Neutral Citation Number: [2026] EAT 29

Case No: EA-2024-000980-TH

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 16 February 2026

Before:

HIS HONOUR JUDGE JAMES TAYLER

- -

Between:

Mr F Ngole

Appellant

- and –

Touchstone Leeds

Respondent

- -

- -

Bruno Quintavalle and Michael Phillips
(instructed by Camerons Solicitors LLP) for the **Appellant**
Katherine Apps KC
(instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing date: 29 and 30 October 2025

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JUDGMENT

Sent under embargo 29 January 2026

SUMMARY

RELIGION OR BELIEF DISCRIMINATION

The Employment Tribunal erred in law in its analysis of certain complaints of direct discrimination because of religious belief. The correct analysis considered. The appeal is otherwise dismissed.

HIS HONOUR JUDGE JAMES TAYLER

The Issue

1. The issue in this appeal is whether the Employment Tribunal erred in law in its analysis of complaints of direct discrimination because of religious belief.

The judgment appealed

2. This is an appeal against the judgment of Employment Judge Brain, sitting with members. The claim was heard in Leeds on 2, 3, 4, 5 and 8 April 2024, with chambers deliberation on 9 and 10 April 2024. The judgment was sent to the parties on 21 June 2024.

The facts

3. I take the facts from the findings of the Employment Tribunal.

4. The respondent is a charity that provides mental health and well-being services. Kathryn Hart, Director of People and Culture, gave evidence, accepted by the Employment Tribunal, that the respondent is committed to promoting equality, diversity and inclusion and has a strong track record of specifically adapting and tailoring its services to the LGBTQI+ community. About a third of the respondents' workforce and approximately 12% of service users are from the LGBTQI+ community.

5. The respondent also supports various faith groups. The respondent has a diverse workforce. Just under a third of the respondent's staff describe themselves as Christian.

6. The respondent decided to appoint a discharge mental health support worker at Pinderfields Hospital in Wakefield. The Wakefield Clinical Commissioning Group ("Wakefield CCG") provided funding for the role.

7. The claimant obtained a MA in Social Work from the University of Sheffield in October 2021. When the claimant applied for the role of discharge mental health support worker with the respondent, he was working as a residential children support worker.

8. The Employment Tribunal set out the claimant's pleaded beliefs:

> 79.1. That marriage is a divinely instituted lifelong union between one man and one woman. This belief is supported by numerous biblical texts including Matthew 19:5-6 (New International Version (NIV)) which says, "For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh. So they are no longer two, but one flesh. Therefore, what God has joined together, let no one separate".
>
> 79.2. That the expression of sexual relationships only accords with Biblical teaching when expressed within a monogamous marriage of one man and one woman as set out, inter alia, in 1 Corinthians 7:2-4 (NIV), which says, "But since sexual immorality is occurring, each man should have sexual relations with his own wife, and each woman with her own husband. The husband should fulfil his marital duty to his wife, and likewise the wife to her husband. The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife."
>
> 79.3. That sex is a biologically immutable fact based on the Bible's teaching in Genesis 1:27 (NIV) that "God created man in His own image, in the image of God he created him; male and female He created them".
>
> 79.4. Lack of belief that it is possible for a person to change their sex/gender ("lack of belief in transgenderism").

9. The respondent accepted that the claimant held those beliefs and had the protected characteristic of religion or belief, for the purposes of section 10 **Equality Act 2010** ("**EQA**")

10. Mrs Hart gave evidence that the respondent "understands that there is often a strong correlation between mental health struggles and an individual's sexuality and/or gender identity". Mrs Hart stated that the respondent wanted to appoint "someone who would be able to work comfortably and collaboratively with all people including LGBTQI+ organisations". The discharge mental health support worker would be working alone without any direct supervision. The principal purpose of the role was to support vulnerable service users with severe mental health issues during the process of discharge from hospital.

11. The job description required the postholder to "operate within the aims, policies and practices of Wakefield CCG/Touchstone at all times and to be committed to and promote the organisation's equal opportunities and anti-discrimination policies." The claimant accepted that a significant number of the service users of the respondent are from the LGBTQI+ community.

The Employment Tribunal held that support of people from the LGBTQI+ community is a priority for the respondent.

12. In April 2022, the claimant applied for the discharge mental health support worker role. The claimant declared his religion to be Christian.

13. The claimant was invited to attend an interview on 10 May 2022. The claimant was one of 13 applicants. The claimant was interviewed by Ishrat Nazir, Leeds Well Bean Café Manager, and Martin Bishop, Peer Support Co-Ordinator. The claimant scored well at the interview and was offered the post by letter dated 19 May 2022, subject to the provision of satisfactory references.

14. The claimant provided two references that stated little more than the dates of his employment. The claimant was asked for a third reference. He provided a reference from a person who referred to the claimant as a "family friend". The respondent's recruitment policy requires successful applicants to provide two references from professional referees.

15. Because of the difficulties with the claimant's references, Sharon Brown, the business development director, carried out a Google search of the claimant's name. She found news stories about the claimant published by the Guardian and BBC News about a claim he had brought against Sheffield University. The claimant had been removed from the MA Social Work course at Sheffield University because of some Facebook posts. The posts, from 2015, concerned Kim Davis, an American registrar, who had been imprisoned after refusing to administer same-sex marriages because of her Christian beliefs.

16. The claimant lost a claim he brought against Sheffield University in the High Court: **R (on the application of Ngole) v University of Sheffield** [2017] EWHC 2669 (Admin). The High Court rejected an Article 9 **ECHR**, freedom of thought, conscience and religion, analysis of the posts holding:

> 64. **The NBC postings were not made in a religious context of the sort which could potentially bring it close to the examples of worship or devotion recognisable as forming part of the practice of a religion or belief in a generally accepted form. They were made in the essentially political context of news media, as a religiously motivated contribution, albeit with a high religious content, to a political debate about the place of religious belief in the delivery of public services. I was shown no authority on Art.9.2 which justifies regarding that as a protected manifestation of religious adherence or creed.** The possibility, emphasised by Mr Diamond, that if the same content had been part of a sermon in church it might have been protected by Art.9, is not to the point. The postings were not made in any such context. In the circumstances therefore I accept the University's submission that there has been no interference on the facts of this case with Mr Ngole's Article 9 rights.
>
> 65. I observe in passing that the feature which distinguishes the NBC postings from the sort of everyday off-line religious conversation which may be almost intrinsic to the holding of belief itself (within the terms of Art.9) is the publicity and accessibility which are in the nature of participation in social media. Both of these also persist over time to some degree. It may be that the courts in future will need to grapple with the Convention implications of the increasing ubiquity of social media as a means of intimate and everyday self-expression by religious believers of their faith, just as it is of other aspects of individuals' identities. On its particular facts, however, this is not the case in which to do so. Very little other evidence of Mr Ngole's online behaviour was before the court. [emphasis added]

17. The High Court also rejected an analysis based on Article 10 **ECHR** freedom of expression.

18. The Guardian story was written after the High Court decision, but before the decision of the Court of Appeal. The headline was "Christian thrown out of university over anti-gay remarks loses appeal" with the sub-headline, "Felix Ngole, who was on social work course at Sheffield University, wrote on Facebook that homosexuality was a sin." The Employment Tribunal quoted the entirety of the story. The only beliefs of the claimant's that were specifically referred to were that "homosexuality is a sin" and that "same sex marriage is a sin whether we like or not".

19. The decision of the High Court was overturned by the Court of Appeal**: R. (on the application of Ngole) v University of Sheffield** [2019] EWCA Civ 1127.

20. The Court of Appeal described the claimant's posts:

10. In September 2015, the Appellant posted a series of comments on his Facebook account about a prominent news story on MSNBC, an American news website. The story related to the imprisonment of an American registrar, Kim Davis, for contempt of the order of a US Federal District Court which resulted from her refusal to issue marriage licences to same-sex couples because of her Christian religious beliefs about same-sex marriage. The Appellant contributed around twenty posts to the MSNBC Facebook website ("the NBC postings") in response to comments by others. The Appellant's comments included statements and observations expressing views on same sex marriage and homosexuality:

> "… [S]ame sex marriage is a sin whether we accept it or not"
>
> "…Homosexuality is a sin, no matter how you want to dress it up"
>
> "…[Homosexuality] is a wicked act and God hates the act"
>
> "…God hates sin and not man"
>
> "…[O]ne day God will do away with all diseases and all suffering. He will also get rid of the devil who is the author of all wickedness. That day will surely come. But remember that He will also Judge all those who indulged in all forms of wicked acts such as homosexuality".

11. He also included a number of Biblical quotations, some of which contained strong language:

> "…If a man lies with a male as with a woman both of them have committed an abomination. Leviticus 18:22"
>
> "…Just as Sodom and Gomorrah and the surrounding cities which likewise indulged in sexual immorality and p[u]rsued sexual desire, serve as an example by undergoing a punishment of eternal fire. Jude 1."
>
> "…For this reason God gave them to dishonourable passions. For their women exchanged natural relations for those that are contrary to nature; and the men likewise gave up natural relations with women and were consumed with passion for one another; men committing shameless acts with men and receiving in themselves the due penalty for their error: Romans 1:26-28."

21. The Court of Appeal determined the appeal on the basis of an asserted breach of Article 10 **ECHR**. The Court of Appeal provided a summary of its joint judgment, including:

> (4) The right to freedom of expression is not an unqualified right: professional bodies and organisations are entitled to place reasonable and proportionate restrictions on those subject to their professional codes; and, just because a belief is said to be a religious belief, does not give a person subject to professional

regulation the right to express such beliefs in any way he or she sees fit.

(5) It will be apparent, therefore, that both sides adopted extreme and polarised positions from the outset, which meant that the disciplinary proceedings got off on the wrong track.

(6) At no stage, did the University make it clear to the Appellant that it was the manner and language in which he had expressed his views that was the real problem, and in particular that his use of Biblical terms such as 'wicked' and 'abomination' was liable to be understood by many users of social services as extreme and offensive. Further, at no stage did the University discuss or give the Appellant any guidance as to how he might more appropriately express his religious views in a public forum, or make it clear that his theological views about homosexuality were no bar to his practising as a social worker, provided those views did not affect his work or mean he would or could discriminate.

(7) The University quickly formed the view that the Appellant had become "extremely entrenched" and that he lacked "insight" into the effect that his actions in posting his views on social media would have. This led the University rapidly to conclude that a mere warning was insufficient and that the Appellant's fitness to practice was irredeemably impaired and, therefore, only the extreme sanction of suspension from his course was appropriate.

(8) The University failed to appreciate two matters. First, failing to appreciate that the Appellant's apparent intransigence was an understandable reaction by a student to being told something that he found incomprehensible, namely that he could never express his deeply held religious views in any manner on any public forum. Second, failing to appreciate that a blanket ban on the expression of views was not in accordance with the relevant HCPC professional code or guidance. In these senses, it was the University and its processes which could be said to lack insight.

(9) It was, in fact, the University itself which became entrenched. First, by failing even to explore the possibility of finding middle ground, despite this being suggested by Pastor Omooba, who accompanied the Appellant at the disciplinary proceedings. Second, by unfairly putting the onus entirely upon the Appellant to demonstrate that he did have "insight" and could mend his ways.

(10) The University wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (e.g. that 'homosexuality is a sin') does not necessarily connote that the person expressing such views will discriminate on such grounds. In the present case, there was positive evidence to suggest that the Appellant had never discriminated on such grounds in the past and was not likely to do so in the future (because, as he explained, the Bible prohibited him from discriminating against anybody).

(11) The University gave different and confusing reasons for suspending the Appellant. Initially, it was said (by the Fitness to Practice Committee) that he

> lacked "insight" into how his NBC postings might affect his ability to carry out "his role as a social worker"; and subsequently it was said (by the Appeals Committee) that he lacked "insight" into how his NBC postings "may negatively affect the public's view of the social work profession". Further, at no stage during the process or the hearings did the University properly put either concern as to perception to the Appellant during the hearings.
>
> (12) The University's approach to sanction was, in any event, disproportionate: instead of exploring and imposing a lesser penalty, such as a warning, the University imposed the extreme penalty of dismissing the Appellant from his course, which was inappropriate in all the circumstances.

22. The BBC News story was written after the Court of Appeal judgment. The headline was "Sheffield University student wins Facebook post appeal." The article referred to the claimant expressing a traditional Christian view that "the Bible and God identify homosexuality as a sin". The story did not refer to any of the other beliefs that the claimant relied on for the purposes of his Employment Tribunal claim.

23. Ms Brown told Mrs Hart about the Guardian and BBC News stories. Ms Hart and the others dealing with the claimant's application did not read the Court of Appeal judgment. This is surprising, in circumstances in which the BBC story stated that the claimant had succeeded in his appeal.

24. Mrs Hart decided that the claimant held views that were not "seemingly in alignment with the respondent's vision, values and ethos". Mrs Hart discussed the matter with Arfan Hanif, the respondent's chief executive officer. They decided to withdraw the conditional job offer. An email was sent to the claimant on 10 June 2022, stating:

> I write further to the provisional offer we sent to you on 19 May 2022 for the role of mental health support worker. **Having received only basic references** (including one from a family friend which unfortunately we cannot accept), **we were required to carry out further background checks to determine your suitability** for the role and have unfortunately identified some significant areas of concern regarding your suitability for both the role and Touchstone as an organisation. **In particular, we have uncovered some information about you which does not align with the Touchstone Leeds ethos and values; we are an organisation proud to work in alliance with the LGBTQ+ community and we pride ourselves with being an inclusive employer.** It is with regret therefore that we must withdraw the provisional offer of employment made to

> you. We thank you for your interest in Touchstone and wish you all the best with your future endeavours. [emphasis added]

25. Mrs Hart accepted in evidence that she was motivated by the prospect of the claimant discriminating against service users from the LGBTQI+ community in deciding to withdraw the job offer at this stage.

26. The claimant responded immediately, challenging the decision and suggesting he could provide a further reference. On 11 June 2022, the claimant wrote again stating:

> What I find worrying though is that **you seem to have hastily made an assumption that I will not provide a safe and equitable service to people within the LGBTQ community** without providing any information to back that assumption. **I find this in itself offensive, very biased, potentially discriminatory and unfair.** [emphasis added]

27. On 14 June 2022, Mrs Hart wrote to the claimant:

> **Unfortunately, we came across a number of articles on Google which suggest that your views towards the LGBTQ+ community do not align with Touchstone's.** In particular, we can see that you have very strong views against homosexuality and same sex marriage, which completely go against the views of Touchstone, an organisation committed to actively promoting and supporting LGBTQ+ rights.
>
> **In particular, we have serious concerns that your ability to act in the best interests of Touchstone, service users and its staff would be compromised by your strong views, and do not feel that you would be able to perform in the mental health support worker role without posing a significant risk to Touchstone's service users and reputation**.
>
> **We may be willing to reconsider the position if you are able to give us assurances that your role would not be compromised by your views, and you would be able to fully embrace and promote Touchstone's values and work respectfully with those you would come into contact with**, **including the promotion of homosexual rights.**
>
> **Without those assurances** and fully respecting your rights to hold certain beliefs (regardless of whether we disagree with them or not), **we will be unable to progress with this matter.**
>
> To allow us to consider this position further, I would like to invite you to an in person meeting with myself and David Pickard … **The purpose of this meeting will be for us to discuss the role and responsibilities as a mental health supporter and Touchstone Leeds's aims and objectives as an inclusive employer, promoting LGBTQI+ rights**. [emphasis added]

28. The claimant replied on 15 June 2022:

> **I am happy to give you assurances that I will not discriminate against anyone on the basis of their sexual orientation.** What I cannot do, and **you cannot reasonably expect me to do without yourselves being discriminatory, is make my participation in the 'promotion of homosexual rights' a condition of my employment.** [emphasis added]

29. On 16 June 2022, Mrs Hart wrote:

> Whilst I note the contents of your email and the judgment from your case against the University of Sheffield, **the concern relates to your ability to fully embrace and promote Touchstone's values and work respectfully with those you come into contact with, which may involve directing people as to their rights that seem to be incompatible with your beliefs.**
>
> As part of your role, **you would in order to gain an understanding of this, be expected to attend transgender training, LGB training and transgender awareness training and other such modules which are mandatory for all staff.**
>
> **You would also, as part of your role, be expected to use the correct pronouns by which people wish to be identified, such as he/she, them/they**. **You will also be expected to work and support service users**, including from black and minority ethnic and **LGBTQI+ communities** to **identify and reduce barriers to discharging them from hospital, assisting them to navigate and access appropriate support in the community eg Choice Support – LGBT, TransWakefield.** You would also be **expected to develop effective partnerships and network with such agencies** that directly support individuals who are homosexual eg Mesmac for example and **promote their services to these often vulnerable individuals.**
>
> **I am not therefore stating that the promotional of homosexual rights is a condition of your employment, but I do need to consider the above matters when considering your suitability for the role.** [emphasis added]

30. The meeting took place on 11 July 2022. Mrs Hart and David Pickard, operations director, attended for the respondent. Lauren Smith, HR administrator, attended to take notes. The Employment Tribunal accepted that her notes of the meeting were accurate.

31. The Employment Tribunal held of the approach that each side adopted to the meeting on 11 July 2022:

> It was also suggested on the claimant's behalf that Mrs Hart and Mr Pickard were hostile to the claimant. The Tribunal does not accept that there was hostility to the claimant. However, there appeared to be a large measure of

> agreement between the parties at the hearing that this was a difficult meeting. As will be seen, there are criticisms to be made of the approach of each side. That said, we are satisfied that each party entered the meeting in good faith. The claimant did so with the intention of providing the assurances sought by the respondent. The respondent did so to afford that opportunity.

32. The Employment Tribunal made detailed findings about what was said at the meeting. On 18 July 2022, Mrs Hart wrote to the claimant stating that the respondent's decision to retract the conditional offer of employment stood. The Employment Tribunal set out relevant parts of the letter:

> "(5) Towards the beginning of the meeting (of 11 July 2022) **we asked <u>why you had applied to work</u> for Touchstone particularly as we very clearly and publicly pride ourselves in being an ally to the LGBTQI+ community**, **a community you have expressed strong views against**. **You indicated that this question was inappropriate as you felt you had already been asked this question at your original interview on 10 May 2022.** The answer to this question is, however, incredibly important to us and your ability to do the role as it ties in with our values, ethos, policies and direction as an organisation and underpins everything we do at Touchstone. **Despite asking this reasonable question, you did not explain why, specifically, why you wished to work for us, instead citing that you had the requisite experience and qualifications needed for the role.**
>
> (6) **In particular, we asked whether you would be able to <u>promote services in the LGBTQI+ community</u>, to which you responded by stating that you had already answered this particular question**, which we are aware was not actually asked of you during the first interview. **You did go on to say that whilst you believe in the Bible and feel that marriage should be kept between a man and a woman, you have never chosen not to work with anyone.**
> (7) **Furthermore, you explained that you had never been accused of discrimination, nor do you have any intention to discriminate against anyone.** With respect this rather misses the point. As mentioned during the meeting, **we have no issues with your religious views and respect your rights as an individual to hold those beliefs and, as an inclusive employer, we are welcoming of staff of all religions and faiths.** We have several staff including our CEO (Muslim) who are from different faith backgrounds which include Christians, Muslims, Sikhs and Hindus and we are very proud of promoting and celebrating religious festivals within our diverse faith staff.
>
> (8) **You did not, however, offer us any real assurance that you would be able to <u>actively promote LGBTQI+ services</u> within the community to service users who are of incredibly high risk of self-harm and**

suicide and **that your beliefs would not be asserted in a way that goes against the purpose of what we are trying to achieve.** This causes us a great deal of concern that you **might not be able or willing to promptly signpost service users to LGBTQI+ specific services**, which for a **service user in crisis, could literally mean the difference between life and death.**

(9) **We then asked you how you would address a service user or colleague who came across your anti-gay marriage comments on Google and ask you specifically about this.** You accepted that some individuals could potentially see your views as being "horrible" but **explained that you would not engage in discussions regarding your religious views with others and if there was an issue, it could be referred to your line manager, or the service user in question could be referred to another MH support worker.**

(10) Your suggested approach does, however, concern us, as ultimately, **you would be the only MH support worker within the service**. **If service users cannot (or do not feel comfortable being able to) speak to you about issues they are facing regarding their sexuality or gender identity, it renders the service redundant** and prevents them accessing the help they need, which is a key part of the role. **This could be considered as a discriminatory service outcome exposing Touchstone to potential legal action or sanctions from the commissioner and adversely impacting our reputation as an inclusive service provider.**

(11) **Furthermore, we feel it could pose a significant risk to Touchstone's service users if they were to come across the comments you have made about homosexuality and gay marriage who could understandably find those comments upsetting and offensive.** Our concern is that **your comments (if discovered) could seriously exacerbate a struggling service user's symptoms of anxiety and/or depression rather than improve it.**

(12) **In addition, we asked whether you would be able to contact and develop effective working relationships with partner organisations such as Mesmac and TransWakefield to support service users**. You explained that whilst you have previously worked with multiple services, you have not specifically worked with LGBTQI+ ones. **You did not, in our view, express any real interest in promoting these services and when asked whether you would signpost service users to those organisations, you advised that you would "follow the policies and procedures of the organisation"** which suggests a real lack of interest to us and positive promotion, inferring that you would simply "go through the motions".

(13) **When asked whether you would attend and contribute to training sessions on LGB and transgender awareness training** you advised you would attend such training, however, you would share your views in the

> training in that you believe that marriage should be between a man and a woman (and not two persons of the same sex). **It causes us concern that you would share these views which could impact negatively on other attendees and the trainer's health and well-being, including people who are LGBTQI+ and not in accordance with Touchstone's vision and values.**
>
> (14) We had hoped that Monday's (11 July 2022) meeting would be a positive opportunity for you to appease our concerns and we could at least give you a trial period in the role but unfortunately, we found you to be quite confrontational and resistant during the meeting, often refusing to provide answers to what we considered to be reasonable questions.
>
> (15) **The meeting was intended to be an opportunity for you to demonstrate that your views would not get in the way of, or prevent you from fully embracing your role as a MH support worker at Touchstone**, however you seemed to see the meeting as a pointless exercise and instead seemed to just want to have the meeting and then pursue an Employment Tribunal against us if you were unhappy with the outcome (which is of course your legal right should you wish to do so), effectively in our view seemingly threatening us.
>
> (16) Unfortunately, due to your refusal (or inability) to provide appropriate answers to the questions asked, **we do not feel assured that you would be able to support service users from the LGBTQI+ community, therefore negatively exposing Touchstone as an LGBTQI+ ally and its service users and potentially putting Touchstone at risk of legal action on the grounds of discrimination in both employment and service delivery.** Put simply, we cannot afford to take that risk."

138. The Tribunal is satisfied that where Mrs Hart refers to what was said in the meeting, she has accurately recorded matters. The exception to this is in respect of paragraph 13 of the letter – the claimant did say that he would share his Christian views but with caveat (as we observed in paragraph 130) that he would do so if invited. The conclusions that she reached are of course very much at the heart of the case and will be discussed in due course.

139. The Tribunal has no record of Mr Phillips taking issue with the factual content of the letter of 18 July 2022 (as opposed to the conclusions reached). The only matter put to Mrs Hart about the letter was the reference in paragraph 3 to the claimant's "attitudes and behaviours" as opposed to his views. This was a reference to the Facebook postings the subject of Ngole. She agreed that the claimant's views were not an issue for the respondent. [emphasis added]

33. The Employment Tribunal heard expert evidence. The claimant called Reverend D. Paul Sullins, PhD a research associate professor of sociology at The Catholic University of

America with expertise in inferential statistics, the sociology of religion, and issues of human sexuality. The respondent called Dr Hercules Eli Joubert, clinical director of the Leeds Gender Identity Service at the Leeds and York NHS Foundation Trust, consultant clinical psychologist, clinical psycho-sexologist, clinical lead at the Leeds Gender Identity Service and founder of the Northern Gender Network.

34. The Employment Tribunal said of the evidence of Dr Joubert:

> 30. In his report dated 17 October 2023, Dr Joubert says (at paragraph 5.1) that, "NHS Digital, a branch of NHS England, reports that people from the LGBTQI+ communities are much more likely to report mental health difficulties (16%) compared to their heterosexual counterparts (6%)". He goes on to say that MIND (the UK based mental health charity), states that sexual orientation per se does not cause mental health difficulties and the reason for an increased rate of mental health difficulties is likely to be due to homophobia, biphobia or transphobia, stigma and discrimination, difficult experiences of coming out, social isolation, exclusion, and rejection.
>
> 31. In evidence given under cross-examination, it was put to Dr Joubert by Mr Phillips that no study makes a causative link between poor mental health on the one hand and being a member of the LGBTQI+ community on the other. Dr Joubert accepted that LGBTQI+ status was not a pathology but held his position that this factor does not detract from the fact that members of the LGBTQI+ community generally suffer poorer mental health issues than others. The Tribunal accepts this to be the case. As a proposition it is supported by Dr Joubert's expert evidence which was unchallenged by Mr Phillips. Mrs Hart's evidence was based upon her significant experience and Mr Pickard's evidence to this effect was from his lived experience. There was little evidence to the contrary led by the claimant. (See also paragraphs 36 to 39 below corroborative of this finding). The proposition that those from the LGBTQI+ community are more likely to report mental health difficulty is also supported by data from the NHS.

35. The Employment Tribunal stated of the claimant's and Dr Sullins' evidence as to what is meant by suggesting that homosexuality is a sin:

> 143. The claimant denied that by expressing the view of homosexuality and same sex marriage as "a sin" he was passing any kind of moral judgement on others. The claimant replied when asked about this in cross examination that, "we all have sin, I do." He said (in evidence given by way of supplementary questioning) that, "I love people. It is part of my faith. I cannot hate people."
>
> 144. Reverend Sullins said, in evidence given under cross-examination, that "To say that something is a 'sin' is pejorative is a misunderstanding as in Christian

> theology all of us are subject to sin." He went on to say that those who are, for example, in an adulterous relationship "need love from God and support".
>
> 145. Mr Wilson put to him that "This is a Christian centred explanation, could it lead to psychological damage." Reverend Sullins replied "The word 'sin' is a Christian theological word. I can't account for the connotations others may put on it." He went on to say that "There may be a position of ignorance from Mrs Hart and Mr Pickard. Mr Pickard said John 3.16 [For God so loved the world that he gave His only begotten Son, that whoever believeth in Him should not perish, but have everlasting life] may be triggering, which was a message of love. God draws us into greater goodness. If that's seen as judgemental, I don't know what to say to that."
>
> 146. In our judgment, this was unfair criticism by Reverend Sullins of Mrs Hart and Mr Pickard. They cannot reasonably be expected to view matters from the same theological viewpoint as does Reverend Sullins. **They were, in our judgment, entirely justified in exploring with the claimant how the expressions of orthodox Christian belief around homosexuality and same sex marriage would impact upon their staff and service users. It is simply unrealistic to expect staff and service users to draw the theological distinction between the theological use of the word 'sin' and the everyday sense of that word.** [emphasis added]

36. An issue of dispute between Reverend Sullins and Dr Joubert related to minority stress theory (MST) about which the Employment Tribunal stated:

> 151. In paragraph 15 of his report (page 25 SB) Reverend Sullins gives an overview of minority stress theory (MST). As he says, "The central premise of MST is that LGBT mental health is determined by the external social environment, not internal psychodynamic factors." He then cites in support of that proposition a report published in Psychological Bulletin 129, number 5 (2003). Reverend Sullins' opinion is contrary to this - in summary, his opinion is that MST is purely theoretical, and that evidence does not support the proposition in the Psychological Bulletin article that harm will come to an individual hearing world views that do not accord with their own.
>
> 152. In paragraph 28 of his report (page 31 SB) Reverend Sullins concedes that, "My critical opinion of MST is probably still a minority opinion among demographers and psychologists, although scholarly scepticism continues to grow as the theory continues to fail to provide an answer to the difficulties noted above." "The above" was Reverend Sullins' critique of MST between paragraphs 15 and 27 of his report.
>
> 153. Dr Joubert's opinion (as summarised in the joint expert witness summary at pages 120 to 127 SB) is that "**MST is an academic theory describing and discussing generic concepts which contributes to minority stress. I questioned the relevance of this in my report as it seems an academic discussion regarding minority stress missing the point of the Touchstone**

> **Leeds context where the service users are not merely from a minority group but are, by definition of being service users, vulnerable**."
>
> 154. At pages 122 and 123 SB (at section 6 of the joint experts report) Dr Joubert expressed the opinion that, "**Expressions of negative views regarding homosexuality which position aspects related to it as sinful or wrong, are very highly likely to cause significant harm within the context of Touchstone Leeds." In section 7, on the same page, he opined that the claimant's "expressions will, most likely, be received as prejudiced and judgemental causing harm rather than being helpful**." [emphasis added]

The relevant complaints

37. The claimant brought complaints of direct belief discrimination. So far as is relevant to the appeal, the claimant asserted in the list of issues that he had been discriminated against because of his belief by the respondent (1) requiring him to attend a second interview on 11 July 2022; (2) not offering him employment in the role of discharge mental health support worker (the Employment Tribunal split this into two complaints of the initial withdrawal of the offer on 10 June 2022 and the decision not to revoke the withdrawal in the email of 18 July 2022); and/or (3) putting a reverse burden of proof on the claimant to prove that he would not discriminate because of his religious beliefs.

38. It was recorded in the list of issues that:

> It is the Respondent's case that the treatment complained of by the Claimant, including the withdrawal of the offer of employment, was a proportionate means of achieving the legitimate aim that **the needs of LGBTQI+ service users with mental health conditions who required support after being discharged from Wakefield Hospital should be fully met**. [emphasis added]

39. The claimant also brought a complaint of indirect belief discrimination in which he asserted that the respondent applied PCPs that were to his disadvantage by requiring that staff (1) actively promote LGBT lifestyles; (2) during LGBT awareness training only share views positive and promoting of LGBT lifestyles; (3) support same sex marriage; (4) be 'an ally' and 'speak up' for LGBTQI+ rights; (5) confirm his or her adherence to the said PCPs prior or during their employment; and/or (6) use the pronouns by which people wish to be identified,

such as he/she, them/they.

40. The claimant also brought a complaint of belief harassment including assertions that he had been asked to act "act contrary to his religious and/or philosophical beliefs" by (1) promoting the rights of LGBTQI+ persons; (2) supporting same sex marriage; and/or (3) being an LGBTQI+ ally.

41. The only complaint that the claimant has been granted permission to appeal are the direct belief complaints referred to above. I will return to the grounds of appeal permitted to proceed in more detail after considering the relevant law.

The legal principles

42. The claimant's complaints were brought under the **Equality Act 2010** ("**EQA**").

43. Section 39 **EQA** makes it unlawful to discriminate in the employment context:

> 39 Employees and applicants
>
> (1) An employer (A) **must not discriminate** against a person (B)—
>
> (a) in the **arrangements A makes for deciding to whom to offer employment**;
> (b) as to the terms on which A offers B employment;
>
> (c) by **not offering B employment**. [emphasis added]

44. The complaints relevant to this appeal were about the arrangements the respondent made for deciding whom to offer the role of discharge mental health support worker and in not offering the claimant that job.

45. Section 4 **EQA** sets out protected characteristics, including "religion or belief". Section 10 **EQA** provides:

> 10 Religion or belief
>
> (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
>
> (2) Belief means any **religious** or **philosophical** belief and **a reference to belief includes a reference to a lack of belief**. … [emphasis added]

46. The claimant relied on beliefs that: (1) "marriage is a divinely instituted lifelong union between one man and one woman"; (2) "the expression of sexual relationships only accords with Biblical teaching when expressed within a monogamous marriage of one man and one woman"; (3) "sex is a biologically immutable fact"; and a lack of belief (4) "that it is possible for a person to change their sex/gender".

47. On an overall reading of the judgment it is clear that the three beliefs, and one lack of belief, were accepted to be religious. I will use the term religious beliefs to include religious lack of belief. The respondent accepted that the claimant's religious beliefs were protected by section 10 **EQA**.

48. Direct discrimination is defined by section 13 **EQA**:

> 13 Direct discrimination
>
> (1) A person (A) discriminates against another (B) if, **because of a protected characteristic**, **A treats B less favourably than A treats** or would treat **others**. [emphasis added]

49. There is no provision in Section 13 **EQA** permitting justification of direct discrimination, save for the protected characteristic of age.

50. Section 23 **EQA** explains the comparative exercise required by section 13 **EQA**:

> 23 Comparison by reference to circumstances
>
> (1) **On a comparison** of cases for the purposes of section 13 … there must be **no material difference between the circumstances relating to each case**. [emphasis added]

51. Section 10 **EQA** defines the protected characteristics relevant to this appeal as religious belief and religious lack of belief. The **EQA** does not refer to manifestation of religious belief

52. The issues raised by manifestation of religious belief introduces Convention Rights. Article 9 **European Convention on Human Rights** ("**ECHR**") provides:

> Freedom of thought, conscience and religion
>
> 1. **Everyone has the right to freedom of thought, conscience and religion**; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom **to manifest one's religion or beliefs shall be subject only to such limitations as** are **prescribed by law** and are **necessary in a democratic society** in the interests of **public safety**, for the protection of public order, **health** or morals, or for **the protection of the rights and freedoms of others**. [emphasis added]

53. The right to freedom of thought, conscience and religion is an absolute right. Freedom to manifest religion or belief is qualified and can be subject to limitations provided that they are prescribed by law and necessary in a democratic society for matters including public safety, protection of health and the protection of the rights and freedoms of others. The distinction was considered by the Grand Chamber of the European Court of Human Rights in **Eweida v United Kingdom** (2013) 57 EHRR 8:

> 80. **Religious freedom is primarily a matter of individual thought and conscience**. **This aspect of the right set out in the first paragraph of article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified**. However, as further set out in article 9(1), **freedom of religion also encompasses the freedom to manifest one's belief**, alone and in private but also to practise in community with others and in public. **The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions** (see *Kokkinakis v Greece* (1994) 17 EHRR 397, para 31 and also Şahin v Turkey (2005) 44 EHRR 5, para 105). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in article 9(2). This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein.

54. In **Eweida** nature of manifestation of religious belief was considered:

> 82 … In order **to count as a 'manifestation'** within the meaning of article 9, the act in question **must be intimately linked to the religion or belief**. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; **the existence of a**

> **sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case**.

55. Where the expression of an opinion linked to a religious belief does not qualify as the manifestation of the religious belief, it may still be protected by Article 10 **ECHR**, which provides:

> Freedom of expression
>
> 1. **Everyone has the right to freedom of expression**. This right shall include **freedom to hold opinions** and to receive and **impart information and ideas** without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be **subject to such formalities, conditions, restrictions or penalties** as are prescribed by law and **are necessary in a democratic society**, in the interests of national security, territorial integrity or **public safety**, for the prevention of disorder or crime, for the **protection of health** or morals, for the protection of the reputation or **rights of others**, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [emphasis added]

56. Freedom of expression, like manifestation of religious belief, is qualified.

57. Articles 9 and 10 **ECHR** are, in extreme circumstances, subject to Article 17 **ECHR**, which provides:

> Prohibition of abuse of rights
>
> Nothing in this Convention may be interpreted as implying for any State, group or person any right to **engage in any activity** or **perform any** act **aimed at the destruction of any of the rights and freedoms set forth herein** or at their **limitation to a greater extent than is provided for in the Convention**. [emphasis added]

58. In **Higgs v Farmor's School** [2025] EWCA Civ 109, [2025] ICR 1172, CA, Lord Justice Underhill considered how correctly to analyse a complaint of discrimination because of the manifestation of belief.

59. Underhill LJ stressed the vital importance of free speech:

61. The protection of the right of free speech, including speech expressing a person's religious or other beliefs, has always been regarded as a cardinal principle of the common law, and it is of course now also protected by the incorporation by the 1998 Act of articles 9 and 10 of the Convention. There are many decisions of the highest authority expounding the relevant principles, but I do not need to recapitulate them here. I only note three points to which Mr O'Dair, and the FSU in its written submissions, attached particular importance.

62. First, **freedom of speech necessarily entails the freedom to express opinions that may shock and offend**. The most authoritative statement to this effect is probably that of the ECtHR at para 46 of its judgment in *Vajnai v Hungary* (2008) 50 EHRR 44, where it said:

> "The court further reiterates that freedom of expression, as secured in article 10(1) of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to article 10(2) , it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but **also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broad-mindedness, without which there is no 'democratic society' … Although freedom of expression may be subject to exceptions, they 'must be narrowly interpreted' and 'the necessity for any restrictions must be convincingly established'** (see, for instance, *Observer v United Kingdom* (1992) 4 EHRR 153, para 59)."

A very frequently-cited domestic authority to the same effect is *Redmond-Bate v Director of Public Prosecutions* [2000] HRLR 249, where Sedley LJ, sitting with Collins J in the Divisional Court, said, at para 20:

> "**Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having** …"

63. Second, the protection of freedom of speech is particularly important in the case of "political speech"—that is, expression of opinion on matters of public and political interest. At para 47 of its judgment in *Vajnai* the ECtHR stressed "that there is little scope under article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest".

64. Third, in any given case **it is important to be alive not just to the effect of restrictions on freedom of speech in that case but to their chilling effect more widely**. In *R (Miller) v College of Policing* [2022] 1 WLR 4987 , Dame Victoria Sharp P said, at para 68:

> "The concept of a chilling effect in the context of freedom of expression is an extremely important one. It often arises in discussions about what if any restrictions on journalistic activity are lawful; but in my judgment it

> is equally important when considering the rights of private citizens to express their views within the limits of the law, including and one might say in particular, on controversial matters of public interest."
>
> 65. **These are principles which any court or tribunal must have at the forefront of its mind in considering a case involving freedom of speech, including the expression of religious or other beliefs**. It should be noted, however, that in each of those cases the court was concerned with limitations on free speech imposed by a public authority. **The present case is concerned with an interference with free speech on the part of an employer against an employee, and it is necessary to assess whether the interference was justified in the context of the employment relationship and the law applicable to it.** [emphasis added]

60. Underhill LJ noted that there may be cases in which it is asserted that the discrimination is because of the manifestation of belief, but the real objection is to the belief itself:

> 55. It is worth clarifying one point that came up in the submissions before us. **There will be cases where the treatment complained of by the employee was ostensibly on the ground of conduct which manifested a religious or other belief but where it is found that the real reason was an animus against the belief in question. Such a finding may be straightforwardly because the employer's account of its reasons is disbelieved**; but it may also be because, as I put it in *McFarlane v Relate Avon Ltd* [2010] ICR 507, it is **in the circumstances of the particular case "impossible to see any basis for the objection other than an objection to the belief which it manifests" so that "[the employer's claim] to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference**" (see para 18). **Neither kind of case is in truth a manifestation case at all**, because **the employer is motivated simply by the fact that the employee holds the belief.** In a manifestation case proper the employer genuinely has no objection to the employee holding the belief and is motivated only by the conduct which constitutes its manifestation. Most claims of discrimination on the ground of religion or belief are likely to be genuine manifestation cases of this kind. [emphasis added]

61. Underhill LJ noted that the protection of manifestation of belief is not unqualified:

> 56. At the risk of stating the obvious, the fact that **the 2010 Act gives employees a right not to be discriminated against on the ground of manifesting a belief does not mean that that right is unqualified**; but the basis on which it should be treated as qualified is contentious in this appeal, and I return to it below. [emphasis added]

62. Underhill LJ explained the required analysis, derived from his judgment in **Page v NHS Trust Development Authority** [2021] EWCA Civ 255; [2021] ICR 941, CA:

74. In summary, *Page* was decided on the basis that **adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something "objectionable" in the way in which the belief was manifested**: it thus **introduced a requirement of objective justification into the causation element in section 13(1)**. Further, we held that **the test of objective justification was not substantially different from that required under article 9(2) (and also article 10(2)) of the Convention**. I should **clarify two points about language**:

> (1) The word "**objectionable**" in para 74 is evidently a (possibly rather inapt) shorthand for the phrase in para 68 "**to which objection could justifiably be taken**". Both have the same effect as the word "**inappropriate**" which is also used.
>
> (2) The "**way**" in which the belief is manifested is **a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs**.

That is the ratio of Page (as regards the direct discrimination claim). **I need to make five further points** about it.

75. **First, my formulation does not directly apply the four-step process identified in *Bank Mellat* [2014] AC 700, but it is a compressed version** of the same exercise, involving (a) the identification of a feature of the employee's conduct to which the employer could legitimately object (broadly corresponding to step (1)), and (b) an assessment of whether the employer's response to that feature was proportionate (broadly corresponding to steps (2)–(4)). **It is no doubt best practice to consider each of the *Bank Mellat* steps separately, but it is well recognised that there is a considerable degree of overlap between them.**

76. **Second, the equation of the applicable test with that under article 9(2) of the Convention appears to bring in not only the test of objective justification but also the requirement that the act in question be "prescribed by law"**. The School sought to object to this element in its respondent's notice (see para 117 below), but since permission was refused the issue was not live before us. However, even if, absent Page, it would be unnecessary to import this element, **I cannot see that it causes any conceptual problem in this context: the employer's rights under the employment contract provide the necessary framework of "law"**, in the sense in which that term is used in paragraph 2 of articles 9 and 10 .

77. **Third, the burden of proof of objective justification is on the employer.** I make this point in particular because in her reasons for giving permission to appeal Elisabeth Laing LJ expressed a concern that a consequence of the reasoning in Page might be that employees had to demonstrate that the treatment of which they complained was not in accordance with the law or proportionate to a legitimate aim. **I do not believe that to be the case: as a matter of general**

> **principle a justification for interfering with a qualified Convention right must be proved by the party relying on it**.
>
> 78. Fourth, although *Page* imports a test of objective justification into the separability approach, it does so only because of the protection conferred on the right to manifest a religious belief conferred by the Convention. It has no impact on the application of the separability approach in other cases.
>
> 79. Fifth, as regards a claim of harassment, section 26 of the 2010 Act requires the treatment to be "related to" the protected characteristic, rather than "because of" it as in section 13(1) . It was not suggested in argument before us that that difference renders the ratio of *Page* inapplicable in harassment cases, and I do not believe that it does.

63. Underhill LJ considered that the ratio in **Page** could be justified on a Section 3 **Human Rights Act 1998** analysis. However, that was not the basis of the decision in **Page**, which relied on ordinary principles of domestic construction. The construction set out in **Page** is of binding effect.

64. The approach to justification approved in **Higgs** was that of Lord Reed JSC in the Supreme Court in **Bank Mellat v HM Treasury (No 2)** [2013] UKSC 39; [2014] AC 700 which requires consideration of:

> (1) whether the **objective of the measure is sufficiently important to justify the limitation of a protected right**, (2) whether the **measure is rationally connected to the objective**, (3) **whether a less intrusive measure could have been used** without unacceptably compromising the achievement of the objective, and (4) whether, **balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective**, to the extent that the measure will contribute to its achievement, **the former outweighs the latter**. [emphasis added]

65. Where a proportionality assessment is challenged on appeal it is generally appropriate to adopt a review approach, but in some cases the appellate Court or tribunal should conduct the assessment afresh: **Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs; Dalston Projects Ltd and others v Secretary of State for Transport** [2025] UKSC 30, [2025] 3 WLR 346:

> 161. As we have explained in para 145 above, with reference to *Safe Access Zones*, para 30, proportionality assessments involve elements of both fact and

law. The relative significance of those elements varies from case to case. This court gave general guidance in *In re B* which indicates that **the appropriate provisional starting point for an appellate court in deciding between the review approach or the fresh decision approach on an appeal is that the former is likely to be appropriate**. Lord Clarke JSC emphasised * (para 137) the statement about domestic civil procedure in In re *Grayan Building Services Ltd* [1995] Ch 241, 254: "generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision". **Reflecting this general point, ordinarily the review approach in relation to an appeal in respect of a proportionality assessment will reflect a fair and appropriate division of responsibilities between the first instance court and the appellate court**.

162. **The adoption of a more intensive role by the appellate court in terms of proceeding to make its own fresh assessment** (even though there has been no error by the first instance court) **requires to be justified by special factors** as being constitutionally appropriate in the public interest and to uphold the rule of law. The main factors which are likely to be relevant to justify adoption of such an approach are (i) **the relevance of the assessment of proportionality across a range of cases**, whether in terms of establishing a point of general principle or approach, the proper interpretation of legislation or the proper development of the common law; (ii) the **nature of the measure in question**, since **the constitutional responsibility of the senior courts is likely to be engaged in a more acute way in relation to challenges to primary or secondary legislation**; (iii) whether the case involves a claim that legislation or proposed legislation of any of the devolved legislatures is outside competence by reason of incompatibility with Convention rights (since such an important question should again be resolved by a senior court); (iv) whether the case involves a claim that there is significant incompatibility between primary legislation and Convention rights (since such a claim invites the court to critique what Parliament has done and also because a determination of that issue may later fall to be scrutinised on an application to the European Court of Human Rights, which is likely to be assisted to the greatest degree by a domestic determination of proportionality by a senior court); (v) **the need to resolve differences between divergent strands of authority** which may have emerged in the lower courts; and (vi) **the high importance for society of the issue to be resolved** and the concomitant public interest in its being directly determined by a senior court. This is **not an exhaustive list and in some situations there may be some other compelling reason for the appellate court to adopt the fresh assessment approach in order to fulfil its constitutional responsibilities**.

163. Unfortunately, the fact that simple categories do not exist in this area may mean that in circumstances where it is unclear which appellate approach is correct, and there is the prospect of an onward appeal to this court, an intermediate appeal court may find it prudent to make an assessment of proportionality according to both approaches. In fact, it is noticeable that this is frequently done by the Court of Appeal (including in these cases), in which it often explains that not only could it not be said that the judge went wrong in

their assessment, but that the court agrees with the assessment they made. The Supreme Court sometimes expresses its view on proportionality in a similar way: see, eg, *Z v Hackney*, para 75, and AAA (Syria), para 73. [emphasis added]

66. **Higgs** concludes with a summary:

> 175. This has been a regrettably long, and long-delayed, judgment. It may assist non-lawyers or skim-readers if I summarise my essential conclusions in broad terms:
>
> > (1) **The dismissal of an employee merely because they have expressed a religious or other protected belief to which the employer, or a third party** with whom it wishes to protect its reputation, objects **will constitute unlawful direct discrimination** within the meaning of the *Equality Act 2010*.
> >
> > (2) However, **if the dismissal is motivated not simply by the expression of the belief itself (or third parties' reaction to it)** but by **something objectionable in the way in which it was expressed**, determined objectively, then the effect of the decision in *Page v NHS Trust Development Authority* [2021] ICR 941 is that **the dismissal will be lawful if, but only if, the employer shows that it was a proportionate response to the objectionable feature—in short, that it was objectively justified**: see para 74 above.
> >
> > (3) Although point (2) modifies the usual approach under the Equality Act 2010 so as to conform with that required by the European Convention on Human Rights, that "blending" is jurisprudentially legitimate: see paras 81–97 above.
> >
> > (4) In the present case the claimant, who was employed in a secondary school, had posted messages, mostly quoted from other sources, objecting to government policy on sex education in primary schools because of its promotion of "gender fluidity" and its equation of same-sex marriage with marriage between a man and a woman. **It was not in dispute**, following the earlier decision of the EAT in *Forstater v CGD Europe*, **that the claimant's beliefs that gender is binary and that same-sex marriage cannot be equated with marriage between a man and a woman are protected** by the Equality Act 2010.
> >
> > (5) The school sought to justify her dismissal on the basis that the posts in question were intemperately expressed and included insulting references to the promoters of gender fluidity and "the LGBT crowd" which were liable to damage the school's reputation in the community: the posts had been reported by one parent and might be seen by others. However, **neither the language of the posts nor the risk of reputational damage were capable of justifying the claimant's dismissal in circumstances where she had not said anything of the kind at work or displayed any discriminatory attitudes in her treatment of pupils**: see paras 159–163

above.

> I emphasise that that is intended as **no more than a broad summary**. For anyone needing an accurate understanding of the details of our decision and the reasons for it, there is no substitute for a careful reading of the judgment in full. [emphasis added]

67. The parties referred me to a recent decision of the High Court**, Smith v MCC** [2025] EWHC 2987 as an example of the analysis of this type of case. I have read it, but do not consider that it sets out any new legal principles to which I need to refer.

68. In **Page** Underhill LJ, while accepting that it can be helpful to start the analysis in complaints of this nature by considering Convention rights, stated it is legitimate to start with an analysis of the **EQA** from which the right to bring the complaint derives:

> 37. The tribunal begins its discussion of the issues, at paras 49–62, by considering articles 9 and 10 of the Convention . It had no jurisdiction to entertain any claim for a breach of the appellant's Convention rights as such: see *Mba v Merton London Borough Council* [2014] ICR 357 , in particular per Elias LJ at para 35. However, by virtue of sections 3 and 6 of the Human Rights Act 1998 it was obliged to determine his claims under the 2010 Act compatibly, so far as possible, with his Convention rights. In his skeleton argument **Mr Diamond submits that for that reason in every case of religion or belief discrimination a tribunal should start by deciding whether there has been a breach of the claimant's relevant Convention rights, which can then inform its analysis of the claim under the 2010 Act . For myself, I do not think that there needs to be any such rule. It is, ultimately, the Act from which the claimant's rights must derive, and there can be nothing wrong in a tribunal taking that as the primary basis of its analysis. But of course if there is reason to believe that a particular approach or outcome may involve a breach of the claimant's Convention rights that question must be fully considered.** [emphasis added]

69. An advantage of having the **EQA** firmly in mind is that it ensures that careful consideration is given to the reason for the treatment. In **Higgs** Underhill LJ noted:

> **The phrase "because of" in section 13(1)** connotes a causative link between the protected characteristic and the treatment complained of. There has been a fair amount of exposition of the nature of that link in the case law. The line of cases begins with the speech of Lord Nicholls of Birkenhead in *Nagarajan v London Regional Transport* [1999] ICR 877; [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of JFS* [2010] 2 AC 728 ("the JFS case") . What it refers to is "**the reason why**" the putative discriminator or victimiser acted in the way complained of. In some

> cases that reason is inherent in the act complained of: these are often referred to as "criterion cases". **But in others it consists in the "mental processes", conscious or unconscious, that caused the discriminator to act, often referred to as their "motivation" (though not their "motive").** Where convenient I will in this judgment sometimes use the phrase "on the grounds of" as an alternative to "because of": this was the language of the predecessor legislation to the 2010 Act , as also of the EU Framework Directive referred to below, and it is recognised as having the same effect.

70. In **Page** Underhill underlined the importance of considering the reason for the treatment:

> 68. **I start with a point which is central to the analysis on this issue. In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it**: see para 29 above. **It is thus necessary in every case properly to characterise the putative discriminator's reason for acting.** In the context of the protected characteristic of religion or belief the Employment Appeal Tribunal **case law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of.** Of course, **if the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself.**
>
> 69. The distinction is apparent from three decisions in cases where an employee was disciplined for inappropriate Christian proselytisation at work— *Chondol v Liverpool City Council* (unreported) 11 February 2009, *Grace v Places for Children* (unreported) 5 November 2013 and *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 . In essence, **the reasoning in all three cases is that the reason why the employer disciplined the claimant was not that they held or expressed their Christian beliefs but that they had manifested them inappropriately**. In *Wasteney* Judge Eady QC referred to the distinction as being between the manifestation of the religion or belief and the "inappropriate manner" of its manifestation: see para 55 of her judgment. That is an acceptable shorthand, as long as it is understood that the word "manner" is not limited to things like intemperate or offensive language.

71. While Underhill LJ refers to the reason for the treatment, there may be more than one reason. In **Nagarajan** Lord Nicholls stated in the context of race discrimination:

> **Decisions are frequently reached for more than one reason.** Discrimination may be on racial grounds even though it is not the sole ground for the decision.

> **A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies** in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. **No one phrase is obviously preferable to all others**, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. **If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.** [emphasis added]

72. Where a decision is made for a number of reasons, which may result from an employee holding or manifesting a religious belief, all of which were an effective cause of the treatment, it will generally be necessary to analyse each reason separately.

73. Manifesting a belief generally demonstrates that you hold the belief. If an employee is subject to detriment asserted to be because of an objectionable way in which the belief has been manifested, it is always possible that, in reality, the objection is to the belief itself, rather than something inappropriate in the manifestation of the belief. Because the focus under the **EQA** is on the reason for the treatment, it is possible that different people might react differently to, for example, the same social media post. One person might react to an inappropriate manner in which the belief is manifested in the post, while another person might object to the belief itself.

74. In a case in which a it is asserted that a person has been subjected to detriment, or dismissed, because of an inappropriate manifestation of a protected belief or beliefs it may be helpful to ask:

1. what is, or were, the reason, or reasons, for the treatment
2. in respect of each reason:

    2.1 was it genuinely an objection to the manifestation of the belief rather than the holding of belief itself - if it was merely the holding of the belief the treatment cannot be justified

    2.2 if the reason for the treatment was the manifestation of the belief, was there something objectionable or inappropriate in the manifestation of the belief

– if not the treatment cannot be justified

2.3 if the reason for the treatment was something objectionable or inappropriate in the manifestation of the belief, was the treatment prescribed by law and proportionate - applying the **Bank Mellat** test – i.e.

2.3.1 whether the objective of the measure is sufficiently important to justify the limitation of a protected right

2.3.2 whether the measure is rationally connected to the objective

2.3.2 whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and

2.3.4 whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

75. Where there was more than one reason for the treatment, the analysis may not be the same for each reason.

76. In some cases it might be asserted, and could be determined, that the reason, or reasons, for the treatment is something properly separable from both the belief and the manifestation of the belief.

77. An employer is entitled to require its staff to conduct the full range of duties assigned to them, particularly where it has an ethos that includes the protection of people who have specific protected characteristics. In **Eweida v United Kingdom** (2013) 57 E.H.R.R. 8 the ECHR held of the case of McFarlane:

> 107 Mr McFarlane's principal complaint was under art.9 of the Convention, although he also complained under art.14 taken in conjunction with art.9. Employed by a private company with a policy of requiring employees to provide services equally to heterosexual and homosexual couples, he had refused to commit himself to providing psycho-sexual counselling to same-sex couples,

> which resulted in disciplinary proceedings being brought against him. His complaint of indirect discrimination, inter alia, was rejected by the Employment Tribunal and the Employment Appeal Tribunal and he was refused leave to appeal by the Court of Appeal.
>
> 108 **The Court accepts that Mr McFarlane's objection was directly motivated by his orthodox Christian beliefs about marriage and sexual relationships, and holds that his refusal to undertake to counsel homosexual couples constituted a manifestation of his religion and belief.** The state's positive obligation under art.9 required it to secure his rights under art.9.
>
> 109 It remains to be determined whether the state complied with this positive obligation and in particular whether a fair balance was struck between the competing interests at stake. In making this assessment, **the Court takes into account that the loss of his job was a severe sanction with grave consequences** for the applicant. On the other hand, the applicant **voluntarily enrolled on Relate's post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible. While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question of whether or not there been an interference with art.9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck.** However, **for the Court the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination**. The state authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case.
>
> 110 In conclusion, the Court does not consider that the refusal by the domestic courts to uphold Mr McFarlane's complaints gave rise to a violation of art.9, taken alone or in conjunction with art.14.

78. Generally, there is nothing unlawful in an employer deciding that they wish to support the LGBTQI+ community and requiring that their employees comply with their policies designed to put that support into effect.

The analysis of the Employment Tribunal

79. The Employment Tribunal chose to analyse the claim starting with Convention rights. The Employment Tribunal took its reasoning from the harassment complaints and applied it to

the direct discrimination complaints. I appreciate the considerable time and effort spent by the Employment Tribunal in analysing the complaints, but the approach it adopted has made the reasoning difficult to follow, particularly as it appears that the Employment Tribunal accepted that the respondent had a number of reasons for the treatment of the claimant.

80. I consider it is helpful to analyse the complaints relevant to the appeal brought in chronological order.

81. The first complaint concerns the initial withdrawal of the offer of the role of discharge mental health support worker on 10 June 2022. The claimant succeeded in this complaint but the analysis is relevant to the complaints that failed. The Employment Tribunal first considered this act in the section of the judgment dealing with the harassment complaints, although the initial withdrawal of the offer of the role of discharge mental health support worker on 10 June 2022 was not one of the specific complaints of harassment:

> 275. The withdrawal of the offer without more on 10 June 2022 had a severe effect upon the claimant. **He lost the conditional job offer because he had exercised his right to freedom of expression by way of participation in a political debate.** We accept it to be a job that he desired. He would not have applied for it otherwise. There was no suggestion he applied for it in bad faith. On the other hand, the respondent's objective (of caring for and safeguarding vulnerable service users) plainly is a weighty one. **Withdrawing the conditional job offer without giving the claimant a right to have his say and provide the assurances sought by the respondent went towards the objective of caring for vulnerable service users or discharging the duty of care owed to staff members. This is because it removed or significantly reduced the risk of the service users encountering the claimant's views. However, the claimant was not in post at this stage. He was not caring for any of the respondent's service users at this point. Objectively, the measure of withdrawing the conditional job offer without giving the claimant an opportunity to provide the assurances went beyond what was reasonably necessary to achieve the respondent's aims. Had the claimant been able to give the necessary assurances, the withdrawal of 10 June 2022 may in fact have impaired the objectives (if not defeated them altogether) as the claimant was the best candidate in the selection exercise.** (These considerations do not avail the claimant given the way in which the harassment complaint has been pleaded. For further reasoning on the question of the 10 June 2022 decision see paragraphs 322 and 323). [emphasis added]

82. When specifically considering the initial withdrawal of the job offer as a direct discrimination complaint, the Employment Tribunal stated:

> 322. When we considered this issue (in connection with the harassment claim in paragraph 275) we observed that, **when considering the withdrawal of 10 June 2022 through the prism of the claimant's Convention rights, there was a breach of such rights absent at least giving the claimant the opportunity of providing him with the necessary assurances.** (This was not a claim brought by the claimant). By application of the *Bank Mellat* criteria, the objective of the measure (withdrawing the conditional job offer) was sufficiently important to justify the limitation of the claimant's rights to freedom of expression and the measure was rationally connected to that objective. **At the risk of repetition, the respondent's focus was upon the welfare of service users. However, a less intrusive measure impacting on the claimant's Convention right to freedom of expression could have been used without unacceptably compromising the achievement of the objective. Rather than simply withdrawing the offer to the claimant without more, he ought to have been given the opportunity of providing the assurances sought by Touchstone.** Unfortunately, the respondent's approach had a severe effect upon Mr Ngole's right to freedom of expression. It had a significant impact upon him as he really wanted the job. While the objective being pursued by Touchstone was of course very important, simply withdrawing the conditional job offer without giving him that opportunity went further than was reasonably necessary towards Touchstone's objective. **To repeat what was said before, the claimant was simply not in post and therefore there was no or little risk of a service user finding him through an internet search.** He would simply not have been on the radar of any service user at that point. A less intrusive way of dealing with the matter was to invite him for a further interview or discussion. This step went towards the objective for the reasons cited towards the end of paragraph 276. However, that the measure went towards the objective does not outweigh its impact upon the claimant's rights.
>
> 323. Just as the University of Sheffield acted precipitously and disproportionality by removing (in breach of his rights under the ECHR) Mr Ngole from the social work course without giving him a right of reply (per paragraph 5(6) of Ngole cited in paragraph 230 above) so too did the respondent in this case by withdrawing the conditional job offer without more. **By application, therefore, of Article 10(1) and (2) this aspect of the claimant's direct discrimination claim upon the issue of the 10 June 2022 withdrawal must succeed. In paragraph 177, we cited from paragraph 94 of Higgs. By application of the principle there set out, just as where a limitation is objectively justified and (properly understood) that is not action taken because of the right in question but rather the objectionable way the right has been manifested or expressed, then the converse must be the case. If objective justification is not made out, then the reason for the impugned action must the exercise of the Convention right in question - in our case, that of freedom of expression under Article 10.** The views expressed by the claimant were rooted in his religious beliefs but were not a manifestation of

> them. **The reason why the respondent acted as they did is because of the claimant's expression of his religious beliefs. Those beliefs were a material reason for this treatment. That protected characteristic therefore was a cause of his treatment.** [emphasis added]

83. The Employment Tribunal decided that the core reason for the respondent's decision to retract the job offer on 10 June 2022 was the risk of service users encountering the claimant's views, presumably as a result of a internet search like that undertaken by the respondent. Because Mrs Hart and Mr Hanif had only read the Guardian and BBC News stories the only posts they can have been aware of were those referred to in the news stories – that "homosexuality is a sin" and "same sex marriage is a sin whether we like or not". It must be those posts that the Employment Tribunal thought service users might encounter. The Employment Tribunal treated the posts as the expression of a belief. The Employment Tribunal held that the initial withdrawal of the job offer could not be justified because the claimant had not been given an opportunity to provide the "assurances sought by Touchstone". It is a little difficult to understand what assurances the claimant could give that would prevent the risk of a service user coming across the Guardian and BBC news stories on conducting an internet search. There was no suggestion that the claimant could have arranged for the stories, that dated from 2017 and 2019, to be removed. In any event, the Court of Appeal judgment set out the claimant's Facebook posts in much greater detail and could be found on an internet search.

84. The Employment Tribunal held that, at the stage when the claimant applied for the role of discharge mental health support worker, there was little chance of service users conducting an internet search about him, because they would not know about his application for the role. The Employment Tribunal did not in its later consideration assess the likelihood of "vulnerable service users with severe mental health issues" choosing to conduct a internet search on the claimant, during the process of discharge from hospital, had the claimant been appointed to, and started working in, the role of discharge mental health support worker.

85. The next chronological complaint concerned the requirement on the claimant, in the letter of 14 June 2022, to attend a meeting, that eventually took place on 11 July 2022. The complaint includes the assertion that the burden of proof was reversed in requiring the claimant to prove that he would not discriminate because of his religious beliefs.

86. The Employment Tribunal dealt with this matter first when considering harassment. The Employment Tribunal stated:

> 257. Therefore, applying this to our case, we must consider whether the actions of Mr Ngole which caused the response complained of amount to a manifestation of his Christian beliefs. **The impugned actions of Mr Ngole were the posting of the Facebook messages which were reported by BBC News and The Guardian** (see the findings of fact at paragraphs 63 to 67). It was those postings which were in the minds of the respondent, and which caused Mrs Hart to send her letter dated 14 June 2022.
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> 258. As we observed in paragraph 68, neither Mrs Hart nor Mr Pickard read the judgment of the Court of Appeal in Ngole. (That said, the BBC News and The Guardian articles were accurate as to the contribution made by the claimant upon the debate around the Kim Davis case).

87. I note that it can only have been the posts referred to in the Guardian and BBC News stories that can have been a reason for the treatment. It was necessary for the Employment Tribunal to consider what it was about those posts that formed the reason or reasons for the treatment.

88. The Employment Tribunal stated:

> 259. As we said in paragraphs 193 and 194, the Court of Appeal in Ngole upheld **the High Court judge's findings in that case that the Facebook postings in question were made in a political context. They were not a protected manifestation of religion.** Per Eweida, there was **no sufficient close and direct nexus between the claimant's acts and the holding of Christian beliefs in themselves.**
>
> 260.**There was no evidence before this Tribunal otherwise.** With reference to paragraph 50 of these reasons, Mr Phillips asserted that the claimant was an Evangelical Christian. There was no evidence of this. No such evidence emanated from the claimant himself or from his witness Reverend Munby. Mr Phillips defined Evangelical Christianity as "a belief in the Bible, conservative views on homosexuality and spreading the belief." The evidence from the claimant and Reverend Munby (summarised in paragraph 51) speaks in

measured terms about evangelising. They both said that it is part of their faith so to do especially when called upon or asked to do. Neither suggested that they would evangelise without being asked to do so. Further, the claimant's expert evidence on this question (summarised in paragraph 52) does not refer to the claimant as an Evangelical Christian or that it is part of his faith it to evangelise save where asked to do so. **Reverend Sullins gave no expert theological evidence that the Facebook postings made by the claimant about the Kim Davis case were a manifestation of the claimant's religious beliefs.**

261. **Kathryn Hart's letter of 14 June 2022 was predicated upon the basis of concerns about the impact of the claimant's religious beliefs upon the respondent's service users.** It was not an objection to his religious beliefs in and of themselves. **A favourable inference is drawn in favour of the respondent upon this issue by the fact that a conditional job offer was made to the claimant in circumstances where it was clear from his application form that he is of the Christian faith.** We refer to the findings of fact at paragraphs 41 to 47.

262. **Further, a significant proportion of the respondent's workforce are Christian.** We refer to the findings of fact in paragraphs 25 and 47. In those circumstances, it is against the probabilities that the respondent would seek to withdraw an offer made to an individual who has openly declared their Christian faith simply because they are Christian.

263. **In our judgment, therefore, Kathryn Hart's letter of 14 June 2022 was not a breach of the claimant's unqualified right to hold his religious belief pursuant to Article 9(1)**. Further, **his right to manifest his religious belief in Article 9(2) is not engaged**. There being no evidence additional to that presented before the High Court in *Ngole* (to the effect that Facebook postings of the kind made by the claimant are a manifestation of his religion) **it follows that the Tribunal is bound by the rulings of the High Court and the Court of Appeal in *Ngole* to hold there to have been no manifestation of the claimant's religious beliefs by the Facebook postings.** Without such binding rulings, respectfully we would have reached the same conclusions. The claimant's Facebook postings about the Kim Davis case were plainly influenced and rooted in the claimant's religious beliefs. However, the postings were not intimately linked to the religion or belief. There was no sufficient and close nexus to his religious beliefs. They were a contribution to a political debate. There was no evidence that the claimant's contribution to the debate around Kim Davis was intimately linked to his religion. There was no evidence that making such postings was a tenet of Evangelism or sufficiently close to it and in any case, there was no evidence that the claimant was an Evangelical Christian. Even if we were to accept him to be an Evangelical Christian, the suggestion that it was a tenet of his faith to proselytise was contrary to the claimant's evidence as we said in paragraph 260. Per Page (cited in paragraph 192 of these reasons) the beliefs expressed in the postings were rooted in the claimant's religious beliefs but were not a direct expression of his Christianity. [emphasis added]

89. The Convention rights focus did not greatly assist in the analysis because it diverted attention away from the question of what it was about the posts that the respondent thought might be damaging to vulnerable service users. If it was an objection to the fact that the claimant held the beliefs of which the respondent was aware, and accepted to be protected religious beliefs for the purposes of the **EQA**, Article 9 **EHRC** would be engaged.

90. The Employment Tribunal went on to consider Article 10 **EHRC** in the context of the harassment complaint:

> 264. **We therefore turn on this issue to a consideration of the claimant's rights under Article 10** to freedom of expression. **That the respondent may have found the claimant's Facebook postings to be disagreeable or even offensive is of course no answer to the claimant's rights to express those views**. Authority for this proposition is to be found in paragraph 173 [43] to [49] and in the cases cited in paragraphs 235 to 238. However, this principle is of less applicability per *Page* - (see paragraph 200 above) - where the views in question create a risk which relates directly to the ability of a party to perform core healthcare functions. The respondent's concerns went beyond simply finding the claimant's to be offensive.
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> 265. We agree with the claimant that his rights to freedom of expression are engaged on the facts of this case. In *Higgs*, no question arose as to the applicability of Article 10 to that case involving issues of expressions of opinion rooted in religious belief, notwithstanding the question raised about this in Page at [64] (see paragraph 174). The right to freedom of expression is of course a qualified right per paragraph 173 [49] and [50]. **The issue which arises therefore is whether Mrs Hart's assertions in the letter of 14 June 2022 to the effect that the claimant's religious beliefs might prevent him from acting in the best interests of service users** were prescribed by law and if so, were a proportionate restriction upon the claimant's rights to freedom of expression.
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> 266. Eady P in *Higgs* looked at what was meant by the expression "prescribed by law": (see paragraph 173 [52]). We also looked at how this issue was addressed in Purdy (paragraphs 221 to 224).
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> 267. The question is whether there is a legal basis in domestic law for the restriction upon the claimant's right to freedom of expression. Mr Wilson submitted in paragraph 20 of his written submissions that, "it is not immediately apparent how that analysis applies in the context of an employer considering whether or not to maintain a job offer to a potential employee."
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> 268. Where there may be some merit in that observation, in the Tribunal's judgment there is a legal basis in domestic law for the restriction upon the right

to freedom of expression. The first of these may be found in the public sector equality duty to be found in Part 11 Chapter 1 of the 2010 Act. Section 149(1) provides that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation or any other conduct prohibited under the 2010 Act, advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and those who do not share it.

269. Of course, the respondent in this case is not a public authority. Nonetheless, as Mrs Hart says in paragraph 29 of her witness statement the respondent sought to achieve the objectives in the public sector equality duty anyway and of course were required by the CCG to work in compliance with that duty as the CCG themselves would be subject to it as a public authority. **Further, it is of course lawful for an employer to set out their requirements in a job description and person specification such as those to be found at pages 116 to 124 of the bundle.** These meet the second requirement per Purdy of accessibility to the affected individual - (the claimant in this case). He saw the job description and person specification and was able to tailor his application accordingly to comply with the respondent's requirements. **This, amongst other things, required the post holder to be committed to and to promote the respondent's equal opportunities and discrimination policies** (at page 119, point 7) and **have a commitment to respecting diversity, to anti-discriminatory, anti-oppressive practices and equal opportunities and be sensitive to the needs of disadvantaged groups** (pages 121 and 122). No issue appears to arise upon the third requirement per Purdy that the restrictions were being applied in a way that is arbitrary such as being in bad faith. This segues now to the proportionality assessment in Bank Mellat.

270. This is set out in (paragraph 173 [54]). The first question which arises is whether the objective of the measure is sufficiently important to justify the limitation of a protected right.

271. **There is, in our judgment, ample evidence that much of the respondent's work is with the LGBTQI+ community**. We refer to paragraphs 24 and 25 above. Further, a significant proportion of the respondent's workforce is from the same community (paragraph 26).

272. **There is also ample evidence that those from the LGBTQI+ community are (far more than other groups) likely to experience serious mental health problems.** We refer for instance to paragraph 28, 29, 30, 31, 36, 37, 39, 40 and 74 and the expert evidence recited at paragraphs 147 to 163. **On any view, therefore, the respondent's objective of restricting the claimant's right to freedom of expression (for the safeguarding of the interests of vulnerable service users and members of Touchstone's staff) is of sufficient importance to justify the limitation of that right.** It is also rationally connected to the objective of safeguarding service users as articulated by Mrs Hart – see paragraphs 28 and 74, and upon the basis of **Dr Joubert's expert evidence of the risk to service users from the open expression of orthodox Christian**

> **views coupled with the professional experience of Mrs Hart and Mr Pickard.**
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> 273. The next issue upon proportionality per *Bank Mellat* is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective of safeguarding service users and staff welfare. **A less intrusive way of dealing with the respondent's concerns than simply withdrawing the conditional job offer (as took place on 10 June 2022) was to alert the claimant to the concerns and then to give him an opportunity to provide the assurances required by the respondent.** Mrs Hart did not do this on 10 June 2022 (paragraph 75). The conditional job offer was simply withdrawn without the giving the claimant that opportunity. That this was intended to be the respondent's final word is plain from the last sentence of the letter where the claimant is thanked for his "interest in Touchstone" and Mrs Hart wished him well for the future. It is only because the claimant effectively pushed back that the suggestion was made by Mrs Hart of a meeting between her, Mr Pickard and the claimant. By her letter of 14 June 2022, in our judgment, that which ought to have been done on 10 June was done. (The harassment claim is pleaded upon the basis of the letter of 14 June 2022 (at paragraph 15 of the amended particulars of claim) and not based on the letter of 10 June 2022 pleaded in paragraph 11). Giving the claimant an opportunity to provide assurances and satisfy the respondent as to his suitability for the role at interview would not compromise the objective. The role was not yet on-stream. The relevant Wakefield Hospital patient group were not and could not have been aware of the claimant or of his interest in the role at this point. There was negligible risk of the patient group encountering the claimant's views. That the claimant had applied for the role was not public knowledge. Withdrawal of the conditional job offer without more on 10 June 2022 was not rationally connected to the objective. Indeed, it ran counter to the objective as the claimant was the best candidate, there was a pressure to get the role started, and withdrawing the offer left the respondent with the issue of backfilling the role. Thus, it was an intrusive measure. **A less intrusive way of proceeding was alighted upon several days later by affording the claimant a further interview.**
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> 274.The fourth and final element of the proportionality assessment in *Bank Mellat* is to consider whether, balancing the severity of the measure's effect on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. Per Denbigh High School the Tribunal's task is to make a value judgment by reference to the circumstances prevailing at the relevant time. [emphasis added]

91. The Employment Tribunal then discussed the original withdrawal of the job offer, before returning to the requirement on the claimant to attend a second meeting:

> 276. **On the other hand, Mrs Hart's letter of 14 June 2022 may be viewed in a different light. It does not go too far in summarising the claimant's views. It is right for her to say that he has very strong views against**

homosexuality and same sex marriage, and it is equally right to say that those views go completely against those of the respondent. She had well founded concerns as to how those views would impact upon his ability to act in the best interests of the respondent's service users and staff given that there are members of the LGBTQI+ community in both groups. The claimant was then told that he was to be afforded an opportunity of giving the respondent the assurances required that the role would not be compromised by his views. Per *Begum*, weight must be given to the expertise of Mrs Hart and Mr Pickard in the way in which they decided to balance the interests of the claimant by allowing him a second interview against achieving the objective of safeguarding the interests of the service users. **Testing the claimant's views and his suitability for the role was rationally connected to the safeguarding objective. There was a need to ascertain and revisit the claimant's suitability for such a highly sensitive role given the new information obtained by the respondent in the Google search after they made the conditional job offer.** The consequences of not conducting further enquiries and appointing an unsuitable candidate were so serious that the adverse effect upon the claimant of calling him for a second interview was outweighed by the interests of the service users. Calling him for a second interview was also rationally connected to the safeguarding objective given that the claimant was the best candidate in the selection process in May 2022, there was time pressure from the CCG to get the role on stream, and had the claimant been able to offer assurances matters could have proceeded swiftly. Otherwise, the process of getting someone in situ in the role would be set back. **The safeguarding concerns outweighed the impact of the measures upon the claimant's rights.**

277. **In our judgment, therefore, it follows that there was no infringement of the claimant's Article 10 rights in Mrs Hart's letter of 14 June 2022**. Per the citation from *Higgs* in paragraph 177 **the action taken (being objectively justified) was not because of the claimant's exercise of his freedom of expression but rather because of the objectionable expression of his views**. **The same justifications would have availed the respondent had the claimant's rights to manifest his religious beliefs been engaged.** As we have said, Underhill LJ at [67] of *Page* says that the Convention rights and rights under the 2010 Act must be intended to be coextensive. He also observed at [74] that it is highly desirable that the domestic and convention jurisprudence should correspond. Further, the Tribunal derives little assistance from *Livingston*. The impugned comments of Mr Livingston were (as in Mr Ngole's case) made in a private capacity (outside the parameters of his (Mr Livingston's) job role. **The claimant was seeking a role where the evidence is that lives may potentially be at stake were the claimant's views to become know.** We cannot see that Livingston may be taken as authority that the claimant's views may not be restricted in circumstances such as those prevailing in June 2022. An exercise such as this places the Tribunal in an invidious position of carrying out an unnecessary weighing of the relative importance of different jobs. Each case must be decided on its own merits and on our analysis of the facts of this case, objective justification is made out on this issue. [emphasis added]

92. When considering the direct discrimination complaint in respect of requiring the claimant to attend a second interview, the Employment Tribunal stated:

> 315. However, the allegation of direct discrimination is more broadly couched than the specific allegations of harassment pertaining to the interview of that date. **The direct discrimination allegation is the requirement for the claimant to attend the second interview which took place on 11 July 2022.** The restrictions placed upon the claimant's freedom of expression by the requirements in the harassment claims were, for the reasons given, prescribed by law and satisfy the four criteria in the *Bank Mellat* proportionality test. We refer to paragraphs 287 to 300 (when read with paragraphs 266 to 269 on the issue of prescription by law).
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> 316. **Precisely the same considerations apply as to the reasonable necessity of Touchstone to call the claimant in for a second interview.** Plainly, **the respondent's concern, in summary, was for the protection of the health of others (being members of staff but even more importantly perhaps vulnerable service users) and for the protection of the respondent's reputation with the CCG.** We agree with Mr Wilson that **there was a need for the respondent to satisfy themselves that the claimant would be capable of fulfilling the role and to enable them to assess the risk to service users in light of the respondent's discovery of the Facebook postings.** Plainly, this was an important objective and one rationally connected to the limitation imposed upon the claimant's rights to freedom of expression in permitting the claimant a further meeting before agreeing to reinstate the job offer.
> 317. It is difficult to see how a less intrusive means of ascertaining the claimant's suitability could have been alighted upon than by inviting the claimant to be questioned and to give him the opportunity of satisfying the respondent as to his suitability for the role and giving him the assurances sought. Mrs Hart said in paragraph 8 of her witness statement (in paragraph 137) that those from the LGBTQI+ community are at incredibly high risk of self-harm and suicide. **Discovery of the claimant's beliefs is a realistic possibility in the era of internet searches.** The respondent's position is corroborated by the expert evidence which they commissioned from Dr Joubert that although the risk cannot be quantified it should be eliminated as much as possible. **Given the potentially disastrous consequences for the service users and devastating reputational damage to the respondent that would follow, Mr Wilson must be right that the severity of the measure (of inviting the claimant for second interview) upon his rights to freedom of expression was far outweighed by the respondent's need to ensure the potential postholder to be suitable for role when servicing the needs of vulnerable service users.** This is even more so (by reference to the factors in paragraph [94] of Higgs) taking into account the content and tone used by the claimant in his postings, the respondent's business and their audience (of service users), and the power imbalance as the post holder is the only social worker to whom recourse may be made by service users. [emphasis added]

93. On a fair reading of the judgment as a whole, including the passages quoted above, it appears that the Employment Tribunal decided that the reasons for the respondent's decision to invite the claimant to a second interview were because of the firm views that the claimant had expressed about homosexuality and same-sex marriage in the posts, of which the respondent was aware from reading the Guardian and BBC news stories, and the conclusion that the claimant should demonstrate that he would be able to meet the needs of the respondent's service users and work with all his colleagues, including by complying with the respondent's policies. The reference to reputation damage in this context is to the damage that would be caused if the respondent did not support its service users and employees from the LGBTQI+ community.

94. When dealing with the assertion of a reversed burden of proof, the Employment Tribunal held:

> 331. The final allegation is at sub paragraph 2.2.4 of paragraph 164 which was that a reverse burden of proof was put on the claimant to prove that he would not discriminate because of his religious beliefs. We agree with Mr Wilson's submission (in paragraph 42 of his written submissions) that **the claimant was required to provide an assurance that he would fully support LGBTQI+ service users were he to be re-offered the mental health support worker role.** Whether one calls this a reverse burden of proof or not, it is plain in our judgment that there was an expectation placed upon the claimant by the respondent to provide them with the assurances required. While we may not go so far as to call this a reverse burden of proof, the respondent was certainly placing the onus on the claimant to satisfy them. It was not the case, for example, that the respondent was seeking to convince the claimant that he was unsuitable for the role. The ball was plainly put in the claimant's court. However, we find this not to be a breach of the respondent's Convention rights to freedom of expression for much the same reason as upon the first allegation of direct discrimination, that being the requirement for the claimant to attend the second interview of 11 July 2022 in paragraphs 314 to 317. For the same reasons, we find that the respondent acted in a proportionate manner given the issues at stake.
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> 332. For the avoidance of doubt, the same considerations would apply upon the claimant's Article 9(2) rights to manifest his religious belief were the Tribunal to be wrong to find there to be no manifestation on the facts of the case. This imports the same considerations of proportionality pursuant to Bank Mellat and we are satisfied for the reasons given that the respondent has discharged the

> burden upon them of proving a proportionate and justified interference with the claimant's qualified rights to manifestation of religious belief (were they to be applicable) and freedom of expression.

95. The next relevant allegation concerns the decision not to reinstate the job offer set out in the letter of 18 July 2022. This resulted from the respondent's assessment that the claimant had not provided the assurances that they required about his suitability for the role of discharge mental health support worker at the meeting on 11 July 2022. The Employment Tribunal first considered this when analysing the harassment complaint:

> 290. In addressing the impugned events of 11 July 2022, the Tribunal shall adopt the same approach as with that of Mrs Hart's letter of 14 June 2022. For the same reasons, we hold that the claimant's Article 9 rights are simply not engaged. **The questions and issues raised at the interview of 11 July 2022 were all directed at the compatibility of the claimant's religious beliefs with the role at Touchstone. They were not directed at the claimant's Christian beliefs in and of themselves.** There was dissociation of the belief from the message and the impact of the message. **In any case, as we have found, the views expressed by the claimant in the political debate about Kim Davis were not a manifestation of his religious beliefs.**
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> 291. **As with the impugned act of 14 June 2022, the claimant's rights under Article 10 to freedom of expression are engaged.** For the same reason as with the impugned act of 14 June 2022, the prescription by law requirement in Article 10(2) is satisfied: see paragraphs 268 and 269. The issue which arises therefore is the application of the *Bank Mellat* proportionality test.
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> 292. **This engages much the same considerations as with the impugned act of 14 June 2022 and our conclusions are the same.**
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> 293**. The objective of the questioning of 11 July 2022 was to ascertain the claimant's suitability for the role given that he would be working (albeit not exclusively) with those from the LGBTQI+ community who have mental health issues sufficient to warrant in-patient hospital treatment**. **The risks to service users of coming across the open expression of the claimant's orthodox Christian views presented a significant risk to service users.** This was a real risk as identified by Mrs Hart, Mr Pickard, and Dr Joubert.
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> 294. **The Tribunal acknowledges that the claimant said that he would approach matters respectively and cautiously if asked to espouse his views and would not engage in any unwelcome evangelising - (paragraph 130). The Court of Appeal held (as we observed in paragraph 77) that the mere expression of views on theological grounds does not necessarily connote that the person expressing such views will discriminate on such grounds. It was not, therefore, so much a question of the claimant engaging in unwelcome**

evangelising or discriminating (and the Tribunal readily accepts that he would not) but rather, as Mrs Hart said in paragraph 82 of her witness statement (quoted in paragraph 74 above) **the public nature of the claimant's views and the risk of a service user conducting a Google search of him out of curiosity and finding the same information uncovered by Touchstone on their Google search.** The Court of Appeal observed (as we said in paragraph 231 above) that social work service users cannot usually choose their social worker. This was the case with the role in question here as it is intended to be a sole role. The claimant's suggestion therefore that another employee may be able to take over in a difficult case was unfounded.

295. **Dr Joubert's expert opinion (recorded in paragraph 158) was that the risk in question cannot be quantified but if recognised** (as it had been by Mrs Hart and Mr Pickard) **then it should be eliminated as much as possible**.

296. **It is, in our judgment, unrealistic for anyone encountering the claimant's Facebook postings about the Kim Davis case to make the theological distinction between the word "sin" in the Christian sense on the one hand and the word "sin" in its everyday sense on the other. Strong theological language had been used by the claimant in the postings.** We commented in paragraph 146 that in our judgment there was unfair criticism by Reverend Sullins of Mrs Hart and Mr Pickard of a failing to make theological distinctions. **It is simply unrealistic to suppose that a vulnerable service user such as those to be helped in the role in question could make those distinctions such that there was no risk of those adverse consequences alluded to by Mrs Hart.**

297. Mr Ngole's case has some resonance with that of *Page*. Of course, there are factual distinctions. **Mr Ngole's impugned Facebook postings were, as Mr Phillips rightly observes, made some eight years prior to the events with which we are concerned** in the summer of 2022. Mr Page's actions were much more contemporaneous with the events in his case. **Mr Ngole did not disregard instructions not to broadcast views and certainly did not appear on national television to espouse them.** On the other hand, the position of Touchstone is as sensitive as was that of the Trust and the Authority in *Page*. We touch on this in paragraphs 197 and 200. As in the instant case, in Page there was evidence that there was a specific and genuine concern as to the impact of Mr Page's actions on the ability to serve the entire community in the catchment area in circumstances where, as it was found by the Employment Tribunal in Page, there had been "specific issues with LGBTQI+ members of the community suffering disproportionately from mental health problems and difficulty persuading them to engage with the Trust's services." **Plainly, there was a reputational issue. This was of concern to Touchstone who wished to develop their relationship with the Wakefield CCG in the hope of maintaining and attracting work.**

298. In *Page*, the complainant in that case did not run an argument that the perceived risk was unreal. In our case, Mr Phillips cross-examined Mrs Hart and Mr Pickard to that effect and took issue with Dr Joubert's views about the reality of the risk presented. Nonetheless, the Tribunal is satisfied on the facts

that there was a sufficiently real risk such as to present a matter of sufficient concern for the respondent to justify the limitation of the claimant's protected right to freedom of expression. The measure was rationally connected to the objective. **The purpose of the meeting of 11 July 2022 was for Touchstone to receive the assurances which they needed before reinstating the conditional job offer.** (To this extent, the Tribunal had additional evidence and material not available to the High Court in Ngole about the potential impact on service users).

299. It is difficult to see how a less intrusive measure could have been used without unacceptably compromising the achievement of the objective of safeguarding the interests of the service users. How else, it may be asked rhetorically, could the respondent achieve the objective (of receiving a sufficient assurance of the claimant's suitability for the role) without questioning him directly? This was not done at the interview in May 2022 because, of course, the respondent was not aware of the Facebook postings at that point. Had they been, they doubtless would have asked him then. As it was, what was tantamount to a second interview was arranged. There was no other way that Touchstone could satisfy themselves, given the paucity of information in the references.

300. In balancing the severity of the measure's effects on the rights of the claimant against the importance of the objective (to service users), on any view the balance favours the respondent's chosen course of action. It would not objectively have been reasonable to allow the claimant simply to take the role and see what happens. Indeed, such would have been an irresponsible course. The respondent had to assure themselves of the suitability of the claimant for the role. **The consequences for some service users of coming across the claimant's views was so serious that there plainly has been made out justification for the limitation of the claimant's protected right to freedom of speech.** Applying the guidance in paragraph [94] of *Higgs* leads inexorably to this conclusion for similar reasons as in paragraph 286 above. Per [94] of *Higgs* (cited in paragraph 177 above) the limitation on freedom of expression was objectively justified and thus the limitation was not because of the exercise of the claimant's rights under Article 10 but by reason of the objectionable manner of the expression by the claimant of his views.

301. The remaining three allegations of harassment all concern admitted acts on the part of the respondent which took place on 18 July 2022. These are at sub-paragraphs 3.1.3, 3.1.4 and 3.1.5 of paragraph 164. They all relate to what was said in the respondent's letter of 18 July 2022 which is quoted in paragraph 137.

302. Having considered the letter, the respondent's concession that they did the impugned acts on 18 July 2022 is one properly made. For very much the same reasons as with the impugned acts of 11 July 2022, the Tribunal finds there to have been a justified interference with his right to freedom of expression by application of the proportionality test in *Bank Mellat*.

303. The letter of 18 July 2022 was written after the meeting of 11 July 2022. **The respondent's conclusion was that they had not received the necessary assurance as to the claimant's suitability of the role and therefore the risk of engaging him was too great. The respondent concluded that there was potential for harm arising out of the expression by the claimant of his views.** Objectively, the tribunal concludes this was a proportionate conclusion in the circumstances giving appropriate weight to the expertise of the respondent's lay witnesses per Begum. We have found as a fact that the claimant said on a number of occasions that he had already answered (at the first interview) questions asked of him in the second interview, and that on a number of occasions he fell back on saying that he would follow the respondent's policies and procedures. We refer to paragraphs 110 to 112. **The claimant also described the meeting of 11 July 2022 as "dodgy" and "despicable and wrong". He said that he felt "ambushed" and that the meeting was "unfair and unjustified".** We refer to paragraph 113. When viewed in this way, the claimant's approach was hardly assuring given the somewhat hyperbolic language used by him. Further, as we said in paragraph 126 **the claimant expressed a preference to be excused from LGBT awareness training. He said that he would express his views if others did likewise.** He assured Touchstone that he would do this is a professional way but that to force him to "keep quiet" would be discriminatory against him. He also intimated (in paragraph 135) the possibility of the pursuit of proceedings in the Employment Tribunal. This was perceived by Mrs Hart as a threat and may be thought a surprising approach where the claimant was seeking restoration of the job offer. **These features could hardly reassure the respondent that the claimant would not espouse views hurtful to the LGBTQI+ community.**

304. We have observed that there is criticism to be made of the respondent's approach in the interview. We refer in particular to paragraphs 105, 106 and 133. Mr Phillips is right to suggest that there were many questions about LGBTQI+ rights. However, it is, we think, wrong to characterise this as an "obsession" (as it was put by him when cross examining Mrs Hart). Rather, it was an understandable focus on the part of Touchstone given the sensitivity of the LGBTQI+ community who Touchstone was hoping to serve in the Wakefield area.

305. These observations from the interview filtered through into the letter of 18 July 2022 and into the three impugned acts of harassment at sub paragraphs 3.1.3, 3.1.4 and 3.1.5. For the same reasons as with the allegations of harassment arising out of the letter of 14 June and the meeting of 11 July 2022 the Tribunal is satisfied that the respondent has made out their case that their approach was proportionate by reference to the four *Bank Mellat* criteria and by application of the guidance in paragraph [94] of Higgs. It follows therefore that there was no unjustified interference with the claimant's Article 10 rights by the respondent. The same conclusions would be reached upon justification of interference with the right to manifest religious beliefs were the Tribunal to be wrong to find them not to be engaged. **The action was taken by reason of the objectionable manner of the expression of the claimant's views, was not taken because of his religious beliefs, and is objectively justified.** [emphasis added]

96. When considered as an allegation of direct discrimination, the Employment Tribunal stated:

> 324. However, the complaint about the refusal to reinstate the conditional job offer must fail for the reasons given in paragraphs 290 to 305. **In summary, the respondent's conclusion was that they had not received the necessary assurance as to the claimant's suitability of the role and therefore the risk of engaging him was too great.** Objectively, the tribunal concludes this was a proportionate conclusion in the circumstances giving appropriate weight to the expertise of the respondent's witnesses per *Begum*. There was no less intrusive way of achieving the aim than not reinstating the job offer after **the claimant had been assessed as unsuitable for the role due to the risk of service users coming across his views.**
>
> 325. The Tribunal has of course found that the claimant's Article 9 rights are not engaged in this case. This is because **the claimant did not suffer the withdrawal of the conditional job offer upon the basis of his religious beliefs in and of themselves or because of a manifestation of his beliefs. Rather, it was because the comments made gave rise to a concern on Touchstone's part about his ability to fulfil the role.** The views expressed in the Facebook postings about the Kim Davis case were rooted in the claimant's Christian faith but were not, on our findings, a manifestation of them. The respondent has justified its actions in not reinstating the conditional job offer. **The action was not taken because of is expression of views rooted in Christian beliefs but because of the objectionable manner of the expression of them.**
>
> 326. If the Tribunal is wrong upon the question of manifestation, then the same outcome would apply by application of the *Bank Mellat* proportionality test to the claimant's claims under Article 9(2) as under Article 10(1) and (2) in any case.

The grounds of appeal permitted to proceed

97. The grounds of appeal that were permitted to proceed are:

> 1. the ET came to a perverse finding that Minority Stress Theory was a credible theory and related to this, that Mrs Hart's, Mr Pickard's and/or Dr Joubert's evidence on this matter was credible
>
> 2. the ET found that there was no interference with the Claimant's Article 9 rights
>
> 3. the ET was bound to conclude that the Respondent's interference with the Claimant's rights cannot be justified under Article 9(2) or 10(2)
>
> 6. having found the views expressed by the Claimant were rooted in his religion and were a material influence upon the Respondent's decision to withdraw the

> conditional job offer without more, the ET should have found all aspects of his Direct Discrimination claim proved
>
> 8. the Respondent adopted the discriminatory views of that third party and was thus guilty of direct discrimination
>
> 9.1. the ET reversed the burden of proof to the Claimant such that he was required to prove that his views would not lead him to act in a discriminatory manner
>
> 9.2. the ET created a false comparator and then muddled the *Ladele* comparator such that it became nonsensical

98. The grounds of appeal are overlapping and interrelated. The text supporting the grounds is often wide ranging and appears to include challenges to findings of fact.

99. The respondent asserts that the grounds of appeal inappropriately challenge findings of fact and that, on the findings of fact made by the Employment Tribunal, it was correct to reject the complaints. The respondent argued in the alternative that on the basis of the facts found and other uncontested facts, the respondent would have been justified in maintaining the withdrawal of the offer of employment for reasons that were properly separable from the claimant's protected beliefs. I have to consider whether there was an error in law in the analysis of the reasons the respondent had for maintaining the withdrawal of the job offer. If any of the reasons were discriminatory, the assertion that there was an additional or alternative reason, or reasons, for maintaining the withdrawal of the job offer would go to remedy.

Overall

100. I have concluded that it is most effective to consider each of the specific complaints live in this appeal and to analyse the challenges relevant to the findings on each complaint separately. The following conclusions should be read with my analysis of the law and comments on the reasoning of the Employment Tribunal above.

101. The Employment Tribunal, having identified a number of reasons for the treatment, failed to identify, for each act, the reasons why the respondent acted as it did, and then to

analyse each reason separately. This is not a case like **Higgs** in which the fundamental reason for the treatment was not significantly in issue.

Requiring the claimant to attend a second interview

102. On a fair reading of the relevant sections of the judgment, the main reason for the claimant being called to a second interview was Mrs Hart's concern that the claimant might express his view inappropriately with service users and staff and not comply with the full requirements of the role. This reason was about how the claimant would undertake the role if appointed. The Employment Tribunal also held that another part of the reason was that service users might find out about the claimant's posts if they conducted an internet search.

103. Dealing first with the concern that the claimant might not act in the best interests of the respondent's service users and staff. The Employment Tribunal permissibly concluded that it is lawful for an employer to set out their requirements in a job description and person specification and that the respondent was entitled to require the post holder to be committed to, and to promote, the respondent's equal opportunities and anti-discrimination policies. The Employment Tribunal was entitled to accept that the respondent required an assurance that the claimant would fully support LGBTQI+ service users were he to be re-offered the mental health support worker role.

104. It was the discovery of the Guardian and BBC News stories that resulted in the respondent seeking those assurances. What was it about those news stories that resulted in the respondent seeking the assurances? The Employment Tribunal referred to the "objectionable expression" of the claimant's views. The claimant when engaged in a political debate had expressed in strong terms that "homosexuality is a sin" and "same sex marriage is a sin whether we like or not". The respondent was entitled, in the context of its vulnerable service users, to conclude that such strong statements, if made in the workplace, are something to which "objection could justifiably be taken" and "inappropriate". The fact that the claimant had

previously posted such comments meant it was appropriate for the respondent to consider with him whether he might similarly manifest his beliefs at work and whether he would fully engage with LGBTQI+ service users, training and partner organisations.

105. The Employment Tribunal did not rely substantially on the opinions of Dr Joubert. The Employment Tribunal stated that there was ample evidence that those from the LGBTQI+ community are likely to experience serious mental health problems. However, that was of relatively little relevance to its analysis because the service users about whom the respondent was concerned are not from the LGBTQI+ community at large, but are people who were being released from Pinderfields Hospital and require assistance from a discharge mental health support worker. All those who need the assistance of a mental health support worker would be very likely to be vulnerable, including those from the LGBTQI+ community. To the limited extent to which the Employment Tribunal relied on the evidence of Dr Joubert, I do not consider that the Employment Tribunal erred in law. The Employment Tribunal heard evidence from two experts, whose evidence did not substantially assist in determining the complaints, and preferred one to another. That is not a valid basis for appeal. I do not consider that ground 1 is made out.

106. Insofar as the respondent wished to ensure that the claimant would not make similar statements to those in the posts referred to in the Guardian and BBC News stories and that he would be committed to their policies of engagement with the LGBTQI+ community and LGBTQI+ support services, I do not consider that there is any error of law in the analysis of the Employment Tribunal. The Employment Tribunal adopted a **Bank Mellat** proportionality assessment that was open to it. This was a one-off decision on a subject that, while contentious, is now relatively well-trodden ground in employment law. By application of **Shvidler**, I consider that a review analysis is appropriate and do not consider that there was an error of law as asserted in ground 2 in respect of this aspect of the appeal. Any discriminatory impact on

the claimant being expected to attend a second meeting was minor. The same analysis would have applied even if the posts referred to in the news stories had been accepted to be a manifestation of the claimant's religious belief. I do not consider that, in the circumstances of this case, requiring assurances that the claimant would fully comply with the requirements of the role of discharge mental health support worker involved a reversal of the burden of proof. I reject Ground 9.1.

107. However, the Employment Tribunal also concluded that part of the reason for the claimant being called to a second interview was a concern that service users (and possibly staff members) from the LGBTQI+ community might find out about the posts referred to in the news stories, rather than the concern that the claimant might make similar statements at work, or not comply with the ethos and policies of the respondent in supporting service users from the LGBTQI+ community.

108. The Employment Tribunal referred to the impugned actions of the claimant being the posting of the Facebook messages which were reported by BBC News and the Guardian. The Employment Tribunal noted that the fact that staff of the respondent may have found the claimant's Facebook postings to be disagreeable or even offensive was no answer to the claimant's rights to express those views. The Employment Tribunal appears to have accepted that objection to the posts referred to in the news articles would not, of itself, justify any detrimental treatment. If the concern was, in part, merely that service users or staff might discover the posts referred to in the new stories, that begged the question of what it would be about the posts the respondent considered service users would find objectionable and what assurances the claimant could give that would satisfy the respondent's concerns, particularly in circumstances in which it was not suggested that he could arrange for the stories to be removed from the internet. The Employment Tribunal did not analyse what the respondent thought service users might have found objectionable about the posts referred to in the news stories and

whether it was properly separable from the beliefs. It seems a little unlikely that the objection of service users would be to the fact that the claimant had, some years ago, engaged in a vigorous political debate about the treatment of Kim Davis, the American registrar, who had been imprisoned after refusing to administer same-sex marriages because of Christian beliefs. It seems rather more likely that the objection would result from the discovery that the claimant held the beliefs that "homosexuality is a sin" and "same sex marriage is a sin whether we like or not". While I understand that there are many who find such views objectionable and deeply upsetting, those beliefs were accepted by the respondent to be protected religious beliefs. To the extent that the decision to call the claimant to the second interview was because of a concern that service users might have reacted badly merely to the fact that the claimant held the religious beliefs in question that would be treatment because of the belief and not capable of justification. The Employment Tribunal did not properly analyse this aspect of the complaint that will require further consideration on remission.

Not reversing the decision to revoke the job offer

109. It appears that the Employment Tribunal accepted that the reasons for not reinstating the job offer were essentially those set out in Mrs Hart's letter of 18 July 2022.

110. There are two main areas of concern raised in the letter. The first is about how the claimant would conduct the role of discharge mental health support worker if he was appointed. The second is the risk that service users and staff might come across the posts referred to in the Guardian and BBC News articles. The Employment Tribunal did not state how significant it considered each of these reasons, or group of reasons, to be. The Employment Tribunal did not analysed them separately, as I consider was necessary. The reasoning was elided.

111. The respondent was troubled that the claimant would not expressly state why he wanted to work for them. The respondent was concerned that the claimant might not actively promote services in the LGBTQI+ community and contact and develop effective working relationships

with partner organisations such as Mesmac and TransWakefield to support service users. The respondent was also concerned about whether the claimant would attend and contribute to LGB and transgender awareness training. The letter concluded by stating "we do not feel assured that you would be able to support service users from the LGBTQI+ community, therefore negatively exposing Touchstone as an LGBTQI+ ally and its service users and potentially putting Touchstone at risk of legal action on the grounds of discrimination in both employment and service delivery".

112. These concerns are consistent with the fact that the claimant asserted in the indirect discrimination complaint that he would be disadvantaged by the application of PCPs of the respondent requiring staff to: (1) actively promote LGBT lifestyles; (2) during LGBT awareness training only share views positive and promoting of LGBT lifestyles; (3) support same sex marriage; (4) be 'an ally' and 'speak up for LGBTQI+ rights; (5) confirm his or her adherence to the said PCPs prior to or during employment; and/or (6) use the pronouns by which people wish to be identified, such as he/she, them/they.

113. Similarly, in the harassment complaint the claimant contended that he had been asked to "act contrary to his religious and/or philosophical beliefs" by (1) promoting the rights of LGBTQI+ persons; (2) supporting same sex marriage; and/or (3) being an LGBTQI+ ally.

114. To the extent that any failure of the claimant to provide the assurances the respondent required might amount to manifestations of his religious belief , the treatment could potentially be justified, whether assessed under Article 9 and 10, adopting a **Bank Mellat** approach. However, the Employment Tribunal did not properly analyse the extent to which the decision not to reinstate the offer resulted from a failure to provide assurances that could be properly severable from the holding of the belief. The Employment Tribunal also did not properly analyse, in light of what the claimant had said at the meeting, whether the treatment was justified on **Bank Mellat** principles, particularly having regard to the greater discriminatory

effect of not reinstating the job offer as opposed to the requirement to attend a second meeting. The reasoning conflated this issue with that of service users coming across the claimant's posts.

115. Mrs Hart in her letter referred to the risk to service users if they came across the comments the claimant had made about homosexuality and gay marriage referred to in the news stories. Mrs Hart thought that service users might find the comments "upsetting and offensive". This was a matter referred to repeatedly in the Employment Tribunal's analysis of this complaint. The Employment Tribunal referred to the "risks to service users of coming across the open expression of the claimant's orthodox Christian views" and "the risk of a service user conducting a Google search of him out of curiosity and finding the same information uncovered by Touchstone on their Google search". The Employment Tribunal also referred to a "reputational issue" which was of concern to the respondent who "wished to develop their relationship with the Wakefield CCG". The Employment Tribunal stated that the "consequences for some service users of coming across the claimant's views was so serious that there plainly [was] justification for the limitation of the claimant's protected right to freedom of speech" and that "the claimant had been assessed as unsuitable for the role due to the risk of service users coming across his views".

116. As in the analysis of the complaint about the requirement to attend the second meeting, it was necessary for the Employment Tribunal to analyse what the respondent thought service users would object to if they came across the news stories; whether it would be the fact that the claimant held the beliefs or something objectionable in the manner in which he had expressed them. Any properly separable reason for the treatment would have to go beyond the fact that the beliefs that the claimant holds, that the respondent accepted are protected, are objectionable and upsetting to many people.

117. If the Employment Tribunal considered it necessary to construct a comparator as part of the analysis, which may well not be helpful in this case, it would depend on the specific

reason for the treatment being analysed, whether the concern about how the claimant would conduct the job if appointed or about how service users would react to discovering the posts of which the respondent was aware.

Outcome

118. The relevant components of grounds 2, 8 and 9.2 succeed in respect of the complaint of requiring the claimant to attend the second meting to the extent that it was based on the concern that service users might come across the news stories. I dismiss the challenge to the decision to require the claimant to attend a second meeting insofar as it was based on concerns about whether the claimant might provide the required support to service users and staff from the LGBTQI+ community, in respect of which reassurance was required. The relevant components of grounds 2, 8 and 9.2 succeed in respect of the complaint about the decision not to reinstate the job offer. The decision not to reinstate the job offer will have to be analysed again in full.

119. To the extent that these grounds succeed, analysis of the complaints is remitted to the Employment Tribunal. The analysis of the Employment Tribunal should include answering the questions at paragraph 74 above, insofar as each reason for the treatment is asserted to have been because of the allegedly inappropriate manifestation of the claimant's religious beliefs.

120. The Employment Tribunal will have to determine the extent to which each reason contributed to the relevant decision. That analysis will be important when assessing compensation, particularly in assessing what would have happened absent any further direct discrimination that is found to have occurred.

121. I do not uphold grounds 3 and 6 because they assert that the Employment Tribunal was bound to find in the claimant's favour, whereas I have concluded that is a matter for remission. I have also rejected ground 1 and 9.1.

122. The matter is therefore remitted to the Employment Tribunal. I have considered the submissions of the parties on remission and the factors in **Sinclair Roche & Temperley v**

Heard [2004] IRLR 763. The judgment of the Employment Tribunal was not totally flawed. The Employment Tribunal spent considerable time and effort in dealing with difficult issues in an area where the law is complex, although perhaps the dust is beginning to settle. The Employment Tribunal did not have the benefit of the decision of the Court of Appeal in **Higgs**.

123. There is no reason to doubt that the Employment Tribunal will act with integrity and professionalism and determine the matter with the assistance of the Court of Appeal judgment in **Higgs** and the structure for analysis set out in this judgment. The Employment Tribunal must analyse each reason, or group of related reasons, for the treatment separately and decide whether, at least in part, the treatment of the claimant was, in reality, because of his religious beliefs as opposed to something properly separable from them that justified the treatment. While there has been a significant passage of time, I expect that the Employment Tribunal will remember the case well, and will be better placed than a newly constituted Employment Tribunal to carry out the necessary analysis. Remission to a newly constituted Employment Tribunal would be likely to be somewhat more costly and so proportionality, albeit only to a limited extent, is in favour of remission to the same Employment Tribunal. Accordingly, I direct that the remission be to the same Employment Tribunal, unless there are factors, in the view of the Regional Employment Judge, that make reconvening the same panel impractical.