Federal Court  Cour fédérale

**Date: 20240913**

**Docket: IMM-1656-23**

**Citation: 2024 FC 1446**

**Ottawa, Ontario, September 13, 2024**

**PRESENT: Madam Justice Pallotta**

**BETWEEN:**

**LUIGI'S CONCRETE LTD.**

**Applicant**

**and**

**THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] Luigi's Concrete Ltd (LCL) is a small Alberta business that seeks judicial review of a January 13, 2023 notice of final determination (Decision) by the Assistant Deputy Minister (ADM) responsible for the Temporary Foreign Worker Program (TFWP). The ADM concluded that LCL had failed to comply with conditions under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] and imposed sanctions that included a $153,000 monetary penalty and five-year ban from the TFWP.

[2] The Decision relates to a Labour Market Impact Assessment (LMIA) that allowed LCL to hire temporary foreign workers as concrete finishers at a wage of $30/hour. During an unannounced site visit in August 2019, LCL's owner informed an inspector from the Integrity Services Branch of Service Canada that it had lowered the wages of three foreign workers. LCL explained that they did not have the skills to work as concrete finishers. They were being paid $20 per hour as general labourers and LCL had agreed to train them.

[3] In a January 2020 letter, the inspector set out concerns that LCL may not be complying with conditions of the TFWP by paying foreign workers incorrect wages, changing their occupation, and failing to report the changes to Service Canada. The letter asked LCL to justify the discrepancies and outline the actions taken to mitigate them and prevent their re-occurrence.

[4] Following the January 2020 letter, there were various calls and written communications between the inspector and LCL management. In summary, LCL's response to the letter was that it became apparent during the workers' first week at work that they did not have the skills to work as concrete finishers. An immigration consultant suggested LCL could "send them back" and apply for replacements but the workers were extremely upset and did not want to leave Canada. Out of compassion, LCL's owner discussed with the consultant whether the workers could be paid $20/hour until they were trained to work as concrete finishers. The consultant spoke with the workers, they agreed to the new wage, and LCL relied on the consultant's advice that the arrangement was legal.

[5] During one of the calls, the inspector asked if LCL intended to pay the amounts owing due to the $10 discrepancy in the workers' hourly wage. The owner stated that LCL would not, as the immigration consultant was to blame for failing to provide skilled workers. The owner said the workers were treated well—LCL had helped to pay their expenses and provided benefits such as rent-free accommodation, even though it did not have to. When the inspector asked why LCL did not inform Service Canada about the change, the owner replied that the consultant "told him that it was okay".

[6] In February 2022, the inspector issued a notice of preliminary findings (NOPF). The NOPF stated that LCL may have violated subparagraph 209.3(1)(a)(iv) of the *IRPR*, which requires employers to provide foreign workers with employment in the same occupation and at wages that are substantially the same but not less favourable than the offer of employment for which a positive LMIA was issued. The reduced wages paid to the three workers resulted in a shortfall of over $7,500 each. The inspector considered LCL's response to the justification letter and found that LCL's explanations did not amount to justification under the *IRPR*. The inspector further noted that LCL did not inform Service Canada of changes to the workers' wages and occupation, despite a prior compliance review in 2013 where LCL was told to do so.

[7] The NOPF set out the violations and the corresponding sanctions under the *IRPR*, which included a possible five-year ban from the TFWP as well as a monetary penalty of $153,000 calculated in accordance with subsection 209.98 of the *IRPR*. The NOPF stated LCL could make written submissions to provide new information or correct inaccuracies relating to the violations, the facts surrounding the violations, the reasons for the preliminary findings, or the monetary

penalty; LCL was not to provide the same information previously submitted during the course of the inspection.

[8] LCL's lawyers made written submissions in response to the NOPF by letter dated March 17, 2022 (March 2022 Letter). An objective review team considered the March 2022 Letter and decided that it did not provide any new information that could alter the inspector's preliminary findings, noting that LCL did not compensate the three foreign workers who were negatively affected by the violation.

[9] In the Decision issued on January 13, 2023, the ADM concluded that LCL had failed to provide three foreign workers with the same occupation and wages as their offer of employment, contrary to subparagraph 209.3(1)(a)(iv) of the *IRPR*, and that LCL's justification did not meet the legal requirements for justification under the *IRPR*. The Decision noted that LCL did not inform Service Canada of the change in wage even though LCL had been reviewed in April 2013, the same discrepancy was uncovered, and LCL invoked the same reason (worker inexperience) for paying an inferior wage. The ADM found that the March 2022 Letter, which did not provide new information or indicate that the affected workers had been compensated, "had no incidence on the preliminary findings". The ADM imposed sanctions that included a $153,000 penalty and a five-year ban from the TFWP.

[10] LCL asks this Court to set aside the Decision and the sanctions, stating the Decision was both procedurally unfair and unreasonable. Specifically, LCL submits the decision maker: (i) failed to consider evidence, including evidence of additional compensation that was provided or

offered to the workers, as explained in the March 2022 Letter; (ii) failed to consider or analyze the additional compensation in deciding whether LCL's conduct was legally justified under the *IRPR*; and (iii) made a factual error by stating that LCL provided "no new information" and did not compensate the workers, when the March 2022 Letter detailed the factual circumstances that justified the arrangement with the workers, outlined the benefits that LCL provided to them and quantified the value of the benefits, and also offered to provide further compensation to the workers.

[11] The respondent submits the Decision was reasonable and procedurally fair. LCL simply did not comply with the legislated conditions under the TFWP.

[12] Allegations of procedural unfairness 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: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*], citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23, among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[13] The reasonableness standard of review applies when reviewing the merits of the Decision. This is a deferential but robust form of review that considers whether the Decision, including the reasoning process and the outcome, is transparent, intelligible, and justified:

*Vavilov* at paras 13, 99. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[14] Before turning to the main issues, I note that LCL filed two affidavits that include evidence that was not before the decision maker. As a general rule, the evidentiary record on judicial review is restricted to the record that was before the decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19. LCL states that the affidavit evidence relates to the procedural fairness allegations. In my view, the new evidence relates to the merits of the decision and does not assist in identifying any procedural defects so as to fall under an exception to the general rule: *Ibid* at para 20. However, the respondent did not object to the evidence and I have considered it in reaching my decision.

[15] For the reasons below, LCL has not established that the Decision was procedurally unfair or that it was unreasonable.

[16] Regarding procedural fairness, LCL states that the ADM ignored the evidence in the March 2022 Letter, including the economic benefits LCL had provided to the workers and the offer to provide further compensation. LCL states the decision maker also ignored evidence that the workers voluntarily agreed to a lower wage in order to remain in Canada. LCL submits the Decision fails to outline the reasoning for finding there was no justification under the *IRPR*, and the lack of procedural fairness “resulted in a failure of a logical chain of analysis”.

[17] The ADM did not ignore or fail to consider evidence. The Decision explicitly states that the March 2022 Letter was considered, and explains that the letter provided no new information and had no bearing on the investigator's preliminary findings. I will return to this point in the context of the reasonableness analysis, but from a procedural fairness perspective, LCL's submissions were considered and it has not shown that it was denied the right to be heard.

[18] There is no merit to LCL's contention that the Decision fails to outline the reasons for finding there was no justification under the *IRPR*. Both the NOPF and the Decision reproduce the list of circumstances that would justify a breach of conditions under the TFWP, which are enumerated in subsection 209.3(3) of the *IRPR*. LCL's breach was not the result of an enumerated circumstance. The reasons allow LCL to understand why the explanation it offered was not accepted as justification under the *IRPR*.

[19] As the respondent correctly points out, the level of procedural fairness owed to LCL fell at the lower end of the spectrum: *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 at para 73. LCL received letters outlining the investigator's concerns, had direct access to the investigator (including by telephone), and had multiple opportunities to provide information and submissions in writing during the course of the investigation. LCL was aware of the case to meet and it had many opportunities to respond to the investigator's concerns. The process was fair.

[20] LCL submits the Decision was unreasonable because it contains errors of fact and law. The ADM erred in law by failing to consider or analyze whether LCL's conduct was justified

under paragraph 209.3(3)(d) of the *IRPR*, and by failing to consider why the economic benefits that LCL had provided to the workers and its offer to provide further compensation as a "top up" did not provide justification under paragraph 209.3(3)(d). LCL submits the Decision also contains a factual error. The Decision states that the March 2022 Letter provided no new information; however, the March 2022 Letter explained the reasons for paying lower wages to the workers, the economic benefits they received, and the offer to make a further payment.

[21] LCL has not established that the Decision was unreasonable.

[22] Paragraph 209.3(3)(d) of the *IRPR* provides:

| | |
|---|---|
| (3) A failure to comply with any of the conditions set out in subparagraphs (1)(a)(i) to (xiv) and paragraphs (1)(a.1) and (b) is justified if it results from | (3) Le non-respect de l'une des conditions prévues aux sous-alinéas (1)a)(i) à (viii) et à l'alinéa (1)a.1) est justifié s'il découle, selon le cas : |
| […] | […] |
| (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 a disadvantage as a result of the error; | 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 lésé par cette interprétation ou, s'il ne l'a pas indemnisé, il a fait des efforts suffisants pour le faire; |

[23] I agree with the respondent that LCL did not make an error in interpretation. LCL admitted that it changed the foreign workers' occupation and lowered their wage without consulting with Service Canada or obtaining a new LMIA. For this reason alone, the justification described in paragraph 209.3(3)(d) did not apply.

[24] Furthermore, justification based on paragraph 209.3(3)(d) of the *IRPR* requires the employer to have subsequently provided compensation to all affected foreign workers, or made sufficient efforts to do so. In this case, the LMIA specified compensation of $30/hour. LCL's position was that the economic value of benefits voluntarily provided should be counted as compensation, and it never resiled from its position. The inspector calculated the back wages owing for each employee in the NOPF, outlining the sanctions that LCL would face. LCL still refused to pay the back wages owing and insisted that the economic value of benefits voluntarily provided to the workers should be set off against the back wages owing. The offer in the March 2022 Letter was to pay the workers the difference between the calculated back wages and LCL's estimate of the value of the benefits voluntarily provided to the workers. There was never any offer to pay the back wages.

[25] LCL provides no authority for its position that it can count its own estimate of the economic benefits provided to the workers as "compensation" in order to satisfy the condition in paragraph 209.3(3)(d). I am not satisfied that it can. In *Farms v Canada (Employment and Social Development)*, 2017 FC 302 (at paragraph 32) [*Farms*], this Court held 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. LCL states that its good deeds, including an

alternative arrangement that allowed the foreign workers to continue working, benefitted the workers. However, the Court in *Farms* (at paragraph 31) noted that the justification provisions in the *IRPR* must be strictly interpreted, given that Parliament's intention was to prevent abuse of highly vulnerable temporary foreign workers who lack the normal safeguards available to most Canadian workers. Allowing LCL to justify a unilateral reduction of compensation specified under the terms of the LMIA by setting off the economic value of benefits voluntarily provided would circumvent the purpose of the justification provisions under the *IRPR*.

[26] Turning to the alleged factual error, I agree with the respondent that the March 2022 Letter did not address the concerns in the NOPF. Instead, it reiterated the information LCL had provided to the investigator, including that LCL had helped to pay the foreign workers' expenses and provided other benefits, and reasserted LCL's right to set off the value of the economic benefits.

[27] The inspector had explained in the NOPF that LCL provided no evidence that it had fully compensated each worker for the shortfall in wages. The inspector pointed out that when LCL was reviewed in 2013 and the same discrepancy was uncovered, LCL was told that any changes in wages must be reported to Service Canada. The NOPF also noted that LCL had not demonstrated the steps taken to ensure the violations would not reoccur, as requested in the inspector's January 2020 letter. The March 2022 Letter did not address these points.

[28] In summary, the ADM considered the March 2022 Letter and reasonably found that it did not provide any new information. The ADM reasonably determined that LCL's proposed

justification for violating the wage and occupation requirements of the LMIA, which did not change over the course of the inspection, did not fall within the justification provisions of the *IRPR*.

[29] LCL has not established that the Decision was procedurally unfair, and accordingly, this application for judicial review is dismissed.

[30] The parties did not propose a question of importance for certification. In my view, there is no question to certify.

**JUDGMENT IN IMM-1656-23**

**THIS COURT'S JUDGMENT is that:**

1. The application is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-1656-23 |
| **STYLE OF CAUSE:** | LUIGI'S CONCRETE LTD. v THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA |
| **PLACE OF HEARING:** | EDMONTON, ALBERTA |
| **DATE OF HEARING:** | APRIL 8, 2024 |
| **JUDGMENT AND REASONS:** | PALLOTTA J. |
| **DATED:** | SEPTEMBER 13, 2024 |

**APPEARANCES:**

| | |
|---|---|
| Morgan M. Deacon | FOR THE APPLICANT |
| Meena Ahluwalia | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| McAllister LLP<br>Barristers and Solicitors<br>Edmonton, Alberta | FOR THE APPLICANT |
| Attorney General of Canada<br>Calgary, Alberta | FOR THE RESPONDENT |