

RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA

Appellant: VY (Skilled Migrant)

Before: S Benson (Member)

Representative for the Appellant: T Delamere

Date of Decision: 11 October 2021

RESIDENCE DECISION

[1] The appellant is a 32-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand. The application includes the appellant's 34-year-old husband and their 8-year-old son, also citizens of India.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it determined that her employment as the store manager of a service station in Z town was not a substantial match to the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description and core tasks for the occupation of Retail Manager (General). Without points for skilled employment or bonus points for employment out of Auckland, her application could not succeed.

[3] The principal issues for the Tribunal are whether Immigration New Zealand was correct that the appellant did not perform some of the core tasks for the ANZSCO occupation of Retail Manager and that his employment was not a substantial match for this occupation. For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision to decline the application was not

correct. The Tribunal therefore cancels the decision and refers the application back to Immigration New Zealand for a correct assessment.

BACKGROUND

[4] In February 2015, the appellant arrived in New Zealand as the holder of a student visa. She attended a tertiary educational institution in Auckland and, in February 2016, completed a Diploma of Business Management. Since March 2016, the appellant has held a series of work and interim visas.

Application for Residence

[5] On 18 October 2018, the appellant applied for residence, claiming 160 points, including 50 points for skilled employment and 30 points for employment outside the Auckland region. The appellant relied on her employment, since September 2018, as manager of a service station at Z town, a rural village in Y area, where she earned \$24.50 per hour. The appellant's employer was a franchisee of Gasoline Alley Services Ltd (GAS Ltd), which operated a franchised network of petrol stations. In 2020, a new employer purchased the business.

[6] In support of her claim to be in skilled employment, the appellant provided:

- (a) Employer Supplementary Forms completed by directors of the employer companies.
- (b) A copy of her offer of employment (23 July 2018) as manager of the service station at Z town.
- (c) A copy of her employment agreement with her first employer (17 September 2018), variations of her employment agreement (11 October 2018, 24 April 2019) and her current employment agreement (12 October 2018).
- (d) A list of products sold by the employer, stating revenue, cost of the goods and gross profit.
- (e) Copies of her payslips, bank account statements, Inland Revenue Department records of her income and her first employer's time and wage records.

- (f) An organisational chart showing that the appellant reported to the directors of the employer and that she supervised two cashier staff.
- (g) Photographs of the store.

Verification by Immigration New Zealand

[7] On 16 July 2019, the appellant stated in a telephone interview with Immigration New Zealand that, in September 2018, she was transferred from the employer's store in X town to the store at Z town, a small village in a rural area, because the existing manager was alone at night in the attached accommodation, whereas she had a family. Her tasks included setting up the store (including turning on the petrol pumps and air compressor), ordering stock and paying supplier invoices. She set a monthly budget for the store, which determined how much she could spend on purchases. It was up to her to keep store expenses within that budget. The franchisor provided the employer with fuel products and a cash register system. She added her own margin to the fuel price and set prices for non-fuel products for the convenience store. She had continued the store's existing suppliers but was changing a supplier of pies. She did not need the director's authority to change a supplier. She had added products, such as new ice cream flavours, chips and (after customer demand) fresh bread.

Immigration New Zealand Site Visit

[8] On 31 July 2019, Immigration New Zealand officers visited the store and noted that the premises included a petrol station, workshop and attached accommodation for the appellant's family. Immigration New Zealand's notes record that the appellant stated that:

- (a) The store opened at 7 am and closed at 6 pm, with local customers in winter and tourists in summer. Her husband often opened the store before he started his employment at a supermarket in a nearby town at 9 am.
- (b) The store had three employees: herself, her husband (three days per week) and a third person (who usually worked on weekends).
- (c) The director, based in Auckland, visited the store once every two or three months.

- (d) She had full authority from the director to control the business. She operated the bank account, including paying staff wages using the payroll software. She recorded purchases and expenses in a book to work out overheads for the store. She ensured that there were sufficient funds every 20th of the month, when most suppliers were paid. On Monday and Wednesday, she placed orders, usually online from home and suppliers often visited the store on Friday.
- (e) She had full authority to set prices. She determined the price of fuel based on how much had sold, which was two or three cents per litre higher than the price in the next town on the basis that customers would not drive a long distance to save a small amount of money. In general, she added a 35 to 40 per cent margin on non-fuel products, even if supplied to the store at a discounted price. She had not changed suppliers to the store but changed products to keep customers interested. Before changing a product, she could ask the managers of service stations in X town whether it sold well. She had also bought cookies from a supermarket, which was cheaper than the supplier to the employer's store and allowed for a greater mark up. She cancelled the store's order for a newspaper (saving about \$500 per month), which sold well on the weekend but poorly during the week and would not provide a credit for unsold papers.
- (f) In respect of service standards, she offered to replace or refund the price of an item if a customer was not satisfied.

Immigration New Zealand's Concerns

[9] On 25 November 2019, Immigration New Zealand informed the appellant of its concern that her employment was not a substantial match to the ANZSCO occupation of Retail Manager. It appeared that business operations were organised and controlled by a franchisor, not by the appellant. The franchisor's Retail Supply Agreement, Retail Operations Manual and other manuals set out how fuel products (the main product of the business) were marketed, sold and presented, including uniforms, logos, colour schemes, service standards and hours of operation. Further, sales reports indicated that non-fuel products sold by the business were not a significant proportion of total sales.

[10] Immigration New Zealand invited the appellant to make comments and to provide further information.

The Appellant's Reply

[11] In reply (13 December 2019), the appellant's then representative submitted that the appellant organised and controlled the operations of the service station. The franchisor required the employer to maintain an agreed level of fuel products, but did not stipulate fixed, maximum or minimum prices. Further, non-fuel products were sold with a much higher profit margin than fuel products and constituted most of the profit for the business. The franchisor did not monitor the operations of the service station, which was independently owned and operated by the employer.

[12] The representative submitted that the appellant performed core tasks of the occupation of Retail Manager in her employment. Although the appellant could not determine product mix in respect of fuel products, she determined product mix and stock levels for more than 1,000 non-fuel products. The franchisor's service standards were a base and did not prevent the appellant from creating her own service standards. She could determine service standards because she had charge of the store and she determined to what degree the standards were implemented. The appellant was not limited by the franchisor in formulating and implementing purchasing and marketing policies or setting prices. The appellant was also responsible for hiring, training and supervision of staff.

[13] The appellant stated (10 December 2019) that she determined product mix and stock levels based on demand, customer buying habits and stock levels, which she monitored with a computer system and physical stocktakes. She had made service standards for the store. She monitored customer service by weekly meetings with staff and ensured that customer complaints were resolved as the highest priority. She was responsible for setting prices, including fuel. She monitored competitors' prices and could negotiate lower prices with suppliers if competitors' prices were lower. She was also responsible for setting prices for non-fuel products, including pricing to clear demonstration products, discontinued products and returned products and price matching, trade-in discounts, add-on sales and seasonal pricing. Her purchasing policy depended on factors such as the life of the product, demand (including past sales, current demand and future forecasting) and stock levels. She marketed products instore with displays in the front windows and counter and posters on the main glass wall in the store. She put stickers on products, placed bargain products in bins at busy places in the store, offered combo deals (such as a pie and drink), low prices for milk and bread and advertised with road signs, in-store posters for premium products and on

Facebook. She maintained records of financial transactions. In respect of budgeting, she analysed invoices for any significant anomalies. For example, she obtained a \$16,000 refund from an electricity company that had overcharged the employer for two years. She ensured that the store met the monthly income target, that expenses were reasonable and cost-effective and that payroll obligations were met. She was responsible for staff recruitment, including advertisements, telephone interviews and face-to-face interviews. She trained new staff and had ongoing training for existing employees, for example, as to customer services and product knowledge.

[14] The director stated (13 December 2019) that he was a hands-off investor and that the store was managed by the appellant. The franchisor supplied fuel and did not control fuel prices, which were set by the appellant. Further, most of the business' profits were from non-fuel products.

Further Verification by Immigration New Zealand

[15] On 25 August 2020, the appellant stated in a telephone interview with Immigration New Zealand that she was employed as store manager for 40 hours per week at \$24.50 per hour and she supervised two staff. She had made changes to product mix based on customer feedback, the time and year and popularity. For example, she had recently introduced jellies in school holidays, a third brand of pies and more flavours of ice cream and a milk product. She determined stock levels based on product levels, customer habits, price, sales, past sales and her budget after fixed costs. She had set up a budget based on monthly sales reports and expected expenses. She had cut expenses, for example, by reducing staff hours when the store was not busy, and she had discounted prices of products close to an expiry date. Her service standards for the store were to provide the best customer service in a timely manner. She had updated the till system. She allowed credit to a few reliable customers. There was a refund policy, by which she would replace a product with a different item. Her purchasing policy was to buy hot products for the winter, cool products for the summer. She bought products when they were cheaper and from cheaper suppliers (such as a supermarket), according to stock levels. She had recently signed an agreement with a drink supplier to take a wider range of products for a cheaper price and new freezers. As the store was in a small community, there was little spent on marketing. She advertised in the shop windows, with signs by the road and by posters and flyers at schools and local rugby games. She set prices for non-fuel products, with a general margin of 35 to 40 per cent and lower

margins for ice cream and cigarettes. Her time serving customers was five or six hours out of a 10-hour shift on busy days (Tuesday and Thursday) and three to four hours out of a 10-hour shift on quieter days (Monday, Friday and Saturday). She maintained records of stock levels and financial transactions. She had authority to operate the business bank accounts and paid wages to staff. She interviewed, hired, trained and supervised staff, including signing employment agreements on behalf of the business.

[16] On 27 August 2020, the appellant provided copies of franchisor manuals:

- (a) A Retail Supply Agreement which, among other things, provided for hours of operation of the store, conduct of the store as a branded service station of the franchisor, the exclusive supply of target volumes of petroleum products and participation in a nationwide fuel discount scheme.
- (b) A Retail Operations Manual which provided for: compliance standards; health and safety standards, including safety checklists; franchisor brand standards; a fuel price policy, permitting the employer to set its own price; sales and stock management; promotion of the store through national advertising, local advertising materials, gift cards, VIP cards, business cards and a Facebook page, all provided by the franchisor; mandatory suppliers of fuel products and recommended suppliers of non-fuel products; best management practices for forecourts; inspection and maintenance schedules; pro-forma trailer hire agreements; LPG management; testing of fuel quality; certification of the service station; stock reconciliation for petrol and diesel; calculation of fuel card margins; a motor oil guide; and a staff induction and training checklist.
- (c) A Health and Safety Manual, including sections on: dealing with incidents (such as broken pumps, armed robbery, LPG leaks, oil spills and fire); hazard identification and risk assessment; health and safety in respect of the employer and employees; and a first aid good practice guide.

[17] The appellant also provided documents to demonstrate performance of tasks in her employment, including: a list of products for the store and a list of 14 added products and 12 deleted products; receipts for purchases at supermarkets; invoices from suppliers, including fuel provided by the franchisor

and various invoices and receipts, where the appellant has identified expensive products; approved supplier forms (including contact details and products supplied); handwritten stocktake sheets; emails and invoices in respect of a new point of sale (POS) computer terminal for the store; a document stating service standards for the store, such as customer service, health and safety, personal hygiene, incident reports, cleaning, customer complaints, temperature records and parking; customer complaint forms (April and October 2019); credit applications to suppliers and statements from four suppliers (27 and 28 November 2019); a list of fuel prices set by the appellant (August to December 2019); a list of daily cleaning duties; copies of posters advertising goods at the store, photographs of instore specials (including on the store window); reports by appellant and the Police as to a robbery at the store on 20 October 2019; a copy of a gas retailer LPG bottle swap agreement for the period November 2018 to June 2021; three trespass notices (August and October 2018) issued by the appellant; copies of store sales records, bank account statements for the store (December 2019) and proof of cash deposits to the store bank account (July and August 2020); a statement (27 August 2020) by the appellant that she ensured that income and expenses meet the budget for the store and that she based her decisions on previous sales; handwritten budgets (June to August 2020); a computer printout of prices and margins for store products; extracts from four employment agreements (all since September 2018) for employees hired by the appellant; staff training records; and cleaning records.

[18] On 11 September 2020, the director stated in a telephone interview with Immigration New Zealand that he visited the store once or twice per month; and, under a franchise agreement, the business had an obligation to buy fuel and related products from the franchisor's suppliers, but the operation of the store was otherwise left to the business.

Immigration New Zealand's Further Concerns

[19] On 11 January 2021, Immigration New Zealand informed the appellant of its further concerns that she did not perform core tasks of the occupation of Retail Manager:

- (a) There was no independent evidence that she was responsible for product mix and stock levels: it was not clear what products were purchased through the franchisor's approved suppliers, according to the franchisor's Retail Operations Manual; the appellant appeared to

have no significant involvement in these tasks as she had only had a few examples of products added and deleted, and a change to beverages was initiated by a supplier; she had no managerial control over the sale of fuel products; and most suppliers and stock levels were determined before she started her role.

- (b) Service standards were determined by the franchisor through the Retail Supply Agreement and Retail Operations Manual. Her service standards appeared to have been recently formulated to demonstrate performance of this task and merely stated basic rules applicable to any business. Further, an upgrade of a computer system was not a service standard.
- (c) The Retail Supply Agreement stated purchasing and marketing policies. There was no evidence that this was an intrinsic part of the appellant's role.
- (d) The franchisor undertook national advertising and the appellant had not proved her involvement in the promotion and advertisement of the store's goods and services.
- (e) The appellant had not demonstrated her "actual role" in undertaking budgeting for the store by the handwritten budget or by operation of business accounts to pay suppliers.

[20] Further, the appellant did not appear to organise and control the operations of the store. The franchisor controlled the supply and sale of petroleum products (the main product of the business) through the Retail Supply Agreement, Retail Operations Manual and other manuals. The appellant's work in serving customers, ordering stock, maintaining records of transactions, supervising staff and ensuring compliance with relevant regulations made her employment as substantial match to the ANZSCO occupation of Retail Supervisor, but her income did not meet the remuneration requirements of instructions to qualify for skilled employment.

[21] Immigration New Zealand invited the appellant to comment and to provide further information.

The Appellant's Further Reply

[22] In reply, on 25 January 2021, the appellant's new representative submitted

that the appellant's role was a substantial match for the occupation of Retail Manager. The establishment provided retail services by stocking and selling a range of petrol, grocery and takeaway snack products. It was indisputable that the appellant managed the store: the director lived 210 kilometres away, visited once or twice per month and had no active involvement in the store. Every person employed at the store reported to the appellant. Further, the appellant made all decisions as to purchasing, stock, marketing, promotion, budgeting, compliance, hiring staff and setting prices.

[23] In support of the submissions, the representative provided:

- (a) Letters (various dates in January 2021) from the former owners of the store and from members of the appellant's community, referring to her management of the store and contributions to the community.
- (b) Five letters (various dates in January 2021) from suppliers, stating that the appellant had managed their accounts with the store.
- (c) Several screenshots of the employer's Facebook page.

Immigration New Zealand Decision

[24] On 3 May 2021, Immigration New Zealand declined the appellant's application for residence on the basis that her employment did not substantially match the ANZSCO occupation of Retail Manager. It found that head office had direct control over store operations through the franchise agreement documents. The appellant did not perform the core tasks of the occupation of determining product mix, stock levels and services standards, formulating and implementing purchasing policies and marketing policies, setting prices, promoting and advertising the store's goods and services and undertaking budgeting. Her role was a substantial match for the ANZSCO occupation of Retail Supervisor because she spent most of her time serving customers, but her remuneration was too low for her role as a Retail Supervisor to qualify as skilled employment under immigration instructions.

[25] Immigration New Zealand declined to award points for skilled employment or bonus points for skilled employment outside the Auckland region. Without these points, the appellant's residence application could not succeed.

STATUTORY GROUNDS

[26] 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.

[27] 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

[28] On 21 June 2021, the appellant lodged this appeal. The appeal form does not state the grounds of appeal, but the representative submits that Immigration New Zealand's decision was not correct. He submits, in summary, that:

- (a) The appellant's role is a substantial match to the occupation of Retail Manager because she performs the core tasks of that occupation.
- (b) She is not a Retail Supervisor because such a person reports to an onsite store manager, whereas the appellant reports to the director who has no involvement in the day-to-day operations of the store.

ASSESSMENT

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

[30] 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

[31] The application was made on 18 October 2018 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 was a substantial match to the ANZSCO occupation of Retail Manager. The relevant instructions in this case concern the assessment of skilled employment under SM6.10, SM6.10.5 and SM6.10.5.1 (all effective 21 May 2018):

SM6.10 Skilled Employment

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

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

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

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

- a. the occupation is described in the ANZSCO as:
 - i. a skill level 1, 2 or 3 occupation and the remuneration for that employment is \$24.29 per hour or above (or the equivalent annual salary); or
 - ii. a skill level 4 or 5 occupation and the remuneration for that employment is \$36.44 per hour or above (or the equivalent annual salary); and
- b. the principal applicant can demonstrate that their employment substantially matches the description for that occupation as set out in the ANZSCO (see SM6.10.5.1); and

...

SM6.10.5.1 Assessment of 'substantial match'

- a. For the purpose of SM6.10.5 (b) above, assessment of 'substantial match' involves a determination of whether the applicant's employment is substantially consistent with the ANZSCO 'Occupation' (6-digit) level description for that occupation and with the tasks listed at the ANZSCO

'Unit Group' (4-digit) level description for that occupational group, excluding any tasks which are not relevant to the 'Occupation' description.

- b. To be considered a substantial match to an occupation, the tasks that are relevant to the applicant's employment role must comprise most of that role.

For example: An applicant's employment in the occupation 'Disabilities service officer' (411712) is not required to include the task set out at the ANZSCO Unit Group (4-digit) classification level for 'Welfare support workers' of "supervising offenders on probation and parole". Other listed tasks that are relevant to the role of a "Disabilities services officer" must comprise most of their role.

...

Note: Determining whether an applicant's employment substantially matches an ANZSCO occupation description may require consideration of the scope and scale of the employer's organisation and operation (the size of the operation, the number of staff and managers, and whether management functions are centralised at a head office or undertaken by other managers).

[32] When deciding an application, Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). Relevant factors include whether an application is given proper consideration, whether appropriate reasons are given for declining an application, whether only relevant information is considered, and whether all known relevant information is considered (A1.5, effective 29 November 2010).

Retail Manager occupation

[33] The appellant contends that her employment is a substantial match for Retail Manager (ANZSCO code 142111), an ANZSCO skill level 2 occupation. The description for Retail Manager states that such a person "organises and controls the operations of a retail trading establishment". Unit Group 1421 states that the core tasks for the occupation include (numbering added):

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

[34] Immigration New Zealand was satisfied that the appellant performed core tasks 4, 5, 7 and 8. However, it was not satisfied that she performed core tasks 1, 2, 3 or 6.

Task 1 – Determining product mix, stock levels and service standards

[35] Immigration New Zealand stated that determining product mix and stock levels was not an “integral” part of the appellant’s role. The franchisor provided suppliers who could supply stock:

We were concerned that you have not provided any supporting documents that show what products are determined through the GAS suppliers vs the products selected through the market; and, therefore, we were not satisfied that you significantly determine product mix outside the preferred GAS suppliers. Although we acknowledged that you have some control over the products in the store, it is likely that the majority of these are standard across all service stations. It was also noted that you are unable to make any changes the fuel, lubricant or LPG products, due to the nature of the GAS supply agreement.

[36] Further, the products added and deleted by the appellant were “insignificant” compared to the total number of products in the store, some changes with existing suppliers were the result of “supplier input” and there was no independent evidence that the appellant was responsible for this task.

[37] However, the Tribunal finds that Immigration New Zealand did not properly consider whether the appellant determined product mix and stock levels. She was merely required to perform these tasks, not to perform them “significantly” or as an “integral” part of her role. It was not determinative that the store sold fuel products supplied by the franchisor’s approved suppliers because the business also sold, and depended for its profit on, the sale of a large range of non-fuel convenience store products. Clearly some product mix and stock levels were determined by the appellant, who gave examples of products added and deleted by her. Further, non-fuel products and stock levels were not dictated by the franchisor (which merely provided a list of suppliers) or the director (who visited the store infrequently) and there was no evidence that this task was performed by anyone else at the store.

[38] Immigration New Zealand also found that the appellant did not determine service standards: the franchisor required the employer to maintain standards set out in the Retail Operator Manual; the appellant’s standards were the “general basic rules expected from any retail business”; and upgrading the till terminal was not a service standard.

[39] The Tribunal finds that Immigration New Zealand did not give appropriate reasons for finding that the appellant did not perform this part of task 1. She was only required to perform this part of task 1, whether her standards were “general basic rules” or not. Further, the fact that the franchisor set service standards in the

Retail Operator Manual did not mean that the appellant could not produce her own service standards. The Tribunal notes that there was an overlap between the standards set by the appellant and the franchisor. However, her standards differed, for example, under the heading “Customer Service”, where she stated:

Always greet customer with a smile. Always be cooperative and polite to customers. If customer asks for cash out amount, always ask them for signature after giving their amount to them. For serving smoke, politely ask them for ID.

[40] The Retail Operator Manual contained similar statements about greeting customers, but did not refer to cash out or identification when selling cigarettes:

Five steps to providing quality customer service:

1. Greet the customer promptly and with a smile – ask ‘May I help?’
2. Offer added value to their visit – ‘Would you like me to check the oil and water?’ ‘Would you like your windscreen cleaned?’
3. Deliver what you promise – Gasoline Alley Services promises service. If you stock Coke, stock the full range of Coke bottle sizes and varieties. If your price board / pump states \$1.589, charge \$1.589 on your POS.
4. Provide service worth talking about – go the extra mile.
5. Promote customer awareness that you and your staff are happy to provide assistance.

[41] Finally, the appellant’s upgrade of the till terminal, although a one-off event, related to the quality of service and therefore could be seen as a service standard.

Task 2 – Formulating and implementing purchasing and marketing policies, and setting prices

[42] In its decision (3 May 2021), Immigration New Zealand stated that purchasing policies and marketing policies were determined by the head office of the franchise, rather than the appellant. It did not accept that she had performed these tasks by her evidence, for example, of ordering stock from suppliers, adding and deleting certain products, purchasing stock from a supermarket and undertaking local marketing.

[43] The representative submits that the appellant has authority to formulate and implement such policies, that they do not have to be in writing, and she was not precluded from making her own policies by the franchisor’s national marketing.

[44] The Tribunal agrees that the policies do not have to be in writing. The Tribunal finds that Immigration New Zealand did not properly consider whether the appellant had formulated purchasing policies according to her statements that she

bought products based on the life of the product, demand (including past sales, current demand, future forecasting), stock levels, price and seasonal factors (10 December 2019 and 25 August 2020). However, there appeared to be no evidence that the appellant had formulated and implemented a marketing policy.

[45] As to setting prices, Immigration New Zealand's decision stated that it accepted that the franchisor did not control the retail price of fuel products, but the appellant had no capacity to negotiate the supply price for these products. It stated that it did not understand a document which appeared to record changes in fuel prices and that documents from the appellant as to approved suppliers, customer complaints, incidents and cleaning did not demonstrate that she set prices.

[46] The Tribunal finds that Immigration New Zealand's decision as to setting prices is not correct. A price is set by the vendor of goods. A purchaser of the goods accepts, rejects or negotiates (rather than sets) the price. It was therefore not relevant to the task of setting prices that the franchisor supplied petroleum products to the employer's store at a set price. In that context, Immigration New Zealand did not properly consider the Retail Supply Agreement, which stated that the employer could set its own retail price:

Based on the supply price from [the franchisor], **you are able to set your own retail price for the fuel you sell.** [The franchisor] does not control or influence your retail price.

[47] Further, given that the director was not involved in the day-to-day operations of the business, it was clear from the list of fuel prices that these prices were set by the appellant. Further, Immigration New Zealand did not consider her evidence that she set prices for non-fuel products. Finally, the appellant's documents as to approved suppliers, customer complaints, incidents and cleaning, were not relevant to setting prices.

Task 3 – Promoting and advertising the establishment's goods and services

[48] Immigration New Zealand, in its decision, was not satisfied that the appellant performed this task. It stated that the task "might not be intrinsic" to her role because she did not spend much on marketing. Further, she did not explain her involvement in the planning and execution of promotions, such as posters and specials and, under the Retail Supply Agreement, the franchisor undertook national advertising.

[49] The Tribunal finds that Immigration New Zealand did not give appropriate reasons for finding that the appellant did not promote and advertise the store's goods and services. She was merely required to perform the task, which did not have to be intrinsic to her role or subject to a minimum spend. Further, the decision did not refer to the appellant's evidence of her local promotions and advertising. Finally, the Tribunal notes that there was no evidence that anyone else was involved in local advertising.

Task 6 – Undertaking budgeting

[50] Task 6 requires the appellant to “undertake” budgeting, which does not require her to also set the budget. The responsibility for determining, deciding or approving the budget, in many cases, lies with the business owner: see *QG (Skilled Migrant) [2015] NZIPT 202322* at [29]:

[Task 6] requires the appellant to *undertake*, not *determine*, the budget. The requirement to undertake budgeting implicitly recognises that responsibility for determining, deciding or approving the budget should lie with the person assuming the financial risk of the venture, that is, the business owner. To undertake budgeting, a Retail Manager must have control over a number of those factors which determine whether the budget is complied with, such as labour costs and pricing.

[51] To demonstrate performance of task 6, it is sufficient for the appellant to control financial elements which determine whether the store kept to a budget. Immigration New Zealand, in its decision (11 January 2021) stated that the appellant had not explained her “actual role” in budgeting:

In our letter of concern dated 11 January 2021, we noted that it is not clear what your actual role in the budgeting process was except that you analysed the budget and ensured the expenses were met as per budget. The provided copy of the handwritten budget plan for August 2020 demonstrates you conducted an analysis of expenses for June and July 2020. It does not demonstrate your involvement in undertaking budgeting for the store. In addition, it is not clear whether this document impacted business operations.

[52] Further, the Retail Supply Agreement limited the appellant's ability to spend on fuel and fuel-related products.

[53] The Tribunal finds that Immigration New Zealand did not properly consider whether the appellant undertook budgeting, such as her statements in her interviews: that she budgeted for the store based on past sales and expenses; that she had analysed expenses for anomalies, such as a large overcharge by an electricity company; and that she had reduced expenses, to keep within the budget, by reducing staff hours when the store was not busy. Further, although the Retail Supply Agreement required the store to purchase fuel products from

suppliers approved by the franchisor, the same agreement permitted the appellant to set her own retail prices and this did not prevent her budgeting in respect of other costs, as demonstrated above.

Organise and control the operations of the store

[54] In determining whether the appellant's role was a substantial match to the occupation of Retail Manager, Immigration New Zealand had to consider whether the role matched the description of the occupation, which required her to organise and control the operations of the store.

[55] Immigration New Zealand's decision noted that the appellant spent most of her time working alone, with a substantial part of that time spent serving customers, rather than performing the managerial tasks of a Retail Manager. Further, the franchisor's substantial involvement in determining product mix, stock levels and service standards (task 1) and formulating and implementing purchasing and marketing policies (task 2) limited her ability to organise and control the operations of the store.

[56] However, in the Tribunal's view, it was not determinative that the appellant largely worked alone during her shifts. Although a role in which an appellant mostly served customers might be a substantial match to another occupation, such as Sales Assistant (General) (ANZSCO code 621111, a skill level 5 occupation), many core tasks of the occupation of Retail Manager did not require the appellant to work with others, such as determining product mix, setting prices, maintaining records of financial transactions and undertaking budgeting. Further, Immigration New Zealand's assessment of whether the appellant organised and controlled the operations of the store must be considered in light of a correct assessment of whether she determined product mix, stock levels and service standards (task 1), formulated and implemented purchasing policies, set prices (part of task 2), promoted and advertised the store's goods (task 3) and undertook budgeting (task 6).

Conclusion on correctness

[57] The Tribunal finds that Immigration New Zealand's decision was not correct. It did not properly consider the appellant's performance of core tasks 1, parts of task 2 (formulating and implementing purchasing policies, setting prices) or tasks 3 and 6. Further, the appellant's organisation and control of the operations of the

store must be reassessed in the light of a proper consideration of her performance of the core tasks.

[58] The Tribunal therefore cancels the decision and refers it back to Immigration New Zealand for a correct assessment in terms of the applicable residence instructions and the Tribunal's directions.

DETERMINATION

[59] 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.

[60] 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

[61] 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 require updating:

- (a) 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.
- (b) Immigration New Zealand is to invite the appellant to update her application within a reasonable timeframe, if she sees fit.
- (c) Immigration New Zealand shall take into account any new evidence produced by the appellant, along with the relevant evidence

submitted on appeal and that already held on her residence application file.

- (d) 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.

[62] The appellant is to understand that the success of this appeal does not guarantee that her application will be successful, only that it will be subject to reassessment by Immigration New Zealand. The Tribunal notes the recent announcement concerning the introduction of a new 2021 Resident Visa category. It will be for the appellant and Immigration New Zealand to address how this new residence category impacts on the reassessment of the appellant's application.

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

Order as to Depersonalised Research Copy

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

"S. Benson"
S Benson
Member

Certified to be the Research
Copy released for publication.

S Benson
Member