

Lying in unison (B)

The report into the “lying in unison” affair was a critical step in James Buwalda’s accession as Secretary of Labour. Most of his new senior managers wanted him to treat the matter as an issue confined to the Immigration Service;¹ instead Buwalda used the report to underline senior managers’ accountability for the performance of their staff. The new boss was signalling the need for a change in the culture of the department and that he expected his new team to get on board.

But he had to be careful to avoid mistakes, especially in delicate matters of employment law. He consulted with his employer, the State Services Commissioner, and was warned against the risk of publishing unproven allegations against an employee.² Though it seemed that Ian Smith may have deliberately deceived the Ombudsman there was no proof; accordingly Buwalda used a negative construction to explain what he had found:

“I did not find evidence ... of collusion or conspiracy to deceive... Nor did I find evidence [against] Mr Smith.”³

However, though employment law prevented Buwalda from arriving at a clear finding in respect of deception, there were other grounds for action because the whole affair made it difficult to continue to have trust and confidence in Ian Smith. Accordingly, Buwalda

This case was written by Adjunct Professor Mark Prebble (School of Government, Victoria University of Wellington) with research assistance from Meg Prebble. It is a sequel to the case 2013-147.1 and was written as a basis for class discussion rather than to illustrate either effective or ineffective handling of a managerial situation. The assistance of James Buwalda is appreciated, but responsibility for the final content rests with the author.

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¹ Interview with James Buwalda, 8 May, 2012.

² Ibid.

³ Buwalda, James (28 August 2003), *Report on an investigation into the Department of Labour’s management of information in relation to Ahmed Zaoui*. Department of Labour: Wellington (DoL Report). p 17 – 18

initiated disciplinary proceedings which eventually led to Ian Smith's departure in early 2004.

On 28 August 2003 James Buwalda published his report. In total he produced 22 pages of findings in just four weeks from the day he began the inquiry. The media and the opposition, however, were neither impressed by the speed nor sympathetic about the constraints that Buwalda had faced. For example, in a press release Murray McCully (the opposition Immigration spokesperson) said:

“The Secretary of Labour is asking us to believe that the recipients of the explosive memorandum had amnesia in unison when responding the Ombudsman's enquiries. I have said from the outset that an in-house inquiry would satisfy no one in light of the seriousness of the issues which have been raised.”⁴

Ombudsman's inquiry

Six months later, on 24 February 2004 the Ombudsman, Mel Smith, completed his inquiry.⁵ His report was not troubled by complexities of employment law, nor did he need to concern himself with possible reactions from the senior management team at the Department of Labour. His main focus was on how the Department had failed to provide him with information during his review of the refusal to respond to Sarah Boyle's earlier request for information. This was the report the opposition and media had been clamouring for.

The Ombudsman's process was slower, more painstaking and more forensic than the departmental review had been. Mel Smith put witnesses on oath; the report included pages of questions and answers from witness interviews. The Ombudsman's Office also accessed emails between staff to determine what had happened. The final report was narrower in scope than the departmental review but it was more than double the length - 48 pages.

Even after all that investigation it was not possible to prove that Ian Smith or anyone else had deliberately concealed the 17 December “lying in unison” comment; but the Ombudsman carefully constructed a damning scenario.

For example, when Sarah Boyle had initially asked for “daily media logs and associated commentary or remarks from employees”⁶ Ian Smith had said that he could not locate the log for 17 December, adding “I have a feeling I never did one for that day, but for the life of me I can't recall why.”⁷

This reply seemed barely credible. In fact when the Ombudsman's office came to check Ian Smith's computer they found an unedited copy of the 17 December media log complete with the “lying in unison” comment in his “sent” folder.⁸ In addition, they located his diary for 17 December, including a hand-written annotation recording the media log.

When Sarah Boyle later asked again for “...comments from NZIS staff on information contained within media logs”⁹ Ian Smith translated that to a request for “responses” and he

⁴ McCully, M. *Report relies on amnesia in unison*, Press Statement, 3 September 2003.

⁵ Office of the Ombudsman, 2004. *Report of the Ombudsman, Mel Smith, upon the actions of the Department of Labour in regard to an Official Information Act complaint by Sarah Boyle, of the office of the Leader of the Opposition. (Ombudsman's Report)*

⁶ Ombudsman's Report, p11.

⁷ Ibid, p12.

⁸ Ibid., p19.

⁹ Ibid., p13.

said in a later email “I would have deleted any responses to the media logs that far back.”¹⁰ Effectively Ian Smith’s emails put a whole new spin on the information request.

Overall the Ombudsman found it hard to accept what Ian Smith told him: “I have formed the opinion that during May 2003 Mr Smith knew or believed that unedited versions of his media logs were sought by the Ombudsman for the purposes of an investigation, and deliberately dissembled.”¹¹ And he did not confine his comments to Ian Smith; he further found that “CD” had “consciously failed to draw attention” to unedited media logs.¹² The finding of “deliberate dissembling” contrasted with James Buwalda’s conclusion that “allegations of lying... cannot be substantiated.”¹³

Though the findings about Ian Smith and “CD” were expressed in carefully neutral language it was apparent that the whole episode had distressed the Ombudsman, who concluded:

“It has been necessary for me to express adverse opinions with regard to the credibility of Mr Smith and CD, and to express an adverse opinion as to the manner in which they fulfilled their departmental responsibilities. It has grieved me to do so, and I would hope that it will never again become necessary for me to express any similar opinions in the course of any future investigation which may fall to me. I consider the circumstances of this investigation provide a salutary warning to all persons who may be subject to requirements by an Ombudsman that their functions should be undertaken with the greatest of care, and that the Ombudsmen will not treat lightly any dereliction of duty.”¹⁴

Aftermath

The Ombudsman’s report provided another opportunity for political criticism. The view of the opposition was summed up by Murray McCully who used the report as a basis for a renewed attack on the department, the government and everyone in the vicinity. Niceties of employment law were ignored as he used the differences between the reports to describe the initial report as “a shabby cover-up” saying:

“The findings made by the Ombudsman in today's report are a damning verdict not just on the actions of two public servants, but on those of a department which is contemptuous of its obligations to the Parliament, the public, and the Ombudsman. That the Prime Minister, her Ministers, the State Services Commissioner and the Secretary of Labour were prepared to stand in the way of an independent inquiry reflects no credit upon them whatsoever.”¹⁵

Once the dust settled, however, normal administration continued. James Buwalda completed the disciplinary process and Ian Smith left the department shortly after. In the following months James Buwalda addressed the underlying issues; he launched a programme of culture change throughout the department supported by a comprehensive reorganisation and a new senior management team.

¹⁰Ibid., p13.

¹¹ Ombudsman’s Report, p29.

¹² Ibid, p38.

¹³ DoL Report, p4.

¹⁴ Ombudsman’s Report, p46.

¹⁵ McCully, M, 2004, *Ombudsman Exposes Shabby Cover-up*, Press Statement, 26 February.