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Inducement and Invalid Termination Provision Prove Costly for Employer

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By Daniel Wong, Fiona Wong

Inducing an employee to leave secure employment can be costly for an employer when it comes to a termination of employment without cause. Inducement is an argument that is often advanced by employees, but not always successfully. *Miller v AlayaCare Inc.*, 2025 ONSC 1028 ("*Miller*") serves to clarify what constitutes inducement in the circumstances. Earlier this year, the Ontario Superior Court of Justice released *Miller*, a wrongful dismissal claim, which examined the factors of inducement and the enforceability of termination clause language.

In *Miller*, Ms. Miller was a senior executive employee induced by her employer, AlayaCare Inc., from her previous employment where she worked for 12 years. Her compensation package included an increased salary compared to her salary from her previous employer, bonuses, and equity in the form of restricted share units (RSUs) that vested over time. As a result of accepting the offer with AlayaCare, she forfeited unvested equity in RSUs and stock options that she held with her previous employer, worth an estimated USD$407,465. The terms of this increased compensation were outlined in an offer letter, followed by an employment agreement. The offer letter included one sentence stating that upon a termination without cause, she would receive a minimum of 4 months of base salary, as follows:

In the unlikely event that you are terminated without cause, you will receive a minimum of 4 months of base salary.

In the employment agreement, a more comprehensive termination clause outlined her entitlement to a payment in the amount of four (4) months of base salary and continuation of employee benefits for four (4) months. The termination clause did not contain language to allow the employer to terminate Ms. Miller's employment without cause "at any time", which the court in *Dufault* held to contravene the minimum standards provided for in the *Employment Standards Act, 2000* (the "ESA") , but did contain language that allowed it to do so "at its sole discretion for any reason":

AlayaCare may terminate your employment at its sole discretion for any reason or for no reason, without cause, by providing you with (i) a payment in the amount of four (4) months of your base salary (net of required withholdings); and (ii) a continuation of your then-current Employee Benefits for a coterminous four (4) month period. You agree and acknowledge that this compensation shall be AlayaCare's sole obligation and your sole entitlement to any pay in lieu of notice, benefits, equity compensation, bonus or variable compensation or commissions of any and all nature whatsoever upon a termination of your employment under this Section. You acknowledge and agree that you have reviewed this entitlement with legal or other experts of your choosing and you enter into it voluntarily as full satisfaction of any common law or other rights that you may have.

The for-cause termination provision in the employment agreement read:

AlayaCare may terminate your employment at any time for Cause without payment of any compensation either by way of anticipated earnings or damages of any kind. "Cause" for the purposes of this agreement means any cause recognized at law which would entitle

AlayaCare to terminate your employment without notice or pay in lieu thereof, including anything that constitutes "serious reason" within the meaning of the laws of Ontario. If your employment is terminated for Cause, you shall be entitled to all salary earned on or before the date of termination plus any accrued and unpaid vacation pay as of the date of termination. All Employee Benefits will cease as of the date of termination. No termination pay shall be owed in the event of termination for Cause. No termination pay shall be owed in the event of termination for cause [*sic*].

Ms. Miller's employment with AlayaCare only lasted about 7 months as Vice President, Client Services at which time her employment was terminated without cause. She was paid 4 months' salary but was not provided with the proceeds of the vested RSUs.

Applying *Rahman v Cannon Design Architecture Inc.*, 2022 ONCA 451, the court held that a provision permitting termination without notice and without payment in lieu for "just cause" that falls short of wilful misconduct violates section 5 of the *ESA* and renders it void. Section 5 of the *ESA* says that an employer cannot contract out of an employment standard. On this basis, the court held that the employment agreement was not enforceable.

Turning to the offer letter, as the employer argued that the termination language in the offer letter applied even if the termination provision in the employment agreement was found invalid, the court held that because 1) the clause did not clearly have the effect of stating that the common law no longer applied and 2) the termination provision in the offer letter did not address any benefits and/or bonuses payable upon termination, it was not enforceable either, and therefore Ms. Miller was entitled to reasonable notice of the termination of her employment.

When the court had to determine the amount of reasonable notice at common law, it considered:

- her 12 years of prior service with the previous employer, given that she was only employed by the recent employer for 7 months;
- her senior executive position in a niche industry, where she reported to the COO;
- her significant compensation package;
- her age (62 years old); and
- inducement by AlayaCare, and the fact that she anticipated long-term employment with the defendant.

The factors supporting a finding of inducement included the fact that:

- the company sought her out, with the company contacting her on LinkedIn, and she did not approach the defendant (despite being dissatisfied with the previous employer);
- the company made representations in its correspondence that it was expanding, and they wanted her experience to help them grow the company;
- the recent employer agreed to pay for her legal costs/indemnify her should her previous employer commence litigation against her, which it did, and the injunction and claims sought against her were both dismissed;
- the recent employer inquired about her existing rate of compensation, including RSUs and bonuses, so that they could have a "good sense of what it would take… to lure" her over, and the Court explicitly noted that the RSUs formed a significant part of her new compensation; and
- the company embarked on an "aggressive growth strategy" in 2021 but later terminated the employment of 80 employees, including Ms. Miller.

In the end, despite securing employment within 6 months after termination at a lower rate of compensation, Ms. Miller still received 14 months' notice for lost salary, benefits, bonuses, and RSUs, for a total award of $204,404.18. The court explicitly noted that the speed with which Ms. Miller was able to secure alternative employment was and should not be considered by the court in determining the period of reasonable notice. Notice was determined by the circumstances existing at the time of her termination.

Key Takeaways for Employers:

1. Careful drafting of termination clauses continues to be important, especially:

a. in just cause termination clauses permitting termination without notice or payment, the threshold of "wilful misconduct" must be met to prevent breaching section 5 of the *ESA*, which states that an employer cannot contract out of employment standards with an employee; and

b. in without cause termination clauses, avoid the use of "base salary" and follow the more expansive definition of "wages" under the *ESA* instead so that those clauses are not offside of any *ESA* requirements to pay other elements of compensation to the dismissed employee, in addition to their base salary.

2. Be mindful that certain actions in reaching out to potential candidates for employment may, in certain circumstances, constitute inducement that may result in the court recognizing the candidate's service with their prior employer if they are entitled to reasonable notice of a without cause termination.

3. An employee's compensation should be clearly spelled out in an employment agreement, and the terms should exactly match as between the offer letter and employment agreement to avoid ambiguity.

4. Generally, an employee's RSUs and stock options are still payable within the period of reasonable notice – as such, it is important to have strong language in place for stock option and RSU agreements outlining entitlements upon termination to limit liability.

5. Where a bonus is non-discretionary and forms an integral part of the employee's compensation package, damages for wrongful dismissal includes both the bonus actually earned before termination and the bonus that would have been earned during the notice period, unless the terms of the bonus plan alter or remove that right. As such, it is important to have strong language in place for bonus plans outlining entitlements upon termination.

[1] *Dufault v The Corporation of the Township of Ignace,* 2024 ONSC 1029. Read our article on the trial decision here.

For more information or inquiries:

Daniel Wong

Toronto
416.947.5042

Email:
dwong@weirfoulds.com

Daniel Wong is Chair of the Firm's Employment & Labour Practice Group with a practice that is focused on employment and labour relations.

Fiona Wong

Toronto
416.619.6282

Email:
fwong@weirfoulds.com

Fiona Wong is an Associate in the Employment & Labour Practice Group at WeirFoulds LLP.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035