Case In Point

Court Rules that Calculation of Severance Under ESA is not Limited to Ontario Payroll

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In *Hawkes v Max Aicher,* the Divisional Court set aside an Ontario Labour Relations Board (OLRB) decision and found that the calculation of payroll for the purposes of determining an employee's severance entitlement under the *Employment Standards Act, 2000* (ESA) should be based on the combined payroll of the Ontario employer and its global parent company. Our previous discussion of the OLRB decision can be found here.

The ESA

Section 64 of the ESA provides that an employee who was employed by the employer for five years or more and "the employer has a payroll of $2.5 million or more" is entitled to severance.

Section 3 of the ESA provides that the employment standards in the Act applies to an employee and an employer if (a) the employee's work is performed in Ontario; or (b) the employee's work is performed in and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

OLRB Decision

In this case, the employer had a payroll of less than $2.5 million in Ontario, but the global payroll far exceeded $2.5 million. The OLRB reasoned that section 64, which set out the conditions of entitlement to severance, must be read in light of section 3 of the ESA. When sections 3 and 64 are read together, only an employer's payroll in Ontario is considered for the purposes of calculating severance. In arriving at this conclusion, it distinguished the facts in an earlier decision, *Paquette v Quadraspec Inc,* [2014] OJ No 5484, which held that the employer's national payroll must be considered in determining severance.

Divisional Court Decision

The Divisional Court held that the OLRB's decision was illogical and inconsistent with the text, context and purpose of the provision. Among other things, it stated that "when interpreting a statute, ordinarily the inclusion of words of limitation in one part of the act and not in another is seen as deliberate and meaningful." Section 64 of the ESA does not limit the calculation of an employer's payroll to payroll in Ontario. The Court found that the OLRB's approach rendered the legislature's use of the words "in Ontario" in section 3 and exclusion of those words in section 64 as meaningless. The Court reasoned that it made sense why Ontario would restrict entitlement to severance to *work* performed in Ontario, but base the requirement to pay severance on the size of the employer's total payroll, both within and outside the province.

The Divisional Court also noted that the OLRB ought to have given serious consideration to *Paquette.*

Takeaway

Employers whose global payroll is at least $2.5 million but whose payroll in Ontario is less than $2.5 million are now liable for severance under the ESA by virtue of this decision.