

Implied freedom of political communication

Constitution – Public sector employment – Comcare

A case note on *Comcare v Banerji* [2019] HCA 23

By Nicholas Green QC, Svenson Barristers

1. On 7 August 2019 the High Court held (7-0) in *Comcare v Banerji* that a Commonwealth public servant who anonymously published many tweets of an anti-government nature had contravened s 13(11) of the *Public Service Act 1999* (Cth) by not upholding the APS Values and the integrity and good name of the APS. The implied freedom of political communication under the *Constitution*, not being a personal right of free speech, did not extend to her tweets.
2. A Commonwealth public servant, Ms Banerji, was dismissed for misconduct under the *Public Service Act*. The High Court allowed an appeal, which had been removed into the court under s 40(1) of the *Judiciary Act 1903* (Cth), from the Administrative Appeals Tribunal on the ground that the AAT misconceived the nature of the implied political freedom.
3. Section 13(11) of the *Public Service Act 1999* (Cth) is: “An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.”
4. Section 10(1) of the Act defined the APS Values, so far as is relevant:

“The APS Values are as follows:

 - (a) the APS is apolitical, performing its functions in an impartial and professional manner:
 - ...
 - (g) the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.”
5. Section 15(1) empowered an Agency Head to impose sanctions on an APS employee in the Agency found to have breached the Code of Conduct. The sanctions ranged from termination of employment (at the most grave end) to a reprimand (at the least grave end).
6. When the matter was heard in the AAT, by agreement of the parties, the sole issue for the determination of the Tribunal was “whether or not the termination of [Ms Banerji’s] employment with the Commonwealth falls outside the exclusion of s 5A(1) of the *Safety, Rehabilitation & Compensation Act 1988* (Cth).” Section 5A(1) defined “injury” as including, in substance, an aggravation of a mental injury that arose out of, or in the course of, employment but as excluding any such aggravation as is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee’s employment.
7. So framing the issue seems to have led the Tribunal into error.

8. Not for the first time, the court held that the implied freedom of political communication is not a personal right of free speech. It is a restriction on legislative power arising as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution*. That being so, it extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution.
9. Thus, while the effect of a law on an individual's or a group's ability to participate in political communication is relevant to the assessment of the law's effect on the implied freedom, the question whether the law imposes an unjustified burden on the implied freedom of political communication is a question of the law's effect on political communication *as a whole*. In particular, even if a law significantly restricts the ability of an individual or a group of persons to engage in political communication, the law will not infringe the implied freedom of political communication unless it has a material unjustified effect on political communication as a whole: [20] per Kiefel CJ, Bell, Keane & Nettle JJ.
10. The court recognised that there are restrictions on a public servant's ability to engage in political communication. "If a law prohibits an employee of the APS from commenting publicly in a manner which fails to uphold the integrity and reputation of the APS, the law restricts the ability of the APS employee lawfully to engage in governmental and political communication regardless of whether the penalty for contravention is large or small." [39] per the plurality.
11. Neither is it so that all APS employees who breach s 13(11) by broadcasting public "anonymous" communications are susceptible of dismissal. "It is not the case that every employee of the APS who commits a breach of s 13(11) by broadcasting public "anonymous" communications is liable to be dismissed. Nor is it the case that the impugned provisions provide for the imposition of a penalty which is not proportionate to the contravention. Breach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct." [40] per the plurality.
12. The plurality gave short shrift to the idea that "anonymous" communications are more deserving of protection by the implied freedom than communications for which the speaker acknowledges responsibility: [37]
13. When it comes to imposing a penalty under s 15, it is no part of a decision maker's function to take the implied freedom into account. [45]
14. Each of Gageler, Gordon & Edelman JJ delivered separate reasons for judgment.
15. All seven justices of the court held that Ms Banerji had contravened s 13(11) and that the implied freedom did not apply.
16. As a result, the decision pursuant to s 15(1)(a) of the *Public Service Act* to impose on Ms Banerji the sanction of termination of employment was not unlawful.

17. The court allowed the appeal, set aside the decision of the AAT made on 16 April 2018, ordered that the reviewable decision of 1 August 2014 be affirmed, and ordered Ms Banerji to pay Comcare's costs of the appeal.

Owen Dixon Chambers
11 August 2019