

# CERB'ing Your Enthusiasm: Court Deducts COVID Wage Replacement Amounts From Notice Period

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Despite the breadth and depth of the effects of the pandemic, we have not seen many reported court decisions considering the impact of federal emergency pandemic payments on termination pay. In fact, to date, only two reported decisions appear to have considered whether the Canada Emergency Response Benefit ("CERB") should be considered as mitigation to reduce wrongful dismissal awards, one from Ontario, released February 2021 and one from British Columbia, released within the last number of days. Although the latter considered the former, it came to the opposite conclusion. As such, the British Columbia Supreme Court case of *Hogan v. 1187938 BC Ltd.*, 2021 BCSC 1021 (*Hogan*) is now considered to be the first case where CERB payments were deducted from a wrongful dismissal award.

The circumstances of the cases follow an unfortunately familiar pattern: pandemic hits Canada, employer lays off employee, employer terminates employee. The specifics are as follows: In late March 2020, Hogan's employer informed him of his temporary layoff due to the adverse economic impact of the pandemic to the Vancouver Mercedes-Benz dealership of which he was assistant service manager. On August 28, 2020, Mercedes terminated Hogan's employment, providing him with termination pay of \$13,255. In addition to mitigation through temporary employment with BC Elections (where he earned \$4,335), the Hogan had received \$3,459 in Employment Insurance (EI) benefit payments and \$14,000 in CERB payments. Importantly, in March 2021, an entity related to the employer's group offered him employment in a similar position, service advisor, so long as he settled his lawsuit for constructive dismissal, which he had already commenced by that time. Aside from refusing due to this condition, Hogan considered the new position to be a significant demotion and noted that unless he worked significant overtime hours - which would be difficult due to childcare responsibilities - he would earn less than he had prior.

After deciding the matter was appropriate for summary trial, the Court determined Hogan had been constructively dismissed on the day of the layoff in March 2020 and not merely terminated on August 28, concluding the employer's unilateral conduct in laying him off clearly showed the defendant's intention to no longer be bound by the contract despite the "good faith...legitimate business interest" for doing so. The Court accepted Hogan's arguments and awarded 22-months' notice.

## It is at this point that the case gets interesting.

Mercedes took the position that Hogan had failed to reasonably mitigate his losses, arguing that after April 1, 2021, he could have commenced employment with the associated enterprise. However, the Court rejected that argument, concluded that Hogan should not be required to surrender his legal claim as part of his duty to mitigate.

## It is at this point that the case gets relevant.

After determining that EI payments do not constitute mitigation since they must be repaid under s. 45 of the *Employment Insurance Act*, the Court considered the relatively new employment benefits, CERB and stated:

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- CERB payments are not private insurance; neither the employer nor the employee contributed to them. As a result, they are not delayed compensation or part of the plaintiff's earnings;
- The nature of the benefit is an indemnity for the wage loss caused by the employer's breach of contract.
- Unlike EI benefit payments, there is no evidence that Hogan will have to repay the CERB to the federal government.
- But for his dismissal, Hogan would not have received the benefit.

The Court concluded there was "no basis for departing from the general rule that contract damages should place the plaintiff in the same economic position he would have been in had the defendant performed the contract. As such, the CERB payments should be deducted from the 22 months of notice awarded".

In coming to this conclusion, the Court reviewed *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (*Iriotakis*) and noted that Court declined to deduct the CERB payments. In that case, the employment contract specified that Iriotakis was not entitled to commission income upon termination, resulting in an award for lost wages of less than half of his actual pre-termination earnings. Thus, the key to the Court's decision was the disparity between the payments and the employee's loss of salary and significant loss of commission; it would not be equitable to reduce Iriotakis' entitlement to damages by the CERB payments.

Interestingly, this was the approach taken by the Ontario Labour Board in *Gray v Safecross First Aid Ltd.*, 2021 CanLII 18879 (*Grey*), when it awarded an employee wages and general damages after ruling the employer unlawfully retaliated against her contrary to the Ontario *OHS Act*. Adopting the approach of *Iriotakis*, the Labour Board refused to deduct CERB payments, noting it would not be "fair or appropriate" in the circumstances to reduce the damages by the amount of CERB benefits received (and by a notional statutory deduction amount), noting "there will be no 'double award' as suggested by the employer as [the worker] may be required to repay any amounts determined to be in excess by the CRA" [emphasis added]. Although it involved employment considerations, *Gray* is coloured by concerns regarding the ramification of retaliation by an employer after an OHS complaint and thus may not be a proper case to consider in the context of notice periods and mitigation.

By contrast, Hogan's notice award was not so hampered and reflected the income he would have earned if he had continued to work during the reasonable notice period: "In other words, [Hogan] will be compensated for the income he would have lost. He did not suffer additional losses due to a loss in commission income. As a result, there is not a large disparity between the plaintiff's actual loss and the amount of damages he will receive... The CERB payments raise a compensating advantage issue. 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."

### Lesson for Employers

Despite its headline-grabbing nature, this decision is arguably quite unremarkable. As in all cases, the Court identified whether there was a wrongful dismissal and, having found there was, determined the proper amount of notice and whether there should be any deductions from that notice period, i.e., mitigation. Quite properly, the Court concluded that CERB payments are not like other employment benefit payments, which are subject to a statutory obligation to repay them should the employer provide (or be forced to provide) payment in lieu of notice. While there is a built-in mechanism to avoid overpayment or "double-dipping" where a terminated employee receives EI benefits and a damages award, there is no such mechanism for CERB. Without such a mechanism and with CERB not being the product of any payments or contribution by the employee there is no legal or logical reason to depart from the norm: damages awards are designed to put the terminated worker in the position they would have been had the employer provided actual and proper notice of termination.

Although *Hogan* comes to a different conclusion than *Iriotakis*, it is suggested that *Iriotakis* is mainly decided on the unfairness that would result in that case and the specific operation of that employee's contract to his situation. Absent those situations, it is suggested that the approach in the *Hogan* decision will be the basis for future decisions involving notice periods during the time of pandemic.

Terminations can be a difficult maze to navigate, even without the added complication of CERB benefits, but Field Law is here to provide strategic advice and support. Please contact [Steve Eichler](#) or any lawyer from the [Labour + Employment group](#) at any time to discuss the best options for you and your organization.