IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 205755**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**ML (Skilled Migrant)**
Before:	L Moor (Member)
Representative for the Appellant:	D Fisher
Date of Decision:	5 August 2020

RESIDENCE DECISION

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[1] The appellant is a 27-year-old citizen of 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 that his role as a store manager at a Four Square store substantially matched the (ANZSCO) description, including core tasks, of a Retail Manager (General). Without points for skilled employment, the appellant's application could not succeed.

[3] The principal issue for the Tribunal is whether Immigration New Zealand followed a fair process in its assessment of whether the appellant's employment was a substantial match within the scope of a franchised retail operation.

[4] For the reasons that follow, the Tribunal finds that Immigration New Zealand failed to follow a fair process. It did not properly consider all relevant information regarding the appellant's fulfilment of the tasks of determining the product mix and stock levels, formulating purchasing and marketing policies, setting prices, undertaking budgeting for the store, and hiring, training and supervising staff. Further, it failed to properly consider all of the relevant evidence provided as to the

role of the employer and the franchisor and incorrectly determined that they, rather than the appellant, organised and controlled the operations of the store.

[5] Immigration New Zealand's decision is cancelled and returned for a correct assessment.

BACKGROUND

[6] The appellant made his application for residence on 17 August 2018. He claimed a total of 160 points, including points, and bonus points, for his skilled employment as store manager at a Four Square store. He produced a copy of his offer letter (12 March 2018), individual employment agreement (signed 14 March 2018), and job description (14 March 2018). The appellant was required to work 45 hours per week, over six days, and paid a salary of $58,968 per annum.

[7] On 20 December 2018, the appellant's employer, the store owner, responded to Immigration New Zealand's request for information regarding the appellant's employment. He provided a completed questionnaire, a copy of the store's organisational chart, copies of the store's supplier agreements, leave records, Inland Revenue Department (IRD) Employer Monthly Schedules as well as wages and time records. The employer advised that the due to the sensitive nature of the franchise agreement, he was unable to provide it.

[8] In the questionnaire, the employer advised that he had passed on responsibility to the appellant to operate and control the business. The appellant was responsible for deciding the product mix; setting, developing, changing and maintaining customer service standards and store regulations; deciding on stock levels based on demand, costs prices, historical movement and promotion; had full authority to set prices and promotions; deciding on and implementing special promotions; developing new purchasing policies, particularly in response to a previous overstocked situation; deciding on store level promotions and advertising tailor-made for the local community; budgeting and sales forecast responsibilities; as well as hiring, training and supervising all staff. He also advised that the store did not have set supplier agreements and the appellant could decide to introduce new suppliers at his discretion.

[9] On 14 February 2019, Immigration New Zealand conducted a brief telephone interview with the appellant. He explained, among other things, that he had 12 staff who report to him, he determined prices and products, which could be ordered from any supplier, developed marketing policies, and organised promotions, including

generating promotional materials. The appellant also stated that he formulated purchasing policies, for example ensuring that the product would last the promotional period and was at the best value price, as well as marketing policies. He also hired new staff, for example he had recently hired three new staff. He did not require the authorisation of the employer to hire staff. The appellant also advised that he set the budget, based on sales history and forecasts for increasing future profitability.

[10] By letter dated 5 April 2019, a representative from Foodstuffs, 'the franchisor', responded to a request for information from Immigration New Zealand. He advised, among other things, that Foodstuffs provided core, recommended and optional ranges of products. However, it did not limit the authority of the store manager to determine product mix and in fact actively promoted this, so stores could meet the needs of their local catchments. In addition, the authority for making stock management systems resided with the store manager, based on margin expectations, cost and suitability to the store. He advised that while Foodstuffs had a base plan for marketing and setting of prices, each store was required to use local store-specific knowledge to further manage the marketing and pricing at store level. Stores also have direct-to-store suppliers and arrange deals individually. The franchisor also advised that if any further information was needed, to contact him.

[11] On 26 May 2019, the appellant's representative provided a range of "exemplar evidence" to Immigration New Zealand including product orders, sales reports, communications with suppliers, stock-take records, evidence of price reductions for promotions, marketing materials including signage and in-store promotions, store policies for purchasing and marketing, banking records, sales and expense reports, expenses report, and the 2020 budget.

[12] By letter dated 4 September 2019, Immigration New Zealand advised the appellant that it did not appear that his position substantially matched the ANZSCO occupation of a Retail Manager. It appeared that the appellant lacked "organisation and control" over the following core tasks:

> Determining product mix, stock levels and service standards
>
> Formulating purchasing and marketing policies and setting prices
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> Promoting and advertising the establishment's goods
>
> Undertaking budgeting for the establishment

[13] Immigration New Zealand also noted that, as the franchise agreement was not available for examination, there were important organisation and control tasks

which could not be completely assessed. As such, it was not satisfied that the appellant had the requisite autonomy in decision-making authority to be considered "the controller and organiser of the key managerial functions" of the Four Square store.

[14] By letter dated 30 September 2019, the appellant's newly appointed representative responded, enclosing a range of evidence including Foodstuffs policies on suppliers, procurement practices, as well as internal audit reports, the employee handbook, store budgets, health and safety policy, the appellant's job description, company structure, product order forms, lists of available products, staff contracts signed by the appellant, sales and expense reports, stock-take sheets, and promotional and marketing materials. He also produced multiple letters from suppliers, confirming that the appellant had responsibility for determining product mix, negotiating prices and the management of stock.

[15] The company structure chart showed the appellant headed the managerial hierarchy, with an assistant manager and a store supervisor reporting to him. Below them in the chain of hierarchy came nine shop assistants. An external accountant was listed, but not included in the store's reporting hierarchy.

[16] The employer's letter (23 September 2019), advised, among other things, that the franchisor was not involved in the "day to day operations" of the business. The employer, as franchisee, had given "full responsibility" of these to the appellant. The appellant had sole responsibility for purchasing, stock control, pricing and day-to-day operations of the store. The appellant was responsible for determining a product mix of 7,500 products from the 100,000 possible products. He determined the product mix based on customer preference, as well as stocks levels, seasons and demand. He was also responsible for the store's service standards including complaints. The employer confirmed the appellant held responsibility for formulating and purchasing policies through research (online and in person) as well as analysing sales trends. The appellant formulated marketing policies and set prices in line with the local market and available competition. The appellant undertook all promotions, including in-store promotions, specials and all local advertising and sponsorships. The appellant was also responsible for all budgeting matters, formulating the budgets, which are ultimately signed off by the employer. The employer had other business interests and relied on the appellant to manage the store.

[17] By letter dated 10 December 2019, Immigration New Zealand again wrote to the appellant's representative setting out its concerns that the appellant's position did not substantially match the ANZSCO occupation of Retail Manager.

[18] On 8 January 2020, the appellant's representative responded, enclosing submissions (8 January 2020), a letter (undated) from the appellant, a letter (undated) from the appellant's employer and copies of previous Tribunal decisions As Immigration New Zealand had advised that the application had been reallocated to a new staff member, the representative produced copies of documentation previously provided on 30 September 2019.

[19] On 21 February 2020, the representative provided to Immigration New Zealand a copy of the appellant's new employment agreement, with an increased salary of $61,550 per annum, a job description and a letter from the appellant's employer dated 16 February 2020.

Immigration New Zealand Decision

[20] By letter dated 27 February 2020, Immigration New Zealand declined the appellant's application for residence on the basis that he was not eligible for points for skilled employment and therefore his application could not succeed. His position of store manager at a Four Square store did not substantially match the ANZSCO occupation of Retail Manager.

STATUTORY GROUNDS

[21] 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—
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> (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.

[22] 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

[23] On 20 May 2020, the appellant lodged this appeal on both grounds in section 187(4).

[24] In support of his appeal, the appellant's newly appointed representative makes detailed submissions, comprising 72 pages (20 May 2020). He submits, in summary, that Immigration New Zealand failed to properly consider the specific nature of the appellant's employer's business model. The co-operative supply structure of which the employer's business was a part, and the specific nature of the particular franchise-type arrangement in operation, were not properly considered. Immigration New Zealand failed to properly consider the available evidence demonstrating that the appellant substantially met the description and core tasks of an ANZSCO Retail Manager. These procedural failings mean that the decision is incorrect.

[25] The representative also provides the following documents, in addition to those already provided to Immigration New Zealand:

(a) A letter (April 2020) from the appellant to the Tribunal, describing his responsibilities in his position as store manager.

(b) Four Square mailout and screenshot of disclaimer stating that products and prices may vary between stores.

(c) Extract from Immigration New Zealand records showing Immigration New Zealand verification accepting the veracity of the letter (5 April 2019) from the franchisor stating that the employer's business was independent of Foodstuffs.

(d) Foodstuffs annual audit report (February 2020).

(e) Screenshots of Four Square website marketing.

(f) Extracts from Immigration New Zealand records in which Immigration New Zealand approved the residence application in principle and accepted the appellant's position in relation to an Essential Skills work visa. An extract also records the employer (email 10 January 2019) explaining that the franchise agreement could not be released as it was commercially sensitive, but information could be provided in other forms.

(g) A news article (January 2020) regarding the Foodstuff and Countdown duopoly in New Zealand.

(h) Printouts from the franchisor's website containing policies and information on the franchise's product ranges, suppliers and their operations.

[26] The Tribunal's ability to consider this new evidence on appeal is constrained by section 189(1) of the Act. The Tribunal finds that it is unable to consider the appellant's new evidence when assessing the correctness of Immigration New Zealand's decision. This is because this evidence either did not exist at the time of Immigration New Zealand's decision, or if it did, there is no explanation as to why, with reasonable diligence, it could not have been provided to Immigration New Zealand.

ASSESSMENT

[27] 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.

[28] 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

[29] The application was made on 17 August 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 occupation of Retail Manager.

[30] The relevant instructions in this case are:

> **SM6.10 Skilled Employment**
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> a. Skilled employment is employment that meets a minimum remuneration threshold and requires specialist, technical or management expertise obtained through:
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> i. the completion of recognised relevant qualifications; or
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> 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

[31] The appellant was required to demonstrate that his employment substantially matched the description for the occupation set out in the ANZSCO (SM6.10.5.b, also effective 21 May 2018). The residence instructions also set out how a substantial match was to be assessed:

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: Where no description is stated at the ANZSCO Occupation (6-digit) level, an immigration officer should refer to the ANZSCO Unit Group (4-digit) description or higher ANZSCO group (3-digit or 2-digit) level as necessary to determine a substantial match with the stated occupation. Similarly, where no ANZSCO core tasks are listed at the ANZSCO Unit Group (4-digit) level, an immigration officer should refer to a higher ANZSCO group (3-digit or 2-digit) level as necessary to locate core tasks ANZSCO associates with the stated occupation.

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] A substantial match should be determined on a holistic basis, taking into account the core tasks and the specific characteristics of the appellant's particular employment; see (29 September 2009) at [47]. A

substantial match is a question of fact and degree in the context of the appellant's employment; see (20 November 2009) at [48].

[33] In [2018] NZIPT 204965 at [31], the Tribunal held that Immigration New Zealand was required to consider whether, overall, the core tasks for the occupation comprised most of the appellant's role:

> Instruction SM6.10.5.1.b provides that "the tasks that are relevant to the applicant's employment role must comprise most of that role" (emphasis added) and later, in discussing an example, SM6.10.5.1 states (verbatim):
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> > 'Other listed tasks that are relevant to the role of a "Disabilities services officer" must comprise most of their role'.
>
> 'Comprise' in both of those expressions appears to be used in a manner that is not entirely standard English. A sensible interpretation of both expressions is that, to be a substantial match to an ANZSCO occupation, an applicant's employment must mostly consist of the relevant ANZSCO core tasks (as opposed to other work unrelated to those tasks). The 'most', in 'most of that role', means that, at a minimum, the majority of the applicant's time is spent undertaking ANZSCO core tasks.

[34] In [2014] NZIPT 201941 at [24], the Tribunal remarked upon the differences between the role of a Retail Manager and that of a Retail Supervisor under the ANZSCO, stating:

> While both roles contain core tasks relating to the management of staff, customer service, and elements of stock management, there is a clear distinction between the two. Missing from the supervisor's role are those elements of the manager's role which confer on the latter responsibility for formulating and determining key components of the retail trading environment such as determining product mix, stock levels and service standards, formulating purchasing and marketing policies and setting prices or promoting advertising goods and services.

[35] The appellant was employed as store manager of a Four Square store in a small provincial town in the North Island, where he earned $61,550 per year. The store was part of a franchise arrangement, entered into between Foodstuffs and the employer.

[36] Whether there is a substantial match within the setting of a franchised business will depend on the level of organisation and control that vests in an applicant when compared to what is retained by the franchisor and/or the owner. The issue of "organisation and control" in a franchised restaurant business was before the Tribunal in [2016] NZIPT 203659. The Tribunal observed:

> [44] … In franchised restaurants, it is likely that it will be more difficult for a manager to establish that they have the required level of managerial organisation and control, simply because many of the core tasks, which in an independent establishment would normally involve managerial discretion, are undertaken by the franchise's head office. This does not imply that an applicant is not a skilled person

> or does not work hard; it simply reflects the fact that managers' roles in franchise establishments do not necessarily substantially match the ANZSCO descriptions and may not meet the requirements of the instructions.
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> …
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> [46] When someone running a retail establishment has limited control over which products were sold; where products would be purchased from; and how goods were to be marketed, advertised, promoted and priced, his or her ability to control and organise the operations of the establishment will be limited. This was the situation faced by the appellant. Head Office determined almost all of the product mix sold by its stores. Its involvement in formulating purchasing policies and formulating and implementing marketing policies and advertising and promotional activities limited the appellant's responsibilities in those areas. Similarly Head Office's involvement in pricing meant that, at best, he shared this responsibility with Head Office.

[37] The Tribunal (differently constituted) additionally confirmed in [2016] NZIPT 202785 at [38] that:

> [E]ach case falls to be assessed on its own specific facts and must take into account not only the franchise model but also the specific context and features of the applicant's store, including the involvement of the employer/owner and other employees.

[38] The ANZSCO describes a Retail Manager (General) (ANZSCO code 142111) as someone who "[o]rganises and controls the operations of a retail trading establishment". The core tasks for the Unit Group 1421 are (numbered for ease of reference):

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

[39] Immigration New Zealand was not satisfied that the appellant's employment was a substantial match for the description of the occupation of Retail Manager, or that he performed core tasks 1, 2, 6 or 7 in the Unit Group's tasks. These are addressed below.

[40] For the reasons which follow, the Tribunal finds that Immigration New Zealand failed to follow a fair process in its assessment of whether the appellant's employment was a substantial match to the ANZSCO description, including core tasks, of a Retail Manager. It failed to properly consider all of the relevant evidence provided by the appellant, his employer and the franchisor, as well as documentation from the store's operations, including the marketing and purchasing policies and letters from suppliers. In doing so, its decision cannot be relied upon as correct.

[41] In its decision, Immigration New Zealand concluded that the appellant had minor input in the decision-making over the store's product mix and as such did not meet this task. It referred to a Four Square franchise agreement provided in relation to another store, the franchisor's letter (5 April 2019) referring to a "core range" of products, the appellant referring to making product selections based on the "available range", and fact that 4,082 of the store's 7,899 products were from the franchisor's distribution centre. It also stated that the appellant's job description was silent on the issue of determining product mix.

[42] In making this assessment, despite providing four pages of explanation in relation to the task of determining product mix alone, Immigration New Zealand did not properly consider the submitted evidence which supported the claim that the appellant was responsible for determining the store's product mix.

[43] The appellant's employer advised in his questionnaire (20 December 2018) and letters in response to Immigration New Zealand (23 September 2019 and 8 January 2020) that the appellant determined the product mix. He also explained how the appellant made decisions on product mix based on sales data, seasonal changes, competitive and marketability. This was acknowledged by Immigration New Zealand. However, it did not accept this as compelling evidence as the appellant had not mentioned this himself in his own interview. Instead, it was overly focused on the fact that the franchisor pre-approved suppliers and had a core range.

[44] Immigration New Zealand also cited the evidence contained in the franchisor's letter (5 April 2019) which stated that the franchisor did not limit the store manager in determining product mix. However, again, Immigration New Zealand considered this was negated by the reference to a core range.

[45] Immigration New Zealand also referred to evidence provided by the appellant's employer in 2013 in relation to another application and a Four Square franchise agreement that had been provided in relation to another case. It cited these as evidence that the franchisor had a core range and pre-approved suppliers that needed to be used.

[46] While it was relevant for Immigration New Zealand to have regard to the existence of pre-approved suppliers, as well as franchise agreements used by the franchisor, even if not for this particular store, it could not properly do so without also taking into account the other relevant evidence provided to it. This included the letter from the franchisor, the employer's multiple communications, the letters from suppliers, the job descriptions and the appellant's own statements. The Tribunal finds that Immigration New Zealand failed to fairly and properly engage with, and assess, the totality of the evidence it had before it as regards the appellant's performance of this task.

[47] While the requirement of stocking a core range was a relevant consideration, the nature of the core range and restrictions around it needed to be properly assessed. Immigration New Zealand failed to do this. It did not properly consider what the core range actually was and how this could have limited the appellant's responsibility in relation to this task.

[48] Both the appellant and his employer advised Immigration New Zealand in their letters (23 September 2019 and 8 January 2020) that the franchisor provided an available range of products, from which the appellant determined the product mix for his store. They advised that this constituted over 100,000 products, only 7,899 of which were used in the store's selected product mix.

[49] In its assessment, Immigration New Zealand failed to refer to the overall size of the available "core" range and therefore did not properly assess the responsibility held by the appellant to determine the product mix. Due to the sheer magnitude of possible products, over 100,000, the reality was that this did not limit the appellant's responsibility to determine the product mix in any significant way. The appellant selected a mere fraction of the 100,000 available products, meaning he retained the requisite authority to determine product mix and was not limited by the franchisor.

[50] In relation to determining stock levels, Immigration New Zealand also failed to give proper consideration to the evidence of the appellant, his employer and the contents of his job description, all of which indicated that it was the appellant who was responsible for this task. The employer advised immigration New Zealand in

his questionnaire and letter of 23 September 2019 that the appellant held this responsibility. The appellant also advised that he completed this task. In addition, the franchisor stated in its 5 April 2019 letter that authority for making stock management systems resided with the store manager, based on margin expectations, cost and suitability to the store.

[51] Immigration New Zealand failed to properly consider this evidence. Instead it referred to a franchise agreement for another Four Square store which stated that, in general, stores had access to "policies, systems and manuals covering inventory control". However, this was an irrelevant consideration in light of the fact there was no evidence this was applicable to the store in question or the store in question utilised available resources.

[52] Regarding this task, Immigration New Zealand was not satisfied that the appellant formulated purchasing and marketing policies or set prices. It determined that in the absence of a franchise agreement, it could not be satisfied that the appellant's responsibilities in this regard deviated from other franchise agreements.

[53] However, in making this finding Immigration New Zealand speculated as to what was contained in the franchise agreement to the exclusion of properly considering the available evidence.

[54] In the appellant's job description, it stated that the appellant was responsible for formulating a marketing plan. The appellant also provided a marketing strategy for the year 2018/19, signed by himself. Despite this persuasive evidence, Immigration New Zealand found that the content in the strategy appeared to have existed before the appellant's commencement of the role. Further, it was not necessary, due to a base marketing plan being provided from the franchisor. Again, it referenced the fact that in the absence of a franchise agreement it could not determine the extent of the appellant's marketing policy formulation.

[55] The Tribunal finds this reasoning to be flawed. While Immigration New Zealand was entitled to seek the franchise agreement, the employer was not obliged to provide it. However, the appellant was required to provide evidence in lieu of the agreement. The Tribunal is satisfied that it did and in its assessment of this task, Immigration New Zealand again failed to fairly and properly assess the totality of the evidence it had before it as to the appellant's performance of this task.

[56] While the franchisor provided a base plan, the appellant held responsibility for adjusting this plan to the specifics of their local situation. This was confirmed in the franchisor's letter of 5 April 2019, but this aspect of the letter was not cited in the decision. Further, the appellant's responsibility for this task was clear from the job description and the employer's confirmation of this. The marketing plan, while similar to others, had been formulated by the appellant, as part of his responsibility for doing so.

[57] In finding that the appellant did not formulate purchasing policies, Immigration New Zealand failed to properly consider the evidence provided by the employer and the appellant regarding the appellant's role in this task: the letters dated 23 September 2019 and received 8 January 2020, the appellant's interview, and the copy of the purchasing policy 2018/19, signed by the appellant. The evidence produced to Immigration New Zealand provided information on the policy or polices utilised by the appellant in his approach to purchasing. For example, in the 23 September 2019 letter, the employer explained the factors used by the appellant in formulating his purchasing policies. In his letter of the same date, the appellant advised that he had never seen a purchasing policy from the franchisor and had developed his own for the store and recorded them in the strategy for other staff undertaking purchasing in his absence. However, this evidence was not properly considered by Immigration New Zealand in its assessment. Instead, it again referred to the absence of a franchise agreement and its unsubstantiated belief that the franchisor was responsible for this task.

[58] In addition, Immigration New Zealand was not satisfied that the appellant set prices, citing the fact that there was no evidence of how the appellant determined prices, such as calculations. However, in doing so, Immigration New Zealand failed to have regard to the totality of evidence and properly consider the evidence from the employer, the appellant or in the job descriptions. In the employer's letter received 8 January 2020, he clearly stated that the appellant set the prices and provided an explanation of how this was done:

> [P]roducts are priced at a competitive price in comparison to other retail stores. This is to be implemented on a daily basis through the purchase invoices and is set by [the appellant]. [The appellant] has a good understanding of what the product would sell for. He also looks at what the recommended retail price is and where needed sets the price in accordance with competition in the area. He also ensures that he prices goods to meet a certain market criteria to meet the budgeted sales and profitability for the store. He looks at the sensitivity of the prices on certain items so that it meets satisfaction and price perception of the customers together with an intention of meeting the profitability levels expected from me as the store owner.

[59] In the appellant's job descriptions (14 March 2018 and 20 February 2020) it was clearly stated that the appellant held responsibility for setting prices:

> Calculate margins and ensure profitability when setting selling price of new products or promotional offers.

[60] In the appellant's interview he also stated that he held responsibility for setting prices, explaining the process he employed for this to ensure products sold:

> The suppliers give the RRP prices, we don't need to select the data, the RRP prices are way more higher. They just want to sell their products [undetermined] … they really don't move at the RRP price. I determinate the prices like at which price I'm buying the product, and I set the price on those products.

[61] Instead, Immigration New Zealand chose to rely on the statement in the franchisor letter (5 April 2019) that it had an internal policy guideline that stores do not go above the recommended retail price. Further, Immigration New Zealand also failed to properly consider the condition also stated in this letter that it "actively encouraged stores to manage and reduce retails we needed to ensure they are competitive and the fact that they know that stores do this on key lines". Further, while the franchisor stated that it provided a base plan for marketing and setting of fair prices, it also stated that owners/managers were then " to use local store-specific knowledge to further manage the pricing and marketing for products at store level."

[62] In its decision, Immigration New Zealand acknowledged that the appellant was involved in weekly, monthly and annual budgeting in close interaction with his employer, who would sign off on the appellants drafts, set sales targets and approve budgets for promotional activities. It also referred to the appellant's telephone interview and email dated 26 May 2019, in which he advised that he decided on the budget, and the relevant financial and budgetary documentation provided.

[63] Immigration New Zealand also noted the employer's evidence that the appellant held responsibility for budgeting and sales forecasts for the store. The appellant was working on a comprehensive budget for 2020 to be ready by March 2019 looking at controlling profitability by department.

[64] However, Immigration New Zealand then referred to information provided by the appellant's employer in 2013 in relation to another applicant. This stated that normally the directors gave the managers the expected "growth in sales in bottom-lines" and in a joint meeting the growth forecast was discussed. This was

agreed upon or amended. The managers then prepared a budget based on the previous year's figures.

[65] Based on this evidence, Immigration New Zealand was not satisfied that the appellant had sole responsibility for budgeting and found that the input of his employer and the employer's accountants negated the appellant's responsibility for this task. Again, it was not satisfied that the appellant had provided sufficient evidence showing how he made his calculations in relation to this task, dismissing the fact that he had stated that, when budgeting, he looked at expected inflation, CPI, and changes in population. He had not explained how the system had changed from 2013 to now and the submitted documentation did not indicate whether the appellant was its author.

[66] This Tribunal (differently constituted) has previously observed that this budgeting task requires an applicant to show that they undertake the task of budgeting, but it is not necessary for them to show that they
for the business (see [2015] NZIPT 202409 at [46]).

[67] In the present case, the Tribunal is satisfied that the evidence provided by the appellant, his employer, as well as sales reports, budget documents and pricing reports show that the appellant was undertaking this task, albeit with involvement from the employer. Immigration New Zealand did not need to see calculations from the appellant, nor did the appellant need to rebut the 2013 evidence provided in relation to another application. The employer had provided evidence that the management system had changed since that time.

[68] The Tribunal is satisfied that the appellant had provided credible evidence, including from himself and his employer, demonstrating that he undertook the task of budgeting. This was not properly considered. Further Immigration New Zealand misdirected itself as to the necessary level of involvement in budgeting that was required.

[69] Immigration New Zealand's finding that there was insufficient evidence that the appellant was responsible for controlling selection, training and supervision of staff failed to take into account the clear evidence that the appellant had responsibility for hiring, training and supervising staff. This was provided in the employer's questionnaire, the employment agreements signed by the appellant, the advertisements for hiring staff, copies of staff declarations taken by the appellant

regarding legal compliance, and letters from the appellant and employer. The store's organisational chart also confirmed that the appellant held responsibility of managing all staff in the store.

[70] Immigration New Zealand was also not satisfied that the appellant was responsible for this task as it found that he did not hold responsibility for hiring managerial staff in the store. This was based on the fact that the employer had signed an employment agreement for a managerial staff member during the time the appellant was employed at the store.

[71] Immigration New Zealand did note the appellant's explanation. Specifically, the employment agreement for the assistant manager in question had been signed a number of weeks after the appellant commenced in his store manager role. Prior to this, the employer had occupied the role of store manager and had commenced the recruitment of an existing staff member as the assistant manager role himself. The employer had continued the recruitment while the appellant was settling into the role. Notwithstanding this, the appellant interviewed the assistant manager prior to his promotion and then undertook all staff matters in relation to him after the employment agreement was signed.

[72] However, because the employer had signed this employment agreement and no other "managerial" staff had been hired since the appellant started in his role, Immigration New Zealand was not convinced that the appellant held full control for hiring managerial staff and as such found that he did not meet this task.

[73] The Tribunal finds Immigration New Zealand failed to follow a fair process in doing so. It failed to properly take into account the plausible explanation for the employer's involvement on this one occasion, and the appellant's explanation that there had been no need to hire "managerial" staff since that time.

[74] Further, Immigration New Zealand referred to information provided by the employer in 2013 as to the store's human resources practices. However, the relevance of information from many years earlier was irrelevant to the situation of the appellant at the time of determination. The employer had made clear in his communications with Immigration New Zealand that the appellant was responsible for hiring and had taken over more responsibilities since he was appointed to the store manager role.

[75] In any event, even if the employer retained responsibility for hiring managerial staff, the vast majority of staff at the store were non-managerial, all reporting to the

appellant. The appellant would still hold the primary responsibility for hiring staff for the store and, under a holistic assessment, could be taken to perform this task. As correctly submitted by the representative, it is not required that the appellant have absolute control over hiring staff for the appellant to fulfil this core task. It is expected that some degree of oversight may be retained by the employer, while the appellant can still be primarily responsible for hiring, training and supervising staff.

[76] Beyond the core ANZSCO tasks, Immigration New Zealand considered that the appellant did not meet the descriptive requirement to 'organise and control' due to the fact the business was part of a franchise and because of the involvement of the employer. As such, it was not satisfied that the appellant met the ANZSCO description of a Retail Manager.

[77] In making this finding, Immigration New Zealand failed to properly consider all the available evidence, in a holistic manner, including the evidence given by the franchisor, the employer and the appellant regarding the nature of the appellant's employer's business and the franchise itself, as well as the responsibilities held by the appellant.

[78] Instead, it relied on a number of speculative bases for the employer's apparent involvement in the operations of the store, failing to take into account the unequivocal evidence provided by the employer as to his actual involvement. In addition, it was overly influenced by the fact that the appellant worked in a franchised business and did not properly consider the appellant's actual responsibilities in his position within the actual operation of the business in question.

[79] In its decision, under the heading "Holistic assessment", Immigration New Zealand referred to the fact that the employer had signed one managerial employment agreement four to five weeks after the appellant started in his store manager role. It also referred to the fact that the employer had the final say in sales targets and budgeting matters, that another staff member's job description stated that the employer planned marketing and promotional activities and visited the store for promotional purposes or media. In addition, the employer's wife was an employee and "may appear as a 2IC".

[80] The Tribunal finds that such speculation is not supported by the available evidence, including the employer's unequivocal statements that the appellant had been appointed in the role to take over the control and running of the store, as had

not occurred previously, the appellant's evidence, job descriptions and the wide range of corroborative evidence.

[81] Immigration New Zealand erroneously considered irrelevant considerations when it referred to another employee's job description, without providing specifics about how it related to the appellant's position or whether it was in force at the present time. Further, its finding that the employer's wife's role "may appear" as a 2IC was entirely speculative and without a proper basis. Immigration New Zealand also failed to adequately address the plausible explanation for the employer's single managerial hire, as addressed above.

[82] In relation to the employer's involvement, the Tribunal is satisfied that his presence at the store for promotions and media, as well as responsibility for the final sign off on budgets, new equipment and sales targets does not undermine the appellant's responsibilities as store manager to control and organise the operations of the store, as required by the instructions.

[83] Immigration New Zealand also found, incorrectly, that the franchisor's involvement in supporting the business undermined the appellant's ability to organise and control the store's operations.

[84] While the employer and the franchisor did not wish to disclose the franchise agreement due to commercial sensitivity, which it was entitled to do, sufficient evidence was provided (and offered) upon which Immigration New Zealand could make a decision as to the level of authority and control the appellant held in the store's operations. If Immigration New Zealand remained unsatisfied with information as to the franchise arrangement, in part due to the absence of the franchise agreement, it should have sought further information from the franchisor, as was offered to be provided in the 5 April 2019. It did not.

[85] Notwithstanding this, there was sufficient evidence aside from the agreement regarding the nature of the franchise arrangement for this particular store. As the appellant, franchisor and employer advised in their communications (franchisor letter dated 5 April 2019, appellant interview of 14 February 2019 and letter provided 8 January 2020), the franchise operated to provide service standards, access to a wide range of suppliers and carry the franchise name. However, within this structure, the store manager made the decisions as to product mix within a large supplier database and an extensive core range of approximately 100,000 products from which they could select products for their individual store. The appellant was able to select from a range of suppliers including the franchisor's distribution centre,

direct purchasing and third-party suppliers. As the franchisor advised in the 5 April 2019 letter, it did not "limit the authority of the store manager/individual store to determine product, in fact it actively promotes this".

[86] Furthermore, Immigration New Zealand failed to properly consider the evidence provided by the employer that the appellant held responsibility for the operation of the store. This was contained in the appellant's job descriptions dated 14 March 2018, and 20 February 2020 which stated:

> The main purpose of this position is to manage and take full responsibility of the operation of the retail store and its sales, customer services, service providers, staff, marketing, daily finances and administration requirements.

[87] In the questionnaire (20 December 2018), the employer explained that he had passed on to the appellant responsibility for running the store. The employer now served as director, with "minimum directive roles in the daily operations and business decision-making of the store operation":

> In general I have passed on the responsibility to [the appellant] to operate and control the retail business to perform with the highest level of efficiency, honesty and integrity.

[88] Similarly, in his last letter (received on 8 January 2020), the employer stated unequivocally (emphasis in original):

> Who controls the **[XY] FOUR SQUARE BUSINESS**? Obviously in this case it is [the appellant].

[89] By letter dated 23 September 2019, the employer also advised that he had handed over full responsibility to the appellant as store manager for the day-to-day operations of the store. He also provided credible reasons for his absence from any day-to-day involvement in the store. Previously he had more of a day-to-day involvement, but since employing the appellant who had the capability to run the store and was employed to do so, and the fact that the employer had shares in two businesses in different rural locations, he had passed over full control to the appellant. While he was still involved in an oversight role, and signing off on budgets, this did not undermine the appellant's responsibility as having the primary responsibility for running and controlling the store. Immigration New Zealand failed to properly consider these explanations in its final assessment.

[90] Finally, Immigration New Zealand did not properly consider the organisational hierarchy that was provided to Immigration New Zealand in its final assessment. This showed that the appellant managed 12 staff: an assistant manager, a store supervisor and 9 shop assistants. The appellant reported to the employer. The

relatively large number of employees managed by the appellant, the fact that no other employees apart from the appellant reported to the employer and the absence of the employer from the store's management organisational chart, were not properly considered by Immigration New Zealand. This structure indicated that the appellant held a level of managerial responsibility, authority and control of the operations to be expected of a Retail Manager. Further, it did not consider the evidence of the appellant's sole responsibility for hiring staff that reported to him.

[91] The Tribunal finds that Immigration New Zealand was not correct to decline the application. While the store operated as part of a franchise, and as such the appellant was not wholly unfettered in his ability to undertake the core tasks of a Retail Manager, the evidence established that he had a significant role in determining the product mix, stock levels and service standards for the store, formulating and implementing purchasing and marketing policies, and setting prices, and hiring, training and supervising staff. Immigration New Zealand was required to take into account all available evidence and to determine the appellant's actual responsibilities within the specific business. It did not do this. In the absence of a franchise agreement, Immigration New Zealand resorted to speculating about the nature of the appellant's responsibilities and did not properly consider the evidence provided as to the actual business and the appellant's role within it.

[92] Weighing the evidence in the specific context of the appellant's employment, the Tribunal finds that Immigration New Zealand erred in its assessment of the application.

DETERMINATION

[93] 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 that the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[94] 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

[95] 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.

1. The application is to be reassessed by an Immigration New Zealand officer not previously associated with the application in accordance with the instructions in existence at the date the residence application was made. No further lodgement fee is payable.

2. Immigration New Zealand is to invite the appellant to update his application within a reasonable timeframe, if he sees fit. The appellant may wish to consider providing Immigration New Zealand with further documents demonstrating that he is in skilled employment.

3. Immigration New Zealand shall take into account any new evidence produced by the appellant, along with the relevant evidence submitted on appeal and as already held on his residence application file.

4. If the appellant is still employed in the same role, Immigration New Zealand shall determine whether the appellant's employment is a substantial match to the occupation description, including the core tasks, of a Retail Manager.

5. If the appellant is no longer employed as a store manager, he is to be given a reasonable opportunity to put forward evidence of being in skilled employment or having an offer of skilled employment.

6. Immigration New Zealand is to provide the appellant with an opportunity to comment on any potentially prejudicial information and provide a reasonable opportunity to respond to it.

[96] 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.

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

Order as to Depersonalised Research Copy

[98] 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.

"L Moor"
L Moor
Member

Certified to be the Research Copy released for publication.

L Moor
Member