Federal Court  Cour fédérale

Date: 20161128

Docket: IMM-736-16

Citation: 2016 FC 1316

Ottawa, Ontario, November 28, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

DRAGO KOZUL AND DSM ALUMINUM CONTRACTING LTD.

Applicants

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] After it obtained a significant contract to install copper soffits and fascia for new homes being constructed in Kitchener, Hamilton and Oakville, DSM Aluminum Contracting Ltd. [DSM] needed to hire a copper sheet metal worker with at least three years' experience fabricating and installing copper sheets. DSM and its owner, Drago Kozul, looked for qualified individuals by advertising the position during April and May 2015 in the Toronto Star, and on Workopolis.com and Indeed.ca. The Applicants received 14 applications for the position, but

none of the candidates possessed the required three years of experience as a copper sheet metal worker. The Applicants also contacted the Carpenters and Allied Workers Union but were informed the Union did not have any experienced copper fabricators and installers available for employment.

[2] By way of a letter from its legal counsel dated June 17, 2015, DSM then applied under the Temporary Foreign Worker Program for a Labour Market Impact Assessment [LMIA] in order to hire a copper sheet metal worker as a Temporary Foreign Worker [TFW]. In their LMIA application, the Applicants cited their inability to find a suitable candidate within the region and, as a result, indicated their intention to hire a TFW with sufficient experience handling copper sheet metal. The Applicants also noted that the TFW could fill the immediate labour shortage as well as teach and develop the skills of other Canadians and permanent residents as to the handling, installation and fabrication of copper sheet metal.

[3] On January 7, 2016, a TFW Program Officer [the Officer] contacted Mr. Kozul and requested the relevant collective agreement and some additional information. The Officer informed the Applicants' legal counsel on January 13, 2016, that the collective agreement was required because employers hiring TFWs for available positions which are part of a union must advertise and offer the same wage rates as those established under the collective agreement. On January 20, 2016, the Applicants' representative advised the Officer that the work associated with the copper sheet metal worker position was not covered by the collective agreement since it covered only the installation of aluminum and vinyl soffits and facia and not copper fabrication and installation. The Applicants' representative also provided the Officer with a letter from the

Union dated January 20, 2016, stating it did not have any experienced copper fabricators and installers available for employment and did not oppose the Applicants' intention to hire a TFW to fill the position.

I. Decision

[4] In a letter dated February 9, 2016, the Officer advised the Applicants that a positive opinion in respect of the LMIA could not be issued because they had not demonstrated sufficient efforts to hire Canadians and because the employment of a foreign national was not likely to fill a labour shortage. The Officer's rationale for not issuing a positive opinion was set forth in her notes to file which state, in relevant part:

> After considering the factors outlined in R200(5) and 203(3) [subsections 200(5) and 203(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227] and based on all the documents provided, the Employer is offering the foreign worker a higher wage than what was advertised for this position to Canadians and permanent residents. As a result, the Employer has not been able to demonstrate he has made reasonable efforts to hire Canadians and permanent residents as outlined in R203 (3) (e). Additionally, the Employer has not tested the market with a wage that is consistent with wages that are generally accepted Canadian standards.
>
> Even though the Employer provided a letter from its union which confirms that they do not have any workers to fill this position and does not object the Employer hiring outside the union, various sources verified regarding labour market indicate that there is no labour shortage for this occupation as outlined in R203(3)(c).
>
> After reviewing all documents provided by the Employer and upon considering the labour market factors, a negative decision has been rendered for not meeting R203 (3)(c) and (e).

[5] The Officer in this case, in addition to the information and documentation provided by the Applicants, consulted various other sources of information regarding the labour market for copper sheet metal workers. In particular, the Officer reviewed and relied on the Ontario Government's "Ontario Jobs Futures" website to assess labour market conditions and the Government of Canada's Job Bank website for job postings for sheet metal workers in the regions of Toronto, Hamilton-Niagara, and Kitchener-Waterloo-Barrie; she also obtained and reviewed construction forecasts for the Greater Toronto Area, Central Ontario, and Southwest Ontario, from www.constructionforecasts.ca.

[6] The Officer's notes further show that on February 8, 2016, she spoke by telephone with Darryl Stuart, the in-coming Executive Director of the Ontario Sheet Metal Contractors Association:

> He indicates that currently there is no labour shortage for Copper Sheet Metal worker, in fact there is a down turn in the market. He said that someone with 3 years of experience would be considered 3 year apprentice who would be paid 70% of Journeyman rate that could be about $42.00/hr (that is if the position is unionized).
>
> When asked if it's possible for some occupations to be non-unionized and some to be unionized for the same organization. He stated that it is possible, however, he confirmed that those individuals who are not part of the union would not be paying union dues.

II. Issues

[7] This application for judicial review raises one primary issue: that is, whether the Applicants were denied procedural fairness by the Officer's failure to afford the Applicants an opportunity to address certain extrinsic evidence upon which she relied in not issuing a positive

LMIA opinion. For the reasons that follow, I find that the Applicants were denied procedural fairness in the circumstances of this case and, therefore, it is not necessary to consider the other issues raised by the parties.

III. Analysis

[8] Whether the Applicants were denied procedural fairness is reviewed on the correctness standard (see: *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 at para 23, 473 FTR 67 [*Frankie's Burgers*]). This requires the Court to determine whether in rendering the negative LMIA opinion the Officer satisfied the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). It is, therefore, not so much a question of whether the decision or opinion is correct as it is a question of whether the process followed in making the decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 249 ACWS (3d) 112).

[9] The content of the duty of procedural fairness owed in the context of applications for a LMIA is relatively low. As the Court observed in *Frankie's Burgers*:

> [73] The requirements of procedural fairness will vary according to the specific context of each case (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21 [*Baker*]). In the context of applications by employers for LMOs, a consideration of the relevant factors that should be assessed in determining those requirements suggests that those requirements are relatively low. This is because, (i) the structure of the LMO assessment process is far from judicial in nature, (ii) unsuccessful applicants can simply submit another application

> (*Maysch v Canada (Citizenship and Immigration)*, 2010 FC 1253, at para 30; *Li v Canada (Citizenship and Immigration)*, 2012 FC 484, at para 31 [*Li*]), and (iii) refusals of LMO requests do not have a substantial adverse impact on employers, in the sense of carrying "grave," "permanent," or "profound" consequences (*Baker*, above, at paras 23-25).

[10] While the duty of procedural fairness owed in this case may be at the low end of the spectrum, this is not to say that the duty is non-existent. There is a duty to disclose extrinsic evidence if it may impact the outcome of a decision. As noted by the Court in *Yang v Canada (Citizenship and Immigration)*, 2013 FC 20 at para 17, [2013] FCJ No 25: "The question is whether meaningful facts essential or potentially crucial to the decision had been used to support a decision without providing an opportunity to the affected party to respond to or comment upon these facts."

[11] The Respondent contends that the Officer was not required to disclose the information she obtained from sources other than the Applicants since such disclosure is only required "when an applicant's credibility or the authenticity of documents or evidence is in question." I disagree.

[12] In this case, the Officer's reliance upon websites which are generally accessible to members of the public for information about the labour market for sheet metal workers was not unfair. An officer's reliance upon information gleaned from websites has been found to be fair and not an improper resort to extrinsic evidence in several decisions of this Court (see e.g.: *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 58, 472 FTR 285; *Sinnasamy v Canada (Minister of Citizenship and Immigration)*, 2008 FC 67 at paras 39-40, 164 ACWS (3d) 667; *De Vazquez v Canada (Citizenship and Immigration)*, 2014 FC 530 at paras 27-

28, 456 FTR 124; *Pizarro Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623 at para 46, 434 FTR 69).

[13] However, in the circumstances of this case, it was unfair that the information the Officer obtained from speaking with Mr. Stuart was not conveyed or disclosed to the Applicants before she issued the negative LIMA opinion. This information directly challenged the Applicants' view as to the existence of a labour shortage for experienced copper sheet metal workers. Denying the Applicants an opportunity to comment upon or offer evidence to contradict the undisclosed information from Mr. Stuart was unfair. Consequently, the matter must be returned to a different TFW program officer to be assessed anew.

[14] At the hearing of this matter, the Respondent referred the Court to the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at paras 4-5, 112 ACWS (3d) 558, and urged the Court to exercise its discretion not to grant the application for judicial review because, even if the Officer unfairly relied upon the information obtained from Mr. Stuart, such a breach of procedural fairness was immaterial to the broader LMIA decision since the Officer also found that the Applicants had not demonstrated sufficient efforts to hire a Canadian or permanent resident worker. I decline the Respondent's request for the Court to exercise its discretion in this regard. I do so because the undisclosed information pertained directly to the very question the Officer had to answer in response to the Applicants' LMIA application: whether there was or was not a labour shortage for copper sheet metal workers. The Applicants were entitled to have their LMIA application assessed fairly,

something which did not occur in this case since the Officer failed to afford the Applicants an opportunity to challenge the extrinsic evidence provided by Mr. Stuart.

IV. Conclusion

[15] The Officer's failure to provide the Applicants with an opportunity to respond to the information provided by the Executive Director of the Ontario Sheet Metal Contractors Association breached the duty of procedural fairness to which they were entitled.

[16] The Respondent's request at the hearing of this matter that the Minister of Citizenship and Immigration be removed as a Respondent is granted and the style of cause amended accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the Minister of Citizenship and Immigration is removed as a Respondent; and there is no order as to costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DRAGO KOZUL AND DSM ALUMINUM CONTRACTING LTD. v THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT
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APPEARANCES:

Wennie Lee	FOR THE APPLICANTS
Wendy Wright	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT