IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2020] NZIPT 205848**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**OA (Skilled Migrant)**
Before:	M Avia (Member)
Counsel for the Appellant:	S Laurent
Date of Decision:	16 December 2020

RESIDENCE DECISION

---

[1] The appellant is a 36-year-old citizen of India whose application for residence under the Skilled Migrant category was declined by Immigration New Zealand.

THE ISSUE

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

[3] The principal issue for the Tribunal is whether Immigration New Zealand properly considered all relevant information when it determined that the appellant's position was not a substantial match to the occupation of Retail Manager (General).

[4] For the reasons that follow, the Tribunal finds that Immigration New Zealand's decision to decline the application was incorrect because it failed to properly consider and weigh all relevant information. Accordingly, the Tribunal cancels the decision and refers the application back to Immigration New Zealand for a correct assessment.

BACKGROUND

[5] The appellant made his application for residence on 2 February 2018. He claimed 160 points, which included 30 bonus points for employment outside Auckland and 50 points for skilled employment as a store manager at a Bottle-O liquor outlet, a position he claimed substantially matched the ANZSCO description of a Retail Manager (General). In support of his claim to be in skilled employment, the appellant produced a copy of his employment agreement, which included a job description. The appellant began his employment in November 2016 and worked a 40-hour week. His hourly rate was $23.50.

[6] The employing company's three owners were also the shareholders and are referred to throughout the decision as the owners. The owners did not live in the town in which the liquor store was based. The store employed two staff members (one full-time and one part-time) who both reported to the appellant.

Verification of the Application

[7] During the assessment of this application, the appellant's residence application went before four different immigration officers who, at various points as set out below, made recommendations as to the outcome of the application.

Employer questionnaire

[8] In February 2018, the assessment of the application began. On 9 March 2018, Immigration New Zealand emailed the owners a list of questions about the appellant's employment. In reply, one of the owners stated that the appellant controlled the overall functioning and operations of the store, which included responsibility for business retention and growth, supplier relationships and stock management, customer relationships, profitability and reduction of costs and wastage, and meeting staff requirements.

[9] The owner stated that the appellant ascertained stock requirements using the computerised system and undertook manual stock counts from time to time. He placed product orders and negotiated cost with suppliers, priced products including specials, organised shop floor displays, and arranged marketing and promotions. He was also responsible for day-to-day banking, arranging the budget based on current trends, projected forecasts and previous sales information. He maintained financial records and reviewed the store's financial performance and profit margins.

He was responsible for managing staff, including training, hiring and supervising and ensured compliance with relevant statutory requirements.

[10] The owners were not involved in the day-to-day operation of the store, although they would visit the store weekly for updates. The appellant ran the store at a profit and had received an Employee Recognition Award at the 2019 Bottle-O National Conference in Australia.

The Bottle-O Alliance Agreement

[11] Accompanying the owner's response was a document called The Bottle-O Alliance Agreement signed by Bottle-O and the employing company, dated 26 April 2016 (the Agreement). This set out the basis of the relationship between the two parties and included negotiation with suppliers, promotions of suppliers' products including pricing, and the operation of the store in line with Bottle-O standards. According to the Agreement, Bottle-O was the retailer's (the store's) exclusive agent to negotiate training terms on its behalf with suppliers, subject to clause 6.1 (clause 2.1). Bottle-O was appointed as the banner manager (the manager of the group of stores operating under Bottle-O's name and branding (clause 2.2)). The retailer was required to take supply of products from Bottle-O's wholesaler pursuant to an agreement negotiated between suppliers and Bottle-O or "independently from an Approved Supplier" (clause 6.1). In relation to promotions, Bottle-O would arrange promotions with suppliers which would be promoted through national and local advertising (Clause 3.1). During any promotions, the retailer could not sell promotional products at a price higher than the promotional price (clause 3.5). The retailer was obliged to operate the store in a way that maintained Bottle-O's prescribed standards, which included keeping the store in good condition, using and keeping Bottle-O's internal and external signage in good condition and staff wearing Bottle-O-issued uniforms (clause 7.5).

Information about the relationship between Bottle-O and its franchisees

[12] Two additional documents on the Immigration New Zealand file provided information about the relationship between Bottle-O and the store, and between Bottle-O and its franchisees. The origin of these documents is not clear, although their position on the file indicated that they may have accompanied the owner's response to Immigration New Zealand's queries.

[13] The first document is a letter from Bottle-O (27 September 2017) setting out clarification about Bottle-O's engagement with its retailers. It indicated that the

appellant had significantly more autonomy than provided by the Agreement and stated that the strategic and operational management of the individual members' stores lay with the owners and their managers. Due to the nature of the New Zealand retail liquor market, suppliers often engaged with individual stores to negotiate special pricing, stock levels, additional promotional funds, new product ranges and account payment terms. The owners and managers were responsible for determining the majority of their range and prices as well as local marketing programmes. It confirmed that while there was a core range, it comprised only 15 percent of what the store could offer. It did not dictate fitout but required members to have Bottle-O branded material. The only mandatory stock level requirements were in relation to the core range. Bottle-O's engagement with suppliers was in relation to marketing plans and minimum prices were set for promotional products, although individual stores had the ability to negotiate pricing in respect of its products. Bottle-O had some training modules that managers had the option to use. It was not involved in the budgeting or financial management of individual stores. Information regarding budgeting and sales was available should a store seek assistance from Bottle-O.

[14] The second document is a completed questionnaire from Bottle-O's general manager (21 August 2015), which set out the relationship between Bottle-O and the franchisees. Because a decentralised model was used, retailers had significant autonomy with regards to the operation and supplier relationships. The retailer was required to have a core range of products in their store (about 300) but could stock other products as they saw fit. Core range products were to be purchased from designated suppliers with whom the retailer could negotiate prices. Retailers were obliged to adhere to service standards set in relation to particular issues.

[15] While retailers were obliged to adhere to advertised prices of products during particular promotions, they could otherwise set their own prices. Although Bottle-O undertook national marketing, retailers could undertake their own promotions as long as brand guidelines were followed. Bottle-O had no input into a retailer's budget planning, financial management or staff selection. Bottle-O had no control over its stores' health and safety obligations, although it would notify a store if it happened to observe any unsafe practice. Bottle-O provided online training programmes as a training option for retailers and their staff.

Telephone interview with appellant

[16] On 21 March 2018, Immigration New Zealand conducted a telephone interview with the appellant. The appellant set out a typical day at work where he would open up the store, check banking, check stock and order more if necessary, and liaise with staff over any issues. He checked Bottle-O promotions and took purchase prices into account when determining where to buy and whether stock should be on special.

[17] There were 700 to 800 products in the product range offered by the store. Of that, Bottle-O head office determined about 300 of those products. The appellant had introduced a number of smoking and vaping-related products to the store as well as varieties of low alcohol wine and beer. He was able to choose new suppliers.

[18] The appellant marketed the store through its Facebook page and organised paid Facebook promotions. In relation to budgeting, the appellant calculated the store's budget based on factors such as the time of year, the previous year's data, supplier credit terms, and projected stock movement.

Assessment of application March 2018, and January and March 2019

[19] On 23 March 2018, Immigration New Zealand completed its assessment of the application and found that the appellant's employment was a substantial match to the ANZSCO occupation of Retail Manager (General). Immigration New Zealand was satisfied that the appellant determined 70 per cent of the product mix and performed the remaining core tasks. On 11 January 2019, a second Immigration New Zealand officer completed another assessment of the application and agreed.

[20] In response to an email from Immigration New Zealand, on 13 March 2019, the owners confirmed that they were all self-employed. They lived and had other business interests at a location some 150 kilometres from the Bottle-O store that employed the appellant. The owners, through another company, also owned a second Bottle-O store located about 30 kilometres from the appellant's employment.

[21] During a call between the Immigration New Zealand officer and the appellant on 14 March 2019, the appellant confirmed that stock orders were made by telephone, email, the Bottle-O portal and from the sales representatives. Although the second store was run separately, the appellant ordered stock for both stores, giving him increased purchasing power and better discounts. He also negotiated with sales representatives when he considered there was a prospect of better

pricing. On 25 March 2019, the officer recommended the appellant's application be approved.

Immigration New Zealand's concerns

[22] By letter dated 8 October 2019, on behalf of Immigration New Zealand, a third officer wrote to the appellant's then representative with concerns that the appellant's employment did not substantially match the ANZSCO description, including core tasks, of a Retail Manager (General).

[23] Immigration New Zealand found that Bottle-O, as the franchisor, was heavily involved in the store's operations, meaning that the appellant did not organise and control its operations. He performed one core task, "selling goods and services to customers and advising them on product use". The Agreement, which Immigration New Zealand considered governed the operations of the store, showed that Bottle- O was very involved in the remaining core tasks and the organisation and control of the store's operations. In relation to the 2017 letter, Immigration New Zealand found that it was not a variation of the Agreement, because it did not comply with the relevant requirements for a variation. Further, the appellant had not provided evidence to support his assertions that the core tasks were his responsibility.

Appellant's response

[24] The appellant's then representative responded on 4 December 2019. He considered the Agreement to be of a type that was akin to a license, which gave the licensee more freedom to act than a franchise agreement would give to a franchisee. In relation to the core tasks, the representative stated that the appellant determined 85 per cent of the products stocked in the shop and interpreted market trends when deciding the products to stock. The appellant and the owners confirmed that the appellant checked stock levels, ordered extra stock for particular occasions, and planned stock levels in accordance with stock movements and the business's credit facilities. The appellant determined service standards as Bottle-O's role was limited.

[25] The Agreement specified mandatory purchasing policy requirements only in relation to the core range of products, which comprised about 15 per cent of the total product in the store. The appellant had full authority to formulate and implement purchasing and marketing policies and prices for the remaining 85 percent of the stock. Correspondence from Bottle-O confirmed that it did not maintain control over individual store's stock levels; rather, the Agreement set out Bottle-O's obligation to

ensure that stock was available for the retailer to purchase. The evidence from Bottle-O, the appellant and the owners demonstrated that the appellant also performed the remaining core tasks.

[26] Further, the representative noted that Immigration New Zealand had not asked the appellant specific questions about his performance of a number of tasks, such as determining stock levels and service standards, and formulating and implementing purchasing and marketing policies, and setting prices. Had such questions been asked, the appellant would have explained what it was he did in performing these tasks, and would have provided supporting examples. The representative also noted that two immigration officers had been previously satisfied that the appellant's employment was a substantial match to a Retail Manager (General).

[27] The following supporting documents were produced:

(a) a letter from the Bottle-O operations manager (22 October 2019) attaching a report clarifying its relationship with its retailers operating under the Bottle-O name. This repeated the information contained in the letter from the general manager dated 27 September 2017;

(b) a list of products in Bottle-O's core range (undated) and a document headed "PLU (price look-up) price list" listing products available in the store (29 October 2019), a list of core suppliers and a contract with a new supplier signed by the appellant (5 June 2018), and support letters from suppliers (various dates);

(c) delivery dockets and evidence of arrival of goods (various dates);

(d) service standards devised by the appellant in respect of selling and emergency procedures (undated) and instructions devised by the appellant regarding adding products, entering stock, eftpos enquiries, end of day point of sale information and creating a new customer account (undated);

(e) an advertisement, six Facebook promotional posts from 2016 to 2018, an invoice indicating the store's sponsorship of a local rugby club team (1 March 2019), and a photograph of a gift pack devised by the appellant;

(f) financial records including a record of suppliers paid (various dates) and a stock variance report compiled by the appellant (17 December 2018); and

(g) an employment agreement signed by an employee and the appellant for the company (29 May 2017), an email from one of the owners forwarding a job application to the appellant, employees' training records in respect of the store's operations (11 April 2019 and 19 June 2019), health and safety requirements (undated), and a written warning by the appellant to an employee and a response from the employee (undated).

[28] On 5 June 2020, the appellant's residence application was allocated to a fourth immigration officer, who on that date, emailed the owners seeking confirmation that the appellant remained in the same employment. Following receipt of that information, Immigration New Zealand emailed the owners with a query about the appellant's employment agreement. On 6 July 2020, the officer assessed the application and recommended it be declined as the appellant's employment was not a substantial match for the occupation description and core tasks of a Retail Manager (General).

Immigration New Zealand Decision

[29] On 26 August 2020, Immigration New Zealand declined the appellant's application because it was not satisfied that his employment was a substantial match to the description, including core tasks, of a Retail Manager (General). Immigration New Zealand was not satisfied that the appellant performed any of the core tasks except selling goods and services to customers and ensuring compliance with occupational health and safety regulations. He had failed to provide any evidence to support his statements that he performed many of the core tasks. Further, he did not organise and control the store's operations. Immigration New Zealand considered that the Agreement governed the operations of the store and its terms showed that in many respects the appellant did not manage the store. As a legally binding document, the Agreement superceded any statement made by the owners, the appellant and Bottle-O's senior management, including the letters written by the general manager and operations manager written in 2017 and 2019, respectively.

[30] Without points for skilled employment, the appellant was entitled to 85 points for his age and qualification. His application did not meet the selection criteria of the Skilled Migrant category.

STATUTORY GROUNDS

[31] 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.

[32] 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

[33] On 11 September 2020, the appellant (through newly-appointed counsel) lodged this appeal on both grounds in section 187(4) of the Act. In support of the appeal, counsel produces submissions (8 October 2020) and, in addition to documents held on the Immigration New Zealand file, produces terms and conditions from the Bottle-O website.

[34] When determining the correctness of Immigration New Zealand's decision, the Tribunal can consider new information if the documents meet the requirements for admissibility at section 189(3)(a)(i)–(iii). The Tribunal finds that the document setting out terms and conditions from the Bottle-O website is admissible. Immigration New Zealand had access to this information during the assessment of the application because its decision includes a reference to the terms of the trading relationship found on the Bottle-O website.

ASSESSMENT

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

[36] 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

[37] The application was made on 2 February 2018 and the relevant criteria are those in residence instructions as at that time. Immigration New Zealand declined the application because it determined that the appellant's employment did not substantially match the ANZSCO description and core tasks for the occupation of Retail Manager (General).

Skilled Migrant category instructions

[38] The Skilled Migrant instructions required Immigration New Zealand to assess whether the appellant's employment was skilled employment within the ANZSCO:

> **SM6.10 Skilled Employment**
>
> a. Skilled employment is employment that meets a minimum remuneration threshold and requires specialist, technical or management expertise obtained through:
>
> i. the completion of recognised relevant qualifications; or
>
> ii. relevant work experience; or
>
> iii. the completion of recognised relevant qualifications and/or work experience.
>
> b. Assessment of whether employment is skilled for the purposes of the Skilled Migrant Category is primarily based on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which associates skill levels with each occupation, and the level of remuneration for the employment.
>
> …
>
> *Effective 15/01/2018*

[39] An appellant's employment will be assessed as skilled if the employment is a substantial match to a relevant ANZSCO occupation as set out in SM6.10.5 of instructions:

> **SM6.10.5 Skilled employment in an occupation included in the ANZSCO**
>
> Current employment in New Zealand or an offer of employment in New Zealand will be assessed as skilled if:
>
> a. the occupation is described in the ANZSCO as:

i. a skill level 1, 2 or 3 occupation and the remuneration for that employment is $24.29 per hour or above (or the equivalent annual salary); or

ii. a skill level 4 or 5 occupation and the remuneration for that employment is $36.44 per hour or above (or the equivalent annual salary); and

b. the principal applicant can demonstrate that their employment substantially matches the description for that occupation as set out in the ANZSCO (see SM6.10.5.1); and

…

Effective 15/01/2018

[40] An assessment of a substantial match required Immigration New Zealand to determine whether the appellant's employment was substantially consistent with the description and core tasks of the relevant ANZSCO occupation:

SM6.10.5.1 Assessment of 'substantial match'

a. For the purpose of SM6.10.5 (b) above, assessment of 'substantial match' involves a determination of whether the applicant's employment is substantially consistent with the ANZSCO 'Occupation' (6-digit) level description for that occupation and with the tasks listed at the ANZSCO 'Unit Group' (4-digit) level description for that occupational group, excluding any tasks which are not relevant to the 'Occupation' description.

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

…

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

Effective 15/01/2018

[41] When assessing an application, instructions at A1.1 and A1.5 require that Immigration New Zealand act fairly and according to the principles of natural justice:

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 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

ANZSCO requirements

[42] According to the ANZSCO, a Retail Manager (General) (code 142111) is a Skill Level 2 occupation. The description for the occupation states that a Retail Manager "organises and controls the operations of a retail trading establishment". Unit Group 1421, under which the occupation of Retail Manager (General) is included, outlines eight core tasks (numbering added):

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

Substantial match

[43] The Tribunal has consistently held that the assessment of a substantial match is a question of fact and degree in the context of an applicant's employment. The Tribunal has also held that the "scope and scale" of the employer's operation (as outlined in the Note to SM6.10.5.1) are important aspects of the context of an applicant's employment: see *YR (Skilled Migrant)* [2018] NZIPT 204965 at [36].

[44] In determining the application, Immigration New Zealand was satisfied that the appellant performed two ANZSCO core tasks: selling goods and services to customers and advising them on product use and ensuring compliance with occupational health and safety regulations. After reviewing the evidence, the Tribunal finds the assessment in respect of these tasks was correct.

[45] Immigration New Zealand was not satisfied that the appellant was undertaking the remaining core tasks, nor that he was organising and controlling the operations of the store, as required by the ANZSCO occupation description of a

Retail Manager (General). The Tribunal has a number of concerns about those aspects of Immigration New Zealand's decision.

Failure to adequately consider appellant's statements as evidence

[46] Immigration New Zealand dismissed the appellant's statements about the way in which he performed a number of core tasks because what it referred to as his "claims" were not supported by evidence. The core tasks Immigration New Zealand rejected on this basis included determining product mix and stock levels, formulating and implementing purchasing and marketing policies, setting prices, maintaining records of stock levels and financial transactions, and controlling the selection, supervision and training of staff.

[47] The Tribunal is mindful of the fact that it is an applicant's responsibility to ensure that the information, evidence, and submissions they provide demonstrates that they meet instructions to the satisfaction of Immigration New Zealand: R5.10.a (effective 22 August 2016). However, the appellant's statements, including recorded responses to Immigration New Zealand's questions, were not "claims", but evidence, and they should have been assessed as such. There was nothing to suggest that his statements could not be given weight because, for example, his statements were false or misrepresented his responsibilities. The Tribunal finds that the appellant's explanations should not have been dismissed solely because he had not furnished sufficient documentary evidence to support his verbal evidence.

[48] However, to be clear, the Tribunal is not suggesting that, as a matter of course, Immigration New Zealand should accept an applicant's verbal evidence without supporting documentation, but rather, such acceptance will depend on the context in which it was given. For example, although the appellant did not provide a lot of documentary evidence to support his assertion that he implemented local or national marketing strategies, undertook promotional and advertising activities, or maintained records of stock levels and financial transactions, it was he, not Bottle-O or the owners, who was the person working at the store every day. His responses indicated that he knew what he was talking about and his performance of those tasks was confirmed by the owners.

[49] Immigration New Zealand also incorrectly disregarded statements from the owners on the same basis. For example, Immigration New Zealand should have given more weight to the owners' statements about factors relevant to determining stock levels that had little to do with Bottle-O, such as available storage, the

employing company's cashflow constraints, and local supplier representative relationships.

Incorrect finding that the franchise agreement took precedence

[50] The Agreement set out the rights and obligations of Bottle-O and the owners. It addressed matters such as Bottle-O's position as banner manager, its control over setting various service standards and the rights it had to negotiate with suppliers. Broadly speaking, the Agreement indicated Bottle-O's control over significant aspects of the operations of Bottle-O stores. In contrast, the 2017 and 2019 letters from Bottle-O management (set out at [13] to [15] of this decision) indicated that the appellant had significantly more autonomy than that provided by the Agreement. For example, the letters stated that only 15 percent of Bottle-O core products had to be stocked by the store, the implication being that most of the stock in the store could be sourced from elsewhere. Further, the letters confirmed the appellant's ability to deal with suppliers individually and set prices.

[51] To resolve this, Immigration New Zealand determined that the agreement took precedence to the exclusion of consideration of all other relevant documentary evidence. This was made clear in the decline decision, when Immigration New Zealand stated that the Agreement was a "legally binding document" which has "not been varied" and which "supersede[d]" the statements made by the appellant, the owners, the operations manager and the chief executive. Immigration New Zealand continued to refer to the primacy of the Agreement throughout the decision, either explicitly (when assessing core tasks such as maintaining records of stock levels, formulating and implementing purchasing policies and financial transactions and undertaking budgeting for the establishment) or implicitly (determining product mix and promoting and advertising the establishments goods and services). The primacy of the Agreement was reiterated at the end of the decision.

[52] As the Tribunal (differently constituted) has previously observed in appeals involving franchise, the fact that the Agreement is a legally binding document does not take matters very far; what is important is how the contracting parties decide to implement it: see *MA (Skilled Migrant)* [2020] NZIPT 205690 at [61]. However, Immigration New Zealand failed to properly consider whether the terms of the Bottle- O franchise agreement were required to be considered alongside, rather than to the exclusion of, the evidence as to how the appellant was undertaking of the core tasks. Immigration New Zealand's assessment gives the impression that the franchise agreement was treated as a barrier that no amount of documentary evidence would be likely to displace.

[53] Immigration New Zealand found that the 2017 letter did not vary the Agreement because it did not comply with clause 24.3 of the Agreement, which required any variation to be in writing and signed by both parties. While the writing requirement was met, only one party signed the letter. Whether the 2017 letter constituted a variation may be a factor to be considered when determining how the parties decided to implement the Agreement. However, the lack of one signature on its own should not be grounds to find that the letter should be given no weight.

[54] Without properly considering the place of the Agreement alongside the other evidence, the Tribunal finds that Immigration New Zealand failed to adequately give weight to the statements and documentary evidence which supported the appellant's performance of the core tasks, in the context of his employment. It therefore failed to conduct a comprehensive and holistic assessment of whether his employment was a substantial match to an ANZSCO Retail Manager (General).

Failure to seek clarification of the proportion of non-core to core products ordered, stocked and sold by the store

[55] Under the terms of the Agreement, the store was required to stock minimum quantities of 'core' products, but was also permitted to stock 'non-core' products. The greater the proportion of non-core products to core products stocked by the store, the higher the likelihood that the appellant had sufficient autonomy to perform a number of core tasks key to the operation of the store, such as determining product mix and stock levels, formulating purchasing and marketing policies, and promoting and advertising the store's goods and services.

[56] The documents produced showed that the range of core products available to the store were significantly outweighed by the number of non-core products available (about 85 per cent to 15 per cent respectively), confirmed in Bottle-O's October 2019 letter. Nevertheless, as Immigration New Zealand noted, this did not confirm the respective quantities of non-core and core products stocked.

[57] In March 2018 and January 2019, two different Immigration New Zealand officers had assessed that the appellant determined 70 per cent of the product range. The officers noted that the core range comprised 30 per cent of the product range stocked and sold and that the appellant determined the remaining 70 per cent. However, at page nine of its decision declining the application, Immigration New Zealand asserted that "there was no information that can tell us … what is the proportion of core products to non-core products", which when considering the previous findings made, does not appear to be correct.

[58] Immigration New Zealand's earlier assessment notes do not make it clear whether the appellant's response to Immigration New Zealand's query about product mix intended to convey the proportion of non-core and core products stocked in the store or whether it related to the number of core and non-core products available. However, given the previous findings, and given the importance of this issue to the outcome of the claim, if Immigration New Zealand had concerns about what this meant, it should have sought clarification from the appellant on the issue. If those concerns remained, it should have addressed this in the decision and explained why. Had Immigration New Zealand sought clarification, evidence from the appellant such as current PLU lists and SKU (stock keeping unit) lists as well as information showing the sales turnover of non-core products compared to core products may have been helpful.

Incorrect interpretation of the Agreement when determining whether the appellant formulated purchasing policy

[59] Aspects of the Agreement indicated that retailers had more freedom of action than Immigration New Zealand found was the case. For example, Immigration New Zealand concluded that the appellant did not undertake the formulation of purchasing policy. It considered that clause 2.1 of the Agreement appointed Bottle- O as the exclusive agent to negotiate trading terms with suppliers. However, clause 2.1 was subject to clause 6.1, which read:

> The Retailer shall only take supply of Products of Tasman Liquor Whole, pursuant to an arrangement negotiated with the Suppliers by the Bottle-O as agent for the Retailer or independently from an Approved Supplier.

[60] It appears to the Tribunal that clause 6.1 gave Bottle-O stores considerable freedom to purchase elsewhere. The store was obliged to source its products through Tasman Liquor or through what were termed "Approved Suppliers". The definition of "Approved Supplier" was set out in the Agreement and not confined to suppliers approved by Bottle-O but referred to New Zealand-based brands or their official New Zealand sales agents who were authorised to produce, import or sell products in New Zealand. This was reinforced by the fact that in relation to Approved Suppliers, the retailer could source products "independently". In other words, it appears that the store could independently source products from any supplier having the legal authority to sell the relevant products in New Zealand.

Failure to properly consider evidence provided in relation to other core tasks

[61] The Tribunal has concerns about several of the specific findings made by

Immigration New Zealand regarding several core tasks. Some conclusions did not align with the evidence provided and other conclusions were not reached fairly. For example, Immigration New Zealand found that there was insufficient evidence to show that the appellant set prices. However, the operations manager confirmed in the letter of 22 October 2019 that "the member and their managers are responsible or determining the majority of their … pricing and margins decisions". Further the appellant described the factors that he took into account when he set prices such as seasonal demand, popularity, what he believed the customer would pay and the store's operational costs. At least one of the sales representatives indicated that the appellant would discuss prices when ordering stock.

[62] In addition, when Immigration New Zealand concluded that the appellant did not control staff training, it noted the presence of Bottle-O staff training modules available online. In doing so, it did not appear to have taken into account the optional nature of Bottle-O's training modules as well as evidence already provided by the appellant about the training he undertook with staff. While the evidence about the appellant's ability to control selection was somewhat sparse, he had signed on employment agreement on behalf of the company. Although one of the owners forwarded a job application to the appellant and offered the successful applicant the job via email, this also does not rule out that staff selection was the appellant's responsibility. Such matters, along with the remainder of the appellant's application, can be reassessed by Immigration New Zealand.

[63] Immigration New Zealand also found that the appellant did not undertake budgeting for the store, stating that Bottle-O had some involvement in the core task. It pointed to clause 3.3 of the Agreement, which set out certain commitments that Bottle-O required from the retailer in terms of stock. However, Immigration New Zealand should have given more weight to Bottle-O's assertion that it had no role in undertaking budgeting, in part because a key advantage of franchising to the franchisor is the devolution of financial risk to its franchisees, the individual store owners. In particular, just because there might be certain commitments that Bottle- O required in terms of stock did not mean that it undertook the store's budgeting.

[64] Because the responsibility for the budget will usually lie with the business owner, a Retail Manager (General) is not required to "control" a store's budgeting by creating a formal budget. Undertaking budgeting can be demonstrated if an appellant had control of elements in the budget – see, for example, *QG (Skilled Migrant)* [2015] NZIPT 202322 at [29]. In the present case, the evidence indicated

the appellant undertook budgeting, with the owners noting that the appellant arranged the budget based on current trends, projected forecasts and previous sales information.

[65] To ensure the efficient operation of a retail store, tasks relevant to the day-to-day operations of the store must, as a matter of necessity, be done regularly. The evidence showed that the appellant carried out a number of these core tasks. As the "on the ground" person, the evidence indicated that it was the appellant who implemented purchasing policy as he was responsible for sourcing and negotiating costs with suppliers and placing orders. Further, he ordered for his store and the owners' second store to take advantage of any bulk discounting available. Letters from four suppliers' representatives confirm that they dealt with the appellant.

[66] It is difficult to see how any local or national marketing strategies would have been implemented, or promotional and advertising activities would have taken place, had the appellant not been working in the store. This is supported by the statements from the suppliers' representatives that referred to the marketing and promotional work the appellant undertook for their brands. It is also difficult to see how anyone else other than the appellant would have been responsible for maintenance of stock levels and financial transactions. The Tribunal notes that the appellant provided evidence to show that he undertook stocktaking duties and provided records of payments made to suppliers.

[67] Immigration New Zealand determined that the appellant did not control staff supervision. However, as the person in the store for 40 hours per week, the appellant was the only person who was in a position to supervise staff. In addition, according to the owner, the appellant ensured that staff knew what their duties were and provided instructions to staff throughout the day regarding various matters such as closing the store. He organised rosters and compiled time sheets. The written warning to one staff member demonstrated that the appellant managed staff disciplinary issues.

Organisation and control of the operations of the store

[68] The description of the ANZSCO occupation of Retail Manager (General) requires the person to organise and control the operations of the store. These elements distinguish the occupation from the lesser-skilled occupation of Retail Supervisor (ANZSCO code 621511), which merely requires the person to supervise and coordinate the activities of retail sales workers – see *IB (Skilled Migrant)* [2014] NZIPT 201941 at [24].

[69] A franchise agreement can limit the extent to which an appellant organised and controlled the operations of the store – see, for example, *TM (Skilled Migrant)* [2016] NZIPT 203659 at [46], where the franchisor had tight control of a pizza restaurant:

> 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.

[70] In the present case, Immigration New Zealand stated that the appellant did not organise and control the store's operations:

> We accept that you supervise the day-to-day operations of the store, however, with lack of supporting evidences to back your claims you have made (as explained above each task) we are not satisfied that you, as the Store Manager, control and organise the operations of the business as per the ANZSCO requirements.

[71] However, Immigration New Zealand's assessment of the extent to which the appellant organised and controlled the operations of the store must be reassessed in the light of a proper consideration of his performance of all of the core tasks of the occupation of Retail Manager (General). For example, verifying the proportion of non-core to core products stocked by the store will be important when assessing whether the appellant performs core tasks key to the control and organisation of the store's operations (such as determining product mix and stock levels, formulating purchasing and marketing policies and setting prices, and promoting and advertising the store's goods and services).

[72] The assessment of organisation and control should also consider the limited involvement in the store of the owners, who lived and had business interests elsewhere and visited the appellant's store weekly. It should also consider the Agreement between Bottle-O and the employing company in the context of the operation of the franchise in practice, as explained by the appellant, the owners and Bottle-O personnel. Those explanations indicated that the appellant had significantly more freedom to organise and control operations than was apparent from the Agreement.

Conclusion on substantial match

[73] The Tribunal finds that Immigration New Zealand's decision was not correct

as it did not give the application proper consideration, as required by A1.5. It did not give proper weight to statements made by the appellant and the owners about the appellant's work and wrongly held that the Agreement took precedence over other evidence provided by Bottle-O, the owners and the appellant. It failed to properly consider that a number of core tasks required that someone had to be in the store regularly to perform them. Further, it incorrectly interpreted the Agreement when determining whether the appellant formulated purchasing policy. It also failed to properly consider whether the appellant undertook other tasks, such as the pricing of goods, budgeting and whether the appellant controlled the selection and training of staff. Immigration New Zealand should also have sought more clarification of its concerns about the proportion of core and non-core products stocked by the store.

[74] Further, the appellant's organisation and control of the operations of the store should be reassessed in light of a proper consideration of the appellant's performance of the core tasks and in the full context of the involvement of the owners and franchisor. 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.

Bottle-O and exploitation of workers

[75] In the last few years, the Bottle-O franchise has received publicity because more than one of its franchisees has faced charges of exploitation of migrant workers on temporary visas, see S Kilgallon "Bottle-O Baron Accused of Exploitation Obtained 107 Visas for Migrant Workers" *Stuff* (9 August 2020) and S Kilgallon "Another Bottle-O Baron - More Allegations of Migrant Exploitation" *Stuff* (6 August 2020). Further, a recent article raises concerns about whether the Bottle-O franchisor was unwilling to engage in discussions about the issue, see S Kilgallon "Bottle-O Boss Grant Simpson Steadfastly Refuses to Speak About Migrant Exploitation in Some of its Stores" *Stuff* (1 November 2020).

[76] On the evidence before the Tribunal, there is nothing to suggest that the owners of the store are linked to the above cases. Nevertheless, the appellant is a migrant worker on a temporary visa employed as part of a franchise that has had very recent publicity about migrant worker exploitation. If any issues arise about compliance with relevant immigration and employment laws or whether the appellant's employment creates unacceptable risks to the integrity of New Zealand's immigration or employment laws, policies or instructions (see SM6.35, effective 28 August 2017), these must be put to the appellant and the opportunity for comment must be afforded to the appellant.

DETERMINATION

[77] 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.

[78] 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

[79] 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 produce updated evidence in support of his employment. He is to be given a reasonable opportunity to put forward evidence of being in skilled employment. Such time period should take into account any current practical difficulties that may arise due to the COVID-19 pandemic.

3. In particular, the appellant may wish to provide evidence to demonstrate the proportion of non-core to core products stocked by the store. Information such as current PLU lists, SKU (stock keeping unit) lists and information showing the sales turnover of non-core compared to core products may be helpful.

4. Immigration New Zealand shall then conduct a new assessment of whether the appellant's employment substantially matches the

ANZSCO description, including core tasks, of a Retail Manager (General). In doing so, it shall have regard to all updated evidence and submissions produced, along with all the information previously provided to it and to the Tribunal on appeal. It is to take account of the Tribunal's findings above, as summarised above at [72]-[73].

5. Immigration New Zealand shall put any concerns to the appellant, following the receipt of any updated evidence and/or further verification. If Immigration New Zealand is not satisfied about proportion of non-core and core products stocked in the store it shall seek further clarification, as the Tribunal sets out at [54] to [57].

6. The appellant is to be afforded a reasonable opportunity to respond and may wish to provide further evidence and information.

[80] 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.

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

Order as to Depersonalised Research Copy

[82] 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.

"M Avia"

M Avia
Member

Certified to be the Research Copy released for publication.

M Avia
Member