Australian High Court scraps free speech for workers

Mike Head
9 August 2019

Australia's supreme court this week handed down a ruling that essentially abolishes freedom of speech for workers, whether in government or corporate employment. With no dissent, the seven High Court judges endorsed the sacking of a federal public servant for criticising—even anonymously—the country's brutal refugee detention regime.

After a six-year legal battle, the court overturned a tribunal decision that Michaela Banerji was unlawfully dismissed in 2013 for allegedly breaching "code of conduct" restrictions that bore "a discomforting resemblance to George Orwell's thoughtcrime."

The judges reinforced previous High Court rulings that a so-called constitutional implied freedom of political communication "is not a personal right of free speech." In other words, there is no protection of free speech in the 1901 Constitution.

Like many other workers, including public servants, Banerji was outraged by the Gillard and Rudd Labor governments' revival of the Howard Liberal-National government's "Pacific solution"—the indefinite detention of asylum seekers in barbaric camps on Nauru and Papua New Guinea's Manus Island.

Using the pseudonym "LaLegale," she posted thousands of tweets condemning the violation of Australia's international legal obligations to refugees. In one typical tweet, she denounced the "deaths and agonies of unlawful, immoral and destructive IDCs [Immigration Detention Centres]."

Banerji's identity was discovered when departmental officials examined a folder on her desk in 2012. She was sacked for violating provisions in the Australian Public Service (APS) Code of Conduct that said "an APS employee must *at all times* behave in a way that upholds the APS Values and the integrity and good reputation of the APS."

Taken together with police raids on journalists, the court's ruling is part of an assault on working class free speech under conditions of escalating war tensions, trade war, economic slump, austerity measures and corporate attacks on workers' jobs and conditions.

Not only is the verdict a direct threat to the fundamental democratic rights of almost two million federal, state and local government employees, including school teachers, nurses and other healthcare workers.

According to workplace law experts, it sends a similar chilling message to all workers. Most of them also confront rules forbidding them from expressing any opinion that could allegedly damage their company's reputation.

By the logic of the High Court, workers could be lawfully victimised for condemning any of their employer's actions—even closures, sackings and wage cuts.

Christian Porter, the Liberal-National government's attorney-general, who sent Banerji's case to the High Court, welcomed the outcome. But it is a bipartisan attack. The moves to sack Banerji began under the last federal Labor government, and the Western Australian Labor government joined the High Court test case, along with two other state governments.

Banerji had won a workers' compensation case when the Administrative Appeals Tribunal found her sacking breached the constitutional implied freedom. But the High Court declared that the tribunal misinterpreted the implied freedom as a right of "free speech."

The seven judges dismissed the fact that Banerji, who worked in the Immigration Department, adopted a pseudonym to show she was posting in a personal capacity, disclosed no confidential departmental information and did all her posting (with one exception) in her own time.

Justice Stephen Gageler, in fact, declared that someone posting material anonymously was conducting a

"clandestine" operation against the political establishment. To permit that would undermine "the confidence of the Government, the Parliament and the Australian public in the APS as an apolitical and professional organisation." No APS employee could be allowed to criticise the policy of the government "or of a political party which might then or later be represented in the Parliament."

Gageler cited an 1867 British inquiry report that insisted that government employees "are still the Queen's servants, and are bound to do the Queen's business under the orders of any officer that may in that behalf be honoured with Her Majesty's commands."

In other words, government workers have no right to criticise the policy of any parliamentary party and must unquestionably obey the orders given to them by their superior officers.

Judges ruled that even though the APS code "casts a powerful chill over political communication," it was for the "legitimate" purpose of upholding the integrity of the public service.

Moreover, the implied constitutional freedom "extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the Constitution." Thus, political views that challenge the parliamentary framework or the underlying capitalist order are not protected at all.

Previous High Court rulings effectively gave federal and state governments, and local councils, carte blanche to suppress political free speech, including by banning the distribution of leaflets in public places and gagging paroled prisoners from speaking to the media.

As a result of Banerji's sacking, many public servants have deleted twitter or Facebook accounts because departments can trawl through the internet to find grounds for dismissal. Even private emails could be covered by the court's ruling, since they can be forwarded on, leading to the discovery of the sender's identity.

The court upheld the code's stipulation that "anyone who posts material online should assume that, at some point, his or her identity and the nature of his or her employment will be revealed."

In 2017, the Australian Public Service Commission issued an even more draconian policy. It declares that employees could breach the code by "liking" or "sharing" a social media post, or simply by failing to denounce a critical comment by a friend.

"What you say in your own time on social media can affect that confidence and the reputation of your agency and of the APS," the policy warns, even if social media accounts, such as Facebook, are set to private.

This amounts to a sweeping ban on internet discussion, and extends right across the working class.

Commenting on the court ruling, RMIT workplace law professor Anthony Forsyth wrote: "The decision confirms the steady march of employer control over workers' private views and activities, supported by courts and tribunals over many years."

An *Australian Financial Review* article quickly drew employers' attention to their power to exploit the ruling. It noted that codes of conduct in most employment contracts have clauses such as "don't make public comments or otherwise act contrary to the best interests of the employer."

As much as the Labor Party, trade unions are complicit in the attack on free speech. The Community and Public Sector Union (CPSU), which covers most government workers, has refused to mobilise its members to defend Banerji and the basic rights of all workers.

CPSU national secretary Nadine Flood merely described the court ruling as "a disappointing decision." She issued an obsequious plea to the Liberal-National government. "The Morrison government needs to demonstrate that it prioritises democratic rights, with a social media policy that reflects the real world," her media release said.

In reality, as demonstrated by the federal police raids on journalists for publishing leaks exposing government and military crimes, and the bipartisan backing for the persecution of WikiLeaks founder Julian Assange, the ruling class as a whole is seeking to suppress information and dissent amid mounting social and political discontent.