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PUBLICATION

# Ontario employers take note: Divisional Court finds statutory severance pay calculation based on global payroll

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On June 15, 2021, the Ontario Divisional Court released a decision that requires employers to pay statutory severance pay on termination if their annual payroll exceeds $2.5 million globally. This decision could have wide ranging implications to employee statutory severance entitlements in Ontario under the *Employment Standards Act, 2000* ("ESA").

Currently, the ESA requires payment of statutory severance in the amount of roughly one (1) week of regular wages per year of service, to a maximum of twenty-six (26) weeks. However, for an employer's statutory severance obligation to be activated, section 64 of the ESA requires that the employee who has been terminated has at least five (5) years of service, and that the employer has a payroll of $2.5 million or more. Section 64 states as follows:

64 (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 years or more and,

(a) 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; or

(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 in the four weeks that ended with the last day of the last pay period completed prior to the severance of an employee's employment, when multiplied by 13, was $2.5 million or more; or

(b) the total wages earned by all of the employer's employees in the last or second-last fiscal year of the employer prior to the severance of an employee's employment was $2.5 million or more.

[Emphasis added]

We note that section 3(1) of the ESA also limits the jurisdiction of the Ontario Labour Relations Board to employees whose work is considered within Ontario. Section 3(1) states as follows:

3 (1) Subject to subsections (2) to (5), 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]

The question remains, how does one calculate the $2.5 million annual payroll requirement under the ESA for an employer that operates in more then one jurisdiction (either directly or through related companies)?

### Conflict in Past Decisions

In 2014, the Superior Court, in *Paquette c. Quadraspec Inc.*, 2014 ONCS 2431 [*Paquette*] provided some clarification. In its decision, the Court found that the employer's total payroll (in both Ontario and Quebec) would be relevant in determining statutory severance obligations. The Court in *Paquette* found that the absence of the language "in Ontario", within the $2.5 million restriction under section 64 of the ESA, allowed for payroll outside Ontario to be counted, including Quebec.

However, the question remained how far did "outside Ontario" extend?

In 2018, the Ontario Labour Relations Board ("OLRB") provided an answer. In the OLRB decision *Doug Hawkes v. Max Aicher (North America) Limited*, 2018 CanLII 125999 [*Hawkes*], the applicant argued that Paquette stood for payroll being calculated globally under section 64 of the ESA (Europe in the applicant's case). However, the OLRB found that section 64 should only account for Ontario payroll. The OLRB's reasoning was as follows:

1. Section 3(1) of the ESA is directed to Ontario-based employment. Therefore, it in turn restricts the reference to an employer's payroll in s. 64(2) of the ESA to its payroll in

Ontario;

2. *Paquette* was distinguishable from this case because it was "factually different" and because it did not address the interaction of s. 3 (1) and s. 64 of the ESA. Mainly, *Paquette* involves an Ontario employee working for an employer predominately in Quebec, whereas *Hawkes* involves an Ontario employee working for an Ontario-based employer; and

3. The OLRB "saw no reason" to depart from pre-*Paquette* decisions of the OLRB, which found that payroll calculations for section 64 must be restricted to Ontario employment.

## Judicial Review of Hawkes and new Guidance from the Ontario Divisional Court

However, on June 15, 2021, the Ontario Divisional Court clarified the above dispute around the meaning of section 64. In its decision *Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290, the Court stated bluntly that the calculation of payroll under section 64 of the ESA is not restricted to Ontario employment; employment outside of Ontario, including employment outside of Canada, must be included in the payroll calculation. The Court reversed the OLRB decision for the following reasons:

1. The Court disagreed with the OLRB's reasoning that the legislature must have intended to limit the obligation to pay statutory severance pay to Ontario payroll based on section 3(1). The Courtcited several provisions within the ESA that are limited to employees whose work is performed in Ontario (or is a continuation of work when performed outside of Ontario), noting that section 64 was not one of them;

2. The Court also disagreed with the OLRB distinguishing *Paquette* from the applicant's factual circumstances noting that there is nothing to distinguish between calculating payroll in Quebec versus Europe, as Ontario has no greater authority in either jurisdiction. Also, the Court found that *Paquette* did in fact deal with section 3(1) of the ESA. Specifically, *Paquette* stated that the ESA limited the OLRB to awards of statutory severance pay to Ontario based employees, but had no baring on how statutory severance ought to be calculated; and

3. Finally, the Court found that is a strong reason to depart from the pre- *Paquette* decisions on this issue, as they are a "house of cards, built on a flimsy foundation".

Ultimately, the Court considered the purpose and intent of the ESA as "benefits-conferring legislation", that it 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.

## Takeaways

The Divisional Court's decision in *Hawkes* clarified that an employer must take global payroll into account when determining whether it is obligated to provide statutory severance pay under the ESA. While this is the current state of the law in Ontario, given the conflicting decisions and the possibility of an appeal, this may not be the last word on the issue.

The decision will also raise several legal and logistical questions for Ontario employers that have not considered themselves to be a statutory severance pay employer for purposes of the ESA. For example:

- How can a Canadian Court determine that a foreign company, with no employees in Canada, is a "related employer" to the Canadian entity operating in Ontario? How will parties "discover" whether there is 'common control and direction'?
- What is the appropriate period for calculating the exchange rates when "combining" a Canadian payroll with a foreign payroll?
- How does one obtain the payroll amounts from entities not subject to Canadian Law?
- What will be the impact of an employer that has no office or "place of business" in Ontario, but uses a payroll provider in Ontario to pay its employees?
- Could this decision have retroactive application considering it relates to ESA minimum entitlements?

We will continue to monitor any changes to the case law and legislation resulting from this decision. Please contact Blaney McMurtry's Labour and Employment Group should you have any questions regarding the impact of this decision on your business or wish to have your employment agreements reviewed.

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