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Indigenous Peoples and Employment Law: the Australasian model

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This paper examines the relationship between Indigenous values and employment law in New Zealand and Australia, with some comparative reference to the position in North America and in relation to international standards.[1]

Since the 1980s, Indigenous values have emerged as a dynamic in the first world workplace, particularly in Indigenous enterprises, and enterprises and organisations with a strong Indigenous element or connection. One manifestation of this is the recent proliferation of Indigenous and Aboriginal chambers of commerce and business associations in Australasia and North America. The reasons behind the emergence of this dynamic are political, social and, particularly in North America, economic.

On the whole, trade unions have not been the driver of this development, but have responded to it by incorporating it, usually into their own social justice agendas, but also by taking the opportunity to acquire new members. In North America, the advent of the lucrative casino gaming industry onto tribal lands since the 1980s spawned a sudden interest in union organising on reservations, as well as Indigenous resistance to those efforts. In New Zealand and Australia, there has been increased recognition of Indigenous culture in employment agreements and the general law, which largely stems from the social, political and increasing economic influence of Indigenous consciousness.

New Zealand

Employment in the New Zealand public sector provides for the *top down* accommodation of Māori values. The State Sector Act 1988 sets out a number of *good employer* obligations that are deemed necessary for the fair and reasonable treatment of public sector employees. These include:[2]
Recognition of —

i. The aims and aspirations of the Māori people;
ii. The employment requirements of the Māori people; and
iii. The need for greater involvement of the Māori people in the Public Service.

As in other countries, the values promoted in public sector employment normally have a spin off effect on private sector employment.

More noteworthy are the *bottom up* influences of Māori culture on employment law and practices that will be canvassed below.

Workplace issues relating to Māori

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[1] For a broader and historical comparative treatment that also covers unions and Indigenous voice, see Paul Roth, "Indigenous Voices at Work", in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014), 96-121.
[2] State Sector Act 1988, s 56(2)(d).

There are a number of workplace issues that particularly affect Māori.[3] Most workplaces operate in accordance with mainstream non-Māori cultural values and assumptions, with the result that Māori can feel excluded or marginalised. Where workplaces do recognise the importance of Māori values and issues, there is an expectation that Māori workers should provide guidance and leadership on Māori issues. This can result in extra pressures upon individuals and can even render employment more precarious. For example, in one case a Māori social worker was dismissed, inter alia, for an inadequate understanding of *tikanga Māori*,[4] despite the fact that employment was on the basis that training and guidance would be provided.[5] The dismissal was found to be unjustified. In another case, a Māori employee complained of unjustified disadvantage in her employment because she had been required to deliver Māori cultural training even though she had told her employer that she was not trained to do so.[6] Even where an employee is able to provide Māori cultural guidance, there is a further issue as to the terms upon which such extra contributions should be made, particularly concerning any special recognition or compensation for doing so.

Māori have a wider concept of the family (*whānau*) than non-Māori, and a wide set of obligations that are owed to one's *whānau*. This has implications for domestic purposes and bereavement leave,[7] as well as for special cultural occasions.[8]

Conversely, the role played by Indigenous values within a mainstream common law legal system can raise some challenging issues. When the promotion and implementation of Indigenous culture in the workplace relate to the treatment of employees, there are situations where Indigenous values do not always sit comfortably with employment law generally. In cases where employers seek to rely on Indigenous values or processes, the law will override the Indigenous approach to protect the rights of workers. This approach is consistent with art 17 of the United Nations Declaration on the Rights of Indigenous Peoples, [9] which implicitly renders Indigenous customs and values subject to domestic and international labour law. Moreover, art 46 subordinates Indigenous rights to domestic and international human rights standards, including the principle of non-discrimination. These aspects of the international standards have not always found favour with Indigenous people themselves.[10]

There may be instances when there is tension between Indigenous and non-Indigenous values. One flashpoint is the right to be free from sex discrimination. There have been a few occasions when there was Indigenous objection against fertile female workers working in areas that are *tapu*.[11] Sex discrimination was claimed in a Human Rights Review Tribunal case where a female employee of the Department of Corrections was forbidden to sit in the front row or speak at a workplace celebration for Māori graduates of a departmental programme.[12] She had mentored two of the graduates. After she

[3] See Public Service Organisation, *Māori Enterprise Delegate Guide* (November 2009), p 11.
[4] "Māori custom, the Māori way of doing things".
[5] *Waters v Aupouri Māori Trust Board* [1995] NZEmpT 380.
[6] *Scott v Chief Executive, Department of Corrections*, WA29A/06, 13 March 2006.
[7] See below, on special provisions in agreements and legislation that recognize this factor.
[8] See below, on *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668.
[9] Adopted by a General Assembly resolution on 13 September 2007: General Assembly A/RES/61/295, 2 October 2007.
[10] The prioritisation of conventional international human rights standards over Indigenous values has been criticised as stemming from a Eurocentric perspective: see Sharon Venne, "The New Language of Assimilation: A Brief Analysis of ILO Convention 169," (1990) 53(2) *Without Prejudice*, at 60, and Catherine Iorns, "Australia Ratification of International Labour Organisation Convention No. 169" (1993) 1(1) *E Law - Murdoch University Electronic Journal of Law*, available at <http://www.austlii.edu.au/au/journals/MurUEJL/1993/1.html>
[11] Defined as "sacred, prohibited, restricted, set apart, forbidden" in the online *Māori Dictionary*, available at < http://maoridictionary.co.nz/ >. In relation to Department of Conservation workers, see Angela Gregory, "Elder says tribe's ruling on woman 'act of paganism'", *New Zealand Herald*, 30 June 2000.
[12] *Bullock v Department of Corrections* [2008] NZHRRT 4 (19 March 2008).

disrupted the ceremony because of her treatment, the workplace Māori Staff Network lodged a complaint against her. Although the Tribunal made a finding of sex discrimination, no remedy was awarded. The Tribunal's decision in this case skirted around the difficult issue of how an employer should accommodate more than two legitimate interests in such a situation. The Tribunal recognised that the employer was in a difficult position and was taking steps to reconcile Indigenous rights with other rights. The employer's concern for respecting Māori culture and following proper Māori protocol in this instance could be viewed in light of the fact that relative to their numbers in the general population, Māori are over-represented in the criminal justice system.[13] Therefore, a proportionality test to weigh the importance of the respective cultural interests in the circumstances would probably be the appropriate approach to follow.

Indigenous cultural values may also conflict with the employer's managerial prerogative. This sort of issue has been encountered in other jurisdictions as well, where employers have variously sought to prohibit the wearing of religious or cultural symbols or items of dress, such as headscarves, turbans, beards, ceremonial daggers, niqabs, chadors and the like. The usual principle is that the employer can require a dress code so long as it does not breach discrimination laws. Sometimes breaches are justified in certain types of positions, such as where niqabs are prohibited where eye contact is a requirement of the job. In *Haupini v SRCC Holdings Ltd*,[14] an employer asked a Māori employee performing a food service role at a catered social function to cover up the traditional *moko* (tattoo) on her arm for a particular function. The employee was highly distressed at this request, which she regarded as offensive to her cultural identity, and she brought a discrimination case against her employer. The Human Rights Review Tribunal commented that the case raised issues "at an intersection between significant cultural expectations on the one hand, and reasonable concerns of an employer to be able to manage the appearance of its staff working in a 'frontline' role on the other."[15] The employee's claim failed. The Tribunal accepted expert evidence that the wearing of *moko* was not exclusive to Māori, and that the question whether a tattoo design was *moko* or not was highly subjective: [16] "it is necessary to look at each piece of work on its own and make a personal judgment about whether what is being worn can be described as *moko* or not."

The Tribunal did not find that there was so close a connection between the tattoo design in question and the employee's ethnicity or race that there was direct discrimination against the employee because she was Māori. The Tribunal noted that discrimination on the grounds of culture was not provided for under New Zealand's Human Rights Act 1993.[17] The Tribunal also found that there was no indirect discrimination, as the evidence failed "to establish that there is a disproportionate negative effect on Māori in being asked to cover a tattoo of the kind in question in this case".[18]

Relations within a *whānau* also can also give rise to difficulties in relation to employment matters where one *whānau* member is in a position of authority over another, which is not uncommon in *kōhanga reo*, or *whānau*-based Māori *language nests*, and other organisations. In mainstream employment law, this could give rise to unfairness, where poor family relations might act as an *accelerant* to problems in the workplace, but a Māori workplace may require a different approach in principle. For example, in *Timu v Te Runanga O Kirikiriroa Trust Inc*,[19] where a Māori health services

[13] About half of the male prison population, and about 60 per cent of female prisoners, are Māori: see *Over-representation of Māori in the criminal justice system: An exploratory report,* Policy, Strategy and Research Group, Department of Corrections, (Wellington, September 2007) 6.
[14] *Haupini v SRCC Holdings Ltd* [2011] NZHRRT 20; (2011) 9 HRNZ 668; (2011) 9 NZELC 93,952.
[15] At [2].
[16] At [49].
[17] At [53].
[18] At [64].
[19] *Timu v Te Runanga O Kirikiriroa Trust Inc* [2012] NZERA Auckland 216 (25 June 2012).

provider dismissed a young casual worker, the Employment Relations Authority raised an issue as to a possible conflict of interest. It seemed inappropriate that the employee's manager, her stepfather, was involved with the disciplinary action against her; it would have been preferable to involve someone else instead. The employer explained the interaction between the parties in terms of the traditional Māori principles of *whanāungatanga* ("kinship, family connection"), *manaakitanga* ("support, care"), and *tino rangatiratanga* ("self-government, self-determination"). The Authority, "reflecting upon the overall situation, including the culture of the Runanga",[20] concluded that, in the present case, the family relationship did not raise any unfairness in relation to the employee, and the employee did not claim otherwise. The Authority commented, however, that "the situation was less than best practice in an employment relations setting", but the employee was not disadvantaged by the family relationship. In other circumstances, unfair pressure may be brought to bear on an employee, and the employee may feel bullied.

Recognition of Māori values in New Zealand employment law

Employers are expected to accommodate Māori values and practices where workplaces acknowledge a commitment to them. Such workplaces tend to be run by Māori, or are Māori in nature (such as Māori language schools, Māori media, health provider and welfare organisations), or are public sector agencies, particularly those with a particular Māori connection or relevance (Ministry of Māori Development, Department of Corrections, Ministry of Education, Ministry of Health).

The most obvious recognition of Māori values is the provision in some employment agreements for cultural leave in order to attend important occasions and ceremonies.[21] There is similar provision for such leave in some Australian employment agreements and awards (see below). In New Zealand, the statutory provisions for sick leave recognise the possible cultural dimensions of bereavement leave. After enumerating the various types of conventional close relations that entitle workers to the taking of bereavement leave, there is a catch all provision that provides for the taking of bereavement leave where the employer accepts that a *relevant factor* applies,[22] which includes:

a) the closeness of the association between the employee and the deceased person;
b) whether the employee has to take significant responsibility for all or any of the arrangements for the ceremonies relating to the death;
c) any cultural responsibilities of the employee in relation to the death.

In one case, the Employment Relations Authority accepted that a worker whose *whangai* brother died ought to have been given three days' bereavement leave, rather than only one, under the applicable collective agreement, as well as the legislation, because it was an "immediate relative" who had died.[23] *Whangai* is an informal customary practice whereby a blood relative is given to a family to raise. The deceased was the worker's first cousin in eurocentric terms, but he had come to live with the worker's family when he was five years old and was raised as a son by the worker's parents. As an adult, he cared for his elders, lived in the family home, and had his name carved on the headstone of the worker's father. The collective agreement defined "immediate relative" as including a "brother" or "sister", and incorporated the provisions of the Holidays Act. Neither the agreement nor the legislation defined "brother", but the Authority held that, in the circumstances, "the word 'brother' should be interpreted

[20] At [38]. "Runanga" is a tribal board, assembly, or authority.
[21] This is sometimes offered as paid leave. For example, the Secondary Teachers' Collective Agreement 2015-2018 provides for paid leave of up to six weeks: cl 6.6.5. Available at: <http://www.education.govt.nz/assets/Documents/School/Collective-Employment-Agreements/Secondary-Teachers-Collective-Agreement/SecondaryTeachersCA20152018.pdf>.
[22] Holidays Act 2003, s 69(2) and (3)(a)-(c).
[23] *Minhinnick v New Zealand Steel Ltd* [2016] NZERA Auckland 335.

in a way that recognises the relationship of a whangai brother".[24] The Authority found that the worker had suffered an unjustified disadvantage grievance, and he was awarded $1,000 for his distress. The two days' annual leave that he had to use to attend the funeral were reinstated.

Some agreements contain problem resolution processes that, while compatible with ordinary employment law principles, provide for the resolution of employment problems in a *Māori context and manner*. In one collective agreement, this was defined as involving the following features:

> (i) Meetings can be held on a *marae*;[25] (ii) There is face to face engagement; (iii) There can be *whanāu* [extended family] support for all involved; (iv) Guidance and advice is often provided to everyone concerned by *kaumātua* [elders] and *kuia* [female elders].[26]

Another collective agreement provides for a dual-track grievance procedure: a conventional track and a Māori cultural track for those who choose it.[27] The latter, labeled *korero tahi kaupapa* ("talking it out in the Māori way"), involves the grievance first being raised at a low level with one's immediate manager in order to arrive at a resolution; then, if unsuccessful, raising it with the CEO to seek a resolution; and finally, meeting with elders (*kuia*, *kaumātua*) and *whānau* on a *marae* and, therefore, outside the place of employment in a culturally appropriate location for resolving issues in a Māori way. In the Māori Studies department of a Polytechnic, there was a clause in the employment contract that provided for *hui*[28] to resolve interpersonal problems involving probationary staff.[29] The aim of such processes (variously called *hui* or *wānanga*[30]) is to talk out the issue and reach a consensus at the end of the discussion that forms a binding resolution of the issue.[31] Similarly, in the Māori Television Service, there is a form of internal mediation that is used involving *hohou rongo* ("making peace") meetings.[32]

Despite the recognition of Māori custom in the workplace, conventional employment law rights still apply to disciplinary processes, so that any Māori-based values or policies must be consistent with basic requirements of reasonableness and fairness. Despite the ostensibly voluntary nature of such dispute resolution, it must still satisfy the same standards of fairness that apply to everyone under New Zealand employment law, as held in the early case of *Te Whanāu a Takiwira Te Kohango Reo v Tito*,[33] where the Employment Court emphasised that the following of a customary process does not exclude

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[24] At [37].
[25] This is the courtyard of a Māori meeting house, or the meeting house itself.
[26] See the Secondary Teachers' Collective Agreement 2015-2018, cl 3.5.1(b), available at: < http://www.education.govt.nz/assets/Documents/School/Collective-Employment-Agreements/Secondary-Teachers-Collective-Agreement/SecondaryTeachersCA20152018.pdf>.
[27] The Te Rau Kōkiri multi-employer collective agreement (8 June 2012) between the New Zealand Nurses Organisation and Ahipara Health & Resource Trust and others, which covers health workers employed by Māori health providing agencies and trusts.
[28] Defined by the online *Māori Dictionary* as "gathering, meeting, assembly, seminar, conference": see <http://maoridictionary.co.nz/>.
[29] *Fraser v Manukau Polytechnic*, AEC 71/96, 31 October 1996. Such *hui* were not intended to be disciplinary in nature; see further discussion below.
[30] Defined by the online *Māori Dictionary* as "seminar, conference, forum": see < http://maoridictionary.co.nz/>.
[31] See, for example, *Gibson v Ngati Porou Hauora Incorporated* [2008] NZERA (Auckland) 799 (7 April 2008), where the employer sought to deal with a serious employment matter in a Board *hui* "in accordance with the culture of [the Ngagti Porou Haurora Incorporated, a health services provider] and tikanga Māori, by seeking consensual termination of the employment to allow a dignified departure of [the employee]." *Tikanga* is defined in the online *Māori Dictionary* as "correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention": see < http://maoridictionary.co.nz/>.
[32] *Mercer v Maori Television Service* [2009] NZERA 477 (Auckland) (30 July 2009), at [2]. In that case, after the process the employee concerned was provided with a written review that set out nine performance issues and the expectations associated with these, which he accepted.
[33] *Te Whanau a Takiwira Te Kohango Reo v Tito* [1996] 2 ERNZ 565, 573.

the ordinary requirement of fairness. In that case, the *wānanga* process involved discussion conducted by a *whānau* group of the two employees concerned, with everyone enjoying unlimited speaking rights, until a binding resolution was framed and unanimously agreed to by all concerned. The Court commented that this was "no more than a process, like any other process that an employer may choose when considering termination of employment".[34] The Court, however, went on to caution:[35]

> The fact however that certain actions which are the subject of a grievance claim and challenged for fairness, were performed validly in a customary context cannot throw up a shield preventing the eyes of the Court from probing the customary actions to see if they complied with the law's requirement that they be fair … [What] the Court must decide … is not whether the employer has justified the terminations of employment by showing they occurred in a valid customary way, but whether the terminations complied with the law.

The issue in this case centred on whether the employees concerned had freely consented to termination of their employment. The Court accepted that, in some circumstances, even reluctant acceptance of the will of the majority of the *whānau* could be considered to amount to free consent to termination by way of mutual agreement, but in the case at hand, this had not occurred.

Likewise, in *Skipwith-Halatau v Ngati Kapo (Aotearoa) Inc*,[36] the employee successfully contended that the *hui* that led to her dismissal was defective. It did not require an agenda to be notified in advance, and thus she had no notice that her employment would be considered by the *hui*. The Court held that mainstream employment law applied to the employer notwithstanding the Māori nature of the enterprise, though the law could, in so far as there was no inconsistency: [37]

> allow for the special characteristics of any employment relationship including, in this case, the expectation of the parties that *tikanga Māori* will be basis of the parties' dealings with each other.

The employer, however, still needed to comply with "[t]he law's essential requirements of fairness and reasonableness in circumstances leading to, and of, dismissal", which "mould to and accommodate these *kaupapa*."[38] The Court recognised that procedural flaws in the use of *hui* for dealing with employment disciplinary matters can lead to an unfair result. This was also the result in *Rerekura v Presland*,[39] where the Court found fault with a suspension and disciplinary investigation based on a procedurally flawed *hui*.

Hui can also be used for non-disciplinary matters in the workplace, such as interpersonal conflicts. In *Fraser v Manukau Polytechnic*,[40] a *hui* was held to deal with the deteriorating relationship between a probationary lecturer and the head of the Polytechnic's Māori Studies department. There was a clause in the employee's employment contract that provided for such *hui* where problems arose in relation to probationary staff. The Court rejected the employee's argument that this was an "unauthorized disciplinary *hui*" to deal with administrative and professional complainants against him,[41] and

[34] Ibid.
[35] Ibid.
[36] *Skipwith-Halatau v Ngati Kapo (Aotearoa) Inc* [1997] NZEmpC 165.
[37] At [12].
[38] Ibid. *Kaupapa* is defined in the online Māori Dictionary as "matters for discussion, subjects": see <www.maoridictionary.co.nz>.
[39] *Rerekura v Presland* AC 68/03, 17 December 2003.
[40] *Fraser v Manukau Polytechnic* AEC 71/96, 31 October 1996.
[41] At 7. There had also been complaints against the worker concerning "attendance at required times, record keeping, expenses claims and other significant administrative matter": *Fraser v Manukau Polytechnic*, at 9.

accepted that this was merely a "cross-cultural conflict resolution mechanism".[42] It was not an element in a disciplinary process against the employee and, therefore, the idea of procedural fairness was not applicable to this particular type of *hui*. The Court commented: [43]

> Neither in this case, nor generally in my opinion, is it helpful to rigorously and narrowly analyse the processes of dispute resolution mechanisms such as *hui* in terms of what may be monocultural employment law principles. Whilst the outcome of different dispute resolution techniques will no doubt be relevant, as in this case it was, it would be unreasonable for the Tribunal or the Court to find an employer's resultant action unfair and without justification merely because the culturally and agreed process undergone does not itself conform with monoculturally accepted and recognized rules of fairness.

The Court found that the decision to dismiss the employee turned on the inability of the participants to reach a consensus as to the co-existence of employees, rather than on the outcome of the *hui*.

In *Good Health Wanganui v Burberry* (*Burberry*),[44] the leading case in this area, the Employment Court held that an employer's obligations to accommodate Māori values are heightened where there is an express policy to that effect, and a matter concerns a Māori employee working in a Māori setting. The employee was a Māori mental health worker for a hospital's Māori mental health unit who sought 3 days' leave to attend a Māori festival where she was responsible for the provision of health services. Her employer had granted her leave to attend this event for the previous 17 years. After some delay, she was denied leave at the last minute, having already made arrangements to attend the festival and for her work to be covered. She had tried to convince her manager to allow her to attend the festival, and she emphasised its cultural importance to her, but to no avail. Despite this, she went ahead and attended the festival, and was summarily dismissed on her return.

The Court found that the dismissal was unjustified on the basis that it was unreasonable and unfair that the employee had been refused leave to attend the festival since the refusal was notified too late and without considered justification. Moreover, the employer failed to accept that attendance at the festival, and the importance of keeping her word to the festival organisers, was culturally important to the employee. The dismissal process was also faulty in that it was conducted with undue haste and in a culturally insensitive manner. The Court found that the onus was on the employer to be culturally sensitive, not on the employee to assert her *mana Māori*: "The fact that an employee is Māori and is working in a Māori setting should have been sufficient to alert them to a need for an appropriate procedure."[45] The Court noted that the employee's managers were "genuinely surprised at the fact that cultural issues had been raised after the event" and that the employee had not asked for cultural support or procedures during the dismissal interview.[46] The Court's perception was that, while the employer made provision for Māori issues, it was more of an *annexure* than an integrated part of the workplace culture. The Court remarked that the employer should have been particularly alerted to the cultural aspects of what they were doing as the employee concerned in the case was obviously Māori and had been hired to deal specifically with cultural issues in relation to mental health patients. The Court also noted that new Māori employees were welcomed by a traditional Māori *powhiri* ceremony, but:[47]

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[42] At 8.
[43] Ibid.
[44] *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668. For case comment, see Catherine Iorns Magallanes, "Cultural sensitivity in the Employment Court" [2003] NZLJ 153, and Paul Roth, "Employment Law" [2003] NZLR 609, 620-621.
[45] *Burberry*, at [58].
[46] At [57].
[47] Ibid.

> The question must be asked why, having been granted that respect on their arrival, they could not be afforded the dignity of a *poroporoaki* or farewell. If it is appropriate at the beginning of employment it should be appropriate at the end even when the circumstances are difficult.

Burberry was referred to in a subsequent redundancy case, where the employer was also found to have fallen short of the required standard of procedural fairness by not taking cultural matters into account. In *Benton v New Zealand Tertiary College* (*Benton*),[48] the Employment Relations Authority similarly found fault with the employer for not arranging an appropriate farewell for the redundant employee.[49] During her time at NZTC, Dr Benton had been associated with aspects of its programme which addressed Māori cultural issues and had been welcomed on her appointment in a way in which she was able to *mihi* or greet and introduce herself to colleagues. It would have been appropriate for NZTC to similarly ensure she could be farewelled in a dignified manner. That was so whether the standard of NZTC's conduct in that regard was measured against specific Māori cultural values – about which it offered courses to its own students – or the general social value of treating respectfully someone who was losing their position on the "no fault" basis of redundancy.

Burberry and *Benton* illustrate that the Court's approach falls within conventional mainstream employment law principles. Where actions affecting workers are concerned, their individual circumstances, including cultural factors, are relevant considerations when the fair and reasonable treatment to which they are entitled to under common law and statute is being assessed. The cases also show that the Court can take into account Māori emotional sensibilities and values. In *Burberry*, the Court took into account the ways in which the employer was culturally in the wrong in the way it handled the Māori employee's dismissal, and it considered the impact of the harm on the employee. The employee gave evidence that she was unable to work after the dismissal because of the emotional and psychological effect on her. It "impacted on her culturally, *wairua* (spiritually), *tinana* (physical wellbeing), *hinengaro* (emotional psychological mental health), and *whanāu* [in terms of family]."[50] The way the dismissal process was carried out was blind to the Māori cultural aspect. The Court found that the escorting of the employee to her office and being told to pack up and leave was culturally inappropriate from the employee's perspective, and referred to her reaction: [51]

> To be marched over to community mental health by two men – being Māori, being an older woman coming towards a point where I am able to take *kuia* [elder] status, that was degrading and they couldn't even have another woman there present during the meetings or even their *tumuaki* ["head, director"] or *kai whakapiringa* [Māori cultural advisor and provider of collegial support].

The Court found that, during the dismissal interview, the employee was feeling *whakamā*, or extreme embarrassment and shame, which has been described as follows: [52]

> Analysis of the situations in which *whakamā* occurs reveals a variety of causes: shyness, shame not only for wrongdoing but also for being suspected of it, embarrassment over falling short in some respect, feelings of injustice, powerlessness and frustration. The common denominator seems to be "feeling at a disadvantage, being in a lower position morally or socially", whether as a result of your own actions or another's. To be *whakamā* is to be "put out of one's place", "pushed off a secure base." Occasionally, *whakamā* involves hostility directed outward in the

[48] *Benton v New Zealand Tertiary College* [2011] NZERA (Auckland) 429 (3 October 2011) .
[49] At [27]
[50] *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668, [34].
[51] At [41].
[52] At [55], quoting from Joan Melge, Patricia Kinloch, "Talking past each other", Victoria University Press, 1995, 23.

> form of dirty looks and critical asides but, in general, a person who is *whakamā* retreats from social contact and turns in on themselves. They are victim not agent, and though their behavior is annoying it is not deliberately intended to annoy. A person who is *whakamā* does not consciously choose to feel and act that way and certainly cannot turn it on and off at will. Unconsciously, however, they are trying to get a message across to those around them – to "speak" by not speaking. Exactly what the message is is not immediately apparent and it must be carefully interpreted in order to select the right treatment.

In another case, however, the Court was unable to accept a cultural argument raised by an employee who was dismissed on the grounds of misusing sick leave. The employee argued that he had been unwell in a culturally broad sense.[53] The Court referred, in a shorthand way, to *rongowai* for what was described in the employee's evidence as the Māori way "of identifying and treating physical and spiritual maladies in an individual".[54] The employee was both physically and emotionally unwell, and he had been reluctant to speak of this "not least to the women who were his managers and those who assisted them, and were responsible for, or contributed to, his subsequent dismissal."[55] The Court remarked that it would have been reasonable for the employer, as a Māori youth training establishment, to treat the employee in a culturally sensitive way, but it was unable to do so if unaware of the issues concerned. Accordingly, the employer could not be accused of having dismissed the employee unjustifiably if it did not know what was affecting the employee's health and well-being.

The point that there can be a number of different perspectives on the application of a traditional notion was noted in an earlier case, where the Labour Court[56] remarked: [57]

> Important influences in this case in evidence and submissions, were the concepts of *mana* and *tikanga Māori*. The perception of the participants in the case of these notions was largely consistent but there was no general agreement as to their application to the circumstances of the case….
>
> We appreciate that each of these notions is susceptible of variations and gradations of meaning, often of a most subtle nature, depending on the context in which the terms are used and the circumstances to which they are applied. We accept the reality and the importance of these concepts to the people involved in this case and in their bearing upon the case itself and we have kept in mind the meaning, particularly of *mana*, in our assessment of the effect of the events on both the Board and Mrs Stephens. The sensitivities of Maoridom featured in our consideration of this case and we welcomed the introduction of the material relevant to those sensitivities.

Indigenous values and collective industrial relations

When the New Zealand Nurses Organisation (nurses' union) was attempting to negotiate a collective agreement that covered a number of Māori health service providers, some of the employer parties brought up the objection that joining with other employers in a multi-employer collective agreement would be inconsistent with the principles of *tino rangatiratanga* ("sovereignty, self-determination,

[53] *Taiapa v Te Runanga O Turanganui A Kiwa Trust t/a Turanga Ararau Private Trading Establishment* [2013] NZEmpC 38 (18 March 2013).
[54] At [33].
[55] At [34].
[56] The Labour Court under the Labour Relations Act 1987 (1987 to 1991) was replaced by the Employment Court.
[57] *Central Clerical Workers Union v Taranaki Maori Trust Board* [Pre-1991] ERNZ 542, at 546.

autonomy"), which implied Māori control over all things Māori.[58] The Authority facilitator, however, did not accept this objection, because the blind schedules to the proposed agreement provided for "a degree of uniqueness and self-determination", and at least 15 different employers from across the country already agreed in principle to the multi-employer collective agreement. The facilitator commented that he did "not consider that they would have done so as Māori and iwi organisations if this fundamentally breached the principle of *tino rangatiratanga*."[59] The facilitator went on to comment that the union's members, who were generally Māori themselves, voted for the negotiation of the multi-employer collective agreement, and that "they are entitled to *tino rangatiratanga* as well, meaning that that principle cannot greatly assist the recommendation process."

The sort of tensions evident here between Indigenous self-determination and legislation requiring good faith collective bargaining, and between workers who want to bargain collectively and Indigenous employers who are reluctant to be bound by a multi-employer collective agreement is not unique to New Zealand, but has parallels in North America, where such tensions have arisen over the past few decades in connection with union organising on Indigenous reservations.[60]

Australia

Since the mid-1990s, a number of employment agreements and collective awards have provided for recognition and accommodation of Aboriginal and Torres Strait Islander cultural values. In taking Aboriginal culture into account, it must be realised that the variety of obligations owed in different places and by different peoples is not uniform, so a degree of flexibility is required. Thus, the Australian Industrial Relations Commission has recognised that "[t]he areas of concern will vary from one locality to another as the cultural duties and responsibilities and needs of Aboriginal (Indigenous) employees vary from place to place."[61] This means that care must be taken that the parties' obligations are not overly prescriptive. The Commission commented that:

> …a difficulty with specifying rights, duties and obligations with particularity … is that there is not uniform observance of aboriginal culture and there are, therefore, many different cultural requirements amongst the aboriginal workforce. There are different family responsibilities depending on the adherence to tribal or kinship laws and whether persons of aboriginal descent are adherents to the aboriginal culture. If real progress is to be made in this most important area towards national reconciliation, appropriate and proper steps need to be taken in a careful and planned manner in order to achieve the stated objectives of the union and the employers with respect to employment covered by the Award.

The first industrial instrument that recognised the cultural and spiritual beliefs of Aboriginal workers was a 1995 Australian Industrial Relations Commission decision on the variation of a Western Australian local government industrial award.[62] The Commission decided that the industrial award

[58] This case involved a facilitation of bargaining when negotiations had reached an impasse: Employment Relations Authority, *Recommendations, Facilitation Te Rau Kokiri, New Zealand Nurses Organisation v Ahipara Health & Resource Trust and 49 ors*, G J Wood, ERA5346855; the application for facilitation was granted in *New Zealand Nurses Organisation v Ahipara Health and Resource Trust* [2012] NZERA (Wellington) 1 (9 January 2012).
[59] At [6].
[60] This New Zealand case, however, appears to be unique thus far, given the relatively recent proliferation of specialised Māori agencies as employers.
[61] *Re Federated Municipal and Shire Employees Union of Australia (WA Div)* (1996) 1(1) *Australian Indigenous Reporter* 32 (Dec 227/95, 31 January 1995).
[62] Ibid. For commentary, see Loretta de Plevitz, "Recognition in the workplace: Re Federated Municipal and Shire Employees Union of Australia (WA Div)", (1995) 3(77) *Aboriginal Law Bulletin* 19. The Commission noted that the

should impose a general duty on employers in the following broad terms:

> An employee, covered by this Award, who is an adherent to Aboriginal culture and who practices Aboriginal spiritual and/or religious beliefs, shall be afforded a reasonable opportunity by his or her employer to follow and practice the requirements of that culture or spiritual or religious belief.

The Commission accepted that the provision of adequate and culturally appropriate bereavement leave, adoption and maternity leave, and paid holiday leave for the National Aboriginal and Islander Day of Celebration, was essential for increasing Aboriginal employment so that employment obligations would not be an impediment to the cultural and spiritual needs of Aborigines. As has been noted elsewhere: [63]

> Flexible work arrangements such as cultural and ceremonial leave and Indigenous-specific provisions can assist Indigenous employees remain employed when they face competing demands from the workplace as well as their family, community and cultural obligations.

In particular, the Commission recognised that Aboriginal people required more frequent and longer bereavement leaves because of the importance of attending funerals of kin; the existence of extended kinship networks; the great distances that often have to be travelled in order to attend funerals; and the fact that the low average lifespan of Aboriginal males entails more frequent attendance at funerals during one's working life. The Commission observed that "attendance at funerals is the major social activity that brings together relevant people". It stated:

> It is an essential feature of aboriginal culture that when a person dies, all those who have a kinship relationship to the deceased person should and, in some cases must, attend the funeral ceremony. There is a very strong belief that the spirit is reluctant to leave the body of the deceased person and, if it does not leave in a proper manner and return to the place from whence it came, there is likely to be trouble, and even death, in the relevant community. Persons who do not give effect to this fundamental duty may forfeit their right to become elders in the Aboriginal community and may, in some circumstances, even be ostracized by their fellows.

In addition to greater flexibility in leave entitlements for Aboriginal workers, the Commission also made provision for appropriate induction and training in accord with their culture when Aboriginal workers were hired. In relation to dispute resolution processes, Aboriginal culture was also ostensibly accommodated by entitling Aborigines to be represented by a person of their own choosing, which could include a fellow employee, since there was some anthropological evidence that in Aboriginal society, it is often not regarded as proper to speak on behalf of oneself. [64] Where the chosen representative is a fellow employee, they may not suffer any loss of wages or other benefits arising from their participation in any stage of the dispute settlement procedure. [65]

Another issue tackled by the Commission was how to approach the application of the clauses relating to Aboriginal people, since two-thirds of Aboriginal people are of mixed descent, and the population

matter before it raised "questions for determination which, as far as I aware, have not previously been decided by this Commission or by a State industrial tribunal."

[63] Boyd Hunter, Matthew Gray, "Workplace Agreements and Indigenous-Friendly Workplaces" (2013) 8(8) *Indigenous Law Bulletin* 7, 7.

[64] This point has been queried as an "extrapolation from one particular observation to all Aboriginal societies": ibid, 20.

[65] See also *Municipal Employees Rottnest Island Award 1992 – re Award simplification – PR916454* [2002] AIRC 374 (5 April 2002), cl 8.4.

adheres to Aboriginal culture to varying degrees. To get around the issue of whether the burden would be on employers to assess Aboriginality, the Commission decided that the most appropriate approach was self-identification as an Aborigine and identification by the Aboriginal community.[66]

The Commission commented generally on the variations it had made to the award as follows:

> The variations to be made to the award are intended to make a contribution to the acceptance and recognition of the rights of employees to practice their cultural and spiritual duties without loss of employment rights. To make such provision is not to afford special treatment to one class of employees. Rather, it is to afford a proper recognition of equality.

The approach and variations accepted for the West Australian local government award in respect of Aboriginal workers have since become more commonly found in public sector industrial agreements elsewhere. Aside from the public sector, there are other sectors where there is a business case for including Aboriginal-specific provisions: mining companies that operate on or near Aboriginal lands, which will be likely to accommodate the needs of local Aboriginal workers and community (which could be described as a "social licence");[67] organisations that deal with Aboriginal matters and issues; and Aboriginal enterprises and organisations.[68]

In relation to bereavement leave for Aboriginal and Torres Strait Islander employees, one staff policy broadly defines "immediate family" as also denoting: [69]

> [family members] by marriage, adoption, fostering, or traditional kinship, and … staff member's spouse, former spouse, domestic partner or former domestic partner, child or adult child, parent, brother, sister, grandparent, foster-grandparent, step-grandparent, grandchild, in-law relative, guardian, ward, or person with respect to whom the staff member has an Indigenous kinship relationship of equivalent significance, or a person who stands in a bona fide domestic or household relationship with a staff member including situations in which there is implied dependency or a support role for the staff member.

Provisions for ceremonial leave for those of Aboriginal and Torres Islander descent are common for workplaces with Aboriginal workers or that want to encourage Aboriginal employment. A study of registered federal workplace agreements for the period 1997-2013 found that the proportion of lodged agreements with cultural or ceremonial leave increased from about two per cent to over five per cent over the period, and the proportions of employees covered by these agreements with ceremonial leave provisions grew from about 15 per cent of employees to about 25 per cent.[70] With regard to Aboriginal-specific provisions generally, between 1997 and 2013 the estimated proportion of federal agreements with such provisions increased from about 0.5 per cent to just over two per cent, and the proportion of

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[66] Compare the definition of "Aboriginal person" as "a person who identifies as such and furthermore is regarded as an Aboriginal person by members of his or her community": *Municipal Employees Rottnest Island Award 1992 – re Award simplification – PR916454* [2002] AIRC 374 (5 April 2002), cl 4.1.

[67] See David Brereton, Joni Parmenter, "Indigenous Employment in the Australian Mining Industry" (2008) 26(1) *Journal of Energy & Natural Resources Law* 66; Ciaran O'Faircheallaigh, "Aboriginal Mining Company Contractual Agreements in Australia and Canada: Implications for Political Autonomy and Community Development" (2010) 30(1-2) *Canadian Journal of Development Studies* 69.

[68] Boyd Hunter, Matthew Gray, "Workplace Agreements and Indigenous-Friendly Workplaces" (2013) 8(8) *Indigenous Law Bulletin* 7, 9.

[69] Australian National University, Personal Leave Policy, para 8, available at <https://policies.anu.edu.au/ppl/document/ANUP_000552>.

[70] Boyd Hunter, Matthew Gray, "Workplace Agreements and Indigenous-Friendly Workplaces" (2013) 8(8) *Indigenous Law Bulletin* 7, 10.

employees having access to such provisions under federal agreements increased from about four per cent to just under nine per cent.[71] These provisions tend to be concentrated in the public administration/safety and health care/social assistance sectors.[72]

One personnel policy provides that cultural leave for Aboriginal staff members may also include "leave to fulfil ceremonial obligations which may include cultural events, initiation, birthing and naming, funerals and smoking or cleansing, and sacred site or land ceremonies".[73] Typically, provision is made for 10 days' unpaid leave per year.[74] There may also be paid leave for attendance at official activities during National Aboriginal and Torres Islanders Week in July. A common type of award provision provides that: [75]

> An employee covered by this award, who is an adherent to Aboriginal culture and who practises Aboriginal spiritual and/or religious beliefs, shall be afforded a reasonable opportunity by their employer to follow and practise the requirements of that culture or spiritual or religious belief. Where this involves time away from work, arrangements will be made for the employee concerned to take annual leave or accumulated rostered days off for the purpose, if leave is not otherwise provided in the award. Alternatively, the employer and the employee concerned may agree to time off without pay. Provided that an employer may require reasonable evidence of the legitimate need for the employee to be allowed the required time off from work.

The Queensland Industrial Relations Act 2016 makes provision for up to five days of unpaid cultural leave.[76]

An award or policy may also undertake to provide Aboriginal employees with culturally appropriate induction training that incorporates recognition of Aboriginal beliefs and cultures.[77]

International comparisons with the Australasian model

North American comparisons

The position of Indigenous peoples in Australasia can be distinguished from that in North America in three main respects. Firstly, there is generally greater union engagement with Indigenous concerns in Australasia than in North America. This may be due to the size of the respective countries, and the visibility and prominence of Indigenous peoples in Australasia, particularly New Zealand, in comparison with other disadvantaged minority groups. Secondly, Indigenous values in Australasia have been accommodated within mainstream labour law where not inconsistent with the laws of general application. Thirdly, and a significant difference between the two, is that many Indigenous

[71] Ibid.
[72] At 12-13.
[73] Australian National University, Personal Leave Policy, para 9, available at <https://policies.anu.edu.au/ppl/document/ANUP_000552>. Cultural leave is also available for other staff members as well "for the purpose of observing or attending essential religious or cultural obligations associated with the staff member's particular religious faith, culture or tradition": para 5.
[74] See, for example, Nurses Award 2010, cl 33, available at <http://awardviewer.fwo.gov.au/award/show/MA000034>.
[75] Municipal Employees (Western Australia) Interim Award 2011 Municipal Employees (Western Australia) Interim Award 2011, cl 23.10, available at <http://forms.wairc.wa.gov.au/awards/MUN001/p1/MUN001.html>.
[76] Section 51(2). This was carried over from s 40A(1) of the Queensland Industrial Relations Act 1999.
[77] See, for example, the University of Queensland, *Handbook of University Policies & Procedures*, Aboriginal and Torres Strait Island Employment Policy, 5.30.19, available at <http://www.uq.edu.au/hupp/?page=50247>.

people in North America live on tribal reserves[78] that enjoy a degree of sovereignty and self-determination that is jealously guarded. This has caused friction between tribal hierarchies and unions seeking to organise on Indigenous land, often with the support of federal authorities in the United States (the National Labor Relations Board ("NLRB") under the National Labor Relations Act 1935 ("NLRA")) and, in Canada, provincial labour relations boards. In the United States, this tension has produced legal pluralism in relation to labour law that has no counterpart in Australasia.

The impetus for this development has been the burgeoning Indian casino gaming industry, 'the new buffalo',[79] which has brought jobs and prosperity to Indigenous reserves, as well as many non-Indigenous workers,[80] since the late 1970s. Today, the Indian casino industry earns over US$31 billion, and represents over 43 per cent of all casino gambling in the United States. There are currently 460 Native American casinos that are operated by 244 out of 565 federally recognised tribes.[81]

This development had its origin in a Native American couple's successful legal battle against a local tax assessment on their mobile home, which was situated on a reservation in Minnesota. The United States Supreme Court held that states did not have the right to impose taxes on Native American property without Congressional authorisation.[82] This ruling enabled Native Americans to get into the reservation gambling business without being subject to state regulation or taxes. Among the first to take advantage of this ruling were the Seminole tribe in Florida, which opened a high stakes bingo operation that was open six days a week, whereas Florida state law limited such gambling to two days a week with a $100 jackpot limit. The tribe successfully defended its gaming business in the United States Court of Appeals,[83] and this case opened the way for other tribes to follow suit. The Cabazon Band of Mission Indians in California won a similar case in the Supreme Court in 1987.[84]

At the same time that states unsuccessfully sought to impose their laws on Native American reservations, Indian casinos and unions were engaged in litigation concerning whether the federal NLRA applied on reservations. A key case was decided by the NLRB in 2004,[85] and affirmed by a federal appeals court in 2007,[86] which agreed that tribal businesses could be subject to the NLRA depending on the particular Indian treaty with the United States government, and whether the tribe employed non-Indians and catered to non-Indians. Other federal courts, however, held differently. In *NLRB v Pueblo of San Juan*,[87] the federal court upheld a Pueblo right-to-work law that gave employees the right to work without having to join a union. The court held that the NLRA did not displace the

[78] About 34% in the United States, see Stella U Ogunwole, *We the People: American Indians and Alaska Natives in the United States, US Census Bureau* (February 2006) 14 < https://www.bia.gov/sites/bia.gov/files/assets/public/press_release/pdf/idc-001819.pdf>; and about 40 per cent in Canada, see Statistics Canada, '2006 Census: First Nations people' <http://www12.statcan.ca/census-recensement/2006/as-sa/97-558/p16-eng.cfm>.

[79] Ambrose Lane, *Return of the Buffalo: The Story Behind America's Gaming Explosion* (Bergin & Garvey, Westport 1995).

[80] For example, only 85 out of 1150 employees of the Great Blue Heron Casino were Mississaugas of Scugog Island (which only had a population of 173), and in the early 2000s, only 700 of 3700 employees of Casino Rama were Mnjikaning First Nations: see Yale D Belanger, "Labour Unions and First Nations Casinos: An Uneasy Relationship", in Yale D Belanger (ed), *First Nations Gaming in Canada* (University of Manitoba Press 2011) 295.

[81] See the 500 Nations website at < https://www.500nations.com/Indian_Casinos.asp>.

[82] *Bryan v Itasca County*, 426 US 373 (1976).

[83] *Seminole Tribe of Florida v Butterworth*, 658 F 2d 310 (5th Cir, 1981).

[84] *California v Cabazon Band of Mission Indians*, 480 US 202 (1987).

[85] *San Manuel Indian Bingo & Casino v NLRB*, 341 NLRB 1055 (2004).

[86] *San Manuel Indian Bingo & Casino v NLRB*, 475 F 3d 1306 (DC Cir 2007). The decision was widely criticised; see, for example, Bryan H. Wildenthal, "Federal Labor Law, Indian Sovereignty, and the Canons of Construction" (2007) 86(2) Oregon Law Review 413, and "How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—And Has So Far Gotten Away With It" [2008] Michigan State Law Review 547.

[87] 276 F 3d 1186 (10th Cir 2002).

tribe's jurisdiction over economic relationships within its territory.[88] In the face of legal uncertainly, parties seemed reluctant to pursue a "winner take all" approach through appeal to the Supreme Court. Instead, various strategies have been adopted by tribes to avert NLRB regulatory attention. Chief among these strategies is the adoption of tribal labour codes, which are expected to provide for some form of collective bargaining.[89] There are currently scores of such codes in reservations around the United States.

The most recent development should bring an end to the struggle between Native American tribes and unions. This is the proposed Tribal Labor Sovereignty Act, of 2017,[90] which would exempt tribes and their gaming facilities from collective bargaining under the NLRA. It would not bar organised labour on reservations, but it leaves the issue up to tribal governments. This legislation has been under consideration in Congress since 2004 and is currently awaiting a vote in the Senate. Republicans unanimously support it, and Democrats are finding it difficult to oppose it. While it is an anti-union measure, and unions form a powerful Democratic party constituency, the legislation provides for the preservation of Native American rights and is broadly supported across Indian country, so it presents a political problem for Democrats.

International labour standards relating to Indigenous peoples

The Australasian model is consistent with international labour standards, which do not go as far as the American model in terms of Indigenous self-determination.

There are two international instruments that contain provisions that relate specifically to the labour rights of Indigenous peoples: the International Labour Organization's Convention concerning Indigenous and Tribal Peoples in Independent Countries 1989 (No 169),[91] and the United Nations Declaration on the Rights of Indigenous Peoples 2007.[92] These instruments mainly seek to target discrimination and ensure that Indigenous workers enjoy the same labour standards as other workers. While the ILO Convention provides for the recognition of Indigenous values in the workplace, this is only "where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights".[93] The United Nations Declaration, unlike the ILO

[88] On the inconsistency between the *San Manuel* and *San Juan* decisions, see Vicki J. Limas, "The Tuscarorganization of the Tribal Workplace" [2008] Michigan State LR 467.

[89] See Kaighn Smith, Jr, *Labor and Employment Law in Indian Country*, (Drummond Woodsum MacMahon 2011). Indigenous labour codes in Canada appear to have met with less success, since generally reserves fall under provincial labour legislation unless s 35 of the Constitution Act 1982 applies (wherever the issue of "Indianness" arises), in which case federal jurisdiction applies to First Nations workplaces. For an unsuccessful attempt at an Indigenous labour code covering band members, see *Saskatchewan Indian Gaming Authority (SIGA) v National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* [2003] 3 CNLR 349; Yale D Belanger, "Labour Unions and First Nations Casinos: An Uneasy Relationship", in Yale D Belanger (ed), *First Nations Gaming in Canada* (University of Manitoba Press 2011) 288. In *R v Pamajewon* [1996] 2 SCR 821; 138 DLR (4th) 204, the Supreme Court of Canada found that First Nations gaming fell under Provincial law as casino gambling was not a traditional Indian activity.

[90] "A bill to clarify the rights of Indians and Indian tribes on Indian lands under the National Labor Relations Act", S 63, sponsored by Senator Jerry Moran (Republican, Kansas), introduced on 9 January 2017.

[91] Adopted 27 June 1989; entered into force 5 September 1991. This Convention replaces ILO Convention 107 on the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957, which took an outmoded paternalistic and assimilationist approach. This approach is still evident in its accompanying Recommendation concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (No 104).

[92] See above n 9.

[93] Article 8(2). Only 22 countries have ratified this convention. New Zealand, Australia, Canada, and the United States have not ratified it, nor are they likely to. Indigenous groups themselves have not supported ratification, since it does not recognise aspirations to self-determination and expressly (in art 1(3)) does not acknowledge Indigenous populations as

Convention, does not advert to the possibility of Indigenous systems or customs accommodated within or separate to a mainstream labour law system.

Conclusion

The incorporation of Indigenous culture into employment law, where applicable, may be viewed as a positive development for a number of reasons. Firstly, given that unemployment tends to be higher among Indigenous people, the incorporation of Indigenous values in workplaces recognises that cultural demands are not easily met within a "one size fits all" framework, which can act as an impediment to Indigenous people taking up employment. Thus, in Australia, where unemployment is particularly high among Aborigines and Torres Strait Islanders, the past two decades have seen the adoption of more flexible provisions in contracts and collective instruments to enable more Indigenous people to take up employment that allows for the fulfilment of cultural obligations. Secondly, cultural well-being significantly relates to career satisfaction. A recent New Zealand study has indicated that Māori respondents enjoyed the highest level of career satisfaction where workplace cultural wellbeing was high.[94] Thirdly, and conversely, workplace dissatisfaction has a negative effect upon worker health, with a lack of workplace satisfaction, respect, and fairness being relevant factors.[95] Finally, there is an ethical argument that if one identifies as Indigenous, one should be able to choose to live as an Indigenous person, and this includes operating as an Indigenous person in one's working life. Workers who identify as Indigenous need their own culture to survive and develop, and Indigenous culture has no home other than in the land that was originally theirs.

Recognising Indigenous values in the workplace, however, is not entirely unproblematic. Although there is a distinctive Indigenous approach to workplace matters, there can at times be tension, if not outright conflict, between worker and Indigenous interests. Where the workforce is mixed Indigenous/non-Indigenous, or where there is some incompatibility between ethnic consciousness on the one hand, and labour or gender consciousness on the other, there can be friction. There can also be more than one Indigenous approach, as indicated where an Indigenous employer and an Indigenous worker have a difference of view as to the application of Indigenous values, as has arisen in some of the New Zealand cases. The North American experience has also shown that there can be tension where an established traditional hierarchy is being challenged, or where Indigenous workers push for mainstream workers' rights.[96]

"peoples" entitled to self-determination at international law in terms of arts 1(2) and 55 of the United Nations Charter.

[94] Jarrod M Haar, Dave M Brougham, "An Indigenous Model of Career Satisfaction: Exploring the Role of Workplace Cultural Wellbeing" (2013) 110(3) *Social Indicators Research* 873.

[95] See, for example, Lois M Verbrugge, "Work satisfaction and physical health" (1982) 7(4) *Journal of Community Health* 262-283; Keith James, Chris Lovato, Gillian Khoo "Social Identity Correlates of Minority Workers' Health" [1994] 37(2) *Academy of Management Journal* 383-396.

[96] See Brock Pitawanakwat, "Indigenous Labour Organizing in Saskatchewan: Red Baiting and Red Herrings" (2006) 58 New Socialist 32