

CERB PAYMENTS DEDUCTIBLE FROM WRONGFUL DISMISSAL DAMAGES

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The Covid-19 pandemic has had a drastic impact on Canadian businesses, and resulted in many Canadian employers resorting to terminations and layoffs to keep their businesses afloat.

In an effort to assist Canadians whose employment was directly impacted by Covid-19, the Canadian government instituted the Canada Emergency Response Benefit (“CERB”), which provided financial support to employed and self-employed Canadians who were unable to earn an income.

Since the inception of CERB, there has been much discussion and speculation about whether CERB payments received by employees would constitute mitigation earnings in the context of a wrongful dismissal. In *Hogan v. 1187938 B.C. Ltd.*, 2021 BCSC 1021, the British Columbia Court for the first time discusses this issue.

The Facts

In this case, the Plaintiff, Mr. Hogan, was a 52 year old assistant service manager at a car dealership where he had been employed for almost 22 years.

In March 2020, the employer’s business was severely impacted by Covid-19, resulting in the employer issuing a temporary layoff to the Plaintiff.

Following his layoff, the Plaintiff applied for, and received general employment insurance (“EI”) benefit payments from the government, as well as \$14,000 in CERB payments.

In August 2020, the employer determined that it was not in a position to recall the Plaintiff to his employment, and sent a letter to the Plaintiff which purported to terminate his employment effective August 28, 2020.

The Plaintiff commenced an action for wrongful dismissal seeking damages for reasonable notice and took the position that his employment was constructively dismissed when he was placed on temporary layoff in March 2020.

The Decision

The Court held that the Plaintiff's temporary layoff in March 2020 amounted to a constructive dismissal since the employer did not have the right to unilaterally layoff the Plaintiff without his consent. The Plaintiff did not consent to the layoff, and therefore, it constituted a termination. After concluding that the temporary layoff constituted a termination, the Court went on to assess reasonable notice for the Plaintiff at 22 months.

Once the reasonable notice period had been determined, the Court looked at the issue of mitigation. More particularly, the Court specifically considered whether the \$14,000 in CERB that the Plaintiff had received should be deducted from the reasonable notice damages award.

The Court concluded that the CERB payments were deductible from the damages award. In making this finding, the Court compared the CERB payments to EI payments and determined the following:

1. EI payments are repayable to the government upon receipt of severance, and therefore, deductible from any wrongful dismissal damages award. CERB payments do not come with a repayment obligation, and as a result should not be deducted from a wrongful dismissal damages award.
2. EI benefits are considered private insurance in that both the employer and the employee contribute to them over the course of employment. CERB payments on the other hand, are not private insurance and do not constitute delayed compensation or earnings rightfully belonging to the employee.
3. Not deducting the CERB payments would place the Plaintiff in a better economic position than he would have been had he not been terminated. The Court held that the purpose of a wrongful dismissal damages award was to put the Plaintiff in the **same position** he would have been in had he not been terminated, not a better position. In the circumstances, there was no reason to depart from this long well recognized and established rule relating to wrongful dismissal.

As a result of the above, the Court held that the wrongful dismissal damages award should be reduced by \$14,000 to account for the CERB received by the Plaintiff.

Conclusion

Whether CERB payments could be considered mitigation earnings, and thus be deducted from wrongful dismissal damages, has been the subject of much debate since the CERB payments were introduced last year. This is the first British Columbia decision to address this issue, and welcomed news for employers. Employers will want to ensure that they are requesting information pertaining to any CERB payments which may have been received when negotiating settlements relating to terminations which occurred during the period of time in which CERB was available.

This case also confirms the well-established principle that a temporary layoff will amount to a dismissal unless an employee consents to the layoff. Employers will want to consider adding a properly drafted layoff provision

to their employment contracts that expressly authorizes the layoff without it amounting to a termination or constructive dismissal.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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