



# What's New in HR Law

## Are CERB Payments Deductible from Wrongful Dismissal Damages? Maybe.

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### Bottom Line

In a recent “win” for employers, and a decision that is the “first of its kind”, a court in British Columbia deducted Canada Emergency Response Benefit (“CERB”) payments from wrongful dismissal damages awarded to an employee during the COVID-19 pandemic. However, *Hogan v 1187938 B.C. Ltd.*, 2021 BCSC 1021 (“*Hogan*”) is an outlier from other recent cases decided by various courts across the country that contrarily suggest CERB benefits will **not** be deducted from wrongful dismissal damages.

### Background

In 1998, Terence Hogan commenced employment with Mercedes-Benz Canada. Over the course of his tenure, Mr. Hogan was promoted several times, including to his most recent position of assistant service manager at Mercedes-Benz Vancouver (the “Dealership”).

In March 2020, with the onset of the COVID-19 pandemic, and as the Dealership experienced a decline in business, Mr. Hogan and others were temporarily laid-off. By August 2020, it became apparent that the effects of the pandemic would be protracted and, as such, after 22 years of service, Mr. Hogan’s employment was terminated “without cause”. He was 52 years old.

Mr. Hogan commenced a lawsuit claiming he was wrongfully dismissed and seeking common law reasonable notice.

In response, the Dealership argued that Mr. Hogan failed to reasonably mitigate his damages (by declining a job as “service advisor” at another car dealership owned by his former employer) and that any CERB payments received by him during the notice period should be deducted from any wrongful dismissal damages award.

## Court Deducts CERB Payments from Wrongful Dismissal Damages

At summary trial, Justice Gerow of the British Columbia Supreme Court held in favour of Mr. Hogan as follows:

First, applying the *Bardal* factors, the Court held that the appropriate notice period for a 52 year-old managerial employee with 22 years of service working in the automotive industry was 22 months.

Second, the Court found that Mr. Hogan did not fail to mitigate his damages. The Court considered the circumstances leading to the “service advisor” offer, noting that the offer was effectively a demotion and was only presented to him after he had commenced litigation in exchange for settling the lawsuit.

Lastly, in calculating Mr. Hogan’s damages award, the Court concluded that Mr. Hogan’s wrongful dismissal award should be discounted by the \$14,000.00 in CERB payments he had received during the notice period.

## Government Income Replacement Benefits and Wrongful Dismissal Damages

Although it is well-settled that Employment Insurance benefits are not deductible from wrongful dismissal damages; to date, the case law on whether CERB payments are deductible from wrongful dismissal damages is largely (and, unfortunately) unsettled.

The first case that considered the CERB deductibility issue was *Iriotakis v. Peninsula Employment Services Limited*, 2021 ONSC 998 (“*Iriotakis*”), previously summarized [here](#). In that case, Justice Dunphy of the Ontario Superior Court of Justice declined to offset, or reduce a wrongful dismissal damages award, by CERB payments received by an employee.

In *Iriotakis*, Justice Dunphy awarded a terminated employee three months’ notice less any amounts paid to him on termination (among other things) and declined to discount his wrongful dismissal damages by CERB payments received stating:

**[21] I agree with the defendant that CERB cannot be considered in precisely the same light as Employment Insurance benefits when it comes to calculating damages for wrongful dismissal.** CERB was an ad hoc programme and neither employer nor employee can be said to have paid into the program or “earned” an entitlement over time beyond their general status as taxpayers of Canada. The level of benefit paid (approximately \$2,000 per month) was considerably below the base salary

previously earned by the plaintiff to say nothing of his lost commission income. On balance and on these facts, I am of the view that it would not be equitable to reduce Mr. Iriotakis' entitlements to damages from his former employer by the amount of CERB given his limited entitlements from the employer post-termination relative to his actual pre-termination earnings. I decline to do so.

In stark contrast, in *Hogan*, Justice Gerow discounted Mr. Hogan's wrongful dismissal damages since he would be placed in a better position by receiving same:

[99] The EI benefits should not be deducted. Section 45 of the *Employment Insurance Act*, S.C. 1996, c. 23, requires a claimant to repay any unemployment benefits if an employer becomes liable to pay their earnings.

[100] The plaintiff received \$14,000 in CERB payments in 2020. 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.

[...]

[104] In *Iriortakis* the award for the lost wages was reduced by more than half as a result of the plaintiff's employment contract, and retaining the CERB payments would not have put the plaintiff in a better economic position than he would have been but for the breach. In this case, if the CERB payments are not deducted the plaintiff will be in a better economic condition than he would otherwise be.

[105] The CERB payments are not private insurance, and neither the employer nor the employee contributed to them. As a result, they are not delayed compensation or part of the plaintiff's earnings. There is no evidence that the plaintiff will have to repay the CERB.

[106] The CERB payments were intended to be an indemnity for the type of loss resulting from the employer's breach but the employee had not contributed in order to obtain the entitlement [...].

[107] As a result, I see no basis to depart from the general rule that contract damages should place the plaintiff in the economic position he would have been in had the defendant performed the contract.

Later, in *Slater v. Halifax Herald Limited*, 2021 NSSC 210, the Supreme Court of Nova Scotia held that CERB payments should not be deducted from wrongful dismissal damages in light of the fact that the plaintiff employee “will likely be required to repay” such benefits.

Lastly, and notwithstanding the result in *Hogan*, in *Andrews v Allnorth Consultants Limited*, 2021 BCSC 1246, Justice Tindale of the British Columbia Supreme Court likewise declined to discount a wrongful dismissal damage award by the CERB payments received by an employee.

## Check the Box

How do we reconcile these decisions? In what circumstances, if any, can employers expect that an employee’s wrongful dismissal damages will be discounted by CERB payments?

Unfortunately, the courts have not yet finally resolved this issue. But, for now, the majority of adjudicators appear to be taking the position that CERB payments should not be deducted from wrongful dismissal damages since the plaintiff employees may be required to repay such benefits in the future.

All of this said, in *Hogan*, the court suggested that CERB payments may be deducted from wrongful dismissal damages if a terminated employee is placed in a better financial position post-termination by same.

Employers may have to wait for further guidance from the courts, or ultimately, the Federal government, on this important income replacement benefit issue.

## Need more information?

For more information, or assistance with workplace management issues amidst the ongoing 54 pandemic, please contact [Janeta Zurakowski](#) at 905-972-6876 or your regular lawyer at the firm.



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