

The \$2.5M Payroll Threshold Includes Payrolls Outside Ontario, According To The Ontario Superior Court



Severance: The Basics

There are two types of statutorily mandated pay that an employer may be required to provide an employee upon termination: (1) termination pay and (2) severance pay. Both termination and severance pay are minimum employment entitlements, they cannot be contracted out of, and they must be paid and calculated separately pursuant to the mechanisms provided by the *Employment Standards Act, 2000*¹ (the “ESA”).

The ESA defines what constitutes severance and who is entitled to severance.² In the case of individual termination, an employer must provide severance pay to an employee who has been employed for at least five years, and the employer has a payroll of \$2.5 million or more.³

The payroll threshold is met if either (a) the product of 13 multiplied by the total wages of all employees during the preceding four-week period ending on the last day of the last pay period prior to the severance or (b) the total wages of all employees in the penultimate or last fiscal year prior to the severance, is at least \$2.5 million, then the employer has met the payroll threshold.⁴

An Employee: The Basics

An employee is defined in the ESA.⁵ While the standards in the ESA apply to an employee *if* his or her work is performed in Ontario or a continuation thereof in another province;⁶ the meaning of employee for the purposes of the ESA is not limited to Ontario.

Putting the two together: Calculation of Payroll Threshold

When adding up the wages of all employees to calculate severance pay, who counts as an employee? More importantly, does this calculation only encompass the wages of employees *in Ontario*? These are the questions asked and answered by the Ontario Superior Court of Justice in *Paquette v Qudraspec Inc.*, 2014 ONSC 2431 (“*Paquette*”).

Although cases have gone back and forth, it’s generally standard practice to only consider the Ontario payroll when determining whether an employer meets the payroll

threshold. Note this is only a practice, without any statutory authority to support it. The court's legislative interpretation of the severance pay provisions should draw the attention and concern of all employers with operations both in and outside Ontario.

***Paquette v Quadraspec Inc.*: A cautionary tale to inter-provincial employers**

The facts of the case are simple. Paquette, the former 28-year employee of Quadraspec challenged the validity of the termination provisions in his employment contract because they allegedly fell below the statutory minimum requirements. Finding that these clauses were in fact null and void, the court moved to the issue of Paquette's entitlement to severance pay. Justice Kane posits that for the purposes of the ESA's severance provisions, "payroll" must be calculated with reference to all of the employer's operations, both inside and outside Ontario.

The court makes it clear that the Ontario legislature governs employers and their obligations, not the general practice that may have developed. To paraphrase Justice Kane:

The extent and enforceability of the obligation is based on the "total wages earned by all employees of the employer." The wording of the ESA is clear. The measure corresponds to the wages paid by the employer and inside and outside of Ontario. There is no legal justification or authority to interpret these provisions so as to insert restrictions that are not found in the ESA.⁷

Conclusion of the Case: Quadraspec's Ontario payroll was modest, but when combined with that of its Quebec operations, the employer surpassed the payroll threshold; thus entitling Paquette to severance pay pursuant to Ontario's employment standards legislation.

Looking Forward: Severing the practice?

Some courts, including the Ontario Superior Court in *Altman v Steve's Music*,⁸ the Ontario Labour Relations Board, and the Ministry of Labour have historically supported the practice of Ontario-only payroll calculations. However, in light of this Superior Court decision, wherein Justice Kane refused to read in "in Ontario" into s 64(1) of the ESA, we may see these bodies sever their ties with the practice.

If the *Paquette* decision stands, terminating employees who have been employed for five or more years may become an unexpectedly expensive endeavour. Regardless of the size of an employer's Ontario operation, the employer must take into account its national payroll, in determining whether it must provide any Ontario-based employee statutorily mandated severance pay. Justice Kane drew the limits around the country; whether or not international payrolls become subject to scrutiny next is yet to be seen.

Employers with operations outside of Ontario should consider speaking to an employment lawyer before terminating the employment of an employee currently working within an Ontario operation to discuss the employers' responsibilities under the ESA, particularly with regards to their obligations to provide severance pay.

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