CITATION: Miller v. Alaya Care Inc., 2025 ONSC 1028
COURT FILE NO.: CV-23-31764
DATE: 20250214

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Moyra Miller	)	
Plaintiff/Moving Party	)	Stephen J. Moreau and Kaley Duff, for the Plaintiff/Moving Party
– and –	)	
Alaya Care Inc.	)	
Defendant/Responding Party	)	Jonathan L. Dye, for the Defendant/Responding Party
	)	**HEARD:** July 8, 2024, and further written submissions January 27, 2025

RULING ON MOTION FOR SUMMARY JUDGMENT

CARROCCIA J.:

[1] The plaintiff brought a motion for Summary Judgment seeking a declaration that she was wrongfully dismissed from her employment by the defendant, a declaration that the defendant breached the employment contract between them, damages, pre-judgment and post-judgment interest and costs.

[2] The plaintiff submits that she was terminated from her employment with the defendant without cause and without notice. While she was terminated, she was provided with four months pay in lieu of notice.

[3] The issue is whether the plaintiff is entitled to reasonable notice pursuant to the common law or whether the liability of the defendant is limited to the notice set out in the Offer of Employment Letter and/or the Employment Agreement.

BACKGROUND

[4] The facts are not significantly disputed. The plaintiff, Moyra Miller, was employed by WellSky, a technology company (and its predecessors) for nearly 12 years but left that

employment to work for the defendant. She resigned from WellSky on December 15, 2021. At that time, her salary was $175,515 in Canadian funds plus bonuses (which was anticipated to be $50,000 based on past bonuses paid), incentive payments, as well as stock options.

[5] At the time of her resignation from WellSky, Ms. Miller, who was 61 years old, was the most senior employee of that company in Canada, she managed client relationships in Canada and the United States, she was responsible for the operation of the account management teams and she was the Director of WellSky's Canadian subsidiary. She was considered a valuable employee at WellSky and represented the company at industry conferences.

[6] Ms. Miller began having discussions with AlayaCare Inc. (AlayaCare), a software-as-a-service company for the homecare industry in Ontario commencing in the Fall of 2021 when she was approached by the defendant. WellSky was AlayaCare's biggest competitor. Although the plaintiff attests that she was not interested in leaving her employer, she was prepared to meet with Mr. Brady Murphy who was the co-founder of AlayaCare when he messaged her through LinkedIn and invited her to meet with him and other "team members who would try and convince [her] to leave WellSky and join AlayaCare as an executive employee".[1]

[7] The plaintiff continued her discussions with Mr. Murphy by telephone and through him met Mr. Adrian Schauer, the Chief Executive Officer of AlayaCare. Further messages were exchanged through LinkedIn. The plaintiff met with Mr. Murphy in person on October 20, 2021, at which time they had a discussion during which she disclosed to him her salary, bonuses and stock options. The plaintiff expressed a concern that if she left her employment with WellSky to work for AlayaCare, they might sue her. AlayaCare undertook in writing to pay for a lawyer to defend any action that WellSky might bring.

[8] According to the affidavit of Adrian Schauer, the Chief Executive Officer of AlayaCare, sworn January 5, 2024, the plaintiff indicated to him, that she had grown unhappy with WellSky. Ms. Miller's evidence (by affidavit) is that although things were not perfect with her then-employer, she did not intend to leave.

[9] On November 23, 2021, Ms. Miller accepted an invitation to attend at the AlayaCare offices in Toronto, Ontario to meet with other "team members".

[10] AlayaCare offered Ms. Miller a compensation package to work for them that included an increased salary, bonuses, and equity in the form of Restricted Share Units or "RSUs" set to vest in the future. The plaintiff would stand to forfeit any unvested equity in RSUs and stock options she had with WellSky, for a forfeiture of approximately $407,465 in U.S dollars if she left WellSky.

[1] Affidavit of Moyra Miller sworn November 1, 2023, at para. 26.

[11] These discussions continued culminating in a letter containing an Offer of Employment that was sent to Ms. Miller on November 27, 2021. The parties entered into an Employment Agreement in writing on December 15, 2021, which incorporated the Offer Letter into its terms. The Offer Letter included the following term:

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

[12] Furthermore, the Employment Agreement contains the following term at para. 13:[2]

> 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.

[13] The plaintiff accepted the offer and gave notice by email to WellSky on December 15, 2021, which was to be effective January 7, 2022.

[14] After the plaintiff began working for AlayaCare, she noticed some "red flags" that caused her concern. She states that her duties were changed and she was not performing the duties set out in the Offer Letter and Employment Contract she signed.[3]

[15] Shortly after her resignation from WellSky, Ms. Miller received a letter from a lawyer representing WellSky who indicated that WellSky believed she was working for a competitor and had taken confidential information with her upon leaving WellSky. WellSky thereafter commenced litigation seeking an injunction against the plaintiff. AlayaCare retained counsel on behalf of the plaintiff and defended that claim. The motion for an injunction against Ms. Miller brought by WellSky was ultimately dismissed and the action was thereafter dismissed.

[16] Ms. Miller was employed by AlayaCare from January 17, 2022, until August 15, 2022, in the position of Vice President, Client Services until her employment was terminated without cause.

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[2] Affidavit of Moyra Miller sworn November 1, 2023, Exhibit Q.
[3] Affidavit of Moyra Miller sworn November 1, 2023, at para. 51.

[17] Ms. Miller had a phone conversation with Mr. Schauer on August 9, 2022, wherein he indicated that her employment with AlayaCare would be terminated in the near future. On August 15, 2022, the plaintiff was terminated by letter due to "a reduction in its [AlayaCare's] workforce" without notice. That letter was apparently sent by email to all staff to announce a restructuring of the company. The letter (and a revised letter dated August 17, 2022) included information about a severance package in exchange for signing a release.

[18] The terms of the plaintiff's employment with AlayaCare included a base salary of $200,000, with a bonus "up to $40,000". The bonus would have been paid following an assessment in November or December annually of the plaintiff's performance. Ms. Miller did not receive any bonus payment after her termination, nor did she receive any payout for the RSUs which would have vested over a three-year period. Ms. Miller was paid $66,666.67 after the date of termination which represents four months' salary.

[19] Following the termination of her employment, the plaintiff felt betrayed. She had been recruited to leave her secure employment with WellSky by the promise of increased financial benefits. The plaintiff took some time to process the situation and take care of her elderly mother and stepfather before returning to the workforce. She began to seek out employment commencing in October 2022 and ultimately secured employment with AxisCare on February 28, 2023. She had to accept a lower compensation package than the one with AlayaCare.

[20] Mr. Schauer who is the Chief Executive Officer and Director of AlayaCare provided an affidavit in which he attests that during negotiations with Ms. Miller, changes were made to the Employment Agreement at the request of the plaintiff (i.e. an extra week of vacation was added and a clause indicating that AlayaCare would indemnify the plaintiff in the event that WellSky took legal action against her). He notes that she did not request any change to the clauses related to the rights and obligations of the parties to terminate her employment. Further, she did not specifically request that AlayaCare recognize her prior work with WellSky as a term of her employment.

[21] In August 2022, AlayaCare decided to restructure as a result of slower than expected revenue growth and, as a result, it reduced its workforce by 80 employees, including the plaintiff.

[22] Mr. Schauer attests that Ms. Miller was also offered, in exchange for signing a release, six months of pay subject to mitigation in the form of a reduction of 50 percent of that amount if she secured alternative employment, continued vesting of any RSUs until February 13, 2023, which would have amounted to 840 RSUs and outplacement services.[4] Ms. Miller did not accept this offer.

[4] Affidavit of Adrian Schauer sworn January 5, 2024, at para. 37.

[23] Mr. Schauer attests that despite her rejection of this offer, the 840 RSUs due to vest in January 2023 have been credited to Ms. Miller. Ms. Miller attests that she has no access to the account and does not have any vested RSUs from AlayaCare.

[24] After the hearing of this motion, but before the court's ruling was released, the Court of Appeal of Ontario released its decision in *Dufault v. The Corporation of the Township of Ignace*, 2024 ONCA 915. At the request of counsel for the plaintiff/moving party, the parties were permitted to make further submissions in writing on the applicability of that case to these circumstances.

THE POSITION OF THE PARTIES

The position of the plaintiff

[25] The parties agree that this is an appropriate case for summary judgment to be granted. The plaintiff submits that the issues to be decided are:

i) Is the plaintiff owed reasonable notice or shorter contractual notice as the defendant contends? and

ii) If she is entitled to reasonable notice, what is the length of the reasonable notice?

[26] The plaintiff takes the position that the terms of the Employment Agreement are unenforceable insofar as they conflict with the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"), and, accordingly, the plaintiff is entitled to reasonable notice upon termination (and not the shorter period of notice set out in the Employment Agreement).

[27] In considering what period would constitute reasonable notice, the plaintiff submits that there is significant evidence of inducement by AlayaCare to cause the plaintiff to leave her previous employment and work for the defendant. Accordingly, the plaintiff takes the position that she should be treated as a 12.5-year employee in a senior role who was terminated at age 62 and should have been given a lengthy period of notice totalling 22 months.

[28] It is the submission of the plaintiff that the court should find that she was wrongfully terminated and is entitled to damages in lieu of a 22-month notice period. She was paid four months' salary and was promised that one third (1/3) of the RSUs would be vested but they have not been.

[29] The plaintiff suggests that where, as here, there is evidence of inducement and the promise of job security, even short-term employees are entitled to be awarded notice periods in the range of 18-22 months. It would be unfair to fix the notice period on the basis of the plaintiff's short employment with AlayaCare given all of the circumstances.

The position of the defendant

[30] It is submitted by the defendant that the plaintiff was a short-term employee who was terminated without cause but who was provided with pay in lieu of notice in excess of what she was entitled to under the ESA.[5]

[31] The defendant takes the position that even if the terms of the Employment Agreement are unenforceable, the offer letter, which does not "contract out" of the ESA, governs the terms of the plaintiff's employment.

[32] It is the position of the defendant that Ms. Miller has received all that she is entitled to and AlayaCare is not liable for damages in lieu of notice for her termination.

[33] Alternatively, the defendant submits that the damages sought by the plaintiff are excessive and do not constitute reasonable notice. The defendant denies that Ms. Miller was induced to leave her previous employment and argues that if the court finds that she was, this is but one factor to be considered in determining what constitutes reasonable notice in the circumstances.

[34] Further, the defendant submits that the plaintiff had no entitlement to RSUs as part of her entitlement on termination based on the terms of the Offer Letter and the RSU Plan and Grant documents. Despite this, AlayaCare provided 840 RSUs which were due to vest on January 15, 2023.[6]

[35] The defendant submits that the RSUs do not have inherent value because AlayaCare is a privately owned company. Their value can only be realized upon sale of the business or if the business were to "go public". No owner of the RSUs has the right to obtain the cash value for them, including the plaintiff.

THE LEGAL PRINCIPLES

[36] Rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O.1990, Reg. 194 (*Rules*) states that:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all, or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[5] Under the ESA, the plaintiff would have been entitled to only one week's notice.
[6] This is subject to the evidence of the plaintiff that she has been unable to access the RSUs.

General Principles

[37] An employee who is dismissed without cause is entitled to reasonable notice to afford them a reasonable amount of time to secure alternative employment.[7]

[38] In *Andros v. Colliers Macaulay Nicolls Inc.*, 2019 ONCA 679, at paras. 18-19, the court of Appeal addressed the issue of contractual notice versus reasonable notice and said:

> There is a common law presumption that an employee's dismissal without cause will only take place on reasonable notice to that employee. That presumption is rebutted only "if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly" (emphasis added): *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at p. 998; *Wood*, at paras. 15, 28. If the common law presumption of reasonable notice has not been clearly rebutted, then the employee is entitled to pay in lieu of notice for the reasonable period under the common law.
>
> The *ESA* contains employment standards distinct from those at common law. An employment standard is defined in s. 1(1) to mean a "requirement or prohibition" under the *ESA* that applies to an employer for an employee's benefit. Subsection 5(1) of the *ESA* prevents employers, employees and their agents from contracting out of or waiving "an employment standard". The length of notice of termination, the payment of benefits during notice periods, and the payment of severance all constitute "requirements" applying to an employer for an employee's benefit, and therefore constitute employment standards. These employment standards cannot be contracted out of unless the contract is for a "greater benefit" than what the *ESA* provides for: *ESA*, s. 5(2).

[39] In *Movati Athletic (Group) Inc v. Bergeron*, 2018 ONSC 7258, the Divisional Court set out at para. 24 the steps to be followed to determine whether a contractual provision can rebut common law notice. The steps to be followed are:

1. All contractual provisions must meet the minimum notice requirements for termination without cause set out in the *ESA*: *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41, at p. 998;
2. There is a presumption that an employee is entitled to common law notice upon termination of employment without cause;
3. Provided minimum legislative requirements are met, an employer can enter into an agreement to contract out of the provision for reasonable notice at common law upon termination without cause: *Nemeth v. Hatch*

[7] *Lynch v. Avaya Canada Corporation*, 2023 ONCA 696, at para. 9.

Ltd., 2018 ONCA 7, 287 A.C.W.S. (3d) 291 (Ont. C.A.) at para. 11 citing *Machtinger* at pp. 1004-1005;

4. The presumption that an employee is entitled to reasonable notice at common law may be rebutted if the contract specifies some other period of notice as long as that other notice period meets or exceeds the minimum requirements in the *ESA*: *Machtinger supra,* at p. 998;

5. The intention to rebut the right to reasonable notice at common law "must be clearly and unambiguously expressed in the contractual language used by the parties": *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158 (CanLII), 134 O.R. (3d) 481, at para. 40;

6. The need for clarity does not mean a specific phrase or particular formula must be used, or require the contract to state that "the parties have agreed to limit an employee's common law rights on termination". The wording must however, be "readily gleaned" from the language agreed to by the parties: *Nemeth* at para. 9;

7. Any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the principle of *contra proferentum*: *Miller v. A.B.M. Canada Inc.*, 2015 ONSC 1566 (CanLII), 27 C.C.E.L. (4th) 190, at para. 15 (Div. Ct.); *Ceccol v. Ontario Gymnastic Federation* (2001), 2001 CanLII 8589 (ON CA), 55 O.R. (3d) 614 (C.A.), at para. 45; and

8. Surrounding circumstances may be considered when interpreting the terms of a contract but they must never be allowed to overwhelm the words of the agreement itself: *Sattva* at para. 57.

Enforceability of Employment Contracts that breach the Employment Standards Act

[40] In *Dufault v. The Corporation of the Town of Ignace*, 2024 ONCA 915, the Court of Appeal determined that the motion judge did not err in determining that the termination "for cause" clause in the employment contract in this case was unenforceable since it did not comply with the minimum requirements of the ESA.

[41] The court upheld its earlier finding in *Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (which was followed in *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451), where it determined that the termination provisions in an employment contract must be read as a whole and if one termination provision in an employment contract violates ESA minimum standards, then all provisions in the contract are invalid (at para. 23).

[42] Accordingly, it is irrelevant whether an employee is terminated with or without cause, if either clause in an employment contract is found to violate the ESA, then both clauses are invalid and unenforceable: *Dufault*, at para. 24.

[43] In *Waksdale*, the court said that even if an employer's actions comply with its ESA obligations on termination, that compliance does not save a termination clause that violates the ESA (at para.8).

Factors to be considered in determining reasonable notice

[44] The oft-quoted decision of *Bardal v. The Globe & Mail Ltd.* (1960), 24 D.L.R (2d) (H.C.J.) at p. 145, sets out the basic principles to be applied in a determination of what constitutes reasonable notice of termination:

> 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.

[45] In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 82-83, the Court held that the *Bardal* factors are not exhaustive and a factor that can be considered in determining what constitutes reasonable notice is whether the employee was induced to leave previous secure employment. Iacobucci J. speaking for the majority of the Court said at para. 85:

> In my opinion, such inducements are properly included among the considerations which tend to lengthen the amount of notice required. I concur with the comments of *Christie et al*., supra, and recognize that there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements will carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.

[46] In *Love v. Acuity Investment Management Inc.*, 2011 ONCA 130, the appellant who was also a 2 percent owner of the company was dismissed without cause at age 50 after approximately two-and-a-half years of service. The court held in that case that determining an appropriate notice period required the weighing and balancing of a variety of relevant factors. At para. 19, Goudge J.A. said:

> First, it overemphasizes the appellant's short length of service. While short service is undoubtedly a factor tending to reduce the appropriate length of notice, reference to case law in a search for length of service comparables must be done with great care. The risk is that while lengths of service can readily be compared with mathematical precision that is not so easily done with other relevant factors that go into the determination of notice in each case. Dissimilar cases may be treated as requiring similar notice periods just

> because the lengths of the service are similar. The risk is that length of service will take on a disproportionate weight.

ANALYSIS

[47] The parties agree to the following:

(i) that this is an appropriate case to be determined by summary judgment;

(ii) that the plaintiff's employment with the defendant corporation was terminated without cause and without notice; and

(iii) that the plaintiff took reasonable steps to mitigate.

[48] At the outset, I find that this is an appropriate case to grant summary judgment.

[49] The court must next determine whether the plaintiff was entitled, upon termination of her employment by the defendant, to reasonable notice under the common law, or to contractual notice as outlined in the Offer Letter and/or Employment Agreement.

[50] The plaintiff submits that the termination clauses contained in the Employment Agreement are void because they violate the ESA and, accordingly, the court should award damages in lieu of notice under the common law.

[51] The plaintiff suggests that there are four distinct issues with the wording of the Employment Agreement that should lead the court to determine that it is unenforceable:

a) the Employment Agreement permits termination "for cause" without notice;

b) the Offer Letter sets out a minimum and not maximum payment of four months pay upon termination without cause;

c) both documents restrict entitlement to base salary only; and

d) the Employment Agreement suggests the employer has "sole discretion" to terminate Ms. Miller's employment by providing notice or payment when the ESA removes discretion in many instances.

[52] Clause 11 in the Employment Agreement entitled "Termination by AlayaCare for Cause" states:

> 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*].

[53] Sections 54, 57 and 58 of the ESA set out minimum notice requirements upon termination of employment even if there is "cause" except for "prescribed employees" as set out ins s. 55 of the ESA. The provision in the Employment Agreement outlined above permits AlayaCare to terminate Ms. Miller for "cause" including "any cause recognized at law" or "serious reason" without notice or payment in lieu.

[54] This very issue was addressed in *Rahman* at paras. 26-30. The factors that can trigger disentitlement to notice are set out in s. 2(1) of the regulation *Termination and Severance of Employment*, O.R. 288/01, under the ESA. It sets out those categories of employees who are not entitled to notice or payment and includes the following:

> 3. An employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer.

[55] In *Rahman*, 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 s. 5 of the ESA and renders it void. Section 5 of the ESA says that an employer cannot contract out of an employment standard.

[56] In this case, like *Rahman*, the terminology falls short of "wilful misconduct" and permits the employer to terminate Ms. Miller's employment without notice or payment for "cause" or "serious reason". At para. 30 of *Rahman*, the court said:

> This court has repeatedly held that if a termination provision in an employment contract violates the ESA – such as a "no notice if just cause" provision – all the termination provisions in the contract are invalid….
>
> > In *Waksdale*, as in the present appeal, the employer had not purported to terminate the employee for just cause. However, the just cause provision in the employment contract violated the *ESA*. The invalidity of the just cause provision rendered the other termination provisions unenforceable: *Waksdale*, at para. 10.

[57] Accordingly, since the terms of the Employment Agreement violate the ESA, it is unenforceable.

[58] However, because the defendant relies on the Offer Letter as the relevant governing document even if the Employment Agreement is found to be void for violating the ESA, I must consider the provisions of that document as well.

[59] The Offer Letter contains only one paragraph in relation to termination of employment. It states:

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

[60] In *Rahman*, there was an offer letter which contained terms that conflicted with the employment contract also. In that case because of a stipulation in the Offer Letter that in such a situation the terms of the offer letter prevailed, the court relied on the Offer Letter as the governing document (at para. 16).

[61] In this case, the parties agreed that in the event that there is a conflict between the Offer Letter and the Employment Agreement, the Offer Letter would govern. A similar clause is included in the Employment Agreement.

[62] The plaintiff points out that the Offer Letter provides only the "minimum" obligation on the defendant and does not limit or displace Ms. Miller's entitlement at common law. It does not set out that it is the *only* entitlement due to an employee.

[63] It is not clear that this clause has the effect of stating that the common law no longer applies.

[64] The presumption that an employee is entitled to reasonable notice may be rebutted if the contract specifies some other period of notice as long as it meets or exceeds the minimum requirements of the ESA: see *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), at p. 998. But the intention of the parties to rebut the right to reasonable notice at common law must be set out in clear and unambiguous language: see *Nemeth v. Hatch Ltd.*, 2018 ONCA at para. 8.

[65] A high degree of clarity is required to reflect the intention of the parties to rebut the right to reasonable notice at common law and any ambiguity will be resolved in favour of the employee: see *Movati* at para. 10.

[66] According to the plaintiff, because both the Offer Letter and the Employment Agreement entitle the plaintiff to base salary only upon termination without cause therefore, they both violate the provisions of the ESA. Accordingly, they are unenforceable. That provision does not specifically state that Ms. Miller is entitled to benefits and/or bonuses in addition to base salary.

[67] In *Wood*, at para. 37, Laskin J.A. said:

> I agree with Wood's submissions and for that reason find the termination clause unenforceable. I would summarize my conclusion as follows. Wood's compensation included Deeley's contributions to her two benefit plans. Under ss. 60 and 61 of the ESA, Deeley was required to continue to make those contributions during the notice period. Its obligation to do so was an employment standard under the ESA. Yet the termination clause's wording excludes and therefore contracts out of that obligation.

[68] The provision in the Offer Letter does not address any benefits and/or bonuses payable upon termination and, in accordance with the principles outlined in *Wood*, is unenforceable.

[69] Having found, for the reasons outlined above, that the plaintiff is not restricted to contractual notice of termination, I have concluded that it follows that she is therefore entitled to reasonable notice upon termination.

What is the appropriate period of notice?

[70] To determine what constitutes reasonable notice in the circumstances of this case, the court must look at all the relevant factors in a holistic manner without giving disproportionate weight to one factor over another: see *Singer v. Nordstrong Equipment Limited*, 2018 ONCA 364, at para. 6. There is no formula to determine what constitutes reasonable notice, but the non-exhaustive list of factors outlined in *Bardal* along with other relevant factors, including whether the plaintiff was induced to leave her previous employment have been considered.

Length of employment

[71] The plaintiff was employed with AlayaCare for a short period of time – seven months, but she argues that her previous employment of 12 years with WellSky (and its predecessors) should be factored into the assessment of the length of her employment.

[72] One of the reasons Ms. Miller was recruited by AlayaCare was because of the experience she had in this specialized area. She was hired to work in a senior executive position which likely would not have been available to her had she not had the work experience with WellSky.

[73] I agree with the plaintiff that although she was only employed by AlayaCare for a short period of time, some credit must be given for the fact that she had 12 years of secure employment in the software-as-a-service health care industry. That is the reason she was recruited by Mr. Murphy to join AlayaCare.

[74] However, I also note that while the plaintiff made a request to amend the Offer Letter and the Employment Agreement to include an extra week of vacation and to indemnify her from legal action by her former employer, she did not specifically request that she be credited with her years of experience in the industry.

[75] Accordingly, I have taken into account the fact that the plaintiff was a 12-year employee of WellSky, and the fact that she had a great deal of experience in what has been described as a "niche" industry as one of the factors to be considered in assessing the period of reasonable notice.

Nature of the employment

[76] She was hired in an executive supervisory position with AlayaCare, a position of responsibility. However, once she started her employment with AlayaCare she was given

only a small team to work on a small project. She initially reported to the COO of the company, George Psihairis, and subsequently was told to report to the senior vice-president.

[77] In *Love v. Acuity Investment Management Inc.*, the Court of Appeal overturned the decision of the trial judge finding that he had overemphasized the appellant's short length of service (2.5 years) and underemphasized the nature of the appellant's employment. He was a senior vice-president who reported directly to the chief executive officer and was one of nine owners in the company. These factors favoured a longer notice period. In that case, the Court of Appeal substituted a period of nine months notice for the five-month notice period ordered at trial.

[78] In this case, the plaintiff was employed in a senior executive position, reporting to the COO of the company. She was paid a substantial salary and was entitled to bonuses as well as an equity share in the company in the form of RSUs which would vest in the future. This factor favours a lengthier period of notice.

Age

[79] The plaintiff was 62 years old at the time of her termination.

Was the plaintiff induced to leave her previous employer?

[80] The plaintiff submits that this factor weighs heavily in the assessment of what constitutes reasonable notice.

[81] In *Wallace*, at para. 85, the court found that inducements are properly included among the factors which tend to lengthen the notice requirement, but the importance of an inducement in deciding the notice period will vary depending upon the nature of the inducement.

[82] Some of the factors taken into account to determine whether there has been an inducement were set out by Bordin J. in *Grimaldi v. CF+D Custom Fireplace Design Inc.*, 2023 ONSC 6708, at paras. 52-53:

> At paragraphs 25 and 26 of *Firatli*, the court noted that in considering whether an employer's recruitment methods amounted to inducement, courts have highlighted the following factors:
>
> 1. the reasonable expectations of both parties;
>
> 2. whether the employee sought out work with the prospective employer;
>
> 3. whether there were assurances of long-term employment;
>
> 4. whether the employee did due diligence before accepting the position by conducting their own inquiry into the company;

> 5. whether the discussions between the employer and prospective employee amounted to more than the persuasion or the normal "courtship" that occurs between an employer and a prospective employee;
>
> 6. the length of time the employee remained in the new position, the element of inducement tending to lessen with the longevity of the employment; and
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> 7. the age of the employee at termination and the length of employment with the previous employer.
>
> As noted, Mr. Grimaldi was 50 when terminated. Before being hired by CF+D, he had been employed with Honeywell for about four years. Mr. Grimaldi did not need to leave Honeywell. Both parties expected the position to be a permanent and long-term position.

[83] In this case, I have determined that the plaintiff did not seek out employment with the defendant, AlayaCare quite clearly sought her out. Whether or not the plaintiff was dissatisfied with how things were at WellSky does not alter this fact. She did not approach the defendant. Their communications began with a LinkedIn message sent by Brady Murphy to Ms. Miller on September 26, 2021, with the title "Bold moves?". In that message Mr. Murphy tells the plaintiff that "At AlayaCare we're looking to grow and the CEO and I believe your talent pool would really help us grow and learn more about the US market".

[84] Although there is no evidence that Ms. Miller undertook any sort of due diligence before accepting the offer of employment, she did express concern about facing litigation from WellSky and was assured that AlayaCare would assist her. She was assured that she would be an executive at AlayaCare. The details of the phone conversations and Zoom meetings as well as the in-person meetings between the plaintiff and Mr. Murphy come from the affidavit of Ms. Miller since there is no evidence before the court from Mr. Murphy.

[85] On October 7, 2021, Mr. Murphy sent a LinkedIn message to Ms. Miller which stated:

> Hey Moyra, another great catch up. Per Adrian's comment we'd like to know what your job would be and the compensation in terms of salary and forgone equity. Number of rsus, options vested and untested (sic) you have now will give us a good sense of what it would take us to lure you over.

[86] Despite the position of the defendant that Ms. Miller was not "lured" or induced to leave her employment and join AlayaCare, by his own words, Mr. Murphy inquired to learn the extent of the plaintiff's compensation with WellSky for the purpose of determining "what it would take" to persuade her to leave that employment and join AlayaCare.

[87] After Ms. Miller was notified of her impending termination, Mr. Murphy sent her a text message on August 9, 2022, saying: "Moyra, I would like to speak with you about this situation AlayaCare and I have put you in".[8]

[88] In my view, these discussions initiated by the defendant go beyond the normal "courtship" between an employer and prospective employee and amount to an inducement. The following circumstances support this finding:

1. The defendant reached out to the plaintiff first.

2. There were representations made by AlayaCare that the plaintiff's experience would assist in "growing" the company.

3. Inquiries were made by AlayaCare as to the extent of the plaintiff's renumeration with WellSky, including bonuses and RSUs so that they could "lure" her.

4. AlayaCare had hired a number of people in 2021 as part of an "aggressive growth strategy".

5. The defendant was prepared to go as far as indemnifying the plaintiff in the event that her previous employer commenced litigation against her for leaving them to join AlayaCare.

[89] As a result, I find that there were inducements offered to the plaintiff to lure her to leave her employment with WellSky to become an employee of AlayaCare. This factor favours a longer period of notice.

Does the presence of a non-competition clause in the Employment Agreement lengthen the notice period?

[90] The plaintiff submits that an assessment of a reasonable notice period should take into account the "non-solicitation" clause contained in the Employment Agreement and that the notice period should be lengthened as a result. The plaintiff claims that this clause, which prohibited Ms. Miller from conducting any business "directly or indirectly" with customers or partners of AlayaCare even if unenforceable, "would give Ms. Miller pause when attempting to mitigate".

[91] The evidence does not, however, support this position. The affidavit of the plaintiff indicates that following her dismissal she felt betrayed by AlayaCare and felt that they had made significant promises to her to secure her services, and they had been dishonest with her. As a result, she took some time to process her termination. Also at that time, her mother, stepfather and father's health had declined. She provided care for her mother and

[8] Exhibit FF to the Affidavit of Moyra Miller sworn November 1, 2023.

stepfather. She subsequently spent time with her father when he was in hospital in London before he passed away on January 20, 2023.

[92] She looked for work from October to December 2022 with employers who were involved in the same niche industry as AlayaCare and WellSky. On February 28, 2023, she accepted a job with AxisCare who appears to be in direct competition with AlayaCare.[9] At no time does the plaintiff indicate that the non-competition or non-solicitation clause played any part in her efforts to mitigate. Nor is there any evidence that AlayaCare took any steps to enforce this agreement, and they did not raise any objection to the plaintiff obtaining employment with AxisCare.

[93] In *Holland v. Hostopia Inc.*, 2015 ONCA 762, at para. 60, the Court of Appeal found in that case that there was no evidence that a non-competition provision made it more difficult for the appellant to find comparable employment and ruled that the failure of the trial judge to take the non-competition clauses into consideration in those circumstances was not an error.

[94] In my view, in these circumstances, the existence of the non-competition clause does not lengthen the period of reasonable notice because there is no evidence that it impacted the ability of the plaintiff to secure new employment.

Availability of similar employment

[95] Although Ms. Miller's employment was in a specialized industry, she was able to secure employment within six months after she began searching for employment. She started working for AxisCare on April 17, 2023. That employment was at a reduced rate of pay as compared to AlayaCare, but was comparable to what she earned at WellSky.

[96] However, the speed with which the plaintiff was able to secure alternative employment has not, and should not, be considered by the court in determining the period of reasonable notice. Notice is determined by the circumstances existing at the time of termination: see *Holland* at para. 61.

Conclusion on the period of reasonable notice

[97] It is clear that Ms. Miller was induced to leave her employment at WellSky to seek increased compensation with AlayaCare. She was an individual with significant work experience in a niche industry who anticipated long-term employment with the defendant. She was described as an executive employee who was well-paid and who was entitled to significant bonuses as well as equity interest in the form of RSUs to be vested over the period of three years.

[98] Based on all of these factors as discussed above, in my view a reasonable period of notice is 14 months.

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[9] Affidavit of Moyra Miller sworn November 1, 2023, at paras. 96-109.

CONCLUSION

[99] Accordingly, I am granting summary judgment in favour of the plaintiff. I find that she was wrongfully dismissed from her employment with the defendant, and is entitled to damages at common law.

[100] In terms of damages, I find that the plaintiff is entitled to damages in lieu of reasonable notice to be put in the position she would have been in had she continued to work until the end of the notice period: see *Matthews v. Ocean Nutrition Canada Ltd.*, 2020 SCC 26. at para. 59.

[101] Ms. Miller is owed her base salary for the first eight months of the notice period. She earned $200,000 annually in base salary which is the equivalent of $16,666.67 per month. Accordingly, $16,666.67 x eight months (for the first eight months before she secured new employment) is $133,333.33. From this sum I must subtract the amount paid in lieu of notice by AlayaCare, which the parties agree is $66,666.67. Accordingly, the amount owed by AlayaCare to the plaintiff for that period is $66,666.66.

[102] Once the plaintiff commenced her employment with AxisCare in April 2023, she earned $14,583.33 per month. The difference between what she earned from AxisCare and what she would have earned at AlayaCare ($2,083.34 more per month) would represent the damages due for the following six months. Accordingly, $2,083.34 x 6 months would amount to $12,500.04.

[103] The total damages in relation to base salary for the 14-month notice period less the amount paid by AlayaCare in lieu and taking mitigation into account is $79,166.70.

[104] The plaintiff is also entitled to benefits during the period of reasonable notice which she submits amounts to $95.02 per month. For the period of 14 months this totals $1,330.28.

[105] I find that the plaintiff is also entitled to compensation for the bonus she would have earned during the period of reasonable notice. The bonus was an integral part of the plaintiff's compensation package, and she is entitled to the bonus she would have earned. So, although the Employment Agreement refers to the bonus as a "discretionary annual cash bonus as outlined in the Offer Letter", the Offer Letter describes the bonus as follows:

> Should you fulfill these conditions of employment, [the conditions refer to the signing of the Offer Letter and passing reference and security checks] you will receive an annual base salary of $200,000 plus an annual cash bonus whose target will be $40,000 for an on-target earning of **$240,000**. Your eligibility for your annual bonus will be determined 25% based on corporate targets and 75% on your personal/departmental targets.

[106] In *Andros v.* Colliers *McCauley Nicolls Inc.*, 2019 ONCA 679, at para. 52, Fairburn J.A. (as she then was) delivering the decision of the court said:

> Where a bonus is a non-discretionary and integral part of the employee's compensation package, damages for wrongful dismissal should include both the bonus actually earned before being terminated and the bonus that would have been earned during the notice period, unless the terms of the bonus plan alter or remove that right….

[107] In order to calculate the bonus due to the plaintiff, I have to consider the words of the Offer Letter as to entitlement and pro-rate the bonus over the period of reasonable notice. I note that there is no evidence that there were any issues identified related to the plaintiff's work performance, but clearly, AlayaCare did not meet their projected earnings for the year, based on their claim that they needed to restructure.

[108] The plaintiff, based on the wording of the bonus clause and on the absence of evidence that her performance would warrant anything less than the full amount for reaching her personal targets, suggests that she is owed $32,500 in bonus payments for the year 2022 and the same amount for the year 2023.

[109] Since I have found that the reasonable notice period is 14 months, Ms. Miller is owed a bonus payment, based on the wording of the Offer Letter, for the year 2022. The notice period would take her to the end of October 2023 so she would be owed a pro-rated bonus for 2023.

[110] The bonus was to be calculated at 75 percent for reaching personal/departmental targets and 25 percent based on corporate targets. Another vice-president received one-quarter of the corporate entitlement as a bonus due to AlayaCare's performance in 2022. The plaintiff suggested she should be credited the full amount for reaching her personal targets for a total of 81.25 percent of the bonus amount. There is an absence of evidence as to whether the plaintiff did reach her personal targets, however. Further, it can be inferred based on the evidence of the plaintiff that she supervised a small team and "had very little to do" that it would be unlikely that she would have been awarded the full 75 percent in calculating her entitlement to a bonus. Accordingly I calculate the bonus due as 50 percent to the plaintiff for reaching personal/departmental targets and 6.25 percent for reaching corporate targets for a total of 56.25 percent.

[111] As a result, the plaintiff is due a bonus of $22,500 for the year 2022. The period of reasonable notice of 14 months would have taken the plaintiff to October 2023. On a pro-rated basis, she is entitled to a bonus payment for 2023 of $18,750, for total bonus payments of $41,250 less the bonus she received from AxisCare of $7,500 for a total bonus due of $33,750.

[112] As for the value of the RSUs to which the plaintiff would be entitled, according to the Offer Letter, the plaintiff was given 2520 RSUs valued at $95.2375 per share for a total value of $240,000 to be vested over three years. After one year, or in January 2023, 840 RSUs would vest and so on over the course of three years.

[113] The plaintiff seeks by way of damages the value of the RSUs due since the entitlement to RSUs was an integral part of the Employment Contract as is evidenced by the discussions held between the plaintiff and AlayaCare which preceded her employment.

[114] I agree.

[115] During the recruitment by AlayaCare, they wanted to know what the value of the RSUs were that the plaintiff was entitled to from her former employer. The RSUs offered by AlayaCare represent an important part of the total renumeration offered to the plaintiff to secure her services.

[116] Based on a reasonable notice period of 14 months, the plaintiff would have had 840 RSUs vested in January 2023, but the next group of RSUs would not have vested until January 2024 which is outside of the reasonable notice period.

[117] The defendant claims that the RSUs have been made available for the plaintiff, but they submit that the RSUs have no value until there is a sale or a public offering. These are not publicly traded shares that have value on the open market. The plaintiff urges the court not to accept that argument because there is no evidence to support that position, it is based solely on the submissions of counsel. There is evidence before the court that the 840 RSUs have been vested for the plaintiff, but she is unable to access them.

[118] The defendant claims that Ms. Miller has the same right to the RSUs as any other current employee or former employee and she does not have the right to the cash value of those RSUs until one of those events occurs.

[119] The plaintiff submits that even if the RSUs are currently in an account for the benefit of the plaintiff at this time, there is no guarantee that they will be there in the future and that the court should order damages in lieu. The defendant disputes that the shares can be taken away once vested. The plaintiff relies on the decision of *O'Reilly v. Imax Corporation*, 2019 ONSC 342, at para. 60, where the court found that the plaintiff's unlawful termination in that case did not cancel the plaintiff's rights to RSUs and stock options within the period of reasonable notice.

[120] According to the evidence before the court, the RSUs have increased modestly in value since the Offer Letter was signed and are now worth $107.33 each. Accordingly, the plaintiff is entitled to the value of 840 RSUs for a total of $90,157.20.

[121] Accordingly, the total award of damages due to the plaintiff for reasonable notice for the period of 14 months is as follows:

Lost Salary:	$ 79,166.70
Lost benefits:	$ 1,330.28
Lost bonuses:	$ 33,750.00
RSUs:	$ 90,157.20
Total:	$204,404.18

[122] There will be an order for pre-judgment interest of the award of damages pursuant to s. 128(1) of the *Courts of Justice Act*, R.S.O 1990, c. C.43.

COSTS

[123] As it relates to costs, if the parties are unable to agree on the quantum of costs payable, they may make submissions in writing of no more than five pages in length, exclusive of a bill of costs. The submissions of the plaintiff will be due within 30 days of the date of this decision. The submissions of the defendant will be due 30 after receiving the submissions of the plaintiff and no later than 60 days from the date of the decision. No reply is necessary.

Maria V. Carroccia
Justice

Released: February 14, 2025

CITATION: Miller v. Alaya Care Inc., 2025 ONSC 1028
COURT FILE NO.: CV-23-31764
DATE: 20250214

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Moyra Miller

Plaintiff/Moving Party

– and –

Alaya Care Inc.

Defendant/Responding Party

RULING ON MOTION FOR SUMMARY JUDGMENT

Carroccia J.

Released: February 14, 2025