

Case In Point

British Columbia Supreme Court Finds CERB Amounts Should Be Deducted from Wrongful Dismissal Damages

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On May 28, 2021, the British Columbia Supreme Court (Court) released its decision in [Hogan v. 1187938 B.C. Ltd.](#), finding that the plaintiff had been constructively dismissed after being temporarily laid off at the outset of the COVID-19 pandemic by the defendant, which operated a car dealership (Dealership).

The plaintiff was laid off on March 24, 2020 due to the substantial drop in the Dealership's business caused by the pandemic. At the time of the layoff, the plaintiff was 52 years old and had worked for the Dealership since 1998, most recently in the role of assistant service manager. His employment was formally terminated on August 28, 2020 due to the continued decrease in vehicle service appointments and related services.

The Court found that the Dealership's decision to layoff the plaintiff was unilateral and there was no evidence that his employment contract authorized the Dealership to unilaterally place employees on a temporary layoff. The Court stated, "the employer may have been acting in good faith for a legitimate business interest in laying off the plaintiff," but given the "unilateral nature of the layoff and the subsequent termination, it is clear from the defendant's conduct that it no longer intended to be bound by the contract at the time it laid off the plaintiff."

The Court determined that the plaintiff had been constructively dismissed and that a 22 month notice period was appropriate.

The plaintiff had received \$14,000 from the Canada Emergency Response Benefit (CERB) following his layoff, which the Dealership argued ought to be deducted from the damages award. The Court agreed and distinguished the facts at hand from *Iriotakis v. Peninsula Employment Services Limited (Iriotakis)*, a recent decision from the Ontario Superior Court that declined to deduct CERB payments from a damages award. In *Iriotakis*, the plaintiff earned \$145,186.30 the previous year, comprised of \$60,000 in base salary and \$85,186.30 in commissions. The plaintiff was awarded a notice period of 3 months.

The Court reasoned, "If the CERB payments are not deducted, the plaintiff would be in a better position than he would have been if there had been no breach of the employment contract. But for his dismissal, the plaintiff would not have received the benefit." In distinguishing this scenario from *Iriotakis*, the Court noted that on the specific facts of that case, particularly the "disparity between the payments and the employee's loss of salary and significant loss of commission," it would not have been equitable to reduce that plaintiff's entitlement to damages by the CERB payments. In retaining the CERB payments, the plaintiff in *Iriotakis* was not put in a better economic position than he would have been but for the breach, unlike the plaintiff in this case.

The Court also commented on the nature of the CERB benefits, and noted that "they are not private insurance, and neither the employer nor the employee contributed to them," unlike Employment Insurance benefits, which were not deducted from the award. As a result, the Court found that CERB payments are not "delayed compensation or part of the plaintiff's earnings," and noted that there "is no evidence that the plaintiff will have to repay the CERB payments." Notably, the Court did not comment on the impact of Interim Order No. 8 Amending the *Employment Insurance Act* (Interim Order), which paused Employment Insurance repayment requirements for the period between September 27, 2020 and September 25, 2021.

This decision is a reminder that there remains some uncertainty on what impact CERB payments (or the Interim Order) will have, if any, on wrongful dismissal damage awards. As the courts around the country continue to grapple with this issue, employers facing litigation from former employees laid off or terminated during the pandemic should be alive to the fact that



the receipt of CERB, or other similar government benefits, could reduce a former employee's potential damages.