Neutral Citation Number: [2025] EWCA Civ 6

Case Nos: CA-2024-000318 and 301

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ADMINISTRATIVE COURT AND PLANNING COURT, LONDON
Mrs Justice Ellenbogen
CO/3384/2020 and AC-2020-LON-002644

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 January 2025

Before:

SIR ANDREW McFARLANE,
THE PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE COULSON
and
LADY JUSTICE ELISABETH LAING

- -

Between:

THE KING ON THE APPLICATION OF KNOT BUILDERS LTD	**Appellant**
- and -	
CONSTRUCTION INDUSTRY TRAINING BOARD	**Respondent**

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Ben Jaffey KC and Christopher Leigh (instructed by **KPMG Law**) for the **Appellant**
Christopher Knight (instructed by **Fieldfisher LLP**) for the **Respondent**

Hearing date: 26 November 2024

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Approved Judgment

This judgment was handed down remotely at 11.00 am on 17 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This appeal concerns grants which are made available by the Respondent ('the Board') to employers to encourage training in the construction industry, and the other side of that coin, the liability of those employers to pay the levy which generates the money for, among other things, those grants. The relevant legislation is in three parts: the Industrial Training Act 1982 ('the Act'), the Industrial Training (Construction Board) Order 1964 1964 SI No 1079 ('the 1964 Order'), and successive levy orders made under the Act. The Board's relevant grant years were from 2014/15 to 2017/18 (see further, paragraph 28, below). I will refer to those grant years, for convenience, as 'year 1', 'year 2', 'year 3' and 'year 4'. I say more about the details of this scheme in paragraphs 6-29, below.

2. The Appellant is Knot Builders Limited. The Appellant is, to put it neutrally, the product of a corporate re-structure. Before it changed its name, the Appellant was called Hudson Contract Services Limited. For convenience, I will refer to the Appellant as 'the Claimant'. Until 25 March 2018, the Claimant provided a service to clients who used the services of self-employed people who worked in the construction industry ('operatives'). The Claimant received a fee from its clients in return for contracting with the operatives, and providing payroll services for the operatives. It took the risk that the operatives might turn out to be employees.

3. In a decision dated 26 June 2020 ('the Decision'), the Board rejected the Claimant's application for grant in year 2, and partly rejected its applications for grant in years 3 and 4. The Claimant applied for judicial review of the Decision. After a two-day hearing, Ellenbogen J ('the Judge') partly allowed the Claimant's application for judicial review, for the reasons in her judgment ('the Judgment'). She remitted one aspect of the application to the Board. She dismissed the rest of the application. The Claimant appeals against the Judge's order and the Respondent ('the Board') cross-appeals, both with the permission of Arnold LJ.

4. On this appeal, the Claimant was represented by Mr Jaffey KC and Mr Leigh, although Mr Leigh was not present at the hearing. Mr Knight represented the Board. I thank counsel for their written and oral submissions.

5. For the reasons given in this judgment, I would dismiss the appeal and allow the cross-appeal. I consider that, with the exception of the issue which was the subject of the Board's cross-appeal, the Judge's approach to the Claimant's claim was practical, realistic, and right. If necessary, I would also uphold the argument in the Respondent's Notice ('RN') (see paragraph 83, below).

The legal framework

The legislative scheme

The Act

6. As its long title shows, the Act consolidates the law relating to industrial training boards. It is divided into five groups of sections, headed 'Establishment and winding up of industrial training boards', 'Functions of Boards', 'Levies', 'General Provisions' and 'Supplemental'. There is one relevant Schedule, entitled 'Industrial Training Boards'.

7. Section 1(1) of the Act gives the Secretary of State powers 'For the purpose of making better provision for the training of persons over compulsory school age …for employment in any activities of industry or commerce'. Those powers are to make an order specifying such activities and to establish a board 'to exercise in relation to them the functions conferred on industrial training boards' by the provisions of the Act.

8. Section 1(2) defines some of the terms used in the Act, either directly, or by reference to the relevant provision of the Act. They include 'base period' (by reference to section 11(2E)), 'employee' ('includes a person engaged under a contract for services'), 'employer' (which is to be construed accordingly), 'the industry' (in relation to an industrial training board, 'the activities in relation to which it exercises its functions'), 'levy order' (by reference to section 11(2)), and 'levy period' (by reference to section 11(2A)). Section 1(4) and (5) requires the Secretary of State, before making an industrial training order, to consult, in brief, such relevant organisations as he thinks fit in such manner as he thinks fit. Section 1(7) and (8) makes supplementary provision about the contents of an industrial training order.

9. Section 5(1) confers seven functions on industrial training boards 'for the purpose of encouraging adequate training of persons employed or intending to be employed in the industry'. They may provide, or secure the provision of, such courses or other facilities for training those people as the board considers adequate, 'having regard to any courses or facilities otherwise available to those persons'. They may approve such courses and facilities. They may consider various employments in an industry and publish recommendations about the nature and length of the training for any such employment and the post-school education to be associated with the training, the people by whom and to whom the training ought to be given, the standards for such training and the methods for testing whether the standards have been reached. They may make arrangements for selection tests and for other methods of measuring the attainment of those standards and may award relevant certificates. They may help people find facilities for being trained. They may do their own or help with others' research 'into any matter relating to training for employment in the industry'. They may also give advice about training connected with the industry.

10. An industrial training board may make contracts of service or of apprenticeship with persons who intend to be employed in the industry, or to attend courses, or to use other facilities provided or approved by the board (section 5(2)). Section 5(3) gives them powers to provide, at the request of others, various services connected with training. Section 5(4) gives boards powers to make four broad types of payment connected with training. The second is 'grants or loans' for various purposes in including 'to persons providing courses or other facilities approved by the board'. The fourth is 'payments to persons in connection with arrangements under which they or employees of theirs make use of courses or other facilities provided or approved by the board'.

11. Section 6(1) gives boards powers to require information from employers, in the form of 'such returns and other information of a kind approved by the Secretary of State' and to require employers to keep relevant records which the board can examine. A failure to comply with such a requirement is a criminal offence (section 6(5)), as is the provision of false information (section 6(6)). Section 7(1) gives the Secretary of State power to issue a direction requiring a board to exercise the powers conferred by section

6(1). A board must keep accounts for each of its financial years (section 8(1)). Section 8(2)-(4) makes provision for the scrutiny of those accounts by various bodies.

12. Section 11 is headed 'Levies'. Section 11(1) gives a board power, exercisable from time to time, to submit levy proposals to the Secretary of State 'for the raising and collection of a levy to be imposed for the purposes of raising money towards meeting the board's expenses'. The levy is to be imposed in accordance with an order made by the Secretary of State ('a levy order'). A levy order must 'give effect to levy proposals' submitted to the Secretary of State. It 'shall provide for the levy to be imposed on employers in the industry' (section 11(2)). Subject to section 11(2C) and 11(2D), levy proposals must provide for 'one or more periods (… "levy periods") by reference to which a person's liability to levy is to be established and the levy period or periods must fall within the period of three years beginning with the day on which the levy order…is made'. Levy proposals may not provide for more than three levy periods (section 11(2A)). Levy proposals must specify, for each levy period, a period ('the base period') by reference to which the relevant 'emoluments' are to be calculated (section 11(2E)).

13. If levy proposals will result in the payment by employers or some employers of more than 0.2% of 'the relevant emoluments', the Secretary of State shall not make a levy order unless 'he is satisfied that' the levy proposals are 'necessary to encourage adequate training in the industry' and one of the three conditions in section 11(6) is met (section 11(5)). The first such condition is that the Secretary of State is satisfied that the board has taken reasonable steps to consult those who are likely to be liable to the levy and 'a class of persons, who together satisfy the requirements of section 11(6A)…considers that the proposals are necessary to encourage adequate training in the industry' (section 11(6)). The class of persons must consist of more than half of those who, the Secretary of State considers, are likely to be liable to pay the levy, and those who are likely to be liable to pay more than half of the aggregate amount of the payments. If the first and second conditions in section 11(6) are not met, the Secretary of State may still make an order if he considers that it is appropriate in the circumstances (section 11(6)(c)). Section 11(7) limits the amount of levy payable under an order, in respect of each levy period, to an amount which the Secretary of State estimates to be equal to one % of 'the relevant emoluments', or, if the Secretary of State considers it appropriate, to a lower amount.

14. 'The relevant emoluments' is defined in section 11(8) as the aggregate of the 'emoluments and payments intended to be disbursed as emoluments which are paid and payable by' any person 'to or in respect of persons employed in the industry in respect of a period specified in levy proposals as a base period'.

15. Section 11 is supplemented by section 12. A person who is 'assessed to levy imposed under a levy order' may appeal to the Employment Tribunal ('the ET'). The levy order must provide for the relevant time limit (section 12(4)). The ET's powers on such an appeal include a power to rescind, reduce, or increase assessment (section 12(5)).

16. Section 13(1) provides for the submission by boards of proposals for the issue by them of exemption certificates in respect of employers who make their own arrangements for the training and education associated with training of people who intend to be or are employed in the industry and who satisfy the board, by reference to criteria specified in the proposals, that 'the arrangements are adequate and are to a material extent being

implemented'. The criteria referred to in section 13(1) 'must relate to the quality of or amount of training, or training and education, provided for by the arrangements…' (section 13(3)).

17. If an employer which is liable to pay a board any levy applies to that board for an exemption certificate, the board, if satisfied that that 'arrangements made by him for the training or the training and post-school education associated with training' of people employed or to be employed in the industry 'are such that in accordance with proposals published by the board' he should be issued with an exemption certificate, 'it shall be the duty of the board to issue' such a certificate (section 14(1)). The effect of the certificate is that the employer is exempt from 'levy payable to the board by virtue of' the Act 'in respect of persons employed at the establishment to which the certificate relates' (section 14(2)). A certificate may impose conditions 'relating to the training, or the training and education' of employees or prospective employees including inspection by the board of the arrangements for training and education specified in the certificate (section 14(3)).

18. Section 17(1) gives the Secretary of State power to make loans and grants to a board. Section 17(2) gives the Secretary of State power to give directions designed to ensure that the board's expenditure stays within limits specified in the direction and to ensure that the board uses any grant or loan for purposes specified in the directions. A board has power, with the consent of the Secretary of State, to borrow temporarily from another person (section 17(4)).

Secondary legislation

The Industrial Training (Construction Board) Order 1964

19. The Board was established by article 2 of the 1964 Order to exercise, in relation to the activities specified in Schedule 1 to the 1964 Order as the activities of the construction industry, the functions conferred on industrial training boards by the Industrial Training Act 1964 ('the 1964 Act'). The 1964 Order was made under section 1 of, and paragraphs 1 and 7 of the Schedule to, the 1964 Act. It is still in force.

The Industrial Training Levy (Construction Industry Training Board) Order 2015

20. The preamble to the Industrial Training Levy (Construction Industry Training Board) Order 2015, 2015 SI No 701 ('the 2015 Order') recites, among other things, that the Board's levy proposals included proposals for securing that the Board would issue no exemption certificates and that the amount of levy would exceed the amount specified in section 11(5)(a) of the Act, that section 11(5) therefore applied, and that the Secretary of State was 'satisfied that the levy proposals' were 'necessary to encourage adequate training in the industry and that the condition in section 11(6)(a) was met'. The Secretary of State was also satisfied that the amount of levy exceeded 1% of the employers' relevant emoluments, that the 2015 Order was within section 11(7)(b) of the Act, and that the amount of the levy was appropriate in the circumstances.

21. Article 3 defines various terms. Article 3(1) provides that for the imposition of the levy on 'employers in the construction industry', and for three levy periods between 11 March 2015 (the day the 2015 Order came into force) and 31 March 2017. Article 4 provides for three base periods for each of the levy periods. They are each of the three tax years between 6 April 2013 and 6 April 2015.

22. Article 5(1) imposes a duty on the Board to assess the amount of levy to be paid in respect of each construction establishment of an employer. A 'construction establishment' is 'any particular establishment of the employer engaged wholly or mainly in the construction industry during the necessary period' (article 5(2)). The 'necessary period' is defined in article 5(3). Article 5(4) treats the person who owns or otherwise has responsibility for a construction establishment on the first day of the relevant levy period as the employer of all the people who are employed at or from that establishment during the relevant base period.

23. Article 7 provides for the assessment of the amount of levy by reference (depending on the levy period) to percentages of the emoluments of employees, of payments made and received under labour-only agreements (as defined in article 2) and of contract payments made by the employer at or from the establishment. 'Contract payment' has the meaning given by section 60 of the Finance Act 2004 (article 7(3)). Article 8 provides for the total amount of levy in each levy period. There is a 50% reduction for employers which pay smaller amounts of emoluments, of sums under labour-only agreements, and of contract payments. Article 9 provides for exemptions for very small employers and for charitable trusts.

24. Article 10 obliges the Board to serve an assessment notice on every employer assessed to the levy, and provides for the formalities of such notices, which include giving the Board's address for the service of a notice of appeal. Article 10(c) makes it clear that an assessment can be based on information provided by an employer, or on 'a reasonable estimate' by the Board. The Board has power, on notice, to withdraw and to amend an assessment (articles 11 and 12)).

25. With two exceptions, the amount of the levy is payable by the employer one month after service of the assessment notice (article 14(1)). The amount which is (or may be) due cannot be recovered while an appeal against the levy is pending (article 14(4)(a)). Article 15 provides for the time for appealing. It is one month, unless that period is extended by the Board or by the ET.

The Industrial Training Levy (Construction Industry Training Board) Order 2018

26. The Industrial Training Levy (Construction Industry Training Board) Order 2018 2018 SI No 432 ('the 2018 Order') was made on 27 March 2018 and by article 1 came into force on 28 March 2018. Its provisions, including its preamble, are relevantly similar to those of the 2015 Order.

The Board's relevant policies as they applied in this case

27. The administrative details of the scheme are complicated, but it is not necessary, in the light of the narrow issues on this appeal, to say much about them. The Board makes and publishes various policies, which explain, for example, how an employer is to show that it is eligible to receive grants in a particular year. Those policies include a statement of grant terms and conditions, and Training and Development Plan Rules ('TDP Rules'). I will refer to the statement of grant terms and conditions as 'the Policy'. A new version of the Policy is issued for each of the Board's 'grant years'.

28. As the Judge explained in paragraph 11 of the Judgment, the grant year did not coincide with the levy period or with the base period. For 2015/16 and 2016/17, the grant year ran from 1 August to 31 July. From 2017/18, the grant year ran from 1 August to 31 March, as a result of a proposal to align the grant year more closely with the levy period. She recorded, in paragraph 12, that grants were available to employers 'registered as in-scope leviable with [the Board] including those in-scope employers who don't pay a Levy as they fall below the Small Business Levy exemption'. The Board's evidence was that two thirds of employers were 'nil-assessed for levy' but were entitled to claim grant.

29. She also explained that the Policy for 2015/16 required that to be eligible for a grant, an employer had to complete a levy return which the Board received before 31 December 2015. As the Judge also recorded, the Board waived that requirement in the Claimant's case. That Policy also imposed conditions for newly registered employers. The Claimant was first registered in February 2016. The Board did not waive those conditions, and decided that they prevented the Claimant from receiving any grant in the 2015/2016 grant year. Those conditions were referred to by her and by the parties as 'the waiting period'. During that grant year, grant was available for training directly related to the employer's construction business received by (1) directly employed staff and (2) net CIS sub-contractors, including the Claimant's operatives. The Policy for 2016/17 was 'materially identical'. The Policy for 2017/18 provided, in addition, that in order to be eligible for grant, an applicant must 'identify the need for training, organise the training and accept the cost of the training'. I will refer to those stipulations as 'the three requirements'.

The relevant authorities

30. The parties referred to many authorities. The significant legal issues in this appeal concern when and in what circumstances a public authority may or must depart from a published policy. The most useful explanation of the relevant principles is in the judgment of Lord Dyson in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] AC 245. The main issue in that case was whether the appellant was entitled to damages for false imprisonment. He was detained by the Secretary of State pursuant to paragraph 2 of Schedule 3 to the Immigration Act 1971 pending his deportation. During that period, the Secretary of State's published policy for immigration detention had a presumption in favour of release. Mr Lumba was a foreign national prisoner ('FNP'). He was detained under a secret policy which, contrary to the published policy, had a presumption in favour of the detention in the case of some FNPs. The Supreme Court held that he had been falsely imprisoned, but that he was only entitled to nominal damages, as, if the Secretary of State had acted lawfully, she would inevitably have detained Mr Lumba.

31. In paragraph 26, Lord Dyson explained that a decision-maker must follow his published policy (and not a different unpublished policy) unless there is good reason to depart from the published policy. In paragraph 34 he said that the rule of law requires 'a transparent statement by the executive of the circumstances in which …broad statutory criteria will be exercised'. He added, in paragraph 35, that a person has 'a public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute'. There is, he said, a 'correlative right to know what the currently existing

policy is so that the [person] can make relevant representations in relation to it', and, if necessary 'challenge an adverse decision' (paragraph 36).

The facts

2008-2011

32. The Board first became aware of the Claimant in 2008. The Board's initial view, in short, was that the Claimant was an 'employer in the construction industry', which meant that it would be liable to pay the levy. That view was vigorously contested by the Claimant. We were shown an exchange of correspondence, which culminated in an email from the Board dated 20 January 2009. The Board then accepted that the Claimant was not an employer in the construction industry. At that stage, it seems that the Board's view was that the Claimant was not subject to the levy but that its clients were.

The decision in Beacon Roofing

33. In due course there was litigation about this between the Board and one of the Claimant's clients. That led to a judgment of this court in *Construction Industry Training Board v Beacon Roofing* [2011] EWCA Civ 1203; [2012] ICR 672. The Board's understanding was upheld. This court affirmed a decision of Keith J. He had allowed an appeal from a decision of the ET and had held that the purpose of the contract between the Claimant and its clients was to provide them with the labour of various operatives under 'labour-only agreements'. As the making of payments under such contracts was then the criterion for liability to the levy, the Claimant's client was liable to pay the levy.

The making of the 2015 Order

34. In September 2014, the Secretary of State was considering making a new levy order. The 2015 Order was in due course made on 10 March 2015. When what was to become the 2015 Order was still in draft, the Claimant's managing director, Mr Anfield, emailed the Board's general inquiries email address. He asked some broad questions about the changes to the scheme which were proposed, pointing out that they could have negative consequences, in particular for 'pay-roll companies' which were paid gross. Many were not registered and would resist registration. The Board would be vulnerable to 'phoenixing', as it was 'moving the liability for the levy down the contracting chain'. Companies needed to know when the basis of accrual was to change, otherwise they would not account for it and would not be able to pay. The Board thanked Mr Anfield for his email and told him that his email had been copied to the Levy Department. An internal email forwarded the chain to the Board's simplification team.

35. On 13 October 2014, Mr Anfield wrote to the Board. He explained that '[r]emoving the offset facilities and aligning the levy with net payments reported through the CIS' would pushing 'levy collection down the contracting chain'. 'CIS' stands for the HMRC Construction Industry Scheme, a scheme administered by HMRC. He asked five questions. The Board replied on 21 October 2014. The proposed changes affected the way that levy liability was assessed: decisions about whether an entity was subject to the levy would depend on whether the entity was an employer 'wholly or mainly undertaking a construction activity'. Overall, a substantial majority of registered employers and levy payers would 'see no change or a decrease in levy assessments'. The current problems of interpreting the legislation to identify labour-only agreements

would be eliminated. The Board would monitor the position closely. The Board gave six answers to Mr Anfield's questions. In particular, it confirmed his understanding that the relevant period for payments forming the basis of the levy raised in 2017 was the 2015/16 tax years. Whether an accrual was required was a matter for employers and their auditors. The letter explained that the use of the CIS was not directly relevant to whether an employer was 'in-scope and leviable'. That was determined by the relevant levy order.

The Claimant's challenge to the 2015 Order

36. On 20 March 2015, the Claimant's then solicitors wrote a pre-action protocol letter to the Secretary of State and sent a copy to the Board. The Claimant intended to challenge the 2015 Order. There were three grounds of challenge. The 2015 Order allowed the levy to be charged twice 'in an inconsistent and unreasonable manner'; it was ultra vires the Act; and it had 'disproportionate/unreasonable impacts'. On 9 June 2015, the Board, which had received copies of the correspondence between the Claimant's solicitors and Government Legal Department, referred to the Claimant's solicitors' letter of 5 May 2015 and said that the Board considered that the Claimant might meet the criteria for registration. In the light of its belief that the Claimant might 'be an employer in the construction industry', the Board asked the Claimant to complete a questionnaire within the next 21 days. The Board gave a telephone number in case a discussion would be helpful. The Claimant's reply was that one of the key issues in the proceedings was whether or not it was liable to pay the levy. It suggested that it would be appropriate, before 'registering (or not)' with the Board, to wait and see what the court decided. The Claimant maintained that position in further letters.

The oral renewal hearing in 2015

37. The Claimant then applied for judicial review of the 2015 Order. Permission to apply for judicial review was refused on the papers. There was an oral renewal hearing on 8 October 2015. Kenneth Parker J gave permission on three of four grounds. The exchanges at the hearing on which the Claimant now relies related to the Claimant's fourth ground for challenging the 2015 Order. That was that the 2015 Order put an unreasonable or disproportionate burden on the Claimant. The articulated complaint was that the Claimant could not pass on the burden of the levy to its client or to the operatives. The Claimant would be one of the biggest payers of the levy, but would not be able to claim grants. The Board's counsel asked the Claimant's counsel where he got that idea from. The latter referred to 'tab 29' (the Policy), under the heading 'Who cannot apply'. The former said that he could explain that that was a misreading, and the Claimant would 'be entitled'. In his later oral submissions on this ground, the former referred to paragraphs 18 and 22 of *Beacon Roofing*, in order 'to direct [I think the word 'attention' is missing] to the mischaracterisation of what [the Claimant] does. That somehow being outside the provision of workers they will not benefit from the training. From the documents, there is nothing which prevents [the Claimant] from benefitting from the grants'.

Further correspondence about registration

38. The Board wrote to the Claimant on 18 January 2016, explaining why it considered that the Claimant met the criteria for registration. It asked again for information. On 19 January 2016, the Claimant replied, attaching the correspondence from 2009 and one

letter from 2014. That correspondence was said to show that the Claimant was not, and that the Board had accepted that it was not, an employer in the construction industry. Mr Anfield expressed the hope that 'this is sufficient information for you to conclude that '[the Board] will not take the step of registering [the Claimant]…'

39. The Board replied on 8 February 2016. It now had more information than it had had in 2008 and 2009. Its provisional view (based on a letter dated 5 May 2015 from the Claimant's solicitors) was that the claimant did meet the test for liability to levy. The Claimant had no legitimate expectation other than that the Board would apply the relevant test to the facts. The Board again asked for information and said that if that was not given, it would register the Claimant.

The Board registers the Claimant

40. In a letter dated 16 February 2016, the Board said that it would register the Claimant 'with immediate effect'. The Claimant's first liability would be for year 2 and the levy would be payable in 2017. A further letter dated 29 February 2016 confirmed that. On 19 December 2016, the Claimant told the Board that it had no PAYE or net paid sub-contractors to report. It sent, in effect, a nil return.

Kerr J's decision on the challenge to the 2015 Order

41. On 18 April 2016 Kerr J handed down his judgment in *R (Hudson Contract Services Limited) v the Secretary of State for Business and Skills* [2016] EWHC 844 (Admin). He dismissed the Claimant's application for judicial review of article 7(2) of the 2015 Order. His account of the legislative history (judgment, paragraphs 6-46) is very informative. I refer the interested reader to it and do not repeat it here. The key change made by the 2015 Order, known as 'Net CIS' was supported by the industry (paragraphs 48-50). It was that the levy was no longer to be based on payments by employers to labour-only sub-contractors, but instead on 'the labour element of payments made to sub-contractors, taxed (Net paid) by way of [the CIS]' (judgment, paragraph 51). The Claimant did not appeal against that decision.

The levy assessment and appeal

42. On 18 February 2017, the Board estimated that the levy due from the Claimant for the 2015/16 tax year at £7,964,584. The Claimant was told that it could appeal, and it did so.

Correspondence about a potential grant claim

43. On 16 May 2017, the Claimant wrote to the acting Chief Executive of the Board. The letter was headed 'Without prejudice…'. The Claimant referred to its appeal against the assessment. It was confident of success. The Claimant nevertheless wanted to lodge a 'protective grant claim to be submitted in the unlikely event that we are eventually found to be within scope of grant and levy'. The Claimant had engaged a Mr Price as a consultant to help with that and suggested a meeting to 'agree principles and timescales'. The Claimant believed it could claim up to £11m in grants. The idea that an employer could be faced with paying the levy while not being able to claim grants was 'wholly unrealistic and unacceptable'.

44. The acting Chief Executive of the Board emailed the Claimant's consultant on 31 May 2017 to explain the Board's view of the framework for making claims 'under the current grant rules'. The Claimant was a levy payer from 17 February 2016 but had not submitted a 2016 levy return, so that the 'No Levy No Grant' ('NLNG') rule was 'triggered'. The Claimant had therefore forfeited its right to claim grant for the 2016/17 grant year. The Claimant could appeal 'should they accept at any point the Levy status'. Any appeal would need to include a return for 2016. She then explained what grant would be available were the appeal to succeed. But no grant would be payable until the Board had assessed the 2016 levy, which clearly depended on the outcome of the appeal. The 2017 return was also outstanding and the NLNG rule would also be triggered for that year. '[F]ollowing the scope appeal [the Board would] delay this for 21 days giving the Claimant time to submit the outstanding return'. She added that she did not understand what a 'protective claim' was. The Board would only accept and process claims that fell within the existing Grant Scheme Rules, 'including their time-bound nature'. The consultant acknowledged that email on 1 June 2017. She then gave the details of the person whom the consultant should contact should he 'need to clarify any grant scheme rules or have any queries in regard to potential grant claims'.

45. On 26 October 2017, the Board's solicitors wrote to the Claimant's solicitors, referring to the Claimant's letter of 16 May 2017 (see paragraph 43, above). The Board's solicitors described the effect of the 'protective grant claim' as a retrospective claim for grant. The Board had decided that the Claimant was not eligible for grant. The base period for the first levy assessment was the 2015/16 tax year. Eligibility for grant ran from 1 August to 31 July the following year. The application was 'theoretically' governed by the Policy for year 3 '(notwithstanding that it disputes its levy liability)'. If the Claimant were eligible to claim grant, it could claim new entrant and apprenticeship grants from August 2014 and all other grants from 1 August 2016.

46. The Board's solicitors then explained that the Policy for year 1 expressly identified the three requirements. The Policy for years 2 and 3 did not expressly refer to the three requirements. They had been removed 'due to an administrative error and did not represent a formal change of policy'. The three requirements had been reinstated in the Policy for year 4. They had, nevertheless, been applied in practice to applications for grant in years 2 and 3, and were implicit in the relevant Policies. The letter summarised the Claimant's representations in the letter of 16 May 2017. The Board had had a meeting with the consultant on 14 September 2017 to discuss that claim in more detail. He had acknowledged that the Claimant had 'not delivered or paid for any training' between August 2017 and the date of the letter; it was trying to get grant for 'the training delivered by around 1500 of its clients' who were not eligible for grant because the Claimant was, itself, 'gross paid'. The scheme rules, the consultant had argued, did not stop the Claimant being eligible for grant despite the facts that it had not delivered or paid for any training. The Claimant would contact its clients to get the appropriate training records. The Board had decided that the Claimant did not meet the criteria to claim grant in respect of the relevant period. The Claimant did not, on its own account, meet the three requirements. The three requirements were explicit in the current Policy and were implicit in the Policy for year 2. The Board had never knowingly paid grant, retrospectively or otherwise, in respect of training where the applicants did not identify the need for the training, organise, or pay for it. The complaint that it was unrealistic and unacceptable to expect an employer to pay levy if it could not claim grants 'misses the point'. Nothing prevented an employer from claiming grants for training. The

reason the Claimant could not claim grant was because it was not doing any training. If the Claimant did training, it would be able to claim grant under the scheme. For those reasons, the Board considered that the retrospective application for grant should be refused.

47. The Claimant's solicitors replied on 31 January 2018. The Claimant had not yet applied for grant. The Board was asked to confirm that if and when the Claimant did make such an application, the board would consider it properly. The solicitors did not accept that the three requirements were implicit in the Policy for the two intervening years. The obvious inference from their removal was that they no longer applied. They wrote to the Board's solicitors again on 13 July 2018. They made various points about the current litigation. They added that the Claimant had 'assembled sufficient evidence to support a sizeable grant claim' in the unlikely event that it was held liable to pay levy. It had evidence to support a claim of nearly £10m for year 2, which exceeded any possible liability for levy.

The Claimant ceases to be an 'employer' for levy purposes

48. I note here that the Claimant ceased to be an 'employer' for levy purposes on 26 March 2018 'as a result of restructuring'. Before the 'restructuring' the Claimant had contracted with clients, and had contracted with operatives. The aim of the restructuring was to split those activities between different corporate vehicles. The Claimant did not disclose this significant event to the Board until it wrote to the Board on 20 November 2020 (see paragraph 69, below). I doubt whether that date was a coincidence. The first levy period for the 2018 order began on 28 March 2018 (article 3(1)(a) of the 2018 Order). If the Claimant had been an employer in the construction industry on 28 March 2018, it would, in accordance with article 5(4) of the 2018 Order, have been treated as the employer of all persons employed at or from its establishment throughout the first levy period created by the 2018 Order, that is, throughout year 3. The Judge noted the closeness of the relevant dates in paragraph 14 of the Judgment.

Further correspondence in 2018

49. The Board's solicitors wrote again, on 12 September 2018, in response to a letter which was not in bundle for the hearing of this appeal. The Claimant had repeated that it intended to submit a grant claim if it was held liable for levy. The Board reminded the Claimant that if it considered that it was eligible for grant, it should submit a claim in the relevant levy returns as soon as possible 'and in any case, no later than 30 November 2018'. The Claimant was in a different position from most other employers which claimed grant, as it was a recently registered employer which disputed its liability to pay levy. The Claimant had only submitted one nil return, in 2016. The Board could not carry out its functions if employers 'stockpile' grant claims as it has to keep a balance between levy received and grants paid. The relevant rules reflected that by imposing time limits on the receipt of levy returns. The Board had not yet seen any evidence that the Claimant was eligible for grant, but would consider any application on its merits. For those reasons, the Board's solicitors 'recommended' that the Claimant submit any claim by 30 November 2018, if it considered that it was 'entitled to submit a grant claim in respect of the current Grant Scheme Terms and Conditions'. If the Claimant did not submit the necessary returns and claim forms by that date, the Board reserved the right not to consider any claims on the basis that they were out of time.

Lambert J's decision in Hudson Contract Services Limited v Construction Industry Training Board

50. On 18 January 2019, Lambert J handed down her judgment in *Hudson Contract Services Limited v Construction Industry Training Board* [2018] EWHC 45 (Admin); [2019] ICR 1001. In a passage of her judgment which was cited by the Judge in paragraph 2, she described the Claimant's business model (paragraphs 5-8). She dismissed the Claimant's appeal against a decision of the ET to dismiss the Claimant's appeal against the Board's 2016 levy assessment. The Claimant appealed her decision.

Correspondence in 2019

51. There was further correspondence in 2019. In a letter dated 28 May 2019, the Board's solicitors said that the Claimant had first said it would make a grant claim nearly two years earlier. In October 2017, they had explained why they considered that the Claimant was not eligible for grant. A long time had passed. The Claimant had said that the claim was substantial, but the Claimant had done nothing about it. 'As a matter of good administration, and given the cyclical nature of [the Board's] funding, [the Board] would need to take these matters into account in determining any application' which the Claimant might make. On 24 January 2020, the Board sent a further letter about the requirement to submit a claim as soon as possible.

The hearing of the appeal in Hudson Contract Services Limited v Construction Industry Training Board

52. The Claimant's appeal was heard by this court on 15 January 2020.

The Claimant's grant application

53. The Claimant submitted a claim for year 2, with supporting documents, under cover of a letter dated 13 February 2020. Since first engaging with the Board in 2014, the Claimant had 'repeatedly' made clear that if it were found liable for levy, it would make a claim for grant. The Claimant was waiting for the outcome of its appeal to this court '(and indeed that of any appeal from the Court of Appeal's decision)' but thought, nevertheless, that it should provide the details of its claim. The claim was without prejudice to the arguments in the appeal (that the Claimant was not an employer in the construction industry and that it had no construction establishment).

54. The Claimant summarised the history from its point of view. Based on its 'net payments to subcontractors' the Claimant would be the biggest ever annual levy payer. 'Based on the number of people we contract with who undergo training, it would follow that' the Claimant would be the biggest ever recipient of grants. The Board had chosen to register the Claimant in February 2016, and the Board should have helped the Claimant as it had helped other levy payers. The Claimant referred to the meeting on 16 May 2017 and to the letter of 23 May 2017. After delays and a further meeting on 14 September 2017, 'all looked positive'. But the Board had 'shut the issue down' without proper analysis. The Board had finally confirmed on 5 March 2018 that it would consider any application properly. The Claimant referred to the three requirements relied on in the letter of 26 October 2017 (see paragraphs 45 and 46, above). They were not in the relevant Policy and it was unfair to apply them to the Claimant 'after the event'.

55. Whether or not they could be 'enforced' for 2015, the Claimant said that, in any event, it met them. First, the Claimant relied on the terms (a) of its contracts with its clients which made them responsible for all the requirements imposed by health and safety legislation in relation to the engagement of an operative and (b) of its contracts with the operatives, which obliged them to 'comply with the requirements stated in the Client's Health and Safety Policy and those regulations enforced by the Health and Safety Executive'. It was a 'necessary corollary' of those requirements that clients should provide 'full and adequate training and operatives must attend it'. Second, the Claimant met the cost of training 'in that a proportion of the payments it makes to operatives is in respect of the training [the Claimant] contractually requires those operatives to attend'. They are paid by the Claimant for the time they spend in training. Third, in the case of category D claims, the Claimant identified the need for, organised, and accepted the cost of training by arranging for its people to give training on site. 'But it is true for the rest of the training in respect of which grant is claimed, too'.

56. The Claimant then set out, in a table, the value of its claims for the three relevant years. The total was just over £28m. The sum claimed for year 2 was supported by contractual documents 'for each of the potential learners you say are [the Claimant's] statutory employees and in respect of payments to whom [the Claimant] is therefore liable to levy. It follows that the grant rules provide that we are the only organisation eligible for grants on the training they received'. The Claimant had only provided the documents for the first year, because of their volume, but could provide the documents for later years if asked. The letter then explained the seven headings in the attached spreadsheet. All claims were expressly based on estimates, approximations or assumptions. The Claimant enclosed 94,690 pages of documents, of which nearly 80,000 were redacted copies of contracts. 14,920 were 'training records'. The 'records were checked as a sample to be projected over the operatives engaged with the period'. If necessary, the amount and quality of the training could be verified further 'by using sample records of client training, and evidence from our clients who are well engaged with our disputes and the issues around CITB levy in general. However, because many of our clients are CITB registered and use CITB material, and the likely outcome would be an even higher grant claim' the Claimant saw no current need to provide that material. The Claimant was confident that it had provided the same evidence as other substantial grant claimants. The Claimant noted the Board's letter of 24 January 2020. 'We look forward to engaging with you constructively in these grant applications, and in a timely fashion'. The letter referred to the consultant. He was available to work with the Board on this, as before. The letter ended, 'and we look for a similar degree of co-operation and flexibility to that shown to Berkeley and others being shown to [the Claimant], and to reaching a satisfactory conclusion…'

The Board's request for information

57. In a letter dated 4 March 2020, the Board asked for as much information as possible about the Claimant's claims for years 3 and 4.

The decision of this court in Hudson Contract Services Limited

58. On 10 March 2020, this court handed down its judgment ([2020] EWCA Civ 328; [2020] 4 All ER 1007) in the Claimant's appeal against the decision of Lambert J (see paragraph 50, above). This court dismissed the appeal. It held that, on the proper construction of article 3(1) of the 2015 Order, the Claimant was an 'employer in the

construction industry', and that the ET had been entitled to conclude that the Claimant's operatives had been employed 'from' (if not 'at') the Claimant's head office, which was, accordingly, a 'construction establishment'.

The Decision

59. The Board replied to the Claimant's application in a letter dated 26 June 2020, which I have referred to as 'the Decision'. The Decision was the subject of the Claimant's application for judicial review and is the subject of this appeal. The Claimant had in the meantime responded to the Board's request for further information about the other grant years (see paragraph 57, above) so the Board considered the applications for each of the three relevant years.

60. The Board noted that the claims had been made 'outside the ordinary timeframe' set out in the Policies for the relevant years. The Claimant had not met other conditions for grant: the timely completion of a levy return, the payment of the assessed levy, or an agreed appropriate direct debit arrangement. The Board had considered whether there were exceptional circumstances which would enable it, as a matter of discretion, to consider the claim despite the fact that the Claimant had not met the 'gateway conditions'. As the Claimant had been disputing its liability and had appealed, and the levy is not recoverable during an appeal, the Board decided to consider the claim, with the exception of the claim for supplementary grant, to which different considerations applied.

61. The Board rejected the entire claim for year 2. It decided that the Claimant was not eligible to receive grant under four listed heads for years 3 and 4. It also decided that the Claimant might be eligible under two other heads in those years, but that it needed further information in order to consider those claims. If the Claimant wished to challenge the first two decisions it should do so promptly. The Claimant was liable for some £27m in levy. That liability had been upheld in three different courts. I interpose that, as I understand matters, the Claimant still has not paid any of that amount.

62. In section 2 of the letter, under the heading 'General', the Board repeated its case that the three requirements applied to the application. In any event, this approach was the 'practical embodiment' of the statutory scheme. The purpose of grants was to encourage adequate training for workers in the industry. Section 5 of the Act gave the Board a broad discretion. The Board's position, in the exercise of that discretion, was that it would not generally be appropriate to pay grant to an employer who did not meet the three requirements. Giving a grant to a body for training which had been paid for by others would not serve the statutory purpose. The Claimant had never suggested that it had changed any of its arrangements about training employees in reliance on the difference between the Policies for years 1, 2, 3 and 4.

63. The Board did not accept that the Claimant met the three requirements in relation to four of the heads, for the reasons given in paragraphs 2.6-2.8 of the Decision. The primary purpose of the contractual provisions on which the Claimant relied was to ensure that the client, rather than the Claimant, was responsible for operatives' health and safety. The Claimant did not identify training needs, or organise training to meet those needs. The clients would identify the need for training and organise the necessary training. To pay grant to the Claimant in those circumstances would not further the

statutory purpose. Contrary to the Claimant's argument, it did not bear the financial burden of training. It did not pay for training itself, or pay others to do it. The fact that operatives were trained at work, and were paid for their work by the Claimant (who recovered it from clients) was not enough. To pay grant in such circumstances would not further the statutory purpose. In reaching those conclusions, the Board had taken into account the evidence given by the Claimant in earlier litigation, as explained in paragraph 2.8 of the Decision.

64. The Board explained, in section 3, why it had refused the claim for year 2. The Claimant was not registered to pay the levy until February 2016. The first year of liability was based on the 2016 levy assessment. Its liability was not 'raised' until 18 February 2017 (see paragraph 42, above). Paragraph 2 of the Policy for year 2 made it clear that the only grants which the Claimant was entitled to claim were the new entrant and apprenticeship grants, from 1 August 2014: but those were not part of the claim. The Claimant would only potentially have been able to claim other grants from 1 August 2016, under the Policy for year 3. Further, the Board would not accept the claim for four heads of grant for the same reasons as applied in relation to years 3 and 4.

65. In section 4, the Board considered, under seven headings, the claims for grants in years 3 and 4. The first was 'Company Inductions', for (a) the Claimant's own inductions for new starters, and (b) for inductions done by the Claimant's clients. The Claimant might be eligible for (a) if it provided more information. The claim for (b) was refused, for the reasons given in section 2 of the letter (see paragraphs 62 and 63, above). Further, the claims were, on the face of the letter, 'customer and site inductions'. The TDP rules for years 3 and 4, which were generally taken into account by the Board when deciding claims, explicitly excluded customer and site inductions, in the ninth bullet point under the heading 'What training is not supported'.

66. The Board considered the claims for the next three types of training together. The Board rejected the claims for the reasons given in section 2 (see paragraphs 62 and 63, above). Further, even if the Board had been satisfied that the Claimant met the three requirements, it would not have been satisfied that the Claimant had given enough detail to show that the training was within the TDP rules. The Board was not asking for that information; but noting that even if its position in section 2 was wrong in principle, it would not follow that the Claimant would be entitled to those grants.

67. The Board considered that the Claimant might, in principle, be entitled to grants for training in relation to the Claimant's site audits, as it seemed that the Claimant might have met the three requirements in relation to that training. The Board would write separately to the Claimant about that.

68. The Board was not yet in a position to decide what if any deduction could be made for grant already paid for existing clients. The Board did not accept that the Claimant was entitled to any supplementary payment uplift. That could only be paid to employers who completed a 2015 levy return and were assessed to levy for that year. The Claimant was not liable to pay levy until 2016 and was therefore 'out of scope' for that. It was intended to recognise employers which complied fully with the requirements of the scheme. The Board rejected the assertion that the Claimant's 'ultimately unsuccessful' challenge prevented the making of timely payments.

The Claimant discloses, in November 2020, its 're-structuring' on 26 March 2018

69. The next relevant communication from Mr Anfield of the Claimant was a letter to the Board dated 20 November 2020, headed 'Re: Extent to which [the Claimant] was liable to levy'. The Claimant referred to a telephone conversation on 17 November 2020 and an email on 19 November. Mr Anfield wished 'to confirm' (over two years and seven months after the event) that the Claimant had ceased to be an 'employer' for levy purposes on 26 March 2018 'as a result of restructuring'. Before the 'restructuring' the Claimant had contracted with clients, and had contracted with operatives. The aim of the restructuring was to split those activities between different corporate vehicles. The Claimant had only existed, since 26 March 2018, to defend its position on grant and levy. It had not contracted with operatives, 'so therefore has not been an employer for levy purposes'. They had no intention of changing that, so asked that Hudson Contract Services Limited 'now Knot Builders Limited' be removed from the levy register beyond the 2016 levy.

These proceedings

The grant of permission to apply for judicial review of the Decision

70. The Claimant applied for judicial review of the Decision on 21 September 2020. Collins Rice J refused permission to appeal for judicial review on the papers. Mr Anthony Elleray QC gave permission after an oral hearing on 28 June 2022.

The grounds for judicial review considered by the Judge

71. As appears from the Judgment, the Claimant relied, by the stage of the hearing, on three somewhat diffuse grounds.

    1. The Board had acted unlawfully by not considering whether to relax the waiting period which was provided for in the second paragraph of the Policy for year 2, which was really directed at new entrants to the industry. The Board had delayed registering the Claimant between September 2014 and 1 April 2015 (the relevant cut-off date). The Claimant also had a legitimate expectation that it would be eligible in year 2 based on what its counsel had said at the hearing on 8 October 2015 (see paragraph 37, above).
    2. The Board had erred in law in applying the three requirements. The Board should have decided the application in accordance with the words of the Policy which was in force in years 2 and 3. The Board was relying on a secret unpublished policy, which was unlawful (*Lumba*). The Claimant had a legitimate expectation that the three requirements would not be applied to its claim. In any event, if they were so applied, the Claimant met them.
    3. The Board acted irrationally by treating the Claimant differently from others in the same position.

72. The Board argued that if the Claimant were otherwise entitled to any relief, the claim should not be remitted to it. If it had known, when it made the Decision, that the Claimant had not been within the scope of the levy for two of the three years, it would not have exercised any discretion to consider a retrospective application for grant for those two years. This argument is the subject of the RN.

The Judgment

Did the Claimant ask the Board to depart from its time-related eligibility policy?

73. The Policy for year 2 unambiguously provided that an employer newly registered in that year was not eligible to claim grant until 1 August 2016. The policy was not just directed at 'new entrants to the industry'. That was the starting point. It was agreed that the Board should be prepared to depart from the policy in appropriate circumstances (*Lumba*, paragraphs 20 and 21). The Claimant had not made an express request for such a departure in the application, but had made an implicit request. The Board had elected to waive other conditions, without any express request. The Board should have given 'rational consideration' to that implicit request. The application 'had alluded to the history of matter of which [the Board] was well aware and which it was able to take into account' (Judgment, paragraph 21).

74. The Judge added that, on the proper construction of the Act and of the 2015 Order, the Board had no duty 'proactively to seek out and register' an employer. Article 3(1) of the Order did not help the Claimant. Section 5(4) of the Act was permissive. An employer could ask to be registered at any time. The suggestion that 'any such duty arose on the facts of this particular case, notwithstanding the Claimant's persistent and trenchant representations, first made in 2008, that it was not such an employer, or subject to levy and that its registration was wrong in law, and its challenge to the 2015 Levy Order itself, is both fanciful and opportunistic'. The decision in *Beacon Roofing* did not change that. That dispute did not concern the Claimant and the issue was different. The Board's internal discussions did not change that, either; nor did the Claimant's inquiries in 2014; nor the Board's reply dated 21 October 2014 (see paragraph 35, above); nor the Board's 'minded to register' decision and later decision to register the Claimant (see paragraph 40, above), and after further information and an 'apparent shift' in position by the Claimant) (Judgment, paragraph 22).

Did counsel's statements at the renewal hearing in October 2015 give rise to a legitimate expectation that it was eligible for grant in year 2?

75. The Judge held that this argument fell 'at the first hurdle' (paragraph 24). Counsel had referred to a heading which was not in the relevant policy: either counsel made a mistake, or the note was inaccurate. The heading counsel intended to refer to was 'Who can't claim'. That was clear from the later part of the note. That meant that what counsel was talking about was a different issue. He was not talking about the requirement to be registered by a particular date in order to be eligible. In any event, it was very unlikely that such 'broad brush submissions' were to be, or were intended to be…interpreted to mean that the Claimant would receive a grant, as opposed to being entitled to apply and have its application considered in accordance with the relevant policy. It was significant that the Claimant did not refer to counsel's statements in its (protective retrospective) application, or in its pre-action protocol letter. 'At its highest…counsel's submission was, and was understood to indicate that, the Claimant's business model did not automatically rule out such a claim'.

Did the Board act unlawfully by applying the three requirements to the Claimant's application?

76. The evidence of Mr Byrne, for the Board, was that the omission of the three requirements from the policy for years 2 and 3 'could properly be described as an administrative oversight'. He did not know whether an employee had removed the requirements by mistake, or consciously, but acting without instruction or authority

from the appropriate decision-maker. It was not likely that there had been a change in policy, and, in any event, the Board had continued to apply the three requirements in years 2 and 3 in assessing claims for grant (paragraph 26). The Judge accepted Mr Jaffey's submission that it was 'inherently unlikely that it had been removed by way of oversight', and that, in any event 'an objective reader' could not 'discern' the three requirements 'from the relevant policies themselves' (paragraph 27).

77. The Judge then cited various passages from the relevant authorities (paragraphs 28 and 29). She accepted Mr Knight's submissions about the underlying principles. First, a public authority must have a consistent approach. There was no challenge to Mr Byrne's evidence that the Board had consistently applied the three requirements to applications during years 2 and 3. She held that that approach was 'not inconsistent' with the words of the relevant policies. The letter to the Claimant from the Board's solicitors (26 October 2017; see paragraphs 45 and 46, above) had also given the Claimant a 'transparent statement of the circumstances in which the criteria applied will be exercised'. It was irrelevant that the letter postdated years 2 and 3: the Claimant's application was made two years and four months after the date of the letter (and, I would add, long after the end of years 2 and 3). Third, the point of giving notice of the criteria was to enable the Claimant to make representations about the criteria, and challenge any decision. The Claimant was able to do both when it made the application. On the facts, the Board was not applying a 'secret policy' (paragraph 30).

78. In any event, the TDP rules were relevant, as Mr Jaffey had accepted. They contained a requirement about payment of the costs of training in relation to four categories of grant. There was no evidence that the Claimant had relied in any way on the absence of the three requirements (paragraph 31).

79. The Judge held that 'the overriding interest' in ensuring a close connection between the arrangement of, and payment for, training, and the receipt of grant justified the Board in resiling from any representation (paragraph 32).

Did the Claimant meet the three requirements?

80. The Judge described the contractual provisions on which the Claimant relied. In paragraph 34 she explained her five detailed findings that this material did not satisfy the three requirements. The Board had been 'right, and certainly entitled' to reach that conclusion.

    1. There was no contractual requirement to provide or to attend any training or mechanism for informing the Claimant or the Board about any training. Indeed Mr Jaffey told the Judge that the claimant did not monitor training records. His submission that the Board could insist on training being done 'rings hollow'.
    2. The Claimant had not identified any specific needs for training; and the training for which grant was claimed was just about health and safety.
    3. The Board did not suggest that the Claimant had to do the training, but the Claimant did not arrange training, either. 'On its own case, the Claimant has done nothing more than require that the client take on that role and that the operatives attend training

once organised, in each case only in the sphere of health and safety'.

4. The Claimant did not have any financial responsibility for the cost of training. It simply paid the operatives for their time, whether that was spent in training or in other work. Someone else would bear the cost of training. She quoted Mr Anfield's evidence in earlier proceedings. Nor did the obligation to pay levy satisfy that criterion; that was payable because the Claimant was an employer in the construction industry.
5. The decision of this court did not, contrary to Mr Jaffey's submissions, compel a different result. The Claimant's choice of business model was not dictated by the legal framework. It could have chosen a different model which enabled it to meet the three requirements. The fact that no-one would receive a grant for training done in the relevant years was not a perverse result, but the consequence of that choice. The Claimant's suggested interpretation of the three requirements was 'strained'. She added that 'the windfall argument' did not help the Claimant, either. The 'cynicism' of that argument, in the context of the Claimant's 'substantial' claim for grant for a period during which 'it will not itself be subject to levy, and in circumstances in which it has not paid the levy' which it accepted was 'due…in November 2020' was 'noteworthy'.

The Claimant's grounds of appeal

81. The Claimant was given permission to rely on four grounds of appeal.

1. The Board breached its statutory duty to assess the Claimant's liability to levy at nil for the years before year 2. If the Board had not breached its statutory duty, the waiting period would not have applied in relation to a claim for year 2. The Judge should have found that the Claimant was entitled to grant in year 2 and that the Board was obliged to disapply the waiting period (ground 1(a)).
2. The Judge was wrong to hold that counsel's submissions did not give rise to a legitimate expectation that the Claimant was entitled to grant in year 2 (ground 1(b)).
3. The Judge was wrong to find that the Board was entitled to apply the three requirements in years 2 and 3. The Claimant was entitled to have its claim for grant decided in accordance with the published policy which was in force in years 2 and 3 (ground 2(a)).
4. The Judge was wrong to find that, if the three requirements applied, the Claimant did not meet them (ground 2(b)).

The Board's ground of appeal

82. The Board lodged a notice of appeal on the same day as the Claimant. Arnold LJ gave the Board permission to appeal on the same day as he gave the Claimant permission to appeal. The Board's ground of appeal relates to the principle that a public authority should not fetter its discretion by adopting a rigid policy, but should listen to any request

to depart from its policy. The Board argues that that the Judge was wrong to hold that that principle can be engaged by an implied request, or, if it can be, that, in the context, the application was an implied request to the Board that it waive the waiting period.

The Respondent's Notice

83. On 17 May 2024, the Board lodged the RN. The RN relied on its submission to the Judge that were the Claimant's claim to succeed to any extent, it was at least highly likely that the outcome for the Claimant would not have been substantially different, so that relief should be refused under section 31(2A) of the Senior Courts Act 1981 ('the 1981 Act') (see further, paragraphs 88 and 89, below). The Board maintained that submission. It was also a reason for dismissing the appeal under grounds 2(a) and 2(b).

The oral submissions

84. It is not necessary to record the parties' oral submissions at any length, as, to a large extent, they repeated the points they had made to the Judge, which she recorded in great detail between pages 8 and 26 of the judgment (in paragraphs 16 and 17).

85. Mr Jaffey's oral summary raised three broad issues.

1. (a) The Board's reliance on a waiting period before the Claimant was eligible for grant was unfair because the Claimant was not 'a new entrant'. The Board had acted unlawfully in not registering the Claimant sooner. If the Board had registered the Claimant sooner, the Board would have given a nil assessment, but the Claimant would not have had to wait later on for grant. The Board appealed from the Judge's finding that it should have waived the waiting period; but the Claimant argued in its cross-appeal that the Judge should have gone further. She should not have remitted the claim to the Board, because there was only one possible answer; or she should have made a declaration to 'help' the Board on remittal.
   (b) Counsel had made a clear and unambiguous statement to the Administrative Court which gave rise to a legitimate expectation; the Judge was wrong to reject that argument and only did so because she had misunderstood the evidence.
2. The three requirements were not in the Policy for years 2 and 3. The Judge found that they were removed deliberately. As a matter of legitimate expectation and fairness the Claimant was entitled to have the Policy applied without the three requirements, even though the Claimant was told in 2017 that the requirements would be applied. If the Judge was right to hold that they had been lawfully reintroduced, then she was wrong to find that the Claimant did not meet them.
3. The RN argued that any relief should be refused for last 2 years because the Board would never have waived the retrospectivity rule in the Claimant's favour if it had known about the re-structure in 2018. Mr Jaffey accepted that he had given no advance written notice of his argument on this point, as 'the temperature of the allegation' had gone up. He eventually apologised for that omission. His argument appeared to be that

> the Board could not complain that it had not been specifically told about this until 20 November 2020, because it could have worked out '(and had worked out)', both that there had been a re-structure, and its implications for the Claimant's liability to levy, from reading the Claimant's published accounts. He also accepted, in answer to questions from the court, that the Claimant had not specifically said, then, that it was no longer an employer in the construction industry.

Discussion

General

86. As the Judge found, and it cannot be controversial, the legislative scheme provides for a close link between liability to pay levy and eligibility to claim grant. It does not necessarily follow, however, that an employer which is liable to levy is, because of that fact alone, also entitled to grant. Against that background, I endorse the Judge's comments that the Claimant's arguments were both 'opportunistic' and 'cynical.' Two features of this case, in particular, prompt my remark.

87. The first is that the Claimant had been vigorously asserting for a decade or so that it was not liable to pay the levy, had been represented by solicitors for much of that period, and had launched an application for judicial review, and brought a separate appeal, which it pursued from the ET to this court. The aim of all that litigation was to ensure that the Claimant should not be found liable to the levy. The suggestion that the Board breached a statutory duty to register the Claimant at some earlier point than it did register the Claimant, or that the Claimant could have suffered any disadvantage from not being registered sooner, when it was actively fighting off registration, is untenable.

88. The second is that when the Claimant eventually made the application for grant, it did not disclose to the Board that, well over two years previously, it had re-organised its business with the express intention of avoiding any liability to the levy. That fact was plainly highly material to its application. It was claiming grant for a significant period in which, unlike the Board, it knew that it was not liable to pay the levy. In that context, the Claimant's complaint that the application had been treated unfairly, when it knew full well, and before it made the application, how the Board would approach it (see paragraphs 45 and 46, above) and when it did not fully disclose its position to the Board, or explain to the Board why the Board's normal rules should not apply to the application, had and has no merit.

89. This conduct is relevant to the Board's subsidiary argument in the RN that, if for any reason the cross-appeal should fail, the Claimant should get no relief, because it is highly likely that the outcome would have been the same. If the Board had known, when it made the Decision, that the Claimant had not been liable to pay levy since March 2018, it is highly likely that it would have rejected the application. Had I needed to, I would have upheld that subsidiary argument.

90. I would also have rejected the ambitious suggestion that the Board should have worked out, from the Claimant's published accounts, that it was no longer liable to levy, and when that liability ceased. The Board's duties in this regard are analogous to, and are no wider than, those imposed by the reasoning in *Secretary of State for Education and*

Science v Tameside Metropolitan Borough Council [1977] AC 1014. A duty to comb through the published accounts of every employer in the construction industry for clues about whether a corporate restructure might affect their liability to levy goes much further than a duty to make reasonable inquiries.

Ground 1(a) and the cross-appeal

91. The Judge was right to find that the waiting period was a published requirement. It is clear that the Claimant did not, in the application, ask the Board to disapply the waiting period. The high point of the argument that the Claimant made an implied request in the application is the last sentence of paragraph 56, above. This is no more than a vague exhortation. The starting point (see *Lumba*) is that a decision-maker is not only entitled, but expected, as a matter of public law, to apply its published policy to a particular case. That (in an application case) is what all applicants expect. They expect all similar applications to be treated in the same way. It is only if an applicant actually makes representations to the decision-maker under the terms of the policy, such as a plea that some aspect should not, for some exceptional reason, be applied to his case, that the decision-maker can or should consider whether or not it would be right to depart from the published policy.

92. The premise of ground 1(a) is that the vague exhortation in the application (see the last sentence of paragraph 56, above) imposed on the Board a duty to hunt through all its relevant policies, and to ask itself, in relation to each provision which might affect the application, whether it should disapply that provision, even though the Claimant, which was especially well-informed about the scheme, was represented by solicitors, and had been communicating regularly with the Board about a possible application, had not identified the waiting period as a particular adverse requirement, still less explained why, in its exceptional case, that requirement should not be applied to the application. That premise is untenable. Further, the waiting period was rightly applied by the Board: other applicants in a similar position would have been aggrieved if it had not been. As the Board pointed out in its letter of 12 September 2018, the Claimant was not in the same position as other grant claimants (see paragraph 49, above). The Board had been encouraging the Claimant to fill in a levy return and claim grant in that return for a long time before the Claimant did those things. The Claimant had resisted registration for years. If it could or should have been registered sooner, that was its responsibility alone.

93. The Judge was wrong to find that the Claimant had made a relevant implied request, or that if made, such an implied request could on these facts generate a duty to consider anything, when the Claimant could have made, but never did make, any relevant request, or explain why such a request should be met. There is no material for the supposed duty to bite on. There is no clue in the Judge's reasoning about what compelling factor the Board should have taken into account in considering whether or not to disapply the waiting period. This was not a meritorious case, for the reasons given by the Judge, let alone an exceptional case. If there was ever a case in which the waiting period was rightly applied, it was this case. For that reason alone, I would allow the Board's cross-appeal.

94. The Judge was right to find, on ground 1(a), that registration is an administrative process and that there is no express legislative duty to register an entity. The Board is not under any broad duty imposed by public law to expend time and money

investigating, and arguing with, a recalcitrant subject, unless and until it is reasonably clear to the Board that that entity is liable to pay the levy. Again, the Board's duties in this regard are analogous to, and are no wider than, those imposed by the reasoning in the *Tameside* case (see paragraph 90, above). Still less is the Board under a duty to draw subtle inferences from a court decision in litigation involving a different entity from the Claimant (that is, the decision of this court in *Beacon Roofing*). I agree with the Judge that there was a significant change in 2015. She was therefore right, for the reasons which she gave, to reject the argument that the Board had breached a duty to register the Claimant by not registering it sooner than it did.

95. This conclusion, however, provides further support, if it is needed, for my view that there was no basis on which the Judge could properly have found that the Board should have disapplied the waiting period. That is reinforced by the failure of the Claimant to rely on any such argument in the application as a reason for the disapplication of the waiting period.

Ground 1(b)

96. The Judge was right to reject what is now ground 1(b). Whether or not she referred to the right heading in the right policy is immaterial, as she gave a second independent reason for rejecting this argument. The underlying point is that counsel's statements in the course of the hearing in October 2015 were not, and could not reasonably have been interpreted as, a clear and unambiguous representation that, come what may, an application which had not yet been made would succeed. The statements were expressly based on 'the documents', which must mean the documents which existed at the date of the renewal hearing. Quite apart from anything else, counsel could not then have known whether an application would be made, or when, or what the relevant circumstances would be when it was made. Later events illustrate this point. I will give only two examples. First, the issue about the applicability of the three requirements had not yet surfaced. Second, the Claimant had not re-organised its business in 2015, but did so before it made the application, and that was highly material to its eligibility for grant, and to the exercise of the Board's discretion to disregard the requirements of the Policy.

Ground 2(a)

97. A sensible starting point for ground 2(a) is to ask why it matters whether or not the three requirements were expressed in the Policies for years 2 and 3. It is clear from, for example, section 1(1), section 5(1), section 5(4), section 13 and section 14 of the Act that the clear statutory purpose is that a board should support and encourage suitable training for people who work in, or intend to work in, the construction industry. The Policies are subordinate to the legislation. Neither the express terms of the Policies, nor omissions from those terms, could oblige the Board to subvert that statutory purpose by paying grant to an employer which was doing to nothing to foster that statutory purpose.

98. The premise of ground 2(a) is that the Judge was obliged to apply dicta in the relevant authorities, in particular *Lumba*, in a wholly mechanical way, and to find that the Board acted unlawfully, even though none of the underlying principles was offended on these facts. The most relevant underlying principle is that a person should know what policy a decision-maker will apply to his application so that he can try to persuade the

decision-maker that his case is exceptional and that the policy should not apply to him. The Claimant had exactly that opportunity, as it was told, in October 2017, that the Board would apply the three requirements to any application it might make in the future. From the Claimant's point of view, at the point when it made the application, this was not a 'secret' policy, therefore. The Claimant did not apply for grant in years 2 or 3, and did not know or care about the terms of the Policy in those years. It did not in any way rely on the fact that the three requirements were missing from the Policy in those years, as the Judge found. The Claimant made a retrospective application long after the end of years 2 and 3. The Claimant was not treated unfairly, as it made the application knowing that the Board would apply the three requirements to it. A decision that the Board was prevented, long after the relevant years had ended, from applying the three requirements to a retrospective application, would not only contradict the clear statutory purpose but would be a perverse triumph of empty form over substance.

Ground 2(b)

99. The Judge considered the arguments on ground 2(b) in depth, over nearly three pages of the judgment. I have summarised her reasoning at paragraph 80, above. I will not improve those points by repeating them. The Judge was right, for the detailed reasons which she gave, to reject ground 2(b).

Conclusion

100. For those reasons I would dismiss the Claimant's appeal and allow the Board's cross-appeal. If necessary, I would also have accepted the argument in the RN (see paragraph 83, above).

Lord Justice Coulson

101. I agree that, for the reasons set out by my lady, Lady Justice Elisabeth Laing, the Claimant's appeal should be dismissed and the Board's cross-appeal should be allowed. I would add only this on ground 1(b), where I consider the Claimant's case as to legitimate expectation to be an artificial construct. If the Claimant had truly had an expectation that the published time limits would not be applied to their application for grant, based on what counsel had said in court (on a different point) in October 2015, they might have been expected at least to refer to that statement in their grant application of 13 February 2020 (paragraphs 53-56 above). In fact they make no reference to it at all.

Sir Andrew McFarlane P

102. I also agree.