

2014 ONSC 1190
Ontario Superior Court of Justice

Felice v. Cardinal Health Canada Inc.

2014 CarswellOnt 8419, 2014 ONSC 1190, 241 A.C.W.S. (3d) 854

Joe Felice, Plaintiff and Cardinal Health Canada Inc., Defendant

Pollak J.

Heard: February 10, 2014; February 11, 2014; February 12, 2014; February 13, 2014; February 14, 2014

Judgment: March 20, 2014

Docket: CV-13-472374

Counsel: Matthew Fisher, for Plaintiff
Richelle Pollard, for Defendant

Subject: Employment; Public

Headnote

Labour and employment law

Table of Authorities

Cases considered by Pollak J.:

Bardal v. Globe & Mail Ltd. (1960), [1960] O.W.N. 253, 24 D.L.R. (2d) 140, 1960 CarswellOnt 144 (Ont. H.C.)
— followed

Vorvis v. Insurance Corp. of British Columbia (1989), 25 C.C.E.L. 81, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218,
58 D.L.R. (4th) 193, 94 N.R. 321, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 90 C.L.L.C. 14,035, 1989 CarswellBC 76,
1989 CarswellBC 704 (S.C.C.) — considered

Pollak J.:

Introduction

1 The Plaintiff, Joe Felice ("Mr. Felice"), is suing his former employer the Defendant, Cardinal Health Canada Inc. ("Cardinal") for damages for wrongful dismissal from employment. His employment as a senior executive on Cardinal's management team, earning an annual salary of \$130,000 with participation in an executive incentive plan and executive benefits plan, was terminated without cause. His length of service with Cardinal is disputed.

2 The issue in dispute is the determination of the amount of damages for Cardinal's alleged failure to give appropriate reasonable notice of termination — specifically what the period of reasonable notice should be. The parties also disagree on Mr. Felice's entitlement to a bonus that was earned up to the date of termination and what Mr. Felice would have earned as bonus had he been given reasonable notice of termination of employment.

3 Mr. Felice was 52 years old at the time of his termination of employment. His only income since the termination has been approximately \$10,000 in earnings from work he performed on a short term contract.

Facts

4 Mr. Felice alleges he was induced to leave secure employment of almost five years as a contractor for the Town of Oakville, for employment with the Defendant's predecessor Futuremed Health Care Products Corp. ("Futuremed"), as its Vice President of Operations & Information Technology.

5 Cardinal bought the shares of Futuremed in February of 2012. Mr. Felice, who started work with Futuremed on April 4, 2011, continued his position with Cardinal without interruption after the sale of shares.

6 He had a written contract of employment with Futuremed (the "Futuremed Agreement") which provided for severance of twelve months of income if employment was terminated without cause. After a transition period, Mr. Felice signed a document (the Cardinal document") that Cardinal alleges is an employment agreement, which reflects changes in his position and remuneration but did not have any severance provision.

7 Mr. Felice claims that as this document did not contain an "entire agreements" clause, it did not terminate the Futuremed Agreement, but is an amendment of it.

8 Cardinal submits that the document clearly covers all terms of Mr. Felice's employment. As there is no severance provision, the period of reasonable notice is governed by the common law, which in this case would be 3 to 4 months, subject to the duty to mitigate damages.

9 Mr. Felice argues in the alternative, that if the severance provision in the Futuremed Agreement does not apply, the period of reasonable notice at common law is twelve months less the amount he has earned under his contract.

Issues

10 The parties agree on the issues for this Court. They are:

- (i) Was the September 2012 document a "new" employment agreement or an amendment to the Futuremed Agreement?
- (ii) Did the September 2012 document have the effect of terminating the operation of the existing severance clause in the Futuremed Agreement?
- (iii) If so, what is the reasonable period of notice under the common law?

11 There are not many facts in dispute. The only significant dispute in the evidence was Mr. Berneche's (Vice President of Operations of Cardinal) evidence that Mr. Felice asked him whether the twelve month severance clause would be included in the Cardinal document/agreement and that he said no. Mr. Felice denies that he asked that question or that severance was discussed.

**Was the September 2012 document a "new" employment agreement or an amendment to the Futuremed Agreement?
Did the September 2012 document have the effect of terminating the operation of the existing severance clause in the Futuremed Agreement?**

12 Mr. Berneche gave Mr. Felice a draft proposal for the Cardinal document.

13 That draft was changed to reflect Mr. Felice's new title as National Director, Supply Chain Management.

14 Mr. Felice submits that the Cardinal document did not cover all terms and conditions of his employment.

15 The Cardinal document stated:

Congratulations! I am pleased to offer you regular full-time employment as National Director, Supply Chain Management, reporting to Jim Berneche, Vice President, Distribution Operations. This role is a critical part of our long-term success and we believe you would be a great member of a growing and successful team.

Joe, I believe this covers the key items discussed. Please confirm your acknowledgment and acceptance of the terms of employment as described above by signing and returning one copy of this letter to Mike Rodgers, Vice President, Human Resources no later than September 13, 2012 (Michael.Rodgers@cardinalhealth.com)

We look forward to having you as a valuable member of our team and are delighted that you are choosing Cardinal Health Canada as an employer.

16 Mr. Felice argues that the Cardinal document did not terminate the Futuremed Agreement as it did not have all of his employment agreement. It only mentioned certain terms and conditions of employment and was silent on others. It is submitted that the severance provision in the Futuremed Agreement continued as a term of his employment.

17 His evidence was that the issue of severance was not raised by either party.

18 Cardinal submits that the Cardinal document was an employment agreement covering all of the terms of employment. As there was no express provision regarding severance owed, Mr. Felice was entitled to reasonable notice in accordance with the common law.

19 Cardinal relies on jurisprudence confirming that the function of the law of contracts is to protect the reasonable expectations of the parties. It argues that as the reasonable expectation is an objective standard, this Court must ask how the conduct would be viewed by a reasonable person in the circumstances.

20 Cardinal relies on the evidence that the change to Mr. Felice's employment was needed because it already had a Vice President of Operations. As well, Cardinal did not wish to continue Futuremed's treatment of Mr. Felice as a contractor who was paid through his company and not as an employee. Cardinal wanted to put Mr. Felice on its payroll.

21 Cardinal submits that there is nothing in the objective conduct of the parties to support the argument that the severance provision of the Futuremed Agreement would continue to apply as a term of Mr. Felice's employment.

22 It is submitted that the characterization of the Cardinal document as an "amendment" to the Futuremed Agreement would lead to an absurd commercial result. This would mean that Mr. Felice could receive the increased salary and other benefits that were provided to him under the Cardinal document but choose to keep those benefits he liked under the Futuremed Agreement.

23 Further, Cardinal submits that Mr. Felice's position is contrary to the express terms found in the Cardinal Agreement, which I have referred to above, and that the interpretation of these terms is clearly that the document covers all terms of Mr. Felice's employment.

24 Mr. Felice submits that as of February 2012, Cardinal stepped into the shoes of Futuremed because of the share purchase. The Futuremed Agreement was not terminated by his signing of the Cardinal document. After the sale, Cardinal and Mr. Felice continued to operate under the terms and conditions pursuant to the Futuremed Agreement.

25 It is therefore argued that the Cardinal document had to be an amendment of the Futuremed Agreement. The Cardinal document does not, it is submitted, inherently terminate all terms that existed before. Rather, the only terms of the Futuremed Agreement that changed are those that were explicitly altered and agreed to by the parties in the Cardinal document. There is no agreement between the parties to terminate the severance provision in the Futuremed Agreement.

26 Mr. Felice submits that Cardinal cannot remove a highly desirable term from Mr. Felice's employment contract by ignoring that term and only addressing others. The Supreme Court of Canada case in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.) is relied upon in this regard:

13. ...Whatever may be implied in a case of ambiguity or absence of a provision, no term may be implied in a contract which is contrary to the clearly expressed intention of the parties: see Chitty on Contracts, 25th ed. (1983), at p. 460, and *London Export Corp. v. Jubilee Coffee Roasting Co.*, [1958] 1 W.L.R. 661, [1958] 2 All E.R. 411 at 417-18 (C.A.), per Jenkins L.J.

27 I agree with the submissions of Cardinal that the terms of the Cardinal document are clear. I have referred to the provisions above and in my view they clearly reflect that the reasonable expectations of the parties were (from an objective point of view) that the Cardinal document was intended to cover all of Mr. Felice's terms and conditions of employment. It is also, in my view, clear that the reasonable expectations of the parties were that terms of the Futuremed Agreement would no longer be operative.

What is the reasonable period of notice under the common law?

28 Mr. Felice was employed by Futuremed, and then its successor Cardinal, between April 4, 2011 and December 5, 2012 for a period of 19 months.

29 I do not accept Cardinal's submission that Mr. Felice was only employed for three months. Cardinal inherited Mr. Felice's service with Futuremed when it bought all of its shares.

30 It is also alleged that Mr. Felice was enticed from secure employment to a senior executive position based upon representations made to him by Futuremed of long term opportunities for growth and security. Cardinal disputes this.

31 Mr. Felice argues that if his contractual severance is not upheld, a 12 month reasonable notice period should be awarded. He submits that in addition to the jurisprudence he relies on, the Court should note that the only agreement between the parties on what a reasonable notice was, was that 12 months was reasonable and appropriate. Mr. Felice relies on Mr. Sandrock's evidence that it was the common practice of Futuremed to provide its senior executives with 12 months of notice in the event of dismissal. This is evidence of the reasonable expectation of the parties.

32 As a result, it is submitted that the jurisprudence as well as the expressed mutual intentions of the parties supports an assessment of a 12 month reasonable notice period.

33 Cardinal argues that at the time that his employment was terminated, Mr. Felice was 52 years old, had less than 3 months service with Cardinal as a full time employee and approximately 1.5 years service with Futuremed as a contractor before that time. He was earning \$130,000 per year and held a director position. In these circumstances, Cardinal states that the offer it provided to Mr. Felice at the time of termination of 12 weeks (3 months) was appropriate.

34 Cardinal submits that Mr. Felice is not entitled to any additional damages because of the alleged inducement.

35 The burden of proving the inducement is on Mr. Felice. I find that Mr. Felice has not met that burden of proof. It refers to Mr. Felice's evidence that when he was contacted by Mr. Sandrock on behalf of Futuremed he expressed an interest in the position and looked forward to working with Mr. Sandrock. Mr. Felice was not told by Mr. Sandrock that his employment with Futuremed would be guaranteed. Cardinal also submits that Mr. Felice's evidence with respect to the security of his contracted position is not strong enough for this Court to make such a finding. It emphasizes that the only evidence in this regard is Mr. Felice's evidence. He refused to produce his contracts with the Town of Oakville. I agree that such self-serving evidence is not of great assistance to this Court.

36 The factors to be considered by the court when determining the applicable notice period are set out by the Court in *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.). These include:

- (1) the character of employment;
- (2) length of service;
- (3) age of the employee; and

(4) availability of similar employment having regard to the experience, training and qualifications of the employee.

37 There is a lot of judicial support for awards to short term senior executives receiving lengthy notice periods, both with and without enticement as a factor. Mr. Felice relies on this jurisprudence.

38 I agree with Mr. Felice that a 12 month period of notice, having regard to the *Bardai* factors and based on the jurisprudence relied on, is appropriate.

Bonus

39 Cardinal relies on the terms of its bonus plan, that to qualify for payment, employees must be actively employed in September of each year when the payments are made.

40 Further, it is submitted that the evidence was that Mr. Felice understood these limitations as they were set out in the Cardinal document and the requirements were explained in detail to him by Mr. Berneche.

41 Cardinal relies on jurisprudence that has held that where the terms of a plan are clear and unambiguous and the evidence suggests that the employee understood the eligibility requirements, bonus payments should be denied on the basis that the employee failed to meet the requirement by being actively employed at the time of payout. I agree that Mr. Felice has not met his burden of proving he is entitled to such bonus payments.

Damages

42 With the above findings, the parties can agree on the amount of damages that are awarded to Mr. Felice based on a reasonable notice period of 12 months, less the amounts he earned after his termination of employment.

Costs

43 If the parties are unable to agree on the issue of costs, they may make brief written submissions to me. As the rules provide, the submissions will be no longer than three pages in length. They will include a bill of costs, together with information on each lawyers' year of call and actual billing rate. If there are any offers of settlement that bear on the issue of costs, these will be included as well. The Plaintiff's costs submissions will be delivered within two weeks of the date of release of these reasons, with the Defendant's to be delivered within two weeks of receiving the Plaintiff's costs submissions.