

## Case In Point

# OLRB Finds Global Payroll not to be Considered in Calculation of ESA Severance Pay

**Date:** January 30, 2019

In [Doug Hawkes v. Max Aicher \(North America\) Limited](#), 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* (ESA). The OLRB determined that global payroll should not be included for the purposes of calculating payroll; rather, the calculation of payroll to determine entitlement to severance pay should be restricted to an employer's payroll in Ontario.

## Background

Section 64 of the ESA requires an employer who severs an employment relationship 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. Following the decision in *Paquette v. Quadraspec Inc.*, [2014] O. J. No. 5484 (*Paquette*), there has been some question as to whether the calculation of an employer's payroll should be restricted to its payroll in Ontario or whether an employer's payroll outside of Ontario must also be considered as part of the calculation.

In this case, the applicant was a former employee of Max Aicher (North America) Limited (MANA), which operates in Ontario. MANA is a wholly owned subsidiary of Max Aicher GmbH & Co KG (MAG), a company incorporated in Germany and headquartered in Bavaria.

On October 7, 2015, the applicant's employment was severed and at the time, he had greater than five years service. The applicant then filed an ESA complaint seeking unpaid vacation pay, termination pay, and severance pay. The Employment Standards Officer (ESO) determined that he 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 arriving at this conclusion, the ESO determined that it was only employee salaries within Ontario that are to be considered in calculating the payroll threshold. The applicant appealed this decision.

## The Applicant's Argument

The applicant argued that the payrolls of both MANA and MAG ought to be considered together in determining MANA's total payroll for the purposes of calculating severance under section 64 of the ESA.

In support of his position, he relied on the Ontario Superior Court's decision in *Paquette*, in which the Court rejected an interpretation of section 64 of the ESA which restricted the computation of an employer's total payroll to only those employed by the employer in its Ontario operations. The employer in *Paquette* had operations in both Ontario and Quebec, and the Court determined that it was appropriate to consider the employer's national payroll (combined payroll in both provinces) in determining whether or not the employer had met the \$2.5 million threshold set out in section 64 of the ESA. The applicant submitted that the reasoning in *Paquette* should be extended and applied to an employer who has a global payroll of \$2.5 million or more.

## The OLRB Decision

The OLRB rejected the applicant's argument that the reasoning in *Paquette* should be extended to a scenario to include a related employer's global payroll in the computation of payroll for the purposes of section 64 of the ESA. In support of its

decision, the OLRB made the following findings:

1. *Paquette* was factually different from the present case. In *Paquette*, the employer had operations in both Ontario and Quebec. In this case, the related employer, MAG, did not have any employees in Ontario.
2. The Court in *Paquette* did not consider the interaction between sections 3 and 64 of the ESA. Section 3 of the ESA identifies that the ESA applies to employees who perform work in Ontario. Prior to the *Paquette* decision, there was an established body of case law that identified that section 64 must be read in light of section 3 of the ESA. This line of cases suggested that when this approach is followed, the reference to an employer's payroll in section 64 can only mean an employer's payroll in Ontario.
3. The circumstances of this case did not warrant a departure from the pre-*Paquette* line of cases.

Ultimately, the OLRB determined that MAG's global payroll Ontario should not be included for the purposes of calculating payroll under section 64. Rather, the entitlement to severance pay should be restricted to MANA's payroll in Ontario.

### Key Takeaways

The decision in *Doug Hawkes v. Max Aicher (North America) Limited* clarifies that an Ontario employer will not be liable for severance payments if the Ontario company's payroll is under \$2.5 million, notwithstanding the fact that its parent company has a global payroll in excess of \$2.5 million. In addition, the OLRB found that on the facts of this case, the pre-*Paquette* analysis applied – there was nothing warranting a departure from that analysis.