

CASE STUDY



LITIGATION & DISPUTE RESOLUTION

EMPLOYEE RELATIONS

Comcare v Banerji [2019] HCA 23

Introduction

The High Court of Australia, on 7 August 2019, unanimously upheld an appeal from the Administrative Appeal Tribunal in *Comcare v Banerji* [2019] HCA 23. The decision is likely to have far reaching effect for employers generally.

Question

The question determined by the Court was whether provisions of the Public Service Act 1999 (Cth):

- (a) imposing requirements that Australian Public Service (APS) employees "... at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS ...";
- (b) the APS Value "... the APS is apolitical, performing its functions in an impartial and professional manner ..."; and
- (c) an Agency Head could impose sanctions on an APS employee found to have breached the Code, including termination of employment, imposed an unjustified burden on the implied freedom of political communication, with the result termination of the respondent's employment by the Commonwealth for breaching the Code was not reasonable administrative action taken in a reasonable manner with respect to her employment.

Facts

The respondent was employed by the Ombudsman and Human Rights and Equal Opportunity Commission, later becoming the Department of Immigration and Citizenship. She established a Twitter account "@LaLegale" and posted more than 9,000 tweets, at least one during business hours. Many of the tweets were critical of the Department, other employees of the Department, departmental policies and administration, Government and Opposition immigration policies and Government and Opposition members of Parliament.

A complaint was made and investigated. Ultimately, the respondent's employment was terminated.

Decision

The Court again emphasized, as it did in *Brown v Tasmania* (2017) 261 CLR 328, the implied freedom of political communication is not a personal right of free speech. It is a restriction on legislative power which arises as a necessary implication from the Constitution and, as such, extends only so far as necessary to preserve and protect the system of representative and responsible government mandated by the Constitution.

It was argued by the respondent that because the Twitter account was anonymous and therefore the tweets were anonymous, the impugned provisions did not apply. Alternatively, in so far as the impugned provisions purported to authorize sanctions against the respondent for anonymous communications, they imposed an unjustified burden on the implied freedom of political communication and are for that reason invalid.



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Anyone who posts material online, particularly on social media websites, the Court observed, should assume that, at some point in time, his or her identity and employment will be revealed, as happened in this case. Tweets such as those posted by the respondent are bound to raise questions about his or her capacity to work professionally, efficiently and impartially and are likely to seriously disrupt the workplace and, for those reasons, are calculated to damage the integrity and good reputation of the APS.

The legislation does not purport to proscribe all forms of anonymous communications, only those which fail to uphold APS Values and the integrity and good reputation of the APS. It is a question of fact and degree whether an anonymous communication infringes the section by failing to do so.

The question whether the burden is justified, the Court held, is a two-part test. The first part is whether the impugned law is for a legitimate purpose consistent with the system of representative and responsible government mandated by the Constitution.

The second part is, if so, whether the law is reasonably appropriate and adapted to the achievement of that objective.

The Court decided the impugned provisions, including their prescription of the range of penalties and the procedures for the assessment of breach and the imposition of penalty and review, present as a plainly reasoned and focussed response to the need to ensure the requirement of upholding the APS Values and the integrity and good reputation of the APS trespasses no further upon the implied freedom than is reasonably justified.

Application of the decision to business generally

Increasingly, social media is being used by employees, disaffected and otherwise, to criticize employers, fellow employees, policies and procedures and decisions taken by management. The criticism has the potential to significantly damage the goodwill and reputation of a business.

How we can help you

The decision provides guidance on the policies and procedures for regulating the use of social media by employees likely to withstand attack before a court. We can provide you with advice and assistance with drafting appropriate policies and procedures in the light of the decision and updating existing policies and procedures.

