

## Member's Quarterly

Fall 2021 Edition

## Feature

## Double Dipping During COVID-19?

*Court rules that CERB not deducted from wrongful dismissal damages*

**COVID-19** has taken a toll on all aspects of our lives, particularly employment. More than a year and a half into the global pandemic, we are starting to see the first cases involving aspects of the pandemic make their way through the court system. In *Iriotakis v Peninsula Employment Services Limited*, 2021 ONSC 998, the Court dealt with the impact of the Canada Emergency Response Benefit ("CERB") on damages in the context of wrongful dismissal case.

The plaintiff in this case brought an action for damages for wrongful dismissal after his employment was terminated without cause. The plaintiff subsequently filed a motion for summary judgment and both parties agreed that summary judgment was appropriate. The plaintiff argued that he was entitled to common law reasonable notice and that he did not receive such notice upon termination of his employment. The plaintiff was fifty-eight (58) years old at the time, had just over two years of service and held the position of Business Development Manager.

There was no dispute as to whether employment was terminated for cause or whether the plaintiff mitigated his losses. The Court determined that there were only three issues to be decided:

- 1) what amount of notice is the plaintiff entitled to?;
- 2) what, if any commission is owed to the plaintiff?; and
- 3) what, if any other payments are owed to the plaintiff?

When determining the amount of notice the plaintiff was entitled to, the Court considered his age as well as the prospects of secure employment and the impact of COVID-19 on the job market. The Court found that although the pandemic had some influence on the plaintiff's job search, how much of an impact was speculative and uncertain. Following the termination of his employment which was at the beginning of the pandemic in March 2020, the plaintiff received CERB. The defendant employer argued that CERB payments received by the plaintiff during the reasonable notice period should be taken into account. The Court found that because CERB was an ad hoc program that neither employer or employee paid into, the plaintiff wasn't earning any entitlement over above that of a taxpayer, and the comparison between the plaintiff's base salary and commission, which was much higher than the amount paid under CERB, it was not equitable in the circumstances to reduce the plaintiff's entitlement to damages by the amount of CERB received by the plaintiff. Ultimately, the Court concluded that the plaintiff was entitled to three (3) months reasonable notice.

The Court went on to consider what if any payment of commission the plaintiff was entitled to receive. Commissions in this case were calculated and paid nine (9) months after the acquisition of the client's business and depended upon the payment and cancellation history of the client to whom the sale was made. The provisions in the employment contract regarding commissions required active employment in order to qualify for commission and stated that any commission payment would cease immediately upon termination of employment and excluded any entitlement to accruing commission during any period of common law reasonable notice following termination of employment.



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The plaintiff argued that despite having been aware of the limitations regarding commission payments upon the termination of employment, the provisions were unenforceable because they precluded payment of commissions on sales made prior to the termination of employment that were payable afterwards, contrary to section 1(1), 11(1), and 5(1) of the *Ontario Employment Standards Act, 2000, SO 2000, c 41* ("ESA") which requires payment of all earned wages and prohibits contracting out of minimum standards under the legislation.

The Court noted that there were three (3) types of commissions at issue in this case:

- 1) commissions arising on sales made prior to termination which would have become payable during the notice period but for the termination of employment;
- 2) commissions arising from sales made prior to termination that would have become payable beyond the notice period but for the termination of employment; and
- 3) commissions earned and payable on sales made during the notice period but for the termination of employment.

The Court found that given the circumstances of this case, only damages for the first type of commissions could be awarded. Having found that the plaintiff was entitled to common law reasonable notice of three (3) months, he was entitled to receive commissions on sales made by him between six (6) and nine (9) months prior to the termination of his employment as they would have been earned and payable, subject only to the passage of time and the actual payment history of the client during the notice period. The Court affirmed that the employee must be put in the same position he would have been in had he been provided with the appropriate working notice. The Court ruled that the plaintiff was not entitled to damages in relation to the two (2) other types of commissions because they did not fall within the definition of "wages" having been "earned" pursuant to ss.1(1) and 11(1) of the *ESA*. The Court also awarded damages to compensate for loss of the plaintiff's cell phone plan, RRSP and profit-sharing contributions and health spending allowance.

This decision is one of many to come dealing with the impact of the pandemic not only on the job market, but also how damages may or may not be affected by COVID-19 benefits.

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