IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 204027**

AT AUCKLAND

Appellant:	**CV (Skilled Migrant)**
Before:	P Fuiava (Member)
Representative for the Appellant:	W Delamere
Date of Decision:	14 August 2017

RESIDENCE DECISION

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[1] The appellant is a 44-year-old citizen of Sri Lanka 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 it was not satisfied the appellant's employer complied with New Zealand's employment laws or that the employer had good workplace practices. As a result, the appellant was not awarded points for skilled employment and, consequently, he did not meet the minimum selection criteria for the Skilled Migrant category.

[3] The principal issues for the Tribunal are whether there was a breach of the Wage Protection Act 1983 by the appellant's employer and whether Immigration New Zealand considered all known relevant information before it determined the application. For the reasons that follow, the Tribunal finds that the Immigration New Zealand decision to decline the application was incorrect. The application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant arrived in New Zealand in March 2008 as the holder of a visitor visa. For the most part, he has lived here on a series of visitor, interim, and work visas. His current work visa expires on 23 August 2017.

[5] In April 2010, the appellant commenced employment as an Office Facilities Manager for a cleaning business in a New Zealand city. The position was full-time and the appellant was paid a salary of $48,000 per annum. The business was owned by AA and his late brother. After the brother's death, AA established his own cleaning business, ABC Ltd, which was incorporated in July 2014. The new business employed the appellant as a Service Manager on similar terms and conditions. His position remained fulltime and his salary remained unchanged. Among other things, the appellant's new individual employment (1 July 2014) stated:

> "15.5 Deductions from Salary/Wages
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> Where requested by the Employee, the Employer shall deduct from their salary/wages any agreed amount for matters such as superannuation, a staff social club or union fees and pay the amount to the organisation specified by the employee…"

[6] On 19 August 2015, the appellant made his application under the Skilled Migrant category. He claimed 120 points, which included 60 points for skilled employment that he initially claimed substantially matched the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) occupation, including core tasks, of a Hospitality, Retail and Service Manager NEC (not elsewhere classified). The nominated occupation was later changed to Customer Service Manager (ANZSCO 149212).

[7] Over the intervening months that followed, Immigration New Zealand requested more information about the nature of the appellant's employment. Because the application was declined on another ground, the issue as to whether the appellant's employment substantially matched the relevant ANZSCO occupation was left unresolved.

[8] On 15 December 2016, Immigration New Zealand requested further documents from the appellant's former representative regarding the appellant's wages. In response, the representative provided Immigration New Zealand with the appellant's summary of earnings information from the Inland Revenue Department (IRD) from April 2015 to November 2016, four of the appellant's payslips from 29 September 2016 to 30 December 2016 (he was paid on a

monthly basis), his bank account statements from June 2016 to January 2017, and a savings agreement (15 November 2015) between ABC Ltd and the appellant. The savings agreement recorded the following terms and conditions:

> "Terms of Agreement
>
> 1. [ABC Ltd] under the directorship of [AA] has made available a savings scheme for [the appellant] which will be accumulated in varying sums as specified by [the appellant].
>
> 2. The funds allocated to the savings fund will be the resulting amount from [the appellant's] salary and held in an account with [ABC Ltd] until a time where [the appellant] requests the funds to be released.
>
> 3. The salary will be paid to [the appellant] at intervals, and in amounts, specified by [the appellant]. The request made will be processed and released immediately by [ABC Ltd].
>
> 4. Once a request by [the appellant] is made to release the savings, [AA] will transfer the balance owing within 2 weeks of the date of request.
>
> 5. Payment of the funds will take priority over any available funds, and/or funds received by [ABC Ltd] at the time of the request."

[9] The representative explained in her email that the appellant had entered into the savings scheme because he had found it difficult to save money. This was due to him paying child support and supporting his new partner, who had recently obtained employment in New Zealand. The representative stated that the appellant was saving his money to visit his mother in Sri Lanka, who would be receiving laser surgery for her eyesight. The savings scheme was an arrangement the appellant had established with his employer whereby part of the appellant's salary was kept in reserve for him to use at a later time. The employer kept a record of the appellant's savings, which the appellant could obtain at any time.

[10] Immigration New Zealand asked the representative to provide more documents surrounding the savings agreement. In particular, it wanted the bank statements of the account to which the appellant's savings had been deposited. In response, the representative provided a bank account statement (1 November 2015 to 1 December 2016), which was under the employing business's name and had an overdraft limit of $5,000. The account balance was -$4,503.11.

[11] Immigration New Zealand asked the representative to provide the whole account statement for the appellant since the commencement of the savings scheme in 2015. Immigration New Zealand was provided with a running tally from the employer of the appellant's savings, which showed total accrued savings of $14,221.66. In addition, the representative provided a bank account statement

from ABC Ltd, which showed payments of $5,820 by the employer to the appellant from 16 September 2016 to 19 December 2016.

[12] In an Immigration New Zealand email dated 23 January 2017, the representative was advised that the appellant's savings account had still not been provided. Immigration New Zealand repeated its request for that information.

[13] On 24 January 2017, the employer emailed Immigration New Zealand to advise that there was no specific savings account created for the appellant. His savings remained in the company's cheque account from which all payments to the appellant had been made. The employer repeated that the payment of the appellant's savings took precedence over all available funds. The savings were secure because the business billed over $85,000 per month. The employer explained that the idea of the savings scheme had been proposed to him by the appellant because he wanted to visit his mother at a time of his choosing. Because they had worked together for seven years, the employer agreed to help the appellant. Aware of his professional responsibilities to the appellant, the employer made certain that there was a formal agreement in place so that the appellant's savings were protected. The employer advised that none of his other employees had an arrangement like the appellant's in place.

Immigration New Zealand's Concern

[14] On 8 February 2017, Immigration New Zealand advised the appellant of its concern that it appeared the money from his savings agreement was being used to float the business. In addition, Immigration New Zealand expressed the concern that the appellant was not receiving interest on his savings. It appeared to Immigration New Zealand that the deductions from the appellant's wages breached the Wages Protection Act 1983 (the WPA). This was because the deductions varied from week to week and there was no agreement in writing that authorised the employer to make a specific deduction from the appellant's wages.

[15] As there was no agreement in writing that authorised the making of specific deductions of money from the appellant's salary, it appeared to Immigration New Zealand that the employer had failed to pay the appellant's wages in full. As the deductions breached section 5 of the WPA, it followed that the employer had not complied with New Zealand's employment laws and, therefore, did not have good workplace practices.

Appellant's Response

[16] In a written response (21 February 2017), the representative stated that the appellant's savings were not being used to float the company's finances because his funds could be recalled at any time. The representative advised Immigration New Zealand that the employer had, at the appellant's request, paid him his savings in full. Evidence of the payments was provided to Immigration New Zealand, which comprised a screenshot of two online payments by the employer to the appellant of $14,221.66 and $2,029.88 on 17 and 20 February 2017, respectively. The appellant's joint bank account for the same period showed that he had received the monies.

[17] The representative stated that the business was not dependent on the appellant's salary to float the business because there was no evidence to indicate that this was the case. The concern appeared to be based on nothing more than the fact the appellant's savings had been left in the employer's business account.

[18] The representative acknowledged that it may have been better, in terms of transparency, for the monies to have been put aside in a separate company account. However, the arrangement had worked from the appellant's point of view and he had not been harmed because of it. The representative stated that the employer had entered into the arrangement in the spirit of generosity to accommodate a long-time employee. Their working relationship was based on mutual trust and collaboration.

[19] The representative stated that the employer ran a profitable business. The suggestion that the employer needed the appellant's wages to support his business was "simply inaccurate". The employer was willing to submit his financial records, if necessary.

[20] With respect to the appellant's funds not earning interest, the representative stated that, in any case, the interest the appellant could have earned would have been charged at a low rate. The ability to save money was of greater benefit to the appellant than the few dollars he would have earned in interest.

[21] The representative denied the employer's deductions breached section 5 of the WPA. This was due to the fact that there was a general deductions clause in the appellant's individual employment agreement (see [5]). While the amount deducted from his wages varied from week to week, the deductions were at the appellant's request. This gave him greater flexibility to save. While the flexible

nature of the scheme benefited the appellant, it placed a greater burden on the employer's shoulders in terms of administering the scheme.

[22] The representative stated there had been no breach of the WPA, which was designed to protect a worker from unreasonable or unjustified deductions from their wages. This was not the case here because the savings agreement was written evidence of the appellant's consent to the deduction. The employer had entered into the agreement in good faith. All of the appellant's savings had recently been paid to him at his request.

Immigration New Zealand Decision

[23] On 9 March 2017, Immigration New Zealand declined the appellant's residence application because it was not satisfied that his employer had complied with New Zealand's employment laws or that he had good workplace practices. Without points for skilled employment, the appellant did not meet the minimum selection criteria for the Skilled Migrant category.

[24] Immigration New Zealand stated that a general deductions clause had to be contained in the appellant's employment agreement, which was not the case. While there was a written savings agreement, the agreement did not allow for specific deductions to be made, which in the appellant's case varied from week to week. It was a requirement of the WPA that deductions from wages had to be specific and included in a general deductions clause in the employment agreement. This was not the case here.

STATUTORY GROUNDS

[25] 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.

[26] 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

[27] On 19 April 2017, the appellant lodged this appeal on both grounds of section 187(4) of the Act.

[28] On appeal, the appellant is represented by another representative, who makes submissions (undated).

[29] Briefly stated, the representative submits that there was no breach of employment law because the WPA does not require a general deductions clause to be included in an employment agreement before deductions can be made. The WPA merely requires deductions to be made with the worker's written consent or at his or her request. Even if a general deductions clause is required, Immigration New Zealand overlooked the fact that the appellant had such a clause in his employment agreement at clause 15.5 (see above at [5]).

[30] The representative submits that the savings agreement was evidence of the appellant's written consent for his employer to make deductions from his savings. The formal written agreement that had been entered into shows the employer's commitment to complying with employment law. To say he did not have good workplace practices is misguided and unfair.

[31] Finally, the representative submits that Immigration New Zealand's assertion that deductions have to be "specific and included in a general deductions clause in the employment agreement" is not an express requirement of the WPA. A lawful deduction from wages only requires written consent and consultation with the employee, which was the case here.

ASSESSMENT

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

[33] 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

[34] The application was made on 19 August 2015 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied the appellant's employer complied with all relevant employment laws in New Zealand or that he had good workplace practices.

[35] The relevant instructions in this case are SM7.20 and A1.5:

> **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:
>
> i. paying employees no less than the appropriate minimum wage rate or other contracted industry standard; and
>
> ii. meeting holiday and special leave requirements or other minimum statutory criteria, e.g. occupational safety and health obligations; and
>
> iii. only employing people who have authority to work in New Zealand.
>
> 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.
>
> ...
>
> *Effective 29/11/2010*

[36] A1.5 of residence instructions relevantly states:

> **A1.5 Fairness**
>
> a. Whether a decision is fair or not depends on such factors as:
>
> …
>
> ● whether all known relevant information is considered.
>
> …
>
> *Effective 29/11/2010*

[37] To qualify for points for skilled employment, an applicant's employment, or offer of employment, must be with an employer who satisfies SM7.20 of the instructions. The appellant was not awarded points for skilled employment because Immigration New Zealand considered the employer's deductions of the appellant's wages did not comply with section 5 of the WPA, which relevantly states:

> **5 Deductions with worker's consent**
>
> (1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—
>
> (a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or
>
> (b) on the written request of the worker.

[38] The Tribunal finds that Immigration New Zealand was incorrect when it determined that the employer had breached section 5 of the WPA because the appellant did not have a general deductions clause in his individual employment agreement. The Immigration New Zealand file contains a copy of the appellant's employment agreement (1 July 2014). The appellant's general deductions clause is found at clause 15.5 of his employment agreement. Immigration New Zealand appears to have overlooked this relevant information, which is a breach of the fairness and natural justice provisions of A1.5 of instructions. In any case, section 5 of the WPA makes it clear that a general deduction clause is but one means by which written consent can be provided by a worker. Here, there is the savings agreement, which *prima facie* is evidence of the appellant's written consent or of his written request for his employer's deductions of his wages.

[39] Not only was there a general deductions clause in the appellant's employment agreement, there was also evidence of his written consent and/or request authorising his employer to make the deductions. It appears that Immigration New Zealand sought to dilute the significance of the savings agreement by adding a gloss to section 5 that is not there. There is no requirement in the WPA for an employer to make specific deductions. The purpose of the WPA is to ensure that workers are paid their wages and to prevent unlawful deductions from their wages. The savings agreement is clear evidence of the appellant's written consent to the deductions. It was incorrect of Immigration New Zealand to decide otherwise.

[40] Another shortcoming with Immigration New Zealand's decision was its failure to consider the fact that the employer had paid the appellant all the monies

he had put into the saving scheme. Evidence had been provided that the appellant had received all of his savings from his employer, which amounted to over $16,000. This was relevant information that *prima facie* showed that the appellant had not been underpaid. In declining the application, Immigration New Zealand did not appear to take this information into account.

[41] Immigration New Zealand expressed concern that the appellant's wages were being used to keep his employer's business afloat. The Tribunal finds no evidence on the Immigration New Zealand file to substantiate its concern. In the absence of financial reports indicating that the business was not in a good financial position, there was no basis for Immigration New Zealand to state that the appellant's monies were being held to sustain the business. The Tribunal notes that the company was incorporated in 16 June 2014 and that, before this, the employer and his late brother had operated their own cleaning business together. The employer provided Immigration New Zealand with three GST returns from 1 April 2015 to 30 September 2015. On average, his business appeared to be making sales of approximately $56,849 per month at that time. The employer's evidence suggests that this figure has increased to $85,000 per month. Based on the information that was before Immigration New Zealand, the Tribunal can find no evidence that would indicate the appellant's employment was not sustainable.

[42] With respect to the savings agreement, the Tribunal finds nothing wrong with the agreement itself. By his own admission, the employer accepts that, with the benefit of hindsight, he would have done things differently. Even so, the Tribunal finds that the savings agreement and the appellant's individual employment agreement constitutes evidence of the appellant's written consent and request for his employer's deductions of his wages.

[43] For completeness, the Tribunal has considered Immigration New Zealand's concern regarding the opportunity lost to the appellant in not earning interest on his savings. However, as this is not an express requirement of instructions, the Tribunal finds this concern to be irrelevant as the loss of any interest does not mean that the deductions were in breach of the WPA or were otherwise unlawful.

Conclusion on correctness

[44] For the reasons given above, the Tribunal finds that Immigration New Zealand's decision to decline the application was incorrect because its assessment breached the principles of fairness and natural justice in that all known relevant information was not properly considered. Further, Immigration

New Zealand's determination that the employer had acted in breach of the WPA, and therefore employment laws, was incorrect. The application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[45] 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.

[46] 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

[47] 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. If the appellant remains in the same employment, Immigration New Zealand is to invite him to produce further and updated information about his employment.

3. Should any issues arise that are potentially prejudicial to the appellant, Immigration New Zealand is to clearly put this information to him and allow him a reasonable opportunity to respond.

4. If the appellant does not remain in the same employment, Immigration New Zealand is to allow him a reasonable period of time to produce evidence of any new employment or offer of employment that he has obtained.

[48] 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.

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

Order as to Depersonalised Research Copy

[50] 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.

"P Fuiava"
P Fuiava
Member

Certified to be the Research Copy released for publication.

P Fuiava
Member