

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 94  
3020396

BETWEEN

NEW ZEALAND PUBLIC  
SERVICE ASSOCIATION  
TE PUKENGA HERE  
TIKANGA MAHI  
First Applicant

WALTER KUPA  
Second Applicant

LARRY MEREDITH  
Third Applicant

STEPHEN MINTO  
Fourth Applicant

AND

COMMISSIONER AND  
CHIEF EXECUTIVE INLAND  
REVENUE DEPARTMENT  
TE TARE TAAKE  
Respondent

Member of Authority: Vicki Campbell

Representatives: Peter Cranney for Applicant  
Susan Hornsby-Geluk for Respondent

Investigation Meeting: On the papers

Determination: 28 September 2017

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**DETERMINATION OF THE AUTHORITY**

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- A. This matter is removed in its entirety under s 178 of the Act for the Court to hear and determine.**
- B. Costs are reserved.**

## **Removal Application**

[1] This is an urgent application under section 178(2) of the Employment Relations Act 2000 to remove the applicants claims lodged under matter number 3020376 against the Commissioner and Chief Executive Inland Revenue Department Te Tare Taake in their entirety to the Employment Court without prior investigation by the Authority.

[2] Section 178(2) of the Act allows the Authority to remove a matter to the Court without investigating it if one of the following four grounds are established:<sup>1</sup>

- a) an important question of law is likely to arise in the matter other than incidentally; or
- b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or
- c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
- d) the Authority is of the opinion that in all the circumstances the court should determine the matter.

[3] Inland Revenue is undertaking a major restructuring program affecting around 3,500 employees. The selection process for appointment to positions within the new structure includes a requirement that employees undergo an online psychometric assessment. The PSA and its members object to the requirement for the psychometric assessments on a number of grounds including the lack of a contractual obligation to require such testing, the lack of reliable information being provided and that the assessments and the implementation of the assessments does not comply with the principles of the Treaty of Waitangi.

[4] I have received two applications for removal. By consent the applications for removal are being dealt with on the papers currently before the Authority.

[5] The first application is from the PSA. The PSA seeks removal on the grounds that:

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<sup>1</sup> Employment Relations Act 2000 section 178(2).

- a) One or more important questions of law are likely to arise other than incidentally. The questions include:
- i. Whether an employer can require employees under threat of redundancy dismissal, to undergo psychometric assessments;
  - ii. Whether an employer is entitled to compel or require employees to undergo psychometric assessments;
  - iii. Whether psychometric assessments and how it was advanced and promoted was consistent with the principles of the Treaty of Waitangi.
- b) The case is of such a nature and of such urgency it is in the public interest that it be removed immediately to the Court. Specifically the applicants say the employer is attempting to implement psychometric assessments involving thousands of employees.

[6] The second application is from Inland Revenue. Inland Revenue seeks removal on the grounds that:

- a) One or more important questions of law are likely to arise other than incidentally. The questions include:
- i. Whether the use of psychometric assessments by employers as part of their selection process for new roles created following restructuring is legitimate;
  - ii. What constitutes “informed consent” in the context of psychometric assessments;
  - iii. What the information collected as a result of psychometric assessments can be used for;
  - iv. Whether the Court has jurisdiction to deal with claims made in reliance on the Treaty of Waitangi, and if so, what if any relevance does the Treaty of Waitangi have to the claims made.

b) The case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.

[7] An important question of law is one that will arise other than incidentally. Its importance has to be measured in relation to the case in which it arises and must be decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it. As the Court observed in *McAlister v Air New Zealand Ltd*:<sup>2</sup>

The importance of a question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it.

[8] I am satisfied the questions raised by the PSA and Inland Revenue in each of their applications are important questions of law that can affect large numbers of both employees (3,500 Inland Revenue employees) and those employers who use psychometric assessments within employment relationships generally.

[9] While the Authority needs only be satisfied that one of the grounds listed in s 178(2) exist I am also satisfied that the case is of such a nature and of such urgency it is in the public interest that it be removed immediately to the Court.

[10] This matter is removed in its entirety under s 178 of the Act for the Court to hear and determine without first being investigated by the Authority.

### **Costs**

[11] The parties have not had an opportunity to address me of the issue of costs. I am of a mind to let costs lie where they fall. If the parties wish me to address costs they will have 14 days from the date of this determination to lodge and serve memorandum on the matter.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>2</sup> EmpC Auckland AC22/05, 11 May 2005, unreported, Shaw J, at [9]. See also *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1 at 7.