

FAO Councillor Bob Egerton

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Reference

Acting Director
Sarah Jardine

Date 17 April 2020

Dear Councillor Egerton,

Thank you for your 24 and 26 March 2020 e-mail messages to [REDACTED], Head of Operations Wales, South and South West of England, Construction Division, in which you respectively explain your intention to proceed to stage 2 of HSE's complaints procedure¹ and your reasons for doing so. I am the independent person in HSE appointed to oversee your stage 2 complaint. Please accept my apologies for the delay in providing this response.

Your complaint covers the following points:

- Cormac Solutions Limited ["Cormac"] deliberately lied to HSE on three occasions concerning the nature of the injury to Mr [REDACTED] and that the HSE position seems to be that because it would not have taken action even if it had been told the truth, it does not matter that Cormac lied to them.
- the investigation of your concern by [REDACTED], HM Principal Inspector of Health and Safety, was superficial.
- Mrs [REDACTED] either did not produce a written justification regarding her decision to take no action against Cormac, or if she did, HSE failed to provide it when you submitted a FOI request
- HSE did not provide you with any written record of the further information, lessons learnt, or improvements made by Cormac in respect of their internal accident reporting and investigation procedures, following Mrs [REDACTED] meeting with the company

You seek an explanation of why HSE is not prosecuting Cormac, in line with your interpretation of paragraph 16.1 of our Enforcement Policy Statement² ["EPS"].

¹ HSE's complaints handling procedure is available at:
<https://www.hse.gov.uk/foi/internalops/og/ogprocedures/complaints/>

² HSE's Enforcement Policy Statement and Enforcement Management Model are available at:
<https://www.hse.gov.uk/enforce/enforcepolicy.htm>

I have reviewed your correspondence and the papers associated with this case. I have also spoken to Mrs [REDACTED] and Mr [REDACTED]. I have considered the actions Mrs [REDACTED] took and compared them to our published policies and procedures.

The Cormac Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013³ [RIDDOR] report

When Cormac submitted the RIDDOR report concerning Mr [REDACTED] on 23 January 2017, it had enough information to have properly determined that Mr [REDACTED] had suffered a specified injury, specifically an injury described in Regulation 4(1)(a) of RIDDOR, namely *“any bone fracture diagnosed by a registered medical practitioner, other than to a finger, thumb or toe.”* Instead the company reported the incident as on over 7-day injury. This constitutes a breach of Regulation 4(1)(a) of RIDDOR.

You assert that this and the other examples set out in your 26 March 2020 email are demonstrative of Cormac having deliberately lied to HSE. On the other hand, Cath Robinson, Group Managing Director, Corserv, in her 17 September 2019 letter to HSE, provided an account of why the incident had in error been reported as on over 7-day injury, as well as the steps that had subsequently been taken to in future ensure correct reporting.

There is insufficient corroborative evidence to prove beyond reasonable doubt that Cormac deliberately lied in the RIDDOR report. Even if HSE obtained additional evidence to prove your assertion, application of our Enforcement Management Model⁴ [EMM] rarely supports enforcement in respect of a breach of RIDDOR beyond the service of an Improvement Notice [IN]. In this case, it does not support enforcement action beyond sending Cormac a letter (see below).

EMM, EPS and why HSE is not prosecuting Cormac

The EMM is a framework that helps inspectors make decisions in line with HSE's EPS. In summary, the EMM gives inspectors guidance to help them decide: if they should take enforcement action; and what sort of enforcement action to take.

The legal duties in RIDDOR do not directly result in the control of risk but still demand compliance by the dutyholder. They are referred to in the EMM as 'compliance and administrative arrangements' and are considered separately from risk-based issues. The EMM uses three different descriptors to describe deviations from full compliance with a compliance and administrative arrangement, namely Absent, Inadequate and Minor (Table 4). Cormac's misreported RIDDOR corresponds to the Inadequate descriptor, that is: *“Only rudimentary observance with standards or inadequate compliance, where such failures are of substantial or material nature ...”* Paragraph 74 of the EMM explains that it is not usually appropriate to prosecute in relation to compliance and administrative arrangements that do not in themselves give rise to risks, unless there are relevant dutyholder and/or strategic factors or matters specified in the EPS.

Consideration of the dutyholder factors and strategic factors set out in the EMM (Tables 6 and 7 respectively), lead to the conclusion that prosecution in this case was not appropriate.

You highlighted a circumstance set out in the EPS that you consider indicates HSE should prosecute Cormac, specifically: *“false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk”*. However, the misreported RIDDOR is not a matter which gives rise to any risk. Consequently, the misreported RIDDOR does not meet the criteria set out in the EPS.

³ The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 is available at: http://www.legislation.gov.uk/ukxi/2013/1471/pdfs/ukxi_20131471_en.pdf

⁴ The HSE's Enforcement Management Model is available at: <https://www.hse.gov.uk/enforce/emm.pdf>

None of the potential reasons for prosecuting a compliance and administrative arrangement issue are made out. The EMM (Table 5.2) indicates an initial enforcement expectation of an IN for an inadequate compliance and administrative arrangement against a defined legal standard. However, Corserv provided HSE with evidence of the improvements it had made to its arrangements for submitting RIDDOR reports, thereby pre-empting the need for HSE to serve an IN in relation to this issue. Under these circumstances the service of a Notice was not necessary, justified or appropriate. In this case, proper application of the dutyholder factors required HSE to reduce the initial enforcement expectation set out in Table 5.2 from an IN to a letter.

Other issues

Having looked at the investigation papers I am satisfied that conduct of the investigation was appropriate and all information was considered in line with HSE's EPS, EMM and the Code for Crown Prosecutors⁵. I did not find evidence that Mrs ██████ investigation of your concern was superficial. I agree with Mrs ██████ conclusion that there was insufficient evidence to the criminal standard to support any legal proceedings against Cormac or Corserv Limited for either the reporting or investigation of the incident involving Mr ██████.

Mrs ██████ met with you on 15 November to fully understand your concerns. She informed you of her decision in an e-mail on 16 December 2019 and further corresponded with you on 23 December 2019. She also met with you again on 23 January 2020 to discuss her conclusions.

I accept that we did not sufficiently document the rationale for the approach we have taken. I have corrected this omission by setting out the rationale for our decision making in this letter. I also consider that, in line with my explanation of the application of the EMM in this matter, we should have formally written to Corserv to explain what Cormac did wrong; why it was wrong; and what we expected the company to do about it. Specifically, the misreporting of the injuries to Mr ██████ as on over 7-day injury rather than as a specified injury; an explanation of the legal requirements they had breached under RIDDOR; and finally, an explanation of the corrective action required. In respect of the latter point, this would have effectively acknowledged that Corserv had already taken the necessary corrective action. Mrs ██████ has now written to Corserv along these lines.

Mrs ██████ did not provide you with written records of the further information, lessons learnt, or improvements made by Cormac in respect of their internal accident reporting and investigation procedures. This is in line with HSE's policies and procedures on information sharing.

In closing, I would like to thank you for raising these issues with HSE. I hope my reply gives you reassurance that your complaint was correctly escalated, and the points raised were properly investigated. If you wish to take this matter further, you can ask the Parliamentary and Health Service Ombudsman⁶ to review your complaint via your Member of Parliament.

Yours sincerely,



Paul Hems
Acting Head of Operations, Construction Division, London, South East and East Anglia

⁵ The Code for Crown Prosecutors, available at:

https://www.cps.gov.uk/sites/default/files/documents/publications/code_2013_accessible_english.pdf

⁶ The Parliamentary and Health Service Ombudsman, available at: <https://www.ombudsman.org.uk/>