

Federal Court



Cour fédérale

Date: 20220927

Docket: IMM-2129-21

Citation: 2022 FC 1344

Ottawa, Ontario, September 27, 2022

PRESENT: Madam Justice Pallotta

BETWEEN:

KULJIT SINGH DHALIWAL

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The applicant, Kuljit Singh Dhaliwal, is an Indian farmer who was offered employment at a farm in Abbotsford, British Columbia as a temporary foreign worker (TFW). He asks this Court to set aside an immigration officer's (Officer) March 8, 2021 decision that refused his work permit application on the basis that the Officer was not satisfied his offer of employment was genuine. While the prospective employer received a positive labour market impact assessment (LMIA) to hire 25 TFWs, the Officer found the farm did not have the capacity or resources to extend offers of employment to 25 TFWs.

[2] I am satisfied the Officer's decision should be set aside for the reasons below.

[3] Mr. Dhaliwal alleges the decision is unreasonable because the Officer failed to articulate reasons why his offer of employment was not genuine. He alleges the Officer did not have due regard to the LMIA for 25 TFWs or consider that the farm was hiring additional workers in order to increase revenue, and ignored information sent in response to a procedural fairness letter (PFL) sent January 15, 2021 including information about the farm's need for TFWs.

[4] Whether the Officer's decision is unreasonable is determined according to the guidance set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. The reasonableness standard of review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court does not ask what decision it would have made, attempt to ascertain the range of possible conclusions, conduct a new analysis, or seek to determine the correct solution to the problem: *Vavilov* at para 83. Instead, the reviewing court must focus on the decision actually made, and consider whether the decision as a whole is transparent, intelligible, and justified: *Vavilov* at paras 15 and 83.

[5] The Global Case Management System (GCMS) notes record the following reasons supporting the Officer's decision (employer's financial information omitted):

Response to PFL reviewed. Application reviewed for a [work permit] in NOC 8431 as a General Farm Worker. [Mr. Dhaliwal] offered one of 25 positions of a Farm Worker to work with Jot Enterprises limited, BC. Employment offer is for a full-time farm worker position and wages are \$14.60 CDN per hour for 40 hours per week. Annual salary per employee is \$ 30,368 CDN. Financial documents indicate the following: [...]. Hiring 25 more TFWs would cost approximately: $\$30,368 * 25 = \$759,200$ which is

considerably higher than reported sales. Given the potential employer's stated income, it does not appear to have the resources to extend offers of employment to 25 TFW farm workers. Based on info. before me, I am not satisfied that the employer has the capacity to hire additional workers and that the offer of employment is genuine. Refused pursuant to R200(5)/200(1)c(ii.i)(A).

[6] Visa officers have wide discretion to determine whether an applicant has met the legislated requirements for a work permit: see for example *Liu v Canada (Minister of Citizenship and Immigration)*, 2018 FC 527 at paras 52-54 and *Patel v Canada (Minister of Citizenship and Immigration)*, 2021 FC 573 at paras 18 and 30-31. One of the legislated requirements is a genuine job offer: 200(1)(c)(ii.1)(A) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. Subsection 200(5) of the *IRPR* sets out the factors an officer should consider when assessing the genuineness of a job offer. Paragraphs 200(5)(b) and (c) are particularly relevant to the Officer's reasons:

Genuineness of job offer

(5) A determination of whether an offer of employment is genuine shall be based on the following factors:

(a) whether the offer is made by an employer that is actively engaged in the business in respect of which the offer is made, unless the offer is made for employment as a live-in caregiver;

(b) whether the offer is consistent with the reasonable employment needs of the employer;

(c) whether the terms of the offer are terms that the

Authenticité de l'offre d'emploi

(5) L'évaluation de l'authenticité de l'offre d'emploi est fondée sur les facteurs suivants :

a) l'offre est présentée par un employeur véritablement actif dans l'entreprise à l'égard de laquelle elle est faite, sauf si elle vise un emploi d'aide familial;

b) l'offre correspond aux besoins légitimes en main-d'oeuvre de l'employeur;

c) l'employeur peut raisonnablement respecter les conditions de l'offre;

d) l'employeur – ou la personne qui recrute des travailleurs étrangers en son nom – s'est

employer is reasonably able to fulfil; and

(d) the past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

conformé aux lois et aux règlements fédéraux et provinciaux régissant le travail ou le recrutement de main-d'oeuvre dans la province où il est prévu que l'étranger travaillera.

[7] While Mr. Dhaliwal states that the Officer found his offer to be non-genuine without due regard to the positive LMIA for 25 workers, I agree with the respondent that a positive LMIA is not determinative. The Officer was required to independently assess the genuineness of Mr. Dhaliwal's offer in light of the subsection 200(5) factors, including whether the offer is consistent with the employer's reasonable employment needs and whether its terms are ones the employer would be able to fulfill.

[8] However, I agree with Mr. Dhaliwal that the Officer did not articulate sufficient reasons why the offer of employment was found to be not genuine. The decision does not identify any issue with Mr. Dhaliwal's offer specifically, only with the total number of offers permitted under the LMIA. It is unclear whether the Officer's conclusion that Mr. Dhaliwal's offer was not genuine was based on a particular interpretation of the relevant statutory provisions, or on what appears to be "all or nothing" logic—that unless the employer had the capacity to hire all 25 TFWs, none of the offers extended under the LMIA could be genuine offers. Either way, the matter must be returned.

[9] If the Officer's conclusion was based on a particular interpretation of the legislation, then the matter must be returned because I am unable to determine whether they interpreted the legislative requirements reasonably: *Vavilov* at para 123. The GCMS notes do not explain the Officer's interpretation and it is not otherwise apparent from the record. Furthermore, Mr. Dhaliwal filed an affidavit from the farm owner who attests that, after Mr. Dhaliwal's application was refused, Immigration, Refugees and Citizenship Canada (IRCC) approved 5 work permits under the same LMIA. If the Officer's conclusion rested on a particular interpretation of the legislation, it does not seem to be an interpretation that is universally applied by IRCC officers.

[10] Alternatively, if the Officer's conclusion was based on the "all or nothing" logic noted above, the conclusion is unreasonable because it is based on assumptions that are not supported by the record and it is inconsistent with information Mr. Dhaliwal provided in response to the PFL.

[11] Mr. Dhaliwal points out that the information submitted in response to the January 15, 2021 PFL included evidence that the farm needed TFWs. The farm hired TFWs in the past (for example, 8 TFWs in addition to 2 Canadian workers in 2018) but employed one Canadian worker and no TFWs as of February 2021. An organizational chart filed as part of the PFL response includes the following note (as written):

Mohinder Gill [farm owner] has not being able to bring foreign nationals to Canada because their WPs are not getting approved. Recently she just got 1 WP approved, but the person is not yet in Canada. She is relying on contract labour, which is getting more scares since the demand for their services has increased considerable during 2020 and is continuing in 2021. The existing labour shortage in the agricultural sector has been accentuated by the pandemic. Farmers are in need of people to work on their farms

but locals don't want to work in the farms and foreign national are not arriving fast enough to meet the need for labour.

[12] Mr. Dhaliwal's job offer is the only offer in the record that was before the Officer. The Officer's finding that the employer would not have the resources to extend offers of employment to 25 TFW farm workers assumes that the employer made 25 offers with the same compensation terms as Mr. Dhaliwal's offer—full time employment, for 12 months, with the same hourly rate and weekly hours—yet ignores the term making his employment conditional on the issuance of a valid work permit by IRCC. If the employer extended 25 conditional offers of employment, then the Officer's reasoning is not intelligible. The Officer effectively assumed that 24 work permits had already been issued at the time of the decision when the PFL response stated that only one work permit had been approved by that time. In other words, if the Officer had approved Mr. Dhaliwal's work permit he would have been the 2nd rather than the 25th TFW under the LMIA to meet the condition of his job offer.

[13] Turning to the allegations of procedural unfairness, Mr. Dhaliwal submits the decision was based on new concerns that were not raised in the PFL. Also, he argues he had a legitimate expectation his work permit would be approved and that the decision demonstrates bias, relying on the fact that work permits were issued to other applicants under the same LMIA.

[14] Questions of procedural fairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is “eminently variable”, inherently flexible, and context-specific: *Vavilov* at para 77, citing *Baker v Canada (Minister of*

Citizenship and Immigration), [1999] 2 SCR 817, at paras 22-23 [*Baker*], among other cases. An applicant must have had a meaningful opportunity to present their case and have it fully and fairly considered: *Baker* at para 32. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[15] The respondent argues that concerns about whether Mr. Dhaliwal's job offer satisfied subsections 200(5)(b) and (c) of the *IRPR* were not new concerns that required notice, as an officer has no duty to provide an opportunity to address concerns that arise directly from the legislation: *Zeeshan v Canada (Minister of Citizenship and Immigration)*, 2013 FC 248 at para 33.

[16] I fail to see how the Officer's concern in this case arose "directly" from the legislation, as I do not see how Mr. Dhaliwal could have anticipated this particular concern based on the language of the legislation.

[17] In any event, the Officer saw a reason to send a PFL to Mr. Dhaliwal, but the letter did not mention a concern with the employer's capacity to hire all 25 TFWs under the LMIA or any other specific concern about the genuineness of his job offer. It simply requested information and documents. The PFL asked Mr. Dhaliwal to submit information about the steps that were taken to identify him as a suitable worker and recruit him, the due diligence taken to satisfy the employer that Mr. Dhaliwal could be relied on to comply with the terms of his visa, and any precautionary steps followed by the employer in order to promote and encourage visa compliance. The PFL also requested information and documents about the farm business,

including its size, history of operations, the number of TFWs and non-foreign workers employed over the previous three years, and asked for copies of business documents such as financial statements, tax documents, and lists of major customers and suppliers. Although Mr. Dhaliwal provided the requested information, if he had been aware of a concern about the number of offers he could have tailored his response—for example, by providing information about other job offers or an explanation for the number of TFWs under the LMIA. In my view, Mr. Dhaliwal was denied procedural fairness by not having the opportunity to address the Officer's concern.

[18] Mr. Dhaliwal's arguments of bias and legitimate expectations rely on the 5 work permits that were approved after his own application was refused. He asserts that a well-informed person would consider that the Officer did not approach his case with impartiality, and the inconsistency in outcomes breaches principles of legitimate expectations. The respondent notes that other applicants under the same LMIA were refused work permits, like Mr. Dhaliwal.

[19] In my view there is no merit to the arguments of legitimate expectations and bias. In addition to the fact that the five approvals post-date the decision at issue in this case, the doctrine of legitimate expectations is a procedural protection that does not create substantive rights or guarantee a specific result: *Masam v Canada (Minister of Citizenship and Immigration)*, 2018 FC 751 at para 15; *Nshogoza v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1211 at para 39. Also, Mr. Dhaliwal's assertions fall well short of the high threshold for finding a reasonable apprehension of bias, which cannot rest on suspicion, conjecture, insinuation or impressions: *Kaur v Canada (Minister of Citizenship and Immigration)*, 2022 FC 30 paras 12-13.

[20] In conclusion, the application for judicial review is allowed and the Officer's decision is set aside. The matter shall be returned for redetermination by a different officer. Neither party proposed a question for certification and in my view there is no question to certify.

JUDGMENT in IMM-2129-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.
2. The Officer's decision is set aside and the matter shall be redetermined by a different officer.
3. There is no question to certify.

"Christine M. Pallotta"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2129-21

STYLE OF CAUSE: KULJIT SINGH DHALIWAL v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: JUNE 30, 2022

JUDGMENT AND REASONS: PALLOTTA J.

DATED: SEPTEMBER 27, 2022

APPEARANCES:

Parveer Singh Ghuman FOR THE APPLICANT

Nima Omid FOR THE RESPONDENT

SOLICITORS OF RECORD:

City Law Group LLP FOR THE APPLICANT
Barristers and Solicitors
Surrey, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia