

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

GARY MORIGEAU,

Plaintiff-Respondent,

vs.

CONFEDERATED SALISH &
KOOTENAI TRIBES

Defendant-Appellant.

Cause No. AP-02-295-CV

OPINION

BEFORE: Chuck Wall, Clayton Matt and
Wilmer E. Windham, Associate Justices

APPEARANCES:

For Appellant

John T. Harrison
Ranald McDonald
Confederated Salish and Kootenai Tribes
Tribal Legal Department
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For Appellee

Richard A. Volinkaty, P.L.L.C.
212 West Spruce Street
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Opinion by Associate Justice Windham.

Summary

According to the allegations of the complaint filed August 9, 2002, Gary Morigeau was hired on May 9, 1998 as Head of Tribal Health and Human Services Department. He was terminated on April 20, 2001, whereupon he timely pursued his grievance under Ordinance 69B. His grievance was denied. He then sought arbitration as required under this Ordinance and pursued it to the point of having an arbitrator appointed. At that point, deeming his dispute to be ripe for a judicial declaration, he filed an action for Declaratory Judgment and other relief.

The complaint may be summarized as an attack on the dispute resolution machinery, based upon the compulsory arbitration feature and an apparent conflict between Ordinance 69B, which governs employment generally, and Ordinance 93A enacted June 18, 1993, which is specifically directed to the subject of wrongful discharge. Plaintiff points to a conflict between these enactments; particularly between the arbitration feature of Ordinance 69B; designated, in effect, as the sole and final remedy and section 6B of the Wrongful Discharge Ordinance, which requires the exhaustion of "all other administrative procedures" (as contained in Ordinance 69B) prior to filing an action under Ordinance 93A. The latter allows for recovery for wrongful discharge limited to lost wages and benefits; provided, that if the Court finds "extremely intolerable or outrageous behavior" by the employer, a further award up to \$2,500 is authorized. This amounts to a limited waiver of governmental immunity in this specific context. See CSKT Laws Codified, Title IV, Chapter 1, Part 4, Section 4-1-402(b).

With respect to the particulars of Morigeau's grievance, the complaint is not very helpful. Paragraph 14 is the sole charging allegation and reads as follows:

"The Plaintiff's discharge was not for good cause and the Defendant violated express provisions of its own written personnel policy resulting in an objectively measurable and quantifiable amount of harm to the Plaintiff in violation of Section 4 of Ordinance 93A."

These allegations are devoid of any actual facts and merely repeat the language of the Ordinance. The complaint was, however, filed before our decision in *Bear Don't Walk v. CS&K Tribal Council* (AP-03-218-CV), where we held that exceptions to tribal sovereignty are strictly construed and that "[B]efore permitting a case against the Tribes or any person or entity accorded immunity under section 4-1-401 to go forward, facts must be clearly alleged which, if proven, would bring the claimant within one or more of the limited waivers which are provided."

After the close of discovery, defendant renewed its unsuccessful motion to dismiss for lack of subject matter jurisdiction. Plaintiff countered with a motion for a summary judgment and for a permanent injunction.

History of Relevant Ordinances

February 10, 1987 - Ordinance 69B was enacted, providing Tribal personnel rules, regulations and procedures.

December, 1991 - Chapter XIV of Ordinance 69B was revised to provide a grievance procedure culminating in a Grievance Committee hearing and decision; subject to judicial review only for conformity to written policies and procedures.

June 18, 1993 - Ordinance 93A, the "Wrongful Discharge Ordinance" was enacted. This waived sovereign immunity as to the covered subject matter, provided the exclusive remedy for wrongful discharge, but required the exhaustion of "all other available administrative procedures" under Ordinance 69B prior to filing suit.

April, 1997 - Chapter XIV of Ordinance 69B was revised by the addition of a provision for "binding" arbitration if the aggrieved employee was not satisfied with the decision of the Grievance Committee.

The Decision of the Tribal Court

The trial judge concluded as follows:

1. The Court has subject matter jurisdiction to adjudicate the dispute. Sovereign immunity as to the procedural issue is waived.
2. The Court has subject matter jurisdiction over the wrongful discharge action.
3. The provisions of Ordinance 69B and 93A are in hopeless conflict.
4. 93A is the issue specific ordinance and is controlling. Inconsistent provisions of 69B will not be enforced and Tribe is enjoined from enforcing them as to Plaintiff.
5. Plaintiff may, therefore, proceed to trial of the wrongful discharge cause presented in the complaint.
6. Plaintiff's claim for \$7,988.67 for attorney fees is deferred pending a fully briefed hearing.

Defendant Confederated Salish and Kootenai Tribes filed a timely appeal.

Standard of Review

This case comes to us as an appeal from a Summary Judgment. Since the trial court does not appear to have based its decision on any of the factual material developed in discovery, we consider this to be more in the nature of a Judgment on the Pleadings and will treat the case as one involving a pure question of law which we will examine *De Novo*.

Statutory Construction

This Court accords great deference to the legislative enactments of the Tribal Council, which is the elected voice of the people. We will attempt to give effect to the expressed intent of these enactments and will try to give effect to every part thereof; resolving inconsistencies if possible; provided always that no violation of fundamental guaranteed rights would result from such enforcement.

Discussion

Arbitration developed as a supposed speedy, low cost alternative to litigation. Originally disfavored by the courts, its acceptance and indeed encouragement by the judiciary grew as the courts became increasingly backlogged. However, inevitable abuses developed. Parties of superior bargaining power, such as employers and financial institutions, imposed onerous provisions; including inconvenient locations, arbitrators preselected by the superior party and excessive charges. These provisions could be "agreed to" by accepting employment or making a credit card purchase after receipt of a printed notice with a monthly statement. These schemes are inconsistent with the original idea of arbitration as a voluntary, low cost dispute resolution alternative. Any arbitration scheme other than one entered into by fully informed parties after the particular dispute has arisen should be examined very closely for fairness and compliance with fundamental due-process rights. On the other hand, a governmental body enjoying sovereign immunity might grant an exception to that protection subject to conditions which, in any other context, could be considered unconscionable. With that preamble we now consider the particular statutory plan which is before us.

Appellant urges us to hold that, by amending Ordinance 69B after the enactment of Ordinance 93A, the Tribal Council repealed the latter enactment by implication. We decline to do so. Ordinance 93A, by its express language, is intended to provide "the exclusive remedy for a wrongful discharge from employment." It is not only a procedural enactment, but it significantly expands the rights of a discharged employee. Most importantly, section 4 contains waivers of sovereign immunity beyond those granted by section 4-1-402, CSKT Laws Codified. Without a more explicit expression of an intent to repeal, we hold that the Tribal Council, by amending Ordinance 69B, did not impliedly repeal Ordinance 93A.

Appellant also argues that the requirements of due process are satisfied by any kind of post-termination administrative procedure, which affords notice and an opportunity to

be heard by an impartial fact finder. However, that is not what is involved in this case. The Tribal government has provided an extensive set of protections for terminated employees, concluding with some sort of judicial review. It is the duty of this Court to give effect to the intention expressed in these enactments, subject always to the requirements of due process.

We turn then to the problem of reconciling the conflicting procedural provisions of these two laws. Morigeau argues, and the trial court held, that these two provisions are hopelessly conflicted. The trial court resolved the problem by nullifying the arbitration provisions of 69B and allowed Morigeau to proceed with a wrongful discharge action with a full trial *de novo*. The ruling of the Court below is based upon the provisions of Ordinance 69B which, by requiring binding arbitration, would force an employee in Morigeau's circumstances to "forfeit his or her right to bring a wrongful discharge action as provided under Ordinance 93A." However, while Ordinance 93A uses the term "binding arbitration," the full text makes it clear that the arbitration specified is not "binding" in the same way that a standard commercial arbitration is binding under state and federal arbitration statutes.

That is because section 7, part 6 of Ordinance 69B imports substantial parts of the Tribal Administrative Procedures Ordinance (TAPO), including section 17, giving the arbitrator the powers and duties of an Administrative Law Judge, section 22 (Notice), section 23 (Ancillary matters), section 24 (Ex Parte communications), section 27 (Conduct of hearings), except that the arbitrator is excused from making a record of matters officially noticed under subsection "e", section 28 (Final Orders) except that the arbitrator may not change the Ordinance and, significantly, section 29 (Judicial Review); and provides specifically that the Tribal Court shall not amend, modify, supplement or nullify any provision in this agreement (*sic*), except that only the Tribal Court shall have jurisdiction to review claims arising from allegations of violation of the Indian Civil Rights Act of 1968, 25 U.S.C. section 1302 (8). A decision of the Tribal Court can be appealed to the Tribal Appellate Court in the usual manner.

It is clear that the Tribal Council, by that clear expression, withheld jurisdiction to do what the trial court did (i.e., nullify the arbitration provision). The trial court recognized and quoted this language, but held that the arbitration provisions of Ordinance 69B operated to deny Morigeau the due process guaranteed by the Indian Civil Rights Act. We do not believe that it is necessary to go that far. We agree with the trial court to the extent that by requiring, in part 4 of section 7, the aggrieved employee to pay half the cost of the arbitration and the transcript, a party in Morigeau's position could be effectively denied any relief. This provision could render illusory the full relief which the Tribal Council intended to afford to a discharged employee. To that extent, we hold that if arbitration is insisted upon, the cost (except for the claimant's attorney fees) should be borne by the Tribes, just as this government would be responsible for the cost of any other hearing under TAPO.

Before turning to the apparent discrepancy between the scope of judicial review under TAPO as imported into Ordinance 69B and that afforded by Ordinance 93A, we need to clarify the language providing for the tolling of the limitations period. Under section 6(B) of Ordinance 93A, the limitation period is tolled until the procedures available under chapter XIV of Ordinance 69B are fully exhausted and "a decision is rendered by the Personnel Grievance Board." This language was appropriate when the Ordinance was enacted and the Grievance Board decision was the final step in the administrative process. However, when Ordinance 69B was amended to add the arbitration feature, this language was not amended to conform as it obviously should have been. We hold that the intent of the two enactments, read together, is to toll the period of limitations until the conclusion of the arbitration and the rendering of the decision in that proceeding.

It is the obvious intent of Ordinance 93A that the trial court conduct a full trial on the merits, and is not bound by the outcome of the administrative proceedings. TAPO, on the other hand, provides for a very limited judicial review and provides, subject to a number of exceptions, that "the Tribal Court may not substitute its judgment for that of the Hearings officer." Section 29 (4) (a). However, subsection (1) of section 29 contains this language:

"This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial *de novo* provided by Tribal law."

By this language, the Tribal Council has given itself the latitude to provide for the trial *de novo* envisioned by Ordinance 93A. However, it is equally clear that its intent, as expressed to this date, is to preserve the modified arbitration procedures set forth in Ordinance 69B.

Holding

We therefore hold that upon receiving notice of the Grievance Committee decision, if the employee is not satisfied, he or she may elect to proceed to arbitration in accordance with the procedures set out in section 7 of Ordinance 69B, but at government expense; and if this does not resolve the matter, the employee may then proceed under Ordinance 93A with a trial *de novo*. At all stages of the proceedings, if the claimant elects to be represented by an attorney, that cost should be borne by the claimant; unless there is a basis for shifting that burden under CSKT Law. The limitations period provided in subsection (A) of section 6 is tolled until a decision is rendered by the arbitrator. The parties may, however, agree to waive arbitration and proceed directly to the process provided by Ordinance 93A by the filing of a timely action in Tribal Court by the employee.

The question of attorney fees was not submitted for decision, is not ripe for appellate review, and we do not reach this issue.

Disposition

Morigeau may proceed to arbitration if the parties desire to do so. The cost of the arbitration, except for Morigeau's attorney fees, shall be borne by defendant. At the conclusion of the arbitration or upon a waiver of arbitration, Morigeau shall have leave to amend his complaint to set forth, with particularity, the basis for claiming a waiver of Tribal sovereign immunity in accordance with this Court's holding in *Bear Don't Walk v. McDonald*, Cause No. AP-03-218-CV.

Dated this 3rd ^{May} Day of ~~April~~, 2005



Wilmer E. Windham, Associate Justice

We Concur:

Chuck Wall, Associate Justice

Clayton Matt, Associate Justice

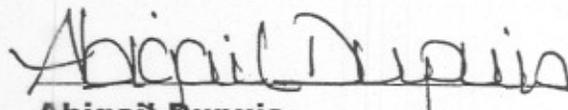
CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 3rd day of May, 2005.

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