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You Heard Us the First Time: Global Payrolls Determine Severance Pay Obligations in Ontario

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In *Hawkes v. Max Aicher (North America) Limited*,[1] the Divisional Court strongly affirmed and expanded the 2014 ruling in *Paquette v Quadraspec Inc*[2] that an employer's entire national payroll must be taken into account when determining its obligation to provide severance under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (" *ESA*"), and not just its payroll in respect of Ontario-based operations. In light of *Hawkes*, not only must national payroll be considered, but so too must an employer's *global* payroll.

Severance Pay Under the ESA

Section 64(1)(b) of the *ESA*, which deals with entitlement to severance pay in Ontario that is not the result of a permanent discontinuance of all or part of the employer's business at an establishment, states that an employer will only be obligated to provide severance pay to terminated employees if "the employer has a payroll of $2.5 million or more". In *Paquette*, the employer's payroll in Ontario was less than $2.5 million, but Justice Kane held that its operations in Quebec must also be taken into account. This pushed the company over the threshold and meant that the plaintiff employee was entitled to severance pay.

Back in 2014, *Paquette* came as a shock for most employers. Prior to the decision, the prevailing view was that only an employer's Ontario operations would be considered when determining its payroll under s. 64.[3] For many employers, *Paquette* meant they could now be obligated to pay severance pay to more employees, representing a much higher contingent labour cost.

Post-*Paquette*, there has been some uncertainty as to whether the courts might once again reverse their position. After all, Ontario remains the only province with any mandatory severance pay legislation in the first place. However, the recent decision in *Hawkes* not only removes any doubt surrounding *Paquette*, it also clearly extends the payroll calculation under the *ESA* to include a company's *global* operations.

Background

The applicant Mr. Hawkes worked as maintenance manager for the respondent, Max Aicher (North America) Limited ("Aicher") from 2010 until his termination in 2015. Although Aicher is based in Ontario, it is a wholly-owned subsidiary of Max Aicher GmbH & Co KG ("MAG") which is a steel company based in Germany.

After his termination, Mr. Hawkes filed a complaint with the Ministry of Labour claiming he was entitled to severance pay. The complaint was dismissed by the Employment Standards Officer, who concluded that Aicher did not have a payroll over $2.5 million and that only Ontario payroll should be considered under s. 64 of the *ESA*. Mr. Hawkes then applied to have this decision reviewed by the Ontario Labour Relations Board. The Board agreed with the Employment Standards Officer's conclusion and provided three points of emphasis. First, s. 3(1) of the *ESA* indicates that the Act only applies to Ontario-based employment, and this has the effect of limiting s. 64(1)(b) to a consideration of Ontario-based payroll. Second, the decision in *Paquette* is factually distinguishable because

it dealt with payrolls in the domestic context, while *Hawkes* involved payrolls in an international context. And third, there was no reason for the Board to depart from pre-*Paquette* decisions.

Mr. Hawkes then brought an application for judicial review of the Board's decision.

The Decision

Writing for a unanimous panel of the Divisional Court, Justice Dambrot definitively rejected the Board's analysis. While he acknowledged that the standard of review is one of reasonableness and that a high degree of deference must be given to the Board, he nonetheless found "each of the considerations illogical and the Board's analysis flawed."[4]

Ultimately, the Court arrived at the following conclusions with respect to the Board's points of emphasis. First, according to the basic tenets of statutory interpretation s. 3(1) does not limit the calculation of payroll to that of Ontario because it does not contain such an express restriction.[5] Second, the distinction between domestic and international payrolls is not one that "rises to the level of principle" and that "Ontario has no greater legislative authority outside Ontario but within Canada than it does in Europe."[6] And finally, the pre-*Paquette* cases referenced by the Board were either taken out of context or were simply decided incorrectly.[7]

Justice Dambrot concluded by explaining how this decision remains in line with the purpose of the *ESA* by extending protection to as many employees as possible.[8]

The Court accordingly set aside the decision of the Board, remitted the matter to the Board, and directed the Board that the calculation of payroll for the purpose of s. 64 of the ESA is not limited to either Ontario payroll or Canadian payroll.[9]

With the *Paquette* decision having been delivered in French, Justice Dambrot has now made clear that nothing was lost in translation.

Significance

Going forward, payroll calculations as required by s. 64 of the *ESA* will not be limited to Ontario-based operations. Rather, an employer's entire global workforce will be taken into account, regardless of geographic location. Accordingly, more Ontario employers may be liable for severance pay entitlements upon terminating their Ontario-based employees. Employers with workforces that are not limited to the Province of Ontario should review their total payroll figures with *Hawkes* in mind to determine whether severance pay may now be owed to terminated Ontario employees.

[1] 2021 ONSC 4290 (Div Ct) (*Hawkes*).

[2] 2014 ONSC 2431 (SCJ) (*Paquette*).

[3] E.g. *Sheet Metal Workers' International Association, Local 397 v. Northland Superior Supply Company Ltd*., [2004] OESAD No 307; *Genesta Inc (cob. as Spectrus) v. Union of Needletrades, Industrial and Textile Employees (Ontario Council), Local 2508G*, [2007] OLAA No 9.

[4] *Hawkes*, *supra* note 1 at 24.

[5] *Ibid* at para 25. The Court contrasts the section with other statutes which spell out a geographical limit, such as section 1(4) of the *Pay Equity Act*, RRO 1990, c. P.7, and regulations made under the *Accessibility for Ontarians with Disabilities Act*, *2005*, SO 2005, c. 11.

[6] *Ibid* at 33.

[7] *Ibid* at paras 35-39.

[8] *Ibid* at para 45.

[9] *Ibid* at para 52.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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