

Report

on an investigation into
complaint no 11 022 700 about
Derbyshire Dales District Council

21 March 2013

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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.

This report has been produced following the @examination of relevant files and documents and @interviews with the complainant and relevant employees of the Council.

The complainant and the Council were given a confidential draft of this report and invited to comment. The comments received were taken into account before the report was finalised.

Report summary

Environmental services, public protection and regulation

Mr and Mrs W live next to a business. They complain about noise from machinery that runs during the night. As a result of a previous complaint to the Ombudsman, the Council agreed to resolve any continuing noise problem before the Summer of 2011.

Due to unreasonable delays by the Council, it did not issue an abatement notice until August 2012. This meant Mr and Mrs W suffered noise nuisance throughout the Summers of 2011 and 2012.

Finding

Maladministration causing injustice.

Recommended remedy

The Council has now served an abatement notice requiring the business owner to stop the noise nuisance. If the notice is breached, the legal process will take its course.

The Council should also:

- provide an apology to Mr and Mrs W;
- pay Mr and Mrs W £1,820 in recognition of the two additional summers during which noise continued, after the Council failed to take effective action.

Introduction

1. Mr and Mrs W complain that Derbyshire Dales District Council:
 - Failed to tackle problems of noise from a business close to their home; and
 - Failed to keep to a commitment given to the Ombudsman that it would resolve the noise nuisance by Summer 2011.

Legal and administrative background

2. Noise from premises that is 'prejudicial to health or a nuisance' is a 'statutory nuisance' - Environmental Protection Act 1990, section 79(1)(g).
3. Section 80 of the Act says that if a council is satisfied a statutory nuisance exists (or it is likely) it 'shall' serve an abatement notice. An abatement notice requires the owner or operator of the premises to:
 - stop the nuisance or prohibit or restrict it from happening;
 - require works or steps be taken to stop the nuisance or prohibit or restrict it from happening.

An abatement notice should specify the time frame for action to stop the noise.

4. Someone who has been served an abatement notice can appeal to a magistrates' court.
5. A business can show it is using the 'best practicable means' to limit a nuisance as a defence to a prosecution.
6. The law does not set levels at which a noise becomes a statutory nuisance. Whether a nuisance exists is a matter of judgement in the individual case.
7. It can be quicker and better use of public resources for a council to negotiate a resolution rather than take legal action. I would be unlikely to find maladministration if a council was purposefully following an alternative that had a realistic prospect of success.

Investigation

Background

8. Mr and Mrs W live next to a business owned by a former member of the Council. They complain about noise from machinery that runs during the night. They first complained to the Council in July 2007. In 2007 they triple glazed their bedroom windows to lessen noise.

9. They can hear the noise with their windows closed. The Council has assessed that the noise amounts to a statutory nuisance only when the windows are open. In the Council's view, a statutory nuisance only happens during the summer because that is when Mr and Mrs W need to open their windows.

Ombudsman's investigation, June 2010 – March 2011

10. Mr and Mrs W complained to me in 2010 about the way the Council dealt with their noise complaint between 2007 and 2010.
11. My investigator found the Council:
- had not kept proper records of its discussions with the owner;
 - got an independent report confirming statutory nuisance in September 2009 but the business owner did not fit a silencer to equipment until August 2010;
 - was allowing noise nuisance to continue;
 - had found the owner exceptionally difficult to deal with, which led the Council to seek extra evidence and involve senior officers to strengthen its position;
 - had persisted for too long in negotiating with the business owner before taking any significant action to address the problem.
12. On 1 November 2010, towards the end of my investigation, Mr and Mrs W made a new complaint to the Council about noise nuisance from a different source within the business premises. They said despite recent changes to equipment made by the business owner, noise problems continued.
13. Officers installed noise measuring equipment in Mr and Mrs W's bedroom in February 2011. They decided on further noise recording because they anticipated the business owner would challenge any action.
14. Council officers gave me a commitment that the Council would:
- pay £300 to Mr and Mrs W for its delay in 2008/2009;
 - not give the owner any special status and deal with the matter in the usual way by a case officer rather than involve senior officers;
 - keep written records of any meetings or discussions with the owner during future investigations;
 - carry out further recording to assess the January 2011 complaint by 1 March 2011; and
 - resolve any continuing noise problem before Summer 2011.
15. Mr and Mrs W could expect any continuing noise nuisance to end by Summer 2011. On that basis I discontinued my investigation.

16. My investigator was conscious that a member of the Council, the business owner, had benefited from the delay. She found no evidence that Council officers had been or had felt under any pressure to act differently than they would otherwise have done. They were dealing with a business owner who knew a lot about enforcement under the Environmental Protection Act and was likely to contest any action. My investigator concluded that the officers wanted the Council to have enough evidence to be sure of succeeding if it took action.

Complaint to Ombudsman, March 2012

17. Mr and Mrs W complained to me again in March 2012. They complained the Council had evidence of continuing statutory noise nuisance from the business in February and October 2011 but had, again, not dealt with it. The Council had breached its commitment to resolve any continuing noise nuisance by Summer 2011.

Council action from January 2011 to March 2012

18. In January 2011 the business owner told the Council he would no longer co-operate over the noise complaints and would “see the Council in court”.
19. Council Officers confirmed noise nuisance on 25 February 2011.
20. The Council says that at a meeting on 13 April 2011, a Director asked for a written report rather than the raw data from the sound level meter. This was provided the next day and discussed at another meeting on 3 June 2011.
21. The Council decided it should look at formal action against the owner.
22. In order to do this successfully, senior officers decided further noise measurements should be taken while the extractor fan was operating and as far as possible no other loud noises from neighbouring businesses were occurring. The Council wanted categorical evidence that an extractor fan in the business property was the sole cause of the raised noise level in Mr and Mrs W’s home.
23. The Council carried out further noise measuring on 4 August 2011. This confirmed the fan was responsible for the raised noise level readings. A report was prepared and considered in October 2011.
24. The Council says it then had several discussions with the business owner in October and November 2011. He said he anticipated a permanent solution to the noise would be likely in the “foreseeable future” but could not say what it was likely to be.
25. The Council says it took no further action because it received no more complaints and no information from the business owner.

26. After Mr and Mrs W complained to me in March 2012, the business owner told the Council extensive cleaning of the fan had reduced the noise. The Council tried to arrange a visit, but the owner deferred meetings saying they were not convenient. When my formal investigation began, the Council arranged a visit for 11 June 2012. A Council officer advised the owner reducing the speed and number of rotations of the fan could lower noise levels.
27. On 28 June 2012 the Council again measured noise levels from the fan. The results showed noise from the extractor fan had not reduced. Mr and Mrs W were still experiencing noise that was a statutory nuisance.
28. The Council considered the problem could be resolved quickly and cheaply if the owner co-operated and reduced the speed of the fan.
29. The Council wrote to Mr and Mrs W and the business owner with details of the noise readings. It gave the business owner two weeks to explore measures to abate the nuisance.
30. The owner asked for more information about the method used in the noise readings. Officers had anticipated this and were already preparing a full noise report. The owner told the Council he would soon apply for planning permission. His planning proposal would mean the business would stop its night shift, move the fan and switch it off at night.
31. My investigator told the Council I would be likely to find maladministration if it deferred taking action because of a promise of an unspecified planning application at some time in the future. The law required it to serve an abatement notice and it should do so unless there was a realistic prospect of negotiations leading to a resolution. The history in this case did not suggest the business owner was likely to cooperate.
32. The Council took legal advice. The advice was it must, by law, serve an abatement notice if the business owner did not confirm the action he intended to take to abate the noise.
33. The Council then served an abatement notice on 3 August 2012 giving the owner six weeks to stop the noise nuisance.
34. The business owner applied for planning permission to change the use of the front of the building. This application did not do what the owner had told the Council it would do. It did not lead to the fan being switched off throughout the night.

Findings

35. Since 2007 Mr and Mrs W have suffered night-time noise from the business. The Council not only failed to deal with their complaints but also failed to honour the commitment it made to me to resolve the matter by Summer 2011.
36. In February 2011 the Council had evidence of noise that would be a statutory nuisance in the summer when Mr and Mrs W would want to have their windows open. It was reasonable to make sure that it had evidence that could withstand challenge from the business owner in court. The Council should have done this by April / May 2011 so it could take legal action in good time to prevent Mr and Mrs W experiencing statutory noise nuisance in Summer 2011.
37. The Council did not get and consider its further evidence until October 2011. This was unreasonable delay and maladministration.
38. The Council then failed to take action until my investigation began again in June 2012. This was maladministration.

Injustice

39. The Council did provide the remedy I recommended after my first investigation for the injustice to Mr and Mrs W between 2007 and 2010. This report deals with their injustice from March 2011.
40. The Council's unreasonable delay in taking effective action has meant Mr and Mrs W have suffered noise nuisance at night throughout the summers of 2011 and 2012. This is a significant injustice. They have also been put to some time and trouble in bringing a second complaint to the Ombudsman.

Recommendation

41. The Council has now served an abatement notice and the legal process will take its course. To remedy the injustice caused to Mr and Mrs W, the Council should apologise to them and pay them £10 per night for the two summers during which the noise continued after the Council failed to take effective action. Using the meteorological definition of summer as the months of June, July and August, this is 91 nights each year giving a total payment of £1,820.



Dr Jane Martin
Local Government Ombudsman
Beverley House
17 Shipton Road
YORK
YO30 5FZ