Federal Court  Cour fédérale

Date: 20200203

Docket: IMM-2914-19

Citation: 2020 FC 182

Ottawa, Ontario, February 3, 2020

PRESENT: Associate Chief Justice Gagné

BETWEEN:

MARCOM RESOURCES LTD.

Applicant

and

THE MINISTER OF EMPLOYMENT, WORKFORCE DEVELOPMENT AND LABOUR

Respondent

JUDGMENT AND REASONS

I. Background

[1] Marcom Resources Ltd. [Marcom] operates two McDonald's restaurants in Yellowknife, Northwest Territories. Its application for four full-time food counter attendants under the Temporary Foreign Workers Program [TFWP] was rejected by an Employment and Social Development Canada [ESDC] Officer based on a negative Labour Market Impact Assessment

[LMIA]. The Officer found that, although every other criteria of the assessment had a positive or neutral impact on the labour market, Marcom had not demonstrated sufficient efforts to hire Canadians and permanent residents for the counter service positions.

[2] The LMIA is one requirement for the TFWP created under the authority of the *Immigration and Refugee Protection Act* [IRPA] that allows foreign nationals to work temporarily in Canada. ESDC conducts the LMIA that is based on the impact the foreign national's employment in Canada would have on the Canadian labour market. Specifically, paragraph 200(1)(c) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [the Regulations], allows an officer to issue a work permit to a foreign national upon the satisfaction of certain conditions, which include the making of a positive determination under paragraphs 203(1)(a) to (e) of the Regulations.

[3] Paragraph 203(3)(e) of these Regulations requires that employers show that they have made reasonable efforts to hire Canadian citizens or permanent residents prior to filing an LMIA.

[4] At the time of its application, Marcom employed 35 full-time employees and 54 part-time employees, all of whom were Canadians or permanent residents. However, a Staffing Analysis Tool Marcom enclosed with its Application projected that its two restaurants would be operating at a staffing deficit from August through December of 2018. They therefore applied to hire foreign workers through the TFWP.

II. Impugned decision

[5] The Officer's initial decision worksheet, which she then sent to her supervisor, concluded that Marcom had made reasonable efforts to hire Canadians and that the impact of hiring four foreign workers was neutral. The supervisor made follow-up comments and discussed the decision with the Officer in person. A few days later, the Officer sent her supervisor an updated version of her assessment, in which she recommended that the application be refused.

[6] The Officer refused Marcom's application because she found that it failed to make reasonable efforts to hire Canadian citizens and permanent residents. Marcom did not advertise the median wage for the position, which is $17 an hour in Yellowknife, nor did it advertise part-time positions. She also concluded that Marcom failed to use the JobMatch program as required.

[7] Thus, Marcom's Global Labour Market Factors Assessment was determined to be negative.

III. Issues and Standard of Review

[8] This application for judicial review raises the following issues:

A. *Did the Officer err by not considering the Applicant's submissions and evidence?*

B. *Did the Officer fetter her discretion by relying on policy directives without considering the Applicant's* explanations for deviating from those directives?

[9] In the Supreme Court's recent decision *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Court has revisited in some regards, and clarified in

others, the framework for determining the standard of review applicable to administrative decisions. As neither question raised by the parties falls within the limited situations where the presumption of reasonableness can be rebutted, that standard will hereby apply.

IV. Analysis

A. *Did the Officer reasonably consider the Applicant's submissions and evidence?*

(1) Prevailing wage and potential part-time positions not advertised

[10] The Officer first notes that Marcom advertised a salary of $15 to $17 an hour, which is below the prevailing wage of $17 an hour for the region. She finds that "this is an issue as there is a possibility that more Canadian/Permanent Residents would have applied if the wage was a minimum $17 dollars an hour."

[11] I must say that I have difficulty following the Officer's reasoning in light of the evidence that was before her.

[12] First, the Government's prevailing wage for the region is part of Marcom's job ads, although at the higher end of the wage range offered.

[13] Second, Marcom did adduce significant evidence that the Government's listed median wage might not accurately reflect the actual prevailing wage for the occupation, at least at entry level. Many food establishments in the region have advertised less than a $17 an hour wage for full-time food counter attendants, including Tim Hortons (offering $14 to $16 an hour for full-

time positions), Mac's Convenience Store (offering $13.46 to $15 an hour), and Boston Pizza (offering $13.48 an hour).

[14] In addition, Marcom explained that the wage they offered more accurately reflected the rate of pay for its current food counter attendants based on their level of experience and availability; it pays more to more experienced employees and to those with more flexibility in their work schedule. Most of Marcom's employees at the time earned between $13.50 and $17.70 an hour, with two outlier employees earning $18.60 and $18.95 an hour.

[15] Marcom rightfully argued that, in that context, advertising an entry-level wage starting at $17 an hour would have had a negative impact on the moral of Marcom's then full-time employees and thus on its entire workforce.

[16] The Officer also negatively considered the fact that Marcom was only advertising full-time positions.

[17] However, the evidence shows that Marcom recruits staff throughout the year and has far less difficulty recruiting part-time employees, many of whom are students with less flexible schedules. Marcom clearly made its case that the labour shortage they were dealing with concerned full-time food counter attendants, and thus their business needed full-time employees with more flexibility.

[18] Given the importance of the evidence adduced by Marcom, it was incumbent on the Officer to fully assess Marcom's business case in determining whether it had made sufficient efforts to hire Canadians or permanent residents.

[19] In my view, the Officer relied too heavily on the administrative guidelines in her assessment of whether Marcom's failure to advertise at $17 an hour for entry-level employees was truly the reason it did not receive more applications from Canadians or permanent residents.

[20] Given that Marcom submitted clear evidence to support the fact that its advertising complied with the prevailing wage, and that it was committed to paying the high end of that wage for more experienced and flexible employees, it is unclear why the Officer did not consider this evidence in her assessment. It is well-established that "the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact 'without regard to the evidence'" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*), 1998 CanLII 8667 (FC), [1998] A.C.F. no 1425, at para 17). The Officer's silence on this key evidence is the basis for my finding that she made an erroneous finding.

[21] Ironically, the Officer acknowledged in her assessment of *Factor D – Wage and Working conditions offered to the foreign national* (i.e. whether the job offer complied with subsection 203(3)(d) of the Regulations) that "[t]he wage offered to the foreign national is consistent with the prevailing wage rate for the occupation and the working conditions meet generally accepted Canadian standards". She does not specify the exact wage offered to the foreign national, but one

would assume that it was within the $13.50 to $17.70 hourly range that Marcom paid its employees.

[22] I therefore find that the Officer's failure to provide a rationale for ignoring the evidence before her renders her assessment of *Factor E – Efforts to Hire or Train Canadians or Permanent Residents* unreasonable. Given that this is the only factor with a negative impact on the labour market, the entire decision becomes unreasonable.

(2) Failure to use JobMatch

[23] Given my previous findings, I do not need to address the second issue raised by Marcom. However, I will nevertheless do so briefly.

[24] The requirement to use this service before applying for a LMIA was implemented by ESDC on August 28, 2017. Marcom applied to hire four foreign workers almost 18 months later.

[25] Marcom explained to the Officer that since it had not applied for an LMIA since 2013, it was genuinely not aware of this new requirement. The Officer noted that ESDC's internal guidance expressly acknowledges that applicants may not be aware of it, and thus gives officers the opportunity to educate applicants. This is precisely what the Officer did in this case, and Marcom responded by contacting all six candidates it received through JobMatch.

[26] It seems unfair to me that despite this, the Officer still used this failure to negatively assess *Factor E* of the LMIA.

B. *Did the Officer fetter her discretion?*

[27] As Marcom points out, our Court has often concluded that ESDC officers who rely too narrowly on policies without taking into account relevant information provided by applicants fetter their discretion.

[28] For example in *Frankie's Burgers Lougheed Inc. v Canada (Employment and Social Development)*, 2015 FC 27 (CanLII) at paras 91-92, Chief Justice Paul Crampton found that, given that internal administrative guidelines are not binding, officers cannot rely solely on internal policies in such a way as to fetter their discretion. In *Frankie's Burgers*, however, no fettering of discretion was found, since the Applicant had not submitted any materials which "otherwise indicated" that the Applicants' recruitment efforts were reasonably in line with the requirement of subsection 203(3)(e) of the Regulations. In the present case, the Applicant's materials offer cogent and reasonable rationales for their failure to meet the LMIA requirements strictly, as well as evidence to support this rationale. As discussed above, the Officer did not meaningfully take these submissions into account; that is what amounts to a fettering of discretion.

[29] In *Seven Valleys Transportation Inc. v Canada (Employment and Social Development*), 2017 FC 195, the applicant also took issue with an ESDC officer's decision to issue a negative LMIA. Though its argument was based on a lack of procedural fairness on the Officer's part, Justice Shore also addressed the applicant's argument that the Officer had fettered her 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. […]
>
> [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.

[30] In the case at bar, the Officer noted Marcom's rationale as it related to the JobMatch requirement, yet still determined it had not fulfilled this requirement. As to Marcom's broader recruitment efforts and its posting of a $15-$17 an hour wage, she simply did not consider the evidence. Therefore, the Officer's sole reliance on internal documents about the acceptable wage range and recruitment efforts precluded her from sufficiently considering Marcom's evidence.

V. Conclusion

[31] Given that the Officer did not reasonably consider the Applicant's submissions and evidence regarding the prevailing wage for food counter attendants in Yellowknife, nor did she reasonably consider Marcom's *ex post facto* use of the JobMatch service, this application for judicial review is granted.

[32] The parties have proposed no question of general importance for certification and none arises from the fact of this case.

JUDGMENT in IMM-2914-19

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is granted;
2. The negative Labour Market Impact Assessment dated April 12, 2019 is set aside;
3. The file is remitted back to Employment and Social Development Canada for a new assessment by a different officer;
4. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

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