Thomson

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C12 of 2018

BETWEEN:

COMCARE
Appellant

AND

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MS MICHAELA BANERJI
Respondent

AND

ATTORNEY-GENERAL OF THE COMMONWEALTH
Intervener

20

ORAL OUTLINE OF ARGUMENT OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 20 March 2019

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Part 1: Publication

1. This outline is in a form suitable for publication on the internet.

Part II: Outline

2. In numerous, anonymous tweets, the respondent publicly and emotively criticised the Department of Immigration and Citizenship, in which she was employed, for policies which the Department and its Minister adopted about offshore refugees. Generally, the criticisms were proferred without an objective basis.

3. The critical issue is whether Australian Parliaments have legislative power to make laws requiring a member of a public service not to publicly criticise the current policies of their department, at least where the criticisms are subjectively emotive and not objectively justified, and providing a remedial discretion to terminate that person's employment; or whether the implied freedom of political communication qualifies the power to make such laws for public servants.

4. The implied freedom prevents any Australian Parliament from making laws which burden political communications, unless the purpose of the law is legitimate, and the measures adopted to achieve that purpose are compatible with the implied freedom, ie the measures are rationally connected with the purpose, necessary for that purpose and adequately balanced with the requirements of the implied freedom: ***McCloy v NSW*** at [2] (JBA5, tab 31).

5. The present case concerns the validity of laws which permitted the respondent's termination; not whether that termination was justifiable in the circumstances.

Sections 10(a), 13 and 15 of the *Public Service Act* (Cth) ("PSA")

6. There are five points concerning the scope of ss.10(a), 13(11) and 15 of the PSA.

7. First, the requirement (ss.10(a), 13(11)) that an employee behave in a way that upholds the "apolitical" value of the APS, performing functions in an impartial and professional manner, only related to the employment of that employee. Section 13(11) concerned employee behaviour, not beliefs. That implies behaviour in the capacity as an employee. Consequently, an APS employee was only required to behave "apolitically" about his or her own department. These provisions would not have prevented political communications by an employee of the Defence Department about health.

8. Secondly, the requirement (s.13(11)) that an employee behave in a way that upholds the integrity and good reputation of the APS is a separate requirement from being apolitical. This requirement would have required an employee not to engage in any criminal conduct affecting his or her suitability as an employee. It might also require senior public servants to refrain from criticising the policies of other departments, if that would affect the government's ability to implement its policies. Eg, a departmental head criticising a Minister of a different department.

9. Thirdly, behaving "apolitically" did not mean that the employee could not publicly communicate about departmental matters. This restriction meant that the employee could not *promote or criticise* the department or its policies. That would not generally occur if a communication objectively referred to the advantages and disadvantages of competing policies, without expressing a preferred position. (Here, the respondent's communications were emotive criticism of her department and Minister.)

10. Fourthly, these provisions applied "at all times", not just during employment hours. That was necessary to ensure an employee's continued suitability, eg, criminal conduct unconnected to employment might have made a person unsuitable. The provisions applied even to anonymous conduct, which might later be exposed.

11. Fifthly, if an APS employee contravened a standard set by ss.10(a) and 13(11), a range of sanctions, including termination, could be applied: s.15 of the PSA.

To what extent did ss.10(a) and 13(11) burden political communications?

12. Sections 10(a) and 13(11) restricted an APS employee's ability to publicly promote or criticise policy positions adopted by his or her department. They did not burden an employee's ability to communicate:

    (a) about matters which were not related to the employee's department, unless the seniority of the employee would affect the integrity and good reputation of the APS; or

    (b) the objective advantages or disadvantages of departmental policies.

13. Consequently, ss.10(a) and 13(11) did not make APS employees "silent members of society". The burden upon political communications was comparatively slight.

Legitimate Purpose: An Apolitical Public Service with Integrity and Reputation

14. Australian democracy involves elected representatives acting as Ministers, who are responsible for departments (*Constitution*, s.64). Those departments execute and maintain the Constitution and Commonwealth laws (*Constitution*, s.61). The different responsibilities of elected officials and public servants explains why a public servant may not serve in Commonwealth Parliament (*Constitution*, s.44(iv)).

15. An apolitical public service, with the integrity and reputation to enable it to implement government policies, is a legitimate constitutional purpose. It is inappropriate for public servants to express public views that may conflict with the policies of elected representatives. This may cause a loss of confidence in the public service, by both the public and elected Ministers. The public may apprehend the risk that unelected representatives will subvert policy decisions. Ministers may lose confidence in the public service to faithfully implement policy decisions. Responsible government also requires co-operation between Ministers and departments. Ministers and the public must be assured of the integrity and reputation of the public service generally.

Sections 10(a), 13(11) and 15 were Appropriate and Adapted for this Purpose

16. The wide range of available sanctions in s.15 meant that the particular measure applied to a specific case could be chosen by the Agency Head. The discretion to apply the sanction of termination according to the circumstances of a case was not itself unconstitutional, unless it could never be appropriate.

17. The law here prescribed measures which were suitable, necessary and adequate, as they could be adjusted in each case. That is in the context of a comparatively slight burden on political communications, measured against the important constitutional purpose. If the measures were wrongly applied, that is a matter for merits or judicial review, not an occasion for constitutional invalidity: ***Wotton v Queensland*** at [32], [91] (JBA8, tab 43).

J. A. Thomson SC

N.T.L. John