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Court sides with employer in dispute over foreign worker wage calculations

Confusion around what data to use in calculating prevailing wages

The federal government's changes to the Temporary Foreign Worker Program and Labour Market Impact Assessment have kept employers employing foreign workers busy. Between getting up to speed on the changes and changing practices to meet the new legal demands, it's not uncommon for employers to be confused over some of the new requirements.

Sergio Karas
Legal View

Employers familiar with the Labour Market Impact Assessment (LMIA) process are aware that in order for an application to be successful when requesting authorization to hire a foreign worker, one of the criteria that must be met is the requirement to pay the prevailing wage for the position being offered. However, the Immigration and Refugee Protection Act (IRPA) and Immigration and Refugee Protection Regulations (IRPR) do not specifically define how that prevailing wage, which varies from region to region, must be calculated.

The confusion can increase when the officers doing the assessments aren't consistent on some of the requirements — as seen when one employer's application became problematic.

In *Paturel International Co. v. Canada (Minister of Employment and Social Development*, the Federal Court decided the prevailing wage had been set too high and the Temporary Foreign Worker Program (TFWP) officer committed a reviewable error by relying purely on data relating to median wages in the geographical area where the employer was located, which were not representative of wages in the region.

Paturel operated a lobster processing plant in Deer Island, N.B., under the name East Coast Seafood. It employed a number of foreign workers and wished to renew their work permits so it submitted the relevant LMIA applications to obtain the necessary approvals, which were a prerequisite for the renewal of the work permits.

When adjudicating an LMIA application, a TFWP officer must consider whether the employment of a foreign national would have a neutral or positive effect on the Canadian labour market, including whether the wages are consistent with the prevailing wage rate for the occupation. The prevailing wage is determined with reference to the median wage published online by the federal government's National Employment Service. Wage data derives primarily from Statistics Canada's Labour Force Survey, but other sources may also be considered, including employment insurance (EI) data.

In 2013, the prevailing wage in the area was based on provincial information. However, in 2014 regional EI figures were used instead, which narrowed the geographical scope. According to the EI wage reports, fish processing workers had earned between $10 and $57 per hour and the median wage was calculated at $13.79 based on 590 employees reporting. The average wage was $14.51.

The officer relied on the median wage for the occupation. This represented an increase of more than 20 per cent from the earlier provincial figures of $11.25 per hour. Paturel was the largest employer of shellfish workers in the region and none of its employees earned a wage as high as that established as the median wage for the occupation. The median wage in the province was $11.33 per hour, and job postings in the region offered between $11.49 and $12.43 per hour. Median wages in two regions adjacent to Paturel's location, where its competitors operated, were $11.09 and $11.20.

The minister argued it was not unreasonable for the officer to rely on the median wage calculated with reference to EI data, given that other sources of information were unavailable or unreliable at the time. The court disagreed and held that while the officer had broad discretion to rely on data he considered to be most representative of the prevailing wage in the region, his sole reliance on EI data amounted to a fettering of his discretion and it was therefore unreasonable, as supported by the Federal Court of Appeal in *Stemijon Investments Ltd v. Canada*.

The court also decided that while the IRPR do not specify how a prevailing wage should be calculated and the minister has wide discretion, the IRPR do not stipulate that a failure to meet the prevailing wage, taken alone, would be sufficient reason to refuse an LMIA application. There are other factors that must also be considered to answer the broader question of whether a for-

eign national would have a neutral or positive effect on the Canadian labour market. In fact, in this case, the officer considered those factors and determined the majority of them had a positive effect in that: the employment resulted in direct job retention for Canadian citizens or permanent residents; it was likely to fill a labour shortage; and it was necessary as demonstrated by the employer's unsuccessful efforts to recruit within Canada.

Notwithstanding these positive findings, the officer relied only on the employer's failure to meet the prevailing wage without addressing how all the factors, taken together, impacted the Canadian labour market.

The court further held that while the officer could consider EI data in the calculation of the prevailing wage, it was unreasonable to rely on that data because the difference between the 2013 and 2014 median wages showed a large disparity. This should have caused the officer to consider whether the EI data was a reliable indicator.

An increase of over 20 per cent should have cast doubt on the suitability of EI data, especially since there were no changes in the circumstances of the region other than the methodology by which the prevailing wage was calculated.

Therefore, the court held it was improper for the officer to deny the employer's application based on faulty data.

Moreover, the court called the prevailing wage calculation "an arbitrary standard that had not previously been applied, and seemed inconsistent with other available information." It held that the officer did not have due regard for the overall criteria for approval of the LMIA and relied only on the EI data. The court held that the LMIA refusal was unreasonable, quashed the officer's decision and remitted the application back for another officer to reconsider.

Employers filing LMIA applications are familiar with the lack of uniformity in decision-making and the sometimes arbitrary and capricious way officers interpret regulations and guidelines.

Employers must be prepared to justify wages based on labour market conditions for a specific position in their region, and with reference to their own workforce and that of their competitors.

For more information see:

- *Paturel International Co. v. Canada (Minister of Employment and Social Development)*, 2016 CarswellNat 1669 (F.C.).
- *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 CarswellNat 4372 (F.C.A.).

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