SUMMARY

2013/10 Christian employee entitled to voice opinion on gay marriage on Facebook (UK)

<p>Smith – v – Trafford Housing Trust</p>

Summary

An employee did not commit misconduct when he expressed his faith- based views on gay marriage on his personal Facebook page. Despite the fact that many of his Facebook 'friends' were his colleagues, the employee was not using the social network for work-related purposes. So, his employer acted in breach of the employment contract when it demoted him, purporting to rely on contractual provisions in its equal opportunities policy and code of conduct which prohibited causing offence to colleagues or bringing the employer into disrepute.

Facts

At the relevant time Mr Smith was employed as a housing manager by the Trafford Housing Trust (the 'Trust'), a non-political, non- denominational organisation providing residential housing to a diverse population. Mr Smith was contractually bound by the Trust's Code of Conduct, which obliged him to show commitment to the aims of the Trust and have regard to the need to maintain a positive image for the Trust; to act in a non-confrontational, non-judgmental manner with colleagues and customers; and not to engage in activities which might bring the Trust into disrepute either at or outside of work, including by making derogatory comments about the Trust or engaging in unruly or unlawful conduct on sites such as Facebook. The Equal Opportunities Policy in force at the time also set out the Trust's core values, which were to be: *'honest and open, responsive, responsible, motivational, caring, fair, respectful and innovative*.'

Mr. Smith was a Facebook user, who regularly posted entries about food, sport, motorcycles

and cars on his Facebook wall. Forty-five of his colleagues were part of his Facebook 'friends' network and his profile was semi-public: visible also to 'friends of friends'. On his profile he identified himself as a manager of Trafford Housing Trust and 'a full-on charismatic Christian.'

On 13 February 2011, he posted a link to a BBC news article headed "Gay church 'marriages' set to get the go ahead" to his profile page, adding his own view that this was "an equality too far." On the same day his colleague Ms Stavordale added a comment to his post, saying "Does this mean you don't approve?" He posted in reply:

"no not really, I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose it's rules on places of faith and conscience."

As a result of his two comments on the topic, Mr Smith was suspended on full pay on 17 February. He was made the subject of a disciplinary investigation and then disciplinary proceedings and the charges against him were:

Posting comments on Facebook that had the potential to cause offence;
Posting comments that could be seriously prejudicial to the reputation of the Trust;
Serious breach of the Code of Conduct and the Equal Opportunities Policy; and
Failing to take managerial responsibility.

The investigation consisted of interviews with eight other employees and Facebook 'friends' of Mr Smith. Their reactions to his postings ranged from "blatant homophobia" (from Ms Stavordale), through "out of order" to "silly". The hearing took place on 8 March before Mr Corfield, the Assistant Director of Customers. Taking the charges in order, he found it significant that Ms Stavordale was deeply offended by the comments; that Mr Smith's Facebook profile disclosed that he was a manager of the Trust (thereby linking his views to the Trust); that the terms of the Code of Conduct and Equal Opportunities Policy had been breached and that Mr Smith had failed to uphold the Trust's policies as a manager.

Mr Corfield gave his decision orally on 11 March. Mr Smith was told that he had been guilty of gross misconduct, for which he deserved to be dismissed. Due to his continuous length of loyal service from 1993 he was told that he was only to be demoted to a non-managerial position within the Trust, with a consequential 40% reduction in pay from circa £35,000 to £21,000. This was to be phased over 12 months. The Trust's Disciplinary Procedure allowed demotion as a sanction in the case of an employee's misconduct.

Mr Smith unsuccessfully appealed Mr. Corfield's decision. He reserved his position by protesting against the decision whilst carrying out his new role. Mr Smith brought a claim for breach of contract in the High Court, but did not claim unfair dismissal. The parties agreed that the main issue for consideration was whether Mr Smith's postings on Facebook amounted to misconduct. If they did, then the Trust was contractually entitled to demote him. If they did not, then the Trust was in breach of contract by doing so. There was also the possibility that he had been dismissed, by virtue of the new terms being imposed on him.

Judgment

The court held that Mr Smith did not breach the contractual provisions in the Trust's Code of Conduct and Equal Opportunities Policy when he discussed his personal beliefs about gay marriage on his Facebook profile, in the moderate way he did. On the facts, the Trust had wrongfully characterised Mr Smith's actions as misconduct warranting demotion: it had acted in breach of contract by unilaterally imposing a demotion on him and had effectively dismissed him from his managerial role.

While the Trust's Code of conduct expressly required Mr Smith not to bring the Trust into disrepute (which included his conduct outside of work) the court held that the conduct in question was not capable of doing so. It rejected the Trust's argument that there was a real risk of it being brought into disrepute by reason of Mr Smith's identifying himself as one of its managers; no reasonable person would think that he was expressing views on the Trust's behalf. The purpose of Mr Smith's Facebook profile was clearly for personal and social interaction and was not in any way connected with his role within the Trust. Although it was possible that Mr Smith's expression of his opinion could offend colleagues who had connection to, and chose to read, Mr Smith's profile, the tempered expression of his personal beliefs on his personal wall outside of working hours could not lead a reasonable person to think badly of the Trust for having employed him.

Rejecting the Trust's contention that Mr Smith's views could undermine its credibility regarding diversity issues, the court commented that:

"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."

While an employer may legitimately restrict an employee's freedom of expression and belief at work or in a work related context, the court stated that it would be surprising if the employer could extend this prohibition into the employee's private life by virtue of the incorporation of

a code of conduct and/or equal opportunities policies. The court held that Mr Smith was free to express his lawful religious and political views on Facebook and it was for his Facebook friends to choose whether or not to receive them.

The court held that there had been no failure by Mr Smith to treat his colleagues with dignity and respect and he had not acted in a way which was liable to cause offence to them. It stated that:

"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."

The content of Mr Smith's postings and the manner in which they were made were not judgmental, disrespectful or calculated to cause offence, but are widely held views frequently aired in the public sphere. Mr Smith was doing nothing more than responding to an inquiry as to his personally held views in a moderate manner.

Following the case of Hogg v Dover College [1990] ICR 39, an employee may be found to have been dismissed under his old contract and re-engaged under a new contract where the employer substantially changes the terms of the contract. By agreeing to work in a new capacity and for a reduced salary, Mr Smith accepted that his original contract was at an end and entered into a new contract with the Trust; reserving his position in relation to the breach of contract by the Trust.

However, the remedy was limited to his notice period; meaning that Mr Smith was only entitled to an award of £98 – the net amount he would have received had the Trust served notice lawfully under his contract. This was on the basis that, in a wrongful dismissal case, it is to be assumed that the party in breach would have otherwise done the bare minimum required under the contract. Any other conclusion would offend against the principle in the case of Johnson v Unisys [2003] 1 AC 518, in effect conferring damages in the contractual sphere for that which should only be available for breach of statutory employment rights (unfair dismissal loss).

Commentary

Whilst it is perhaps unsurprising that the High Court found that Mr Smith's behaviour was not sufficiently serious to amount to gross misconduct, it was more unexpected that it decided there had been no misconduct at all - particularly the finding that it was not 'objectively reasonable' to view Mr Smith's comments as offensive, and the observation that his posts reflected views frequently expressed in the media. It was key that his comments were found to

have no connection with the Trust. If Mr Smith had made those comments in the workplace, many of us would think a warning appropriate, even if dismissal or demotion would have been too harsh. The outcome might also be different if the postings were more closely connected with work – such as on an industry networking/forum page regularly used by Trust employees or clients, or comments directed at a work issue.

Recently, there have been a number of cases on the fairness of dismissals resulting from the use of social media such as Facebook or YouTube. Employers have tended to argue that there is a risk of reputational damage, warranting dismissal, where codes of conduct or work policies are breached by employees using social media in their own time; although reported decisions typically suggest that employment tribunals will not readily accept such arguments.

This judgment is particularly interesting as it makes numerous observations about the extent to which is it appropriate for employers to discipline employees when they have exercised their rights to freedom of expression and belief, and on the boundary between the individual's working and personal life. This case does not clarify where to draw the line, but it does show how important it is for policies to be clearly drafted, maintained, and linked together, so employees understand exactly what amounts to misconduct within and outside of work.

Comments from other jurisdictions

Germany (Klaus Thönißen): This is a very interesting case. Facebook postings are increasingly becoming an issue in German employment law as well. As in the UK, the German labour courts have to balance the interests of the employer and the employee. In cases concerning postings on Facebook, the allegation German courts usually have to deal with is one of defamation of an employer or co-worker by an employee. The right approach in such cases is to balance this with the employee's right to free speech.

It is undisputed that the employee's right to free speech can be restricted under particular circumstances. The bar is set high, but there are circumstances where an employee can be dismissed for Facebook- postings, even if the employee falls short of defaming the employer or co-workers. For example, in 2012, the Federal Labour Court upheld the dismissal of an employee regarding a Facebook posting. In that case, the employee supported a call for a right-wing demonstration that had been organized by Nazis.

In view of the need to balance the right to free speech with employers' interests, in the case at hand a German court would consider the context in which the posting took place. The usual approach is to determine whether the employee posted the comment during or after working hours and whether or not the comment was open to the public. Here, the employee made a statement about gay marriage outside of working hours. In addition, the statement was neither

work/employer- related nor offensive towards his employer. Therefore, the employee's statement was incapable of damaging the employer's reputation and the question of whether the posting was open to the public would not be relevant. All in all, I assume that a German court would reach the same outcome regarding the employee's conduct as the High Court did.

Apparently, (although the case report does not make this clear) the employee in this case sued for financial compensation only, not for reinstatement in his previous position or at his original salary. A German employee in similar circumstances would probably have filed a complaint under the Unfair Dismissal Act, given that under German law a demotion is only possible by way of termination of employment followed by a new contract on different terms (i.e. lower position and lower salary, etc.) - a so-called Änderungskündigung. Such a complaint would most likely have been successful, since a dismissal for reasons of conduct is, as a rule, presumed to be unlawful in the absence of a prior written warning.

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