

Do Wrongfully Dismissed Employees Get Less Damages because They Got CERB Benefits?

written by vickyp | July 21, 2021



It may depend on how much money employees lose as a result of being terminated.

Employees who get constructively or wrongfully dismissed are entitled to termination notice and other payments. In most cases, these termination payments come out of the employee's Employment Insurance (EI) benefits. However, COVID-19 pandemic relief measures have thrown a wrench into the system. In August 2020, the federal government issued an [Interim Order](#) effectively banning deductions of termination pay, severance or wrongful dismissal from the EI entitlement of anyone that lost their job between September 27, 2020 and September 25, 2021.

The other key pandemic relief measure for terminated employees was the Canada Emergency Relief Benefit (CERB) and its successor benefits. **The question:** Should the CERB benefits a wrongfully dismissed employee received count against their termination notice? So far, only 3 courts have addressed this issue. **Result:** The courts have split.

CERB Is Not Deductible

Courts in Ontario and Nova Scotia have ruled that CERB doesn't count against wrongful dismissal amounts.

The Ontario Case: *Iriotakis v. Peninsula Employment Services*

What Happened: A HR consulting firm sales staffer with a \$60,000 base salary who also earned \$85,000 in commissions in his last full year on the job got 4 weeks' notice when he was fired and nothing covering lost commissions. All sides agreed it was wrongful dismissal. The question was how much damages the employee should get. The firm claimed the CERB benefits the employee received should come out of his damages.

Ruling: The Ontario Superior Court disagreed, rejecting the comparison between CERB and EI. "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," the court explained. Significantly, the court "coupled" this reasoning with the fact that subtracting CERB would also be unfair and inequitable in this case, citing the huge disparity between his CERB and the amount of money he lost as a result of being terminated, including in commissions not included in his 4-weeks' notice [[Iriotakis v. Peninsula Employment Services Limited](#), 2021 ONSC 998 (CanLII), February 9, 2021].

What It Means: Had the court stopped at the first reason, namely, the difference between EI and CERB, the ruling would have been much more definitive. However, by also weighing fairness and equity into the equation, the court left the door open to subtracting CERB from wrongful damages in a future case [, Had the court stopped there, the decision would have been definitive that CERB doesn't count against wrongful dismissal damages.

The Nova Scotia Case: *Slater v. Halifax Herald*

What Happened: He did nothing wrong; there was no bad blood or vendetta. The *Halifax Herald* just decided to terminate an employee of 39 years 2 weeks into the COVID-19 emergency on the grounds that the pandemic frustrated his contract. But the employee stood his ground and refused to sign the releases dangled in front of him. The day before trial was to begin, the *Herald* dropped its frustration defence making the case purely about the wrongful dismissal damages award, including whether to subtract the employee's CERB payments from his damage award.

Ruling: The Supreme Court of Nova Scotia said no. Not subtracting CERB from wrongful dismissal damages would provide the employee a windfall to the extent he'd get compensation for money he didn't actually lose, the court acknowledged. However, the employee will probably have to pay that money back to the government. By contrast, subtracting CERB would reduce the amount of money the company must pay for wrongful dismissal. It struck the court as wrong that a taxpayer-funded measure to relieve terminated employees should give the *Herald* a windfall in the form of a reduced damage award [[Slater v. Halifax Herald Limited](#), 2021 NSSC 210 (CanLII), June 17, 2021].

What It Means: *Slater* is a more definitive ruling that CERB isn't deductible because it's rooted in the fundamental nature of the CERB program and the purpose of wrongful dismissal damages, rather than the equities of an employee's particular situation.

CERB Is Deductible

A court in BC has taken the opposite stance by ruling that CERB should come out of wrongful dismissal damages.

The BC Case: *Hogan v. 1187938 B.C. Ltd*

What Happened: A car dealership that unilaterally laid off a mechanic was found guilty of constructive dismissal and ordered to pay 22 months' termination notice. The dealership argued that the \$14,000 in CERB payments the mechanic had received should be subtracted from the award.

Ruling: The Supreme Court of BC agreed. The point of damages is to compensate employees for the losses they incur as a result of being wrongfully dismissed. But if the mechanic got to double-dip on both damages and CERB for the same termination, he'd actually come out with more money than he'd have made had he not lost his job. Besides, CERB isn't an insurance program to which the mechanic contributed. And in contrast to the *Slater* court assessment, the court said there was no evidence the mechanic would have to repay the money [[Hogan v 1187938 B.C. Ltd.](#), 2021 BCSC 1021 (CanLII), May 28, 2021].

What It Means: Like the Ontario *Iriotakis* case, *Hogan* is based mostly on the equities of the particular situation. In fact, the BC court specifically compared those situations. Unlike the sales employee in *Iriotakis* who lost so much in commissions as compared to what he got in CERB payments, the mechanic in this case would have actually come out ahead had his CERB benefits not been deducted from his damages.

Takeaway

It's impossible to come to sweeping conclusions based on such a small case sample, especially since those cases all came from lower courts. However, the early consensus seems to be that the deductibility of CERB benefits from wrongful dismissal termination notice and damages will be far less clear than deductibility of EI benefits and will depend on an assessment of the employee's specific financial losses. Deductions will be especially hard to justify if:

- If CERB payments are well below an employee's lost employment income; and/or
- The federal government decides that employees must repay the CERB payments they received.