MANAGEMENT
COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Threshold for Severance Pay Limited to Ontario Payroll – so says Ontario Labour Relations Board

Patrick Ganley
416.603.6263
pganley@sherrardkuzz.com

As many employers are aware, in Ontario, an employee is entitled to *severance* pay in addition to *termination* pay if, at the time of termination, the employee has been employed by the employer for five years or more and the employer has a payroll of at least $2.5 million.[1] Severance pay - an additional week of pay per year of completed service to a maximum of 26 weeks - can represent a significant increase to the termination obligations of an employer.

In recent years, there has been uncertainty about whether the $2.5 million threshold should be calculated on only the payroll of Ontario operations, or whether an employer's payroll outside the province should be included.

Prior to 2014, the Ontario Labour Relations Board ("OLRB") and courts held that only the Ontario payroll should be considered. However, the Ontario Superior Court took the opposite approach in its 2014 decision, *Paquette v Qaudraspec Inc.*[2] ("*Paquette*"). In that case, the court held an employer's *national* payroll could be considered and aggregated payrolls in Ontario and Quebec.

Fortunately, the OLRB in a recent decision[3], departed from *Paquette*, returning to the pre-2014 line of cases.

This is good news for employers with an Ontario payroll of less than $2.5 million and operations in other jurisdictions.

What happened?

For 38 years, Mr. Hawkes was employed by Max Aicher (North America) Limited ("MANA"), a corporation operating in the steel industry in Ontario. MANA is a wholly owned subsidiary of Max Aicher GmbH & Co KG ("MAG"), a company formed under the laws of Germany and headquartered in Bavaria.

continued inside...

April 2019 Vol. XVIII No. 2

...continued from front

Following the termination of his employment, Hawkes filed a claim with the Employment Practices Branch of the Ontario Ministry of Labour, claiming entitlement to unpaid vacation pay, termination pay and severance pay under Ontario's *Employment Standards Act, 2000* (*"ESA"*). Specifically in relation to severance pay, section 64 of the *ESA* states, in part, as follows:

(1) An employer who severs an employment relationship with an employee shall pay severance pay to the employee if the employee was employed by the employer for five years or more and,

(b) the employer has a payroll of $2.5 million or more.

(2) For the purposes of subsection (1), an employer shall be considered to have a payroll of $2.5 million or more if,

(a) the total wages earned by all of the employer's employees … was $2.5 million or more…

The Employment Standards Officer ("ESO") determined Hawkes was entitled to vacation and termination pay, but not severance pay, because MANA's payroll was less than $2.5 million. Hawkes sought a review of the ESO's decision.

Positions of the parties

Relying on *Paquette*, Hawkes argued the payrolls of both MANA and MAG ought to be considered when determining whether the $2.5 million threshold had been met. As in *Paquette*, Hawkes argued section 64 does not expressly restrict the $2.5 million threshold to Ontario operations, and instead refers to "all of the employer's employees". Further, he said, there would be no harm in including the global payroll of a company because the intent of section 64 is to exempt smaller employers from paying severance, and a global payroll would not capture these small employers.

MANA argued only the Ontario payroll is relevant, for two principal reasons. First, the Ontario legislature, and therefore the *ESA*, has no jurisdiction over business operations outside of Ontario. Second, subsection 3(1) of the *ESA* expressly states the *ESA* only applies to an employee and employer if *(a) the employee's work is to be performed in Ontario, or (b) the work is performed in and outside Ontario if the work performed outside Ontario is a continuation of the work performed in the province.* Accordingly, every provision of the *ESA* should be read as applying only to Ontario-based employment.

Finally, both MANA and the Director of Employment Standards pointed to practical enforcement issues if a payroll outside of Ontario is captured in the calculation, including that the Ontario Ministry of Labour has no authority to compel document production or make orders in a foreign jurisdiction. These practical issues, they maintained, make it obvious the intent of the *ESA* is to confine payroll computation to Ontario-based operations.

Decision of the OLRB

The OLRB agreed with MANA, holding that while an employer may have operations and payrolls outside of Ontario, only Ontario-based employment and operations are governed by the *ESA*.

The OLRB noted that, prior to *Paquette*, both the OLRB and courts interpreted the severance pay provisions with regard to section 3 of the *ESA* – even if this resulted in limiting an employee's entitlement to severance pay. The OLRB was not persuaded there was any reason to depart from this long line of decisions.

What this means for employers

The OLRB decision is welcome news for any employer with a payroll of less than $2.5 million in Ontario and operations in other jurisdictions.

However, the decision does not necessarily settle the matter. As an administrative tribunal, the OLRB is not part of Ontario's court system, and judges are not obliged to follow the decision of an administrative body. That said, judges often show deference to the specialized knowledge of administrative tribunals, such as the OLRB; but they are not required to do so.

At the time of writing this article, it is our understanding Hawkes has not sought to review the OLRB decision. We will keep readers apprised should circumstances change.

For assistance with this, or any workplace matter, contact a member of the Sherrard Kuzz LLP team.

[1]In Ontario, an employee is also entitled to severance pay if he or she has been employed for five years or more and the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment and the employee is one of 50 or more employees who have their employment relationship severed within a six-month period as a result.

[2](2014), 121 OR (3d) 765 (Sup. Ct.)

[3]Max Aicher (North America) Limited, 2018 CanLII 125999 (ON LRB)

DID YOU KNOW?

According to the Government of Canada, despite the fact cannabis is now legal and regulated for adults in Canada, it remains illegal to transport cannabis across the Canadian border. This prohibition applies:

- even if you are authorized to use cannabis for medical purposes
- no matter how much cannabis you have with you
- even if you are travelling to or from an area where cannabis has been legalized or decriminalized

Do you know the difference between a layoff and termination? If you're an employer, you should.

Jeremy Ambraska & Lauren Ditschun
Law Students

People often use the terms "termination" and "layoff" assuming they mean the same thing. While in casual conversation glossing over the difference may not be important, for an employer, failing to understand the difference can present a missed opportunity and create unnecessary risk for your business.

Having the legal right to temporarily lay off an employee can provide an employer flexibility to respond to a slowdown or change in business without the need to permanently terminate employment and pay for costly notice periods.

However, unless an employment contract includes an express or implied right to lay off an employee an employer has no right to do so. If there is no express or implied right, a layoff may amount to a fundamental breach of the employment contract (constructive dismissal) entitling the employee to notice or pay in *lieu*[1] and possibly severance pay.

Here is an overview of what you need to know.

Termination vs. layoff

When an employee is terminated, the relationship between employee and employer ceases to exist. When an employee is laid off, the "employer-employee relationship is said to be suspended rather than terminated" because there exists the possibility of a return to work. The Supreme Court of Canada clarified the difference:

> While in common parlance the term "layoff" is sometimes used synonymously with termination of the employment relationship, its function in the lexicon of the law is to define a cessation of employment where there is the possibility or expectation of a return to work. The expectation may or may not materialize. But because of this expectation, the employer-employee relationship is said to be suspended rather than terminated.[2]

Layoff is a tool - not a right

If a business regularly encounters ebbs and flows or is cyclical or weather dependant, the right to temporarily lay off an employee can be very helpful. **However, as noted above, without an express or implied right to lay off an employee the employer has no right to do so.**

Without an express provision in the employment contract there is no right to lay off an employee.

Confusion about this is understandable given that most employment standards legislation in Canada includes some type of layoff language. An employer seeing that language might assume layoff is permitted so long as the legislation is complied with. This is incorrect.

Each Canadian jurisdiction has its own employment standards legislation with unique layoff language and requirements. The rules are not consistent or straight-forward and there are many exceptions and exemptions.

In Ontario, for example, a temporary layoff is deemed a termination of employment if the layoff lasts longer than 13 weeks in any period of 20 consecutive weeks. However, a temporary layoff may last for up to 35 weeks in any period of 52 consecutive weeks if the employer continues the employee's coverage under a group or employee insurance plan or retirement or pension plan or provides substantial payments or supplementary unemployment benefits to the employee during the layoff period.

Moving forward

If you think the option to lay off employees could be helpful to your business, but you don't have written agreements to this effect, all is not lost. Contact our team of employment law experts who will help you determine the most effective way to proceed.

But please - do not simply change your employment agreement without legal advice, as a unilateral change may be unenforceable.

[1] *Chen v Sigpro Wireless Inc,* [2004] O.J. No. 2280 (Sup. Ct.), appeal dismissed [2005] O.J. No. 966 (CA)

[2] *Canada Safeway Ltd v RWDSU, Local 454,* [1998] 1 SCR 1079

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Discipline in the Workplace- Common Issues and Best Practices

Discipline in the workplace can be an employer's greatest challenge; more so, when complicated by a workplace harassment complaint or Human Rights Code consideration. Too often employers feel their hands are tied, preventing corrective action or discipline.

In this seminar we explore practical and strategic approaches to address misconduct, poor performance and discipline. Topics include:

1. **When is discipline appropriate?**
   - Can an employee be disciplined for off-duty misconduct?
   - Is there still value in a performance improvement plan?
2. **What is the appropriate discipline?**
   - Mitigating and aggravating factors.
   - How to communicate the outcome.
3. **Union Representation**
   - How does this impact the process?
4. **Human Rights**
   - When (and how) disability, family status or another protected ground influences an employer's decision-making.
   - Can we still use a Last Chance Agreement? If so, when and how?
5. **Harassment and Conflict**
   - Can an employer's duty to ensure a safe workplace justify discipline?
   - Can discipline be issued to an employee who makes a harassment complaint?
6. **Practical tips to ensure the best outcome**

DATE: **Wednesday June 12, 2019; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)
VENUE: **Mississauga Convention Centre - 75 Derry Road West, Mississauga**
COST: Complimentary
REGISTER: **By Monday May 27, 2019 at www.sherrardkuzz.com/seminars.php**

Law Society of Ontario, CPD Hours: This seminar may be applied toward 1.5 general CPD hours.
HRPA CHRP designated members should inquire at www.hrpa.ca for eligibility guidelines regarding this *HReview Seminar*.

To subscribe to or unsubscribe from *Management Counsel* and/or invitations to our *HR*eview Seminar Series visit our website at www.sherrardkuzz.com

SHERRARD KUZZ LLP
Employment & Labour Lawyers

250 Yonge Street, Suite 3300
Toronto, Ontario, Canada M5B 2L7
Tel 416.603.0700
Fax 416.603.6035
24 HOUR 416.420.0738
www.sherrardkuzz.com
@SherrardKuzz