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Employer applications for TFWs deserve fair assessment: Court

Employer unaware of information that officer used to deny foreign worker application and wasn't given chance to address it

BACKGROUND

There are many restrictions and rules employers must follow when they want to apply to hire temporary foreign workers. However, employers are entitled to a certain level of fairness when their applications are assessed. Recently, an application was sent back for reassessment when it was determined it was unfairly rejected based on information the employer didn't know about the labour market and wasn't given the opportunity to respond to.

BY SERGIO KARAS

The Federal Court of Canada recently held that a Service Canada temporary foreign worker program (TFWP) officer breached her duty of procedural fairness to an employer applicant by relying on information concerning the availability of experienced copper sheet metal workers in a specific geographical area, and by failing to afford the employer the opportunity to dispute that information.

In *Kozul v. Canada (Minister of Employment and Social Development)*, the employer, DSM Aluminum Contracting, won a significant contract to install copper soffits and fascia for new homes being constructed in Kitchener, Hamilton, and Oakville, Ont. DSM needed to hire a copper sheet metal worker with at least three years of experience in fabricating and installing metal sheets. DSM's owner, Drago Kozul, advertised the position for two months in the Toronto Star newspaper and two online job sites. He received 14 applications for the position but none of the candidates possessed the required qualifications and experience. Kozul and DSM contacted the Carpenters Allied Union, but were informed that experienced copper fabricators and installers were not available for employment. Having exhausted these possible recruitment venues, DSM applied to the TFWP for a labour market impact assessment (LMIA) in order to hire a foreign worker for the position. As part of the application, DSM noted that the foreign worker could fill the immediate labour shortage as well as teach and develop the skills or other Canadian citizens and permanent residents to learn fabrication and installation of copper sheet metals.

Shortly after the application was filed, a TFWP officer contacted Kozul and requested a copy of the collective agreement and some financial information. The officer justified the request on the basis that the wages and working conditions to be paid to the foreign worker must be the same as those paid to union members. However, the employer advised the officer that the collective agreement did not cover copper sheet metal workers, and it covered only the installation of vinyl aluminum soffits and fascia. In addition, the employer provided to the officer a letter from the union confirming the lack of experienced copper fabricators and installers, and further confirming that the union did not oppose the hiring of a foreign worker for the position.

Notwithstanding the recruitment efforts made by DSM, the officer refused the LMIA application on the basis that the company had not demonstrated sufficient efforts to hire Canadians and that the employment of a foreign national was not likely to fill a labour shortage. The officer based the negative decision on several considerations, including the fact that the foreign worker was offered a higher wage than was advertised for the position and therefore the employer had not tested the labour market with wages that were consistent with those generally accepted by Canadians. Second, the officer decided that even though the employer provided a letter from its union confirming a shortage of workers, various other sources indicated that there was no labour shortage for this occupation.

The officer's notes revealed that, in addition to the information and documentation provided by the employer, she consulted various other sources of information regarding the labour market for copper sheet metal workers. Amongst the sources consulted, the officer reviewed and relied on the Ontario government's "Ontario Job Futures" website and the Government of Canada's Job Bank website. She also obtained and reviewed construction forecasts for the relevant region from www.constructionforecasts.ca. More important, the notes showed that she had spoken by telephone with the executive director of the Ontario Contractors Sheet Metal Association, and that he indicated there was no labour shortage for the position and, in fact, there was a downturn in the market. In addition, the executive director made comments concerning the wage levels and the possibility of some workers not being unionized in a workplace where most workers were part of the union.

Upon judicial review, the Federal Court held that the primary issue in the case was whether DSM was denied procedural fairness by the officer's failure to afford it an opportunity to address the extrinsic evidence which she relied upon in her refusal to issue a positive LMIA. The court found that DSM was in fact denied procedural fairness in the circumstances of the case.

First, the court canvassed the case law concerning the standard of review for denial of procedural fairness and held that such breach is reviewed on the correctness standard. This requires the court to determine whether in rendering the negative LMIA opinion the officer satisfied the level of fairness required by the circumstances of the matter. Therefore, the determination does not hinge so much on whether the decision is correct but rather on whether the process followed in making the decision was fair.

The court affirmed a line of cases holding that the duty of procedural fairness owed in the context of LMIA applications is relatively low, as held in *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*. In that case, the court held that the requirements of

procedural fairness will vary according to the specific context of each case, and in the context of applications for LMIAs, a consideration of the relevant factors that should be assessed suggests that they are relatively low because the structure of the assessment process is not judicial in nature, unsuccessful applicants can simply submit a new application, and refusals do not have a substantial adverse impact on employers that would carry permanent consequences. Based on this principle, the court held that, while the duty owed to the employers may be at the low end of the spectrum, this is not to say that the duty is nonexistent. It is clear that there is a duty to disclose extrinsic evidence if it may impact the outcome of a decision. As noted in *Yang v. Canada (Citizenship and Immigration)*, "the question is whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts."

The court found that the officer's reliance upon websites which are generally accessible to the public to obtain information about labour market conditions was not unfair. This was supported by several Federal Court decisions. However, in the circumstances of this case, it was unfair for the officer to rely upon the information obtained in conversation with the executive director of the Ontario Sheet Metal Contractors Association, and failing to disclose it to DSM before she issued a negative LMIA opinion. The information the officer gleaned from that conversation directly challenged the employer's view as to the existence of a labour shortage for experienced copper sheet metal workers. By denying the employer an opportunity to comment, offer other evidence or contradict that information was unfair. That was sufficient to quash the officer's decision and to return the matter to a different TFWP officer for reassessment of the application.

For more information see:

- *Kozul v. Canada (Minister of Employment and Social Development)*, 2016 CarswellNat 6255 (F.C.).
- *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)*, 2015 CarswellNat 107 (F.C.).
- *Yang v. Canada (Citizenship and Immigration)*, 2013 CarswellNat 52 (F.C.).