Overzealous control or reasonable and lawful: workplace law in the digital age

RECENT HIGH PROFILE CASES TELL A CAUTIONARY TALE TO EMPLOYERS AND EMPLOYEES ABOUT PUBLIC COMMENT AND EXPRESSING PERSONAL VIEWS IN THE COURSE OF EMPLOYMENT.

BY TESSA VAN DUYN

ADOBESTOCK

With the increasing use and prevalence of social media, employers are taking steps to preserve and protect their reputation through control and monitoring of employees' private activities online.

The High Court's decision in *Comcare v Banerji* [2019] HCA 23 (*Banerji*) is a salient example of the fine line between employees' rights and employers' reputation in the context of public service employment. Ultimately, the High Court's findings may cast a shadow of doubt and silence on political debate by public servants. While the impacts of this case are limited to the public sector, private sector employers and employees take heed: the highest court in our land sees merit in employers regulating employees out of hours speech and conduct.

In this case, Ms Banerji, a public servant in the (former) Commonwealth Department of Immigration and Citizenship (Department), began broadcasting tweets using an anonymous twitter handle. The substance of the tweets included critical commentary on the government and opposition immigration policies. Some of them were "reasonably characterised as intemperate, even vituperative, in mounting personal attacks on government and opposition figures".[1] Ms Banerji made about 9000 tweets, at least one of which was broadcast during working hours.

The *Public Service Act 1999* (Cth) (PS Act) requires that Ms Banerji must "at all times behave in a way that upholds the APS [Australian Public Service] Values" (s13(11)). Central to this mandate is the declaration in the APS Values that "the APS is apolitical, performing its functions in an impartial and professional manner" (s10(1)), which is arguably a fundamental tenet of responsible government and functional democracy.

In March 2012, two separate complaints were made by an employee to the Workplace Relations and Conduct Section of the Department. The complaint alleged that Ms Banerji was inappropriately using social media in contravention of the APS Code of Conduct.[2]

The complaint and subsequent legal applications traversed a number of months and took a number of turns. A brief history of that journey follows.

SNAPSHOT

- Recent case law and public debate highlight the tension between employees' free speech and an employer's right to preserve their reputation.
- The High Court has reminded us that the freedom of implied political communication is not an individual right to free speech. It operates as a limit on legislative power which mustn't overreach the Constitution's boundaries.
- Employees might now think twice before engaging in political debate and commentary in public and on social media for fear of over-regulation or adverse action.

Alleged breach of Code of Conduct

Over the ensuing eight months, the complaints were investigated and a determination was ultimately made that Ms Banerji's conduct gave rise to possible breaches of the APS Code of Conduct. Ms Banerji was notified of the determination that she had breached the APS Code of Conduct and that the proposed sanction was termination of her employment.[3]

On 1 November 2012, Ms Banerji sought interim and final injunctions in the (then) Federal Magistrates' Court of Australia to restrain the Department from proceeding with the proposed sanction of termination.[4] Nine months later, on 9 August 2013, the (then) Federal Circuit Court rejected Ms Banerji's claim for interim injunction.

After some additional correspondence between Ms Banerji and the Department's delegate, the Department and Ms Banerji ultimately entered into a Deed of Agreement to settle the proceedings in the Federal Circuit Court.

Subsequent compensation claim

On 18 October 2013, Ms Banerji lodged a claim for compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (*Compensation Act*) for an injury, described as an underlying psychological condition that was aggravated by the termination of her employment.

On 24 February 2014, Ms Banerji's compensation claim was rejected by a delegate of Comcare. A Comcare review officer affirmed this determination on 1 August 2014 on the basis that the termination of Ms Banerji's employment was a reasonable administrative action taken in a reasonable manner in respect of her employment, within the meaning of s5A(1) of the *Compensation Act*.

Accordingly, the delegate determined that any injury alleged to have been suffered by Ms Banerji was not an "injury" for the purposes of s5A(1) of the *Compensation Act*. Section 5A(1) of the *Compensation Act* operates to exclude from compensation, relevantly, an aggravation of a mental injury that is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment.

The Comcare decision of 1 August 2014 was challenged and reviewed by the Administrative Appeals Tribunal (AAT), with Deputy President Gary Humphries and Member Dr B Hughson presiding. On 16 April 2018, the AAT set aside Comcare's decision and instead found that ". . . Ms Banerji suffered an adjustment disorder characterised by depression and anxiety, being an injury pursuant to s14 of the [*Compensation*] *Act*"[5] and, importantly, that ". . . the use of the Code as the basis for the termination of Ms Banerji's employment impermissibly trespassed upon her implied freedom of political communication".[6] Accordingly, the AAT held that the termination decision was not reasonable administrative action in a reasonable manner in respect of her employment within the meaning of s5A(1) of the *Compensation Act*.

Were Ms Banerji's tweets an exercise of the implied freedom of political communication?

Importantly, it was agreed between the parties before the AAT that the termination of Ms Banerji's employment was reasonable administrative action taken in a reasonable manner in respect of her employment unless Ms Banerji could show that the termination falls outside the exclusion in s5A(1) because of the implied freedom of political communication identified by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*Lange*). Therefore, this question became the principal issue for determination by the AAT.

The High Court has long recognised that the implied freedom of political communication is "essential to the maintenance of the system of representative and responsible government for which the Constitution provides".[7] However, the critical question that the AAT had to ask was to what extent the freedom should operate as a limit on legislative power which impedes the free expression of political opinion. In this case, the AAT fixated on the fact that Ms Banerji's tweets were anonymous, which called into question the real risk of reputational damage to the public sector and responsible government at large.

After exploring the different limbs of the *Lange* test, the AAT found in favour of Ms Banerji because it held that her right to the implied freedom of political communication was impermissibly burdened by the termination of her employment for breach of the Code of Conduct. This result flowed from the AAT's conclusion that the overarching objective of an impartial public service was not undermined where there was no clear nexus between critical comments and a public sector employee. Any curtailment of anonymous expressions of political opinion ought be persuasively and robustly justified. It went on to say that the "stated purpose of the APS and Department Guidelines are not well served when the guidelines are applied to anonymous comment by public servants".[8] Indeed, the AAT went so far as to observe that "restrictions in such circumstances bear a discomforting resemblance to George Orwell's thoughtcrime".[9]

End of the road: the High Court

Comcare appealed the AAT's decision which, on application by the Commonwealth Attorney-General, was removed into the High Court of Australia pursuant to s40(1) of the *Judiciary Act 1903* (Cth).

The question for the High Court was whether the AAT was correct in holding that ss10(1), 13(11) and 15(1) of the PS Act ("the impugned provisions") imposed an unjustified burden on the implied freedom of political communication such that termination of Ms Banerji's employment was not reasonable administrative action taken in a reasonable manner with respect to Ms Banerji's employment within the exclusion in s5A(1) of the *Compensation Act*.

Before the High Court, Ms Banerji agitated the same argument made before the AAT, that on their proper construction, the impugned provisions imposed an unjustified burden on the implied freedom of political communication insofar as they purported to authorise sanctions on an APS employee for "anonymous" communications. Again, Ms Banerji argued that where there was no clear connection between the comments and a public sector employee, the impugned provisions of the PS Act did not apply.

A plurality of the Court (Kiefel CJ, Bell, Keane and Nettle JJ) held that the way in which the AAT determined the matter was misconceived – that is, the AAT was asking itself the wrong question and, therefore, was led into error. The High Court reiterated that the implied freedom of political communication is not a personal right of free speech. Rather, it is a restriction on legislative power which goes ". . . only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution".[10] The inquiry should focus on whether the impugned provisions (or law) impose an unjustifiable burden on political communication as a whole, as compared to the effect on an individual's freedom.[11]

Having regard to the well-established two-part test in *Lange*, the plurality concluded that the burden on the implied freedom was not unjustified. In examining the purpose of the impugned provisions in the PS Act, which are directed at ensuring that APS employees uphold the values, integrity and reputation of the APS, the Court held that anything directed to ". . . the maintenance and protection of an apolitical and professional public service is a significant purpose consistent with the system of representative and responsible government mandated by the Constitution".[12]

In an effort to highlight that the APS Code of Conduct does not impose a gag on political free speech entirely, Justices Gageler, Gordon and Edelman all offered slightly more nuanced reasons for the decision to varying degrees. For example, Gageler J noted that the impugned provisions of the PS Act did not operate as a "blanket restraint on all civil servants from communicating to anyone any expression of view on any matter of political controversy".[13] But rather, what it demands of an APS employee is "a measure of restraint or moderation in the expression of a political opinion . . . [which] is highly situation-specific . . ."[14]

Justices Edelman and Gordon also explored other factors that would influence whether or not an APS employee crosses the boundary of what is acceptable or unacceptable political commentary. Despite this attempt to temper the real effect of the limitation on a public sector employee's implied freedoms, Edelman J did concede that the APS Code of Conduct "casts a powerful chill over political communication".[15]

After a protracted legal battle, the High Court ultimately decided that the implied freedom of political communication cannot be invoked as a shield in the face of internal policies and procedures (in this instance, the APS guidelines) which were created to protect the independence and impartiality of the public service.

The appeal was allowed and the AAT's decision was set aside. The reviewable decision of 1 August was affirmed and Ms Banerji was ordered to pay costs.

Against the backdrop of the current climate

Both the High Court's landmark decision in *Banerji* and the recent political and legal storm around Israel Folau's battle with Rugby Australia highlight the challenges faced by employers to get the balance right between protecting fundamental rights and freedoms and protecting the reputation of the organisation.

ADOBESTOCK

Indeed, even the federal government is coming under fire for its attempts to strike the appropriate balance between the competing rights and interests of individuals against organisations. After having consulted on a second exposure draft of the revised Religious Discrimination Bill 2019, the government has shelved the reforms in the wake of the COVID-19 pandemic. Notably, the Bill was not devoid of extensive criticism and commentary from both faith-based organisations, health care providers and LGBTI advocacy groups about the balance that was struck between the rights to freedom of religion and belief and the right to free speech against an employer's right to regulate their employees' conduct during the course of their employment.

As for the high profile case of Israel Folau and Rugby Australia, a confidential settlement agreement was reached in December 2019. In that case, Folau argued that he was unlawfully sacked by Rugby Australia because of his religion. In contrast, Rugby Australia maintained that Folau breached the professional players' code of conduct with two social media posts condemning homosexuals to hell and labelling as "evil" the legal recognition of transgender and intersex Australians. In light of the parties' settlement, the contentious legal issue of the parameters of the rights of freedom of speech and religion in the workplace will no longer see the light of day in a courtroom. However, this issue will continue to see the light of day in the people's court of the public domain and democracy through the government's legislative agenda.

Whatever the outcome of the Religious Discrimination Bill 2019, one can only hope for greater clarity on how an individual's right to hold and express religious views interacts with an employer's ability to "control" an employee's behaviour in the public arena and on social media. Legislative silence on the balance to be struck between individuals' freedoms and employers' rights is risky, particularly in these uncertain times where the power dynamic between employers and employees may have shifted.

Conclusion

As for an employee's right to free political speech in the digital age, Ms Banerji might argue that the push towards Orwell's dystopian vision of overzealous state control of citizens' behaviour is actually closer to reality than we might like to admit. A majority of the High Court has reminded us that the limits on government's power to infringe on our freedom of political expression must have a material unjustified effect on political communication as a whole. It's not enough to merely restrict the rights of an individual like Ms Banerji to engage freely in political communication.

Indeed, in the case of public servants the Court has effectively given the government carte blanche to intrude into their private lives in the name of an impartial apolitical public service. Employees everywhere might now think twice before engaging in political debate and commentary in a public forum, preferring silence over the risk of adverse action. ■

Tessa van Duyn is CEO at Moores and practice leader in the corporate advisory team with more than 15 years experience as a human rights and public law practitioner. She is a former member of the LIV Human Rights and Administrative Law Committee.

1. *Banerji and Comcare (Compensation)* [2018] AATA 892 at 109.
2. Note 1 above, at 3(14).
3. Note 1 above, at 3(21).
4. Note 1 above, at 3(25).
5. Note 1 above, at 129.
6. Note 1 above, at 120.
7. See most recently, *Brown v Tasmania* [2017] HCA 43 per Kiefel CJ, Bell and Keane JJ at 88.
8. Note 1 above, at 116.
9. Note 1 above, at 116.
10. *Comcare v Banerji* [2019] HCA 23 at 20.
11. Note 10 above.
12. Note 10 above, at 31.
13. Note 10 above, at 89.
14. Note 10 above, at 93.
15. Note 10 above, at 164.