

COURT CONSIDERS IMPACT OF COVID-19, CERB, FOR EMPLOYEE PAY-IN-LIEU ENTITLEMENTS

By Barry W. Kwasniewski*

A. INTRODUCTION

CALCULATING THE IMPACT of COVID-19 on an employee's reasonable notice period or pay-in-lieu of notice must consider the outlook that was available at the time employment was terminated, according to a recent ruling of the Ontario Superior Court. [*Iriotakis v Peninsula Employment Services Limited*](#) ("*Iriotakis*"),¹ a February 9, 2021 judgment, offers some of the first commentary by an Ontario court concerning the effect of the ongoing pandemic on the legal principles of common law reasonable notice which can result from wrongful dismissal suits by employees. *Iriotakis* does not provide a bright-line rule on the issue, but the judgment does offer some guidelines as a precedent for future decisions to consider. Employers of registered charities and not-for-profit organizations will want to follow the development of the law in this matter, as pay-in-lieu of notice can become expensive where lengthy reasonable notice periods are awarded. *Iriotakis* also involves the calculation of damages for pay-in-lieu, with reasons given concerning how the Canada Emergency Response Benefit (CERB) might affect what an employee is entitled to receive.² This Bulletin summarizes the facts of the case and highlights the issue of reasonable notice.

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¹ 2021 ONSC 998, [2021] O.J. No. 635, online: <<https://canlii.ca/t/jd505>>. [*Iriotakis*].

² The Canada Emergency Response Benefit (CERB) ended in September 2020 and should not be confused with the Canada Recovery Benefit (CRB), which replaced it.

B. BACKGROUND

PETER IRIOTAKIS, age 56, was employed as a “Business Development Manager” for nearly 28 months before the defendant terminated his employment without cause on March 25, 2020.³ Although Mr. Iriotakis’s base salary was \$60,000 a year, his compensation was significantly enhanced by commissions, and he earned an income of \$145,186.30 for his final year of full employment in 2019.⁴ Just how “senior” his position was involved some dispute between the parties: his was neither a supervisory nor a managerial role, but he had “significant responsibilities for developing customer relationships.”⁵

S.F. Dunphy J in this decision considered the “Bardal factors” for the legal test to find a reasonable notice period after termination, or payment-in-lieu: *Bardal v Globe & Mail Ltd.*⁶ These factors are “the character of employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.”⁷ According to Dunphy J, these factors “are better understood as guidelines” and not a “mathematically determinative formula.” Each case involves a “highly fact-specific exercise”.⁸

Upon his termination, the employer paid Mr. Iriotakis four weeks of base salary plus benefits for that four-week period, reasoning that he “neither earned nor became entitled to any commissions following the termination of his employment.”⁹ Mr. Iriotakis subsequently found alternative employment several months later on October 19, 2020, with a base salary slightly less than his previous position’s base salary. Dunphy J noted that at the time of this decision, it was still “too soon to assess whether his commission earnings will rival those he earned while employed” with the defendant.¹⁰

The employment contract in this case was problematic: in particular, the termination clause “for cause”, which “purported to absolve the employer of *all* liability towards the employee [...] in language sweeping enough potentially to include accrued but unpaid wages.”¹¹ As Dunphy J outlined, any termination clause that fails to meet the minimum prescribed standards of the *Employment Standards Act, 2000*¹² (ESA) “will

³ The plaintiff began his employment with the defendant on November 27, 2017. *Iriotakis, supra* note 1 at para 4.

⁴ *Ibid* at para 6.

⁵ *Ibid* at para 7.

⁶ [1960] O.J. No. 149, 24 D.L.R. (2d) 140 [*Bardal*].

⁷ *Ibid* at para 21.

⁸ *Iriotakis, supra* note 1 at para 8.

⁹ *Ibid* at para 9.

¹⁰ *Ibid* at para 10.

¹¹ *Ibid* at para 11.

¹² SO 2000, c 41, s 57.

be struck.”¹³ While Mr. Iriotakis was terminated without cause, the violation of the *ESA* minimums in the “for cause” section of the employment contract meant that the entire termination clause in his employment contract would be struck, and a reasonable notice period would need to be calculated according to the common law.

C. ANALYSIS

MR. IRIOTAKIS ARGUED that he was entitled to “at least” six months’ notice of termination, while the defendant argued that reasonable notice should be two to three months’.¹⁴ Dunphy J noted that calculating the period of reasonable notice, despite the difficulty of judging fact-specific circumstances, is not a subjective task, but is “intended to be undertaken objectively and on a principled basis.”¹⁵ Since the Legislature has had ample opportunity to “lay down clear rules to be followed in all cases” but has not done so, Dunphy J found this to be an “implicit acceptance” by the Legislature of the analysis “demanded by the common law” as a “viable and even desirable means of approaching the question.”¹⁶

Dunphy J is among the first judges in Canada to give jurisprudential guidelines concerning the impact of the COVID-19 pandemic on the length of reasonable notice:

I was asked to make findings about the job market and the possible impact of Covid-19 on Mr. Iriotakis. I have little doubt that the pandemic has had some influence upon Mr. Iriotakis’ job search and would have been reasonably expected to do so at the time his employment was terminated in late March 2020. However, it must also be borne in mind that the impact of the pandemic on the economy in general and on the job market, in particular, was highly speculative and uncertain both as to degree and to duration at the time Mr. Iriotakis’ employment was terminated. The principle of reasonable notice is not a guaranteed bridge to alternative employment in all cases however long it may take even if an assessment of the time reasonably anticipated to be necessary to secure alternative employment is a significant factor in its determination. I must be alert to the dangers of applying hindsight to the measuring of reasonable notice at the time when the decision was made to part ways with the plaintiff.¹⁷

However, CERB benefits “cannot be considered in precisely the same light as employment insurance benefits when it comes to calculating damages for wrongful dismissal,” Dunphy J reasoned, as it was an *ad hoc* programme funded by taxpayers, which neither the employee nor the employer paid into or

¹³ *Iriotakis*, *supra* note 1 at para 11.

¹⁴ *Ibid* at para 13.

¹⁵ *Ibid* at para 14.

¹⁶ *Ibid*.

¹⁷ *Ibid* at para 19.

“earned” an entitlement to over time.¹⁸ Therefore it would not be equitable to reduce Mr. Iriotakis’s entitlements to damages by the amount of CERB benefits he received.¹⁹ In the end, Dunphy J ruled that a period of three months was reasonable notice for Mr. Iriotakis, who was “entitled to receive an amount of money equivalent to the earnings and the value of the benefits that he would have earned had he been given the three month’s working notice” prior to termination, without subtracting for CERB payments he received.²⁰

D. CONCLUSION

AN OTHERWISE STRAIGHTFORWARD decision regarding common law reasonable notice, *Iriotakis* is especially noteworthy for providing some of the initial commentary by the Ontario Superior Court about the impact of the COVID-19 pandemic and the CERB on an employee’s pay-in-lieu entitlements. The plaintiff’s employment was terminated in March 2020, at which point the impact of the pandemic was still “highly speculative” according to the court. It will therefore be left to future decisions to consider how the ongoing pandemic and its effect on the economy might further alter the calculation of reasonable notice. *Iriotakis* also offers a guiding precedent that CERB payments do not offset or deduct the amount of damages an employee is entitled to receive, and are not comparable to employment insurance payments in that regard.

¹⁸ *Ibid* at para 21.

¹⁹ *Ibid*.

²⁰ *Ibid* at para 23.