CASE IN POINT: IMMIGRATION

Foreign worker's acceptance of job offer invalid without permit

Probationary period didn't start until worker obtained new LMO and work permit and accepted new offer

BACKGROUND

The point of employment

USUALLY, someone becomes an employee as soon as she accepts an offer of employment. However, in the case of a foreign worker, immigration law can trump employment law if the worker doesn't have a work permit that allows employment with that employer when she accepts the offer.

| BY SERGIO KARAS |

AN ONTARIO arbitrator has dismissed a union grievance filed on behalf of a foreign worker who argued that an offer of employment extended to him by the employer became valid before he obtained the appropriate work permit, entitling him to an award after his dismissal. While the facts of this case are somewhat unusual, the issue concerning the employer obligations and the ability of the foreign worker to perform his duties is highly relevant to the employment of all foreign workers.

The foreign worker was a German national with a valid work permit for a different company as an industrial mechanic (millwright). He was highly qualified and the employer was interested in hiring him. After an interview, an offer of employment was extended to the foreign worker in writing, and he accepted it on the same day.

Immediately after the job offer was accepted, the employer examined the worker's passport and existing work permit and discovered the foreign worker was not entitled to work for a different employer and required a labour market opinion (LMO) and work permit. The employer's HR department filed the appropriate application for an LMO with Service Canada. Unfortunately, the employer had not advertised the position and did not present evidence of reasonable efforts to hire Canadians for the position, and the LMO was refused. There was some dispute in the evidence between the employer and the foreign worker's recollection of the events, as the latter argued company officials led him to believe a new work permit was not necessary. However, it became apparent that the company took steps to obtain an LMO and it was not reasonable for the foreign worker to conclude he would not require a new work permit. In addition, the evidence showed the employer had withdrawn the offer of employment after the LMO refusal and informed the foreign worker that it had been "rescinded."

Revised job offer

The company extended a new offer of employment which contained the condition that the foreign worker obtain the appropriate authorization to work in Canada. It filed a new LMO application with Service Canada, this time after advertising the position and with the support of a union letter indicating it had no objection to the foreign worker's employment. A positive LMO was granted and the foreign worker obtained the appropriate work permit soon after.

Meanwhile, the company negotiated a new collective bargaining agreement with the union and the probationary period for new employees increased from 520 hours to 1040 hours of work. The new collective agreement took effect after the first offer of employment was extended to the foreign worker, but before the second offer and positive LMO was issued. This change became the central issue in the dispute.

The relationship between the employer and the foreign worker did not progress as planned and his employment was terminated. At the time of termination the employer believed the foreign worker was still a probationary employee, as he had worked less than 1040 hours under the new collective agreement, while the union believed that he had finished his probationary period and he had become established as a seniority employee under the previous agreement. It was incumbent upon the arbitrator to decide whether the first offer of employment was valid despite the fact the initial LMO application was refused to determine if the foreign worker was entitled to compensation.

The union argued, as a matter of contract law, a person becomes an employee the instant when she accepts an offer of unconditional employment, even if that offer indicates the person will not start work for a period of time. The union contended that the Immigration and Refugee Protection Act (IRPA) expressly contemplates a valid job offer is a precondition to an LMO. Despite language in the IRPA, which prevents a foreign

Continued on page 5

CASE IN POINT: IMMIGRATION

Worker was terminated before end of probation period

...continued from page 4

national from working or studying in Canada unless authorized to do so and makes it an offence for an employer to employ a foreign national in a capacity for which she is not authorized, the application for an LMO includes a section which the employer must complete in respect to the job offer to the foreign worker, and the IRPA Regulations require that a foreign national receive a genuine offer of employment prior to the issuance of an LMO. It was therefore obvious that any application for a work permit must be preceded by a genuine job offer.

The employer submitted that the grievance should be dismissed because:
•The first job offer was unenforceable by reason of the lack of a valid work permit.
•Under Service Canada rules, the job should have been advertised and posted within Canada before a foreign national could have been employed. Thus, the employee could not have fulfilled his duties as he did not have the appropriate work permit.
•The employee had applied for the job under false pretences, as he failed to disclose his immigration status.
•The first offer was rescinded and that the collective agreement did not apply until such time as he had commenced work.

The arbitrator found the foreign worker did not become an employee of the employer until he obtained an LMO and valid work permit. It followed that the longer probationary period set out in the new collective agreement applied and the foreign worker was then a probationary employee at the time of his termination and not entitled to compensation.

Employer unlikely to wilfully contravene immigration act

The arbitrator's decision was based on several factors. First, he found the first job offer was rescinded since it was unlikely the employer would have proceeded in direct contravention of the IRPA, especially when it had previous experience in hiring foreign workers. It was also apparent the employer did not become aware of the foreign worker's immigration status until after the first offer had been signed, and it was at that time when it began its efforts to obtain an LMO. As soon as the first LMO application was refused, the employer rescinded the first offer of employment and then signed a second one conditional upon the foreign worker obtaining the appropriate authorization to work in Canada.

Further, the arbitrator found that, under normal circumstances, an employment contract is formed at the time an unconditional offer of employment is accepted, but that principle was not applicable in this case because the provisions of the IRPA prevented the foreign worker from finally accepting the offer until he was in possession of a work permit. The arbitrator interpreted the relevant provisions of the IRPA as allowing for the possibility that a job offer might be made to a foreign worker in advance of the issuance of a permit, and that the requirement was for the employer to describe its job offer in the application for an LMO. The regulations and the LMO itself — which must be issued before a work permit can be obtained — require that an employer comply with the terms of the job offer, except where it has reasonable justification for its failure to do so. The arbitrator noted that it would be "the height of absurdity" to require an employer to take all the steps necessary to obtain a positive LMO without having discussed with the foreign worker the offer it was prepared to make, and having received from the worker an indication that she was prepared to accept those terms.

The arbitrator noted that the foreign worker's acceptance of the offer would not, in these circumstances, create an employment relationship because he was not in the position to finally accept the offer until such time as he had a work permit. The arbitrator found that one of the purposes of the IRPA is to ensure a foreign worker does not deprive a Canadian resident of a job, which the Canadian is able and willing to perform. This is the reason for the requirement that the job be advertised in Canada in advance of and in support of an LMO. Therefore, the foreign worker was not legally competent to accept the employer's offer until he received a work permit. The employment contract could only have become effective on that date.

The arbitrator also held that, to the extent that both the foreign worker and the employer may have been of the view that the foreign worker was legally capable of becoming an employee, the doctrine of mutual mistake was applicable as it appeared both parties were under the mistaken belief that the foreign worker could start work immediately. It was only after the first offer of employment was extended that the employer became aware an LMO and work permit were required. The grievance was dismissed.

For more information see:

■*Essar Steel Algoma Inc. v. United Steelworkers of America, Local 2251 (Smetek Grievance)*, [2012] O.L.A.A. No. 412 (Ont. Arb. Bd.).

ABOUT THE AUTHOR

Sergio R. Karas

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