

Federal Court rules on first LMIA employer compliance case

First decision on compliance in new regulatory regime emphasizes importance of documentation for everything

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BACKGROUND

EMPLOYERS who employ temporary foreign workers have faced a flurry of new regulations in recent years, leading to confusion for some and increased paperwork for most. A recent Federal Court decision — the first to deal with compliance under the new legislative regime — shows that one thing hasn't changed: The need to document all aspects of the foreign worker's employment.

Since the end of 2015, employers who obtain a labour market impact assessment (LMIA) are subject to a strict compliance regulatory regime created to prevent abuse of foreign workers and to increase the protection of the Canadian labour market.

The relevant provisions that created the compliance scheme are found in the Immigration and Refugee Protection Act Regulations (IRPR), and are set out in three parts: the first relates to the requirement not to modify wages and working conditions agreed upon in the LMIA, and to make reasonable efforts to provide an abuse-free work place; the second part deals with the retention of documents; and the third part imposes administrative penalties for breaches. The compliance regime is cumbersome and has caused considerable confusion amongst employers.

The Federal Court recently ruled on the applicability of the compliance scheme in *Obeid Farms v. Canada (Minister of Employment and Social Development)*. An employer was found by Employment and Social Development Canada (ESDC) to be in breach of the regulations. The employer was sanctioned and placed on the list of those who are ineligible to use the temporary foreign worker program (TFWP) for a period of two years and its details were published in the public list of non-compliant employers, colloquially known as a "blacklist." The employer sought judicial review of that administrative decision.

The employer operated a family farm that had utilized the TFWP for more than 23 years. Between March 2014 and January 2015, the employer was issued three positive LMIA's and was advised in writing of its rights and obligations with respect to compliance

with the program, including complying with the terms of the seasonal agricultural workers' program (SAWP). Allegations were made against the employer by a former employee concerning poor working conditions and physical abuse. An inspector visited the employer's farm and, taking into consideration other information he received, found the employer to be in breach of the TFWP. The employer provided justification for the breaches, but the inspector deemed it to be insufficient.

Payment records lacking

The deputy minister recommended that the minister of ESDC find the employer to be noncompliant on the grounds that it was in breach of various conditions relating to wages and working conditions. The minister found the employer to be noncompliant with respect to wages, as the inspection revealed that approximately 20 foreign workers had deductions of between \$200 and \$250 each during the first six weeks of their employment, which the employer claimed was a cash advance given upon arrival. The employer was unable to provide documentary evidence, in particular cancelled cheques for certain pay periods for a number of foreign workers. The employer claimed that they had been paid in cash.

The employer was also found noncompliant with respect to working conditions. The inspection revealed that all foreign workers were consistently required to work seven days a week, notwithstanding the terms of their contract that required them to have one day of rest for every six days worked. It was determined that the employer failed to make reasonable efforts to provide a workplace free of abuse. Further, the employer was unable

to provide certain documents and was also found to be noncompliant with the regulatory requirement to retain and provide documentation. The minister decided to ban the employer from accessing the TFWP for two years and to publish the employer's information on the ineligible list.

Under the regulatory framework, an inspection can be conducted on any employer who has received an LMIA and has employed a temporary foreign worker if there is reason to suspect noncompliance, the employer has not complied in the past, or it has been chosen as part of a random verification of compliance. Pursuant to s. 209.91 of the IRPR, employers who have been found noncompliant following an inspection can be banned from the program for two years and their name and address published in the public ineligibility list.

The court noted that allegations were made against the employer by a former temporary foreign worker concerning poor working and living conditions, as well as physical abuse. The employer was notified in advance of the inspection and documentary request. The employer characterized the \$200-\$250 deductions as "cash advances" but could not provide canceled cheques for many of the foreign workers. That explanation was found to be insufficient and not supported by the evidence.

With regards to noncompliance of working conditions, the employer argued that there was a verbal agreement with the foreign workers to work extra, so they may be able to return home early. However, the employer could not produce any document and the verbal agreement could not be confirmed because the foreign workers had already left the country.

Since the employer could not provide supporting documentation for his claim, it was also found noncompliant with respect to its obligation to retain documents.

The court held that the minister's decision was reasonable because it included a consideration of the employer justification. The inspector considered the justifications put forward by the employer but found them to be inadequate. The regulations require that in order for a breach to be justified, the employer must demonstrate that it has made all reasonable efforts to comply with an LMIA condition, or that the breach resulted from anything done or omitted to be done by the employer in good faith. In this case, the justification provided did not meet the regulatory standard. The court agreed with the inspector's findings that any modification to the SAWP contract with a foreign worker requires a written agreement for any extra deductions being taken from pay. There was no documentary evidence to support the cash advances.

The employer argued that the lack of documentation constituted either "administrative errors, or errors made in good faith." However, the court held that the wording of the justification provisions only applies to an "error made in good faith" or "unintentional accounting or administrative errors" if subsequently compensated for. Neither of those justifications applied in the circumstances of the case. Indeed, the court went further and held that the justification provisions must be strictly interpreted. It referred to the context in which the justification provisions are couched and held that the intention of Parliament in enacting the compliance regulatory scheme was to prevent abuse of highly vulnerable temporary foreign workers, given the tenuous circumstances of their employment which lack the normal safeguards preventing abuse otherwise available to most Canadian workers. While the court accepted that the cash advances appeared to have been made in good faith as a benefit to the workers, the problem remained that there was no evidence

that they were actually provided to the foreign workers. Notwithstanding the fact that the employer had obtained a letter from one of its long-term employees confirming the foreign workers consented to the cash advance and to work an extra day, the court held that the inspector's conclusions were reasonable because the evidence could not be corroborated because the foreign workers were no longer in Canada. The court added that cash is not normally used for transactions in a business setting in Canada or to pay wages. The court also found that it was rather unusual for an employer to give cash advances of \$200-\$250 to 20 employees without any documents to support it. The court also noted, as an observation, that cash transactions are to be avoided almost universally in an employment context, as they are not verifiable and, therefore, raise a higher standard of corroboration with a higher onus on the employer.

Retention of documents required

The court noted that the regulations required the retention of documents for a period of six years. That requirement reflected the longevity of the period during which investigations may be carried out. Therefore, documented information is by far the most reliable evidence over extended periods of time.

With regards to the issue of foreign workers working seven days a week, the court noted that the SAWP contract stipulated that foreign workers could only work on their day off if there was a situation of urgency to finish farm work which could not be delayed. There was no evidence of urgency in this case. Further, the court expressed its view that changing working conditions to allow workers to work seven days a week should not be seen as a good faith justification. The court held that "an unremitting work schedule while working in Canada cannot be presented to be in the best interests or desires of all workers even if they were to consent to it. Such a practice is not to be condoned under Canadian employment and labour laws." The court also held that even if the employees consent

to work nonstop over an extended period of time, it was not unreasonable to conclude that, given the power imbalance in favour of the employer, such consent would hardly be voluntary. In the court's view, the SAWP contract term limiting the seven-day work week to demonstrated situations of urgency should be strictly enforced.

Finally, with regards to the allegation against the employer that it did not make reasonable efforts to provide a workplace that was free of abuse, the court sided with the employer. There was no basis to support the inspector's conclusion that the employer did not provide a workplace that was free of abuse. Even though the employer did not have specific anti-abuse policies in place, that did not mean that an abuse situation existed on the farm. That finding constituted a reviewable error and was referred back to the minister for redetermination. The court held that in so doing, it would provide the Minister with the opportunity to publish further guidelines for small employers as to what reasonable efforts regarding abuse situations are expected under the SAWP.

The court was mindful of the fact that this was its first decision concerning the TFWP compliance scheme. The court was sensitive to the fact that there were considerable misinterpretations and mischaracterizations based on the employer's lack of experience with the regulatory scheme. Nevertheless, the court agreed that the findings made against this employer were reasonable, that it failed to comply with its obligations under the SAWP and that it failed to provide the appropriate justification as required by the regulations.

This case should be a warning to all employers who employ temporary foreign workers, especially in light of the increasing number of inspections and audits performed by the TFWP.

For more information see:

- *Obeid Farms v. Canada (Minister of Employment and Social Development)* 2017 CarswellNat 815 (F.C.).