

**AT AUCKLAND**

**Appellant:** **RB (Skilled Migrant)**

**Before:** A Davidson

**Counsel for the Appellant:** J Turner

**Date of Decision:** 19 April 2018

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**RESIDENCE DECISION**

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[1] The appellant is a 31-year-old citizen of China 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 application because her employment was not considered ongoing and sustainable. Without points for skilled employment, the appellant did not have sufficient points to meet the minimum selection criteria for the Skilled Migrant category.

[3] The principal issue for the Tribunal is whether Immigration New Zealand fairly and properly assessed the sustainability of the appellant's employment. For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision was incorrect. The Tribunal therefore cancels the decision and refers it back to Immigration New Zealand for a correct assessment in terms of the applicable residence instructions and the Tribunal's directions.

## **BACKGROUND**

[4] The appellant made her application for residence under the Skilled Migrant category on 24 July 2017. She claimed points for skilled employment as an ICT Customer Support Officer, relying on her employment as an ICT customer support officer at a small information technology and telecommunications business (“the business”). She commenced her employment in April 2017. With her application, she provided her employment agreement, job description and a letter of support from her employer (17 July 2017). The terms of her employment included working at least 35 hours per week for a salary of \$38,220 per annum.

### **Verification of the Role**

[5] In September 2017, the business’ director completed an Immigration New Zealand questionnaire about the nature of the appellant’s work and the business. The director provided:

- (a) the business’ Inland Revenue Department (IRD) employer monthly schedules for the March through August 2017 calendar months showing that the business had declared the appellant’s earnings to the IRD each month from the commencement of her employment in April 2017. The schedules also showed that the business employed between 8 and 12 individuals during that period and that its salary cost varied between \$24,339 (August 2017) and \$29,066.00 (June 2017) per month;
- (b) payslips for the appellant for the calendar months May through to August 2017;
- (c) the business’ financial statements for the 2015 and 2016 financial years. The statements showed that turnover increased from \$19,860 in the 2015 financial year to \$2,520,629 in the 2016 financial year, salaries increased from \$2,439 to \$85,204, and that profit fell from \$12,166 to \$4,093; and
- (d) a table and an organisational chart showing the business had eight paid full-time employees (excluding the director).

### **Immigration New Zealand’s Concerns**

[6] On 24 October 2017, Immigration New Zealand wrote to the appellant with concerns regarding the sustainability of her employment. It noted that the business

had supplied it with a range of financial documents which raised concerns that the business was not in a financial position to support her permanent ongoing employment.

[7] Immigration New Zealand stated that the business' financial information was being withheld under section 9(2)(b)(ii) of the Official Information Act 1982 to protect the business' commercial position.

[8] On 30 October 2017, Immigration New Zealand specifically articulated its concerns to the director. Immigration New Zealand said:

- (a) The financial statements showed that the business had made only a small profit in the 2015 and 2016 financial years and therefore it could not sustain the number of staff it employed;
- (b) The salary cost of \$85,204 in the 2016 financial statements was not sufficient to pay the eight staff referred to in the organisational chart; and
- (c) It had received applications from staff working at the business but who were not shown on the organisational chart and that those individuals' salaries also had to be considered when assessing the business' sustainability.

### **Response to Concerns**

[9] The director responded to Immigration New Zealand's concerns on 8 November 2017, providing:

- (a) the business' financial statements for the 2017 financial year. The statements showed that turnover had fallen from \$2,520,629 in the 2016 financial year to \$274,151 in the 2017 financial year, salaries had increased to \$194,716, and that profit had increased to \$14,607;
- (b) a financial forecast prepared by the business' accountant for the 2018 financial year. The forecast included actual results for the calendar months April through September 2017. The forecast indicated turnover of \$407,413, salary costs of \$271,714, and a profit of \$34,161 for the 2018 financial year. The forecast stated that actual turnover for the period April through September 2017 was \$186,033;

- (c) The business' IRD Goods and Services tax return for the period April through September 2017, specifying that the business' total sales and income during that period were \$137,804;
- (d) the business' employer monthly schedule for September 2017, showing its wage expense was \$20,042 during that month, and that the business had declared the appellant's earnings to the IRD. The schedule also showed that the business employed 8 individuals;
- (e) the business' employer monthly schedules for the period July 2015 through March 2016, showing it paid a total of \$84,737 of wages and salaries during this period and that it made payments to three employees each month, except for March 2016, when it made payments to four employees;
- (f) a table showing salary payments by the business each month from April 2015 through August 2017.

[10] The director disputed that the small profit earned by the business meant that it may be unable to pay its employees. He explained that the salary cost of \$85,204 in the 2016 financial statements related to a period when the business employed only three employees. The eight staff referred to in the business' organisational chart were employed during the 2017 financial year, during which the business paid total salaries of \$194,716, which the director said was sufficient to pay eight staff, as demonstrated by the business' employer monthly schedules. Without specific information on the additional staff Immigration New Zealand alluded to, the director said that the business' employer monthly schedules were the most appropriate basis for determining the number of employees the business employed.

### **Immigration New Zealand Decision**

[11] On 18 December 2017, Immigration New Zealand declined the appellant's application because it was not satisfied that her employment was ongoing and sustainable. Immigration New Zealand acknowledged that the director had provided it with further financial information but said it could not disclose the additional financial information, or the reasons why it was not satisfied the appellant's employment was not sustainable, because of the sensitive nature of the financial information.

[12] Immigration New Zealand assessed that the appellant was entitled to 75 points. Without points for skilled employment, she did not meet the minimum selection criteria of the Skilled Migrant category.

## **STATUTORY GROUNDS**

[13] 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.

[14] 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](http://www.immigration.govt.nz)).

## **THE APPELLANT'S CASE**

[15] On 25 January 2018, the appellant lodged this appeal under section 187(4)(a) of the Act on the grounds that Immigration New Zealand's decision was not correct in terms of the residence instructions applicable at the time her application was made.

[16] On appeal, the appellant appoints counsel. Counsel makes submissions (16 March 2018) and provides copies of documents already on Immigration New Zealand's files.

## **ASSESSMENT**

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

[18] 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**

[19] The application was made on 24 July 2017 and the relevant criteria are those in residence instructions as at that time.

[20] Immigration New Zealand declined the application because it was not satisfied that the appellant's employment was sustainable. Without points for skilled employment she did not meet the minimum selection criteria for the Skilled Migrant category.

#### *The relevant instructions*

[21] Residence instructions require that applicants relying on points for skilled employment must demonstrate that their employment is ongoing and sustainable:

#### **SM7.15 Additional requirements for skilled employment**

...

- b. Employment must be ongoing and sustainable. Ongoing and sustainable employment is:
  - i. an offer of employment or current employment, with a single employer, that is permanent or indefinite, and of which the employer is in a position to meet the terms specified; or

...

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**Note:** When assessing whether employment is sustainable, officers may consider, but are not limited to, such factors as the residence status of the employer, the period for which the employing organisation has been established as a going concern, and the financial sustainability of the employing organisation.

*Effective 25/08/2014*

[22] When deciding an application, Immigration New Zealand must act in accordance with the principles of fairness and natural justice (A1.1.c, effective 29 August 2012). Relevant factors relating to fairness include:

#### **A1.5 Fairness**

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

- whether the applicant is informed of information that might harm their case (often referred to as potentially prejudicial information);
- whether the applicant is given a reasonable opportunity to respond to harmful information;
- whether the application is decided in a way that is consistent with other decisions;
- whether appropriate reasons are given for declining an application;
- whether only relevant information is considered;
- whether all known relevant information is considered.

...

*Effective 29/11/2010*

### *The appellant's role*

[23] The appellant was employed as an ICT customer support officer at a small information technology and telecommunications business. Her employer provided numerous financial and other documents to Immigration New Zealand during its assessment of her application including: financial statements; employer monthly schedules and an organisational chart. Immigration New Zealand considered the employer's financial information but declined the appellant's application because it was not satisfied that her employment was ongoing and sustainable.

[24] Immigration New Zealand articulated three concerns to the appellant's employer during its assessment: that the business had made only a small profit in each of the years for which financial statements had been provided; that the wage cost disclosed in the business' financial statements appeared too low for the number of employees; and that the business appeared to employ other employees that were not disclosed on the business' organisational chart. While Immigration New Zealand did not provide specific reasons in its decision, the SMC Visa Assessment document on Immigration New Zealand's file shows that it declined the appellant's application because it was not satisfied that her employer had satisfactorily addressed these concerns. Immigration New Zealand also stated that it could not consider the business' financial forecast because "the figures are assumed".

[25] On appeal, counsel submits that Immigration New Zealand's decision was unfair because it failed to properly assess the evidence provided to it, that its failure to disclose its concerns to the appellant was procedurally unfair and that it misapplied section 9(2)(b)(ii) of the Official Information Act 1982.

*Proper consideration*

[26] The Tribunal finds that Immigration New Zealand failed to give the appellant's application proper consideration. This was unfair and breached Immigration New Zealand's obligations under A1.5.a of instructions.

[27] Immigration New Zealand noted that the business had earned only small profits: \$12,166 for the 2015 financial year, \$4,093 for the 2016 financial year, \$14,607 for the 2017 financial year, and a forecast profit of \$34,161. It said the small profits meant "... concern remains that the company cannot sustain paying the wages for all employees". However, Immigration New Zealand's conclusion appears to arise from a basic misunderstanding of financial accounts: employee wages are not paid from a business' profit, they are paid from revenue. Profit is what remains of a business' revenue after staff wages and other expenses are deducted. Provided a business can generate sufficient revenue to pay staff wages, and other expenses, it is not necessary for it to be very profitable for an employee's employment to be ongoing and sustainable. In this case, the business' financial statements and employer monthly schedules show that it was generating sufficient revenue to pay its employees, including the appellant.

[28] Immigration New Zealand was concerned that the wage cost disclosed in the business' financial statements appeared too low for the number of employees. It made a basic calculation, dividing the wage expense of \$194,716 specified in the financial statements for the 2017 financial year, by nine employees and a notional 35-hour week, and concluded, that the business may not be paying its employees at least the minimum wage. However, Immigration New Zealand's calculation was flawed. While the salary figure used related to a period of 12 calendar months (April 2016 to March 2017), Immigration New Zealand assumed a fixed number of employees, specifically nine. It is unclear where that figure came from. The organisational chart shows eight employees (September 2017), the March 2017 employer monthly schedule shows eight employees (the employer monthly schedules for April 2016 – February 2017, the balance of the 2017 financial year, were not provided to Immigration New Zealand), while the director stated in his response to Immigration New Zealand's concerns that the business employed between six and nine employees during the 2017 financial year.

[29] The reality is that Immigration New Zealand's assumptions in relation to employee numbers and working hours rendered its calculation unreliable and it was unfair of Immigration New Zealand to rely on it to decline the appellant's application. If Immigration New Zealand wished to pursue this concern it should have obtained

actual information on monthly employee numbers and hours during the relevant financial period. The Tribunal also notes that Immigration New Zealand's concern in relation to the credibility of the salary information in the business' financial statements would appear to relate more closely to the requirements for employers under SM7.20 of instructions than the sustainability of the appellants employment.

[30] Immigration New Zealand was also concerned that the business appeared to employ other employees that were not disclosed on the business' organisational chart. The basis of its concern was that it had received applications from employees of the business that were not specified on the business' organisational chart. However, the number or identity of such other employees was not disclosed and the organisational chart represented the business' employees only at a specific point in time (September 2017). The number and composition of the business' employees changed over time and it is possible that the other employees referred to by Immigration New Zealand were not employees at the time the organisational chart was prepared. Without further information, it was impossible for the business to respond. The vagueness of Immigration New Zealand's concern meant that it was unfair for it to rely on it as a reason for declining the appellant's application.

[31] Immigration New Zealand also stated that it could not consider the business' financial forecast because "the figures are assumed". That was plainly incorrect. Assessing the sustainability of an applicant's employment is necessarily a forward-looking exercise. When undertaking such an assessment, Immigration New Zealand may consider a range of evidence, including historical and forecast financial performance. The financial forecasts were clearly relevant, particularly as they included six months of actual financial results and had been prepared by an accountant. Immigration New Zealand's failure to consider the business' financial forecast meant that it failed to consider relevant evidence or properly consider the appellant's application.

#### *Conclusion as to correctness*

[32] For the reasons given above, the Tribunal finds that Immigration New Zealand's decision to decline the application was incorrect. Its assessment was not correct because it failed to give the appellant's application proper consideration. Accordingly, the application must be returned to Immigration New Zealand for correct assessment.

*Observation on section 9(2)(b)(ii) of the Official Information Act 1982*

[33] The Tribunal observes that Immigration New Zealand took an unsatisfactory approach to releasing information under the Official Information Act 1982. Section 9(2)(b)(ii) of the Official Information Act 1982 is intended to be a response to a request for information under section 12 of the Act. However, there was no evidence that such a request had been made. That being the case, reliance on the section prior to any such request was premature and could amount to predetermination in the event such a request is made: see *LW (Skilled Migrant)* [2018] NZIPT 204360 at [54]. Further, there is no evidence that Immigration New Zealand made any attempt at undertaking the required assessment specified in section 9(1) of the Act before determining that the business' financial information, and its specific concerns, could not be disclosed to the appellant pursuant to section 9(2)(b)(ii) of the Act.

[34] At the very least, Immigration New Zealand should have ascertained whether the business would have made its financial information available to the appellant, thus allowing Immigration New Zealand to properly inform the appellant of its concerns.

*Observation regarding the business' financial statements*

[35] The Tribunal notes that three aspects of the business' financial statements were not explored by Immigration New Zealand. First, the precipitous fall in turnover from \$2,520,629 for the 2016 financial year to \$274,151 for the 2017 financial year. Second, the unexplained appearance of accounts receivable of \$395,692 in the financial statements for the 2017 financial year. Generally, accounts receivable arise from sales made by a business, for which customers have yet to pay. Presumably, as there were no accounts receivable shown in the financial statements for the 2016 financial year, the accounts receivable of \$395,692 relate wholly to the 2017 financial year. However, total sales for that financial year were only \$274,151. The financial statements do not appear to disclose how accounts receivable exceeding sales arose during the same trading period. Third, the business' IRD Goods and Services tax return for the period April through September 2017 states that its turnover was \$137,804. In contrast, the actual turnover for that period, specified in the business financial forecast, were stated to be \$186,033.

[36] The Tribunal also notes that none of the monthly salary payments in the salary table (showing salary payments made by the business from April 2015 through August 2017), provided to Immigration New Zealand by the director on

8 November 2017, appear to match the salary amounts specified in the equivalent employer monthly schedules provided to the IRD.

[37] These concerns, amongst others, suggest that a careful review of the business' financial information, by an immigration officer experienced in interpreting financial information, is warranted.

## **DETERMINATION**

[38] This appeal is determined pursuant to section 188(1)(e) of the Immigration Act 2009. The Tribunal considers that 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.

[39] 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**

[40] 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. The appellant is to be provided with an opportunity to update her application and submit any further evidence. Immigration New Zealand is to consider properly and fairly all evidence and information contained on the file, submitted on appeal, and any new information submitted to it by the appellant.

3. Immigration New Zealand shall have regard to the Tribunal's observations regarding financial information provided by the appellant's employer (see [35]–[37] above).
4. If the appellant is no longer employed in the same or similar role with the same employer, she is to be given a reasonable opportunity to produce evidence of her current skilled employment or an offer of skilled employment, which Immigration New Zealand shall assess accordingly.
5. Should any information arise that is potentially prejudicial to the appellant, Immigration New Zealand must clearly put this information to her, and allow her a reasonable opportunity to respond to that information.

[41] The appellant is to understand that the success of this appeal does not guarantee that her application will be successful, only that it will be subject to reassessment by Immigration New Zealand.

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

### **Order as to Depersonalised Research Copy**

[43] 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.

"A Davidson"  
A Davidson  
Member

Certified to be the Research  
Copy released for publication.

A Davidson  
Member