

On the Case Issue 26: Comcare V Banerji: High Court Unanimity; Divided Public Scrutiny?

I INTRODUCTION

In this edition of *On The Case*, LLB candidate, Michael Dimarco, discusses the High Court's recent decision in *Comcare v Banerji*.¹ In this case, the High Court considered whether ss 10(1), 13(11), and 15(1) ('the Impugned Provisions') of the *Public Service Act* ('PSA')² infringed the implied freedom of political communication mandated by the *Constitution*.³

Four separate judgments unanimously set aside the decision of the Administrative Appeals Tribunal ('the Tribunal').⁴ The High Court reiterated that the implied freedom is not a personal right of free speech but a restriction on legislative power.⁵ However, the decision may not encourage those who want to see the High Court expand implied freedoms generally or develop either free speech or religious liberty.

II BACKGROUND

A The Facts

Ms Banerji commenced her employment with the Department of Immigration and Citizenship on 29 May 2006.⁶ Before 7 March 2012, she began posting tweets about matters that related to that Department under the Twitter handle @LaLegale.⁷ There were over 9,000 tweets, and on 9 November 2012, Ms Banerji conceded she had tweeted more than once during work hours.⁸ The tweets were critical of the Department, other employees, the Government and Opposition immigration policies, and Members of Parliament.⁹ The plurality noted¹⁰ the Tribunal's view that some of Ms Banerji's tweets could be characterised as personal, intemperate and vituperative.¹¹

Following the receipt of complaints by other APS employees, an investigation to determine whether Ms Banerji's conduct breached the APS Code of Conduct commenced in May 2012.¹² On 20 September 2012, Ms Banerji was sent a letter that proposed termination for breach and was invited to respond.¹³ On 1 November 2012, she sought an injunction in the Federal Magistrates Court to prevent the termination of her employment.¹⁴ The Federal Circuit Court dismissed that application on 9 August 2013¹⁵

and her employment was terminated effective from close of business on 27 September 2013.¹⁶

On 18 October 2013, Ms Banerji claimed compensation for psychological injuries flowing from the termination of her employment.¹⁷ The claim was refused by Comcare on 24 February 2014, and following internal reconsideration, the decision was affirmed on 1 August 2014.¹⁸ Ms Banerji then appealed to the Tribunal.¹⁹

B The Tribunal Decision

There was an agreed statement of facts before the Tribunal. The core question was whether Ms Banerji had suffered an injury pursuant to s 14 of the *Safety Rehabilitation and Compensation Act* ('SRCA').²⁰ Comcare contended there was no liability because Ms Banerji's termination was reasonable administrative action pursuant to s 5A(1) of the SRCA.²¹ Ms Banerji contended that the termination could not be characterised as reasonable administrative action if it was carried out in breach of the implied freedom of political communication.²²

The Tribunal agreed with Ms Bannerji. Because the termination 'trespassed on the implied freedom of political communication, [it could not]... constitute reasonable administrative action' and was therefore unlawful.²³ Thus, Comcare's decision was set aside.²⁴ Comcare appealed to the Federal Court, but upon the intervention of the Commonwealth Attorney-General, the case was removed into the High Court pursuant to s 40(1) of the *Judiciary Act*.²⁵

III THE IMPUGNED PROVISIONS

Section 13(11) of the PSA²⁶ stipulates:

'(11) An APS employee must at all times behave in a way that upholds:
(a) the APS Values and APS Employment Principles; and
(b) the integrity and good reputation of the employee's Agency and the APS.'²⁷

Section 10 of the PSA stipulates the APS values, which include, that the APS is to be apolitical, professional objective and trustworthy.²⁸ Section 15 of the PSA²⁹ 'provided for

the establishment of procedures for the determination of breach³⁰ including termination of employment.³¹

IV RESPONDENT'S CONTENTIONS IN THE HIGH COURT AS SUMMARISED BY THE PLURALITY

Before the High Court, Ms Banerji contended that, the impugned provisions of the PSA:

1. Did not apply to "anonymous" communications,³² or
2. Alternatively, 'that sanctions against an APS employee for "anonymous" communications, imposed an unjustified burden on the implied freedom of political communication and were for that reason invalid,'³³ or
3. That the decision to terminate her employment on the basis of her "anonymous" communications without taking into account the implied freedom',³⁴ was unlawful.

V THE DECISION

The High Court held the Impugned Provisions did not infringe the implied freedom and thus the termination of Ms Banerji's employment with the Commonwealth was lawful.³⁵

A The Plurality

(Kiefel CJ, Bell, Keane and Nettle JJ)

The plurality was reluctant to entertain Ms Banerji's argument that the Impugned Provisions did not extend to anonymous communications, because she had not made that argument before the Tribunal below.³⁶ However, the plurality noted there was 'no reason to suppose that "anonymous" communications' were not covered.³⁷ Further, the plurality noted that the guidelines to APS employees explained that those who posted material online 'should assume that, at some point, [their] identity and the nature of [their] employment will be revealed.'³⁸

The parties agreed that the relevant provisions of the PSA imposed a burden on Ms Banerji's implied freedom of political communication.³⁹ But

[t]he question [of] whether that burden [wa]s justified according to the two part test [in the *Lange* case depended on] whether the impugned law [wa]s for a legitimate purpose consistent with ... representative and responsible government ... and...whether that law [wa]s reasonably appropriate and adapted to the achievement of that objective.⁴⁰

That depended on whether it was legitimate to require APS employees to uphold the APS values which included ‘the maintenance and protection of an apolitical public service that is skilled and efficient in serving the national interest.’⁴¹ The plurality noted that

[t]here c[ould] be no doubt that the maintenance and protection of an apolitical and professional public service [wa]s a significant purpose consistent with the system of representative and responsible government mandated by the Constitution,⁴²

and that the provision and maintenance of that apolitical service had constituted the APS’ ethos ‘throughout the whole period of the public administration of the laws of the Commonwealth.’⁴³ But were the PSA requirements in this case reasonably appropriate and adapted to the achievement of that legitimate purpose? Applying the principles set out in *McCloy*,⁴⁴ a law was reasonably appropriate and adapted to its legitimate purpose if it was suitable, necessary and adequate in its balance.⁴⁵

In this case, the plurality determined the Impugned Provisions of the PSA were suitable because the requirement they imposed upon APS employees to act in a way that upholds the APS values was ‘a rational means of realising those objectives and thus of maintaining and protecting an apolitical and professional public service.’⁴⁶ Nor was there any ‘obvious and compelling alternative.’⁴⁷ Ms Banerji’s argument that anonymous communications could and should rationally have been excepted from these PSA laws, was not compelling because “‘anonymous” communications are [always] at risk of ceasing to be anonymous.’⁴⁸ In any event, anonymous communications could harm the good reputation of the APS notwithstanding their anonymity.⁴⁹ Nor did the penalties imposed under s 15 of the PSA render the Impugned Provisions inadequate in their balance.⁵⁰ This dismissal was neither harsh nor unreasonable,⁵¹ and did not make every APS employee broadcasting anonymous tweets liable for dismissal.⁵² In this case, the penalties were proportionate and ‘trespasse[d] no further upon the implied freedom than [wa]s reasonably justified.’⁵³

B Judgments of Gageler, Gordon and Edelman JJ

In respect of the implied freedom argument, Gageler J noted the question turned on whether the burden ss 10(1)(a), 13(11) and 15(1)(a) and (3) imposed on the freedom was

justified.⁵⁴ These provisions of the PSA were justified because their object was consistent with representative government and served positively to promote responsible government.⁵⁵ These provisions were also narrowly tailored to achieve that object, and they did so 'in a manner which minimally impair[ed] freedom of political communication.'⁵⁶

Gordon J said that '[t]he requirement to uphold the apolitical nature, integrity and good reputation of the APS' was a defining characteristic of representative and responsible government.⁵⁷ Thus the Impugned Provisions 'd[id] not impose an unjustified burden on the implied freedom'.⁵⁸ The Impugned Provisions were not self-executing, were directed at a specific group (APS employees),⁵⁹ and did not just target political communication.⁶⁰

Edelman J noted that '[f]or much of the century since Federation, any public expression of political opinion by a Commonwealth public servant could be grounds for termination of employment.'⁶¹ Though this ban on political communication had been reduced over the years, the Code regulating the behaviour of public servants 'still casts a powerful chill over political communication.'⁶² Nevertheless, and notwithstanding that burden, the impugned provisions were 'reasonably necessary and adequately balanced given the place of its legitimate policy purpose in Australia's constitutional tradition and the importance of that purpose to responsible government.'⁶³

VI CONCLUSION

Whilst there were four separate judgments, it is clear the High Court agreed that the Impugned Provisions were constitutional. But that unanimity has not satisfied all commentators and members of the wider public who are concerned with freedom of speech in Australia.⁶⁴

Immediately after the decision was handed down on 7 August 2019, commentators have compared it with the Israel Folau case.⁶⁵ While there are obvious parallels (both cases concern an employee's right to freely express an opinion on social media, and an employer's right to terminate the employment of that individual for having expressed that opinion), there are significant differences. Israel Folau was not employed by the APS nor did his tweets relate to his employer. Further, different questions about the legitimacy of

his employer's code of conduct arise since the *Fair Work Act* outlaws discrimination on grounds of religious belief and his expression related to his religious belief.

What the decision in *Comcare v Banerji* does reveal is that some government employers may legitimately establish codes of conduct to protect an ethos that binds the communications of their employees for the duration of their employment without infringing the implied freedom of political communication. It remains to be seen whether private employers can establish and enforce codes of conduct to protect an ethos that may be unrelated to that employment that prohibit employee expression of opinion in breach of anti-discrimination law.

¹ *Comcare v Banerji* [2019] HCA 23.

² *Public Service Act 1999* (Cth) ss 10(1), 13(11), 15.

³ *Australian Constitution*.

⁴ *Banerji and Comcare (Compensation)* [2018] AATA 892.

⁵ See *Comcare v Banerji* [2019] HCA 23 [20] (Kiefel CJ, Bell, Keane, Nettle JJ).

⁶ *Banerji and Comcare (Compensation)* [2018] AATA 892, 4 [3].

⁷ *Ibid* 5 [3].

⁸ *Ibid* 16 [26]–[28].

⁹ *Comcare v Banerji* [2019] HCA 23, [2] (Kiefel CJ, Bell, Keane, Nettle JJ).

¹⁰ *Ibid*.

¹¹ *Banerji and Comcare (Compensation)* [2018] AATA 892, 56 [109].

¹² *Ibid* 6 [16].

¹³ *Ibid* [19].

¹⁴ *Ibid* 7 [25].

¹⁵ *Ibid* [31].

¹⁶ *Banerji and Comcare (Compensation)* [2018] AATA 892, 8 [36].

¹⁷ *Ibid* 5 [3.5].

¹⁸ *Ibid* 4 [2].

¹⁹ *Ibid*.

²⁰ *Safety Rehabilitation and Compensation Act 1988* (Cth) s 14.

²¹ *Banerji and Comcare (Compensation)* [2018] AATA 892, 9 [5].

²² *Banerji and Comcare (Compensation)* [2018] AATA 892, 9 [6].

²³ *Banerji and Comcare (Compensation)* [2018] AATA 892, 9–10 [7].

²⁴ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 14.

²⁵ *Judiciary Act 1903* (Cth) s 40(1).

²⁶ *Public Service Act 1999* (Cth) s 13(11).

²⁷ *Ibid*.

²⁸ *Ibid* s 10.

²⁹ *Ibid* s 15.

³⁰ *Comcare v Banerji* [2019] HCA 23, 6 [16] (Kiefel CJ, Bell, Keane, and Nettle JJ).

³¹ *Public Service Act 1999* (Cth) s 15(1)(a).

³² *Comcare v Banerji* [2019] HCA 23, [22] (Kiefel CJ, Bell, Keane, and Nettle JJ).

³³ *Ibid*.

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- ³⁴ Ibid.
- ³⁵ Ibid [1] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ³⁶ Ibid [23] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ³⁷ Ibid.
- ³⁸ Ibid [24] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ³⁹ Ibid [29] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴⁰ *Comcare v Banerji* [2019] HCA 23, [29] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴¹ Ibid [30] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴² Ibid [31] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴³ Ibid.
- ⁴⁴ *McCloy v New South Wales* (2015) 257 CLR 178.
- ⁴⁵ *Comcare v Banerji* [2019] HCA 23, [32] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴⁶ Ibid [34] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴⁷ Ibid [35] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴⁸ Ibid [36] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁴⁹ Ibid.
- ⁵⁰ Ibid [39] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁵¹ Ibid citing *Fair Work Act 2009* (Cth) pt 3.2.
- ⁵² *Comcare v Banerji* [2019] HCA 23, [40] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁵³ Ibid [42] (Kiefel CJ, Bell, Keane, and Nettle JJ).
- ⁵⁴ Ibid [53] (Gageler J).
- ⁵⁵ Ibid [54] (Gageler J).
- ⁵⁶ Ibid.
- ⁵⁷ Ibid [111] (Gordon J).
- ⁵⁸ Ibid.
- ⁵⁹ Ibid [139] (Gordon J).
- ⁶⁰ Ibid [140] (Gordon J).
- ⁶¹ Ibid [164] (Edelman J).
- ⁶² Ibid.
- ⁶³ Ibid [166] (Edelman J).
- ⁶⁴ See, eg, Sky News Australia, ‘Landmark High Court free speech case ‘not comparable’ to Folau’ (YouTube, 7 August 2019) <https://www.youtube.com/watch?v=35Zky4FpN8A>.
- ⁶⁵ See, eg, Anthony Forsyth, ‘Will the High Court ruling on public servant’s tweets have a ‘powerful chill’ on free speech?’ *The Conversation* (Blog Post, 7 August 2019) <http://theconversation.com/will-the-high-court-ruling-on-public-servants-tweets-have-a-powerful-chill-on-free-speech-121556>.