Federal Court Cour fédérale

Date: 20150421

Docket: IMM-3644-14

Citation: 2015 FC 507

BETWEEN:

EURO RAILINGS LTD

Applicant

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

REASONS FOR JUDGMENT

PHELAN J.

I. Introduction

[1] This is the judicial review of a decision by a Program Officer, Foreign Worker Program [Officer] wherein the Applicant was refused a positive labour market opinion [LMO] to hire a foreign worker – a highly skilled welder for a specialized metal railing business. A LMO is required as part of the approval to hire a foreign worker and must generally show a labour shortage in the particular trade.

II. Background

[2] To say that outlining the facts in this case is a challenge is to downplay the word "challenge". The Certified Tribunal Record can only be described as a mess. Its inadequacy was compounded by its incompleteness remedied only recently when the Officer found documents behind a cabinet.

[3] The record in this case was sufficiently deficient that the Respondent, without leave of the Court, filed both an affidavit from the Officer purporting to explain the reasons for her decision and an affidavit from the Officer's supervisor [Director] in part explaining the program as she saw it and the duties of an officer assessing labour markets. Both affidavits are submitted to buttress the Officer's decision – to make up for the obvious deficiencies in it.

[4] The Applicant was rightly concerned that the Respondent was trying to manipulate the process of judicial review. At the hearing I ordered the Director's affidavit struck from the record as improper evidence in a judicial review. I neglected to similarly strike the Officer's affidavit for the same reason. The final judgment will do so.

[5] The process at issue is governed by s 203(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

203. (3) An opinion provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)*(b)* shall, unless	**203.** (3) Le ministère de l'Emploi et du Développement social fonde son avis relatif aux éléments visés à l'alinéa (1)*b)* sur les facteurs ci-après, sauf dans les cas où le travail

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:

(a) whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;

(b) whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;

(c) whether the employment of the foreign national is likely to fill a labour shortage;

(d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;

(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;

(f) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of

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) :

a) le travail de l'étranger entraînera ou est susceptible d'entraîner la création directe ou le maintien d'emplois pour des citoyens canadiens ou des résidents permanents;

b) le travail de l'étranger entraînera ou est susceptible d'entraîner le développement ou le transfert de compétences ou de connaissances au profit des citoyens canadiens ou des résidents permanents;

c) le travail de l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;

d) le salaire offert à l'étranger correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui sont offertes satisfont aux normes canadiennes généralement acceptées;

e) l'employeur embauchera ou formera des citoyens canadiens ou des résidents permanents, ou a fait ou accepté de faire des efforts raisonnables à cet effet;

f) le travail de l'étranger est susceptible de nuire au règlement d'un conflit de travail en cours ou à l'emploi de toute personne touchée par

any person involved in the dispute; and	ce conflit;
(g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any opinion that was previously provided under subsection (2), with respect to the matters referred to in paragraphs *(a)*, *(b)* and *(e)*.	*g)* l'employeur a respecté ou a fait des efforts raisonnables pour respecter tout engagement pris dans le cadre d'un avis précédemment fourni en application du paragraphe (2) relativement aux facteurs visés aux alinéas *a)*, *b)* et *e)*.

[6] The Applicant is a specialty custom railing company. It began advertising for a welder in October 2013, requesting someone with five years' experience. Although the Applicant received numerous applications for the welding position, 90% were from individuals who did not meet the requirements.

[7] The Officer informed the Applicant on April 9, 2014, of the negative LMO. The LMO letter was not sent that day so as to permit the Applicant's representative to make submissions. The submissions, made the next day, were to the effect that there was a labour shortage for welders and this occupation was listed as an occupation on the Federal Skills Trade Program [FSTP] indicating a need for such skills in Canada.

[8] The LMO refusal letter was based on:

- the absence of a demonstrable labour shortage in this occupation; and
- Service Canada labour market information and analysis for the Ontario region indicates there is no demonstrable shortage of workers in this occupation in Ontario.

[9] The Applicant has raised a breach of procedural fairness in this decision; firstly, because the decision had been made on April 9 despite accepting submissions on April 10; and, secondly, the reasons were either non-existent or inadequate. The first issue is a form of bias, the second is either part of a challenge to the reasonableness of the decision or a challenge to the procedural right to reasons itself – inadequacy of reasons is no longer a standalone grounds for review.

[10] The overarching challenge is to the procedural fairness of the decision. As such, the standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[11] The Applicant, particularly in oral argument, made a number of submissions suggesting that the record of decision had been manipulated. That allegation was not established in my view. The Respondent did attempt to manipulate the judicial review with improper evidence. That has been dealt with. The Applicant should be reminded of the saying "Do not attribute to malice that which can be explained by incompetence".

[12] More importantly, turning to the substantive challenge, this Court in *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27, while holding that the procedural rights on a LMO application are minimal, held that an applicant has a right to reasons that are intelligible.

[13] This means more than the grammar and syntax produce coherent sentences. It means that the reasons are intelligible against the background of the material before the Officer.

[14] In this case, the reasons are not intelligible against the background of the material before the Officer. An applicant is at least entitled to an explanation – short, sharp and crisp – for the rejection of key evidence.

[15] The Officer had before her the NOC list indicating that welders were in demand in Canada. The Officer also had before her evidence from the Applicant showing the efforts to secure sufficiently skilled welders and the inability to find such persons.

[16] The Respondent's counsel has suggested that the reason for such an inability is because the Applicant was offering too low a wage. Not only does the Officer not say this but notes that the hourly rate criteria is "Met". The Applicant was entitled to at minimal an explanation of why its concrete evidence was rejected.

[17] The Officer, in her post-decision affidavit, attempts to explain why the NOC evidence – a basis upon which people seek work visas and on which they are granted – was rejected. Such evidence is too convenient and improper.

[18] This is a decision which requires the Court's intervention.

III. Conclusion

[19] The judicial review will be granted, the decision will be quashed and the matter remitted back to be decided forthwith by a different officer.

[20] The Applicant asks for costs. In the normal course, costs would not be granted. However, to indicate to the Respondent the Court’s concern for its filing post-decision evidence, the partial award of $2,500.00 will be ordered.

[21] There is no question for certification.

"Michael L. Phelan"
Judge

Ottawa, Ontario
April 21, 2015

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mary Lam	FOR THE APPLICANT
Lars Brusven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mary Lam Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT