Regulating for Globalization

Trade, Labor and EU Law Perspectives

Mexican government releases anti-climactic report in response to petition alleging sex discrimination in recruitment and hiring for US agricultural and low wage visa programs

Tequila J. Brooks (International and Comparative Labor Law Scholar, Washington, D.C.) · Thursday, July 16th, 2020

On 30 June 2020, the Mexican ministry of labor *Secretaría del Trabajo y Previsión Social* (STPS – Secretary of Labor and Social Protection) issued its report on Public Communication No. MEX 2016-1 under the North American Agreement on Labor Cooperation (NAALC). Better known as the NAFTA labor side agreement, the NAALC was in effect in Canada, Mexico, and the United States from 1 January 1994 to 30 June 2020. NAFTA and NAALC were sunsetted when the United States Mexico Canada Agreement (USMCA in the US, T-MEC in Mexico, and CUSMA in Canada) entered into effect on 1 July 2020. Under the NAALC, members of the public had the

ability to file petitions – "public communications" in the terminology of the agreement – alleging that a member state failed to effectively enforce national labor laws related to 11 labor principles. These principles included Principle 7 (Non-Discrimination based on Race, Sex, and other grounds), Principle 8 (Equal Pay for Equal Work), and Principle 11 (Protection of Migrant Workers).

Sex discrimination claims in NAALC petitions MEX 2016-1 and MEX 2016-2

Public Communication No. MEX 2016-1 was filed with STPS on 15 July 2016 by the bi-national migrant rights non-profit organization *Centro de los Derechos del Migrante* (CDM) and several migrant rights organizations on both sides of the US-Mexico border. Building on CDM's extensive research and advocacy on behalf of migrant workers, the petition advanced serious and substantiated claims of discrimination based on sex in recruitment and hiring of workers in Mexico for two US visa programs, the H-2A agricultural labor visa and the H-2B non-agricultural low wage visa. In 2018, CDM supplemented the original petition with serious and substantiated claims of discrimination in hiring and treatment of women under a range of US work visa programs including under the NAFTA T-1 professional visa program. A separate petition (MEX 2016-2) was filed with STPS by the United Food and Commercial Workers of Canada (UFCW Canada) raising claims of sex discrimination in recruiting and hiring for the Canada-Mexico Seasonal and Agricultural Worker Program (SAWP). Because of discrimination in recruitment and hiring for both US and Canadian agricultural work visa programs, less than 4% of H-2A workers in the US and less than 3% of SAWP workers in Canada were women. STPS accepted both petitions in August 2016. Because of the cross-border nature of the employment relations called into question in the NAALC petitions MEX 2016-1 and MEX 2016-2, they were ideal for dispute resolution under the NAALC. Petitioners pointed to US, Mexican, and Canadian statutory and case law to highlight that sex discrimination in recruitment, hiring, and working conditions in unlawful in all three countries.

Background on dispute resolution of labor petitions under the NAALC

There were three levels of dispute resolution of claims raised in public communications under the NAALC. These were: Ministerial Consultations, the Evaluation Committee of Experts (ECE) – a process by which a panel of experts would be appointed to issue a neutral report on the claims in the public communication – and Arbitration regarding a narrow range of labor principles (child labor, occupational safety and health, and minimum wages). As public communications raising issues under Labor Principles 7, 8 and 11, petitions MEX 2016-1 and 2016-2 were eligible to proceed to the ECE level of dispute resolution. As a matter of practice, no case filed under the NAALC between 1994 and 2020 resulted in the establishment of an ECE. Most cases were "resolved" – a term used loosely – through ministerial consultations between the Ministers of Labor (in practice, personnel within their international labor offices) of the NAFTA member states.

Under the NAALC, STPS had significant leverage and leeway not only to pressure its trading partners to the north to eliminate sex discrimination in recruitment and hiring for agricultural visa programs, but to press for the establishment of an ECE to issue a neutral report on the matter. In its 2012 report on three previously filed NAALC petitions on enforcement of US labor laws with respect to migrant workers hired through the H-2A and H-2B visa programs, STPS called for ministerial consultations with its US counterpart. As a result of these ministerial consultations, the US and Mexican governments entered into a Ministerial Agreement and conducted a series of workshops and training sessions related to the rights of agricultural workers across the United

States in 2014. The opportunity for the exercise of inter-governmental leverage regarding the rights of migrant workers by STPS may have been limited in the MEX 2016-1 case due to anti-immigration stance of the US administration and pressure placed on the Government of Mexico to reform its labor laws as part of the renegotiation of NAFTA.

Report of Government of Mexico in report in response to MEX 2016-1

Despite these pressures, it came as a shock and disappointment to petitioners and observers alike that the 30 June 2020 report on MEX 2016-1 issued by STPS did not recommend ministerial consultations regarding the claims raised by petitioners about sex discrimination in the recruitment and hiring for the H-2A and H-2B visa programs. In its report, STPS summarized petitioners' claims and the US legal framework governing sex discrimination and treatment of workers in the H-2A and H-2B programs – but did not go as far as to validate those claims or request ministerial consultations to engage US authorities to address and eliminate institutional sex discrimination in the implementation of the H-2A and H-2B visa programs. Noting the ongoing process of review and modernization of the H-2A visa program to simplify the application and certification process for employers, STPS apparently accepted the claim made by its US counterpart that the modernization process would improve employer compliance with contractual obligations to Mexican workers hired under the H-2A and H-2B visa programs. Accepting that US government agencies such as the Equal Employment Opportunity Commission (EEOC), the Wage and Hour Division of the US Department of Labor (WHD), and the US Citizenship and Immigration Service of the Department of Homeland Security (USCIS) each have a role in implementing labor laws affecting workers in the H-2A and H-2B visa programs, STPS closed its review of the case.

"Nevertheless," the report concluded, "and given the importance that Mexico review the issue of labor rights of Mexicans workers who travel to [the US] to work, [STPS] will remain vigilant of the wellbeing of its co-nationals and that those who find themselves working in US territory do so in conditions of equality, respect, and legality." STPS ends by observing that this commitment will remain during the process of transition from the NAFTA-NAALC to the USMCA Chapter 23 on Labor, which entered into effect on 1 July 2020.

In a 9 July 2020 Op Ed in *Reforma*, Evy Peña of CDM expressed disappointment in the report, noting, "The response was absurd, establishing that [STPS] had confidence in the legal mechanisms in the US and adding that migrants can call on migration authorities or consult pamphlets in order to file complaints about their employers. If women are channeled into jobs with lower salaries or are denied employment opportunities, it is due to deficient supervision on the part of both countries – the analysis of [STPS] is disconnected from reality." Peña also expressed hope that the report in MEX 2016-1 would not be a sign of things to come under USMCA Chapter 23.

Replacement of NAALC by USMCA Chapter 23 on Labor

USMCA Chapter 23 on Labor is similar to the NAALC in that it provides for a public communication process and contains provisions for resolving labor disputes raised through that process, including government-to-government consultations. Unlike the NAALC, USMCA Chapter 23 requires member states to adopt statutes, regulations, and practices implementing core labor standards established in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, including elimination of discrimination in occupation and employment. USMCA labor petitions are subject to international arbitration under USMCA Chapter 31 on Dispute Resolution. The Evaluation Committee of Experts (ECE) process no longer exists. Labor provisions in

USMCA require not only effective enforcement of labor laws, but adoption of labor laws that conform with international labor standards.

USMCA Chapter 23 on Labor contains new stand-alone provisions related to gender discrimination and protection of migrant workers. Under Article 23.9, the North American governments, “recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace,” and are obligated to implement policies to protect workers from employment discrimination on the basis of sex, including sexual harassment, pregnancy, sexual orientation, gender identity, and caregiving responsibilities. Under Article 23.8, the North American governments commit to, “ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.” Articles 23.8 and 23.9 of USMCA are not subject to dispute resolution under the agreement. In addition to these provisions, USMCA includes an innovative Rapid Response Mechanism to address the denial of freedom of association and collective bargaining rights by individual employers. Preliminary analyses indicate that the mechanism has limited application in the US and agriculture is not listed as a priority sector for utilizing the mechanism .

Ongoing abuse of H-2A workers and sex discrimination in H-2A program

CDM’s April 2020 report *Ripe for Reform: Abuse of Agricultural Workers in the H-2A Program* highlights ongoing and systemic flaws in the legal framework and operation of the US H-2A visa program, including wage theft, lack of access to justice for workers whose rights are violated, and persistent sex discrimination in recruitment, hiring, pay, and working conditions – including pervasive sexual harassment and violence on farms and in fields. In cases like MEX 2016-1 and 2016-2, new labor provisions in USMCA require the US and Canada not only to enforce existing anti-discrimination laws and workplace protections, but to adopt stronger anti-discrimination provisions and workplace protection measures as part of the US H-2A and H-2B and Canadian SAWP visa programs. As observed by CDM in its initial responses to the report released by the Mexican government in response to MEX 2016-1, however, innovative mechanisms and new provisions are meaningless if member state governments cannot muster the political will to enforce those provisions and call their trading partners to account for failure to adopt and enforce meaningful workplace protections for North American workers.

This entry was posted on Thursday, July 16th, 2020 at 12:00 pm and is filed under Labor Law, Mexico, NAFTA, USA
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.