Ontario Superior Court: Employer's Out-Of-Province Payroll Is Relevant To ESA Severance Pay Threshold



As a result of subsection 64(1) of the Ontario *Employment Standards Act, 2000*, certain circumstances of a dismissal trigger an obligation on the employer to provide an employee with severance pay. The most common threshold test is that an employee must have at least five years of service at the end of the statutory notice period and the employer must have an annual payroll of at least $2.5 million.

The common interpretation of this subsection, one which has been consistently endorsed by the Ontario Ministry of Labour and the Ontario Labour Relations Board, is that only the payroll of the employer arising out of its operations in Ontario shall be included in the calculation of the employer's payroll for the purposes of s. 64(1). The rationale behind this analysis is that the Province of Ontario only has the authority to make legislation pertaining to the operations of businesses within Ontario.

In a recent French-language decision, *Paquette v Quadraspec Inc.*, the Ontario Superior Court has determined that all of an employer's payroll, both inside of Ontario and outside of Ontario, shall be included in the determination as to whether the severance pay threshold has been met. This decision, if followed in other decisions and most importantly if followed by the Ministry of Labour and the Ontario Labour Relations Board, could have far reaching implications for Ontario employers whose operations spread into other provinces within Canada.

In this case, an Ontario employee was dismissed without cause after more than 26 years of employment. A written employment contract governed his employment. That contract, among other things, purported to determine his entitlement to payment to him in the event of termination of his employment without cause. The termination clause was found to violate the *Employment Standards Act, 2000*. While it is not our intention to examine this portion of the decision at length, it is a useful case to demonstrate the importance of careful contract drafting. An effective and enforceable termination clause may well have averted a trial in this case.

The employer's annual payroll in Ontario was less than $1.5 million. In Quebec, the same employer's annual payroll was more than $3 million. Combined, the annual payroll more than exceeded the severance pay threshold in the *Employment Standards Act, 2000*. Looking at the Ontario payroll alone, the annual payroll was more than $1 million

short of that threshold.

Ultimately, the termination clause was found to be void for reasons unrelated to the determination of the severance pay issue. Had the contract been drafted in a manner that was enforceable, however, the severance pay threshold would have been key to a determination of whether the employer had complied with the contract. In other cases where an employee brings a claim to the Ministry of Labour under the Act, this is a critical determination as to the quantum of an employer's liability. A shift in the interpretation of section 64(1) could give rise to significant future liability on cases where a dismissal has already taken place, without severance pay, and could significantly alter an employer's decision about whether and how to proceed with a dismissal of a long service employee.

We will monitor this decision in respect of any future appeals, but also to gauge the application of the decision in future MOL and OLRB proceedings, as well as similar wrongful dismissal actions in Superior Court.

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