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Severance Pay Entitlement To Consider Global Payroll - Ontario Superior Court (Divisional Court)

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This week, the Ontario Superior Court of Justice (Divisional Court) set aside a decision of the Ontario Labour Relations Board ("OLRB")[1] in which the OLRB ruled that *payroll* means only Ontario payroll for purposes of severance pay entitlement under the province's employment standards legislation. Describing the OLRB's decision as "unreasonable", "illogical" and "flawed", the Divisional Court held the calculation of payroll includes an employer's global payroll.[2]

The decision has broad, financial implications for Ontario employers. It extends the obligation to pay *severance* pay to any Ontario employer whose global payroll is at least $2.5 million, including the payroll of any related entity such as a parent organization.

While possible, it is unlikely this decision will be further reviewed. If it is, we will keep our readers apprised. For now, the law in Ontario has changed; payroll for the purposes of severance entitlement under Ontario's *Employment Standards Act, 2000*[3] ("ESA"), **includes an employer's global payroll**, not only its Ontario payroll.

The legal backdrop

Under section 64 of the ESA, an employee is entitled to *severance* pay (an additional week of pay per year of completed service to a maximum of 26 weeks) in addition to notice of termination or *termination* pay if, at the time of termination, the employee has been employed by the employer for five years or more and the employer has a payroll of at least $2.5 million.[4] The $2.5 million threshold exempts smaller employers from this financial obligation.

Severance pay can therefore represent a significant increase to the termination obligations of an employer. Section 64 of the ESA reads, in part, as follows:

> (1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five year or more and,

[1] Hawkes v. Max Aicher (North America) 2018 CanLii 125999 (ON LRB).
[2] Hawkes v. Max Aicher (North America) 2021 ONSC 4290.
[3] S.O. 2000, c.41.
[4] In Ontario, an employee is also entitled to severance pay if he or she has been employed for five years or more and the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result.

…

(b) the employer has a payroll of $2.5 million or more.

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by **all of the employer's employees** …was $2.5 million or more…

[**emphasis added**]

Prior to 2014, a line of OLRB decisions appeared to propose that only an employer's Ontario payroll should be considered in the calculation of payroll under s. 64. These decisions stood on two key legs:

1. The Ontario legislature has no jurisdiction over business operations outside of Ontario; and

2. The language of subsection 3(1) of the ESA which reads as follows:

   (1) The employment standards set out in this Act apply with respect to an employee and his or her employer if,

   (a) the employee's work is to be **performed in Ontario**; or

   (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a **continuation of work performed in Ontario**

   [**emphasis added**]

According to the OLRB, the reference to Ontario meant every provision of the ESA should only apply to Ontario-based employment.

In 2014, in *Paquette v Qaudraspec Inc*.[5] ("*Paquette*"), the Ontario Superior Court expanded the definition of payroll under s. 64 of the ESA to include an employer's national payroll.

Fast forward to 2018 and the issue was live again in the case of Doug Hawkes and Max Aicher (North America) Limited ("Aicher").

Hawkes v. Aicher

For 38 years, Hawkes was employed by Aicher, a steel company operating in Ontario and a wholly owned subsidiary of a large German corporation. Hawkes worked for Aicher until 2015 when his employment was terminated without cause. At the time, Aicher's payroll in Ontario was less than $2.5 million. However, the payroll of the German parent company, globally, well exceeded $2.5 million.

[5] (2014), 121 OR (3d) 765 (Sup. Ct.).

Hawkes filed a claim with the Employment Practices Branch of the Ministry of Labour (as it then was), claiming he was entitled to unpaid vacation pay, termination pay and severance pay under the ESA. An Employment Standards Officer ("ESO") awarded vacation and termination pay but not severance pay because Aicher's Ontario payroll was less than $2.5 million.

Relying on the ruling in *Paquette*, Hawkes sought a review of the ESO decision. He argued:

- The payrolls of both Aicher and the parent company ought to be considered when determining whether the $2.5 million threshold had been met
- Section 64 of the ESA does not expressly restrict the $2.5 million threshold to Ontario operations, but instead refers to "all of the employer's employees"
- The $2.5 million threshold is intended to exempt smaller employers from paying severance, not large national or multinationals.

The OLRB was not convinced:

> In this case, the applicant was employed in Ontario by a company operating in Ontario. In my view, having regard to the Act as a whole, while an employer may have operations and payrolls outside Ontario, it is only Ontario-based employment and operations that is captured by section 3 and therefore section 64 of the Act. The absence of the words "in Ontario" in section 64 does not mean that the provisions are unrestricted. The words "in Ontario" are found in section 3 and their effect is to apply to employers whose employees perform work in Ontario (or whose work is a continuation of work performed in Ontario). It does not make sense to presume that provincial legislation could affect employment or operations anywhere but in Ontario.

The OLRB distinguished the decision in *Paquette* as "factually different" and not persuasive because it did not appear to address the interaction of s. 3(1) and s. 64 of the ESA.

Rebuke by the Ontario Court

In a scathing rebuke, the court set aside the decision of the OLRB and substituted its own decision that *payroll* under s. 64 should include an employer's global payroll. Essentially, the court held as follows:

- The standard of review is "reasonableness"; that is, whether the OLRB decision "…falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law".
- "[*T]he ESA ought to be interpreted in a broad and generous manner, and any doubt arising from difficulties of language should be resolved in favour of the claimant*."
- The OLRB reached a conclusion that is inconsistent with the text, context and purpose of s. 64.
- The underlying purpose of the severance pay provision is to "*better recognize the dignity and value of the people who work in this province by extending the protection of severance pay to as many employees as possible."*

- The OLRB departed from this purpose when, rather than narrowly limiting the payroll exemption to small enterprises, it broadened it to allow large, multinational corporations to avoid paying severance pay to long-service employees.
- The language of s. 64 does not restrict the calculation of payroll to an Ontario payroll. Had the legislature wished to do so it could and would have.
- There is no jurisdictional impediment which prevents an adjudicator from taking into account payroll outside of Ontario. An ESO has the power to obtain information regarding the foreign payroll of an employer in Ontario under the ESA.
- *Paquette* was not materially, factually different than the case at bar, carefully addressed interaction of s. 3(1) and s. 64 of the ESA, and ought to have been given serious consideration by the OLRB; not distinguished on trivial grounds.
- The OLRB's pre-*Paquette* line of decisions were wrongly decided, based on a misunderstanding of the law.

The court concluded:

> …[t]he [OLRB] in this case saw ambiguity in the language of the Act where there is none, purported to distinguish *Paquette*, and favoured an interpretation of the ESA that accomplishes the opposite of what the Supreme Court directed. Instead of extending the protections of the ESA to as many employees as possible while remaining true to the words of the Act, the [OLRB] favoured an interpretation that directly undermines that purpose.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or any member of our team at info@sherrardkuzz.com.