Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch) (High Court of Justice, Chancery Division, Briggs J, 16 November 2012)

The Trafford Housing Trust Limited (the Trust) is a private housing trust, formed as a company limited by guarantee for charitable purposes. It succeeded to the housing functions and responsibilities of the Metropolitan Borough Council of Trafford (Trafford Council) in 2004, and now owns 9,100 homes across Trafford in England, with a rental turnover of £31m per annum. The Trust's customer base (its residential tenants and their families) and its workforce display wide diversity in terms of ethnic origin, sexual orientation, religion and gender. It has approximately 330 employees, including Adrian Smith.

This case concerned two comments posted by Smith on his Facebook page which referred to his disapproval of gay marriages taking place in churches. The comments led to his suspension from work at the Trust on full pay. Subsequently, there was a disciplinary hearing which resulted in a finding of gross misconduct against Smith. It was recommended that he be dismissed. Instead, due to his long record of loyal service, he was demoted, with immediate effect, to a non-managerial position with the Trust; consequently suffering a 40% reduction in his pay, phased over 12 months. Smith appealed internally, but the appeal was dismissed, although the phasing-in of his salary reduction was extended from one to two years.

In this hearing, Smith claimed damages for breach of contract, on the basis that there was no gross misconduct in posting two comments on his private Facebook page. The Trust’s position was that by making the two postings on a Facebook page which identified him as one of its managers, Smith committed breaches of the Trust’s Code of Conduct for its employees, and acted contrary to the Trust’s Equal Opportunities Policy. Alternatively, the Trust claimed that if it was a breach of contract to demote him, Smith waived the breach by taking up his non-managerial post. In the further alternative, the Trust said that its liability for damages was limited to the difference between his original and reduced pay for his twelve week notice period, a net amount of £98.

His Honour said that this was not a case concerning rights of free speech or religious freedom as such, though these matters provided some context. His Honour said that there were three main issues, all concerning the interpretation of his employment contract (at [9]):

1. The first was centred upon questions as to the application of the Trust's code of conduct and equal opportunities policy to Smith's use of his Facebook account.
2. The second was whether, if applicable, the code of conduct or equal opportunities policy were contravened by his making the two postings on his Facebook page.

3. The third was the appropriate measure of damages, if the Trust had acted in breach of contract by demoting Mr Smith.

Smith had worked for the Trust since 1993, and was now aged 55. He had signed a contract with the Trust in 2006 which designated him as a ‘Housing Manager’. Clause D of that contract, headed ‘Employee Duties And Obligations’, provided (in part) as follows:

(a) You are required to perform the duties and activities as may be reasonably associated with your job role in an efficient and acceptable manner taking into account the stated values of the Trust and the attached Code of Conduct.
(b) You may also be required as a condition of employment to undertake duties not indicated by the job title or in the job description which may reasonably be required by the Trust.
(c) You must ensure that you are familiar with the law and regulation as it applies to your duties and that you comply at all times. You should also familiarise yourself with, and adhere to, all Trust policies and procedures and standards of performance asking for clarification if required.

Disciplinary matters were dealt with in clause L(c). ‘Gross misconduct’ was defined as:

...any deliberate act committed by a member of staff which is severely detrimental to the good conduct of the business or harmful to other members of staff. Such acts by their very nature are extremely serious and will normally warrant summary dismissal (i.e. without notice or payment in lieu of notice) possibly following a period of paid suspension pending the outcome of an investigation.

Examples followed this definition which included violence, drug abuse, fraud and corruption, misuse of confidential information, serious breaches of Trust procedures and gross insubordination.

The Code of Conduct was an 11 page document which required the Trust’s staff to be:

- honest, open and approachable;
- responsive to people’s needs and aspirations;
- responsible for the Trust's activities and outcomes and respectful of individuals and communities;
- caring;
- motivational to staff, communities and others to achieve the Trust's vision;
- fair in all dealings;
- innovative, finding new ways of achieving customers' aspirations;
- committed to the aims of the Trust;
- responsible for promoting a positive image of the Trust and of Trafford.

The Code of Conduct also required employees to:

- maintain the highest standards of personal/professional conduct and integrity at all times and to be courteous and considerate with all customers, their family and friends, colleagues and members of the public;
- act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues;
- treat customers, their friends and family and colleagues with dignity and respect.

The document further stated (at separate places) that:

- the Trust ‘is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views. Employees are expected to respect the customs and culture of any customers, their friends and family and colleagues’;
- ‘Employees should not engage in any activities which may bring the Trust into disrepute, either at work or outside work. This includes not engaging in any unruly or unlawful conduct where you are or can be identified as an employee, making derogatory comment about the Trust, its customers, clients or partners or services, in person, in writing or via any web-based media such as a personal blog, Facebook, YouTube or other such site.’

The Trust’s Equal Opportunities Policy referred to matters such as ‘Employees have a responsibility to treat their colleagues, tenants, third party suppliers and members of the public with dignity and respect being non judgemental in approach and not engaging in any conduct which may make another person feel uncomfortable, embarrassed or upset’.

Smith had 201 Facebook ‘friends’, most of whom were fellow charismatic Christians, many in Africa, where Smith had connections through his church, where he was a lay-preacher. Fellow employees who were ‘friends’ numbered 45. His Facebook profile stated his position as a manager at the Trust, which he described in the following terms: ‘What can I say. It’s a job and it pays the bills’. Smith’s comments
about gay marriage were based on a BBC article and were placed on his Facebook wall among comments on sport, toast and jam, washing his motorcycle, and the TV program 'Top Gear'.

The disciplinary proceedings at the Trust were commenced after a complaint from a fellow employee, who was not one of Smith's Facebook 'friends', but who had seen the two comments when they came through a newsfeed site he administered with the approval of the Trust.

His Honour said that the facts were not in dispute, but that (at [49]):

The Trust did not have a general right to 'demote' Mr Smith, by assigning him to a more junior or non-managerial role with a substantial reduction in salary. Under his employment contract the Trust could demote him under section B(2)(e) of the Disciplinary Policy only as a disciplinary sanction for misconduct which, in the context, meant a breach of Company rules or failure to reach the required standards in regard to conduct, performance and/or attendance... [It eventually became common ground between counsel that Mr Smith's demotion was a breach of contract unless it could be shown that his Facebook postings amounted to misconduct.

His Honour said that whether the postings were gross misconduct, or misconduct of any kind was not the issue (at [50]). Rather (at [50]–[51]):

The only question... was whether his postings amounted to a breach, either of the Code of Conduct or of the Equal Opportunities Policy. In this respect the Trust's case may loosely be categorised under three headings. The first was the allegation that the postings were 'activities which may bring the Trust into disrepute' contrary to the Code of Conduct. The second was that Mr Smith was by his postings promoting his religious views contrary to that part of the Code of Conduct dealing with relationships with customers, members of the public and colleagues. The third was that Mr Smith was failing to treat fellow employees with dignity and respect, including being non-judgmental in approach and that he was engaging in conduct which may make another person feel uncomfortable, embarrassed or upset, contrary to section B(b) of the Equal Opportunities Policy as well as contrary to the Code of Conduct.

His Honour dealt with each of these issues in turn. On the issue of bringing the Trust into disrepute, His Honour said (at [57]–[59], [62]):

I do not consider that any reasonable reader of Mr Smith's Facebook wall page could rationally conclude that his two postings about gay marriage in
church were made in any relevant sense on the Trust's behalf. I have two main reasons for that conclusion. The first is that Mr Smith's brief mention at the top of the page that he was employed as a manager by the Trust (as part of a note form CV which also identified his school, his place of residence, his marital status and his date of birth) could not possibly lead a reasonable reader to think that his wall page consisted of, or even included, statements made on his employer's behalf. A brief mention of the identity of his employer was in no way inconsistent with the general impression to be gained from his Facebook wall, that it was a medium for personal or social, rather than work related, information and views. That is not to say that Facebook cannot be used as a medium for work related communications.... But Mr Smith's Facebook wall did nothing of the sort, and any reader of his profile page would be left in no doubt that he regarded his employment merely as a fact, and not a particularly interesting fact, about himself. My second reason is that, viewing the entries on Mr Smith's wall for the period in question as a whole, it is obvious, and would be obvious even to a casual reader, that he used Facebook for personal and social rather than work related purposes. As I have said, the other entries made on the same page during that short period related to sport, food, motorcycles and cars, none of which could have any relevance to his work and all of which were about his personal and social life. Nor were his postings about gay marriage in church themselves work related.... The Trust prides itself on encouraging diversity both among its customers and its employees, and that encouragement of diversity forms part of its no doubt well-deserved reputation. But the encouragement of diversity in the recruitment of employees inevitably involves employing persons with widely different religious and political beliefs and views, some of which, however moderately expressed, may cause distress among the holders of deeply felt opposite views.

On the issue of promoting religious views among customers and colleagues, His Honour held that the central point was the Code of Conduct of the Trust referred to the promotion of such views. This meant that there had to be an element of ‘proselytising’, ‘canvassing’ or ‘advancing’ religious views. The Code could not mean that there should be no discussion of religion or politics in the workplace. Moreover, would a reasonable employee think that the prohibition extended to outside the workplace? His Honour said (at [66]):

"The right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work related context, but it would be prima facie surprising to find that an employer had, by
the incorporation of a code of conduct into the employee’s contract, extended that prohibition to his personal or social life.

His Honour also considered whether Smith’s Facebook page had come to be an extension of his work life, with 45 of his colleagues being ‘friends’. His Honour held that it was still not sufficiently work-related. He said (at [75]–[78]):

First, Mr Smith’s Facebook wall was inherently non-work related. That is because, while identifying himself as a manager at the Trust, he plainly and visibly used it for the expression of personal views about matters which had nothing whatsoever to do with his work. His Facebook (often described as a social medium) was an aspect of his social life outside work, no less than a pub, a club, a sports ground or any other physical (or virtual) place where individuals meet and converse. Secondly, although Mr Smith's Facebook wall was not purely private, in the sense of being available only to his invitees (due to its ‘friends of friends’ extension) it was not in any sense a medium by which Mr Smith could or did thrust his views upon his work colleagues, in the sense in which a promotional email sent to all their addresses might fairly be regarded. His Facebook wall was primarily a virtual meeting place at which those who knew of him, whether his work colleagues or not, could at their own choice attend to find out what he had to say about a diverse range of non-work related subjects. Even to the extent that his Facebook wall was accessible to friends of friends, actual access would still depend upon the persons in that wider circle taking the trouble to access it... it makes no difference to that analysis that postings on Mr Smith's wall would appear automatically on the newsfeed pages of his friends' Facebooks. Again, whether to allow Mr Smith's postings to appear there would be a matter of choice for them, in making him one of their Facebook friends. It would be a choice made wholly otherwise than in a work related context even if (as may well have been the case) those friends chose to do so as a result of coming into contact with Mr Smith at work, and forming a wish to learn about, and be posted about, his personal views. Finally, the critical difference between a targeted email (or for that matter inviting his workplace colleagues for a drink at the local pub for the purpose of enabling religious or political promotion outside work) and Mr Smith's Facebook is that it was his colleagues' choice, rather than his, to become his friends, and that it was the mere happenstance of their having become aware of him at work that led them to do so. He was in principle free to express his religious and political views on his Facebook, provided he acted lawfully, and it was for the recipients to choose whether or not to receive them.
On the third issue of mistreatment of fellow employees, His Honour took the view that (at [82]):

The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker. This is a necessary price to be paid for freedom of speech. To construe this provision as having application to every situation outside work where an employee comes into contact with one or more work colleagues would be to impose a fetter on the employee’s freedom of speech in circumstances beyond those to which a reasonable reader of the Code and Policy would think they applied. On any view their main application is to circumstances where the employee is working for the Trust. For the reasons already given, Mr Smith’s use of his Facebook involved his work colleagues only to the extent that they sought his views by becoming his Facebook friends, and that did not detract to any significant extent from the essentially personal and social nature of his use of it as a medium for communication.

His Honour acknowledged that there was an element of degree in these matters, but held that Smith’s postings were not, ‘viewed objectively, judgmental, disrespectful or liable to cause upset or offence’. They were views which could be found in the mass media, and were expressed moderately. They were not homophobic on any reasonably objective basis, and this had been acknowledged by the Trust.

Therefore, all three grounds the Trust had relied on to dispute breach of contract failed. The Trust did not have the right to demote Smith because of his Facebook postings, and to do so was a breach of his contract. Moreover, His Honour held that Smith’s purported demotion, in breach of his contract, amounted to a wrongful dismissal. Damages of the small difference in salary (£98) for the twelve weeks of the demotion were awarded on that basis. His Honour said in relation to the amount awarded (at [106]):

I must admit to real disquiet about the financial outcome of this case. Mr Smith was taken to task for doing nothing wrong, suspended and subjected to a disciplinary procedure which wrongly found him guilty of gross misconduct, and then demoted to a non-managerial post with an eventual 40 per cent reduction in salary. The breach of contract which the Trust thereby committed was serious and repudiatory. A conclusion that his damages are limited to less than £100 leaves the uncomfortable feeling that justice has not been done to him in the circumstances. All that can be said is that, had he applied in time, there is every reason to suppose that the Employment Tribunal would have been able (if it thought fit) to award him substantial compensation for the
unfair way in which I consider that he was treated. If, about which I can make no finding of fact (since I was merely informed about it on counsel’s instructions), financial stringency made it practically impossible for Mr Smith to bring proceedings in the Employment Tribunal in time, then the injustice he has suffered, although very real, is unfortunately something which this court is unable to alleviate by an award of substantial damages.

The damages were paid, but Smith was not reinstated.

The case may be viewed at:
http://www.bailii.org/ew/cases/EWHC/Ch/2012/3221.html

Implications of this case
The use of Facebook, or other social media, by employees is an issue which has become controversial. This decision found that the comments made were not in contravention of the Trust’s Code of Conduct or other employment policies, which had to be viewed ‘objectively’ (meaning viewed as a reasonable person would). However, the comments in this case were mild, made in answer to another employee’s query, and mixed in with harmless postings about quite unrelated (and not work-related) issues. As His Honour pointed out, context was crucial.