IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2015] NZIPT 202431**

AT AUCKLAND

Appellant:	**XH (Skilled Migrant)**
Before:	P Fuiava (Member)
Counsel for the Appellant:	A McClymont
Date of Decision:	23 July 2015

RESIDENCE DECISION

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[1] The appellant is a 28-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 application because the appellant's employer did not have good workplace practices. The application was also declined because the appellant's employment created an unacceptable risk to the integrity of New Zealand's employment laws. The principal issue for the Tribunal is whether Immigration New Zealand's decision was procedurally fair and correct, given that it relied on prejudicial matters which it did not disclose to the appellant for further comment.

[3] For the reasons that follow, the Tribunal finds that Immigration New Zealand's assessment was incorrect and the application is returned for a correct assessment.

BACKGROUND

[4] The appellant arrived in New Zealand on 17 May 2009 as a student and he has not left the country. He has held a succession of student and work visas and his current work visa expires on 18 June 2016.

[5] The appellant made his application for residence under the Skilled Migrant category on 15 January 2014. He claimed 165 points which included 50 points for skilled employment as a Cafe or Restaurant Manager as described in the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO), and 10 bonus points for skilled employment outside of Auckland.

[6] In support of the application, Immigration New Zealand was provided with the appellant's employment agreement, dated 27 September 2013, which stated he was the "Restaurant Manager" of an Indian restaurant. He was required to work 40 hours per week, was paid an annual salary of $45,000, and for every 12 months of continuous employment, he was entitled to four weeks' annual leave.

Immigration New Zealand Concerns

[7] On 2 May 2014, Immigration New Zealand made an unannounced visit to the restaurant and interviewed the appellant and his employer.

[8] On 21 May 2014, Immigration New Zealand wrote to the appellant advising him that it appeared he did not organise and control the operations of the restaurant and that his employment did not substantially match the ANZSCO description and core tasks of a Cafe or Restaurant Manager. A copy of its verification report and a recording of the appellant's interview were provided.

[9] In addition to this concern, it also appeared to Immigration New Zealand that the appellant's employment was not sustainable because his payslips showed that he was paid an additional eight per cent in holiday pay. This indicated that he was employed on a casual basis. Further, it appeared that the appellant had worked on 25 December 2013 (Christmas Day), 26 December 2013 (Boxing Day), 1 January 2014 (New Year's Day), 2 January 2014, 6 February 2014 (Waitangi Day), and 25 April 2014 (ANZAC Day); however, he was not paid the correct hourly rate of time-and-a-half for working on a public holiday as provided for in his employment agreement. In failing to pay the appellant in accordance with his employment agreement, it appeared the employer had breached New Zealand's employment laws.

[10] Based on the information the appellant provided, it also appeared that he was being underpaid. During his interview with Immigration New Zealand, the appellant advised that his hourly rate was $20 per hour. At that rate, if he worked 40 hours per week, the appellant could expect to earn $41,600 per year and not the $45,000 recorded in his employment agreement.

[11] The appellant was advised of two other concerns with his application. The first related to an automatic deduction of $150 per week from his wages. While the appellant was renting accommodation from his employer and was paying him $150 per week in rent, there was no written authority from the appellant authorising the employer to automatically deduct the appellant's rent from his wages.

[12] Immigration New Zealand's second concern related to a chef and a waitress who the appellant stated he had employed. Immigration New Zealand was not satisfied that his employer had good work practices because it did not appear that these employees had been provided with a written employment agreement.

Counsel's Response

[13] In a written response dated 9 June 2014, counsel submitted that the appellant's employment was a substantial match to the relevant ANZSCO description and core tasks. In support of that submission, written statements from five suppliers were provided which stated that the appellant ordered and received goods from them.

[14] It was also submitted that the appellant was not a "casual employee" and that his employment was sustainable because he worked at least 30 hours per week. The employer accepted that the appellant had worked four of the six public holidays and that he had not been paid correctly. However, this was a "genuine oversight" on the part of the employer and any breach of the appellant's employment agreement was not intentional. The employer had since reimbursed the appellant and Immigration New Zealand was provided with evidence of the reimbursement.

[15] To demonstrate that the appellant would receive wages of approximately $45,000 per year, counsel provided Immigration New Zealand with the appellant's timesheets stating that he was being paid $865.38 gross per week which equated to approximately $45,000 per year. Counsel explained that when the appellant stated he received $20 per hour, he was only giving a "ballpark figure".

[16] As for the automatic deductions of $150 per week from the appellant's wages, Immigration New Zealand was provided with a written authority from the appellant for the deductions. Finally, copies of the chef's and the waitress's employment agreements were provided dated 3 December 2013 and 17 March 2014. A third employment agreement, dated 1 June 2014, was also provided. This related to another waitress ("the second waitress") who worked on a casual basis.

Immigration New Zealand Decision

[17] By letter dated 7 July 2014, Immigration New Zealand declined the appellant's residence application. While it was satisfied that his role substantially matched the ANZSCO description and core tasks of a Restaurant Manager, he could not be awarded points for skilled employment or bonus points for skilled employment outside of Auckland because his employer did not have good workplace practices. In particular, the second waitress's employment agreement showed that she was being paid below the applicable minimum wage. The application was also declined because the appellant's employment created an unacceptable risk to the integrity of New Zealand's employment laws.

STATUTORY GROUNDS

[18] 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—
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> (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.

[19] 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

[20] On 31 July 2014, 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.

[21] Counsel provides submissions (23 July 2014).

[22] On appeal, new evidence was provided to the Tribunal which had not been previously provided to Immigration New Zealand. The new evidence comprises the second waitress's time and wage records.

[23] In assessing the correctness of the decline decision, the Tribunal is generally precluded from considering new information on appeal unless it falls within the exceptions of sections 189(3)(a), 189(3)(b) or 189(6) of the Act. In this case, the Tribunal finds that the second waitress's wage and time records satisfy the statutory exception of section 189(3)(a) as the records existed at the time of the decline decision and were relevant in determining the application. Moreover, the appellant could not, by the exercise of reasonable diligence, have provided this information before Immigration New Zealand determined his application because the first time he became aware of Immigration New Zealand's concerns regarding the second waitress's wages was after it had declined his residence application. In all the circumstances, the Tribunal is satisfied that it is fair for this new evidence to be considered.

ASSESSMENT

[24] The Tribunal has considered the submissions and documents provided on appeal and the file in relation to the appellant's residence application which has been provided by Immigration New Zealand.

[25] 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

[26] The application was made on 15 January 2014 and the relevant criteria are those in residence instructions as at that time.

[27] The relevant instruction in this case is:

> **SM7.20 Requirements for employers**
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> a. All employers wishing to employ non-New Zealand citizens or residents must comply with all relevant employment and immigration law in force in New Zealand. Compliance with relevant New Zealand employment and immigration law includes, but is not limited to:
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> i. paying employees no less than the appropriate minimum wage rate or other contracted industry standard; and
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> ii. meeting holiday and special leave requirements or other minimum statutory criteria, e.g. occupational safety and health obligations; and
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> ...
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> b. To qualify for points, skilled employment must be with an employer who has good workplace practices, including a history of compliance with all immigration and employment laws such as the Immigration Act, the Injury Prevention, Rehabilitation and Compensation Act, the Minimum Wage Act, the Health and Safety in Employment Act, the Employment Relations Act and the Holidays Act.
>
> c. Current employment or an offer of employment does not qualify for points if it is not compliant with all relevant immigration and employment laws in force in New Zealand or if INZ considers that the employment of the applicant creates unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions.
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> **Note:** To determine whether an offer of employment creates an unacceptable risk to the integrity of New Zealand's immigration and employment laws, policies or instructions an immigration officer may consider whether the remuneration offered for the position is comparable to the market rate for New Zealand workers in that occupation.
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> *Effective 29/11/2010*

[28] In declining the application, Immigration New Zealand provided several reasons why it considered the appellant's employer did not have good workplace practices. The Tribunal considers each of these reasons in turn.

[29] The first reason provided by Immigration New Zealand related to the employer's failure to pay the appellant time-and-a-half for working on a public holiday. It was alleged that the appellant had worked on 25 December 2013 (Christmas Day) 26 December 2013 (Boxing Day), 1 January 2014 (New Year's Day), 2 January 2014, 6 February 2014 (Waitangi Day) and 25 April 2014 (ANZAC Day).

[30] The employer conceded that he had incorrectly paid the appellant for four of the six public holidays. He did not accept that the appellant had worked on Christmas Day or Boxing Day as the restaurant was not open. The Tribunal notes that Immigration New Zealand was provided with evidence that the employer had remedied matters by paying the appellant the correct hourly rate for working on a

public holiday. While the employer did breach the terms of the appellant's employment agreement, the breach was relatively minor and was remedied before the residence application was determined. It is therefore unlikely that the employer will make the same mistake in the future.

[31] Immigration New Zealand's second reason for finding that the appellant's employer did not have good workplace practices related to the second waitress's employment agreement stating that her hourly rate was $13.75, which was below the applicable minimum hourly rate of $14.25. As a new matter which prejudicially affected the appellant's residence application, he should have been given an opportunity to comment on such information before Immigration New Zealand made its decision. Had it done so, Immigration New Zealand would have been provided with the second waitress's wage and time records which showed that, despite her employment agreement, she was in fact paid an hourly rate $14.25 and not $13.75 per hour.

[32] Immigration New Zealand's third reason for declining the application related to the employer's apparent failure to provide all of his employees with a written employment agreement. That finding was incorrect. Two of the three employment agreements, dated 3 December 2013 and 17 March 2014, predated the date of Immigration New Zealand's verification site visit (2 May 2014). This was not a situation where written employment agreements were provided in response to concerns raised by Immigration New Zealand. The date of the second waitress's employment agreement reflects the date in which her employment commenced, namely 1 June 2014.

[33] Immigration New Zealand's final reason for declining the application related to the eight per cent holiday pay which the appellant had received weekly since the commencement of his employment. While Immigration New Zealand no longer considered that he was a casual employee whose employment was not sustainable, it believed that the appellant's eight per cent holiday pay meant that he was no longer entitled to his four weeks' annual leave as provided for in his employment agreement.

[34] It was submitted by counsel that the eight per cent payment of holiday pay was an overpayment by the employer which did not, of itself, constitute a breach of employment law. It is clear that this is not the case as the appellant's payslips record these additional payments as "leave/holiday" pay. While it is not clear why the appellant is receiving eight per cent in holiday pay every week, the Tribunal notes that he has not been given an opportunity to respond to this concern about

his application. Immigration New Zealand's concern that the eight per cent holiday payments meant that the appellant was not entitled to four weeks' annual leave is a new and separate matter which it did not previously raise with the appellant in its letter of concern dated 21 May 2014.

[35] As with the earlier concern relating to the second waitress's hourly wage, the first time the appellant became aware of the prejudicial effect his eight per cent holiday pay had on his residence application was when he received Immigration New Zealand's letter of decline. Given the prejudicial effect of this concern on his application, A1.5 (effective 29 November 2010) of instructions required that the appellant be given a reasonable opportunity to respond.

[36] The penultimate paragraph in Immigration New Zealand's decline letter referred to the appellant's position not qualifying for points for skilled employment because his employment created an unacceptable risk to the integrity of New Zealand's employment law. As has been discussed above, the process Immigration New Zealand followed in order to reach that finding did not comply with the requirements of procedural fairness outlined in residence instructions.

Conclusion

[37] The Tribunal concludes that the findings made by Immigration New Zealand and its decision to decline the application were incorrect. The decline decision is therefore cancelled and the application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[38] 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 Government 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.

[39] 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 in terms of the

applicable Government residence instructions, in accordance with the directions set out below.

Directions

[40] 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 investigations or other aspects of the application which remain to be completed or which 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 records indicate that a recently incorporated company now runs the restaurant in which the appellant works. It is not clear whether the company director and the shareholders of this newly established company have previously been associated with the restaurant and to what extent.

3. If the new owners have no previous association with the restaurant, Immigration New Zealand's concerns regarding the workplace practices of the former employer simply fall away. However, Immigration New Zealand should assess the current employer's workplace practices as part of a correct assessment.

4. In light of the change of entity of the appellant's employer, Immigration New Zealand should invite the appellant to provide updated information about his employment and whether there has been a change in his position and responsibilities.

5. Should the appellant no longer be working in the same position, he is to be given a reasonable opportunity to provide evidence of a new offer of skilled employment.

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

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