IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION
PABLO, MONTANA

No. 92-CV-170-AP

JOSEPH PABLO,

Plaintiff-Appellant; Cross-Appellee,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES,

Defendant-Appellee; Cross-Appellant.

Appeal from the Trial Court
of the Confederated Salish and Kootenai Tribes.
No. CV-170-92--Maylinn Smith, Pro Tem Judge.

Argued February 7, 1994--Decided April 20, 1994

Before GAUTHIER, HALL, and PEREGOY, Civil Appellate Judges

OPINION OF THE COURT

PEREGOY, Chair, Civil Appellate Panel:

INTRODUCTION

This appeal arises out of a dispute over a contract for educational leave and future employment between Joseph Pablo and the Confederated Salish and Kootenai Tribes. Pablo claimed that the Tribes breached the contract, constructively discharged him from his

employment, and breached the covenant of good faith and fair dealing implied in the contract. He sought damages resulting from breach of contract, lost earnings and earning capacity, and emotional distress, as well as prejudgment interest and attorney fees. The Tribes counterclaimed alleging that Pablo breached the contract, and sought damages therefor.

After a bench trial on April 7 and 8, 1993, the Tribes moved to dismiss on the ground that Pablo had failed to exhaust his administrative remedies, and therefore the Tribal Court lacked subject matter jurisdiction to hear the case. On July 14, 1993, the court denied the Tribes' motion to dismiss.

As to Pablo's complaint, the court ruled that the Tribes breached the contract, but found that Pablo had not been constructively discharged. It did not rule on the issue of breach of the implied covenant of good faith and fair dealing. The court dismissed the Tribes' counterclaim. Pablo was awarded certain contract damages, costs, and attorney fees. Both parties have appealed.

I. FACTUAL BACKGROUND

Joseph Pablo is a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation. Born and raised in Arlee, he is married and has seven children, several of whom are still at home. Now in his mid-forties, Pablo has spent most of his life on the Reservation. In 1984, he was awarded an Associate of Arts degree by Salish Kootenai College. In 1986 he received a Bachelor's degree in Social Work from the University of Montana.

Pablo began working for the Tribes as director of the Family Counseling Unit of the Family Assistance Division. He later worked for the Tribes as a Child Protective Services worker. In January 1990, the Tribes reorganized their social services division at the direction of the area office of the Bureau of Indian Affairs, as a condition of retaining a contract to provide local social services. This reorganization resulted in the creation of the Department of Human Services, headed by Thomas "Bearhead" Swaney. The new department was comprised of three programs: Tribal Social Services (TSS), the Alcohol and Substance Abuse Program (ASAP), and Tribal Mental Health. After being selected by Mr. Swaney, Pablo was appointed program manager of TSS in January of 1990.

As program manager of TSS, Pablo was supervised by and reported directly to Bearhead Swaney. He supervised the social workers, including child protective services and foster care, as well as the general assistance program, trust manager, and office manager/bookkeeper and office staff. During his tenure as program manager of TSS, Pablo was "available" to his staff and gave them the "support they needed"; there was no indication of the existence of personnel problems, and employee turnover was low. While TSS was subject to a critical federal review during his employment as program manager, Pablo succeeded in rectifying the problems identified in the program review.

In May of 1991, Anna Whiting-Sorrell, acting on behalf of department head Swaney, rated Pablo's overall job performance as program manager of TSS as "outstanding."[1]

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[1] The evaluation form provided for a rating of 0 to 4 for each performance criterion, with a rating of 0 indicating "unacceptable" performance, and a rating of 4 indicating "outstanding" performance. There were twelve performance criteria under the category of "program management." Pablo's performance was rated as "outstanding" in nine of the management criteria; in two others, he received a rating of 3 ("above standard"), and a

Whiting-Sorrell found that "Mr. Pablo has taken the Social Service Program and brought it through a very difficult time in both morale and funding. For that he needs to be commended."

Pablo believed that he and the Tribes would mutually benefit and provide better services to the TSS clientele if he held a master's degree. At the time, no tribal members with master's degrees in social work (MSW) were employed on the Reservation. During the summer of 1991, with the encouragement and support of department head Swaney, Pablo received approval from the Tribal Council for a leave of absence to begin studies for an MSW at Eastern Washington University (EWU). The MSW degree is a two-year program which includes one year of on-campus course work and a one-year "practicum" of supervised work experience.

Pablo and the Tribes entered into a "Contract for Leave of Absence, Future Employment and Repayment of Educational Loan." The terms of the contract provided Pablo would be given a nine-month leave of absence for the 1991-92 academic year to complete course work, with a minimum "B" average. The Tribes were to loan him $8,000 at the rate of 7% interest, secured by real property owned by Pablo in Arlee. Upon returning from the educational leave, Pablo was to have resumed his duties and responsibilities as program manager of TSS. The contract required him to complete the MSW program by June 1993, and essentially provided that if Pablo thereafter worked for

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rating of 2 ("satisfactory") for one criterion. In the category of "program development and planning", he was rated as "outstanding" (score of 4) in five of six criteria, and "above standard" (score of 3) in the remaining criterion. Pablo's total performance values were scored at 37 for an overall performance rating of "outstanding," which included scores in the range of 34-40.

the Tribes for two years, the loan would be forgiven at the rate of $4,000 plus interest per year. It further provided that if Pablo did not complete the degree, or if he left his employment before the expiration of the two-year loan forgiveness period, either by choice or by termination for specific cause, he would be required to repay the loan. If he would be terminated for other than cause, the Tribes were required to repay the loan. The contract also provided that the prevailing party in litigation would be entitled to reasonable attorney fees and court costs. Finally, the Tribal Court was mandated to be the forum for any cause of action arising under the contract. The document was signed by Michael T. Pablo, Chairman of the Tribal Council, Joseph E. Dupuis, Executive Secretary of the Tribal Council, and Pablo.

Prior to his departure for EWU, Pablo created a plan for the interim supervision of TSS during his educational leave. ASAP administrator Whiting-Sorrell was to oversee TSS, as well as her own program. A lead social worker was hired to provide clinical services. The Tribes contracted with Dr. Charles Horejsi of the University of Montana to provide clinical supervision and services for Whiting-Sorrell and the lead social worker. In September 1991, Pablo commenced graduate study at EWU, four months after Whiting-Sorrell rated his performance "outstanding" as program manager of TSS.

Whiting-Sorrell volunteered to serve as program director of Tribal Social Services during Pablo's educational leave, although she had no education or experience in social work. She testified that she "took a lackadaisical approach" to her responsibilities when Pablo left, and that she had an "unrealistic" idea of the time required to supervise TSS. It took five months for Whiting-Sorrell to fully implement Pablo's interim management plan.

A tribal social worker testified that TSS operations were "chaotic" and "troublesome" during Whiting-Sorrell's tenure, largely as a result of high turnover and changes she made. The social worker also felt that Whiting-Sorrell's lack of background for social work supervision rendered the management of TSS "difficult" for her. Another TSS employee testified that the general working atmosphere at TSS was "out of control" during the period Pablo was on educational leave, including "supervisors not knowing who is supervising who," and directives to secretaries to "write-up" social workers for perceived work deficiencies. The words and actions of Whiting-Sorrell and Bearhead Swaney while Pablo was on educational leave led some staff members to believe that Pablo was being "set-up" to be fired or forced to resign, and that his tenure at TSS would be limited upon his return from his graduate studies at EWU.

To compensate for her self-described lack of "social work expertise," Whiting-Sorrell convened an "administrative work group," consisting of social work and other professionals who were not employed by TSS, but who worked with TSS in various capacities. The group met three times in early 1992 and, according to Whiting-Sorrell, was "able to validate my concerns [sic] identify additional areas of concern and offer recommendations and solutions."

Based upon her involvement with TSS during January 1992, Whiting-Sorrell perceived TSS to be experiencing certain managerial problems. In a February 13, 1992 memorandum to Joe Dupuis through Bearhead Swaney, she cited, in part, the following problems: flawed budgeting procedures; lack of consistent staff meetings; few standards of performance for social work positions; lack of orientation process for new workers; no established mechanism

for data gathering, reporting or filing; lack of training for foster parents; unavailability of prevention and intervention services relating to child abuse; and low staff morale.

In response, Executive Secretary Dupuis and managers Swaney and Whiting-Sorrell decided to institute a "transition" period upon Pablo's return to TSS. During this period, Whiting-Sorrell was to function as program manager of TSS, rather than Pablo. As Dupuis testified, the avowed purpose of this "transition period" was to "integrate" Pablo back into the social services program following unspecified "major changes made in his absence," after he had learned the "new direction." The record indicates that there were no material changes or "new direction[s]" in the work or services of TSS, and that the only "major change" was the replacement of Pablo by Whiting-Sorrell as program manager of TSS.

Pablo completed his course work and returned to TSS on June 15, 1992. On June 19, 1992 Bearhead Swaney advised Pablo by memorandum that Whiting-Sorrell would continue to supervise TSS, including Pablo himself, as well as her own program (ASAP) during a one-year transition period between June 1992-June 1993. Subsequent to issuing the memo, Swaney told Pablo that they had "found some problems with administration" and that the "transition" arrangement outlined in the memo was the "way it was going to be."[2]

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[2] Pablo had no knowledge of Whiting-Sorrell's February 13, 1992 memorandum to Executive Secretary Joe Dupuis until March of 1993--seven months after the termination of his employment with TSS. That memo, citing administrative problems Whiting-Sorrell felt existed with TSS, served as the basis for the "transition" period and the stripping of Pablo's duties and responsibilities as program manager of TSS. The record indicates Pablo had the requisite education and experience to address and resolve the problems cited in the Whiting-Sorrell memorandum, and that he was satisfactorily addressing many of the issues prior to his educational leave. However, his supervisors never gave him a chance to deal with any of the perceived problems listed in the memo after he returned from EWU.

Neither the memo nor Swaney's remarks to Pablo contained any reference to a right of appeal through grievance procedures, or otherwise. Pablo then informed Swaney that he had a contract to return to the position of program manager. Swaney did not respond.

While his rate of pay remained the same as that prior to the "transition" period, Pablo eventually realized he had been effectively stripped of his authority and responsibility as program manager of TSS. He was no longer responsible for day-to-day management and on-going planning and development of TSS; budgeting; contract compliance; personnel supervision and related matters; physical plant; determinations of program eligibility and the development and interpretation of rules and regulations; or program changes. While Pablo was sometimes referred to in TSS communications as "program manager", as a general matter he was no longer invited to attend program manager meetings. Instead, his duties and responsibilities became limited to those of lead social worker, although he was never given an amended job description to reflect such.

On June 30, 1992 Whiting-Sorrell issued Pablo a written reprimand for being "unavailable" to staff on a day that he was home with the flu, notwithstanding that he had called the office early the same day and stated he would be out for at least half of the day. On July 9, 1992, Kimberly Swaney, TSS office manager, issued a memorandum reprimanding Pablo for allegedly creating "undue stress" and "low morale" among the TSS staff, although she had no authority over Pablo.[3] On July 22, Kim Swaney issued a second memorandum

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[3] Prior to the "transition" period, Pablo was the supervisor of Kimberly Swaney, who is the daughter of Bearhead Swaney, head of the Department of Human Services. Bearhead Swaney is the supervisor of Whiting-Sorrell and was Pablo's supervisor prior to the "transition" period.

reprimanding Pablo, this time for alleged improper management of client files. Ms. Swaney sent copies of both memos to Whiting-Sorrell.

On July 23, Pablo notified Bearhead Swaney in writing that he was not content with his position under the transition structure of TSS. Therein, he informed Mr. Swaney that he intended to discuss the matter with tribal Executive Secretary Joe Dupuis, and that he would resign if he was unable to obtain a satisfactory resolution. The memo was a follow-up to discussions that Pablo had previously had with supervisors Whiting-Sorrell and Swaney. In two discussions, Pablo informed Swaney that he wanted his position as program manager restored. Mr. Swaney declined, verbally citing unspecified "shortcomings" in Pablo's ability to administer TSS.

On July 24, Kim Swaney issued a third memorandum of reprimand to Pablo, directing him to submit a report to her that was apparently due in Tribal Court a few days thereafter. However, the memo indicated Pablo had earlier informed Ms. Swaney that the report had not been completed because the court hearing had been rescheduled. Notwithstanding this explanation, Ms. Swaney demanded that Pablo submit the report in the time frame she imposed, claiming that unnamed support staff members were under "undue stress" because the report had not been completed.

On July 29, 1992 Whiting-Sorrell issued Pablo another disciplinary memorandum, including the threat of termination, for missing a court hearing he was to have attended in the place of a fired social worker. The record indicates Pablo missed the hearing because he was attending a meeting with Bearhead Swaney and George Cowan, tribal personnel director. The record further shows that Pablo met with the presiding judge immediately

after the meeting with Mr. Swaney and Mr. Cowan, and that the judge ultimately excused Mr. Pablo for his absence.

Pablo believed these memos constituted attempts to provide documentation for his firing. He further believed he no longer had the support of his supervisors for completion of the MSW. Documentary and other evidence indicates that it was necessary for him to exercise the authority of the program manager of TSS in order to conduct the activities necessary to complete the pre-arranged practicum requirements for the MSW degree. Lacking this authority and believing he was being set-up to be fired, Pablo concluded that he would be unable to complete his practicum at TSS, and that he would therefore be unable to obtain his master's degree under the circumstances.

With one month remaining to finalize and begin his practicum, Pablo felt compelled to resign and develop a new practicum with another agency. He submitted his resignation on July 30, 1992, and began anew his efforts to develop a practicum that would lead to the award of the MSW degree. He subsequently worked out a practicum with the Western Montana Regional Mental Health Center, which EWU approved. The court takes judicial notice that Pablo successfully completed his practicum and was awarded the MSW degree by Eastern Washington University in mid-June of 1993, according to schedule.

During his employment at TSS, Pablo earned $14.05 per hour, or $562 per week. Forty-five weeks elapsed between the time Pablo's employment with TSS terminated on July 30, 1992, and the time he was awarded the MSW degree by Eastern Washington University in mid-June of 1993. During this interval, Pablo earned approximately $6,900 at the Western Montana Regional Mental Health Center for his practicum, and an additional $500

logging, for a total of $7,400. In order to make ends meet during the second year of his degree program, Pablo found it necessary to take out a loan in the amount of $9,300, which he testified would not have been necessary had he remained employed by TSS.

The trial court awarded Pablo damages for breach of the educational leave and future employment contract. With regard to such damages, the court ruled:

> Damages in a breach of contract situation are limited to those contemplated by the parties at the time the contract was entered, including any amount which would place the injured party in the same position he would have been had the contract been performed.[4]

Under this ruling, the court ordered the Tribes to pay Pablo's $8,000 student loan, plus interest.

On appeal, Pablo seeks additional damages for lost earnings and earning capacity in the amount of $28,338, interest accrued on the two educational loans, and prejudgment interest. He further seeks compensation for personal anxiety and family stress, which he claims were suffered as a result of the change of his working conditions, constructive discharge, and subsequent financial strains. Pablo also asks us to overturn the trial court's ruling that he was not constructively discharged. He further asks this court to find that the contract at issue contained an implied covenant of good faith and fair dealing, and to rule that the Tribes breached the covenant.

In a cross-appeal, the Tribes ask us to set aside the trial court's findings and rulings in favor of Pablo on the ground that the lower court lacked subject matter jurisdiction since

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[4] See Pablo v. Confederated Salish and Kootenai Tribes, No. CV-170-92, Tribal Court of the Confederated Salish and Kootenai Tribes, Memorandum and Order, July 14, 1993 at 11.

Pablo failed to exhaust administrative remedies prior to seeking judicial relief. The Tribes also contend that they did not materially breach the contract with Pablo, and that Pablo consented to and accepted any modification to the contract that may have occurred.

II. DISCUSSION

A. Standard of Review

Rule 52(a) of the Federal Rules of Civil Procedure governs the standard of review to be employed in this appeal. Under Rule 52(a), a finding of fact by the trial court in an action tried without a jury may not be set aside unless it is "clearly erroneous." The Tribes contend that the U.S. Supreme Court has interpreted Rule 52(a) to preclude this court from disturbing the trial court's findings of fact, citing Anderson v. City of Bessemer, North Carolina, 470 U.S. 564 (1985). This view is based on a misreading of the plain language of the Rule 52(a) and City of Bessemer. There, the Supreme Court reiterated the meaning and significance of the term "clearly erroneous," first pronounced in a 1948 ruling:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's powers to overturn findings of a district court may be derived from our cases. The foremost of these principles...is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)."

Anderson v. City of Bessemer, North Carolina, 470 U.S. 564, 573 (1985). See also, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 484-85 (1985). Under Rule 52(a), an appellate court must set aside findings if it is firmly convinced that, in view of the record as a whole, the trial court has committed a mistake, i.e., entered findings that are "clearly erroneous."

The Tribes correctly note that Rule 52(a) requires a reviewing court to give "due regard" to the trial court's witness credibility determinations. However, that does not mean, as the Tribes seem to suggest, that findings of fact are insulated from review simply because the trial judge has expressly considered witness credibility. In City of Bessemer, the Supreme Court went on to instruct:

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and belief in what is said...This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible that a reasonable factfinder may well find clear error even in a finding purportedly based on a credibility determination....Anderson v. City of Bessemer, North Carolina, 470 U.S. 564, 575 (1985).

The Tribes assert that the findings which Pablo challenges are "based solely on judgments of credibility." This crabbed reading ignores the express language of the lower court's Memorandum and Order which, as the Tribes recognize, provides that the findings were:

> Based on the various pleadings and briefs, the limited testimony received at the time of trial found to be reliable, and the admitted exhibits....

Thus, there is no support for the imaginative proposition that the findings Pablo challenges are based "solely" on credibility determinations. Further, the trial court did not specify what testimony it found more or less credible. In light of City of Bessemer, *supra*, that credibility was considered does not preclude this court's authority to review findings for

evidentiary support, or to decide whether facts should be interpreted differently in light of applicable legal principles.

The "clearly erroneous" standard of appellate review is applied only to findings of fact by the trial court; it does not apply to the lower court's conclusions of law. See 5A Moore's Federal Practice, ¶52.03[2], Conclusions of Law Not Binding, (1992) at 52-77. This is clear both from the language and context of Rule 52(a) and the long-established principles that the appellate court is not bound by the trial court's view of the law. Id., *citing* Chapman & Cole v. Itel Int'l B.V. 865 F.2d 676 (5th Cir. 1989), *cert. denied* 493 U.S. 872 (1989) (when there is no ambiguity, the interpretation of a contract is a matter of law and an appellate court is free to review such findings de novo); and Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184 (9th Cir. 1984) (although the findings of fact by the district court must be upheld unless clearly erroneous under Rule 52(a), whether those facts constitute a violation of the law is a matter of law that may be reviewed de novo by the appellate court). Findings of fact that are the product of an erroneous understanding of applicable law are not binding on the appellate court, nor are findings that combine both fact and law, if there is an application of the wrong legal standard. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984); see also, Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1975).

Notwithstanding, a strong presumption exists in favor of the trial court's findings of fact. See e.g., Smith v. James Irvine Found., 402 F.2d 772 (9th Cir. 1968), *cert. denied*, 394 U.S. 1000 (1969). The party attacking the validity of the findings generally has the burden to prove they are "clearly erroneous" before they will be set aside. See generally, 5A

Moore's Federal Practice, ¶52.03, Effect of Findings of Fact and Conclusions of Law, (1992) fn. 18 at 52-30, *citing* Anderson v. Federal Cartridge Corp., 156 F.2d 681, 684 (1946) ("The findings of the court are presumptively correct and will not be set aside unless resulting from an erroneous view of the law or are clearly against the weight of the substantial evidence, and in considering this question we view the evidence in the light most favorable to the prevailing party, the burden being on the unsuccessful party to show that the evidence compelled a finding in his favor.").

B. Exhaustion of Administrative Remedies

The trial court held that exhaustion of administrative remedies is a defense which must be raised either in responsive pleadings or by motion, and is waived if not timely raised, except where going to subject matter jurisdiction. It further ruled that a determination of whether exhaustion of administrative remedies effects its subject matter jurisdiction is within its discretion, unless specifically addressed by statute. Finding that the grievance provisions of Ordinance 69B are not mandatory, the trial court held that exhaustion was not required by statute, and therefore failure to exhaust such administrative remedies was not a jurisdictional bar to judicial review. The court went on to find that the Tribes waived their right to raise the defense of failure to exhaust administrative remedies by not timely raising the issue, and ruled that it had jurisdiction to decide the dispute.[5]

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[5] We affirm the trial court's decisions regarding waiver of defenses. The factors considered by the trial court in deciding that the Tribes waived their defense include the fact that the Tribes did not raise the matter until after completion of trial; the Tribes raised no previous objection to the court's jurisdiction over the issues raised in Pablo's complaint; and the Tribes' responsive pleadings stated that jurisdiction resided with the court under the terms of the contract in dispute.

On appeal, the Tribes challenge the trial court's ruling that it had subject matter jurisdiction to address the issues in this action. The Tribes contend that the lower court erred in declining to hold that the exhaustion provision of the grievance procedures of the tribal personnel rules and regulations (Ordinance 69B) is mandatory, and that since Pablo failed to follow it, the tribal court lacked jurisdiction to hear this case. In essence, the Tribes argue that exhaustion of administrative remedies is mandated by statute, and therefore the trial court had no discretion to determine whether it had jurisdiction to hear the case.[6]

The Tribes went to great lengths at both the trial and appellate levels in basing their exhaustion argument on a long line of cases in which federal and state courts have declined to exercise jurisdiction over Indian matters, e.g., National Farmers Union Insurance Co., 471 U.S. 845 (1985), and Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987). As the trial court correctly stated, the exhaustion requirement established in these cases is based on principles of comity, not jurisdictional issues. "Comity" is the principle that the courts of one jurisdiction will recognize another jurisdiction and give effect to its laws and judicial decisions, not as a matter of obligation, but out of deference and mutual respect. See e.g., Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. 1977). Recognition of comity in these cases warrants exhaustion of tribal remedies before another jurisdiction, state or federal, will exercise its jurisdiction. The cases stress, however, that the "the exhaustion rule enunciated

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[6] Both the trial court and Tribes appear to view the exhaustion requirement as linked to the power of the trial court to entertain actions, i.e., that it is jurisdictional in nature. As the discussion below indicates, this view is based on a misconception of the law.

in National Farmers Union did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." LaPlante, 480 U.S. at 16, n. 8; Wellman v. Chevron USA, Inc., 815 F.2d 577 (9th Cir. 1987).

The doctrine of comity, while valid, simply does not apply here.[7] As the trial court correctly found, neither National Farmers Union or LaPlante, nor their progeny, imposes a requirement that tribal administrative procedures be exhausted in this case as a perquisite to tribal court review.

Exhaustion of available administrative remedies is in general a prerequisite to obtaining judicial relief for an actual or threatened injury. See e.g., Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. cir. 1984), *citing* Meyers v. Bethlehem Ship Building Corp., 303 U.S. 41, 50-51 (1938); see also Ticor Title Insurance v. Federal Trade Commission, 814 F.2d 731, 734-35 (D.C. Cir. 1987); Joint Board of Control v. United States and Confederated Salish and Kootenai Tribes, 862 F.2d 195 (9th Cir. 1988); Stevens v. Employer-Teamsters Joint Council, 979 F.2d 444, 459-60 (6th Cir. 1992). When a statute or agency rule demands exhaustion of administrative remedies, courts may not assert jurisdiction to review agency action until the administrative appeals are complete. White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988). The exhaustion requirement is not in general jurisdictional in nature, but rather must be applied in accord with its purposes. Andrade,

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[7] The Tribes recognize that while "[e]xhaustion as between the Tribal and federal courts is based upon inter-governmental principles of comity,...[t]his case...doesn't raise the intergovernmental federal exhaustion question." Notwithstanding, the Tribes inexplicably devote a significant portion of their appellate briefs to National Farmers Union and LaPlante, and their progeny.

729 F.2d at 1484.[8] Since the exhaustion doctrine is not linked to the power of the court to entertain actions, but instead implicates prudential considerations, the exhaustion requirement may be waived by the agency, or disregarded by the court when the application of the doctrine would be futile. Cutler v. Hayes, 818 F.2d 879, 890-91 (D.C. Cir. 1987).

In addition to the doctrine of futility, the courts have identified other exceptions to the general rule of exhaustion. One exception permits immediate judicial review of a challenge to agency authority where the agency's assertion of jurisdiction "would violate a clear right of a petitioner by disregarding a specific and unambiguous statutory, regulatory or constitutional directive." Another exception permits immediate judicial review where postponement of review would cause the plaintiff irreparable injury. Ticor Title Ins. Co, 814 F.2d at 740.

We direct our inquiry into whether the trial court properly asserted jurisdiction in this case, with the above legal principles in mind. As a threshold matter, we must determine whether Ordinance 69B contains an exhaustion requirement. If it does, we must determine

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[8] As noted by the Andrade court, the exhaustion requirement serves four primary purposes:

> First, it carries out the congressional purpose in granting authority to the agency by discouraging the "frequent and deliberate flouting of administrative processes [that] could * * * encourag[e] people to ignore its procedures." Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency. (Citations omitted). Andrade, 729 F.2d at 1484.

whether Pablo can avail himself to any of the exceptions to the requirement in order to properly obtain judicial review without first exhausting administrative remedies. As stated, the trial court found the following statutory language controlling:

> Ordinance 69B, Chapter XIV, Section 1 enacted by the Confederated Salish and Kootenai Tribes indicates that "[e]mployees are **encouraged** to bring problems, complaints, or grievances to the attention of their immediate supervisors, in writing." [emphasis supplied by trial court]. Section 3 of the same chapter states that grievances "**may** be filed to seek redress of any supervisor action...." [emphasis supplied by trial court].

The trial court ruled that the word "may" is permissive or discretionary, relying on In re Ramona Cajune, AP-01-93 (App. Ct. Confederated Salish and Kootenai Tribes 1993) at 6. It accordingly held that exhaustion of the administrative grievance procedure was not required prior to judicial review of the issues at bar:

> Since neither of the above cited sections explicitly make [sic] the grievance process mandatory, a formal grievance procedure is not statutorily required prior to any judicial review of the issues in dispute as a matter of tribal law.
>
> In the absence of any statutory language requiring that all employees complete formal grievance proceedings prior to commencing any judicial review, there is no mandatory exhaustion requirement which would divest this Court of jurisdiction. [Citations omitted]. This Court, therefore, is not precluded from addressing the issues raised in this action due to a lack of subject matter jurisdiction.

The Tribes assert that the trial court erred in finding that the grievance procedures embodied in Ordinance 69B are not mandatory, i.e., that they are discretionary. We agree. The words "encouraged" and "may" merely provide general authorization for a tribal employee to bring problems, complaints or grievances to the attention of immediate supervisors, in writing. They do not speak to the question of whether certain steps or

procedures must be followed before a grievant can obtain judicial review, i.e., whether exhaustion is required. These terms are therefore inapposite.[9]

As the Tribes correctly assert, the controlling provisions of Ordinance 69B are found in Sections 1 and 5 of Chapter XIV. Section 1 codifies the tribal government policy that "any employee problem, complaint, or grievance will be handled in accordance with an established step-by-step procedure." (Emphasis added). Section 5 provides that "[f]ormal grievance proceedings shall always follow the sequence outlined in the following sections." (Emphasis added).

The question whether a statutory provision has a mandatory or permissive character is one of statutory construction. 3 Sutherland, Statutory Construction, § 57.02 at 3 (1992). Where the language of a statute is clear and unambiguous, courts generally hold that the construction intended by the legislature is obvious from the language used. The ordinary meaning of the language should always be favored. The form of the verb used in a statute,

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[9] Notwithstanding, the trial court's error was harmless because, as decided *infra*, it court properly asserted jurisdiction here, although for reasons other than those upon which it relied. Under Rule 7 of the Tribal Court Appellate Procedures of the Confederated Salish and Kootenai Tribes:

> No Civil judgment or order shall be reversed upon appeal by reason of any error committed by the trial court affecting the interests of the appellant where the record shows that the same result would have been attained had the trial court not committed the error or errors.

We are required to affirm the trial court's ruling that exhaustion of administrative remedies was not statutorily required prior to judicial review. See Helvering v. Gowran, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."). See also, Wellman v. Chevron U.S.A., Inc., 815 F.2d 577, 578 (9th Cir. 1987) (lower court's decision affirmed since "[t]he ruling was correct though based upon the wrong reason").

i.e., something "may," "shall" or "must" be done, is the single most important textual consideration determining whether a statute is mandatory or directory (permissive). Sutherland, § 57.03 at 7. "Shall" is considered presumptively mandatory unless there is something in the context or character of the legislation which requires it to be looked at differently. Sutherland, § 57.02 at 4. See also, United States v. Chavez, 627 F.2d 953, 954-55 (9th Cir. 1980) (The use of the word "shall" in the statute, although not entirely controlling, is of significant importance, and, indicates an intention that the statute should be construed as mandatory). Application of the foregoing rules of statutory construction leads us to conclude that the words "will" and "shall" as used in Ordinance 69B are mandatory, not permissive. The plain, applicable language of Chapter XIV of Ordinance 69B indicates that the Tribal Council intended, in general, that an aggrieved employee must exhaust administrative remedies prior to obtaining judicial review. In light of the above-controlling law, we hold that an aggrieved tribal employee is required to exhaust the step-by-step grievance process set forth in Ordinance 69B before judicial review of an adverse administrative determination will obtain.

However, our ruling does not automatically compel the conclusion that the trial court improperly asserted jurisdiction over this dispute. Chapter XIV, Section 3 of Ordinance 69B provides:

> A grievance may be filed to seek redress of any supervisor action which, in the opinion of the employee, violates a personal or employment right. This includes disciplinary actions documented by a Personnel Action Form (Form CS&KT PM-4). Tribal policies or a general management decision or the effects of either may not be aggrieved. (Emphasis added).

The plain language of this provision indicates that it is an exception to the general exhaustion requirement of Ordinance 69B. If an aggrieved party contests a general management decision, or the effects thereof, the grievance procedure is not available for redress, and therefore the exhaustion requirement does not apply in such situations.

The decision to institute a transition period was made primarily by the Director of Human Services, Thomas "Bearhead" Swaney, and Joe Dupuis, Executive Secretary of the Tribes. Pablo argues, and the Tribes do not dispute, that this was a management decision, not a disciplinary action taken in response to a particular situation. Pablo further contends that he was precluded under Section 3 from aggrieving this management decision or its effects. We agree.

There is no question that Bearhead Swaney and Joe Dupuis occupy top level management positions in the tribal government, or that they made the decision to institute the transition period. Further, there is no evidence in the record, such as a Form CS&KT PM-4, indicating that the transition period was a result of formal disciplinary action taken against Pablo for any particular matter. Ordinance 69B, Chapter XII, Disciplinary Actions, Section 4, requires a supervisor, when disciplining an employee, to provide written notice to the employee "together with notice of his right to appeal through the grievance procedures, if applicable." (Emphasis added). The record is devoid of any writing to Pablo informing him that his demotion constituted a disciplinary action, or notifying him of any "applicable" grievance procedures.

Rather, the evidence indicates that the top-level tribal managers instituted the transition period as a result of the February 13, 1992 Whiting-Sorrell memorandum, which

addressed certain perceived deficiencies in the management of Tribal Social Services. To remedy these perceived deficiencies, Swaney and Dupuis made a decision regarding the general management and administration of TSS for an indefinite transition period. That general management decision included refusal to return Pablo to his former position of program manager of TSS, and a contemporaneous demotion to the position of lead social worker. Because these were the effects of a general management decision, neither they nor the decision itself could have been grieved pursuant to Section 3 of Chapter XIV of Ordinance 69B. We hold accordingly, and limit this ruling to the particular facts of this case.

As the trial court correctly found, the Tribes conceded in their responsive pleadings that, pursuant to the terms of the contract between the parties, the tribal court is the forum agreed upon by the Tribes and Pablo to resolve Pablo's complaints. The contract does not mention a transition period or administrative grievance process.[10]

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[10] On appeal, the Tribes assert that Ordinance 69B "expressly applies to all Tribal employees, including contract employees such as Pablo, except to the extent that an 'exemption is provided in the contract.' 69B, Chapter I, Section 3(D). No such exemption is in Pablo's contract." The cited section dealing with "contract employees" is not applicable to Pablo. Pablo's contract was a "Contract for Leave of Absence, Future Employment and Repayment of Educational Loan", not an employment contract *per se*, as contemplated by Section 3, Part D of Chapter I. The express purpose of Pablo's contract was to provide for his education and repayment or forgiveness of a tribal loan given to help further his education, and to guarantee his position as program manager of TSS upon returning from educational leave. Pablo's general description of work, direction received, supervision exercised, working relationships, working conditions, remuneration, etc. i.e., the material terms of his employment as program manager of TSS, are not delineated in his contract with the Tribes. Rather, the evidence indicates these employment conditions are set forth in the classified position description of program manager of TSS (CS&KT Classification Specification), like those in other position descriptions of tribal employees in the classified system. The court takes judicial notice that, unlike Pablo's educational leave and future employment contract, the "employment" contracts contemplated by Section 3, Part D of

Indeed, in addition to that discussed above, other conduct of the Tribes indicates they did not consider Ordinance 69B to be applicable to Pablo's employment. For example, Chapter XI, Performance Appraisal, Part C requires the Department Head, here Bearhead Swaney, to insure that each employee's performance is evaluated at certain times, including "when an employee changes positions or when performance problems are occurring and there is a need to document specific areas which need improvement." If, in fact, the Department Head believed there were "specific" administrative problems warranting a transition period before Pablo was returned to his position as program manager, as the Tribes allege, a written performance evaluation was required by tribal law. The record contains no evidence which indicates Swaney evaluated Pablo's job performance at the time the tribal management structure instituted the transition period. That no evaluation was conducted in conformance with Ordinance 69B indicates either that the Tribes did not believe it was applicable to Pablo's employment, or that the alleged problems cited in the February 13, 1992 memorandum were a pretext, or both.

In light of the above, Pablo was not required to exhaust administrative remedies set forth in the grievance procedures of Ordinance 69B prior to obtaining judicial review. Since there was no requirement to exhaust administrative remedies in this case, the trial court

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Chapter I contain the precise, essential terms and conditions of one's employment, as noted.

properly asserted its jurisdiction to adjudicate the instant dispute. We hold accordingly.[11]

C. **Material Breach of Contract**

The educational and future employment contract at issue provided, in significant part, that Pablo would resume his position as the program manager of Tribal Social Services immediately upon return from his educational leave. The trial court found that Pablo:

> did not return to the position of Director of Social Services for the Confederated Salish and Kootenai Tribes when his employment with Defendants was re-instated in June of 1992, but instead was placed in a position with duties and responsibilities normally associated with a lead social worker and was under the supervision of Anna Whiting Sorrell. (Citations omitted).

While the Tribes do not challenge this finding or the conclusion that they breached the contract, they claim on appeal that the trial court's findings do not support a "material breach." Without citing any legal authority, they argue that because they only intended to deprive Pablo of his contractually guaranteed position on a temporary basis, the deprivation was not material. This argument is frivolous.

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[11] Assuming, but not deciding, there was a statutory requirement here mandating Pablo to exhaust administrative remedies as a prerequisite to obtaining judicial review, the record indicates that it may well have been futile for him to do so. The grievance procedure provided pursuant to Ordinance 69B requires an aggrieved employee to first submit a written complaint in sequential order to his immediate supervisor, the Department Head, the Executive Secretary, and the Personnel Committee. The evidence shows that Whiting-Sorrell, Bearhead Swaney, and Joe Dupuis, i.e., Pablo's immediate supervisor, Department Head and the Executive Secretary, respectively, were the three management personnel who, in effect, made the decisions to deny him his job as program manager, demote him to the position of lead social worker, and institute the transition period. The record shows that several appeals by Pablo to this supervisory triumvirate to return to the *status quo ante* proved futile, and that he had "no faith" in the grievance process. "In exceptional circumstances, exhaustion may not be required. Objective and undisputed evidence of administrative bias would render pursuit of an administrative remedy futile." Joint Bd. of Control of Flathead Irr. D. v. U.S., 862 F.2d 195, 200 (9th Cir. 1988). However, since the issue was not raised or briefed, we do not decide it.

In determining whether a breach of contract is material, the significant circumstances must be considered. These include the extent to which the injured party will be deprived of a reasonably expected benefit; the extent to which the injured party can be adequately compensated for the lost benefit; the extent to which the party in breach has already partly performed or made preparations for performance; the likelihood that the party in breach will "cure" its failure to perform; and the extent to which the behavior of the party in breach meets standards of good faith and fair dealing. Restatement (Second) of Contracts, § 275, Rules for Determining Materiality of a Failure to Perform, at 188 (1982). See also, In re Oscar Nebel Co., 117 F.2d 326, 327 (3rd Cir. 1941) (in contract performable over four-month period, buyer breached contract to pay for at least eight machines per month when, during the first month, he neither paid anything nor indicated he would perform; breach held to be material).

Returning to the position of program manager of TSS after his educational leave comprised the core of the "future employment" contract between Pablo and the Tribes. The record indicates that Pablo would not have taken an educational leave in the absence of binding, enforceable assurances that he would be able to return to his job. The evidence further indicates it was necessary for Pablo to function as program manager of TSS in order to complete the requirements for the practicum he had negotiated with EWU, and that the practicum was a necessary prerequisite to obtaining the MSW degree[12]--all conditions necessary for Pablo to meet his contractual obligations. Accordingly, Pablo reasonably expected to return to his former job, and the deprivation of this contractually promised

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[12] See footnote 16 and accompanying text at p. 33, *infra*.

benefit, even if "temporary," was of sufficient duration to effectively repudiate the agreement. In short, the provision guaranteeing Pablo his job could not have been of more central importance to the contract, or more material.

Further, the evidence shows that the Tribes declined to cure their breach after several opportunities to return Pablo to his job, and that there was a substantial likelihood that the breach would have continued for at least the remainder of Pablo's educational program--which was the motivating factor for the parties to enter into the contract in the first place. The likelihood that the Tribes would not perform their end of the bargain by returning Pablo to his job in time to complete his negotiated, planned practicum further supports a ruling that the Tribes' breach of contract was material. The trial court correctly held that deprivation of this core contractual benefit constituted a compensable and, therefore, material breach. The Tribes have cited no plausible reason to disturb this sound ruling and we discern none. It is therefore affirmed.

D. Waiver of Breach of Contract

In this appeal the Tribes do not contest the trial court's ruling that they breached their contract with Pablo by unilaterally modifying its terms when they refused to allow him to return to work as the director of TSS. However, the Tribes contend Pablo waived his right to damages for the breach on the basis that he had knowledge of the modification, and for 34 days continued to perform and receive benefits under the contract. We disagree.

While a material breach does not automatically end a contract, it gives the injured party a choice between canceling the contract and continuing it. Cities Service Helex, Inc. v. United States, 543 F.2d 1306, 1313 (Ct. Cl. 1976). If the injured party elects to terminate

the contract and acts accordingly, both parties are relieved of further obligations.[13] If the injured party ends the contract "within a reasonable time after becoming aware of the facts," he will not be held to have waived the breach. Id. Nor will a waiver be found where the injured party unsuccessfully attempts to persuade the breaching promisor to reject his repudiation and proceed honorably in the performance of his agreement. See e.g., 17A Am. Jur. 2d Contracts § 730 at 741 (1991).

Here, Pablo returned from his educational leave with the intent of carrying out his obligations under the contract, i.e., performing as program manager of TSS, completing his practicum and obtaining his advanced degree, and using his education and experience to further serve the Tribes. He learned of the so-called "transition" period a few days after he returned to work. Soon thereafter Pablo informed department head Swaney that he desired to return to his promised position, as specified in the contract. This was the first of several opportunities Pablo gave the Tribes to cure their breach.

Several weeks later, Pablo again notified Bearhead Swaney, this time in writing, that he was not content with his position under the transition structure of TSS; that he intended to discuss the matter with Executive Secretary Dupuis; and that he would resign if he was not restored to his position of program manager of TSS. Pablo's memo followed two contemporaneous discussions with Mr. Swaney where Pablo again told the him he wanted his position as program manager restored. Notwithstanding this written consultation with Swaney (with copies sent to Dupuis and Whiting-Sorrell), Swaney refused to honor the

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[13] The injured party is then entitled to damages to the end of the contract term to put him in the position he would have occupied if the contract had been completed. Cities Service Helex, Inc., *supra*, at 1313.

Tribes' contractual promise. Pablo thus fully realized that he had been effectively stripped of his authority and responsibility as program manager of TSS, and that the tribal management structure had no intention of returning him to his position for the foreseeable future, if at all. One week after this final consultation with the supervisory triumvirate, Pablo resigned.

Under the circumstances, Pablo terminated the contract within a reasonable time after becoming aware of the relevant facts i.e., that the Tribes had breached the agreement, and that it was futile to attempt to continue to get them to make good on their promise. Accordingly, we hold that Pablo did not waive the Tribes' breach of contract.

The Tribes further rely on Barker v. Sac Osage Electric Coop. Inc., 857 F.2d 486, 490 (8th Cir. 1988) to support their contention that Pablo waived the breach by continuing to perform and accept payment under the contract for "roughly 34 days." However, Barker does not support the Tribes, nor is it applicable to the facts here. In Barker, the unsuccessful plaintiff accepted vacation pay, severance pay and a total of $6,603.23 from the alleged breaching employer for a period of several months after the breach was discovered, and after Barker resigned his position. The employer received no benefit for such post-employment payments; waiver of the right to breach was held to be consideration for the benefits Barker received. In contrast, here the Tribes received the benefit of Pablo's work, and did not pay him anything after his employment was terminated. Acceptance of payment for his work therefore cannot constitute waiver of Pablo's right to cancel the contract or avail himself to damages for breach thereof.

E. Constructive Discharge

On appeal, Pablo challenges the trial court's findings of fact and conclusion of law which form the basis of the ruling that he was not constructively discharged. He asserts the challenged findings are not supported by the evidence, and that the lower court failed to apply the appropriate legal standard in determining whether a constructive discharge occurred.[14] Specifically, Pablo takes issue with the following findings of the trial court:

> 14. Neither the evidence presented, nor the credible testimony received, sufficiently demonstrated that Defendants, or their agents, had taken unreasonable or unnecessary steps designed to permanently deprive Plaintiff of his job as Director of Tribal Social Services, either prior to his return from educational leave or after returning as lead social worker.
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> 15. The two mentioned disciplinary incidents towards Plaintiff after his return from educational leave were based on justifiable concerns arising from unprofessional actions take by Plaintiff and do not demonstrate any calculated plan or design by Defendants' to create false or unwarranted grounds for discharging Plaintiff.
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> 17. Although Plaintiff testified that he did not feel he could complete his practicum in the position of lead social worker, there was no independent testimony supporting this position. No evidence was presented showing that any attempt was made to arrange an acceptable practicum program based on Plaintiff's change in duties and responsibilities after he returned to Defendants' employment in June of 1992. Nor was any testimony or evidence

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[14] The Tribes did not address Pablo's substantive arguments on the constructive discharge issue in their Answer Brief or during oral argument. Instead, they argue that this court must assume the trial court applied the correct legal principles if that authority was supplied. However, the Tribes cite no authority for their creative proposition, and we are aware of none. An essential purpose of appellate review is to ensure that correct legal principles are applied. Where the trial court's own language indicates that an erroneous standard was applied, the appellate court must set such findings aside, as discussed *supra*.

In their Answer Brief, the Tribes referred this court to their post trial brief for a "more exhaustive briefing of the arguments against constructive discharge." However, trial briefs are not part of the appellate record and therefore have no bearing on the outcome of the appeal.

presented which sufficiently showed Plaintiff could not undertake 20 hours of new duties in the position of lead social worker which would satisfy the requirements for completing of his practicum.

18. Plaintiff failed to adequately show that his working conditions upon returning from educational leave were objectively so unacceptable and unreasonable that he was forced to submit his resignation for other than personal preferences.

Pablo also contests the following conclusion of law related to the constructive discharge claim:

9. Given the fact that Plaintiff's resignation was a voluntary act, based upon personal considerations rather than any proven necessity, Defendants are not liable for any loss of earning capacity or expenses incurred by Plaintiff as a result of his resignation.

Pablo asserts the foregoing findings of fact and conclusion of law must be set aside because they erroneously assume that he had the burden of showing that the Tribes' subjective intent was to permanently deprive him of his position as program manager of TSS, i.e., because they are based on the wrong legal standard. He contends an employer's subjective intent is not relevant in a constructive discharge inquiry. We agree. The law in the Ninth Circuit is:

> A constructive discharge occurs when, looking at the totality of the circumstances, "a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions. Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984) (brackets original); Nolan v. Cleland, 686 F.2d 806, 812-14 (9th Cir. 1982).

Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987). This test establishes an objective standard; the plaintiff is not required to show that the employer subjectively intended to force the employee to resign. Ibid; Satterwhite, 744 F.2d at 1383; Borque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

In addition to the Ninth Circuit, the Montana Supreme Court has recognized the doctrine of constructive discharge since 1982. See Snell v. Montana-Dakota Utilities Co., 198 Mont. 56, 65-66 (1982). See also, Russell v. Mini Mart Inc., 711 F.Supp. 556, 559-560 (D. Mt. 1988); Niles v. Big Sky Eyewear, 771 P.2d 114, 117-118 (Mont. 1989); Finstad v. Montana Power Company, 241 Mont. 10, 27-28 (1990). We join the Ninth Circuit and the Montana Supreme Court in recognizing the doctrine of constructive discharge in this jurisdiction.

Findings of fact numbers 14 and 15 and conclusion of law 9, set forth above, indicate the trial court erroneously considered the employer's subjective intent to be the applicable legal standard in the constructive discharge inquiry. However, the relevant focus is on the employee's working conditions, not what the employer intended to cause as a result of working conditions. Because the trial court employed the wrong legal standard, it erred in requiring, in effect, Pablo to prove a design or "calculated plan" to permanently deprive him of his job, either by "unreasonable or unnecessary steps" or the creation of "false or unwarranted grounds for his discharge." Finding numbers 14 and 15 are therefore set aside.

We thus turn to the question whether, in light of the totality of the circumstances, a reasonable person in Joe Pablo's position would have found the working conditions at TSS so intolerable or discriminatory that he or she would have felt compelled to resign.

In this inquiry we are guided by the general rule that a "single isolated instance" of employment discrimination is insufficient as a matter of law to support a finding of constructive discharge. Watson, 823 F.2d at 361; Nolan, 686 F.2d at 813; Satterwhite, 744 F.2d at 1381-82. Instead, a plaintiff alleging constructive discharge must show some

"aggravating factors", such as a continuous pattern of discriminatory treatment, or a series of other intolerable working conditions. See e.g., Watson, 823 F.2d 823 at 361; Satterwhite, 744 F.2d at 1381-82.[15]

The evidence in this case shows that when the proper legal standard is applied, the working conditions imposed on Pablo after he returned from educational leave meet the test for constructive discharge. Pablo had been an employee of Tribal Human Services for several years before his employment with the Tribes was terminated. He postponed the pursuit of an advanced degree in order to complete several projects he felt were integral to increasing the funding and improving the services provided by the Tribes' social services program. He testified that he intended to complete his contract and to continue to work for the tribes as program manager of TSS.

In the six weeks between his return from his educational leave and his resignation, Pablo was confronted with numerous incidents, conditions and requirements which we conclude a reasonable employee in his shoes would have found "so difficult or unpleasant,"[16] or sufficiently intolerable, to compel resignation. Most significantly, the Tribes refused to return him to his former position of program manager of TSS, a violation of the express terms of the educational leave and future employment contract. He thus was unilaterally stripped of the supervisory and administrative authority he had previously held,

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[15] The determination whether working conditions were sufficiently intolerable and discriminatory to justify the resignation of a reasonable employee is normally a factual question left to the trier of fact, to be decided on a case-by-case basis. Watson, *supra*, 823 F.2d at 361.

[16] See e.g., Lojek v. Thomas, 716 F.2d 675, 681 (9th Cir. 1983); Russell v. Mini Mart, Inc., 711 F.Supp. 556, 560 (D. Mt. 1988).

and for which he was trained. This occurred in a context where his previous job performance as program manager of TSS was rated as "outstanding" by essentially the same people who denied him his contractually promised position. Against this backdrop, Pablo was, in effect, demoted to the position of lead social worker, although he was never given a job description notifying him what his actual new duties and responsibilities would be. The record indicates that the position of lead social worker lacked the authority and responsibility to undertake the tasks Pablo had negotiated with Eastern Washington University for completion of his work practicum with the Tribes--a requirement for the MSW degree, as discussed below. In short, Pablo reasonably believed that his demotion would effectively prevent him from completing his practicum, his degree, and his contractual obligations.

Upon reviewing the entire evidence, we are firmly convinced that it was necessary for Pablo to function as program manager of TSS in order to complete the requirements of his practicum. Pablo's uncontradicted testimony to this effect is corroborated by the documentary record. Plaintiff's exhibit number 8, a letter from the Practicum Director of Eastern Washington University to Department Head Bearhead Swaney, and related testimonial evidence show that two of the three practicum activities negotiated between Pablo and EWU could only have been undertaken and completed by Pablo serving in the position of program manager of TSS. There is no evidence to the contrary, including Plaintiff's exhibit number 7, a previous letter from EWU's practicum director, upon which the trial court solely relied to support finding number 17. Accordingly, finding of fact number 17 is clearly erroneous, and is therefore set aside in its entirety. Further, the trial

court's implicit assumption that Pablo had a duty to work out a new practicum in light of his demotion is both irrelevant and erroneous. The gravamen of Pablo's complaint is that he was not returned to his previous position of program manager. The whole purpose of his educational leave, including the practicum, and therefore the contract in question, was predicated on Pablo continuing to serve as program manager. To expect Pablo to rearrange a practicum to reflect the new duties associated with his demotion is tantamount to back door approval of the Tribes' breach of contract, which the trial court correctly ruled was unlawful. This court simply will not countenance such contradictory or untenable results.

Equally intolerable is the fact that the Tribes never gave Pablo a copy of the February 13, 1992 Whiting-Sorrell memorandum during his employment with them.[17] This memorandum attempted to blame Pablo for certain alleged deficiencies in the administration of the TSS program. Significantly, it served as the basis for Pablo's demotion and the contemporaneous creation of the so-called "transition period," even though the memo was constructed by an individual who testified she had no training in social work, had an "unrealistic" idea of the time required to supervise TSS, and "took a lackadaisical approach" to her responsibilities as interim program manager of TSS after Pablo began his educational leave.

In addition to breaching the employment contract, the Tribes violated Ordinance 69B, their own Personnel Rules, Regulations, and Procedures Manual, when they effectively demoted Pablo. Chapter XI, Performance Appraisal, Section 2, Responsibility, requires

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[17] Pablo was not furnished a copy of the memorandum until seven months after he resigned his employment with the Tribes--and then only as part of the discovery process associated with the instant litigation.

Department Head Swaney, in relevant part, "to insure that the performance of each employee is evaluated":

> C. As the need arises, i.e., when an employee changes positions or when performance problems are occurring and there is a need to document specific areas which need improvement. Ordinance 69B at 25.

If, in fact, department head Swaney believed there were serious administrative problems warranting a transition period before Pablo was returned to his full responsibilities as program manager at TSS, he was required by tribal law to conduct a written performance appraisal of Pablo. However, Mr. Swaney failed to evaluate Pablo's job performance in conformance with Ordinance 69B when Pablo was demoted as a result of Whiting-Sorrell's February 13, 1992 memorandum. At no time during his employment was Pablo given notice of the specific reasons for his demotion. He was only told that there were some unspecified "problems with administration." Pablo was thus denied the opportunity to respond to the alleged problems which led to his demotion, the transition period, and ultimately to his resignation.[18]

In addition to the above, other aggravating factors contributed to the intolerable working conditions which the Tribes imposed on Pablo after he returned from educational leave. He was required to answer to an interim manager who had no training in social work, and who disciplined and threatened to suspend and/or terminate him for what the record indicates are ostensibly pretextual or picayune reasons. He was further reprimanded on two occasions by an employee who had no authority over him, and whom Pablo had

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[18] The question whether this conduct in and of itself constituted a violation of Pablo's employment contract with the Tribes, or violated his due process rights, if any, is not before us.

previously supervised. He was excluded from program manager meetings, and found that other government officials external to TSS were equally confused about his role. Some fellow staff members felt the atmosphere at TSS to be uncertain, chaotic and fearful, and shared Pablo's belief that he would be fired or forced to quit.

In light of the above, the evidence does not support finding number 18 of the trial court, i.e., that "Plaintiff failed to adequately show that his working conditions upon returning from educational leave were objectively so unacceptable and unreasonable that he was forced to submit his resignation for reasons other than personal preference." It is therefore clearly erroneous and set aside.

Considering the totality of circumstances, as we must, the number and nature of "aggravating factors" between the time of Pablo's return from educational leave and his resignation created a pattern of intolerable working conditions sufficient to establish constructive discharge. See e.g., Watson v. Nationwide Ins. Co., 823 F.2d 360, 361-62 (9th Cir. 1987) (events occurring in one-month period were sufficient aggravating factors that a reasonable person would be justified in resigning; events included employer conspiring to create trumped up charges of inadequate job performance while employee was on leave, notwithstanding that employee had recently received excellent performance rating; employer subsequently told employee she was an incompetent supervisor, stripped her of her supervisory duties and transferred them to someone else; manager told employee she could be demoted to a position in which she would be supervised by her former subordinate trainees). Considering the totality of the circumstances, Pablo's resignation was reasonable and constitutes constructive discharge. We hold accordingly, and reverse in its entirety the

trial court's ruling, *supra*, that Pablo's resignation was voluntary. Concomitantly, for the same reasons we reverse conclusion of law number 8 which held that "[g]iven the fact Plaintiff's resignation was a voluntary act, [the Tribes] are not liable for any loss of earning capacity or expenses incurred by Plaintiff as a result of his resignation."

F. Breach of the Implied Covenant of Good Faith and Fair Dealing

On appeal, Pablo asserts the trial court erred in failing to find the existence of the implied covenant of good faith and fair dealing in the contract at issue. He further contends that the trial court erred in failing to find that the Tribes breached the implied covenant, and that he should have been awarded tort damages therefor.

The Tribes do not contest Pablo's argument that their contract with him included a covenant of good faith and fair dealing, nor do they contest the availability of tort damages for contractual bad faith, when a special relationship is violated. The Tribes simply argue that because the trial judge was provided the applicable law, heard the evidence, and chose not to find a breach, the appeal should be denied.

The trial court did not make explicit findings regarding the implied covenant issues which Pablo appeals. However, we may determine them for ourselves "because the comprehensive record before us on appeal provides for our 'complete understanding' of the matter." Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984), *citing* Swanson v. Levy, 50-9 F.2d 859, 861 (9th Cir. 1975).

Montana has long recognized the implied covenant of good faith and fair dealing in employment contracts. See e.g., Kittelson v. Archie Cochrane Motors, Inc., 248 Mont. 512, 517 (1991). In the seminal case of Story v. City of Bozeman, 791 P.2d 767 (Mont. 1990),

the Montana Supreme Court retraced its history of adjudicating implied good faith covenant cases. In Story, Montana's high court held:

> [E]very contract, regardless of type, contains an implied covenant of good faith and fair dealing. A breach of the covenant is a breach of the contract. Thus, breach of an express contractual term is not a perquisite to breach of the implied covenant. For every contract not covered by a more specific statutory provision, the standard of compliance is:..The conduct required by the implied covenant of good faith and fair dealing is honesty in fact and observance of reasonable commercial standards of fair dealing in the trade. Id. at 775. (Citation omitted).
>
> ...Each party to a contract has a justified expectation that the other will act in a reasonable manner in its performance or efficient breach. When one party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract, the contract is breached.[19] Id.

We adopt the above-quoted legal principles as the law of this jurisdiction, for we see no reason in this instance why contracts under the jurisdiction of Tribes should be treated any differently than those under the jurisdiction of the State of Montana, a sister sovereign of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

In the vast majority of ordinary contracts, a breach of the implied covenant of good faith and fair dealing amounts only to a breach of the contract and only contract damages are due. Story at 775. Such damages are generally "the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom." Damages which are not

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[19] As explained in Wagner v. Benson, App., 161 Cal.Rptr. 516, 520 (1980), the implied covenant of good faith and fair dealing means that neither party will do anything which prevents the other party from performing the contract or "injures the right of the other to receive the benefits of the agreement." The covenant imposes upon each of the contracting parties the affirmative duty to do "everything the contract presupposes he will do to accomplish its purpose." (Citations omitted).

"clearly ascertainable" in both their nature and origin are not compensable for a breach of contract. Id. at 776.

In common contract cases, tort-type damages are not available for breach of the implied covenant of good faith and fair dealing. However, the Montana Supreme Court has recognized the availability of tort damages for contractual bad faith in situations involving "special relationships," the elements of which are:

> (1) the contract must be such that the parties are in inherently unequal bargaining positions; [and] (2) the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, future protection; [and] (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party "whole"; [and] (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability. Story v. City of Bozeman, *supra*, at 776.

This court will also recognize the availability of tort damages for breach of the implied covenant of good faith and fair dealing where "special relationships" are found to exist, in conformance with the above-quoted elements enunciated by the Montana Supreme Court. The Tribal Court of the Confederated Salish and Kootenai Tribes will also observe other standards and procedures set forth by the Montana Supreme Court in Story with regard to tort liability for contractual bad faith in situations involving "special relationships," as follows:

> If the facts of the special relationship are undisputed as to whether there is a special relationship, it is a question of law for the court to decide. If substantial evidence is presented supporting each and all of the above essential elements and such evidence is controverted in whole or in part, there arises appropriate questions of material fact to be submitted to the jury. If substantial evidence is not presented in support of each and all of the essential elements, the court shall direct there is no special relationship.
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> In special relationship contacts, the standard of conduct is the same as that for other contracts--honesty in fact and observance of reasonable commercial standards of fair dealing in the trade....In contracts involving special relationships..., if the standard of conduct required by the implied covenant of good faith and fair dealing[20]...is violated, the duty of good faith and fair dealing is breached. In addition to recovering damages for breach of contract, the aggrieved party may also recover tort damages.
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> [In cases tried to a jury,] [a] special jury verdict form...must present the jury with a consistent and logically ordered progression of issues reflecting the above analysis. When contract breach is alleged, the form must first direct the jury to determine if an express term of the contract was breached or if the implied covenant of good faith and fair dealing was breached. If the jury answers affirmatively, it may then consider contract damages. If the court, or the jury upon proper questions, as the case may be, has found that a special relationship exits between the contracting parties, and the jury has found the implied covenant was breached, the jury may then consider tort damages. Story v. City of Bozeman, *supra*, at 776.

With the foregoing principles of law in mind, we turn to the questions raised by Pablo on appeal regarding the implied covenant of good faith and fair dealing, namely: whether the trial court erred in failing to find the Tribes breached the covenant; whether a "special relationship" existed between Pablo and the Tribes by virtue of the educational loan and future employment contract; and whether the trial court should have awarded Pablo tort damages.

As set forth above, for a plaintiff to maintain a cause of action for breach of the implied covenant, whether it is based in contract or based on the special relationship criteria giving rise to a tort, he must first establish a breach of the "honesty in fact" standard. See also, Kinniburgh v. Garrity, 244 Mont. 350, 354 (1990). In this case the record contains ample evidence that the Tribes violated the honesty in fact standard.

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[20] This standard is set forth on page 39, *supra*.

Here, the Tribes acted dishonestly in divesting Pablo of his contractually guaranteed position of program manager of TSS after he returned from educational leave. The fact the Tribes failed to give Pablo notice or furnish him a copy of the February 13, 1992 Whiting-Sorrell memo during his employment is in and of itself a dishonest act, particularly considering that it served as the basis for denying him his promised position, and triggered his contemporaneous demotion to be served during the entire duration of the so-called "transition" period. As noted elsewhere herein, the Tribes' failure to afford Pablo any notice whatsoever of the memorandum violated express requirements of tribal law, as set forth in the personnel rules, regulations and procedures manual.[21] As a result of the Tribes' violation of their own laws and procedures, Pablo had no idea why he was being mistreated, nor did he have an opportunity to offer an informed response, i.e., the Tribes kept him in the dark and at their mercy. That he was stripped of his contractually guaranteed position, and demoted in the context of a recent "outstanding" performance evaluation--without notice of the reasons therefor in violation of tribal law and established personnel requirements and procedure--offends reasonable standards of fair dealing in the context of the employer-employee relationship. Accordingly, we hold that the Tribes breached the covenant of good faith and fair dealing. Cf. Lachenmaier v. First Bank Systems, Inc., 246 Mont. 26, 31-32 (1990).

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[21] Ordinance 69B, in relevant part, requires management to undertake performance evaluations, and therefore *sub silentio*, to give an employee notice in situations where, as here, an employee changes positions or when there is an alleged need to document specific areas which need improvement. See Chapter XI, "Performance Appraisal", Section 2, "Responsibility", Part C.

Pablo argues on appeal that the facts here fit under the "special relationship" tort criteria set forth in Story, and that he should be awarded tort damages for the Tribes' violation of the covenant of good faith and fair dealing. While he has met the threshold requirement of establishing that the Tribes violated the "honesty in fact" standard, and therefore breached the covenant, we conclude that Pablo has failed to satisfy "each and all" of the mandatory criteria necessary to establish the existence of a "special relationship."

While Pablo has presented a credible argument in support of the existence of a "special relationship" between him and the Tribes, he failed to show that contract damages will not make him "whole". He asserts that "[o]nly tort damages will compensate for [his] personal losses..." However, Pablo failed to establish the nature or extent of such "personnel losses" at trial. As the trial court found:

> 16. Nothing was presented to this Court which would indicated [sic] Plaintiff suffered any significant and enduring emotional distress as the result of any actions taken by Defendants, or their agents.

This finding is supported by the record. The only evidence in the record regarding this issue is Pablo's testimony. There is no corroborating testimony from expert witnesses, or documentary evidence such as medical reports, or the like that Pablo suffered compensable personal losses. In short, the trial court's finding is sound and will therefore stand. Failure to establish the element number 5 of the Story criteria is fatal to Pablo's attempt to demonstrate the existence of a "special relationship."[22] Therefore, tort damages

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[22] We need not determine whether Pablo satisfied the remaining elements necessary to establish the existence of a "special relationship," for if an aggrieved party fails, as here, to meet any one of the elements, the relationship will not lie.

cannot be awarded here.[23]

G. Damages

The trial court awarded Pablo certain contract damages based on its ruling that the Tribes breached the contract. It correctly held that:

> 6. Damages in a breach of contract situation are limited to those contemplated by the parties at the time the contract was entered, including any amount which would place the injured party in the same position he would have been had the contract been performed.

The court then ordered Pablo's $8,000 loan, plus interest, be forgiven. On appeal, Pablo, contends, in part, that he is entitled to damages for lost earnings and earning capacity. We agree.

The contract in essence called for Pablo to be employed as program manager of Tribal Social Services for a period of two years beyond his graduation date of mid-June, 1993, i.e., until mid-June of 1995. To make Pablo whole, i.e., to restore him to the same position he would have occupied had the contract been performed, the Tribes must compensate Pablo for lost salary and wages between the time of his forced resignation on July 30, 1992 though June 15, 1995. Under the rulings of this appeal, Pablo is entitled to contract damages under any one of three theories: breach of contract, constructive discharge, and/or breach of the implied covenant of good faith and fair dealing.

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[23] Notwithstanding, Pablo can still avail himself to contract damages for breach of the implied covenant of good faith and fair dealing. However, such is purely academic at this point. He has already established breach of an express material term of the contract, as well as constructive discharge--both of which include damages sounding in contract. However, he can recover contract damages only once, albeit under multiple contract violation theories.

Pablo earned $14.05 per hour, or $562 per week as program manager of TSS. Forty-five (45) weeks elapsed between the time of his resignation (7/30/92) and his graduation (6/11/93). But for the contract breach and constructive discharge, Pablo would have earned $25,290 during this period. As to mitigation of damages, Pablo in fact earned $7,400, thus showing a net earning loss of $17,890 to mid-June of 1993.[24]

Evidence was adduced at trial that the entry level income of a person with an MSW without seniority is approximately $24,000 per year, compared to the salary of $29,224 per year which Pablo was earning as program manager of TSS. The court takes judicial notice that Pablo has been employed by the Tribes in a position earning approximately $24,000 per year since receiving his MSW in mid-June of 1993. Thus, Pablo is earning $5,224 less per year than he would have, had he remained employed as director of TSS. We must factor this amount at the rate of two years, since the parties contemplated that Pablo would remain employed as TSS program manager for a period of two years after his graduation. Accordingly, Pablo has established an additional loss of $10,448 in salary and wages for the period June 15, 1993 through June 15, 1995.

In light of the above, Pablo suffered a loss of $28,338 in salary and wages during the contract period as a result of the Tribes' actions.[25] In addition to tendering this amount to Pablo, the Tribes shall pay the interest on the $9,300 personal loan Pablo was forced to take out to complete his second year MSW, for such would not have been necessary but for

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[24] Prior to graduation on June 11, 1993, Pablo earned $500 logging and $6,900 at the Western Montana Health Clinic.

[25] This figure is the sum of $17,890 in lost earnings before gradation and $10,448 after graduation.

the Tribes' breach of contract and constructive discharge. Of course, since we awarded Pablo lost salary and wages for the Tribes' violations of the contract, he is liable for the principle of the $9,300 personal loan. Pursuant to Rule 14 of the CS&KT Tribal Appellate Rules, Interest on Judgments, the Tribes shall pay Pablo interest on the judgment of $28,338, at the maximum rate allowed by law, commencing on July 14, 1993, the day the lower court entered its judgment in this case, and continuing to the day payment is tendered. Pursuant to Rule 15, Tribal Appellate Rules, Costs on Appeal, costs associated with this appeal are hereby awarded to Pablo.

CONCLUSION

Although the trial court erred in finding that the grievance procedure was permissive, rather than mandatory, it correctly concluded that it properly asserted its jurisdiction to hear the issues raised in this action. The trial court also correctly ruled the Tribes breached a material term of their contract with Pablo. Because he terminated the contract within a reasonable time, Pablo did not waive the Tribes' breach. The trial court erred in failing to find that Pablo was constructively discharged and that the Tribes breached the covenant of good faith and fair dealing.

Because Pablo suffered lost salary and wages as a result of the Tribes' multiple contract violations, the Tribes are liable to compensate Pablo in the amount of $28,338 therefor, plus interest at the maximum rate allowed by law, from July 14, 1993 to the day payment is tendered. The Tribes are also liable for the interest on the $9,300 loan incurred by Pablo, as well as costs associated with this appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED TO THE CHIEF JUDGE OF THE TRIBAL COURT FOR FINAL DISPOSITION OF THE JUDGMENT ENTERED HEREIN.

IT IS SO ORDERED this 20th day of April, 1994.

Robert M. Peregoy, Chairman
Civil Appellate Panel