

Foreign worker gets loss of earnings for work permit extension period

Employer laid off worker after work permit expired but worker was still able to work during application period

BACKGROUND

A grey area between permits

WHEN a foreign worker's work permit is due to expire, the worker can apply to Citizenship and Immigration Canada for an extension. If the original permit expires before an extension is approved — but is still being considered — the worker is generally given “implied status,” which means the worker's eligibility to work in Canada is still good until he is outright rejected.

However, there can be a grey area if the worker's permit expires but the employer doesn't know there's an extension application ongoing. The worker may have thought he told someone, but sometimes the message doesn't get through and the workers can be left with a period of unemployment.

| BY SERGIO KARAS |

IN ANOTHER twist to the lengthy delays that foreign workers must endure when applying for extensions of their status at the Citizenship and Immigration Case Processing Center in Vegreville, Alta., a recent worker's compensation decision held that an employee performing modified work duties, acting in good faith in attempting to renew his work permit, was entitled to loss of earnings benefits for a period in which he was laid off because the employer thought his work permit was not valid.

The Ontario Workplace Safety and Insurance Appeal Tribunal allowed an appeal by a foreign worker employed as a labourer after a case manager denied loss of earnings benefits on the basis that the worker did not provide the employer with appropriate documentation of his renewed work permit during a layoff. The worker injured his right shoulder when he was pulling a hydro cable and the Worker's Safety and Insurance Board (WSIB) granted him compensation. He received the

appropriate treatment and returned to modified work with his employer.

The employee was a foreign worker in Canada and was in the process of seeking permanent residence. He had a valid temporary work permit issued by Citizenship and Immigration Canada (CIC), which expired on July 27, 2009. On Aug. 13, 2009, the employer laid off the worker until he could provide a new work permit as it assumed he was no longer entitled to work in Canada.

The worker returned to work to modified duties on Sept. 17, the day after he received his new work permit. The worker requested that the WSIB grant him loss of earnings attributable to the period of his layoff, but the case manager denied the worker entitlement to benefits for the approximately four weeks of the layoff on the basis that the reason for his wage loss was not compensable, since the worker was not legally entitled to work in Canada. A reconsideration requested by the worker's representative also resulted in a negative decision, even though he

indicated the worker had “implied status” during the time in question because he had filed a request for an extension of his work permit. Nevertheless, the request for reconsideration was denied on the basis that the worker did not provide the employer with appropriate documentation of his renewed work permit until after he returned to work. However, the Ontario Workplace Safety and Insurance Appeal Tribunal allowed the appeal.

The tribunal noted that there was no dispute that the worker required modified work due to his injury and the employer provided suitable modified work before and after the period of loss of earnings. The main question was whether the worker's legal status prevented him from performing the modified work, which the employer offered him during the period in question and which he confirmed in his testimony was suitable and he was able to do.

Employer didn't know worker filed for work permit renewal

The worker claimed that he applied for an extension of his work permit on May 28, 2009, before the expiration of his previous permit. He argued he had “implied status” that allowed him to continue working while his renewal application was being processed. It must be noted that it is CIC policy that applicants who file a work permit extension request prior to the expiry of their permit indeed have “implied status” until a decision is made by the case processing centre. On the other

Continued on page 5

CASE IN POINT: IMMIGRATION

'Implied status' allowed worker to work while waiting

...continued from page 4

hand, the employer argued that it stopped providing modified work and laid off the worker on Aug. 12, 2009, when it became aware the work permit had expired and the worker had not advised the employer he had applied for renewal. The worker agreed the employer acted in compliance with the law by not employing him while its managers understood that his status in Canada was in question. However, that was an incorrect interpretation from their part, argued. The worker provided the tribunal with a copy of his application to extend his Work Permit showing payment of the required filing fee on May 28, 2009, and testified that he told his foreman that he had applied to renew his permit two months before it expired.

The tribunal found it reasonable and sufficient that the worker would have advised his foreman of his renewal application with the expectation that he would have passed on the information to the company administration. Even if he had not advised the employer at the time, the tribunal said the employee's representative who filed the extension request faxed the employer a copy of the application on Aug. 12, 2009. The employer advised that it had no clear protocol for maintaining records for such information at the time and it appears that, therefore, the communication between the worker's representative and the employer was not handled appropriately. The worker also testified that he had applied for a previous extension without any difficulties, continuing to work while his application was pending on that occasion. The tribunal found that the worker complied with his obligations and took the necessary steps to keep the employer informed of his efforts to maintain his legal status in Canada and that he remained willing and able to perform the modified work.

The tribunal noted that the

employer raised the issue that the worker's social insurance number (SIN) had expired with the work permit and therefore the worker was not legally able to work and should not be entitled to loss of earnings benefits. However, it found that the lack of a valid SIN was not an issue at the time and it lacked the capability of verifying

The worker had applied for a previous extension without any difficulties, continuing to work while his application was pending on that occasion.

whether a person can be paid after a SIN has expired.

Based on the evidence, the tribunal held that the worker acted appropriately to keep the employer informed of his efforts to maintain his legal status and was therefore entitled to loss of earnings benefits for the period in question. However, the tribunal also held that the employer acted in good faith in suspending the worker's employment during that time as this was a novel situation and it appeared there was some confusion within the company about how to handle it. As a result, the employer should not be penalized with the cost of the claim, said the tribunal.

Tips for employers

This case highlights the importance for employers to have the appropriate protocol in place to track the status of foreign workers in their employ. Had the employer obtained legal counsel, it would have been advised that the worker had "implied status and could have continued to work while his application for a work permit extension was pending. This would have saved the employer considerable time, effort and cost in dealing with the situation. Employers must endeavor to maintain good records and make inquiries of the foreign workers as to the steps they

have taken to maintain their status in Canada. Employers must be proactive in assisting their foreign workers to pursue their applications deliberately and well in advance of the expiry of their work permits to avoid unnecessary headaches and unpleasant situations. ■

For more information see:

■ *Decision No. 822/11* [Names of Parties are Not Published], [2011] O.W.S.I.A.T.D. No. 1148.



ABOUT THE AUTHOR

Sergio R. Karas

Sergio R. Karas is a certified specialist in Canadian citizenship and immigration law by the Law Society of Upper Canada. He is past chair of the Ontario Bar Association Citizenship and Immigration Section, past chair of the International Bar Association Immigration and Nationality Committee and editor of the Global Business Immigration Handbook. He can be reached at (416) 506-1800 or karas@karas.ca.

Employment law blog

Canadian Employment Law Today invites you to check out its employment law blog. Recent topics include employee misconduct, moonlighting employees, job stress and disappearing employees.

You can get to the blog by visiting www.employmentlawtoday.com and clicking on the employment law blog banner.