Cassels

A "Border Wall" of a Legal Kind

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Ontario Labour Relations Board Holds that Only Ontario Payroll Matters in Determining Potential Employer Liability for Severance Pay

While every Canadian province requires employers to provide employees with a prescribed minimum amount of notice (or pay in lieu thereof) on termination without cause, Ontario is unique in that it is the only provincial jurisdiction where employees may also be eligible for statutory "severance pay"[1].

Under subsection 64(1)(b) of the Ontario *Employment Standards Act, 2000* (the ESA), employers who terminate an employee with five or more years of service are required to provide such employee with severance pay equivalent to an additional week per year of service up to a maximum of 26 weeks, *provided that* "the employer has a payroll of $2.5 million or more." Where an employer crosses that $2.5 million threshold, its statutory obligations to long-service employees could escalate virtually overnight from a maximum of 8 weeks' notice to as much as 34 weeks (with at least 26 of those weeks in the form of a monetary payment rather than working notice).

While, in simpler days dominated by local businesses, establishing whether an employer had met the $2.5 million threshold would be easy enough, the growth of interprovincial, let alone international, trade has added a new complication to the analysis - specifically, the question of whether, given that subsection 64(1)(b) of the ESA does not explicitly indicate who should be counted in an employer's payroll, it should be limited to Ontario-based employees.

There was a time when it was widely understood that an employer's payroll outside of Ontario was irrelevant to the calculation, as affirmed, for example, in the case of *Altman v. Steve's Music*, 2011 ONSC 1480 (*Altman*). Then came the 2014 decision in *Paquette c. Quadraspec Inc.*, 2014 ONCS 2431 (*Paquette*).

Paquette was a groundbreaking decision in that it held that the payroll calculation for severance pay eligibility purposes must correspond to the wages paid by the employer *both inside and outside Ontario*. According to the Court in *Paquette*, there was "no legal justification or jurisdiction to interpret [section 64] so as to insert restrictions which are not found in the [ESA]." As such, the Court ruled that Quadraspec Inc.'s employees both in Ontario *and Quebec* needed to be considered in determining whether the payroll threshold had been met.

In the four and a half years that followed *Paquette*, there has been much uncertainty as to which line of authority should prevail - the cases following *Altman* or, alternatively, *Paquette*. The Ontario Labour Relations Board (the Board) recently weighed in on this very issue in the December 27, 2018 decision in

Hawkes v. Max Aicher (North America) Limited (2018 CanLII 125999) (*Max Aicher*).

The *Max Aicher* case came before the Board as an application for review of the decision of an Employment Standards Officer to deny Mr. Hawkes, a long-term employee of Max Aicher (North America) Limited (MANA) and its predecessor companies, severance pay. The discrete question before the Board in *Max Aicher* was whether the calculation of the employer's payroll under section 64 of the ESA should be restricted to the Ontario operations of MANA or whether the global payroll of Max Aicher GmbH & Co KG (MAG), its parent company, should also be included in the assessment – assuming the two companies are related companies. In this regard, the *Max Aicher* decision took the fact situation in *Paquette* one step further by looking not only beyond the borders of Ontario but beyond the borders of Canada altogether. It is likewise notable that MAG, the parent company, did not have any employees of its own in Ontario.

The Board in *Max Aicher* began its analysis by examining section 3 of the ESA which sets out limits on the application of the employment standards contained therein. This section provides that the employment standards apply to "an employee and his or her employer" if the work is performed in Ontario or if the work performed outside Ontario is a continuation of work performed in Ontario. It was with this in mind that the Board and the Courts had interpreted section 64 prior to *Paquette* – a consideration that *Paquette* did not address.

While acknowledging that this case was "factually different" from *Paquette*, the Board then went on to endorse the pre-*Paquette* line of cases. According to the Board (at para. 25):

....[H]aving regard to the [ESA] as a whole, while an employer may have operations and payrolls outside Ontario, it is only Ontario-based employment and operations that is captured by section 3 and therefore section 64 of the [ESA]. The absence of the words "in Ontario" in section 64 does not mean that the provisions are unrestricted.... It does not make sense to presume that provincial legislation could affect employment or operations anywhere but in Ontario..."

As a result, MAG's global payroll was *not* included in the calculation of MANA's payroll for severance pay eligibility purposes.

Takeaway for Employers

While the Board's decision in *Max Aicher* does not have the force of law to officially override *Paquette*, a decision of the Ontario Superior Court of Justice, it certainly lends further credence to the argument that *Paquette* is, and should be treated as, an anomaly. And while the *Max Aicher* decision is unlikely to put a stop altogether to employee counsel invoking *Paquette* to argue that their clients are entitled to severance pay in light of the magnitude of an interprovincial or international employer's operations, it at least reinforces and strengthens the figurative payroll "border wall" other adjudicators suggest encircles the province of Ontario. Interprovincial and international employers can thus perhaps sleep a little easier

knowing that their growth and success outside Ontario may not necessarily cost them more when it comes to terminating Ontario employees.

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[1] Such obligations may also arise under the *Canada Labour Code* in the case of employees in federally regulated industries.

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