Federal Court  Cour fédérale

Date: 20160307

Docket: IMM-3055-15

Citation: 2016 FC 286

Ottawa, Ontario, March 7, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

CHARGER LOGISTICS LTD.

Applicant

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of a Foreign Worker Officer [the Officer] of Service Canada dated June 8, 2015, in which the Officer refused the Applicant's request for a positive Labour Market Impact Assessment [LMIA].

[2] For the reasons that follow, this application is allowed.

I. Background

[3] The Applicant is a Canadian logistics and transportation company based in Mississauga, Ontario with 200 trucks in its transportation fleet, which moves freight throughout Canada, the United States and Mexico. This application arises out of its recruitment for a Supervisor – Truck Drivers arising from its expanding business in the United States/Mexico corridor.

[4] The Applicant advertised for the position through Job Bank and the Indeed and Workopolis websites. Sixty people applied, but only ten were interviewed as having the requisite work experience. Of these ten candidates, only four spoke Spanish, which was a job requirement. Three of these four were unsatisfied with the salary and the other candidate was unwilling to relocate to take the job.

[5] On March 17, 2015, the Applicant applied for a LMIA for the position. Following a number of communications between the Applicant and the Officer, which included the subjects of the Applicant's advertising efforts and the wage offered for the position, on June 8, 2015 the Officer issued the decision which is the subject of this judicial review.

II. Impugned Decision

[6] The Officer's decision advised that Service Canada was not able to issue a positive LMIA opinion and that this was based on the wages the Applicant was offering and based on the Applicant not having demonstrated sufficient efforts to hire Canadians in the occupation.

[7] The Officer's notes to file include the following comments:

A. The median wage for the occupation, described by the Officer as National Occupation Classification [NOC] 7222 – Supervisors, Motor Transport and Other Ground Transport Officers, is $33/hour at the Ontario provincial level and $30.76/hour in Toronto (GTA-Mississauga) where the temporary foreign worker would be employed;

B. The wage of $30.76 hour offered by the employer should be over the prevailing wage for the occupation because of the requirement for an additional language skill, combined with job duties and education requirements beyond those listed under NOC 7222;

C. The employer's search for an individual able to coordinate the flow of equipment primarily in the Latin American marketplace, who is fluent in Spanish, and who has a Business Administration Degree, will make it difficult to find a candidate locally with the offered salary. The median wage for this occupation at the provincial level is $33/hour. Considering the specific skills sought, a higher wage offering may attract an individual capable of meeting the employer's needs;

D. On August 20, 2015, the Officer wrote to the Applicant's representative, noting that the Applicant had clarified that the hourly wage for the position was $33.33/hour rather than $30.76/hour. The Officer requested the formula used to calculate the relationship between the hourly wage and the posted $64,000 annual wage;

E. The Officer's August 20, 2015 communication also noted that the Applicant's advertisement on Job Bank was no longer active and gave the Applicant an opportunity to provide any other job advertisements it may have already posted;

F. There were gaps in the Job Bank advertisement. The advertisement went inactive on April 11, 2015 and, despite being given an opportunity, the Applicant failed to provide any other active job advertisement posted prior to the March 17, 2015 date on which it sought the LMIA;

G. The Indeed advertisement was no longer active on February 25, 2015. Despite an explanation provided by the Applicant on April 22, 2015, it could be verified that the advertisement was no longer available on Indeed. The Applicant provided an explanation on April 27, 2015 of the functioning of the Indeed website based on consultation with its account manager at Indeed;

H. The Applicant submitted that hiring the temporary foreign worker would have a net positive impact on its industry sector, resulting in job retention and the creation of jobs. The Applicant provided a transition plan, but none of the proposed activities involved knowledge transfer.

III. Issues and Standard of Review

[8] The Applicant submits the following issues for the Court's consideration:

A. Was the Officer's discretion fettered by treating the advertising requirements set by the Temporary Foreign Workers Program [TFWP] as mandatory requirements?

B. Was the Officer's refusal of the Applicant's LMIA application unreasonable with respect to prevailing wage, given the evidence that was before the Officer?

[9] The parties agree, and I concur, that the standard of review applicable to the Officer's decision is reasonableness (*Frankie's Burgers Lougheed Inc v Canada (Minister of Employment and Social Development)*, 2015 FC 27 [*Frankie's Burgers*]). Overall, the issue for the Court to consider is whether the decision is reasonable.

IV. Submissions of the Parties

A. *Applicant's Position*

[10] The Applicant relies on *Canadian Reformed Church of Cloverdale B.C. v The Minister of Employment and Social Development Canada*, 2015 FC 1075 [*Reformed Church*] where the Court found that an officer had fettered her discretion. Section 203(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] made under the *Immigration and Refugee Protection Act*, SC 2001, c 27 confers on an officer the discretion to determine *inter alia* whether the "employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada". In making that determination there are seven factors (set out in

section 203 (3) of the Regulations) that must be taken into consideration. The Applicant notes that none of these factors mandate minimum advertising requirements.

[11] The Applicant submits that, instead of looking at the evidence to determine whether the Applicant "will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so", as the Officer was required to do under section 203(3)(e), the Officer assessed only whether the minimum advertising requirements set by the TFWP were met. In such assessment, the Officer did not consider the evidence of all the advertising the Applicant had done to fulfill the position. The Applicant also takes the positon that the Officer failed to address evidence that the advertisement on the Indeed website had been running continuously.

[12] With respect to the hourly wage for the positon, the Applicant explains that, if one works 160 hours per month (the monthly hours described in its advertisements) for $64,000 per year, the hourly wage rate is $33.33 hours, not $30.76 as the Officer found. The Officer therefore erred in the component of the decision based on the prevailing wage calculation.

[13] Finally, the Applicant argues that the Officer erred in failing to weigh all the factors set out in section 203(3) of the Regulations. The Applicant refers to evidence that the temporary foreign worker it wished to hire had previously worked for the Applicant, performed extremely well and would bring benefits to its operations that would secure Canadian jobs.

B. *Respondent's Position*

[14] The Respondent would distinguish *Reformed Church* on the basis that the Officer in that case relied completely on an internal guideline as the basis for refusing an LMIA, without considering the language in the applicable Regulations. The Respondent relies on *Frankie's Burgers*, where Chief Justice Crampton observed that the TFWP requirements ensure that employers are aware of the minimum efforts necessary for obtaining a positive LMIA and assist in promoting a measure of consistency and predictability in officers' assessments of the factors set out in the Regulations.

[15] The Respondent notes that the Officer determined that the Applicant stopped advertising the position on the Job Bank in April 2015, after the Applicant had submitted its application but before a decision had been rendered. The minimum advertising provisions require that an Applicant's advertisement on the Job Bank be continuous until a decision on the application is reached. However, the Respondent argues that the Officer departed from these requirements and asked the Applicant if one of its supplementary advertisements was still ongoing.

[16] The Respondent also argues that the Officer's finding, that that the Applicant had not offered wages consistent with the prevailing wage, was reasonable. The prevailing wage for the position was $33/hour and, based on a 40 hour work week, this translates into an annual wage of $68,640, not $64,000 as offered by the Applicant. The Officer also concluded that the wage offered by the Applicant should have been higher than the prevailing wage, because the Applicant sought a candidate who was fluent in Spanish, had one year's experience as a

dispatcher and had a degree in Business Administration. Three Canadian applicants who were qualified for the position were not hired because they sought more money than was offered.

[17] In response to the Applicant's argument that the Officer erred in failing to weigh all the factors set out in section 203(3) of the Regulations, the Respondent refers to portions of the Officer's notes that address each of these factors, including the Applicant's submissions to the Officer about the temporary foreign worker it wished to hire.

V. Analysis

[18] My decision to allow this application for judicial review turns on the Officer's consideration of the Applicant's advertising efforts. On this issue, the Applicant argues principally that the Officer fettered his discretion by focusing on the minimum advertising requirements prescribed by the TFWP. The Applicant emphasizes in particular the portion of the Officer's notes which states as follows:

> Rationale for positive or negative LMIA
>
> Details: The assessment for this LMIA application does result in a negative opinion (contingent to BEA concurrence for 100% monitoring) for the following reasons:
>
> ER does not meet the minimum advertising requirements set by the TFW Program
>
> ER does not meet the prevailing wage requirements R203(3)(d).
>
> (emphasis added)

[19] With respect to the advertising requirements, the Applicant argues that the Officer's obligation was to consider whether it had made reasonable efforts to hire Canadians, pursuant to the factor set out in section 203(3)(e) of the Regulations as follows:

> (e) whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so;

[20] The Applicant compares the statement in the Officer's notes that the employer does not meet the prevailing wage requirements, where the relevant section of the Regulations is expressly referenced, to the statement that the employer does not meet the minimum advertising requirements, which references neither section 203(3)(e) of the Regulations nor its language, but instead references the TFWP.

[21] While I agree with the Applicant that the Officer's analysis focuses upon its advertising efforts, I do not consider this analysis to amount to a fettering of his discretion. While the Officer's notes refer to the advertising requirements of the TFWP, the June 8, 2015 letter which conveys the decision states that it is based on the Applicant not having demonstrated sufficient efforts to hire Canadians in the occupation. More importantly, I agree with the Respondent's argument that the manner in which the Officer approached his analysis of the advertising efforts demonstrates that he was not slavishly following the requirements of the TFWP. When the Officer identified that there was a gap in the Applicant's Job Bank advertisement, he afforded it an opportunity to identify other advertisements that had been run continuously up to the time of the LMIA decision.

[22] In my view, the Officer's approach was consistent with that approved by the Court in its recent decision in *Frankie's Burgers*, where Chief Justice Crampton held as follows at paragraph 92:

> 92 So long as the guidelines are not binding on officers, and are applied in a manner that permit departures where warranted, it is not unreasonable for officers to apply and follow them in the majority or even the substantial majority of cases.

[23] The Officer in the present case demonstrated willingness to depart from the strict requirements of the TFWP, by considering advertising by the Applicant other than through the Job Bank. I therefore conclude that he did not fetter his discretion in his approach to the decision under review. However, I nevertheless agree with the Applicant that the portion of the Officer's decision considering the evidence of its advertising efforts contains a reviewable error in that it does not address the evidence related to the other advertisements in a manner that would allow the Court to conclude the decision to be transparent, intelligible and therefore reasonable.

[24] I note that, at the hearing of this application, when the Applicant raised this particular argument, the Respondent took the position that the application did not challenge the Officer's decision on this basis. The Respondent submitted that the Applicant's challenge to the Officer's approach to its advertising efforts was framed entirely as a fettering of discretion rather than failure to consider the evidence. However, the Applicant pointed out that its Reply Memorandum raised this argument as follows (with all emphasis from the original):

> 4. It is submitted that in any event the Applicant did put evidence before the officer that its Indeed advertisement had been running continuously. That evidence is as follows:
>
> > From http://ca.indeed.com/job/supervisor-truck-driver-19a1a1c72676c776 on April 24, 2015, this ad

> was no longer active with the Indication "Indeed – 6 months ago"
>
> **The following explanation was provided by ER on Mon 27/04/2015** *11:29 AM: "As per our conversation on Friday, April 24th, 2015, [PO] requested a report from Indeed that indicates the Supervisor – Truck Driver posting activity since its date of posting.*
>
> **In speaking with our account manager at Indeed, I have come to understand that their system does not produce any such reports; Indeed, too, can only view the job created date. The account manager indicated that the "job created" date (as per the image attached herewith and also sent to you by [third party] r. Eastman on Friday April 24th) is the original date of job posting. In the case were the job is cancelled or paused, and subsequently re-posted, the "job created" date will automatically update to the re-posted date. …**[Emphasis added]
>
> **Respondent's Record, p.51**

> 5. The officer failed to address this significant evidence in arriving at his refusal decision. It is submitted that the officer's refusal of the Applicant's LMIA application was unreasonable in that it does not fall within the range of acceptable outcomes that are defensible in respect of the facts and law. Thus, this court's intervention is warranted.
>
> **New Brunswick (Board of Management) v Dunsmuir, 2008 SCC 9 at para. 47**

[25] I agree with the Applicant that the issue of the Officer's consideration of the evidence surrounding the Indeed advertisement was squarely raised by the Applicant in its written submissions. I also find that the Officer's decision does not demonstrate any analysis of the evidence provided by the Applicant to the Officer to support its position that the Indeed advertisement remained active and had been running continuously. The above except from the

Applicant's Reply Memorandum quotes the portion of the Officer's notes that relates to the status of the Indeed posting.

[26] The April 27, 2015 communication from the Applicant's representative to the Officer quoted in those notes refers to an attached image which identifies the original date of the job posting. That image includes the entries "Status: Open" and "Created: 14-Oct-2014". The Applicant argues that these entries, combined with the explanation of the functioning of the Indeed website received from the Applicant's account manager and conveyed to the Officer, demonstrates the advertisement to have been running continuously since October 14, 2014.

[27] It is not the Court's role to analyze this evidence or the apparent conflict between the statement in the Officer's notes that the advertisement was not available on Indeed and the evidence subsequently provided by the Applicant, which it characterizes as establishing that the Indeed advertisement remained active. The reviewable error is the absence of any analysis by the Officer of this evidence to support a conclusion on this issue.

[28] The Applicant's evidence was provided to the Officer on April 27, 2015 in response to a request by the Officer on April 24, 2015 for a report from Indeed indicating the job posting activity since its date of posting, which presumably demonstrates that the Officer had not yet reached a conclusion as to the status of that advertisement. However, while the Officer's notes then refer to the evidence received on April 27, 2015, they contain no resulting analysis. Earlier in the notes, in setting out the rationale for the negative LMIA, the Officer refers to the gap in the Job Bank advertisements and states that the Applicant failed to provide any other active job

advertisement posted prior to the March 17, 2015 LMIA application date. However, this does not reveal how the Officer reached that conclusion in the context of the apparently conflicting evidence surrounding the Indeed posting.

[29] In this respect, I find the decision lacking the transparency and intelligibility necessary to find it reasonable. As this requires that the decision be set aside and the matter referred to another officer for re-determination, it is unnecessary for me to consider the Applicant's arguments surrounding the wage rate considered by the Officer in making his decision.

[30] On the subject of the wage rate, the Applicant proposed a question of general importance for certification for appeal, related to whether an employer is required to advertise for a position at a wage above the prevailing wage rate for an occupation where a prospective employee's skills warrant an increase above the prevailing wage. This question would involve interpretation of section 203(3)(d) of the Regulations, which requires assessment whether the offered wage is consistent with the prevailing wage for the occupation. The proposed question arises from the Respondent's defence of the reasonableness of the Officer's decision based on the conclusion that the wage offered by the Applicant should have been higher than the prevailing wage, due to the specific requirements of the candidate sought.

[31] The Respondent opposes certification of this question, arguing that it does not raise a matter of general importance. As my decision does not turn on the arguments related to the wage advertised for the position, and as the Applicant has prevailed in this application, this question

would not be dispositive of an appeal. I therefore decline to certify this question, and it is not necessary for me to consider whether it can be characterized as a question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed and the Applicant's request for a Labour Market Impact Assessment is referred to a different officer for re-determination in accordance with these reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Jeremiah A. Eastman	FOR THE APPLICANT
Wendy Wright	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeremiah A. Eastman Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT