

## EMPLOYMENT BULLETIN

23 November 2012

### Facebook comment not misconduct

On 16 November 2012, in *Mr Adrian Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch)*, the High Court held that the Trafford Housing Trust (**Trust**) had acted unlawfully and in breach of Mr Smith's employment contract when they demoted him from his position as Housing Manager for comments Mr Smith had posted on Facebook outside of work.

On Sunday 13 February 2011, Mr Smith (a practising Christian) read a news article on the BBC News website headed "Gay church 'marriages' set to get the go-ahead". Thinking some of his Christian friends might be interested in the article, Mr Smith posted a link to it on his Facebook wall page, together with the following comment: "*an equality too far*". Some of Mr Smith's colleagues at the Trust are also his Facebook friends and a short discussion took place between Mr Smith and a couple of his work colleagues. This meant that several of Mr Smith's colleagues were able to see his comment.

After a complaint was made to the Trust, they suspended Mr Smith on full pay and carried out a disciplinary investigation which included asking Mr Smith's colleagues for their views on his comments. A disciplinary hearing took place at which Mr Smith was found guilty of gross misconduct for a serious breach of the Trust's Code of Conduct and Equal Opportunities policy. Mr Smith then appealed unsuccessfully. He began working in his new role but continued to protest against his demotion.

The High Court had to decide whether Mr Smith's postings on Facebook amounted to misconduct.

Mr Justice Briggs ruled that Mr Smith did not breach his employment contract when he expressed his views about gay marriage on his Facebook wall, in the manner in which he did. On examination of the facts, the Trust had not been entitled to characterise Mr Smith's conduct as misconduct warranting demotion. Therefore, the Trust had acted in breach of contract by unilaterally imposing a demotion on Mr Smith and had effectively dismissed him from his old role.

If you would like further information or advice please contact:



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Unfortunately for Mr Smith, his remedy was limited to £100 compensation, being the pay differential during his notice period.

While the court acknowledged that his comments had caused particular offence to an employee with different views, this was held to be a *“necessary price to be paid for freedom of speech.”*

### **What does this mean for employers?**

This decision affirms an employee’s right to privacy and is bound to be influential in future employment law cases on social media, conduct outside work and freedom of expression.

The employment cases on the use of social media suggest that an employer may need to make efforts to assess potential damage caused to it before it takes any action where the facts are borderline.

In the age of Facebook and Twitter, in addition to their Code’s of Conduct and Equal Opportunities policies it is advisable for employers to think about having a dedicated and carefully drafted Social Media policy to assist them when carrying out a disciplinary investigation.

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