal grievance the Court is empowered under s 123(1)(ca) to make recommendations to an employer concerning the action they should take to prevent similar employment relationship problems occurring. I was invited by Ms Dew to make recommendations in this case, and I consider it appropriate to do so in light of the evidence I have heard. I accordingly make the following formal recommendations pursuant to s 123(1)(ca):

Recommendation 1

- Having committed to tikanga/tikanga values in its employment relationships, **I recommend** that Customs take steps to engage pūkenga to ensure that it has in place capacity and capability to meet its obligations.

Recommendation 2

- As a public service organisation subject to the heightened good employer obligations contained in s 73 of the Public Service Act 2020, **I recommend** that Customs take steps to receive appropriate advice and training on the nature and scope of those obligations.

Recommendation 3

- **I recommend** that Customs take steps to review its communications strategy to enable it to adequately and appropriately engage with the full range of employees in circumstances such as arose in this case.

Non-publication orders

[188] GF applied for permanent non-publication orders in respect of their name and identifying details. The application extended to the names and identifying details of the witness I have referred to as SW and other employees who attended the meeting on 29 April 2021, and the names of the ports at which GF worked. Customs took a neutral position on the application.

[189] I approach the issue on the following basis.

[190] The Court has a broad power under sch 3 cl 12 of the Employment Relations Act to order that "all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published," subject to such conditions as the Court thinks fit. While the discretion is broad, it must be exercised consistently with applicable principles. The principle of open justice is a principle of fundamental importance. It forms the starting point for determining whether the circumstances of

a particular case justify an order for non-publication.[95] A party applying for such an order must establish that sound reasons exist for the making of an order of non-publication, displacing the presumption in favour of open justice.[96]

[191] The discretionary exercise involves the Court balancing other interests with the fundamental principle of open justice. The discretion must also, of course, be exercised consistently with the objectives of the legislative framework that applies in this specialist Court. These objectives include the need to support successful employment relationships and to address the inherent inequality of bargaining power between employers and employees.[97] In this regard the significant detrimental impact that publication of the names of parties, or even witnesses, can have on their ongoing prospects of employment, regardless of the outcome of the case, is a factor which has become increasingly well recognised in this jurisdiction as relevant to the weighing exercise the Court is required to undertake in order to arrive at a just outcome in a particular case.[98]

[192] GF's application highlighted a concern that, if identified, they may be a magnet for unwanted attention. That concern is reasonable having regard to the matters at issue in this case and the strong opinions that some hold about vaccination status. There is no general public interest in knowing GF's name – it adds nothing to what is already contained within this judgment, which the public do have a legitimate interest in knowing. I issued interim non-publication orders in these proceedings having regard to such issues and I consider that the same concerns warrant permanent orders having regard to the overall interests of justice.

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95 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

96 At [13].

97 Employment Relations Act 2000, s 3(a). See *FMV v TZB* [2021] NZSC 102, [2021] 1 NZLR 466 at [54].

98 See, for example, *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [12]; *WN v Auckland International Airport Ltd* [2021] NZEmpC 153 at [43]-[44]; *JGD v MBC* [2020] NZEmpC 193, [2020] ERNZ 447 at [8]. See also the discussion in James Crichton "Employment Institutions – an argument for reform" (paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019): "As Chief of the Authority, I regularly get letters from employee parties who appeared in the Authority in earlier years, [had] been successful in claims against their former employer, and then not worked again because potential employers have been able to access the information, which of course is public, about the individual's previous success against another employer."

[193] A permanent order of non-publication is accordingly made in respect of:

- the plaintiff's name and identifying details (the identifying details include the names of the ports at which GF worked);

- the name of SW and any of their identifying details (the identifying details include the name of the port at which they worked); and

- the names and any identifying details of the other affected employees in the meeting on 29 April 2021 (the identifying details include the name of the port at which they worked).

Costs

[194] If any issue of costs arises I will receive memoranda.

Christina Inglis
Chief Judge

Judgment signed at 4.30 pm on 30 June 2023