

Taylor Smith appeals from the decision of the Administrative Appeals Tribunal (the **Tribunal**) given on 13 July 2021: *Smith v Comcare* [2021] MootAAT 10.

The Tribunal affirmed Comcare's 15 November 2020 decision, denying Smith's claim for compensation under s 10 of the *Public Sector Employment Act 1992* (Cth) for an adjustment disorder arising out of the termination of Smith's employment with the Department of Prime Minister and Cabinet on 1 May 2020.

Smith appeals from the Tribunal's determination that the termination of Smith's employment was "reasonable administrative action taken in a reasonable manner in respect of the respondent's employment", within the meaning of s 5A(1) of the *Public Sector Employment Act 1992* (Cth) and, consequently, that any injury Smith may have suffered was not an "injury" within the meaning of the Act.

Questions of law

1. Whether the burden that ss 14(2) - (5) of the *Public Sector Employment Act 1992* (Cth) impose on the implied freedom of political communication is unjustified, with the result that the 1 May 2020 decision to terminate Smith's employment was not 'reasonable administrative action' within the meaning of s 5A(1) of that Act.
2. Whether the decision to terminate Smith's employment was made in the absence of the jurisdictional fact prescribed in s 14(2) of the *Public Sector Employment Act 1992* (Cth), with the result that the decision was not 'reasonable administrative action' within the meaning of s 5A(1) of that Act.
3. Whether the Tribunal's decision is invalid, due to the Tribunal member making a material finding of fact ('the tag finding') vitiated by legal error.

Orders sought

1. Set aside the Tribunal decision.
2. Remit the case to the Tribunal to be heard and determined according to law.

Grounds relied on

1. The 1 May 2020 decision to terminate Smith's employment was not 'reasonable administrative action' within the meaning of s 5A(1) of the Act because the statutory provisions are unconstitutional, in that the burden they impose on the implied freedom of political communication is unjustified.
2. The 1 May 2020 decision to terminate Smith's employment was not 'reasonable administrative action' within the meaning of s 5A(1) of the Act because the decision to terminate Smith's employment was made in the absence of the jurisdictional fact prescribed in s 14(2) of the Act.
3. The Tribunal decision affirming Comcare's decision is invalid, being based on a finding of fact vitiated by legal error.

Particulars: The Tribunal's finding (at [12]) that Smith tagged the Australian Greens is vitiated by legal error, where Smith in fact tagged a social football team, 'the Green Hornets' (at [3]).

Smith and Comcare (Compensation) [2021] MootAAT 10 (13 July 2021)

Tribunal: Mercurial DP

1. The Tribunal affirms Comcare's reviewable decision of 15 November 2020. The applicant, Taylor Smith, is not entitled to compensation under section 10 of the *Public Sector Employment Act 1992* (Cth) (**'the Act'**) for any adjustment disorder arising from the termination of her employment with the Department of Prime Minister and Cabinet (**'the Department'**). The decision to terminate Smith's employment was reasonable administrative action, and so any disorder Smith may have suffered as a result of the termination is not an "injury" within the meaning of s 5A(1) of the Act.

Agreed facts

2. Smith commenced employment within the Department in October 2004.
3. On 1 May 2020, Smith's employment was terminated on the basis she had breached the Australian Public Service Code of Conduct prescribed in s 13(4) of the Act. The conduct relied upon as the basis for the breach was a tweet posted by Smith during the Australian Football League Women's 2020 Grand Final. After a third contentious referee decision favouring one team, Smith tweeted: 'This ref's calls are as impartial as Coalition grants for commuter carparks!' Smith tagged the AFL team she plays with in a local round-robin, 'the Green Hornets'.
4. On 1 September 2020, Smith lodged a claim for workers compensation for an adjustment disorder characterised by anxiety and depression under s 10 of the Act. Comcare refused the claim on 15 November 2020. Smith made an application for merits review by the Tribunal on 15 January 2021.

Relevant law

5. Section 10 of the Act provides, so far as is relevant, that Comcare is liable to pay compensation in accordance with the Act in respect of a workplace "injury" suffered by an Australian Public Service ('APS') employee, if the injury results in death, incapacity for work, or impairment.
6. Section 5A(1) of the Act defines "injury" as including, in substance, an aggravation of a mental injury that arose out of, or in the course of, employment, but as excluding "any such aggravation as is suffered as a result of reasonable administrative action taken in a reasonable manner in respect of an employee's employment, such as the lawful and reasonable imposition of a sanction under section 14 in respect of a breach of the APS Code of Conduct set out in section 13."
7. Section 13 of the Act sets out 'the APS Code of Conduct':
 - (1) An APS employee must behave honestly and with integrity in the course of APS employment.
 - (2) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
 - (3) An APS employee must uphold public service delivery that is fair, effective, and courteous to the Australian public and sensitive to the diversity of the Australian public.
 - (4) An APS employee must not make any unofficial public comment that is so harsh or extreme in its criticism of the Government or a Minister that it calls into question the employee's ability to work professionally, efficiently or impartially.
8. Section 14 prescribes the sanctions available for breach of s 13 as follows:
 - (1) If an Agency Head is satisfied that an employee has breached s 13(1), 13(2) or 13(3) - the Agency Head may impose the following sanctions:
 - (a) termination of employment;
 - (b) reduction in classification;
 - (c) re-assignment of duties;
 - (d) reduction in salary;
 - (e) deductions from salary, by way of fine;
 - (f) a reprimand.
 - (2) If an employee breaches s 13(4) - the Agency Head must terminate their employment.
 - (3) If the Minister thinks that it is in the public interest to do so, the Minister may revoke a decision made under subsection (2), within 21 days of that decision.

(4) The Minister does not have a duty to consider whether to exercise the power under subsection (3) whether he or she is requested to do so by the employee or by any other person, or in any other circumstances.

(5) If the Minister does not make a decision under subsection (3) within 21 days of the s 14(2) decision, on the 22nd day after the decision it will be taken that the Minister has decided not to consider whether to exercise the power under subsection (3).

Constitutional issue

9. Smith argues that ss 14(2)-(5) of the Act impose an unjustified burden on the implied freedom of political communication. It is unnecessary to address this in any detail. The argument is untenable on the authority of *Comcare v Banerji* [2019] HCA 23, in which the High Court concluded that the burden imposed by a relevantly similar statutory discretion to sanction breach of a relevantly similar APS Code of Conduct was justified.

Administrative law issue

10. Smith argues that, even if ss 14(2)-(5) are valid, the Agency Head's decision to terminate Smith's employment was not authorised by s 14(2) of the Act. Smith argues that her tweet was *not* 'so harsh or extreme in its criticism of the Government or a Minister that it calls into question Smith's ability to work professionally, efficiently or impartially.' Smith has not demonstrated that the Agency Head's determination on this matter is vitiated by any jurisdictional error.
11. First, the statutory criterion in s 14(2) is a question of fact on which reasonable minds might differ. The Agency Head evidently determined that the tweet *did* have the qualities described in the statute. Whether I agree with that evaluation or not is entirely beside the point. This is not a proceeding for merits review of the termination decision. This tribunal does not have authority to exercise the Agency Head's powers and discretions under s 14(2). It is true that section 14(2) prescribes a state of affairs that must exist before the duty is enlivened. Importantly, though, it is the Agency Head's role to decide whether that state of affairs exists.
12. Additionally, the Agency Head's decision was intelligible in the statutory and factual context. The statutory context is a scheme to promote impartiality and independence in the APS which in turn serves the constitutional system of responsible government. The facts include Smith's decision to tag the Australian Greens, who are known to support a Senate inquiry into the commuter carpark grants scheme.

Conclusion

13. For these reasons, the termination of Smith's employment was reasonable administrative action and any adjustment disorder Smith may have suffered (if any) cannot be an injury within the meaning of the Act. Comcare's decision to refuse compensation is affirmed.