

## **HSE Response - Consultative Document (CD284) Proposal to revise the process for considering disputes under Fee for Intervention (FFI)**

HSE provides a procedure by which disputes relating to fees for intervention (FFI) are considered, as required under Regulation 24(5) of the Health and Safety and Nuclear (Fees) Regulations 2016.

Following a thorough review of the dispute process, HSE set out proposals to move to a fully independent system for considering disputes in relation to FFI and how the process should operate. To inform HSE's decision-making process and ensure it is open, fair and transparent, HSE conducted a public consultation, the scope of which was to seek stakeholder views on whether:

- the revised process will provide sufficient information to enable a dutyholder to understand why HSE considers FFI is payable and how the costs have been reasonably incurred;
- the revised process enables a dutyholder to make sufficient representations;
- disputes should be considered by an independent panel consisting of a lawyer as chair together with two other members with practical experience of health and safety management;
- there should be a different process where the amount of the fees is small and/or there is no dispute about whether there is a material breach;
- any dispute process should be suspended where an investigation or appeal against an enforcement notice is still pending;

A total of 33 responses to the consultation were received and respondents were broadly supportive of the overall approach. Some respondents provided additional comments on the proposed revisions and concerns in relation to certain aspects of the process. HSE has taken account of all comments made in relation to the disputes process and provides the following response to the issues raised.

It is important to note that some respondents submitted generic comments in relation to the FFI process; HSE notes these comments but as these are out of scope of the consultation, are not included for the purpose of this response.

### **1. Provision of information**

#### **Issue**

- i) Businesses need to understand why HSE considers they are in breach of health and safety law, and for this purpose, HSE should provide sufficient information when the Notification of Contravention (NOC) is issued but specifically to provide any challenge where a fee is in dispute.

- ii) HSE should provide dutyholders with all the relevant information to enable them to understand the basis of the inspectors' decision set in the context of the EMM.
- iii) HSE should not provide different or more information to the panel than that on which the inspectors opinion was based and informed the initial FFI action.
- iv) HSE should update guidance to reflect the changes to the dispute process.

## **Response**

- i) The consultation related to changes to the disputes process and not the information provided to businesses when the NOC is issued. The Fees Regulations already require the provision of sufficient information in the NOC, with clear reasons why HSE considers a dutyholder is in material breach. HSE is always seeking to improve its internal practices to ensure sufficient information is provided in the NOC to continue to help businesses understand the nature of the breach and the costs incurred; and so that they can challenge this if they believe they are not in material breach or that the fees have not been reasonably incurred. A recent amendment to the NOC encourages dutyholders to contact the inspector or their line manager if they do not understand why the NOC has been issued.
- ii) HSE will provide a copy of the EMM1 or an explanation of the decision in the context of the EMM as part of the information provided in advance of the panel considering the dispute.
- iii) HSE will provide the panel with all the relevant information that was available to the inspector on which their decision was based, and why a contravention was considered to be a material breach. This information, most of which will be provided in the NOC, will set out:
  - What provisions have been contravened
  - Why HSE is of that opinion
  - Evidence upon which the opinion is based
  - Why contraventions are considered to be material breaches
  - What functions have been performed as a result of the contravention
  - How the performance of those functions can be attributed to the person
  - HSE's opinion as to how and why the costs have been reasonably incurred
  - HSE's response to any issue raised by the dutyholder as a query or in requesting the dispute

HSE will only provide a summary to assist the panel where there is a gap in the information outlined above. Additional information that was not available or known to the inspector at the time the NOC was issued will not be submitted to the panel. In addition to information which HSE seeks to rely on to demonstrate that the fees

are payable, HSE will also provide any information in its possession which could reasonably be considered to indicate that the fees were not payable.

iv) HSE guidance and internal procedures will be updated with the revised disputes process.

## **2. Representation from dutyholders**

### **Issue**

Sufficient and meaningful representations can only be made if the dutyholder is in receipt of all the information upon which HSE has based their opinion.

### **Response**

Respondents concerns are addressed in the above response 'Provision of information.' If all of the relevant information is provided to the dutyholder, this should allow them to make sufficient and meaningful representation.

## **3. Consideration of disputes by an independent review panel**

### **Issue**

i) Members of the review panel should be appointed through an open and transparent appointment process; and be independent of and not associated with HSE.

ii) The roles of panel members should be clearly established and set out in Terms of Reference; and panel members should have an understanding of health and safety legislation, the work activity involved and HSE's principles of enforcement in relation to the Enforcement Management Model and Enforcement Policy Statement.

iii) Where a meeting is convened, there should be representation from both HSE and the dutyholder.

iv) The outcome of the decision and the evidence on which it is based should be clearly documented and published.

### **Response**

The payment of fees can only be enforced by HSE bringing a civil action in court. The decision of the panel cannot bind the dutyholder or HSE (although HSE will normally accept the decision of the panel). The Fees Regulations require HSE to

provide a process by which dispute relating to fees can be considered - it is not a formal appeal mechanism. The constitution of the panel must be seen in this context.

HSE wishes dutyholders to have confidence in the independence and transparency of the process and provides the following response to the issues raised above:

i) It is for HSE to appoint the chair of the panel, and to decide on the appropriate way to do this and who the appropriate person might be. HSE recognises that dutyholders will wish to have confidence in the independence of the panel chair, it is therefore HSE's intention for the appointment to be from the Attorney General civil panel – HSE has no role in any appointments to this panel.

ii) The process will ensure that appointed panel members have the right level of expertise, experience and level of evidence to consider the dispute. The two independent panel members appointed to assist the lawyer will provide details of their background to demonstrate that they have practical experience of health and safety management. The list of independent representatives will comprise those currently on the list, who will be asked to reapply to be considered for reappointment. HSE will also consider whether there is a need to appoint new members.

iii) The panel will have the discretion to convene a meeting with the dutyholder but this will only be held i) in agreement with all parties, ii) to expedite a decision and iii) only in exceptional circumstances when panel considers the case cannot be decided on written information alone. This is not a 'hearing' and there will be no opportunity for witnesses to be called or questioned. Where a meeting is held both the dutyholder and HSE will be entitled to attend.

iv) The dutyholder will be informed of the decision and the reasons for it. The outcome will not be formally published; details of the NOC are not published. HSE will continue to publish statistics relating to the outcome of disputes considered by the panel.

#### **4. Different process where fees are small and/or there is no dispute as to the material breach**

##### **Issue**

A separate process should be introduced where fees are small and/or there is no dispute as to the material breach. This could have a significant, beneficial impact on micro and small businesses where currently, payment of the fee is more likely than the risk of disputing the fee and potentially incurring large costs. Where the dispute is solely in relation to the level of the fee incurred and does not concern the material breach, consideration of such cases by a single panel member would help reduce burdens on unnecessary business and utilise to best effect panel resource.

## **Response**

60% of respondents were in favour of there being a different process where the amount of the fees was small and/or there is not dispute about whether there was a material breach. HSE will consider options for introducing a separate process where fees are under a specified level and for such cases to be considered by non-lawyer panel member on papers only basis – as there will be no meeting this will assist in reduce costs and burdens on businesses.

## **5. Suspension of dispute process**

### **Issue**

97% of respondents were in favour of the dispute process being suspended where an investigation or appeal is pending.

### **Response**

HSE will suspend the disputes process until the outcome of the appeal or enforcement action is known.

## **6. Recovery of dutyholder costs**

### **Issue**

Dutyholders should be able to recover costs where a panel resolves a FFI dispute in favour of the dutyholder as the current process makes no provision for this.

### **Response**

This was not a matter which was part of the consultation. HSE is legally required to recover fees in relation to FFI as set out in Regulation 22 of the Health and Safety and Nuclear (Fees) Regulations 2016. Regulation 24(6) provides that if a dispute is not upheld, the fee payable will include costs reasonably incurred by HSE in handling the dispute. However, the costs payable in the event of a dispute being unsuccessful relate only to the costs incurred in the panel considering the dispute and not to any costs incurred by HSE in preparing for or providing information to the panel. These regulations do not make any provision for dutyholders to recover costs and there is no legal power for HSE to pay the costs of a person disputing an invoice.