Federal Court  Cour fédérale

Date: 20170519

Docket: IMM-4140-16

Citation: 2017 FC 514

Ottawa, Ontario, May 19, 2017

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AYR MOTORS EXPRESS INC

Applicant

and

MINISTER OF EMPLOYMENT WORKFORCE DEVELOPMENT AND LABOUR

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant is a company involved in long-haul highway transportation services. For years now, a portion of its workforce has been comprised of foreign workers hired under the Temporary Foreign Worker Program (the TFW Program) established pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *Act*) and the *Immigration and*

Refugee Protection Regulations, SOR/2002-227 (Regulations). The purpose of the TFW Program is to enable employers to hire foreign workers on a temporary basis to fill immediate skills and labor shortages when there are not sufficient Canadian citizens or permanent residents available to fill the positions in question (*Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27, at para 41 [*Frankie's Burgers*]).

[2] In order to access the TFW Program, an employer must first seek- and obtain - from the Minister of Employment Workforce Development and Labour (the "Minister") a positive Labour Market Impact Assessment ("LMIA"). It is only then that an employment offer to a temporary foreign worker can be made by the employer and that a work permit can be sought from - and delivered by -Immigration, Refugees and Citizenship Canada.

[3] On July 21, 2016, the Minister, after a previous failed attempt, revoked three of the LMIAs previously issued to the Applicant on the basis that the Applicant had provided "false, misleading or inaccurate information" in its applications for these LMIAs.

[4] The Applicant is seeking judicial review of this decision on the ground that the Minister breached the principles of procedural fairness and that the decision is otherwise unreasonable.

II. Background

[5] The relevant facts of the present case can be summarized as follows. Since its first participation in the TFW Program in 1999, the Applicant has employed approximately 550

temporary foreign workers (TFWs). It says that TFWs currently represent ten percent (10%) of its workforce.

[6] Under paragraph 30(1.43) of the *Act*, the Minister is empowered to suspend or revoke a LMIA where he/she is of the view that public policy considerations that are specified in instructions given by him/her justifies it. Since December 31, 2013, the instructions governing the revocation of LMIAs are those specified in the *Ministerial Instructions Respecting Labour Market Opinions*, 28 December 2013 (2013) C Gaz I, 3005 (Ministerial Instructions). Especially, section 2 of the Ministerial Instructions, provides for three (3) situations that may lead to revocation, one of which is if the employer provided false, misleading or inaccurate information during the LMIA application process.

[7] On November 4, 2014, the Applicant was informed that the Minister would be reviewing its participation in the TFW Program. This was the fourth review of the Applicant's participation into the TFW Program in two years. According to the Applicant, the previous reviews had found no wrongdoing on its part.

[8] However, the November 2014 review led, on March 30, 2015, to the revocation of the LMIAs at issue in the present instance. The Applicant challenged that decision before the Court and on October 26, 2015, a consent Order quashing the Minister's decision was issued by the Court (Docket No. IMM-1850-15). No particular context is offered as to why the Minister consented to such Order.

[9] Following that consent Order, the Minister initiated a second review into the same LMIAs. The Minister's concerns were communicated to the Applicant in a letter dated December 4, 2015. They were expressed in these terms:

> "Based on this Review, Employment and Social Development Canada/Service Canada ("Service Canada") has concerns that Ayr may have provided false or misleading statements in its applications for the above referenced LMIAs with respect to the wages and transportation costs of the temporary foreign workers ("TFWs"). More specifically, the information on our files indicated that Ayr may have required their TFWs to pay for items with no associated documentation or agreement and to pay their own transportation costs, contrary to the attestations Ayr provided in its LMIA applications. Furthermore, although Ayr has provided some explanations on deductions such as "Tractor Expense" "Fine Expense" and "Payroll Advances", it did not provide any documentation to demonstrate that agreements were signed between AYR and the foreign worker allowing for these specific deductions".

[10] The Applicant was invited to "provide additional information and clarification to address Service Canada's concerns" by December 21, 2015. In particular, the Applicant was requested to provide specific documentation to demonstrate its compliance to the TFW Program, namely (i) signed documentation/agreements pertaining to TFW's wages deductions and (ii) documentation establishing that the Applicant had paid up front TWFs' transportation costs when the TWFs were coming in from another country or another location in Canada.

[11] By letter dated December 17, 2015, the Applicant, through its counsel, responded to the Minister's concerns. It denied having provided false or misleading information in relation to the TFWs' transportation costs and wage deductions and explained why. It also contended that any violation of the TFW Program would have been inadvertent and administrative in nature. It further claimed that any such violation "was not blameworthy as it was not in the nature of an

abuse of the system nor an abuse of TFW's". At most, these problems or irregularities were oversights which had been corrected since.

[12] The Applicant also urged the Minister to consider its compliance history with the TFW Program's requirements and continued cooperation with TFW Program's officials in the conduct of their investigation. Finally, the Applicant claimed that if the LMIAs at issue were to be revoked by the upcoming decision, it would be punished beyond the maximum punishment provided by the TFW Program by being barred from the TFW Program for a longer period than the two years prescribed by the Program as a result of the bar imposed in relation to the March 30, 2015 decision and the one that would ensue a new decision revoking these LMIAs.

[13] On March 3, 2016, claiming that the Minister was unduly delaying its review of the three impugned LMIAs as well as of a pending LMIA request, the Applicant filed a second judicial review application in the nature of a *mandamus* (Docket No. IMM-936-16). Leave was granted by the Court in June 2016.

[14] On July 21, 2016, the Minister issued the impugned decision, holding that the Applicant had provided false, misleading or inaccurate information in its requests for these LMIAs by not paying transportation costs in advance and by not providing written agreements for deductions taken from TFWs' wages as required by the TFW Program.

[15] As a result to the July 21, 2016 decision, the *mandamus* proceedings were held to be moot by Order of this Court dated August 29, 2016. The Applicant then filed the present judicial review proceedings.

III. Issues and Standard of Review

[16] As indicated at the outset of these Reasons, the Applicant claims that the impugned decision is flawed in two respects; that is by having been rendered in violation of the principles of procedural fairness and by being unreasonable.

[17] In my view, the determinative issue in this case is procedural fairness. It is trite law that questions of that nature are reviewable on the correctness standard, which means that no deference is owed to the decision-maker in this respect (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43).

[18] As a result, there will be no need to determine whether the Minister's decision is reasonable or not.

IV. Analysis

[19] The requirements of procedural fairness are flexible and will vary according to the specific context of each case (*Frankie's Burgers,* at para 73; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21 [*Baker*].

[20] *Baker* sets out a non-exhaustive list of factors that are relevant in the determination of the duty of procedural fairness owed in a given set of circumstances. Recently, in *Frankie's Burgers*, which concerned the denial of applications for Labour Market Opinions (renamed LMIAs on June 20, 2014), the Court held that a consideration of these factors led to the conclusion that the requirements of procedural fairness in such context were relatively low. It so concluded on the ground that,

> (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)"
>
> (*Frankie's Burgers*, at para 73)

[21] The Applicant contends that where an LMIA is being revoked as opposed to being denied as was the case in *Frankie's Burgers*, an elevated standard of procedural fairness is required. However, there is no need to embark on this analysis as I am of the view that even the most basic requirements were not met in this case. Here is why.

[22] These most basic requirements entitled the Applicant to know the case against it and to make representations to the decision-maker, which in this case, is the Minister herself, not her officials. The Applicant did have the opportunity to respond to the Minister's concerns but its submissions did not make their way to the Minister. This is, in my view, the fundamental and determinative flaw with the process that led to the Minister's decision. In other words, the Applicant was not given a meaningful opportunity to be heard.

[23] A review of the document that was before the Minister, which is a memorandum prepared by her officials (the Memorandum), reveals that the gist of the Applicant's position was not conveyed to the Minister. All it says is that the Applicant could not demonstrate that it had paid up front the transportation costs and that it was unable to produce written agreements or a responsible explanation for deductions from TFWs' wages that were not covered by federal or provincial law. It does not convey the Applicant's position that it is not a requirement of the TFW Program to pay transportation costs in advance or that wage deductions not covered by federal or provincial law were made with the full consent of the TFWs concerned. Furthermore, none of the Applicant's submissions which could have enabled the Minister to appreciate the nature of the alleged misleading or incorrect information nor any mention of the Applicant's overall compliance with the TFW Program over the years, can be found in the Memorandum.

[24] This is all the more surprising that there is on record a detailed 6-page chart outlining side by side the Minister's concerns, the Applicant's response to these concerns and an analysis of the Applicant's response. However, as counsel for the Respondent acknowledged at the hearing, this chart was not before the Minister when she made the decision to revoke the MLIAs at issue in July 21, 2016. The only piece of information that was before her was the Memorandum.

[25] I appreciate the fact that the volume and complexity of modern decision-making in a regulatory setting such as the present one necessitates resort to many sources, including officials not charged with the responsibility of deciding the matter (*Armstrong v Royal Canadian Mounted Police*, [1994] 2 FCR 356 citing *Khan v College of Physicians and Surgeons of Ontario* (1992), 9 OR (3d) 641 (C.A.), of the Court of Appeal of Ontario). However, this does not

supersede the need to satisfy the applicable procedural fairness requirements in any given case. Here, again, I am struck by the fact that the Memorandum only conveys the officials' conclusions as to the Applicant's alleged non-compliance with the TFW Program requirements. It conveys none of the Applicant's submissions, be it in a summary form or otherwise, and no analysis whatsoever of these submissions, be it again in a summary form or otherwise. In other words, the Minister revoked the LMIAs at issue without knowing what the position of the Applicant on the allegations it was facing was and without the benefit of any analysis in this regard. Yet, the chart mentioned above provided this information but it was not shared with the Minister to any appreciable degree.

[26] As the Memorandum shows, it was open to the Minister to seek an oral briefing or to ask her officials that a member of her staff be briefed. According to the Memorandum, she did not request any briefing. However, have she had before her some idea of what the Applicant's position was, she and/or members of her staff may have asked more questions to the officials in charge of the file and possibly come up with a different decision.

[27] I am also struck by the fact that pursuant to paragraph 203(1)(e) of the Regulations, it is open to an employer, when its employment offer is being assessed by Immigration, Refugees and Citizenship Canada for the purposes of issuing a work permit, to justify its non-compliance with some of the conditions for the issuance of the requested work permit, including those relating to wage conditions. Section 203(1.1) lists recognized justifications that may be accepted. Notably, section 203(1.1)(e) stipulates that a failure to satisfy the criteria set out in paragraph 203(1)(e) is justified if it results from an unintentional accounting or administrative error made by the

employer, if the employer subsequently provided compensation. I note that a similar approach governs the sanctioning of an employer's failure to satisfy the TFW Program's conditions, be it through a monetary penalty or a period of ineligibility. In such instances, it is also open to the faulted employer to offer some justification for the alleged wrongdoing, as evidenced by sections 209.93 to 209.996 of the Regulations.

[28] Given the close interconnection between the LMIA, the employment offer and the ensuing work permit, the Minister may have been inclined to exercise her revocation authority under the Ministerial Instructions in this case in a way that would have allowed, as the Regulations do, some consideration for the justifications put forward by the Applicant to explain what, in its view, were, at worst, mere administrative oversights. This has not been possible since the Minister did not have that information before her.

[29] As the Court stated in *Tiedeman v Canada (Human Rights Commission)* [1993] FCJ No. 667 at para 12, "[t]o solicit the representations of a party and, subsequently, to fail to consider them, renders hollow the hallowed principle of the right to be heard". This is precisely what the Applicant, in my view, is ultimately complaining of in the present case. It was deprived of the right to be heard when and where it counted. Given the present case's judicial history, I would have thought that a more cautious approach in this regard would have been taken in bringing the matter to the attention of the Minister for decision.

[30] For all these reasons, I find that the Applicant's basic right to be heard in a meaningful way was not respected. As the Supreme Court of Canada stated in *Lakeside Colony of Hutterian*

Brethren v Hofer, [1992] 3 SCR 165 [*Hofer*], natural justice "requires procedural fairness no matter how obvious the decision to be made may be". In other words, it may not change anything ultimately to the decision to be made, but this is what the law requires (*Hofer*, at p 222).

[31] The present judicial review application will therefore be granted and the matter remitted to the Minister for redetermination.

[32] As the parties were not prepared at the hearing to make submissions on certification, I indicated that I would accept written submissions on this issue once my decision was rendered. The parties are therefore given 30 days from the release of these Reasons to make submissions on this issue. These submissions shall be provided by letter to the Court's Registry in Ottawa, Ontario, and shall not exceed three (3) pages.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is granted;
2. The decision of the Minister of Employment Workforce Development and Labour, dated July 21, 2016, is set aside and the matter is remitted to the Minister for redetermination;
3. The parties are given 30 days from the release of these Reasons to make submissions on Certification.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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