

AT AUCKLAND

Appellant: HO (Skilled Migrant)

Before: P Fuiava (Member)

Representative for the Appellant: W Delamere

Date of Decision: 15 November 2017

RESIDENCE DECISION

[1] The appellant is a 28-year-old citizen of the 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 residence application because it was not satisfied his employment as a customer service representative in a technical support role for an internet service provider substantially matched the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description, including core tasks, of an ICT Customer Support Officer. The application was declined on the additional ground that the appellant's employment created an unacceptable risk to the integrity of New Zealand's immigration or employment laws because he was not paid the market rate for his position. Without points for skilled employment, the appellant did not meet the minimum selection criteria of the Skilled Migrant category.

[3] The principal issues for the Tribunal are whether Immigration New Zealand fairly and properly assessed the appellant's employment and the market rate for an ICT Customer Support Officer. For the reasons that follow, the Tribunal finds that Immigration New Zealand's assessment was not fair and nor was it correct. The application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] The appellant first arrived in New Zealand in February 2015 as the holder of a student visa. He has lived here on consecutive student and work visas. He currently holds a work visa valid to 26 October 2018.

[5] In May 2016, the appellant obtained a Graduate Diploma in Information and Communication Technology (Level 7) from a New Zealand tertiary education provider.

[6] In April 2016, the appellant commenced employment as a “customer support representative – technical support” for an Australian internet service provider. He was employed full-time (40 hours per week) and he was paid a base salary of \$39,000 per annum. He was paid time-and-half for working weekends and he earned an additional \$800 per month via the company’s reward and recognition scheme. In addition, his salary increased by \$500 for every six months of employment for five years.

[7] The appellant made his application for residence under the Skilled Migrant category of instructions on 4 November 2016. He claimed 155 points, which included 50 points for skilled employment that he claimed substantially matched the ANZSCO description, including core tasks, of an ICT Customer Support Officer. A copy of his individual employment agreement and job description was provided to Immigration New Zealand.

Employment Verification

[8] As part of Immigration New Zealand’s verification of the appellant’s employment, the acting customer service manager of the employing organisation stated in an employer questionnaire:

[The appellant] is one of our frontline staff and his position as a CSR (customer support representative) is to provide awesome customer service to our customers within a contact centre environment. He is in a dedicated technical support team, so the types of calls he is answering involve troubleshooting of technical enquiries for hardware and software issues, supporting customers with their connection setup, responding and resolving customer complaints and following resolution of the customer’s issues he may be involved in upselling and promoting our company’s products and services.

[9] When asked about what kind of training was required to become a customer service representative, the manager stated:

We provide eight weeks of induction training. This is comprised of two weeks of product, billing and [ABC’s] system training, then two weeks on the phones only

taking billing calls, followed by two weeks of technical support up-skill training and then two weeks of inbound calls. The employee is then nested into their team.

[10] The manager explained that, on occasion, the appellant did refer calls to others, for example, if he detected that the line was the issue, he checked whether there was a known fault in the network and then he troubleshooted the customer's equipment. If there was still no resolution, he escalated matters to a telecommunications technician who physically checked the line at the customer's premises. If there was a network outage, he referred the call to the "faults" team. If there was something technical he simply could not resolve, he referred the customer to the business's "solutions" team.

Immigration New Zealand Concerns

[11] On 3 March 2017, Immigration New Zealand advised the appellant in writing that it appeared his employment did not substantially match the ANZSCO description of an ICT Customer Support Officer. It was satisfied that he responded to inquiries about software and hardware problems (task two), installed and downloaded appropriate software (task four), ensured efficient use of applications and equipment (task five), and worked in a call centre (task nine). It also determined that designing and maintaining websites (task seven) was not relevant to his employment.

[12] However, Immigration New Zealand was not satisfied the appellant determined software and hardware requirements to provide solutions to problems (task one) because he did not perform the task to the extent envisaged by the ANZSCO. It appeared that the solutions he provided were "predetermined" by following selected troubleshooting steps instead of determining the software and hardware requirements independently to find a solution.

[13] The appellant was considered not to adapt existing programs to meet users' requirements (task three) because he maintained existing programs and software. He did not make changes to or adapt the software to meet the users' requirements as intended by the ANZSCO. While he assisted customers to connect to existing LAN networks, he did not implement computer networks (task six) to the extent envisaged by the ANZSCO. Finally, he did not repair and replace peripheral equipment such as terminals, printers and modems (task eight) because he worked in a fixed location at a call centre and he was not physically present at a customer's premises.

[14] Immigration New Zealand noted that the qualifications associated with an ICT Customer Support Officer was a New Zealand Register Diploma or three years of relevant work experience, which could substitute for the formal qualification. The appellant's employer had advised that the business provided eight weeks of induction training for its customer service representatives, who were then nested into their team. It therefore appeared that the qualification requirement for the appellant's role was less than those required by the ANZSCO, which supported Immigration New Zealand's concern that his role may not substantially match the relevant ANZSCO occupation.

[15] Immigration New Zealand further noted that, according to the New Zealand Careers website, IT helpdesk/support technicians usually earned \$43,000 to \$60,000 per year. The appellant's annual salary of \$38,500 was lower than the salary market rate for an ICT Customer Service Officer. The effect of instructions at SM7.20.c meant that, if Immigration New Zealand considered an applicant's employment to create an unacceptable risk to the integrity of New Zealand's immigration or employment laws, policies or instructions, it could decide not to award him points for skilled employment. Immigration New Zealand regarded his salary to be considerably below the market rate for New Zealand workers in his occupation and, therefore, his employment was considered to create unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions.

[16] The appellant was advised that his role appeared to substantially match that of a Call or Contact Centre Information Clerk or a Call or Contact Centre Operator. However, neither role qualified for points for skilled employment because they were not included in the List of Skilled Occupations at Appendix 6 of instructions.

[17] Immigration New Zealand's letter recorded that it had not awarded the appellant points for skilled employment or for skilled employment in an identified future growth area or an area of absolute skills shortage. In addition, he was not awarded points for his qualification in an identified future growth area or for having a basic New Zealand qualification because he had not commenced his studies or completed his qualification before 25 July 2011 as required by the instructions. Without points for skilled employment, he would be eligible for only 80 points, which did not meet the minimum selection criteria of the Skilled Migrant category.

Appellant's Response

[18] On 24 March 2017, the appellant's newly appointed (and now former) representative responded in writing, which extensively quoted information provided by the senior human resources adviser of the employing organisation (the employer) in a letter dated 17 March 2017. In addition, the representative provided screen shots of the employing organisation's website, specific examples provided by the appellant of him undertaking tasks one, three, six and eight of an ICT Customer Support Officer, and his payslips from July 2016 to March 2017.

[19] The employer stated the appellant determined software and hardware requirements to provide solutions to problems (task one) by providing instruction and direction to customers on how to troubleshoot their connection issues. The employer provided Immigration New Zealand with specific examples of the appellant's performance of tasks one, three, six and eight.

[20] With respect to the appellant's qualifications, the employer acknowledged that the appellant's individual employment agreement required him to have a "Cert III" as a minimum requirement, but he asked Immigration New Zealand to consider that employees in New Zealand shared the same position description with their co-workers in Australia. In New Zealand, unless an unqualified applicant demonstrated strong ICT knowledge and skills gained from previous work or life experience, the employer considered a New Zealand Diploma level qualification to be the minimum requirement when recruiting staff. Through experience, the employer had found that unqualified applicants or those with a qualification below diploma level, struggled to meet the requirements of their position during their induction and their KPIs (key performance indicators) during the probation period of their employment.

[21] For the period from 26 April 2016 to 15 March 2017, the employer stated that the appellant had earned \$47,183.85, which appeared to be within the industry market rate range of \$43,000 to \$60,000 per annum. Overall, the employer considered that the duties performed by the appellant to better match the ANZSCO core tasks of an ICT Customer Support Officer than a Call or Contact Centre Information Clerk or a Call or Contact Centre Operator.

Immigration New Zealand Decision

[22] On 5 May 2017, Immigration New Zealand declined the appellant's application because it was not satisfied that his employment as a customer service

representative in a technical support role for an internet service provider substantially matched the ANZSCO description, including core tasks, of an ICT Customer Support Officer. While he performed some of the ANZSCO core tasks, Immigration New Zealand was not satisfied they were performed to the extent envisaged by the ANZSCO. The tasks he performed overlapped with the tasks of a Call or Contact Centre Information Clerk or a Call or Contact Centre Operator. Further, the tasks he performed did not appear to require specialist, managerial, or technical skill, which distinguished a skilled role from a non-skilled role.

[23] The qualification requirements of the appellant's position description reinforced Immigration New Zealand's concerns that his employment was not skilled under immigration instructions. It also reinforced its concerns that his occupation was not a substantial match to an ICT Customer Support Officer as the ANZSCO requirements was a New Zealand Register Diploma or three years of relevant work experience. Immigration New Zealand's concerns with the non-skilled nature of his employment were further supported by the basic knowledge requirements listed in the Person Specification – Technical Expertise section of his position description.

[24] The application was declined on the additional ground that the appellant was not paid an acceptable market rate for his position. While he earned approximately \$47,000 for the previous financial period, Immigration New Zealand stated that it could not include bonuses in the calculation of his annual salary, which was \$39,000. Based on its assessment, Immigration New Zealand was not satisfied his salary met the acceptable market rate and, therefore, it was not satisfied his employment did not create unacceptable risks to the integrity of New Zealand's immigration or employment laws. He was awarded 80 points (30 points for his age and 50 points for his qualification), which was not sufficient to meet the minimum selection criteria of the Skilled Migrant category.

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 15 June 2017, the appellant lodged this appeal on both grounds in section 187(4) of the Act.

[28] The appellant's newly appointed representative makes submissions (9 June 2017 and 4 and 11 September 2017). She refers the Tribunal to several of its previous decisions, some of which are discussed later in this decision.

[29] In addition to information that is already on the Immigration New Zealand file, the Tribunal was provided with Immigration New Zealand notes regarding a site visit conducted on the employer's premises on 13 April 2017; email correspondence (22 and 23 June 2017) between the employer and an Immigration New Zealand Privacy Officer regarding an Official Information Act request; and a letter (28 June 2017) from the employer outlining aspects of Immigration New Zealand's site visit notes that require correction.

[30] The extent to which the Tribunal can consider new information and evidence on appeal is constrained by section 189(1) of the Act. New evidence on appeal is inadmissible when considering the correctness of Immigration New Zealand's decision, unless it falls within the exception contained in section 189(3)(a) of the Act, or under section 189(6) of the Act. Given the outcome of this appeal, it has not been necessary for the Tribunal to consider the admissibility of this information. That said, it may be considered, as appropriate, by Immigration New Zealand in its reassessment of the application.

ASSESSMENT

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

[32] 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

[33] The application was made on 4 November 2016 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 as a customer service representative in a technical support role for an internet service provider substantially matched the ANZSCO description, including core tasks, of an ICT Customer Support Officer. Further, it was not satisfied that the appellant's employment did not create unacceptable risks to the integrity of New Zealand's immigration or employment laws, as it considered the appellant's salary fell below the acceptable market rate.

Relevant instructions

[34] Paragraph SM7.10 of instructions states that skilled employment requires specialist, technical or management expertise, and the assessment of whether an occupation is skilled is primarily based on the ANZSCO:

SM7.10 Skilled Employment

- a. Skilled employment is employment that requires specialist, technical or management expertise obtained through:
 - i. the completion of recognised relevant qualifications; or
 - ii. recognised relevant work experience (see SM7.10.15 below); or
 - iii. the completion of recognised relevant qualifications and work experience.
- b. Assessment of whether an occupation is skilled for the purposes of the Skilled Migrant Category (SMC) is primarily based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which associates skill levels with each occupation.

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

Effective 14/05/2013

[35] For an applicant to be awarded points for their employment, SM7.10.1.a requires that their employment substantially match the ANZSCO description, including core tasks, of an occupation on the List of Skilled Occupations at Appendix 6 of instructions:

SM7.10.1 Assessment of whether employment is skilled

An offer of employment or current employment in New Zealand will be assessed as skilled if it meets the requirements of (a), (b) or (c) below.

- a. The occupation is included in part A of the List of Skilled Occupations held at Appendix 6 and the principal applicant can demonstrate that their offer of employment or current employment substantially matches the description for that occupation (including core tasks) as set out in the ANZSCO and:
 - i. the applicant holds a relevant recognised qualification which is at, or above, the qualification level on the NZQF (see SM14.5) that corresponds to the indicative skill level described for that occupation in the ANZSCO; or

...

Effective 14/05/2013

[36] SM7.20.a requires that an applicant's employer comply with all relevant immigration and employment laws in force in New Zealand, including paying an applicant the appropriate wage. SM7.20.c requires that Immigration New Zealand be satisfied that the employment does not create unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions, which may include an assessment of whether an applicant's remuneration is comparable to the market rate for such employment:

SM7.20 Requirements for employers

...

- 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.

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.

Effective 07/12/2015

ANZSCO requirements

[37] The ANZSCO occupation of ICT Customer Support Officer (313112) is described in the ANZSCO Unit Group 3131 ICT Support Technicians. This occupation is included in Part A of the List of Skilled Occupations at Appendix 6 of instructions. Alternative titles for an ICT Customer Support Officer as listed in ANZSCO include ICT Help Desk Officer, ICT Help Desk Technician, and Systems Support Officer. One of the potential specialisations is Network Support

Technician. The ANZSCO describes an ICT Customer Support Officer as someone who:

Provides support, education and guidance in the deployment and maintenance of computer infrastructure and the diagnosis and resolution of technical problems and issues. May work in a call centre.

[38] Other occupations included in the Unit Group are Hardware Technician (313111), Web Administrator (313113) and ICT Support Technicians NEC (not elsewhere classified) (313199). The core tasks for the Unit Group 3131 ICT Support Technicians are as follows (numbered for ease of reference):

1. determining software and hardware requirements to provide solutions to problems
2. responding to inquiries about software and hardware problems
3. adapting existing programs to meet users' requirements
4. installing and downloading appropriate software
5. ensuring efficient use of applications and equipment
6. implementing computer networks
7. designing and maintaining websites
8. repairing and replacing peripheral equipment such as terminals, printers and modems
9. may work in a call centre

The appellant's employment

[39] The appellant works full-time for a large Australian internet service provider as a customer service representative in a technical support role. He works in a call centre and is part of the company's front-line staff. He provides answers to customers who have technical problems with hardware and software issues, supports customers with their connection setup, and he responds and resolves customer complaints. He primarily deals with residential and business customers and he may be involved in upselling and promoting ABC's products and services.

[40] If the appellant is not able to find any fault with a customer's network or equipment, he escalates the matter to a telecommunications technician who is responsible for checking the lines at the customer's premises. If the appellant becomes aware of a network outage, he refers the customer to someone in the "faults" team. If there is a technical issue the appellant cannot resolve, he refers the matter to the "solutions" team.

Whether performing a core task at a basic level was determinative

[41] In terms of task one, Immigration New Zealand acknowledged that the appellant took multiple steps to resolve issues customers had with his employer's products and services, but the problems were basic and his solutions were predetermined and did not require a high level of expertise or knowledge. In

addition, his position description required him to resolve a customer's problems on their first contact, which substantiated Immigration New Zealand's concerns that the problems he handled were of a basic nature.

[42] Similarly, with task three, the employer had provided the example of a customer who wished to have a better internet speed to run their business and to play their game consoles. The solution was to change the speed profile from standard to extreme. Both the problem and the solution appeared simple and did not require a high level of expertise.

[43] With respect to task six, while the appellant assisted customers to set up their internet connections, he did not implement the computer network, but rather, helped customers connect to existing networks, which did not appear to require a high level of skill.

[44] The Tribunal in *WB (Skilled Migrant)* [2015] NZIPT 202536 at [23] has previously cautioned Immigration New Zealand against importing a skill level into its assessment of whether an applicant has undertaken the core tasks because the instructions do not specify a skill level in undertaking the tasks, just that the applicant has undertaken the task. By describing the appellant's performance of the core tasks as basic or not requiring a high level of skill, Immigration New Zealand failed to consider what mattered, namely that he had performed the tasks.

[45] The appellant in *WB (Skilled Migrant)* had claimed that his employment as a store manager of a takeaway business substantially matched the ANZSCO occupation of a Retail Manager (General). The ANZSCO description of a Retail Manager requires such a person to organise and control the operations of a retail establishment. The Tribunal finds the use of descriptors such as "basic nature" or "basic" to describe the performance of core tasks by an applicant claiming to be a Retail Manager is appropriate because it is rarely the case that a person who performs the core tasks of a Retail Manager at a basic level has sufficient autonomy to organise and control a retail establishment.

[46] In this current appeal, before Immigration New Zealand could describe the appellant's performance of the core tasks of an ICT Customer Support Officer as "basic", it first needed to consider the context of his employment to determine whether he performed the core tasks and met the occupation description. Here, Immigration New Zealand made the error of not engaging with the ANZSCO description, which envisages someone like the appellant who provides support, education and guidance for customers with technical problems with their computer and works in a call centre. It can be inferred from the ANZSCO description that

the level of skill required of an ICT Customer Support Officer is moderate (but not extensive) technical competence.

Task six not relevant to appellant's employment

[47] The Tribunal notes that in *IZ (Skilled Migrant)* [2014] NZIPT 201940 at [39], the Tribunal observed that it is unlikely that persons in each occupation group in Unit Group 3131 ICT Technicians are expected to perform all nine core tasks.

[48] In the appellant's case, Immigration New Zealand made the error of including task six as a core task that was applicable to the appellant's employment. It was not. This is a task that is more likely to be performed by a Web Administrator rather than an ICT Customer Support Officer. While Immigration New Zealand was correct to exclude tasks seven and eight from its assessment as to whether the appellant's employment substantially matched the ANZSCO description and core tasks of an ICT Customer Support Officer, it was wrong to have assessed his employment against task six.

Qualification required for the appellant's role

[49] In support of its finding that the appellant's employment was not skilled under immigration instructions, Immigration New Zealand referred to his position description, which did not require him to have a New Zealand Register Diploma or three years of relevant work experience. Immigration New Zealand formed this view notwithstanding the later evidence of his employer, who stated that a New Zealand Diploma-level qualification was in fact required for the appellant's role.

[50] The Tribunal has previously stated in *LH (Skilled Migrant)* [2014] NZIPT 202056 at [37]:

Immigration New Zealand was incorrect to reject the manager's assertion solely on the grounds that the job description and advertisement did not *require* someone with a Bachelor degree in Nursing. Instructions do not require that a job description or job advertisement requires a specific qualification in order for it to be a key factor in the person's employment. What instructions require is an assessment by the employer that a qualification held by an applicant was a key factor in the decision to employ that person for a particular role.

[51] The Tribunal is not satisfied Immigration New Zealand properly considered the employer's statement regarding the qualifications required for the appellant's employment. Nor did it properly explore the possibility that, because New Zealand staff shared the same position description as their colleagues in Australia, the appellant's position description may have been generic in nature and not reflective of the qualifications needed for the role.

Market rate

[52] The application was declined on the additional ground that Immigration New Zealand was not satisfied the appellant's salary was within the market rate for his occupation. Immigration New Zealand used the New Zealand Careers website because it was a highly credible and comprehensive source supported by data from industry and government statistics.

[53] Absent from Immigration New Zealand's decline letter is any attempt to ascertain what the market rate is for an ICT Customer Support Officer. In *LX (Skilled Migrant)* [2014] NZIPT 202125 at [25], the Tribunal considered it reasonable to adopt W2.2.15 as a guide to the assessment of a market rate for the purposes of SM7.15 and SM7.20. W2.2.15 of instructions (effective 25 August 2014) provides a non-exhaustive list of factors Immigration New Zealand may consider in assessing the New Zealand market rate.

[54] In addition, the Tribunal in *LX (Skilled Migrant)* made it clear that Immigration New Zealand should consider a range of sources of information to determine a market rate, including CRiSM labour market information pages showing averages and medians from data collected since 2009; up-to-date information from relevant websites; and information from the relevant industry. Along with the provisions of W2.2.15, these sources of information allow for a free-ranging investigation into a typical or usual pay rate received by a New Zealand citizen or resident for equivalent work.

[55] In this present appeal before the Tribunal, there was no such investigation, free-ranging or otherwise. None of the factors set out in W2.2.15 were considered by Immigration New Zealand. It consulted only one website, New Zealand Careers, for information on the pay rates for "ICT helpdesk/support technicians", thereby using only one source as being definitive of a market rate salary. To use only one source for this information meant that the assessment of a market rate salary was flawed. It must therefore be reassessed.

[56] In addition, Immigration New Zealand did not properly explain why it considered the appellant's employment created an unacceptable risk to the integrity of New Zealand's immigration or employment laws. As the Tribunal observed in *LX (Skilled Migrant)* at [32]:

Further, Immigration New Zealand must appreciate that the ultimate question is whether the offer of employment creates an unacceptable risk. The degree of variance from the market rate, for example, is relevant to that question. There may be other terms and conditions of the employment which have a bearing on the pay

rate and which it is relevant and fair to take into account. In other words, Immigration New Zealand must also explain *why* a lower than market pay rate creates an unacceptable risk to the integrity of New Zealand's immigration and employment laws, policies or instructions.

[57] The Tribunal has previously stated in *QT (Skilled Migrant)* [2015] NZIPT 202225 at [26] that SM7.20 comprises a set of instructions that sit apart from most Skilled Migrant category requirements, which must be applied with the utmost fairness to an applicant when it becomes apparent to Immigration New Zealand that an employer's actions might impact negatively on an application.

[58] In this present appeal, the Tribunal notes that the appellant lives in a New Zealand city and earns a base salary of \$39,000. Payslips and income tax information from the IRD showed that he was paid considerably more than his base salary would suggest. While there is no guarantee this would continue to be the case, there was no evidence of exploitation. His employing organisation was incorporated in 2006 and is a subsidiary of a large internet service provider domiciled in Australia. The business employs approximately 300 staff in New Zealand and Immigration New Zealand was satisfied the employing organisation was financially sustainable.

[59] For all the reasons given above, the Tribunal finds that Immigration New Zealand was incorrect to decline the application because it considered the appellant's employment created unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions.

Other matters

[60] On appeal, the representative provided the Tribunal with an Immigration New Zealand site visit report regarding an unannounced site visit that took place at the employer's premises on 13 April 2017. There is no record of such a visit on the Immigration New Zealand file or in its Customer Interaction notes. It is not clear whether the site visit had directly or indirectly affected its decision to decline the application.

[61] In the interests of fairness and natural justice, it is important that the Immigration New Zealand file is a full and accurate record of its assessment of an application. This eliminates the perception of other extraneous reasons for declining the application, which must be put to an applicant for further comment pursuant to A1.5 of instructions (effective 29 November 2010). As the Tribunal cannot rule out the possibility that the site visit report, which has been challenged,

has indirectly contributed to the decline of the application, the application must be reassessed.

Conclusion on correctness

[62] The Tribunal finds that Immigration New Zealand's decision was incorrect because it incorrectly imported a skill level into the performance of the ANZSCO core tasks and failed to consider relevant information by the employer about the qualifications required for the appellant's role. Further, Immigration New Zealand did not properly determine the market rate for an ICT Customer Support Officer and nor did it explain why a salary lower than the market rate created unacceptable risks to the integrity of New Zealand's immigration and employment laws, policies or instructions. The decision to decline is cancelled and the application is returned to Immigration New Zealand for a correct assessment.

DETERMINATION

[63] 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.

[64] 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

[65] 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 shall invite the appellant to update his application within a reasonable timeframe, including an update as to his current position, salary, and conditions of employment, and any further evidence of the tasks that he completes. The appellant may also wish to provide any evidence he can obtain about the current market rate for an ICT Customer Support Officer.
3. For the reasons given above at [41] to [46], Immigration New Zealand shall reassess whether the appellant's employment substantially matches the ANZSCO description and core tasks of an ICT Customer Support Officer without reference to tasks (the core tasks are set out in [38]) six, seven and eight. Having previously determined that he performed tasks two, four, five and nine, Immigration New Zealand shall accept that the appellant performs these tasks. This presupposes that he has not, in the interim, had a change of employment.
4. In reassessing the application, Immigration New Zealand shall consider whether the appellant performs ANZSCO core tasks one or three by having regard to the Tribunal's observations at [44] to [46]. It should refrain from importing a skill level to these tasks. Further, Immigration New Zealand is to have greater regard to the employer's evidence concerning the qualification requirements for the appellant's role. It must then consider whether the appellant's employment substantially matches the ANZSCO description of an ICT Customer Support Officer.
5. Should Immigration New Zealand continue to have concerns regarding whether the appellant's remuneration is at the market rate in terms of SM7.20.c, it must conduct a free-ranging investigation considering several sources of information, including the factors set out in W2.2.15. If it determines that he is not paid at the market rate, it must provide him with an opportunity to respond to this finding. Immigration New Zealand must also explain why his lower than market pay rate creates an unacceptable risk to the integrity of New Zealand's immigration and employment laws, policies or instructions.

6. The application is then to be assessed against the remaining relevant instructions. If, at any stage, Immigration New Zealand finds potentially prejudicial matters that 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.

[66] 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.

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

Order as to Depersonalised Research Copy

[68] 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 his identification.

"P Fuiava"

P Fuiava
Member

Certified to be the Research
Copy released for publication.

P Fuiava
Member