

ABC NEWS

Public servant loses free speech High Court case over tweets criticising government policies

By Elizabeth Byrne

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A former public servant at the centre of a landmark free speech case has lost her High Court fight after it was found tweets she sent critical of the Federal Government breached the public service code of conduct.

Michaela Banerji argued she had been unlawfully fired in 2013, from what was then the Department of Immigration and Border Protection.

She had operated the Twitter profile LaLegale, which frequently posted opinions critical of the Australian Government, its immigration policies, and its treatment of immigration detainees.

Ms Banerji was sacked from her role for breaching the Australian Public Service (APS) Code of Conduct, after an internal investigation linked her to the Twitter account.

She took her case to the Administrative Appeals Tribunal, which found her sacking had impeded her implied right to freedom of political communication.

But on Wednesday the High Court unanimously ruled that was not the case, and that the APS code was proportionate to its purpose of maintaining an apolitical public service.

The decision also ended Ms Banerji's hopes for compensation.

Outside the court, Ms Banerji fought back tears as she expressed her disappointment.

"The only advantage of this case and taking this action was to affirm the role of this freedom of speech for public servants, and we failed," she said.

"It's not just a loss for me, it's a loss for all of us, and I'm very, very, very sorry."

Her lawyer, Allan Anforth, said he expected the decision to have far-reaching consequences.

"The implications don't stop at the boundary of public servants," he said.

"The implication is that for any employee-employer relationship, if the employee is critical of the employer's position on some politically relevant social issue, they can be sacked.

"This is a really naive decision in terms of the political realities of what exist in the community."

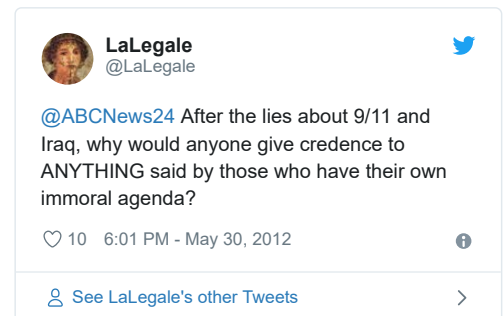
Tweets sent from private device, mostly outside hours

It was Ms Banerji's claim for compensation — for the post-traumatic stress disorder she claimed developed after she was fired — that ultimately led to the High Court challenge.

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Key points:

- Michaela Banerji cries as the High Court hands down its decision
- Ms Banerji's lawyer says the court's decision could impact employees outside of the public service
- The public sector union says the current social media policy is 'draconian' and 'bad for democracy'



The court needed to decide whether Ms Banerji's sacking was illegal because it breached the implied freedom of political communication guaranteed in the Constitution.

APS guidelines include stipulations that "an APS employee must take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment" and that an employee must "uphold the integrity and good reputation of the employee's agency and the APS".

Her lawyers argued sacking Ms Banerji was unreasonable, because while the LaLegale account was clearly critical of the Government, it did not disclose that it was operated or endorsed by a member of the public service — and therefore could not bring the APS into disrepute.

But the court's reasons explained that the APS guidelines explicitly warned that staff should not expect to be protected by anonymity when posting online.



PHOTO: Michaela Banerji lost her job over the LaLegale Twitter account. (Twitter)

"There is no reason to suppose that "anonymous" communications cannot fail to uphold the integrity and good reputation of the APS," the court said.

It noted APS guidelines said "as a rule of thumb, anyone who posts material online, particularly on social media websites, should assume that, at some point, his or her identity and the nature of his or her employment will be revealed".

"The risk of identification which justifies that rule of thumb is obvious, and it is borne out by the facts of this case," the court said.

The court heard Ms Banerji tweeted approximately 9,000 times in 2012, from a private device and mostly outside of work hours.

After one tweet her boss Sandi Logan tweeted back:

"Give it a rest @LaLegale. #DIAC celebrates success, not mired in harping. If you have a policy frustration, take it where it will make a diff"

Ms Bannerji retweeted a response from another Twitter user who said:

"@SandiHLogan What a rude response! And where would you suggest LaLegale take her 'policy frustration'?"

It was Mr Logan who raised concerns Ms Bannerji was using the LaLegale Twitter handle, and that she was placing the department "at considerable reputational risk."

On Wednesday a spokeswoman for APS Commissioner Peter Woolcott said the Commissioner was "giving careful consideration to the High Court's decision" and would issue a statement "in due course".

'Disjointed from reality': lawyer



PHOTO: Ms Banerji and her lawyer Allan Anforth said they were disappointed by the decision. (ABC News: Michael Black)

Mr Anforth said the High Court decision effectively meant anything a public servant did had to be "with loyalty to the government" and not critical of it.

"It is basically saying that if you take the Queen's shilling, you surrender your rights to participate in the political process," he said.

"They justify that by saying the public service is an apolitical, permanent, career public service."

But Mr Anforth said that view of the public service was "disjointed from reality".

"It's a 1960s, 1970s view that the public service is staffed by permanent professional, career public servants — they're not," he said.

"The more senior you become in the public service ... the more your political interests and biases are relevant to your appointment."

Current social media policy 'bad for democracy', union says

The Community and Public Sector Union (CPSU) said the High Court's decision could potentially affect 2 million Australians working in state, local and federal governments.

In a statement CPSU national secretary Nadine Flood called *Comcare v Banerji* "one of the most important cases on the implied freedom of political communication of recent years".

"People working in Commonwealth agencies should be allowed normal rights as citizens rather than facing Orwellian censorship because of where they work," Ms Flood said.

Ms Flood said in the years since the case had been underway the approach to the use of social media by public servants had become "even more draconian".

"This is a disappointing decision, but at the end of the day the Government has a responsibility to protect freedom of speech," she said.

"The Morrison Government needs to demonstrate that it prioritises democratic rights, with a social media policy that reflects the real world.

"The notion that the mum of a gay son who happens to work in Centrelink can't like a Facebook post on marriage equality without endangering her job is patently absurd.

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"The Government's overreach on social media has been bad for the public sector and bad for our democracy."

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