

## WorkSafe’s decision not to formally investigate an incident

<b>Legislation</b>	Ombudsmen Act 1975
<b>Agency</b>	WorkSafe New Zealand
<b>Ombudsman</b>	Peter Boshier
<b>Case number(s)</b>	505641
<b>Date</b>	10 December 2020

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### Summary

*Complaint about WorkSafe’s decision not to investigate and lay charges following an accident causing injury – failure to consider all relevant information – failure to engage meaningfully with the complainant – no evidence that documents had been falsified by WorkSafe*

### Background

The complainant was injured at a mine site on 11 April 2018, while undertaking demolition work for a mining company. The mining company had contracted the job to a demolition company, which sub-contracted part of the work to the complainant’s employer.

The mining company notified WorkSafe of the incident, and advised that the complainant had suffered minor soft tissue injuries.

Following a site visit and preliminary enquiries, WorkSafe decided not to conduct a formal investigation. Instead, it issued the mining company with a prohibition notice on 13 April 2018, which prohibited further demolition work. WorkSafe lifted the prohibition notice on 19 April 2018 after it inspected the mine and reviewed the company’s response. The company was also asked to provide a copy of its internal investigation report to WorkSafe once this was complete.

In late October 2018, the complainant's lawyer asked WorkSafe to reconsider formally investigating the incident. The lawyer advised that the complainant's injuries were more serious than originally thought, and that he required surgery and had limited mobility of the affected limb.

WorkSafe closed the file on 21 November 2018, and notified the mining company of this on 28 November 2018.

On 10 December 2018, WorkSafe responded to the complainant's lawyer. It advised that the updated information on the complainant's injury had not changed the decision not to investigate. The complainant was informed that he had the option of bringing a private prosecution.

On 10 April 2019 (the day before the anniversary of the injury), the complainant's lawyer contacted WorkSafe again, requesting that it reconsider investigating the incident. The lawyer:

- provided further information on the complainant's injury, namely that he had had surgeries and may have permanent loss of mobility;
- raised concerns that the complainant's 'Site Induction Checklist' in the mining company's investigation report had been altered;
- drew WorkSafe's attention to differing versions of the mining company's investigation report, provided to the complainant by his employer and by WorkSafe;
- discussed the alleged errors or omissions that caused the incident; and
- observed that this new information enabled WorkSafe to extend the 12-month limitation period on prosecution under the Health and Safety at Work Act 2015.

WorkSafe's response on 15 April 2019 explained that it was now outside the 12-month statutory deadline for bringing a charge and it could not see any benefit in investigation.

On 25 June 2019, the complainant wrote to a number of parties with his concerns about WorkSafe's decisions, and alleged that certain documents had been forged or falsified. On 30 August 2019, WorkSafe advised him that it was satisfied that the documents had not been falsified and that his accident had been adequately considered. It advised that while there was a limited ability for WorkSafe to apply for an extension of time, the provisions did not apply in his case.

The complainant complained to the Chief Ombudsman about:

- WorkSafe's decision not to conduct a formal investigation and its refusals to reconsider that decision; and
- irregularities in the documentation, particularly different versions of the mining company's investigation report and the Safe Work Method Statement, and alleged that WorkSafe had falsified information to protect the mining company.

## Investigation

The Chief Ombudsman notified WorkSafe of his intention to investigate the complaint. He considered WorkSafe's decision not to pursue a formal investigation, its engagement with the complainant, and whether there was any evidence that documents were falsified.

## Assessment

### Decision not to investigate and refusal to reconsider decision

WorkSafe has a number of enforcement powers when a breach or failing has occurred. These powers range from verbal directions to prosecution.

WorkSafe's enforcement decisions are discretionary and take into account a number of factors. Formal investigation and prosecution action are not automatic outcomes where there have been failures leading to injury.

When an agency makes a discretionary decision, the Chief Ombudsman's focus is on establishing whether the discretion was exercised fairly and appropriately. As such, he looked at WorkSafe's processes and whether it took into account all relevant factors before reaching the decision.

### Original decision in April 2018

The Chief Ombudsman considered that WorkSafe's original decision – not to investigate the incident and to issue a prohibition order – was proportionate on the basis of the information available. The WorkSafe inspector had attended the scene, made enquiries with the mining company, and discussed options with senior WorkSafe staff before taking a decision.

However, the Chief Ombudsman was concerned about the record-keeping of the decision. There was limited contemporaneous information on file as to the reason for the decision and the factors taken into account. WorkSafe explained that it considered the mining company's '*serious attitude towards health and safety*' and cooperation, as well as the degree of culpability given that the job had been contracted out and then subcontracted. However, this was not recorded on the file.

The only recorded reason for the decision was a note that the investigations team would not undertake an investigation for this incident, because '*the injuries would not meet the threshold for investigation*'. From this, the primary reason for WorkSafe's decision not to investigate appeared to be the nature of the complainant's injuries.

### First refusal to reconsider in December 2018

The Chief Ombudsman considered that WorkSafe had not given adequate consideration to the additional information about the complainant's injury. The decision was made based on advice

from WorkSafe's investigations team on 10 December 2018 that '*more extensive soft tissue injuries*' would not change the outcome not to investigate formally.

The Chief Ombudsman took the view that WorkSafe appeared to have trivialised the extent of the complainant's injury, which called into question the decision not to reconsider its original decision. He noted that WorkSafe had relied on the mining company's investigation report for its assessment of the complainant's injuries, instead of seeking further details from the complainant or his lawyer. This was concerning as the original decision in April 2018 was made because the injuries did not meet the '*threshold*'.

The Chief Ombudsman was also concerned that WorkSafe did not appear to have genuinely considered the lawyer's request for the decision to be reconsidered or the information provided. The advice from the investigations team on 10 December 2018 was received after the file had been closed (on 21 November 2018) and the mining company informed (on 28 November 2018). The timeline suggested that WorkSafe had already determined that it would not investigate and closed the file without further assessment of the information presented by the complainant's lawyer.

The Chief Ombudsman was not in a position to say whether WorkSafe's decision not to reconsider a formal investigation was wrong, or whether the outcome would have been the same had the full extent of the complainant's injury been considered. However, his opinion was that WorkSafe's decision was unreasonable because it did not properly consider the request and all relevant information.

## Second refusal to reconsider in April 2019

The Chief Ombudsman looked at WorkSafe's internal email correspondence following receipt of the lawyer's letter in April 2019. From this, he formed the opinion that WorkSafe had closed its mind to the issues raised by the lawyer, on the basis that it was too late to do anything as the 12-month statutory limit had expired. There was no suggestion that WorkSafe considered any of the information provided or arguments made, other than acknowledging that the complainant's injury was serious. Nor did WorkSafe turn its mind to whether an extension to the 12-month period was possible and, if so, appropriate.

The Chief Ombudsman noted that the lawyer's letter called into question the reliability of the mining company's investigation report and alleged that documentation (a Site Induction Checklist) had been tampered with. WorkSafe appeared to have given no thought to these concerns which, if factually correct, could have raised questions and potentially led to a different outcome.

While the Chief Ombudsman was unable to conclude that WorkSafe's decision was wrong, he formed the opinion that WorkSafe's decision and response were unreasonable because it did not give the matter proper consideration.

## Engagement with the complainant

While the main complaint was about WorkSafe's decision not to investigate and prosecute the mining company, the Chief Ombudsman also looked into the issue of WorkSafe's lack of

engagement with the complainant. The Chief Ombudsman noted a distinct lack of parity between WorkSafe's interaction with the mining company, and with the complainant.

WorkSafe's engagement during the process was almost entirely with the mining company. Practically all discussions about the event, risks, root causes, and even the complainant's condition appeared to have been with the mining company.

This was in stark contrast with the record of WorkSafe's interactions with the complainant. There was little information on file to show that WorkSafe spoke to the complainant during the process. The complainant stated that he received *'little to no communication from WorkSafe apart from 2-3 phone calls'* wishing him well and he was *'just left in the dark'*.

The Chief Ombudsman also noted that WorkSafe was prepared to give the mining company months to respond to questions, and acted in a timely fashion on the information once received. However, it waited a month and a half to respond to the complainant's lawyer in late 2018, and based its subsequent decision on information obtained from the mining company.

It was also unclear whether WorkSafe advised the complainant of the enforcement action taken at the time. Nor did WorkSafe give the complainant the opportunity to express his feelings or raise concerns about the process. No meaningful explanation of WorkSafe's reasons for not conducting a formal investigation was ever given to the complainant.

The Chief Ombudsman considered that WorkSafe treated the complainant with a lack of regard and courtesy. This caused distrust, which led to an escalation of concerns and an increasingly difficult relationship. He was of the view that more proactive engagement with the complainant early on in the process may have prevented this escalation.

## **Allegations that the documents have been tampered with**

The complainant provided the Chief Ombudsman with the mining company's final investigation report. Based on the information provided, it appeared that the complainant received one version from the mining company, via his employer, in mid-2018 (the First Report). Another version was provided to him by WorkSafe early 2019 (the Second Report), in response to his lawyers' request for the file. The complainant highlighted discrepancies between the two documents, and believed that WorkSafe removed key findings from its copy of the investigation report in order to protect the mining company.

The complainant also raised concerns that the Safe Work Method Statement (SWMS) was changed. He noted that the pre-incident SWMS was not adhered to, and changes were made to it post-incident.

The Chief Ombudsman found no evidence that WorkSafe had deliberately removed or falsified information from the documents on record.

## **The mining company's investigation report**

WorkSafe explained that it was unaware of the differing versions of the investigation report at the time it made the original decision not to investigate the incident. It became aware of the

First Report only through the Chief Ombudsman's investigation. WorkSafe noted that it is not uncommon for companies to provide differing or updated copies of reports.

Reviewing the reports side-by-side, the Chief Ombudsman noted that the First Report appeared incomplete – it was shorter, had missing information and its body did not reflect the table of contents.

The Second Report was longer, with complete attachments and the table of contents that accurately reflected the body of the report. While one page (a timeline) was missing, this page was unlikely to have affected an assessment of culpability and WorkSafe's enforcement decision. The Chief Ombudsman considered that the missing page was more likely to have been due to an administrative error rather than deliberate tampering.

Accordingly, the Chief Ombudsman took the view that the First Report was a draft document, and the Second Report was a later and more complete version. Further, during the course of the investigation, the Chief Ombudsman received a third version of the report from the complainant. This too appeared to be a draft version.

The Chief Ombudsman noted that it is usual for reports to go through multiple drafts and revisions before being finalised. This did not equate to a report being tampered with, but was part of the usual report drafting process.

The Chief Ombudsman also reviewed the differences in the content of both reports. The First Report contained a more detailed narrative of the events and its language was more critical. Key points were reproduced in the Second Report though in less detail and in different order. Both reports dealt with the same contributing factors, and the overall conclusions were the same.

The main point of difference between the two reports was their identification of organisational factors contributing to the incident. The First Report identified '*change management*' as a factor and had two paragraphs on this point. The Second Report did not mention '*change management*' or those paragraphs. Instead, it referred to '*contractor management*' as a factor contributing to the incident, but did not explain it. However, following receipt of the Second Report, WorkSafe picked up on this omission and requested further information on '*contractor management*'. This was provided by the mining company.

Having considered these changes, the Chief Ombudsman concluded that the Second Report, when read together with the mining company's response, was a more accurate reflection of the relevant events and roles of the parties. The differences between the reports did not support the view that the Second Report was modified to protect the mining company.

## Safe Work Method Statements

WorkSafe explained that the mining company revised the SWMS following the incident. It stated that it was common for companies to review SWMSs following an event. WorkSafe considered this to be good practice as the learnings are used to avoid a repeat of the incident.

The Chief Ombudsman found no evidence of anything untoward concerning the revision of the SMWS.

## Outcome

The Chief Ombudsman recommended that WorkSafe apologise to the complainant for:

- not properly considering (and responding to) the updated information on his injury and his concerns; and
- failing to engage with him in a meaningful way.

The Chief Ombudsman did not recommend that WorkSafe reconsider its decision not to investigate because the 12 month statutory limit for laying charges had elapsed.<sup>1</sup> While WorkSafe had the ability to apply to the courts for an extension of time, any such application must have been made before the end of that 12-month period.<sup>2</sup> By the time the Chief Ombudsman received the complaint, the 12-month period had expired.

WorkSafe accepted the recommendation. It also advised that it was willing to meet with the complainant – to offer an apology, answer his questions and to hear how it could have done better to engage him during the process.

The Chief Ombudsman considered the offer of a meeting to be a positive step.

WorkSafe has apologised to the complainant in writing. It has also made a standing offer to meet with him.

## Disclaimer

*This case note is published under the authority of the Ombudsmen Rules 1989. It sets out an Ombudsman's view on the facts of a particular case. It should not be taken as establishing any legal precedent that would bind an Ombudsman in future.*

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<sup>1</sup> Section 146(1)(a) of the Health and Safety at Work Act 2015 states that prosecutions can only be brought 'within 12 months after the date on which the incident, situation, or set of circumstances to which the offence relates first became known, or ought reasonably to have become known, to the regulator'.

<sup>2</sup> Section 147 of the Health and Safety at Work Act 2015. The court is not bound to grant an extension – the application can be declined if the criteria in section 147(3) are not satisfied.