Federal Court  Cour fédérale

Date: 20190408

Docket: IMM-3009-18

Citation: 2019 FC 420

Ottawa, Ontario, April 08, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

BROCOR CONSTRUCTION LTD.

Applicant

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Brocor Construction Ltd. (Brocor), applied to the Minister of Employment and Social Development Canada (MESD) for a Labour Market Impact Assessment (LMIA) to hire a Temporary Foreign Worker (TFW) as a heavy equipment operator. The LMIA was refused as the Officer determined that Brocor's experience requirements for the job were excessive and not in keeping with industry standards.

[2] For the reasons that follow, this judicial review is dismissed as the Officer's decision is reasonable and the Officer did not fetter her discretion.

Background

[3] The TFW Program enables Canadian employers to hire foreign workers on a temporary basis to fill immediate skill and labour shortages when Canadian citizens and permanent residents are not available to fill the positions.

[4] A work permit is issued to a foreign worker pursuant to Part 11 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*], provided certain requirements are met. One such requirement is that the employer receives an assessment from MESD pursuant to paragraph 203(1)(b) that stipulates "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada."

Decision Under Review

[5] On February 15, 2018, Brocor applied for a LMIA to hire a TFW to work as a heavy equipment operator for its operations in Dawson Creek, British Columbia. Brocor's requirements included hiring an individual with 3-5 years of experience.

[6] On June 6, 2018, the Officer assessing the LMIA application contacted Brocor for further information. The Officer requested justification for the requirement that candidates have 3-5

years of experience, noting that on-the-job training was typical for heavy equipment operators and that requiring 3-5 years of experience was excessive for a low-skilled level C occupation as defined by the National Occupational Classification (NOC). Brocor explained that the experience was necessary because it would be hard to train someone, especially in the middle of a work project when there would be little time. The Officer noted that requiring 3-5 years of experience rather than providing on-the-job training was above industry standards for heavy equipment operators. The Officer ultimately concluded that this job posting could have potentially discouraged otherwise qualified individuals from applying, and thus the employer did not make reasonable efforts to hire Canadians or permanent residents.

[7] Brocor's application was refused by the MESD Officer on June 13, 2018. The refusal letter states that the basis for the refusal was twofold: 1) that the Applicant did not sufficiently demonstrate a plan to support the transition to a Canadian or permanent resident workforce; and 2) that the Applicant did not demonstrate sufficient efforts to hire Canadians in the occupation.

Preliminary Issue

[8] At the judicial review hearing, counsel for the Respondent asked to have the style of cause amended to name only the Minister of Employment and Social Development as the Respondent, it being the department that administers the LMIA program and the department that made the decision under review.

[9] Legal counsel for the Applicant disagreed, arguing that the MESD decision-making authority is delegated from the Minister of Citizenship and Immigration (MCI) and, as such, the MCI is also an appropriate party to be named. She did not, however, point to any legislative provisions or other authority to support this assertion.

[10] In the covering letter for the decision under review it states: "This is to inform you that Employment and Social Development Canada…has completed the processing of your Labour Market Impact Assessment (LMIA) application…".

[11] Here the decision challenged by the Applicant was made by the MESD. I fail to see any valid basis to name the Minister of Citizenship and Immigration as a Respondent. Therefore, the style of cause is amended with immediate effect to remove the MCI as a named respondent.

Issues and Standard of Review

[12] Brocor raises the following issues:

A. Was the Officer's decision reasonable?

B. Did the Officer fetter her discretion?

[13] Reasonableness is the applicable standard of review for the MESD Officer's findings and conclusions as well as the allegation that the Officer fettered her discretion (*Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 [*Frankie's*

Burgers] at para 22). A decision arising from a fettering of discretion is *per se* unreasonable (*Frankie's Burgers* at para 24).

Relevant Statutory Provisions

[14] Subsection 203(3) of the *Regulations* provides as follows:

(3) An assessment provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)(b) shall, unless 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:	(3) Le ministère de l'Emploi et du Développement social fonde son évaluation relative aux éléments visés à l'alinéa (1)b) sur les facteurs ci-après, sauf dans les cas où le travail 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) 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;	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) 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;	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) whether the employment of the foreign national is likely to fill a labour shortage;	c) le travail de l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;

(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;	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) 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;	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) whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute; and	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 ce conflit;
(g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any assessment 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'une évaluation précédemment fournie en application du paragraphe (2) relativement aux facteurs visés aux alinéas a), b) et e).

A. *Was the Officer's decision reasonable?*

[15] The Applicant argues that the Officer misconstrued the facts and made unreasonable findings on the "experience requirement". The Applicant argues that a comparison between the

NOC requirements and Brocor's requirements show that they are consistent and that Brocor did not impose requirements in excess of the NOC.

[16] The NOC provides a standardized description of the work performed in the Canadian labour market based on extensive occupational research and industry consultations. The NOC employment requirements relevant for a heavy equipment officer in British Columbia are as follows:

- Some secondary school education;
- Completion of a one- to two-year apprenticeship program or some high school, college or industry courses in heavy equipment operating combined with on-the-job training; and
- Internal company certification may be required by some employers.

[17] Brocor asserts that requiring someone with 3-5 years of experience is not a "great deviation" from the above NOC requirements for a heavy equipment officer and that it still falls within a reasonable range of employment requirements.

[18] Brocor argues that its particular needs do not allow for on-the-job training as the work in in remote locations requires employees to be self-sufficient. They argue that the 3-5 year experience requirement is needed so that a job candidate would be able to "hit the pavement and perform all the needed duties right off the bat."

[19] However, Brocor has not provided any evidence that someone with less than 3-5 years of experience would not have the skills required for the position, especially considering industry

standards for heavy equipment operators. The Officer appropriately concluded that the advertisement could have discouraged otherwise qualified candidates from applying.

[20] The Officer's notes read, in part, as follows:

> Job offer details: TFW will be working at various sites in Dawson Creek area. ER is offering $29/hr, 40hrs/wk with an overtime pay at $43.5/hr after 8hrs/day or 40hrs/wk. Benefits: disability, dental, and extended medical insurances. Duration of employment will be 2 years. Duties as per discussion with ER and as in LMIA are consistent with NOC7521. Minimum experience: 3 yrs; minimum education: Grade 12. When asked as per NOC description, there is no need to have a 3 years' experience, and in fact, an on-the-job training should be required. ER explained that it would be hard to train especially when in the middle of work, and they may not have time to do the training. I told ER that this would be an excessive requirement for a low skilled level C occupation, ER understood and agreed. When asked if ER ever considered her current Canadian/PRs to do this job, ER stated that everyone has their own work already.

[21] In fact, the Officer noted that Brocor declined 196 applicants because they did not have the requisite 3-5 years of experience in road construction and site development.

[22] On judicial review it is not the role of this Court to determine whether Brocor's particular work requirements are reasonable, but rather to determine whether the Officer's decision is reasonable. In the circumstances, it was reasonable for the Officer in considering the NOC requirements to determine that the experience insisted upon by Brocor was comparatively excessive.

[23] The decision of Chief Justice Crampton in *Frankie's Burgers* is applicable to these circumstances. While I acknowledge that the Applicant here is in a different industry and the

facts are different, the overriding principals still apply. In particular, while an employer must be given some latitude in its hiring practices even within the TFW program, this has its limits and cannot be extended to the point where it is inconsistent with the scheme set forth in the *Regulations* (at para 36). The Chief Justice goes on to further state at paragraph 40:

> Indeed, it is readily apparent from subsection 203(3) of the Regulations that the reasonableness of the officer's decisions should be assessed by reference to the ultimate test of whether "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." The seven specific criteria set forth in paragraphs 203(3)(a) - (g) reinforce this orientation, and do not in any way allude to or contemplate the types of considerations or latitude emphasized by the Applicants.

[24] Moreover, the decision in *Fredy's Welding Inc v Canada (Employment and Social Development)*, 2017 FC 7 [*Fredy's Welding*] addresses many of the arguments made by Brocor. In *Fredy's Welding*, there were 97 candidates who had applied for the position, but none had the required diesel generator maintenance and repair skills that the applicant was seeking and which the officer noted was in excess of the qualifications under the NOC. Justice Strickland decided that this was a conclusion that was reasonably open to the officer to make and fell within a range of possible, acceptable outcomes defensible on the facts and as legislated under the *Regulations*. The same rationale should similarly apply to this case.

[25] Here it cannot be said that the Officer's decision is unreasonable. In reviewing the criteria to be considered by the Officer, her decision is within the range of possible, acceptable outcomes and, therefore, has the necessary hallmarks of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

B. *Did the Officer fetter her discretion?*

[26] The Applicant argues that the Officer erred by refusing the application because of the lack of a transition plan. The Applicant makes two points: first, a transition plan was already included in the application; second, by requiring a transition plan the Officer imported an unnecessary requirement to the LMIA. This, the Applicant argues, is a fettering of discretion.

[27] It is argued that a transition plan is not mentioned in section 203 of the *Regulations* and is thus a creation of the guidelines. For the Officer to rigidly follow this requirement of a transition plan leads to an alleged fettering of discretion.

[28] While I acknowledge that the lack of a transition plan is noted in the refusal letter, upon review of the Officer's notes it is clear that lack of the transition plan did not form a ground of refusal. In particular, the Officer's notes as entered on June 13, 2018, which is the same date as the refusal letter, state as follows:

> Since this file will be refused based on excessive experience requirement, I did not ask ER to re-submit her TPlan, but I did go through with ER on how to complete her TPlan if she decides to come back to our program in the future.

[29] The Officer explicitly states that the lack of a transition plan did not form the basis for refusing the TMIA and, therefore, nothing turns on this point. Contrary to the Applicant's submissions, I do not find that the Officer drew a negative inference from the lack of a transition plan, but rather made note of it in the event the Applicant reapplies.

[30] Accordingly, there was no fettering of the Officer’s discretion on this issue.

JUDGMENT in IMM-3009-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to remove "The Minister of Citizenship and Immigration" as a Respondent;

2. The judicial review is dismissed; and

3. There is no question for certification.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3009-18
STYLE OF CAUSE:	BROCOR CONSTRUCTION LTD v THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 18, 2019
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	APRIL 8, 2019

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