

Beware the 'inducement increase' when recruiting a new employee

Recent decision highlights area of potential additional liability for employers



Shana French and Sundeep Gokhale

DESPITE A GLOBAL pandemic and growing unemployment across Canada, the market for top talent is fiery hot. Headhunters can't keep up with demand as employers offer overly generous compensation and benefit packages.

But buyer beware! As a recent decision¹ demonstrates, if a new employee is "induced" to leave secure employment and the new employment doesn't work out, this may result in additional liability for the new employer.

What happened?

Shahram Younesi had been employed as

a Project Manager for National Grid USA for more than a year and a half when he was headhunted through LinkedIn by a recruiter on behalf of Kaz Minerals. At the time, Younesi and his family lived in Vancouver, B.C., and Younesi worked both part time in the USA and remotely from his home in Vancouver.

Younesi expressed interest in the position and provided information about his existing compensation. He went through several interviews and was ultimately offered the job. The Offer Letter he signed provided that he would be assigned to the 'Peschanka Project' until September 30, 2020, unless the assignment was terminated or extended on notice. The Offer Letter also included a clause permitting either party to terminate employment on one month's written notice.

Significantly, the Offer Letter included a schedule comparing Younesi's current compensation package with one proposed by Kaz Minerals. It identified a substantial increase in salary and vacation, and guaranteed Younesi to be in Vancouver for the first

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22 months — an important perk not offered in his then current role.

Younesi accepted the offer, resigned from his employment and started with Kaz Minerals on November 12, 2018. Subsequently, he executed a written employment agreement that stated it superseded all prior agreements and discussions between the parties, including any "statements, representations, proposals, offer letters and understandings...." Like the Offer Letter, it included a termination clause that gave either party the right to terminate employment on one month's written notice.

Roughly one month after he began work with Kaz Minerals, Younesi was given one month of working notice of termination. Younesi maintained that he had been hired for the duration of the Peschanka Project (roughly two years) and should be paid for that period of time. He sued for wrongful dismissal.

Inducement extends the notice period

At trial, the British Columbia Supreme Court found Younesi had been hired for an indefinite period; not a fixed term as Younesi argued:

It is clear that both parties to Mr. Younesi's employment agreement hoped and expected that he would be successfully employed ... for at least the duration of the Peschanka Project Both parties expected the duration of that work to last until at least the end of September 2020. However, that expectation does not as a matter of law, convert Mr. Younesi's employment agreement into a fixed-term contract.

The text of Mr. Younesi's Offer Letter is plain and clear: both the assignment

and his employment were subject to early termination by either party with, in the case of employment termination, the provision of one month written notice. Mr. Younesi read the document before he signed it. The language used was unequivocal and explicit, and the contractual intention was clear and unambiguous.

Younesi was awarded six month's notice; four month's reasonable notice and a further two month "inducement increase." The one-month termination provision in the employment agreement was found to be void because it did not comply with the minimum requirements of the British Columbia *Employment Standards Act*.

In assessing the appropriate period of reasonable notice, the court noted:

The analysis respecting short-term employees may be distinctive. Absent enforceable probationary provisions, such short-term employees may benefit from a proportionately longer period of notice, with two to three months often being the starting point before further adjustment.

As for an "inducement increase," the court held there was "no doubt" Kaz Minerals induced Younesi to leave his previous employment. It had requested particulars of his former compensation package for the sole purpose of preparing the comparison schedule attached to the Offer Letter and emphasized the 22-month assignment based in Vancouver. According to the court, the package "... was designed to be an irresistible offer having regard to Mr. Younesi's personal circumstances. By any measure, it amounts to inducement far beyond the standard "wooing" of a prospective employer...."

Lessons learned

While competition for top talent is fierce, it need not expose a prospective employer to additional liability. If a *bully offer* is the only way to close the deal, a clear and enforceable termination clause remains the best way to mitigate risk and provide certainty to an employer, should employment be short-lived. 

To learn more and for assistance, contact Sherrard Kuzz LLP.

¹Younesi v Kaz Minerals Projects B.V., 2021 BCSC 614.

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