

RŌPŪ TAKE MANENE, TAKE WHAKAMARU
AOTEAROA

Appellant: WC (Skilled Migrant)

Before: M Avia (Member)

Representative for the Appellant: T Delamere

Date of Decision: 18 October 2021

RESIDENCE DECISION

[1] The appellant is a 36-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand. Her application includes her 35-year-old husband and her two sons, aged eight years and 20 months.

THE ISSUE

[2] Immigration New Zealand declined the appellant's residence application because it was not satisfied that her employment as the manager of a Bottle-O store was a substantial match to the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description of a Retail Manager (General). Without points for skilled employment, the appellant could not succeed under the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand properly assessed whether the appellant's position was a substantial match to the ANZSCO occupation description and core tasks of Retail Manager (General).

[4] For the reasons that follow, the Tribunal finds that Immigration New Zealand's assessment was not fairly conducted because it did not give the application proper consideration, put potentially harmful information to the appellant, give her a reasonable opportunity to respond to it, consider all known

relevant information, or give appropriate reasons for its decision. The decision is not correct, and accordingly, the application is returned to Immigration New Zealand for a correct assessment.

BACKGROUND

[5] In July 2017, the appellant began her employment as a retail assistant and then, as an assistant manager at one of the employing company's two Bottle-O liquor stores. Following the sale of that store, the appellant was promoted to manager of the company's other liquor store in October 2019.

[6] On 7 June 2019, the appellant made her application for residence under the Skilled Migrant category. She claimed 165 points, including 50 points for skilled employment as a store manager at the Bottle-O liquor store and 30 bonus points for employment outside Auckland. In support of her claim to be in skilled employment, the appellant produced a copy of her employment agreement, dated 26 March 2019, which set out her duties and stipulated that she was employed for 35 hours per week for an hourly rate of \$25.

[7] The appellant claimed that her position substantially matched that of Retail Manager (General) (ANZSCO code 142111, skill level 2 occupation), an occupation included under the ANZSCO Unit Group 1421 Retail Managers and described as follows (numbering added):

Organises and controls the operations of a retail trading establishment. ...

Tasks include:

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

Verification of Appellant's Employment

[8] In response to queries from Immigration New Zealand, on 12 November 2020, one of the company shareholders ("the employer") provided information

about the appellant's employment. The employer stated that the appellant operated the business and undertook all managerial duties and ensured that it met the company's profit expectations. Because the employer owned and operated an accountancy business elsewhere, the appellant did not report to him, although they had weekly discussions about the performance of the business. An assistant manager, working full time, and two staff members, working part-time, reported to the appellant.

[9] On 1 December 2020, Immigration New Zealand interviewed the appellant by telephone and obtained the following information. Previously, the employer worked at the store but, since buying an accounting business in another city, his time was spent managing the new business. Once or twice weekly, the appellant updated the employer about the store's operations. His last visit to the store was about two months previously. The appellant did not require the employer's approval when making decisions about business operations.

[10] The appellant confirmed that a full time assistant manager and two part-time employees reported to her. The Bottle-O franchisor required the store to implement its monthly promotions and use its various display materials. The appellant added her own specials, especially when she was able to bulk buy goods at a better than usual discount. She set prices for the goods sold, and determined the margin on each category of goods sold, taking into account expenses and competitors' prices. The appellant did not generally order from small suppliers because it was more efficient to order through the main supplier, the Tasman Liquor Company (Tasman Liquor). Tasman Liquor would introduce new products from time to time; which the appellant might introduce depending on the needs of the store.

Immigration New Zealand's Concerns

[11] On 9 December 2020, Immigration New Zealand wrote to the appellant's representative with concerns that the appellant's employment did not substantially match the ANZSCO description and core tasks of a Retail Manager (General). Immigration New Zealand considered that Bottle-O set the main promotional items and advertising materials, and set prices, raising a concern that the appellant did not appear to set retail prices and sale prices for the store's products generally, formulate marketing policies or have full control over the product mix. This also raised concerns about the appellant's involvement in formulating and implementing purchasing policies and implementing marketing policies.

[12] The fact that the appellant only purchased goods through Tasman Liquor raised a concern that the scope of the business did not allow the appellant to determine the product mix, and that she ordered products previously determined by the employer or the previous manager. Without having control over setting prices and the ability to make decisions about promotions and advertising or produce mix, Immigration New Zealand was concerned that the appellant did not organise and control the operations of the store. It appeared that the appellant's role was more of a substantial match to the ANZSCO occupation of a Retail Supervisor, a skill level 4 occupation. However, the appellant's hourly rate was less than the minimum remuneration requirement for that occupation.

Appellant's Response

[13] On 11 January 2021, the representative replied. He submitted that the director and her shareholder husband (the employer) had no involvement in the business. The appellant made all purchasing, stock, marketing and pricing decisions without reference to the owner and as such organised and controlled the operations of the store.

[14] The representative also submitted that while it was correct that the Bottle-O head office set monthly promotions and that the store used its promotional materials, the appellant was able to make set prices changed for any product or range of products. Due to competition in the local market, she regularly set prices that differed from those set by head office and was able to set prices for any specials she chose. Immigration New Zealand misunderstood the appellant's evidence about purchasing from suppliers other than Tasman Liquor. She ordered from many suppliers, for which documentary evidence was now provided. It was contended that these documents also showed that Immigration New Zealand was incorrect to find that the appellant had not determined prices, made decisions regarding promotion and advertising, determined product mix and that overall, the appellant did not organise and control the operations of the store. The representative also noted that no explanation was provided for Immigration New Zealand's assertion that the appellant was employed as a Retail Supervisor.

[15] The representative provided a number of supporting documents including: a letter from the appellant (8 January 2021); the appellant's stocktaking records (September to November 2020); records of the store's bank deposits made by the appellant (November 2020 and January 2021); the appellant's orders to various suppliers and email contact with suppliers over unavailable or missing stock (June

to December 2020); advertisements showing the manager's specials for Father's Day, National Crate Day and Christmas; and an email summary (13 December 2020) of invoices from June 2020 to October 2020.

[16] Also provided was a letter from Bottle-O's operations manager (6 January 2021), which confirmed the ownership of Bottle-O by Tasman Liquor.

Immigration New Zealand Decision

[17] On 13 May 2021, Immigration New Zealand declined the appellant's application as it was not satisfied that her employment was a substantial match to the ANZSCO occupation description and core tasks of a Retail Manager (General). Immigration New Zealand's principal concerns were that the appellant had not established that she set retail prices, made decisions relating to promotions and advertisements, determined product mix, and formulated and implemented purchasing and marketing policies. Insufficient evidence or explanation was provided by the appellant to assess the level of control she had as required by the ANZSCO description. Without points for skilled employment, the appellant's application could not succeed.

STATUTORY GROUNDS

[18] The appellant's right of appeal arises from section 187(1) of the Immigration Act 2009 (the Act). Section 187(4) of the Act provides:

- (4) The grounds for an appeal under this section are that—
 - (a) the relevant decision was not correct in terms of the residence instructions applicable at the time the relevant application for the visa was made; or
 - (b) the special circumstances of the appellant are such that consideration of an exception to those residence instructions should be recommended.

[19] The residence instructions referred to in section 187(4) are the Government residence instructions contained in Immigration New Zealand's Operational Manual (see www.immigration.govt.nz).

THE APPELLANT'S CASE

[20] On 9 June 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct in terms of the applicable residence instructions. In support of the appeal, the representative produces submissions (23 June 2021) in which he submits that Immigration New Zealand's decision was incorrect because it did not undertake a proper substantial match assessment and did not assess the application fairly.

ASSESSMENT

[21] The Tribunal has considered the submissions and documents provided on appeal and the files in relation to the appellant's residence application. 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

[22] The application was made on 7 June 2019 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it determined that the appellant's employment was not a substantial match to the ANZSCO description and core tasks for the occupation of Retail Manager (General).

Relevant instructions

[23] The instructions relevant to the assessment of skilled employment are SM6.10, SM6.10.5 and SM6.10.5.1 (all effective 26 November 2018).

[24] Instruction SM6.10 defines skilled employment as employment that meets a minimum remuneration threshold and requires specialist, technical or management expertise obtained through the completion of recognised relevant qualifications and/or relevant work experience (SM6.10.a). Assessment of whether employment is skilled is primarily based on the ANZSCO and the level of remuneration for the employment (SM6.10.b).

[25] Instruction SM6.10.5 sets out the requirements for employment to be assessed as skilled. Instruction SM6.10.5.b provides that current employment will

be assessed as skilled if (among other things) an applicant can demonstrate that their employment substantially matches the description for that occupation as set out in the 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:

...

- 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

...

[26] More detailed instructions, at SM6.10.5.1, explain that an assessment of ‘substantial match’ requires Immigration New Zealand to determine whether the appellant’s employment is ‘substantially consistent’ with the description and core tasks of the relevant ANZSCO occupation and that the tasks relevant to the role must “comprise most of that role”. The assessment may also require consideration of the scope and scale of the employing business, including whether management functions are centralised at a head office or undertaken by other managers:

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.

...

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).

[27] It will be recalled that the occupation of Retail Manager (General) is described in the ANZSCO as someone who “[o]rganises and controls the operations of a retail trading establishment”. As set out previously, the core tasks for this occupation, located in Unit Group 1421, are as follows:

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

[28] When deciding an application, instructions require that Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). A1.5 of instructions sets out factors determining whether a decision is fair or not:

A1.5 Fairness

- a. Whether a decision is fair or not depends on such factors as:
 - whether an application is given proper consideration;
 - whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
 - whether the applicant is given a reasonable opportunity to respond to harmful information;
 - ...
 - whether appropriate reasons are given for declining an application;
 - whether only relevant information is considered;
 - whether all known relevant information is considered.

The appellant's employment

[29] The appellant claimed that her employment as a liquor store manager substantially matched the ANZSCO description, including core tasks, of a Retail Manager (General). The employer had little to do with the business apart from receiving updates from the appellant once or twice a week. She made decisions concerning the operation of the business, and did not require the employer's approval to do so. This included deciding what goods to order and where to order them from. She set prices for the goods sold by taking into account the margin on each category of goods sold, the store's expenses and competitors'

prices. While Bottle-O had monthly promotions, the appellant would also decide on her own specials and price them accordingly.

[30] In its decision, Immigration New Zealand was not satisfied that the appellant performed tasks 2 and 3 and two components of task 1, determining product mix and service standards. As a result, it was not satisfied that she organised and controlled the operations of the store. The Tribunal turns now to assess Immigration New Zealand's assessment of the application.

Task one – determining product mix and service standards

[31] In its decision, Immigration New Zealand found that the appellant did not have control over product mix for two reasons. First, because the main monthly promotion items being advertised were selected by the Bottle-O head office. However, the Tribunal finds that the head office's decisions regarding the monthly specials for the store had limited relevance as to whether the appellant determined product mix, which is instead relevant to part of task 2 – formulating and implementing marketing policies and task 3 – promoting and advertising the establishment's goods and services. Further, Bottle-O's specials comprised a very small proportion of the total products sold by the store. According to the appellant's letter of 8 January 2021, she selected and stocked 1,000 products in the store, whereas Bottle-O specials comprised about 40 products per month.

[32] Second, Immigration New Zealand considered that the appellant's lack of control over product mix was demonstrated by the fact that the store had not changed its one supplier (Tasman Liquor) for the past 10 to 15 years, and because it dealt with only one supplier, this business model did not provide any scope for the appellant to determine product mix.

[33] The Tribunal finds that Immigration New Zealand did not clearly put this second concern to the appellant by explaining how it saw this concern to be relevant to the task of determining product mix. It was therefore reasonable for the appellant to have assumed that, in responding to Immigration New Zealand's concerns, she should provide evidence of dealing with multiple suppliers, which she did. However, in its decision, Immigration New Zealand expressly rejected its relevance of this to determining product mix and instead, found that it only indicated that the appellant performed task 5 (maintaining records of stock levels and financial transactions).

[34] To the extent that the ability to determine product mix is predicated on the freedom to choose suppliers, the summary of invoices provided to Immigration

New Zealand showed that from June to December 2020, the appellant ordered from about 15 suppliers, and most regularly from four suppliers, including Tasman Liquor. Of the four suppliers, Tasman Liquor ranked third in the number of orders the appellant had placed. A rough tally of the value of orders placed with each of the four suppliers showed that the appellant ordered products of similar total monetary value from Tasman Liquor and from the most frequently ordered from supplier. This evidence did not show that the appellant's ability to determine product mix was constrained by Tasman Liquor's ownership of Bottle-O.

[35] The Tribunal apprehends that Immigration New Zealand's "one supplier" concern was actually that Tasman Liquor, as both the owner of Bottle-O and apparent sole supplier to the store, had the power to direct Bottle-O to stock only particular products in its stores. Had Immigration New Zealand properly identified and raised this concern with the appellant, it would have given the appellant a reasonable opportunity to respond to it with pertinent evidence. The Tribunal notes that the issue of the quantity of core products Bottle-O required its stores to stock in comparison to other products has featured in earlier Tribunal decisions; see for example *PF (Skilled Migrant)* [2021] NZIPT 205958 at [29] to [32] and *OA (Skilled Migrant)* [2020] NZIPT 205848 at [55] to [58]. However, Immigration New Zealand did not raise this as a concern in the present case.

[36] In relation to service standards, the appellant gave evidence that she made the wearing of Bottle-O uniforms compulsory and that she set standards in relation to selling goods. In its decision, Immigration New Zealand found that the appellant did not determine service standards because the Bottle-O operations manager's letter, provided by the appellant in response to its concerns, stated that the appellant maintained standards "in accordance with [Bottle-O] requirements". However, this specific concern was never put to the appellant. Had it done so, and bearing in mind that complying with Bottle-O's service standards did not necessarily preclude the appellant from determining additional service standards, this would have given her the opportunity to respond with further relevant evidence. The Tribunal finds that to rely on this concern about service standards to decline the application, without previously informing the appellant and giving her an opportunity to respond to it, was a breach of Immigration New Zealand's obligations to conduct a fair assessment under A1.5.

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

[37] In its letter raising concerns, Immigration New Zealand considered that the advertising materials provided by head office could affect the appellant's ability to formulate and implement purchasing and marketing policies. Although not made explicit by Immigration New Zealand, this concern appeared to also be founded upon the fact that Tasman Liquor was the store's only supplier. In its decision, Immigration New Zealand went on to determine that, while it had raised a concern about formulating and implementing purchasing and marketing policies, the appellant had provided no explanation or evidence to demonstrate this.

[38] As a preliminary point, the Tribunal observes that the freedom to decide suppliers can indicate the freedom to decide when and how to purchase products. Therefore, the "one supplier" concern is relevant to the task of formulating purchasing policies. The concern about head office providing advertising materials is relevant to the task of formulating marketing policies.

[39] Immigration New Zealand was incorrect to find that the appellant did not provide any evidence in response to these concerns. The invoices and correspondence with different suppliers that was produced showed that the appellant dealt with at least 15 suppliers, including the 4 suppliers she most frequently dealt with, including Tasman Liquor. The fact that the supply relationships may have been developed before her employment is not fatal to her ability to formulate purchasing policies, as it is her *authority* to do so that is relevant. Here, her explanation that there were good reasons to continue the supply relationships (availability of a wide range of stock, reliability and timeliness of delivery) indicated that she may have exercised her authority to decide that various existing supply arrangements should be continued. The Tribunal also notes that the appellant had added new suppliers to the store in recent months.

[40] In relation to formulating marketing policies, the appellant stated that she devised her own specials separately from the head office specials. Evidence supporting this explanation was provided, indicating that her specials were based on events being held at different times of the year or relevant holidays; for example, Father's Day, National Crate Day, and the Christmas period.

[41] The appellant also produced evidence to show that she was involved in implementing purchasing and marketing policies, ordering stock for the store, and marketing her own specials as well as Bottle-O's monthly specials in-store.

[42] In light of the above, Immigration New Zealand's finding that the appellant had not provided evidence in response to its concerns about formulating and implementing purchasing policy, demonstrated a failure to address and consider relevant evidence provided to it, in breach of its obligations under A1.5.

[43] In relation to setting prices, Immigration New Zealand found that the appellant did not price goods because she set prices to encourage the store to "go along" with Bottle-O's pricing recommendations. Further, she had provided no information or evidence to show how she assessed competitors' pricing strategies and used the information to decide prices. Finally, setting the prices of her own specials was not relevant to whether she could set retail prices.

[44] In her letter of 8 January 2021, the appellant set out the factors she took into account when determining specials: the store's expenses, competitors' prices, current buying prices and selling patterns. While suppliers offered recommended retail prices (RRP), she could set prices at higher or lower than the RRP. She also explained that her approach to competitors' pricing could vary depending on the product and stated that she had her own margins on different product lines.

[45] The appellant provided some evidence that she set prices for the store, except for the small number of products featured in Bottle-O's monthly specials. She explained that when assessing the pricing of other competitors, she aimed to achieve prices that were attractive to customers but sufficient to be profitable. The Tribunal also notes that RRPs were "recommended" not "mandatory", that the evidence provided showed that the appellant could, and frequently did, sell suppliers' goods at prices that varied from the RRP, and that she set her own margins in relation to different products lines. Even if her pricing did not significantly depart from the RRP, this ought not be construed negatively because RRPs will be based on concrete factors such as the supplier's costs and the need for both the supplier and the retailer to make a profit. To conclude, the Tribunal finds that Immigration New Zealand failed to properly assess the appellant's evidence when it determined that the appellant did not set prices for the store.

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

[46] Immigration New Zealand's concerns about the appellant's involvement in promotion and advertising were similar to those raised in relation to the formulation of marketing policies, in particular, that the main promotion and advertising materials were set by Bottle-O. Immigration New Zealand concluded that the appellant did not perform this task as she did not explain how she decided which products to promote. The Tribunal finds this to be incorrect. She explained that

she devised her own specials on specific products in response to particular occasions (Father's Day, National Crate Day, and Christmas). She also explained that she factored in other considerations; whether stock levels indicated products were slow moving, where expiry dates were looming and she also devised her own advertising material. In short, there was evidence provided that the appellant was engaged in promoting and advertising the store's goods; however, Immigration New Zealand failed to properly consider that evidence when it determined that the appellant did not perform task 3.

Distinction between Retail Supervisor/Retail Manager (General)

[47] The representative submits that Immigration New Zealand incorrectly determined that the appellant was a Retail Supervisor (ANZSCO code 621511, skill level 4 occupation). In its letter raising concerns, Immigration New Zealand considered that the appellant's employment was akin to that of a Retail Supervisor and although it was not specifically referred to in the letter of decline, it noted, generally, that its initial concerns remained.

[48] There is no doubt that there will be some small-scale retail operations where the presence of a Retail Manager (General) is unnecessary and that the business can be run by a Retail Supervisor. Relevantly, recent decisions of the Tribunal have considered the differences between the two occupations when determining the most applicable to a particular appellant's employment.

[49] In *UI (Skilled Migrant)* [2021] NZIPT 206194, the Tribunal (differently constituted) set out the core tasks of a Retail Supervisor and concluded (at [53]) that many of a Retail Supervisor's core tasks were "broadly similar" to tasks 4, 5, 6, 7 and 8 of the Retail Manager (General) occupation. In the present case, it appears that, by concluding that the appellant was employed as a Retail Supervisor, Immigration New Zealand also considered that the appellant performed tasks 4 to 8. Unhelpfully, it did not specifically say so, except for a brief reference in its decision indicating that the appellant performed task 5. Nevertheless, on the evidence before it, the Tribunal considers that the appellant performed these tasks.

[50] In *UI (Skilled Migrant)*, the Tribunal then went on to find that the appellant was not in skilled employment as a Retail Manager (General) noting at [53] that "core tasks 1, 2 and 3 of the occupation of Retail Manager were different and were largely not performed by the appellant". In other words, it is the performance of tasks 1 to 3 that is what chiefly sets the occupations of Retail Manager and Retail

Supervisor apart. Therefore, when assessing the appellant's employment in this appeal, Immigration New Zealand was correct to focus on core tasks 1 to 3. However, in doing so, the Tribunal finds that Immigration New Zealand did not properly assess the evidence provided to it and did not, in several respects, properly or fairly put its concerns to the appellant and give her an opportunity to respond. Given these errors, the Tribunal is not satisfied that Immigration New Zealand was able to properly conduct an overall assessment of the appellant's employment and whether her role was a substantial match to the occupation of a Retail Manager (General).

The ANZSCO occupation description

[51] Immigration New Zealand did not properly consider whether the appellant organised and controlled the operations of the store. In its letter of 9 December 2020, Immigration New Zealand considered that the appellant might not meet the occupation description because she did not perform the three core tasks it had concerns about. In its decision of 13 May 2021, Immigration New Zealand determined that "no sufficient explanation or evidence [is] provided for us to assess the level of control you have as per ANZSCO requirement" and that the letter from the operations manager (6 January 2021) "did not clarify the level of control you have of the store from [the] brand, Bottle-O".

[52] Because Immigration New Zealand's findings in respect of the three tasks were unfairly reached, it follows that the finding that the appellant did not organise and control the operations of the store cannot stand. Further, while there was evidence that Bottle-O exerted influence over the store's operations through the monthly specials, this alone was not sufficient to justify Immigration New Zealand's finding that the appellant did not operate or control the store's operations.

Scope and scale

[53] The Tribunal considers that Immigration New Zealand should have, but did not, address scope and scale in its assessment. The Note to SM6.10.5.1 states that when determining whether an employment substantially matches an ANZSCO occupation description, the scope and scale of the employer's organisation may be considered, including factors such as "whether management functions are centralised at a head office or undertaken by other managers". As the Tribunal (differently constituted) set out in *BZ (Skilled Migrant)* [2018] NZIPT 205074, such considerations are important aspects of the context of the appellant's employment where, in a franchise or licensed operation:

[32] ... Immigration New Zealand will need to consider the degree of autonomy and control that is vested in the applicant compared to what is retained by the franchisor/licensor, when it is assessing whether the applicant's employment is a substantial match to the ANZSCO occupation of a Retail Manager.

[54] Due to the potential impact of a franchisor's role on an applicant's ability to organise and control operations, the Tribunal does not consider that the phrase "*may* require consideration" was intended to mean that, when assessing substantial match, Immigration New Zealand can elect to overlook a franchisor's role. Rather, an assessment of scope and scale may not be necessary if there is no other party capable of exerting control over a retail store's operations through the centralisation of management functions. However, if such a third party exists; for example, a franchise or a "hands-on" owner or employer, an examination of this aspect of scope and scale becomes necessary and therefore, *required*.

[55] Here, the appellant's evidence indicated that she exerted authority over the store's operations. Nevertheless, before Immigration New Zealand could conclude whether or not she controlled and organised the store's operations, it needed to ascertain the specifics of whether the store's management functions were centralised at Bottle-O's head office. However, before making its decision, Immigration New Zealand failed to raise any substantive concerns with the appellant as to the role of the franchisor, largely confining its analysis of 'organisation and control' to the three core tasks (its conclusions about which were unfairly reached).

[56] For the sake of completeness, the Tribunal notes that such an examination did not appear to be required in respect of the employer's role, as his ownership and operation of an accountancy business in another city meant that his involvement in the store was minimal.

Conclusion as to correctness

[57] The Tribunal finds that Immigration New Zealand's decision to decline the appellant's application was incorrect. It did not give the application proper consideration, failed to put potentially harmful information to the appellant and give her a reasonable opportunity to respond to it, and did not consider all known relevant information; or, give appropriate reasons for its decision. In so doing, it breached its obligations to assess the application fairly under A1.5. The decision is not correct and is returned for a new assessment.

STATUTORY DETERMINATION

[58] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to decline the appellant's visa application 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 grant of a visa.

[59] 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

[60] It should be noted that, while these directions must be followed by Immigration New Zealand, they are not intended to be exhaustive. There may be other aspects of the application which require further investigation, remain to be completed or require updating.

1. The application is to be assessed again by an immigration officer with no previous association with this application, in accordance with residence instructions in effect at the date the application was made and without the requirement to pay any further lodgement fee.
2. Immigration New Zealand shall then undertake a new assessment, having regard to all of the information previously provided to it by the appellant and to the Tribunal on appeal, and any additional material with which she chooses to update her application.
3. Immigration New Zealand's assessment shall include a full assessment of substantial match, in accordance with the relevant instructions, including SM6.10.5.1. In doing so, Immigration New Zealand shall:
 - (a) Assess the core tasks of Unit Group 1421 and the ANZSCO occupation description of a Retail Manager (General) against the appellant's employment, taking particular account of the Tribunal's findings at [29]–[52] above.

- (b) Assess the scope and scale of the of the employer's organisation, in particular, whether management functions are centralised at Bottle-O's head office as set out in the Note to SM6.10.5.1. In doing so, Immigration New Zealand shall take particular account of [53] to [56] above.
4. If, at any stage in its reassessment of the application, Immigration New Zealand decides that there are 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.
 5. Immigration New Zealand shall provide appropriate reasons for its decision as to the appellant's residence application.
 6. 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.

[61] The appellant is to understand that the reassessment of her application is no guarantee that she will be granted residence.

[62] The appeal is allowed in the above terms.

Order as to Depersonalised Research Copy

[63] 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 and her family members.

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Copy released for publication.

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Member

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