

19 September 2018

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Concerns regarding draft report

1. You have provided us with a copy of your draft report into the complaint made by **Employee A** against my client, The Honourable Meka Whaitiri.
2. We have a number of serious concerns in relation to your draft report and the draft conclusions and set these out below. We consider that the matters raised below demonstrate the conclusions that have been reached are not sound or sustainable. We have followed the order of the issues set out in the draft report.
3. We ask that you take these matters into account and amend your draft report accordingly. We also ask that a copy of this letter is annexed to the report to be provided to the decision maker.

Wider context of the complaint is lacking

4. As you are aware, the circumstances for the commencement of this complaint are unusual. In particular:
 - (a) The email sent to the Prime Minister on 29 August and the tone and context of that email.
 - (b) The timing of the email and **Employee A** not making the complaint **self**.
5. We are concerned that this has not been explored sufficiently in the investigation. It is relevant to both the significance of the allegations and the credibility of **Employee A**.

Threatening email of 29 September

6. The email sent on to the Prime Minister on 29 August 2018 at 8:18 am, and its potential effect on **Employee A** is significant.
 - (a) The email uses very strong language to describe the alleged events. This includes the subject line [REDACTED] and makes another reference to [REDACTED] later in the email. The email describes what allegedly happened as [REDACTED]. It makes the allegation that Ms Whaitiri [REDACTED].
 - (b) The email makes reference to a number of serious themes including [REDACTED] and the [REDACTED]. It then goes on to [REDACTED].

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link the alleged action of the Minister with this background, saying things will not improve if [REDACTED]

- (c) The email includes an explicit threat. The emailer [REDACTED]
- (d) The email concludes with the paragraph [REDACTED]
7. **Employee A** has acknowledged that the author of the email is the [REDACTED] of a friend. **Employee A** had spoken to [REDACTED] about the incident. There is no suggestion that the [REDACTED] who sent the email to the Prime Minister saw the events in Gisborne first hand. Accordingly, it appears that the content of the 29 August email came from a conversation that **Employee A** had with [REDACTED] friend and, subsequently, the friend had with [REDACTED]
8. A number of relevant matters arise from this email which do not appear to have been explored with **Employee A**
- (a) The very strong language in the 29 August email is not supported by what **Employee A** self described in [REDACTED] interviews with you. Given **Employee A** was, at least one step removed from the source of this information, what did s/he say to [REDACTED] friend?
- (b) How and when **Employee A** spoke to [REDACTED] friend and what s/he told [REDACTED]
- (c) The inconsistencies between the email and **Employee A** subsequent accounts were not put to [REDACTED]. If s/he had exaggerated matters to [REDACTED] friend, s/he may also have exaggerated matters when speaking with you.
- (d) Given the tone and content of the email, including the blackmail threat; was **Employee A** embarrassed that the email had been sent? Did that effect what s/he said about the Minister's actions?
- (e) Did the email, having been seen by the Prime Minister's Office, the Chief of Staff and **Employee A's** employer, effect what **Employee A** said about the Minister's actions?

"Complaint process" initiated by Ministerial Services, once wider political context was known

9. **Employee A** did not initiate the complaint [REDACTED] self: this is clear from **Employee A's** initial interview with you, 5 September 2018.
10. Rather, Ministerial Services decided to initiate the "incident process" on **Employee A's** behalf on Thursday, 30 August, following a meeting s/he had with two Ministerial Services managers. By the time the statement was written for **Employee A** by Ministerial Services, **Employee A**, and the Ministerial Services staff, were aware that:
- (a) An email had been sent to the Prime Minister by the [REDACTED] of one of **Employee A's** friends.
- (b) The Chief of Staff of the Prime Minister's Office was involved and there was potentially a political element to the matter.

11. We are concerned that the investigation has not considered the possible impact of this chain of events on **Employee A's** actions or motivations. In particular, it does not appear that **Employee A** has been asked:
- Whether, without the email to the Prime Minister and subsequent events, would **Employee A** complained?
 - Why **s/he** had not complained **self** in the first instance?
 - Whether **Employee A** felt **s/he** had to continue with the issue because it had been brought to the attention of the Prime Minister and the Chief of Staff?
12. We consider it is highly relevant to the credibility of this complaint that it was commenced by **Employee A's** employer and that by that time, the Prime Minister's Office were aware of the email. **Employee A** may have felt **s/he** had no other choice but to continue with the process and allow a complaint to be made. It may also have influenced what **Employee A** alleged happened between **self** and the Minister.
13. These matters were not explored with **Employee A**. Nor are their possible impacts explored in the draft report.

Finding of grabbing: lack of basis for credibility finding

14. The report makes a draft finding that Ms Whaitiri "grabbed" **Employee A** on the back of the arm, while standing behind **self**. We have a number of concerns about the approach that the report has taken in making this finding and the evidence relied on.
15. The draft report seeks to "reconstruct events" with the intention of ascertaining what happened. This is not appropriate.
- The reasons provided in paragraph 39 of the draft report presume that **Employee A** was not facing the Minister when the Minister approached **self**. This is not Ms Whaitiri's evidence.
 - Nor is it "logical" that Ms Whaitiri (even if she had been angry), would have physically touched **Employee A** to get **self** attention (draft finding 39.3). The basis for concluding this is not set out and has not been put to Ms Whaitiri.
16. The draft report has implicitly made a credibility finding to favour **Employee A's** evidence (grabbed, from behind) over the evidence of Ms Whaitiri. The draft report provides no basis for the credibility finding.
17. From the material provided to us, we have a number of concerns about **Employee A's** credibility which have not been considered in the draft report.

Version of events change

18. **Employee A's** version of events appears to have changed throughout this process, yet the draft report fails to mention or consider those inconsistencies and they do not appear to have been put to **Employee A**.
19. Given the content of the 29 August email (the use of **self** and **self**), it would appear that **Employee A** may have left **self** friend with the impression that a significant physical altercation took place between **Employee A** and the Minister. This language is not supported by **Employee A's** own subsequent version of events. As noted, **Employee A** has not been asked about this.

20. The statement from the meeting between Employee A and Ministerial Services on 30 August (prepared by Ministerial Services and subsequently confirmed by Employee A) alleges, amongst other things, that Employee A was "pulled / dragged" outside by the Minister. Employee A resiled from this later, saying in 12 September 2018 interview that the Minister grabbed [redacted] from behind and then let go. On [redacted] own evidence, there is now no suggestion that Employee A was physically taken outside by the Minister.
21. Employee A's statement regarding not being dragged from the building is appropriately relied on in the draft report as a basis for the finding that this allegation did not happen. However, we consider that this change goes more broadly to Employee A's credibility, as s/he appears to be resiling from the description that s/he apparently gave to [redacted] friend ("forcibly pinching") and to [redacted] employer ("pulled/dragged" outside) in the days immediately after the incident.
22. These inconsistencies call [redacted] credibility into question, yet none were put to [redacted] as part of the investigation process and so [redacted] credibility cannot have been properly (if at all) assessed. We consider this is fundamental flaw in the investigation process which flows into the draft report.

Wider circumstances of events in Gisborne

23. In your draft report you record that there were no witnesses to the incident.
24. However, there is uncontested evidence that there were a significant number of people in the vicinity of where these events allegedly took place. Ms Whaitiri's evidence is that she wanted Employee A to come outside in part because of the noise of people talking over lunch inside the building.
25. We consider it would be likely, if the events were as significant as Employee A had described, they would have been noticed by one or more of the people who were also attending the event. Given the media coverage of the investigation that has followed, many attendees are likely aware that it was underway.

Employee A had not checked for a bruise

26. The description of the alleged "grab" also varied. Employee A said in 5 September interview that the Minister's grab was "hard" and that s/he hadn't "been grabbed like that before". However, at 12 September interview, Employee A refers to the grab as "...quite hard". Employee A is also less than clear on exactly where the Minister allegedly touched [redacted], going on to say that "it was up round my shoulder or the top of my arm".
27. We consider that it is also very significant that Employee A had not checked [redacted] arm following the events with the Minister, or otherwise noticed any bruising, until s/he was prompted to do so on the morning of Thursday 30 August.
28. It appears implausible that if the grab was as Employee A alleged on 5 September, s/he would not have checked [redacted] arm on the Monday evening or some time before Thursday morning. When Employee A was asked about this in [redacted] second interview, s/he replied "I hadn't thought to look. It's right there, it's not somewhere you look". We consider that this answer is significant – had the events been as alleged, we consider it is likely that Employee A would have looked at [redacted] arm.

29. We consider that it is also unlikely that s/he would not have noticed a bruise on the front of [redacted] right arm as part of [redacted] normal dressing or ablutions in the three days between the alleged events and the Thursday morning.
30. Employee A's evidence is that s/he was wearing a coat when the Minister allegedly grabbed [redacted] arm. s/he was not asked to describe the coat but we presume it was of winter weight material. In those circumstances, it is likely that considerable force would have been required to leave a bruise – making it more implausible that Employee A would not have checked for bruising or noticed any resulting bruise.

Reliance on photographs

31. In reaching your draft finding that the Minister grabbed Employee A's arm, you rely on the photographs of the bruise on Employee A's arm (39.4).
32. We are concerned that the photographs of the bruise is not reliable evidence on which to make this conclusion.
- (a) The bruise is small: as you described it in the interview with Ms Whaitiri, it is "tiny".
 - (b) Employee A cannot be sure where the bruise came from, as s/he didn't notice it until s/he was prompted on 30 August between 9-9:50 am.
 - (c) The bruise is not the expected shape given the action Employee A alleges. Rather, if Ms Whaitiri had grabbed Employee A in the manner alleged, with sufficient force to cause bruising, it is likely that there would have been four finger bruises on the front of Employee A's arm and, perhaps, a bruise from the pressure of a thumb on the back of Employee A's arm or shoulder. It is unlikely that such an action would have left Employee A with a single small bruise, indicating that one finger was used with more force than the others.
 - (d) The photographs were not taken in a timely way, being taken three days after the alleged incident.
 - (e) As noted above, it is implausible that Employee A would not have noticed a bruise on the front of [redacted] right arm in the preceding three days. The bruise was positioned in a place that would be obvious to Employee A when s/he was showering or getting dressed.
33. Given the bruise was not "discovered" until four days after the alleged events it is possible the bruise could have been as a result of an entirely unrelated matter. There is no contemporaneous evidence (i.e. a photo taken just after the alleged incident) to indicate the bruise was present on the Monday of the alleged incident and to conclude the bruise was as a result of Ms Whaitiri's actions in those circumstances is not sustainable.

Finding that Ms Whaitiri raised her voice

34. The Minister acknowledges that she spoke to Employee A in a direct manner. She is also clear that she did not yell at Employee A as Employee A herself acknowledges.
35. We ask that you reflect this in your report.

Draft findings regarding impact on Employee A of Minister's actions

36. The draft report records, in summary form at paragraph 57, what you consider to have been the impact on Employee A of the Minister's actions.
37. The present summary of events does not include any detail of the interactions between Employee A and Ms Whaitiri on Monday afternoon of 27 August, or on Wednesday 29 August. From the Minister's perspective, these interactions and discussions were professional and, indeed, were cordial. By providing a summary in its current form, we consider this overstates the impact of the Minister's alleged actions on Employee A and fails to provide important and relevant context to what happened after the alleged incident.

Lack of training or induction

38. The draft report does not presently include relevant and important context for Employee A's apparent reaction; the lack of training, induction and support s/he received in commencing role.
39. Employee A had only been in the role for [redacted]. S/he had commenced on the [redacted]. In that short time, s/he had travelled on a number of days with the Minister, including overnight, and was also expected to be preparing a number of speeches in [redacted], when these events allegedly took place.
40. It is clear from the evidence of both Employee A and [redacted] that Employee A [redacted] prior to commencing role as a [redacted]. We understand that s/he had not previously worked as a [redacted], something that must have been known to Ministerial Services when s/he was employed. It would appear that Employee A was ill-equipped for the role and was not aware of a number of fundamental aspects of it. For example, Employee A said in [redacted] second interview that [redacted].
41. A ministerial working environment, particularly when the Minister is also travelling with the Prime Minister, is understandably both a very busy and intense environment. It does not appear that Employee A was provided with any training about how to navigate that environment and how to fulfil [redacted] role in that context.
42. [redacted]
43. The Minister was entitled to assume that Employee A had been appropriately inducted and prepared to fulfil the role in the Minister's office. It is not a Minister's role to provide or ensure training is provided for Ministerial Services staff such as [redacted]. As Ministerial Services were aware, the Minister had been without a [redacted] for some time and was likely to have immediate expectations of her new staff member.

44. It is apparent from the interviews with Employee A that s/he has not been questioned prior to the incident at the event in Gisborne, and whether [REDACTED]
45. It is likely, given this lack of training and induction, and the demands placed on Employee A in the very short period s/he had been working with Ms Whaitiri, that Employee A was under a degree of stress. S/he may have been anxious, settling into a new role for which s/he was not prepared. This wider context, and the possibility that Employee A was already in a stressed and anxious mind-set, may explain the strength of [REDACTED] reaction to the Minister's direct questioning at the Gisborne event.

Conclusion

46. Please amend your report to take account the matters noted in this letter and annex a copy of this letter to the report.
47. Please advise when this report has been finalised and provided to the Chief Executive of the Department of Internal Affairs. We understand that the Prime Minister will be out of the country from Saturday this week.
48. We look forward to hearing from you.

Yours faithfully
SIMPSON GRIERSON



Sally McKechnie
Partner

Copy to:

Counsel for Ministerial Services

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