CITATION: Henderson v. Slavkin et al., 2022 ONSC 2964
COURT FILE NO.: CV-20-00644914
DATE: 2022/08/10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Rose Henderson, Plaintiff

AND:

David Slavkin and Melvyn Kellner, Defendants

BEFORE: Carole J. Brown J.

COUNSEL: Lluc Cerda, Counsel for the Plaintiff

Frank Portman, Counsel for the Defendants

HEARD: February 14-15, 2022

REASONS FOR DECISION

[1] At the commencement of trial, a misnomer, namely the spelling of the defendant's surname as "Slavki", was amended pursuant to Rule 5.04 (2) to his correct name "Slavkin".

[2] The plaintiff brings this wrongful dismissal action against her employers, the defendants, Drs. David Slavkin and Melvyn Kellner, in the form of a summary trial.

[3] The parties, at the commencement of trial, advised that they had agreed upon a notice period of 18 months, in the event that the court finds that the plaintiff was wrongfully dismissed.

The Facts

[4] The parties have agreed upon numerous facts. Others were presented by the affidavits of the parties, with exhibits appended and cross-examinations and re-examinations conducted at trial.

[5] The defendants, Dr. David Slavkin and Dr. Melvyn Kellner, operated oral surgery dental offices in the Greater Toronto Area (GTA) and in Bolton, Ontario. Both doctors are now retired, Dr. Slavkin having retired on December 31, 2020 and Dr. Kellner on April 28, 2021. Dr. Slavkin is 74 years old and Dr. Kellner is 71 years old.

[6] The plaintiff, Rose Henderson, was the receptionist at the Bolton office. She commenced employment with the defendants in April 1990. Her employment terminated on April 30, 2020. She had been a loyal and dedicated employee throughout her employment, which

was reflected in the letter of reference provided by her employers at the time of her termination.

[7] At the time of her termination, she received an annual base salary of $46,000 and 20 days of paid vacation per year.

[8] The defendants worked as oral surgeons, not as general family dentists. In general dentistry, practices are built on the basis of a regularly recurring patient base that returns regularly for scheduled checkups and dental hygiene. By contrast, most patients of oral surgeons require only a single or a few procedures. Consequently, the majority of work at an oral surgery practice is by way of referrals from general practice dentists. Thus, it is more difficult to sell an oral surgeon's practice than a family dentistry practice, the charts and records of which would have inherent value to a purchasing family dentistry practice.

[9] Dr. Slavkin began business with another oral surgeon, Dr. John Gryfe, in Downsview in 1976. Dr. Kellner began working with them in September 1981. The three partners opened the third office in Bolton in April 1990, which is the office at which Ms. Henderson was employed. In 2006, Dr. Gryfe left the practice and the Weston office was closed.

[10] In 2015, Dr. Slavkin and Dr. Kellner, who were 68 and 65 respectively, began to make plans for their future retirement. They reduced their hours worked per week. They had hoped that they might sell to another oral surgeon and, to that end, had brought a third person, Dr. Gregory Duviner, into the practice. However, he was not interested in purchasing the practice and left in October 2019.

[11] Given their plans to retire, the defendants sought to implement employment contracts so that the employees would know what they could expect from the defendants' impending retirements. On May 26, 2015, the defendants offered all of the staff employed by them, including the plaintiff, new employment contracts. There had not previously been written contracts. These new employment contracts were accompanied by an explanatory letter.

[12] The letter sent to the plaintiff read as follows:

> It has become necessary for the Practice to adopt new employment policies. While neither of us has any immediate plans for retirement, you are all aware that we are both of advancing age and there may have been uncertainty as to future working conditions, hours, and/or terms of employment. We appreciate and look forward to your continued employment with the Practice, and this is not a reflection of your value to the practice
>
> …
>
> You have two choices as to how your agreement will be implemented. The first choice is that we are prepared to pay you $500.00 for your signature on the enclosed letter agreement. If you are not prepared to sign the agreement in exchange for the $500.00 payment, then we are herein providing you with actual working notice (based on the length of your employment here) that effective May 26, 2017 your employment on your current terms will terminate and you will be

> offered a contract in the wording attached. If at that point you are not prepared to sign the letter agreement, then your employment with us will terminate effective May 26, 2017.
>
> We are taking these steps to protect the practice goodwill and to provide clarity and stability in the workplace. We look forward to discussing this with you.

[13] The new employment agreement accompanied the letter. The three clauses of that employment agreement which the plaintiff asserts are illegal are paragraphs 13, 18 and 19, which read as follows:

> 13. Your employment may be terminated without cause for any reason upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the *Employment Standards Act*, if any. By signing below, you agree that upon receipt of your entitlement under the *Employment Standards Act*, no further amount shall be due and payable to you, whether under the *Employment Standards Act*, any other statute or common law.
>
> 18. Conflict of Interest. You agree that you will ensure that your direct or indirect personal interests do not, whether potentially or actually, conflict with the Employer's interests. You further covenant and agree to promptly report any potential or actual conflicts of interest to the employer. A conflict of interest includes, but is not expressly limited to the following:
>
> (a) Private or financial interest in an organization with which does business *[sic]* or which competes with our business interests;
>
> (b) A private or financial interest, direct or indirect, in any concern or activity of ours of which you are aware or ought reasonably to be aware;
>
> (c) Financial interests include the financial interest of your parent, spouse, partner, child or relative, a private corporation of which the [*sic*] you are a shareholder, director or senior officer, and a partner or other employer;
>
> (d) Engage in unacceptable conduct, including but not limited to soliciting patients for dental work, which could jeopardize the patient's relationship with us.
>
> A failure to comply with this clause above constitutes both a breach of this agreement and cause for termination without notice or compensation in lieu of notice.
>
> 19. Confidential Information. You recognize that in the performance of your duties, you will acquire detailed and confidential knowledge of our business, patient information, and other confidential information, documents, and records. You agree that you will not in any way use, disclose, copy, reproduce, remove or make accessible to any person or other third party, either during your employment

> or any time thereafter, any confidential information relating to our business, including office forms, instruction sheets, standard form letters to patients or other documents drafted and utilized in the Employer's practice except as required by law or as required in the performance of your job duties.
>
> For clarity, confidential information includes, without limitation, all information (in written, oral, tape, cd rom, diskette, and USB keys or any electronic form) which relates to the business, affairs, properties, assets, financial condition and plans, concerning or relating to the Employer, our dental practice or patients and specifically includes all records, patient files, patient lists, patient names, patient addresses, patient telephone numbers, email addresses, invoices and/or statements, daily appointment sheets, radiographs, marketing information and strategies, advertising information and strategies, and financial information,
>
> In the event that you breach this clause while employed by the Employer, your employment will be terminated without notice or compensation in lieu thereof, for cause.
>
> This provision shall survive the termination of this Agreement.

[14] The plaintiff, after two days, signed the agreement. She continued her work with the defendants in her position as receptionist.

[15] In January 2019, the defendants closed the office in the GTA, leaving the Bolton clinic as the only office left. By February 2019, Dr. Kellner had reduced his office hours to 2.5 days per week. In the late spring of 2019, Dr. Slavkin announced that he would retire effective August 26, 2019.

[16] In October 2019, Dr. Duviner advised that he would not be continuing with the practice and was not interested in purchasing it. The defendants determined that they could not feasibly sell their practice.

[17] On November 1, 2019, the defendants convened a meeting of all staff to advise that Dr. Kellner would be retiring in March 2020 - Dr. Slavkin having already retired - and that all staffs' employment would terminate on that date. At the meeting, the defendants provided to all staff, including the plaintiff, confirmation in writing of the termination of their employment effective April 30, 2020.

[18] The plaintiff, in accordance with her working notice of six months, continued to work until February 2020. After that time, she went on a preplanned vacation. Thereafter, she went on paid sick leave. Throughout this, she was paid her full salary by the defendants.

[19] Thereafter, the plaintiff, whose only income source had been her position with the defendants, chose to move back to her childhood home town, Glencoe. She did not own the house in which she lived, but only rented the house, and chose to move to Glencoe where she had family and friends, and where the rent was not as expensive.

[20] At the time of the termination of the oral surgery practice and, as a consequence, her employment, the COVID-19 pandemic had just been announced. Dental practices were closed pursuant to government requirements until approximately June 2020.

[21] The plaintiff, based on her own admission, did not seek other employment from the time she received her working notice through the end of 2020. As of January 2021, she began to search for new employment and was able to secure employment in May 2021 as a frontline worker in a long-term care home. I note that, pursuant to the evidence adduced, she had made application to numerous optometrist offices in the vicinity, as well as a variety of other advertised positions.

Positions of the Parties

[22] It is the position of the plaintiff that the contract of employment which she was asked to sign in 2015 was unconscionable, contained provisions that were contrary to the *Employment Standards Act, 2000*, S.O. 2000, c.41 ("ESA"), the *Occupational Health and Safety Act*, R.S.O. 1990, c.O.1 ("OHSA") and/or the *Human Rights Code*, R.S.O. 1990, c. H.19 ("HRC"), and therefore illegal, and that, as a result, she was wrongfully terminated. It is the position of the plaintiff that the employment contract must be set aside and, as a result, she is entitled to common-law damages. Further, it is the plaintiff's position that she has reasonably mitigated her damages.

[23] It is the position of the defendants that the contract signed by the plaintiff in 2015 was not unconscionable or illegal. It is the position of the defendants that they, in planning for their upcoming retirement, did everything they could to ensure that the employees were terminated professionally and with significant notice. It is their position that the plaintiff's entitlements pursuant to the ESA were fully satisfied. It is their position that the plaintiff failed to mitigate her damages.

The Issues

[24] The issues to be determined in this case are as follows:

1. Whether the plaintiff was wrongfully terminated;

    (a) Whether the termination clause was unenforceable;

    (b) If so, whether the termination clause is unconscionable;

2. If so, what measure of damages is to be applied;

3. If damages are awarded, whether the plaintiff mitigated said damages; and

4. Whether CERB payments received by the plaintiff should be deducted from an award for wrongful dismissal.

The Law

[25] The basic principles forming the framework for the determination of the enforcement of a termination clause are set forth concisely in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, at para. 28, as follows:

> 1. Employees have less bargaining power than employers when employment agreements are made;
>
> 2. Employees are likely unfamiliar with employment standards in the ESA and thus are unlikely to challenge termination clauses;
>
> 3. The ESA is remedial legislation, and courts should therefore favour interpretations of the ESA that encourage employers to comply with the minimum requirements of the *Act*, and extend its protection to employees;
>
> 4. The ESA should be interpreted in a way that encourages employers to draft agreements which comply with the ESA;
>
> 5. A termination clause will rebut the presumption of reasonable notice only if its wording is clear, since employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment; and
>
> 6. Courts should prefer an interpretation of the termination clause that gives the greater benefit to the employee.

And see: *Alarashi v. Big Brothers Big Sisters of Toronto*, 2019 ONSC 4510, 57 C.C.E.L. (4th) 321, at para 20.

[26] Where an employment agreement is not consistent with the ESA, it becomes invalid irrespective of the actual arrangements made with an employee on termination, and the terminated employee becomes entitled to common-law damages.

[27] In interpreting an employment agreement, it must be remembered that contracts are to be interpreted in their context in a way that the parties reasonably expected the contract would be interpreted when they entered into it: see *Oudin v. Centre Francophone de Toronto,* 2016 ONCA 514, 34 C.C.E.L (4th) 271. The court should not strain to create ambiguity where none exists in the context of interpreting the termination clause: see *Amberber v. IBM Canada Ltd.*, 2018 ONCA 571, 424 D.L.R. (4th) 169, at para. 63; see also *Chilton v. Co-operators General Insurance Co.* (1997), 32 O.R. (3d) 161 (C.A.), at p. 169.

[28] The role of a judge in interpreting a termination clause in relation to the ESA requirements is to "look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law: *Cook v. Hatch* 2017 ONSC 47, at para 25.

[29] I have kept the foregoing principles in mind in my analysis.

Analysis

[30] It is the position of the plaintiff that the employment contract the plaintiff signed in 2015 contained three problematic and illegal provisions, including clauses 13, 18 and 19, all of which are set forth above at pages 3 and 4.

Clause 13

[31] The plaintiff submits that the clause does not exhibit the high degree of clarity that is required of termination clauses and cites *Nemeth v. Hatch Ltd*., 2018 ONCA 7, 418 D.L.R. (4th) 542, where the Court of Appeal stated, at para. 12, that in assessing the validity of a termination clause, "a high degree of clarity is required and any ambiguity will be resolved in favour of the employee and against the employer who drafted the termination clause in accordance with the principle of *contra proferentem*". The plaintiff submits that the clause did not provide for the payment of severance pay as required by section 64 of the ESA and the payment of vacation pay during the statutory notice period. Further, the plaintiff argues that by providing that benefits must be paid during the statutory notice, rather than "continued", the clause attempts to illegally contract out of the ESA. The plaintiff submits that, at best, the clause lacks clarity as to whether Ms. Henderson would be paid severance pay or continued benefits.

[32] In this case, the plaintiff was not provided with benefits in the context of her employment, nor were the defendants severance-paying employers. However, an employee cannot contract out of a protected employment standard under the ESA, even if that particular standard does not yet apply to them: ESA, s. 5(1). "It is sufficient if a provision of an employment contract *potentially* violates the ESA at any date after hiring" (original emphasis): *Rutledge v. Canaan Construction Inc*., 2020 ONSC 4246, at para. 15. In *Waksdale v. Swegon North America Inc*., 2020 ONCA 391, 446 D.L.R. (4th) 725, at para. 11, the Court of Appeal for Ontario stated that "the court is obliged to determine the enforceability of the termination provisions as at the time the agreement was executed; non-reliance on the illegal provision is irrelevant."

[33] The plaintiff further argues that an employer cannot terminate an employee for any reason and, indeed, there are 47 circumstances pursuant to the ESA, OHSA and the HCR which specifically prohibit termination.

[34] The plaintiff challenges the termination clause not on the basis of the actual conduct of the defendants in relation to her termination but, rather, on the ground that it is not open to parties to contract out of the ESA.

[35] It is the position of the defendants that the termination clause should be read in context and as a reflection of the clear intent of the parties that the minimum requirements of the ESA apply. The defendants cite *Oudin* as a framework for the analysis of the enforcement of a termination clause.

[36] As stated in *Amberber*, the court should not strain to create ambiguity where none exists in the context of interpreting a termination clause. Further, as stated in *Cook v. Hatch*, a judge, in interpreting a termination clause, must look for the true intention of the parties, not to disaggregate the words looking for any ambiguity that can be used to set aside the agreement and, on that basis, apply notice as provided for by the common law.

[37] In my view, there is no inconsistency between the termination clause and the ESA provisions which could give rise to any ambiguity in the plaintiff's right to continue to receive benefits pursuant to the ESA. When considering the wording of the clause in issue and the intent of the parties demonstrated in the wording of the clause, indicating compliance with the requirements of the ESA, I cannot conclude that the clause could or should be interpreted as contrary to or inconsistent with the provisions of the ESA. I do not find anything which would suggest that the termination clause should be interpreted as contrary to the ESA.

Clause 18

[38] It is the position of the plaintiff that conduct that falls short of wilful misconduct cannot constitute dismissal for cause. The standard for just cause termination under the ESA entitles even those terminated with cause to minimal entitlements unless the employer can establish, pursuant to s. 2(1)(3) of *Termination and Severance of Employment*, O. Reg. 288/01, that the employee is guilty of wilful misconduct or wilful neglect of duty. While the defendants argue that the provisions enumerated above all bespeak wilful misconduct or wilful neglect of duty, I am unable to conclude that that is indeed the case, based on the wording thereof. I am, however, of the view that the provisions are overly broad and ambiguous. Sub-paragraph (a) does not represent a complete sentence, as a word or words are missing. One would have to guess as to what words are missing such that an employee would not be able to know, upon entering the contract, what conduct in that case might cause termination without notice or compensation in lieu thereof. I am further of the view that sub-paragraph (b) is equally broad, unspecific and ambiguous. I find equally that sub-paragraphs (c) and (d) fall into the same category of broad, unspecific and ambiguous wording.

[39] In light of my findings regarding clause 18, the clause is invalid and must be set aside.

Clause 19

[40] It is the position of the plaintiff that clause 19 defines confidential information and forbids its disclosure, with termination for cause being the penalty for the breach. However, the clause does not stipulate that any misconduct must be wilful and not trivial to support a termination without notice, as required by the ESA.

[41] As set forth in *Wood v. Fred Deeley*, a termination clause will rebut the presumption of reasonable notice only if its wording is clear, as employees are entitled to know at the beginning of an employment relationship what their employment will be at the end of their employment.

[42] Again, an employee is entitled to know at the beginning of an employment relationship what the employment will be at the end of their employment and how and when it may be terminated without cause. In this case, it is not clear in what circumstances the disclosure of confidential information may occur without immediate termination for cause without notice. One can conceive of a situation where confidential information may have been inadvertently disclosed in a situation where it is not wilful and/or where it is a trivial breach. This clause does not respect the ESA provisions in this regard.

[43] Based on my findings regarding clause 19, this clause is also invalid and must be set aside.

Mitigation of Damages

[44] The defendants submit that Ms. Henderson failed to mitigate her damages. They point to the fact that she did not obtain employment for 18 months after her termination. Further, they state that she did not apply to any dental or oral dental surgeon offices. They maintain that she was highly and easily employable given her experience.

[45] It is the position of the plaintiff that her termination occurred at the height of the COVID-19 pandemic in April 2020, when many businesses, including dental offices, were closed. She maintains that positions were not easily obtainable at that time, nor when businesses slowly began to reopen. She takes the position that she acted reasonably in her efforts to mitigate her damages and made significant efforts to secure alternate employment.

[46] The onus of demonstrating that the plaintiff has failed to act reasonably in an attempt to mitigate her losses is that of the defendants and is typically a high onus: *Lalani v. Canadian Standards Association*, 2015 ONSC 7634, 27 C.C.E.L. (4th) 279, at para. 27; *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Dobson v. Winton and Robbins Ltd*., [1959] S.C.R. 775. The Supreme Court of Canada, in *Red Deer College*, at p. 332, stated as follows: "The burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame."

[47] In *Somir v. Canac Kitchens* (2006), 56 C.C.E.L. (3d) 234 (Ont. S.C.), at para. 58, the court stated that "the onus rests on the defendant to show either that the plaintiff 'found, or by the exercise of proper industry in the search, could have procured other employment of an approximately similar kind reasonably adapted to his abilities' ... The defendant must establish that the plaintiff's conduct in seeking to find alternate employment was unreasonable in all respects" (citations omitted).

[48] The onus is on the employer to prove that the employee failed to take reasonable steps to find a comparable position: *Gracias v. Dr. David Walt Dentistry*, 2022 ONSC 2967, at para. 106.

[49] In *Adjemian v. Brook Compton North America* (2008), 67 C.C.E.L. (3d) 118, at para. 21, the court emphasized that mitigation need not be perfect, only reasonable. To meet its onus, the employer must advance evidence of comparable positions to which the plaintiff is reasonably adapted and cannot "pick away at the plaintiff's performance with a bald suggestion that she could have done better": *Peticca v. Oracle Canada ULC*, [2015] O.J.

No. 1985 (S.C.), at paras. 18-20; see also *Drysdale v. Panasonic Canada Inc.*, 2015 ONSC 6878, at paras 18-23.

[50] This is a somewhat unique situation, given the timing of closing of the business and the termination at the height of the pandemic. I have no doubt that the pandemic and the significant closures of businesses across the province and the country had an impact on the plaintiff's search for employment and the success of that search.

[51] Based on the evidence adduced, dental offices were closed through at least June of 2020, and opened again with restricted capacity, as did other businesses.

[52] In addition, consideration must be had to her age - 63 years old at the time of termination - which may have made finding another comparable position more difficult.

[53] Further, following her termination, Ms. Henderson decided not to remain in Toronto, where she rented a house and where the rent was high. She was single and had lost her only source of income. She moved to Glencoe, where she had grown up, where she had family, and where rents were lower. This must also be considered in assessing the reasonableness of her ability to mitigate her damages and find comparable employment in a smaller market outside the Toronto area.

[54] After moving to Glencoe, Ms. Henderson began to look for work. She applied to numerous positions, including medical offices, and finally secured employment as a frontline worker in a long-term care home.

[55] This took 18 months from her notice of termination, 12 months from her last day of work. In normal circumstances, this would not meet the test for mitigation. However, given the pandemic, the long economic recovery, the difficulty in finding work as businesses slowly began to open, as well as the plaintiff's age and her move to a smaller centre where rent was cheaper, I am of the view that there should be only a small deduction for the length of time it took her to mitigate in the circumstances. The plaintiff acted reasonably and did her best to find work once she moved from Toronto to Glencoe. I am of the view that the notice period should be reduced by 3 months in the circumstances.

[56] I note that the defendants have failed to demonstrate that there were other positions open to which Ms. Henderson could and should have applied.

[57] Again, this is a somewhat unique set of circumstances and this issue has been decided in this unique context.

CERB

[58] Ms. Henderson received income support payments under the *Canada Emergency Response Benefit Act*, S.C. 2020, c. 5, s. 8 ("*CERB Act*"), during the reasonable notice period, totalling $10,000.

[59] The defendants' position is that this amount should be deducted from the damages award; otherwise, Ms. Henderson will be in a better position than she would have been in had she

not been terminated. They argue that, since there is no basis for repayment under the *CERB Act* or a regulation promulgated under it, her CERB is a gain that will not need to be repaid. Further, an award of pay in lieu of notice does not amount to employment income or any other source of income enumerated in the *CERB Act* disentitling an individual from receiving the benefit.

[60] The plaintiff argues that her CERB does not amount to a collateral benefit because she may need to repay it. She was not eligible to receive it in the first place because she did not stop working "for reasons related to COVID-19". Further, the benefits she received are not sufficiently connected to the defendants' breach. She received CERB because she was terminated during the pandemic. That benefit, she says, was not designed to indemnify her for the sort of loss occasioned by the defendants' breach.

The Law

[61] This case raises the two-fold question of whether Ms. Henderson's CERB creates a compensating advantage and, if so, whether that advantage should be deducted from the damages award.

[62] Collateral benefits were most recently considered by the Supreme Court of Canada in *IBM Canada Limited v. Waterman*, [2013] 3 S.C.R. 985. In *Waterman*, the Court addressed the question of when a collateral benefit or "compensating advantage" the plaintiff receives (pension benefits, in that case) should be deducted from damages otherwise payable for a wrongful dismissal.

[63] The Court indicated that a collateral benefit is an advantage or gain that flows to a plaintiff: *Waterman*, para. 15. Further, that advantage or gain must also be connected to the defendant's breach on a 'but for' causal basis or because the gain was intended to provide the plaintiff with an indemnity for the type of loss caused by the breach: *Waterman*, para. 15. However, even if a collateral benefit is recognized as such, it is not necessarily deductible. A strict application of the compensation principle, *i.e.*, that a defendant should compensate the plaintiff only for his or her actual loss, will in some cases not do justice between the parties: *Waterman*, at para. 36. These "exceptions" include the two well-known ones of charitable gifts and private insurance, which are justified on the basis of "justice, reasonableness and public policy": *Waterman*, at para. 37.

[64] The caselaw is split on whether CERB, specifically, is deductible from wrongful dismissal damages.

[65] In *Iriotakis v. Peninsula Employment Services Ltd*, 2021 ONSC 998, 154 O.R. (3d) 373, CERB was not deducted. The 56-year-old plaintiff was dismissed without cause from his sales position in March 2020, after 28 months of service. In his last year of employment, he received a base salary of $60,000 and $145,000 in compensation, including commissions. The court noted that CERB was "an *ad hoc* programme and neither employer nor employee can be said to have paid into [it] or 'earned' an entitlement over time beyond their general status as taxpayers". Dunphy J. found that there was a significant difference between the plaintiff's CERB and his salary and compensation and concluded, at para. 21,

that "[o]n balance *and on these facts*, it would not be equitable to reduce Mr. Iriotakis' entitlements to damages ... given his limited entitlements from the employer post-termination relative to his actual pre-termination earnings" (emphasis in original).

[66] *Iriotakis* was applied in *Fogelman v. IFG*, 2021 ONSC 4042. At paras. 94-95, Vella J. stated her agreement with *Iriotakis* and declined to deduct CERB. Similarly, in *Dr. David Walt Dentistry*, Perell J. indicated that he agreed with the reasons in *Iriotakis* (but also *Slater* and *Snider* – discussed below) and held that CERB was not a "mitigation credit" in the case before him.

[67] A different approach was taken in *Slater v. Halifax Herald Limited*, 2021 NSSC 210. The plaintiff was laid off in March 2020 after 39 years of service. He was awarded damages of $88,000. The court declined to deduct CERB. Campbell J. found that Mr. Slater might have to repay CERB because the damages were a "form of payment" for the period he would have otherwise been working and the *CERB Act* requires repayment if a recipient is rehired or receives retroactive pay: paras. 53-4. In that case, it would be unfair to reduce the damages award. Further, even if he were not required to repay CERB, this "windfall" would not require his employer to pay more damages than it would have had to pay had CERB not existed: para. 54. The alternative would be that his employer "would benefit from the taxpayer funded CERB payments by having a reduced damage award and Mr. Slater would be left providing an explanation" (para. 60).

[68] *Slater* was applied in *Donovan v. Quincaillerie Richelieu Hardware LTD.*, 2021 NBQB 189, another instance in which CERB was not deducted.

[69] Courts have come to the opposite conclusion in several cases, mostly from British Columbia.[1]

[70] In *Hogan v. 1187938 B.C. Ltd*, 2021 BCSC 1021, CERB was deducted from the damages award. Mr. Hogan was laid off in March 2020, after nearly 22 years, at a then-annual salary of $86,000 and bonuses of up to $12,000 a year. Gerow J., applying *Waterman*, concluded that CERB was to be deducted so as not to put the plaintiff in a better position than he would have been in had he not been terminated. 'But for' his dismissal, he would not have received CERB, and the "nature of that benefit is an indemnity for the wage loss caused by the employer's breach of contract": para. 101. Gerow J. distinguished *Iriotakis* on the basis that there was a large disparity between Mr. Iriotakis' loss and the damages he received, one that would allow him to retain CERB without putting him in a better economic position that he otherwise would have been in: paras. 102-104. Gerow J. further noted, at para. 105, that there was no evidence that Mr. Hogan would have to repay CERB.

[71] *Hogan* was followed in *Yates v. Langley Motor Sport Centre Ltd.*, 2021 BCSC 2175. The plaintiff was laid off in March 2020. Following *Hogan*, the court concluded, at para. 43, that if the plaintiff's CERB was not deducted, she would be in a better position than she otherwise would have been in. The court found that 'but for' her termination, she would

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[1] See also *Livshin v. The Clinic Network Canada Inc.*, 2021 ONSC 6796, at para. 93; *Oostlander v. Cervus Equipment Corporation*, 2022 ABQB 200, at paras. 41-44; *Abdon v. Brandt Industries Canada Ltd.*, 2021 SKPC 37, at para. 70.

not have been eligible for CERB; that it was a benefit intended to be an indemnity for the loss of regular salary arising from the employer's breach; and that she had not contributed to that benefit: para. 43. The court also declined to find that an award of damages would trigger a CERB repayment obligation, chiefly on the basis that payment in lieu of notice does not constitute employment income and is not prescribed as "other income" by regulation under the *CERB Act*: para. 44. Finally, the court declined to apply *Andrews v. Allnorth Consultants Limited*, 2021 BCSC 1246, in which CERB was not deducted, on the basis that it was decided without the benefit of the reasons in *Hogan* and *IBM* (para. 46).

[72] *Hogan* and *Yates* were followed in *Shalagin v. Mercer Celgar Limited Partnership*, 2022 BCSC 112; *Reotech Construction Ltd. v. Snider*, 2022 BCSC 317; and *Nicolas Jr. v Ocean Pacific Hotels Ltd.*, 2022 BCSC 1052.

[73] In *Shalagin*, the court concluded that CERB would be deducted if the plaintiff had been wrongfully dismissed. He was terminated in March 2020 after ten years of service for reasons unrelated to the pandemic. Branch J. stated, at paras. 85-86, that *Horgan* and *Yates* were binding and offered the "more compelling" analysis, one that "better accords with a foundational principle of contract law—ensuring that the plaintiff is put in the same position they would have been in had the contract been performed." The court also stated that *Iriotakis* and *Slater* were distinguishable for the reasons set out in *Hogan* and declined, for lack of evidence, to find as the court did in *Slater* that "the requirement for repayment makes [CERB] analogous to EI benefits" (para. 85).

[74] In *Reotech*, the Supreme Court of British Columbia allowed an appeal in part of the trial judge's decision not to deduct CERB. The court endorsed *Hogan* and *Yates* and indicated that *Yates*, which was released after the trial decision, "established that CERB payments are a collateral benefit" (para. 88). Fleming J. concluded that, given the lack of evidence that the plaintiff's CERB would have to be repaid, the trial judge had erred in law in declining to deduct it (para. 89).

[75] Finally, in *Ocean Pacific Hotels*, Ross J. stated, at para. 56, that he was bound by *Hogan* and *Yates*, considered them to be correct, and concluded that CERB would be deducted.

Analysis

[76] After considering the caselaw, including *Dr. David Walt Dentistry*, and the parties' submissions, I conclude that the CERB at issue does not amount to a compensating advantage, for the following reasons.

[77] The CERB is not an advantage or gain that flowed to Ms. Henderson because there is a real risk that she will be required to repay it, in due course. Pursuant to s. 6(1)(a) of the *CERB Act*, a "worker" is entitled to CERB if he or she, "whether employed or self-employed, ceases working for reasons related to COVID-19". Based on the evidence before me, Ms. Henderson did not "cease working" for reasons related to COVID-19; in fact, her notice of termination long predated the pandemic and the availability of the CERB program. There is also the question, which I need not decide here, of whether Ms. Henderson met the definition of "worker" under s. 2 of the *CERB Act* at the time of her application.

[78] Further, Ms. Henderson's receipt of CERB was not sufficiently connected to the defendants' breach. First, it was not connected on a 'but for' causal basis. To be eligible for CERB, a worker must have stopped working for COVID-related reasons. This was the case in *Yates* and *Hogan*. The plaintiffs stopped working for COVID-related reasons because the pandemic prompted their employers to terminate their positions in March 2020. In this case, Ms. Henderson was dismissed in November 2019, months before the pandemic arrived and for reasons completely unrelated to it. While her dismissal left her unemployed during the period when she received CERB, this is an insufficient basis on which to find a strong causal connection between the defendants' breach and the receipt of a benefit meant to support those who have stopped working for pandemic-related reasons. The evidence does not lead me to the conclusion that CERB would not have accrued to Ms. Henderson 'but for' her wrongful dismissal.

[79] Second, I do not find, as the court did in *Hogan* and *Yates*, that CERB is a benefit intended to be an indemnity for wage loss arising from the employer's breach of the employment contract. In *Hogan* (at paras. 10-11) and *Yates* (at para. 2), the employers' breach was prompted by the pandemic. Under the *CERB Act*, however, a worker is eligible for the benefit if, among others, he or she "ceases working for reasons related to COVID-19". This suggests that CERB is a benefit intended as an indemnity for wage loss related to COVID-19, not for wage loss arising from an employer's breach of an employment contract.

[80] As a result, I find that Ms. Henderson's CERB does not amount to a collateral benefit.

[81] Nevertheless, even if I am found to be wrong in this regard, this case does not merit an unyielding application of the compensation principle. In particular, I find compelling the reasoning in *Slater* regarding the allocation of risk in case of a windfall. Ms. Henderson was wrongfully dismissed. She should not have to bear the risk of not being made whole, especially at her advancing age and after being a loyal and dedicated employee for 30 years—a length of service reflected in the 18-month notice period agreed to by the parties. The Supreme Court in *Waterman* recognized that in some cases a strict application of the compensation principle can lead to injustice. I find that this is one of those cases.

[82] The damages award should not be reduced by the CERB payments that Ms. Henderson received.

Conclusion

[83] Based on the foregoing, I find that the plaintiff was wrongfully dismissed. Clauses 18 and 19 of the employment contract were not in compliance with the ESA, and therefore invalidated the employment contract.

[84] The parties have advised me that they have agreed on an applicable notice period of 18 months, from which, as set forth above in my finding on mitigation, 3 months should be deducted.

[85] Finally, as set forth above, I find that the CERB payments should not be deducted from the award of damages.

Costs

[86] I strongly urge the parties to come to an agreement as regards costs in this matter. Should they be unable to do so, the parties are to provide me with their bills of costs, limited to three pages total within 60 days of release of these Reasons for Judgment.

Carole J. Brown J.

Date: August 10, 2022