NOTICE

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78-109

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

LADYSMITH-HAWKINS SCHOOL SYSTEMS, JOINT DISTRICT NO. 1; BOARD OF EDUCATION OF LADYSMITH; JAMES F. BUCHHOLZ, CLERK OF BOARD OF EDUCATION,

Petitioners-Respondents,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Appellant.

COURT OF APPEALS
DECISION
DATED AND RELEASED

JAN 3 - 1979

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

Decision No. 14719-B

APPEAL from a judgment reversing an order of the Wisconsin Employment Relations Commission entered in the circuit court for Rusk County: Robert F. Pfiffner, Circuit Judge. Reversed and remanded.

BEFORE Dean, P. J., Donlin, J., and Foley, J.

DONLIN, J.

Tina Faust signed a contract with the Ladysmith-Hawkins School Systems, Joint District No. 1, (District) to teach grade 5 during the 1975-1976 school year. The contract included the following language: "This contract is issued and accepted by both parties with the understanding that it will not be renewed . . . for the 1976-77 school year." It further provided that it was subject to all provisions of any master contract agreed upon by the District and the Ladysmith-Hawkins Education Association (Association).

The Association and District entered into a written collective bargaining agreement containing provisions for arbitration of grievances which were defined as, among other things, "complaint[s] regarding wages, hours or conditions of employment as set forth" in such agreement.

Pursuant to statute,[1] the District notified Faust that her employment would not be renewed for the 1976-77 school year. She requested a conference with the Board of Education after which the nonrenewal was affirmed but termed a "layoff."

Faust then filed a grievance alleging that the District was in violation of various conditions of the collective bargaining agreement. The grievance was processed according to steps prescribed in the bargaining agreement without reversal of the nonrenewal determination. On April 27, 1976, the Union advised the District that it wished to submit the Faust grievance to arbitration. A week later, the District refused to proceed to arbitration, contending that the grievance was not arbitrable under the master contract between the Association and the District.

On June 7, 1976, Faust petitioned the circuit court for Rusk County for a writ of mandamus to require the District to issue her a contract for the 1976-77 school year. On June 8, 1976, the Association filed a petition with the Wisconsin Employment Relations Commission (WERC) alleging the District had engaged in a "prohibited practice,"

contrary to sec. 111.70(3)(a)(5), Stats., by its failure to submit the Faust grievance to arbitration. The circuit court denied the writ sought by Faust. The WERC examiner found that the grievance was facially arbitrable and an order issued directing arbitration. The District filed a petition for review with the WERC, and the commission confirmed the findings and order of the examiner.

The District then sought review of the WERC order in the circuit court of Rusk County. The circuit court reversed the WERC order and directed dismissal of the petition. The WERC appeals from that determination.

Two questions are dispositive of this appeal:

1. Was the WERC's construction of the collective bargaining agreement reasonable?

2. Was the circuit court's denial of Faust's application for a writ of mandamus res judicata as to this action by the Association to compel arbitration?

Upon review of the commission's construction of a collective bargaining agreement, the question is whether the construction was reasonable in light of the language of the agreement and the industrial relations context.[2] Our review does not reach the merits of the grievance[3] and must be conducted in light of strong legislative and judicial policies favoring arbitration.[4] If any construction of the contract could encompass the grievance on its face and make it arbitrable, then the grievance is arbitrable unless such arbitration is explicitly prohibited by the contract.[5] Unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation which makes the grievance arbitrable, the grievance is arbitrable.[6]

The examiner found the master contract provided for arbitration of the Faust grievance, reasoning that the provisions of the master contract, which had been incorporated by reference into the Faust contract, were in effect at all times material to the complaint and did provide for arbitration of the grievance. The Association and the District stipulated before the WERC hearing examiner that the master contract containing the arbitration clause was the applicable collective bargaining agreement. The examiner found the grievance was arbitrable on its face. He left the merits of the Faust grievance to the arbitrator. The examiner's findings, sustained by the WERC, provided a reasonable interpretation of the contract language and must be sustained.

The District argues that the denial of Faust's petition for mandamus is res judicata as to the complaint to compel arbitration of the Faust grievance. The doctrine of res judicata allows one who has reduced a cause of action to judgment to assert the conclusiveness of the judgment in subsequent litigation involving the same cause of action and the same parties (or their privies) as to all matters actually litigated and as to any matters which might have been litigated in the former proceedings.[7] The District contends that Faust and the Association are in privity and that the Association is seeking in this action to assert the same cause of action as Faust pursued in her mandamus action to enforce her alleged rights under ch. 118, Stats., because, according to the District, the same evidence will sustain or defeat both the former and present actions. Both actions arise out of the same transaction, the nonrenewal of Faust's contract; however, such common origin, without more, does not make the causes of action identical.[8] The present action to compel arbitration based on the terms of the collective bargaining agreement is not the same cause of action litigated in the mandamus proceeding where Faust's statutory rights to renewal were adjudicated.[9] Therefore, even if Faust and the Association were in privity, the judgment in the mandamus action does not constitute a bar to the present action.

Part of the District's res judicata argument alludes to the supposed identity of issues in the mandamus action and the present action.[10] Faust, the petitioner in the mandamus action, was required to establish her entitlement to the relief requested on a clear, specific legal right, free from substantial doubt.[11] Regardless of the purported basis of the circuit court's decision on the mandamus petition, a ruling on Faust's entitlement to mandamus would not necessarily entail a decision on the Association's right to compel arbitration or Faust's rights under the collective

bargaining agreement. The sole issue before the WERC examiner and the commission itself being the arbitrability of the grievance on its face and not being identical to those issues decided in and essential to the circuit court's mandamus determination, such prior determination did not preclude the WERC from deciding the arbitrability issue and does not preclude this court from sustaining the WERC order as reasonable.

The order of the circuit court is reversed and the cause is remanded with directions to enforce the order of the WERC.

By the court: Reversed and remanded.

Recommendation: No publication.

APPENDIX

1 §118.22, Stats.

2 E.g., Board of Educ. v. WERC, No. 76-164 (Wis. Sup. Ct. Nov. 28, 1978); Tecumseh Prod. Co. v. WERC, 23 Wis.2d 118, 126 N.W.2d 520, 525 (1964).

3 Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, 78 Wis.2d 94, 253 N.W.2d 536, 545 (1977).

4 §111.70(3)(a)(5) and §111.70(6), Stats; ch. 298, Stats; Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, supra, note 3; City of Madison v. Frank Lloyd Wright Found., 20 Wis.2d 361, 122 N.W.2d 409 (1963). See also United Steelwkrs, v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelwkrs v. Warrior & Gulf N. Co., 363 U.S. 574 (1960); United Steelwkrs v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960). But see Acting Supt. of Schools v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 369 N.E.2d 746 (1977). The Liverpool case is not in point because New York law requires an agreement to arbitrate must be express, direct and unequivocal before an order to arbitrate will be issued. Such principles of construction of collective bargaining agreements are alien to Wisconsin law where construction must indulge any reasonable presumption in favor of arbitration.

5 Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, supra, note 3.

6 Joint School Dist. No. 10 v. Jefferson Educ. Ass'n, supra, note 3.

7 Leimert v. McCann, 79 Wis.2d 289, 255 N.W.2d 526 (1977); Stafford v. General Supply, 5 Wis.2d 137, 92 N.W.2d 267 271 (1958); Gohr v. Beranek, 266 Wis. 605, 64 N.W.2d 246 (1954); Cf. Conway v. Div. of Conservation, 50 Wis.2d 152, 183 N.W.2d 77, 81 (1971) (collateral attack and right to "only one kick at the cat").

8 The School District's reliance on Nickoll v. Racine Cloak & Suit Co., 194 Wis. 298, 216 N.W. 502 (1927), is misplaced. In Nickoll, notwithstanding that the actions, a first based on an alleged oral contract and a second based quantum meruit, arose out of the same transaction, dismissal of the first did not constitute a bar to the second action. See also Stafford v. General Supply Co. 5 Wis.2d, 92 N.W.2d 267 (1958); Lindemann v. Rusk,125 Wis. 210, 237, 104 N.W. 119 (1905).

9 Cf., Local 1401, Retail Clerks Int'l Ass'n v. Woodman's Food Market Inc., 371 F.2d 199 (7th Cir. 1966) (judgment dismissing former action on employer's oral promise not res judicata as to subsequent action to compel arbitration of employee's discharge pursuant to collective bargaining agreement).

10 Closely related to the doctrine of res judicata is the doctrine of collateral estoppel, also known as issue preclusion. See Morgan v. Inter-Continental Trading Corp., 360 F.2d 853 (7th Cir. 1966) and Falk v. Falk Corp., 390 F.Supp. 1276, 1281 (E.D. Wis. 1975), quoting from Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322, 326 (1955). This doctrine operates to preclude relitigation of an issue of ultimate fact actually litigated in a prior action and essential to judgment rendered against one in privity with or a party who is seeking to relitigate such issue. See, e.g., State ex rel Flowers v. Dept. of H&SS, 81 Wis.2d 376, 260 N.W.2d 727, 734 (1978), quoting from Ashe v. Swenson, 397 U.S. 436; 443 (1970); Northwestern Nat. Cas. Co. v. State Auto & Cas. Underwriters, 35 Wis.2d 237, 151 N.W.2d 104 (1967). See generally Restatement (Second) of Judgments §68.1 (Tent. Draft, No. 4, 1977). The party seeking to apply collateral estoppel has the burden to establish its applicability. State ex rel. Flowers, supra, 260 N.W.2d at 735. Even if the court had decided such issues here, there is nothing in the record before us to indicate resolution of such issues was essential to the judgment in favor the District in the mandamus proceeding.

11 Eisenberg v. Estkowski, 59 Wis.2d 98, 207 N.W.2d 874 (1973); State ex rel. Ryan v. Pietrzykowski, 42 Wis.2d 457, 167 N.W.2d 242 (1969).