

**Divisional Court: Employer’s Global Payroll Relevant to \$2.5 Million Severance Pay Threshold**

The Ontario *Employment Standards Act, 2000* (the “*ESA*”) outlines the minimum standards that an employer must adhere to when terminating an employee’s employment. When terminating an employee without cause, the employer must provide notice of termination/pay in lieu of notice based on the employee’s length of service. Payment in lieu of notice is often referred to as termination pay. In some instances, an employer will also be required to pay severance pay. Severance pay compensates long-serving employees for their years of service and investment in the employer’s business, and for the special losses they suffer when their employment terminates.

Section 64 of the *ESA* requires an employer to pay severance pay to an employee if the employee was employed for at least five years and:

- a) the employer discontinues all or part of its business and the employee is one of 50 or more employees who have their employment severed within a six-month period as a result; or
- b) the employer has a payroll of at least \$2.5 million.

Employers should be aware of the Ontario Divisional Court’s recent decision in *Hawkes v. Max Aicher (North America) Limited*, 2021 ONSC 4290, where the Court held that the calculation of an employer’s payroll (for the purposes of statutory severance pay) under the *ESA* includes the employer’s **global** payroll. It is not limited to the employer’s payroll in Ontario as some decisions previously held.

**Background**

Mr. Hawkes was terminated from his employment with Max Aicher North America Limited (“Aicher”), which is a wholly owned subsidiary of a German steel company, Max Aicher GmbH & Co KG (“MAG”). Related or associated businesses are treated as one employer for the purposes of the *ESA*. It was not disputed that Aicher and MAG are related businesses, and that their combined global payroll exceeded \$2.5 million at the relevant time.

Following Mr. Hawkes’ termination, he filed a complaint with the Ministry of Labour alleging that he was entitled to termination, vacation, and severance pay. An Employment Standards Officer (“ESO”) awarded Mr. Hawkes termination and vacation pay, but not severance pay because Aicher did not have a payroll of \$2.5 million. In reaching this conclusion, the ESO found that only salaries under Ontario jurisdiction factor into the calculation of payroll under section 64.

The Ontario Labour Relations Board (the “Board”) upheld the ESO’s decision, affirming that global payroll is excluded from the section 64 calculation. Mr. Hawkes applied for judicial review of the Board’s decision.

### **The Divisional Court’s Decision**

The Divisional Court set aside the Board’s decision, finding instead that section 64 requires consideration of an employer’s global payroll to determine whether the \$2.5 million threshold is met, and thus whether the employer is liable for severance pay. The Divisional Court emphasized the Supreme Court of Canada’s previous affirmation that the *ESA* is benefit-conferring legislation that must be interpreted in a broad and generous manner that extends protections to as many employees as possible.

### **Practical Implications**

- Subject to a successful appeal of this decision, Ontario employers may now be required to consider the company’s global payroll when determining an employee’s entitlement to severance pay upon termination:
  - Employers may be liable for severance pay where its Ontario payroll is less than \$2.5 million if the employer’s global payroll is at least \$2.5 million.
  - Employers may be liable for severance pay where its Ontario payroll is less than \$2.5 million if the company is the parent or subsidiary of a corporation outside Ontario or is otherwise an associated or related business in the meaning of section 4 of the *ESA*, and the combined payroll of the companies is at least \$2.5 million.
- Section 91(12) of the *ESA* prohibits the refusal to answer questions on matters that an ESO thinks may be relevant to an investigation or inspection. Accordingly, employers may be required to obtain and provide an ESO with the company’s global payroll information during an investigation to enforce the severance provisions of the *ESA*.

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