Federal Court  Cour fédérale

Date 20170323

Docket: IMM-3024-16

Citation: 2017 FC 302

Ottawa, Ontario, March 23, 2017

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

OBEID FARMS

Applicant

And

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act, or IRPA], of a decision by the Minister dated June 30, 2016, [the Decision] finding the Applicant non-compliant with the conditions set out in sections 209.3 or 209.4 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the

Regulations] and recommending that the Applicant be added to the list of non-compliant employers [the Ineligibility List], pursuant to s 209.91(2) of the Regulations.

[2] The Minister's decision with respect to the Applicant's noncompliance with wage and working condition requirements is upheld. However, the Court concludes that the decision with respect to the failure of the Applicant to make reasonable efforts to provide a workplace free of abuse should be set aside and returned to the Minister with directions.

I. Background

[3] The Applicant is a family farm that has utilized the Temporary Foreign Worker Program [the TFWP] for over 23 years. Between March 2014 and January 2015, the Applicant was issued three positive Labour Market Impact Assessments [LMIAs] and was advised in writing of its rights and obligations with respect to demonstrating compliance with the TFWP, which included fulfilling the obligations of the Seasonal Agricultural Worker's Program employment contract [SAWP contract].

A. *Regulatory Framework*

[4] Employers under the TFWP must agree to comply with the various conditions outlined in sections 209.3 and 209.4 of the Regulations.

[5] Pursuant to s 209.5, an inspection can be conducted on any employer who applied for and received a LMIA and has employed a Temporary Foreign Worker [a TFW] if there is reason to

suspect non-compliance, the employer has not complied in the past, or the employer has been chosen as part of a random verification of compliance.

[6] Pursuant to s 209.91, employers who have been found non-compliant with the TFWP following an inspection will be banned from the program for two-years and have their name and address published on the public Ineligibility List.

B. *The Inspection*

[7] Allegations against the Applicant were received from a TFW alleging poor working and living conditions, as well as physical abuse. On February 26, 2016, an Inspector notified the Applicant that it would be inspected pursuant to s 209.5 of the Regulations and requested documentation to demonstrate compliance. On March 10, 2016, the Applicant responded to this request. On March 30, 2016, the Inspector requested further documents. On April 4, 2016, the Applicant responded to this request. In early April, the Inspector physically inspected the Applicant's farm. On April 12, 2016, the Inspector requested further information, notified the Applicant of what he considered to be breaches of the TFWP, and requested justification for these breaches. The Applicant replied to the request for further information on April 18, 2016 and provided justifications on May 5, 2016.

C. *The Decision*

[8] On June 17, 2016, the Deputy Minister provided the Minister with a Memorandum recommending that the Minister find the Applicant to be non-compliant. The Memorandum

found that there was a reasonable basis to find that the Applicant had not complied with the conditions relating to wages (failure to have written agreements with foreign workers in cases where extra deductions were taken from pay cheques), working conditions (failure to have written agreements in place with workers changing their work schedule from 6 days/week to 7 days/week), reasonable efforts to provide an abuse free workplace, provision of documents, and retention of documents. The Annex to the Memorandum detailed the reasons for the recommendation.

[9] The Minister found the Applicant to be non-compliant with respect to wages. The inspection revealed that 20 or so TFWs had deductions for $200-$250 during the first 6 weeks of employment. The employer's documentation described the deduction by the term "Advance". While the Applicant stated that these employees had been provided cash advances upon arrival. The Inspector could not confirm the existence of payment advances or the employee's consent for the extra deductions, as the concerned TFWs are no longer in Canada.

[10] Further, the Applicant could not produce cancelled cheques for certain pay periods for a number of the TFWs. The Applicant informed the Inspector that these workers had been paid in cash with no receipts or records retained.

[11] The Minister also found the Applicant non-compliant with respect to working conditions. The inspection revealed that all 20 TFWs were consistently working 7 days a week despite the employment contract stating they were to have 1 day of rest for every 6 days worked. At the hearing, upon reviewing the inspection report, it appeared that the TFWs were working an extra

half day which was credited to them to allow them to return home early. Despite any agreed upon changes to the contract having to be done in writing, the employer provided no proof of any such written agreement with the TFWs, submitting that the agreements were verbal in nature. Again, this could not be confirmed with the TFWs as they are no longer in Canada.

[12] The Minister found the Applicant failed to make any reasonable efforts to provide a workplace free of abuse. The Applicant did not have any abuse-free workplace policy and procedures, nor did it provide its TFWs with any special training or other mechanisms to identify and address any workplace abuse.

[13] The Minister found the Applicant non-compliant with the requirement to retain documents related to compliance with conditions and to provide documents as required. The employer was unable to provide the Inspector with the necessary additional information and documents regarding written agreements, employer contracts and proof of cash payments.

[14] The Memorandum also acknowledged that this would be the first determination of non-compliance the Conditions for a Seasonal Agricultural Worker Program [SAWP] employer and, as such, that it would likely have broader implications on this sector and garner significant public attention.

[15] On June 30, 2016, the Minister made the Decision to ban the Applicant from accessing the TFWP for two years and to publish the Applicant’s information on the Ineligibility List.

II. Relevant Legislation

[16] Because of the intricacy of the relevant statutory conditions with respect to this Application they are set out in three parts: the first relating to the requirement not to modify the wages and working conditions and to make reasonable efforts to provide an abuse free workplace; the second with respect to the retention of documents; and the third regarding the sanction provision.

[17] The relevant Regulations pertaining to maintaining wages and working conditions and reasonable efforts to provide an abuse free workplace are found at s 209.3(1)(a) (iv) and (v). Abuse for the purpose of section 209.3(1)(v) is set out at section 72.1.(7) (a). Justification of noncompliance of these requirements is found at section 209.3(1)(c), which in turn incorporates section 203(1.1) (d) and (e) of the Regulations. The relevant provisions are set out below with my emphasis.

Compliance

209.3 (1) An employer who has made an offer of employment to a foreign national referred to in subparagraph 200(1)(c)(iii) must comply with the following conditions:	**209.3 (1)** L'employeur qui a présenté une offre d'emploi à un étranger visé au sous-alinéa 200(1)c)(iii) est tenu de respecter les conditions suivantes :
(a) during the period of employment for which the work permit is issued to the foreign national,	**a)** pendant la période d'emploi pour laquelle le permis de travail est délivré à l'étranger :
[…]	[…]

iv) the employer must provide the foreign national with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and working conditions that are substantially the same as — but not less favourable than — those set out in that offer, and	**(iv)** il lui confie un emploi dans la même profession que celle précisée dans son offre d'emploi et lui verse un salaire et lui ménage des conditions de travail qui sont essentiellement les mêmes — mais non moins avantageux — que ceux précisés dans l'offre,
(v) the employer must make reasonable efforts to provide a workplace that is free of abuse, within the meaning of paragraph 72.1(7)(a);	**(v)** il fait des efforts raisonnables pour fournir un lieu de travail exempt de violence au sens de l'alinéa 72.1(7)a);
72.1(7) For the purpose of subsection (6),	**72.1(7)** Pour l'application du paragraphe (6) :
(a) abuse consists of any of the following:	**a)** la notion de violence vise, selon le cas :
(i) physical abuse, including assault and forcible confinement,	**(i)** la violence physique, notamment les voies de fait et la séquestration,

(ii) sexual abuse, including sexual contact without consent,	**(ii)** la violence sexuelle, notamment les contacts sexuels sans consentement,
(iii) psychological abuse, including threats and intimidation, and	**(iii)** la violence psychologique, notamment les menaces et l'intimidation,
(iv) financial abuse, including fraud and extortion; and	**(iv)** l'exploitation financière, notamment la fraude et l'extorsion;

Justification

209.3(3) A failure to comply with any of the conditions set out in paragraphs (1)(a) and (b) is justified if it results from any of the circumstances set out in subsection 203(1.1).	**209.3(3)** Le non-respect des conditions prévues aux alinéas (1)a) et b) est justifié s'il découle de l'une des circonstances prévues au paragraphe 203(1.1).
203(1.1) (1.1) A failure to satisfy the criteria set out in subparagraph (1)(e)(i) is justified if it results from	**203(1.1)** Le non-respect des critères prévus au sous-alinéa (1)e)(i) est justifié s'il découle :
[…]	[…]
(d) an error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered	**d)** d'une interprétation erronée de l'employeur, faite de bonne foi, quant à ses obligations envers l'étranger, s'il a indemnisé tout étranger qui s'est vu lésé par cette interprétation ou, s'il ne les a pas indemnisé, il a consenti des efforts suffisants pour le faire;

a disadvantage as a result of the error;	
(e) an unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation — or if it was not possible to provide compensation, made sufficient efforts to do so — to all foreign nationals who suffered a disadvantage as a result of the error;	**e)** d'une erreur comptable ou administrative commise par l'employeur à la suite de laquelle celui-ci a indemnisé tout étranger lésé par cette erreur ou, s'il ne les a pas indemnisé, il a consenti des efforts suffisants pour le faire;

[18] The relevant provisions concerning the requirement to maintain accurate documentation are found at section 209.3(1)(c)(i) and (ii). Justification for non-compliance with these provisions is found at section 209.3(4) as well as 209.4(1) and 2) which incorporates section 209.7 as follows:

Compliance

209.3 (1) An employer who has made an offer of employment to a foreign national referred to in subparagraph 200(1)(c)(iii) must comply with the following conditions:	**209.3 (1)** L'employeur qui a présenté une offre d'emploi à un étranger visé au sous-alinéa 200(1)c)(iii) est tenu de respecter les conditions suivantes :
[…]	[…]
(c) during a period of six years beginning on the first day of the period of employment for which the work permit is issued to the	**c)** pendant une période de six ans à compter du premier jour de la période d'emploi pour laquelle le permis de travail est délivré

foreign national, the employer must	à l'étranger :
(i) be able to demonstrate that any information they provided under subsections 203(1) and (2.1) was accurate, and	**(i)** il peut démontrer que tout renseignement qu'il a fourni aux termes des paragraphes 203(1) et (2.1) était exact,
(ii) retain any document that relates to compliance with the conditions set out in paragraphs (a) and (b).	**(ii)** il conserve tout document relatif au respect des conditions prévues aux alinéas a) et b).

Justification

209.3(4) A failure to comply with either of the conditions set out in paragraph (1)(c) is justified if the employer made all reasonable efforts to comply with the condition.	**209.3(4)** Le non-respect des conditions prévues à l'alinéa (1)c) est justifié si l'employeur a fait tous les efforts raisonnables pour respecter celles-ci.
209.4 (1) An employer referred to in section 209.2 or 209.3 must	**209.4 (1)** L'employeur visé aux articles 209.2 ou 209.3 est tenu de respecter les conditions suivantes :
[…]	[…]
(b) provide any documents that are required under section 209.7; and	**b)** fournir les documents exigés par l'article 209.7;
[…]	[…]
209.4(2) A failure to comply with any of the conditions set out in subsection (1) is justified if the employer made all reasonable efforts to comply with the condition or if it results from anything done or omitted to be done by the	**209.4(2)** Le non-respect des conditions prévues au paragraphe (1) est justifié si l'employeur a fait tous les efforts raisonnables pour respecter celles-ci ou si le non-respect découle d'actions ou d'omissions que l'employeur a

employer in good faith.	commises de bonne foi.
209.7 (1) If any of the circumstances set out in section 209.5 exists,	**209.7 (1)** Si l'une des circonstances prévues à l'article 209.5 se présente :
(a) an officer may, for the purpose of verifying compliance with the conditions set out in section 209.2, require an employer to provide them with any document that relates to compliance with those conditions; and	**a)** l'agent peut, aux fins de vérification du respect des conditions prévues à l'article 209.2, exiger que l'employeur lui fournisse tout document relatif au respect de celles-ci;
(b) the Minister of Employment and Social Development may, for the purpose of verifying compliance with the conditions set out in section 209.3, require an employer to provide him or her with any document that relates to compliance with those conditions.	**b)** le ministre de l'Emploi et du Développement social peut, aux fins de vérification du respect des conditions prévues à l'article 209.3, exiger que l'employeur lui fournisse tout document relatif au respect de celles-ci.

[19] The relevant provisions for concerning sanctions for non-compliance are found at sections 209.91(2) and (3), now repealed, as follows:

209.91(2) If the Minister of Employment and Social Development determines, on the basis of information obtained during the exercise of the powers set out in sections 209.6, 209.7 and 209.9 and any other relevant information, that an employer did not comply with any of the conditions set out in section 209.3 or 209.4 and that the	**209.91(2)** Si le ministre de l'Emploi et du Développement social conclut, en se fondant sur les renseignements obtenus dans l'exercice des pouvoirs prévus aux articles 209.6, 209.7 et 209.9 et sur tout autre renseignement pertinent, qu'un employeur n'a pas respecté l'une des conditions prévues aux articles 209.3 et 209.4 et que ce non-respect n'est pas

failure to do so was not justified, that Minister must notify the employer of that determination and must add the employer's name and address to the list referred to in subsection (3).	justifié, il en informe l'employeur et ajoute les nom et adresse de celui-ci à la liste visée au paragraphe (3).
209.91(3) A list is to be posted on the Department's web site that sets out the name and address of each employer referred to in subsections (1) and (2) and 203(5) and the date on which the determination was made in respect of the employer.	**209.91(3)** La liste contenant les nom et adresse de chaque employeur visé aux paragraphes (1) et (2) et 203(5) et la date où la conclusion a été formulée à leur égard est affichée sur le site Web du ministère.

III. Issues

[20] The Applicant raises the following issues:

1. Was the Decision reasonable?

    a. Did the Minister err by not determining whether the Applicant's breach was justified?

    b. Was the Minister's determination that the Applicant did not provide wages and working conditions that were substantially the same as in its previous LMIAs reasonable?

    c. Was the Minister's finding that the Applicant did not make reasonable efforts to provide a workplace that was free of abuse reasonable?

2. Did Minister breach the Applicant's right to procedural fairness?

IV. Standard of Review

[21] The Applicant submits and the Respondent agrees that, since the application of section 209.91 of the Regulations involves the Minister interpreting and applying his or her own statute, the reasonableness standard applies to questions of fact and mixed fact and law. As such, the Court will be concerned with the existence of justification, transparency, and intelligibility in the decision making process and whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). The Parties agree that the issue of procedural fairness is reviewable on a correctness standard. I agree in both cases.

V. Analysis

A. *Was the Decision reasonable?*

(1) Did the Minister err by failing to consider whether the Applicant's breaches were justified?

[22] The Applicant submits that the Decision was both unreasonable and a breach of procedural fairness as the Minister did not consider whether the Applicant's alleged breaches were justified, as required under section 209.91(2) of the Regulations.

[23] The Applicant argues that pursuant to section 209.91 (2) (now repealed), it was clear that decisions of noncompliance regarding TFW provisions of the Regulations were required to be carried out in two distinct steps: first, a finding of noncompliance and second a finding that "the failure to do so was not justified". Even without this provision, the statutory scheme under sections 209.3 (3) and (4) allow for justification of noncompliance. Section 209.3 (3) incorporates the justification provisions found in subsection 203 (1.1). Paragraph (d) of 209.3 (1.1) permits justification of noncompliance arising from errors in interpretation made in good faith if subsequently compensated for. Similarly paragraph (e) of the same provision allows justification for unintentional accounting and administrative errors if the employer subsequently provides compensation for any disadvantage caused to the worker by the error.

[24] The Applicant argues that the Decision is limited to considering whether the Applicant failed to comply with the conditions of the TFWP. As a result, a determination of noncompliance had been made in accordance with subsection 209.9(1)(2) without any reference to the issue of whether the breaches were justified. The Applicant claims it provided justification of breaches as either administrative errors or errors made in good faith, yet the Decision and the record do not address the issue in any fashion. The Applicant argues that, at a minimum, the Memorandum and annexes should have included a summary of all the relevant information to making a determination on both issues.

[25] On the last point, I disagree that the Decision must follow any specific form, or refer in detail to the relevant information in arriving at its decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62).

[26] More substantively and as discussed below, the Decision included a consideration of whether the breaches were justified. The Minister relied on a summary (annex A) of the Inspector's analysis which was limited and did not include the Inspector's full report. The record nevertheless, reveals that the Inspector considered the justifications put forward by the Applicant, but found them to be insufficiently supported by reliable evidence. Moreover, the justifications provided did not meet the explicit criteria set out in the regulations. As such, the Decision did not need to further elaborate on these alleged justifications.

[27] The Court therefore, rejects the Applicant's submissions that there was a failure in the decision to consider justification of the various findings of noncompliance. It further is of the view that the rejection of any justification for each head of the Applicant's noncomplying conduct was reasonable and sufficiently explained to sustain the Decision. The Court will now consider each of the individual areas of noncompliance

(2) Was the Minister's determination that the Applicant did not provide wages and working conditions that were substantially the same as in its previous LMIAs reasonable?

(a) *Modification of Workers' Wages - Unsubstantiated Deductions for Cash Advance Payments*

[28] The Inspector summarized his findings on this issue as follows:

> Based on information provided by the employer, the inspector determined that 20 Temporary Foreign Workers had deductions of $200-$250 during the first 6 weeks of employment. The employer stated they provided payment advances however the employer could not demonstrate that the payment advances had been made. Further, there is a requirement in the SAWP employment contract

> to have a written agreement with the foreign workers for any extra deductions being taken from pay cheques. The employer could not provide any evidence of written agreements with the foreign workers, confirming the foreign worker's consent to the deductions. The inspector could not confirm the existence of payment advances or the consent for the extra deductions directly with the Temporary Foreign Worker(s) as they are no longer in Canada.
>
> [Emphasis added]

[29] Among the reasons supporting the noncompliance finding described in the Inspector's report was first, that the Applicant had not provided evidence that the cash advances had been made, and, second, that it had not complied with the requirement that agreements, such as the one giving consent to deductions, be in writing. In its written submissions, the Applicant indicated that it was not aware of the requirements regarding advance payments. The Inspector rejected these arguments and pointed out that the SAWP contract requires a written agreement with the foreign workers for any extra deductions being taken from paychecks. The Inspector also indicated that he could not confirm the existence of the advances or the consent directly with the TFWs as they were no longer in Canada.

[30] The Applicant argues that the information provided describes complaints of situations of noncompliance where "either administrative errors or errors that were made in good faith". However, the wording of the justification provisions only applies to an "error in interpretation made in good faith" or "unintentional accounting or administrative errors" if subsequently compensated for. Neither of these justifications would appear to apply in these circumstances, if strictly interpreted.

[31] In this latter regard, it is the Court's view that the justification provisions must be strictly interpreted. This conclusion flows from a consideration of these provisions in their context and when interpreted purposively. The intention of Parliament in enacting these provisions 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.

[32] Given the purpose and context of the justification provisions, the Court is the opinion that a good faith justification can only arise where the non-compliant conduct can be seen to benefit the worker and is in the worker's best or desired interest. Otherwise, the justification provisions would be used to circumvent a scheme which must be strictly interpreted. Certainly, a lack of knowledge of a LMIA condition or SAWP contract requirement cannot be justified on a good faith premise, all the more so when the obligations are contained in contractual provisions which the Applicant is presumed to know.

[33] An example of the appropriate application of the requirement that the justification exception benefit the worker is evident in the "change in wage and working conditions" that the Court is considering in this matter. The situation of the employer changing the wage payment scheme by providing foreign workers with a cash allowance upon their arrival strikes the Court as benefiting the workers, inasmuch as having cash on hand to make purchases for their domestic and related purposes would assist in their settlement. Conversely, an arrangement eliminating the seventh day of rest for all workers is unlikely to benefit all of the workers, at least as judged by

Canadian employment norms and the terms of the SAWP contract prohibiting changes except in the most limited circumstances.

[34] With respect to the cash advances, while accepting that they were made in good faith as a benefit to the workers and resulted from an interpretation of the requirements, the problem remains that there is no evidence that they were provided to the workers. The Inspector indicated that he could not confirm the advances or the consent for extra deductions directly with the workers as they were no longer in Canada.

[35] The Applicant mischaracterizes this conclusion by describing the situation of one where the Inspector concluded that "it was not possible for the Inspector to verify whether any of the Applicant's previous foreign workers consented to both the cash advance as well as working 6.5 days per week." The Applicant had obtained a letter from one of the Applicant's long-term employees confirming that the employees consented to the advance cash payment and to work the extra day. The Applicant submitted that this evidence would justify the failure to comply with the terms of the LMIA and SAWP contract, but was not taken into consideration in the Decision.

[36] I understand the Inspector's use of the term "directly" to refer to a level of reliability and administrative efficacy that the TFWP provisions require. The most reliable and probative evidence confirming both the advance payments and the consent of the employees to work extra time is to be obtained contemporaneously and directly in writing from the employees. The Inspector indicates in his report that if the workers were in Canada and available for an

interview, he would consider this form of evidence, despite its diminished reliability, because he could obtain the information directly from the workers.

[37] Cash is not normally used for transactions in Canada in a business or employment setting unless for minor transactions such as petty cash. It would be contrary to Canadian employment norms for cash payments to be used to disperse significant funds totaling in the neighborhood of $5000 for cash allowances of $200 or $250 for 20 or more employees, without proper recording of the payments with receipts and description of the deductions on pay stubs. The very purpose of the document requirements outlined in the LMIA and SAWP contract is to prevent the mischief that arises from the use of undocumented cash payments in the employment context and to do so in an administrative efficient manner where evidence of the payments is contained and retained in written records.

[38] Moreover, as an observation of the Court regarding the use of cash payments, I think it may be stated as a general proposition that there is an underlying presumption in employment matters that cash transactions are to be avoided, unless properly recorded in business records. If something is contemporaneously acknowledged and recorded, it is available for verification by audit or other means. Cash transactions, however, by the fact that they are not subject to verification by third-party independent institutions such as banks, have proven to be indicia of unlawful activity. Cash transactions therefore, raise a higher standard of corroboration, the onus of which rests with the employer.

[39] In addition, the Court notes that, pursuant to the Regulations, records are to be retained for six years. This reflects the longevity of the period during which investigations may be carried out. Documented information is by far the most reliable evidence over extended periods of time, such as six years.

[40] I find that the Inspector, and thereby the Minister, reasonably decided to require that any justification for noncompliance involving cash payments, if it is to be allowed as an exception to the rule of thoroughly documenting cash transactions, be limited to situations where the inspector is directly able to confirm the evidence to his or her satisfaction, and within the reasonable time parameters of the conduct of an administrative investigation.

[41] Moreover, there is no onus on the Inspector to justify an employer's noncompliance. In the present circumstances therefore, the Inspector cannot be chastised for refusing to accept evidence of considerably less reliability from a worker living abroad, in the place of the reliable evidence required by the terms of the LMIA and SAWP contract and meant to avoid this type of situation from arising.

(b) *Unverifiable Cash Payments of Wages*

[42] In Annex B to the Decision, the Inspector noted that for a number of the TFWs the employer could not produce canceled cheques for certain pay periods. The justification offered by the Applicant was that the workers had been paid in cash, without retaining receipts or other verifying records of the transactions. The Applicant did not specifically address this aspect of the the decision. As it stands, there is no apparent justification. When the Court raised this issue at

the hearing, it was directed to pages 18 and 19 of the Inspector's detailed report where the circumstances of each cash payment were documented.

[43] The Inspector's detailed report was not before the Minister, but only introduced as an exhibit in the Defendant's record. Upon the Applicant's objection to its admission, it was agreed during the hearing that it could only serve to respond to the Applicant's allegations of procedural unfairness. By this objection and the Court's consent ruling, it would appear that the Applicant is hoisted on its own petard in terms of being able to rely upon the contents of the detailed report. If the Court cannot access the substantive details with respect to these cash payments and the justification offered by the Applicant, it seems that the Decision cannot be criticized for its failure to consider justification when the Applicant offers none.

[44] Even putting aside these evidentiary qualms, in perusing the report at pages 18 and 19, it appears that the Inspector found ten situations where payments were either not made to employees or, if they were made, they were paid in cash. Seven of these alleged cash payments were undocumented and could not be verified. Accordingly, there is no evidence with respect to these particular cash payments to justify the Applicant's breaches of the LMIA program.

(c) *Modification of Workers' Working Conditions - Working Seven Days in a Week*

[45] The summary of the Inspector's report in the Decision indicated that all twenty TFWs were consistently working seven days per week over the course of their employment with the Applicant. The Inspector noted that the SAWP contract required TFWs to have one day of rest

for every six days worked. Any changes to this requirement were required to be recorded in writing and agreed upon by the employer and worker.

[46] The Inspector concluded that the additional time worked was not compliant with the SAWP because any alleged agreements with the workers to do so were not in writing and not otherwise subject to direct verification. The Applicant's argument was similar to that concerning the undocumented deductions in lieu of the cash allowances; namely that the Inspector refused to consider the letter from a long-term employee attesting to the workers' agreement to work the additional days because it was not evidence that could be directly obtained by the Inspector. For all of the reasons cited above, the Court concludes that no reviewable error was made by the Minister in finding that the Applicant's evidence was insufficient to justify its noncompliance of the conditions of the program.

[47] It might be noted that at the hearing, again apparently in reliance upon the Inspector's detailed report, Counsel for the Applicant stated that the additional time worked by the TFWs consisted of one half day on their regular day off, being Tuesday. The workers were apparently credited with the time in order to allow them to return home before the regular contract termination date.

[48] The Court notes that the SAWP contract stipulates that employees could only work on a day off "where the urgency to finish farm work cannot be delayed, (such that) the Employer may request the worker's consent to postpone that day until a mutually agreeable date." Although not raised as an issue before the Court, it is noted that there is no evidence of urgency which could

justify the postponement of the work to another date, even assuming there were agreements to that effect.

[49] The Court reiterates its view that changing working conditions to allow workers to work seven days a week without respite should not be seen as a good faith justification. An unremitting work schedule while working in Canada cannot be presumed 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.

[50] Additionally, the Court takes a somewhat jaundiced view of the "voluntary nature" of these agreements when all employees consent to work nonstop over an extended period of time such as in this instance. Bearing in mind the significant power imbalance in favour of the employer, it is not an unreasonable assumption that any worker rejecting the employer's request would do so with some reasonable apprehension of anxiety, be it from being at a disadvantage for future employment with the employer or in Canada, or other prejudice. In the Court's view, the SAWP contract term limiting the seven day work week to demonstrated situations of urgency should be strictly enforced.

[51] With respect to the issue of the Applicant not meeting the documentation requirements of the Regulations, LMIA and SAWP contract, the Court concludes that the Applicant failed to comply with them by its conclusion that it failed to corroborate in writing the various transactions described above.

(3) Was the Minister's finding that the Applicant did not make reasonable efforts to provide a workplace that was free of abuse reasonable?

[52] The Inspector concluded that the Applicant failed to provide a workplace free of abuse. He found that the employer did not have any abuse-free workplace policies and procedures, nor did it provide its TFWs with any special training or other mechanisms to identify and address any workplace abuse issues that may have occurred.

[53] The Applicant submits that it was unreasonable for the Inspector to determine that the Applicant did not comply with this requirement without there being a finding of abuse. The Court rejects this argument. Workplace policies and procedures are preventative in nature and are intended to forestall abuse. Moreover, without such policies and training in place, it cannot be certain that past abuses did not occur. The abuse may not have been recognized, or even if recognized, the worker would not have known what procedure to follow to address the situation or could have feared some form of retaliation if a complaint were lodged.

[54] That being said, the determination at hand is whether the Applicant's efforts were reasonable to provide a workplace free of abuse, not whether this objective was achieved by the implementation of appropriate policies and training. The Inspector's summary mis-stated the regulatory requirement by concluding that the noncompliance was not meeting "]t]he requirement to provide a workplace that is free of abuse (s. 209.3(1)(a)(v))". This is quite different than whether the employer "made reasonable efforts to provide a workplace that is free of abuse". The Minister adopted the recommendation of her officials that the Applicant be found non-compliant for its failure to make "reasonable efforts to provide an abuse-free workplace".

There is no suggestion however, that the recommendation was not premised on the summary of the Inspector's report, which I conclude provides the substantive basis for the finding of non-compliance.

[55] While I rejected the Applicant's argument in paragraph 53 above that there must be evidence of abuse to demonstrate that reasonable efforts were not made; conversely, there is no evidence that the workplace was not free of abuse, for whatever reason, including the personal efforts made by the Applicant, or the behavioural norms of the workers themselves. There is no basis to support the Inspector's conclusion that the Applicant did not provide a workplace that is free of abuse. For that reason, the fact that such policies are not in place does not necessarily mean that the Applicant's efforts to achieve that end were not reasonable.

[56] Reasonableness is a highly, and indeed, almost entirely contextual standard. It is said to be objective inasmuch as measuring the reasonableness of conduct is determined by placing the fictional reasonable person in the same circumstances as, in this case, the Applicant and assessing whether the Applicant's conduct was reasonable in those circumstances. Evidence of reasonableness often is based on the norms of other persons in similar circumstances, in this case perhaps on the basis of evidence from other farming operations in similar circumstances. The Court's sense is that other small farming TFW employers might have interpreted this provision in a similar fashion, not really knowing what the requirement really entailed other than assuring no abuse was occurring.

[57] I say this because the terms of the LMIA and SAWP contract did not prescribe that "reasonable efforts" would require the adoption of appropriate policies and staff training. If these were base line conditions for reasonable efforts, then it would be expected that appropriate wording would have been incorporated in the requirement. The Applicant argues that it was unreasonably blindsided by this interpretation of reasonable efforts and had it understood these were the requirements, it would have acted to implement them. The Inspector appears to have agreed with this view by initially stating that the absence of such measures was justified because the Applicant had to be told to put in place written policies in order for his efforts to be judged unreasonable. He later modified this reasoning to judge reasonable efforts by the fact of whether such policies and staff training were provided, which I find mis-characterized the regulatory requirement.

[58] Accordingly, the Minister's decision finding that the Applicant had not provided a workplace that is free of abuse constitutes a reviewable error insofar as it misstates the legal requirement and therefore the relevant evidence that must be considered. The issue the Minister must determine is what efforts the Applicant undertook to provide a workplace free of abuse and whether, in the Applicant's circumstances, these efforts were reasonable.

[59] In returning this issue to the Minister for further consideration, this will provide the program administrators with an opportunity to consider whether a redetermination of this issue is necessary, instead of perhaps implementing more specific policies or programs intended to assist small business employing TFWs to meet the requirements of achieving a workplace free of abuse.

B. *Did the Minister breach the Applicant's right to procedural fairness?*

[60] The Applicant submits that the Inspector breached the Applicant's right to procedural fairness. It is common ground that the level of procedural fairness required in cases such as this is at the lower end of the spectrum: *Frankie's Burgers Lobbied Inc. v. Canada*, 2015 FC 27 at paragraph 73.

[61] I have already rejected the Applicant's first argument that a breach of procedural fairness occurred as the Inspector did consider the document from the overseas worker averring to the workers having consented to the advance payment of wages and to work seven days a week. There is no basis to argue that this is an issue of procedural fairness when it is a matter of the reliability of the evidence tendered.

[62] Second, I find that over the course of the almost four-month investigation the Applicant knew the case against it and had an opportunity to respond: *Catastrophe Solutions International v Canada (Minister of Employment, Workforce Development and Labour)*, 2016 FC 1004.

[63] Third, there was no a negative credibility finding as to the Applicant's statement that there were verbal agreements between it and its employees to work the extra day. The issue, again, is one of the weight that can be attributed to such statements in a situation of potential abuse of vulnerable TFWs involving the acknowledged noncompliance by the Applicant that he was not aware that it was necessary that such agreements be in writing. By the Applicant seeking to corroborate his verbal agreements, it in effect acknowledged that these statements needed to

be corroborated. However, such corroboration by indirect means was insufficient to satisfy the reliability requirements required under the Regulations.

[64] Fourth, the Applicant was repeatedly advised that it would need to provide proof of payments and, as such, there was no surprise in the Inspector's decision. The evidence does not support the submission that the Inspector created a "false sense of security".

VI. Conclusion

[65] Apart from the conclusion regarding whether reasonable efforts were made to provide an abuse-free workplace, the Decision in its finding of failures to comply with the Regulations without justification meets the requirements of the *Dunsmuir* test. The requirements of procedural fairness were also met.

[66] The conclusion that the Applicant failed to demonstrate reasonable efforts to provide an abuse free working environment is set aside. It is based upon reasoning that misapprehends the terms of compliance that are required to be met by the Applicant as that of providing an abuse free workplace, as well as an erroneous finding of fact that the Applicant did not meet this condition, which is not reasonably sustained by the record. This issue is returned to the Minister to be decided on the basis of whether the Applicant made reasonable efforts to provide a workplace free of abuse, in accordance with the directions of the Court as addressed in these reasons.

[67] The parties did not request that any questions be certified for appeal and none are certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed and the decision set aside, but only with respect to whether the Applicant failed to make reasonable efforts to provide an abuse-free working environment. The matter is to be returned to the Respondent with directions as stipulated above. No question is certified for appeal.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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