

Judge P Spiller (Chair)

D Fisher

27 May 2021

[1] The appellant is a 29-year-old citizen of India. His application for residence under the Skilled Migrant category of residence instructions was declined by Immigration New Zealand. Included in his application were his 27-year-old wife and 19-month-old son, also citizens of India.

[2] Immigration New Zealand declined the appellant's residence application because it found that his employment as manager of a Thirsty Liquor store did not substantially match the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) description, including core tasks, of a Retail Manager (General). Without points for skilled employment, the application could not succeed.

[3] The principal issue for the Tribunal is whether Immigration New Zealand correctly assessed the appellant's application. For the reasons which follow, the Tribunal finds that Immigration New Zealand did not. The application is therefore referred back to Immigration New Zealand for a new assessment.

[4] The appellant arrived in New Zealand in February 2011 and was granted a visa. In 2013, he obtained a National Diploma in Business, Level 6, with majors in marketing and business strategy. In October 2013, he was granted a work visa. In May 2018, he was employed as manager of a Thirsty Liquor store, which operated with himself and two staff members.

[5] On 24 December 2018, the appellant applied for residence under the Skilled Migrant category. He claimed points for skilled employment as a Retail Manager (General), relying on his employment as manager of a Thirsty Liquor store. He claimed a total of 160 points, including 50 points for skilled employment.

[6] In support of his application, the appellant attached his employment agreement which set out his job description. His salary was listed as \$24.60 per hour.

[7] On 20 November 2019 and 18 September 2020, Immigration New Zealand conducted telephone interviews with the appellant, concerning the work that he performed as a manager.

[8] On 9 November 2020, Immigration New Zealand advised the appellant in writing that it did not consider his role to be a substantial match to the ANZSCO description, including core tasks, of a Retail Manager (General). Immigration New Zealand acknowledged that the appellant undertook a number of tasks at a supervisory level. However, given the nature and the structure of the business, and his tasks and duties, his ability to perform these tasks at a managerial level appeared to be limited.

[9] Immigration New Zealand thus advised that the appellant did not appear to qualify for points for skilled employment. Without these points, the application could not succeed.

[10] On 11 December 2020, the appellant's representative responded to Immigration New Zealand's concerns. The representative submitted that the

appellant's employment met the requirements of the ANZSCO occupation of a Retail Manager (General), and that he performed the core tasks of that occupation. The representative provided evidence of the work performed by the appellant in his role as a store manager, including letters from the appellant and his employer, and documentary evidence of the tasks that the appellant performed.

[11] By letter dated 11 February 2021, Immigration New Zealand declined the appellant's application.

[12] Immigration New Zealand advised that it had taken into account the information received. However (for the reasons outlined below), it was not satisfied that his employment was a substantial match with the description, including core tasks, of a Retail Manager (General).

[13] Immigration New Zealand awarded the appellant a total of 80 points. Without points for skilled employment, his application could not succeed.

[14] 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.

[15] 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).

[16] On 24 March 2021, the appellant lodged this appeal on the ground that the decision of Immigration New Zealand was not correct.

[17] In support of the appellant's appeal, his representative provides submissions (19 April 2018). He submits that Immigration New Zealand incorrectly assessed the appellant's skilled employment as a Retail Manager (General). This was because Immigration New Zealand: (a) failed to appreciate the nature of autonomy the appellant enjoyed under the franchise arrangement, which differed from a traditional franchise arrangement; (b) placed too much emphasis on the role of the POS (Point of Sale) system; (c) imported additional requirements for the substantial match test to be met; (d) failed to undergo a holistic assessment of the substantial match test taking into account the context of the appellant's employment; and (e) showed elements of predetermination and bias when assessing the appellant's application.

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

[19] 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.

[20] The application was made on 24 December 2018 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it was not satisfied that the appellant's employment was a substantial match to the ANZSCO description, including core tasks, of the occupation of a Retail Manager (General).

[21] The relevant instructions in this case concern the assessment of skilled employment. The residence instructions relevant to the assessment of skilled employment are SM6.10, SM6.10.5 and SM6.10.5.1 (all effective 26 November 2018).

[22] 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).

[23] 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. 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 may require consideration of the scope and scale of the employing business:

- 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.

...

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).

[24] Instructions also address the requirements of fairness in decision-making, at A1.5.a, relevantly as follows:

- a. Whether a decision is fair or not depends on such factors as:
 - whether an application is given proper consideration;
 - ...
 - whether appropriate reasons are given for declining an application;
 - ...

- whether all known relevant information is considered.

Effective 29/11/2010

[25] The appellant claimed that he was employed in a position which substantially matched the ANZSCO description, including core tasks, of a Retail Manager (General). For the appellant's employment to be classified as skilled, SM6.10.5.b requires that it substantially match the description, including core tasks, of a Retail Manager (General) as set out in the ANZSCO.

[26] Assessment of whether an applicant's employment is a substantial match to an ANZSCO occupation is not achieved by simply "ticking off" a certain number of tasks, but must be determined on a holistic basis, taking into account the specific characteristics of the appellant's employment and the overall nature of the organisation in which he or she is employed.

[27] In terms of the ANZSCO description, a Retail Manager (General) (142111) is someone who "[o]rganises and controls the operations of a retail trading establishment".

[28] The ANZSCO outlines the core tasks of a Retail Manager (General) as follows (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.

[29] Immigration New Zealand, in its decision, was satisfied that the appellant performed tasks four and eight. Having considered the evidence before Immigration New Zealand, the Tribunal agrees with this assessment. The appellant presented evidence that he sold goods to customers, and ensured that the store complied with occupation health and safety regulations. Immigration New Zealand found that the appellant did not perform the remaining tasks. The Tribunal will now examine Immigration New Zealand's assessment of these tasks.

Task one: determining product mix, stock levels and service standards

Product mix

[30] The appellant stated that he was responsible for making decisions on product mix. He took into consideration customer feedback, customer requests, area needs and the popular range of products in determining the product mix. Most products were ordered from the sales representatives, as the most popular or core products were sold by them. He was not forced to buy any products, but he decided the product mix considering customer demand. Determining product mix required the ability to make decisions based on quality and quantity of products. He provided evidence of a new supplier that he had chosen, with correspondence and invoices.

[31] The appellant's employer stated that the Thirsty Liquor head office was not involved in the daily management of the business. The store obtained the advantage of discounts as a participating store, but the store manager could negotiate his own deals, and the head office setting did not preclude the store manager from selecting the product mix. There was no core requirement for the products by the head office: although it gave a list of products to be kept in the store as a suggestion, it was the decision of store manager to choose the products and suppliers according to area needs. The suggested supplier brands (such as Steinlager) were the main products that all liquor stores had, and if a store did not have that product, it would probably not have customers anyway.

[32] Immigration New Zealand noted that ordering and stocking products already existing on the store's product database due to seasonal factors, did not demonstrate that the appellant had determined the product mix for his store. His ability to decide suppliers was conditional upon the price, and only a price match situation would give him the discretion to choose other suppliers. Immigration New Zealand was not satisfied that the appellant had the discretion to determine the product mix at a level required by the ANZSCO description. The proportion of core products purchased from the listed suppliers was greater than the products introduced by the appellant. Storing popular brands and products sold within a liquor store chain could not be identified as having the discretion to determine the quality of products. In terms of quantity, the POS system provided "system prompts" when stock was at a low level, and this led the appellant to order stock. It seemed that the POS system determined the quantity of the stock that was to be maintained within the store, and so Immigration New Zealand was not certain that the appellant made a significant contribution towards this task.

[33] The Tribunal finds that Immigration New Zealand has not engaged with the evidence provided by the appellant and his employer. This evidence indicated that the appellant did have the discretion to determine product mix and that he exercised this discretion. It is incorrect that the appellant's decisions on product mix were made only according to the criterion of price, as he stated that he took into consideration customer feedback, customer requests, area needs and the popular range of products.

[34] The fact that the majority of the products stocked by the appellant accorded with those suggested on the Thirsty Liquor website did not necessarily eliminate the appellant's role in determining product mix for his store. The Tribunal has previously warned against an assessment that is overly influenced by the fact that the appellant worked in a franchised business, without proper consideration of the appellant's actual responsibilities in his position within the actual operation of the business in question: see *ML (Skilled Migrant)* [2020] NZIPT 205755 at [78].

[35] The existence of a POS system which kept track of stock on hand also did not appear to constrain the appellant's discretion to determine product mix. The Tribunal has previously pointed out that, while in-house company systems might provide some assistance, this fact should not necessarily mean that an applicant's ability to perform the relevant core tasks is constrained, because it is still necessary for an applicant to utilise his or her own skills and expertise to use such systems: see *JC (Skilled Migrant)* [2017] NZIPT 204151 at [73]–[74]; and *PJ (Skilled Migrant)* [2021] NZIPT 205817 at [58].

Stock levels

[36] The appellant stated that the POS system was a management software which was very helpful, but he was in control of managing the software. While he received "system prompts", he decided the product mix depending on the seasons, supplier price, customer demand, and storage. He further stated that, even if the POS system provided information on stock levels and sales numbers, it would be useful only for a manager who knew how to interpret and understand it. The appellant's employer stated that the appellant did not just restock from a list, but he actually had to make decisions about which items to order.

[37] Immigration New Zealand acknowledged that the existence of the POS system did not impede the appellant's ability to make decisions, and that he had some input in entering data and record-keeping. However, it found that the existence of the POS system limited his ability to make decisions, as the system

told him what to do, and he then followed this information. This indicated that he was not required to decide what needed to be done, and there was no requirement for him to perform this task as it was already laid out by the existence of the POS system. There was no evidence to indicate how he determined stock levels, taking into account the profitability of the store. His role was to perform simple administrative tasks involved in the day to day business, and it was not managerial in nature.

[38] Immigration New Zealand did not appear to engage properly with the evidence provided by the appellant, or give appropriate reasons. The POS system used by the appellant was essentially a calculator and storage device for information, showing stock levels and sales. The system did not process this information or come to commercial decisions on stock levels, based on criteria such as price, sales volumes, current seasons, latest market trends and actual storage space. The Tribunal refers to the previous decisions of the Tribunal on the use of in-house systems, cited above at [35]. Immigration New Zealand was also incorrect, in view of the appellant's explanation of his determination of stock levels, to find that there was no evidence to indicate how the appellant determined stock levels.

Service standards

[39] The appellant stated that he trained staff on how to use the POS system and on how to sell. His job description noted that he determined the service standards and trained the staff according to the House Rules/Staff Rules (a copy of which was provided). His employer noted that he had given the appellant full managerial authority including the supervision of staff, and there were no restrictions of any kind imposed by the franchise.

[40] Immigration New Zealand noted that simply providing a set of rules that indicated how to greet customers or how to store items was not setting service standards. These standards were already set by the employer or the external governing body, and were common to any retailer. The appellant's contribution towards this task was merely to provide basic instructions to staff. Immigration New Zealand acknowledged that the appellant had some autonomy to implement the service standards that had already been set. However, it was not satisfied that he had set different service standards taking into consideration the profitability of the store and management performance. Training staff was not the same as setting service standards.

[41] The Tribunal accepts that there is limited evidence of the appellant's determination of service standards. It is also accepted that the nature and context of the appellant's store (serviced by himself and two assistants) was such that the performance of some core tasks appeared to be less sophisticated than those of other retail establishments. However, there is clear evidence from the appellant and his employer that the appellant had full autonomy to organise all aspects of the store, and there is no evidence that anyone else determined service standards. As the Tribunal has previously observed, the assessment of relevant tasks must have regard to whether the appellant was the person responsible for these tasks, in a manner appropriate for the store: see *JZ (Skilled Migrant)* [2019] NZIPT 205483 at [69], and *RD (Skilled Migrant)* [2021] NZIPT 206046 at [44].

Task two: formulating and implementing purchasing and marketing policies, and setting prices

Purchasing policies

[42] The appellant stated that he had changed his purchasing policies to take account of customer demand, for example, for healthier drinks and for non-alcoholic or low alcoholic drinks. He said that, while he did not have solid evidence as proof of formulating and implementing purchasing policies, it was due to the fact that he was the manager of the store, and he kept these policies in his mind. He further stated that, while other stores stocked up too much, his policy was to purchase when required. He wanted to effectively manage storage space and stock flow. He referred to various products that he had purchased to meet customer requirements. The appellant's employer noted that he had given the appellant authority over all financial transactions, and there were no restrictions of any kind imposed by the franchise.

[43] Immigration New Zealand noted that purchasing when stock was required could not be identified as a purchasing policy, as this action was a requirement to be performed in any retail store. The appellant needed to have the autonomy to design and implement purchasing policies that would have an impact on the operations or profitability of the store. However, given that most products he purchased were purchased from the standard core suppliers included in the franchisor's supplier list, it could not be satisfied that his role had the autonomy to design purchasing policies, as it was set by the franchisor.

[44] The Tribunal finds that Immigration New Zealand did not have proper regard to the evidence presented by the appellant. His evidence, supported by the evidence of his employer in relation to product mix, indicated that the appellant had autonomy to formulate and implement purchasing policies, and that he exercised this responsibility. There is no evidence to suggest the purchasing policies were set by the employer or the Thirsty Liquor head office. The Tribunal refers to the previous decisions of the Tribunal cited above at [41].

Marketing policies

[45] The appellant submitted that, due to “host responsibility” laws, liquor stores were not permitted to advertise and promote on a large scale. His policy was to focus on in-store marketing. He rotated well-priced deals and placed them in positions near the counter for customers to see them and to create the image that he always had good prices. While the Thirsty Liquor website provided him with some templates, he was still required to create the signage. His employer stated that, while the store benefited from the head office’s branding, there was no restriction of any kind imposed by the head office.

[46] Immigration New Zealand found that the evidence provided did not sufficiently indicate how the appellant aimed and planned to develop the business, or how he had formulated marketing policies for business growth.

[47] The Tribunal accepts that there is limited evidence of the appellant’s determination of marketing policies. Again, however, there is clear evidence from the appellant and his employer that the appellant had autonomy to organise all aspects of the store. The Tribunal refers to the previous decisions of the Tribunal cited above at [41].

Setting prices

[48] The appellant stated that sometimes he purchased products from the supermarket if there was a difference in price, rather than buying from the supplier. Most products come with a recommended retail price (RRP) but, considering the competitor prices, he did not keep the price the same as the RRP. For example, he was able to sell Steinlager 15-pack bottles at a lower price than the competitor’s price of \$31.99, because he bought these from the supermarket at a discounted rate. By purchasing this item from the supermarket at a discounted rate, he was able to get a profit margin of 23–26 per cent. He set RTDs and bourbon at a profit margin of between 20–25 per cent because the next closest

liquor store was a 15-minute drive away from his store. The appellant's employer stated that the Thirsty Liquor head office did not dictate pricing, and he had given the appellant full financial authority.

[49] Immigration New Zealand considered that there was no involvement on the appellant's part in setting profit margins. His involvement was limited to entering the data into the system which included details of the cost price, retail prices and any permitted discounts. When an item was sold, the margin for that product was automatically set in the POS system. The price of core products was standard across all stores coming under the franchise logo, and the Sale and Supply of Liquor Act 2012 imposed a limitation on the sale price of alcohol. On a holistic assessment of the information provided, it was not satisfied that the appellant had involvement in this task.

[50] The Tribunal finds that Immigration New Zealand did not engage with the evidence of the appellant or provide appropriate reasons. Immigration New Zealand appears to have inflated the role of the POS system as being the determiner of prices. This system simply recorded and calculated the information inserted by the appellant. The evidence provided indicated that the appellant set the prices, accounting for all relevant variables and keeping in mind the profit margin he wished to achieve, before he inserted information into the POS system.

Task three: promoting and advertising the establishment's goods and services

[51] The appellant stated that, due to "host responsibility" laws, his store was not permitted to do advertisements and promotions on a large scale. While the Thirsty Liquor Store website provided him with some templates, he was still required to create the signage. His policy was to focus on in-store marketing. He displayed the deals in a way that highlighted special prices; made special tickets to present promotional prices; organised loyalty cards and gift cards; and offered chances for customers to win prizes. He attached photographs of promotional tickets and activities. The employer stated that the Thirsty Liquor head office provided support in terms of national marketing, but imposed no restrictions of any kind, and he had given the appellant full managerial authority over the store.

[52] Immigration New Zealand noted that the appellant followed a template provided by the head office on its website to create the signs for marketing within the store and followed directions from the head office to create the marketing material. This limited his ability to make his own design and create his own

marketing material. His role lacked the ability to perform this task at a strategic level required by the ANZSCO.

[53] The Tribunal finds that Immigration New Zealand did not engage with the evidence of the appellant or provide appropriate reasons. The Tribunal notes the evidence of promotional and advertising activity provided by the appellant, and the evidence of the employer that the appellant has full managerial responsibility for the store. The Tribunal refers to the previous decisions of the Tribunal cited above at [41].

Task five: maintaining records of stock levels and financial transactions

Stock levels

[54] The appellant stated that he entered the data of the invoices received by him in the POS system that led to finalising the budgeting process. He maintained all invoices, records of prices and daily sales, and a cash book. He stated that, while the accountant completed GST returns and an annual financial statement, he provided details of financial statistics to the accountant when required. The appellant's employer stated that the appellant had full authority to decide on stock levels and to pay suppliers, and full access to the company's internet banking. He did not require the employer's approval to make payments.

[55] Immigration New Zealand acknowledged that the appellant had partial involvement in maintaining records of stock levels, in data entry with the assistance of the POS system. However, considering that a considerable amount of work was automatically completed by the POS system, it could not identify the quantity or frequency of this task performed by him. It could not be satisfied that he performed this task in its entirety. As to financial transactions, Immigration New Zealand note that, while the POS system provided the appellant with the statistics required, he extracted this information and provided it to the accountant. It acknowledged that the appellant had some involvement in this task, in entering data, but the main objective of the task was carried out by the POS system.

[56] The Tribunal finds that Immigration New Zealand did not have proper regard to the evidence presented or give appropriate reasons. Again, Immigration New Zealand appears to have overlooked the evidence of the appellant and his employer as to the autonomy that he enjoyed in the store and the role played by the appellant in maintaining records of stock levels and financial transactions. Immigration New Zealand again inflated the role of the POS system, which was an

electronic storage mechanism into which the appellant inserted the stock levels and loaded financial transactions.

Task six: undertaking budgeting for the establishment

[57] The appellant stated that setting, implementing and executing the budget was one of his main responsibilities. He set the store budget after analysing the sale and expenses of the previous month and the expectations for the coming month. He considered the sales target, upcoming expenses, wages, funds on hand, and terms from the suppliers to make payments. He noted that the budget varied throughout the year depending upon what was “coming” and what would be the products selling frequently. The budget for purchasing during Christmas, New Years, Good Friday and Easter was always high as compared to other times of the year. He budgeted for each upcoming month and it was very helpful to know in advance what would be the financial position the following month in terms of all financial transactions. The appellant’s employer stated that the appellant set up an appropriate budget for the business and had full financial authority.

[58] Immigration New Zealand noted that, apart from the fact that the POS system provided the appellant with all of the information that was required in relation to budgeting, it had not received evidence to indicate his performance of this task. It could not be satisfied that he performed this task merely based on his statement. This needed to be supported by evidence detailing the process on how he took into consideration the stated factors and undertook budgeting for the business.

[59] The Tribunal finds that Immigration New Zealand did not have proper regard to the evidence presented or give appropriate reasons. The appellant explained his budgeting processes, his employer confirmed that the appellant had the responsibility for budgeting, and there is no evidence that anyone else performed this role. The Tribunal notes that task six requires the applicant to undertake budgeting, rather than set the budget.

Task seven: controlling selection, training and supervision of staff

[60] The appellant stated that he advertised vacancies in the newspaper and through Work and Income, and placed posters outside of the store. He had his own training procedure that required all new staff to complete induction training. He trained and supported staff on service standards, usage of POS system,

stacking, and stock filling. He provided copies of a signed employment agreement, time sheets maintained by him that indicated that he recorded the time and wages of employees, and an outline of the induction training provided for new staff. The appellant's employer noted that he had given the appellant full managerial authority over the store, and that the appellant controlled the recruitment and supervision of staff.

[61] Immigration New Zealand noted that providing copies of a signed employment agreement did not suffice to meet the requirement of this task. He was required to provide evidence of the process followed through, along with email communication with potential employees and performance management. It was hard to comprehend that, since he was employed with the store from 2018, he had only one piece of evidence to provide in confirmation of his involvement in this task. Furthermore, apart from this evidence, it had not received any other information that justified his involvement in a managerial capacity. Immigration New Zealand acknowledged that the appellant provided some day to day training to his staff and supervised them in their day to day activities, but it was not satisfied that he had the organising and controlling authority as required by this role, and as such it was not satisfied that he performed this task.

[62] The Tribunal finds that Immigration New Zealand did not adequately engage in the evidence presented by the appellant. He and his employer presented evidence of his control of the selection, training and supervision of staff, and there is no evidence that anyone else was involved in this task. As noted above at [41], the assessment of this task needed to be in the context of the appellant's store, involving himself and two assistants.

Overall assessment

[63] As noted above, the description of the occupation of a Retail Manager (General) is that this involves organising and controlling the operations of a retail trading establishment.

[64] The employer stated that Thirsty Liquor was not like the other franchise-like arrangements such as Super Liquor or Liquorland: Thirsty Liquor was a buying group and there was the advantage of better pricing/preferential treatment on certain deals, but there was no input from it about how to run the store, and the store manager could always negotiate his own deals. The employer said that the licence agreement did not supersede any authority of the manager to make decisions for the business, because he had to decide what to do on a daily basis.

The employer stated that the appellant was the key person within the store, and the employer had given the appellant managerial and financial authority to fully control the business.

[65] Immigration New Zealand acknowledged that the appellant's job tasks incorporated aspects of supervising the store. However, given the nature and the structure of the business, and his tasks and duties, his ability to perform the required tasks at a managerial level was limited. The primary focus of his work was to coordinate and provide administrative, accounts and clerical support to the organisation, while supervising the staff. These tasks did not relate to organising and controlling the operations at a managerial level, but were those of a Retail Supervisor. The appellant had stated that his employer had involvement in the store as the owner of the store on a casual basis, and this further circumvented the appellant's ability to perform this role as defined by the ANZSCO at a more managerial level.

[66] The Tribunal notes the Immigration New Zealand accepted that the appellant sold goods and services to customers, advised them on product use, and ensured compliance with occupational health and safety regulations. The Tribunal has found that there is evidence that the appellant determined product mix, stock levels and service standards; formulated and implemented purchasing and marketing policies; set prices; promoted and advertised the establishment's goods and services; maintained records of stock levels and financial transactions; undertook budgeting for the establishment; and controlled selection, training and supervision of staff. The Tribunal accepts that the evidence of the performance of some of these tasks was limited, and that some of the tasks appeared to be performed at a rudimentary level. However, the evidence of the appellant and his employer indicates that the organisation and control of the operations of his store vested in him, and did not vest in the employer or the Thirsty Liquor group. In particular, the employer noted that there was no input from Thirsty Liquor head office about how to run the store, and that he (the employer) had given the appellant managerial and financial authority to fully control the business.

Conclusion as to correctness

[67] Immigration New Zealand's decision to decline the appellant's application was incorrect. Immigration New Zealand did not adequately engage with the appellant's evidence or provide appropriate reasons for declining the appellant's application (contrary to instruction A1.5.a).

[68] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers the decision to refuse the visa was made on the basis of an incorrect assessment in terms of the applicable residence instructions. However, the Tribunal is not satisfied the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the immediate grant of a visa.

[69] 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.

[70] 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 the directions set out below.

4. 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 he chooses to update his application. It must ensure that all relevant evidence is properly considered and weighed in its determination of whether the appellant's employment substantially matches the description, including core tasks, of the occupation of a Retail Manager (General), or any other relevant occupation.
5. If, at any stage in its reassessment of the application, Immigration New Zealand identifies 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.
6. Immigration New Zealand shall provide appropriate reasons for its decision, in relation to each of the relevant ANZSCO core tasks and description of the appellant's occupation, and refer (as appropriate) to the evidence it took into account to reach its decision.

[71] The appellant is to understand that the reassessment of his application is no guarantee that his employment will be found to be a substantial match or that he will be granted residence.

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

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

Certified to be the Research
Copy released for publication.

Judge P Spiller
Chair

"Judge P Spiller"
Judge P Spiller
Chair