

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 264/09
5163908

BETWEEN NING WANG
 Applicant

AND HAMILTON
 MULTICULTURAL
 SERVICES TRUST
 Respondent

Member of Authority: Vicki Campbell

Representatives: Ning Wang in person
 Julie Hardaker for Respondent

Investigation on the
papers: 6 August 2009 at Hamilton

Submissions Received: 29 July 2009 from Applicant
 17 July 2009 from Respondent

Determination: 7 August 2009

**DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER
OF JURISDICTION**

[1] On 29 May 2009 Mr Wang lodged a personal grievance in the Employment Relations Authority claiming he had been disadvantaged in his employment by the unjustifiable actions of his employer, Hamilton Multicultural Services Trust ("HMST"). HMST denies the claims.

[2] On receipt of HMST's Statement in Reply, the Authority was alerted to the possibility that Mr Wang had commenced proceedings in the Human Rights Commission on ostensibly the same or similar matters.

[3] By minute dated 17 June 2009 I brought to Mr Wang's attention the prohibition contained in the Employment Relations Act 2000¹ on continuing to pursue a claim in both jurisdictions where they amount to the same circumstances.

[4] Having read Mr Wang's complaint to the Human Rights Commission I was satisfied the circumstances of both complaints were the same, although the examples of the conduct complained of were about different events. Both the action commenced in the Human Rights Commission and the Statement of Problem lodged in the Employment Relations Authority refer to claims of discrimination, aggression and harassment.

[5] In order to resolve the issue as to whether Mr Wang is able to continue with his action in the Authority I called for submissions on the issue and this determination is as a result of having read and considered those submissions.

[6] Section 112 of the Employment Relations Act sets out the law relating to the choice of procedures and states:

(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.

Section 79A of the Human Rights Act 1993 sets out the choice of procedures with regard to complaints under that legislation as follows:

(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:

¹ Section 112.

(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.

[7] In his submissions Mr Wang states that mediation has occurred with regard to his Human Rights complaint but that no resolution was achieved and no further action has been taken.

[8] I am satisfied that at the time Mr Wang lodged his personal grievance in the Employment Relations Authority he had made a complaint to the Human Rights Commission. In *BHP NZ Steel v O'Dea*² the High Court considered whether proceedings in the Complaints Review Tribunal were valid given that proceedings had already been commenced in the Employment Tribunal pursuant to the Employment Contracts Act (under similar provisions as those set out in the Employment Relations Act). The High Court stated:

It is clear that there is unambiguous policy decision in both the Human Rights Act and the Employment Contracts Act that arising out of the one factual situation there can only be one set of proceedings.

[9] In this matter, 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.

Costs

[10] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Hamilton Multicultural Services Trust may file and serve a

² [1997] ERNZ 667.

memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority