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Boxing with Kid Gloves: Why Temporary Foreign Workers must be Treated Differently than Canadian Employees

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About the Authors

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Reis has presented position papers before the Minister of Citizenship and Immigration, co-authored Manitoba Bar Association and HRMAM responses to proposed immigration changes, and has appeared before House of Commons and Senate Committees on immigration legislation. He has written over 100 articles and papers on immigration law that have appeared in human resource, professional services, construction, legal and ethnic publications.

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I. Introduction

Temporary foreign workers (TFWs) are foreign nationals employed in Canada who are neither Canadian citizens nor Canadian permanent residents. As employees, most people believe that TFWs are entitled to be treated the same as Canadian citizens and Canadian permanent residents. While this is generally the case, in some situations, TFWs may be entitled to better treatment than their Canadian citizen and Canadian permanent resident co-workers. This paper will cover the different rules that apply to the treatment of TFWs as compared with Canadian citizen/permanent resident employees.

II. What types of foreign workers are in Canada?

In Canada, there are two types of TFWs:

1. foreign nationals who come to work in Canada after an employer applies for and receives positive Labour Market Impact Assessment ("LMIA"); and
2. foreign nationals who come to work under Canada's International Mobility Program.

Under the LMIA process, an employer must first apply for permission to hire a TFW. Typically, this process requires the employer to actively recruit Canadians or Canadian permanent residents before turning to a TFW[1]. Once an employer receives approval to hire a TFW – known as a positive LMIA - the foreign national can then apply for a work permit to work in Canada as a TFW.

For TFWs covered by the International Mobility Program, an employer typically does not have to establish that they cannot find qualified Canadians or Canadian permanent residents to fill the position in Canada. For the most part, foreign nationals who enter Canada under the International Mobility Program are individuals coming under arrangements where reciprocal employment for Canadian citizens is available abroad - typically by way of treaty[2].

Foreign nationals who can come to Canada under the International Mobility Program include intra--company transfers (employees transferring from a foreign multinational to a Canadian branch or subsidiary), professionals and technicians under free trade agreements, and other foreign nationals covered by bilateral or multilateral agreements.

[1] See page 1 of Overhauling the Temporary Foreign Worker Program
[2] See page 1 of Overhauling the Temporary Foreign Worker Program

III. Where can an employer find its obligations to TFWs under the law?

The first place an employer should look at to determine its obligations under the law is Canada's *Immigration and Refugee Protection Act*[3] and the *Immigration and Refugee Protection Regulations*[4]. In Manitoba, employers must also be aware of their obligations under *The Worker Recruitment and Protection Act*[5]. Both of these acts are important as they have specific provisions dealing with TFW's and the obligations of employers to these types of employees.

While most people believe that rules relating to TFWs are contained entirely in the *Immigration and Refugee Protection Act* and *The Worker Recruitment and Protection Act*, there have been more and more decisions coming out in labour, employment, and human rights law dealing specifically with how TFWs should be treated differently than domestic Canadian employees. As a result, employers must be aware of these cases as well.

IV. Why is it important to be extra vigilant when dealing with TFWs?

While it is important to ensure that an employer complies with all relevant labour, employment and human rights laws in connection with all the employees, violating these and other laws when dealing with TFWs can bring additional risks and liabilities.

As will be seen in this paper, a failure to understand how TFWs should be treated can result in reputational, financial, and penal risks to employers.

A. Why violations of employment, labour and human rights laws in connection with TFWs may be easier for government to spot?

Under new rules pertaining to LMIAs, the federal government has set a target to audit 25% of employees who use this program[6]. This audit (officially known as an employer compliance review) can result in an employer being banned from hiring temporary foreign workers in the future and also can result in the employer's name being published on an internet based blacklist.

While these are the direct results of an employer compliance review, these reviews also run the risk of uncovering employment, labour and human rights violations that would not normally be uncovered at a work place without TFWs as the power of the federal government to launch an employer compliance review only exists at workplaces where an LMIA was filed and approved.

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[3] *Immigration and Refugee Protection Act*, S.C. 2001, c.27
[4] *Immigration and Refugee Protection Regulations*, SOR/2002-227
[5] *The Worker Recruitment and Protection Act*, C.C.S.M. c.W197
[6] See page 25 of Overhauling the Temporary Foreign Worker Program

In addition, the federal government will also be introducing rules that will compel banks and payroll companies to provide documents to help government inspectors verify that employers are complying with rules of the TFW program[7]. As a result, the possibility of finding further violations through these investigations will be present.

Also, the federal government has introduced a new complaints website[8] and confidential tip lines[9] which will allow the public, competitors, and disgruntled employees from reporting potential violations of immigration law to the government for investigation.

Finally, in Manitoba, Employment Standards has a dedicated unit which they use to investigate employers who must comply with *The Worker Recruitment and Protection Act*. Employers not subject to *The Worker Recruitment and Protection Act* would not be investigated under this Act.

B. What penalties could employers face for violating laws pertaining to the treatment of TFWs?

With respect to government penalties, in addition to appearing on a publicly available blacklist[10] and being banned from hiring temporary foreign workers in the future, the federal government has signaled that they will be looking at prosecuting employers under existing sections of the *Immigration and Refugee Protection Act* relating to misrepresentation[11]. If found guilty of a misrepresentation employers face both fines and possible jail time[12].

Finally, just last month, the federal government released a discussion paper outlining potential new fines on employers who break the rules of the TFW program[13]. This will compound the risk to employers who do not comply with the law.

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[7] See page 17 of Overhauling the Temporary Foreign Worker Program

[8] Service Canada's on-line fraud website can be found at: www.servicecanada.gc.ca/eng/about/integrity/online.shtml

[9] Service Canada's Confidential Tip Line is 1-866-602-9448

[10] Service Canada's Blacklist can be found here: www.esdc.gc.ca/eng/jobs/foreign_workers/employers_revoked.shtml while Citizenship and Immigration Canada's Blacklist can be found here: www.cic.gc.ca/english/work/list.asp

[11] See page 20 of Overhauling the Temporary Foreign Worker Program

[12] See page 20 of Overhauling the Temporary Foreign Worker Program

[13] Please see the Discussion paper: Regulatory proposals to enhance the Temporary Foreign Worker Program and the International Mobility Program compliance framework. Amongst other things, the discussion paper has suggested a framework for a system of "administrative monetary penalties" (in other words, fines) and also a system of graduated penalties ranging from warning letters to administrative monetary penalties and fines. The discussion paper also suggests changing the lengths of bans imposed on employers to better reflect the offence. Depending on the violation bans of 1, 2, 5 or 10 years may be imposed.

V. Employer obligations under the Immigration and Refugee Protection Act

The main employer obligations under the *Immigration and Refugee Protection Regulations* are the known as the "genuineness" test[14] and "substantially the same" test[15].

A. The "Substantially the Same" Test

Under the substantially the same test, an employer will be prohibited from hiring temporary foreign workers if it is found that one or more of the following has occurred in the past six years:

1. The employer did not provide substantially the same wages to all TFWs employed in the last six years;
2. The employer did not provide substantially the same working conditions to all TFWs employed in the last six years;
3. The employer changed the occupation in which a TFW had received approval to work;
4. The employer paid any TFW employed in the last six years less than what was originally offered; and
5. The employer provided working conditions that were less favorable than what was originally offered.

The biggest question when looking at the substantially the same test is whether changes to benefit plans, changes to employment contracts, and even changes to collective agreements would result in wages are working conditions not being substantially the same. For the most part, it would be easy to determine whether a change in a TFWs terms and conditions of employment would be "less favorable". However, when wages or benefits are increased, the question is whether the increase is so high as to make the change more than what is "substantially the same".

If an employer violates the "substantially the same" test, the employer can justify the violation under the *Immigration and Refugee Protection Regulations* section 203(1.1) in the following situations:

1. A change in federal or provincial law;
2. A change to the provisions of the collective agreement;
3. A dramatic change in economic conditions that directly affected the business but were not directed disproportionately at TFWs;
4. A good faith error that was subsequently corrected;

[14] *The Immigration and Refugee Protection Regulation* section 200(1)(c)(ii.1)
[15] *The Immigration and Refugee Protection Regulation* section 200(1)(c)(ii.1)(B)(I)

5. An unintentional accounting and administrative error that was subsequently corrected; and
6. Force majeure.

B. The "Genuineness" Test

Under section 200(5)(d) of the *Immigration and Refugee Protection Regulations*, an employer must show they are in past compliance with any "federal or provincial laws that regulate employment or the recruiting of employees" in the province in which it is intended that the TFW work. The importance of this section is the requirement that an employer of the TFW comply with laws that "regulate employment". By making this a requirement, the federal government essentially has given itself the power to refuse to allow an employer to hire a TFW if an employer has violated any federal or provincial employment laws.

The question of which particular provincial violations could result in an employer failing the "genuineness" test is not clear. When this rule was first introduced in 2011 it was accompanied by the release of an operational bulletin that indicated that the federal government was working on creating a list with provincial governments to more clearly define what violations of provincial law would be serious enough to merit a finding of a violation of the genuineness test[16]. Unfortunately, no such list has been agreed to between the federal government and the provinces.

This uncertainty, plus the fact that there is no reasonable justification defense available for a violation of the "genuineness" test, makes it that much more important for employers to be aware of provincial rules, regulations and case law that may affect the employment of TFWs.

VI. Employer Obligations under The Worker Recruitment and Protection Act

For employers that are employing TFWs in Manitoba, attention should be paid as to whether it is necessary to comply with the requirements of *The Worker Recruitment and Protection Act*.

Under *The Worker Recruitment and Protection Act*, employers that hire individuals that fall within the definition of "foreign workers" under the act are subject to the foreign worker provisions of that act. However, not all TFWs under the *Immigration and Refugee Protection Act* are "foreign workers" under *The Worker Recruitment and Protection Act* [17].

[16] See section 3.3.4 of Operational Bulletin 275-C from April 1, 2011
[17] See Hiring Foreign Workers: When WRAPA Can Be Avoided by R. Reis Pagtakhan, HRMatters, Spring 2012

If an employer is not required to register under *The Worker Recruitment and Protection Act* it is strongly advised not to. As a general rule, if an LMIA is required before hiring a TFW, registration under *The Worker Recruitment and Protection Act* is necessary. If a TFW qualifies for the International Mobility Program, registration under *The Worker Recruitment and Protection Act* is likely not needed and the provisions that regulate an employer under *The Worker Recruitment and Protection Act* do not apply.

In situations where *The Worker Recruitment and Protection Act* does apply, employers not only have to be aware of their obligations under this act but also must be aware of differences between *The Worker Recruitment and Protection Act* and the *Immigration and Refugee Protection Act* rules as they are sometimes contradictory.

Under *The Worker Recruitment and Protection Act*, an employer cannot recover from a foreign worker any cost associated in recruiting that worker either directly or indirectly[18]. The only exception to this is that an employer can sue to recover its "reasonable costs of recruiting" if the worker fails to report for work or, having reported, acts in a manner that constitutes willful misconduct, disobedience or willful neglect of duty, is violent in the workplace, is dishonest in the course of employment, or fails to complete substantially all of his or her term with the employer[19].

While the above provision is not inconsistent with the *Immigration and Refugee Protection Act*, section 17 of *The Worker Recruitment and Protection Act* may be. Under this section, an employer cannot reduce the wages of worker, or reduce or eliminate any other benefit or term or condition of a foreign workers employment that the employer undertook to provide as a result of participating in the recruitment of foreign worker.

Where this section of *The Worker Recruitment and Protection Act* may be inconsistent with the *Immigration and Refugee Protection Act*, is that the *Immigration and Refugee Protection Act* can allow for a reduction in wages or benefits if justified for reasons enumerated in the *Immigration and Refugee Protection Act*. However, under *The Worker Recruitment and Protection Act* there is no justification defense. Because violations of provincial laws that regulate employment, such as *The Worker Recruitment and Protection Act*, are potential violations of the "genuineness" test under the *Immigration and Refugee Protection Act*, it is possible that the reasonable justification defenses available under the *Immigration and Refugee Protection Act* are not actually available to Manitoba employers who must comply with *The Worker Recruitment and Protection Act*.

[18] See section 16(1) of *The Worker Recruitment and Protection Act*
[19] See section 16(2) of *The Worker Recruitment and Protection Act*

VII. Application of Non-Immigration Legislation in the Common Law

A. Interpreting the Standards of Employment and the Responsibility of the Employer

Strictly speaking, foreign workers are entitled to the same rights and privileges as Canadian resident employees. This includes overtime, vacation pay, holiday pay, maternity leave, parental leave, reasonable notice of termination, and all other rights as set out in the *Canada Labour Code* (R.S.C., 1985 c. L-2), and related legislation[20]. In theory, this would mean that no separate guidelines or considerations for TFWs are necessary as all employees are the same in the eyes of the law.

The way the same standards and rights may apply to temporary foreign workers can raise distinct and novel concerns that employers must be aware of in order to minimize the costs and legal exposure that may result. For instance, what is "reasonable notice" to a Canadian or permanent resident employee may not be "reasonable notice" to a TFW. For example, where a TFW holds an employer-specific work permit (a work permit that does not allow the TFW to work for another employer), an employer may be subject to a much higher standard of scrutiny when terminating or dismissing that employee.

1. Vulnerability of the Worker and Knowledge of Employer

An employee is in a position of vulnerability as a TFW in a number of respects[21]. TFWs often do not have the ability to move freely from one job to another, because their status in Canada is often linked to the job that brought them to Canada[22]. As a result, TFWs may be reluctant to bring claims or raise concerns about the workplace environment.

The employer is presumed to be aware of the vulnerability of TFWs and to reflect that awareness in the conduct of the employment relationship. The inequality of the bargaining position of a TFW is recognized in the approach of courts and tribunals towards issues of the imposition of job requirements, the keeping of records by employers, termination, as well as costs ordered in lieu of notice. As a result, an employer must be aware of and to take steps to avoid taking advantage of or being perceived to take advantage of this vulnerability.

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[20] Each province has an *Employment Standards Act* (in Manitoba, C.C.S.M. c. E110) that sets out a number of minimum standards that apply to all employees, including the Crown and agricultural workers. See also: Susan J. Martyn, "Foreign Worker Issues for Employment Lawyers", Employment Law Conference 2014 – Paper 1.1

[21] Lee v. ScotiaCare Homecare & Caregivers Inc, 2014 NSLB 53 (CanLII); this has also been recognized in a number of other cases, including Re 639299 Alberta Ltd. (c.o.b. Bistro India) [2013] A.E.S.U.D. No. 5 (Alberta Employment Standards Umpire) ("*Bistro India"*)

[22] *Ibid*

2. *Employment Contract*

Immigration laws in Canada impose a number of requirements on employers, including the need for the work provided to the TFW to be the same or substantially the same to that which was advertised and contained in the LMIA and corresponding work permit. This factor also applies to any subsequent changes or amendments to the employment contract. As discussed above, to the extent that such a change or offer could be considered to offer new terms of employment, or any unilateral changes to the job description for a TFW, the employer and TFW may both face consequences under immigration law. This may include the need for a new LMIA, and a change in work permit in addition to potential law suits for constructive dismissal should the TFW decline.

In addition, employers must exercise caution in relying on any agreement with a TFW with respect to a term of employment. Boards and Tribunals have recognized the inequality of bargaining power in not enforcing alleged agreements unless it is very clear that the employee knew precisely what was being agreed to and was not being taken advantage of[23]. For example, a verbal agreement between the employer and a TFW to work overtime without overtime pay will be presumptively problematic. The employer will bear this burden and the Board will presume, in the absence of convincing evidence, that no such contract or agreement exists. Even if an amendment is in writing, if it purports to "water down" or detract from the rights of a TFW in any way, it is not likely to be upheld.

3. *Job Requirements*

It has been recognized that a proving a direct threat from an employer may not be required to demonstrate that an employee feels obliged to take shifts, or accept terms under certain circumstances. For TFWs on an employer-specific work permit, refusing to do something "required" by the employer puts them more at risk than for the loss of employment. This represents significant bargaining power in the hands of employers. In the context of employment standards legislation, this would be sufficient to satisfy the test of being "required" to do something as opposed to doing it purely voluntarily. As a result, employers have the corresponding responsibility to ensure that all expectations and rights of employees are clearly defined and understood.

In a recent case, the issue arose with respect to an employer's legal obligations arising out of hours worked by a TFW. In addition to other issues, the employee felt that she did not have ability to refuse shifts (despite not being paid overtime) without a real risk of being fired[24]. The

[23] *Ibid,* at para. 9; see also Bistro India, at paras. 44-45.
[24] *Ibid,* at para. 30-31.

employer had argued that the employee was not required to work the extra hours and had therefore "volunteered" freely to do work those hours.

The case law supports a finding that an employer can be found constructively to have "required" an employee to do something, such as work overtime[25], and thus run afoul of certain labour codes and standards. This is likely to be the case regardless of whether there has been a direct request, order or threat actually made by an employer. It is recognized that on account of the particularly vulnerable status of a TFW that the necessary employer compulsion can be "gleaned from conversations" with the employer, coworkers, office staff, as well as an employee's own general sense of his or her status with the employer[26].

The take away message is that there is an increasing responsibility on employers with respect to defining the terms and conditions of employment as well as for the nature of the workplace environment generally where a temporary foreign worker is involved. Employers would be well advised to structure employment contracts and policies that clearly define the expectations and limits on the job description and requirements where TFWs are involved. If there are any changes to the job requirements that are "anticipated" (given the nature of the work or industry) these should be made express and reflected in job requirements.

To address any adverse presumption to the contrary, employment documents should be clear that job requirements and expectations are not subject to change other than in writing, and possibly in consultation with an immigration officer. This is a prudent course of action with respect to inadvertently offending any immigration laws in the process. In addition, such policies should be clearly communicated, evidenced in writing and additional effort should be made to ensure it is properly understood.

4. Termination

The employer retains the right to dismiss an employee, including a TFW, for cause. Considerations of the vulnerability generally and circumstances specifically of TFWs are relevant insofar as they may work additional hardships in certain aspects of the employment relationship. An employer must be particularly mindful of these concerns in reaching the decision to terminate employment.

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[25] In Russell v Consolidated Food Corporation of Canada Ltd., c.o.b. Electrolux Canada LST No. 374, the employee worked a number of additional hours and claimed to be entitled to overtime because she could not complete the work that was required of her by the employer during regular hours.

[26] This was the case in Lee. The Nova Scotia Labour Board found this to be sufficient to satisfy the test of the overtime being "required".

There is little case law regarding the legal entitlements of terminated TFWs[27]. This is hardly surprising. The loss of a job and income is not conducive to commencing legal actions. Many workers abandon legal claims and return to their home countries. The result is that these concerns are often borne out as considerations properly before the court when deciding whether or not termination was for cause. From an employer's perspective this leaves an uncomfortable amount open to interpretation, especially when following generally accepted employment standards and rules may nevertheless result in additional costs for TFWs. Nevertheless, there are some practice considerations that can be taken from the limited authority available.

5. Notice

An employer may terminate an employee, including a TFW, for cause, with notice, or with compensation in lieu of notice. A TFW's immigration status is properly considered when assessing the notice period required on termination of employment, particularly so where the employee holds an employer or location-specific work permit. There are a number of reasons for this.

In the leading case on TFWs and severance[28], the court took notice of the fact that the employee's immigration status in Canada was tied specifically to the employer. This set of circumstances was "almost akin to the situation where an employee is dismissed in a one-employer town". The concern is that an employer will generally be aware of this and may take advantage of it in holding an employee to unfair standards in the workplace or to secure more favourable terms in the employment arrangement. As a result, a longer notice period was required to take account of this unique vulnerability. The court awarded the employee 12 months' pay in lieu of notice despite the fact that she had only been employed with the company for a total of 6 years and had been terminated for cause, allegedly due to insubordinate behavior.

An employer may be responsible for other costs in these circumstances in addition to those required by virtue of a longer notice requirement for TFWs. There is potential for costs to be ordered for a TFW to obtain a new work permit, return travel expenses, and in one case for retaining immigration counsel[29]. Dismissal must be *bona fide* and the reasons for the dismissal ought to be enumerated as clearly as possible prior to the dismissal. Ideally the employer should have workplace policies that clearly delineate those situations (and accompanying reasons) that will result in termination of employment. In any event, an employer of a TFW must be aware of the potential legal exposure for the wages, in lieu of notice or otherwise, that would have been paid until the end of the work permit.

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[27] *Martyn,* at note 1.
[28] Nishina v Azuma Foods (Canada) Co. Ltd., BCSC 2010 502 ("*Nishina"*)
[29] Major v Phillips Electronics Ltd., 2004 BCSC 438, aff'd 2005 BCCA 1770; while the legal expenses ordered were ultimately overturned on appeal, this was only because the parties had previously explicitly agreed that the employee would be responsible for all immigration-related expenses.

6. *Fiduciary Duty and Implied Duty of Good Faith*

The "fiduciary" concept operates by imposing onerous duties upon those parties that possess active or effective power over the interest of others by virtue or nature of their association. The range of potential fiduciary relations remains open and is not properly subjected to preconceived or artificial limits[30]. Any additional duties owed by a fiduciary employer to a TFW are in addition to the typical duties owed by an employer to an employee.

In 2012, the British Columbia Superior Court decided to certify the first class action case in Canada to address the claims of TFWs who contend a Canadian employer is liable for breaches of obligations or duties relating to their employment in Canada[31]. In addition to a number of other allegations, it was alleged that at least one prior TFW had been terminated shortly after filing a complaint with the Employment Standards Branch. The argument raised was that TFWs were in a vulnerable position given their employment and immigration status and the employers took advantage of that status for their own benefit by ignoring various contractual terms on a systemic basis. It was alleged that a fiduciary duty was owed by the employers to the TFWs, and that the employer had been unjustly enriched by the failing to pay the workers adequately. While a settlement was ultimately reached and approved in 2013, the fact that certification was approved means these are real issues for an employer of TFWs.

The determination of whether an employer has a fiduciary duty towards a TFW is determined on an individual basis. Relevant factors have included the employer's knowledge of the specifics of the TFWs work permit, particularly where work-related and physical mobility is severely restricted under its terms.

In the *Mustaji*[32] case, where a fiduciary duty was found to exist, the TFW had a particular vulnerability which gave significant power and discretion to the employer over her legal and practical interests. The employer had essentially "taken over her affairs" and exercised complete control over her immigration status. It was accepted that the TFW had a "reasonable expectation", as a result, that in all of the circumstances the employer would act in her best interests in respect of the matters in issue[33]. The significance of a finding of a breach of fiduciary duty is that it opens the employer to be found liable for punitive damages far in excess of compensating an employee for wages.

In cases where a fiduciary duty cannot be sustained to increase the duty and compensation payable by an employer, it is also possible for an employee to assert a breach of the duty of good

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[30] Leonard I. Rotman, "Fiduciary Law" by Rotman, 2005, Thompson Carswell, at page 244 and 286.
[31] Dominguez v Northland Properties Corporation, 2012 BCSC 328 (CanLII) ("*Dominguez"*)
[32] Mustaji v Tjin, 1996 CanLII 1907 (BCCA) ("*Mustaji"*)
[33] *Ibid,* citing *Mustaji v Tjin,* [1995] B.C.J. No. 39 (BCSC), at para. 26.

faith and fair dealing per the contract of employment[34]. This is a term that is implied into the contract itself. Where an employer knows that an employee's immigration status makes him or her particularly vulnerable and can be seen to use this in a way that creates pressure to accept less favourable shifts, wages, or terms of employment generally, the court may order further costs against the employer.

A duty of good faith can be considered within the context of an employment relationship and can be implied with a view to securing the performance of the terms of a contract[35]. The content of the duty of good faith could include taking active measures to ensure that are employees are not required or permitted to work overtime or that overtime be paid for whether it was approved in advance or not[36]. Clear and cogent policies with respect to overtime along with clearly defined expectations for employees and TFWs, consistently applied, would go a long way to counter findings of bad faith or adverse dealing on the part of an employer.

7. Record-Keeping

Employers are generally expected to maintain current and thorough records pertaining to personnel files, timesheets and other matters necessary to document the workplace accurately. Aside from the requirements found in provincial labour standards legislation, it is accepted as good and prudent practice with respect to any disputes or claims that may arise out of employment. This applies to all employers whether or not a TFW is employed.

There is authority for the proposition in Canada that this may extend into a presumption against the employer where it is unable to produce accurate or complete timesheets or records of the work being performed. In at least one such dispute, the timesheets of a TFW were accepted on a balance of probabilities in terms of determining the compensation that the employer was obligated to pay[37]. In the absence of any records maintained by an employer, there is no alternative but to accept the employee's word in regard to the situation[38].

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[34] See Nishina, *supra,* at note 9, where a breach of fiduciary duty was denied but the punitive damages were awarded based on a breach of an implied obligation of good faith and fair dealing in the manner of the dismissal of a TFW.
[35] Fulawka v Bank of Nova Scotia, 2012 ONCA 443 at para. 42-53.
[36] Endorsed in Dominguez; see Fulawka, *supra.*
[37] Bistro India, note 2, at para. 20-35.
[38] Woods J., acting as Umpire in *Beiseker Battery Barn Inc. v. Sibernagel* (August 17th, 1989), as cited in Skovberg Hinz Barristers & Solicitors v. Garrett, 2008 73832 (AB ESU) and endorsed in the temporary foreign worker context in Bistro India, *supra,* at para. 50, interpreting section 14 of the *Employment Standards Code,* which:

> 'imposes obligations on the employer regarding maintenance of records. It does not impose on an employee any such obligation. The legislation is entirely social in its nature for the protection of employees against employers who are by the very nature of their relationship in a dominant position."

VIII. Human Rights Issues and "Immigration Status" as a Ground of Discrimination

1. Human Rights Code

Provincial human rights codes prohibit provincially-regulated employers from discriminating against employees on the basis of certain protected grounds. The operation of section 9(2) of Manitoba's *Human Rights Code* prohibits the discrimination against any persons on the basis of ancestry, including colour and perceived race, nationality or national origin. The effect is that employers are prohibited from treating TFWs in a manner that is differential and less favourable than resident workers.

"Immigration status" is not an expressly prohibited ground of discrimination under the *Human Rights Code,* nor recognized consistently by analogy. What is emerging in the case law is the recognition on the part of boards and tribunals that a number of prohibited grounds have particular application to non-residents and TFWs[39].

The recent decision in *United Steelworkers*[40] involved a Human Rights Code complaint on behalf of workers from the Philippines employed as TFWs at a Tim Horton's restaurant. It was alleged that workers were required to rent expensive and substandard accommodations, denied overtime premiums, given less desirable shifts, and threatened with being returned to the Philippines. On the basis of the latter issue, it is clear that the latter point discriminates directly on the basis of immigration status. But for the precarious status of these TFWs, the employer would not have this threat to levy against the employees. However, perhaps because of the reluctance in the case law to recognize it as a distinct ground of discrimination, this was not relied upon. The complaint has ultimately been allowed for filing on the basis of discrimination in employment on the basis of group members' race, colour, ancestry, and place of origin[41].

2. Differential Treatment

In theory, avoiding discrimination is simple. All employees, TFW or not, should receive equal treatment. The difficulty that arises is that equal treatment may not amount to the same treatment. In addition, treating TFWs as a group differently than Canadian or permanent resident workers, whether on the basis of immigration status or not, may find an employer subject to increased legal exposure.

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[39] United Steelworkers obo others v Tim Horton's and others, 2014 BCHRT 152 (CanLII) ("*United Steelworkers"*) at para. 21; see Chein and others v. Tim Horton's and others, 23013 BCHRT 229, involving several individuals from Mexico who make similar allegations with respect to tenancy are made against another Tim Horton's franchisee.
[40] *Ibid.*
[41] *Ibid.*

Employers maintain the rights to discipline dismiss and determine the roles of an employee within the guidelines imposed by employment legislation. It is obviously problematic in the TFW context when a workplace distinction is made, such as a priority for paid overtime, on the basis of an employee's immigration status. What may be less obvious and equally problematic is where the distinction is not made on the grounds of an immigration status but on grounds that are "unreasonable" or cannot be substantiated by the employer.

For an employer to differentiate between TFWs and others in the workplace without risking liability for some form of compensation requires the distinction made to be both "rational and justifiable" given the purpose of the particular policy[42]. Ultimately, where the differences can be attributed to *bona fide* occupational requirements and legitimate objectives an employer cannot be found accountable for discrimination[43].

3. *Injury to Human Dignity, Feelings and Self-Respect*

In some situations, an employer may liable to compensate an employee for the intangible losses he or she has experienced on account of discriminatory treatment. In assessing the compensation for injury to dignity, feelings and self-respect, there are two main considerations: the objective seriousness of the conduct of the employer and the effect on the particular applicant who experienced discrimination. An account of the recognized vulnerability of TFWs by the courts, employers must be extremely sensitive to the application of these principles[44].

For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect[45]. Particularly relevant to the situation of a TFW, damages will be generally at the high end when the particular circumstances make the effects particularly serious[46].

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[42] Kiewit Energy Fabricators Ltd. v. Christian Labour Association of Canada, 2012 CanLII 46404 (AB GAA); in this case, TFWs were already employed in the basic workforce, whereas the Eastern Canadian employees were brought in last minute for very "short term" work. It was found that accommodation expenses could be justifiably paid to the short-term employees and not the TFWS on the basis that the short-term employees were not on the work site for long enough to establish a residence whereas the "one-year period, with a real possibility of longer term opportunities" of TFWs would justifiably not qualify for the allowance.

[43] See Dayal v. D-Wave Systems, 2014 BCHRT 196, at para. 29, where the respondent employer provided a "reasonable, non-discriminatory explanation" for the conduct in question in addition to "uncontested contemporaneous evidence" which showed the ranking of candidates and that the successful applicant (the resident applicant) fulfilled more of the criteria for the job than the non-resident applicant.

[44] See Arunachalam v Best Buy Canada, 2010 HRTO 1880 (CanLII).

[45] *Ibid,* at para. 52-55.

[46] *Ibid*

The recent decision of *Monrose v. Double Diamond Acres Limited*[47] provides a recent example of costs being payable by the employer on account of discrimination in employment on the basis of colour, ethnic origin, place of origin, race and reprisal. The employee was employed as a TFW under the Seasonal Agricultural Workers Program and was terminated in response to having raised concerns about being addressed in a racialized derogatory manner in front of a number of similar migrant workers. The tribunal endorsed the view that demonstrative evidence of this discrimination is not necessary to establish a breach of the *Human Rights Code*[48]. The employer was ordered to pay $3,000 on account of the losses to the employee's dignity, feelings and self-respect. In addition, the employer had to pay a further $15,000 of damages for losses associated consequent to the violation of the right to be free from reprisal and the unique vulnerability of migrant workers.

It is clear that deliberate acts of discrimination, in contrast to inadvertent conduct found to be discriminatory, will often inflict greater damages. Intangible losses may also be payable by an employer in situations where differential treatment has damaged the human dignity, feelings and self-respect of an employee. These issues may be particularly acute in the TFW context on account of the unique vulnerability of these workers and their understandable reluctance to stand up for their rights.

The decision of Construction and Specialized Workers' Union et al v. SELI Canada Inc.[49] involved a claim filed by a union on the basis that Latin American employees were being paid less than the European workforce for carrying out comparable activities. In addition, it was alleged that the Latin American employees were receiving less favourable housing, meal and expense benefits. The employer had argued that the differential pay was appropriate on account of the respective skill level of the groups.

The tribunal found there was no *bona fide* occupational requirement which might justify this differential treatment[50]. The employer had failed to apply its international compensation policies in a consistent manner, which disallowed certain of the Latin American workers to collect a higher wage.

In effect, the application [of SELI's actual international compensation practices to the Latin Americans employed by them on the Canada Line project] was to take advantage of the existing disadvantaged position of these workers, who are from poor countries, and to perpetuate that disadvantage, and to do so while they were living and working within the province of British

[47] 2013 HRTO 1273 (CanLII).
[48] *Ibid,* at para. 7; see also, Whale v. Keele North Recycling, 2011 HRTO 1724 (CanLII), 2011 HRTO 1724.
[49] Construction and Specialized Workers' Union et al. v. SELI Canada Inc. et al., 2008 BCHRT 436 ("***Seli***")
[50] *Ibid,* at paras. 490, 497 and 505

Columbia. As such, the application of those practices in British Columbia perpetuated, compounded and entrenched existing patterns of inequality[51].

Ultimately, the wage differential was awarded to each Latin American employee, along with $10,000 for injury to human dignity[52].

A number of important practice points can be summarized from these cases. First, it is not sufficient for an employer to hold a *bona fide* occupational requirement that is not discriminatory. The manner in which that requirement is applied and assessed must also be above reproach, particularly on account of TFWs as vulnerable employees in the eyes of the courts.

Second, it is the ongoing responsibility of the employer to cultivate and maintain an environment of inclusiveness. Failure to do so may result in an adverse inference being drawn on the part of the employer. Vicarious liability and responsibility for the discriminatory conduct of other employees towards TFWs, for example, may be inevitable if the employer does not develop and enforce strict policies with respect to workplace discrimination.

The tribunal in *Monrose* ordered the employer to develop a comprehensive human rights and anti-discrimination policy with the assistance of an expert in human rights law. This is an excellent and prudent practice for any employer who wishes to hire TFWs and anticipates continuing to do so. On account of the potential for high damage awards, the policy should include an effective complaints mechanism for workers to exercise their rights and voice other employment concerns. Such policies should be public, and be posted in the workplace in a location where it will come to the notice of other workers.

Finally, training for any and all employees with supervisory responsibilities with respect to TFWs is advisable[53]. These steps may mitigate the responsibility of the employer for the individual conduct of employees, as well as prevent a finding from a reviewing body that its occupational requirements are discriminatory.

IX. Conclusion

In addition to specific violations found in the *Immigration and Refugee Protection Act* and the *The Worker Recruitment and Protection Act*, a number of presumptions operate in favour of TFWs to account for the vulnerability of these employees in the Canadian workplace.

[51] *Ibid,* at 489; See *Martyn,* 11.1.11, at 24;
[52] *Ibid,* at 538 and 558-599.
[53] Similar content was ordered by the Human Rights Tribunal of Ontario in *Montrose,* at para. 74.

Responsible employers must be familiar with and account for this reality in developing and implementing policies in the operation of the workplace.

Where policies and decisions are required to be made by an employer that affect the work place it is essential to have clear and cogent reasoning for each. It may not be sufficient to expect courts and tribunals to accept these are not discriminatory against TFWs because they are in the best interest of the employer generally. It may just be that justifying a *bona fide* rationale for employment decision where TFWs are involved may look a lot more like an explanation or demonstration that such policies are not in fact discriminatory.

Given the emerging trends in the employment context, as well as interpretations of human rights, it is in the best interests of the employer to take proactive steps to ensure that employers are aware of presumptions in place in workplaces with TFWs.