



HIGH COURT OF AUSTRALIA

7 August 2019

COMCARE v MICHAELA BANERJI
[2019] HCA 23

Today the High Court unanimously allowed an appeal from the Administrative Appeals Tribunal ("the Tribunal"), removed from the Federal Court of Australia under s 40(1) of the *Judiciary Act 1903* (Cth). The High Court held that ss 10(1), 13(11) and 15(1) of the *Public Service Act 1999* (Cth) did not impose an unjustified burden on the implied freedom of political communication, with the result that the termination of the respondent's employment with the Commonwealth was not unlawful.

As set out in the *Public Service Act*, the Australian Public Service ("APS") Code of Conduct ("the Code") included a requirement that APS employees "at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS" (s 13(11)); the APS Values included that "the APS is apolitical, performing its functions in an impartial and professional manner" (s 10(1)); and an Agency Head could impose sanctions on an APS employee found to have breached the Code, including termination of employment (s 15(1)). Departmental and APS guidelines cautioned against unofficial public comment and recorded a "rule of thumb" that anyone posting material online should assume that their identity and employment would be revealed.

While an employee in the Department of Immigration and Citizenship, the respondent used the Twitter handle "@LaLegale" to broadcast more than 9,000 tweets, many of which were critical of that Department, its other employees, policies and administration, and Government and Opposition immigration policies and members of Parliament. Following an investigation, a delegate of the relevant Agency Head determined that the respondent had breached the Code and proposed a sanction of termination of employment. After providing the respondent with opportunities to respond to the proposed sanction, the delegate decided to impose that sanction under s 15(1) of the *Public Service Act*, and a notice of termination was provided to the respondent.

The respondent claimed compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) for injury resulting from the termination of her employment. In that Act, "injury" was defined to exclude injury suffered as a result of "reasonable administrative action taken in a reasonable manner in respect of the employee's employment" (s 5A(1)). A delegate of the appellant rejected the claim, and another delegate affirmed that determination, on the basis that the respondent's injury was suffered as a result of such action. That decision was set aside by the Tribunal, on the basis that the use of the Code impermissibly trespassed upon the respondent's implied freedom of political communication.

On appeal, the High Court unanimously held that the impugned provisions had a purpose consistent with the constitutionally prescribed system of representative and responsible government, namely the maintenance of an apolitical public service. The Court also held that the provisions were reasonably appropriate and adapted or proportionate to their purpose and accordingly did not impose an unjustified burden on the implied freedom.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*