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Ontario Labour Relations Board Sheds Light on Severance Pay Calculation Rules

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In its December 2018 decision in *Doug Hawkes v. Max Aicher (North America) Limited (Hawkes)*, the Ontario Labour Relations Board (OLRB) addressed the issue of whether an employer's global payroll should be considered in determining an employee's entitlement to severance pay under the *Employment Standards Act, 2000* (the ESA).

As Ontario employers are aware, section 64 of the ESA requires an employer who terminates an employee's employment without cause to provide an employee with severance pay, where the employee has five or more years of service and the employer has a payroll of at least $2.5 million.

Since the Ontario Superior Court's decision in *Paquette v. Quadraspec Inc. (Paquette)*, there has been some question as to whether, for the purposes of determining the $2.5 million threshold, the calculation of an employer's payroll should be restricted to its payroll in Ontario or whether the payroll outside of Ontario must also be considered.

Paquette had held that the severance pay obligation set out at section 64 of the ESA required a consideration of the employer's national payroll and not just its Ontario payroll in determining whether the employer had met the $2.5 million threshold. This finding was contrary to a well-established line of case law which had interpreted the $2.5 million threshold to apply only to an employer's Ontario payroll.

The *Hawkes* Decision

In *Hawkes,* the applicant was a former employee of Max Aicher (North America) Limited (MANA), which had operations in Ontario. MANA was a wholly owned subsidiary of Max Aicher GmbH & Co KG (MAG), a company incorporated in Germany.

In 2015, the applicant's employment was terminated without cause. At the time, he had more than five years of service but was not paid severance pay under the ESA. The applicant filed an ESA complaint seeking unpaid vacation pay, termination pay, and severance pay. The Employment Standards Officer (ESO) determined that the applicant was entitled to vacation pay and termination pay. She concluded, however, that he was not entitled to severance pay, as MANA did not have a payroll of $2.5 million or more in Ontario. In arriving at this conclusion, the ESO determined that it was only employee salaries within Ontario that were to be considered in calculating the payroll threshold. The applicant appealed the ESO's decision to the OLRB.

At the OLRB, the question to be considered was whether the payrolls of both MANA and MAG ought to be considered in determining MANA's total payroll for the purposes of calculating severance under section 64 of the ESA.

The applicant relied upon the Ontario Superior Court's decision in *Paquette*, to argue that the OLRB should not restrict the computation of his former employer's total payroll to only its Ontario operations. The applicant argued that the employer in *Paquette* had operations in both Ontario and Québec, and that the Court had determined that it was appropriate to consider the combined payroll in both provinces in determining whether or not the employer had met the $2.5 million threshold.

The OLRB rejected the applicant's argument that the reasoning in *Paquette* should be applied to the present circumstance to include a related employer's global payroll. In particular, the OLRB found that:

1. The facts of *Paquette* were distinguishable from the present case. In *Paquette*, the employer had operations in both Ontario and Québec. In the present case, the related employer, MAG, did not have any employees in Ontario.
2. *Paquette* did not consider the interaction between sections 3 and 64 of the ESA. Section 3 of the ESA provides that the ESA applies to employees who perform work in Ontario.
3. The circumstances of the present case did not warrant a departure from the pre-*Paquette* line of cases, which had held that section 64 must be read in light of section 3 of the ESA, resulting in an interpretation of the severance threshold as applicable only to Ontario payroll.

Notably, the OLRB made the following general finding:

"[W]hile 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."

On the basis of the above-noted reasoning, the OLRB determined that for the purposes of the severance pay obligation under section 64 of the ESA, only MANA's payroll in Ontario, and not MAG's global payroll, should be considered. As such, the OLRB upheld the ESO's finding that *Hawkes* was not entitled to severance pay at termination.

Takeaway for Employers

The decision in *Hawkes* confirms that an Ontario employer will not be liable for severance payments if the company's Ontario payroll is less than $2.5 million, even if the Ontario employer's parent company has a global payroll in excess of $2.5 million. This interpretation of the severance obligations under the ESA is favourable for employers who have operations outside of Ontario. What remains to be seen is whether future adjudicators will follow the OLRB's reasoning in *Hawkes* when confronted with a fact scenario outside of the related employer context similar to that in *Paquette*.

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[2] [2014] O. J. No. 5484

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