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TestSafe Australia
919 Londonderry Road
Londonderry NSW 2753

Atn: David Wilson

Please find below my findings and inspector decision in relation to the Statutory request for TestSafe Londonderry.

Issue:

On 23rd December 2022, pursuant to Section 54 of the Work, Health and Safety Act 2011 (WHS Act) Simone Fraser, Senior Safety & Wellbeing Advisor, Department of Customer Service requested the Regulator, SafeWork NSW, appoint an Inspector in relation to the following sections of the Act,

WORK HEALTH AND SAFETY ACT 2011 - SECT 54

54 Failure of negotiations

1. If there is a failure of negotiations (including negotiations concerning the variation of an agreement), any person who is or would be a party to the negotiations may ask the regulator to appoint an inspector for the purposes of this section.
2. An inspector appointed under subsection (1) may decide—
 - a) the matters referred to in section 52 (3), or any of those matters which is the subject of the proposed variation (as the case requires), or
 - b) that work groups should not be determined or that the agreement should not be varied (as the case requires).
3. For the purposes of this section, there is a failure of negotiations if—
 - a) the person conducting the business or undertaking has not taken all reasonable steps to commence negotiations with the workers and negotiations have not commenced within 14 days after—
 - b) a request is made under section 50, or
 - c) a party to the agreement requests the variation of the agreement, or
 - d) agreement cannot be reached on a matter relating to the determination of a work group (or the variation of an agreement concerning a work group) within a reasonable time after negotiations commence.
4. A decision under this section is taken to be an agreement under section 52.

Application of the facts - Section 54 WHS Act 2011:

Negotiations between the parties to negotiate workgroups over a period have failed to reach an amicable outcome to comply this section.

TestSafe: Overview

TestSafe is an agency within the Department of Customer Service that provides auditing, chemical, electrical and mechanical testing services. TestSafe is located at 919 Londonderry Rd, Londonderry and has approximately 29 workers.

Brief background to issue:

(Note: Full chronology of events is available)

1. 20th July 2022 request for HSR nominations for the Londonderry working group was sent by Safety & Wellbeing team
2. Two nominations for HSR's were received and an election was initiated by Department of Customer Service Safety & Wellbeing.
3. September 2022, PSA notified the Safety & Wellbeing team that several members raised concerns about the makeup of the working groups.
4. DCS worked with the working group to negotiate a potential variation to the current work group
5. October 2022 Safety & Wellbeing conducted a vote via Microsoft forms and members voted with ■ votes for one working group and ■ votes for two working groups
6. November 2022 PSA ran an independent survey and members voted with majority supporting 2 working groups and 2 HSR's. Members not willing to compromise on one working group with one HSR.
7. Agreement cannot be reached on the number & composition of the working groups.
8. November 2022 mediation requested by the Regulator

Scope:

This decision extends to TestSafe workers located at 919 Londonderry Rd, Londonderry.

An inspector appointed under Section 54(2) of the WHS Act can decide:

1. Any of the matters referred to in Section 52(3) having regard to clauses 16 and 17 of the WHS Regulations 2017; or any matters the subject of the proposed variation; or
2. That workgroups (or a variation to the current workgroups) should not be determined.

The matters referred to in s.52(3) of the WHS Act are:

- (a) the number and composition of work groups to be represented by health and safety representatives; and
- (b) the number of health and safety representatives and deputy health and safety representatives (if any) to be elected; and
- (c) the workplace or workplaces to which the work groups will apply.

Determination of work groups – Legislative provisions and definitions

Section 51 WHS Act 2011

1. If a request is made under section 50, the person conducting the business or undertaking must facilitate the determination of one or more work groups of workers
2. The purpose of determining a work group is to facilitate the representation of workers in the work group by one or more health and safety representatives.
3. A work group may be determined for workers at one or more workplaces.

Work group and HSR roles are defined as follows – *(Source SafeWork NSW website)*

A work group usually consists of workers who perform similar types of work and have similar health and safety conditions within the workplace.

They represent the interests of workers and ensure that health and safety representatives (HSRs) are accessible to work group members.

Application of the facts to clause 17 of the Work, Health & Safety Regulation 2017:

a) **the number of workers,**

There are currently 29 workers located at TestSafe, all of whom are permanent employees.

b) **the views of workers in relation to the determination and variation of work groups**

Inspector conducted both site visit and phone call enquiries with workers to obtain views of workers in relation to determination of workgroups.

In general, the workers' views were inconsistent in that:

- A single workgroup with one HSR which incorporates all workers would most likely be sufficient to represent the views of all workers regardless of what team they are.
- Creation of two workgroups based upon specific tasks and risks with one HSR for each work group is needed to ensure that the workers who perform physical testing are adequately represented.
- Majority of workers within the [REDACTED] workers + [REDACTED] and [REDACTED] ([REDACTED] workers + [REDACTED] teams are of the opinion that their tasks and role is very different to those in other teams due to the nature of the work, risks and hazards associated with tasks of physical testing, as well as the areas in which the testers perform their work and accessibility to the current HSR [REDACTED]

- It has been reported that the current HSR, [REDACTED] whose role is a [REDACTED] within the [REDACTED] team predominately works offsite and when he is onsite is office based.

c) the nature of each type of work carried out by the workers

Workers potentially impacted by this decision can be categorised into the following teams.

TestSafe Commercial	TestSafe Quality and Certification	TestSafe Mechanical Testing	TestSafe Electrical Assessment	Building Service Delivery Team
1. Commercial Business Officer	1. Quality and Certification Manager	1. Manager Mechanical Testing	1. Manager Electrical Assessments	1. Facilities Officer
2. Commercial Business Assistant	2. Lectical Engineer	2. Senior Technical Officer	2. Electrical Engineer	
3. Commercial Business Assistant	3. Assistant Quality and Certification Officer	3. Technical Officer	3. Senior Technical Officer	
4. Commercial Business Team Leader		4. Destructive Wire Rope Test Specialist	4. Senior Technical Officer	
		5. Technical Officer	5. Team Leader Electrical Engineering	
		6. Technical Officer	6. Electrical Engineer	
		7. Senior Mechanical Engineer	7. Senior Engineer	
		8. PPE Specialist	8. Senior Engineer	
		9. Senior Technical Officer	9. Senior Engineer	
		10. Supv Diesel Engine Testing	10. Senior Engineer	
			11. Electrical Engineer	

TestSafe Commercial

- [REDACTED] office-based workers [REDACTED] of which work part-time)

TestSafe Quality and Certification

- [REDACTED] workers made up of office based and one worker predominately offsite.

TestSafe Mechanical Testing

- [REDACTED] workers, [REDACTED] of whom perform physical testing based at Londonderry and [REDACTED] worker, [REDACTED] who performs testing predominately offsite

TestSafe Electrical Assessment

- [REDACTED] onsite physical testers

Building Service Delivery Team

- [REDACTED] site-based facilities officers. Manager works from [REDACTED] and the Facilities officer works throughout various of the site at Londonderry.

d) the number and grouping of workers who carry out the same or similar types of work

The number and grouping of workers can be categorised into the following

	Work Area	Workers	Manager/Leader
TestSafe Commercial	Onsite office-based	[REDACTED]	[REDACTED]

TestSafe Quality and Certification	Onsite, offsite & office-based	Onsite worker Offsite worker	█
TestSafe Mechanical Testing	Onsite & offsite physical testing	Onsite workers Offsite worker	█
TestSafe Electrical Assessment	Onsite & electrical physical testing	Onsite workers Some off-site work as required but rarely	█
Building Service Delivery Team	Onsite & Remote	Based at various locations throughout Londonderry	Based in █

e) the areas or places where each type of work is carried out,

See above point (c). The main areas of work are physical onsite testing, offsite testing and office-based workers.

f) the extent to which any worker must move from place to place while at work

- It is reported by workers that office-based staff do not perform any physical onsite or offsite testing and typically work from an allocated area in the main office or remotely working as a hybrid model.
- Onsite physical testers perform testing throughout various areas of the Londonderry site and spend small portions of their time in the office.
- Offsite testers typically spend their time offsite with small portions of their time in the office eg. 4 days offsite testing with 1 office day
- The Facilities Officer works throughout various areas at Londonderry approx. 3-4 days per week.

g) the diversity of workers and their work

TestSafe Londonderry was not assessed for cultural or diverse workers, nor was it identified during enquiries.

h) the nature of any hazards at the workplace or workplaces

The nature of the potential risks and hazards associated with the work carried out within the different teams at Londonderry varies greatly.

The nature of potential hazards exposed to the Mechanical Testing and Electrical Testing teams may include, but not limited too.

- Exposure to hazardous chemicals and dangerous goods
- Explosives
- Extreme heat and flammables
- Personnel protective equipment requirements
- Manual handling

- Plant and equipment
- Environmental risks including weather and animals.
- Destructive and non-destructive testing

The nature of potential hazards exposed to the Quality & Certification team may include, but not limited too.

- Office based risks and hazards such as ergonomics, strains, manual handling.
- Offsite workers are exposed to fatigue and other risks associated with national and international travel.

The nature of potential hazards exposed to the Building Service Delivery Team may include, but not limited too.

- Office based risks and hazards such as ergonomics, strains, manual handling
- Exposure to environmental hazards
- Plant and equipment

The nature of potential hazards exposed to the Commercial Business team may include, but not limited too.

- Office based risks and hazards such as ergonomics, strains, manual handling

i) **the nature of any risks to health and safety at the workplace or workplaces**

As per point (h).

j) **the nature of the engagement of each worker, for example as an employee or as a contractor**

All TestSafe employees are permanent employees, some work on a part-time basis and/or work remotely with a hybrid working model.

k) **the pattern of work carried out by workers, for example whether the work is full-time, part-time, casual or short-term**

Majority of all workers at TestSafe work on a fulltime basis with exceptions for some within the main office who work part time.

TestSafe adopts a hybrid working model with office-based workers working remotely from home or other suitable and approved locations.

l) **the times at which work is carried out,**

The times of work are as follows and is guide only, these working hours can vary:

Mechanical Testing & Mechanical Testing

- General hours are 8am – 4pm Monday to Friday

TestSafe Commercial

- General hours 8:30am to 4:30pm Monday to Friday

TestSafe Quality and Certification

- General office hours 8:30 to 4:30pm Monday to Friday. Offsite work varies and is dependent on travel, location and site requirements. International and National travel is required for [REDACTED]

Building Service Delivery Team

- The Facilities Officer works from 6am-3pm onsite 3-4 days per week. The Manager works from the [REDACTED] office.

m) any arrangements at the workplace or workplaces relating to overtime or shift work

For all teams across TestSafe, it is under rare circumstances that they undertake overtime or shift work. Off-site testers and auditors can experience longer days when factoring travel to site, locations and testing or auditing timeframes.

Application of facts to cl 16 of the Work, Health & Safety Regulation 2017

Negotiations for and determination of work groups and variations of work groups must be directed at ensuring that the workers are grouped in a way that:

- a) **most effectively and conveniently enables the interests of the workers, in relation to work health and safety, to be represented.**

Workers should be grouped in a way that allows the most effective and convenient representation of their health and safety interests. This regard may take into consideration grouping of workers with similar interests including working arrangements, performing similar tasks, exposure to hazards / risks and location at the workplace.

Further inspector enquiries indicate that majority of the [REDACTED] and [REDACTED] teams agree that two working groups with a HSR's for each working group would best achieve the objective for the following reasons:

- Physical testers all perform similar tasks
- Exposed to similar hazards and risks.
- Their work is predominately based onsite in areas around the Londonderry yard with minimal time based in the office.
- Their general working hours are Monday to Friday 8am to 4pm.
- Physical testers have similar requirements for equipment and PPE.
- A HSR representing this working group would be easily accessible
- The current HSR, although is from the [REDACTED] team is predominately based offsite

- b) **has regard to the need for a health and safety representative for the work group to be readily accessible to each worker in the work group.**

The regard for primarily office-based workers to form part of one working group along with the Mechanical and Electrical testing team presented concerns due to the differing tasks performed and risks/hazards associated with the different teams at Londonderry.

The current HSR, [REDACTED], performs off-site [REDACTED] therefore accessibility can be limited.

Inspector's decision

Pursuant to Section 54 in the WHS Act 2011, the PCBU has taken all reasonable steps to negotiate however an agreement cannot be reached on a matter relating to the determination of a work group.

Pursuant to Section 54 WHS Act 2011 work groups will consist of two work groups with two HSR's.

The composition of the working groups will be as follows:

Number of groups	Number of HSR's	Employment Type	Worker(s) to which are applied
Group 1	1 HSR	TestSafe Londonderry	Mechanical Testing team Electrical testing team
Group 2	1 HSR	TestSafe Londonderry	Quality & Certification TestSafe Commercial Building Service Delivery Team

The work group structure and number of HSR's above is in my view adequate to meet the PCBU's obligations as to the Act.

Any vacant HSR positions in any work group should be filled as soon as practicable.

TestSafe must, as soon as practicable, notify workers of the outcome of negotiations determined by this agreement pursuant to Section 53 (1) of the Work, Health & Safety Act 2011.

Should you disagree with the outcome of this decision you have a statutory right of review at SafeWork NSW Governance and Appeals Unit or the Industrial relations Commission of New South Wales as outlined under Section 229 of the WHS Act 2011.

Kind Regards,

Sara Van den Anker

A/State Inspector | Investigations & Emergency Response
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