

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 171
EMPC 181/2023**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application to appoint a Court expert

AND IN THE MATTER OF an application to participate at a hearing via
 audio-visual link

BETWEEN MICHAEL LANIGAN AND THE OTHER
 PLAINTIFFS LISTED IN APPENDIX A
 First Plaintiffs

AND E TŪ INCORPORATED
 Second Plaintiff

AND FONTERRA BRANDS (NEW ZEALAND)
 LIMITED
 Defendant

Hearing: On the papers

Appearances: T Oldfield, counsel for first plaintiffs
 P Cranney, counsel for second plaintiff
 M Dew KC and R Rendle, counsel for defendant
 G Iddamalghoda, counsel for the New Zealand Council of Trade
 Unions as intervener
 I Clarke and S Cates, counsel for Privacy Foundation New
 Zealand Inc as intervener

Judgment: 9 September 2024

INTERLOCUTORY JUDGMENT (NO 3) OF JUDGE M S KING
(Application to appoint a Court expert)
(Application to participate at a hearing via audio-visual link)

[1] On 13 February 2024, the Privacy Foundation New Zealand Inc (the Foundation) was granted leave to intervene in this proceeding.¹ The Foundation seeks to assist the Court with privacy law and how it relates to issues raised in this proceeding.

[2] On 29 July 2024, the Foundation filed a memorandum of counsel in which it seeks that the Court appoint a pūkenga or an expert; it also seeks leave to present its submissions at the hearing of the proceeding via audio-visual link. Both of these matters are being treated as formal applications in this judgment.

Application to appoint a pūkenga

[3] The Foundation’s application seeks that the Court exercise its power to appoint a pūkenga or an expert to explain the tikanga Māori concepts involved in this proceeding. It submits that the appointment is likely to assist the Court in determining the matters arising in this proceeding, including a consideration of whether, and if so how, tikanga norms or values might be engaged by the collection and use of an employee’s personal biometric data, and the relevance or otherwise of the incorporation of tikanga norms/values into the parties’ employment relationship via policy documentation.

[4] The plaintiffs and the New Zealand Council of Trade Unions, an intervener, do not oppose the Foundation’s application and have indicated they will abide the decision of the Court.

[5] The defendant opposes the application. The defendant’s grounds for opposition include:

- (a) It is not necessary, or in the interests of justice, to appoint a pūkenga where the plaintiffs have not pleaded any material facts in relation to tikanga, or any breach of tikanga by the defendant. The dispute between the parties does not put tikanga at issue on the facts or pleadings before the Court.

¹ *Lanigan v Fonterra Brands (New Zealand) Ltd* [2024] NZEmpC 15.

- (b) To avoid culturally inappropriate outcomes, tikanga considerations and the engaging of a pūkenga should be reserved for cases where tikanga is central to the facts, the pleadings between the parties and those parties include Māori representation.
- (c) The appointment of a pūkenga could unfairly increase the costs to the parties, which is not warranted on the pleadings.

[6] There is no dispute that the Employment Court has the power to make an appointment in this case. Section 189(2) of the Employment Relations Act 2000 (the Act) confers a broad power on the Court to “...accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.”

[7] The provision is broadly worded. It is directed at supporting the exercise of the Court’s jurisdiction in matters coming before it consistently with equity and good conscience. The test is whether the Court is likely to be assisted by the appointment of an expert.²

[8] As the defendant points out, the engagement of tikanga is not specifically pleaded. However, that is not determinative. Tikanga norms and values may be relevant at a framework level in understanding employment obligations in Aotearoa New Zealand, including (more specifically) to an assessment of what a fair and reasonable employer could do. The issues are likely to have particular focus where (as here) the parties have agreed to incorporate such norms and values into their employment relationship and intend to argue whether these norms and values have been breached.

[9] While the Supreme Court has observed that the nature of tikanga as a separate or third source of law is still unresolved, it has nevertheless acknowledged that tikanga was the first law of Aotearoa/New Zealand, and that tikanga has been and will be recognised in the development of the common law of New Zealand where it is

² *Pilgrim v Attorney General (No 17)* [2022] NZEmpC 168 at [13].

relevant.³ When the Court is being asked to consider a novel area of law or to reconsider a previous decision, tikanga principles may be relevant alongside existing common law principles and relevant domestic and international materials.⁴ It is not necessary to refer to all relevant common law principles or international materials in pleadings, and neither is it necessary to refer to relevant tikanga principles.

[10] The second issue raised by the defendant is that tikanga is not relevant to the present proceedings. The statement of claim refers to the defendant's code of conduct which includes a commitment to manaakitanga and uses other te reo Māori phrases; however, those references alone would not necessitate a pūkenga being appointed.⁵

[11] But on the other hand, as noted by the Foundation, tikanga may be relevant to the broader privacy issues at stake in this case. The Foundation submits that if the Court is to revisit the scope of privacy obligations in relation to the collection of biometric information from employees, it is critical that it has information, as to how the relevant issues and concepts might be viewed through a tikanga Māori lens, before it. Those matters were said to potentially include tikanga Māori concepts related to privacy (like whakapapa, mana, tapu, mauri and hau); consent and rangatiratanga; biometrics and the importance of the human body in Te Ao Māori; storage/care of information and kaitiakitanga; and the characterisation of fingerprint scanning as unintrusive. It was noted that list is not exhaustive. Biometric information holds cultural significance to Māori; it is related to whakapapa and carries the mauri of the person it was taken from.

[12] The matters noted by the Foundation may have implications for the development of the law in the present case. This is particularly so in light of the fact that the case is set down to be heard by a full Court and will likely have implications for other parties going forward. It goes without saying that if the Court is to properly

³ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 at [19], [22], and [111] per Glazebrook J.

⁴ See at [212]; and *Takamore v Clark* [2012] NZSC 116, [2013] 2 NZLR 733 at [150].

⁵ This situation is materially different to *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409, where the employer had incorporated a Te Ao Māori perspective throughout its documentation. See also *Ellis v R*, above n 3, at [125] per Glazebrook J and [273] per Williams J.

consider the relevance of tikanga Māori to biometrics, it will need to be sufficiently informed to enable it to do so.

[13] The defendant also raised a concern about the risk of culturally inappropriate outcomes where there are no Māori parties or counsel. I acknowledge that risk; however, there is perhaps a greater risk that if tikanga issues are ignored in the present case, it may disadvantage Māori claimants in the future, lead to uneven developments in the common law or have consequences for Māori employees more broadly. Although the Court applies the law on a case-by-case basis and develops the law incrementally, no case arises in a vacuum, and where tikanga appears likely to be relevant to broader issues arising in a case, it is appropriate to consider that possibility. And, as *Ellis v R* and (in this jurisdiction) *GF v Comptroller of the New Zealand Customs Service* made clear, the fact that there are no Māori parties before the Court is not a controlling factor, as tikanga norms and values may operate more broadly.⁶ The presence of a pūkenga will go some way to otherwise addressing the risk the defendant has identified.

[14] The Court acknowledges that the appointment of a pūkenga will likely add to the costs of these proceedings. However, such matters, while relevant, must be balanced with other considerations, including the extent to which the Court may be assisted by the evidence, particularly in a developing area of the law.

[15] Having balanced the above matters, I am satisfied that it is appropriate to appoint a pūkenga. The following directions are made:

- (a) Counsel for the Privacy Foundation is to liaise with counsel for the parties with a view to filing with the Court a list of appropriate pūkenga, preferably by agreement. The list should be filed within 15 working days.
- (b) Counsel for the Privacy Foundation is to liaise with counsel for the parties with a view to agreeing a draft set of questions to be asked of the appointed pūkenga, together with the materials that might

⁶ *Ellis v R*, above n 3; and *GF v Comptroller of the New Zealand Customs Service*, above n 5.

appropriately be provided to them. This material should be filed and served within 15 working days.

- (c) The list and draft set of questions and materials is then to be referred to a Judge for any necessary further directions or orders, or for appointment of a pūkenga to be made by the Court through the Registry. If the parties are unable to agree on the list and/or draft set of questions, the Court will appoint a pūkenga from persons named by the parties and/or will settle what questions ought to be asked of the pūkenga.⁷

Application for submissions to be heard by audio-visual link

[16] This proceeding is estimated to be set down for a seven-day hearing in Auckland. Counsel for the Foundation are appearing on a pro bono basis and are based in Wellington.

[17] The Foundation has now applied for leave to present its submissions at the hearing via audio-visual link (AVL). The basis for the application is to avoid costs and travel that would be incurred if counsel are required to travel to Auckland to give submissions on behalf of the Foundation. The Foundation acknowledges that if it becomes apparent that an in-person appearance would be useful, or necessary for some or all of the hearing, it could make arrangements to attend the hearing, or part thereof, in person.

[18] The application is consented to by the parties and the other intervener, the New Zealand Council of Trade Unions.

[19] Section 7 of the Courts (Remote Participation) Act 2010 provides the Court with discretion to permit appearance by AVL in accordance with the criteria in s 5 and taking into account whether the parties' consent. Section 5 of that Act states:

5 General criteria for allowing use of audio-visual links

A judicial officer or Registrar must consider the following criteria when he or she is making a determination under this Act whether or

⁷ See High Court Rules 2016, rr 9.36(3) and 9.37.

not to allow the use of AVL for the appearance of any participant in a proceeding:

- (a) the nature of the proceeding;
- (b) the availability and quality of the technology that is to be used;
- (c) the potential impact of the use of the technology on the effective maintenance of the rights of other parties to the proceeding, including—
 - (i) the ability to assess the credibility of witnesses and the reliability of evidence presented to the court; and
 - (ii) the level of contact with other participants;
- (d) any other relevant matters.

[20] In the circumstances, I am satisfied that the criteria in s 5 are met. The time and costs involved in expecting counsel for the Foundation to travel from Wellington to Auckland for a seven-day hearing, in circumstances where counsel are acting on a pro bono basis for a not-for-profit organisation intervening in this proceeding, would be an unreasonable imposition.

[21] There are no factors which count against the application. There is nothing about the nature of the proceeding which suggests that the use of AVL would be unsuitable.

[22] The application is granted. The order is subject to counsel complying with the conditions set out in the Court's Guideline for Appearing by Audio-Visual Link.⁸

[23] I do not understand any issue of costs to arise in respect of either application.

M S King
Judge

Judgment signed at 1.30 pm on 9 September 2024

⁸ Employment Court "Guideline for Appearing by Audio-Visual Link, Including in Virtual Hearings" (February 2022) <www.employmentcourt.govt.nz>.

APPENDIX A

PETER ARMSTRONG

JAN BOSMA

MARTIN BROCK

ANTHONY CROPP

SHANNON FARLEY

DION HUBERS

BRIAN HUGHES

ANDREW JAMES

BRADLEY JESSON

CLIFF MCNEIL

WILLIAM MARR

BRUCE MUNRO

JASON POWRIE

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