



e2r Alert!

PSA for Ontario Employers Operating in Multiple Jurisdictions - Court Rules Severance Pay Under the ESA is not Limited to Ontario Payroll

Ontario employers with a payroll of \$2.5 million or more are required under Section 64 of the *Ontario Employment Standards Act, 2000* (the "ESA") to pay statutory severance pay to terminated employees who have five or more years of service.

In *Hawkes v Max Aicher* ("Hawkes") the Divisional Court overturned an earlier Ontario Labour Relations Board ("OLRB") decision and found that the \$2.5 million threshold is not limited to an employer's payroll in Ontario, but instead, based on an employer's global payroll. In this context, 'global payroll' means the total payroll of the employer including Ontario, all payrolls in provinces outside of Ontario and payrolls throughout the world as well as the payrolls of related companies to the employer. The Court, in coming to its decision, noted that there is nothing in the provision itself that limits the calculation to Ontario payroll. The Court, to support its finding, cited previous decisions by the Supreme Court of Canada, which stand for the principal that the ESA should be characterized as benefits-conferring legislation and interpreted in a broad and generous manner in order to extend its protection to as many employees as possible.

This decision is somewhat surprising because it contradicts a number of OLRB decisions. Although, it is noteworthy the OLRB has essentially ignored a similar court decision from 2014. With two such decisions on the books, it will be interesting to see if the OLRB will follow *Hawkes* or if the legislature will amend the ESA to address the inconsistencies between the OLRB's historical approach and cases like *Hawkes*.

Key Takeaways: We understand that this case is likely to be appealed. However, for the time being, it appears there is now more caselaw in support of the position that the

severance pay calculation is based upon global payroll rather than Ontario payroll. With this in mind, Ontario employers will need to be prepared to pay severance pay where their global payroll exceeds \$2.5 million annually. Strategically, Ontario employers may decide to wait until they are ordered to pay severance pay by the OLRB or a court, or simply pay it out upon termination to avoid any potential issues.

If you have any questions regarding this, or terminations in general, do not hesitate to reach out to speak with an e2r™ Advisor.