

TWEET AT YOUR OWN RISK

SEPTEMBER 6, 2019 | EMPLOYER'S LIABILITY

The High Court has recently handed down its unanimous decision in the matter of *Comcare v Michaela Banerji* [2019] HCA 23 finding that the termination of Ms Banerji's employment with the Department of Immigration was lawful.

The judgment brings to an end nearly a decade worth of proceedings and provides a comprehensive look into the operation of the implied freedom of political communication, relevant to this digital era.

IN ISSUE

- Policy to uphold employer's values and regulate employee behaviour
- Anonymous, and after work hours, social media use
- Public criticism of employer
- Valid termination of employment

THE BACKGROUND

Ms Banerji began working at the Department of Immigration (Department) in around early 2006.

Some six years later Ms Banerji began posting tweets under the handle of '@LaLegale' with the tweets being highly critical of the government's refugee policy.

Significantly, Ms Banerji's tweets were anonymous, political in nature and did not disclose any confidential information not already publicly known. For the most part, these tweets were also sent outside of work hours.

Shortly after the tweets began two complaints were made concerning Ms Banerji's social media use. Following the second complaint an investigation was commenced.

While Ms Banerji initially admitted to being responsible for the tweets and offered an apology for her actions, she subsequently withdrew her confession and apology just a month later and commenced legal proceedings to seek an injunction to prevent the termination of her employment. These proceedings were subsequently dismissed and in September 2013 Ms Banerji's employment was terminated.

Importantly, the Department relied on breaches of the Australian Public Service (APS) Code of Conduct (Code) to terminate Ms Banerji's employment.

In essence, the relevant provisions of the Code provide that the values of the APS include remaining apolitical and to ensure that the functions are performed in an impartial and professional manner. The Code further requires that employees behave in a way that upholds these values to maintain the integrity and good reputation of the APS.

Following her termination, Ms Banerji proceeded to make a claim for workers' compensation alleging that, as a result of this termination, she suffered psychological injury.

On 24 February 2014 the claim was denied and on 1 August 2014 this decision to deny was again affirmed.

The matter then proceeded to the Administrative Appeals Tribunal (Tribunal) where Ms Banerji applied for a merits review of this decision to deny her workers compensation.

THE DECISION AT TRIAL

It was agreed between the parties that the only issue required for determination by the Tribunal was whether or not the termination of Ms Banerji's employment did not constitute reasonable administrative action having regard to the implied freedom of political communication.

The Tribunal held that:

- the Code did in fact burden the freedom of political communication;
- maintaining an apolitical public service and maintaining public confidence in that service was not a legitimate purpose; and
- the Code seriously impinged the applicant's implied freedom of political communication.

It was further held that Ms Banerji had suffered injury on the date she was notified of her termination.

Comcare promptly appealed the decision, which was transferred directly to the High Court.

The Issues on Appeal

Central to the appeal was the question of whether the relevant provisions in the Code imposed an unjustified burden on the implied freedom of political communication, with the result that the termination of Ms Banerji's employment for breaching the Code was not reasonable administrative action taken in a reasonable manner.

In considering the application of the Code, Ms Banerji attempted to argue that the penalty imposed on her did not accord to the nature and gravity of her contraventions or her personal circumstances.

The High Court however held that this argument was not available to Ms Banerji given the way in which the case was conducted before the Tribunal. It was held that at the Tribunal she was taken to have 'accepted' that her conduct in broadcasting the 'anonymous' tweets was conduct which failed to uphold the APS values and the integrity and good reputation of the APS, and that, but for the implied freedom, the sanction of dismissal was warranted.

THE DECISION ON APPEAL

The High Court unanimously held that the Code did not infringe the constitutionally implied freedom of political communication, the object of the Code was consistent with the principle and that the provisions of the Code were reasonably appropriate and adapted to achieve that object in a manner consistent with the principle.

Little discussion was had regarding conduct of an employee outside of work hours however on the issue of anonymity it was said that "... as a rule of thumb, anyone who posts material online, particularly on social media websites, should assume that, at some point, his or her identity and the nature of his or her employment will be revealed."

Edelman J went further in his judgment to consider the implications such a policy would have on social media use and held that the Code did not impose behavioural obligations that preclude a public servant from making political comment on social media, but rather they create a boundary, albeit ill-defined, between acceptable expression of political opinions and unacceptable expression of political opinions. This distinction was seen to be a necessary element for consideration, assessed in light of all circumstances, on a case-by-case basis.

Six factors were said to affect an assessment of whether a comment imperils the trust between the APS and

the Parliament, executive government or the public, with those being:

1. the seniority of the public servant within the APS;
2. whether the comment concerns matters for which the person has direct duties or responsibilities, and how the comment might impact upon those duties or responsibilities;
3. the location of the content of the communication upon a spectrum that ranges from vitriolic criticism to objective and informative policy discussion;
4. whether the public servant intended, or could reasonably have foreseen, that the communication would be disseminated broadly;
5. whether the public servant intended, or could reasonably have foreseen, that the communication would be associated with the APS; and
6. if so, what the public servant expected, or could reasonably have expected, an ordinary member of the public to conclude about the effect of the comment upon the public servant's duties or responsibilities.

Certain situations were also envisaged to fall outside the ambit of the Code with Edelman J providing one such example as being the unintended public repetition of criticism initially expressed in a private conversation between a senior public servant and their spouse outside of work hours to illustrate this point.

In essence, the Code required that employees, at all times, behave in a way that upholds the values of political neutrality, impartiality and professionalism, while being openly accountable to the government, the Parliament and the Australian public within the framework of ministerial responsibility.

IMPLICATIONS FOR YOU

- For an employer, it is important that you identify the underlying purpose and objectives of any code or policy which may operate to restrain the conduct of an employee, especially in circumstances where those restraints can apply to an employee outside of work hours or under the cover of anonymity. The underlying purpose and objective, and the restraints imposed, must be valid and appropriate.
- For an employee, be mindful that anonymity does not equal protection. As was found here, despite under the apparent cover of internet anonymity, serious consequences can result from a breach of your employer's codes and policies.
- From a general perspective, be mindful that on appeal you will often be bound by the way in which you have earlier presented your case. This significantly impacted Ms Banerji's ability to argue that the penalties imposed did not accord with the nature and gravity of the contraventions.

[Comcare v Michaela Banerji \[2019\] HCA 23](#)

This case note was written by Lachlan Doran, a graduate in BN's Insurance & Health team.