Neutral Citation Number: [2012] EWHC 3221 (Ch)

Case No: 1IR54453

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY
(Transferred from the Manchester County Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2012

Before :

MR JUSTICE BRIGGS

- -

Between :

MR ADRIAN SMITH	**Claimant**
- and -	
TRAFFORD HOUSING TRUST	**Defendant**

- -
- -

Mr Hugh Tomlinson QC (instructed by **Aughton Ainsworth**) for the **Claimant**
Mr Andrew Short QC (instructed by **Devonshires Solicitors**) for the **Defendant**

Hearing dates: 18 and 19 October 2012

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BRIGGS

Mr Justice Briggs :

Introduction

1. During the morning of Sunday 13 February 2011 Mr Adrian Smith, the claimant in this matter, read on his computer a news article on the BBC news website headed:

> "Gay church 'marriages' set to get the go-ahead'."

Mr Smith is a practising Christian and occasional lay preacher. Thinking that the BBC article and his response to it might interest some of his many Christian friends, particularly in Africa, at 12.18 on the same day he posted a link to the BBC article on his Facebook wall page, together with the following comment, under his name:

> "an equality too far."

2. At 15.13 on the same day one of his Facebook friends, a Ms Julia Stavordale, posted this comment on his Facebook wall:

> "Does this mean you dont approve?"

Miss Stavordale was one of Mr Smith's colleagues at work. They were both employed by the defendant in these proceedings, the Trafford Housing Trust ("the Trust").

3. Later that day, at 20.57, another Facebook friend and colleague at work, Alison Hawkins, posted the comment:

> "Dont think we had better have you two in the same room some how!"

Ms Stavordale responded, at 21.04:

> "Alison … just interested in Adrian's viewpoint … no fisticuffs … promise!!"

4. After a pause for thought, at 22.19 on the following day, Mr Smith responded as follows:

> "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."

5. For making those two comments Mr Smith was suspended from work, on full pay, on 17 February, made the subject of a disciplinary investigation and then disciplinary proceedings leading to a hearing on 8 March, at the end of which he was told that he had been guilty of gross misconduct for which he deserved to be dismissed. Due to his long record of loyal service he was told that he was with immediate effect only to be demoted to a non-managerial position with the Trust, with a consequential 40 per

cent reduction in his pay, phased over 12 months. Mr Smith appealed. The appeal was heard on 31 March and, on 5 April, in substance dismissed, but with an extension of the phasing-in of his salary reduction from one to two years.

6. Mr Smith did not accept that he had been guilty of gross, or any, misconduct in posting those two comments on his Facebook wall page. Although he has continued to work in the more junior non-managerial role assigned to him, he claims that it was a breach of contract for the Trust to demote him and substantially to reduce his pay, when he was not guilty of any misconduct. By these proceedings, commenced in the Manchester County Court, he seeks damages for breach of contract. He did not commence proceedings for unfair dismissal in the Employment Tribunal, and does not claim to have been dismissed at all.

7. For its part, the Trust maintains that, by making those two postings on a Facebook page which identified him as one of its managers, Mr 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 says that, if it was a breach of contract to demote him, Mr Smith waived the breach by taking up his non-managerial post. In the further alternative, the Trust says that its liability for damages is limited to the difference between his original and reduced pay for his twelve week notice period, in a net amount of £98.

8. Mr Hugh Tomlinson QC for Mr Smith submitted in his skeleton argument that:

> "This case raises important issues of principle concerning the extent to which it is proper or appropriate for employees to be disciplined for exercising their rights to freedom of expression and to manifest their religious beliefs."

Although those rights of Mr Smith are undoubtedly relevant in the context of the interpretation of his employment contract with the Trust, this is not a case in which his convention rights are sought to be enforced directly, since the Trust is not a public authority. Nor is it in terms a case about the propriety or appropriateness, or even the fairness, of disciplinary action, since Mr Smith has not sought to invoke his statutory rights under the Employment Rights Act 1996: contrast *X v Y* [2004] ICR 1634.

9. Nor is this a case in which the primary facts are significantly in issue. There are three main issues, or groups of issues. The first, being an issue as to the interpretation and application of the employment contract between the parties, is centred upon questions as to the application of the Trust's code of conduct and equal opportunities policy to Mr Smith's use of his Facebook account. The second is whether, if applicable, the code of conduct or equal opportunities policy were contravened by his making the two postings which I have described. The third is as to the measure of damages if, by demoting Mr Smith, the Trust acted in breach of contract.

10. Context is vital to a proper understanding and determination of at least the first two issues. For that reason it is necessary for me to describe the almost entirely uncontentious facts in some detail. The evidence is mainly documentary, but I was assisted by witness statements from, and cross-examination of, Mr Smith himself and the three employees of the Trust centrally engaged in the conduct of the disciplinary

process against him. I consider that all four witnesses were doing their honest best to assist the court.

The Facts

11. Trafford Housing Trust Limited ("the Trust") is a private housing trust, being a company limited by guarantee and formed 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 some 9,100 homes across Trafford, with a rental turnover of some £31m per annum.

12. 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. Its workforce consists of approximately 330 employees.

13. Mr Smith, who is now aged 55, became a Housing Manager with the Bury Council in October 1993. In November 2003 he became a Neighbourhood Housing Manager for the Trafford Council. Accordingly, he became an employee of the Trust from the moment of its take-over of the Trafford Council's housing stock in March 2005 under the TUPE Regulations 1981, with an initial job title of Neighbourhood Manager, and an initial salary of £25,938 per annum.

14. In November 2006 Mr Smith signed a new contract of employment with the Trust. Having inherited its workforce on the terms of their contracts with the Trafford Council, the Trust initiated a wholly fresh form of contract from 2006, so that the detailed terms of its predecessor (and its public authority origin) are of no continuing relevance.

15. Mr Smith's contract (which remained in force substantially un-amended until 2011, having been signed by him on 20 November 2006), describes him under the job title as "MANAGER, HOUSING". By clause B(c) the new contract replaced all previous terms and conditions of employment with the Trust. Clause D, headed Employee Duties And Obligations, provided so far is relevant 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. …"

16. Section L, headed Grievance/Disciplinary Procedures, provided at sub-clause (c):

> "Where the Trust believes a breach of discipline has occurred the procedures set out in the Trust's Disciplinary procedures will apply. If you are dissatisfied with the disciplinary decision, short of a decision to dismiss, you can apply in writing outlining the reasons why the decision is unfair, to your Senior Manager. In the case of dissatisfaction with a decision to dismiss, you can apply in writing outlining the reasons why the decision is unfair to your Director."

17. By section P(b) the contract provided for one month's notice of termination by either party. Nonetheless it is common ground that, pursuant to section 86(3) of the Employment Rights Act, Mr Smith's contractual notice period in 2011 was twelve weeks.

18. The disciplinary procedures referred to in clause L(c) of Mr Smith's contract are set out in a written Grievance and Disciplinary Policy ("the Disciplinary Policy"), having been issued in January 2006 and revised in September 2010. Section B governs disciplinary procedure. Sub-section 1, headed Disciplinary Principles, commences as follows:

> "(a) Disciplinary action against an employee arising from a breach of Company rules or failure to reach the required standards in regard to conduct, performance and/or attendance will normally be taken in accordance with the procedures outlined below. This procedure is designed to ensure fair, consistent and effective treatment of any disciplinary matter and to avoid arbitrary action.
>
> (b) Conduct that occurs outside working hours or away from the premises of the Trust may be considered as a breach of discipline and be subject to disciplinary procedures."

19. Sub-sections 2 and 3 are headed, respectively, Disciplinary Procedures and Gross Misconduct. By sub-sub-section 2(a), the procedures set out in the remainder of sub-section 2 do not apply in cases of gross misconduct. There follows a description of verbal, followed by written, warnings in sub-sub-sections (b) to (d). Sub-sub-section (e) provides:

> "In circumstances where misconduct occurs, the Trust may decide to issue other sanctions in conjunction with the above warnings. These may include suspension from work without pay, demotion, transfer, redeployment, withdrawal from Company benefits including the sick pay scheme, withholding movement against the Rising Stars Framework, removing Gold level payments etc."

20. Sub-section 3, headed Gross Misconduct, provides at, at sub-sub section (a):

> "This covers 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."

Sub-sub-section (b) sets out a non-exhaustive list of some twenty three examples of gross misconduct, ranging from violence, drug abuse, fraud and corruption at one end to misuse of confidential information, serious breaches of Trust procedures and gross insubordination at the other. Sub-sections 4 and 5 deal with appeals.

21. The Code of Conduct, as in force in 2011, was revised in 2010. It is common ground that it was both communicated to Mr Smith and assented to by him. It is an eleven page document, beginning with a general statement of the Trust's values. They require 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.

On the following page it provides that:

> "We expect all employees to be committed to the aims of the Trust and, given the fact that much of our work is dependent on a positive public profile, we further expect employees to promote a positive image of the Trust and of Trafford."

22. There follow sections about various aspects of conduct, ranging from honesty through dress code to the use of mobile telephones. Central to the issues in the present case are the following two sections. The first is headed "Relationships with Board members, customers, their friends and relatives, members of the public and with colleagues".

Under that heading the following three passages are relied upon:

> "Employees are required 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.
>
> …
>
> Employees are required to act in a non-confrontational, non-judgmental manner with all customers, with their family/friends and colleagues. 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.
>
> …
>
> Customers, their friends and family and colleagues must always be treated with dignity and respect."

23. The second heading is "Behaviour to external authorities/outside interests". The following passage is relied upon by the Trust:

> "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."

24. The Equal Opportunities Policy in force at the material time was also reviewed in September 2010. It begins again with a statement of the Trust's core values, which are to be:

> "Honest and open, responsive, responsible, motivational, caring, fair, respectful and innovative."

Under section B, headed Responsibilities, sub-section (a) provides that:

> "Directors and Managers have prime responsibilities for all aspects of equal opportunities within their areas. This includes:
> …
>
> - Fostering a working environment that is relaxed and business-like and free from harassment, intimidation and bullying and in which employees can grow and develop.
>
> ..."

Sub-section (b) provides that:

> "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."

25. The confines of a judgment make it necessary to quote selectively from the Trust's codes and policies. As is common ground, a proper understanding of their ambit and meaning in relation to any particular aspect of an employee's daily life has to be based upon a reading of each of them as a whole.

Facebook

26. Facebook is a widely used free social networking website which allows registered users to create profiles, upload photographs and videos, send messages and keep in touch with friends, family and colleagues. The court was not treated to a comprehensive description or demonstration of its features or operation, and only two and a quarter A4 pages were included within the trial bundle by way of printout. Nonetheless an understanding of aspects of its mode of operation forms the central context to the conduct of Mr Smith in issue in these proceedings. The following aspects of the way in which Facebook works were sufficiently demonstrated by the evidence, and none of them were, in the end, controversial.

27. Facebook constitutes a communications medium between an account holder and an identified group of other persons known as "friends". To become an account holder's friend, a person must either apply and be permitted by the account holder, or be invited by the account holder and consent. For brevity I shall refer to the account holder as a member, but without thereby intending to attribute any particular meaning to that word.

28. Each member's friends have access to the member's pages. One of those is the member's profile, which contains as much (or as little) as the member wishes to provide under the headings education, work, philosophy (including religious and political views), arts and entertainment, activities and interests, basic information, relationship status and gender. More important for present purposes is the member's "wall" page, upon which the member may place comments, items of interest and nutshell descriptions of recent activities. Friends may also post items on the member's wall. The member also has a newsfeed page, upon which automatically appear the most recent postings of the member's friends. Each page conspicuously displays a photograph of the member's face, and a smaller version of it appears as the icon for each posting by the member.

29. Members may widen the class of those enabled to visit their pages by engaging a "friends of friends" option so that any one of the several friends of the member's friends has the same access to the member's page as do the friends. In February 2011 Mr Smith's wall was accessible both by friends and by friends of friends. It is in theory possible for a member to compile a complete list of those friends of friends with access to the member's wall, since the identity of any particular member's friends is accessible by anyone with access to the member's pages. All friends are themselves members. In practice however, in particular in relation to a member like Mr Smith, with 201 friends in February 2011, an entry on his wall would be

accessible by a large section of the Facebook community about whom he would know nothing at all.

February 2011

30. By February 2011 Mr Smith's salary had risen to just over £35,000. Although he had, in June 2007 and September 2008, received written warnings about aspects of his conduct, he was the Trust's manager for the Altrincham district. His pay reflected his having achieved the highest of three levels of overall competency (bronze, silver and gold). His responsibilities included staff development, and the development and improvement of the provision of high quality services by the Trust to its customers in relation to that defined neighbourhood.

31. Mr Smith had, as I have said, 201 Facebook friends by February 2011. Most of them were fellow Christians, including a large number based in Africa, with whom he had come into contact in connection with his church-related activities. 45 of his Facebook friends were fellow employees of the Trust. On his profile page, under 'Employers' he had entered:

> "Trafford Housing Trust
>
> Manager Housing – November 2003 to present Altrincham
>
> What can I say - it's a job and it pays the bills."

Under religious views he put "full on charismatic Christian" and under his political views "Left of centre".

32. On both his profile and wall pages, under his name at the top, appears the following in small print:

> "Manager Housing at Trafford Housing Trust. Went to Glastonbury High School FCHL, Sutton, Surrey
>
> Lives in Bury Married from Tottington, Bury, United Kingdom born 20 March"

33. I have already described the entries of Mr Smith's wall which have given rise to these proceedings. It is, again, important to place them in their context, as appears from a printout of his wall made on 17 February 2011. The first item (posted on the previous Tuesday), congratulated Spurs on a "brilliant result" in a recent match. There followed the items which I have described. Below them, dated (for some reason non-chronologically) 13 and 12 February are two short items, the first about wholemeal toast and apricot jam, and the second about his having washed his motor scooter. The final item (undated) on the imperfect copy in the trial bundle contained a comment about an article in the Guardian newspaper critical of the BBC television series Top Gear. Thus, taken as a whole, his comments on gay marriage in church appear among entries about sport, food, motorcycles and cars.

34. Additional context to Mr Smith's postings on his Facebook wall may be gained from looking further at the BBC news article which prompted them. Under the heading

"Gay church 'marriages' set to get the go-ahead" and in smaller but still heavy type is the comment:

> "Ministers are expected to publish plans to enable same-sex couples to "marry" in church, the BBC has learned."

Thereafter, not in heavy type:

> "Equalities Minister Lynne Featherstone is to consider lifting the ban on civil partnerships taking place in religious settings in England and Wales.
>
> There are no plans to compel religious organisations to hold ceremonies and the Church of England has said it would not allow its churches to be used."

The Disciplinary Proceedings

35. Since the present litigation is not about the fairness or otherwise of the procedure used, but only about the question whether the sanction purportedly imposed was a breach of contract, I can summarise the disciplinary proceedings relatively briefly. They are fully documented, both in terms of the party and party correspondence and full and apparently careful notes of the three relevant meetings.

36. The disciplinary proceedings were triggered by a complaint from a Mr Stephen Lynch, one of Mr Smith's colleagues at work (although not one of his Facebook friends) who had seen the relevant postings on the newsfeed page of a facebook site which he administered with the Trust's approval, called Trusty Bear. This complaint was made to the Trust's Equality and Diversity section, passed to the H R Advisor and then, on 16 February, to Mr Smith's immediate manager Mrs Deborah Gorman. She and Ms Ellie Bifield (of the HR Department) met Mr Smith and his union representative on the following day. Mr Smith was suspended on basic pay pending an investigation into what were described as potentially serious breaches of the Trust's policies and procedures.

37. Mrs Gorman's investigation consisted of interviews with eight other employees (including Mr Lynch) seeking their reactions to Mr Smith's postings. They ranged from "blatant homophobia" (from Ms Stavordale), through "out of order" to "silly".

38. On 1 March Mrs Gorman gave formal notice of a disciplinary hearing, to be held on 8 March, to consider "potential breaches of discipline" under the following headings:

> "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.
>
> Failing to take managerial responsibility."

Each of those headings was supported by particulars. As to the first, reliance was placed upon the fact that one employee (Ms Stavordale, who had regarded his postings as blatantly homophobic) had in fact been offended. The second was based upon the fact that Mr Smith's wall page disclosed, under his name, that he was a manager of the Trust, and expressed concern that the Trust might thereby have its recent accreditation by the Albert Kennedy Trust (which provides support, advice, guidance and services to the lesbian, gay, bisexual and transgender community) put at risk. As to the third, reliance was placed on the extracts from the Code and Equal Opportunities Policy which I have already quoted. As to the fourth, the allegation was that the postings demonstrated a failure to uphold the Code of Conduct and the policies and procedures of the Trust. Mr Smith was sent attendance notes of the staff interviews conducted by Mrs Gorman to which I have referred.

39. The disciplinary hearing began on 8 March before Mr Michael Corfield, the Assistant Director of Customers. It resumed on 11 March for Mr Corfield to give his decision orally. He followed it up with a written decision on 14 March.

40. All that needs to be said about the oral hearing was that Mr Smith said, at one point, that he had intended his postings to be "mildly provocative" in the sense of generating "a bit of a discussion" and that he recognised that he had made "a big error in judgment" in linking his status as a Trust manager with his postings, on the same Facebook page. But he denied that he had been guilty of any misconduct.

41. Mr Corfield's conclusion was, nonetheless, that Mr Smith had been guilty of gross misconduct, for which he deserved to be dismissed. In his written reasons, he accepted that Mr Smith had not acted out of a desire to express homophobic views, but he found that the postings had nonetheless caused "concern and distress to members of staff, in particular Julia Stavordale". He relied centrally on Mr Smith's admission of a "desire to be provocative", upon the fact that his Facebook profile page identified him as a member of the Trust's neighbourhood management team, and upon the fact that a sizeable proportion of his Facebook friends were Trust employees, one friend being a board member of the Trust (chosen from among its tenants). His conclusion was that Mr Smith's postings were a serious breach of discipline and amounted to serious breaches of the Code of Conduct and of the Equal Opportunities Policy. Mr Corfield expressed concern that Mr Smith appeared not to have learnt from previous warnings so as to have recognised that he was in breach of the Code of Conduct and Policies, or to have given any assurance that nothing similar would happen in the future.

42. As I have said, Mr Smith was not formally dismissed but rather demoted to the non-managerial position of a Money Support Advisor, at a silver rather than gold level. The written reasons identified the rate at which his salary would reduce, with an initial reduction to £31,704 from 21 March, and a final reduction down to £21,396 from March 2012. He also received a Final Written Warning for gross misconduct. Mr Smith was required to assume his new role from 21 March, but was notified of his right to appeal by a written notice by the same date.

43. Mr Smith did appeal, by letter dated 20 March. Following a hearing on 31 March, the appeal was dismissed by a written decision dated 5 April, by Mr David Barrow, the Trust's Commercial Director. His reasoning focused upon what he described as the "level of upset and distress" caused by the incident, the potential for the postings

adversely to impact on the Trust's reputation, and the potential for postings on Facebook (which he described as a "stage" which is largely in the public domain) to come to the attention of the customers of the Trust or members of the public. He referred to the requirement in the Code of Conduct that employees should not attempt to promote their political or religious views, and to act in a non-confrontational and non-judgmental manner with all customers, with their family/friends and colleagues, and he described the postings as "a value judgment on the merits of gay marriage" which Mr Smith had admitted was confrontational.

44. In his evidence in these proceedings, Mr Barrow made much of the fact that Mr Smith had admitted that his postings were provocative. It is however clear from Mr Barrow's written reasons for dismissing the appeal that he then understood Mr Smith to mean that he had intended his postings to be thought-provoking, rather than provocative in the sense of being designed to offend or cause distress.

45. Mr Smith had in the meantime had begun working in his new role but, upon receipt of the appeal decision, he wrote to Mr Barrow reserving his position. A pre-action protocol letter was sent on Mr Smith's behalf to the Trust on 20 June, and these proceedings followed on 25 October 2011.

46. Mr Smith has continued to work for the Trust as a Money Support Advisor and, pursuant to the appeal decision, his salary has been reduced from £35,139 (which would have risen to £35,775) to £24,127 by the time of trial. It will continue to reduce, reaching £21,781 by 1 April 2013, in the absence of any intermediate pay rise.

47. Mr Smith did not make a claim in the Employment Tribunal alleging that he had been unfairly dismissed. Mr Tomlinson explained on instructions that this was because, by the time Mr Smith had raised funds with which to pursue his claim, the time limit for such proceedings had expired.

Analysis

48. The issues raised by the facts I have described may be grouped under two headings: breach of contract and consequences. There was a sharp debate between counsel whether, if the Trust had no right to demote Mr Smith, he was thereby dismissed, actually or constructively. Although the question whether Mr Smith was or was not dismissed straddles the two headings which I have described, I will deal with it as part of the consequences.

Breach of contract

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: see section B(1)(a). After some diversionary skirmishing in the statements of case and skeleton arguments about breach of the employer's implied duty of good faith, 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. In that respect

Mr Short QC for the Trust placed no emphasis on a failure to reach required standards. Rather, he relied upon breach of the Company rules, which he submitted (correctly) would include any breach of the Code of Conduct or the Equal Opportunities Policy.

50. Mr Short submitted, and Mr Tomlinson eventually agreed, that it mattered not whether the Trust could satisfy the court that Mr Smith's postings amounted to gross misconduct. Nor was it for the court to act as a final court of appeal on the question whether, if there was misconduct, it was sufficiently serious to warrant the demotion to which Mr Smith was subjected. The only question, counsel eventually agreed, was whether his postings amounted to a breach, either of the Code of Conduct or of the Equal Opportunities Policy.

51. 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.

52. Before dealing with each of those headings, it is convenient briefly to address counsel's submissions on misconduct generally as the trigger for the exercise of the Trust's power to demote. Mr Short submitted that where, as in the present case, misconduct was to be identified by reference to codes and policies rather than 'bright line' terms of a contract as such, then the court had to take a broad and inclusive view of the concept, by reference to the codes and policies as a whole, a process which he said involved an element of "joining the dots". Further, he submitted that the Trust was entitled, after the event, to form its own view as to whether particular actions of an employee did or did not constitute misconduct, rather than to have to specify every possible aspect of prohibited conduct in advance, in detail.

53. I accept that submission, but only up to a point. Like any piece of writing, a code or a policy must be interpreted as a whole, and particular forms of behaviour may constitute misconduct even though not precisely specified and prohibited. Nonetheless codes and policies which form part of a contractual framework (in the sense that the employee is required to observe and abide by them) must be objectively construed, by reference to what a reasonable person with the knowledge and understanding of an employee of the type in question would understand by the language used. If an employee is liable to be demoted and to have his salary substantially reduced as a result of misconduct, he must be entitled to ascertain from the codes and policies to which he is subjected what he is and is not permitted to do, and to understand the extent to which those obligations extend beyond the workplace into his personal or social life.

54. Of course, an employer such as the Trust may wish constantly to develop and improve its codes and policies in the light of experience, but for an employee to be disciplined for misconduct by reason of an alleged failure to comply with codes and policies, it

must be to an objective interpretation of the codes and policies as promulgated and in force at the time of the conduct in question that the employer must have regard. There may well be cases where conduct not prohibited by a code or policy causes trouble in the workplace, which the employer will then wish to prohibit for the future, but this cannot be relevant to any disciplinary proceedings in which the issue arises whether the past activity of an employee is misconduct.

Bringing the Trust into disrepute

55. In its express terms the passage in the Code of Conduct about bringing the Trust into disrepute extends to conduct at or outside work, to unlawful or unruly conduct while identifiable as an employee of the trust, and to making derogatory comments about the trust, its customers, clients, partners or services by the use (among other things) of Facebook. Mr Short did not suggest that Mr Smith's postings about gay marriage in church were unlawful, unruly or derogatory in that sense.

56. It is apparent from the evidence about the disciplinary and appeal processes relating to Mr Smith that the Trust's case in this respect falls into two parts. First, it is said that, by identifying himself in the abbreviated CV under his name on his Facebook wall as a manager of the Trust, Mr Smith thereby created a real risk that readers of his two postings about gay marriage in church would think that he was expressing views on the Trust's behalf. This would, if true, undermine the Trust's sensible determination to maintain neutrality on contentious matters of religious belief and politics. The second part, as expressed by Mr Barrow in his written appeal decision, was that the expression of views by a manager which could cause distress to other employees or even customers could of itself bring the Trust into disrepute, even if those persons did not believe that Mr Smith was in any sense speaking on the Trust's behalf.

57. Taking those two points in turn, 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.

58. That is not to say that Facebook cannot be used as a medium for work related communications. Mr Lynch (the original complainant about Mr Smith's postings) ran a Facebook account headed "Trusty Bear", which was indeed authorised by the Trust and by its very name associated itself with the Trust's activities. Trusty Bear was the Trust's mascot. 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.

59. 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.

60. I asked Mrs Gorman about this, at the end of her cross-examination. My question (which has unfortunately been misreported in the media) was whether, looking at the whole of Mr Smith's Facebook wall page as it appeared at the time, including the entries on the same page about sport, food and motor vehicles, she thought that readers would think that any part of it, including the entries about gay marriage in church, was made on the Trust's behalf. Her response was that, in her view, readers would look at Mr Smith's postings about gay marriage in isolation from those about sport, food and motor vehicles and then make a direct association between the gay marriage postings and the Trust. In my judgment that evidence was more a reflection of the Trust's understandable sensitivities about the matter, than a persuasive description of the likely reaction of any reasonable reader. Mrs Gorman's written evidence also contained reference to the fact that the gay marriage postings would appear automatically upon the newsfeed pages of Mr Smith's Facebook friends, divorced from the context of the contemporaneous postings about sport, food and motor vehicles. That may be so, but readers of those postings on their own newsfeed pages would see them divorced from Mr Smith's reference at the top of his wall page to being a manager at the Trust. There would in that context be no basis for the reader to make any connection between the postings and the Trust.

61. As to the second point, namely that the propensity of postings such as those in issue to cause distress among employees and customers was sufficient to bring the Trust into disrepute, I shall deal later in this judgment with the question whether the postings really did risk distressing reasonable readers. For present purposes, the question is whether, even if there was such a risk, Mr Smith's expression of those views, uncoupled with any implication that he was writing on behalf of the Trust, could bring the Trust itself into disrepute. Mr Barrow recorded his affirmative conclusion to that question by reference to the risk that the Trust might lose its recently won accreditation from the Albert Kennedy organisation, the implication being that for the Trust to employ as a manager a person with Mr Smith's views would undermine its reputation for the encouragement and support of equal treatment of gay and lesbian people.

62. Again, I cannot envisage how any such loss of reputation would arise in the mind of any reasonable reader of Mr Smith's postings, whether in the Albert Kennedy organisation or otherwise. 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.

63. On the assumption that Mr Smith was not (as I have found) reasonably to be taken as seeking to express the Trust's own views, I cannot envisage how his moderate expression of his particular views about gay marriage in church, on his personal

Facebook wall at a weekend out of working hours, could sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager.

64. For those reasons I have come, without difficulty, to the conclusion that Mr Smith's postings about gay marriage in church were not such as did, or even could, bring the Trust into disrepute.

Promoting religious views among colleagues and customers

65. In this context, the relevant passage in the Code of Conduct states that:

> "The Trust is a non-political, non-denominational organisation and employees should not attempt to promote their political or religious views."

I consider that the key word in that sentence, for the purpose of understanding it objectively, is "promote". The prohibition is plainly not designed to prohibit any discussion of religion or politics, even in the workplace. Rather, it is concerned with proselytising, canvassing and more generally with the advancement of religious or political views, with a view to persuading recipients to accept them. It is in that context to be noted that, save for the opening phrase "an equality too far", the expression of Mr Smith's partly religious and partly political views about gay marriage in church which then followed was prompted by a written invitation from his Facebook friend Ms Stavordale to explain his viewpoint. It was at that stage part of a Facebook conversation rather than anything which could sensibly be described as promotion. Nor in my view could his earlier unprompted comment about the BBC article sensibly be regarded as promotion.

66. The second question raised by this part of the Code of Conduct is the extent to which a reasonable managerial employee would think it purported to lay down any rule or instruction about how he (or she) should behave outside the workplace or the work context. 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.

67. The Trust's attempted answer to this analysis was that, to Mr Smith's knowledge, some 45 of his Facebook friends were fellow employees of the Trust and one of them was both a board member and customer of the Trust. Mr Short's submission was that this necessarily created a work related context to any use by him of his Facebook pages, sufficient to attract the prohibition against promotion of religious or political views in the Code of Conduct.

68. The question whether Mr Smith's Facebook pages had by February 2011 acquired a sufficiently work related context to attract the application of the Code of Conduct and Equal Opportunities Policy lies at the heart of both the second and third ways in which the Trust puts its case on misconduct. The question is both one of interpretation of those documents and of their application in a fact intensive context.

Dealing first with interpretation, the Disciplinary Policy makes it clear at section B(1)(b) that conduct outside working hours or away from the Trust's premises may be considered as a breach of discipline. To that extent, the reasonable employee is fairly warned that conduct in his personal or social life is not wholly unaffected by the Code and Policies. Beyond that, the question whether and if so how far particular provisions of those documents affect an employee's personal or social life requires careful consideration of each relevant provision, its purpose (in the better conduct of the Trust's affairs) and its consequences (in terms of the potential for invasion of the employee's human rights of expression and belief). But the question is and remains: what do the particular provisions of these documents mean, rather than what extent of interference in an employee's personal and social life is permissible to a private (rather than public body) employer.

69. It is therefore first to the language of the provisions relied upon that recourse must be had. But slavish attendance to linguistics may (as so often happens in the construction of documents) be an unreliable guide. A useful illustration of that unreliability may be found in the passage in the Code immediately following the one which prohibits the promotion of political or religious views. It reads as follows:

> "Employees who are related to other employees who are involved in a close personal or sexual relationship with a colleague should report this to management, in confidence if required, in order that the relationship can be managed appropriately and not cause any embarrassment."

Read literally, this might appear to constitute a claim by the Trust to manage the close personal or sexual relationships between its employees rather than, as Mr Short frankly accepted, the more restricted right to manage the impact of such relationships in the workplace, for example, by requiring that employees in such relationships do not work in close proximity.

70. More generally the heading under which both these provisions appear in the Code, namely:

> "Relationships with Board members, customers, their friends and relatives, members of the public and with colleagues."

cannot literally be taken to extend the Code's authority to every occasion on which, outside the workplace, employees come into relevant contact with customers of the Trust or with their colleagues. In that context, Mr Short accepted that the phrase "their friends and relatives" in the heading meant friends and relatives of customers rather than friends and relatives of the employees subject to the Code.

71. A reading of the whole of the provisions under this heading in the Code reveals a range of provisions with widely differing applications outside the workplace. Some plainly had no application outside the workplace (or rather outside working hours in the context of work which may, for a housing trust, frequently take place on housing estates rather than in the Trust's office premises). For example, this part of the Code requires employees to be "enthusiastic always maintaining interest in the customers and their communities" and that they "should give their name and job title to any customer or member of the public with whom they have contact". Plainly this has no

application to the employee's personal or social life. By contrast, other provisions, such as those which prohibit employees from borrowing money or equipment from customers or engaging the services of customers in any personal transactions without management's knowledge or permission, plainly apply primarily to an employee's conduct of their own affairs, outside the work context. They do so because they are designed to prevent the employees from coming into a position of conflict between their interests and those of the Trust and its customers.

72. I consider that the prohibition on the promotion of political or religious views lies very much at the work-related end of this spectrum. That is because of its obvious potential to interfere with the employee's rights of freedom of expression and belief. Mr Short readily conceded that the Code did not in any way prohibit Mr Smith from preaching in church, even if a number of his work colleagues chose to attend. Nor, I would add, would it prohibit an employee from canvassing for a political party, merely because a number of his work colleagues happened to live in the residential area allocated to him for canvassing purposes.

73. I accept nonetheless Mr Short's submission that this prohibition cannot be rigidly confined to the workplace, or to working hours. For example, an employee might compose a piece of political or religious promotion and send it by email targeted at his work colleagues. He would not escape the prohibition in the Code merely by doing so in the evening from his home, rather than from his work computer.

74. Beyond that, pure interpretation takes the matter no further. The question then becomes a fact intensive issue of application, namely whether Mr Smith's Facebook wall had by February 2011 acquired a sufficiently work related context to attract the prohibition against the promotion of political or religious beliefs, because 45 of his work colleagues had become his Facebook friends.

75. In my judgment, it had not. My reasons follow. 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.

76. 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.

77. Notwithstanding the Trust's submissions, and Mrs Gorman's evidence, 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.

78. 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.

79. For all those reasons I have concluded that the Trust fails in the second way in which it puts its case. The prohibition on the promotion of the political and religious views in the Code of Conduct did not, as a matter of interpretation and application, extend to Mr Smith's Facebook wall. In any event, the postings in question did not amount to promotion.

Mistreating fellow employees

80. The Trust's case under this heading is based upon the requirement, both in the Code of Conduct and in the Equal Opportunities Policy that employees should treat their work colleagues with dignity and respect, being non-judgmental in approach and "not engaging in any conduct which may make another person feel uncomfortable, embarrassed or upset". It is said that Mr Smith's postings about gay marriage in church on a format immediately accessible to some 45 of his work colleagues were judgmental, and potentially both disrespectful and liable to upset those colleagues. It is, again, said that the fact that, to Mr Smith's knowledge, that number of his colleagues were among his Facebook friends imparted the necessary work related context to the postings for the purposes of these provisions in the Code and Policy.

81. The Trust relied upon the undoubted fact that one of Mr Smith's work colleagues, Ms Stavordale, was upset as demonstrating that Mr Smith's postings had the requisite potential to upset colleagues, in the sense of giving rise to a real risk that they would do so. I have studied the notes of Mrs Gorman's interviews. Apart from Ms Stavordale, only one of them was recorded as having been offended by Mr Smith's postings. This was Ms Hawkins, who told Mrs Gorman that she was offended by the tone, rather than by the content, of the postings. The attitude of the others ranged between "being annoyed", to disagreeing with Mr Smith's views but respecting his right to hold them, and to regarding his putting his views on Facebook as "silly" or "a bit iffy". Miss Stavordale was the only employee to give her reasons for having been upset in any detail. She regarded Mr Smith's postings as having been "blatantly homophobic". It was that interpretation of his postings that made her upset.

82. I have already concluded that, for the purposes of the prohibition on the promotion of religious and political views to colleagues, Mr Smith's Facebook did not have the necessary work related context to attract that provision of the Code of Conduct. I have reached the same conclusion in relation to this part of the Code and the Policy,

largely for the same reasons. 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 Cod 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.

83. This issue is of course a matter of fact and degree. It is not difficult to imagine the use of Facebook, for example to pass judgment on the morality of a named work colleague, which would contravene this part of the Code and the Policy. Furthermore prohibitions upon certain kinds of conduct may be of wider application to managers than to other employees. Nonetheless some objectivity needs to be applied to the analysis of Mr Smith's postings, even if a "real risk" test is applied to the prohibition on causing upset. Statements about religion or politics may be more prone to misinterpretation than others, but I do not consider it to be a reasonable interpretation of those provisions that they should be taken to have been infringed if language which is non-judgmental, not disrespectful nor inherently upsetting nonetheless causes upset merely because it is misinterpreted.

84. In my judgment Mr Smith's postings about gay marriage in church are not, viewed objectively, judgmental, disrespectful or liable to cause upset or offence. As to their content, they are widely held views frequently to be heard on radio and television, or read in the newspapers. The question remains whether the manner or language in which Mr Smith expressed his views about gay marriage in church can fairly or objectively be described as judgmental, disrespectful or liable to cause discomfort, embarrassment or upset. Again, it seems to me that it was not. He was mainly responding to an enquiry as to his views, and doing so in moderate language.

85. It is understandable that a person like Miss Stavordale, who misinterpreted Mr Smith's observations as homophobic, would be offended by that interpretation of them. But her interpretation was not in my view objectively reasonable, nor was Ms Hawkins' view that the tone of the postings was offensive. In that context Mr Corfield was right to acknowledge, in his written reasons for demoting Mr Smith, that his postings did not disclose homophobia. The result is that in my judgment the Trust's third way of putting its case on misconduct also fails.

Conclusion on breach of contract

86. Having rejected all three ways in which the Trust puts its case on misconduct, it follows that the Trust did not have a right to demote Mr Smith by reason of his Facebook postings and that the demotion imposed by way of purported disciplinary sanction constituted a breach of contract by the Trust.

Consequences

87. The first question is whether the Trust's reported demotion of Mr Smith amounted to a dismissal, actually or constructively. An unusual irony of the present case is that it is the employer which alleges that there was a dismissal, and the employee who says that there was not. This is because, subject to legal submissions to which I will have to return, the damages which ordinarily flow from a wrongful (as opposed to unfair) dismissal are limited to the wages and other financial benefits which would have been paid during the contractual notice period, less any earnings obtained by the employee by way of mitigation, including by the acceptance of some different, lower paid, employment from the same employer: see *Harvey on Industrial Relations and Employment Law*, at paragraphs 392 to 393, and *Chitty on Contracts* (31st Ed.) at paragraph 39-196. The application of that conventional analysis to a wrongful dismissal of Mr Smith would, it is common ground, limit his damages to about £100.

88. Mr Tomlinson's submissions for Mr Smith on this point may be summarised as follows:

> 1) Although the Trust's purported demotion of Mr Smith was a repudiatory breach of contract, which would have given rise to a dismissal if Mr Smith had accepted it as such, his decision to continue working for the Trust in a non-managerial role and at a greatly reduced salary, while protesting the lawfulness of his demotion, amounted to an affirmation of the contract, but without waiving his right to damages for breach.
>
> 2) The Trust's breach has continued from March 2011 until trial, and will continue unless Mr Smith is reinstated or dismissed.
>
> 3) Mr Smith is therefore entitled to be put in the same position as if the Trust had complied with, rather than committed a continuing breach of his contract. He claims no monetary damages for the different nature of his work, but simply the aggregate of the growing disparity between his actual pay, and that to which he is entitled. A last minute attempt, without pleading it, to introduce a claim for loss of pension rights was not pursued.
>
> 4) If the Trust chooses to dismiss Mr Smith hereafter, then he will be able to pursue both contractual and statutory rights arising from that dismissal thereafter.

89. Against the risk that the court finds that his client was dismissed, Mr Tomlinson submits further that the traditional assumption that damages for wrongful dismissal are limited in the way which I have described has been undermined by recent authority, so that the court can conduct a counter-factual analysis of what the employer would have done if it had not dismissed the employee which is not predicated on a presumption that the employer would have dismissed the employee as soon as contractually possible. Mr Tomlinson submits that, in the present context, the

Trust would not have given Mr Smith twelve weeks' notice, but would have continued to abide by its contractual obligation to pay him at the going rate for a Housing Manager.

90. For the Trust Mr Short submitted, in summary, as follows:

1) Whenever an employer insists, in breach of contract, in requiring the employee to do a substantially different job, for a substantially reduced salary, it thereby dismisses the employee. It is an actual rather than a constructive dismissal, which the employee is not at liberty to reject. If the employee does work in the new role, it takes place under a new contract, unless there is a consensual variation of the original contract.

2) Mr Smith was, accordingly, actually (rather than constructively) dismissed by reason of Mr Corfield's decision to demote him and reduce his salary.

3) Recent authority has not disturbed the invariable consequence, in relation to employment contracts, that Mr Smith's claim for damages is limited to his reduction in pay and benefits during the contractual notice period.

4) Any other conclusion would offend the principle established by the House of Lords in *Johnson v Unisys* [2003] 1 AC 518 that an employee cannot by a contractual claim obtain damages for that which is available in the Employment Tribunal for breach of statutory employment rights: ("the *Johnson* exclusion").

5) But in any event, by continuing to work for the Trust, Mr Smith had waived any contractual rights, including any right to claim damages by reason of the Trust's breach.

91. The first question, namely whether Mr Smith was in fact dismissed, is in my judgment conclusively determined by the legally indistinguishable decision of the Employment Appeal Tribunal in *Hogg v Dover College* [1990] ICR 39. In that case the applicant had been a full time teacher at the respondent college and, after a period of ill-health, was told, in a letter from his headmaster dated 31 July 1987, that from the beginning of the following term in September he was to work part-time, for a substantially reduced salary, and that another teacher had been appointed head of history in his place. The applicant continued to work part-time at the reduced salary but, one week into the new term, his solicitors alleged that he had nonetheless been both wrongfully and unfairly dismissed from his post as head of history. Dismissal was denied by the college, and its case accepted by the Industrial Tribunal. The Employment Appeal Tribunal allowed the teacher's appeal, expressly upon the ground that there had been a dismissal on 31 July, rather than on the later date in September when the teacher first alleged that he had been dismissed. In that respect the EAT followed *Marriott v Oxford and District Co-operative Society Ltd* (No 2) [1970] 1 QB 186. In both cases the conduct of the employee in continuing to work for the employer in a different post and for a reduced salary, but under protest, was not held to be (or to be capable of being) an affirmation of the original contract.

92. Mr Tomlinson submitted that the critical distinction between this case and the *Dover College* case was that, in the latter, the employee had eventually accepted the

purported demotion as constituting a dismissal, whereas in this case Mr Smith had done no such thing. An unaccepted repudiation is, he said, a thing writ in water, which creates no legal rights of any kind.

93. That principle is or may be of limited application in relation to employment contracts, because of the employee's inability to go on working if the employer refuses to let him. But in any event a repudiatory breach may be accepted as such by conduct rather than mere words. In the present case, Mr Smith accepted that his original contract was at an end, by agreeing to work in a different capacity and for a greatly reduced salary. He thereby entered into a new contract with the Trust (as in the *Dover College* case) in substitution for the original contract, and in sensible mitigation of his loss. It is in that context to be borne in mind that (as Mr Tomlinson told me on instructions) the reason why Mr Smith made no application to the Employment Tribunal on the grounds of unfair dismissal was not because he regarded himself as not having been dismissed, but because of a lack of funds with which to pursue his claim within the statutory time limit.

94. I have therefore concluded that Mr Smith's purported demotion, in breach of his contract of employment, amounted to a wrongful dismissal. It remains to consider the appropriate measure of damages for that breach.

95. The starting point is that I reject the Trust's case that he waived the breach altogether. He protested the contractual lawfulness of his demotion at every stage, and his conduct could not reasonably have been regarded as a waiver of his right to damages. It is therefore necessary to consider whether the previously settled law, namely that damages for wrongful dismissal are limited to financial loss during the contractual notice period, has been undermined by recent case law.

96. Mr Tomlinson's submission that it had been undermined was based entirely on the Court of Appeal's decision in *Durham Tees Valley Airport Ltd v BMI Baby Ltd and anr* [2010] EWCA Civ 485. The case was about the repudiatory breach by an airline of a fixed term contract for the use of an airport. It was far removed from an employment contract, terminable on notice, of the type in issue in the present case. Nonetheless two members of the Court of Appeal, Patten and Toulson LJJ, conducted a detailed analysis of the fundamental principles applicable to the identification of the measure of damages arising from a repudiatory breach, starting with *Livingstone v Rayward.s Coal Company* (1880) 5 App. Cas. 25 and reviewing a series of subsequent Court of Appeal decisions, including in particular *Abrahams v Herbert Reich* [1922] 1 KB 477, *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 and *Cantor Fitzgerald International v Horkulak* [2004] EWCA Civ 1287 and *The "World Navigator"* [1991] 2 Lloyd's Rep 23.

97. Patten LJ concluded his analysis, at paragraph 79, as follows:

> "The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The

> judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted un-commercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind."

98. Toulson LJ's conclusion is less easy to summarise by a precise citation from his judgment but, read as a whole, I take it to have been broadly in agreement with Patten LJ's analysis.

99. The competing view, which is that in every case the court identifies the counter-factual assumption by reference to an assumption that the party in breach would have done the bare minimum required of him under the contract, still prevails in relation to wrongful dismissal under an employment contract, as is apparent from the passages in Harvey to which I have already referred. Mr Tomlinson was unable to point to any text book on employment law which suggested that any inroad to that conventional approach had been made by the *BMI Baby* case.

100. There are I think two reasons why it should be concluded that no such inroad has in fact been made. The first is that the *BMI Baby* case was about a contract specifying a single method of performance, but giving the party in breach discretion as to how to perform. It was a ten year contract for the use of an airport in which the airline had discretion as to the intensity of that use. That it was this type of contract was important to the outcome; see per Patten LJ at paras 65, 66 and 69 and per Toulson LJ at paras 96, 121 and 145. See also McGregor on *Damages* (18th Ed, 2nd Supp) at 8-095A – D. By contrast, an employment contract terminable on notice is not a contract for the performance of a single obligation for a specified period, but rather a contract giving the employer a free choice as to its duration, subject only to giving the requisite contractual period of notice of termination. Employment beyond the earliest contractual termination date is not something to which the employee has a contractual right.

101. Of course, in the real world, (save where Employment Rights Act does not apply) an employer has no such freedom, because it will in general be constrained by the economic consequences of unfair dismissal. Indeed, Mr Tomlinson's submission was that, if the counter-factual analysis was carried out in the present case in accordance with the principles laid down by Patten LJ in the *BMI Baby* case, it would lead to the conclusion that the Trust would not have terminated Mr Smith's contract at all, if unable to dismiss him on disciplinary grounds, precisely because of the statutory liability to make compensation for unfair dismissal which would then probably have arisen.

102. I consider that the second difficulty with this submission is that it would import into the counter-factual analysis of damages for breach of an employment contract precisely those statutory rights (not to be unfairly dismissed) compensation for the breach of which is prohibited in purely contractual cases by the *Johnson* exclusion: see *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22.

In that case, the employment contract in question contained provision as to the manner in which disciplinary proceedings were to be conducted against the employee, broadly similar to those conferred by statute on employees generally. Although a breach of those contractual provisions was recognised by the Supreme Court as a breach of contract, it did not sound in damages, and the employee was limited to loss of earnings during his contractual notice period.

103. There is real force in Mr Tomlinson's submission that, in the real world, the Trust might well not have dismissed Mr Smith, had it decided that it had no disciplinary power to do so, either by forcing him to accept a more junior post at a reduced salary, or by requiring him to leave after 12 weeks' notice. Nonetheless, if the economic constraint on the Trust taking that course consisted only of its perception of its potential liability for unfair dismissal, to allow that analysis into a purely contractual assessment would, it seems to me, clearly offend against the *Johnson* exclusionary principle. It would in particular require the court to conduct that sort of detailed analysis of unfairness which Parliament has entrusted to the jurisdiction of the Employment Tribunal, which is precisely the type of exercise by the court which, under that exclusionary principle, it has been concluded that Parliament intended to prohibit.

104. If a fear of unfair dismissal is excluded from the counter-factual analysis, I cannot envisage any reason why the Trust, concerned to comply purely with its contract with Mr Smith, would have done otherwise than to give him 12 weeks' notice, and then offered him a more junior but different job thereafter. That is what the Trust wished to do, not only in order to give effect to its misguided perception that Mr Smith had conducted himself in a manner contrary to the Code of Conduct and the Equal Opportunities Policy, but also to send out a message to all its employees not to use Facebook in the manner adopted by Mr Smith, and to distance itself from any risk of association with Mr Smith's views about gay marriage in church. Unless constrained by the employment legislation to do otherwise, I conclude that, even applying the counter-factual analysis developed in the *BMI Baby* case, the Trust would nonetheless have done what in fact it did, but upon 12 weeks' notice.

Conclusion

105. It follows that the correct measure of damages is indeed the very small difference between Mr Smith's contractual salary, and the amount actually paid to him during the 12 weeks following his assumption of his new, but reduced, role. Counsel are agreed that the mathematical calculations arising from the identification of that measure of damages need not concern the court, since they can be agreed, no doubt in a very modest sum.

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.

107. Mr Tomlinson expressed the hope that, if Mr Smith's case in breach of contract was well-founded, the Trust might find a way to reinstate him. I was however told by Mr Short, again on instructions, that there is no such prospect.