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T R I B U N A L W A T C H

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Employer Nomination Visa - an appropriate record of employment

The Immigration Review Tribunal in Melbourne recently handed down a decision concerning an application for a Malaysian citizen to enter Australia as a permanent resident, under the Employer Nomination Scheme.

Rankine and Hill Pty Ltd made an application for Jee Toon Tan to enter Australia and be employed as an engineer with their Company. Regulation 51 of the Migration Regulations specifies several criteria to be met before an Employer Nomination Visa may be granted.

The application was refused by a Departmental decision-maker, and was reviewed by the Migration Internal Review Office which affirmed the decision. The MIRO review is a pre-requisite to an application to the IRT.

Upon review, the IRT set aside the refusal and substituted a new decision accepting Rankine and Hill's nomination of Jee Toon Tan. The IRT considered that the Department had erred by applying policy guidelines rather than applying the terms of the Regulations in determining whether Jee Toon Tan's work experience constituted an 'appropriate record of employment in that occupation'. It was on that basis that the application had been initially refused.

The Department's guidelines required one of the elements 'in determining an appropriate record of employment' to be that an applicant should possess 3 years work experience. The IRT determined that the terms of the Regulations revealed that the legislators had used the chosen form of words in order to 'ensure flexibility in labour market recruitment overseas for employers who have been unable to recruit locally', consequently a strict application of a 3 year period as a limitation was not correct.

The IRT made two further points:

(i) some occupations included periods of training prior to graduation, so there may not be an extra requirement of work experience; and

(ii) an employers' judgment of what was an appropriate record of employment for the occupation nominated should normally carry great weight.

Immigration Review Tribunal: Practice Notes
Social Security Appeals Tribunal Manual

Both the IRT and the SSAT have recently prepared and released documents which detail the manner in which they will conduct reviews.

Both tribunals are required by their empowering legislation to provide a mechanism of review that is 'fair, just, economical, informal and quick'. The people who seek review will often not be in a position to effectively present their side of the matter and it is crucial that the tribunals' method of operations are designed with their particular clientele in mind.

While noting that there is a fundamental difference between the two Tribunals, with the IRT hearing the final review on the merits, the following list, although not exhaustive, notes some of the common and different procedures:

- a statutory requirement that each tribunal is not bound by technicalities, legal forms or rules of evidence; and
- each tribunal may actively seek information and evidence to enable it to carry out its review.

Features which differ between the IRT and the SSAT include:

- in the IRT there is a discretion to make the most favourable decision to an applicant, on the papers available to the Tribunal, without proceeding to an oral hearing;
- in the IRT it is common to use preliminary meetings prior to a hearing; and
- the IRT may be constituted by a single member whereas the SSAT may only be constituted by fewer than 3 members when the National Convener is satisfied that special circumstances exist that warrant such a course.

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