

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 43/09  
ARC 67/09**

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

BETWEEN                NING (NEIL) WANG  
                                  Plaintiff

AND                      HAMILTON MULTICULTURAL  
                                  SERVICES TRUST  
                                  Defendant

Hearing:            by memoranda of submissions filed on 28 October and 16 November  
                                  2009

Appearances: Plaintiff in Person  
                                  Rebecca Fraser, Agent for Defendant

Judgment:        20 November 2009

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**JUDGMENT OF CHIEF JUDGE GL COLGAN**

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[1]     There is a single but important question for decision on this challenge from a determination of the Employment Relations Authority. It is whether Ning Wang's complaint of unlawful discrimination made to the Human Rights Commission and associated mediation preclude him from pursuing a personal grievance for unjustified disadvantage in employment in the Employment Relations Authority.

**The Employment Relations Authority's determination**

[2]     The Authority conducted its investigation "*on the papers*". It was satisfied, as a matter of fact, that the content of Mr Wang's complaint to the Human Rights Commission was the same as in his statement of problem alleging a personal grievance lodged with the Authority. After setting out s112 of the Employment

Relations Act 2000 (“the ERA”) and s79A of the Human Rights Act 1993 (“the HRA”), and in reliance on Mr Wang’s advice that there had been unsuccessful mediation of his Human Rights Commission complaint but no more, the Authority reached the following brief conclusion:

*[9] ... I am satisfied that Mr Wang exercised his rights under the Human Rights Act when he made his complaint to the Human Rights Commission in March 2009. It follows therefore that jurisdictionally he is precluded from taking any steps under the Employment Relations Act 2000.*

[3] The Authority made no other findings of fact about the point in the human rights complaint process that Mr Wang had reached.

[4] The Authority subsequently awarded costs to the Hamilton Multicultural Services Trust (“the Trust”) of \$200 which have been paid.

### **The facts**

[5] These are established by reference to the Authority’s determination and the pleadings on the challenge. The Trust admits that Mr Wang sent a letter dated 5 March 2009 to the Enquires and Complaints Service of the Human Rights Commission in Auckland, making a complaint against it of unjustifiable treatment, discrimination, oppression, and harassment. The Trust also admits that the Human Rights Commission facilitated a mediation which took place in Hamilton on 30 April 2009 but at which no settlement was reached. The Trust admits that Mr Wang then lodged his personal grievance with the Employment Relations Authority on 28 May 2009.

### **The law**

[6] The relevant sections of the two statutes are as follows with points at issue in this case underlined. Section 112 of the ERA provides:

#### *112 Choice of procedures*

*(1) Where the circumstances giving rise to a personal grievance by an employee are also such that that employee would be entitled to make a complaint under the Human Rights Act 1993, the employee may take 1, but not both, of the following steps:*

(a) the employee may, if the grievance is not otherwise resolved, apply to the Authority for the resolution of the grievance:

(b) the employee may make, in relation to those circumstances, a complaint under the Human Rights Act 1993.

[(2) For the purposes of subsection (1)(b), an employee makes a complaint when proceedings in relation to that complaint are commenced by the complainant or the Commission.]

[(3) If an employee applies to the Authority for a resolution of the grievance under subsection (1)(a), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the grievance that the employee may have under the Human Rights Act 1993.]

[(4) If an employee makes a complaint under subsection (1)(b), the employee may not exercise or continue to exercise any rights in relation to the subject matter of the complaint that the employee may have under this Act.]

[7] Section 79A of the HRA provides:

**79A Choice of procedures**

(1) If the circumstances giving rise to a complaint under Part 2 are such that an employee would also be entitled to pursue a personal grievance under the Employment Relations Act 2000, the employee may take 1, but not both, of the following steps:

(a) the employee may make in relation to those circumstances a complaint under this Act:

(b) the employee may, if the grievance is not otherwise resolved, apply to the Employment Relations Authority for the resolution of the grievance under the Employment Relations Act 2000.

(2) To avoid doubt, a complaint referred to in subsection (1) includes, but is not limited to, a complaint about sexual harassment or racial harassment.

(3) For the purposes of subsection (1)(a), an employee makes a complaint when proceedings about that complaint are commenced by the complainant or the Commission.

(4) If an employee makes a complaint under subsection (1)(a), the employee may not exercise or continue to exercise any rights relating to the subject matter of the complaint that the employee may have under the Employment Relations Act 2000.

(5) If an employee applies to the Employment Relations Authority for a resolution of the grievance under subsection (1)(b), the employee may not exercise or continue to exercise any rights relating to the

*subject matter of the grievance that the employee may have under this Act.*

[8] Despite, inexplicably, s112(2) of the ERA using the phrase “*in relation to*” and s79A(3) of the HRA using the word “*about*” in otherwise identical subsections intended to be mirror images, this difference is not material.

### **Decision**

[9] It is common ground that someone in Mr Wang’s circumstances, wishing to complain about his treatment by his employer, must eventually make an election whether to do so under the human rights legislation or the employment legislation. The important question for decision is the point at which that election must be made so precluding access to the alternative dispute resolution system. In this case, Mr Wang pursued his human rights remedies first before turning to the employment legislative scheme.

[10] Section 112(1) of the ERA and s79A(1) of the HRA both define those points of irrevocability, in the employment law case, applying to the Employment Relations Authority for a resolution of the grievance or, in the case of the human rights track, making “*a complaint under the Human Rights Act 1993*”. The making of such a complaint is further and importantly defined by s112(2) of the ERA and s79A(3) of the HRA as being “*when proceedings in relation to that complaint are commenced by the complainant or the Commission.*”

[11] The relevant legislation has changed since the judgments of the High Court in *BHP NZ Steel Ltd v O’Dea*<sup>1</sup> and this Court in *Begley v Christchurch City Council*<sup>2</sup>. This is the first case of which I am aware interpreting and applying the new statutory provisions which were alluded to, albeit then still at the stage of a Bill, in *Begley*. The case is one for decision on statutory interpretation and not previously decided cases under differently worded sections.

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<sup>1</sup> [1997] ERNZ 667; (1997) 4 HRNZ 456

<sup>2</sup> [2001] ERNZ 460

[12] It is important to note that s112(2) of the ERA defines the point of election not as being the making of a complaint (to the Human Rights Commission) but, rather, "*when proceedings in relation to that complaint are commenced by the complainant or the Commission.*" That is the process addressed in s92B of the HRA referred to in that Act as "*Civil proceedings arising from complaints*".

[13] The objectives behind the election are to preclude double dipping in remedies and also to preclude an unsuccessful applicant in one jurisdiction then having an opportunity to try again.

[14] Had Mr Wang, either himself or by the Human Rights Commission, applied to the Human Rights Review Tribunal for relief, he would have made a commitment to the human rights dispute resolution track which would have precluded any access to the Employment Relations Authority. But he did not do so. All he did was to attempt to resolve his dispute by mediation with the assistance of the Human Rights Commission after a complaint to the Commission. That was in the same way that he could have gone to mediation (with the assistance of a representative) under the ERA without lodging a personal grievance with the Employment Relations Authority.

[15] The Authority's determination declining jurisdiction assumed erroneously that the making of the complaint by Mr Wang to the Human Rights Commission was the fork in the road at which is found the "no U turn" sign. The Authority failed to take account of s112(2) of the ERA and s79A(3) of the HRA. Its determination was wrong and must be set aside. In substitution for that, I make a declaration that Mr Wang is entitled to pursue his complaints as personal grievances before the Employment Relations Authority.

[16] It follows that the award of costs made by the Authority must likewise be set aside and, having paid these, Mr Wang is entitled to a refund of them. Mr Wang is entitled to seek costs against the Trust in the Employment Relations Authority although I note that, as in this Court, Mr Wang represented himself. The respondent is directed to refund the filing fee on the challenge to Mr Wang who, if he does have

a claim for further costs, should make this by memorandum to which the defendant will have an opportunity to respond.



GL Colgan  
Chief Judge

Judgment signed at 4.30 pm on Friday 20 November 2009