

Neutral Citation Number: [2026] EWCA Civ 1562

Case No: CA-2026-000598

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
HIS HONOUR JUDGE JAMES TAYLER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2026

Before:

LORD JUSTICE BEAN (Vice President of the Court of Appeal, Civil Division)
LADY JUSTICE ELISABETH LAING
LORD JUSTICE MILES

- -

Between :

FELIX NGOLE	**Appellant**
- and –	
TOUCHSTONE LEEDS	**Respondent**

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- -

Mr Bruno Quintavalle and **Mr Michael Phillips** (instructed by Camerons) for the Appellant
Ms Katherine Apps KC and **Mr Monty Fynn** (instructed by Irwin Mitchell) for the Respondent

Hearing dates: 28-29 September 2026

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Judgment Approved by the court

Lord Justice Bean:

1. The Appellant, Felix Ngole, brought claims against the Respondent Touchstone Leeds of direct discrimination, indirect discrimination and harassment because of or related to his religion or belief. Following a five-day hearing in the employment tribunal (ET) at Leeds before Employment Judge Brain and two members, Mr Ngole's complaints, save on one limited issue, were dismissed. He appealed to the Employment Appeal Tribunal (EAT). The appeal came before HHJ James Tayler who, in a reserved judgment dated 16 February 2026, allowed the appeal to the extent that the issues raised by three grounds of appeal were remitted to the same ET for a further hearing.

2. With permission granted by Singh LJ, Mr Ngole appeals against the EAT's decision to remit the issues on which it had allowed his appeal for re-hearing. Mr Quintavalle and Mr Phillips contend on his behalf that his appeal on the relevant issues should have been allowed outright. Conversely, again with permission granted by Singh LJ, Ms Apps KC and Mr Fynn contend by way of cross-appeal that the EAT should simply have dismissed Mr Ngole's appeal without remitting anything to the ET.

3. I gratefully adopt the factual narrative set out by the EAT:-

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 ET, 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 Respondent's 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 an 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 ET 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."
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> 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".
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> 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 ET 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. He 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 Appellant brought a judicial review claim 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 a claim under Article 9 ECHR, freedom of thought, conscience and religion.

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 an appeal was made to this court. 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 ET 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 it 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 Appellant's posts as follows:

> 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:
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> "... [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"
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> "...[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 provided a summary of its joint judgment in [5], 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.
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> (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 ET 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.

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."

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."

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."

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 ET accepted that her notes of the meeting were accurate.

31. The ET 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 ET 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 why you had applied to work 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.
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> (6) In particular, we asked whether you would be able to promote services in the LGBTQI+ community, 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 actively promote LGBTQI+ services 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.
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> (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.
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> (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."

33. The ET 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, and Founder of the Northern Gender Network.

34. The ET 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.
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> 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 ET 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."
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> 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".
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> 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."
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> 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 ET 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.
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> 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.
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> 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."
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> 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. 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 ET 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."

39. The claimant also brought a complaint of indirect belief discrimination in which he asserted that the Respondent applied provisions, criteria or practices ("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 to or during their employment; and/or (6) use the pronouns by which people wish to be identified, such as he/she, them/they. This was disavowed and is not the subject of the appeal to this court.

40. The claimant also brought a complaint of belief harassment including assertions 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". This was also disavowed and is not the subject of the appeal to this court.

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

Important findings of fact by the ET

42. The ET's judgment, handed down on 21 June 2024, runs to 101 pages containing 361 paragraphs. The following findings appear to me to be of particular significance:-

> "102. ... He [the Appellant] then mentioned that the Court of Appeal had found there to be no evidence of the claimant having discriminated against anybody in connection with case [sic] brought by him against the University of Sheffield. (There was no evidence to the contrary before the Tribunal and we accept there to be none that the claimant has ever discriminated).
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> 103. ... The Tribunal accepts that the claimant's Christian faith is tantamount to a belief in non-discrimination.
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> ...
>
> 163. While we accept there to be no evidence that the claimant would engage in any unwelcome evangelising, and if called upon to evangelise would do so in a respectful manner, it follows that Dr Joubert's opinion that there is a risk to service users from the open expression of orthodox Christian views with expressions of negative views around homosexuality and same sex marriage is credible. This therefore was a legitimate concern for the Respondent.
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> ...
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> 276. ... Mrs Hart's letter of 14 June 2022 ... 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.**
>
> ...
>
> 290 ... 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.
>
> ...

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.

...

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.

...

298. ... 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.

299. It is difficult to see how a less intrusive measure [than a second interview] 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?

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.

...

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.

...

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.

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 [sic] expression of views rooted in Christian beliefs but because of the objectionable manner of the expression of them.**

...

335. The impugned acts in sub-paragraphs 1.2.1 (requiring the claimant to attend the second interview) and 1.2.4 (the reverse burden of proof issue) arose out of the Respondent's well-founded concerns about the risk of conflict between the claimant's views in the Facebook postings on the one hand and the needs of vulnerable service users on the other. (It is convenient to take these together as the claimant was effectively put to proof of his suitability in the interview). These considerations culminated (subject to what is said in paragraph 339 to 345 below) in the Respondent not offering him the role - sub-paragraph 1.2.3.

...

340. The claimant was treated as he was because he exercised his right to freedom of expression which was rooted in his religious beliefs when participating in the political debate about Kim Davis and the concerns that these engendered in the Respondent's minds. As this was not a manifestation of his religious belief, there was no less favourable treatment of the claimant on that ground. Further, the Respondent did not treat the claimant less favourably on the grounds of his religion in and of itself for the reasons already given. The views expressed by the claimant were rooted in his religious beliefs but were not a manifestation of them.

341. 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. As we said in paragraph 77, Mrs Hart was motivated by the prospect of the claimant discriminating against those from the LGBTQI+ community and a well-founded concern about the impact of the Facebook messages on service users. It was not the orthodox Christian views themselves which were a concern, but rather the effect of them upon the claimant's efficacy in role.

...

346. Ultimately, then, the issue is less of the appropriate comparison than that of determining the real reason why the claimant was treated as he was. **The real reason that Mr Ngole was treated as he was is because of his expression of views rooted in his religious beliefs which impacted on Touchstone's concerns for the safeguarding of their service users.** The expression of his beliefs rooted in his religion was a material reason for the decision taken by Touchstone to withdraw the conditional job offer on 10 June 2022. The direct discrimination claim must therefore succeed. The reason why the job offer was not reinstated is the claimant's performance in interview on 11 July 2022 and the concerns of Mrs Hart and Mr Pickard for the welfare of service users. These concerns were not assuaged by the interview. We have held (in paragraph 96) that the interview was not a sham. There was a purpose to it. Touchstone must therefore have considered that the position was capable of remediation otherwise they would not have gone ahead with it and had rightly retreated from their position on 10 June 2022 that the claimant's position was irremediable. (This had been to fall into the same error as had the University of Sheffield in Ngole that the claimant was 'unteachable' per paragraph 228 above. It is all the more reason why the Respondent's actions in withdrawing the job offer on 10 June 2022 cannot be objectively justified). The interview failed. By this reasoning, bound as we are to find a co-extensive outcome when applying the ECHR and the 2010 Act, the outcome under ECHR and the 2010 Act corresponds.

...

350. ... The Tribunal accepts there to have been a requirement that the holder of the post should have a non-discrimination belief as defined. That is plain from the job description and the person specification. Holding the non-discrimination belief was plainly a proportionate means of achieving the legitimate aim of looking after the welfare of service users.

351. The Respondent could not be satisfied that the claimant did not hold the non-discrimination belief. ... There was positive evidence to suggest that the claimant had never discriminated on such grounds in the past and was not likely to do so in the future because, as he said (in paragraph 103 above) the Bible prohibits him from discriminating against anyone. The occupational requirement defence must therefore fail.

352. That said, the difficulty for the claimant was not that he did not hold the non-discrimination belief **but rather the Respondent's well-founded concerns that others (in particular service users) may come across his beliefs which may be harmful to their already vulnerable mental health.** This is not to import the "hecklers' veto" but rather, to justify

> interference with the claimant's freedom of expressions specifically upon the risk (per Page in paragraph 200 above) that holding the claimant's views about homosexuality might deter mentally [sic] people of the LGBTQI+ community from engaging with the Respondent's services risking the Respondent's ability to perform their core healthcare functions and risking significant reputational damage with the Wakefield CCG. The risk was a real one based upon the experience of Mrs Hart and Mr Pickard and the expert evidence of Dr Joubert and is the foundation of the Respondent's defence to the direct discrimination claim generally.
>
> ...
>
> 357. In balancing the needs of the claimant and the Respondent, the balance favours the Respondent. **They simply could not take the risk of the discovery by a vulnerable service user of the claimant's views. The effect upon such an individual may be potentially devastating.** Mrs Hart sets out very well in the citation in paragraph 74 the issues to which this gives rise and how she balanced the needs of the claimant and the Respondent. This is of course an objective test and not a range of reasonable responses test, but nonetheless Mrs Hart's reasoning does, it seems to us, stand scrutiny and is in any case corroborated by the Respondent's expert evidence. The views of responsible decision makers are to be afforded a margin of appreciation per *Begum*.
>
> 358. ... The difficulty which is presented in this case was the acute sensitivity and needs of a particular section of the Respondent's clientele with whom the claimant applied to work.
>
> 359. Balancing the interests of the Respondent in preserving the mental health of their service users against the wishes of the claimant to work for the Respondent and his ability to work elsewhere gives of only one answer. The balance favours the Respondent, and their actions were therefore proportionate and are justified." [emphasis added]

Equality Act 2010

43. The claimant's complaints were brought under the EQA.

44. Section 39 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. "

45. 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.

46. Section 4 sets out protected characteristics, including "religion or belief". Section 10 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. …"

47. Direct discrimination is defined by section 13 (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."

48. There is no provision in Section 13 permitting justification of direct discrimination, save (by s13(2)) in respect of the protected characteristic of age.

Ground of appeal 1A: stereotyping

49. This alleges that the requirements for the Appellant to attend a second interview and to give assurances constituted in themselves unlawful discrimination by stereotyping. It is not clear that a claim based on stereotyping was argued before the ET whether in relation to the requirement to attend a second interview "and to give assurances" or more generally; and there is good authority for the proposition that an appellate court should not consider an argument which was not put before the employment tribunal. Nevertheless, I will deal with it briefly.

50. The Appellant's skeleton on this ground focuses on the decision of the House of Lords in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] IRLR 115. That examined the legality of immigration officers subjecting Roma applicants for visitor visas to the UK to more intensive questioning than that which non-Roma applicants were subjected to, on account of the fact that statistically Roma visitors included a higher proportion of covert asylum-seekers than other groups. As the Appellant's skeleton argument states, the practice was found to be discriminatory and to constitute unlawful stereotyping since it treated all people who fell into the protected class as being more likely to behave inappropriately solely on the basis that they belonged to a protected class. As Mr Quintavalle put it in oral argument, they should have been treated as individuals. But there was no evidence before the tribunal that evangelical Christians or conservative evangelical Christians were subjected to

detriment as a class. All that Mr Ngole could show is that he as an individual was, he says, subjected to detriment by being called to a second interview when Touchstone became aware of the views he had expressed as reported in the Guardian article.

51. The real gravamen of the Appellant's case can be found under Grounds 1B and 1C relating to the ultimate decision (contained in Mrs Hart's letter of 18 July) not to reinstate the job offer. Insofar as the Appellant complains on wider grounds than stereotyping about the requirement for him to attend the second interview, the answer is very straightforward. The tribunal said of the "measure" consisting of the arranging of "what was tantamount to a second interview" [at paragraph 300]:-

> "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."

52. The complaint that the requirement to attend a second interview amounted to unlawful discrimination more generally can in my view be shortly dealt with. The ET were entitled to find that it would have been irresponsible for the Respondent, on learning of the views Mr Ngole had expressed and the publicity they had attracted, simply to have allowed him to take up the post (despite the absence of a reference of the required type) without asking any further questions. If the result of the second interview had been that the job offer was reinstated, it seems highly improbable that any discrimination claim would have been brought. The real complaint is that after the interview the Respondent failed to reinstate the job offer.

Ground of Appeal 1C: material reason

53. This alleges that, having found that the Appellant's beliefs were one of the material reasons for the refusal to reinstate his job offer, direct discrimination was thereby made out.

54. The finding referred to is to be found at paragraphs 323 and (less clearly) 341 of the ET judgment:-

> "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.
>
> ...
>
> 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."

55. Mr Quintavalle also relied on some passages in Mrs Hart's witness statement put to her in cross-examination by Mr Phillips. For example she had said:-

> "I was incredibly concerned that the Claimant's views on homosexuality and gay marriage would be one of the barriers to service users being discharged from Wakefield Hospital."

Mr Phillips then asked, "So it was his views?" and Mrs Hart replied, "Yes".

56. There are other questions and answers on similar lines. But evidently the ET did not regard them as establishing or supporting a simple case that the Respondent withdrew the job offer because the decision-makers objected to Mr Ngole's views; and I do not read them as doing so either.

57. The EAT at paragraph 110 of Judge Tayler's judgment said that the letter informing Mr Ngole that he would not be given the job raised two main areas of concern:-

> "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."

58. The EAT's criticism of the ET was that the ET had not stated how significant it considered each of these reasons to be: Judge Tayler said that the reasons should have been analysed separately. Mr Quintavalle, however, submits that it is enough to establish direct discrimination if a prohibited reason is a material reason for the treatment, that is to say it had a material influence on the result, and that, given the findings at paragraphs 323 and 341, his client should have won outright in the EAT.

59. It is well-established in discrimination law that, if a claimant has been dismissed or subjected to detrimental treatment for two separate reasons, one of which is a prohibited reason and one of which is not, it is sufficient to establish liability if the prohibited reason (such as dismissal on the grounds of the claimant's beliefs) is a material factor in the decision. But this is a very difficult distinction to apply in a case where the two factors are the claimant's manifestation of his beliefs and the beliefs themselves. It is highly improbable that anyone will be refused a job because of the public expression of views with which everyone agrees.

60. Paragraphs 323 and 341 are difficult to align with other findings of fact in the judgment of the ET. On a fair reading of the decision as a whole, I consider that they found that the reason why Touchstone withdrew the job offer, and refused to reinstate it, was because of their concern that vulnerable service users might come across Mr Ngole's publicly expressed views and disengage from the service. The ET could have found, but did not find, that this alleged concern was simply a cover for a decision taken on the grounds of personal dislike or disapproval of the views, or a decision taken simply because those views were out of line with the ethos or policy of the organisation. I would therefore reject Ground 1C.

Ground of Appeal 1B: separability

61. This is the heart of the Appellant's case. It argues that "there could be no separability in circumstances where there was no objectively objectionable manifestation of the Appellant's beliefs and hence the ET should have found that the detriment was imposed because of the Appellant's protected beliefs."

62. At the time of the ET's decision on 21 June 2024 they had available to them the decision of this court in the *Page* cases (*Page v Lord Chancellor* [2021] EWCA Civ 254; [2021] ICR 912 and *Page v NHS Trust Development Authority* [2021] EWCA Civ 255; [2021] ICR 941, the latter being more relevant for present purposes). They also had the decision of Eady J, President of the EAT, in *Higgs v Farmor's School* [2023] EAT 89; [2023] ICR 1072*,* but *Higgs* had not yet reached this court.

The Page cases

63. Mr Page was a Christian who was a non-executive director of an NHS Trust and also sat as a magistrate in family cases involving decisions about adoption. He held views on homosexuality and single and same-sex adoption which he claimed were in accordance with his Christian faith and the belief that it was in the best interests of a child to have a mother and a father. While sitting on an adoption panel, he expressed those views while refusing to sign an adoption order for a same-sex couple. He was reprimanded, gave media interviews about the matter, and was then removed from the magistracy. When his press contacts came to the attention of the NHS Trust, he was told to inform the trust before making further media contacts. However, he proceeded to give a number of interviews, including a televised interview where he expressed his views about homosexuality and same-sex adoption. He was suspended from his position as a non-executive director of the trust and when his term of office expired, it was decided that it would not be renewed.

64. He complained to an ET of direct and indirect discrimination because of religious belief and also alleged breaches of his rights under Article 9 of the ECHR. The ET dismissed the claim and Mr Page's appeals to the EAT and this court were unsuccessful. In this court, Underhill LJ said:-

> "48. ... The primary focus of what the Appellant is saying is his belief about the importance of a child having a mother and a father. The fact that that belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a "direct expression" of the Appellant's Christianity. The closeness and directness of the relevant nexus was a matter for the assessment of the Tribunal, and it was in my view open to it to reach the conclusion that it did. I note that in *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127, which involved a student who had been disciplined for expressing views about homosexuality derived from his Christian belief, this Court endorsed the finding of the Judge that article 9 was not engaged: see para. 61 of its judgment.
>
> ...
>
> 61. ... [T]his was not ... a case where the justification advanced is merely that some or many members of the public, or members of the Trust's staff, both gay and straight, might find the Appellant's views about homosexuality offensive or disturbing; nor is it based on some generalised perceived reputational damage to the Trust. **On the contrary, it is based specifically on the risk that the fact that a member of its board held the**

> **views that the Appellant did about homosexuality might deter mentally ill gay people in the Trust's catchment area from engaging with its services. That risk relates directly to the ability of the Trust to perform its core healthcare functions**. As I have said, it is not part of the Appellant's case that that risk was unreal. Mr Diamond's submissions fail to engage with this aspect.
>
> ...
>
> 63. I do not need to say much about the authorities on which Mr Diamond relied. There is no issue about the general principles, but their application in particular cases is necessarily fact-specific. Mr Diamond suggested that the facts in Smith and Ngole were so close to those of the present case that they should be treated as determinative of how the proportionality balance should be struck. I do not agree. In both cases the claimant – in Smith an employee of a Housing Trust (not at board level) and in Ngole a social work student – had expressed their views about homosexuality on social media. **There was no reason to suppose that their expression of those views in that way would have any impact on how the public might engage with the relevant services: that point is made very clearly in para. 135 of the judgment in Ngole."** [Emphasis added]

65. Turning to Mr Page's claim for direct discrimination, Underhill LJ continued:

> "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 EAT 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 [circumstances] 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* [2009] UKEAT 0298/08, *Grace v Places for Children* [2013] UKEAT 0217/13 and *Wasteney v East London NHS Foundation*

> *Trust [*2016] UKEAT 0157/15, [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* HH 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."
>
> ...
>
> 72. ... The Authority took disciplinary action against the Appellant not because he was a Christian or because he held the traditional family belief but because he expressed the latter belief (and his other views about homosexuality) in the national media in circumstances which, on the Tribunal's findings, justified the action taken.
>
> 73. At para. 55 of his skeleton argument Mr Diamond submits that the correct analysis of that finding in law is that the only "reason" for the action taken against the Appellant was "[his] very public expression of his protected belief", and that "the concerns about a possible misinterpretation, and the potential impact on [the] LGBT community" were no more than "motives": he is thus invoking the distinction which I mention at para. 29 above. That characterisation of the Authority's reason does not essentially differ from mine, but it does not follow that the other considerations are irrelevant. **Their importance is that, if they are sufficiently cogent, they may demonstrate that the Authority's objection to the Appellant's public expression of the belief is a different reason from an objection to his holding the belief, as explained at para. 68 above. That is a quite different distinction from the reason/motive distinction that was applied in *James v Eastleigh."***

Higgs v Farmor's School

66. Mr Quintavalle placed great emphasis on the decision of this court in *Higgs v Farmor's School*, which, as I have noted, post-dated the ET decision in the present case. Mrs Higgs was employed by the Respondent secondary school as a pastoral administrator and work experience manager. At the relevant time she had been employed at the school for six years. She had two children, one of whom was a pupil at the school. A parent emailed the head teacher complaining that the claimant had expressed "homophobic and prejudiced views" on her Facebook page.

67. The posts, which are set out at paragraphs 10-12 of Underhill LJ's judgment, included one headed "PLEASE READ THIS! THEY ARE BRAINWASHING OUR CHILDREN!" It went on to criticise a government consultation into making

Relationships Education mandatory in schools, which might mean that children would be taught that same-sex marriage is exactly the same as traditional marriage. It said that this "means that freedom of belief will be destroyed" and that "this is a vicious form of totalitarianism aimed at suppressing Christianity and removing it from the public arena." Another post by the claimant reposted messages from campaigners from the USA objecting to materials used in schools there alleging that liberal school systems are busy indoctrinating their children: "Kindergarten and First Grade children are being primed for a gender-fluid society."

68. After a disciplinary process Mrs Higgs was dismissed for gross misconduct. She complained to an ET that this was direct discrimination on the grounds of religion or belief. She did not claim to have been discriminated against "for her Christianity per se" but for the beliefs set out at paragraph 27 of the judgment:-

> "(a) Lack of belief in 'gender fluidity'.
>
> (b) Lack of belief that someone could change their biological sex/gender.
>
> (c) Belief in marriage as a divinely instituted life-long union between one man and one woman.
>
> (d) Lack of belief in 'same sex marriage'. Whilst she recognises the legalisation of same sex marriage she believes that this is contrary to Biblical teaching.
>
> (e) Opposition to sex and/or relationship education for primary school children.
>
> (f) A belief that she should 'witness' to the world, that is when unbiblical ideas/ideologies are promoted, she would publicly witness to Biblical truth.
>
> (g) A belief in the literal truth of the Bible, and in particular Genesis 1 v. 27: 'God created man in His own image, in the image of God He created him; male and female He created them'."

69. Underhill LJ referred at paragraph 57 to the principle of separability. He said:

> "57. In a case where the 2010 Act (or its predecessors), and other analogous legislation, affords protection to particular kinds of conduct by an employee – for example, in victimisation or whistleblowing cases, for making complaints of discrimination or making protected disclosures – the case-law recognises that it may be necessary to decide whether the real cause of the treatment is the conduct itself or is some properly separable feature of it. This is sometimes referred to as "the separability principle". This line of authority is potentially applicable in a (true) manifestation case, since in such a case the court is concerned (untypically for a direct discrimination claim) with a

motivation based not on the possession of the protected characteristic but on particular conduct on the part of the employee.

58. The most recent discussion of the separability principle can be found in the judgment of Simler LJ in *Kong v Gulf International Bank (UK) Ltd* [2022] EWCA Civ 941, [2022] ICR 1513. The case concerned an alleged dismissal for making a protected disclosure. At paras. 47-55 of her judgment Simler LJ considered a number of authorities concerned with protected conduct of various kinds and quotes various passages from them which I need not identify. At paras. 56-57 she says:

> "56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in *Page*, the protected disclosure is the context for the impugned treatment, but it is not the reason itself.
>
> 57. Thus the 'separability principle' is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for the impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct."

> .....
>
> 60. Elisabeth Laing LJ in her concurring judgment in *Kong* expressed some hesitation about references to "the separability principle", given that, as Simler LJ had herself said, it did not connote a rule of law. I share that hesitation, but some label is required: I will in this judgment refer simply to "separability" or "the separability approach"."

70. Underhill LJ went on to discuss his previous judgment in *Page v NHS Trust.* At [74] he said:-

> 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)
>
> .....
>
> **85. The starting-point is that the Court in *Page* believed that the legislature cannot have intended that an employer should be obliged to tolerate any conduct at all by an employee which constituted a manifestation of a belief, whatever form it took and whatever the circumstances;** and that is reinforced by the fact that the drafters of the Convention thought it necessary to qualify the right to manifest a belief. It is not necessary to multiply examples of cases where an inability to prohibit particular kinds of manifestation would produce an obviously unacceptable result. One familiar case is the wearing of clothes or jewellery which would create a serious risk to health or safety at work. Another is that of religious

> proselytisation at work, as illustrated by the cases noted at para. 70 above: in that connection, I note that A-G Sharpston observed at para. 73 of her Opinion in Bougnaoui that proselytisation "has … simply no place in the work context". It follows that it is in accordance with the legislative purpose to construe the Act, so far as possible, so as to incorporate some such limitation.
>
> ...
>
> 92. ... Direct discrimination in manifestation cases is (uniquely) different from discrimination on the ground of other protected characteristics (and indeed from simple belief discrimination) because it is based, as the Court in Eweida identifies, not on the possession of the characteristic as such but on overt conduct, which thus has the potential to impact on the interests of society and the rights and freedoms of others. That distinction may be said to put it in a special category which requires a more flexible approach. As I have said, **I find it hard to accept that the legislature intended employees to enjoy an absolute right not to suffer any adverse treatment on the basis of conduct manifesting their religious or other beliefs, whatever the nature of that conduct and whatever the circumstances.** [emphasis added]

71. At paragraph 105, Underhill LJ summarised the ET's reasoning as follows:-

> "(1) The Claimant's protected beliefs could not themselves be equated with hostility to gay or trans people – for short, with holding "homophobic and transphobic" views. The Claimant denied holding any such views, and the Tribunal made no finding that she did: indeed it seems clear that it accepted that she did not. It follows that it did not find that there was a risk that she would treat gay or trans pupils differently in the course of her work.
>
> (2) However, although the Claimant did not in fact hold homophobic and transphobic views, the School had concluded that the language of her posts might reasonably lead readers of them to think that she did; and that was the reason why it had dismissed her.
>
> (3) Accordingly, her dismissal was not because of her protected beliefs about gender fluidity and same-sex marriage but because the School feared that the way in which she had expressed those beliefs would be perceived as showing that she had homophobic and transphobic views, whose expression would be unprotected and unacceptable."

72. Underhill LJ continued at paragraphs 138-144 with a submission on behalf of the school on the issue of reputational damage.

"138. Mr O'Dair submitted that the effect of the reasoning of the ET summarised at para. 105 (2) above was that the School had been justified in dismissing the Claimant simply on the basis that the complainant had been, and other readers of the posts might be, offended by her expression of her protected beliefs and think the worse of it for employing her. He submitted that reliance on reputational damage of that kind was unacceptable in principle. It is part of the price of a pluralist society that employers may sometimes have to take a hit for employing someone who expresses unpopular beliefs. He pointed out that it is well established that an employer cannot avoid liability for race or sex discrimination by showing that the act complained of was done in order to avoid adverse reactions from racist or sexist customers or clients (see, e.g., *Din v Carrington Viyella Ltd* [1982] ICR 256); he submitted that that principle applies equally in the present case. The FSU likewise in its written submissions expressed concern about the indiscriminate use of reputational harm as a justification for interference with employees' freedom to manifest their beliefs.

139. The ET was not of course addressing the issue of justification as such, and I am not sure that the effect of its reasoning is indeed as Mr O'Dair characterised it; but I agree with him that, if it is, it is wrong in principle. **An employer does not have carte blanche to interfere with an employee's right to express their beliefs simply because third parties find those beliefs offensive and think the worse of it for employing them. Nor, however, does the employee have carte blanche about what they can say in public or how, or in what circumstances, they say it. The characteristics of the employment relationship may entitle the employer to impose limitations on the employee's rights to manifest their beliefs and of free expression in accordance with articles 9.2 and 10.2 of the Convention. The particular characteristic with which we are concerned here is the employer's legitimate interest in protecting its reputation – not only with customers or consumers or users of its services, but also with other third parties, including other employees, whose perception of it may affect its work or business.** The extent to which it will be justified in interfering with the employee's article 9 or article 10 rights will depend on the circumstances, and it is not possible to give any kind of general exposition. For present purposes I need only note three considerations which will be relevant to the proportionality of any such interference.

140. The first consideration is the subject-matter of the expression of opinion or belief. A statement of the employee's views about matters which have nothing to do with the employer's business is self-evidently less likely to damage its reputation than a statement about matters which are central to it. In the present case there is, as Mr Jones pointed out, a connection between the posts and the School because they related to sex education in schools.

141. The second consideration is the way in which the employee expresses their beliefs. This of course is the same kind of distinction as discussed above in connection with the separability cases, and also acknowledged in *Giniewski* and *Lilliendahl*. Even where the belief itself is protected, an employer may suffer reputational harm from being associated with an employee who expresses it publicly in an inappropriate way. The paradigm of such a case will be where the views are expressed in egregiously offensive or insulting language, as illustrated in cases like *Lilliendahl* (though there might in principle be cases where the reputational harm is done by some other feature). I would emphasise that the threshold of offensiveness should be high: protection should not be lost merely because the employee has expressed themselves intemperately. As we have seen, Mr Jones submits that the threshold is crossed in this case.

142. The third consideration is whether it is clear that the views expressed are personal to the employee. It is one thing to be entitled to express your own views on sensitive topics, but another to risk them being imputed to your employer, to whom it may be important to maintain institutional neutrality on the issue in question. This consideration may be particularly (though not only) important in the case of senior employees. As I said at para. 59 of my judgment in *Page*,

> "[t]he extent to which it is legitimate to expect a person holding a senior role in a public body to refrain from expressing views which may upset a section of the public is a delicate question which can only be decided by reference to the facts of each particular case."

A principal reason why this Court upheld the tribunal's decision in that case was that it had found that the trust legitimately feared that the expression by one of its directors of a view that homosexual acts were wrong might discourage some gay patients from taking up its services: see para. 61 of my judgment, where I distinguished a concern of that kind from "generalised perceived reputational damage". I mention this consideration because it is quite clear that it was not present in this case. As we have seen, the panel expressly accepted that it was unlikely that readers of the posts would believe that the Claimant was speaking for the School (see the final paragraph of the passage in the dismissal letter quoted at para. 22 above).

143. I should emphasise that those are no more than relevant considerations. They should not be treated as criteria all of which an employer must satisfy in order to justify an interference with an employee's article 9 or article 10 rights on the basis of reputational harm. I should also emphasise that even where reputational harm, or a risk of it, is shown the interference in question must be proportionate.

> 144. It follows from that discussion that the School's reliance on reputational damage in this case is open to it in principle. Mr Jones does not rely on any damage that might be caused simply by the Claimant's expression of her gender-critical views, or her beliefs about same-sex marriage, but on the damage done by what he says was her gratuitously offensive and insulting language about gay and trans people in relation to an issue of relevance to the work of the School." [emphasis added]

73. Underhill LJ stated his conclusion on the dismissal claim as follows:

> "157. It is simpler to state my conclusion first and then give my reasons. In my opinion the ET would be bound to find that the Claimant's dismissal was not objectively justified and accordingly that it constituted unlawful discrimination. That is of course her principal complaint, and no separate finding is required about the rejection of her internal appeal. As regards her secondary complaint about the disciplinary process leading to her dismissal, I do not believe that we are in a position ourselves to decide whether that also was unjustified, but I hope and expect that it will not be necessary for the case to be remitted for the determination of that question. I take the two complaints in turn.
>
> 158. As regards the dismissal, I am prepared to assume, but without deciding, that the School was entitled to take objection to the posts for the reasons relied on by Mr Jones – that is, that their language was gratuitously offensive to gay and/or trans people because of the way that it described the conduct of "the LGBT crowd" and that it was used in the context of sex education in schools and was accordingly relevant to the Claimant's work. Even on that assumption, however, I believe that dismissal was unquestionably a disproportionate response. My reasons are as follows.
>
> 159. First, even if the language of the re-posts passes the threshold of objectionability, it is not grossly offensive. In context, the description of the promoters of gender fluidity as "the LGBT crowd" does not appear to be primarily intended to incite hatred or disgust for homosexuals or trans people. Rather, it is one of a series of derogatory sneers, alongside "liberal school systems" and "far-left zealots". The accusations of "child abuse" and the promotion of mental illness may be stupidly rhetorical exaggeration but they are not likely to be taken literally. I do not mean to downplay the offensiveness of the language of the re-posts, but we are a long way from the kinds of direct attack on homosexuality found, for example, in *Lilliendahl*.
>
> 160. Second, the language is not the Claimant's own (except for her repetition of the word "brainwashing"). It appears only in messages from others which (as would be evident to the reader)

she had re-posted. She made clear to the School that she did not agree with the language used: that does not of course absolve her of responsibility for re-posting it, but it is relevant to the question of the degree of any culpability.

161. Third, the panel accepted that there was no evidence that the reputation of the School had thus far been damaged: its concern was about potential damage in the future (see, again, the final paragraph of the passage in the dismissal letter quoted at para. 22 above). As it also accepted, there was no possibility that, even if readers of the posts associated the Claimant with the School, they would believe that they represented its own views. Any reputational damage would only take the form of the fear expressed by the complainant, namely that the Claimant might express at work the homophobic and transphobic attitudes arguably implicit in the language used. I accept that if that belief became widespread it could harm the School's reputation in the community, as the panel clearly thought. But the risk of widespread circulation was speculative at best. **The posts were made on her personal Facebook account, in her maiden name and with no reference to the School. By the time of the hearing, several weeks after the posts were made, only one person was known to have recognised who she was.**

162. Fourth, even if readers of the posts might fear that the Claimant would let her views influence her work, neither the panel nor the ET believed that she would do so. There was no reason to doubt her assertion that her concern was specifically about the content of sex education in primary schools; that she "wouldn't bring this into school"; and that she would never treat gay or trans pupils differently (see para. 16 above). **There had indeed been no complaints about any aspect of her work for over six years.** It would have been open to the School, if it really thought it necessary, to issue a statement making it clear that it was confident that there was no risk that the Claimant's views would affect her attitude towards gay or trans pupils or parents: it will be recalled that the ET itself floated this possibility at para. 65 of its Reasons.

163. Taking those reasons together, I do not believe that dismissal was even arguably a proportionate sanction for the Claimant's conduct. It was no doubt unwise of her to re-post material expressed in (to use the ET's words) florid and provocative language with which she did not agree, and in circumstances where people were liable to realise her connection with the School. **But I cannot accept that that can justify her dismissal, and still less so where she was a long-serving employee against whose actual work there was no complaint of any kind.**

> 164. My decision on this point is reinforced by the strong indication in the ET's Reasons that it would be likely to have found that the Claimant's dismissal was unfair if that issue had been before it: see para. 103 above."

74. He summarised his judgment at para. 175 as follows:

> "(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.
>
> (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 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 so as to conform with that required by the European Convention of Human Rights, that "blending" is jurisprudentially legitimate: see paras. 81-97.
>
> (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 GCD 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.
>
> (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."

75. In her concurring judgment at paragraph 181 Falk LJ said:

> "181. As Underhill LJ has explained (at paragraph 74 above) the words "to which objection could justifiably be taken", and its shorthand version "objectionable", should be taken to have the same effect as the word "inappropriate". Speaking for myself, I find "inappropriate" the more helpful term, for two reasons. First, it reduces the risk of the words "to which objection could justifiably be taken" being incorrectly read as permitting regard to be paid to the risk that some readers might wrongly read what is said in a way that a reasonable reader would not. Secondly, it more obviously conveys that the forum and context for what is said is relevant, as well as the content and manner. For example, something that might be unproblematic on a private Facebook page could justify different treatment if communicated in a work setting."

76. In *Omooba v Michael Garrett Associates Ltd* [2026] EWCA Civ 253 Falk LJ said at [38]:

> "For present purposes, I would draw together the following threads from the case law:
>
> a) The question whether a person has been treated less favourably "because of" a protected characteristic, within section 13(1) EqA (in predecessor legislation "on grounds of") requires a determination of the "reason why" a person was treated less favourably.
>
> b) Except in "criterion" cases (where the position should be obvious from the criterion used to discriminate), a subjective enquiry is required, usually involving inference rather than direct evidence.
>
> c) There is a firmly established distinction in the case law between (i) the "reason why" a person was treated less favourably and (ii) a motive or motives that may lie behind that reason.
>
> d) It is sufficient to establish direct discrimination if the existence of a protected characteristic had a significant influence, or in other words if it was a material part of the "reason why".
>
> e) Further, a Respondent cannot simply shelter behind concerns about discriminatory reactions by others. A wish to

> avoid such reactions may be a motivating factor but will not by itself prevent discrimination.
>
> f) However, there is a distinction between a circumstance or factor that is or forms part of the "reason why", and other contextual circumstances. The fact that a protected characteristic is part of the circumstances or sequence of events leading to the act complained of, or even that the act complained of would not have occurred but for that characteristic, is not enough.
>
> g) The "separability approach" may be a helpful tool in determining the "reason why", because it recognises that distinctions may need to be drawn between a protected characteristic (or protected disclosure, as in *Kong*) and something else which can be separated from it, which might include the manner in which the person expressed themselves or otherwise acted, or some other feature.
>
> h) An example of such other feature would be the sort of dysfunctional situation that was found to have arisen in *Fecitt*.
>
> i) The determination of the "reason why" is a question of fact for the ET.
>
> If further authority is needed for the last of these points, it is definitively confirmed by Lord Nicholls in *Khan* at [29]. It is also why the "separability approach" is no more than a tool, and not a rule of law."

R (Ngole) v Sheffield University

77. Mr Ngole is in the relatively unusual position of being an individual Appellant who has previously succeeded in this court in a different case. But his previous success was not a central feature of the arguments presented to us in this case, in my view rightly. The Sheffield case was not an employment case but a judicial review application concerning Mr Ngole's removal from a course of study. He succeeded because the disciplinary procedure had been unfair. The case was referred to both in *Page* and in *Higgs*. In *Page,* at paragraph 63, Underhill LJ observed that, in contrast to Mr Page's case, the expression of views by a social work student such as Mr Ngole would have no impact on public engagement. In *Higgs,* at [166], he said that the university appears to have acknowledged that Mr Ngole's expressions of view were not inherently inconsistent with working as a social worker. The university lost the case because it was partly responsible for what Underhill LJ described as "Mr Ngole's intransigence", and they had failed to make clear that his manner and language were a problem and had failed to offer suitable guidance.

Discussion: Ground 1B

78. The case put clearly and forcefully by Mr Quintavalle is very simple:

(1) Parliament has decided that direct discrimination on the grounds of religion or belief cannot be justified. A benign motive in the discriminator is irrelevant.

(2) The defence of there being a genuine occupational requirement (GOR) is available in some cases, but here the GOR pleaded by Touchstone was what was described as the non-discrimination belief and the ET, finding that Mr Ngole held the required belief, rejected the defence.

(3) The mere expression of a protected belief in circumstances entirely unrelated to work, entirely unrelated to the job application and in a context where the expression of views cannot be imputed to the employer, cannot as a matter of law constitute an inappropriate manifestation of the beliefs: see *Higgs*.

(4) The fact that some people (whether staff, service users, or anyone else) may disapprove of the beliefs or find them offensive, is irrelevant in law.

(5) The EAT was therefore wrong to remit outstanding issues to the ET, because the ET could only reach one proper conclusion, namely that the claim succeeded.

79. Mr Quintavalle is right that there is no general defence of justification to an allegation of direct discrimination on the grounds of religious or philosophical belief. But in determining whether an employer or prospective employer can lawfully regard the public manifestation of a belief as inappropriate or objectively objectionable, the context must be relevant. It is important to note Underhill LJ's summary in *Higgs* of the *ratio* of *Page.* He said that "the "way" in which the belief is manifested is a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs." There was no suggestion that Mr Page had manifested his views in lurid or extreme terms. Plainly, the "way" in his case must have encompassed the fact that he had expressed his views in interviews in national media, the context being that he was a director of the Respondent NHS Trust.

80. Mr Quintavalle cited the classic case of *R v Commission for Racial Equality ex parte Westminster City Council* [1985] ICR 827, CA. A black road sweeper employed by the council was given a temporary appointment as a refuse collector. Trade union representatives objected to his appointment, ostensibly on the grounds of his poor attendance record. The job offer was withdrawn. The CRE served a non-discrimination notice on the council stating that they had discriminated against the applicant by bowing to industrial pressure and by treating him in a way in which it would not have done had he been white. The council's application for judicial review was rejected. This is wholly different from the present case. Suppose that the applicant in the Westminster case had been the subject of discrimination because of a widely published belief on his part that homosexuality is a sin. It cannot be "inappropriate" or "objectively objectionable" for a refuse collector to say so. Similarly, if Mr Ngole had been applying to Touchstone for (by way of example) a job as a finance officer or auditor, his published beliefs would have been entirely irrelevant. But the position is in my view different where his published beliefs would, if he were appointed to the job, create a real risk of vulnerable service users suffering harm.

81. Turning to the *Higgs* case, it is inaccurate to say that its ratio is that "the mere expression of a protected belief in circumstances entirely unrelated to work made years prior where the expression of view cannot be imputed to the employer cannot as a matter of law

justify dismissal or create a defence to a claim for direct discrimination". Part of the reason why this court felt able to take the unusual step of overturning the decision of the ET (upheld to a large extent by the EAT) in Mrs Higgs' case was indeed that the context was unrelated to work and that the expression of views could not be imputed to the employer. But there were other factors too. Mrs Higgs had expressed her views on her personal Facebook account, using her maiden name, and concern about them was limited to one reader, that is to say the anonymous person who denounced her to the head teacher of the school. Moreover, although Underhill LJ noted that her posts had been "unwise", there was no suggestion that in her six years' service at the school, Mrs Higgs had ever expressed views of this kind, or any other views inappropriate for a member of school staff to express, at her school.

82. It is instructive to compare four cases: *R (Ngole) v Sheffield*, the present case, *Page v NHS Trust* and the *Higgs* case.

83. Mr Ngole's case against Sheffield University was very different from the present case. The former was a judicial review claim which was successful on the grounds of procedural fairness. Also, as noted by Underhill LJ in *Page v NHS Trust,* in the Sheffield case the views expressed by Mr Ngole, at that stage a social work student, would have had no impact on public engagement with social services. Mr Page, on the other hand, lost his case against the NHS Trust because of the risk that the fact of a director of the Trust expressing those views in the media might deter mentally ill gay people from engaging with the Trust.

84. The differences between Mr Page's cases and the present case brought by Mr Ngole are to my mind much narrower. It is right, of course, to observe that Mr Ngole's expression of view that homosexuality is a sin (and likewise gay marriage), originally in Facebook posts and subsequently reported on the BBC News website and in a national newspaper, took place several years ago. On the other hand, Mr Page, though holding the senior position of a non-executive board member of the Trust, was not engaging directly with mentally unwell service users.

85. It is trite law that an employment tribunal's findings of fact cannot be set aside on appeal, whether by the EAT or by this court, unless they were legally perverse, that is to say that there was *no* evidence on which those findings could be made. Mr Quintavalle rightly did not suggest that any of the findings of the ET were in that category. Rather, his argument had to be that the finding is irrelevant in law because once direct discrimination on the grounds of religious or philosophical belief is established and the genuine occupational requirement put forward by the Respondent is rejected there can be no defence to the claim. Parliament could have provided for a defence of justification on the lines available in age discrimination and disability discrimination claims but has decided not to do so.

86. Mr Ngole's views had been expressed several years ago and before he was applying for the job of mental health support worker with Touchstone. Some ETs might have found that the risk of service users conducting an internet search of the name Felix Ngole was small; or might have found that, even if some service users did conduct such a search or learned about Mr Ngole in conversation with others who had done so, the risk of their disengaging from Touchstone was minimal given the historic nature of the views. I would not necessarily have made the same findings of fact myself. But the ET was entitled to make the findings which it did. They are not open to challenge on appeal.

Nor is the finding that the consequences of disengagement for such service users were "potentially devastating".

87. Thus the salient facts found by the ET were these:-

a) the post of mental health support worker for which Mr Ngole was applying required interaction with mentally unwell service users, a significant proportion of whom were gay;

b) he would be the only mental health support worker within the service;

c) there was a well-founded concern that such service users would come to learn of his view that homosexuality was a sin;

d) if they did so, there was a real risk that they would disengage from the services of Touchstone; and

e) the consequences of such disengagement were potentially devastating.

88. This was a decision taken not out of concern about reputational damage, but out of concern for potentially devastating consequences for mentally unwell service users. I consider that the refusal of Touchstone to reinstate the job offer was properly taken on the grounds of the public manifestation of his beliefs, which was objectively inappropriate in the context of an application to be a discharge mental health support worker many of whose service users would be mentally unwell members of the LGBTQI+ community.

89. I would dismiss Mr Ngole's appeal, allow the cross-appeal by Touchstone and restore the order of the ET.

Lady Justice Elisabeth Laing:

Introduction

90. I regret that I disagree with both of the conclusions of the Vice President, Bean LJ. I would allow Mr Ngole's appeal and dismiss Touchstone's cross-appeal.

91. I will explain why as briefly as possible. I will start with two issues of principle which are the essential background to this appeal. I will then summarise some of the ET's relevant findings of fact. Next, I will consider, based only on those findings of fact, what conclusions the ET should have reached if it had applied what I consider is the correct approach. In the next section of this judgment, I will comment on Bean LJ's reasoning. Finally, I will consider whether the appeal should be remitted to the ET.

What is the correct approach to an employer's reasons in a direct discrimination claim?

92. The central issue for an ET in a direct discrimination claim is to decide why a Respondent subjected a claimant to less favourable treatment. The approach was settled more than a quarter of a century ago in *Nagarajan v London Regional Transport* [2000] 1 AC 501. The House of Lords was considering different legislation and different language, but the essential principles apply to the current legislation. The issue was the correct interpretation of the victimisation provision in the Race Relations Act 1976,

section 2(1). Lord Nicholls and Lord Steyn gave the leading speeches. Two other members of the Appellate Committee agreed with both speeches. Lord Browne-Wilkinson dissented.

93. The reasoning about direct discrimination in the speeches is strictly obiter, but both Lord Nicholls and Lord Steyn applied it to the construction of section 2. It has not been doubted since. At pp510 to 511, Lord Nicholls said that under section 1(1)(a) of the Race Relations Act 1976, the 'crucial question' was 'why the complainant received less favourable treatment'. Was it 'on grounds of race', or for some other reason? 'Usually, the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances'.

94. He added, p511B-C, that the first question was to be distinguished from a 'second and different question'. That was, 'if the discriminator treated the complainant less favourably on racial grounds, why he did so'. That question was 'strictly beside the point' when deciding whether there was an act of racial discrimination. 'For the purposes of direct discrimination…as distinct from indirect discrimination …the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose…in treating a person less favourably on racial grounds'. He gave the example of an employer who might be thought to have a 'benign motive' for rejecting a job applicant on racial grounds, because, for instance, he believed that the applicant would not fit in, or other employees would make his life a misery. There is something of an echo of those words in the facts of this case.

95. At p512H he said that decisions are often taken 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. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were 'consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against LRT'.'

96. *R (E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 WLR 153 ('*JFS*'), was a case about direct discrimination under the Race Relations Act 1976. The 2010 Act had completed its committee stage in the House of Commons when *JFS* was decided (see paragraph 70 of the judgment of Baroness Hale). It was decided by a panel of nine, and by a majority of five to four. All members of the majority cited *Nagarajan* with apparent approval (Lord Phillips, paragraphs 21-23; Baroness Hale, paragraphs 54-64; Lord Mance, paragraphs 78-89; Lord Kerr, paragraphs 114-116; and Lord Clarke, paragraphs 134-143).

97. In some later cases, it has been suggested that it can be possible for a Respondent to a whistleblowing claim or to a discrimination claim to show that the reason why he did what he did was a reason which was genuinely separable from the protected disclosure or from the protected characteristic, as the case may be. A well-known example is the

decision of this court in *Fecitt v NHS Manchester* [2011] EWCA Civ 1190; [2012] ICR 372. The ET in that case accepted that other employees had treated the claimants badly because of their whistleblowing, that the employer could have done more to protect them from that treatment, but that the reason why the employer had treated them less favourably was not because of their disclosures, but because it was the only feasible way of resolving a problem at their workplace. *Page v NHS Trust Development Authority* [2021] EWCA Civ 255; [2021] ICR 941 ('*Page*') is another example of such a case.

98. None of those cases is a factual precedent, however. In particular, in the light of the long line of authority consistently following the principles described in *Nagarajan*, they cannot and do not establish a rule that in all whistleblowing or discrimination cases, an employer can have only one of two possible and mutually exclusive reasons for imposing the detriment or for the less favourable treatment, and that proof of one excludes the other as a matter of law. Neither the Equality Act 2010 nor *Nagarajan* support the view that the ET's task is to find the dominant reason for the less favourable treatment. The ET does not have a binary choice between only two possible and mutually exclusive reasons for the employer's decision to impose a detriment on a person or to subject him to less favourable treatment. We know from the approach in *Nagarajan* that an employer may, on the facts, act for two or more significant reasons. A finding that he acted for a reason which is distinct from the protected disclosure or from the protected characteristic does not, on appropriate facts, necessarily preclude a finding that he also acted on the ground that the employee made a protected disclosure or because of the protected characteristic. Indeed, in some cases, as Lord Nicholls pointed out in *Nagarajan*, there may be a distinction between the reasons why a person acts and his motive or purpose in acting.

Can direct discrimination be justified?

99. It is trite that direct discrimination cannot be justified, as Bean LJ accepts. If judicial authority were needed for this proposition, it can be found in paragraphs 55-57 of the judgment of Baroness Hale in *JFS*. It is a compelling and irrefutable inference from the scheme of Part 2 of the Equality Act 2010 ('the 2010 Act'). Bean LJ refers to the express exception to that rule in section 13(2): 'If the protected characteristic is age, A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim'. The provision which shows that, by contrast, indirect discrimination can always be justified, is section 19(2)(d). It exonerates a putative discriminator if he can show that the 'provision, criterion or practice' on which the claimant relies is 'a proportionate means of achieving a legitimate aim', echoing the language of section 13(2).

100. Section 3(1) of the Human Rights Act 1998 ('the HRA') provides that 'So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights'. The many authorities on section 3 make it clear that it is not 'possible' to read primary legislation in a way which 'goes against the grain' of that legislation. It is not 'possible' to read Part 2 of the 2010 Act as permitting an employer to justify direct discrimination (other than in relation to age, pursuant to the express exception in section 13(2)). The judicial creation of such a defence plainly goes against the grain of Part 2. Section 3(1) does not permit, still less require, the creation of such a defence. The authorities cannot, therefore, be read, as permitting the creation of such a defence.

101. What a court may do, if appropriate in a direct discrimination case, is to cross-check to ensure that its reasoning under the 2010 Act is compatible with the claimant's Convention rights. In a case where his Convention rights are somehow infringed, then, subject to justification, it is perhaps conceivable that section 3 may add to the rights conferred on a claimant by Part 2 of the 2010 Act. It may perhaps also be relevant if there are competing Convention rights in play. Section 3 cannot, however, be used to give a defence to an employer which, it is clear, Parliament did not intend him to have under the 2010 Act. It is just not 'possible' for the courts to interpret Part 2 of the 2010 Act as permitting a defence of justification in a direct discrimination case. It follows that this court cannot have intended to, and could not have, created such a defence in *Page*. I reach that conclusion without reference to section 11 of the HRA, although section 11 certainly supports it. Section 11 is not referred to in any of the relevant authorities.

The ET's findings of fact relating to Mr Ngole's direct discrimination claims

102. In paragraph 74, the ET found as a fact that the reasons why Touchstone withdrew the job offer were set out in the relevant part of Mrs Hart's witness statement, which it quoted extensively. There is no doubt that all the reasons on which she relied stemmed from the fact that Touchstone had Googled Mr Ngole and found an article in the Guardian about his High Court claim against Sheffield University ('article 1') and an item on the BBC website about his successful appeal to this court ('article 2'). The ET found that they had not read, and therefore could not have been influenced by, his original Facebook post, or by the reasoning in the judgment of this court in his first appeal. Article 1 and article 2 referred to his religious beliefs that homosexuality is a sin and that 'same-sex marriage is a sin, whether we like it or not'.

103. Mrs Hart's opinion was that his beliefs did not align with Touchstone's 'vision, values and ethos'. He would be the only social worker supporting people who were suicidal or in crisis. His beliefs prompted concerns that he would not be able to work co-operatively with Wakefield Clinical Commissioning Group ('WCCG') or with community groups such as TransWakefield and Mesmac. WCCG had chosen Touchstone because it was an 'inclusive organisation'. Touchstone was 'struggling to see' how his views would 'align with' the requirements of the job. Touchstone was concerned by the 'public nature' of his views and the resulting media attention. The views could be found 'with minimal effort'. Touchstone had never had a member of staff who had 'outwardly questioned or shamed the choices' of LGBT people in the way that Mr Ngole had done while he was at university. Mrs Hart was 'really concerned' about the risk that service users or partners would Google Mr Ngole and discover his views, which showed that he was not 'supportive of [LGBT] people and their rights'. She did not know what impact his views would have on vulnerable service users. Employing him was too much of a risk. There could be 'serious consequences' if Touchstone got that wrong. What would happen if a service user discovered his views? The conclusion she reached 'each time' was that such a discovery could be the last straw, and the service user might commit suicide. That was an 'enormous and a very real risk which she could not accept under any circumstances'. It was 'impossible to reconcile' Mr Ngole's views with Touchstone's.

104. Mrs Hart accepted in cross-examination that Mr Ngole did not believe that being a homosexual was a sin (paragraph 76) and that she was motivated by the prospect of his

discriminating against people who were LGBT (paragraph 77). He would not be able to adapt 'his style' and Touchstone had a duty of care to service users (paragraph 78).

105. The ET also made relevant findings of fact in the context of its reasons for dismissing Mr Ngole's harassment claims. It made findings about Mrs Hart's letter to Mr Ngole on 14 June 2022 asking him to a second interview. On 'any fair reading' the letter suggested that Mr Ngole's beliefs would stop him from acting in the best interests of service users. In paragraph 263 the ET accepted that what Mr Ngole had said in the Facebook post was 'rooted in his religious beliefs' but (bizarrely, in my view) was not an expression of his Christianity. Touchstone's concerns 'went beyond simply finding' Mr Ngole's views were offensive (paragraph 264). The ET found that Mrs Hart was right to say that Mr Ngole had 'very strong views against homosexuality and same sex marriage' and that those went against Touchstone's. She had 'well founded concerns as to how those views would impact on his ability to act in the best interests of service users and staff' given that both groups included LGBT people. The letter of 14 June did not therefore infringe Mr Ngole's article 10 rights, said the ET. It was objectively justified. It was not because of his exercise of his article 10 rights, but because of the 'objectionable expression of his views'. The evidence was that lives were potentially at stake (paragraph 277).

106. The letter of 14 June 'clearly related to' Mr Ngole's religion or belief. Mrs Hart's concerns about his strong views 'against homosexuality and same sex marriage' caused her to send the letter of 14 June 2022. Those views meant that she needed the assurance that he would be able to do the job. Those views were 'rooted in' his Christian faith. "On any view, therefore, there is a causal connection between [his] religious belief and the impugned conduct". The ET continued, 'The religious belief is clearly related to that letter' (paragraph 280). The reason why he was treated as he was clear and there was no need to resort to the burden of proof (paragraph 285). A relevant factor was the 'tone used' by Mr Ngole in the Facebook post. He had used 'very strong terms'.

107. In paragraph 305, the ET found that 'for the same reasons' as it had found in relation to the harassment allegations based on the 14 June letter and on the meeting of 11 July 2022, Touchstone's approach was proportionate, and there was therefore no unjustified interference with Mr Ngole's article 10 rights. If the ET was wrong, and he had been manifesting his religious beliefs, 'The action taken was by reason of the objectionable manner of the expression of his views', and 'not taken because of his religious beliefs and is objectively justified'.

108. In paragraph 306 the ET then considered 'the events of 11 July and 18 July through the prism of' the 2010 Act. 'On any view the conduct related to' Mr Ngole's 'religious beliefs'. The conduct was not reinstating the job offer. Touchstone's discovery of those beliefs had precipitated the interview of 11 July and the letter of 18 July. 'There is plainly a causal nexus between Mr Ngole's religious beliefs… and the impugned conduct'. The second interview was 'related to' Mr Ngole's beliefs 'as it was those beliefs which led to' Touchstone's 'concerns and the need for assurances'.

109. The ET considered the direct discrimination claims after the harassment claims and after the claims for indirect discrimination, in paragraphs 312-352. Much of that consideration is based on loose proportionality reasoning and takes into account various justifications which Touchstone had suggested for holding the second interview and for

not reinstating the job offer. For example, the ET referred to the protection of the health of others: LGBT fellow employees and vulnerable LGBT service users.

110. In paragraph 352 the ET identified the 'foundation' of Touchstone's defence to the claim for direct discrimination. It was Touchstone's 'well founded belief that others (in particular service users) may come across his beliefs which may be harmful to already vulnerable mental health. This is not to import a "heckler's veto" but to justify interference with [Mr Ngole's] freedom of expression specifically on the risk (per **Page**, paragraph 200 above) that holding' Mr Ngole's 'views about homosexuality might deter mentally [sic] people' who were LGBT from engaging with Touchstone's service, 'risking' Touchstone's 'ability to perform their core healthcare functions and risking significant reputational damage with' WCCG. That risk was real based on 'the experience of Mrs Hart and Mr Pickard and the expert evidence of Dr Joubert…'

111. Significantly, the ET 'readily accepted' that Mr Ngole would not engage in unwelcome evangelism and that he would not discriminate (paragraph 294). It also held, in paragraphs 348-351, that Touchstone could not be satisfied that Mr Ngole did not hold 'the non-discrimination belief'; that is, that 'people should be treated equally and fairly and with dignity and that there should be no discrimination, in particular against [LGBT] people'. There was positive evidence to suggest that Mr Ngole 'had never discriminated on such grounds in the past and was not likely to do so in the future because, as he said…the Bible prohibits him from discriminating against anyone. The occupational requirement defence must therefore fail' (paragraph 351).

What is the outcome if the correct approach is applied to the ET's findings of fact?

112. If the correct test is applied to the ET's findings about the letter of 14 June, it is absolutely clear that 'a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor', if not, indeed, the main reason, why the letter of 14 June 2022 was written was the expression of Mr Ngole's protected religious belief as reported in articles 1 and 2: that is, that homosexuality and same-sex marriage are sins. Similar reasoning applies to the refusal to reinstate the job offer.

113. What the ET described as the 'foundation' of Touchstone's defence to the direct discrimination claim was the risk of service users Googling Mr Ngole, discovering his beliefs and being deterred from engaging with Touchstone's services, risking Touchstone's ability to perform their healthcare functions and risking significant reputational damage with WCCG. That defence, expressed in that way, is a defence of justification, which is not available in a case of direct discrimination. If that defence is an application of the so-called separability principle, it cannot extinguish the other material reason for Touchstone's conduct, that is, the reports of his beliefs in articles 1 and 2.

114. If and to the extent that any further separate analysis of the reasons why Touchstone invited Mr Ngole to the second interview and did not reinstate the job offer is needed, it is clear, on the ET's own findings, that 'a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor', if not, indeed, the main reason, for that conduct, was the expression by Mr Ngole of his religious beliefs as reported in articles 1 and 2, which Touchstone had discovered 'with minimal effort', and which, it feared, others might also discover. Indeed, it could be said, following the analysis of Lord Nicholls in *Nagarajan*, that the rest of Touchstone's reasons for

withdrawing the offer, asking him to a second interview, and not reinstating the offer, are Touchstone's motive, intention, reason or purpose for treating him less favourably on the ground of his protected belief.

115. It was the expression of those beliefs which gave rise to the justifications on which Touchstone relied (or which were the motive, intention, reason or purpose for treating him less favourably on the ground of his protected belief). Those were all grounded in the actual or feared reactions of others to those beliefs. They are not distinct or separable from the beliefs, but stem from them and are inextricably linked with them. Mr Ngole had done no more, as reported in articles 1 and 2, than simply and accurately to express his beliefs that 'Homosexuality is a sin' and 'Same-sex marriage is a sin whether we like it or not'. There is therefore no basis for the ET's finding that Mr Ngole had expressed his beliefs in an 'objectionable way'. On that approach, there is no unobjectionable way of expressing those beliefs.

Bean LJ's reasoning
Ground 1A

116. Bean LJ dismisses ground 1A in paragraphs 49 and 50.

117. Mr Ngole made a claim based on 'stereotyping' in his ET1 (see paragraphs 30.1 and 30.2). What he said, in short, was that Touchstone had assumed that, because he had the beliefs he had, he would discriminate against people on the grounds of their protected characteristics. It is clear from the sample of the ET's findings of fact I have given above that part of Touchstone's response was indeed to assume that because Mr Ngole had the beliefs which he had expressed, he would discriminate against LGBT people and would not be able to do his job properly as respects such service users.

118. Although it is obiter, there is a very illuminating passage in the judgment of Underhill LJ in *Higgs v Farmor's School* [2025] EWCA Civ 109; [2025] ICR 1172 (paragraphs 170-173) in which he expressed his provisional (and obiter) views about the stereotyping argument on which Mrs Higgs relied. He indicated that he considered, provisionally, that the written submissions by the Equality and Human Rights Commission ('the EHRC') on direct discrimination by stereotyping in the context of religion and belief were correct.

119. The EHRC submitted that a decision-maker will discriminate where 'the reason given for the treatment is significantly influenced, consciously or unconsciously, by a stereotype that persons who hold or manifest the relevant belief will share attributes of a group which they might not in fact possess'. An example was the decision of this court in Mr Ngole's first appeal: that people who believe that 'same-sex sexual activity is sinful have an animus towards gay persons'. Some people who hold the belief might have such views, 'but it is stereotyping to assume that all do…The stereotype must significantly influence the decision-maker's decision'.

120. I consider that that analysis is correct and that it applies to the findings of fact made by the ET in this case. I would, if necessary, have allowed the appeal on ground 1A. I do not consider that there is any need for a finding that all evangelical Christians were subjected to a detriment as a class. It is nevertheless obvious that, if not all evangelical Christians do have an animus towards gay people, they are subjected to a detriment if and to the extent that an employer or employers assume that they all do. The detriment

is treating all evangelical Christians as ciphers, and not as individuals, and assuming that they will hold particular attitudes on the sole ground that they belong to that class.

Ground 1C

121. In paragraph 56 of his judgment, Bean LJ says that the ET 'evidently …did not regard' the passages in its judgment and from the cross-examination of Mrs Hart as 'establishing or supporting a simple case that [Touchstone] withdrew the job offer because the decision-makers objected to Mr Ngole's views and I do not read them as doing so either'. I disagree, for the reasons I have already given. The ET's findings, consistently with the approach in *Nagarajan*, do establish such a case, and the ET erred in law in not holding that it did. Those findings do not support the idea that Touchstone had only one reason for acting.

122. In paragraph 59, he refers to a 'difficult distinction'. It is indeed a difficult, if not an impossible, distinction, because, on the facts of this case, the 'manifestation' and the 'belief' are the same thing. To the extent that the 'reason' to which he refers in paragraph 60 is a justification, it is not a defence to a claim of direct discrimination. To the extent that it might suggest reliance on 'the dominant' reason, that is wrong, and it cannot, as a matter of law, exclude another significant reason, that is, Mr Ngole's protected belief. It is also inconsistent with the ET's actual findings, which refer to several reasons.

Ground 1B

123. In paragraph 79, Bean LJ again accepts that there is no defence of justification in a direct discrimination claim. On analysis, his conclusion is in part based on a justification: that Touchstone could not take the risk of mentally ill service users encountering Mr Ngole's views.

124. To the extent that it relies on the reasoning in *Page*, I am not persuaded by it. Mr Page publicly expressed his beliefs while he was a member of the board of an NHS Trust and did not notify the Trust that he was going to make one of his public interventions, despite having been told by the Trust that he should do so. Mr Ngole's 'public manifestation of his beliefs' happened long before he applied for the job. I cannot accept that that past public manifestation, as reported in articles 1 and 2, which was lawful when made and which was no more than an accurate description of those lawful beliefs, could become 'objectionable' because of the nature of the job for which he applied. Bean LJ, it seems to me, has, in this part of his judgment, isolated one of Touchstone's reasons for not reinstating the offer, and treated it as the dominant reason, when the ET's judgment shows that it found that one of the reasons for Touchstone's conduct was Mr Ngole's protected beliefs. I do not consider that that approach is correct, as I have explained.

Should the claim be remitted to the ET?

125. I agree with Bean LJ that this case should not be remitted to the ET for it to make further findings about the reasons why Touchstone asked Mr Ngole to a second interview or did not reinstate the job offer. The hearing in the ET took five days, and the ET spent a further two days in chambers. The remitted hearing was, apparently, to have been listed for five days, which suggests that the parties think the whole case should be re-run. The

ET's reasons for its judgment are over 101 pages, and 361 paragraphs, long. It spent much time and effort on the case, and it must be assumed that it did the best it could to reach its conclusions. More fundamentally, I do not understand what further findings of fact the ET could or should make. It is not possible or necessary for a tribunal of fact to make findings which are any more precise than the findings which the ET did make; such as that the reasons for act 'x' were 25% 'reason a', 25% 'reason b' and 50% 'reason c'. That the ET's findings of fact are sufficient for the purposes of this appeal is evident from the evaluative language which it used when it made them, and from my summary.

Conclusions

126. For those reasons, I would allow Mr Ngole's appeal on grounds 1B and 1C, and if necessary, on ground 1A. I would dismiss the cross-appeal. I would not remit the case to the ET.

Lord Justice Miles:

127. I have had the benefit of reading the judgments of Bean LJ and Elisabeth Laing LJ. I agree with the reasoning and conclusions of Elisabeth Laing LJ. I add a short further judgment to explain why I prefer her approach.

128. I would start by re-emphasising four principal points from the caselaw addressed above. First, direct discrimination under the 2010 Act cannot be justified.

129. Second, as Lord Nicholls explained in *Nagarajan v London Regional Transport* [2000] 1 AC 501, in a direct discrimination claim the tribunal must decide the reason why the employer subjected the employee to less favourable treatment. It is sufficient for a claim of direct discrimination under the legislation that the protected characteristic was a significant influence on the outcome. Where that is shown, the further question why the employer treated the complainant less favourably on those grounds is beside the point.

130. Third, in cases where the protected characteristic is a belief, there may be cases where it may be necessary to decide whether the real cause of the treatment is the belief or its manifestation or is some properly separable feature of it. In *Higgs* at [57] Underhill LJ said that "this line of authority is potentially applicable in a (true) manifestation case, since in such a case the court is concerned (untypically for a direct discrimination claim) with a motivation based not on the possession of the protected characteristic but on particular conduct on the part of the employee." At [74] he distinguished between the manifestation of the belief and something objectionable in the way the belief was manifested; and explained that the way in which the belief is manifested is a deliberately broad phrase intended to cover the circumstances in which the manifestation occurs.

131. Fourth, what has been called "the separability approach" is no more than a way of analysing the facts and is not a rule of law.

132. Turning to the facts, I would start by emphasising that the ET rejected the occupational requirement defence. The ET was not satisfied that Mr Ngole did not hold the non-discrimination belief, i.e. "people should be treated equally and fairly and with dignity and that there should be no discrimination, in particular against [LGBT] people". There

was positive evidence to suggest that Mr Ngole "had never discriminated on such grounds in the past and was not likely to do so in the future because, as he said…the Bible prohibits him from discriminating against anyone. The occupational requirement defence must therefore fail" (ET [351]).

133. I agree with Elisabeth Laing LJ's conclusion that, on the factual findings of the ET, the only tenable conclusion is that the Respondent was significantly influenced, in all of the decisions it made after it had discovered the Guardian and BBC articles, by Mr Ngole's expression of beliefs as so recorded. I cannot improve on her careful analysis. As she says the question is not whether that was the only or dominant reason for the decisions; it is enough that Mr Ngole's beliefs were a significant influence.

134. I do, however, wish to add some brief observations about the suggestion that it is possible on the present facts to separate Mr Ngole's expressions of his beliefs from the manner or way in which they were expressed, as this appears to me to be the crux of Bean LJ's reasoning.

135. Mr Ngole's beliefs as expressed in the two media articles were that homosexuality is a sin and that "same-sex marriage is a sin, whether we like it or not". The articles had been published some years previously, at a time when Mr Ngole was studying at Sheffield University.

136. Mr Ngole did not therefore express these beliefs at a time when he was working or applying to work for the Respondent (or indeed for anyone else). There is nothing in the ET's findings to suggest that anyone coming across the articles subsequently would have supposed that they represented the views of the Respondent or could otherwise be imputed to it. Mr Ngole's views may not be generally accepted and indeed may offend many people, but they were not expressed in provocative or incendiary language. There was in my judgment nothing separable, whether in Mr Ngole's own conduct, or the manner in which he had expressed his beliefs, from the expression of the beliefs themselves.

137. Bean LJ has relied on some of the factual similarities with *Page*. In my judgment the decision of this court in *Page* is an instructive application of the separability approach and its limits. Mr Page was a non-executive director of an NHS Trust who gave a television interview in contravention of the Trust's instruction not to do so without telling it in advance. Given his position there was good reason for thinking that viewers would impute his views to the Trust. It was his inappropriate conduct, or (putting it another way) the manner or way in which he expressed his views, that constituted the reason for the decision, not the views themselves. It was thus a case where (as this court held) Mr Page's objectionable conduct could properly be separated from the mere expression of his views. The present case lacks such features. On the ET's findings all that Mr Ngole did, some years previously when (naturally) he had no connection with the Respondent, was to express his own views in an objectively unobjectionable manner.

138. Bean LJ concludes that in the present case the ET found that the Respondent acted as it did because of the risks that service users would react adversely if they discovered the articles. I agree with Elisabeth Laing LJ that, since there is no proper basis for separating Mr Ngole's expression of his beliefs on the one hand from his conduct or the manner or way in which the beliefs were expressed on the other, the Respondent's

reasons about the way in which service users might react were legally beside the point. Such reasons would, using Lord Nicholls' terminology, amount to the motives or reasons why the Respondent had decided to act in a discriminatory way because of Mr Ngole's beliefs. The Respondent was (on the ET findings) benignly motivated when it decided not to employ Mr Ngole, but on the authorities that is no answer to the claim for direct discrimination.

139. In agreement with Elisabeth Laing LJ, I would allow Mr Ngole's appeal and dismiss the cross-appeal.