Case Number: 3201115/2018

RM

EMPLOYMENT TRIBUNALS

Appellant: **Empire Building Systems Limited**
T/a Essex Maintenance Response

Respondent: **Construction Industry Training Board**

Heard at: **East London Hearing Centre**

On: **18 November 2019**

Before: **Employment Judge Burgher**
Members: **Ms L Conwell-Tillotson**
Mrs S Jeary

Representation

Appellant: Mr D Jones, Director

Respondent: Mr J Byrne, Levy Compliance Manager

JUDGMENT

The Appellant's appeal fails and is dismissed.

REASONS

1 On 15 May 2018 the Appellant company was ordered to pay a levy to the Respondent assessed at £2351.50 for the 2016/2017 year.

2 On 29 May 2018 the Appellant appealed to the Employment Tribunal pursuant section 12(4) of the Industrial Training Act 1982 (ITA) and regulation 15 of the Industrial Training Levy (Construction Industry Training Board) Order 2018 ('CITB Levy Order').

Grounds of Appeal

3 At the outset of the hearing the four grounds of appeal were confirmed as follows.

4 Whether the Appellant should be subject to the levy. The Appellant asserted that it only engages fully qualified NVQ2 qualified subcontractors and that there is no apprentice scheme or training courses provided by CITB in respect of fire protection installations. The Appellant states that it would receive absolutely no benefit from the levy. The Respondent states that the regulations apply to the construction industry and the levy is not dependent upon a particular business receiving a benefit.

5 The Appellant disputes that the levy applies because it states that it engaged subcontractors and not employees. The Respondent asserts that the relevant legislation defines employees as include persons engaged under a contract for services.

6 The Appellant asserts that the levy should not apply because it ceased to trade. The Respondent states that the levy order sets out the conditions for the levy to apply it applies if the Appellant is an employer on the first day of the levy period. The Respondent's position is that the Appellant ceased to trade after the relevant date and asserts that all the relevant levy conditions have been met.

7 The Appellant describes its business as providing a variety of passive fire protection services. It disputes that its services fall within the definition of the Industrial Training (Construction Board) Order 1964 (Amendment) Order 1992 (Board Order). The Respondent submits that the Appellant's activities fell within the definition of Schedule 1 1(a)(i) of the Board Order specifically the construction, alteration, repair or demolition of a building or part of a building.

Factual basis for conclusions

8 We did not hear any evidence from the parties and considered the matter on submissions only. We were able to distil from the submissions the following relevant largely uncontested facts that form the basis for our conclusions.

9 The Appellant is a company established 31 October 2011. It held itself out as FIRAS accredited company that supplied and installed passive fire protection. The Appellant ceased trading on 7 March 2019 and changed its company name to Essex Maintenance Response Limited. The Appellant notified the Respondent that it was no longer trading on 8 April 2019.

10 The Respondent is the construction industry training board (CITB). It was established by the Industrial Training Act 1982. Pursuant to section 5 of the ITA, the Respondent is established to encourage adequate training of persons employed or intended to be employed in the construction industry. The Respondent has a discretion conferred upon it to provide training courses, approve facilities and grants to organisations and companies to assist in the development and training in the construction industry.

11 As far as employees are concerned, section 1(2) of ITA states:

> "*employee" includes a person engaged under contract for services, and "employer" shall be construed accordingly.*

12 In respect of the CITB levy, section 11 ITA provides the mechanism for the Respondent to make proposals to the Secretary of State for levy to be imposed for the

purposes of raising money towards its expenses. For present purposes, section 11 ITA is enacted by the CITB Levy Order 2018. This provides the basis for the Respondent to calculate and impose a levy.

13 For the levy to be imposed, amongst other things, the Board Order 1992 requires that the Appellant must undertake activities in the 'construction industry'. The Respondent refers to Schedule 1 1(a)(i) which states:

> *"Subject to the provisions of this Schedule, the activities of the construction industry are the following activities in so far as they are carried out in Great Britain;*
>
> *all operations in-*
>
> *(i) the construction, alteration, repair or demolition of a building or part of a building."*

14 The Appellant had reason to be contacted by the Respondent in 2016. The Appellant's director Mr Jones, made enquiries about what services CITB could provide to it as an organisation. He was very disappointed to discover that CITB provided no training or services in relation to the fire protection sector, which was the Appellant's specialty. Mr Jones therefore considered CITB to be no value to the Appellant at all and had no intention of joining it voluntarily.

15 Nevertheless, the Appellant was sent a levy registration questionnaire which Mr Jones completed on 26 May 2016. In this questionnaire, the Appellant stated its main activity as passive fire protection. This involves installing fire protective boards in walls and floors, installing fire rated ceilings and providing intumescent fire protective coatings to buildings and parts of buildings.

16 A second questionnaire was sent out by the Respondent by mistake. This was completed and returned by the Appellant on 7 June 2016. 'Fire protection' was stated as the main activity.

17 The Respondent made further enquiries as to the activities undertaken by the Appellant by sending an activities questionnaire. The Appellant completed this on 2 August 2016. The Appellant stated that 95% of its activities were installing fire barriers/boards in buildings and 5% was spraying retardant coatings to buildings or parts of buildings (i.e. walls, floors) to steelwork.

18 We were informed that 'active' fire protection which extended to installing sprinklers, fire extinguishers and alarms formed no part of the Appellant's activities. The Respondent accepted that such 'active' fire protection would not have generate a need to pay a levy in accordance with Schedule 1 of the Board Order 1992.

19 The Appellant was sent a levy return by CITB which he completed on 9 May 2018. The Appellant's levy questionnaire completed on 9 May 2018 states that it had two employees on the payroll who were paid £32,608.60 and that there were payments of £72,434.07 to CIS for status and tax in respect of contractors. This was grossed up to amount to £367,170.35 in respect of contractual payments to workers.

20 On 15 May 2018 the Respondent issued the Appellant with a levy assessment notice in respect of the period 6 April 2016 to 5 April 2017. The amount of the levy was assessed at £2351.50. There is no dispute that, if the levy applied, the amount of the levy was correct given the information it was based on and the relevant legislation (Regulations 3, 4, 5, 7 and 8 of the CITB Levy Order 2018).

21 The Appellant continues to dispute the validity being required to pay a levy given that CITB provides no services it or its industry and that it a no stage took on any trainees, workers or employees to benefit from any such services.

22 On 25 May 2018 the appellant appealed against the levy order pursuant to section 12(4) ITA.

Law and conclusions

Ground 1

23 The Appellant maintains that it should not be subject to the levy because it only engages fully qualified subcontractors there is no apprentice scheme in the fire protection industry and it gets no benefit from any levy.

24 Whilst this may be correct, and we have sympathy for and understanding of the Appellant's viewpoint, we are required to apply the law that we were referred to. We were also referred to the ET case of Chappell v CITB 44749/96. Whilst this is an employment tribunal and as such is not binding on us, we cannot improve upon the conclusion given by Chairman Mr Sara which stated:

> *"The first point is that the actual wording of the [section 5 ITA] act does not put an absolute duty on the board to provide such training as may be required but was a general discretion to choose where to put the money obtained by the levy*
>
> *It is clear…. from the Act that there is no absolute obligation on the Board to provide training in a specific area or suitable for a specific employee. The levy is a tax and like all taxes it has to be paid if the relevant conditions apply whether or not the person paying the tax gets the benefit*."

25 In these circumstances the Appellant's ground of appeal in this regard fails and is dismissed.

Ground 2

26 The Appellant states that the levy should not apply because he engaged subcontractors and not employees.

27 The Tribunal referred to section 1(2) of the ITA provides a much wider definition to employee as including persons engaged under a contract for services. Whilst the Appellant may have employed qualified subcontractors, who were in no need of training or support, they were evidently contracted to the Appellant under a contract for services and as such are construed as employees for these purposes. They are employees.

28 The Appellant's ground of appeal in this regard also fails and is dismissed.

Ground 3

29 In relation to the third ground of appeal, the Appellant ceased trading in 2019 and informed CITB on 8 April 2019 of this. CITB has not sought to impose any levy on the Appellant subsequent to the levy in question.

30 When considering whether the levy has been properly applied we have considered regulation 3 of the CITB Levy Order 2018 which states

> *"A levy shall be imposed on employers in the construction industry in respect of each of the following levy periods*
>
> *The period commencing with the day on which this order comes into force [28 of March 2018] and ending with 31 March 2018 (in this order referred to as the first levy period)"*

31 Regulation 4 states that the base period for the first levy period is the twelve month period commencing with 6 April 2016. The base period for the second levy period is the twelve month period commencing 6 April 2017.

32 Regulation 5(2) defines "construction establishment" as any establishment of the employer engaged wholly or mainly in the construction industry for the necessary period.

33 Regulation 5(3) defines the "necessary period" as a period (which need not be continuous) consisting of 27 or more weeks falling within the relevant base period.

34 We were referred to the case of Bobcat Plant Hire (UK) Ltd [2003] EWHC 2383 Admin where HH Blake QC confirmed that an assessment of the number of employees engaged in construction as opposed to non construction activities or where employees are engaged in numerous activities the proportion of time spent engaged in construction activities. If the activity is more than 50% it was considered to be wholly or mainly.

35 It was accepted in this matter that passive fire protection included what the Appellant had stated to be 95% of its activities in its assessment submitted on 6 August 2016. If passive fire protection is considered as construction activities for the purposes of Schedule 1 of the Board Order then the Appellant would be undertaking work for the levy to apply during the relevant period. Therefore this ground of appeal is subject to determination of ground 4 below.

Ground 4

36 The Appellant appeals on the ground that it was providing a variety of passive fire protection services and disputes that they are within the definition of Schedule 1 1(a)(i) if the Board Order 1992.

37 The Tribunal referred to the cases of Mark Wilkinson Furniture Ltd v CITB CO/1318/00 where Mr Justice Newman explained his analysis between paragraphs 12 to 16 that the construction order required the board to focus attention on the part or parts of the building affected by the Appellant's activity rather than the particular purpose which the particular part of the building was to serve. It was held that the relevant parts of the building which make up a room were the walls, ceiling and floor and doors and windows,

by virtue of the construction order, are treated as part of the building. The Wilkinson Furniture case considered whether there was an alteration to a room by installing the kitchen and Mr Justice Newman held at paragraph 13 the CITB was correct to concentrate upon the word alteration in Schedule 1(a)(i) but as an aid in the meaning to be given to the scope of the operations covered by the whole sentence. The Tribunal considered this and construed the Board Order on the basis of natural meaning of the words.

38 The Appellant's work involves installing fire protective boards in walls and floors, installing fire rated ceilings and providing intumescent fire protective coatings to buildings and parts of buildings. The Tribunal concludes that this is 'altering' the walls, floors and ceilings of a building for the Board Order 1992 to apply. In any event the Appellant accepted that the work it did included repairing walls or ceilings to the extent that was necessary to install fire protection. Following Wilkinson Furniture we conclude that this would be repairing the walls, floors or ceilings. In any event we considered that whether the work was defined as an alteration or repair is academic given the terminology of the order which states '*all operations in the construction, alteration, repair, or demolition of a building or able or part of a building'* are included. It was not suggested that any of the exceptions in Schedule 1 paragraph 2 applied.

39 We therefore conclude that the Appellant's business activities fall within Schedule 1 section 1(a)(i) of the Board Order 1992. In these circumstances the Appellant's ground of appeal under this ground and therefore also ground 3 above fail and dismissed.

Conclusion

40 The Appellant's appeal therefore fails and is dismissed.

41 Whilst the Tribunal has sympathy for the position of the Appellant in respect of any failures by the Respondent to provide training within the scope of the Appellant's activities, this consideration is not one which the Tribunal has jurisdiction to deal with. The Appellant may be able to make submissions the CITB in this regard with a view to urging them to review their training offering and support in future.

Employment Judge Burgher

19 November 2019