CASE IN POINT: IMMIGRATION

# Foreign worker wages: Open to negotiation?

*Labour Market Opinions outline required wages for foreign workers, but can employers negotiate pay with the workers themselves?*

## BACKGROUND

### LMO versus employment agreement

**WHEN A** foreign worker comes to Canada for work, they often must obtain a Labour Market Opinion (LMO) from Service Canada to legally work in the country. The LMO outlines who the worker will be working for, confirms there isn't a domestic worker who can fill the job, how long she will be permitted to work in Canada and how much the worker will earn. Generally, the wage component is determined through surveys and comparisons and the employer must agree to pay the wage. But what if the employer offers the foreign worker a different wage than stated in the LMO and the worker agrees?

Immigration lawyer Sergio Karas takes a look at circumstances when an employer discusses a different wage than that outlined in an LMO with a hired foreign worker and whether there is liability on the employer's part for the difference.

| BY SERGIO KARAS |

**EMPLOYERS** hiring foreign workers who do not fit an exemption category under the Immigration Refugee and Protection Act (IRPA), or a treaty such as the North American Free Trade AGreement, must obtain a Labour Market Opinion (LMO) from Service Canada confirming the employment of the foreign worker will have no negative impact on the labour market.

In each LMO, the wages, benefits and working conditions are stated. Large and sophisticated employers usually have detailed contracts signed by the foreign workers clearly stating a variety of employment matters including salaries and allowances. However, many small businesses employing foreign workers do not seek legal counsel and rely on a verbal agreements, especially when they are acquaintances or have an on going relationship with the foreign worker.

Service Canada requires the wages offered to a foreign worker to be the same as those offered to Canadian residents and it usually relies on surveys of wages and working conditions for the particular jurisdiction to determine the appropriate salary for a position. LMOs state the required wage and employers declare they are willing to pay that wage. But can employers be compelled to pay the wages stated in the LMO, or can they pay a different wage?

#### Employer not liable for difference between offered wage and LMO

In *Koo v. 5220459 Manitoba Inc.*, the Manitoba Court of Queen's Bench held that the employer was not liable and refused to direct the employer to pay the difference between the wages stated in the LMO and those agreed orally with the foreign worker.

The employer operated a restaurant in Winnipeg and wanted to hire a sushi chef. The employer obtained a LMO for a period of 12 months which stated a salary of $14.50 per hour. However the employer paid less than that amount to the foreign worker, who was from South Korea, resulting in a difference of $9,057.06 throughout the period of employment. The foreign worker argued there was no discussion about salary prior to his arrival in Canada, while the employer maintained they had a verbal agreement to pay a salary of $1,500 for the first month during which the employee's skills would be assessed and thereafter would be paid a salary commensurate with those skills as demonstrated. The court preferred the evidence given by the employer and found it difficult to believe the foreign worker would move to Canada from South Korea without some discussion concerning salary prior to the receipt of the LMO.

**The employer argued it had a verbal agreement to pay the foreign worker less than the LMO wage for the first month while it assessed the worker's skills**

The foreign worker also argued the provision of the LMO in support of the application for a work permit gave rise to an express or implied contract to pay a wage of $14.50 per hour, and to not enforce that wage would undermine the integrity of the foreign worker program. He said the payment

*Continued on page 5*

**CASE IN POINT: IMMIGRATION**

# LMO an expression of opinion, not an employment contract

*...continued from page 4*

of a lesser salary was illegal or unconscionable and requested that the court follow the principles articulated in the case of *Still v. M.N.R.*

In *Still*, the Federal Court of Appeal ruled that where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when all the circumstances of the case, including the objects and purposes of the statutory provision, mean it would be contrary to public policy to do so. In response, the employer argued the parties were free to contract a salary and the employer should not be forced to pay the wage stated in the LMO, which was nothing more than a prediction of the salary to be paid. The employer further argued that if there was any impropriety, the only remedy available was that Service Canada could take the employer's conduct into account in future dealings, but could not enforce the payment of the wage stated in the LMO.

**LMO not a contract: Court**

The court held it would be difficult to find the LMO, in itself, created a contract, express or implied, between the employer and the foreign worker, and the LMO was an expression of opinion by Service Canada only. None of the essentials of a contract are present in an LMO: offer, acceptance, mutual consent, consideration and the intention to create legal relations, since the fundamental purpose is to protect Canadian citizens and permanent residents. It would be impossible for a member of that class to sustain an action against the employer if it had paid the foreign worker a salary greater than that stated in the LMO and it would also be impossible for Service Canada to sustain an action against either party for breach of the terms of the LMO. There was no basis in contract for allowing the foreign worker to recover on the facts of the case, nor was there a duty of care. The court distinguished the *Still* case because there the claimant was denied employment insurance benefits to which she would have otherwise been entitled, and she had paid the applicable premiums during the term of her employment.

**The court held it would be difficult to find the LMO in itself created a contract between the employer and the foreign worker and the LMO was an expression of opinion by Service Canada only.**

The court left open the determination of whether or not the employer is free to disregard the salary set out in the LMO and referred to the sanctions available for misrepresentation under the IRPA. It added that payment of a lower wage might make it impossible for the employer to justify a finding of genuineness in a second or later application for a LMO. In any event, the court found the foreign worker could have discussed the proposed salary with the employer before receiving the LMO and therefore he could not rely on it to sustain an action for breach of contract.

Although *Koo* appears to exonerate employers from their duty to pay the wages stated in an LMO, it must be noted that it emanates from a lower court and should only be taken as a potential indication of how a court may rule in a similar situation. Employers are strongly cautioned to avoid misrepresenting their intention to pay specific wages to foreign workers, as this may give rise to administrative sanctions in future applications and to potential charges under the provisions of the IRPA.

**For more information see:**

- *Koo v. 5220459 Manitoba Inc.*, 2010 CarswellMan 248 (Man. Q.B.).
- *Still v. Minister of National Revenue*, 1997 CarswellNat 2702 (Fed. C.A.).

**ABOUT THE AUTHOR**

**Sergio R. Karas**

*Sergio R. Karas is a certified specialist in Canadian citizenship and immigration law by the Law Society of Upper Canada. He is past chair of the Ontario Bar Association Citizenship and Immigration Section and the International Bar Association Immigration and Nationality Committee. He can be reached at (416) 506-1800 or karas@karas.ca.*

## Employment law blog online

**INTERESTED IN** discussing or commenting on what's happening in employment law? *Canadian Employment Law Today* invites you to check out its employment law blog. You can get to it by visiting the website at www.employmentlawtoday.com and click on the employment law blog banner on the right side of the website's front page.

Editor Jeffrey R. Smith, and special guest bloggers, write about various issues that are surfacing in employment law. All comments are welcome.

Blogs now online discuss topics such as managers dating subordinates, a parent company muzzling a reporter, responsibility for violence on picket lines and the rights of workers suffering under unpleasant management.