

Ad guidelines for foreign workers in spotlight with Federal Court ruling

Ruling highlights inconsistencies in requirements around TFWP applications

Advertising guidelines published by Service Canada for Labour Market Impact Assessment (LMIA) applications have become a contentious issue between employers seeking to hire foreign workers and Temporary Foreign Worker Program (TFWP) officers adhering to a strict interpretation of those guidelines.



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LEGAL VIEW

In a recent decision, the Federal Court quashed a refusal to issue a positive LMIA where breaks in advertising were considered by the TFWP officer as a failure by the employer to meet the test of having made reasonable efforts to hire a Canadian, as required by the regulations.

In *Charger Logistics Ltd. v. Canada (Minister of Employment and Social Development)*, the employer, a Canadian logistics and transportation company operating a fleet of 200 trucks moving freight across Canada, the United States and Mexico, advertised for the position of supervisor of truck drivers at the Service Canada Job Bank, Indeed and Workopolis websites. Sixty candidates applied and 10 were interviewed because they had the requisite work experience. Of the 10 candidates, only four spoke Spanish — a job requirement — and none were suitable for the position.

So the company applied for a LMIA to hire a temporary foreign worker. The officer re-

viewing the application contacted the employer and expressed concerns regarding the wage to be paid, arguing it was not above the median salary for the province, and also indicated that the search for an individual with the qualifications sought by the employer, which included a degree in business administration, would require a higher wage to attract a qualified candidate.

Further, the officer indicated to the employer that the advertisement on the Job Bank was no longer available at the time of reviewing the application, and that the Indeed one could not be found any longer. The employer provided an explanation concerning the functioning of the Indeed website based on consultation with its account manager. Notwithstanding the employer's

attempts to clarify its efforts, the officer refused the application.

The Federal Court characterized the issues that had to be decided as whether the officer fettered his discretion by treating the advertising guidelines as mandatory, and whether the officer's refusal was unreasonable with respect to the prevailing wage, given the evidence presented by the employer.

As held in *Frankie's Burgers Loughheed Inc v. Canada (Minister of Employment and Social Development)*, the applicable standard of review was that of reasonableness. Therefore, the court had to consider whether the LMIA refusal was reasonable in the circumstances.

The employer argued that section 203(1)(b) of the Immigration and Refugee Protection Regulations conferred discretion on the officer to determine whether the employment of the foreign national was likely to have a positive effect on the Canadian labour market. The regulation specifically set out seven factors that could be taken into consideration in assessing an offer of employment to a foreign worker — and none mandated minimum advertising.

The employer noted the court's previous ruling that reading a mandatory requirement where none existed was tantamount to fettering discretion. The employer submitted that the officer should have taken

into consideration the totality of the evidence to determine whether Canadian citizens or permanent residents would be hired or trained for the position, as required by one of the factors set out in the regulations.

Since the officer only assessed whether the minimum advertising guidelines were met, he did not consider all the steps taken by the employer to fill the position. The employer also contended that it had provided evidence that the Indeed ad had been running continuously.

The respondent officer took the position that the employer stopped advertising the position in various websites and that the minimum advertising provisions required that advertising efforts be continuous until a decision in an application was reached.

The court quashed the LMIA refusal and held that the officer failed to provide an intelligible and transparent rationale as to why the employer's advertising efforts were insufficient. The court held that the officer's approach was consistent with the decision in *Frankie's Burgers*, where it was held that so long as the guidelines were not binding on officers, and were applied in a manner that permitted departures where warranted, it was not unreasonable for officers to apply and follow them in most cases.

However, while the officer dem-

onstrated some flexibility in his interpretation, his decision contained a reviewable error because it did not address the evidence presented by the employer in a transparent, intelligible and reasonable manner. Specifically, the officer neglected to consider the further clarification of the advertising process provided by the employer.

The employer presented evidence that at least one of the ads continued to be available and indicated that to the officer, and it was not for the court to decide its weight. The reviewable error was the absence of

any analysis of that evidence to support the conclusion that the efforts made by the employer were not sufficient.

Having found that the officer's decision should be quashed on the basis of the advertising issue, the court declined to consider the portion of the LMIA refusal dealing with the prevailing wage discrepancy. The matter was remitted back to the TFWP for a decision by a different officer.

The advertising guidelines and the interpretation of reasonable efforts to hire Canadians to be made by an employer seeking to employ

a temporary foreign worker have been fraught with inconsistencies in interpretation by officers across Canada. The decision in this case should give some comfort to employers and strengthen their position as to what constitute reasonable efforts to hire Canadians. However, it would be preferable for employers to insist the guidelines be revised, made clear, reasonable and transparent to avoid further litigation.

For more information see:

• *Charger Logistics Ltd. v. Canada (Minister of Employment and So-*

cial Development), 2016 CarswellNat 593 (F.C.).

• *Frankie's Burgers Lougheed Inc. v. Canada (Minister of Employment and Social Development)*, 2015 CarswellNat 107 (F.C.).

• *Canadian Reformed Church of Cloverdale B.C. v. Canada (Minister of Employment and Social Development)*, 2015 CarswellNat 4453 (F.C.).

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