

Federal Court



Cour fédérale

Date: 20150915

Docket: IMM-7236-14

Citation: 2015 FC 1075

Toronto, Ontario, September 15, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**CANADIAN REFORMED CHURCH OF
CLOVERDALE B.C.**

Applicant

and

**THE MINISTER OF EMPLOYMENT
AND SOCIAL DEVELOPMENT CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In 2014, the Canadian Reformed Church of Cloverdale, British Columbia submitted a Labour Market Impact Assessment in order to hire a translator from outside Canada. Employment and Social Development Canada (ESDC) dismissed the assessment because the Church had not shown that it had made reasonable efforts to hire or train a Canadian employee.

[2] This was the Church's second application. A previous assessment that had been turned down because the wage offered was too low. The Church then increased the wage and re-advertised the position, identifying the location of work as Surrey, BC.

[3] ESDC refused the Church's second assessment because the advertisements did not include the business address where the translator would be working, even though ESDC had previously told the Church that this was a mandatory requirement.

[4] The Church argues that the ESDC officer who dealt with its proposed assessment fettered her discretion by relying exclusively on internal guidelines, rather than on the language in the applicable regulations. It also maintains that the officer rendered an unreasonable decision because she required that the advertisements include a specific business address rather than a general location where the work would be done. The Church asks me to quash the officer's decision and order another officer to reconsider its assessment.

[5] I agree with the Church that the officer fettered her discretion and arrived at an unreasonable decision. Therefore, I will allow this application for judicial review.

[6] A decision that is the product of a fettering of discretion is, by definition, unreasonable (*Frankie's Burgers Lougheed Inc v Canada (Minister of Employment and Social Development)*, 2015 FC 27 at para 24). Therefore, I need only consider whether the officer fettered her discretion.

II. Did the officer fetter her discretion?

[7] In her affidavit, the officer explains that different business names and addresses for the Church appeared in documents submitted to ESDC. She informed a representative of the Church of the usual advertising requirements, including the minimum duration and the need for a business address. In another affidavit, an ESDC director added that the regulatory requirements will “typically not be satisfied” if the advertisements for the position are not accurate and complete.

[8] The Church’s representative states that the officer only discussed with him the need for a business address in job advertisements. He also points out that the Church’s business address was set out on its website, and that advertisements typically included map links to the place of work.

[9] One of the factors that must be taken into account in determining whether to approve an assessment is whether the employer “has made, or has agreed to make, reasonable efforts” to hire or train Canadian citizens or permanent residents (s 203(3)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 – see Annex). The applicable guidelines (*Stream for Higher-skilled Occupations*) stipulate that advertisements “must include the . . . business address”.

[10] Guidelines can serve as a useful benchmark when interpreting regulatory requirements, but they cannot be treated as binding (*Bajwa v Canada (Minister of Citizenship and*

Immigration), 2012 FC 864 at para 44; *Ishaq v Canada (Minister of Citizenship and Immigration)*, 2015 FC 156 at para 51; *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 at para 92).

[11] In my view, the record shows that the sole reason why the officer refused the Church's assessment was because of the absence of a business address in the advertisements. Her notes to file state simply that the assessment was refused because the Church had not met the minimum advertising requirement of listing a business address. The officer did not determine whether the Church had actually made reasonable efforts to hire or train a Canadian in accordance with the regulatory standard but rather rejected the assessment for the solitary reason that the advertisements lacked a business address. The officer appears to have treated the guidelines as mandatory obligations.

[12] While the officer was entitled to consider the absence of a business address as a factor in the exercise of her discretion, that was not a sufficient basis in the circumstances for rejecting the Church's assessment. The officer's approach amounted to a fettering of her discretion.

III. Conclusion and Disposition

[13] By treating the applicable guidelines as mandatory requirements, the officer fettered her discretion and arrived at an unreasonable decision to reject the Church's assessment. I must, therefore, allow this application for judicial review and order another officer to reconsider the assessment. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is returned to another officer for reconsideration.
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Regulations, SOR/2002-227

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Factors — effect on labour market

Facteurs – effets sur le marché du travail

203. (3) An assessment provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)(b) shall, unless the employment of the foreign national is unlikely to have a positive or neutral effect on the labour market in Canada as a result of the application of subsection (1.01), be based on the following factors:

203. (3) Le ministère de l'Emploi et du Développement social fonde son évaluation relative aux éléments visés à l'alinéa (1)b) sur les facteurs ci-après, sauf dans les cas où le travail de l'étranger n'est pas susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien en raison de l'application du paragraphe (1.01) :

...

[...]

(e) the employer

e) l'employeur, selon le cas :

(i) during the period beginning six years before the day on which the request for an assessment under subsection (2) is received by the Department of Employment and Social Development and ending on the day on which the application for the work permit is received by the Department, provided each foreign national employed by the employer with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that were substantially the same as — but not less favourable than

(i) au cours de la période commençant six ans avant la date de la réception, par le ministère de l'Emploi et du Développement social, de la demande d'évaluation visée au paragraphe (2) et se terminant à la date de réception de la demande de permis de travail par le ministère, a confié à tout étranger à son service un emploi dans la même profession que celle précisée dans l'offre d'emploi et lui a versé un salaire et ménagé des conditions de travail qui étaient essentiellement les mêmes — mais non moins avantageux — que ceux précisés dans l'offre,

— those set out in that offer,
or

(ii) is able to justify, under subsection (1.1), any failure to satisfy the criteria set out in subparagraph (i).

(ii) peut justifier le non-respect des critères prévus au sous-alinéa (i) au titre du paragraphe (1.1).

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7236-14

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B.C. v THE MINISTER OF EMPLOYMENT AND
SOCIAL DEVELOPMENT CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

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JUDGMENT AND REASONS: O'REILLY J.

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