

DIVISIONAL COURT RULES THAT EMPLOYERS MUST CLEARLY INDICATE THAT SEVERANCE PAY PACKAGES ARE IN SATISFACTION OF ENTITLEMENTS UNDER THE *EMPLOYMENT STANDARDS ACT, 2000*

By Roslyn E. McGilvery

In *Assurant Group v. Fillion*, [2006] O.J. No. 843 (Div. Ct.), the employer decided to move its service and claims department from Toronto to Kingston. It provided all employees with six months notice of termination and those employees who agreed to continue working until the move received a 25% stay-bonus, which equalled 13 weeks pay.

Based on her length of service, the Claimant was entitled to eight weeks notice of termination and 11 weeks of severance pay pursuant to the *Employment Standards Act, 2000* (“ESA”). Accordingly, the employer’s offer technically exceeded the Plaintiff’s minimum entitlements under the *ESA*.

However, an Employment Standards Officer ruled that the Claimant was entitled to severance pay in addition to the amounts that the employer had provided. The employer had this ruling reviewed by the Ontario Labour Relations Board and then the Divisional Court. The employer argued that the stay-bonus and the notice of termination constituted a greater right or benefit than the Claimant’s entitlements under the *ESA* and that, consequently, the Claimant was not entitled to any further amounts in respect of severance pay. However, both the Ontario Labour Relations Board and the Divisional Court agreed with the employment standards officer and found that the Claimant was entitled to severance pay in addition to amounts already paid.

The Divisional Court’s rationale was that when the employer offered the Claimant the stay-bonus, it did not specifically inform the Claimant that the payments were in satisfaction of her entitlement to severance pay under the *ESA*. Furthermore, even if the employer was able to establish that it was providing the stay-bonus in satisfaction of the Claimant’s severance entitlement, the arrangement did not meet the requirements of the *ESA* because the payment was not based on the Claimant’s length of service. Instead, all eligible employees, regardless of service, were entitled to the 25% stay-bonus. Accordingly, it was found that that stay-bonus could not be set off against the severance payment required by the *ESA*.

With respect to the additional period of notice of termination that the employer provided, the Ontario Labour Relations Board and the Divisional Court confirmed the principle that severance pay is a separate and distinct monetary entitlement that cannot be satisfied by an additional period of notice of termination.

This decision is significant because it underscores the importance of clearly indicating that monies being paid to employees are in satisfaction of all their entitlements under the *ESA*. It is not enough to simply provide employees with amounts that satisfy or exceed their *ESA* entitlements without indicating this intent. Furthermore, it is imperative to base employees’ entitlements on their length of service rather than providing all employees with the same amount.

Finally, this decision confirms that additional periods of notice of termination cannot be used as a substitute for severance pay entitlement.

April 4, 2006