

Federal Court



Cour fédérale

**Date: 20170216**

**Docket: IMM-3434-16**

**Citation: 2017 FC 195**

**Vancouver, British Columbia, February 16, 2017**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**SEVEN VALLEYS TRANSPORTATION INC.**

**Applicant**

**and**

**MINISTER OF EMPLOYMENT AND  
SOCIAL DEVELOPMENT**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] In the context of an application assessment by an Employment and Social Development Canada [ESDC] Program Officer [Officer], Chief Justice Crampton recently explained that “employers have a legitimate expectation that they will be afforded an opportunity to respond to any concerns that an ESDC Officer may have regarding their credibility or the authenticity of documentation that they supply in support of a request for a positive LMO” (*Frankie's Burgers*

*Lougheed Inc. v Canada (Employment and Social Development)*, 2015 FC 27 at paras 73-75 [*Frankie's Burgers*]). This Court has also found that there is a duty to disclose extrinsic evidence if it may have an impact on the outcome of an administrative decision (*Kozul v Canada (Employment and Social Development)*, 2016 FC 1316 at para 10 [*Kozul*]).

[2] As stated by this Court in *Paturel International Company v Canada (Employment and Social Development)*, 2016 FC 541 [*Paturel Int'l Co.*], it is unreasonable for an Officer to solely rely on one factor and one source of data:

[11] Yet, in the end, the Minister's decision relies only on one factor, prevailing wage, without addressing how all the factors, together, impact the Canadian labour market.

[12] Second, while it was open to the Minister to consider EI data in the calculation of the prevailing wage, in the circumstances, it was unreasonable to rely solely on that data. Doing so amounted to a fettering of discretion. The difference between the 2013 median wage and the 2014 median wage, and the other available data, should have caused the officer to consider whether the EI data was a reliable indicator of the prevailing wage for the occupation.

[Emphasis added.]

## II. Nature of the Matter

[3] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by an ESDC Program Officer [Officer], dated July 21, 2016, refusing the Applicant's application for a Labour Market Impact Assessment [LMIA] pursuant to paragraphs 200(5)(b), 200(5)(c) and 203(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

III. Facts

[4] Mr. Nassim Rohani is the owner and director [Director] of Seven Valleys Transportation Inc., which is engaged in a trucking and transportation business, operating a fleet of several long haul trucks.

[5] In January 2016, the Applicant advertised several long-haul truck driver positions, but was only able to hire three Canadian citizens or permanent residents.

[6] On March 31, 2016, the Applicant, through a representative of Ventura Immigration Consultants Ltd. [Representative] applied for a LMIA at EDSC, with the intention of hiring ten Temporary Foreign Workers [TFW] for long-haul truck driver positions.

[7] On July 18, 2016, the Officer called the Applicant's Director regarding the LMIA, and requested additional information in order to wholly assess the genuineness of the employment offer. The Officer raised concerns about the Applicant's ability to fulfill the terms of the offer, namely wage. The Officer also informed the Applicant that the one or two year experience requirement was excessive, which would prevent the approval of the LMIA. The Officer asked the Director to submit a written response addressing her concerns and additional documentation to this effect.

[8] On July 20, 2016, the Applicant provided the Officer with a written response and the requested documents.

[9] On July 21, 2016, the Officer refused the Applicant's LMIA application. The Applicant was informed by phone that there was no appeal process available and that a new application would have to be filed.

[10] On July 25, 2016, the Applicant sent a written request for reconsideration to ESDC.

[11] On August 11, 2016, the Applicant retained legal counsel and an application for leave and judicial review was filed. The Officer's reasons were received on August 23, 2016.

#### IV. Decision

[12] On July 21, 2016, the Officer denied the Applicant's LMIA on the grounds that it was unable to meet terms it had included in its offer. The decision reads as follows:

... The negative opinion is based on the following:

- You did not sufficiently demonstrate that there is a reasonable employment need for this job in your business.
- You did not sufficiently demonstrate that you are reasonably able to fulfill the terms of the employment contract.
- You have not demonstrated sufficient efforts to hire Canadians in the occupation.

The requirement of 1 - 2 years experience (sic) stated in your advertisements is not considered as a bona fide occupational qualification for a Long-Haul Truck Driver. In this situation, experience may be considered as an asset; however, it is not an essential requirement for the position.

[13] Similarly, the Officer's notes dated July 20, 2016, indicate that she also considered the following:

... Do not support wage request. (advised ER to submit attestation letter from CA or lawyer with future applications. Not requested now as file is also being refused on excessive experience requirements).

Also, as per B/E guidance, requesting attestation/information from ER as to ER's request in ads and app, for 1-2 yrs experience required. (NOC 7411 states – on job training provided). May be deemed excessive as per wiki.

“TFWs approved under NOC Code 7411 typically receive “on road” time along with classroom training and then must challenge an exam. As with other occupation that requires licensing and/or certification, once these conditions are met, it is reasonable that the TFW would be considered qualified to work in that occupation once the certification requirements are met. Therefore, a truck driver that holds the appropriate licensing should be considered “qualified” to work in that occupation.

Taking an employer's insurance rate into account is outside the scope of TFWP requirements, and is not a part of the NOC Code 7411.”

V. Issues

[14] The Applicant submits the following issues:

- 1) Did the Applicant raise special reasons so as to allow an extension of time for filing and serving an application for leave and judicial review?
- 2) Did the Officer fail to consider principles of natural justice?
- 3) Did the Officer fetter her discretion?
- 4) Is the Officer's decision unreasonable?

[15] The parties agree that issues related to procedural fairness should be reviewed on a standard of correctness, while issues of fact and mixed issues of fact and law attract deference

and are thus reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9).

## VI. Relevant Provisions

[16] Paragraphs 72(2)(b) and (c) of the IRPA are applicable when granting or denying extension of time requests:

### **Application**

(2) The following provisions govern an application under subsection (1):

...

(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court (“the Court”) within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

(c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

### **Application**

(2) Les dispositions suivantes s’appliquent à la demande d’autorisation :

[...]

b) elle doit être signifiée à l’autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l’alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

[17] Paragraphs 200(5)(b) and (c) and 203(1)(a) of the Regulations provide the following:

### **Genuineness of job offer**

(5) A determination of whether

### **Authenticité de l’offre d’emploi**

(5) L’évaluation de

an offer of employment is genuine shall be based on the following factors:

...

(b) whether the offer is consistent with the reasonable employment needs of the employer;

(c) whether the terms of the offer are terms that the employer is reasonably able to fulfil; and

#### **Assessment of employment offered**

**203 (1)** On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) to (ii.1), an officer must determine, on the basis of an assessment provided by the Department of Employment and Social Development, of any information provided on the officer's request by the employer making the offer and of any other relevant information, if

(a) the job offer is genuine under subsection 200(5);

l'authenticité de l'offre d'emploi est fondée sur les facteurs suivants :

[...]

b) l'offre correspond aux besoins légitimes en main-d'œuvre de l'employeur;

c) l'employeur peut raisonnablement respecter les conditions de l'offre;

#### **Appréciation de l'emploi offert**

**203 (1)** Sur présentation d'une demande de permis de travail conformément à la section 2 par tout étranger, autre que celui visé à l'un des sous-alinéas 200(1)c)(i) à (ii.1), l'agent décide, en se fondant sur l'évaluation du ministère de l'Emploi et du Développement social, sur tout renseignement fourni, à la demande de l'agent, par l'employeur qui présente l'offre d'emploi et sur tout autre renseignement pertinent, si, à la fois :

a) l'offre d'emploi est authentique conformément au paragraphe 200(5);

## VII. Analysis

### A. *Extension of Time*

[18] Both the Applicant and the Respondent observed the ESDC Officer's statement that there

was no appeal or reconsideration process, and that a new application would be required.

[19] The Applicant submits that the Officer erred in providing incorrect information, and should have informed the Applicant of its right to challenge the decision by way of judicial review before the Federal Court. It is further alleged that the delays were not intentional, and that the Applicant had always intended to challenge the decision. Given the Applicant's urgent need for employees, it is argued that LMIA application processing delays would incur undue prejudice to the Applicant, while the Respondent would not suffer the same hardship.

[20] The Respondent argues that the application has no merit, and that the Applicant did not meet its burden of proof per the *Hennelly* test (*Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA), 244 NR 399 [*Hennelly*]). The Respondent also argues that the Officer provided correct information and was not required or qualified to advise the Applicant as to its legal options, including judicial review.

[21] Per *Hennelly*, above, at para 3, an extension of time should be granted if the following criteria are met: (1) a continuing intention to pursue the application; (2) the application has some merit; (3) no prejudice to the respondent arises from the delay; and (4) a reasonable explanation for the delay exists. The Federal Court of Appeal also noted the following in *Grewal v Canada (Minister of Employment and Immigration)*, [1985] FCJ No 144, 63 NR 106:

The underlying consideration, however, which, as it seems to me, must be borne in mind in dealing with any application of this kind, is whether, in the circumstances presented, to do justice between the parties calls for the grant of the extension.



[22] Here, the Court is satisfied that the circumstances of this case reasonably explain the delays and warrant the extension of time. In the Court's view, the Applicant has demonstrated that, at all material times it intended to dispute the Officer's decision, and that the application has some merit. The Respondent will suffer no prejudice due to the delay.

[23] The Applicant's request for an extension of time is therefore granted.

B. *Procedural Fairness*

[24] The Applicant claims the Officer breached procedural fairness by relying on information from an internal database and on interim guidelines without disclosing these documents.

[25] The Respondent contends that the Officer referred to documents which the Applicant should have reasonably expected the Officer to rely on, namely in the context of a LMIA assessment. The Respondent further argues that the Applicant's claim is without merit because the documents presented contain neither novel nor significant information as to the outcome of the decision.

[26] In the context of an application assessment by an ESDC Officer, Chief Justice Crampton recently explained that "employers have a legitimate expectation that they will be afforded an opportunity to respond to any concerns that an ESDC Officer may have regarding their credibility or the authenticity of documentation that they supply in support of a request for a positive LMO" (*Frankie's Burgers*, above, at paras 73-75). This Court has also found that there

is a duty to disclose extrinsic evidence if it may have an impact on the outcome of an administrative decision (*Kozul*, above, at para 10).

[27] In the Court's view, the Officer did not unfairly rely on documents from the internal database. The Officer indeed conveyed the information obtained from the internal database to the Applicant during a phone conversation prior to the publication of the negative decision. The Applicant was made aware of the information relied on by the Officer and was given an opportunity to address it.

[28] In light of the above, the Court finds that the Officer did not breach any procedural fairness principles in assessing the LMIA.

### C. *Fettering of Discretion*

[29] The Applicant submits that the Officer fettered her discretion by relying solely on the data from the internal ESDC database and by failing to take into account the rationale provided with respect to the work experience requirement.

[30] The Respondent argues that the Officer relied on various policy documents and directives from the ESDC internal database and reached her decision after having considered a broad array of policy statements and relevant legislation, which led to a reasonable decision.

[31] It appears from the Officer's reasons that she relied on information from the ESDC internal database, such as the Trucking Operational Guidance and the Excessive NOC

Requirements Policy. In doing so, the Officer ignored relevant information provided by the Applicant. While the Officer mentioned that considering the employer's insurance rate fell outside of the scope of TFW programs, it appears that she ignored the rationale provided regarding challenging routes, public safety, and the high value of the trucks.

[32] As stated by this Court in *Paturel Int'l Co.*, above, it is unreasonable for an Officer to solely rely on one factor and one source of data:

[11] Yet, in the end, the Minister's decision relies only on one factor, prevailing wage, without addressing how all the factors, together, impact the Canadian labour market.

[12] Second, while it was open to the Minister to consider EI data in the calculation of the prevailing wage, in the circumstances, it was unreasonable to rely solely on that data. Doing so amounted to a fettering of discretion. The difference between the 2013 median wage and the 2014 median wage, and the other available data, should have caused the officer to consider whether the EI data was a reliable indicator of the prevailing wage for the occupation.

[Emphasis added.]

[33] In light of the Officer's failure to take into account the Applicant's rationale, the Court finds that the Officer fettered her discretion.

#### D. *Reasonableness*

[34] Considering the information and material present before the Officer during the LMIA assessment, the Applicant claims that the Officer's findings were unreasonable in respect of two aspects: (1) efforts made to hire Canadian citizens or permanent residents; and (2) the ability to meet the terms of the offer.

[35] The Respondent argues that the Applicant is asking the Court to reweigh evidence and that the Officer's decision was reasonable because the Applicant (1) has not demonstrated that the offer is genuine or reasonably reflective of employment realities; and (2) has not made sufficient efforts to hire Canadian citizens or permanent residents.

[36] The Court finds that the Officer's observations regarding the Applicant's efforts to hire Canadian citizens or permanent residents are closely tied to her conclusions regarding the experience requirements. As the Court has already found the Officer's decision to be unreasonable in this regard, and given the evidence that the Applicant has made efforts to hire within Canada, including hiring three Canadian citizens, this finding cannot stand.

[37] The decision rendered by the ESDC Officer was unreasonable.

[38] There is no need to address the Officer's assessment of the Applicant's financial ability to comply with the terms of the job offers, because the Applicant would have been given an opportunity to submit an attestation letter from a chartered accountant or a lawyer in order to complete the application, had its LMIA not been denied on other grounds.

### VIII. Conclusion

[39] The application for judicial review is granted. The decision is set aside and the matter is returned to a different ESDC Officer for redetermination.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review be granted.

The decision is set aside and the matter is returned to a different ESDC Officer for redetermination. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3434-16

**STYLE OF CAUSE:** SEVEN VALLEYS TRANSPORTATION INC. v  
MINISTER OF EMPLOYMENT AND SOCIAL  
DEVELOPMENT

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

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