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2023/HSE/MW

21 November 2023

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Ms S. Albon
Chief Executive
Health and Safety Executive
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L20 7HS

Dear Sarah,

The FBU is extremely disappointed with the letter from the HSE of 3 November 2023, in which you provide its response to our complaint submitted seventeen months earlier in May 2022. The union is gravely concerned not only by the conclusions reached by the HSE on the contentious recommendations for the revised BA procedures but also by the method of inquiry adopted by the HSE. The FBU believes the newly introduced procedures for BA use are not safe systems of work for firefighters. They would, should any fire service be sufficiently foolhardy to use them in practice, put firefighters' lives at an unnecessary risk.

With regard to the HSE's method of inquiry, the FBU is surprised and concerned that the first contact from the HSE following notification of this investigation is the communication of the final outcomes. It was our understanding and expectation that the FBU would be engaged throughout the investigation as the complainant and recognised trade union. This is particularly concerning following the previous HSE shortcomings on this matter. We note that the letter makes reference to communications the HSE is purported to have had with certain fire services in the course of its inquiry, although insufficient information is given about those communications to enable the union to address them, but any contact with the FBU in order to allow the HSE to understand the union's response to positions advanced by the fire services, the manufacturers' recommendations and the adequacy of training methods and auxiliary equipment is conspicuously absent. We do not understand why the HSE has elected not to engage with the union as part of its investigation but believe it is one of a number of flaws which undermines its conclusions.

Not having been given the opportunity to discuss our concerns with the HSE as part of the investigation, the FBU can only at this stage register, in summary form, its concerns about the cogency of the HSE's analysis.

1.0 Compliance with COSHH and PPE Regulations

Paragraph 1.1 does not acknowledge or address the point the union raised in regards the manufacturers' instructions. Although we wholly disagree with your assertion that BA can safely be donned other than in 'clean air', our challenge regarding manufacturers' instructions is concerned with the whole process of donning BA. The FBU provided the HSE with clear examples of the donning process and required start up tests as set out in manufacturer's instructions. The FBU set out how, in unpredictable and rapidly changing conditions, it is highly foreseeable that this process will be rushed, not carried out or at worst, not even possible. Your letter fails to address these concerns. As we set out in our letter to you of 27 May 2022, HSE carried out an investigation of firefighter injuries at a high rise incident in Petershill Court in Strathclyde in November 2004, yet you appear not to have drawn on those lessons from that incident in your recent response.

The FBU believes your point on occupational health specialists to be misleading. The union has no prior knowledge of fire and rescue services using their occupational health services in the development of operational policy and cannot judge from your response whether any such 'specialists' are appropriately qualified to comment on the safe use of BA in an operational environment. If they have, as implied in this instance, consulted such health specialists here, your investigation fails to provide any evidence or outcomes of this engagement. No occupational health specialist who may have contributed to devising the new procedures for BA use has ever been identified by name by any fire service (or the HSE). The FBU has no information as to the level of expertise of any "specialist" or their experience, still less the actual input they may have had in the institution of the new systems.

Paragraph 1.2 claims that HSE specialists in the field of occupational hygiene believe the new procedures are safe. However you provide no evidence as to how they came to this conclusion, including field tests, trials or other practical experience. The policy in question, that of stairwell protection, has been developed due to the now very foreseeable eventuality that the fire, and building construction, may not behave as expected and the atmosphere will become not safe to breathe. The paragraph does not attempt to evidence or define the suggested advantages to public protection or firefighting stated.

Paragraph 1.3 concedes the FBU's position that exposure to products of combustion is increased when not under air. Yet it continues to license the intentional lowering of levels of safety for firefighters. The use of BA is not simply "prudent". It is an essential piece of PPE in a safe system of work. The fire and rescue service has witnessed numerous examples of deaths and injuries that underline the necessity of BA and the FBU has provided evidence of a number of these incidents.

The HSE relies on assumptions rather than competent assessment. It assumes the simple carrying of BA alone allows it to be donned, donned safely and within the manufacturers' guidance, but does not attempt to evidence how this could be done. The FBU has provided evidence of the foreseeable risks faced by firefighters in changing conditions. Firefighters are trained to don BA in a safe and methodical process carried out in safe air. The HSE also claims to address a possible technical communications issue with an intentional lowering of firefighting safety. The evidence for such a communications difficulty is unidentified and as such, does not begin to justify a diminution of clear safety standards.

Paragraph 1.4 makes a series of assertions that are not based on any operational understanding of the fire and rescue service. Going under air and returning to the bridgehead, in changing conditions, is not as straightforward as the paragraph suggests. The FBU referred to examples in our previous complaint evidencing serious injuries to firefighters at incidents.

The HSE again fails to set out how BA is donned safely in this scenario and simply assumes that it will be possible to return to the bridgehead safely.

The HSE has completely misunderstood the safe donning practice and how firefighters are trained to follow it. The HSE also completely ignores the requirement to remove several other items of firefighting PPE in order to don BA. The FBU has not seen any tests or data which seek to measure the time taken to put on and activate breathing apparatus measured against the length of time in which clean air is capable of changing to unsafe air beyond the bridgehead in a building which is on fire. The reason for this absence of data, we infer, is obvious. Beyond the bridgehead in a building which is on fire, air can cease to be clean air in moments. There is no safe way of predicting how long air will remain safe or how changes will occur. The very purpose of a bridgehead is to demarcate the “clean air” area in which it is safe for firefighters to work without BA from areas where the character of the air cannot be predicted. The new procedures abandon the bridgehead as an identifiable boundary, for a system in which firefighters are required to operate without activated BA in air whose hazardous nature is recognised to be unpredictable. The HSE remains silent on the procedures and safe systems of work required to be followed to exit a structure or area safely in BA whilst monitoring air usage.

The FBU cannot countenance HSE’s assertion that exposing firefighters “for a brief period” is acceptable. The intentional exposure of firefighters to contaminants, no matter how “brief”, cannot be acceptable as a matter of law. The FBU is shocked that the HSE is prepared to come to such a conclusion or use such language. In fact, the HSE concedes the key point, in that it admits that a committed firefighter should go under air when they deem that the stairwell could become unsafe. That is the purpose of a bridgehead or controlled entry point.

The FBU cannot accept the HSE’s conclusion in paragraph 1.5 that there is “no breach of relevant duties within COSHH and PPE Regulations” in the new BA procedure. The HSE investigation has failed to specifically address a number of the breaches set out in our complaint. Where it has chosen to respond on manufacturers’ instructions it has ignored the actual substance of our concern regarding the donning process.

The conclusions set out in this section are built largely on assumption and not on an accurate understanding of firefighting operations. The conclusion licenses the intentional exposure of firefighters to harmful substances, where it is reasonably practicable to avoid it by donning BA in clean air, as firefighters are currently trained to do. The HSE’s conclusion is contrary to health and safety law and best practice. The FBU believes the new BA procedure is unlawful.

By way of illustration we repeat our simple observation, made at the outset of our objections to the new procedures, which no “specialist” or agency has sought to contradict and which the HSE has noticeably chosen to ignore. Regulation 7(1) of the Control of Substances Hazardous to Health Regulations 2002 provides: *“Every employer shall ensure that the exposure of his employees to substances hazardous to health is either prevented or, where this is not reasonably practicable, adequately controlled”*. An employer is required to discharge this duty first by preventing exposure to a hazardous substance and, only in circumstances where that is not reasonably practicable, by *“adequately controlling”* it. A system in which a firefighter is only permitted to pass beyond the bridgehead with activated BA serves to prevent exposure to substances hazardous to health. A system in which a firefighter is permitted to pass beyond the bridgehead into an area where the status of the air could change at unpredictable speed and in unpredictable ways does not prevent exposure.

The new system of work reduces a level of safety previously granted to firefighters where, self-evidently, the (previously instituted) greater level of safety is reasonably practicable to achieve.

The new system therefore offends the core statutory obligation which the HSE is tasked with enforcing. We could go through a number of other statutory provisions, which were all carefully formulated in our letter of May 2022, to demonstrate the same principle.

2.0 Benchmarking

Paragraphs 2.1 to 2.4 simply describe some differences between certain fire and rescue service proposals, without clarifying whether they are safe.

It is unclear what is meant by a “passable” evacuation stairwell in paragraph 2.5. If it is meant that physical obstructions may be blocking stairways, then there are a number of options available for the fire and rescue service, local authorities and building owners to maintain safe and clear stairwells that don’t require the intentional lowering of firefighter safety. If the paragraph is referring to an unsafe atmosphere in the stairwells, then this contradicts other points made by the HSE about when the policy can safely be used.

Paragraph 2.6 on National Operational Guidance (NOG) is contradictory. HSE concludes the policy to be safe as it will only be adopted in buildings that aren’t failing, and therefore the atmosphere in stairwells can be deemed safe. This paragraph however clearly confirms that the policy’s intention is in fact to deploy firefighters when it is highly foreseeable the building is failing/may fail. It would otherwise beg the question, what exactly is it the stairwells are being protected from?

Paragraph 2.7 is also flawed. It states: “HSE considers when the building is performing as expected and the air in the evacuation stairwell is safe, being under air is not necessary”. This proposes, under the guise of certainty of prediction, no more than hoping for the best. The contentious issues are the foreseeability of conditions changing and exposing firefighters to unsafe atmospheres, and therefore what procedure to put in place to protect firefighter safety in those (changing) conditions.

Paragraph 2.8 is a flawed and misleading comparison. Workers in chemical and waste industries will usually be operating in ‘business as usual’ conditions, not in confirmed and unpredictable emergency environments. To suggest that a worker in those industries wouldn’t go under air in a comparable situation, such as a known leak, is a disingenuous one to make. In any event, the comparators to which your letter refers, and on which the HSE has relied in reaching its conclusions, are unidentified. The FBU (or the public) have no way of knowing what systems are being compared without express identification of the comparators used.

In any event, it is apparent that the HSE’s conclusions are self-contradictory. At paragraphs 1.3 and 1.4 it is stated that risk of exposure is greater while not under air, yet here, in paragraph 2.8, it is stated the protection afforded is the same as being under air. The latter averment is illogical, contrary to all existing evidence and one no professional firefighter would agree.

3.0 Investigations of Hampshire & Isle of Wight and Dorset & Wiltshire Fire and Rescue Services

In paragraph 3.1, the HSE claims to have put the FBU’s concerns to chief fire officers in Hampshire & Isle of Wight and Dorset & Wiltshire Fire and Rescue Services. However, the FBU has already made detailed representations to those chief officers and did not require the HSE to repeat that. Their positions were known. What is not known is what tests have been undertaken and data collected in order for those fire services to have formulated their new systems.

Rather than merely asking the fire services to explain their proposed systems, the FBU would have expected the HSE to have engaged these fire and rescue services, carried out field tests, observed their practical trials and evaluated their training practices – in order to test whether the proposed BA procedures are safe or not. The HSE provides no evidence of any such assessment.

4.0 Engagement with the NFCC

Similarly, paragraph 4.1 states that the HSE has met with the NFCC. The FBU hasn't been provided with any information about the content, nature or outcomes of that engagement. Nor were the FBU invited to participate in, respond to or comment on these discussions.

The FBU is not aware of the terms of reference or instructions Mr Strawson was given or on what he was commissioned to do in his second report. This is in contrast to the open and transparent process of the chairing the London HSAP, when Mr Strawson was afforded all evidence and arguments from all parties. The FBU had no involvement in the process by which his second document was produced. Whereas when he produced his first report, as a part of an open and structured procedure, Mr. Strawson had the benefit of hearing submissions from all interested parties, there is no statement provided of the information he was given when he produced his new document. What is known is that he was deprived of hearing any direct submissions from the FBU. In any case, a reading of Mr. Strawson's new document shows quite clearly that his base concerns about the new proposals remain unchanged.

5.0 Conclusion

The remaining paragraphs state that HSE has completed its work and supports the new, hazardous BA procedures. The FBU strongly disputes the legitimacy of such conclusions. They have been produced by a flawed investigation and a misconception as to the nature of the legal obligations under which the relevant fire services, as employers, are required to operate.

We do not see that the HSE's *Striking the Balance* licenses the intentional lowering of a safety standard which a previous system of work had achieved or the intentional removal of a control measure that is reasonably practicable to implement. Were it to do so, it would be contrary to the obligations imposed by Parliament in the Control of Substances Hazardous to Health Regulations 2002 and the Personal Protective Equipment at Work Regulations 1992. We have previously explained the reason for this. The FBU cannot accept any attempt to misuse the document to permit breaches of regulations to which employers are subject.

The FBU rejects the HSE's comparison of fireground safety to the chemical industry operating in non-emergency situations. The comparison itself demonstrates the HSE's apparent lack of understanding of the operational fire and rescue service environment. The fact that the comparison is unsupported by any evidenced reference to the systems being compared leads the FBU to question whether the HSE is aware of the flawed nature of its own assertion.

The HSE's overarching conclusion that the new BA policy is safe because buildings can be relied upon to behave as expected is perverse. The BA policy's purpose is a response to buildings not behaving as expected, as exemplified by the Grenfell disaster. The FBU set out in a comprehensive evidence pack over a year ago why this policy is an intentional lowering of safety to deliver an unproven and abstract tactical benefit. The FBU also set out why we believe this to be unlawful.

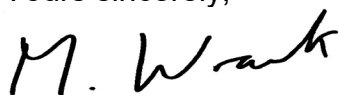
In May 2022, the FBU set out very clearly each specific point within the regulations we believe to be breached by this policy. The HSE's 3 November 2023 letter does not respond specifically to these points. It instead repeats the same un-evidenced arguments put forward by the NFCC and its members in the development of the policy.

Once again, the HSE has chosen to completely exclude the FBU from its investigations and taken statements apparently made in discussions behind closed doors with the NFCC and chief fire officers as the final and only word. HSE has not attempted to discuss their responses, or indeed any of the points raised in our complaint, directly with the FBU at any time. This is simply unacceptable. The FBU has no confidence in your investigation. Worse, we believe it has undermined the status of HSE as an independent safety regulator.

HSE has spent more than a year failing to address the FBU's concerns, to respond to our complaint or engage us as the trade union that represents the vast majority of UK firefighters and control staff. Consultation with trade unions lay at the heart of the HSE's original mission and has been central to its successes over almost 50 years. Sadly, this letter draws the impartiality and objectivity of HSE into question.

The FBU would be prepared to discuss any of the matters raised in this letter further with the HSE but, for now, we will communicate these concerns and this correspondence to our members and decide upon our next steps.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M. Wrack', with a stylized flourish at the end.

Matt Wrack
General Secretary

MW/jr