IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2017] NZIPT 204134**

AT AUCKLAND

Appellant:	**AC (Accredited Employers)**
Before:	M B Martin (Member)
Representative for the Appellant:	W Delamere
Date of Decision:	3 November 2017

RESIDENCE DECISION

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[1] The appellant is a 48-year-old citizen of the Philippines. His application for residence, made under the Residence from Work — Talent (Accredited Employers) category, includes his 49-year-old wife and their two daughters, aged 13 and 17.

THE ISSUE

[2] Immigration New Zealand declined the appellant's application because he was not earning a minimum base salary of $55,000 per annum.

[3] The principal issue for the Tribunal is whether the above finding was correct. The Tribunal finds that it was not. Immigration New Zealand did not factor into its assessment the appellant's increased hourly wage rate based on his length of service at the employing company. His full wage rate demonstrated annual earnings of more than $55,000 on the basis of a 40-hour week. Accordingly, the decision to decline was not correct and the application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant and his wife have lived in New Zealand since December 2006. They have held successive work visas.

[5] The couple's two daughters have lived in New Zealand since July 2007. The couple has a nine-year-old son who was born here.

Residence Application

[6] On 4 October 2016, the appellant made his application for residence. He relied on his employment as a refinery process operator for ABC Ltd ("the company").

[7] The appellant did not include his son in the application because, it appears, there were concerns that he would not meet the health requirements of instructions. He has Autism Spectrum Disorder.

[8] The appellant declared a base salary of $69,615.92. His representative produced the following evidence in support of the appellant's income:

(a) A letter (29 August 2016) from the human resources and payroll administrator for the company. She stated that the appellant had been employed by the company since April 2007. His gross earnings for the 12 months to July 2016 were $105,976.14, but when overtime and allowances were deducted, his annual base earnings, on a 40-hour week, amounted to $69,615.92 (being the figure declared by the appellant above). The administrator said that this figure still included all guaranteed allowances that the appellant would receive for simply performing his eight-hour per day shift. If the variable shift and travel allowances were also removed, this would provide an annual base income of $57,688.32.

(b) A copy of the appellant's collective employment agreement which included a band wage scale, with the appellant's role linked to an hourly wage of $25.21, or $1,008.40 for a 40-hour week. The agreement included a range of allowances, including service and manufacturing allowances.

(c) Weekly payslips for the appellant for the periods 26 June 2016 to 27 August 2016 and 26 February 2017 to 25 March 2017. The

earlier payslips contained a base hourly rate of $26.24060, which had increased, by the time of the 2017 payments, to $26.89160. There were also a range of allowance payments made during each pay cycle, including manufacturing, day shift and travel allowances.

(d) Inland Revenue Department (IRD) statements which showed a gross income of: $103,209 for the 2014 tax year; $111,381 for the 2015 tax year; $98,961 for the 2016 tax year; and $35,289 for the partial tax year ending July 2016.

[9] The appellant's representative, in submissions dated 28 September 2016, acknowledged that the appellant was required, by the applicable instructions, to have employment in New Zealand with a minimum base salary of $55,000 per annum. It was accepted that the instructions made it clear that the minimum base salary excluded employment-related allowances, such as overtime, tool or uniform allowances, medical insurance and accommodation. However, Immigration New Zealand could have regard, it was submitted, to the manufacturing and day shift allowances that the appellant received because they were not discretionary or reimbursement payments. When those allowances were added to the appellant's base hourly rate, it could be seen that he received an income of more than $55,000 per annum.

Immigration New Zealand Clarifies Two Matters

[10] On 13 December 2016, Immigration New Zealand emailed the representative seeking to clarify two points. First, it was not clear why the appellant's employment agreement recorded that refining leading hands earned an hourly rate of $26.20 but, on the payslips provided, the appellant's normal hourly rate was $26.89160. Second, in the letter from the human resources and payroll administrator, it was said that, with variable shift and travel allowances removed, the appellant received an annual income of $57,688.32. However, based on the hourly rates shown on the payslips, it appeared that the appellant received an annual income of $55,934.53 based on a 40-hour week.

[11] In response, the representative submitted an email (20 December 2016) from the human resources and payroll administrator. In respect of the first matter, she said that the appellant received a base rate of $25.21 per hour pursuant to the employment agreement, not $26.20 as stated by Immigration New Zealand. He was also entitled to a service allowance of $1.6816 per hour based on nine years' service, in accordance with the service allowance provisions of the agreement.

Combined, he was entitled to an hourly wage of $26.8916 ($25.21 + $1.6816 = $26.8916 per hour), which was the hourly rate recorded on his payslips.

[12] With respect to the second matter requiring clarification, the reason why Immigration New Zealand had reached a figure of $55,934.53, instead of the figure previously put forward by the company of $57,688.32, was because it had not included the manufacturing allowance or three-rotating shift worker double-time payments. The former was a guaranteed allowance paid to all of the company's waged employees and equated to $1,296.87 per annum. The latter was a payment made to 80 per cent of the company's staff who were entitled to the first hour of their night shift to be paid at double time, pursuant to the employment agreement, which amounted to $456.92 per annum.

[13] In a letter dated 19 January 2017, the representative noted that the administrator had made an error and that the manufacturing allowance amounted to $1,260.06 per annum, not $1,296.87. Further, it was acknowledged that the double-time payment may not constitute a guaranteed minimum entitlement. With this in mind, the representative submitted that the appellant received the followingly income per hour: a wage of $25.21 + service allowance ($1.6816) + manufacturing allowance (0.6058 cents) + day shift allowance ($1.87) = $29.3674 per hour (or $61,084.19 per annum).

[14] The representative stated that the above allowances were guaranteed minimum entitlements and so should be taken into account as part of the appellant's base salary.

Immigration New Zealand's Concerns

[15] On 11 April 2017, Immigration New Zealand advised the appellant that it appeared he did not satisfy the minimum base salary requirement. He earned the equivalent of a base salary of $52,436.80 ($25.21 x 40 x 52). Employment-related allowances could not be taken into account.

[16] In response, the representative reiterated that an allowance was a discretionary payment, but the additional payments the appellant was receiving, while referred to as allowances in the employment agreement, were not in fact discretionary payments. They formed part of the appellant's base income.

[17] In support, the representative produced a letter (26 April 2017) from the human resources and payroll administrator of the company. She stated that the

appellant's wage base rate of $25.21 and his service allowance, which had now increased to $1.7436, provided an hourly rate of $26.9536 (or $56,063.49 per annum). Even without any of the other allowances included, he clearly had the equivalent of an annual salary in excess of $55,000.

[18] The administrator supported her letter by including copies of the appellant's April 2017 payslips, which reflected his increased hourly rate.

Immigration New Zealand Decision

[19] On 8 May 2017, Immigration New Zealand declined the appellant's application because he was not earning a minimum base salary of $55,000.

STATUTORY GROUNDS

[20] 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.

[21] 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

[22] On 2 June 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[23] The representative makes submissions on appeal and produces copies of documents contained on Immigration New Zealand's files. New evidence is also produced, including: the appellant's IRD income tax statement for the financial year ended 31 March 2017, which shows a gross income of $104,094; another letter (16 May 2017) from the human resources and payroll administrator of the

company; and a joint letter (16 May 2017) from the human resources manager and operations manager of the company.

[24] Given the outcome of this appeal, it is not necessary for the Tribunal to determine the admissibility of this new evidence.

ASSESSMENT

[25] The Tribunal has considered the submissions and documents provided on appeal, and the files in relation to the appellant's residence application and an earlier residence application made on 12 October 2015, which have been provided by Immigration New Zealand.

[26] 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

[27] The application was made on 4 October 2016 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because the appellant did not receive a minimum base salary of $55,000 per annum.

Residence from Work — Talent (Accredited Employers) category instructions

[28] The relevant instructions in this case are located in RW2 of the Residence from Work — Talent (Accredited Employers) category. Instruction RW2.c, effective 22 August 2016, states that holders of visas granted under the Talent (Accredited Employers) Work to Residence temporary instructions may be granted residence where, among other things, they have "employment in New Zealand with a minimum base salary of $55,000 per annum if the associated work to Residence visa application (WR1) was made on or after 28 July 2008".

[29] The instructions clarify, by way of a Note to RW2, that the minimum base salary excludes employment-related allowances, such as overtime, tool or uniform allowances, medical insurance and accommodation. Further, where an employee is to work more than 40 hours per week, the minimum base salary must be calculated on the basis of 40 hours per week.

[30] Immigration New Zealand accepted that the appellant was employed by an accredited New Zealand employer and that his associated Work to Residence application had been made after 28 July 2008. At issue was whether he received a minimum base salary of $55,000 per annum.

The appellant's gross annual income

[31] The appellant was paid in excess of $55,000 per annum. The evidence he produced from the IRD showed that he received a gross income of $98,961 for the financial year ending 31 March 2016; $111,381 for the financial year ending 31 March 2015; and $103,209 for the financial year ending 31 March 2014. However, Immigration New Zealand determined that, once a range of employment-related allowances were subtracted from the appellant's gross annual income, including a service allowance and manufacturing allowance, his base salary/earnings amounted to only $52,436.80 per annum ($25.21 (base hourly rate) x 40 hours per week x 52 weeks per year). Accordingly, Immigration New Zealand did not consider that he satisfied the minimum base salary figure of $55,000 set by RW2.c of the instructions.

Base salary

[32] The *Cambridge Business English Dictionary* states that base salary, or basic salary, is "the amount of money that someone earns every year in their job, not including any extra payments they may receive" (Cambridge University Press *Cambridge Business English Dictionary* www.dictionary.cambridge.org). It has elsewhere been defined as a "fixed amount of money paid to an employee by an employer in return for work performed" and does not include "benefits, bonuses or any other potential compensation from an employer" (WebFinance *BusinessDictionary* (2017) www.businessdictionary.com).

[33] The Note to RW2 reflects the above definitions. It makes it clear that the minimum base salary of $55,000 excludes employment-related allowances such as overtime, tool or uniform allowances, medical insurance and accommodation. These payments or benefits do not constitute fixed remuneration paid to an employee for work performed.

The appellant's service allowance

[34] The appellant was paid what his employment agreement referred to as a "service allowance" which, by the time his application came to be determined,

amounted to $1.7436 per hour (based on service exceeding 10 years). This allowance increased his hourly wage rate to $26.9536 and his annual income to $56,063.49. Prior to this, he was receiving an hourly rate of $26.89160 based on nine years of service.

[35] Immigration New Zealand determined that the service allowance was an employment-related allowance and so could not be taken in account pursuant to the Note to RW2. However, the Tribunal agrees with the representative's submissions on appeal that, in substance, this service allowance was in fact simply a wage increase. The appellant's fixed wage became $26.9536 based on reaching a 10-year milestone with the company. That was his new fixed wage figure, and Immigration New Zealand should have proceeded on that basis. While the agreement's reference to a service "allowance" was unhelpful, it should have been clear to Immigration New Zealand that the wage increase that resulted was not caught by the Note to RW2.

[36] The Tribunal finds that the appellant was earning an annual income in excess of $55,000 because his hourly rate ($26.9536) amounted to an annual income of $56,063.49. Given this finding, it is not necessary for the Tribunal to consider Immigration New Zealand's determination as regards the manufacturing payments the appellant also received.

Correctness of decision to decline

[37] For the above reasons, the Tribunal finds that Immigration New Zealand's decision to decline the application was incorrect. The appellant had demonstrated that he was earning a minimum base salary of $55,000 per annum. The decision to decline the application is 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 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 by Immigration New Zealand in terms of the applicable 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 other aspects of the application which require further investigation, 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 is to write to the appellant and invite him to produce updated evidence as to his current income.

3. Immigration New Zealand must also remind the appellant that, if he does not include his son in the residence application, the son will encounter a range of difficulties in any future Family Category residence application that he makes. Express reference must be made to A4.60.b, effective 26 November 2012, and the impact of this provision on the son's eligibility to be considered for a future medical waiver.

4. Immigration New Zealand is to proceed on the basis that the appellant satisfies RW2.c for the reasons set out at [34] to [36] above, unless updated evidence suggests otherwise.

5. If, at any stage, Immigration New Zealand finds potentially prejudicial matters which must be put to the appellant, it is to do so in clear and concise terms with reasons. The appellant is to be given a reasonable opportunity to respond.

[41] 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.

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

Order as to Depersonalised Research Copy

[43] 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 or his family.

"M B Martin"
M B Martin
Member

Certified to be the Research Copy released for publication.

M B Martin
Member