CanLII

Fasullo v. Investments Hardware Ltd., 2012 ONSC 2809 (CanLII)

Date: 2012-05-10
Docket: CV-11-427687
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CITATION: Fasullo v. Investments Hardware Ltd., 2012 ONSC 2809
COURT FILE NO. CV-11-427687
DATE: 20120510

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ANTHONY FASULLO	))	*Matthew A. Fisher* for the Plaintiff
Plaintiff	)	
- and -	)	
	))	
INVESTMENTS HARDWA RE LTD.	))	*Stephen A. McArthur, Christopher E. Bergs* for t he Defendant
Defendant	)	
	))	
		HEARD: April 25, 2012

M.A. SANDERSON J.

REASONS FOR DECISION

Introduction

[1] This is a claim for damages for dismissal without cause brought under the Simplified Procedure /Rule 76.

[2] A summary trial took place before me on April 25, 2012.

[3] Three affidavits had been filed in advance of the summary trial, one of the Plaintiff, Anthony Fasullo ("Fasullo"), sworn January 17, 2012 and two of representatives of the Defendant, Investments Hardware Ltd. (the "Company" or the "Defendant"), sworn on March 2, 2012, one by its CEO, Giuseppe Martino ("Martino"), and another by Domenic

DeGiorgio ("DeGiorgio"). At the summary trial, Fasullo, Martino and DeGiorgio all gave brief evidence in chief, and were then cross-examined at length.

[4] The primary issue to be resolved was whether the Plaintiff is entitled to receive damages for wrongful dismissal in lieu of reasonable notice or is contractually bound by a provision in a document he signed on June 20, 2007 (“the June 20, 2007 Document.")

[5] The content and legal effect of prior oral discussions and an alleged employment agreement made in May 2007 (“the Contract”) and of subsequent amendments on October 25, 2007 and June 6, 2008 to the June 20, 2007 Document are also at issue. The quantum of damages is obviously dependant on the resolution of these issues.

Facts

[6] Fasullo gave evidence that the essential terms [$55,000 base salary plus commissions plus benefits as agreed] of his employment contract/the Contract with the Defendant, were finalized in May of 2007. Plaintiff's counsel submitted the Contract was complete in May 2007, before he resigned from his previous employment.

[7] There is no dispute that the parties settled these terms in May of 2007. Martino gave evidence that at a third meeting he and DeGeorgio attended with Fasullo in May of 2007, they agreed on salary and commission and shook hands. Fasullo was to start work on June 18, 2007.

[8] However, the parties disagree as to whether, in May of 2007, Martino explained and Fasullo agreed that in the event he were terminated without cause, Fasullo would only receive *Employment Standards Act 2000* SO 2000 c 41 (the "*Act*") notice [and severance pay], and would not presumptively be entitled to receive the damages in lieu of reasonable notice otherwise payable at common law.

[9] Fasullo gave evidence that before the Contract was finalized in May 2007, neither Martino nor De Georgio ever mentioned the *Act*. There was no discussion about any contractual imposition of restrictions on the notice or damages payable in lieu of notice in the event he were terminated without cause. He was not informed and did not agree to any imposition of a term in the Contract that his damages in lieu of notice would be limited and would be based on the minimum notice periods specified in the *Act*. Minimum periods were not explained or discussed. Indeed, Fasullo said he did not discuss with either or both of Martino and/or DeGeorgio what would happen in the event of termination.

[10] Martino gave evidence that at a third meeting with Fasullo on May 2007, he did explain that his employment contract would provide for payments on termination without cause of the minimum amounts payable under the *Act*. He said he explained the relevant notice periods and Fasullo agreed to accept amounts calculated on those periods if he were terminated without cause. De Georgio gave evidence he was present when Fasullo agreed.

[11] Fasullo said he accepted the offer of employment [that made no mention of limitations on his entitlements on termination without cause] made by Martino and DeGiorgio on behalf of the Defendant in May 2007. Relying on the Contract, he resigned his employment position at Mapie Incorporated.

[12] Fasullo started work at the Company on June 18, 2007.

[13] It was not until several days later, on June 20, 2007, that Martino and DeGiorgio presented the June 20, 2007 Document for his signature containing the following: "In order to accept this offer, you must agree to the terms and conditions …"

[14] Fasullo said while it was the same in many respects as the Contract already made, it

differed in one significant respect. It included the following clause:

Termination on Notice

The employer may terminate this agreement and your employment at any time upon giving you the written notice or pay in lieu of notice required under the *Employment Standards Act 2000*.

[15] In cross-examination, Martino [who of the two representatives of the Defendant said he had "greater responsibility for human resources"] had palpable difficulty outlining for this Court the applicable provisions of the *Act* that he said he had explained to Fasullo in May of 2007. His explanation of those provisions to this Court was incomplete. Some of it was incorrect. For instance, he wasn't sure whether the *Act* requires employers to pay benefits during the minimum statutory notice periods.

[16] Martino seemed patently uncomfortable trying to set out the applicable terms of the *Act*. His ability to explain the relevant provisions was wanting and I doubt he explained its terms to Fasullo during the third meeting in May in the manner he said he did.

[17] I reject Martino's evidence that he explained and that Fasullo understood the applicable provisions of the *Act* that would apply in the event of termination without cause, and that Fasullo agreed in that event to accept the notice and severance provided by that *Act*. Similarly, I reject the evidence of Martino and De Georgio about discussions with Fasullo in May 2007 about notice he would receive in the event of termination without cause.

[18] Overall, the evidence of both Martino and DeGiorgio was unconvincing. It seemed contrived. I note that the wording of their affidavits, both sworn on the same date, is virtually identical.

[19] Martino advised the Court in cross examination that he did not draft the June 20, 2007 Document. That was done by the Defendant Company's Human Resources Advisor.

[20] Given their apparent unfamiliarity and unease with the *Act* and legal matters generally, it seems unlikely that either addressed termination issues tied to the *Act* during their May 2007 discussions with Fasullo.

[21] I find the essential terms of Fasullo's employment had been agreed by the end of May 2007. The Contract was complete at that time. When Fasullo was hired the Contract contained no reference to the *Act* or to any restrictions on notice that would be imposed in the event of termination without cause.

[22] I find that the Termination on Notice clause in the June 20, 2007 Document was suggested and inserted in the June 20, 2007 Document by the Company's Human Resources Advisor only after Martino and DiGiorgio had already offered Fasullo employment and the Contract had been finalized without any mention of restrictions on notice [and severance] in the event of termination without cause.

[23] Defendants' counsel submitted that whether or not the Contract was complete in May 2007, the contents of the June 20, 2007 Document were entirely confirmatory of the terms already agreed in May.

[24] I disagree. The Notice on Termination provision in the June 20, 2007 Document was new. Its introduction constituted an attempt by the Defendant to unilaterally substantially alter the Contract.

[25] The June 20, 2007 Document makes no mention of the Contract or even of any previous discussions that had admittedly occurred. It purports to make the existence of an employment contract conditional upon the acceptance of all its terms.

[26] The Plaintiff signed the June 20, 2007 Document on June 20, 2007.

The Law

[27] Counsel for the Plaintiff submitted that the intention of the Plaintiff in signing the June 20, 2007 Document is irrelevant. As the Defendant provided no consideration to the Plaintiff for his signature on the June 20 2007 Document, it is null and void.

[28] Counsel for the Defendant submitted that even if the Termination on Notice clause were inconsistent with/constituted an amendment of the Contract, the Plaintiff accepted the June 20, 2007 Document including the new term and is bound by it.

[29] Counsel for the Plaintiff relied in argument on *Hobbs v. TDI Canada Ltd.,* 2004 CanLII 44783 (ON CA), 246 D.L.R. (4th) 43, where the Ontario Court of Appeal held that the Plaintiff was not bound by an amending agreement he signed in the absence of consideration. Juriansz J.A. for the Ontario Court of Appeal wrote at para. 32:

The governing legal authority … is *Francis v. Canadian Imperial Bank of Commerce* 1994 CanLII 1578 (ON CA), (1994), 21 O.R. (3d) 75 (C.A.). *Francis* makes it clear the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.

[30] In *Hobbs* Juriansz JA wrote at para 33-34:

[33] In *Francis v. Canadian Imperial Bank of Commerce* 1994 CanLII 1578 (ON CA), (1994), 21 O.R. (3d) 75 (C.A.), the employer had made a written offer of employment to the employee, subject to a satisfactory reference. The employee accepted the offer, and the satisfactory reference was obtained. When the employee arrived for his first day of work a few days later, he was given a document to sign entitled "Employment Agreement". This document provided that the employer could terminate the employee without cause upon giving one month's notice for each completed year of service, up to a maximum of three months' notice. Some eight years later, the employer terminated the employee. The trial judge concluded that the Employment Agreement was not binding on the employee and found that the appropriate notice period was twelve months.

[34] On appeal, this court upheld the trial judge's conclusion that the Employment Agreement was not enforceable. Weiler J.A., writing for the court, stated at p. 84 that the three months' notice period found in the Employment Agreement was "a tremendously significant modification of the implied term of reasonable notice" that applied to the original terms of employment. Additional consideration was required to support such a modification of the original terms of employment.

[31] He continued at paras. 41-43:

[41] In reaching this conclusion, Rosenberg J.A. was careful to distinguish *Francis*, as well as a decision of the British Columbia Court of Appeal to the same effect: *Watson v. Moore Corp*. 1996 CanLII 1142 (BC CA), (1996), 21 B.C.L.R. (3d) 157. He wrote at para. 26:
Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract, say, 'sign or you'll be fired' and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.

[42] The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability, and the courts should be careful to apply *Maguire* and *Techform Products* only when, on the facts of the case, the employee gains increased security of employment, or other consideration, for agreeing to the new terms of employment.

[43] In the present case, I conclude that Hobbs received no consideration for signing the Solicitor's Agreement. The trial judge made no finding that TDI, either explicitly or tacitly, promised to forbear from terminating Hobbs if he signed the Solicitor's Agreement, nor would the evidence have supported such a finding. There is no evidence that TDI wanted, or intended, to end Hobbs's employment prior to him signing the Solicitor's Agreement. Further, nothing in the evidence suggests that TDI considered that whatever right it had to dismiss Hobbs would be affected in any way by him signing the Solicitor's Agreement. Signing the Solicitor's Agreement did not provide Hobbs with any additional security in his employment than he had under the terms set out in TDI's letter dated December 16, 1999.

[32] Counsel for the Defendants relied on another decision of the Ontario Court of Appeal, *Wronko v. Western Inventory Service Ltd.,* 2008 ONCA 337 (CanLII), in submitting that because the Plaintiff accepted the change to the Contract by signing the June 20, 2007 Document, he is bound by it. In *Wronko*, an employee's three options when faced with an attempt by his employer to amend a fundamental term of his contract of employment were set out by Winkler C.J.O. as follows:

[34] First, the employee may accept the change in the terms of employment, either expressly or implicitly through apparent acquiescence, in which case the employment will continue under the altered terms.

[35] Second, the employee may reject the change and sue for damages if the employer persists in treating the relationship as subject to the varied term. This course of action would now be termed a "constructive dismissal", as discussed in *Farber*, although this term was not in use when *Hill* was decided.

[36] Third, the employee may make it clear to the employer that he or she is rejecting the new term. The employer may respond to this rejection by terminating the employee with proper notice and offering re-employment on the new terms. If the employer does not take this course and permits the employee to continue to fulfill his or her job requirements, then the employee is entitled to insist on adherence to the terms of the original contract. In other words, if the employer permits the employee to discharge his obligations under the original employment contract, then – unless proper notice of termination is given – the employer is regarded as acquiescing to the employee's position. As Mackay J.A. so aptly put it: "I cannot agree that an employer has any unilateral right to change a contract or that by attempting to make such a change he can force an employee to either accept it or quit." [Emphasis added]

[33] Counsel for the Defendant relied on the statement of law regarding the first option.

[34] He also relied on *Russo v. Kerr Bros. Ltd*, 2010 ONSC 6053 (CanLII), 326 D.L.R. (4th) 341 where an employee, when faced with a significant reduction in his compensation, commenced an action for constructive dismissal but continued to work for the defendant company under the new terms to mitigate his losses. Gray J. outlined the limits of this course of action and, in particular, the consequences of continuing to work for too long, even while formally protesting the new terms:

45 In the circumstances, the defendant must be taken to have understood that the plaintiff was remaining in the workplace, but not under the acceptance of any changed terms and conditions of employment. There is no reason in principle, in my view, why the plaintiff cannot be considered to be mitigating his loss by so doing.

46 One of the cases relied on by the defendant supports this view. In *Anstey v. Fednav Offshore Inc.*, [1990] F.C.J. No. 477 (T.D.), MacKay J. stated as follows:
An employee who remains in the new position, changed unilaterally by the employer, with a view to mitigating his or her damages may be expected to do so only for a period constituting reasonable notice or until within that period they secure alternative employment. What will constitute a reasonable notice period will of course depend upon a variety of factors. For the employee to remain in the position without indicating to the employer his or her dissatisfaction with the altered employment relationship, it may be seen as condonation of the change and acceptance by the employee of the new position, particularly after a reasonable time. Indeed, an employee who remains in the new position for an extended period of time, could be viewed as having condoned the change. The employee's active remaining may ultimately speak louder than voicing dissatisfaction for, though discontented, he or she may well be seen as having accepted the change. [Emphasis added]

47 I agree with these observations. As applied to this case, the plaintiff can remain in the workplace under the changed terms as a means of mitigating his damages, but only for the period of reasonable notice. If he elects to remain in the workplace under the changed terms beyond the period of reasonable notice, with the consent of the defendant, it must then be concluded that he has accepted a new contract of employment under the changed terms after the expiry of the period of reasonable notice.
[Emphasis added]

[35] This Court admits to having had some difficulty in reconciling the two lines of cases.

[36] However, I have found the decision of the Supreme Court of Canada in *Machtinger v HOJ Industries*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986 helpful in resolving my concerns. In that case, the Court held that while the common law principle of termination only on reasonable notice is presumptively applicable, it is rebuttable if the contract of employment clearly specifies some other period of notice that is equal to or greater than the minimum notice required under the *Act*. The majority noted that employers can make contracts which referentially incorporate the minimum notice provisions in the *Act*.

[37] However, where the termination provisions in employments contracts of two employees provided for less notice than was their entitlement under the *Act*, the trial judge held them null and void, and ordered payment of damages in lieu of reasonable notice. The Court of Appeal for Ontario allowed the appeal, holding that despite the fact that the termination clauses the employer was seeking to enforce were null and void, the Contract terms and the course of dealing between the parties provided evidence from which the parties' intention could be inferred. The Supreme Court allowed the appeal and restored the result at trial. Iacubucci J for the majority wrote at para 28:

[28] In this case we are not faced with an entirely void contract, but a contract of which one clause is null and void by operation of statute. I would nonetheless apply the reasoning of Kerr L.J.: if a term is null and void, then it is null and void for all purposes, and cannot be used as evidence of the parties' intention. If the intention of the parties is to make an unlawful contract, no lawful contractual term can be derived from their intention. In *Erlund v. Quality Communication Products Ltd.* (1972), 1972 CanLII 1196 (MB QB), 29 D.L.R. (3d) 476 (Man. Q.B.), Wilson J. was faced with a contract of employment which was void by reason of the *Statute of Frauds*. Relying on *James v. Thomas H. Kent & Co.*, [1950] 2 All E.R. 1099 (C.A.), Wilson J. held that in the absence of a valid contract, he had no choice but to imply a term that the employee was entitled to reasonable notice. [Emphasis added.]

[38] It might be argued that the facts in that case are distinguishable from those in the case at bar because *Machtinger* did not involve a contractual provision that would have been enforceable had adequate consideration been provided. It might be argued that here, the signature on the void contract containing the Notice on Termination Clause is evidence of the Plaintiff's intention/what he would have agreed had the clause not been held to be null and void.

[39] However, I also note that in the passage from *Machtinger* quoted above, the Supreme Court reasoned that the null and void term itself could not be used as evidence of intention.

[40] Here, apart from the Plaintiff's signature [given in the absence of consideration] and the content of the void clause itself, there is no evidence of intention as to what the parties would have agreed had the Termination on Notice Clause not been held to be null and void.

[41] McLachlin J. (as she then was) noted that the stipulation for notice was null and void. Where a contract is silent as to the term of notice upon dismissal, the court will imply a term of notice. She disagreed with the reasoning of the Court of Appeal in implying a term it felt reflected the intention of the parties. She wrote at paras. 45-48:

[45] So the real issue is this: in the absence in a contract of employment of a legally enforceable term providing

for notice on termination, on what basis is a court to imply a notice period, and in particular, to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?

[46] This question cannot be answered without examining the legal principles governing the implication of terms. The intention of the contracting parties is relevant to the determination of some implied terms, but not all. Intention is relevant to terms implied as a matter of fact, where the question is what the parties would have stipulated had their attention been drawn at the time of contracting to the matter at issue. Intention is not, however, relevant to terms implied as a matter of law. As to the distinction between types of implied terms see Treitel, *The Law of Contract* (7th ed. 1987), at pp. 158-165 (dividing them into three groups: terms implied in fact; terms implied in law; and terms implied as a matter of custom or usage), and *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711.

[47] Requirements for reasonable notice in employment contracts fall into the category of terms implied by law: *Allison v. Amoco Production Co.*, reflex, 1975 CanLII 247 (AB QB), [1975] 5 W.W.R. 501 (Alta. S.C.), at pp. 508-9 *per* MacDonald J. They do not depend upon custom or usage, although custom and usage can be an element in determining the nature and scope of the legal duty imposed. Nor do they fall into the category of terms implied as a matter of fact, where the law supplies a term which the parties overlooked but obviously assumed.

[48] Terms implied in contracts of employment imposing reasonable notice requirements depend rather on a number of factors, which

> . . . must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

(*Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.), at p. 145 *per* McRuer C.J.H.C.)

These considerations determine the appropriate notice period on termination. They do not depend upon contractual intention. Indeed, some of them -- such as the length of service and prospects of employment -- are usually not known at the time the contract is made. Thus the term of notice fixed by the court is, to borrow the language of Treitel at p. 162, a "legal incident" of a particular kind of contractual relationship.

[42] In the case at bar, the Contract [the oral employment contract reached in May 2007] contained nothing clearly specifying a period of notice equal to or greater than the minimum notice required under the *Act*. The Contract is presumptively assumed to contain an implied term that in the event of termination without cause, common law reasonable notice or payment of damages in lieu thereof would be required.

[43] On the evidence here, I am of the view that there was no consideration offered or passing to Fasullo on June 20, 2007. Signing the June 20, 2007 Document did not provide him with any additional security or benefits in his employment than he had under the existing Contract.

[44] Unless his signature/agreement made without consideration on June 20, 2007 makes the June 20, 2007 Document enforceable, the Contract would govern. It would apply without amendment.

[45] I have concluded that the reasoning of the Court of Appeal in *Wronko* is not applicable on the facts here. In *Wronko* the Court made no mention of any lack of consideration flowing from the employer at the time it sought the amendment. It appears that in that case the Court was satisfied that adequate consideration had been provided for the amendments being sought at the time the employee agreed to them.

[46] Similarly in *Russo*, there was no mention of any lack of consideration for an amendment. The issue in *Russo* was not consideration, but acquiescence to constructive dismissal by conduct extending beyond the reasonable notice period.

[47] Therefore, in the absence of consideration provided by the employer /Defendant to the Plaintiff on June 7, 2007, I am of the view that the Defendant cannot rely on the

Termination on Notice Clause in the June 20, 2007 Document [unless the Notice on Termination Clause in it was somehow revived by the provision of later consideration.]

[48] The Plaintiff signed another two documents in October of 2007 and June of 2008, and continued in his employment until he was dismissed in March of 2011.

[49] Counsel for the Defendant submitted in the alternative that even if the Plaintiff received no consideration for signing the June 20, 2007 Document, the Termination on Notice was effectively and retroactively revived at the time of either or both of those two amendments when consideration was provided.

[50] On October 25, 2007, Fasullo signed an "Amendment to Offer of Employment" that confirmed that "as of October 1, 2007," the following changes had been made to "your existing offer of employment dated June 20, 2007."

[51] I note that “the existing contract of employment,” the Contract then in force, was the May 2007 Contract. As I have held, the Notice on Termination clause in it was null and void. The existing contract of employment did not include the Termination on Notice clause. The Defendant was simply mistaken that the existing contract of employment was that of June 20, 2007.

[52] At that time, for the first time, Fasullo was to receive a car allowance of $650 per month, a cell phone and a gas card. His job description had changed so that he was required to travel by car to visit potential customers. The changes were solely for business related use and covered work-related expenses only. Martino deposed in paragraph 12 of his affidavit that "those entitlements were for work purposes only."

[53] The October 25, 2007 amendment did not mention termination. In my view it was not intended to provide consideration of a nature that could revive the Termination on Notice provisions in the June 20, 2007 Document and it did nothing to cure the deficiencies of the June 20, 2007 Document.

[54] Similarly, the June 6, 2008 letter refers to Fasullo’s" original offer of employment," which I have found was the verbal May 2007 Contract, without any termination provision, not the June 20, 2007 Document.

[55] The change as of June 6, 2008 to his hours of work from Monday-Friday, 6-3:30 and Saturdays as agreed to 7:00a.m.-5:00p.m. Monday through Friday (with a commitment to spend hours in excess of this schedule to meet the duties and responsibilities of this position) did not in my view put the Plaintiff in an enhanced position or constitute consideration of a nature to retroactively revive the Termination on Notice provision in the June 20, 2007 Document.

[56] In summary, if Fasullo received no consideration for signing the June 20, 2007 Document, at law the Termination on Notice clause in it is null and void. The Plaintiff cannot be bound by a provision that was null and void *ab initio* and continued to be null and void to the date of his dismissal. The Contract was never amended to include a valid Termination on Notice Clause. The Defendant cannot rely on that clause in the June 20, 2007 Document to limit the Plaintiff's claim to presumptive reasonable notice and severance pay based on reasonable notice.

[57] As was the case in *Hobbs*, there is no evidence here of detrimental reliance by the Defendant. The Defendant may have believed the June 20, 2007 Document was enforceable but it took no action to its detriment on the basis of that belief.

What is Reasonable Notice Here?

[58] The following reasoning of McRuer C.J.H.C. in *Bardal v. Globe & Mail Ltd.* (1960), 1960 CanLII 294 (ON SC), 24 D.L.R. (2d) 140 (Ont. H.C.), at pg. 145 is often quoted in determining reasonable notice:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[59] The Plaintiff is now 35 years old. He is relatively young.

[60] He worked for the Defendant from June 18, 2007 to March 10, 2011, a total of 3 years and 9 months.

[61] He was a salesman seeking to develop a customer base and sell the Company's products. The Plaintiff had sales responsibilities of importance to the Defendant. The June 6, 2008 letter from the Defendant to the Plaintiff refers to the Defendant's expectation that he would generate a minimum of $100,000 per month in gross sales.

[62] His 2010 T4 income was $82,231.42, comprised of base salary of $55,000 plus commissions.

[63] His earnings are another indicator that the Defendant considered the Plaintiff to hold a position of some significance to the Company. He had a car allowance and gas card for Company travel but received no personal benefit from it. The Defendant provided a prescription, dental and medical plan.

[64] In all the circumstances here, I am of the view that notice of 3.9 months would have constituted reasonable notice.

Damages

[65] Counsel have agreed on an amount for damages comprised of salary/commission of $6,852.62 plus monthly cost of benefits of $177.84, which expressed on a monthly basis is $7,030.46 per month.

[66] $7,030.46 per month x 3.9 months = $27,418.79. After deducting the amount already paid of $4,230.76, I hold that damages of $23,188.03 are appropriate.

Disposition

[67] I would like to compliment both Counsel on their able submissions and great assistance to this Court.

[68] In the result, Judgment will go against the Defendant for payment to the Plaintiff in the amount of $23,188.03 plus costs.

[69] Counsel may make written submissions on costs limited to five pages each, on or before May 25, 2012.

_____
M.A. SANDERSON

Released:

CITATION: Fasullo v. Investments Hardware Ltd., 2012 ONSC 2809
COURT FILE NO. CV-11-427687
DATE: 20120510

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANTHONY FASULLO

Plaintiff

- and –

INVESTMENTS HARDWARE LT
D.

Defendant

REASONS FOR DECISION

M.A. SANDERSON J.

[70]

Released: May 10, 2012

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