

Foreign worker wages: Open to negotiation?

LMOs outline required wages but can employers negotiate pay with workers themselves?

BY SERGIO KARAS

Employers hiring foreign workers who do not fit an exemption category under the Immigration Refugee and Protection Act (IRPA), or a treaty such as the North American Free Trade Agreement, must obtain a Labour Market Opinion (LMO) from Service Canada confirming the employment of the foreign worker will not have a negative impact on the labour market.

In each LMO, the wages, benefits and working conditions are stated. Large and sophisticated employers usually have detailed contracts signed by the foreign workers clearly stating a variety of employment matters including salaries and allowances. However, many small businesses employing foreign workers do not seek legal counsel and rely on a verbal agreements.

Service Canada requires the wages offered to a foreign worker to be the same as those offered to Canadian residents and it usually relies on surveys of wages and working conditions for the particular jurisdiction to determine the appropriate salary for a position. But can employers be compelled to pay the wages stated in the LMO or can they pay a different wage?

Employer not liable for difference

In *Koo v. 5220459 Manitoba Inc.*, the Manitoba Court of Queen's Bench held the employer was not liable and refused to direct the employer to pay the difference between the wages stated in the LMO and those agreed to orally with the

foreign worker.

The employer operated a restaurant in Winnipeg and wanted to hire a sushi chef. The employer obtained an LMO for a period of 12 months with a stated salary of \$14.50 per hour. However the employer paid less than that amount to the foreign worker, who was from South Korea, resulting in a difference of \$9,057.06 throughout the period of employment. The foreign worker argued there was no discussion about salary prior to his arrival in Canada, while the employer maintained it had a verbal agreement to pay a salary of \$1,500 for the first month during which the employee's skills would be assessed and thereafter he would be paid a salary commensurate with those skills as demonstrated.

The court preferred the evidence given by the employer and found it difficult to believe the foreign worker would move to Canada from South Korea without some discussion concerning salary prior to the receipt of the LMO.

The foreign worker also argued the provision of the LMO in support of the application for a work permit gave rise to an express or implied contract to pay a wage of \$14.50 per hour, and to not enforce that wage would undermine the integrity of the foreign worker program. He said the payment of a lesser salary was illegal and unconscionable and requested the court follow the principles articulated in the case of *Still v. M.N.R.*

In *Still*, the Federal Court of Appeal ruled where a contract is explicitly or implicitly prohibited by statute, a court may

refuse to grant relief to a party when all the circumstances of the case, including the objects and purposes of the statutory provision, mean it would be contrary to public policy to do so. In response, the employer argued the parties were free to contract a salary and the employer should not be forced to pay the wage stated in the LMO, which was nothing more than a prediction of the salary to be paid.

LMO not a contract: Court

The court held it would be difficult to find the LMO, in itself, created a contract, express or implied, between the employer and the foreign worker, and the LMO was only an expression of opinion by Service Canada. None of the essentials of a contract are present in an LMO: offer, acceptance, mutual consent, consideration and the intention to create legal relations, since the fundamental purpose is to protect Canadian citizens and permanent residents.

It would be impossible for a member of that class to sustain an action against the employer if it had paid the foreign worker a salary greater than that stated in the LMO and it would also be impossible for Service Canada to sustain an action against either party for breach of the terms of the LMO. There was no basis in contract for allowing the foreign worker to recover on the facts of the case, nor was there a duty of care.

The court left open the determination of whether or not an employer is free to disregard the salary set out in the LMO and referred to the sanctions available for misrepresentation under the IRPA. Pay-

ment of a lower wage might make it impossible for the employer to justify a finding of genuineness in a second or later application for a LMO, it added. In any event, the foreign worker could have discussed the proposed salary with the employer before receiving the LMO and, therefore, he could not rely on it to sustain an action for breach of contract.

Although *Koo* appears to exonerate employers from their duty to pay the wages stated in an LMO, it must be noted it emanates from a lower court and should only be taken as a potential indication of how a court may rule in a similar situation. Employers are strongly cautioned to avoid misrepresenting their intention to pay specific wages to foreign workers, as this may give rise to administrative sanctions in future applications and to potential charges under the provisions of the IRPA.

For more information see:

• *Koo v. 5220459 Manitoba Inc.*, 2010 CarswellMan 248 (Man. Q.B.).

• *Still v. Minister of National Revenue*, 1997 CarswellNat 2702 (Fed. C.A.).

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