Neutral Citation Number: [2024] EWHC 115 (Admin)

Case No: CO/3384/2020; AC-2020-LON-002644

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2024

Before :

MRS JUSTICE ELLENBOGEN

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Between :

The King (on the application of Knot Builders Limited)	**Claimant**
- and -	
Construction Industry Training Board	**Defendant**

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- -

Ben Jaffey KC and Christopher Leigh (instructed by **KPMG Law**) for the **Claimant**
Christopher Knight (instructed by **Fieldfisher**) for the **Defendant**

Hearing dates: 28 February and 1 March, 2023

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APPROVED JUDGMENT

This judgment was handed down remotely at 2pm on 25 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE ELLENBOGEN DBE

Mrs Justice Ellenbogen DBE:

1. The Claimant was formerly known as Hudson Contract Services Ltd. Until 25 March 2018, it provided services to employers operating in the construction and engineering industries in relation to the self-employed part of their workforce. By its contractual arrangements with its clients, it received a fixed fee in return for contracting with, and providing payroll services for, self-employed construction workers, known as 'operatives'. In broad terms, the Claimant would bear the risk of such workers being considered employees, with attendant rights. It did not itself supply labour to its clients, nor did it retain a pool of workers. In *Hudson Contract Services Limited v Construction Industry Training Board* [2019] EWHC 45 (Admin), [5] to [8], its business model was described by Lambert J as follows:

> 5. Hudson is a company established in 1996. Its headquarters is in Bridlington, East Yorkshire although it has a small off-shoot office in Manchester. Its clients are small construction firms who have been engaged by a principal contractor to deliver a specific element of a construction project. Where a client requires the services of self-employed individuals ("operatives"), the client will identify the operatives required and contract with Hudson that Hudson shall (a) engage those operatives on a self-employed contract and (b) supply the services of those operatives to the clients. The client is required to use Hudson's method statement to explain to the operative that he is to be engaged on a self-employed basis with Hudson (with the option of employment if he wishes) and the operative will then sign a contract for services with Hudson at the client's premises. The contract for the provision of services (self-employed) between Hudson and the operative spells out that, following the negotiation of terms between the operative and the client, "*Hudson will step into the shoes of the Client and contract with the Freelance Operative on the terms negotiated*" and that the operative "*has no contract of any type whatsoever with the Client*."
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> 6. It is the client which checks the operative's qualifications and competence, arranges the necessary insurance, negotiates the rates of pay and which is responsible for health and safety issues. Copies of the paperwork are sent to Hudson. Hudson supplies a software package to the client for the purpose of entering details of pay and hours for payroll purposes. The client must ensure that cleared funds are in Hudson's account for payment of the operative. Hudson will then pay the operative, withholding the tax liability and provide a pay breakdown to the operative.
>
> 7. Hudson's own directly employed workforce (that is, those engaged under contracts of employment or materially equivalent contracts) is small, including only its directors and 2 members of staff together with a small team of regional auditors. The directly employed staff provide a wholly office-based function. As [Counsel for Hudson] put it, none of those directly employed by Hudson wield a pickaxe or do anything which is physical in the construction industry. Hudson is not

> contracted to deliver construction outputs or activities; it makes no profit that is dependent upon construction operations; Hudson itself maintains no pool or bank of operatives and does not select them; the directly employed workforce has no supervisory or management function in relation to construction work. Operatives are not despatched or directed or controlled from Hudson's head office and whilst members of the directly employed team may visit construction sites for audit purposes (to check that operatives who state they are self-employed, are self-employed), typically, operatives will never visit the office in Bridlington (or Manchester) and few will ever need to speak to the Hudson directly employed team.
>
> 8. The function served by Hudson's business model is two-fold. It has the effect of transferring to Hudson (a) the administrative burden of operating a payroll function and (b) responsibility for and dealing with compliance issues (including compliance with the terms of the Construction Industry Scheme) and thus shifting to Hudson the risk of Employment Tribunal proceedings and HMRC status enquiries and adverse findings. For each operative engaged by Hudson, Hudson is paid £15 per week. The Employment Tribunal recorded that Hudson was currently paying around 27,000 operatives per week and that, in the levy period under dispute, it paid around 20,702 operatives per week.

2. The Defendant is the statutory body responsible for training the workforce in the construction industry. Pursuant to certain legislation to which I shall come, provision was made for levy payments to be made to the Defendant by employers in the industry, for the hypothecated purpose of promoting and supporting training in that industry and for grants to be payable in specified circumstances. The Defendant paid grants to employers who were subject to the levy, which could be offset against their levy obligation. The history of the relevant legislation was set out in *R (Hudson Contract Services Ltd) v Secretary of State for Business Innovation and Skills* [2016] EWHC 844 (Admin) [3] to [46] and need not be repeated here.

3. Over a period of years, the Defendant did not assess the Claimant for levy. Any such assessment would have resulted in a nil, or negligible, liability, owing to the then applicable formula under which a company in the Claimant's position had been entitled to deduct all sums received from its own clients, which, in the Claimant's case, exceeded those which it paid to self-employed contractors. Following a change to the formula (the subject of an unsuccessful challenge by the Claimant, by way of judicial review — see above), those subject to the levy could no longer deduct sums which had been received from their clients. The Defendant registered and assessed the Claimant for levy for the periods 2015/16, 2016/17 and 2017/18, in the aggregate sum of £27,403,993. The Claimant's appeal against the first of those assessments failed ([2020] ICR 1344). It is now common ground that the Claimant was not subject to levy for the subsequent periods because it had ceased operating in the industry from 25 March 2018, as a result of which the Defendant withdrew its levy claims for those periods. The remaining assessment is in the sum of £7,964,584, subject to set-off of any grant due to the Claimant. As to that, for each of the periods 2015/16, 2016/17 and 2017/18, the

Claimant had applied for a grant, in the aggregate sum of £28,066,327.45, spanning six categories:

a. (i) the Claimant's own company inductions for new starters, plus (ii) health and safety site inductions undertaken by its clients;

b. short duration training against a training plan, for operatives working on client sites;

c. short course, ad hoc, informal, modular, and formal training, received by operatives in order to meet obligations under applicable health and safety legislation;

d. site audits by the Claimant, in the course of which operatives received workplace training on a number of issues;

e. "toolbox talks" (being presentations to operatives, each of which regarding a single aspect of health and safety), delivered to the Defendant's standards; and

f. a supplementary payment of 10%, ordinarily provided to grant claimants who had submitted their assessments and paid the levy on time.

4. By letter dated 26 June 2020, the Defendant made three decisions, the first two of which are challenged in these proceedings:

a. ('Decision One') The Claimant was not eligible for any grant for the grant year 2015/16;

b. ('Decision Two') For categories (a)(ii) (b), (c), (e), and (f) above, the Claimant was not eligible to receive grant in the periods 2016/17 or 2017/18; and

c. For the periods 2016/17 and 2017/18, the Claimant might be entitled to a grant for categories (a)(i) and (d) above, but further information would be required.

The Claimant contends that Decision One is unlawful because the Defendant fettered its discretion by adopting an over-rigid application of its grant policy, as set out in its 2015/16 terms and conditions — having failed properly to have considered a departure from the latter — and by acting in breach of a promise which had created a legitimate expectation that a grant would be payable. Decision Two is said to be unlawful (other than in respect of category a(ii)) because the Defendant applied requirements which did not appear in, and which it had taken a deliberate decision to omit from, the 2015/16 and 2016/17 grant terms and conditions. The Claimant contends that it would be conspicuously unfair, and contrary to its legitimate expectation, if the Defendant were to be permitted to resile from the terms of its published grant scheme, and that, in any event, it (the Claimant) had satisfied the requirements in fact applied. It is further contended that the Defendant's decision not to make a supplementary payment was irrational because analogous payments had been made routinely to others in a similar position. It is the Claimant's case that, if Decisions One and Two are found to have been made lawfully, that will lead to an 'extraordinary windfall' for the Defendant — the sum assessed by the Defendant for the 2015/16 levy was the largest single

assessment in the history of the scheme, which the Defendant will receive notwithstanding that no third party will recover by way of grant the cost of the training which has in fact been provided. Such an outcome, it is said, would be contrary to the levy/grant scheme and unlawful, it being a conspicuous feature of this case that many of the other large levy payers receive a generous set-off by way of grant.

5. In the words of its Managing Director, since 26 March 2018 the Claimant has existed simply to defend its position on grant and levy.

The statutory scheme

6. The levy is imposed under a framework set out in the Industrial Training Act 1982 ('the ITA'). Section 1(1) empowers the Secretary of State to establish industrial training boards, of which the Defendant is one. Section 1(2) sets out relevant definitions, amongst which is that of the term 'employee', the extended definition of which includes self-employed individuals and carries through into the subsidiary legislation discussed below. As noted above, the Claimant engages such individuals, but does not engage 'traditional' employees who work under a contract of service. The Defendant's power to make grants is set out in section 5(4): *'An industrial training board may –... (d) make 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'*. By section 11(1), a training board may submit levy proposals to the Secretary of State to which, under section 11(2), he or she may give effect via levy orders. Provision is made by section 11(2A) for 'levy periods', *'by reference to which liability to the levy is established'*. Such periods specify the days by reference to which liability is assessed and vary in duration from a few days to a few months. Separate 'base periods' are those by reference to which the quantum of any levy for which an employer is liable is assessed (per section 11(2E)).

7. On 10 March 2015, the Industrial Levy (Construction Industry Training Board) Order 2015 ('the 2015 Levy Order') was made, under section 11(2) of the ITA. Article 3 established three levy periods, the first running from 11 to 31 March 2015; and the second and third comprising the first three months of, respectively, 2016 and 2017. An entity would be subject to levy in each such period if, during that period, it was an employer in the construction industry. The base periods were specified by Article 4, being the tax years respectively commencing on 6 April 2013; 2014; and 2015. Thus, for example, an entity which had been an employer in the construction industry between 11 and 31 March 2015 would have been liable for the levy in the first levy period, in a sum calculated by reference to the tax year running from 6 April 2013 to 5 April 2014. Article 5(1) provided that the Defendant '*must assess the amount of levy to be paid in respect of each construction establishment of an employer'*. By Article 5(2), 'construction establishment' was defined to mean '*any particular establishment of the employer engaged wholly or mainly in the construction industry during the necessary period'*. There was no express exemption from that obligation. The levy formula was set out in Article 7. The formula applicable to the third levy period differed from that applicable to the prior two. It is that change which has spawned this claim. That is because, under the first formula, an agency such as the Claimant would have a levy liability of nil; the levy instead being paid by the agency's clients. The formula applicable in the third levy period resulted in the agency, rather than its clients, paying the levy.

8. Article 7 of the 2015 Levy Order provided:

> **Assessment of amount of levy**
> **7.**—(1) In respect of the first levy period and the second levy period, the amount of levy to be assessed in respect of each construction establishment is—
>
> A + B - C
>
> where
>
> A is an amount equal to 0.5% of all emoluments which have been paid or are payable by the employer to or in respect of persons employed by the employer at or from the establishment in the relevant base period;
>
> B is an amount equal to 1.5% of all payments (excluding payments in respect of the provision of materials and any other payments which are not in respect of the provision of services) made to persons during the relevant base period under labour-only agreements in respect of work carried out at or from the establishment; and
>
> C is an amount equal to 1.5% of all payments (excluding payments in respect of the provision of materials and any other payments which are not in respect of the provision of services) received by the employer during the relevant base period from any other employers in the construction industry under labour-only agreements in respect of work carried out at or from the establishment.
>
> (2) In respect of the third levy period, the amount of the levy to be assessed in respect of each construction establishment is—
>
> A + B
>
> where
>
> A is an amount equal to 0.5% of all emoluments which have been paid or are payable by the employer to or in respect of persons employed by the employer at or from the establishment in the relevant base period; and
>
> B is an amount equal to 1.25% of the relevant part of all contract payments made by the employer at or from the establishment in the relevant base period.
>
> (3) "Contract payment" has the meaning given to it by section 60 of the Finance Act 2004.
>
> (4) The relevant part of a contract payment is the part of the contract payment in respect of which the relevant percentage is applied for the purpose of section 61 of the Finance Act 2004.

> (5) Where an amount described as "A", "B" or "C" is not a whole number of pounds, the amount shall be rounded down to the nearest £1.
>
> (6) Where a construction establishment ceases to be engaged in the construction industry during a levy period, the amount of levy imposed in respect of the construction establishment for that period is to be in the same proportion to the amount that would otherwise be due under this article as the number of days between the commencement of the levy period and the date of the cessation of engagement (both dates inclusive) bears to the number of days in the levy period.

9. The effect of Article 7, during the first and second levy periods, was that 'B' represented 1.5% of payments made under labour-only agreements (i.e. those between the Claimant and its operatives), and 'C' represented the sum received from a client for labour-only agreements. As the Claimant charged its clients more than it was paid, and had few employees of its own, the quantum of its levy liability was nil, or negligible. By contrast, the formula applicable in the third levy period re-defined 'B' to mean 1.25% of payments made under the HMRC Construction Industry Scheme ('CIS'). Under that scheme, the Claimant paid self-employed operatives net of tax. The deduction formerly represented by 'C' was removed, with the effect that the Claimant became liable to pay a levy. Articles 8 and 9 applied a 50% discount for smaller firms and a complete exemption for those which were very small. Article 9 exempted charities from the levy. Article 10 imposed a duty on the Defendant to serve an assessment notice on every employer assessed to the levy. Amongst other requirements, such notices had to set out the total amount of levy payable. Such amounts could, and often would, be nil.

10. Following the third levy period, the 2015 Levy Order was replaced by The Industrial Training Levy (Construction Industry Training Board) Order 2018 ('the 2018 Levy Order'), made on 27 March 2018. The terms of that order were, materially, the same as those relating to the third levy period in the 2015 Levy Order. So far as relevant for current purposes, the first levy period under the 2018 Levy Order was the last three days of March 2018 and the base periods were the tax years respectively commencing 6 April 2016, 2017, and 2018.

11. By section 5(4)(b) of the ITA, the Defendant may *'make grants or loans to persons providing courses or other facilities approved by the board …'* For each grant year, the Defendant publishes terms and conditions. Those relevant to this claim related, respectively, to the grant years 2015/16; 2016/17; and 2017/18. The grant year did not correspond with either the levy period or the base period. For 2015/16 and 2016/17, the grant year ran from 1 August to 31 July. For 2017/18, it ran from 1 August to 31 March, the result of a proposal more closely to align the grant year with the levy periods.

12. As a matter of principle, grants were available to all employers *'registered as in-scope leviable with CITB including those in-scope employers who don't pay a Levy as they fall below the Small Business Levy exemption.'* The Defendant's evidence is that two-thirds of employers were nil-assessed for levy but

remained entitled to claim grant. The 2015/16 terms and conditions required that, in order to be eligible for a grant, an employer had to complete a levy return, to be received by the Defendant prior to 31 December 2015. In the Claimant's case, that provision was waived by the Defendant.

13. The 2015/16 terms and conditions also imposed limitations on grants payable to newly registered firms. The Claimant was first registered in February 2016, outside the specified registration window. The Defendant did not waive that provision, determining that it prevented the Claimant from claiming any grant for which it had applied in that year. Subject to qualification, grant could be claimed 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 2015/16 and the 2016/17 terms and conditions were materially identical. In addition to providing for a shorter grant year, the 2017/18 terms and conditions provided that, in order to be eligible, a claimant for grant '*must identify the need for training, organise the training and accept the cost of the training'*. It is the Defendant's position that the Claimant did not satisfy that condition, which it had also applied in the earlier grant years, albeit that the 2015/16 and the 2016/17 terms and conditions had not included it.

14. It is common ground that the Claimant ceased to be in scope for levy on 25 March 2018, three days prior to the commencement of the first levy period for which the 2018 Levy Order provided, under which it had no liability. It did fall within scope throughout the 2016/17 grant year and virtually all of the 2017/18 grant year, throughout which it had been *'registered as in-scope leviable'* and, in principle, eligible for grant.

The decisions under challenge

15. For Decisions One and Two, the Defendant gave as its reasons those following:

    a. **Decision One:** The Claimant had been registered for levy in February 2016; its first year of levy liability had been based upon the 2016 levy assessment and its liability had not been raised until 18 February 2017. In those circumstances, the second paragraph of the 2015/2016 grant terms and conditions made clear that the only grants to which the Claimant could have been entitled were of a type which had not formed part of its claim. It was only entitled to claim for other grants from 1 August 2016, that is under the 2016/2017 terms and conditions. Additionally, certain heads of claim would have been rejected for the same reasons which applied to the two subsequent years (see below);

    b. Decision Two:

    For grant categories (b), (c) and (e):

        i. For the years 2016/17 and 2017/18, the grant terms and conditions required that the Claimant identify the need for training, organise the training, and accept the cost of the training. Such requirements had been made expressly in the

terms and conditions for 2014/15 and 2017/18. The only reason why they had not appeared in the 2015/16 and 2016/17 terms and conditions had been through administrative oversight, rather than any change of policy. In any event, the approach whereby a person claiming grant should generally be the person who identified, organised and paid for the training was the practical embodiment of the statutory scheme. The purpose of the grant under section 5 of the ITA was that *'of encouraging adequate training of persons employed, or intending to be employed in the industry'*. The ITA accorded the Defendant a broad discretion as to whether and when to make grant payments. In the exercise of that discretion, the Defendant's position was that it would not generally be appropriate for a grant to be paid to an employer in respect of training which had been identified etc by others (that is where the financial burden had been met by others), which would not serve the purpose of encouraging training. Thus, there was nothing inappropriate in following the approach adopted by the Defendant, notwithstanding the absence of its express mention from the terms and conditions for 2015/16 and 2016/17. It was also noted that the Claimant had never suggested (nor could it credibly have done so) that it had changed any of its arrangements relating to the training of employees on the basis of differences between the terms and conditions for 2015 to 2017 and those for 2014/15;

ii. The Defendant did not accept that the Claimant's contracts placed responsibility upon its clients to ensure that operatives complied with health and safety legislation and with the clients' own health and safety policies, so as to mean that the Claimant had identified the need for and organised training. The primary purpose of the relevant contractual provisions had been to make clear that it was the client, rather than the Claimant, which bore responsibility for the operatives' health and safety. Consistent with that, so far as understood by the Defendant, the Claimant had not identified any specific training needs and had done nothing actively to organise specific training to meet those needs. It would have been the client which identified the need for, and organised, such training, to meet its own obligations and policies. In such circumstances, the Defendant considered that to pay the Claimant a grant in respect of such training would not meet the statutory purpose of *'encouraging adequate training of persons, employed, or intending to be employed in the industry'*. Secondly, the Claimant's position that it met the cost of training, in that a proportion of the payments made to the operatives was in respect of training which the Claimant contractually required the operative to attend, was not accepted. In addition to the points made regarding the purpose of the contractual provisions in question, the Claimant had not itself borne the financial burden in relation to training. It had neither

paid for training itself, nor paid third parties (including its clients) to provide such training. The fact that its employees might have attended certain training in the course of their work for the client, and been paid for their work by the Claimant (which had recovered that cost from its clients), would not suffice. In all the circumstances, in the exercise of its discretion, the Defendant was of the view that making grant payments to the Claimant would not be for the statutory purpose of encouraging training. In so concluding, it was said, the Defendant had taken into account the facts as it had understood them to be concerning the way in which the Claimant's business had operated over the relevant years, including as gleaned from evidence adduced by the Claimant in earlier litigation against the Defendant. That evidence had reinforced its conclusion;

For grant category (f):

iii. An entitlement to supplementary payment uplift was only available to employers who had completed a 2015 return and been assessed to levy for that year. The Claimant had not been liable to pay levy until 2016 and, accordingly, was out of scope for supplementary payment which was intended to recognise employers who had complied fully with the requirements regarding timely levy assessments and payment. That conclusion was unaffected by the Claimant's assertion that its (unsuccessful) challenge to the levy assessment had 'prevented' the making of timely payments.

The grounds of review: **the parties' submissions**

For the Claimant

16. Mr Jaffey KC, leading Mr Leigh, submitted as follows:

Ground One

a. The principles in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 were well-established. The Defendant's reliance upon the temporal restriction imposed by the second paragraph of the 2015/16 grant terms and conditions had constituted an unlawful fetter of its discretion, in the unusual circumstances of this case. In *R (Behary and Ullah) v Secretary of State for the Home Department* [2016] EWCA Civ 702, Burnett LJ had held that, even where a request to depart from a policy had not been made, there might be cases *'where the facts are so striking that, it would be irrational in a public law sense not to consider the grant of leave outside the rules, or at least seek clarification from the applicant whether he was seeking such leave'*. Here, the temporal restriction had been directed towards new entrants to the construction industry, and not to a situation in which the Defendant had registered and assessed a company many years after it had commenced business. On its face, the decision letter had indicated that the terms and conditions had simply been applied as a rule, without consideration of whether it had been fair or appropriate to depart from

them, a matter accepted by the Defendant, in its amended detailed grounds of resistance. The Defendant had contended, first, that the Claimant had not requested a departure from the policy. That contention was wrong; the application for grant had made clear that a claim was being made for 2015/16, and had included a request for departures from the strict terms to the extent necessary. Inherent in such a claim had been the contention that the Claimant was eligible to make it. Secondly, the Defendant had recognised the unusual circumstances of the case, and had waived key provisions of the terms and conditions, in particular the so-called 'gateway conditions', whereby (a) the claim ought to have been made within a specified timeframe within which (b) a completed levy return had been submitted and (c) an assessed levy had been paid, or an appropriate direct debit arrangement agreed. The Defendant ought to have adopted a similar approach to the waiver of the temporal restriction, and, at least, rationally considered making such a departure. There were compelling reasons for departing from the terms and conditions. The Defendant had delayed registering the Claimant between September 2014 (when the Claimant had first raised the issue of its liability to a levy), and 1 April 2015 (the "cut off" date by which the Claimant had to be registered under the temporal condition for full eligibility in the 2015/16 grant year). The Defendant ought to have registered the Claimant in accordance with its statutory obligations and could not now rely upon its failure to do so in order to justify refusing the grant. That was because the Defendant had a statutory duty to assess the amount of levy from all in-scope entities, even in cases in which the levy was new. On the Defendant's own case, the Claimant had been in scope from at least 2010 until 25 March 2018 and its business model had not changed. The Defendant had, therefore, been under a duty to assess (at nil) the quantum of levy owed in the years prior to the third levy period of the 2015 Levy Order and to have carried out the required internal administrative step (registration) in order to do so. A pre-action protocol letter, dated 23 March 2015 (predating the 'cut off' date by eight days), had prompted the Defendant to *'consider… whether or not, the Claimant should be registered for levy'*. Had the Defendant complied with its statutory duties, the Claimant would have been registered years before the 'cut-off' for the 2015/16 grant year and the temporal restriction would not have applied to prevent a grant in that year, a matter which appeared to have been conceded by the decision-maker, in his evidence in these proceedings. It was irrational for the Defendant to refuse to depart from the temporal condition, when its application had arisen through the Defendant's own breach of statutory duty. Nor could the Defendant exculpate itself by seeking to rely upon the Claimant's former position that it was not liable to levy. In breach of its statutory duty, it (the Defendant) had failed to reconsider its own position, despite a relevant decision of the Court of Appeal: *CITB v Beacon Roofing Limited* [2011] EWCA Civ 1203. Its reliance upon the Claimant's prior submissions regarding liability to levy were equally misplaced; as the decision-maker accepted, it was for the Defendant, and not the Claimant, to decide whether an entity was liable to levy. Nor was the Defendant's reliance in its pleaded case upon the policy

rationale said to underpin the temporal restriction warranted, or its stated concern, regarding a 'mismatch' which 'would risk undermining the viability of the grant scheme and levy'. The Defendant had since changed its policy to remove the waiting period from the date of registration, as evident from the 2019/20 and 2022/23 terms and conditions. The risk of any future mismatch was not, in practice, a concern. The financial viability of the Defendant would not be undermined. As evident from its annual report and accounts, it had very substantial cash reserves. Indeed, were levy to be payable without a grant, the Defendant would enjoy an unexpected windfall. In any event, there was no risk of a mismatch. The Defendant accepted that grant was offset against levy. Were the Claimant to succeed in its claim, its grant would be offset against its levy liability. The change in levy calculation meant that, for the first time, the full levy liability had been pushed down the chain of contractors onto the Claimant. That change alone sufficed to call for consideration of whether to depart from the terms and conditions. It had been unlawful for the Defendant not to have considered departing from the terms and conditions or, at least, to have sought clarification from the Claimant as to whether it was asking the Defendant to do so.

b. Secondly, the Claimant had a legitimate expectation of eligibility in the grant year 2015/16, founded upon the assurance given by counsel for the Defendant, at a permission hearing before Kenneth Parker J, on 8 October 2015, in the course of the Claimant's challenge to the lawfulness of the 2015 Levy Order. The note of that assurance, taken by the Claimant's then solicitors, had been accepted by the Defendant as being materially accurate:

> Counsel for the Claimant: It is said that will get grants; but it has been made clear that [the Claimant] will not be getting grants.
>
> Counsel for the Defendant: Can [counsel for the Claimant] make it clear from where he gets this?
>
> Counsel for the Claimant: CB2, Tab 29 — the terms and conditions of the grant scheme. Section headed "who cannot apply" [read]. [The Claimant] understanding, as this is repeated, in the 2015 version, is that they will not be entitled.
>
> Counsel for the Defendant: I can explain that this is a misreading and that they will be entitled.
> …
> The reason I raise that is to direct to the mischaracterisation of what Hudson does. That somehow being outside the provision of workers, they will not benefit from the

training. From the documents, there is nothing that prevents Hudson from benefiting from grants.

c. The assurances noted were clear, unambiguous and devoid of relevant qualification, stating in no uncertain terms that the Claimant would be entitled to grant, and that there was nothing which prevented it from benefiting from grants, in relation to the 2015 grant terms and conditions which formed the basis of refusal in the relevant grant year. It would be unfair to allow the Defendant to depart from the legitimate expectation; indeed, the availability of the grant had been advanced by counsel for the Defendant as a reason why it was proper that the Claimant should now be subject to levy. The Claimant's expectation, based upon the Defendant's assurances, was that grant would be available in the event that it were obliged to pay levy. No doubt that was why the Defendant had waived the requirements for levy applications (the so-called 'gateway' conditions). Clearly, it had recognised that levy and grant needed to be considered together, and that it had assured the court that that would occur.

d. Contrary to the Defendant's pleaded position, the representation had not been merely a promise that the Claimant would, in principle, be entitled to apply for grants, with no assurance that any such application would be determined on its merits and absent consideration of any applicable exclusions. The terms and conditions under consideration had been those which were now said to exclude entitlement, and yet the response had been that there was 'nothing' which would prevent the Claimant from receiving grants. Nevertheless, in a later e-mail, dated 31 May 2017, the Defendant had resiled from any legitimate expectation which it had created. That merely served to highlight the unfairness of permitting such an approach. The Claimant had been clear from, at the latest, 2015 that, if it were found to be within scope of the levy, it would apply for grant. It had been precisely for that reason that assurances had been given to the court. Sensibly, pending the outcome of the earlier litigation, no application for grant had been made, because the issue would not arise were there to be no levy liability. In these proceedings, the Defendant not only relied upon its failure to have carried out its statutory duties, but attempted to escape assurances given in open court as to the approach to be adopted. It could not fairly have it both ways. Counsel's submission had been made on behalf, and on the instructions, of his client. In so far as the Defendant had sought to rely on immunity in judicial proceedings, the prohibition on collateral attacks, and/or exclusion of a duty of care in connection with the conduct of litigation, such reliance was misplaced. Immunity was not engaged; the question here was whether it was lawful for the Defendant to resile from its publicly stated position that a grant would be available if the Claimant were subject to levy. The purpose of the principle was to hold a public body to its position, consistent with the requirements of fairness. There had been no collateral attack on the judgment of the High Court, which had subsequently found the 2015 Levy Order to

have been lawful. In these proceedings, the challenge was to the decision to refuse grant, and the assurances on which reliance was placed had been given in the course of argument in the earlier proceedings. The existence, or otherwise, of a duty of care was irrelevant as a matter of public law; the courts frequently found a legitimate expectation to have been generated in circumstances in which no duty of care could have arisen in tort.

Ground Two

e. The Defendant had applied a 'Tripartite Requirement', whereby it was incumbent upon the Claimant to identify the need for training; organise it; and pay for it, for the 2015/16, and 2016/17 grant years, notwithstanding its acceptance that no such requirement was to be found in the terms and conditions applicable to those years. The Claimant was entitled to have its claim for grant decided by reference to the Defendant's published policy, such that there had been no lawful basis upon which the Tripartite Requirement had been applied for the two years in question. The Defendant's contention that that requirement was, and always had been, part of the policy and had been omitted due to an administrative oversight, did not assist it, in constituting an apparent acceptance that it had operated a secret, unpublished policy, the application of which, per *Lumba,* was unlawful. It was no answer to say that notice had been given in solicitors' correspondence that the grant would be assessed by reference to the Tripartite Requirement; that letter had been sent after the end of the 2016/17 grant year and could not fairly be deployed to narrow the scheme after the event. It had constituted no more than advance warning of the Defendant's intention unlawfully to apply a previously secret policy. In any event, the Defendant had retreated from its position by letter dated 5 March 2018. Nor was it an answer to assert that the Tripartite Requirement had in fact reflected the policy adopted throughout the relevant period. The Defendant's pleaded case that its Training and Development Plan rules ('the TDP Rules') themselves contained the Tripartite Requirement could not assist it either; those rules had not been mentioned in the decision letter, other than in connection with the Defendant's decision to the effect that the Claimant was, in principle, entitled to a grant for new starter inductions. Furthermore, the decision letter had indicated that those rules were only <u>generally</u> taken into account when determining grant claims. In any event, the TDP Rules did not themselves contain the Tripartite Requirement; they simply provided that the construction firm should have 'paid the cost of the training'. In fact, the Claimant had paid that cost by paying the contractor for the period over which training had occurred. As the TDP Rules noted, the cost of 'instructors and presenters' and of 'delivering the training' could not be claimed. Secondly, the point could only apply to training within the scope of the TDP Rules, and thus, at most, could relate to category (b), but not to the other grant claims. Furthermore, it was apparent from the Defendant's evidence that the change of policy was not an administrative oversight, a contention which was innately highly unlikely.

f. In any event, the Claimant had had a legitimate expectation, following the removal of the Tripartite Requirement from the policy rules, that it would not be imposed. If its imposition had been legitimate, it had been met by means of the Claimant's 'interlocking contracts', with its clients and operatives. Under its standard form terms and conditions with its clients, the clients accepted all responsibilities under all applicable health and safety legislation in relation to the operatives' engagement (which would include training). Under the standard form contract with its operatives, the latter were *'to comply with the requirement stated in the client's health and safety policy and those regulations enforced by the Health and Safety Executive.'* When attending required training, operatives were paid by the Claimant at the rate agreed with the relevant client. The issue was the proper construction of the policy, being a matter of law. The Defendant's suggestion that the Tripartite Requirement was not satisfied because any training was carried out by its clients would lead to the perverse result that no-one would receive grants for the training provided to the Claimant's operatives during the relevant grant years. That would be to undermine the purpose of promoting training in the construction industry and would lead to the Defendant enjoying a significant windfall, contrary to the purposes of the statutory regime.

Ground Three

g. Absent objective justification, it was irrational and unlawful for the Defendant to treat the Claimant differently from, and less favourably than, other firms in a materially similar position. It was clear from the Claimant's evidence that other levy payers, which, like the Claimant, had made retrospective grant applications, had received 'exceptional training grant' ('ETG'), equivalent to a supplementary payment, in as much as both were based upon timely payment of the levy and were, therefore, analogous and materially similar.

h. On the subject of relief, the Defendant's position was that the possibility that it might have to pay a grant in relation to three grant years, whilst receiving levy in relation only to one, rendered it highly likely that a retrospective grant application would not be permitted, if remitted. Such an approach would be for the improper purpose of mitigating the Defendant's own financial liability and put the Defendant's case too high in relation to the second and third grant years. Whilst the Claimant did not submit that the absence of a levy for the later periods could not be taken into account, it did contend that there were arguments as to fairness and propriety to which the Defendant would need to have regard before taking its decision. In the alternative, there were 'exceptional circumstances' as there had yet to be any final determination of the quantum of any grant payable, such that the Defendant's apprehension that it might pay out in grant more than it would receive in levy had yet to eventuate. It would be fair and appropriate to allow a quantum assessment to take place before any decision to refuse relief was taken.

For the Defendant

17. Mr Knight submitted, generally, that the Claimant's submissions failed to address critical aspects of the factual context of these proceedings, said to reveal the cynical nature of the claim which it advanced, and which had been set out in detail in the Defendant's evidence. In summary:

    a. The Defendant had first considered the Claimant for registration as an employer in the construction industry in March 2008. The Claimant had insisted, repeatedly, that it was not such an employer, and that it should not be so registered. The Defendant had accepted that asserted position on 10 November 2008 and on 20 January 2009, an acceptance subsequently relied upon by the Claimant as having given rise to a legitimate expectation that it would not be registered by the Defendant, on the basis of which the Claimant had brought a later, second claim for judicial review of the decision to register it in 2016, which it had then withdrawn. Litigation between the Defendant and a different company in 2011 had not been concerned with the levy status of the Claimant and had not in fact prompted reconsideration of the Claimant's status. On 21 October 2014, the Defendant had reminded the Claimant that grants were available to all employers registered with the Defendant. The Defendant had begun to reconsider whether the Claimant should be registered as liable to levy, upon its receipt of the Claimant's pre-action protocol letter to the Secretary of State for Business, Innovation and Skills, dated 20 March 2015, which had appeared to proceed upon the assumption that the Claimant would be liable to levy in the third levy period for which the 2015 Levy Order provided. On 5 May 2015, the Claimant's position that it was an employer in the construction industry – and therefore registrable – had been set out unequivocally. In light of that correspondence, the Defendant had written to the Claimant on 9 June 2015, asking that it complete a standard registration questionnaire in order that the Defendant could decide whether to register it and assess it to levy. By letters dated 16 June and 15 August 2015, the Claimant had refused to provide the requested information. By letter dated 18 January 2016, the Defendant had warned the Claimant that, were it to refuse to provide the relevant information, the Defendant would proceed to take a decision based upon the information available to it and might register the Claimant and assess it to levy. On 19 January 2016, the Claimant replied asserting that the Board should regard it as being out of scope of levy and, on 16 February 2016, the Defendant had written to the Claimant advising it that the Defendant would register it with immediate effect; that the Claimant's liability for the levy would relate to the period 6 April 2015 to 5 April 2016, which would be payable in 2017; and that a 2016 Levy Return would be sent to the Claimant for completion.

    b. In order for the Claimant to have been able to claim grant under the 2015/16 policy, it would have to have been registered as an employer by 1 April 2015. Lawyers' correspondence sent on behalf of the

Claimant indicating that it was (or might be) registrable had not commenced until shortly before that date and had not been unequivocal until it had passed.

c. The Defendant had estimated the Claimant's liability to levy on the basis of the information available to it and had issued its levy assessment notice under cover of a letter dated 18 February 2017. The levy had been assessed in the sum of £7,964,584. The Claimant had appealed that assessment to the Employment Tribunal, under section 12 of the ITA. The appeal had been unsuccessful, as had been its further appeals. The Court of Appeal had rejected the Claimant's appeal by its judgment and order dated 10 March 2020.

d. In parallel to its levy appeal, and whilst maintaining that it was not liable to levy at all, the Claimant had first written to the Defendant stating that it intended to make a 'protective' grant claim, on 16 May 2017. On 31 May 2017, Ms Sarah Beale (the Defendant's then Interim Chief Executive) had sent an e-mail to the Claimant, stating:

'The date from which we consider Hudson to be a 'Levy payer' is 17/02/16, however we have not received a 2016 Levy Return and the No Levy No Grant rule has been triggered. Hudson have therefore forfeit their right to claim Grants for the 2016/17 Grant Scheme year.'

Ms Beale explained that the Claimant would be eligible for Apprentice Grant from 1 August 2014, and for all other grants from 1 August 2016. She had been thanked by the Claimant for her clarification, by e-mail dated 1 June 2017.

e. On 26 October 2017, the Defendant's solicitors had written to those representing the Claimant explaining that the Defendant did not consider that the Claimant met the requirements of the policy for the award of grant for the period 1 August 2016 onwards. That letter had set out in terms that the test which the Defendant applied to all applications for grant, including any application made by the Claimant, was whether the applicant had identified the need for training, organised that training and accepted the cost of that training. It noted that that test had been omitted from the 2015/16 and 2016/17 policies by oversight, but that it was the applicable test, nevertheless. The Claimant's solicitors had disputed the application of that test by letter dated 31 January 2018. By letter dated 5 March 2018, the Defendant's solicitors had affirmed that an application would be considered when made.

f. After the hearing before the Court of Appeal, but prior to judgment, for the first time the Claimant had made a formal application for grant for the years 2015/16, 2016/17 and 2017/18, by letter dated 13 February 2020. The application made no particular request for a departure from the 'No Levy, No Grant' rule which, in 2017, Ms Beale had explained to be applicable. It sought to explain that the Claimant met the Tripartite

Requirement and claimed grant for the three years in question, in the total sum of £28,066,327.45. It had made no reference to the fact that, with effect from 25 March 2018, the Claimant had engaged in a significant restructure which might affect its levy liability.

g. Following the judgment of the Court of Appeal ([2020] ICR 1344), the Claimant had issued a Press release headed *'Hudson v CITB enters new phase'*, with the sub-heading *'Company hits training quango with £10.5m grant claim'*. That release had made clear that the Claimant would take every step possible to avoid paying the levy and to obtain grant payments which would be offset against any levy due. Permission to appeal to the Supreme Court had been refused on 9 November 2020.

h. The Claimant had been found liable for the levy following extensive litigation and, notwithstanding the various judgments holding that it was payable, had yet to pay it. Levy assessments had been raised by the Defendant for the subsequent two years. After the present claim had been issued, on 18 September 2020, the Claimant had notified the Defendant, for the first time on 10 November 2020 and in greater detail 10 days later, that it had undergone a material restructure of its operations on 25 March 2018, in a manner which meant that it was not liable for levy in the 2016/17 and 2017/18 years. Having considered the evidence provided by the Claimant, by letter dated 21 December 2020 the Defendant had confirmed its acceptance of the asserted effect of the restructure, and that, accordingly, it was withdrawing the levy assessments for the 2016/17 and 2017/18 periods. The remaining levy outstanding was the sum which had been the subject of the original unsuccessful appeal. Nevertheless, in these proceedings, the Claimant had maintained its application for grant across all three years, including in the sum of £17,487,070.30 for the two years for which it knew that it was not liable for levy at all, whilst asserting that the Defendant would obtain an inappropriate windfall in relation to the 2015/16 levy period (a term which could only be appropriate in the event that the levy was paid, something which, to date, the Claimant had shown no indication that it would do, having transferred all of its business to other companies).

i. The Defendant had adopted policies which guided the exercise of its discretionary power to award grants for the purpose identified by section 5(1) of the ITA, in order that all those who might be eligible could understand the basis upon which an application for a grant payment would be considered by the Defendant. Those policies operated at two levels, first in relation to the approach generally to be taken to applications for all types of grant, including the conditions which had to be met and the manner in which applications would be handled. Those matters were addressed by the grants scheme terms and conditions, re-issued annually. Secondly, there were policies relating to individual types of grant, where a valid application had been made. The types of grant which had been the subject of the Claimant's application had fallen within the TDP Rules, also re-issued each year. Both the

policies and the rules had been published online. The second paragraph of the 2015/16 policy had provided that:

'*Employers newly registered between 1 April 2015 and 31 March 2016 will be eligible to claim new entrant and apprenticeship grants from 1 August 2014 and all other grants from 1 August 2016. This is because their first year of liability will be based on their 2016 Levy Return and the levy liability will not be assessed until spring 2017.*'

The criteria to be satisfied before a grant claim could be processed and paid had also been set out in the policy:

i. "*A 2015 Levy Return must be correctly completed and received prior to 31 December 2015, for a grant application relating to the 2015/16 Grants Scheme year*"; and

ii. "*Levy must either be fully paid or subject to Direct Debit arrangement*".

j. The provision relating to supplementary payment had been as follows (sic):

'*A Supplementary Payment of 10% is added to all Grants claimed by employers who are paying a Levy to CITB. To receive the Supplementary Payment, the following conditions must be met by 31 July 2015*

- *a correctly completed 2014 Levy Return has been received that requires you to pay an assessment to CITB*
- *this assessment has been paid in full or being paid by Direct Debit instalments*
- *your correctly completed 2015 Levy Return has been received*.'

k. The 2015/16 policy had also set out various bases upon which an application might be rejected, including where: the criteria had not been met; the training did not qualify for support; there was insufficient evidence to support the claim; the trainee had already received a grant support for the training; or the claim form had been received late, or was incomplete or unclear.

l. The 2016/17 policy had been in materially the same terms. Like the 2015/16 policy, it had commenced with the heading *'Who can claim?'*, under which the following wording had appeared: *'Employers who are registered as in-scope leviable with CITB, including those in-scope and leviable employers who don't pay a levy as they fall below the Small Business Levy exemption level of £80,000.'* The 2017/18 policy had been in similar terms. It had provided that, if the 2017 levy return had not been received by 31 December 2017, no grant payments would be made. The same point had been made in relation to supplementary payments. That policy had also stated, *'You must identify the need for training, organise the training and accept the cost of training'*. Whilst

that wording had also appeared in the 2014/15 policy and in the policies relating to prior years, it had not appeared in the 2015/16 policy, or in the 2016/17 policy. The TDP Rules for 2015/16, 2016/17 and 2017/18 had each required an applicant for grant to have completed a 'training plan', submitted to the Defendant throughout the year and which met the definition of training and the applicable criteria. The plan could list specific individuals and had to *'identify the training they require during the year'*. To be eligible, the employee had to be one *'for whom you paid the costs of the training'*. Records of the training had to be retained in order to evidence the grant claim and for it to be verified by the Defendant, should that be necessary.

m. The Claimant had not identified the need for training, organised that training or met its cost in relation to the operatives in respect of whom it had claimed grant. That Tripartite Requirement had been the applicable test and the Claimant had been informed that it applied. The Claimant could have had no, and had not in fact had any, legitimate expectation to the contrary. The Claimant had had no control over training, or knowledge of whether any training was carried out by its clients or operatives, still less of the type of training delivered or its effectiveness. It had passed on payment to operatives irrespective of whether they had undertaken training and had been wholly disengaged from all training considerations.

n. The Defendant had been entitled to decide that making a supplementary payment to the Claimant would undermine the purpose of such payments, being to reward timeous and co-operative levy payers, and there had been no irrational inconsistency between its approach to the Claimant's application and that adopted in other cases.

o. As set out in its decision, the Defendant had exercised its discretion to consider the Claimant's application, notwithstanding that it had been made well outside the ordinary timeframe for claiming grant, and where no levy return had been submitted and no levy paid. That had been because the Claimant had exercised its right to appeal the levy assessment and of the statutory stay on the recoverability of the levy during an appeal. The Defendant had refused to consider the application for supplementary payment because to have done so would have been to undermine the purpose of such payment.

p. The Defendant had decided that the Claimant was not eligible under the terms of the 2015/16 policy to receive any grant in respect of 2015/16. That had been because, as a newly registered employer, the Claimant had only been entitled to claim the grants sought from 1 August 2016 (i.e. in the following levy and grant year). A claim for new entrant and apprenticeship grants would not have been excluded, but no application had been made for either such grant.

q. In respect of 2016/17 and 2017/18, the Defendant had decided that the Claimant was not entitled to receive grant in respect of claimed heads

(b), (c), (e) and (f). That had been because the Claimant had not identified the need for training, organised the training, and accepted the cost of the training and, thus, did not satisfy the relevant statutory purpose. The Defendant had explained its position:

'*It will not generally be appropriate for grant to be paid to an employer in respect of training that has been identified, organised and paid for by others (i.e. where the financial burden has been met by others), since this will not serve the purpose of encouraging training*.'

It had also made reference to the need for compliance with the TDP Rules.

r. The Claimant had not been entitled to maintain a claim for grant for the years of its application during which it had not been in scope for levy. Any other outcome would have run contrary to the purpose of the policy. Had the Defendant been aware of the true factual position in June 2020, when taking its decision, it would not have exercised its discretion to consider the retrospective application for grant in relation to the two years for which the Claimant had not been in scope for levy (on which basis any relevant relief in these proceedings should be refused under section 31(2A) of the Senior Courts Act 1981 and the claim ought to be dismissed).

s. The grounds of review fell to be considered in the above context.

Ground One

t. It was important to keep in mind the purpose of the legislative framework. It was accepted that the Defendant had a duty to assess those who had been identified as employers in the industry, but none of the Articles within the 2015 Levy Order addressed the prior question of how the Defendant was to determine whether an entity fell within that description. The register was simply its administrative list of those which it considered to do so. The legislation did not create any workable abstract test as to when proactive registration by the Defendant was required. Inherent in the Claimant's case was a recognition of the absence of any legal duty beyond those required by ordinary public law principles, and the point in time at which the duty was said to have arisen had not been identified. In fact, the Defendant having previously accepted the Claimant's position that it was not an employer in the industry, the critical change had come in 2015, with the Claimant's apparent acceptance that it was, or might be, an employer in the industry, on which rational basis the Defendant had examined its earlier decision not to register the Claimant as such. In any event, the instant claim was concerned not with the breach of the ITA and/or the 2015 Levy Order per se, but with whether there had been a public law error in the Defendant's decision. Recognising that registration conferred potential collateral benefits in connection with any application for grant, its purpose was to maximise levy return. There was no public law duty to pay grant to a particular entity and it could not be known at the time of registration whether a grant would in fact be payable.

u. The condition in the 2015/16 policy that an employer which was "newly registered" between 1 April 2015 and 31 March 2016 was not eligible to claim grants (other than new entrant and apprenticeship grants) until 1 August 2016 was unambiguous and applied to the Claimant, which had not been registered (and, then against its will) until 29 February 2016. The rationale for that condition appeared on the face of the policy: the first year of liability would be based on the 2016 levy return and the amount of levy liability would not be assessed until Spring 2017. That was a requirement of the policy because, as the policy explained, the grant scheme was conditional upon the levy received: when an employer paid levy for the first time, its payment did not align with the year and the levy income from which a grant would be paid, and so there would be a mismatch which would risk undermining the viability of the grant scheme and the levy. The Claimant's challenge ran contrary to the principles in *Suffolk Coastal District Council v Hopkins Homes* [2017] UKSC 37 — the court should respect the Defendant's expertise and refrain from undue interference. A clear distinction was to be drawn between '*issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy*' [26]. A challenge to the Defendant's judgment could only succeed, if it surmounted the irrationality threshold. The Defendant had not considered whether to depart from the policy, having not been asked to do so in the manner now submitted. The Claimant had not set out any fact or circumstance which was said to justify, even implicitly, such a departure. That was the more surprising given that the application had been made to Ms Beale who had made express reference to the relevant provision and its effect in her letter of 31 May 2017. The rule against the fettering of discretion did not oblige a public authority to consider departing from the terms of its policy in the absence of a request, indeed an express request, to do so. In *R (AB) v Secretary of State for the Home Department* [2018] EWCA Civ 383, Leggatt LJ had held [48] (with emphasis added) that:

> 'The principle against fettering discretion requires a decision-maker to be willing to listen to and consider arguments for not acting in accordance with a rule or other established policy. <u>But it does not require the decision-maker to cast around for possible reasons to do so</u>. That is clear from the nature of the principle which, as the *British Oxygen* case shows, is a requirement founded in procedural fairness that the decision-maker must not "shut his ears" to an application or refuse to "listen to anyone with something new to say". It is also confirmed by *R (Behary and Ullah) v Secretary of State for the Home Department* [2016] EWCA Civ 702, para 39, where the Court of Appeal held that there was no obligation on the Home Office to consider whether to grant leave to remain outside the Immigration Rules in the absence of an express request to do so or, possibly, of facts which were so striking that it would be irrational not to consider the grant of leave outside the Rules even in the absence of any request. In my view, the same applies to the grant of refugee status.'

Whilst relying on *Behary*, the Claimant had not addressed the irrationality standard, or contended that it had been met. Reliance on the Defendant's failure to have registered the Claimant at an earlier stage was both incoherent and unprincipled. Neither in the ITA, nor in the 2015 Levy Order did any duty to register those whom it considered to be employers in the construction industry appear. Article 3(1) of the 2015 Levy Order required the levy to be imposed on employers in the construction industry without imposing any duty on the Defendant in respect of those not so identified. Article 5(1) required the Defendant to *'assess the amount of levy to be paid in respect of each construction establishment of an employer'*; but that was simply an explanation of how the levy was to be calculated. It did not purport to impose a more general duty on the Defendant to identify all such employers and establishments. Nor was it surprising that Parliament had imposed no such general duty. Even if the Defendant had been under such a duty, the Claimant could not rely upon it, in circumstances in which, in 2008, it had procured from the Defendant a decision not to register it, on an incorrect basis; sought to rely on that decision to challenge the Defendant when it had registered the Claimant; refused at any stage to co-operate or to volunteer for registration (whether to claim grant or otherwise) when the Defendant re-opened the matter; and had, throughout (including in these proceedings), continued to deny its liability to levy and registration.

v. In all the circumstances, the Defendant had not acted irrationally in applying the terms of the policy to the Claimant; indeed, in the context of the Claimant's behaviour throughout it would have been irrational to have adopted an approach to the stewardship of public funds by acting otherwise.

w. The asserted legitimate expectation said to have been created by the oral submissions of the Defendant's then counsel in the course of an oral permission hearing before Kenneth Parker J on 8 October 2015, was not sustainable in fact, law or principle. The note of counsel's submissions fell a long way short of the requirement that a representation be clear, unambiguous and devoid of relevant qualification: *Re Finucane* [2019] UKSC 7. Counsel's submissions had done no more than explain, before the Claimant had been registered and assessed, that the Claimant would be entitled, in principle, to apply for grants, as indeed was the case. Under the policy, the Claimant had been entitled to apply for new entrant and apprenticeship grants from 2014 (but had made no such application) and all other grants from 2016. By its decision, the Defendant had accepted that certain types of grant were, in principle, available to the Claimant, were the application to be appropriately evidenced. Counsel had not represented, clearly or otherwise, that the Claimant would be entitled to all grants for which it applied, or that the policy meant anything other than the Claimant now accepted it to mean. It was difficult to understand how the Claimant could sensibly maintain that it had had a legitimate expectation that the policy meant something other than its plain wording had stated. Nor

had the position on grant been relevant to any issue which had been before the court: whether or not a person may recover grant is irrelevant to whether they are liable to levy: *Gibbon Equipment Hire Ltd v Construction Industry Training Board* [2001] EWHC Admin 954 at [14]-[15], per Keith J.

x. Further, by Ms Beale's email of 31 May 2017, the Defendant had resiled from any legitimate expectation which had arisen from counsel's submission. That e-mail had been sent in light of the way in which registration of the Claimant had come about and its timing; the nature of any proposed grant application; and the Claimant's resolute refusal to contemplate the payment of levy. As Lord Kerr had held in *Re Finucane* [76], *'provided a bona fide decision is taken on genuine policy grounds not to adhere to the original undertaking, it will be difficult for a person who holds a legitimate expectation to enforce compliance with it.'* There was no reason why it would be unfair to rely upon Ms Beale's e-mail, which unlike the observations of counsel, had been sent in the context of a consideration of the Claimant's wish to apply for grant, some three years prior to any application being made, and had not been disputed by the Claimant at the time. There had been no suggestion of reliance by the Claimant on the earlier purported expectation.

y. The Claimant had cited no authority for the proposition that a legitimate expectation could be generated by an oral submission of counsel in the course of a hearing in different proceedings. Such a claim was inconsistent with the broad scope of the absolute judicial proceedings immunity; the prohibition on collateral attacks on decided cases; the rule in *Hollington v Hewthorn* [1943] KB 587, that findings of fact in one case are not admissible to prove them in another; and the exclusion of a duty of care arising in relation to the conduct of litigation. None of those principles was directly applicable, but the policy of the law which underlay them was; that the courts generally restrict an ability to rely on previous proceedings and are reluctant to impose any civil liability arising from their conduct. Doubtless, that explained why the Claimant could cite no authority in which a legitimate expectation had been said, or even alleged, to have arisen from the submissions of counsel in the course of litigation.

z. Even if the Claimant were to succeed on ground one, it would need also to succeed on ground two for the claim in respect of the 2015/16 policy to have any material effect.

Ground Two

aa. It was common ground that the Tripartite Requirement did apply in the 2017/18 policy. Dealing, first, with the Claimant's assertion that it met that requirement, whilst the interpretation of the policy was a matter for the court, its application was a matter of judgement for the Defendant, with which the court should be slow to interfere. Thus, it was for the Claimant to show that the Defendant's conclusion that the test had not

been satisfied had been irrational. In neither of the standard form contracts on which the Claimant relied had there been any mention of training. Generic references to health and safety obligations and policies might encompass some concept of training, but neither the Claimant nor the Defendant had any idea whether that was so. The requirements of health and safety law were context-specific and were not within the Claimant's knowledge or control. It had not suggested that it audited the limited contractual obligations which it had imposed. The Claimant had no knowledge of, or entitlement to know, the training which had been carried out, its content, or quality. The position was not akin to a construction entity which sub-contracted the delivery of its training to a specialist provider, not least because such an entity would have made a conscious choice as to the training which it wished to be provided and the identity of the provider. The Defendant would expect to pay grant in relation to the costs of such an arrangement. In previous proceedings, the Claimant had specifically disavowed any relationship with training, yet, in these proceedings, it had adopted a volte-face, without any explanation for the inconsistency. It had not organised or approved any training itself, nor turned its mind to whether or not training had been carried out. It received a flat rate of £15 per operative per week, whether or not that operative had undertaken any training during that week, or in any other. That 'cost' was unrelated to training. It had no record of training, had produced no adequate or complete training plan, and could not provide any relevant documentation. No evidence of a nature which the Defendant would ordinarily have expected to see had been provided. In that context, it could not be said that paying grant to the Claimant for any training, which might or might not have been arranged by its clients, or by its operatives on their own initiative, could serve or further the statutory purpose of encouraging adequate training of those employed in the construction industry. The evidence demonstrated that the Claimant had not identified the need for training in any material way, had not organised any training, and had not met the cost of training, the application of which test was a question of judgement for the Defendant, which expected some close degree of connection between the cost of training and it being met, at least in the first instance, by the employer claiming grant. The Defendant had been entitled – and, if necessary, right, as a matter of law — to conclude that the Claimant had not satisfied the Tripartite Requirement. The Claimant had objected that the result of that was that it would pay the levy, but that its clients (who were likely to meet the Tripartite Requirement, but who were not liable to levy for the Claimant's operatives) could not claim the grant either, such that the Defendant would enjoy a windfall. In one sense, that was true (albeit limited to one year of levy liability and a sum of money which the Defendant had never received and which the Claimant had now acknowledged that it lacked the ability to pay), but the answer to that concern had always been in the gift of the Claimant, which had itself decided how to structure (and re-structure) its business; the terms of its standard contracts; and not to engage in the provision of training to those for whom it had adopted the employment and tax status risks. The Claimant could have involved itself in training

so as to meet the Tripartite Requirement, and could do so in future. That it had chosen not to do so, and to focus on seeking to avoid levy liability, was a matter about which it could not now be heard to complain.

bb. In relation to policy years 2015/16 (subject to ground one) and 2016/17, the Defendant had not applied a test of which the Claimant had been unaware, or which had been inconsistent with the published policies. In October 2017, the Defendant's solicitors had made clear that any application for grant would be assessed by reference to the Tripartite Requirement, including for those years in which that requirement did not appear on the face of the policy, explaining that the omission had been one of oversight. The Claimant had been on notice of the test which the Defendant would apply and able to address the application of that test to its case. It had done so in its application. None of the legal principles relating to the application of secret policies applied in that context. It was no answer to assert that the relevant notification had been given after the end of the grant year where the application had been made retrospectively, years after the event, and there had been no suggestion that the Claimant had organised its conduct in any way in reliance upon the terms of the policies (a matter of no surprise, given that, primarily, it had structured itself so as to seek to avoid any levy). The application of the Tripartite Requirement had been consistent with the wider terms of the policies. Indeed, on the Claimant's case, there would have been no applicable control test of any form. It was, in that context, relevant that the test remained embedded in the TDP Rules, as then applicable, and against which the application would have fallen to be assessed, had it progressed to that stage. Thus, even if the application had been accepted on the basis that the Tripartite Requirement did not apply generally to all types of grant claim, it would still have been applicable on the basis that most of the heads of grant claimed would have been subject to the TDP Rules. That reflected the consistency of the Defendant's position as conveyed in October 2017 and would be relevant were the matter to be remitted for fresh consideration. It also reflected the approach in fact adopted by the Defendant throughout the relevant period. There had been no legitimate expectation created by the alteration of the 2015/16 and 2016/17 terms and conditions. The Defendant's evidence was clear that the omission had been an administrative oversight and not the subject of instruction or approval by the Defendant. In the circumstances, and in any event, there had been no sufficiently clear and unambiguous representation made by the Defendant that the established test had not continued to apply, and, presumably, that no test would apply in its place. The claimed expectation could not be legitimate, and it had not been said that the Claimant had relied upon it, or conducted itself in any particular way as a result of its claimed understanding. The policies had to be read fairly, including against the background of the TDP Rules. In any event, any expectation created had been corrected and/or resiled from in the October 2017 correspondence which could have given rise to no unfairness in all the circumstances of the case. At the time at which the Claimant had made its application, it had known which test the

Defendant would apply. Accordingly, the Defendant had been entitled to assess the entirety of the Claimant's application by reference to the Tripartite Requirement, and entitled (indeed, obliged) to conclude, as a matter of fact and judgement, that the Claimant's business model did not satisfy any of the elements of that test, still less all of them. That assessment had been for the Defendant, and was not for the court, to make.

Ground Three

cc. In *R (Gallaher Group) v Competition and Markets Authority* [2019] AC 96, the Supreme Court had held that complaints of unfairness or inconsistency of treatment were not free-standing heads of judicial review and, if they were to be advanced, had to amount to irrationality. The Claimant could not meet that standard, and had not attempted to address any of the Defendant's evidence, which was fatal to it. The Defendant had been entitled and right to conclude that the Claimant had not complied fully with the requirements regarding timely levy assessment and payment, and that to have awarded a supplementary payment would have been to undermine the purpose of the latter. The evidence of different cases in which the Defendant had, as part of a settlement of a levy dispute, permitted a levy payer retrospectively to recover a different ETG was not on point. The two forms of grant were not the same. An ETG had been used to distribute surplus levy funds, in two specific years (2012/13 and 2013/14) irrelevant to this claim. Supplementary payment was paid regardless of any surplus held by the Defendant and had been generally maintained under the policy. ETG did not afford a relevant analogy, nor one which could surmount an irrationality hurdle, and it was noteworthy that the Claimant's evidence had made no candid reference to the fact that, in the case upon which it relied, in which ETG had been granted retrospectively, the Defendant had refused a request for retrospective supplementary payment. There had been no instance in which the latter had been granted retrospectively in circumstances remotely analogous to those of the Claimant. Furthermore, on its own terms, supplementary payment was calculated as a percentage of other grants paid, such that, in the Claimant's case, there was nothing to which it could attach. There had been no irrational less favourable treatment of the Claimant.

dd. The Claimant's application for grant had related to the three years in which the Defendant had assessed it as liable to levy and issued levy assessment notices in significant sums. In accordance with the Defendant's decision of 21 December 2020, the Claimant was not liable for levy for the second and third of those years and the two relevant levy assessment notices had been withdrawn. That had resulted from restructuring decisions of which the Claimant had first notified the Defendant on 10 November 2020 (the day after permission to appeal against its levy assessment had been refused by the Supreme Court). The Defendant's assumption had been that the application for grant in connection with those two years, and its pursuit through this claim, would fall away. In fact, it had been maintained, with the Claimant

seeking some £17 million in grant in respect of two years in which it was not liable to levy as a result of its own, deliberate steps, whilst simultaneously maintaining that the Defendant would obtain a windfall if the Claimant could not obtain grant.

ee. There was no dispute that the Defendant had been unaware of the above change in position when taking its original decision, and when filing its Summary Grounds of Resistance. The Claimant had made no reference to its restructures and their effect on levy liability in its claim or accompanying evidence. They had not been addressed in the Claimant's evidence in reply. There had been no explanation as to why the Claimant had first provided any detailed account of its restructures and their intended effect on levy liability only on 20 November 2020. In that, unusual, situation, the Court was entitled to consider, and the Defendant to provide, evidence as to how the application would have been approached had the true position been set out by the Claimant at the relevant time. Given that the Defendant had only considered the retrospective application as an exceptional exercise of its discretion, it was unsurprising that its unequivocal evidence was that it would not have exercised that discretion to consider the application for grant in respect of 2016/17 and 2017/18, where the Claimant was out of scope for levy entirely for the equivalent levy periods. The logic, rationality and lawfulness of the reasons given by the Defendant were unimpeachable. Any other approach would have operated to undermine the purpose of the policy.

ff. Accordingly, even if grounds two or three were made out in any respect in connection with the application for 2016/17 and 2017/18, the court ought to refuse to grant any relief because it was (at least) highly likely that the outcome for the Claimant would not have been substantially different, if the conduct complained of had not occurred. The Claimant's argument that it was registered as in-scope leviable was mere sophistry. It had, indeed, been registered to levy on the basis of the information then available to the Defendant. It had declined to engage with that registration process, maintaining that it was not liable to levy for reasons advanced in its then ongoing appeal. It had not brought to the Defendant's attention the fact that, from 26 March 2018, it had no longer been liable to levy, on a different basis, having taken deliberate decisions to achieve that aim and, from then onwards, in its own words, had *'simply existed to defend its position on grant and levy'*. On any objective and purposive interpretation of the policies, the reference to being 'registered as in-scope leviable' must mean *correctly* registered as being in-scope leviable in law. Any other outcome would frustrate the purpose of the grant scheme: even the Claimant had not suggested that grant was available to a person who in fact was not in scope for levy. Yet, that was the outcome sought for the second and third years of its claim.

gg. The claim ought to be dismissed and/or relief refused.

Discussion and conclusions

18. In addition to the documentation produced by the parties, I have had careful regard to the first and second witness statements of Mr Ian Anfield, the Claimant's Managing Director; and the witness statement of Mr Martyn Price, independent consultant on construction industry training, filed by the Claimant, and to the witness statement of Mr James Byrne, the Defendant's Industrial Training Act Compliance Manager and the maker of the decision challenged in this case, filed by the Defendant.

Ground One

19. As Mr Knight submits, the provision in the 2015/16 policy terms and conditions that an employer which had been newly registered between 1 April 2015 and 31 March 2016 was not eligible to claim the relevant grants until 1 August 2016 was clear and unambiguous. I reject the Claimant's contention that it was directed at new entrants to the industry, which is not what the policy says. As the wording of the relevant paragraph makes clear, the focus is on the date of registration, not on the date of entry into the industry, though a new entrant would be amongst those affected by the condition. The rationale was expressly said to be that the first year of liability would be based upon the 2016 levy return, which would not be assessed until Spring 2017. That rationale applied to all those who had not been registered within the specified window. Thus, the starting point was that the Claimant was not eligible under the policy for the grants for which it had applied and it was from that starting point that any consideration of a departure would stem.

20. It is not in dispute that, per *Lumba* [20] and [21], a policy must not be a blanket policy, admitting of no possibility of exception and so rigid as to amount to a fetter on the discretion of the decision-maker. It is also not in dispute that the Defendant did not, in fact, consider whether it was appropriate to depart from the policy in the relevant respect, whilst exercising its discretion to do so in others. Its contention is that it had been under no obligation to do so in the absence of a specific request, against the background of its earlier clear statement that the provision would apply to any application made. The Claimant retorts that it had implicitly made such a request and that, in any event, per *Behary*, the Defendant had been under a duty to consider departing from the policy, or, at least, to seek clarification from the Defendant as to whether such a departure was being requested. Both parties pray in aid the context of the application.

21. The Claimant's application had been made by letter dated 13 February 2020. It made no express request for a departure from the relevant condition, but I accept Mr Jaffey's submission that, implicit in its application for the relevant grants for the 2015/16 period, was its request that the relevant eligibility requirement be waived and I note that the 'gateway conditions' which the Defendant itself later elected to waive had not been the subject of direct request by the Claimant either. The implicit application made by the Claimant ought to have been given rational consideration. The application had alluded to the history of the matter, of which the Defendant was well aware and which it was

able to take into account. That is not to say that it is for this court to weigh the respective merit in the competing submissions as to whether the Defendant ought to have departed from the relevant policy condition, having given the matter proper consideration. Thus, unless the second aspect of ground one succeeds, and subject to consideration of the effect of sections 31(2A) and (2B) of the Senior Courts Act 1981, it would be for the Defendant itself to consider whether to depart from the relevant policy provision, having regard to all matters relevant to that decision, as counsel agree.

22. That is subject to one consideration, which is a matter for the court, namely the proper construction of the 2015 Levy Order. In my judgement, the Claimant's submissions conflate the basis upon which the quantum of the levy imposed on an employer in the construction industry is assessed, under Article 5, with a duty proactively to seek and register such an employer, which is not to be found in the 2015 Levy Order, or in the ITA. Nor does Article 3(1) of the former ('*A levy shall be imposed on employers in the construction industry in respect of each of the following levy periods…*') assist the Claimant in establishing to the contrary. The legislation is not concerned with any duty relating to entitlement to grant. The language of section 5(4) of the ITA is permissive. It is open to a would-be applicant for grant to apply to be registered at any time. Moreover, 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 April 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. That is so irrespective of: (1) the outcome of litigation between the Defendant and Beacon Roofing Limited, in October 2011, to which the Claimant had not been a party and which had been concerned with a different issue; (2) the Defendant's internal discussions, in 2013, regarding the prospective and fact-sensitive impact on construction labour agencies of levy simplification; (3) the Claimant's generic assertions and enquiries of the Defendant, by letter dated 13 October 2014, as to the prospective effect of the then planned changes to the levy scheme; and the Defendant's reply of 21 October 2014; and (4) the Defendant's independently taken 'minded to register' decision and subsequent decision to register, each taken in February 2016, expressly following its receipt of further information and an apparent shift in position by the Claimant.

23. I turn to consider the second aspect of ground one — whether counsel's submission, in October 2015, gave rise to the legitimate expectation for which the Claimant contends. The legal principles here are, broadly-speaking, agreed. It is for the Claimant to establish that the representation on which reliance is placed is clear, unambiguous and devoid of relevant qualification: *Re Finucane* [64]. In the same case, at [62], Lord Kerr held:

> 'From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it, unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed

> on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive, legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment.'

In *Paponette v A-G of Trinidad and Tobago* [2012] 1 AC 1 [37], the Privy Council held:

> 'The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that, in a claim based on a promise, the applicant must prove the promise, and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.'

In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (no. 2)* [2008] UKHL 61 [60], Lord Hoffmann held:

> 'It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest…'

24. In my judgement, this aspect of ground one falls at the first hurdle. Nothing in the note of counsel's submissions indicates a representation of the requisite character. First, it refers to a heading which does not in fact appear in the policy and must, therefore, have been inaccurately identified by counsel and/or noted by the solicitor. Read in context, the heading to which reference was intended read *'Who can't claim?*' under which the following wording appeared:

    - businesses which are classed as in-scope excluded (they may have no direct employees) or net C.I.S. subcontractors (traders and partnerships)

    - employers whose main activity is not construction

That is clear from the last submission noted, which had been directed to *'what Hudson does. That somehow being outside the provision of workers they will not benefit from the training.'* (sic) Thus, the issue being addressed by counsel (after the cut-off date for registration for which the 2015/16 policy had provided) was not that currently under consideration and no part of his submission related to the separate requirement to be registered within the identified window. Secondly, and in particular in the context of the need for any application to be considered in accordance with the policy, it is inherently unlikely that broad brush submissions of the nature noted were to be, or were

in fact, 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. As Mr Jaffey acknowledged, the question for consideration is how the relevant representation would have been reasonably understood by those to whom, and in the context in which, it was made: *R (Patel) v General Medical Council* [2013] EWCA Civ 327 [44] and [45]. If proof of that were needed, it is afforded by the absence from the Claimant's application for grant (and from the pre-action protocol letter) of any reference to the legitimate expectation now advanced. At its highest, in my judgement, counsel's submission was, and was understood to indicate, that the Claimant's business model did not automatically rule out such a claim. In those circumstances, it is unnecessary for me to decide whether, as a matter of law, a submission of counsel made in open court on behalf of his or her client is capable of giving rise to a legitimate expectation, or whether it would be permissible for the Defendant to resile from the position as represented.

25. Thus, ground one succeeds in part and I shall address disposal at the end of this judgment.

Ground Two

26. It is common ground that the 'Tripartite Requirement' did not appear expressly in the 2015/16 policy or the 2016/17 policy, and that it did appear in the 2017/18 policy. As to the first and second of those periods, it was the evidence of Mr Byrne that the removal of the requirement to identify, organise, and accept the cost of training for two grant scheme years could properly be described as an administrative oversight by the Defendant, and that he was unsure whether it had been an oversight in the sense that it had been carried out in complete error, or deliberately, in good faith by an employee who had lacked proper instruction or authorisation by the appropriate decision-maker. He stated that he did not consider it likely that the change had represented an intended change in policy by the Defendant as a corporate entity, and that, in any event, the Tripartite Requirement had continued to be applied, in practice, by the Defendant when assessing grant claims.

27. Having regard to the selective nature of the text which had been removed from the predecessor policies, I accept Mr Jaffey's submission that it is inherently unlikely that it had been removed by way of oversight and that, in any event, the Tripartite Requirement was not one which an objective reader could discern from the relevant policies themselves.

28. In *Mandalia v SSHD* [2015] UKSC 59 [29] and [31], upon which the Claimant relies, Lord Wilson JSC stated:

> '[29] …So the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation, but free-standing,

which was best articulated by Laws LJ in R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363 at [68]:

"Where a public authority has issued a promise, or adopted a practice, which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured, unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

…

[31] But, in his judgment in the WL (Congo) case, Lord Dyson JSC had articulated two qualifications…Lord Dyson had also said, at para 26, "a decision-maker must follow his published policy… Unless there are good reasons for not doing so."…'

29. Returning to *Lumba* [*WL (Congo)*], at [20] Lord Dyson JSC held:

'20. … Mr Beloff QC rightly asserts as correct three propositions in relation to a policy.… Secondly, if unpublished, it must not be inconsistent with any published policy. Thirdly, it should be published, if it will inform discretionary decisions, in respect of which the potential object of those decisions has a right to make representations.'

At [26] to [38], he continued:

'26. As regards the second proposition accepted by Mr Beloff, a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt: see Wade and Forsyth Administrative Law, 10th ed (2009) p 316. As it is put in De Smith's Judicial Review, 6th ed (2007) at para 12-039:

"there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness."

The decision of the Court of Appeal in R (Nadarajah) v Secretary of State for the Home Department [2003] EWCA Civ 1768, [2004] INLR 139 is a good illustration of the principle. At para 68, Lord Phillips MR, giving the judgment of the court, said that the Secretary of State could not rely on an aspect of his unpublished policy to render lawful that which was at odds with his published policy.

27. As for the third proposition, the Court of Appeal dealt with the issue of whether there is a general rule of law that policies must be published at

paras 70 to 79 of their judgment. Disagreeing with Davis J, they concluded that there is no such general rule and said that the fact that the appellants were detained pursuant to unpublished policies was not in itself a reason for holding that the decisions to detain them were unlawful. Mr Beloff did not feel able to support this conclusion. It is unfortunate that the Court of Appeal embarked on this topic at all, since it was not before them and was not, therefore, the subject of argument or citation of authority. As the point is of general importance, I need to say why in my view the judge was right and the Court of Appeal were wrong on this issue both as a matter of common law and ECHR law.

28. The Court of Appeal referred to a statement of Sedley LJ in R v Secretary of State for Education and Employment Ex P Begbie [2000] 1 WLR 1115, 1132C that there were "cogent objections to the operation of undisclosed policies affecting individuals' entitlements or expectations" and said at para 72 that they had no difficulty in accepting this as (no more than) a statement "of good administrative practice". They also said that the judge was wrong to rely on Sunday Times v United Kingdom (1979) 2 EHRR 245 and criticised the reasoning in Nadarajah at paras 64-67 which relied on the Sunday Times case in support of the proposition that a relevant policy is part of the law that must be accessible, so as to enable those affected by it reasonably to foresee the consequences of their actions. At para 73, they said that the relevant passage in the judgment of the ECtHR at para 49 of the judgment in the Sunday Times case is "not, as we read it, about policy as such, but is rather directed to the need for accessibility and precision, as requirements of law in the strict sense". … In short, policy is not the same as law (para 57).

…

34. The rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised. Just as arrest and surveillance powers need to be transparently identified through codes of practice and immigration powers need to be transparently identified through the immigration rules, so too the immigration detention powers need to be transparently identified through formulated policy statements.

35. The individual has a basic 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: see In re Findlay [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36, [2004] 1 AC 604, para 26 Lord Steyn said:

"Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must

be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice."

36. Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in R (Salih) v Secretary of State for the Home Department [2003] EWHC 2273 (Admin) at para 52 that "it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute." At para 72 of the judgment of the Court of Appeal in the present case, this statement was distinguished on the basis that it was made "in the quite different context of the Secretary of State's decision to withhold from the individuals concerned an internal policy relating to a statutory scheme designed for their benefit". This is not a satisfactory ground of distinction. The terms of a scheme which imposes penalties or other detriments are at least as important as one which confers benefits. As Mr Fordham puts it: why should it be impermissible to keep secret a policy of compensating those who have been unlawfully detained, but permissible to keep secret a policy which prescribes the criteria for their detention in the first place?

…

38. The precise extent of how much detail of a policy is required to be disclosed was the subject of some debate before us. It is not practicable to attempt an exhaustive definition. It is common ground that there is no obligation to publish drafts when a policy is evolving and that there might be compelling reasons not to publish some policies, for example, where national security issues are in play. Nor is it necessary to publish details which are irrelevant to the substance of decisions made pursuant to the policy. What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made.'

30. I accept Mr Knight's submission that it is important to have regard to the rationale which underlies the principles on which Mr Jaffey relies. First, there is a need for consistency of approach to the application of a policy. Here, there is no challenge to Mr Byrne's evidence that, at all material times, the policy had been applied having regard to the Tripartite Requirement. That requirement was not inconsistent with the policy wording adopted in the two relevant years. Secondly, the rule of law calls for a transparent statement of the circumstances in which the criteria applied will be exercised. In this case, that had been provided to the Claimant in the form of the Defendant's solicitors' letter of 26 October 2017[1], operating to supplement the terms set out in the policy

[1] to which reference had been made in their subsequent letter of 24 January 2020.

documents. The fact that that letter had post-dated the relevant policy years was nothing to the point; the Claimant's application for grant was made retrospectively, two years and four months after the date of that letter, and there had been no suggestion that anything done or not done by the Claimant at any point since the publication of either policy document had been a product of the express wording of the policies themselves, a point underlined by the fact that no change in the Claimant's approach occurred when express reference to the Tripartite Requirement was reintroduced in later policy documents. There had also been no retreat from the position there set out, whether in the Defendant's solicitors' letter of 5 March 2018, or otherwise. Thirdly, notice of a policy is required so that an individual knows the criteria being applied and can make relevant representations in relation to the policy and challenge an adverse decision. At the time at which its application was made and considered, all such requirements were satisfied. The Defendant had published, including through its solicitors' letter, that which the Claimant, as a person affected by the operation of the policy, needed to know in order to make informed and meaningful representations to the decision-maker before a decision was made. On the facts of this case, I am satisfied that the Defendant's policy in relation to the relevant application years had been published and that no secret policy had been applied.

31. In any event, as Mr Jaffey acknowledged in the course of his oral submissions, it is appropriate for the court to have regard to the TDP Rules, which set out the various criteria which had to be met for Training and Development Plan grant to be available. That grant was said to support *'employees, NET (taxed) CIS sub-contractors who are under contract for service with you at the time of training and for whom you paid the costs of the training'*. It was available for specified training, including: short training sessions covering health and safety, environmental and technical subjects which lasted at least three hours, were delivered by a supervisor or suitable qualified member of staff (health and safety officer) and which were prepared in advance; in-house short development courses (IT updates etc); training which was company-specific; training the main content of which related to the procedures and organisation of a particular firm; and modular training programmes, including tool box talks; and supplementary payment. In essence, that encompassed grant categories (b), (c), (e) and (f)[2] of the Claimant's application (per Byrne, at [33] and [115]). Thus, even if it be right that the Defendant had not been entitled to apply the Tripartite Requirement, the applicant for the relevant grant was obliged to have *'paid the costs of training'* under the TDP Rules. I discuss, below, the Claimant's alternative case that it had satisfied all three criteria (the last of which encompassing that for which the TDP Rules had provided in, amongst others, the relevant policy years), having first considered Mr Jaffey's alternative formulation of the Claimant's case, that the *'deliberate alteration of the 2015/16 and 2016/17 grant terms and conditions amount[ed] to a clear, unambiguous representation that there is no requirement for a claimant for grant to identify the need for training, organise it or pay for it*', said to give rise to a legitimate expectation that no such requirement would be applied.

[2] adopting the category references identified at paragraph 3 of this judgment

32. I accept Mr Jaffey's submission that, whether or not the relevant policies were altered deliberately and in accordance with the Defendant's internal management processes, they no longer expressly contained the criteria in question and are to be viewed from the perspective of the objective third party reader affected by them. Rightly, Mr Knight did not press his submission to the contrary with any vigour. In my judgement, the leaflet contemporaneously published by the Defendant, entitled *'Highlights of the 2015/2016 Grants Scheme'*, on which Mr Jaffey also relied, advances matters no further. It is true that, amongst other matters, it referred, generically, to a simplification of the rules, but it made no reference to a change in the overarching criteria and the balance of the text was concerned with the nature of the grants available and the sums which could be claimed. As its title indicated, the leaflet did no more than refer to selected highlights and it might equally be said that any intended fundamental change to the overarching criteria against which a claim for grant had been assessed for many years would itself have been highlighted. In any event, I am satisfied that the answer to the Claimant's alternative formulation of its case again lies in the Defendant's solicitors' letter of 26 October 2017. By that point, at the latest, the Claimant could have had no legitimate expectation that the Tripartite Requirement had been abandoned. Furthermore, in all the circumstances, including the absence of any asserted or apparent detrimental reliance by the Claimant upon the terms of the policies prior to that date, or of any evidence to the effect that it had, or would have, conducted itself in any way differently, I am satisfied that the overriding interest in ensuring that there be a close connection between the arrangement of and payment for training and the receipt of grant justified the Defendant in resiling from any representation made by the terms of the relevant policies and that, in the circumstances described, there was no unfairness in its having done so. The Claimant was able to address the Tripartite Requirement in its subsequent application for grant and did so.

33. For his further contention that, in any event, all relevant eligibility requirements had been satisfied in all three grant years, Mr Jaffey relied upon the contracts between the Claimant and, respectively, (1) its clients and (2) the operatives. In the former, he relied upon clause 6 of the Claimant's standard terms and conditions and, in the latter, upon clause 7(v). Those clauses provide:

    a. (clause 6 in the client contract): 'The Client accepts all responsibilities under all applicable Health and Safety legislation in relation to the Freelance Operative's engagement.'

    b. (clause 7(v) in the operatives contract) 'The Freelance Operative hereby desires, understands and agrees: …(v) to comply with the requirements stated in the Client's Health and Safety Policy and those regulations enforced by the Health and Safety Executive.'

    The first clause is said necessarily to include a requirement to provide ongoing health and safety training; and the second to include a requirement

to attend it. Further, it is said, operatives are paid by the Claimant, at the agreed rate, for time engaged in attending training.

34. In my judgement, the above provisions and payments do not satisfy any element of the Tripartite Requirement and the Defendant was right, and certainly entitled, so to conclude:

    a. Nothing in either contract imposes a requirement to provide/attend (as the case may be) training. The relevant contractual provisions might encompass the provision/attendance of training in some cases, but, as Mr Knight observed, neither the Claimant nor the Defendant knows in any case whether it in fact does so. Neither contract makes provision for the Claimant to be informed of the training in fact delivered or attended. As Mr Jaffey made clear in the course of discussion, the Claimant does not monitor training records. In all such circumstances, his submission that, if there were any evidence of breach, the Defendant would insist that training be carried out rings hollow.

    b. In any event, identifying the need for training goes beyond making generic provision for the client to bear the burden of the responsibility for providing it and for the operative to comply with client requirements and health and safety regulations. It requires that the grant applicant identify the particular training needs of those who are to receive the training in question. To borrow the Claimant's example, it might entail identifying that operatives engaged to carry out domestic electrical repairs require a particular type of training, whereas those working at height require another. Furthermore, the training for which grant could be claimed, and was claimed in this case, was not limited to health and safety-related training (and the requirement that a grant applicant keep and provide supporting documentation proving that health and safety played an integral part of all training for which grant was applied did not appear in policies post-dating 2014/15 and, in any event, is not synonymous with the Claimant's contractual requirement that its clients accept all responsibilities under all applicable Health and Safety legislation or that its operatives comply with the requirements stated in the Client's Health and Safety Policy and those regulations enforced by the Health and Safety Executive). Neither clause on which the Claimant relies could be (or has been) said to encompass training of any other form.

    c. Organising the training also goes beyond the generic provision made by the contractual clauses upon which the Claimant relies. The Claimant here sets up a straw man; the Defendant does not suggest that the training itself must be delivered by the grant applicant, but organisation requires the making of arrangements with those who are to provide it. Thus, an agency which arranges for its client (whether directly or through a third party) to provide, say, weekly sessions on particular topics in connection with the identified training needs would, in a meaningful sense, have organised that training. Equally, the client which itself contracts with a specialist training consultancy, recognising

that its operatives have a range of training needs on which it requires advice and which will need to be delivered by a third party, will have organised an appropriate provider by whose recommendations it will then be guided. On its own case, the Claimant has done nothing more than require that the client take on that role and that the operatives attend that training once organised, in each case only in the sphere of health and safety.

d. The third element of the Tripartite Requirement is that the grant applicant 'accept the cost of training'. That entails bearing financial responsibility for it, which is not what the Claimant did. Instead, it paid operatives for their time (whether that time was spent engaged in training or in work), in the sense that it passed on moneys received from the client for that purpose, and received a flat weekly rate of £15 per operative, irrespective of whether that operative had undergone any training. The cost of training itself was borne by the client, or, at least, by someone other than the Claimant. On the evidence of Mr Anfield, at paragraph 23 of his witness statement dated 9 June 2015, filed by the Claimant in the first judicial review proceedings, *'The success of the Claimant's business is in no way dependent on the training provided through the Levy.'* In his witness statement, dated 24 November 2017 (filed in the appeal before the Employment Tribunal), he further stated:

'Hudson does not find labour, negotiate the financial terms on which they are engaged move labour from client to client, involve itself in the day-to- day activities of the operatives, or provide training. In practice, what we do is contract with the self-employed operatives, verify them with HMRC, make payments to them, and account for their tax deductions under the CIS. A copy of a sample contract with an operative is at page [°] of the bundle. We have no control over any sites, or parts of sites, or even operatives on sites, nor do we operate any sites. Our role is simply to provide a compliance risk service to clients.'

In oral submissions, Mr Jaffey expanded his argument to contend that the cost of training was borne by the Claimant in as much as the Claimant was obliged to pay levy, at 1.25% of the hourly rate payable to the operative, for time spent in training. That, too, is misconceived; the levy is payable by virtue of the Claimant's status as an employer in the construction industry, funding the work of the Defendant and for the benefit of the industry as a whole. It is calculated according to a formula set out in legislation. It is not itself 'the cost of training' and, in any event, no such contention was made to the Defendant in the Claimant's grant application, such that it cannot be criticised for any failure to have considered it. Contrary to the Claimant's position, the construction of the third element of the Tripartite Requirement which I find to be correct does not lead to the conclusion that no profitable firm could ever be eligible for a grant. The question is not whether the grant applicant makes a profit but whether it bears the financial burden of the training in question. The same analysis applies to the requirement in the

TDP Rules that the grant applicant is obliged to have paid the costs of training.

e. I reject Mr Jaffey's submission that I am compelled by the Court of Appeal's conclusion that, for the purposes of section 11(2) of the ITA and the 2015 Levy Order, the Claimant is an employer in the construction industry and its stated rationale therefor (at [45] to [61]) to conclude that the Claimant ought to be eligible for grant, or even that I ought to be influenced thereby. The issue here under consideration is whether the Claimant satisfied the Tripartite Requirement and/or that for which the TDP Rules provided. If an employer in the industry chooses to structure its activities in such a way that it cannot do so, that is not a product of the statutory framework and purpose, or of the eligibility criteria, nor does it change the meaning of the latter. It has always been open to the Claimant to adopt a model whereby its involvement in the training for which it would wish to claim grant would enable it to satisfy the eligibility criteria. Nor is there anything perverse about the consequence, in this case, of the construction which I have found to be correct, namely that no party will receive grants for the training provided to the operatives in the relevant years. As Mr Jaffey acknowledged, that, too, is not a consequence of the criteria per se, but of the Claimant's chosen unique business model and its clients' decision to enter into the arrangement in question, for which the Defendant is not responsible and which does not warrant the strained interpretation of the Tripartite Requirement, or of that imposed by the TDP Rules, which the Claimant urges. The 'windfall' argument does not avail the Claimant either, the cynicism of which, in the context of its substantial claim for grant in relation to 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 accepts to have fallen due when the Supreme Court refused permission for a further appeal, in November 2020, is noteworthy. On the Claimant's own case, that, too, would not accord with the purpose of the statutory framework. Acknowledging that any ambiguous wording ought to be construed with that latter purpose in mind, there is, in my judgement, no ambiguity in the Tripartite Requirement (or in that imposed by the TDP Rules), which is consistent with that purpose.

35. Ground two fails.

Ground Three

36. There is nothing in this ground, which, in order to succeed, would need to establish irrationality on the part of the Defendant: *R (Gallagher Group) v Competition and Markets Authority* [2019] AC 96. On any view, the Claimant could not satisfy the eligibility criteria for supplementary payment, or its stated purpose. The evidence (Byrne: [198] to [199]; Price: [3.5]) establishes a clear difference between ETG and supplementary payment: (a) ETG was used to distribute surplus levy funds during two years (2012/13, 2013/14) which are of no relevance to these proceedings or the Claimant; (b) ETG was paid to the Berkeley Group (an alleged comparator) by way of settlement, in

circumstances in which it had been registered and eligible for grant in the relevant years; it had accepted its liability for and paid levy; it had provided sufficient evidence to substantiate its claim; and, albeit not mentioned by Mr Price in his witness statement, the Defendant had refused its claim for supplementary payment, as it had that of O'Halloran and O'Brien (Byrne: [207] to [213], [220]). There has been no analogous instance in which supplementary payment has been granted retrospectively. The closest alleged comparator is Keepmoat, which, unlike the Claimant, had submitted levy returns and paid the levy assessment in full by the due date (Byrne: [214] to [216]). In any event, and as Mr Knight submitted, supplementary payment is calculated as a percentage of other grants. On the basis of the Defendant's decision, no other grant was payable to the Claimant.

37. Ground three fails.

Conclusion and disposal

38. I have found that ground one succeeds in part and that all other challenges fail.

39. Sections 31(2A) to (2C) of the Senior Courts Act 1981 provide:

> '(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.
>
> (2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.
>
> (2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.'

40. It cannot be said that the Defendant's decision on the narrow question of whether to waive the qualifying requirement that an applicant for grant be registered within the specified window satisfies the test in section 31(2A), but that is to ask the wrong question. The test is whether it is highly likely that the outcome for the applicant would not have been substantially different, if the conduct complained of had not occurred. The outcome for the Claimant was the determination that it was not eligible for any grant for the year 2015/16. Had the Defendant considered and waived the relevant qualifying condition, the application for that year would have fallen to be assessed by reference to the same eligibility criteria which had been applied to the subsequent grant years and which I have found to have been lawfully applied and to have reflected the proper construction of those criteria (see ground two). On that

basis, albeit for different reasons, for the grant year 2015/16 the Defendant would have rejected all categories of the Claimant's application which it had rejected by Decision Two, being all categories other than (a)(i) (the Claimant's own company inductions for new starters) and (d) (Claimant site audits), albeit for different, lawful reasons. It had stated as much when explaining Decision One. Thus, subject to section 31(2B), I am obliged to refuse to grant relief on ground one, in relation to all categories other than (a)(i) and (d). For the remaining categories, there is no exceptional public interest which leads me to consider it appropriate to disregard section 31(2A), and I note that the language of section 31(2B) is permissive rather than mandatory. This claim arises in the unusual circumstances of a retrospective application for grant, made substantially outside the relevant policy year (itself now seven years ago), in circumstances in which the relevant issue had arisen because of a protracted dispute and litigation over whether the particular applicant ought to have been subject to levy. There is no wider public interest, exceptional or otherwise, disclosed. It is that which must be demonstrated, not, as Mr Jaffey submitted, 'exceptional circumstances' (of which there is, in any event, none).

41. It follows that:

    a. In relation to categories (b), (c), (e) and (f) of the Claimant's grant application for 2015/16 (as identified at paragraph 3, above), I decline to grant relief.

    b. In relation to categories (a)(i) and (d) of the Claimant's grant application for 2015/16 only (as identified at paragraph 3, above), I quash Decision One and remit those parts of the Claimant's application for fresh consideration by the Defendant, to include consideration of whether the qualifying registration condition should be waived. In relation to all other application categories, Decision One stands.

    c. Decision Two stands.