FEDERAL CIRCUIT COURT OF AUSTRALIA

BANERJI v BOWLES *[2013] FCCA 1052*

Catchwords:
INDUSTRIAL LAW – Fair work – interlocutory injunction – 'serious question' to be tried – alternative remedies available to applicant – applicant seeks declarations in relation to the 'constitutionally protected implied freedom of political communication' – declarations sought on the basis of applicant's apprehension that the respondent has pre-determined adverse action following Departmental workplace review – applicant confirms breach of APS Code of Conduct by 'tweeting' comments critical of Minister for Immigration, critical of Government policy, critical of Department employees but such breaches 'protected' by the 'constitutional right/freedom of political communication' – alleged breach of contract of employment by applicant working elsewhere while still employed by respondent – challenge to the jurisdiction of the Court – 'associated jurisdiction'.

Legislation:
The Constitution
Fair Work Act 2009 (Cth), ss.340, 361(2), 365, 369, 371, 545, 566, 567
Federal Circuit Court of Australia Act 1999 (Cth), ss.8, 10, 10A, 15, 18
Judiciary Act 1903 (Cth), s.78B
Public Service Act 1999 (Cth), ss.13(1), 13(7), 13(11)
Federal Circuit Court of Australia Rules 2001, rr.1.06, 4.01(3), 10.06

Cases cited:
American Cyanamid Co v Ethicon [1975] AC 396
American Optical Corporation v Allergan Pharmaceuticals Pty Ltd (1985) 7 ATPR ¶40-539
Attorney-General for South Australia v Corporation of the City of Adelaide (2013) 295 ALR 197
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199
Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2009) 189 IR 37
Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd (2011) 213 IR 32
Blackadder v Ramsey Butchering Services Pty Ltd (2005) 2212 CLR 539
Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 290 ALR 647; (2012) 86 ALJR 1044
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130

Jones v Queensland Tertiary Admissions Centre Ltd (2009) 190 IR 218
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
LNC Industries Limited v BMW (Australia) Limited (1983) 151 CLR 575
Lumley v Wagner (1852) 1 De G.M & G 604; 42 ER 687
Macteldir Pty Ltd v Dimovski (2006) 226 ALR 773
Monis v R (2013) 295 ALR 259
New South Wales Department of Housing v Moskalev (2007) 158 FCR 206
O'Flaherty v City of Sydney Council [2013] FCA 344
Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1
Quinn v Overland (2010) 199 IR 40
Rehm Pty Ltd v Websters Security Systems (International) Pty Ltd (1988) 81 ALR 79

J. Allsop, "Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002," (2002) 23 *Australian Bar Review* 29-60
H.P. Lee, "The Implied Freedom of Political Communication," in *Australian Constitutional Landmarks* (eds. H.P. Lee & G. Winterton) (Cambridge: Cambridge University Press, 2003) pp.383-411
J. Riley, "Sterilising Talent: a Critical Assessment of Injunctions Enforcing Negative Covenants," (2012) 34 *Sydney Law Review* 617-635
R. Sackville, "An age of judicial hegemony," (2013) 87 *Australian Law Journal* 105-120

Applicant:	MICHAELA BANERJI
Respondent:	MARTIN BOWLES, ACTING SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
File Number:	CAG 83 of 2012
Judgment of:	Judge Neville
Hearing date:	29 January 2013
Date of Last Submission:	3 May 2013
Delivered at:	Canberra
Delivered on:	9 August 2013

REPRESENTATION

Counsel for the Applicant:	Self Represented
Counsel for the Respondent:	Mr Shariff
Solicitors for the Respondent:	Ashurst, Australia

ORDERS

(1) The Amended Application, filed 29th January 2013 (and all prior Applications), be dismissed.

(2) The Application in a Case, filed 25th February 2013 seeking leave to issue a further amended Application, be dismissed.

(3) No order as to costs.

FEDERAL CIRCUIT
COURT OF AUSTRALIA
AT CANBERRA

CAG 83 of 2012

MICHAELA BANERJI
Applicant

And

MARTIN BOWLES, ACTING SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP MARTIN BOWLES, ACTING SECRETARY, DEPARTMENT OF IMMIGRATION AND CITIZENSHIP
Respondent

REASONS FOR JUDGMENT

Introduction

1. There are two inter-related issues to be determined in the current proceeding:

    (a) Is there an unfettered implied right (or freedom) of political expression/communication, for which the Applicant contends, based on comments by Kirby J in *Australian Broadcasting Corporation v Lenah Game Meats*?[1]

    (b) Should an interlocutory injunction issue to prevent the Applicant's [apprehended and/or imminent] dismissal by the Respondent?

2. The answer to both questions is "no."

[1] *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199.

3. The Applicant contends that her right of political expression is a constitutionally protected right which operates, in any event and without restriction, to prevent her dismissal – actual or apprehended - by the Respondent.

4. For the reasons that follow, and subject to what is said below in relation to undertakings regarding the departmental review process and the implementation of any proposed outcome from it, (a) there is no such constitutional right for which the Applicant contends, and (b) an interlocutory injunction should not issue because the legal base for it has not been made out, and or, in the alternative, in the exercise of the Court's discretion, it should not, in any event, be granted.[2]

5. As noted below, the Department gave an undertaking when the matter first came before the Court in Sydney late last year, which has effectively preserved the position of the Applicant within the Department, pending the conclusion of the review process. That undertaking has continued, with slight variation. On the basis of it continuing until (a) the review process is completed, (b) any determination is made (but not yet implemented) by the Department, and (c) a further 14 days after the determination is made but before it is implemented to allow for any further Application, there is neither utility nor need for an interlocutory injunction to issue.

6. The course that I have followed owes much to the decisions of Dodds-Streeton J, in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd* ("AMWU v Visy"), and of Barker J in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* ("ABCC v CFMEU").[3] In both of these cases, interlocutory relief was refused. In the former case, her Honour dismissed the Application on the balance of convenience, which was affected by undertakings being given (a) in relation to the prompt conclusion of an investigation and (b) to refrain

[2] The Applicant filed an Application in a Case on 25th February 2013 in which she sought leave to file a further amended Application "setting out the whole of the applicant's case, consisting of an Amended Form 4…." In all the circumstances, that Application should also be dismissed. Among other things, Ms Banerji has had ample opportunity to outline her case. She has done so on a number of occasions; her submissions have been regular and substantial.

[3] *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd* (2011) 213 IR 32; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2009) 189 IR 37. Decisions to different effect include *Jones v Queensland Tertiary Admissions Centre Ltd* (2009) 190 IR 218.

from implementing any outcome until other interlocutory Applications had been determined.

7. There have been multiple iterations of the Application that is currently before the Court, by which the Applicant [originally] sought urgent [interlocutory] injunctive relief against the Respondent.

8. The Applicant contends that she is at risk of adverse action, namely the imminent termination of her employment. She says that she has been advised of that determination; the Department of Immigration and Citizenship ("the Department") says that the internal review process continues, that no determination of the Applicant's employment fate has been made, and that she has been invited to comment on the recommendations of the review. On the information before the Court, it would appear that the Applicant does not distinguish, or has not distinguished, between a recommendation by a reviewer and a decision by her employer, the Department.

9. Subject to what is said later in these reasons, the Department resists the Application for interlocutory relief.

10. The Department also contended that this Court does not have the jurisdiction to deal with the Application. In part (summarily stated) this was because (a) there was a constitutional matter in relation to which the Court has no relevant jurisdiction, conferred, associated or accrued, and or (b) the Applicant has not specified or sought any final relief.[4]

11. As already noted, while initially seeking injunctive relief, the Applicant now seeks declaratory orders which are said to relate to, or arise out of, the alleged infringement, by the Respondent, of her 'implied freedom of political communication' under the *Constitution*. The Applicant contends that her implied freedom arises out of, in particular,

[4] See Rule 4.01(3) *Federal Circuit Court of Australia Rules* 2001. For completeness, it should also be noted that on 26th October 2012 the Applicant filed a general protections dispute Application with Fair Work Australia ("FWA"). Shortly thereafter the Department wrote to the Applicant to confirm that if she withdrew the Application for an interim injunction, no action would be taken until after FWA had conducted a conciliation conference. The Application for interlocutory relief was [obviously] not withdrawn. FWA conducted a conciliation conference on 8th November 2012. However, FWA did not issue a certificate under s.369 of the *Fair Work Act* 2009 ("FW Act") because there had been no dismissal. Generally, see the operation of ss.365 and 371 FW Act in relation to Applications to FWA in cases of dismissal and the pre-requisites for a general protections Application.

comments made by Kirby J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[5]

12. As already indicated, as the following reasons confirm, the Applicant has not established that the declarations sought should be made, or that an injunction should issue.[6] While the Applicant's fears of dismissal are doubtless real, the internal processes have not yet been concluded. Her immediate 'fear', as she has articulated it, does not in all the circumstances, in my view, establish a sufficient basis – in fact or in law – for any legal redress at this time. Moreover, I accept the submission by the Respondent that, in any event, damages will (or will likely) be an appropriate remedy if the Applicant ultimately makes out her case. Similarly, reinstatement may be an appropriate alternative remedy. Accordingly, her interim or interlocutory Application must be dismissed. Given that the Department has not sought an order for costs but simply that the Application be dismissed, in the circumstances, I make no order as to costs.

Procedural (& Other) History

13. The Application began life in the Sydney Registry, in the Fair Work Division of the Court, filed on 29th October 2012, seeking orders in the most general terms, as I have said, to prevent the Respondent Department from taking any adverse action against the Applicant. Formally, the Applicant, Ms Banerji, stated the relief sought in the following terms:

> *I seek urgent interim order [sic] before 2 November 2012, that the Department of Immigration and Citizenship, and or its delegates, cease and desist from its current proceedings – proposed termination of employment – to permit intervention by Fair Work Australia, in a matter of adverse action on the part of the employer.*

---

[5] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 260 [140] ("Lenah Game Meats").

[6] For recent discussion of interlocutory relief to prevent the taking of apprehended "adverse action", see *Jones v Queensland Tertiary Admissions Centre Ltd* (2009) 190 IR 218; *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2009) 189 IR 37; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Packaging Pty Ltd* (2011) 213 IR 32; *Quinn v Overland* (2010) 199 IR 40.

14. Subject to comment later in these reasons, of some significance is the fact that Ms Banerji did not seek any final relief, in accordance with Rule 4.01(3) of this Court's Rules. That Rule provides:

> *A person may not file an Application for an interim or procedural order unless:*
>
> *(a) an Application for a final order has been made in a proceeding; or*
>
> *(b) the Application includes an Application for a final order.*

15. For the sake of completeness, I note that Rule 1.06 confirms the Court's power to dispense with compliance, or full compliance, with any of the Court's Rules, at any time, "in the interests of justice." Indeed, the rules of court should always be servants of the Court rather than its master.

16. The Applicant, Ms Banerji, who is employed by the Department as a 'public affairs officer', filed an affidavit at the same time as her Application.[7] That affidavit annexed a copy of her Application to Fair Work Australia (filed on 26th October 2012) "to deal with a general protections dispute."

17. To the degree that this Court can (or should) have regard to the Application to Fair Work Australia, in it Ms Banerji said that the contravention alleged involved a breach of s.340(1) of the *Fair Work Act 2009* (Cth) ("FW Act"), which contravention was described thus:

> *Instigation of Code of Conduct investigation in response to my complaint to the department about ongoing victimisation at work between April 2011 and May 2012 – proposed sanction "termination of employment."*

18. Ms Banerji originally contended (and continues to maintain) that the Respondent intends to terminate her employment, among other things, because of her use of social media, and in particular her "Twitter" account. On that account, using the 'Twitter handle' of "*@LALegale*", Ms Banerji has made, or shared, regular comment (sometimes mocking, sometimes critical) on, for example, (a) the practices and policies of the company that provides security services at

[7] I understand that Ms Banerji is legally qualified but has not practiced.

Commonwealth immigration detention centres, (b) the immigration policies of the Australian Government, (c) information and comment by the Opposition spokesman on immigration (Mr Morrison), (d) the Minister for Foreign Affairs (Senator Carr), (e) the [then] Prime Minister, (f) the Leader of the Opposition, and (g) employees of the Department.

19. In her affidavit, filed 29th October 2012, the Applicant confirmed (par.2) that the Respondent had provided her with an opportunity to respond to the sanction proposed. She also contended that adverse action against her had been initiated by Mr Logan (the Manager of the National Communications Branch within the Department) in May 2011.

20. In her second affidavit, filed 31st October 2012, Ms Banerji (a) confirmed that she had lodged a formal complaint against Mr Logan on 4th May 2012 (annexure A to this affidavit); (b) listed various adverse incidents alleged to have been perpetrated against her since 2006 (annexure C to the affidavit); and (c) provided a copy of a report from an OH & S case manager, which is said to detail various injuries suffered by the Applicant (annexure E).[8]

21. On 1st November 2012, Mr McKinnon, the Director, Workplace Relations and Conduct Section, Peoples Services Branch of the Department, filed an affidavit. Of immediate relevance is that he deposed that (a) Ms Banerji's formal complaint of May 2012 against her Manager, Mr Logan, led to an investigation into Mr Logan's conduct, and (b) the investigation was finalised in July 2012. The Applicant was advised that "appropriate action" had been taken by the Department in relation to her complaint against Mr Logan. However, this advice confirmed that the *Privacy Act 1988* prevented the disclosure of any relevant details. A copy of the undated letter to Ms Banerji, but confirmed by Mr McKinnon to have been sent on 26th July 2012, is annexure E to his affidavit.

[8] The other annexures to this affidavit are a letter from Ms Banerji to Mr Bowles, dated 14th August 2012, suggesting a means by which a certain matter be resolved (annexure B), and a copy of the letter, dated 15th October 2012, from Ms White, the relevant decision-maker, notifying Ms Banerji of the proposed sanction (annexure D).

22. Respectfully and unfortunately, the letter is (a) less than informative (or otherwise illuminating), and (b) classic 'Yes Minister speak.' Brief as it is, it is worth recalling that the allegations made by the Applicant are of "bullying, harassment and mobbing". The advice from the Department to Ms Banerji relevantly stated, in part:

> *When an allegation of serious misconduct or of a criminal nature is made against a DIAC employee, the Workplace Relations and Conduct Section is required to investigate the matter.*
>
> *The allegation in this instance was investigated and appropriate action taken by the department. The matter has now been finalised.*
>
> *The Privacy Act 1988 prohibits further disclosure of information relating to this investigation. Accordingly, I am unable to disclose further details regarding the outcome.*
>
> *Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me [contact details supplied].*

23. One might inquire or observe, not unreasonably I hope, how a complainant might obtain any relevant information, or ask any questions, about a grievance that involves "serious misconduct" in circumstances where that person is advised that no relevant information can be provided? One might appreciate or conclude (which formally I do not) that such an information vacuum might understandably give rise to a certain angst or tension in the workplace, which is not necessarily of the complainant's making.

24. In any event, Ms Banerji filed a further affidavit on 9th November in which she alleged bias against the Department in the conduct of its review, its findings of breach, and the proposed sanction.

25. On 26th November, Ms Banerji filed a further affidavit in which she claimed the 'status' of a "whistleblower" in relation to her complaint against Mr Logan. In this affidavit, at par.11, the Applicant also stated (emphasis in original):

> *The department is also discriminating against me in breach of the Fair Work Act, by seeking to dismiss me for* ***expressing my political opinion and in breach of citizens' constitutional right to express political opinion****. The comments for which I am*

alleged to have breached the [APS] Code of Conduct, on closer scrutiny, reveal themselves to be expression of political opinion.

26. In the same affidavit (par.12), Ms Banerji also claims an [unspecified] duty of care owed to her by the Department which, she avers, has been 'serially' breached.

27. Mr McKinnon filed a further affidavit on 22nd January 2013, in which he disavowed that the investigation into her conduct was motivated or otherwise took into account Ms Banerji's complaint against Mr Logan. Rather, he said that the investigation/review of her alleged conduct was undertaken because (par.4) "the allegations, if proven, give rise to serious breaches of the Respondent's policies, including the policy on use of social media, and the APS Code of Conduct." He further confirmed (par.6) that his decision to investigate "was based solely on the allegations made in the specific complaint in relation to the Applicant's conduct received on 9 May 2012."

28. Also on 22nd January 2013, Ms White, the Director, Workforce Design Strategy for the Respondent, filed an affidavit. She said that she is responsible for managing the section that delivers "strategic HR services to the department." On 18th September 2012 she was appointed by the Secretary of the Department to determine (a) whether the Applicant's alleged conduct gave rise to breaches of the Australian Public Service ("APS") Code of Conduct, and (b) if so, what (if any) sanction should be imposed in respect of any such breach.[9]

29. Ms White set out the process she undertook, including having sent the Applicant, on 20th September 2012, a letter which set out possible breaches of the APS Code of Conduct, and which also invited the Applicant to respond to the proposed determination of breach. Ms White confirmed that Ms Banerji provided a written response the same day (20th September).

30. Following consideration of the Applicant's response, on 16th October Ms White sent a letter to Ms Banerji in which she set out (a) her determination of breach, (b) the sections of the APS Code of Conduct ("the Code") found to have been breached, (c) the proposed sanction of

[9] It is not apt here to comment on the risks of reviews conducted internally by an employer, such as the perception (however inaccurate) of the need for an internal review to succumb or yield, for example, to a departmental policy.

termination of her employment, and (d) the formal invitation to the Applicant to respond to the proposed sanction. The time frame for the response was said to be seven (7) days.

31. Ms White noted that Ms Banerji sought an extension of time to respond, which was granted up to 2nd November 2012.

32. Ms Banerji responded to Ms White's invitation on 2nd November 2012. The 17 page response is annexure A to Ms White's January 2013 affidavit.

33. Also on 2nd November, and again on 9th November, the Media, Entertainment and Arts Alliance ("the Alliance") provided written submissions to Ms White on behalf of Ms Banerji, who is a member of that Alliance. Those submissions are annexures B and C to Ms White's affidavit.

34. On 11th November, Ms Banerji provided Ms White with a further submission in relation to the proposed determination of breach and proposed sanction. It is annexure D to Ms White's affidavit.

35. Because of various undertakings given by the Department to his Honour, Smith FM (who originally had carriage of the matter in Sydney), and orders consequent thereon, Ms White confirmed that she had not been able to consider the further responses from Ms Banerji or the Alliance, or to make a determination regarding any sanction.

36. At par.14 and following of her January 2013 affidavit, Ms White summarised the reasons for her determination as to breach of the Code. She said:

> *a. the comments made by the Applicant on Twitter demonstrated a failure to behave with honesty and integrity in the course of her APS employment and in a way that upholds the APS values and the integrity and good reputation of the APS. In addition, the comments made by the Applicant were in breach of the Department's policies and media use; and*
>
> *b. the Applicant had engaged in outside employment without appropriate approval.*

37. Ms White also confirmed that (a) she proposed the sanction of termination of Ms Banerji's employment, and (b) in making that

determination, she did not take into account (i) any complaint by Ms Banerji against Mr Logan, (ii) Ms Banerji's history of workers' compensation claims, or (iii) any previous complaints by Ms Banerji alleging adverse treatment in her workplace.

38. On 29th January 2013, Ms Banerji filed (a) an Amended Application (seeking, among other things, certain declaratory orders and relief in relation to the 'findings' of breach of the APS Code of Conduct), (b) a brief affidavit confirming that she sought final declaratory relief and reserving her position to seek further, consequential relief, and (c) extensive written submissions (21 pages) in support of her Amended Application.

39. Of immediate relevance is Ms Banerji seeking the following relief, as per the January 2013 Amended Application:

> *(i) A declaration ... : that any finding of a breach of the APS Code of Conduct for expressing a political opinion contravenes the implied constitutional freedom of political communication;*
>
> *(ii) A declaration ... : that the Constitution's protection of freedom of political communication precludes the curtailment of such freedom by the exercise of legislative or executive power;*
>
> *(iii) A declaration ... : that the Respondent's finding that the Applicant breached the APS Code of Conduct for expressing her political opinion on the social media Application "Twitter" is an attempt to curtail that freedom and is thus in contravention of the Constitution.*

40. This outline of events is sufficient for current purposes. This is also to say that in order to determine the interlocutory matters that are currently before the Court it is not necessary to examine all the *minutiae* of each of the allegations made by the Applicant.

Applicant's Submissions

41. Ms Banerji provided the Court with written submissions, which were filed on 21st December 2012, 29th January, 25th February and 3rd May 2013. Her first submissions were in quite general terms, such as (par. 4): "The Applicant claims rights, which she seeks to have vindicated by

a permanent injunction – the rights including, but not limited to, workplace rights."

42. She submitted that there was a serious question to be tried in that the Department had serially failed in its duty of care "personally and professionally since 2006", and that the Department had acted adversely towards her because of her [attempts] to claim workplace rights. She maintained that each adverse action by the Department against her had been in response to her claiming a "workplace right".

43. In more detail (par. 15) the Applicant claimed:

> *The Department, in breach of the Public Service Act, failed to protect the Applicant from retaliation. The retaliation took the form of the manager making a subsequent allegation of the Applicant's breach of the Code of Conduct for her use of social media 'Twitter' with a presumption of guilt, relocation and public humiliation by being removed from her job.*

44. The Applicant contended (par.17) that she has been subject to a "history of victimisation", and that the Department has failed to provide a safe workplace for her.

45. Ms Banerji also claimed (pars.19-24) that she has been discriminated against in relation to her "whistle-blower complaint" against Mr Logan, who she said has been engaged in "covert surveillance of an employee's social media account without her knowledge, with intent using monitoring software in prima facie breach of telecommunications legislation…" The legislation contemplated by the Applicant is not identified.

46. Ms Banerji noted (par.28) that she has twice been found by Comcare to have suffered psychological injury at work, which is directly attributable to workplace events. At the same time, she advised that Comcare denied liability.

47. She said that damages would not adequately compensate her in the event that her employment is terminated, because she has already sustained losses (which are not particularised) and that these losses (par. 31) "would be compounded by the termination including but not limited to, shock and awe at termination, shock and awe at unjust action, pecuniary loss, damage to reputation, loss of chance at

employment, loss of professional standing, discrimination on grounds of age, loss of trust and confidence in the employer, loss of enjoyment of work".

48. In relation to the balance of convenience (par.32 *ff.*), the Applicant submitted that it favours the granting of an interim injunction "because she has a great deal to lose, whereas the Respondent has nothing to lose by the injunction being granted."

49. In relation to the implied right of expression of political opinion, the Applicant contended (internal citations omitted):

> *While the Respondent has found that the Applicant has breached the APS Code of Conduct for her use of Twitter, closer scrutiny of the substance of the tweets shows that none are offensive or damaging to individual persons, but instead, they are expressions of political opinion, to which all Australian citizens have a constitutionally implied right.*

50. The tweets in question (with dates, message and commentary) are set out in Annexure B to the 21st December 2012 submissions.

51. Ms Banerji also contended (par.43) that if her employment with the Department was to be terminated, it would be contrary to guidelines that proscribe termination of an employee where there has been a history of bullying and harassment; she also said that termination of her employment would be contrary to "discrimination legislation that states that an employee must not be terminated for her political opinion". The legislation referred to is not identified.

52. Ms Banerji maintained (par. 51) that on close scrutiny of the substance of the tweets, "it is evident that they are a simple expression of political opinion, made in her own time away from work". In such circumstances termination of her employment "would be unconscionable." To be unemployed would lead, she said, to "convulsive shock."

53. In her submissions filed 29th January 2013, the Applicant focussed primarily upon what she described as the contravention by the Department of "a constitutionally guaranteed freedom of political communication". She said: "… were the Respondent to terminate the Applicant for her use of the social media Application 'Twitter' on the

grounds that she expressed her political opinions, the Respondent's actions would be unlawful in that they would purport to limit a constitutional [sic] implied right to political expression".

54. Most of the January 2013 submissions repeat her claims in relation to the alleged conduct of the Department and its impact on her. I need not and will not repeat those parts that are by way of response and/or are repetitious – which is the bulk of the January 2013 submissions. It is significant, however, to highlight two particular submissions.

55. First, at paragraph 2.15 (p.17) Ms Banerji said:

> *The Applicant is proud to be a public servant. She is of the view that in such a small way [sic] she is helping to run our country. She considers herself to be an employee of the people – the government and its executive arm the Respondent, being the representative government of the people. The Applicant does not want to see the Respondent acting unlawfully, in deference to the people of Australia, her employer. The Applicant's allegiance is to the Australian people, for whom she is a servant – the true meaning of the term 'public servant'.*

56. Respectfully, whatever her philosophical views about representative government, or her employment, and accepting that the Court does not [yet] have a copy of her contract of employment, the legal reality is that she is an employee of the Department of Immigration and Citizenship (as it then was, and from time to time is – subject to the usual political vagaries regarding departmental name changes). I do not understand this legal status ever to have been disputed.

57. Secondly, at paragraph 2.18 (p.18) of her January 2013 submissions, which is a reply to paragraph 55 of the Respondent's January submissions, Ms Banerji stated:

> *The Applicant replies that, under all of the circumstances, she deserves to remain in employment, that her employment should never have been threatened, that no sanction should have ever been proposed – that no sanction should be imposed, let alone the sanction of termination of employment. The practical result of affirming the breach and imposing the sanction is to contravene the implied freedom of political communication. In the Applicant's view, this would be unlawful, and the executive power invalid. The Applicant has done nothing wrong. Expressing her*

> *political opinion, whether harsh or not, whether critical or not, whether done in her own name or not, whether done as an APS employee or not, whether done as an employee of the Department of Immigration or not, whether she indicates that she will continue or not, is not wrong – it is a right which is constitutionally guaranteed under our country's laws, and any attempt by the Respondent to act in contravention of that right, is invalid and unlawful.*

58. Ms Banerji's 25th February 2013 submissions are essentially a point by point response to the Respondent's submissions that were filed on 14th February 2013.

59. Again, I need not go through each of the refutations or comments she provided, except to note that she confirmed (par. 4) her intention to seek (emphasis added) "an interim injunction to stay the Respondent's proposed action to terminate her employment, **so as to permit the Court to hear the whole of her adverse actions matter**".

60. The reason for highlighting this part of Ms Banerji's submission is because of the Respondent's submission that the Court does not have jurisdiction to determine the matter. As explained later in more detail, on the basis of Allsop J's (as his Honour then was) decision in *Macteldir Pty Ltd v Dimovski* ("Macteldir"), there is relevant jurisdiction to determine the matters currently before the Court.[10] Albeit not regularly outlined in her Application, in my view, Ms Banerji sufficiently highlighted that a significant part of her Application related to allegations of adverse action under the FW Act. By doing so, and in the light of the decision in *Macteldir* (discussed later in these reasons), the Respondent's challenge to the Court's jurisdiction should be rejected.

61. The Applicant's final submissions, filed 3rd May 2013, were in response to questions from the Court as to the relevance and/or applicability of two recently-decided cases that considered the issue of the implied freedom of political communication. Those decisions are, firstly from the High Court, *Attorney-General for South Australia v*

[10] *Macteldir Pty Ltd v Dimovski* (2006) 226 ALR 773. See also *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575.

Corporation of the City of Adelaide, and from the Federal Court of Australia (Katzmann J) *O'Flaherty v City of Sydney Council*.[11]

62. In short, the Applicant contended that both of these cases provide authority for this Court to grant the relief sought, but on the relatively new ground that "s.13(11) of the *Public Service Act* 1999 (as interpreted by the Respondent) is completely and directly a burden on the freedom of political communication".

63. Section 13(11) of the *Public Service Act* ("PS Act") states: "An APS employee must at all times behave in a way that upholds the good reputation of Australia."[12]

64. It is apposite to note here that, in addition to s.13(11), the Department relies upon s.13(1) and (7) of the PS Act, which provide, respectively: "An APS employee must behave honestly and with integrity in the course of APS employment", and "An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment."

Respondent's Submissions

65. The Respondent filed written submissions on 1st November 2012, 22nd January, 12th February, and 3rd May 2013. For present purposes, it is sufficient to note the following, primarily from the January 2013 submissions (which, in certain respects, were repeated/refined in the February 2013 submissions).

66. First, the Respondent acknowledged that under both the *FW Act* (ss. 545, 566-567) and the Court's own legislation, now the *Federal Circuit Court of Australia Act 1999* ("FCCA Act") (s.15), the Court had statutorily conferred jurisdiction. In its later submissions of 12th February, the Department contended that the Court had limited jurisdiction.[13]

---

[11] *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 295 ALR 197; *O'Flaherty v City of Sydney Council* [2013] FCA 344.

[12] Section 13 of the *Public Service Act* 1999 provides a statement of the APS Code of Conduct, while s.10 of the same Act details "APS [Australian Public Service] Values."

[13] I deal with the submissions regarding the Court's jurisdiction later in these reasons. It is important to note here, however, as Cowdroy J did in *New South Wales Department of Housing v Moskalev* (2007)

67. The Department then outlined the factual and procedural background to which I have earlier referred. That background begins by reference to the two complaints against the Applicant, namely (a) that she was inappropriately using social media in contravention of the Australian Public Service Code of Conduct and (b) later in the submissions, it is noted that, contrary to the Department's policy on outside employment, which provides that all staff must get written permission before commencing outside employment, the Applicant commenced work independent of her employment with the Department, and without relevant permission or authority.

68. It was confirmed that although the Applicant obtained permission in November 2008 to work outside the Department, that approval expired in November 2009. It was submitted that some time after November 2009 Ms Banerji commenced employment as a psychoanalyst.

69. The submissions also stress that, as a matter of fact, the Department's reason for commencing the investigation into the conduct of Ms Banerji, and for proposing the sanction of termination of employment, was/is the Applicant's conduct and not any reason prohibited by the general protections provisions of the FW Act.[14]

70. The Department contended that s.361(2) of the FW Act applies to this case; thus, the reverse onus of proof that would otherwise apply in a general protections dispute, has no Application where there is an Application for an interim injunction.

71. Therefore, according to the Respondent, adopting the principles set out by the High Court in *Australian Broadcasting Corporation v O'Neill* ("ABC v O'Neill"), the Court is required to consider (a) whether there is a serious question to be tried; (b) whether the Applicant is likely to suffer injury for which damages (or other available remedy) will not be

---

158 FCR 206, at [22] – [25], that s.15 of the FCCA Act relates to "power" and not directly to "jurisdiction."

[14] See the affidavit of Mr McKinnon, sworn 16th January 2013, paragraphs 4-6; and the affidavit of Ms White, sworn 21st January 2013, paragraphs 14-16. Generally in relation to 'reasons' for a workplace decision, see the discussion by the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 290 ALR 647, particularly at [42] – [45] (French CJ & Crennan J), [119] – [129] (Gummow & Hayne JJ), and [141] & [146] (Heydon J).

an adequate remedy; and (c) whether the balance of convenience favours the granting of an interim injunction.[15]

72. By reference to these "organising principles" (this term belongs to Gleeson CJ and Crennan J from *ABC v O'Neill* at [19]), and having regard to "the nature and circumstances of the case" (also from *ABC v O'Neill* at [19]), the Department contended that there was no serious question to be tried. In this regard the Department submitted that the Applicant had not actually sought any final relief, nor had she revealed any cause of action, as required by Rule 4.01 of this Court's rules.

73. The Department also submitted that the Applicant had not identified any specific action or conduct that could be properly considered to be 'adverse action', or any conduct that was otherwise for a prohibited reason.[16] Accordingly, there was no serious question to be tried.

74. By reference to the Application to Fair Work Australia, and the elements required under s.340 of the FW Act, the Respondent suggested that, on a generous reading of it, the allegations by the Applicant are that adverse action was taken against her by (a) instigating a Code of Conduct investigation, (b) alternatively, the Department proposed to engage in adverse action by proposing to terminate her employment, and (c) the adverse action alleged to be taken by the Department is because of the Applicant making workplace complaints and or made claims, such as for workers compensation, and or because she held certain particular political opinions.

75. By reference to these matters, the Department submitted that the elements of adverse action or any other ground alleged by the Applicant either has not been made out, or that her case is "extremely weak."

76. Further, the Department contended that the Applicant had provided no evidence that the Code of Conduct investigation was commenced (or any sanction proposed by it) because the Applicant made a complaint against her supervisor, or because of any other reason prohibited by the FW Act. Accordingly, no *prima facie* case had (or has) been

[15] See the comments in *ABC v O'Neill* (2006) 227 CLR 57 by Gleeson CJ and Crennan J at [19], and by Gummow and Hayne JJ at [65], [70] – [72].
[16] Generally, see s.340 FW Act in relation to 'adverse action.'

established that there has been any contravention of s.340 of the FW Act.

77. Moreover, the only evidence before the Court in this regard is the affidavit evidence from Mr McKinnon and Ms White, both of whom depose to the reason(s) for the code of conduct investigation. The reasons given by these persons do not come within the definition of "prohibited reason" under the FW Act. In this regard, the Department also says that Ms Banerji has not provided any evidence to refute the evidence of Mr McKinnon and Ms White and otherwise she has not addressed any of the matters of principle detailed in the High Court decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*.[17]

78. Further, the Department says that Ms Banerji was bound not only by the APS Code of Conduct but also by its *Guidelines on Use of Social Media by DIAC Employees* ("the Social Media Guidelines"). These Guidelines, the Department says, were reinforced by a 'fact sheet' which it published entitled "What is Public Comment? Workplace Relations Conduct Section Fact Sheet."

79. The Guidelines referred to provide that it is inappropriate for employees of the Respondent to make unofficial public comment that is, or is perceived to be, harsh or extreme in its criticism of the Government, a member of parliament or other political party and their respective policies. Considered also to be similarly inappropriate is unofficial public comment that provides strong criticism of the Department's administration that could disrupt the workplace.

80. It was submitted that the code of conduct investigation was instituted *only* (my emphasis) because of (a) certain comments posted on her Twitter account (to which I have already referred), and (b) her employment outside the Department.

81. In relation to possible 'alternative remedies' available to the Applicant, the Department pointed to the possibilities of reinstatement, and or the payment of any relevant 'back-pay.' And by reference to comments by Lord Diplock in *American Cyanamid Co v Ethicon Ltd*, the Department

[17] (2012) 290 ALR 647.

submitted that damages, or the other remedies just noted, would satisfactorily compensate or protect the Applicant.[18]

82. In relation to the balance of convenience, among other things the Department submitted that (a) the Applicant's case was weak, (b) to grant the injunction would be to prevent the conclusion of the review, (c) the breaches of the APS Code of Conduct were significant and for which the Applicant should be held to account, and (d) there is the risk that the Applicant will continue to 'tweet' adverse comment against the Department or others, contrary to the Department's Social Media Guidelines.

83. The Department also noted that Ms Banerji has not given the usual undertaking as to damages.

84. The Department contended that Ms Banerji's Application was premature given that the review process had not concluded, and in particular, the Department had not (or has not) determined that it will impose any sanction, or a particular kind of sanction. The Department said that the most appropriate course, on the balance of convenience, is to let the current process continue.

85. In later submissions, the Department repeated that the Court did not have jurisdiction to hear the Application for interlocutory relief. It made this submission because, it contended, there was no Application for final relief that would found the Court's jurisdiction. Further, it was said that s.18 of the FCCA, which deals with the Court's "associated jurisdiction", did not assist the Applicant to found jurisdiction to hear and determine the interlocutory Application. Thus, so the argument ran, without any relevant jurisdiction (original or associated) there was no jurisdiction to hear the constitutional issue raised by the Applicant.

86. The Department repeated earlier submissions about whether, because of the Amended Application for declaratory orders, there was in fact any interlocutory relief sought. Further, it argued that the comments of Kirby J in *Lenah Game Meats* relied upon by the Applicant were not as

[18] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 406. Although no case law is provided by the Department in its submissions in relation to 'reinstatement', in this regard see the discussion by the High Court in *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 212 CLR 539.

unqualified as alleged and did not support the Applicant's constitutional claim(s).

87. Procedurally, the Department also submitted that if the constitutional issue was to be pressed, and in accordance with s.78B of the *Judiciary Act 1903* (Cth), it would be essential for notices under that section to be issued. The Department may well have also noted that this Court's Rules require that a notice of a constitutional matter be given pursuant to the *Judiciary Act 1903*.[19]

88. Finally, the Department submitted that the Applicant will, in any event, not have lost (or lose) any entitlement to final remedies in the event that interlocutory relief is not granted. The Department also said that, in accordance with the High Court decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, the Applicant has not provided any evidence that would challenge the evidence given by the Department regarding the reason(s) for the review that remains on foot.

89. In response to the Court's invitation to comment on two recent decisions, by the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*, and by Katzmann J in *O'Flaherty v City of Sydney Council*, the Department said that (a) both decisions confirmed that the implied freedom of political communication is not an absolute right, and (b) the Applicant had failed to address the elements of the test set out in *Lange*.

Discussion & Resolution

The Jurisdictional Issue

90. The first challenge to the relief sought by the Applicant, as earlier noted, is that the Court is without jurisdiction to hear and determine Ms Banerji's Application for interlocutory relief.

91. I do not accept this submission for the following reasons.

[19] See Rule 10.06 *Federal Circuit Court Rules* 2001.

92. First, while clearly not a superior court with a presumption of jurisdiction (subject to express statutory prescription), this Court is not an inferior court. It is a court of record and a court of law and equity.[20]

93. Secondly, subject to express provision under other legislation (*e.g. FW Act* ss.539, 545, 566, 567 & 568), the Court's jurisdiction is set out in ss.10 and 10A of the FCCA Act.[21] Further, s.14 of the FCCA Act provides:

> *In every matter before the Federal Circuit Court of Australia, the Federal Circuit Court of Australia must grant, either:*
>
> *(a) absolutely; or*
>
> *(b) on such terms and conditions as the Federal Circuit Court of Australia thinks just;*
>
> *all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him or her in the matter, so that, as far as possible:*
>
> *(c) all matters in controversy between the parties may be completely and finally determined; and*
>
> *(d) all multiplicity of proceedings concerning any of those matters may be avoided.*

94. Thirdly, in *Macteldir*, by reference to the High Court discussion in *LNC Industries Limited v BMW (Australia) Limited*,[22] Allsop J (as his Honour then was) considered it essential to have regard to the jurisdictional basis of the "original controversy." If that is "federal" then it is always "federal" and the jurisdiction of the Court is properly invoked.[23]

---

[20] S.8(3) FCCA Act.

[21] For a helpful discussion of the Court's jurisdiction, including "powers" under s.15, and its associated jurisdiction under s.18, of the FCCA Act, see *New South Wales Department of Housing v Moskalev* (2007) 158 FCR 206.

[22] *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575.

[23] See *Macteldir Pty Ltd v Dimovski* (2006) 226 ALR 773 at pp.790 [63] & 793-794 [76]-[79]. His Honour also discussed the difference between "associated" and "accrued" jurisdiction at [67] *ff.* The relevant discussion by the High Court in relation to jurisdiction is in *LNC Industries Limited v BMW (Australia) Limited* (1983) 151 CLR 575 at pp.581-582. See also the more expansive discussion on these matters by Allsop CJ in "Federal jurisdiction and the jurisdiction of the Federal Court of Australia in 2002," (2002) 23 *Australian Bar Review* 29-60.

95. The "original controversy" between the parties in the current matter arose out of Ms Banerji's apprehension of risk of "adverse action" by her employer, the Department. "Adverse action" is part of and defined by the FW Act (s.342). This Court has jurisdiction under the FW Act in relation to injunctions and other relevant relief.[24] The jurisdiction of the Court has been regularly invoked by the Applicant under the FW Act.

96. Fourthly, having regard to the objects of this Court set out in s.3 of the FCCA Act, and to the fact that the Applicant is a self-represented litigant, the matters of "pleading" raised by the Respondent, while properly made in relation to formal compliance with the Court's Rules and otherwise, are matters of formality which should not be used to thwart the Court's resolution of the substantive matters raised by the Applicant.[25]

97. For these reasons, the challenge to the Court's jurisdiction is not made out. It follows that I do not need to consider anything about the Court's associated jurisdiction.

The Constitutional Issue: Freedom of Political Expression

98. In essence, the Applicant contends that, whatever her comments on policy or persons, when and however made, including while employed by the Department, and notwithstanding her contract of employment and the APS Code of Conduct, and whatever the Department's guidelines regarding the use of social media, her remarks constitute political comment. She contends further that her comments are constitutionally protected by the acknowledged "[f]reedom of communication on matters of government and politics [which] is an indispensable incident of that system of representative government which the Constitution creates."[26]

---

[24] See ss.545, 566 & 567 FW Act.

[25] In this regard, see the comments by Beaumont J in *American Optical Corporation v Allergan Pharmaceuticals Pty Ltd* (1985) 7 ATPR ¶40-539 at p.46,400, and by Gummow J in *Rehm Pty Ltd v Websters Security Systems (International) Pty Ltd* (1988) 81 ALR 79 at p.82 where his Honour referred to a complaint about "pleading" as a "pleaders conceit."

[26] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559. See further the recent detailed discussions in *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 295 ALR 197, and in *Monis v R* (2013) 295 ALR 259. Generally, see also the examination by H.P. Lee, "The Implied Freedom of Political Communication," in *Australian Constitutional Landmarks*

99. Ms Banerji maintains that her "right" to make the comments, which she acknowledges she has made, was recognised by Kirby J in *ABC v Lenah Game Meats*, to which I have earlier referred.

100. Respectfully, the principle for which the Applicant contends is not supported by relevant authority, including the judgment of Kirby J in *Lenah Game Meats*.

101. The unbridled right championed by Ms Banerji, which she says Kirby J articulated, does not exist. His Honour qualified his earlier comments (on which the Applicant relies) and went on the say in *Lenah Game Meats*, at [198] and [199] (internal citations omitted; emphasis added):[27]

> *In these circumstances, and in respect of the activities of the appellant in this case, I would be prepared to accept, for the purposes of the present appeal, that broadcasting of ideas about government or politics relevant to the activities of the Federal Parliament or of a State parliament would fall within the principle expressed in Lange.*
>
> ***However, this principle does not uphold an inflexible rule. Australian law does not embrace absolutes in this matter.*** *Many regulatory laws, federal and State, continue to operate in ways that are compatible with the representative democracy established by the Constitution.* ***Restrictions, imposed by law, for limited purposes (even where they may incidentally diminish completely uninhibited discussion of issues of government or politics) may yet be compatible with the Constitution. It is only if the law in question is inconsistent with the intended operation of the system of government created by the Constitution that the implied constitutional prohibition has effect****.*

102. Further, the on-going jurisprudence of the High Court in relation to the implied right of political expression has confirmed the limitations to which Kirby J referred, such that, as with 'rights' generally, they are not unbridled or unfettered. Indeed, it may be that the Applicant has not, or does not, distinguish between a licence and a right. Further, even if there be a constitutional right of the kind for which the

---

(eds. H.P. Lee & G. Winterton) (Cambridge: Cambridge University Press, 2003) pp.383-411, by R. Sackville, "An age of judicial hegemony," (2013) 87 *Australian Law Journal* 105-120 particularly at pp.115-119, and the other literature cited by Heydon J in footnote 221 in *Monis v R* 295 ALR at p.320.

[27] 208 CLR at p.282.

Applicant contends, it does not provide a licence [allegedly] to breach a contract of employment. In any event, among other things, in *Attorney-General for South Australia v Corporation of the City of Adelaide*, for example, the joint judgment of Crennan and Kiefel JJ confirmed, at [166] (internal citations omitted), that the right asserted here "is not a personal right. It operates as a restriction on legislative power and does so to support the constitutional imperative of the maintenance of representative government."[28]

103. Likewise, in the same case, at [151] and [152], Heydon J confirmed the obvious point that the Australian Constitution does not contain provisions similar to the First and Fourteenth Amendments of the United States' Constitution, or Article 5 of the German Constitution, both of which provide expressly for a right of freedom of expression.

104. As already observed, the *unfettered* right asserted by the Applicant does not exist. In the circumstances outlined in the current matter, and certainly only in the context of an interlocutory Application, I do not see that Ms Banerji's political comments, 'tweeted' while she remains (a) employed by the Department, (b) under a contract of employment, (c) formally constrained by the APS Code of Conduct, and (d) subject to departmental social media guidelines, are constitutionally protected. Further, it makes no difference, and actually strengthens the case against granting the relief she seeks, that her "tweets" occurred (in part or in full) while she was also professionally retained or engaged in employment outside her duties with the Department, and in relation to which she has/had no formal permission from the Department to be so employed.[29]

105. In any event, the constitutional claim or protection sought by Ms Banerji has not been made out.

106. By way of observation only, in the event the matter proceeds to a final hearing or some other Application is ultimately filed and constitutional

[28] 295 ALR at p.245. See also the detailed discussion by Hayne J in *Monis v R* (2013) 295 ALR 259 commencing at [92], and by Crennan, Kiefel and Bell JJ, relevantly commencing at [267].
[29] These and other matters, contend the Department, bring in to play the principles outlined in *Lumley v Wagner* (1852) 42 ER 687 with respect to specific performance of employment contracts. However, because of the course I have adopted, for current purposes I need not discuss them here. For a recent critique of this old authority and its continuing relevance to workplace contracts, see J. Riley, "Sterilising Talent: a Critical Assessment of Injunctions Enforcing Negative Covenants," (2012) 34 *Sydney Law Review* 617-635.

issues remain, subject to submissions from the parties, in my view, such matters should be heard and determined by a superior court, which obviously would be the Federal Court of Australia.

Interlocutory Relief

107. Finally, having determined that there is no constitutional right as claimed by the Applicant, the question now is whether, for any other reason, interlocutory relief should be granted?

108. Since the House of Lords' decision in *American Cyanamid Co v Ethicon Ltd*,[30] and subject to later High Court authority, such as *Lenah Game Meats* and *ABC v O'Neill* noted below, Lord Diplock's statement of principle has been, by and large, the legal touchstone for the consideration of whether to grant an interlocutory injunction. As his Lordship noted in that case, "[the] grant of an interlocutory injunction is a remedy that is both temporary and discretionary."[31]

109. Broadly stated, his Lordship's statement of "governing principle" is as follows.[32] First, Lord Diplock said that the object of an interlocutory injunction is "to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial." His Lordship also noted the correlative or "corresponding need for the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial."[33]

110. Lord Diplock confirmed that the court must be satisfied that the claim is not frivolous or vexatious; "in other words, that there is a serious question to be tried."[34]

---

[30] *American Cyanamid Co v Ethicon Ltd* (1975) AC 396.
[31] *Ibid* at p.405.
[32] Lord Diplock's discussion is at AC pp.406-409. The other members of the House of Lords (Viscount Dilhorne, Lord Cross of Chelsea, Lord Salmon and Lord Edmund-Davies) concurred with Lord Diplock's judgment and statement of principle.
[33] [1975] AC at p.406.
[34] [1975] AC at p.407.

111. In more detail, his Lordship confirmed that in Applications for interlocutory injunctive relief, the proper way to proceed was as follows. If the plaintiff/applicant has demonstrated that there is a serious question to be tried the Court then needs to consider whether damages is an adequate remedy (and whether or not the usual undertaking as to damages is required in the circumstances of the case), and finally, where it appears that damages would be inadequate, the balance of convenience needs to be examined.

112. Lord Diplock also said: "Where other factors appear evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo."[35]

113. In *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia*, Gaudron J endorsed Lord Diplock's comment regarding preservation of the status quo. Citing his Lordship in *American Cynamid* and also in *Garden Cottage Foods Ltd v Milk Marketing Board*, her Honour said:[36] "As a general rule, interlocutory orders and injunctions are confined to orders maintaining the status quo at the time of the making of an Application for those orders." In the same place, Gaudron J noted further (internal citations omitted): "However, that is not invariably so."

114. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[37] Gleeson CJ discussed both the nature of the jurisdiction of a court to grant interlocutory injunctive relief, and the principles on which that might occur.[38] Most relevantly for current purposes, his Honour said:[39]

> *There could be no justification, in principle, for granting an interlocutory injunction here other than to preserve the subject matter of the dispute, and to maintain the status quo pending the determination of the rights of the parties. If the respondent cannot show a sufficient colour of right of the kind sought to be*

[35] [1975] AC at p.408.
[36] *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at p.59 [119]. *Garden Cottage Foods* is reported at [1984] AC 130; Lord Diplock's comments cited are at p.140.
[37] (2001) 208 CLR 199.
[38] See 208 CLR at pp.216-220 [9] – [20].
[39] 208 CLR at p.218 [15].

vindicated by final relief, the foundation of the claim for interlocutory relief disappears.

115. His Honour also said:[40]

> *If there is no serious question to be tried because, upon examination, it appears that the facts alleged by the respondent cannot, as a matter of law, sustain such a right, then there is no subject matter to be preserved. There is then no justice in maintaining the status quo, because that depends upon restraining the appellant from doing something which, by hypothesis, the respondent has no right to prevent.*

116. More summarily, respectfully I adopt the outline of principle in relation to determining Applications for interlocutory relief provided by Bromberg J in *Quinn v Overland*, particularly having regard to his Honour's consideration of principle from *ABC v O'Neill*. Bromberg J said, at [45] and [46]:[41]

> *In determining an Application for interlocutory relief, the Court addresses two main inquiries. First, whether the applicant has made out a prima facie case in the sense that if the evidence remains as it is, there is a probability that at the trial of the action the applicant will be held entitled to relief. Second, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the respondent would suffer if an injunction were granted: Australian Broadcasting Corp v O'Neill (2006) 227 CLR 57 at [65], [19].*
>
> *The requirement of a "prima facie case" does not mean that the applicant must show that it is more probable than not that the applicant will succeed at trial. It is sufficient that the applicant show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. How strong the probability needs to be depends upon the nature of the rights the applicant asserts and the practical consequences likely to flow from the order the applicant seeks. In that context there is no objection to the use of the phrase "serious question" to convey the strength of the probability: Australian Broadcasting Corp v O'Neill per Gummow and Hayne JJ at [65]-[72], Gleeson CJ and Crennan J agreeing at [19].*

[40] 208 CLR at p.218 [16].
[41] *Quinn v Overland* (2010) 199 IR 40.

117. Putting the constitutional matter to one side, the issue is to determine whether the Applicant has established, *prima facie*, that there is a serious question to be tried, and whether, on the balance of convenience, an injunction should, or should not, be granted.

118. The workplace cases to which I have earlier referred, such as *Quinn v Overland*, *Visy Packaging*, *Jones v QTAC*, and *ABCC v CFMEU*, clearly highlight that the risk of dismissal, in certain circumstances, can be grounds for granting an interlocutory injunction.

119. The facts here, or the "nature and circumstances of the case" confirm, that (a) there has been no decision by the Department on Ms Banerji's employment fate, (b) she has confirmed that she has "tweeted" comments of a political nature, (c) she acknowledges the APS Code of Conduct (and at least implicitly the Departmental guidelines in relation to social media) but says that all of her actions are protected by her constitutional right of political expression.

120. In my view, for the reasons or grounds advanced by the Department, the nature and circumstances of the case do not warrant the grant of interlocutory relief. I accept the Department's submission that the Application is, in any event, premature. The departmental review should be allowed to reach the end of its process and make any final recommendation to the Department. The Applicant should then be afforded a reasonable opportunity to take advice and make whatever submission she considers appropriate.

121. Further to this, in my view, Ms Banerji will be adequately protected by the alternative remedies of damages and or reinstatement if and when the ultimate sanction of dismissal occurs.

122. I venture to comment that, once the review has concluded and Ms Banerji has provided her response, I would recommend (as opposed to order) that some form of [independent] mediation take place between the parties with a view to resolving the matter without recourse to litigation.

123. I also note that, in dismissing the Application for interlocutory relief, for example on the ground that it is premature, and or because the Applicant is adequately protected by alternative remedies, and or

because the balance of convenience favours the refusal of relief, Ms Banerji is not precluded from filing a further Application once the decision of the Department has been confirmed (whatever it be) and she has been given an opportunity to respond to it. This is not an invitation to further litigation but rather a statement of one procedural possibility, separate from those earlier suggested, such as mediation, in the event that the Applicant is dissatisfied with the outcome of the review.

124. For these reasons, the orders earlier indicated should be made.

I certify that the preceding one hundred and twenty-four (124) paragraphs are a true copy of the reasons for judgment of Judge Neville

Associate:

Date: 9 August 2013