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Pandemic's Impact on Job Market Not to be Viewed in Hindsight When Assessing Reasonable Notice; CERB is Not Mitigation Income "on These Facts"

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In *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (*Iriotakis*), the Ontario Superior Court of Justice considered two key issues that will be of interest to employers facing claims for wrongful dismissal arising from employment terminations during the COVID-19 pandemic:

1. How does the pandemic's impact on the job market affect an employee's entitlement to reasonable notice?
2. Can the Canada Emergency Response Benefit (CERB) be considered mitigation income and used to offset damages for wrongful dismissal?

In *Iriotakis*, the plaintiff was a 56-year-old sales employee with just over two years of service whose earnings were based heavily on commission. His employment was terminated in March of 2020, at the beginning of the pandemic in Canada. His claim was for six months of notice.

Job Market Impact and Reasonable Notice

The Court accepted that the pandemic had some impact on the plaintiff's job search and would have been reasonably expected to do so at the time his employment was terminated; however, the Court emphasized that at the time of the termination, the impact of the pandemic on the job market was highly speculative and uncertain. The Court further stated:

"The principle of reasonable notice is not a guaranteed bridge to alternative employment in all cases however long it may take even if an assessment of the time reasonably anticipated to be necessary to secure alternative employment is a significant factor in its determination. I must be alert to the dangers of applying hindsight to the measuring of reasonable notice at the time when the decision was made to part ways with the plaintiff."

Even though in hindsight the pandemic obviously had a significant impact on the job market, the Court confirmed the time for assessing the appropriate reasonable notice period was at the time of the plaintiff's termination in March of 2020, when the pandemic's impact on the job market was not so clear.

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While the Court noted that the plaintiff's age and uncertainties in the job market both served to "tilt" the period of reasonable notice upwards, the Court emphasized those factors were not to the exclusion of all others and a balancing approach was required. The Court ultimately awarded three months' notice. It appears the "tilt" effect was minimal in this case.

The Court's decision suggests there may not be a significant increase in the calculation of reasonable notice for employees whose employment was terminated near the beginning of the pandemic, as the impact of the pandemic at that time was "highly speculative". That said, pandemic case law is still developing, and it remains to be seen at what point a Court might find the pandemic's negative impact on the job market to be more certain such that, at the time of termination, it could clearly be expected to impact an employee's ability to find alternative employment and entitle them to a greater period of notice.

CERB and Mitigation Income

According to the Court, CERB could not be considered mitigation income "on balance and *on these facts*" (emphasis in the original) for the following reasons:

- The CERB amount was considerably below the base salary previously earned by the plaintiff; and
- It would not be equitable to deduct the CERB in this case given the difference between the plaintiff's pre-termination entitlements and his significantly reduced post-termination entitlements (as commission amounts awarded by the Court were substantially less).

The Court also noted the CERB was not like Employment Insurance, in that it was not an "earned benefit" that both the employer and employee paid into.

The Court went out of its way in this decision to emphasize this was a fact specific determination, leaving it open for an argument to be made that in other circumstances, it may well be appropriate to offset CERB from wrongful dismissal damages. Nonetheless, applying this approach, it appears the argument may require a focus on whether it is equitable to deduct CERB in the circumstances.

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