



Civil and Administrative Tribunal
New South Wales

Case Name: Salis v Commissioner for Fair Trading

Medium Neutral Citation: [2023] NSWCATOD 188

Hearing Date(s): 28 August 2023

Date of Orders: 19 December 2023

Decision Date: 19 December 2023

Jurisdiction: Occupational Division

Before: J McAteer Senior Member

Decision: 1. The decision of the Respondent dated 1 December 2022 is set aside.

2. The Respondent is to grant the Applicant a variation to his licence – specifically an Individual Contractor Licence in the area of General Building Work within 28 days of the publication of these reasons for decision.

Catchwords: HOME BUILDING ACT – Whether evidence establishes two years relevant experience the majority of which is in the last 10 years- Whether evidence establishes a wide range of building construction work experience – whether experience relevant industry experience – Individual contractor licence – General building work – whether evidence that work performed can be verified by witnesses who are not supervisors – Supervision level of experience required for licence – Comfortable satisfaction that licence holder can perform the work

Legislation Cited: Administrative Decisions Review Act 1997
Civil and Administrative Tribunal Act 2013
Home Building Act 1989
Licensing and Registration (Uniform Procedures) Act 2002

Cases Cited: Commissioner for Fair Trading, NSW Department of Customer Service v Kalkan [2022] NSWCATAP 112
Drake v Minister for Immigration and Ethnic Affairs [1979] AATA; (1979) 46 FLR 409
Edwards v Commission of Fair Trading [2022] NSWCATOD 40
Hall v Commissioner for Fair Trading [2023] NSWCATOD 59
Locking v Department of Finance and Services [2013] NSWADT 239
Sillitoe v Commissioner for Fair Trading [2022] NSWCATAD 263
Shoobridge v Commissioner of Fair Trading [2015] NSWCATOD 42
Vitogiannis v Commissioner for Fair Trading, Department of Customer Service [2020] NSWCATOD 157
Whitehouse v Commissioner for Fair Trading [2017] NSWCATOD 108
Wood v Commissioner for Fair Trading [2022] NSWCATOD 114

Texts Cited: None

Category: Principal judgment

Parties: Adam Salis (Applicant)
Commissioner for Fair Trading (Respondent)

Representation: Solicitors:
Blue Rock Legal (Applicant)
Commissioner for Fair Trading, Legal (Respondent)

File Number(s): 2022/00368907

Publication Restriction: Nil

REASONS FOR DECISION

Introduction

1 The Applicant (Mr Salis) holds a Contractor Licence in the category of Carpenter. In July 2022 Ms Salis applied to the Respondent, the Commissioner for Fair Trading (the Commissioner) to vary his individual contractor licence to

the category of General Building Work under the Home Building Act 1989 (the HB Act).

- 2 In early September 2022 Fair Trading sought further information from Mr Salis concerning his experience. That request was made under the *Licensing and Registration (Uniform Procedures) Act 2002*.
- 3 In late September 2022 after considering the further material provided by Mr Salis, the Commissioner refused his application because they were not satisfied that Mr Salis met the experience requirements to be issued an individual contractor licence in the Category of General Building Work under the HB Act.
- 4 In November 2022 Mr Salis requested an Internal Review of the refusal decision. Mr Salis provided further material for the Commissioner to consider on the Internal Review. In December 2022 the Commissioner refused the Internal Review by affirming the original decision to refuse the variation to the licence.
- 5 The applications were made to the Commissioner of NSW Fair Trading (Fair Trading) who regulates the HB Act. As these proceedings arise under the HB Act the Commissioner is the Respondent in these proceedings.
- 6 The initial refusal notice of 26 September 2022 determined that Mr Salis lacked the required experience. Criticism was made of experience claimed under a supervisor Mr Bartlett because the roles and responsibilities in the referee statement did not equate to a wide range of roles and responsibilities required for the Category of building. The delegate referred to the requirement to obtain experience across 'all stages of a residential building project'. The delegate identified the following areas (described as key roles) where Mr Salis did not show sufficient experience:
 - Supervision of work
 - Co-ordination and organisation of trades
 - Budgeting / quoting for projects
 - Liaising with clients

- 7 Other matters were cited by the delegate including a claim for experience on a non-habitable structure (shed) being rejected. In addition, the referee when checked by Fair Trading inferred that most of the work performed related to carpentry only, and that some of the jobs and sites claimed overlapped to create a lesser period that could be claimed for specific jobs.
- 8 The delegate refused the application under s 33C(1) (b) (i) and s 33D (1) (b) of the HB Act. Those sections provide:

33C Additional requirements for obtaining contractor licences

(1) A contractor licence must not be issued unless the Secretary is satisfied that—

(a) the applicant has, or proposes to have, such numbers of nominated supervisors for the contractor licence as the Secretary considers are needed to ensure that all work for which the contractor licence is required will be done or supervised by qualified individuals, and

(b) the applicant, if also applying for an endorsement of the contractor licence to show that it is the equivalent of a supervisor certificate—

(i) satisfies the requirements of section 33D for the issue of a supervisor certificate to the applicant,

...

33D Additional requirements for obtaining supervisor and tradesperson certificates

(1) A supervisor or tradesperson certificate must not be issued unless the Secretary is satisfied that the applicant—

(a) has such qualifications or has passed such examinations or practical tests, or both, as the Secretary determines to be necessary to enable the applicant to do, or to supervise, the work for which the certificate is required, and

(b) has had experience of such a kind and for such a period as the Secretary considers would enable the applicant to do, or to supervise, the work for which the certificate is required, and

(c) is capable of doing or supervising work for which the certificate is required.

(Emphasis added)

- 9 As noted above Mr Salis applied for an Internal Review of the decision. In making this request Mr Salis provided a statement dated 10 November 2022

(44 paragraphs), copies of previous Tribunal decisions, references, information relating to an owner builder permit issued in January 2009, and other material relevant to the review.

- 10 Mr Salis also provided written submissions (eight pages) in support of the review prepared by his Solicitor. Those submissions referred to a number of legal issues, one of them being the position that the Tribunal had previously determined that it could depart from the requirements of the relevant Gazetted *Instrument* which sets out the criteria that the delegate applies to the evidence on behalf of the Commissioner.
- 11 The reviewer examined the evidence at a number of sites for which time was claimed by Mr Salis. The Boundary Street Moree site time claimed was 6 September 2013 to 29 October 2014. There was some overlap with the Boggabilla Road / Stirton Road Moree site where 5 May 2014 to 21 October 2015 was claimed. A further site at Herber Street Moree indicated a claim from 9 April 2015 to 18 May 2015. Again a period of overlap is evident. This site included the shed construction referred to in the initial refusal. The reviewer determined that the shed could count towards Mr Salis's experience claimed as it was constructed in conjunction with clear residential building works.
- 12 A further site at Boston Street Moree had a claim of time from 14 August 2015 to 16 March 2016. The starting and finishing dates were subsequently amended to 8 October 2015 and 5 February 2016. The reviewer noted that the areas where Mr Salis fell down on (a lack of supervision of other trades, liaising with clients, or experience preparing quotes), were in part conceded, with the defence that the licensed builder who was the supervisor did these things and that as an employee directed to do work by the employer, Mr Salis was in the hands of his supervisor. It was submitted that irrespective of this situation Mr Salis did possess a broad range of experience in a wide range of residential building work (under relevant supervision).
- 13 The reviewer observed that the main thrust of the Internal Review request was around the view that the *Instrument* was to be considered as a guide but was not binding. However that position no longer being a correct statement of the law due to legislative changes, the reviewer determined that the level of

experience did not meet the relevant words of the *Instrument* and as a result refused the application and affirmed the original decision.

- 14 As a result of the decision to refuse the contractor Licence in the category of General Building Work, Mr Salis applied to the Tribunal for Administrative Review of that decision on 7 December 2022.
- 15 The application was made in accordance with s 83B (1) of the HB Act which provides:

83B Administrative reviews by Tribunal

(1) An applicant for the issue, alteration, renewal or restoration of an authority aggrieved by any decision of the Secretary relating to the application may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the decision.

- 16 As the decision under review (the Internal Review) is dated 1 December 2022, there is no dispute that the application to the Tribunal has been lodged within time.

Jurisdiction

- 17 The Refusal Notice was issued under the provisions of s 33C (1) (b) (i) and s 33D (1) (b) of the HB Act. Those are summarised at [8] above, but include items 3C (1) (b) (ii) and (iii):

33C Additional requirements for obtaining contractor licences

(1) A contractor licence must not be issued unless the Secretary is satisfied that—

(a) the applicant has, or proposes to have, such numbers of nominated supervisors for the contractor licence as the Secretary considers are needed to ensure that all work for which the contractor licence is required will be done or supervised by qualified individuals, and

(b) the applicant, if also applying for an endorsement of the contractor licence to show that it is the equivalent of a supervisor certificate—

(i) satisfies the requirements of section 33D for the issue of a supervisor certificate to the applicant, and

(ii) is not disqualified from holding a supervisor certificate or a supervisor certificate of a particular kind, and

(iii) is not the holder of a supervisor certificate that is suspended.

- 18 As a result Mr Salis made an application to the Tribunal for Administrative Review of the refusal decision consistent with s 83B of the HB Act which provides:

83B Administrative reviews by Tribunal

(1) An applicant for the issue, alteration, renewal or restoration of an authority aggrieved by any decision of the Secretary relating to the application may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the decision.

(2) The holder of an authority aggrieved by any decision of the Secretary to alter an authority or to cancel a provisional authority may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the decision.

(2A) The holder of a contractor licence aggrieved by a decision of the Secretary to suspend the contractor licence under section 22A, 22B or 61A may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of the decision.

(3) A person aggrieved—

(a) by a decision made by the Secretary under Part 4 (Disciplinary proceedings) to impose a penalty or to cancel or suspend an authority, or

(b) by any other decision made by the Secretary under that Part that is prescribed by the regulations,

may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of that decision.

(4) For the purposes of this section, the Secretary is to be taken to have refused any application that has not been withdrawn if the Secretary has not served on the applicant notice of the decision on the application—

(a) within 40 days of its being lodged with the Secretary, or

(b) if the Secretary and the applicant agree on a longer period—within the longer period after its being so lodged.

- 19 The Tribunal's powers in relation to an application for administrative review are governed by s 63 of the *Administrative Decisions Review Act 1997* (the ADR Act), which provides:

(1) In determining an application for an administrative review under this Act of an administratively reviewable decision, the Tribunal is to decide what the correct and preferable decision is having regard to the material then before it, including the following:

(a) any relevant factual material,

(b) any applicable written or unwritten law.

(2) For this purpose, the Tribunal may exercise all of the functions that are conferred or imposed by any relevant legislation on the administrator who made the decision.

(3) In determining an application for the administrative review of an administratively reviewable decision, the Tribunal may decide:

(a) to affirm the administratively reviewable decision, or

(b) to vary the administratively reviewable decision, or

(c) to set aside the administratively reviewable decision and make a decision in substitution for the administratively reviewable decision it set aside, or

(d) to set aside the administratively reviewable decision and remit the matter for reconsideration by the administrator in accordance with any directions or recommendations of the Tribunal.

20 The Tribunal has jurisdiction under the HB Act as noted at [18] above.

21 As noted from the section above, an application under s 83B of the HB Act is an administrative review. The Tribunal's function on review under section 63 of the ADR Act is to make the correct and preferable decision having regard to the material before it, and any applicable written or unwritten law. It is well established that in considering an application for review the Tribunal is not constrained to have regard only to the material that was before the agency, but may have regard to any relevant material before it at the time of the review: *Drake v Minister for Immigration and Ethnic Affairs* [1979] AATA; (1979) 46 FLR 409.

What issues do these proceedings raise for determination?

22 On my assessment the issues are as follows:

- Whether the Tribunal can be satisfied that Mr Salis has demonstrated experience in a 'wide range of building construction work';
- Whether the Tribunal can be satisfied that the experience Mr Salis has gained is 'relevant industry experience', and
- Whether the Tribunal can be satisfied that Mr Salis's level of experience directing and supervising work is sufficient to meet the requirement of s 33D(1) (b) to enable the applicant to do, or to supervise the work for which the certificate is required and is capable of doing or supervising the work for which the certificate is required. (these words come from the statute).

Applicant's written evidence

- Exhibit 'A-1': Statement of G D Bartlett 17 February 2023

- Exhibit 'A-2': Statement of D Squires filed 27 February 2023
- (the Applicant also relied on all of Volume 1 of the section 58 documents tendered by the respondent and items A, C and D from Volume 2).

Respondent's written evidence

- Exhibit 'R-1' Documents filed under s 58 ADR Act (Volume 1)
- Exhibit 'R-2' Further Documents filed under s 58 ADR Act (Volume 2)
- Exhibit 'R-3' Fair Trading letter to applicant dated 13 July 2023

23 Both parties were legally represented and provided detailed written submissions and made oral submissions at hearing.

The applicant's case

24 The Solicitor for Mr Salis submitted that no issue about character arises and that the issue in dispute between the parties relates to s 33D of the HB Act.

25 Mr Salis submitted that the issue in dispute concerns his practical experience and whether it is at least two years relevant industry experience in a wide range of residential building work as specified in the Instrument, the majority of which was attained in the last 10 years.

26 Mr Salis set out the history of his application. He initially applied for the Contractor Licence in the category of General Building Work in July 2022 by way of a variation to his existing Contractor Licence in the area of Carpentry. In September 2022 Fair Trading sought further information from Mr Salis via a notice issued under s 14 (1) of the *Licensing and Registration (Uniform Procedures) Act 2002*. Mr Salis provided a range of material but importantly letters from GD & JA Bartlett P/L, and Referee Statements from Garry Bartlett concerning certain sites and jobs in the Moree area from 2013 onwards.

27 On 28 September 2022 the Licence application was refused by Fair Trading's delegate essentially because they were of the view that the evidence did not demonstrate a wide range of roles and responsibilities in residential building work, and that there was not sufficient time accepted for some of the experience due to overlap on job sites and one structure not able to be claimed as it did not meet the 'residential' requirements. Some of these matters are summarised above.

28 In November 2022 Mr Salis sought Internal Review of that decision. He provided a large bundle of material in support of the review (volume 2 of the s - 58 documents tendered in these proceedings). On 1 December 2022 the senior delegate of Fair Trading refused the Internal Review by affirming the initial decision to refuse the Licence variation. The reviewer listed the following areas of experience claimed:

- 46 Boundary Street Moree. Time claimed: 6 September 2013 to 29 October 2014. Roles and responsibilities claimed: general building works for ground preparation, plans and layouts, demolition, frame set out, roofing, organising materials and taking deliveries, liaising with other trades in general and when completing internal and external fit-outs, fitting windows, tiling, site clean up and safety.
- Lot 2 Boggabilla Rd / Stirton Rd Moree. Time claimed: 5 May 2014-20 August 2015. Roles and responsibilities – general building works, ground preparation, piers, concreting, taking delivery of site materials, abiding by WHS and site rules, framing, roofing, sub-floor, internal fit-outs, tiling and steel works for stairs.
- 171 Heber St Moree. Time claimed: 9 April 2015 - 18 May 2015. Construction of a non-habitable shed in conjunction with the construction of a residential dwelling (equates to residential building work). Roles and responsibilities: organising and checking materials, for the job, marking out placement of shed, coordinating with others working on site, following WHS and site rules, supervision of progress of other workers, standing marking and fixing wall frames, tiling roof and wall sheeting, setting up and running stormwater and fitting roller doors and fittings.
- 58 Boston Street Moree. Time claimed 8 October 2015 – 5 February 2016. Roles and responsibilities: demolition of existing patio cover, addition to existing dwelling and erection of carport, general building works from ground preparation and layouts, demolition and set out of frames and roofing, organising and calculating materials needed and taking deliveries, liaising with other trades in general and when completing internal and external fit-outs, fitting windows, tiling, site clean and ensuring site safe.

29 There was a period of Owner Builder work which was initially claimed by Mr Salis but not pressed due to the fact that as an Owner Builder a person in effect self supervises. Whilst this is legitimate in an Owner Builder context it cannot be counted towards the two year provision because (a) the person is not supervised by the holder of a supervisors certificate as a nominated supervisor, and (b) the owner builder is not 'employed' or 'otherwise lawfully engaged'.

30 Mr Salis made reference to the Appeal Panel case of *Commissioner for Fair Trading, NSW Department of Customer Service v Kalkan* [2022] NSWCATAP 112 whereby the Appeal Panel confirmed that legislative amendments made in 2021 which established (amongst other things), that the Tribunal is to have regard to the Instrument, applied to matters before the Tribunal if in force as at the date of adjudication by the Tribunal. At [18] – [27] the Appeal Panel observed:

Amendment to Home Building Act

18 The Building Legislation Amendment Act 2021 (NSW) (the Amendment Act), commenced on 5 July 2021. Schedule 3 of that Act introduced a series of amendments to the Home Building Act, of which two are relevant to this appeal:

Amendment to s 20(2)

19 Prior to 5 July 2021, s 20(2) of the Home Building Act read:

“(2) The regulations may fix or provide for the Secretary to determine additional standards or other requirements that must be met before any contractor licence is issued or before a contractor licence of a particular kind is issued.”

20 Clause 1 of Sch 3 to the Amendment Act amended s 20(2) of the Home Building Act, to read:

“(2) The Secretary may, by notice published in the Gazette, specify qualifications and experience, or additional standards or other requirements, required to be held or met by an applicant for a contractor licence.”

Insertion of cl 159

21 Clause 4 of Sch 3 to the Amendment Act, inserted cl 159 into Sch 4 (Savings and Transitional Provisions) of the Home Building Act:

159 Qualifications and experience required by licence and certificate applicants

1) For the purposes of section 20(2), a notice published in the Gazette before the commencement of the amending Act, specifying the qualifications and experience required to be held by an applicant for a contractor licence, is taken to have been validly made and to be valid on and from the date the notice was published.

...

Whitehouse v Commissioner for Fair Trading

22 Apparently, the amendments to the Home Building Act were introduced to overcome the effect of the decision in *Whitehouse v Commissioner for Fair Trading* [2017] NSWCATOD 108 (Whitehouse).

In that decision, the Tribunal held that in determining an application for administrative review of a decision to refuse to grant a contractor licence, an instrument made under s 33D of the Home Building Act was not binding on NCAT.

23 In *Whitehouse*, the Tribunal considered whether ss 20(2) and 20(3) of the Home Building Act (as they existed at that time) operated to require the Commissioner (and on review, the Tribunal) to refuse to grant an application for a contractor licence in circumstances where the licence applicant, Mr Whitehouse, failed to meet the requirements contained in an instrument made by the Commissioner under s 33D of the Home Building Act. That instrument related to “general building work” (the subject instrument).

24 The Tribunal noted that the regulations made under the Home Building Act did not “fix or provide for the Secretary to determine additional standards or other requirements that must be met before any contractor licence is issued”, as permitted by s 20(2) of the Home Building Act.

25 The Tribunal went on to consider whether it was bound to apply the subject instrument. Section 64(1) of the ADR Act required the Tribunal to “give effect to any relevant Government policy in force at the time the administratively reviewable decision was made except to the extent that the policy is contrary to law or the policy produces an unjust decision”. The Tribunal concluded that the subject instrument, while a policy made by the Commissioner, was not in the nature of “Government policy”, within the meaning of the ADR Act, s 64(5): at [39]. The Tribunal reasoned that, as a consequence, it was not required to give effect to the subject instrument in deciding Mr Whitehouse’s application for a contractor licence.

26 The Tribunal found that while Mr Whitehouse did not meet the requirements contained in the subject instrument, he had “equivalent (or in fact higher) qualifications than those determined by the respondent” and to apply the subject instrument would “produce an unjust result in the circumstances of this case”: [60]-[61]. Applying that reasoning, the Tribunal decided to grant Mr Whitehouse a contractor licence.

27 The reasoning in *Whitehouse* has been adopted in several decisions of the Tribunal including *McGowen v Commissioner of Fair Trading* [2021] NSWCATAD 46 and *Carrigan v NSW Fair Trading* [2018] NSWCATOD 60.

- 31 Mr Salis conceding that he could not claim the owner builder time, or query the provision that the majority of his two years experience must be within the last 10 years (as per the requirement in the Instrument), set about stating his time gained with experience. He submitted that a total of 42 months and 7 days (or 3 years, 6 months and 7 days) was claimed. However when the overlap is

removed, the maximum period is reduced to around 31 months for the four Moree sites set out above.

32 Ms Salis also made reference to the case of *Hall v Commissioner for Fair Trading* [2023] NSWCATOD 59 in respect of whether all of his claimed experience was gained as an employee or as a subcontractor. *Hall* is authority for the position that the classification of whether a worker is an employee or subcontractor rests on a number of factors each of which need to be considered to establish the true position. The issue concerning engagement was not pressed by the Commissioner.

33 He also referred to the passage at [20] – [21] of *Hall* whereby whilst the instrument's words were binding on the Tribunal, what constituted a broad or wide range of experience was a matter for the Tribunal.

20. Having regard to the decision in *Kalkan* and s 20(5) of the Act I am satisfied that in this application the Tribunal is required to give effect to, and cannot review, the experience criteria specified in the Instrument.

21. However, as discussed at [21] to [26] of *Issa v Commissioner for Fair Trading* [2022] NSWCATOD 159 there is nothing limiting the Tribunal's consideration of what exactly the criteria of "a wide range of building construction work" means in the context of an applicant's past work experience. It is not a requirement that an applicant should have constructed a house from start to finish: *Vitogiannis v Commissioner for Fair Trading, Department of Customer Service* [2020] NSWCATOD 157 at [45]; *Wilmot v Commissioner for Fair Trading* [2021] NSWCATOD 43 at [90]; *Tange v New South Wales Fair Trading* [2013] NSWADT 201. Nor is it a requirement that an applicant has experience in all aspects of building work, provided the experience is sufficiently wide: *Price v Commissioner for Fair Trading* [2020] NSWCATOD 93; *Locking v Department of Finance and Services* [2013] NSWADT 239; *Sollazzo v Commissioner of Fair Trading* [2015] NSWCATOD 20.

34 Mr Salis submitted consistent with *Hall* and the cases referred to therein that that the requirement is that an applicant must have experience in aspects that are sufficiently wide, not that they must have experience in all areas.

35 Mr Salis referred to his references in Volume 2 of the s 58 Material which were additional to the referee reports required by the Commissioner during the application and internal review process. Fair Trading on behalf of the Commissioner had advised that this material could not be submitted or relied

upon, but Mr Salis submits that in the application before the Tribunal it can be relied upon.

- 36 Mr Salis submitted that when one looks at all of the information outlined in his referee statements it equates to a broad or wide range of building work. He refers to construction and demolition, construction of stairs, bathrooms, water proofing, roofing, re-roofing and re-footing structures. Mr Salis submitted that he did have experience engaging with clients, supervising employees, issuing instruction to employees in the context of construction of new builds, renovations and commercial work.
- 37 Mr Salis submitted that there is evidence which should satisfy the Tribunal as to his breadth and length of experience and this evidence is before the Tribunal. Reference was made to pages 92 of the s 58's concerning the house 're-stump', the evidence at pages 102 and 103 of the second volume of s-58's where Mr Salis was supervised by Mr Bartlett, and page 95 of the s-58's (annexure F), pages 111,112,118, 125 and 142-150 of the s 58's providing evidence to satisfy the Tribunal.
- 38 In respect of the evidence at page 164 of the supplementary s -58 bundle, Mr Salis submitted that contrary to the Commissioner's assertions, the work could be counted as it did not require a Development Application (DA) to authorise the work, as it was a farm and exceeding the land size for planning approval.
- 39 Mr Salis conceded that there were some 'holes' in his experience in that he had no significant stone masonry experience for example, but broadly he has wide-ranging experience in a range of trades and types of construction. Mr Salis whilst noting that the experience as an owner Builder was 'unsupervised' he submitted that it was evidence of his skill level and development as well as his experience.
- 40 Reference was made to the statement of Mr Bartlett tendered in these proceedings as Exhibit 'A-1'. Mr Salis submitted that page five of the Transcript of the telephone conversation between Mr Bartlett and Fair Trading (page 5 of the further s 58 documents) shows that Mr Salis in Mr Bartlett's opinion can perform any aspect of residential building work.

(FT Officer): Ok and just lastly I wanted to ask you.. em [sic]..do you think he has the ability to run the entire building project, from start to finish, in the capacity of a builder without your supervision?

Bartlett: Em.[sic]. probably, depends what it is. And there's not that much big stuff out there, I would say if he stuck to the smaller stuff to keep him going and then as he increased his knowledge that way.

- 41 It was submitted that in Mr Bartlett's view Mr Salis can be a supervisor of contractors.
- 42 Reference was made to the passage from the Occupational Division case of *Edwards v Commissioner for Fair Trading* [2022] NSW OD 40 where at [20] the Tribunal observes:

20. I therefore consider that relevant experience by a person who is engaged and paid as a subcontractor, which experience is gained under the supervision of a person who is the holder of an endorsed contract or a supervisor certificate, is experience gained by a person who is "lawfully engaged" for the purpose of the standard.

- 43 The discussion and finding in *Edwards* occurred in the context of an applicant being a subcontractor or otherwise unqualified to carry out the work, but able to do the work because they were under the supervision of a qualified supervisor.

The respondent's case

- 44 The Commissioner submitted that Mr Salis did not have enough experience in a wide range of residential building work. The Commissioner recognised that Mr Salis meet the two years requirement, but not the 'high level' admin areas such as costing, scoping and liaising with clients suppliers and trades.
- 45 The Commissioner said that for the rural job at Bullarah, Mr Salis was not supervised for the relevant purpose of his application as he was not in the employment of a supervisor. The reference at 95 of the s-58's talks about Mr Salis *supervising his own employees in completing the work*. As a result, the Commissioner submitted that pages 92-95 of the s-58's should have little weight.
- 46 In respect of the referee statement at page 49 of the s-58's the Commissioner submitted that missing from that reference is evidence of the 'high level matters' that the Commissioner has identified as the main area where Mr

Salis's wide range experience falls down. The Commissioner made the same submission concerning the reference at page 52 of the s -58 documents.

- 47 The Commissioner also submitted that in respect of the job referred to at page 92, the Referee Statement notes that Mr Salis is a 'subcontractor'. The referee as a result cannot give evidence about supervision as (a) Mr Salis was not employed, (b) he was not actually technically responsible for the other subcontractors, as employees and (c) Mr Salis himself was not actually supervised.
- 48 In respect of the 23 Queen Street job the Commissioner submitted that was work only in respect of a swimming pool and as such not residential building work. Whilst the Commissioner agreed that the Tribunal should look at the matters holistically the issue was that much of his evidence has the high level and supervisory matters absent or removed. (see page 30 s 58's and page 4 of the transcript of the telephone conversation between the Fair Trading officer and Mr Bartlett).
- 49 The Commissioner submitted that Mr Bartlett almost expresses reservations at Mr Salis obtaining a building licence. Specifically he implies that such a situation should not occur at this stage. His (Mr Bartlett's) position was characterised as 'ambivalent', and the Commissioner noted that he was not available for cross-examination at hearing.
- 50 Noting all of these matters the Commissioner submitted that the Tribunal needed to reach a comfortable state of satisfaction about Mr Salis's range of experience in the context where he can be assessed such as meeting the mandatory preconditions of employed or otherwise lawfully engaged by a duly qualified supervisor whereby he demonstrates a wide range of residential building work.
- 51 The Commissioner submitted that the requirements as set out in the instrument were extremely important consumer protection matters primarily because engaging a builder was possibly the biggest contract that any consumer (as opposed to a home purchase contract) would enter.

52 The Commissioner took the Tribunal to Mr Bartlett's statement of 17 February 2023 (Exhibit 'A-1'). Mr Bartlett provides evidence about his phone call with the Fair Trading officer (as recorded in the transcript). At [26] the statement states:

26. During that phone call, I confirmed that I was in charge of the build site and the running of it (as I am with all the build sites in which my business is engaged). However Adam did sometimes supervise workers.

29. I also confirmed that he did not have experience with costing / budgeting jobs. / or dealing with clients. However, as outlined above in this statement, this was, and continues to be my job for my business. This is my role as the owner of the business. However, given that he is now running his own business, I can say that he has engaged myself as a client when I have engaged him and his team as subcontractors (as outlined above).

30. In terms of civilian clients though, I would be very surprised if he didn't do these things in his own business, I can only assume this, I do not know it as a fact.

53 The Commissioner submitted that in respect of this evidence, there was a lack of certainty as to when this experience was gained. This was in part because Mr Bartlett had not been made available for cross-examination at hearing. The Commissioner submitted that even if the Tribunal inferred from the timing of the statement and related matters that it was accepted as within the two years, the evidence was not enough for the Tribunal to be comfortably satisfied.

54 It was unclear to the Tribunal whether Mr Bartlett was required for cross-examination at hearing. The Tribunal notes that the Commissioner's submission focused on an onus being on Mr Salis to establish that he did meet the relevant requirements. Whilst that position may be considered correct it remained unclear whether Mr Salis had prevented access to his witness for cross-examination. Where the onus falls to a party if they have not put their case high enough then it fails. As contradictor on a merits review the Commissioner's representative did not indicate that there was any unfairness in the lack of ability to cross-examine Mr Bartlett further or to go beyond the three suites of evidence he had provided.

Mr Salis's reply

55 Mr Salis submitted that Cl 3 Schedule 1 of the HBA provided that pools, sheds, carports etc. are dwellings when built in conjunction with a residential or home building approval. The schedule provides:

3 Definition of "dwelling"

(1) In this Act, dwelling means a building or portion of a building that is designed, constructed or adapted for use as a residence (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat).

(2) Each of the following structures or improvements is included in the definition of dwelling if it is constructed for use in conjunction with a dwelling—

- (a) a swimming pool or spa,
- (b) parts of a building containing more than one dwelling (whether or not the building is also used for non-residential purposes), being stairways, passageways, rooms, and the like, that are used in common by the occupants of those dwellings, together with any pipes, wires, cables or ducts that are not for the exclusive enjoyment of any one dwelling,
- (c) parts of a building containing one dwelling only (where the building is also used for non-residential purposes), being stairways, passageways and the like which provide access to that dwelling,
- (d) if non-residential parts of a building containing one or more dwellings give support or access to the residential part—the major elements of the non-residential parts giving such support or access,
- (e) cupboards, vanity units and the like fixed to a dwelling,
- (f) detached garages and carports,
- (g) detached decks, porches, verandahs, pergolas and the like,
- (h) cabanas and non-habitable shelters,
- (i) detached workshops, sheds and other outbuildings (but not jetties, slipways, pontoons or boat ramps and any structures ancillary to these exceptions),
- (j) concrete tennis courts and the like but only if the work involved is to be done under a contract to do other work that is residential building work,
- (k) driveways, paths and other paving,
- (l) retaining walls,

- (m) agricultural drainage designed or constructed to divert water away from the footings of a dwelling or a retaining wall,
- (n) fences and gates,
- (o) ornamental ponds and water features, and other structural ornamentation, the construction or installation of which requires development consent but only if the work involved is to be done under a contract to do other work that is residential building work,
- (p) any other structure or improvement prescribed by the regulations.

- 56 Mr Salis submitted that he had done work as a subcontractor under the supervision of an endorsed supervisor. He submitted that he had done the 'high level work' that the Commissioner raised as a gap in his experience, albeit predominantly in a commercial setting. He raised his evidence of Tax Invoices issued which had been received in the s 58 documents before the Tribunal as evidence to support this aspect of his application.
- 57 Mr Salis said that the evidence at page 95 of the s-58 documents establishes that he had been: issuing tax invoices, supervising employees and liaising with clients. He submitted in closing that broadly the skills demonstrated in building jobs outside the specific terms of the instrument are broadly transferable to being a holder of a contractor licence in the area of general building work.

Consideration

- 58 I note that the case of *Locking v Department of Finances and Services* [2013] NSW ADT 239 is often relied upon in respect of detailing both the breath and nature of experience (including supervisory experience). In *Locking* the Administrative Decisions Tribunal (ADT) observed at [17]:

17. This experience in carpentry and joinery work is not the equivalent of "a wide range of building construction work" as required by the Instrument. Carpentry and joinery work is a sub-category of building. It is only one aspect of the work required to be done in order to complete the construction of a residential dwelling.

18. A building contractor has the overall responsibility for a site and must be able to supervise all of the trades required to complete any type of dwelling. Additionally a builder must be able to determine that all trades have complied with all standards and requirements. There are many gaps in Mr Locking's trade supervisory experience and therefore his understanding of certain trades. Those trades include flooring, bricklaying, stonemasonry, wet plastering, painting, decorating, general concreting, tiling, demolishing, fencing, glazing and waterproofing.

59 At [53] of the case of *Wood v Commissioner for Fair Trading* [2022] NSWCATOD 114, the Tribunal observed that whilst an applicant cannot self verify they can provide evidence to some extent about their experience.

53. Reference was made to the case of *Vitogiannis v Commissioner for Fair Trading, Department of Customer Service* [2020] NSWCATOD 157 where the Tribunal observed that an applicant cannot verify their own work but can assist the Tribunal in forming a view as to the nature and scope of the experience. Their evidence must be read in conjunction with other evidence supporting the referee statements such as the evidence of unqualified (as in not holding a contractor licence) witnesses who observed the work, and photographs and other material which may assist in clarifying the experience referred to often in limited terms in the Referee Statements. At [35] and [36] of *Vitogiannis* the Tribunal observed:

35. The Respondent sought to diminish the value of the references referred to at [31] on the basis that they had not provided a formal "Referee's Statement" as Mr Ede had, and each individual referee did not hold an endorsed contractor licence or qualified supervisor certificate in residential building work and therefore could not confirm the Applicant's experience. I agree that they cannot verify the Applicant's experience as a whole in accordance with the Instrument, but disagree that their references do not assist with the assessment of the Applicant's competency for the licence. The Instrument requires a formal Referee's Statement, which was provided by Mr Ede. Each of the additional references (as identified at [31]) individually supports various parts of the Applicant's evidence of his experience, which is useful to the Tribunal in verifying the Applicant's experience at the relevant sites as outlined in Mr Ede's Referee Statement and for the periods claimed by the Applicant. The additional references are also useful in supporting the Applicant's evidence and Mr Ede's endorsement that the Applicant is sufficiently knowledgeable and capable to supervise the wide range of trades involved in building and construction of residential dwellings.

36. The Applicant's oral and written evidence of his roles and responsibilities at each of the 6 nominated sites was supported by photographic evidence and the Referee's Statement dated 18 March 2020. They were also supported by the additional references from Mr Ede and the other tradespersons he worked with at those sites as identified above at [31]. I accept the Applicant's evidence and give it significant weight. I also accept Mr Ede's Referee's Statement and additional reference provided, and give it significant weight. In that context I consider the additional references to be corroborative of the Applicant's evidence and afford them reasonable weight.

60 I note that whilst the referees must attest to the nature of the work performed under their supervision, in determining whether a person has a wide range of experience in residential building work the Tribunal can look to other sources of information before it, as referred to in *Shoobridge v Commissioner of Fair Trading* [2015] NSWCATOD 42, at [69]:

69. The respondent submitted that Mr Shoobridge could not verify the experience he gained while working for Mr Kerr, and that the only evidence from Mr Kerr could provide the necessary evidence of practical experience. While I agree with the respondent that direct evidence from the supervisor is the best evidence of relevant practical experience, I do not accept that the only evidence which can demonstrate such experience is evidence from the supervisor. I do agree that an applicant alone cannot verify his own experience.

61 Mr Salis is a Carpenter. As I observed in the matter of *Sillitoe v Commissioner for Fair Trading* [2022] NSWCATAD 263 that the scope of work of a Carpenter goes well beyond working with tools and wood. Carpentry is seen as the central trade in residential construction and the main trade qualification of licensed builders is predominantly carpentry. This issue is regularly raised in the Tribunal when submissions about the breadth of an applicant's work are raised in seeking reviews of these licence decisions. For the holder of a contractor licence in for example tiling or gyprock / plastering to gain (under qualified supervision) experience in a wide range of residential building work, it is often more difficult as the work is more focused and as a specialised trade less opportunities arise to supervise other trades on site, let alone be involved from foundations to gable and lock up.

62 In *Sillitoe* at [82] I observed:

82. .. As is central in these licence application reviews the trade of carpentry (or carpenter and joiner) is often the central pathway to obtaining a supervisors certificate to work as a building under the HB Act. Whilst at times individual trades (not carpentry) such as tiling or roofing do seek to become builders, the usual course is through the carpentry pathway. Other trades go on to obtain contractor licences in the main, but not exclusively, such as plumbers, electricians, painters, tilers, gyprockers / plasterers, roofers etc.

63 These comments and observations are intended to illustrate that carpentry involves more than merely working with wood in construction. As the evidence of many of the witnesses in that case indicated, carpenters are expected to do

work that does not pose a safety risk (work other than electrical, plumbing and roof tiling) as the lead trade on site, including as required, labouring.

64 I have previously observed there are limitations of the Commissioner's proscribed forms for referees to submit the necessary information as set out in the Instrument. However, it appears that in the current case the Commissioner concedes that the only issue is for the Tribunal to comfortably satisfy itself that Mr Salis has a wide range of experience in residential building work and in doing so, has complied with the other requirements of the Instrument.

65 At the end of submissions the following seemed clear. The Commissioner conceded that Mr Salis had met the two-year requirement, the majority of that experience was gained in the last 10 years, in a generally broad range of residential building work. The query concerning whether this is a wide range relates to the 'high level' supervisory, planning and client liaison work.

66 Other concerns of the Commissioner related to the issue about supervision experience as well as the discrepancy between the referee statements and the follow up phone call file notes of the Fair Trading officer.

67 Mr Salis produced a detailed signed statement affirmed by Mr Bartlett on 17 February 2023. This statement postdates the referee statements provided on the Fair Trading Forms and also postdates the telephone conversation between Mr Bartlett and the Fair Trading officer as set out in the transcript provided. In my view the statement of Mr Bartlett (A-1) provides better evidence as to Mr Salis's overall level of experience. There is evidence at [31] of that statement that:

31. I believe that Adam has the requisite knowledge and practical experience to be a qualified builder. To form this opinion, I have drawn upon my experience as a business owner, qualified builder, and someone who has been in the construction industry for over 45 years.

32. If I did not believe this, I would not have taken the time and energy to prepare this statement and give evidence at the Tribunal if need be.

68 When this evidence is placed with the other evidence before the Tribunal, the overwhelming position appears that Mr Salis has the relevant experience to be issued a contractor licence in the category of general building work.

69 The evidence at Pg 111 of the 2nd volume of s -58 material supplements the evidence set out at [28] above. The Gwydirfield Road property, Lilydale Lane property, River Road Pallamallawa property collectively included:

- viewing plans for the jobsite,
- setting out profiles for screw in piers,
- assisting excavator operator pier excavation, installation, drilling and sighting / levelling,
- constructing beams joists and flooring,
- installation of walls and ceiling,
- installation of panelling,
- installing insulation in walls ceiling, installing insulated roof panelling,
- working around other trades, electrical and plastering,
- assisting in tiling bathrooms,
- temporary downpipes, installing guttering and drainage.
- assisting with excavation, addressing and checking plans for build,
- marking out for services and pipes re: excavation,
- installation of roof sheeting,
- working with other trades to complete job, installing doors windows and fixings,

70 In respect of the matters for which Mr Salis issued Tax Invoices at pages 142-150 of the bundle I note that he provided labour and supervised the labour and provided materials for the Toomalah School job, performed demolition and construction work including internal brick wall demolition re-sheeting of eaves, repairing / replacing brickwork, replaced bathroom ceilings, at Moree PCYC.

71 Noting that the HB Act is consumer protective legislation that does not mean that matters will always be interpreted to the Commissioner's position when there is a weighing up exercise. The Tribunal can clearly make findings of fact which can be assessed on the available evidence in an ordinary manner. The Tribunal is only required to apply the words in the section and the instrument and give them their ordinary meaning and sit the available evidence against them.

72 In a merits review the Tribunal effectively is said to 'stands in the shoes' of the administrator or regulator (in this case the Commissioner of Fair Trading) and

makes the correct and preferable decision having regard to the evidence and material before it.

- 73 In this regard the Referee Declarations carry weight. The Transcript of the telephone interview with Mr Bartlett also carries weight. Likewise, Mr Bartlett's statement (Exhibit 'A-1') carries weight, which in my view is greater as (a) it is more recent, (b) it draws on and reflects on the evidence provided prior and to date by the statement maker, and (c) it establishes a position concerning Mr Salis's skills and experience on the totality of matters that Mr Bartlett has observed. The observations of Mr Salis performing work outside of the four jobsites claimed in the time claimed component of the application is in my view telling.
- 74 Reflecting on the totality of the work Mr Bartlett gives his evidence as set out at [67] above, referring to paragraphs [31] and [32] of his statement. In my view in conducting this administrative review Exhibit 'A-1' is the best available evidence.
- 75 In making the finding that I do at [74] I note that the stronger view as to Mr Salis's experience and skills arises by combining all of the evidence that Mr Bartlett is able to comment on, not just the matters whereby he engaged and supervised Mr Salis. This position seems consistent with the findings in *Shoobridge* and *Vitogiannis* as set out above.
- 76 In respect of the Instrument, which appears at pages 84 to 92 of Exhibit 'R-1', I note the interpretation section on page 2 of the Instrument. The term Experience means:

“Experience” mean experience gained by the applicant as:

- (a) an employee of; or
- (b) a holder of a supervisor certificate and as a nominated supervisor for the contractor licence held by; or
- (c) a holder of an endorsed contractor licence contracted to; or
- (d) a holder of a supervisor certificate in the capacity of a nominated supervisor for a contractor licence held by an individual, partnership or corporation contracted to; or

The holder of a contractor licence authorising the holder to do the class of residential building work in which the experience was

gained (“the Work”) where the applicant during the relevant period was:

- supervised and directed in the doing of the Work by the holder of an endorsed contractor licence or supervisor certificate authorising its holder to supervise the Work and this is verified in the Relevant Application Form; and

- received Remuneration in accordance with the law for the Work which the applicant carried out; or

(e) a holder of a supervisor certificate in the category of full general building work or an endorsed contractor licence in the category of full general building work held continuously for a minimum of 2 years within 10 years from the date the application is made.

77 The Instrument goes on to define ‘Relevant application Form’, which equates to the application form used by Mr Salis including the Referee Statements requiring that they be completed in the form of a Declaration.

78 In Schedule 1 Table A Column 2 of the Instrument (page 4) the necessary experience is stated as:

At least two years relevant industry Experience in a wide range of building construction work, where the majority of that Experience was obtained within 10 years of the date on which the application is made.

79 As noted above the Appeal Panel case of *Kalkan* refers to the applicability of the Instrument to administrative review proceedings before the Tribunal.

80 In my view the evidence set out above and tendered in the proceedings establishes that Mr Salis has attained two-year relevant industry Experience in a wide range of building construction work. There is no requirement that supervising and coordinating and scheduling trades, and liaising with clients suppliers and certifiers and other industry officials must constitute a majority or even a significant portion of the work that an applicant is engaged in.

81 These matters, as opposed to hands on working with tools and building materials and mediums, only need to be considered in the context of constituting a wide range of building work. Mr Bartlett’s statement advances the position concerning his ‘high level’ skills (off the tools) concerning supervision and ordering materials and liaising with clients further. The evidence set out in the Tax Invoices and in the job sites not claimed under the two-year period, but

observed and supported by the qualified referee, is in my view sufficient to meet this requirement.

82 The Instrument does not proscribe in Column 2 of Table A or specify the nature of the '*wide range of building construction work*'. It is for the Tribunal to be, as the Commissioner's representative put it, 'comfortably satisfied' as to the level of and breadth of the skill and experience.

83 Mr Bartlett's position that he did not delegate those 'high level' matters is both understandable and adds to his candour as a witness. Clearly in a highly regulated industry there would be limited scope for a subordinate to gain experience and skill in such areas by performing those roles exclusively.

84 The evidence indicates that Mr Salis can perform the necessary work and I am satisfied that he has the requisite experience, and has otherwise met the requirements of the Instrument.

85 As the Tribunal observed in *Wood* at [93] :

93. ... As such an applicant would need to establish that those matters were sufficient in level or basis of what was involved, so as to satisfy the decision maker that such an applicant will be able to sufficiently do all of the duties that the holder of such a licence might do.

94. In conclusion I find that the evidence is sufficient to establish that Mr Wood has experience in a wide range of residential building work. Whilst like all persons who gain experience in a shorter window of industry involvement, he would be more proficient in some areas outside his qualifications than others due to less time performing those roles, in my view the evidence is sufficient to satisfy the requirement in the instrument in order to obtain the endorsed contractor licence in general building work.

95. Clearly the wide range of experience required contemplates experience beyond an individual's trade qualifications. As such individual tradespersons will always be more proficient at their core trade and other trades that they have qualified in, than they will for the types of general building work for which they hold no formal qualifications. However, the purpose of the two-year requirement is to enable such persons to have developed a broad range of generalist rather than specialist experience.

96. As a result, an applicant is only required to possess sufficient experience gained in a manner where they were supervised and directed to do the work by a qualified person to ensure the quality of the work. The Tribunal (or delegate of the Commissioner) must be satisfied

that they possess sufficient experience for which the licence authorises for them to contract with consumers to do the work.

97. In the case of Locking referred to above at [26] citing paragraphs [17] and [18], Fair Trading specified the basis for a strict consideration of the supervision aspect of the experience. Further at [19] the ADT sets out the issue further.

19. A building contractor is also able to contract with the public, and must therefore be able to negotiate a contract, quote for a project and co-ordinate the trades to be able to complete the project on time and within budget. He or she must also be able to negotiate and discuss the jobs with council and private certifiers to ensure that the work is passed fit when appropriate.

98. In my view the evidence demonstrates that Mr Wood's knowledge and experience is equal to that as discussed concerning the claimant in Locking, noting also that Mr Wood's core trade is also carpentry.

86 In conclusion I find that the evidence is sufficient to establish that Mr Salis has experience in a wide range of residential building work. In my view the evidence is sufficient to satisfy the requirement in the instrument in order to obtain the endorsed contractor licence in general building work.

87 I also find that he has met the requirement of two years experience and that the majority of that experience was obtained in the last 10 years. In addition I find that the experience is in a wide range of building construction work.

Conclusion

88 For the reasons set out above, the Commissioner's decision of 1 December 2022 should be set aside so that a contractor licence in the category of general building work may issue.

Orders

- (1) The decision of the Respondent dated 1 December 2022 is set aside.
- (2) The Respondent is to grant the Applicant a variation to his licence – specifically an Individual Contractor Licence in the area of General Building Work within 28 days of the publication of these reasons for decision.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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