

RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA

Appellant: WG (Skilled Migrant)

Before: S A Aitchison (Member)

Representative for the Appellant: H Kaushal

Date of Decision: 21 October 2021

RESIDENCE DECISION

[1] The appellant is a 27-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because it was not satisfied that his employment as a liquor manager in a New World supermarket business (operating as part of a cooperative run by Foodstuffs New Zealand) substantially matched the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description, including core tasks, of a Retail Manager (General) ("Retail Manager").

[3] The principal issue for the Tribunal is whether Immigration New Zealand fairly and correctly assessed the appellant's application. For the reasons that follow, the Tribunal finds that the decision is not correct. Immigration New Zealand placed too much weight on the involvement of the Foodstuffs New Zealand cooperative in the operations of the store and failed to take into account relevant evidence presented by the appellant. The application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant arrived in New Zealand in September 2015 and completed a Diploma in Applied Business in July 2016. His current Essential Skills work visa is valid to 15 September 2024.

The Residence Application

[5] The appellant lodged his expression of interest (EOI) on 5 March 2019 and made his application for residence on 20 May 2019 under the Skilled Migrant category. He claimed 50 points for skilled employment relying on his full-time position as a liquor manager of a New World supermarket, part of a cooperative run by Foodstuffs New Zealand ("Foodstuffs"), a role that he had begun in January 2019.

[6] With his application, the appellant provided a copy of his employment agreement and job description (11 January 2019), which recorded his remuneration at \$25.00 per hour.

[7] The appellant claimed that his position substantially matched that of a Retail Manager (General) (ANZSCO 142111) which is described in the ANZSCO as someone who "organises and controls the operations of a retail trading establishment". Unit Group 1421, in which the occupation of Retail Manager is included, comprises eight core tasks (numbering added):

1. determining product mix, stock levels and service standards
2. formulating and implementing purchasing and marketing policies, and setting prices
3. promoting and advertising the establishment's goods and services
4. selling goods and services to customers and advising them on product use
5. maintaining records of stock levels and financial transactions
6. undertaking budgeting for the establishment
7. controlling selection, training and supervision of staff
8. ensuring compliance with occupational health and safety regulations

Immigration New Zealand's Verification

[8] On 29 March 2021, Immigration New Zealand telephoned the appellant to ask him questions about his application. He explained that he worked as the head of a liquor department at a New World supermarket in a Northland province. Four other team members were employed in the department, in addition to two casual employees over the busy Christmas period. The store was individually-owned under the New World brand and the employer, who had other

busy professional and sporting commitments, gave him full authority to run the liquor department.

[9] Immigration New Zealand asked the appellant specific questions in relation to the ANZSCO core tasks associated with the Retail Manager occupation. He explained his role and the tasks that he undertook, and gave detailed examples in response. He gave an overview of the scope and scale of the liquor department which generated some 10 per cent of the store's annual revenue (some \$90,000 to \$100,000 a week in sales). The department stocked approximately 1,200 items and the Foodstuffs brand prescribed only 15 per cent of this stock and accompanying marketing and advertising initiatives for these stock items. The appellant had full autonomy to otherwise determine the product mix, set prices, and market and advertise products in the department. He maintained stock levels and sales utilising a Systems Applications and Products in Data Processing (SAP) system. He was involved in recruitment, and participated in staff interviews led by the human resources department and he had the final say as to appointments. He trained staff in compliance with health and safety guidelines. He determined labour needs in his department, purchased stock and priced goods, according to a department budget. He negotiated prices and deals with suppliers and set instore specials. When setting prices, he ensured an average profit margin of between 20 to 23 per cent.

Immigration New Zealand's Concerns

[10] On 29 March 2021, Immigration New Zealand advised the appellant that it was not satisfied that his role substantially matched the ANZSCO description and core tasks of a Retail Manager. It only accepted that the appellant was performing the ANZSCO task of selling goods and services to customers and advising them on product use, and training and supervising staff. It considered that the appellant's authority and level of control in the liquor department was substantially limited by the standards set by the cooperative, Foodstuffs. Further, it considered that the appellant was only managing the liquor department in a larger supermarket and was not controlling the operations of "the establishment". It considered that the appellant was ordering stock in line with a predetermined product mix, setting prices, implementing marketing and advertising initiatives, and following service standards, all as prescribed by Foodstuffs. It stated that while the appellant attended interviews for prospective employees, the recruitment process was managed by the human resources department and the appellant did not appear to have control over the selection of staff. Further, while the appellant

had claimed to train staff in health and safety procedures, he had not demonstrated that he ensured their compliance with occupational health and safety regulations.

Appellant's Response

[11] On 14 April 2021, the appellant's representative responded to Immigration New Zealand's concerns, providing detailed submissions to the concerns raised regarding the appellant's performance of the core tasks.

[12] The representative submitted that Immigration New Zealand had overstated the involvement of Foodstuffs in the supermarket, and referred to decisions of the Tribunal articulating a careful, case-by-case, analysis when considering an applicant's employment in the context of a cooperative supermarket model. He stated that the ultimate question was whether, in such a model, there was sufficient managerial autonomy for the applicant to organise and control the operations of the liquor department in the supermarket. He stated that, given the size and scale of the supermarket (which could be characterised as a small to medium sized business) the appellant had capacity to exercise sufficient control and organisation. He stated that, while Foodstuffs prescribed core product for the liquor department, this constituted only 15 per cent of the stock on offer and the appellant was responsible for determining the greater proportion of the product mix.

[13] The representative made further comments in relation to the appellant's completion of all the core tasks, the general performance of the store and its place in the community (as portrayed by the appellant during his interview), and provided a profile of the employer and his other business, charitable and community commitments.

[14] The representative also provided documentary evidence to demonstrate the appellant's completion of the core tasks. This evidence included a letter from the appellant (12 April 2021) in which the appellant provided detailed comments in relation to each of the core tasks, with reference to the documents provided. Two letters from the employer were also submitted, including a letter (25 September 2019) in which the employer explained that the New World supermarket was not a franchise business and operated as part of a cooperative run by Foodstuffs in the North Island, with each store owner owning shares in that company. He emphasised that the business was independent, but part of Foodstuffs which benefited from the buying power of a much larger group.

[15] In his second letter (30 March 2021), the employer re-emphasised that the store operated independently of the Foodstuffs cooperative, and provided detailed descriptions and examples of the appellant's work. He stated that Foodstuffs prescribed a core product range of 15 per cent. The supermarket then had full discretion to determine the remaining product range, which varied across New World stores depending on location and customer demands. For the core product, Foodstuffs recommended prices and organised marketing and advertising promotions for that product which each store implemented. While there was little profit in these initiatives, this drove volume sales and foot traffic, and enabled the store to feature in-store specials and marketing activities, such as demonstrations and tastings, which generated most of the department's profit. The appellant negotiated deals with other suppliers through smart buying, investment buying, and negotiating case deals. He used a second-tier pricing model setting prices midway between full profit and loss leader prices. Profits fluctuated between 15 to 24 per cent profit margins.

[16] The appellant oversaw the liquor department budget. There were 15 different departments, including 180 employees in the supermarket, and the owner delegated budgetary responsibilities to the respective department managers. He had other community commitments to attend to, including outreach and public speaking. Given the size of the supermarket, he treated each department as a business in its own right. The store generated \$62,000,000 in annual sales and the liquor department revenue alone contributed \$6,000,000 annually.

[17] The human resources department oversaw the recruitment process for employees in the store, but the departmental managers participated in the interview process and had the final say on appointments. The appellant oversaw staff compliance with health and safety regulations in his department.

[18] The employer explained that the appellant operated the SAP data system for stock, sales and financial matters. While service standards were universal across the group of some 101 different New World stores throughout the country, the appellant had devised additional service standards, including a department refund policy, which was not addressed by Foodstuffs.

Immigration New Zealand Decision

[19] On 26 May 2021, Immigration New Zealand declined the appellant's application. It was not satisfied that his employment substantially matched the

ANZSCO description and core tasks of a Retail Manager. It was satisfied that he was performing two of the ANZSCO core tasks, and aspects of two other tasks. It was not satisfied that the appellant organised and controlled the operations of the liquor department.

[20] Without points for skilled employment, the appellant was also not awarded bonus points for skilled employment outside Auckland and did not have sufficient points to meet the criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[21] The appellant's right of appeal arises from section 187(1) of the Immigration Act 2009 (the Act). Section 187(4) of the Act provides:

- (4) The grounds for an appeal under this section are that—
 - (a) the relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made; or
 - (b) the special circumstances of the appellant are such that consideration of an exception to those residence instructions should be recommended.

[22] The residence instructions referred to in section 187(4) are the Government residence instructions contained in Immigration New Zealand's Operational Manual (see www.immigration.govt.nz).

THE APPELLANT'S CASE

[23] On 7 July 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions.

[24] The appellant's representative makes submissions on appeal (6 and 21 July 2021) and, in addition to documents already on the Immigration New Zealand file, provides a letter from the appellant's employer (1 July 2021); copies of emails between the appellant and his employer and Foodstuffs and suppliers demonstrating negotiations, purchasing and pricing of stock (June-July 2021); a copy of a staff performance review completed by the appellant (December 2020); a copy of the supermarket's health and safety policy and a staff liquor training record signed by the appellant (October 2020); and a detailed letter

from the Foodstuffs North Island head office (8 July 2021) outlining that the supermarket in question has a franchise agreement which outlines Foodstuffs policies, but there remains “very broad discretion” in operation. The head office further articulates in the letter that, as a cooperative, Foodstuffs aggregates the buying power of the group, but department managers such as the appellant have a high degree of discretion to determine product mix, prices, stock levels and promotions. The head office then sets out how the appellant performs each of the ANZSCO tasks.

[25] The Tribunal’s ability to consider this new evidence on appeal is constrained by section 189(1) of the Act. The Tribunal finds that it is unable to consider the appellant’s new evidence when assessing the correctness of Immigration New Zealand’s decision. This is because this evidence either did not exist at the time of Immigration New Zealand’s decision, or if it did, there is no explanation as to why, with reasonable diligence, it could not have been provided to Immigration New Zealand.

[26] In his submissions, the representative states that Immigration New Zealand did not give the application proper consideration. He submits that, after a long hiatus of inaction, Immigration New Zealand interviewed the appellant and then issued a letter of concerns the same day. It did not contact the appellant’s employer or request any documentary evidence as to the appellant’s employment before forming prejudicial concerns about the nature of the appellant’s employment. He further submits that Immigration New Zealand incorrectly found that the direct oversight and control of the Foodstuff’s cooperative limited the appellant’s ability to organise and control the liquor department in the supermarket, and it did so without having seen the agreement between the supermarket and Foodstuffs.

ASSESSMENT

[27] The Tribunal has considered the submissions and documents provided on appeal, and the files in relation to the appellant’s residence application that have been provided by Immigration New Zealand.

[28] An assessment as to whether the Immigration New Zealand decision to decline the appellant’s application was correct in terms of the applicable residence instructions is set out below.

Whether the Decision is Correct

[29] The application was made on 20 May 2019 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied that the appellant's employment substantially matched the ANZSCO description, including core tasks, of a Retail Manager.

Relevant instructions

[30] When deciding an application, instructions require that Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). Instruction A1.5.a sets out the relevant factors relating to fairness, including whether an application is given proper consideration, and whether all known relevant information is considered:

A1.5 Fairness

- a. Whether a decision is fair or not depends on such factors as:
- whether an application is given proper consideration;
 - whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
 - whether the applicant is given a reasonable opportunity to respond to harmful information;
 - whether the application is decided in a way that is consistent with other decisions;
 - whether appropriate reasons are given for declining an application;
 - whether only relevant information is considered;
 - whether all known relevant information is considered.

...

Effective 29/11/2010

[31] The other relevant instructions in this case concern the assessment of skilled employment. The residence instructions relevant to the assessment of skilled employment are SM6.10, SM6.10.5 and SM6.10.5.1 (all effective 26 November 2018), which concern the assessment of skilled employment:

SM6.10 Skilled Employment

- a. Skilled employment is employment that meets a minimum remuneration threshold and requires specialist, technical or management expertise obtained through:
- i. the completion of recognised relevant qualifications; or

- ii. relevant work experience; or
 - iii. the completion of recognised relevant qualifications and/or work experience.
- b. Assessment of whether employment is skilled for the purposes of the Skilled Migrant Category is primarily based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which associates skill levels with each occupation, and the level of remuneration for the employment.

Note: The ANZSCO is available at www.immigration.govt.nz/ANZSCO

SM6.10.5 Skilled employment in an occupation included in the ANZSCO

Current employment in New Zealand or an offer of employment in New Zealand will be assessed as skilled if:

- a. the occupation is described in the ANZSCO as:
 - i. a skill level 1, 2 or 3 occupation and the remuneration for that employment is \$25.00 per hour or above (or the equivalent annual salary); or
 - ii. ...
 - b. the principal applicant can demonstrate that their employment substantially matches the description for that occupation as set out in the ANZSCO (see SM6.10.5.1); and
- ...

[32] An assessment of “substantial match” requires Immigration New Zealand to determine whether the appellant’s employment is “substantially consistent” with the description and core tasks of the relevant ANZSCO occupation and that the tasks that are relevant to the appellant’s employment comprise most of his or her role (see SM6.10.5.1).

Retail Manager

[33] The appellant contended that his employment as a liquor manager in a New World supermarket was a substantial match to a Retail Manager (General) (ANZSCO code 142111), an ANZSCO skill level 2 occupation. The occupation description for a Retail Manager states that such a person “organises and controls the operations of a retail trading establishment”. Unit Group 1421 lists the core tasks for the occupation as follows (numbering added):

1. determining product mix, stock levels and service standards
2. formulating and implementing purchasing and marketing policies, and setting prices
3. promoting and advertising the establishment's goods and services
4. selling goods and services to customers and advising them on product use
5. maintaining records of stock levels and financial transactions

6. undertaking budgeting for the establishment
7. controlling selection, training and supervision of staff
8. ensuring compliance with occupational health and safety regulations

[34] Immigration New Zealand was satisfied that the appellant performed two of the ANZSCO core tasks, namely: selling goods and services to customers and advising them on product use; maintaining records of stock levels and financial transactions; and aspects of two other tasks, namely, controlling stock levels, training and supervising staff, and that he partially performed the task of promoting and advertising the establishment's goods and services. However, it was not satisfied that the evidence he had provided demonstrated that he completed the remaining core tasks. It did not accept, from the information provided, that the appellant organised and controlled the operations of the store because of the involvement of the Foodstuffs cooperative.

The appellant's role as liquor manager

[35] The appellant was employed as the liquor manager of a liquor department in a New World supermarket. The department was one of 15 different departments in the supermarket which employed a total of 180 employees. In the liquor department, the appellant supervised four team members, in addition to two casual employees over the Christmas period. Overall, the store generated \$62,000,000 sales annually, and the liquor department itself generated \$6,000,000 (10 per cent of the overall store income).

[36] The supermarket was individually owned, operating under Foodstuffs' North Island cooperative, and the employer, with other commitments, gave the appellant full authority to run the liquor department.

[37] Immigration New Zealand found that as part of a cooperative run by Foodstuffs, the supermarket brand did not have autonomy to organise and control of the business and, additionally, the role of the owner and store manager further diminished the appellant's ability to demonstrate that he organised and controlled the liquor department of the supermarket. For the reasons that follow, the Tribunal finds that Immigration New Zealand erred in its assessment by placing too much weight on the involvement of Foodstuffs and failed to give proper consideration to all the evidence provided.

[38] The appellant gave a detailed account of his role during his interview, and provided correspondence from his employer, in addition to store documentation to support his claims that he was undertaking the ANZSCO core tasks for a

Retail Manager, and that he organised and controlled the operations of the store. He did not provide a copy of the agreement between Foodstuffs and his employer, and Immigration New Zealand did not request a copy of this.

[39] While the onus is on applicants to provide all relevant evidence in support of their applications for residence, Immigration New Zealand is also required to act fairly and properly when conducting its assessments. As Immigration New Zealand placed primary emphasis in its assessment on the role of Foodstuffs in the business operations, it would have been greatly assisted by having a copy of the relevant agreement, in particular, given the substantial evidence provided by the appellant which contradicted its view that Foodstuffs' involvement limited his ability to organise and control the supermarket's liquor department.

[40] The Tribunal has, variously constituted, long articulated the necessary approach for Immigration New Zealand in the verification of employment within a branded, chain, or franchise business. In *TP (Skilled Migrant)* [2021] NZIPT 206171, the Tribunal stated:

[33] ... The issue of whether a manager of a franchised or "branded" store can demonstrate organisation and control over the business, so as to substantially match the ANZSCO description of a Retail Manager, has been addressed in many decisions of the Tribunal. As has been stated by the Tribunal on many occasions, where a business is subject to a franchise or licence agreement, it is important for Immigration New Zealand to examine the nature of the business model in order to ascertain the degree of autonomy that is vested in the franchisee business, compared to the level of control that is retained by the franchisor, because this will directly affect the level of organisation and control held by a manager of the business. Franchises operate on a continuum: some will constrain businesses more than others. It is not the legal label of a business model that is determinative but, rather, its detail and operation (see *BZ (Skilled Migrant)* [2018] NZIPT 205074 at [38]).

[41] In similar terms, in *WU (Skilled Migrant)* [2015] NZIPT 202545 stated:

[30] More generally, it is correct that the mere fact that the franchisor's head office was performing a number of core tasks is not determinative. Yet, as the Tribunal has repeatedly emphasised, while the presence and activities of a franchise head office in setting the brand's specific policies for the retail trading environment does not rule out there being a substantial match, nor can such activities be ignored. It is to be determined on a case-by-case basis as to whether the performance of these core tasks by the franchise or head office left sufficient room for the appellant to exercise sufficient organisation and control over the operations of the retail trading establishment in question.

[42] In effect, Immigration New Zealand used the fact that no agreement between the New World supermarket and Foodstuffs had been provided as a double-edged sword. On the one hand, it found that the appellant was unable to perform the ANZSCO description and much of the core tasks because Foodstuffs retained control of those aspects of the business, and on the other hand, it found

that the appellant could not establish that he performed such tasks or organised and controlled the operations as he had not provided a copy of the relevant agreement to clarify this point.

[43] Because Immigration New Zealand did not have a copy of the agreement between Foodstuffs and the supermarket, it was unable to shape its assessment of the appellant's employment with a true appreciation of the nature of the cooperative model in a transparent, substantive manner, which fundamentally compromised its assessment. The primary difficulty was that, in the absence of this agreement, Immigration New Zealand made findings as to the relationship between Foodstuffs and the supermarket in contradistinction to the evidence provided by the appellant. Contrary to Immigration New Zealand's finding, the evidence provided by the appellant suggested a minimal role by Foodstuffs in the supermarket. A thorough exploration of the cooperative nature of the business and impact of this on the appellant's ability to perform the ANZSCO description and core tasks was necessary.

[44] Immigration New Zealand compounded this error by selectively relying on the evidence provided. In instances it noted submissions made by the employer about the nature of the appellant's role, then dismissed this evidence on the basis that it was not corroborated by other evidence. It also found with respect to some of the tasks that there was evidence of those tasks being performed in the business, and notwithstanding representations from the appellant and his employer that the appellant performed these tasks, it found no evidence to prove that this was the case. If Immigration New Zealand had concerns about the credibility of the evidence provided, it should have given the appellant and his employer an opportunity to comment on those prejudicial credibility concerns before reaching its decision. Moreover, if Immigration New Zealand wished to reject the appellant's evidence, or parts of that evidence, then it needed to articulate cogent and specific reasons for doing so in its decision. It did not do so.

[45] Notwithstanding the absence of any copy of the agreement between Foodstuffs and the supermarket business, there was evidence indicating that the appellant had autonomy to organise and control the liquor department of the supermarket, and performed the core ANZSCO tasks. The scale and operations of that department were such that it could be said that the appellant's employment was capable of substantially matching the ANZSCO occupation of a Retail Manager.

[46] Immigration New Zealand was concerned that Foodstuffs determined 15 per cent of the stock, finding that there was no scope for the appellant to determine the product mix in the department. However, the appellant and the employer made clear that the appellant had autonomy to determine the remaining product mix from the Foodstuffs' extensive supplier list, comprising 85 per cent of the stock. In this context, the appellant was determining a significant proportion of the stock of some 1,500 items on hand. The appellant gave details as to how he selected stock according to customer demand, demographics and seasonal requirements.

[47] Immigration New Zealand was also concerned that Foodstuffs determined the store service standards. While the appellant and employer agreed that Foodstuffs prescribed base service standards for New World stores, there was evidence that the appellant had devised additional service standards fine-tuned for the particular supermarket, including refund policies for customers and customer service policies, which were additional to those imposed by Foodstuffs. Immigration New Zealand found that there was no evidence that such policies were not prescribed by Foodstuffs. However, the employer and the appellant had represented that they were initiatives of the appellant, and if Immigration New Zealand had concerns as to the authenticity of these representations, it should have disclosed such concerns to the appellant and invited comment. Again, it would have been assisted if it had a copy of the relevant agreement and prescribed policies before reaching its decision.

[48] In terms of marketing and advertising initiatives, Immigration New Zealand again found that these were prescribed by Foodstuffs. While the appellant and employer explained that the supermarket implemented marketing and advertising programmes devised by Foodstuffs, this concerned only 15 per cent of the core stock. They explained that such programmes were not high profit initiatives, and that the supermarket predominantly made profits through in-store specials and advertising which the appellant was responsible for. Copies of in-store specials and signage prepared by the appellant was provided, but Immigration New Zealand found there was no evidence that the appellant had been responsible for these initiatives, despite representations from the appellant and his employer in the affirmative. Immigration New Zealand noted the Facebook advertisements placed by the store and the in-store display of goods, but found that other staff in the liquor department also contributed to these, minimising the appellant's involvement. In a similar manner, Immigration New Zealand negated evidence from the employer and appellant as to how the appellant priced goods for sale

using a second-tier pricing model and by employing a profit margin. It also negated evidence that the appellant negotiated with suppliers and employed smart buying and investor buying tools. It found that, despite representations from the appellant and employer that the appellant performed these functions, there was no evidence to demonstrate this. In a similar vein, while the appellant and his employer made submissions and provided evidence to demonstrate that the appellant was involved in staff recruitment (including providing copies of correspondence between the appellant and the human resources department concerning his attendance of recruitment interviews, and representations from the employer that the appellant had the final say in selecting staff in his department), it dismissed such evidence as deficient. Further, it found evidence of the appellant training staff in his department in compliance with health and safety guidelines, and referring to staff compliance with such guidelines in performance reviews he completed for them, found that was incapable of demonstrating his performance of this task.

[49] As can be seen, Immigration New Zealand failed to properly consider, or in many instances, engage with, all relevant evidence provided. It did not afford the appellant an opportunity to comment upon its prejudicial concerns that it found much of the evidence provided to be unreliable.

[50] Without proper basis, Immigration New Zealand also found that the supermarket owner/employer and store manager were responsible for running the supermarket which diminished the appellant's ability to organise and control the liquor department. However, this finding lacked foundation and was contrary to the evidence provided. The employer had emphasised that the appellant managed the liquor department with very little input from him. The employer explained that he had other community and sporting commitments in which he was substantially engaged, and he was not in a position manage the operations of a supermarket that comprised 15 departments and included 180 staff members.

[51] Holistically considered, the Tribunal finds that Immigration New Zealand failed to properly consider all the available evidence, including the evidence given by the employer and the appellant regarding the nature of the business and the Foodstuffs cooperative itself, as well as the responsibilities held by the appellant.

[52] Failure to properly consider evidence provided by an applicant is contrary to A1.5 of instructions. Immigration New Zealand's finding that the appellant did not organise and control the operations of the store, nor complete many of the

ANZSCO core tasks, was therefore incorrect as that conclusion appears to be against the weight of evidence provided.

Conclusion on correctness

[53] The Tribunal finds that Immigration New Zealand did not undertake a fair and correct assessment of whether the appellant's employment was a substantial match to the ANZSCO occupation and core tasks of a Retail Manager. Immigration New Zealand placed too much emphasis on the role of Foodstuffs in the supermarket operations, which was not supported on the evidence. It failed to properly consider evidence before it, which was contrary to A1.5. The Tribunal cannot be satisfied that its assessment of the application was correct. The application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[54] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[55] The Tribunal therefore cancels the decision of Immigration New Zealand. The appellant's application is referred back to the chief executive of the Ministry of Business, Innovation and Employment for a correct assessment by Immigration New Zealand in terms of the applicable residence instructions, in accordance with the directions set out below.

Directions

[56] It should be noted that while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive and there may be other aspects of the application that require further investigation, remain to be completed or require updating.

1. The application is to be reassessed by an Immigration New Zealand officer not previously associated with the application in accordance

with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.

2. Immigration New Zealand is to invite the appellant to update his application within a reasonable timeframe, as he sees fit. The appellant is to produce any additional information and evidence to support his claim that his employment is a substantial match to an ANZSCO Retail Manager, and consequently whether his employment is skilled employment according to instructions.
3. The appellant is reminded that it is his responsibility to provide sufficient evidence to demonstrate, to Immigration New Zealand's satisfaction, that his employment meets the requirements of residence instructions (see R5.30.a, effective 29 November 2010). In this regard, the Tribunal notes that a copy of the agreement between the supermarket and Foodstuffs should be obtained and considered in the holistic assessment as to whether the appellant has the requisite organisation and control of the liquor department.
4. On the basis that the appellant remains in the same employment, Immigration New Zealand is to assess whether his employment is a substantial match to the ANZSCO occupation of Retail Manager, taking into account all the information and evidence produced in support of the application and having regard to the Tribunal's comments at paragraphs [36] to [52].
5. If Immigration New Zealand has any remaining concerns about the appellant's application, these matters are to be clearly put to the appellant with reasons. The appellant is to be given a reasonable opportunity to respond.
6. The Tribunal notes the recent announcement concerning the introduction of the new 2021 Resident Visa category. It will be for the appellant and Immigration New Zealand to address whether or not this new residence category impacts on the reassessment of the appellant's application.

[57] The appellant is to understand that the success of this appeal does not guarantee that his application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

[58] The appeal is successful in the above terms.

Order as to Depersonalised Research Copy

[59] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant.

"S A Aitchison"
S A Aitchison
Member

Certified to be the Research
Copy released for publication.

S A Aitchison
Member