ONTARIO EMPLOYERS MUST CALCULATE SEVERANCE THRESHOLD BASED ON GLOBAL PAYROLL

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The Ontario Divisional Court has changed the game for Ontario employers by finding that the payroll threshold for determining if an employer is a severance payor under the *Employment Standards Act, 2000* (ESA) is based on the employer's global payroll, rather than just Ontario or Canadian payroll.

The Divisional Court heard an application for judicial review of a decision by the Ontario Labour Relations Board (Board) in which it found that applicant Doug Hawkes was not entitled to severance pay from the defendant Max Aicher under section 64(1)(b) of the ESA.

Section 64(1) ESA states:

> "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."

Max Aicher is a wholly owned subsidiary of Max Aicher GmbH & Co KG ("**MAG**"), a steel company headquartered in Bavaria, Germany. Max Aicher does not have a payroll over $2.5 million in Ontario, but MAG's global payroll is well over $2.5 million.

After Mr. Hawkes filed a complaint with the Ministry of Labour, an employment standards officer (ES Officer) determined that Mr. Hawkes was entitled to termination and vacation pay, but not severance pay because Max Aicher did not have a payroll of $2.5 million or more in Ontario.

Mr. Hawkes appealed to the Ontario Labour Relations Board, which affirmed that payroll for the purposes of s.64 of the ESA meant only Ontario payroll.

Divisional Court Decision

Mr. Hawkes sought judicial review of the Board's ruling and, in a very surprising decision, the Divisional Court found that the Board's decision was unreasonable. Instead, the Divisional Court held that an employer's "payroll" under section 64 means its global payroll, including that of related companies, rather than just its payroll in Ontario.

The Divisional Court held that the Board's decision was unreasonable for two primary reasons:

1) Board erred in interpreting sections 3(1) and 64(1)(b) of the ESA as limiting the calculation of severance to Ontario payrolls

The Court found that the Board was wrong to consider section 3(1) of the ESA as limiting the application of section 64 to payrolls within Ontario.

Section 3(1) states:

> "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,
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> a) the employee's work is to be performed in Ontario; or
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> 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."

The court wrote that while section 3(1) limits the ESA's application to work conducted in Ontario, it does not restrict section 64 of the ESA to only Ontario payrolls. Instead, the court found that there is no jurisdictional bar to the Ontario legislature accounting for an employer's payroll outside of Ontario to assess an employer's ability to pay severance.

2) The Board erred in considering applicable jurisprudence

Before the Board, the Applicant relied on the decision in *Paquette v. Quadraspec Inc.* (2014 ONSC 2431), wherein the Ontario Superior Court of Justice held that an employer's payroll in both Ontario and Quebec should be considered in determining whether the employer in that case reached the s. 64 severance pay threshold. The Board found that *Paquette* was distinguishable because it addressed Canadian, rather than global payroll – the Divisional Court disagreed and held that Ontario has the same legislative authority to consider payrolls in, say, Europe as it does in payrolls in other provinces.

More broadly, the court held that the Board incorrectly interpreted the ESA because its decision limited benefits of employees, while the ESA's purpose – in the court's view – is to confer benefits upon employees. The court also made clear that it believed the $2.5 million severance threshold to be too exclusionary, stating that

the section's purpose was to exclude small employers only.

Finally, the court asserted that extending the severance threshold to include global payroll and related companies does not pose an enforcement problem, writing that section 91(12) of the ESA prohibits a company from refusing to answer an ES Officer's questions that are relevant to a complaint investigation. Therefore, the court concluded, an employer can be required to obtain payroll information from outside of Canada to calculate severance under section 64(1)(b).

Takeaways for Employers

The Divisional Court's expansion of the severance threshold to include non-Ontario payrolls means that Ontario employers that are related to companies or have operations outside of the province will need to consider their global payroll in assessing obligations to employees terminated without cause.

Employers will also need to consider whether and how to make payroll records available across related entities. Doing so may require a level of cohesion not usually required of separate companies. While the Divisional Court did not specify what may be required of non-Ontario employers, the decision in *Hawkes* appears to impose a duty on Ontario employers to request payroll records and suggests that ES Officers may be able to sanction employers that do not satisfy that burden.

We will continue to monitor related developments, including any appeal proceedings that may be initiated in *Hawkes*.

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A Cautionary Note