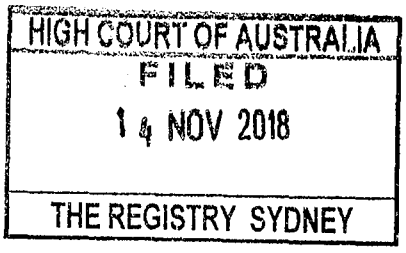
IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY

No. C12 of 2018

BETWEEN:



COMCARE

Appellant

and

10 **MICHAELA BANERJI**

Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES (INTERVENING)

PART I

1. This submission is in a form suitable for publication on the Internet.

20 **PART II**

2. The Attorney General for New South Wales (**New South Wales**) intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth) in support of the Appellant.

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PART III

Introduction

3. The Respondent's employment as an Australian public servant was terminated on the basis that she had made inappropriate online comments, which were harsh and extreme in their criticism of the Government, thereby breaching the "APS Code of Conduct".

4. The Respondent applied for compensation under the Safety, Rehabilitation and Compensation Act 1988 (Cth) (the **SRC Act**) in respect of her dismissal. That Act does not permit compensation for injuries suffered "as a result of reasonable administrative action taken in a reasonable manner in respect of the employee's employment": s 5A (definition of injury). On review in the Administrative Appeals Tribunal of Comcare's decision to refuse the claim for compensation, the Tribunal decided that the termination of Ms Banerji's employment did not constitute reasonable administrative action within the meaning of s 5A, because "the act of termination unacceptably trespassed on the implied freedom of political communication, [was therefore] unlawful, and ipso facto cannot be reasonable administrative action": Reasons at [128] (CAB 64).

5. An appeal on questions of law to the Federal Court has been removed into this Court: CAB 84-86 (amended notice of appeal), CAB 89 (notice of contention) and CAB 81 (removal order).

6. In summary, New South Wales makes the following submissions:

   a. The Tribunal should have found that the decision to terminate the Respondent's employment was reasonable administrative action taken in a reasonable manner, because it was validly authorised by the Public Service Act 1999 (Cth) (as it stood at the relevant time) (the **PSA**).

   b. In particular, ss 13(11) and 15 of the PSA were reasonably appropriate and adapted to advance the legitimate objective of maintaining an apolitical, impartial and professional public service that was efficient and effective in serving the Government, the Parliament and the Australian public, and in maintaining public confidence in that service. Thus, if an APS employee had behaved in a way that did not uphold the APS Values or the integrity and good reputation of the APS, the fact that these provisions imposed a burden

on the implied freedom could not prevent a finding of a contravention of s 13(11) and the imposition of some sanction under s 15.

c. The express and implicit limits on the power to find – and impose sanctions for – a breach of the "APS Code of Conduct" set out in s 13 of the PSA are sufficient to ensure that particular decisions that are authorised by ss 13(11) and 15 will be consistent with the implied freedom of political communication, as was the case here.

Summary of factual and legislative background

7. From May 2006 to September 2013, Ms Banerji was employed in the Australian Public Service ("**APS**") and bound by the APS Code of Conduct set out in s 13 of the PSA. Section 13 required that APS employees, among other things:

a. behave honestly and with integrity in the course of their APS employment (s 13(1));

b. disclose, and take reasonable steps to avoid, any real or apparent conflict of interest in connection with their APS employment (s 13(7)); and

c. behave at all times in a way that upholds the APS Values and the integrity and good reputation of the APS (s 13(11)).

8. The "APS Values", set out in s 10 of the PSA, included that "the APS is apolitical, performing its functions in an impartial and professional manner" (s 10(1)(a)) and that "the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public" (s 10(1)(g)).

9. Section 15(1) of the PSA gave Agency Heads the power to impose sanctions on employees who had been found to have breached the APS Code of Conduct, ranging from a reprimand to termination of employment.

10. A finding that an APS employee had breached the APS Code of Conduct could only be made after certain procedures were followed. In this case, the relevant procedures were those established under s 15(3) and included provision for the employee in question to make a statement in advance of any determination of breach and to make submissions about any proposed sanction to be applied: see BFM at 164 and 165

11. On 15 October 2012, following an investigation of a complaint made against Ms Banerji, Ms Banerji was given notice that a decision-maker appointed by the Secretary had determined that Ms Banerji had breached the APS Code of Conduct (the **breach decision**). The notice said that, if she was dissatisfied with the determination, she could apply for review of the decision under s 33 of the PS Act: BFM 184. (Section 33 provides for review of "APS actions" relating to a person's APS employment: see also Public Service Regulations 1999 (Cth), Part 5, Division 5.3.)

12. On 12 September 2013, Ms Banerji was notified that the decision-maker had decided that the appropriate sanction for her breaches of the APS Code of Conduct was termination of employment (the **sanction decision**). She was advised of possible rights of review under the Fair Work Act 2009 (Cth).

13. On 18 October 2013, Ms Banerji lodged the claim for compensation under the SRC Act.

14. On 16 April 2018, the Tribunal made the decision to which the present appeal relates.

Preliminary matters

15. It may be emphasised at the outset that there has been no suggestion that the "reasonable administrative action" exclusion in the SRC Act itself requires that the reasonableness of the action in question be judged against its effect on a claimant's freedom of expression.

16. Rather, the arguments before the Tribunal were based on the proposition that, if the termination of Ms Banerji's employment had not been validly authorised by the PSA, because relevant provisions of the PSA infringed the implied freedom of political communication, then it would not constitute reasonable administrative action.

17. Where a constitutional challenge is made in the context of a particular exercise of power under a statute, the particular exercise of power provides a concrete instance of the operation of the statute. As Kiefel CJ, Bell and Keane JJ said in Brown v Tasmania (2017) 261 CLR 328 at [150], "[w]hilst the freedom is not an individual right, the extent of the burden on the freedom is usually ascertained by reference to the effect upon the ability of persons to communicate on the matters

the subject of the freedom in various ways...": see also at [90] (Kiefel CJ, Bell and Keane JJ), Unions NSW v New South Wales (2013) 252 CLR 530 ("Unions NSW") at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

18. However, the constitutional challenge will necessarily be to the validity of the statutory provisions. Those provisions will be found:

a. validly to authorise that kind of exercise of power;

b. properly construed, not to authorise that kind of exercise of power; or

c. invalidly purporting to authorise that kind of exercise of power.

19. For example, in Coleman v Power (2004) 220 CLR 1, where the appellant had been convicted and sentenced in the Magistrates Court of, among other things, using insulting words (to a police officer) contrary to s 7(1)(d) of the Vagrants, Gaming and Other Offences Act 1931 (Qld):

a. Chief Justice Gleeson and Callinan and Heydon JJ held that the statute validly authorised the appellant's conviction;

b. Justices Gummow and Hayne, with whom Kirby J agreed, held that, properly construed, the Act was valid but did not authorise the conviction of the appellant; and

c. Justice McHugh held that the statute invalidly purported to authorise the conviction of the appellant.

20. In the case at hand, the circumstances in which Ms Banerji was dismissed illustrate the operation of ss 10, 13 and 15 and confirm that particular aspects of the PSA's operation burden the implied freedom of political communication, by placing some limit on the making of political communications: Monis v The Queen (2013) 249 CLR 92 at [108] (Hayne J); Unions NSW (2013) 252 CLR 530 at [119] (Keane J); McCloy v New South Wales (2015) 257 CLR 178 at [126] (Gageler J). The issues are whether the PSA purported to authorise the termination of Ms Banerji's employment in the relevant circumstances and, if so, whether it did so validly or invalidly, by reason of the freedom of political communication protected by the Constitution.

21. New South Wales submits that the PSA validly authorised the termination of Ms Banerji's employment so that, on the arguments put to the Tribunal, the termination was "reasonable administrative action taken in a reasonable manner" within s 5A(2)(d) of the SRC Act. New South Wales adopts the submissions of the Commonwealth as to why that is so, and makes the following short submissions by way of emphasis or amplification.

Effect of the administrative action on Ms Banerji

22. While the circumstances in which Ms Banerji was dismissed illustrate the operation of ss 10, 13 and 15, the nature and extent of the PSA's burden on the implied freedom is not to be measured by its effect on Ms Banerji personally. The question is, rather, how does the impugned law affect the freedom or, put another way, how does it affect the free flow of political communication within the Federation? (See Unions NSW (2013) 252 CLR 530 at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [111] (Keane J), and the cases there cited.)

23. However, the Tribunal assessed the nature and extent of the burden by focussing on its effect on "Ms Banerji's constitutional freedom": see, for example, Tribunal's Reasons at [113], [117], [119], [120].

24. That was an error of law, which led the Tribunal to ignore the nature of the burden more generally. That burden is indirect or incidental: see, eg, Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106 at 143 (Mason CJ), 169 (Deane and Toohey JJ), 235 (McHugh J). It happens that, in some of its operations, the PSA will impose some limit on the making of political communications, but the latter are not the target of the law. The burden on political communication imposed by the relevant provisions of the PSA is incidental to the regulation of employment in the APS, in a context in which, relevantly, the effective work of responsible government may "enliven the State's interest in preserving the impartiality, neutrality and loyalty of its public service": Bennett v President, Human Rights and Equal Opportunity Commission (2003) 134 FCR 334 at [94] (Finn J). That burden is also confined, applying only to those persons who have accepted employment in the APS.

The role of judgment and discretion in ss 13 and 15

25. On the premise that an employee had behaved in a way that did not uphold impartiality as one of the APS Values or the integrity and good reputation of the

APS, it is difficult to see how a finding that there had been a breach of s 13(11), or the imposition of a proportionate sanction under s 15, could be seen as impermissibly burdening the implied freedom of political communication. That is because, accepting the legitimacy (and importance) of the objective of maintaining an apolitical public service in which there is public confidence, it is difficult to see how the measures described could be said not to be reasonably appropriate and adapted to that objective.

26. On that premise, the complaint must relate to the breadth of the applicable standards or the breadth of the discretion to impose a sanction.

27. It may be accepted that a decision that there has been a breach of s 13(11) will require the decision-maker to make an evaluative judgment, because of the nature of the standards involved. Further, the power to determine an appropriate sanction for breach is discretionary in the sense that, under s 15, it is the Agency Head or his or her delegate who is to determine whether there will be a sanction and, if so, which sanction is appropriate.

28. However, further analysis demonstrates that the obligations imposed and powers conferred by those provisions are appropriately framed, and constrained by: the terms of the provisions themselves; the objects and purposes of the PSA; the mechanisms for internal review of breach and sanction decisions; and the protections provided by the Fair Work Act and applicable discrimination law.

29. First, although the standards in ss 13(11) and 10 are to some extent open-textured, this only requires the relevant decision-makers to exercise the kind of evaluative judgment that is appropriate and necessary to accommodate the multiplicity of circumstances that may arise. (See, in the context of a significantly less confined power, Chief of Defence Force v Gaynor (2017) 246 FCR 298 at [107]; see also Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 (Miller) at 613 (Brennan J); Thomas v Mowbray (2007) 233 CLR 307 at [72]-[92] (Gummow and Crennan JJ).

30. Moreover, the breadth of the standards should not be overstated. In many cases, their application will be straightforward. The merits of a decision by an Agency Head (or his or her delegate) that an employee has breached the Code of Conduct is also reviewable under the internal review process provided for in s 33 of the PSA.

31. Secondly, the power to impose a sanction, which is only enlivened upon a finding of breach of the APS Code of Conduct, is implicitly subject to a requirement that the sanction, if any, be reasonably proportionate to the breach (see Commonwealth's submissions at [45]). The merits of the imposition of a sanction under s 15 are also reviewable under s 33 of the PSA, unless the sanction is termination of employment (s 33(1)), in which case the provisions of the Fair Work Act apply. The Fair Work Act provides, in Part 3-2, for remedies for unfair dismissal. Determination of an application for unfair dismissal requires consideration, among other things, of whether the dismissal was harsh, unjust or unreasonable (s 385). Further, the Fair Work Act (s 351) prohibits an employer taking adverse action against an employee for discriminatory reasons, including on the basis of the employee's political opinion.

32. Thirdly, the considerations able to be taken into account by decision-makers are limited by the scope and purposes of the PSA.

33. In Miller, s 6 of the Wireless Telegraphy Act 1905 (Cth) prohibited the unauthorised establishment, erection, maintenance or use of any station for the purpose of wireless telegraphy and gave the Minister the power to grant licences on such conditions as were prescribed. Justice Brennan, in a discussion relied upon in Wotton v Queensland (2012) 246 CLR 1 at [10], said that the Act was regulatory and that the width of the discretion conferred by the statute can be "destructive of the validity of the scheme only if the exercise of the discretion conferred by the statute cannot be restrained by judicial review so that its exercise is within constitutional power". Evidently, the discretion in Miller was a wide discretion to permit what would otherwise be subject to a prohibition, which is different to the discretion here. Nevertheless, it is instructive in this regard to refer to the specific examples given by Brennan J of cases in which the exercise of discretion would be "obnoxious to the freedom guaranteed by s 92", which were as follows (at 612-614):

a. a refusal of a licence for reasons divorced from the protection of the public and the advancement of the public interest; and

b. a refusal of a licence in order to discriminate against interstate trade, commerce and intercourse.

34. Applying those examples to the present context, it is apparent that a breach or sanction decision that was made divorced from the purposes of – or criteria established by – the PSA would not be a decision authorised by the statutory scheme. That would include, for example, a decision made in order to suppress a particular point of view. As set out above, an employee the subject of such a decision has a number of processes available to him or her to enforce those limits on power, including judicial review.

35. It is unnecessary further to constrain the terms of s 13(11) or the power in s 15 by construing them as subject to an additional requirement that they be applied or exercised in accordance with the implied freedom of political communication. Of course, it is the case that the Constitution cannot support a discretion to the extent that it can be exercised in a manner obnoxious to the implied freedom. However, the restrictions on the power, and rights of review, discussed above are sufficient to ensure that a determination authorised by the PSA would not impose an unjustified burden on the implied freedom of political communication. As already noted, it could hardly be said that, if an APS employee had behaved in a way that did not uphold the APS Values or the integrity and good reputation of the APS, the implied freedom could in some way prevent a finding of a contravention of s 13(11) and the imposition of some sanction under s 15.

36. Turning more specifically to the particular instance of the operation of the PSA on the implied freedom brought to light by Ms Banerji's case, the issue that was significant for the Tribunal was that her comments were what it termed "anonymous". The Tribunal's real difficulty with the decision may have been a view that there was not in fact any breach, because "anonymous" comments were not inconsistent with s 13(11): Reasons at [114]-[116]. Be that as it may, for the reasons explained by the Commonwealth, in a context in which Ms Banerji's Twitter handle included identifying information and in which her comments plainly ceased to be anonymous, if they ever were, it is apparent that the bright line distinction between open and anonymous comments, in terms of their consistency with APS Values, is not one that can be drawn.

37. In the submission of New South Wales, the PSA could, consistently with the implied freedom of political communication, authorise a decision-maker under that Act to form a judgment that Ms Banerji had not behaved in a way that upheld the APS Values and the integrity and good reputation of the APS. That judgment, and the sanction imposed, were each able to be reviewed on their

merits, to protect against the possibility of capricious or disproportionate exercises of power.

PART IV

38. It is estimated that 15 minutes will be required for the presentation of the oral argument for New South Wales.

Dated: 14 November 2018

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