Federal Court Cour fédérale

Date: 20160209

Docket: IMM-2364-15

Citation: 2016 FC 174

Ottawa, Ontario, February 9, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

TOTO BABIC AND BRADA CONSTRUCTION LTD.

Applicants

and

THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

JUDGMENT AND REASONS

I. Preliminary Matter

[1] As a preliminary matter, a motion by the Respondent to remove the Minister of Citizenship and Immigration as a party to this proceeding was granted since the Respondent is the Minister responsible for the Temporary Foreign Worker Program (TFWP).

II. **Overview**

[2] This is an application for judicial review of a decision dated April 28, 2015 (Decision) made by a Program Officer (Officer) within the TFWP of the Department of Employment and Social Development in which the Applicant seeks to have a negative Labour Market Impact Assessment (LMIA) set aside and the matter remitted to a different officer for redetermination. The TFWP and LMIA are governed by the *Immigration and Refugee Protection Regulations* SOR/2002-227 (Regulations).

[3] The Applicant's main argument is that the Officer did not properly follow the applicable guidelines. This argument is couched in various ways including the decision is unreasonable for failing to comply with the guidelines, the Applicant had legitimate expectations which were breached when the Officer failed to adhere to the guidelines and the Officer considered extrinsic evidence without giving the Applicant a chance to comment upon it. This is also said to have been procedurally unfair to the Applicant.

[4] For the reasons that follow I have determined this application is dismissed.

III. **Background**

[5] On January 16, 2015 the Applicant submitted an application for a positive LMIA under the Temporary Foreign Worker Program in order to fulfill a position he had for a carpenter/welder. The Applicant states he needs a welder and carpenter working at heights outdoors on commercial projects. After advertising the position without success the Applicant, wished to hire a person whom he had found through a friend. That person lives in Bosnia & Herzegovina. The Applicant has confirmed that at the end of the contract work, in 24 months, he

does intend to offer the person a permanent job to support their permanent resident visa application.

[6] The Applicant has obtained at least two construction contracts totalling $4.6 million in revenue. The contracts are in a somewhat specialized area of parking garage and balcony/railing remediation. For that reason the worker needs to have both carpentry and welding skills. The position was categorized as falling into the stream for higher-skilled occupations.

[7] The Applicant advertised for a qualified Canadian applicant over a period of more than 4 weeks in the Toronto Star, Workopolis, the online government Job Bank, Indeed.ca and the Toronto Job Board. Of 50 applicants only 40 were either Canadian citizens or permanent residents. None of them met the requirements of having skills in both carpentry and welding.

[8] The Officer, when reviewing the LMIA, sent questions to the Applicant seeking clarification and explanation of various items over a series of several weeks. The Applicant provided timely answers to the questions. Ultimately, on April 28, 2015, the Officer decided the proposed hiring would have a negative impact on the Canadian labour market and issued a negative opinion for these two reasons (my emphasis):

1. You have not demonstrated sufficient efforts to <u>hire</u> Canadians in the occupation.
2. You have not demonstrated sufficient efforts to <u>train</u> Canadians in the occupation.

[9] On receipt of the negative determination by email on the 28th of April counsel for the Applicant immediately asked for a reconsideration of the Decision. The request for reconsideration was refused by a supervisor of the Officer. The Applicant characterizes that refusal as an error in law saying the Officer’s discretion was fettered when her supervisor telephoned the Applicant’s counsel to say there was a policy not to reconsider decisions.

[10] The Respondent has confirmed that although a negative LMIA was received by the Applicant, he is not precluded from filing a new application with fresh evidence to seek to obtain a different determination. He would, however, have to start the process again, wait for it to be processed and pay another fee. There is no guarantee the next application would be approved.

[11] The Applicant filed this application for judicial review on May 21, 2015.

IV. **Relevant Sections of the Regulations**

[12] Work permits are issued to temporary foreign workers in accordance with Part 11 of the Regulations. Section 196 provides that "a foreign national must not work in Canada unless authorized to do so by a work permit". When an employer wishes to offer work to a foreign national they must first obtain a positive LMIA unless the type of employment falls within certain exemptions. None of the exemptions are applicable in this case.

[13] Division 3 of Part 11 deals with the issuance of work permits. Subsection 203(1) requires an officer to determine, on the basis of an assessment (the LMIA), various matters such as whether the job offer is genuine and, importantly for the purposes of this review, if "the employment of the foreign national is likely to have a neutral or positive effect on the labour market in Canada".

[14] While subsection 203(1) establishes *what* an officer must determine, subsection 203(3) sets out *how* an officer is to make that determination. A number of factors which must be considered in the assessment are enumerated. The Applicant challenges the Decision on the basis that several of these factors having been unreasonably determined. The factors in subsection 203(3) are:

203(3) An assessment provided by the Department of Employment and Social Development with respect to the matters referred to in paragraph (1)(b) shall, unless the employment of the foreign national is unlikely to have a positive or neutral effect on the labour market in Canada as a result of the application of subsection (1.01), be based on the following factors:	203(3) Le ministère de l'Emploi et du Développement social fonde son évaluation relative aux éléments visés à l'alinéa (1)b) sur les facteurs ci-après, sauf dans les cas où le travail de l'étranger n'est pas susceptible d'avoir des effets positifs ou neutres sur le marché du travail canadien en raison de l'application du paragraphe (1.01) :
(a) whether the employment of the foreign national will or is likely to result in direct job creation or job retention for Canadian citizens or permanent residents;	a) le travail de l'étranger entraînera ou est susceptible d'entraîner la création directe ou le maintien d'emplois pour des citoyens canadiens ou des résidents permanents;
(b) whether the employment of the foreign national will or is likely to result in the development or transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;	b) le travail de l'étranger entraînera ou est susceptible d'entraîner le développement ou le transfert de compétences ou de connaissances au profit des citoyens canadiens ou des résidents permanents;
(c) whether the employment of the foreign national is likely to fill a labour shortage;	c) le travail de l'étranger est susceptible de résorber une pénurie de main-d'oeuvre;
(d) whether the wages offered to the foreign national are consistent with the prevailing wage rate for the occupation and whether the working conditions meet generally accepted Canadian standards;	d) le salaire offert à l'étranger correspond aux taux de salaires courants pour cette profession et les conditions de travail qui lui sont offertes satisfont aux normes canadiennes généralement acceptées;
(e) whether the employer will hire or train Canadian citizens or permanent residents or has made, or has agreed to make, reasonable efforts to do so;	e) l'employeur embauchera ou formera des citoyens canadiens ou des résidents permanents, ou a fait ou accepté de faire des efforts raisonnables à cet effet;
(f) whether the employment of the foreign national is likely to adversely affect the settlement	f) le travail de l'étranger est susceptible de nuire au règlement d'un conflit de

of any labour dispute in progress or the employment of any person involved in the dispute; and	travail en cours ou à l'emploi de toute personne touchée par ce conflit;
(g) whether the employer has fulfilled or has made reasonable efforts to fulfill any commitments made, in the context of any assessment that was previously provided under subsection (2), with respect to the matters referred to in paragraphs (a), (b) and (e).	g) l'employeur a respecté ou a fait des efforts raisonnables pour respecter tout engagement pris dans le cadre d'une évaluation précédemment fournie en application du paragraphe (2) relativement aux facteurs visés aux alinéas a), b) et e).

V. **Issues**

[15] The issues identified by the parties are suitably articulated by the Applicant. They are whether I should find that:

1. The Officer's findings were unreasonable because they did not meet the legitimate expectations of the Applicant. Therefore the Decision is not reasonable.
2. The Officer erred in law in failing to reconsider the Decision.
3. The Officer referred to extrinsic evidence without giving the Applicant the right to comment upon it. If so, it is procedurally unfair and the Decision cannot stand.

[16] Although the Applicant also identified as an issue "public law promissory estoppel" it was not really pursued at the hearing. In any event, the arguments made by the Applicant are essentially the same as those falling under the doctrine of legitimate expectations.

VI. **Standard of Review**

[17] The standard of review applicable to the first issue, the Decision reached by the Officer, has previously been determined to be reasonableness, therefore it does not need to be determined

again. (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57 and *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)),* 2015 FC 27 at para 22).

[18] The allegation by the Applicant that there was an error of law for failing to reconsider the Decision is reviewable on a standard of correctness. (*Canada (Minister of Citizenship and Immigration) v Khosa)*, 2009 SCC 12 at para 43).

[19] The allegation of fettering of discretion was made both with respect to the failure to reconsider the Decision and the failure to ask the Applicant to comment upon the evidence which the Applicant says was extrinsic. Fettering discretion could be reviewed on the basis of either reasonableness or correctness in that if a decision resulted from a fettered discretion it is *per se* unreasonable. (*Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 20-24).

VII. **Argument and Analysis**

[20] Overall, the recurring theme put forward by the Applicant is twofold. One is that he followed the guidelines, which are onerous, and he answered all the Officer’s questions. But, the Officer nonetheless chose to issue a negative assessment. In doing so the Officer made unreasonable findings. The other theme is that given the contracts he has secured the Applicant has an immediate need for this skilled worker and the options put forward by the Officer with respect to ways to find a worker would (i) take time and (ii) may not prove successful. At the moment the Applicant is performing the job himself and he wants to expand by adding another person. This theme amounts to a disagreement with the outcome based on the personal needs of the Applicant rather than compliance with the Regulations.

A. *Legitimate expectations*

[21] The Applicant submits there were grounds of refusal which were not found in the guidelines. He says that raises issues of procedural unfairness. This is also the basis upon which the Applicant claims there has been a breach of the doctrine of legitimate expectation. The argument is that the Respondent, having established guidelines to be followed, cannot refuse the application based on factors not specifically found in the guidelines. For example, one of the examples given by the Applicant is that the Officer found the wage rate being offered for the position was too low but, according to the Applicant, it was established in compliance with the guidelines. This will be addressed in more detail later in these reasons.

[22] The Respondent points out that in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 (*Baker*), the doctrine of legitimate expectations was examined and found only to give rise to enhanced procedural fairness rights, not a right to a particular outcome. The Applicant also relies on *Baker*, then relies upon an unnamed, uncited decision by the Supreme Court of Canada, which appears to be *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services),* 2001 SCC 41, to introduce the concept of promissory estoppel, which he says arises on the same considerations and from the same conduct. The Applicant recognizes there must be an unambiguous promise but fails to indicate what that promise is in this case other than, apparently, the publication of the guidelines.

[23] The Applicant is essentially asking the Court to reweigh the evidence considered by the Officer because he disagrees with the conclusions drawn by the Officer. In particular the Applicant is upset that the guidelines, which he describes as “onerous” were, he says, followed and so he had a legitimate expectation that he would receive a positive LMIA.

[24] There is no evidence that any promise of any kind, actual or implied, was made to the Applicant that a positive LMIA would be issued if he followed the guidelines. The Applicant is simply trying to elevate guidelines to the position of law or a binding promise of some sort. Neither is possible. In *Canadian Reformed Church of Cloverdale BC v Canada (Employment and Social Development),* 2015 FC 1075 at paragraph 10, Mr. Justice O'Reilly held that "[g]uidelines can serve as a useful benchmark when interpreting regulatory requirements, but they cannot be treated as binding."

[25] Even if the guidelines were somehow binding or could be said to make a promise, the doctrine of legitimate expectations is a procedural doctrine which does not create substantive rights. (*dela Fuente v Canada (Minister of Citizenship and Immigration),* 2006 FCA 186 at para 19). The proper procedure was followed by both parties with respect to completing the application form and applying the guidelines. While the interpretation of the evidence put forward by the Applicant is not what he would have liked, it was not procedurally unfair. More will be said in this respect when dealing with the third issue (extrinsic evidence) put forward by the Applicant.

[26] It may be that the Applicant has raised the spectre of "legitimate expectations" because in *Frankie's Burgers Lougheed Inc v Canada (Employment and Social Development)*, 2015 FC 27 at paragraph 74 (*Frankie's Burgers*), Chief Justice Crampton mentioned that "employers have a legitimate expectation that they will be afforded an opportunity to respond to any concerns an officer may have". If that is why it was raised, it is important to note that the rest of the sentence is "[may have] regarding their credibility or the authenticity of documentation that they supply in support of their request for a positive LMO." (paragraph 74) (my emphasis) This clearly

supports that the doctrine is one of procedural fairness. No such credibility issues were raised by the Officer.

[27] On the evidence presented and on considering the submissions of the Applicant I find he has not made the case for either the application of the doctrine of legitimate expectations or any form of promissory estoppel.

B. *Is the Decision reasonable?*

[28] Reasonableness is a deferential standard in which the Court must recognize that questions which come before administrative tribunals may not lend themselves to one specific, particular result, but can give rise to a number of possible, reasonable conclusions. If, on a review of the reasons provided, I find they are justified, transparent and intelligible within the context of the decision-making process and the Decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law then it is a reasonable decision. (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 47). In addition, I am mindful that reasons need not contain an explicit finding on each constituent element and if the reasons allow me to understand *why* the decision was made, and permit me to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met. (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para 16).

(1) Was the Officer's discretion fettered?

[29] If the Officer fettered her discretion in arriving at the Decision then the decision is unreasonable. The Applicant alleges that he followed and fulfilled the guidelines but the application was refused "based on concerns that seem to stem from the decision maker's own mind, and are simply unreasonable." The Applicant goes on to state that "this makes for a

system that is nebulous and seemingly utterly random, which simply relies on the opinions of the decision-maker, not on law and the intent of Parliament." The Applicant also submits that the guidelines are "de facto law which if not followed strictly lead to a refusal." The Applicant submits that is a fettering of discretion "on an institutional basis".

[30] This argument is virtually identical to the argument made with respect to legitimate expectations and public promissory estoppel. It is equally devoid of merit.

[31] The Applicant is convinced that he answered all questions satisfactorily and fits entirely within the guidelines. As a result he says he is absolutely entitled to a positive LMIA. In my opinion, the Officer provided cogent reasons for finding the Applicant did not satisfy the guidelines in that he failed to demonstrate sufficient effort to hire or train Canadians for the position in question. The Applicant simply disagrees with the conclusions drawn by the Officer as to what his answers to the Officer's questions mean.

[32] The Respondent says the only relevant factor is found in subsection 203(3)(e) which is whether the employer will hire or train Canadian citizens or has made reasonable efforts to do so. I agree. Those two findings are the basis of the negative decision. If either is sustainable then the Decision is reasonable.

[33] The Officer's job includes, but is not limited to, reviewing the guidelines and determining which factors in subsection 203(3) apply. There is no fettering of her discretion simply because the Officer does not agree with the Applicant. The Applicant may not wish to give deference to the expertise of the Officer in this area. The Applicant certainly has the right to disagree with the Officer. But, the fact that the Officer has applied the guidelines as she has *in and of itself* is not a

fettering of discretion. As long as the application of the guidelines was done reasonably, (discussed below) it is the *exercise* of the Officer's discretion that has occurred, not a fettering of it.

(2) Did the Officer reasonably apply the guidelines?

(a) *Is There a Labour Shortage – ss. 203(3)(c)?*

(i) Previous sub-contractor

[34] In order to determine that the combined skill set is available in the Canadian labour market, the Officer considered the fact that the Applicant had previously hired a subcontractor who employed a person with the combined skill set of a carpenter/welder.

[35] The Applicant says the past provision of such an employee is not an indication that in the future one will be available. He points to the fact that the subcontractor has another job and will not make the employee available at this time as proving there is a labour shortage. The Applicant submits that the fact that of 40 applicants for the position he advertised the fact that none possessed the combined skill set of a carpenter/welder "makes it clear that there is [a] labour shortage".

[36] The Respondent says the presence or lack of a labour shortage was not determinative of the Decision. I agree it was not determinative, however, it was a factor considered by the Officer as the Applicant relied on it to prove his case. Therefore, it merits consideration.

[37] The Respondent submits it is not quite as simple saying that 'no one who applied possessed the skills'. Rather, the Respondent points out that the Officer took issue with the advertising of the position and the wages offered, ultimately finding both were insufficient to

attract Canadian workers. The Respondent says it is not a labour shortage issue, it is failing to seek out appropriately qualified candidates that is the issue.

[38] Currently, the Applicant is doing the necessary welding work on his jobs. I note that other than advertising the position (discussed below) there is no evidence the Applicant offered to train any of his existing employees, thirteen of whom are carpenters, to give them what he refers to as the minimal, basic welding skills required. There is also no evidence that the Applicant made general inquiries in the industry or even of the previous subcontractor as to whether there were Canadians available to fill the position. The Applicant has relied solely on the lack of response to the job advertisements to show there is a labour shortage.

(ii) Advertised welding skills required

[39] The Respondent states the Officer noted inconsistencies between the advertised skill requirements and the actual requirements for the position. In two of the Applicant's ads a degree in welding was listed as a requirement. In another it was not so listed. In response to questions posed by the Officer regarding the required welding skills, the Applicant at various times said "training is required but not certification" and "basic competency in welding is required so formal training ensures that is possessed". However, the Applicant also said "to finish the railings a minimal but necessary amount of welding is needed".

[40] While there was discussion at the hearing as to the difference between requiring a degree and having technical training, in my opinion the Officer reasonably found that by calling for a degree in welding in some of the ads but not in others, there was a real risk that a Canadian worker who only saw the ad calling for a degree in welding would not apply with the result that a foreign worker might be hired despite the existence of qualified Canadian candidates. Given the

discrepancy in the advertisements, the Applicant has failed to satisfactorily provide evidence that the lack of response by qualified workers to the position shows there is a labour shortage.

[41] The Officer analysed the qualifications of the 40 applicants who possessed either carpentry or welding experience. She found that 23 had welding skills, 11 possessed carpentry skills, and 6 had neither. The Officer concluded the ads were more appealing to welders than carpenters, even though the job title was Carpenter (Welder). Again, while the Applicant may disagree with that finding, it is reasonable based on the evidence and is within the range of possible, acceptable outcomes when considering the evidence. While this alone may not be determinative, when combined with other factors, such as the wage rate, it is reasonable for the Officer to have concluded there was insufficient effort made by the Applicant to hire Canadians.

(iii) Recruitment suggestions by the Officer

[42] I do not wish to leave this area without commenting upon the umbrage taken by the Applicant to various suggestions made by the Officer as to other avenues of recruitment that the employer might consider exploring. This included considering the Canada-Ontario job fund program to help his existing employees acquire the additional skills, offering on-the-job training to existing employees or new hires, contacting a union to look for qualified candidates since the union deals with high-rise construction, and raising the wage offering. The Applicant once again says he followed the recruitment efforts delineated by the guidelines and that these suggestions seem to be pulled “out of thin air” as “they are certainly not found in law or in the guidelines as to where else the employer could recruit”, concluding with “this illustrates the nature of the process as a *moving target*.” (original emphasis)

[43] I would draw the applicant's attention to page 169 of the application record under the heading "Recruitment, Retention and Training Activities" where it specifically states "Employers are encouraged to use *innovative strategies and activities* in addition to activities such as" (my emphasis). It then lists 13 examples of ways to actively try to hire Canadians. The first example is "increase wages offered", the eighth example is "partner with unions/industry associations to identify potential candidates", and the last bullet is "on-the-job training". Conducting modified or ongoing advertising or offering an apprenticeship are also listed as suggestions. In other words, contrary to the repeated assertions by the Applicant that he complied with the guidelines and therefore is entitled to a positive LMIA, it appears he simply may not have read the guidelines carefully enough.

(b) *Was the wage offered consistent with the prevailing rate - ss. 203(3)(d)?*

[44] The Officer determined that the employer did not offer enough when he set the wage rate for a carpenter who was also a welder. The Applicant says this is unfair and he met the wage guideline. He says he exceeded it by offering $25 per hour.

[45] To that end, the Applicant says he looked at the guideline-posted median wage rate for carpenters in Toronto, which was $22 per hour, and the median wage rate for welders which was $21.53 per hour. He then offered $25 per hour and said it is "well above what you request in your guidelines". This misses the point that simply averaging the wage rates of each individual trade and then increasing that amount slightly does not necessarily take into account whether the resulting amount is an appropriate wage rate for someone with the combination of skills the Applicant seeks. There is no evidence as to the hourly rate paid to the employee of the previous

subcontractor. That might have been useful information for the Applicant to submit to the Officer.

[46] The Officer noted the Applicant had indicated the TFW would work largely by himself and therefore two years' experience was required. Of the 13 carpenters the Applicant currently employed none had welding skills and the pay ranged from $19-$30 per hour. According to the Applicant a Carpenter was paid $25 per hour after "a year or two" if they were good. The Officer fairly noted this was the same rate being offered to the TFW and so there was no premium paid for the additional required skills of some welding experience. It was, on this basis, reasonably open to the Officer to find as she did that "the wage offering was insufficient to attract a qualified Canadian/PR to apply".

(3) Conclusion

[47] It is important to remember that the only reasons given by the Officer for issuing a negative LMIA are those found in subsection 203(3)(e):

> (e) whether the employer will hire or train Canadian citizens or permanent residence or has made, or has agreed to make, reasonable efforts to do so;

[48] While the Applicant said the lack of response to his ads showed there is a labour shortage and a reasonable wage was being offered, the Officer identified at least two viable reasons to the contrary: (i) the inconsistent advertising with respect to skills failed to attract the right calibre of person and (ii) the wage rate was not high enough for those with the specialized combination of skills being sought. The Officer also reasonably took notice of the fact that the Applicant complied with the bare minimum by way of advertisements but took no steps, innovative or otherwise, to actively try to hire Canadians.

[49] I find the reasons given by the Officer show why she made the findings she did with respect to both labour shortage and wage rates, which in turn led to the finding that the Applicant made insufficient effort to hire Canadians. As such they are transparent and intelligible as well as justified in that they fall within the range of possible, acceptable outcomes. They are clearly defensible on the facts and also on the law as articulated in both in subsections 203(3)(c) and (d) of the regulations as well as (e).

[50] Given this finding it is unnecessary to look at the Officer's other finding that the Applicant has made insufficient efforts to train Canadians. I will however address the other two issues raised by the Applicant being the Officer's failure to re-consider the Decision and that extrinsic evidence was consulted by the Officer.

C. *Was the failure to reconsider the decision an error in law?*

[51] By letter dated April 28, 2015 faxed from counsel for the Applicant to the Officer the Applicant asked for a reconsideration of the Decision saying the Officer acted well beyond her jurisdiction and that it appears the process was delayed by a month to enable the Officer to find reasons to refuse the application.

[52] The thrust of the grounds for seeking reconsideration was there had been improper behaviour by the Officer (lack of jurisdiction, imposing requirements not imposed by the legislation or in the guidelines, delay) and it was coupled with a warning that the Applicant would seek costs in this Court. The letter also imposed a deadline of 10 days to issue the LMIA prior to taking action in court. The letter provides comments on each of the 7 reasons given by the Officer, purporting to refute each one and complaining that none of the suggestions made by the Officer (such as offering on the job training to his existing employees or raising the wage

offered etc.) address the Applicant's "real and immediate need". It is clear from both the tone and content of the reconsideration request that the Applicant fundamentally disagrees with the conclusions drawn by the Officer.

[53] The Applicant relies upon jurisprudence from the Court of Appeal in *Canada (Citizenship and Immigration) v Kurukkal,* 2010 FCA 230 (*Kurukkal*) to say that the Officer was not *functus officio* and the reconsideration request should have been considered. The evidence in the record is that the decision not to reconsider the Decision was made by a different person who is identified as being a Supervisor. According to the FSW Notes to File, a telephone call took place on May 14, 2015 between a supervisor, not the Officer, and counsel for the Applicant. The purpose of the call was "to advise that there is no re-consideration nor appeal process in place, for a negative LMIA decision." The Applicant alleges this was an unfair fettering of discretion as there was not even a decision not to reconsider.

[54] I do not accept that premise. I note no new evidence was submitted by the Applicant, he merely repeated the original submissions made for each of the factors identified in the reasons. That alone is determinative of this issue. The Applicant acknowledges he did not submit any new evidence but says he raised a new issue, which was that "the decision was contrary to law, unreasonable and unclear". As I have found that the Decision was not contrary to law and was reasonable and clear, it follows that the failure to reconsider was not an error in law on that basis.

[55] Equally important is the fact that the refusal to reconsider was a discrete decision. It even involved a different decision-maker −the supervisor. The proper course of action for the Applicant to have taken to challenge that decision was to seek leave for judicial review of it. The Notice of Application under consideration here only seeks review of the April 28, 2015

decision. It did not deal with the May 14, 2015 decision. A separate application could have been brought for review of that decision. Given the failure to include the May 14, 2015 decision in the notice of application, there is no jurisdiction to review it within this application.

D. *Should the Applicant have been asked to comment on the "extrinsic evidence"?*

[56] Although the Applicant alleges that the Officer considered information found on seven external websites and did not give the Applicant an opportunity to comment on them, he conceded at the hearing that the Decision did not turn on that information even though the Officer clearly did look at them. As result, it is not necessary to decide this issue since it would have no impact on the Decision.

VIII. **Determination**

[57] For all of the foregoing reasons it is determined that this application for judicial review is dismissed.

[58] There is no serious question of general importance for determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to be certified.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2364-15
STYLE OF CAUSE:	TOTO BABIC AND BRADA CONSTRUCTION LTD. v THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 12, 2016
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	FEBRUARY 9, 2016

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