

Controversial remarks on Facebook about gay marriage are not 'gross misconduct'

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Controversial remarks on Facebook about gay marriage are not 'gross misconduct'

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In *Smith v Trafford Housing Trust*, Mr Smith posted a link on his Facebook wall to a BBC news article entitled "Gay church

marriages set to get the go-ahead” and commented that it was “an equality too far”. In response, his colleague posted a comment on his wall, “Does this mean you don’t approve?”

Mr Smith replied “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 its rules on places of faith and conscience”.

As a result of his comments, Mr Smith was suspended on full pay and subjected to a disciplinary investigation. At the disciplinary hearing, he was found guilty of gross misconduct for breaching the Trust’s Code of Conduct and Equal Opportunities Policy. Instead of dismissing Mr Smith, the Trust demoted him from his managerial position which resulted in his pay being reduced by 40 per cent over two years.

Mr Smith’s appeal to the Trust was dismissed. Therefore he issued proceedings in the High Court for breach of contract (but interestingly not for unfair dismissal or discrimination). He argued that the demotion and pay reduction were unlawful on the basis he had not committed an act of misconduct, gross or otherwise.

The Court agreed with Mr Smith for the following reasons:

1. His conduct did not bring the Trust into disrepute. Although Mr Smith’s wall identified him as an employee of the Trust, a reasonable Facebook reader would not conclude that Mr Smith’s views about gay marriage reflected the views of the Trust.
2. The obligation not to promote religious or political views under the Trust’s Code of Conduct did not extend to Mr Smith’s Facebook wall, irrespective of the fact that Mr Smith had 45 work colleagues as Facebook

friends. This was because the wall was inherently non-work related and, most importantly, Mr Smith's colleagues had chosen to make him a Facebook friend and therefore it was their decision whether or not to acknowledge his views.

3. He had not failed to treat his colleagues with dignity, respect or acted in a manner which was liable to cause offence. Mr Smith's posting about gay marriage was a widely espoused view. Neither was the manner in which he delivered his opinion disrespectful or judgmental. The court said 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"*.

This case demonstrates the rising presence of social media in the employment sphere. Employers should ensure they implement a social media policy which establishes boundaries for their employees on what conduct is acceptable when using social media. However, this case clearly demonstrates that while workplace rules can restrict the use of social media outside work, freedom of expression is paramount and will take precedence where the comments are clearly not intended to be work related.

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