

# Workplace Law Bulletin

## Employment Update: Termination Provisions and the Definition of Severance

By Meghan Cowan

The Ontario Superior Court of Justice's decision in *Paquette v. Quadraspec Inc.* addresses two important issues that employers face: (1) how to properly draft an employment agreement in accordance with the notice provisions in Ontario's employment standards legislation (the *Employment Standards Act, 2000*, ("ESA")); and (2) whether an employee is entitled to severance pay in addition to termination pay upon termination under the ESA.

The interpretation of the wording of termination provisions in employment agreements is not a novel issue. The Supreme Court of Canada and the Ontario Superior Court of Justice have both previously held that employment agreements that do not provide the minimum notice requirements under the ESA are null and void and therefore entitle the employee to common law notice (see the Supreme Court of Canada's 1992 decision in *Machtiger v. HOJ Industries* and the more recent Ontario Superior Court of Justice decisions in *Stevens v. Sifton Properties Ltd.*, *Miller v. A.B.M. Canada Inc.* and *Howard v. The Benson Group Inc.*).

The issue of entitlement to severance pay addressed by the court in *Paquette v. Quadraspec Inc.*, however, is a novel one and changes the game in the sense that it runs against the traditional understanding of the definition of payroll under the ESA.

### The Case

In *Paquette v. Quadraspec Inc.*, Mr. Paquette made two claims against his former employer: (1) he claimed that the termination provision in his employment agreement with Quadraspec Inc. ("**Quadraspec**") did not provide for the minimum benefit entitlements under the ESA and was therefore null and void; and (2) he claimed that

he was entitled to severance pay in accordance with the ESA, despite the fact that his employer's payroll in Ontario was not over \$2.5 million.

### Termination Provisions in the Employment Agreement

Under the ESA, an employer may terminate the employment of an employee and provide pay in lieu of notice if it continues to maintain whatever benefit plan contributions it provided to the employee, had he or she continued to be employed during the notice period.

Mr. Paquette had been employed by Quadraspec and its predecessor since 1983. In 1998, the parties entered into a new employment contract which provided for a maximum termination payment of 6 months' salary. The termination clause expressly stated that the employee waived the right to claim any other amounts, excluding salary, vacation pay and other benefits accrued and unpaid at the time of termination.

Mr. Paquette was dismissed without cause in 2011. At that time, he was covered by Quadraspec's group insurance plan. Upon the termination of his employment, Quadraspec paid Mr. Paquette six months' salary, as well as an amount for benefits earned and unpaid at the time of termination.

Mr. Paquette sued, arguing that the termination clause was null and void because it did not comply with the ESA's minimum requirements. The Court agreed and held that the termination clause was inconsistent with the requirements in the ESA that the employer maintain all benefits until the end of the notice period. In this way, the Court held that Mr. Paquette – an employee with over 24 years' service – was entitled to common law damages (although the Court did not quantify the amount of common law notice in its decision).

### Severance Pay

Under the ESA, employees with more than five years' service are entitled to severance pay if their employer has a payroll of over \$2.5 million. Severance pay entitlement is in addition to any notice required under the ESA and is calculated as one weeks' pay per year of service to a maximum of 26 weeks.

Mr. Paquette had been employed by Quadraspec and its predecessor since 1983 and had worked in Ontario since 1987. While Quadraspec had a payroll of less than \$2.5 million in Ontario, it had a payroll of more than \$2.5 million in Ontario and Quebec together at all relevant times.

In its decision, the Ontario Superior Court held that the calculation of an employer's payroll for the purposes of an employee's entitlement to severance pay under the ESA is not restricted to the employer's payroll in Ontario. The Court held that Mr. Paquette was therefore entitled to severance pay.

### Importance for Employers

- *Be careful when drafting employment agreements:*
  - Quadraspec argued that although the termination provision in the employment agreement did not explicitly mention benefit plan contributions, its obligation to continue such contributions was implicit. In rejecting

this argument, the Court focused on the entire employment contract (a comprehensive 15-page document), and held that it was not up to the Court to infer terms that were absent from the agreement.

- Because of the drafting of the termination provision in the employment agreement, the employer lost its ability to pay Mr. Paquette only six months' termination pay and was required to instead pay the employee common law notice. This meant that Quadraspec lost the benefit of the bargain and, specifically, its agreement with Paquette to provide minimum ESA payments on termination and not common law damages.
- *Know the scope of your business:*
  - With respect to the calculation of severance pay, the Court's decision has potentially significant repercussions for both national and international businesses with a smaller presence in Ontario. As the Court's decision may increase the number of employers liable for severance pay entitlements in Ontario, employers should be mindful of this, especially when planning sales or significant business reorganizations. It will be interesting to note how other courts interpret this decision going forward, due to the implications for larger national and international firms.

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