

BC Court Concludes that CERB Payments are Deductible from Wrongful Dismissal Damages Award

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Some good news came out of British Columbia for employers last week. Specifically, the British Columbia Superior Court (the Court) found that Canada Emergency Response Benefit (CERB) payments received by a former employee were deductible from a wrongful dismissal damages award owing to that employee.

In *Hogan v 1187938 BC Ltd.*, 2021 BCSC 1021, the employee worked for the defendant car dealership for over 20 years. In March 2020, the employer placed the employee on a temporary layoff as a result of a significant decrease in its business resulting from the COVID-19 pandemic. Although both parties anticipated that this would be a temporary layoff, the pandemic continued to impact the employer's business, and the employee was dismissed permanently in August 2020. The Court found the temporary layoff amounted to constructive dismissal because the decision was unilateral and one to which the employee neither consented nor acquiesced. Given the unilateral nature of the layoff and the subsequent termination, the Court concluded that the employer no longer intended to be bound by the contract of employment at the time of the layoff and that the employee had been constructively dismissed.

After concluding that the employee was entitled to 22 months of reasonable notice, the Court considered whether the employee's CERB payments should be taken into account when calculating the appropriate amount of damages.

The Court held that while EI benefits should not be deducted from any amount payable by the employer to the employee (because EI requires a claimant to repay any unemployment benefits if an employer becomes liable to pay the earnings), it found that the \$14,000 in CERB payments the employee received in 2020 should be deducted from the damages awarded. The Court based its decision on the principle that the employee should be put in the same position they would have been in had the wrongful dismissal not occurred. In this case, not deducting the CERB payment would put the employee in a *better* position than he would have been had the constructive dismissal not occurred. The Court called this a "compensating advantage issue."

Only a few months earlier, in *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998 (*Iriotakis*), an Ontario court determined that CERB payments were *not* deductible from a damages award arising from a wrongful dismissal. In *Iriotakis*, the employee earned the majority of his compensation through commissions, which the CERB payments he collected did not account for. Further, his employment contract limited his entitlements on termination to exclude any commission earnings, resulting in a significant reduction in his damages award. Retaining the CERB payments would not have put the employee in a better economic position than he would have been but for the breach. Accordingly, the court in *Iriotakis* found it would be inequitable to deduct the CERB payments from the damages award.

The Court in *Hogan* distinguished *Iriotakis* on the basis that there was no large disparity between the employee's actual loss and the amount of damages he would receive. The employee would be compensated for the income he would have earned had he worked through the 22-month notice period. He did not suffer additional losses due to a loss in commission income. The Court also noted that, unlike EI, neither the employee nor the employer contributed to the CERB program, such that the CERB benefits were not delayed compensation or part of the employee's employment earnings. Moreover, there was no evidence that the employee would have to repay the CERB benefits.

Employer Takeaways

Given the differing approaches taken by the courts in *Iriotakis* and *Hogan*, it is likely that the courts will continue to apply a case-by-case approach to ensure employees are treated equitably but do not receive a windfall as a result of collecting CERB payments.