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REPRINT

Weighting experience in the foreign worker search

BACKGROUND

TWO RECENT CASES highlight the difficulties that exist with the current Labour Market Impact Assessment (LMIA) process. The main question before the Federal Court in these cases was what kind of evidence regarding labour market conditions can be relied upon by a Temporary Foreign Worker Unit officer, and how it must be disclosed to an employer?

Federal Court issues 2 divergent rulings on whether job experience requirements can rule out Canadian candidates

BY SERGIO R. KARAS

Generally, Canadian employers are only permitted to recruit foreign workers if they can't find Canadian candidates to fill open positions. But how important is previous experience when it favours foreign workers over Canadian ones? Two recent decisions by the Federal Court addressed whether experience should be factored into LMIAs and came to different decisions.

In *Seven Valleys Transportation Inc. v. Canada (Minister of Employment and Social Development)*, the question was whether a Temporary Foreign Worker Unit (TFWU) officer fettered — or restrained — her discretion and made an unreasonable decision by considering extrinsic evidence in refusing an LMIA application. The employer applied to hire a foreign worker and required a minimum of one-to-two years of experience for a long-haul truck driver position. The officer felt this requirement was excessive.

The officer stated that while experience may be considered to be an asset, it was not an essential requirement for the position. The officer's notes revealed that her internal research of occupational requirements disclosed that long-haul truck drivers typically received "on road" time along with classroom training and then a licensing exam. Once those conditions were met, the driver would be considered qualified for that occupation. While the employer had stated that insurance rates would be lower for drivers with experience, the officer rejected that rationale.

The employer claimed that the officer breached procedural fairness by relying on information from an internal database and on interim guidelines without disclosing those sources. The court rejected that contention and referred to its 2015 decision *Frankie's Burgers Lougheed Inc. v. Canada (Employment and Social Development)*, where it was held that employers have a legitimate expectation that they will be afforded an opportunity to respond to any concerns an officer may have regarding the credibility or authenticity of documentation that they supply in support of an LMIA application. Further, the court also referred to *Kozul v. Canada (Employment and Social Development)* where the Federal Court found that there is a duty to disclose extrinsic evidence if it may have an impact on an administrative decision. In *Seven Valleys*, however, the court held that the officer did not unfairly rely on documents from the internal database and disclosed the information to the employer prior to rendering a decision. The employer was made aware of the information relied upon by the officer and was given an opportunity to address it.

Notwithstanding the above, the court accepted the employer argument that the officer ignored relevant information presented by the employer. The officer did not take into consideration the employer's evidence regarding challenging routes, public safety, and the high value of the trucks given to the drivers. The court referred to its decision in *Paturel International Company v. Canada (Employment and Social Development)* where it found it is unreasonable for an officer to solely rely on one factor and one source of data while ignoring other factors and evidence presented as part of the application — doing so amounted to a restraining of discretion. In light of the officer's failure to take into account the employer's rationale for requiring a foreign worker, the court in *Seven Valleys* found that the officer fettered her discretion and quashed her negative decision.

Experience requirement considered but not accepted by officer

A different result ensued in *Sky Blue Transport Ltd. v. Canada (Minister of Employment and Social Development)*. The officer refused an LMIA application based on the lack of "genuineness" of the job offer due to the excessive experience requirement. The employer requested that long-haul truck drivers have one-to-two years of experience. and said it was able to hire only one suitable Canadian candidate with those requirements.

The employer explained in a telephone interview with the officer that it was a requirement of the insurance provider as well as part of a risk reduction strategy. In a written submission, the employer reiterated the existence of the written contract with the insurer regarding driver qualifications, which stipulated insurance for drivers with less than one year of experience was not

available, and insurance for drivers with between one and three years of experience was more costly. The officer refused the LMIA application due to the employer's failure to demonstrate it had made sufficient efforts to hire Canadians, and failing to demonstrate a reasonable employment need for this position in the business. The officer found that, although experience was an asset, the one-to-two years required by the employer was not an occupational requirement in the National Occupational Classification (NOC) description for long-haul truck drivers. It is important to note that the officer made specific reference in her notes to the operational guidelines that, if an employer makes a reasonable case that it requires experience for relevant factors related to job performance, these may be accepted — such as experience in driving dangerous goods or challenging routes.

The employer argued that the officer read the NOC classification for the occupation and the guidelines too narrowly and refused to consider an element not laid out in the classification. The court disagreed, noting that the officer did not foreclose the possibility of deviating from the guidelines or the NOC classification, and she recognized the employer could have provided significant justification for additional job requirements but had not done so. The court referred to *Frankie's Burgers*, where it was held that there was nothing wrong with an officer following departmental guidelines or NOC classifications so long as they are not considered binding and are applied in a manner that permits departures where warranted. In this case, the officer specifically recognized that she had the ability to step outside the guidelines in the appropriate case.

The employer relied on *Seven Valleys*, where the negative LMIA decision was overturned because the officer did not take into account specific demands of the position. However, the court distinguished *Seven Valleys* because in *Sky Blue Transport* the officer did consider the employer rationale but found it lacked substance, mostly because it was focused on insurance costs for which minimal detail had been provided.

The court held that the decision was reasonable because the employer failed to provide objective evidence to support the proposed job requirements. A decision maker is not required to mention every piece of evidence before her and the employer never established that a driver with additional experience was required.

The court also rejected the argument that the officer had breached procedural fairness. The court noted that the employer was made aware of the officer's concerns and had an opportunity to address them and said departmental guidelines, whether published or not, do not constitute extrinsic evidence. Reliance on such guidelines or information is not unfair if its substance has been conveyed to an applicant, who has been provided with an opportunity to respond.

The employer also argued it had successfully applied previously for an LMIA with a similar experience requirement but the court rejected that argument because none of the facts or evidence related to that application were before the court or officer. The court upheld the officer's decision.

Experience requirements in LMIA applications should be reasonable and relate closely to the NOC job classification and to industry standards. While it is true that employers may insist on additional experience requirements, they should never be so unreasonable so as to preclude Canadians from qualifying for the position.

For more information see:

- *Seven Valleys Transportation Inc. v. Canada (Minister of Employment and Social Development),* 2017 CarswellNat 529 (F.C.).
- *Frankie's Burgers Lougheed Inc. v. Canada (Employment and Social Development)*, 2015 CarswellNat 107 (F.C.).
- *Kozul v. Canada (Employment and Social Development)*, 2016 CarswellNat 10697 (F.C.).
- *Paturel International Co. v. Canada (Minister of Employment and Social Development)*, 2016 CarswellNat 1669 (F.C.).
- *Sky Blue Transport Ltd. v. Canada (Minister of Employment and Social Development),* 2017 CarswellNat 723 (F.C.).