

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Dylan Pierce et al, :
 :
 Plaintiffs-Appellants, :
 :
 v. : No. 11AP-345
 : (C.C. No. 2010-05960)
 The Ohio State University, : (ACCELERATED CALENDAR)
 :
 Defendant-Appellee. :

D E C I S I O N

Rendered on March 13, 2012

Marshall and Morrow, LLC, Edward R. Forman and John S. Marshall, for appellants.

Michael DeWine, Attorney General, and Randall W. Knutti, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Appellants, Dylan Pierce, Matthew Nord, and Gary Thomas ("appellants") appeal the judgment rendered by the Court of Claims of Ohio dismissing their claims against The Ohio State University ("OSU"). For the reasons that follow, we reverse.

{¶ 2} Appellants were employed by OSU as hot dog vendors. Their positions were included within a bargaining unit, which was represented by the Communications Workers of America, Local 4501. Appellants were subject to a collective bargaining agreement ("CBA"), which had been entered amongst the union and OSU.

{¶ 3} As hot dog vendors, appellants' workdays began at 8:00 a.m. and ended at 4:30 p.m. They generally worked five days a week. Due to the nature of their positions, appellants were unable to take rest breaks during their workdays. Nevertheless,

beginning in March 2007, OSU began deducting 30 minutes from each workday for rest breaks that appellants never took. Appellants challenged this practice by arguing that they were not being compensated for all of the time worked. Appellants filed the instant lawsuit and argued that OSU failed to pay them the minimum wage for time worked and failed to pay overtime wages for hours worked in excess of 40. OSU filed a motion to dismiss and argued that the Court of Claims lacked subject-matter jurisdiction over appellants' claims. The trial court agreed and dismissed appellants' claims. This timely appeal followed and presents the following assignments of error:

1. The Court of Claims Committed Reversible Error in Finding that the Court of Claims is Without Jurisdiction to Determine Claims Under the Ohio Constitution that Do Not Require State Action and, Instead, Apply to Both Private and Public Parties.

2. The Court of Claims Committed Reversible Error in Finding that the Silence of a Collective Bargaining Agreement Precludes Claims Brought Under Ohio Law.

{¶ 4} Because we find it to be dispositive, we initially address appellants' second assignment of error in which appellants challenge the content of the CBA and the trial court's resulting conclusion that it lacked subject-matter jurisdiction over this matter.

{¶ 5} The standard of review applicable to a Civ.R. 12(B)(1) dismissal for lack of subject-matter jurisdiction is whether the complaint raises any cause of action cognizable in the forum. *Crable v. Ohio Dept. of Youth Servs.*, 10th Dist. No. 09AP-191, 2010-Ohio-788, ¶ 8, citing *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77 (1989). Appellate courts review such dismissals de novo by reviewing the entire record and affording no deference to the trial court's determination. *Id.*, citing *Meccon, Inc. v. Univ. of Akron*, 182 Ohio App.3d 85, 2009-Ohio-1700 (10th Dist.).

{¶ 6} Our court recently decided a case presenting similar issues to those presented herein. See *Lucki v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 11AP-43, 2011-Ohio-5404. In that case, a corrections officer was subject to a collective bargaining agreement and alleged that he was not compensated for required, post-shift work. *Id.* at ¶ 2. The Court of Claims dismissed his complaint after having concluded that it lacked subject-matter jurisdiction. *Id.* at ¶ 4. On appeal, our court referenced R.C. 4117.10(A),

which provides, "An agreement between a public employer and an exclusive representative entered into pursuant to this chapter governs the wages, hours, and terms and conditions of public employment covered by the agreement." However, we noted that when a collective bargaining agreement leaves unaddressed a matter that state or local laws do address, R.C. 4117.10(A) indicates that the state or local laws would generally apply with respect to " 'wages, hours and terms and conditions' of employment.' " *Id.* at ¶ 10, quoting *Null v. Ohio Dept. of Mental Retardation & Developmental Disabilities*, 137 Ohio App.3d 152 (10th Dist.2000), citing *Streetsboro Edn. Assn. v. Streetsboro City School Dist. Bd. of Edn.*, 68 Ohio St.3d 288, 291 (1994).

{¶ 7} Following *Null*, our court reviewed the specific provisions of the collective bargaining agreement that applied to the corrections officer. *Lucki* at ¶ 24. ("Article 13.10 of the collective bargaining agreement * * * provides that employees are entitled to compensation for overtime work, so that '[h]ours in an active pay status [of] more than forty (40) hours in any calendar week shall be compensated at the rate of one and one-half (1 1/2) times the employee's total rate of pay for each hour of such time over forty (40) hours[.]' ") After comparing the substance of Article 13.10 against R.C. 4111.03(A), we found a conflict. *Id.* at ¶ 25. As a result, we held: "when a conflict exists, the collective bargaining agreement prevails unless one of the exceptions in R.C. 4117.10(A) applies." *Id.* We noted that overtime compensation was not listed as an exception in R.C. 4117.10(A), so the collective bargaining agreement controlled the dispute. *Id.*

{¶ 8} In the instant matter, OSU mischaracterizes appellants' claims as relating to rest breaks. It then cites Article 23 of the CBA, which establishes the parameters for such breaks. In our view, OSU's argument is misplaced. Indeed, nowhere do appellants argue that they should have been granted rest breaks. Rather, they seek the compensation allegedly due for having worked through rest breaks. In this regard, the dissent recognizes OSU's mischaracterization of appellants' claims but then analyzes the evidence perpetuating the mischaracterization. In performing this analysis, the dissent excuses OSU's failure to file the relevant evidence pertaining to appellant's actual claims.

{¶ 9} Indeed, in the instant matter, the CBA contains articles nowhere found in the record. For example, Article 12 is titled: "Hours of Work and Overtime." (Exhibit A,

table of contents.) Because the substance of this article is not before us, we cannot undertake the necessary analysis to determine whether a conflict exists. Accordingly, based upon the record before us, the trial court erred in concluding that appellants' complaint failed to raise any cognizable claims. *Crabbe*, 10th Dist. No. 09AP-191, 2010-Ohio-788, at ¶ 8, citing *State ex rel. Bush*, 42 Ohio St.3d 77. The lone case cited by the dissent supports this conclusion.

{¶ 10} In *Braun v. Columbus*, 10th Dist. No. 07AP-496, 2007-Ohio-7148, a public, bargaining employee requested paid leave. His request was denied administratively, which prompted an appeal to the trial court. His public employer filed a motion to dismiss and argued that the trial court lacked subject-matter jurisdiction. The basis for its argument was that the employee's remedy was limited to arbitration. Importantly, the portion of the collective bargaining agreement supporting the board's jurisdictional argument was omitted from the record before the trial court. The employee's request was granted on the merits, and the employer appealed. On appeal, we noted that the employer failed to include relevant portions of the collective bargaining agreement in the record before the trial court. Further, we noted that the record could not be supplemented with such evidence on appeal. As a result, we concluded: "Without an evidentiary basis, the [employer's] jurisdictional argument fails." *Id.* at ¶ 11.

{¶ 11} As *Braun* relates herein, it is clear that appellants' claims regard their purported right to compensation for time worked. Because the record lacks evidence on the cognizable claims raised in appellants' complaint, OSU's jurisdictional argument fails. *Id.*

{¶ 12} Accordingly, we sustain appellants' second assignment of error, which renders moot their first assignment of error. We accordingly reverse and remand this matter for further proceedings in accordance with law and consistent with this decision.

*Judgment reversed;
cause remanded.*

TYACK, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶ 13} Because I believe the trial court's resolution of appellants' complaint will necessarily involve interpretation of the CBA to which they are subject, I respectfully dissent.

{¶ 14} In support of its argument that the Court of Claims lacks jurisdiction to resolve this matter because the CBA controls, OSU cites two provisions of the CBA, only one of which is part of the record. As noted by the majority, OSU did not submit Article 12 of the CBA, which relates to "Hours of Work and Overtime." Under similar circumstances, this court has held that failure to do so precludes summary judgment for lack of jurisdiction. *See Braun v. Columbus*, 10th Dist. No. 07AP-496, 2007-Ohio-7148, ¶ 11 ("Because the City neglected to introduce the relevant portions of the CBA into the record, we cannot consider them.").

{¶ 15} Here, however, OSU did submit Article 23, which governs rest breaks. While I agree with the majority that OSU has mischaracterized appellants' claim as a request for rest breaks, I do not agree that the trial court can resolve this dispute without interpreting Article 23. Fundamental to appellants' claim for minimum wages and overtime pay is their allegation that they had to work an eight and one-half hour day without breaks. In their complaint, appellants allege that OSU deducted time from their paychecks "even though OSU knew that the nature of [appellants'] workplace and the absence of support staff for their individually staffed outdoor hot dog stands prevent them from taking a half-hour break." Appellants stated that they could take only a quick break from their stands if they could rely on a student-employee or another student. When appellants complained to supervisors "that OSU was deducting money for breaks they were not receiving," appellants were told "that they did not need a break because they had down time." And, prior to deciding to make the half-hour deductions from appellants' pay, "OSU failed to investigate whether [appellants] were actually receiving breaks and OSU made no other effort to determine if its automatic deduction policy was justified as applied to [appellants]."

{¶ 16} All of these allegations about OSU's failure to provide rest breaks are critical to appellants' claim that they are entitled to wages and overtime pay for the two, 15-

minute periods each day they worked without breaks. In my view, the trial court cannot resolve this dispute without interpreting, at least, Article 23 of the CBA and its provision for these breaks, and the court lacks jurisdiction under R.C. 4117.10(A). Because the majority concludes otherwise, I dissent.
