Local Government & Social Care OMBUDSMAN

Report by the Local Government and Social Care Ombudsman

Investigation into a complaint about North Hertfordshire District Council (reference number: 23 014 065)

19 September 2024

The Ombudsman's role

We independently and impartially investigate complaints about councils and other organisations in our jurisdiction. If we decide to investigate, we look at whether organisations have made decisions the right way. Where we find fault has caused injustice, we can recommend actions to put things right, which are proportionate, appropriate and reasonable based on all the facts of the complaint. We can also identify service improvements so similar problems don't happen again. Our service is free.

We cannot force organisations to follow our recommendations, but they almost always do. Some of the things we might ask an organisation to do are:

- apologise
- pay a financial remedy
- improve its procedures so similar problems don't happen again.

We publish public interest reports to raise awareness of significant issues, encourage scrutiny of local services and hold organisations to account.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Key to names used

Miss F	The complainant

Report summary

Environmental Services & Public Protection & Regulation

Miss F complained the Council wrongly delayed serving an abatement notice on a neighbouring business after it had identified a statutory noise nuisance. Although the Council has accepted it was at fault for this, Miss F complained it has not offered a financial remedy to reflect her loss of amenity and distress arising from the delay. Miss F also says the business is yet to comply with the requirements of the abatement notice, but the Council has not taken action to enforce it.

Finding

Fault found, causing injustice, and recommendations made.

Recommendations

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (Local Government Act 1974, section 31(2), as amended)

To remedy the injustice identified in this report, we recommend the Council:

- offer to pay Miss F £3,000, to recognise her loss of residential amenity because of its failure to serve an abatement notice sooner; and
- circulate guidance to relevant staff,
    - to ensure they are aware the law requires them to make a timely, formal decision about whether a reported nuisance amounts to a statutory nuisance; and that it is only permissible to attempt to resolve a nuisance informally where (a) a statutory nuisance exists, but it is within the seven-day delay period allowed by law in some cases, or (b) a statutory nuisance does not exist. The Council may want to provide a copy of this report as part of the guidance; and
    - to explain the purpose of the Council's 'compensation claim' email address, and that a request for financial remedy for an intangible loss, such as distress, frustration or loss of amenity, can only be considered through the complaints process.

The complaint

1. Miss F complained the Council wrongly delayed serving an abatement notice on a neighbouring business after it had identified a statutory noise nuisance. Although the Council has accepted it was at fault for this, Miss F complained it has not offered a financial remedy to reflect her loss of amenity and distress arising from the delay. Miss F also says the business is yet to comply with the requirements of the abatement notice, but the Council has not taken action to enforce it.

Legal and administrative background

The Ombudsman's role and powers

2. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has had an adverse impact on the person making the complaint. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (Local Government Act 1974, sections 26(1) and 26A(1), as amended)

3. We cannot investigate late complaints unless we decide there are good reasons. Late complaints are when someone takes more than 12 months to complain to us about something a council has done. (Local Government Act 1974, sections 26B and 34D, as amended)

Statutory nuisances

4. Under the Environmental Protection Act 1990 (EPA), councils have a duty to take reasonable steps to investigate potential 'statutory nuisances'.

5. Activities a council might decide are a statutory nuisance include:

   - noise from premises or vehicles, equipment or machinery in the street;
   - smoke from premises;
   - smells and fumes from industry, trade or business premises;
   - artificial light from premises;
   - insect infestations from industrial, trade or business premises; and
   - accumulation of deposits on premises.

6. For the issue to count as a statutory nuisance, it must:

   - unreasonably and substantially interfere with the use or enjoyment of a home or other property; and/or
   - injure health or be likely to injure health.

7. There is no fixed point at which something becomes a statutory nuisance. Councils rely on suitably qualified officers to gather evidence. Officers may, for example, ask the complainant to complete diary sheets, fit noise-monitoring equipment, or make site visits. Councils will sometimes offer an 'out-of-hours' service for people to contact, if a nuisance occurs outside normal working time.

8. Once evidence gathering is complete, a council will assess the evidence. It will consider matters such as the timing, duration, and intensity of the alleged nuisance. Officers will use their professional judgement to decide whether a statutory nuisance exists.

9. Councils can also decide to take informal action if the issue complained about is causing a nuisance, but is not a statutory nuisance. They may write to the person causing the nuisance or suggest mediation.

Abatement notices

10. If a council is satisfied a statutory nuisance is happening, has happened or will happen in the future, it must serve an abatement notice. If the nuisance is noise from premises, the council may delay issuing an abatement notice for a short period, to try to address the problem informally.

11. An abatement notice requires the person or people responsible to stop or limit the activity causing the nuisance. Failure to comply with an abatement notice is an offence, which can lead to prosecution and a fine.

How we considered this complaint

12. We reviewed Miss F's correspondence with the Council, the Council's case notes, the abatement notice, and other relevant documents.

What we found

13. Miss F lives on a residential estate which is next to a business. The business includes several buildings, the nearest of which is approximately 10 metres from Miss F's property.

14. In December 2021, Miss F contacted the Council to say she was suffering from noise nuisance caused by the business's operations. The noise arose from two main sources – the manual loading and unloading of vehicles, and a fume extraction system. She said both types of noise were loud and intrusive, and on most days would begin very early in the morning.

15. The Council opened an investigation into Miss F's allegations, which ran through 2022 and into 2023.

16. During this period Miss F made a series of recordings of the noise, via both her phone and specialist equipment installed by the Council, which the Council then reviewed upon receipt. The Council also made several visits to the business and was in frequent contact with a manager there. The Council highlighted the noise sources to the manager and gained agreement, at various points, for work to be done to mitigate the noise. This produced some marginal, short-term improvement, but Miss F continued to regularly complain about intrusive noise.

17. In September 2023 Miss F submitted a formal stage one complaint to the Council, about its lack of progress in resolving the noise nuisance.

18. The Council responded in November. It acknowledged its investigation had now been running for nearly two years; and, while it explained there had been problems with staff shortages and turnover, the Council accepted this was "far too long".

19. It explained the current case officer had taken over the investigation approximately one year previously, and since then had tried to resolve the problems informally. The Council agreed this was a mistake. It explained it had now served an abatement notice on the business, but acknowledged it should have done so much sooner, and apologised for this.

20. The Council explained the abatement notice required the business to commission an acoustic consultant to identify works needed to mitigate the noise nuisance,

and to then implement those works upon the Council's agreement. It also said it would instigate legal proceedings if the business failed to comply with the notice.

21. Miss F then asked for her complaint to be escalated to stage two, as she said she felt she was due compensation for the stress, anxiety and time she had spent on the matter over the previous two years. In December, the Council responded to say it could not offer compensation as this was not something she had raised in her stage one complaint, but gave Miss F an email address to use to make a formal compensation claim to the Council.

22. Shortly after this Miss F complained to us.

Legislative background

Analysis

23. There are two broad strands to Miss F's complaint: first, the Council's refusal to offer her a financial remedy, having admitted fault in the way it handled the investigation into her complaint of noise nuisance; and second, the fact the Council has not enforced the abatement notice, despite the deadline for compliance having passed. For clarity, we will address each point in turn.

24. Before doing so, we must explain that our role is to review the way councils have made their decisions. We may criticise a council if, for example, it has not followed an appropriate procedure, not taken into account relevant information, or not properly explained a decision. We call this 'fault' and, where we find it, we can consider the consequences of the fault and ask the relevant council to address these.

25. However, we do not provide a right of appeal against council decisions, and we do not make operational or policy decisions on councils' behalf. If a council has made its decision without fault, then we cannot criticise it, no matter how strongly a complainant believes it is wrong. We do not uphold complaints simply because someone thinks a council should have done something different.

26. We now turn to Miss F's substantive points of complaint.

The Council's decision not to offer a financial remedy

27. As the Council has acknowledged, its investigation of Miss F's noise complaint was protracted. But, more specifically, the problem here is that, for a long time, the Council's investigation was not aimed at making a decision whether the noise amounted to a statutory nuisance, but rather at resolving the nuisance informally.

28. The law is clear that, where there is a statutory nuisance, the relevant council must take enforcement action by serving an abatement notice. It has a limited element of discretion in most noise complaints, in that it may delay service for a maximum of seven days, if it considers the nuisance can be resolved informally in that time.

29. Alternatively, the council may attempt to resolve a nuisance complaint informally, where it has decided it does not reach the threshold of statutory nuisance.

30. Either way, the starting point for the council should always be to decide whether there is a statutory nuisance, because it defines what the council must do next. But, as it has accepted, the Council in this case did not do so, which was a critical fault.

31. It appears the Council's recognition of this fault was prompted by Miss F's formal complaint. At that point, it acted quickly to gather more up-to-date evidence,

confirm it demonstrated a statutory nuisance, and then served an abatement notice on the business. It also gave Miss F clear acknowledgement of the fault and apologised for it.

32. However, since serving the abatement notice, the business has taken steps towards compliance (albeit we note Miss F is not satisfied with this, which we will consider in the next section). It appears reasonable to conclude, therefore, that this would have happened sooner if the Council had not delayed serving the notice, in turn at least partially abating the nuisance Miss F was suffering.

33. This being so, the loss of amenity Miss F experienced because of the nuisance during that time is a significant injustice. We share her view that an apology is not adequate remedy for this.

34. To determine the appropriate remedy, we must now consider at what point it was reasonable to expect the Council to have made its decision.

35. As noted at paragraph 3, the law says a person should approach us within 12 months of becoming aware of the issue they want to complain about. This is called the 'permitted period'. But we have the discretion to disapply this rule, where we consider it appropriate to do so.

36. By the time Miss F approached us, the Council's investigation had been ongoing for two years, and we consider it reasonable to say she was aware of her grounds of complaint sooner than this. This being so, under our time restriction, Miss F's complaint is late.

37. We originally decided that we would not exercise discretion to disapply the time restriction in Miss F's case, and for this reason, we would only consider events which occurred during the permitted period, which was from December 2022 onwards (12 months before her complaint).

38. Upon review, however, we concluded this meant we could not make sound findings on her complaint, because the period December 2021 to December 2022 is critical to understanding the fault here. We have therefore exercised our discretion to consider events from before December 2022.

39. The Council has told us it decided there was a statutory nuisance in May 2023, and conceded it should have served the abatement notice at that point. However, the Council's case notes do not reflect this – there is nothing in the notes from May which suggest it made a decision on statutory nuisance then. Rather, it appears the Council made a conclusive decision there was a statutory nuisance only on 10 October 2023, after a visit to the site.

40. The Council has also commented that the case is complicated; but the notes of the site visit on 10 October 2023 show it involved a straightforward process of taking sound level measurements and audio recordings. These, coupled with the timing and regularity of the noise as reported by Miss F, allowed the Council to decide it was a statutory nuisance.

41. We are not persuaded it should reasonably have taken 22 months to make a decision which, ultimately, appears mostly to have been made on the basis of a single site visit.

42. It remains the case that we cannot say precisely when the Council should have made its substantive decision and served the abatement notice. This is because there is no deadline in law by which a council must decide whether something is a statutory nuisance.

43. For the purposes of determining the remedy, in our original decision we said an abatement notice should have been in place by the beginning of the permitted period in December 2022. While we have now decided to extend the period we are investigating, given we still cannot say what date the notice should have been served, and in the interests of fairness, we consider it appropriate to maintain this date as the starting period for remedy.

44. We should stress, however, this does not mean we consider it would have been reasonable for the Council to take a year (December 2021 to December 2022) to serve an abatement notice in this case.

45. Our guidance on remedies says:

"If on the balance of probabilities, a properly conducted investigation would have led to action to address nuisance sooner, we will usually recommend a symbolic payment for loss of amenity in the range of £200 to £500 a month, taking account of the severity of the loss and the circumstances of the complainant."

46. Of relevance here, Miss F says she has been unable to open windows in her home for long periods. She also reports being woken early on most days, often between 4 and 5am, and being forced to sleep with ear plugs. The Council says the various sound recordings Miss F made do not support that she was 'often' woken at these times. However, the Council's own case note of 10 October 2023 said the noise started daily before 7am, which is one of the reasons it was a statutory nuisance. We therefore consider these to be aggravating factors.

47. In mitigation, we are conscious there is no suggestion Miss F has any particular vulnerabilities, which is what we usually mean by the 'circumstances' of a complainant.

48. Taking these points together, we consider a remedy of £300 a month to be appropriate here, and that this should be for the approximately 10 months between the beginning of our investigation and the Council's service of an abatement notice (again, we are conscious Miss F says the nuisance has continued, but we consider this falls under the second strand of her complaint, which we will address presently). We make a recommendation to this effect.

49. Separately, we note again the Council has already accepted it was inappropriate for it to attempt to resolve the noise nuisance informally at first, when it should instead have been making a formal decision whether it amounted to a statutory nuisance. While this is positive, it remains unclear whether the Council has ensured relevant staff are properly conscious of this requirement, and so we consider the Council should provide guidance to them about this. We also make a recommendation to this effect.

50. In her correspondence with us, Miss F has listed various points for which she feels she is due a remedy. This includes not only the loss of amenity, but also the amount of time she has had to spend in contact with council officers and compiling evidence about the nuisance.

51. However, even if the Council had served an abatement notice sooner, it is likely she would still need to have spent time and effort in contact with officers and compiling evidence. On balance, therefore, we are not persuaded this represents a separate, significant injustice justifying an additional remedy.

52. On a separate point, in response to Miss F's stage two complaint, the Council said it could not consider her request for compensation because it was not a point

she had raised at stage one, but directed her to its dedicated 'compensation claim' email address.

53. We find the Council's comments here somewhat curious. We would normally expect a complainant to raise all their points of complaint at stage one, and so we would generally not criticise a council for refusing to consider an entirely new point at stage two. But this really applies where the complainant has raised a new substantive matter – not simply a request for a remedy for something the Council had just upheld at stage one. So we are not persuaded this was a good reason for refusing to consider Miss F's request.

54. More importantly though, the Council's 'compensation claim' email address is for people who have suffered a tangible loss, such as damaged property, similar to making an insurance claim. It is not intended for people claiming for intangible losses, such as a loss of amenity, which should instead be addressed through the Council's complaint procedure. Miss F has confirmed she sent an email to the compensation claim address, and the reply she received explained this distinction.

55. We accept this caused Miss F some additional frustration, although we are not persuaded it is significant enough to amount to a further injustice. But we find it concerning that the Council's complaint officers (such as the one who responded to the stage 2 complaint) are apparently unaware of the purpose of this email address. We therefore consider the Council should take steps to improve its service in this respect, and we make a further recommendation to this effect, which we will detail at the end of this report.

56. We find fault causing injustice in this element of Miss F's complaint.

That the Council has not enforced the abatement notice

57. Turning to Miss F's complaint the Council has not enforced the abatement notice, despite the business not yet having complied with it, we will first note that the requirements of the notice are not straightforward. This is because it contained three sequential steps – arranging an inspection by a consultant, submitting the consultant's report for the Council's approval, and then implementing the recommendations once the Council had agreed them – each with a separate deadline, the final one being 19 February.

58. The business's compliance was then complicated further by the fact the Council was not satisfied with the first report it obtained, and required it to repeat the exercise; along with the fact there were several recommendations, some of which involve works by the business which it has explained to the Council it has been unable yet to complete.

59. When it identifies a statutory nuisance, a council has only very limited discretion in what it can then legally do – in most cases, it will need to serve an abatement notice. But the council does have wide discretion in the decision whether to enforce an abatement notice, once it has served one.

60. There are, broadly speaking, two different ways a council can enforce an abatement notice. It can take direct action, for example by seizing the equipment which is creating the nuisance, or by carrying out 'work in default' (which means entering the site and completing the work required by the notice, and then typically seeking to recover its costs through the courts). Alternatively, it can prosecute the relevant party or parties, which can result in a conviction and significant fine.

61. We note Miss F raised the point of equipment seizure with the Council. The Council explained it could not practically seize the large machinery involved in this case, and that this power is intended more for things like musical equipment. We share the Council's view here.

62. This leaves work in default or prosecution as viable options for the Council. However, having reviewed the Council's notes, it appears clear the business is working towards compliance with the notice, and indeed it has carried out some of the work required, but it is finding it more difficult to comply with some of the requirements for practical reasons. This includes, for example, delays in the supply chain for certain materials.

63. Ultimately, it is a matter for the Council to decide whether, and when, it is appropriate to take enforcement action. There is no suggestion from the evidence we have seen that the Council is allowing the matter to drift, and in this sense, no grounds for us to find fault.

64. This is, of course, not to say the Council should allow the matter to remain unresolved indefinitely. If the business's failure to comply with the notice continues, there will come a point where the Council must make a conclusive decision whether to enforce it. If it does not, or if Miss F is dissatisfied with its decision, then she may make a further complaint at that point.

65. But, for now, we do not consider we can criticise the Council for its handling of the enforcement issue.

66. This being said, we must question the Council's assertion to Miss F, in its stage one response, that it would have "no hesitation instigating legal proceedings through the courts" against the business if it failed to comply with the notice.

67. Given the obvious difficulty the business has faced in complying with the notice, this comment now appears rather bold and ill-advised, as it implied the Council would not accept any excuse or delay by the business. However, that is precisely what the Council has now done.

68. So it would have been better if the Council had explained to Miss F the different options it had for enforcement, and the circumstances in which it might use them, rather than saying it would definitely instigate legal proceedings against the business. We do not consider this significant enough to call fault, in isolation, but we would ask the Council to note our criticism here, as such comments can serve to unhelpfully heighten a complainant's expectations.

69. We find no fault in this element of Miss F's complaint.

Recommendations

70. To remedy the injustice identified in this report, we recommend within one month of the date of this report the Council:

- offer to pay Miss F £3,000, to recognise her loss of residential amenity because of its failure to serve an abatement notice sooner; and
- circulate guidance to relevant staff:
  - to ensure they are aware the law requires them to make a timely, formal decision about whether a reported nuisance amounts to a statutory nuisance; and that it is only permissible to attempt to resolve a nuisance informally where (a) a statutory nuisance exists, but it is within the seven-day delay period allowed by law in some cases, or (b) a statutory

nuisance does not exist. The Council may want to provide a copy of this report as part of the guidance; and

- to explain the purpose of the Council's 'compensation claim' email address, and that a request for financial remedy for an intangible loss, such as distress, frustration or loss of amenity, can only be considered through the complaints process.

71. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (Local Government Act 1974, section 31(2), as amended)

Final decision

72. We have completed our investigation. There was fault by the Council which caused injustice to Miss F. The Council should take the action identified in paragraphs 70 and 71 to remedy that injustice.