EMPLOYMENT TRIBUNALS

Claimant:	**Mr F Ngole**		
Respondent:	**Touchstone Leeds**		
Heard at	**Leeds**	**On:**	**2, 3, 4, 5 and 8 April 2024**
			9 and 10 April 2024 (in Chambers)

Before:	**Employment Judge Brain**
Members:	**Mr W Roberts**
	Mr M Taj (2 and 3 April 2024)
	Mr M Brewer (4, 5, 8, 9 and 10 April 2024)

Representation

Claimant:	**Mr M Phillips, solicitor advocate**
Respondent:	**Mr P Wilson, counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The complaint of direct discrimination because of the claimant's religion or belief (brought pursuant to section 13 when read with section 39(1) of the Equality Act 2010) succeeds in part upon the respondent's withdrawal of the conditional job offer on 10 June 2022. The remaining complaints of direct discrimination fail and stand dismissed.
2. The respondent's occupational requirement defence to the successful direct discrimination claim (made pursuant to paragraph 9 of schedule 1 to the 2010 Act) fails.
3. The complaints of harassment related to the claimant's religion or belief (brought pursuant to section 26 when read with section 40(1)(b) of the 2010 Act) fail and stand dismissed.
4. The complaints of indirect discrimination in relation to the claimant's religion or belief (brought pursuant to section 19 when read with section 39(1) of the 2010 Act) fail and stand dismissed.

REASONS

Introduction and preliminaries.

1. The claimant is a Christian. He is a qualified social worker. He qualified in 2021.

2. In April 2022 he applied for a role with the respondent as discharge mental health support worker, working at Pinderfields Hospital in Wakefield. He was offered the role on 19 May 2022 (subject to a clear DBS certificate and satisfactory references).

3. Following a Google search carried out by the respondent, the conditional job offer was withdrawn on 10 June 2022. The respondent's withdrawal was without any discussion with the claimant. At the claimant's behest, there then followed a meeting to discuss matters which was held on 11 July 2022. The respondent maintained their withdrawal and did not reinstate the conditional offer.

4. Arising from this is a claim about whether the respondent's actions amount to religion or belief discrimination or harassment following what was uncovered about the claimant's religious views (particularly about homosexuality and same-sex marriage) in the Google search.

5. The *Equal Treatment Bench Book* (April 2023) says at paragraph 77 of chapter 12 that. *"Although different identities are involved, transgender people and lesbian, gay and bisexual people often campaign together about discrimination, and it is common to hear the collective term, 'LGBT.' Many research papers also look collectively into issues of discrimination against these groups. The term 'LGBT' is sometimes extended by adding Q (queer or questioning), A (asexual), I (intersex) or more generically, simply a+."* The Tribunal will in this judgment adopt the term '*LGBTQI+'* as that is the term adopted by the respondent in their evidence in chief.

6. The case benefited from a preliminary hearing for the purposes of case management. This came before Employment Judge Buckley on 6 February 2023. She identified the issues in the case and made case management orders. The issues to which the case gives rise are in paragraph 164. Suffice it to say at this stage that it was recorded in her case management order that the claimant pursues the following claims under the Equality Act 2010:

   6.1. Direct religion or belief discrimination.

   6.2. Indirect discrimination in relation to religion or belief.

   6.3. Harassment related to religion or belief.

7. It was recorded by Employment Judge Buckley that there was an issue of jurisdiction, that being whether the claimant's complaints were brought within the limitation period in section 123 of the 2010 Act. In his closing submissions, Mr Wilson (the respondent's counsel) accepted that the claimant's complaints had been presented to the Tribunal within the relevant limitation period. The Tribunal is therefore not concerned with any issue of jurisdiction.

8. Employment Judge Buckley listed the case for hearing over five days between 10 and 14 July 2023. The matter was listed before an Employment Tribunal panel consisting of the Employment Judge, Mr Roberts and Mr Taj. The matter was adjourned on 10 July 2023. This is because an issue arose about the parties'

wishes to adduce expert evidence. An Order was made granting permission to each party to rely upon expert evidence. The matter was then re-listed for hearing in April 2024.

9. The Tribunal amended the hearing timetable which had been set by Employment Judge Buckley to take account of this development. The time allocation was increased from five days to a seven days' listing.

10. The timetable provided for three hours for the Tribunal to read in and then two hours on the first day to start the claimant's evidence. Due to the greater volume of material than had been anticipated, the Tribunal directed (on the morning of 2 April 2024) that the Tribunal would take all of the first day for reading in. Mr Phillips and Mr Wilson both confirmed that the issues remained as *per* those recorded by Employment Judge Buckley at the case management hearing of 6 February 2023.

11. On the morning of 3 April 2024, the claimant made an application that Mr Taj recuse himself from hearing the case. This was upon the basis of material discovered by the claimant following an internet search which revealed that Mr Taj had been president of the TUC between 1 September 2013 and 31 August 2014. During that time, he had supported the TUC's LGBTQI + Conference which was held in June 2014. At the 146th Annual TUC Conference held later in 2014, a motion (known as '*motion 76'*) was carried with Mr Taj's personal involvement. This motion advocated a position that it was time to *"unring the bell on religious zealotry."* The Tribunal understands this to essentially advocate that religious orthodoxy of any kind should be repudiated.

12. It would, frankly, be a poor trade union that does not advocate for equality of treatment of all before the law. However, the Tribunal agreed with Mr Phillips' submissions that the TUC's stance at the June 2014 conference and then at the annual conference went beyond advocating for equality of treatment (to which there can be no objection) and crossed the line into campaigning.

13. The claimant applied for Mr Taj's recusal upon the basis of apparent bias. There was no suggestion of actual bias on his part. The application for recusal was therefore based on apparent bias, as defined by Lord Hope of Craighead at paragraph 103 of **Porter v Magill** [2002] AC 357 HL where he said, *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."* The application was upon the basis that Mr Taj's support for LGBTQI+ rights ran counter to the claimant's Christian orthodox beliefs.

14. A very similar issue had arisen in **Higgs v Farmor's School (No 2)** [2023] EAT 45. In that case, a lay member of the Employment Appeal Tribunal had held a senior position in an education union whose views were diametrically opposed to those of the claimant (Ms Higgs). The union had adopted a campaigning stance upon the issue. It was held that a reasonable observer would conclude that there was a real possibility that he would unfairly regard Ms Higgs' case with disfavour. It was difficult to see any basis upon which **Higgs** could be distinguished from the instant case. Accordingly, the decision was taken that Mr Taj recuse himself from hearing the case.

15. The recusal application took up most of the second day of the hearing on 3 April 2024. Fortunately, Mr Brewer was available at short notice to sit. The Employment Judge is obliged to him for the efforts made by him to read into the case late in the afternoon and into the evening of 3 April 2024. His diligent work enabled the

Tribunal to start to hear the evidence on the morning of the third day of the hearing (4 April 2024).

16. The fourth day of the hearing was largely taken up with the claimant's evidence. He also called evidence from Reverend Canon David Munby. Mr Wilson said, on behalf of the respondent, that Reverend Munby's evidence may be taken as read.

17. The Tribunal then heard evidence from the respondent's witnesses of fact. We heard from:

    17.1. Kathryn Hart. She has been employed by the respondent as its director of people and culture since 31 March 2011. In October 2021, she was appointed as the respondent's deputy chief executive officer, working closely with Arfan Hanif, the respondent's chief executive officer.

    17.2. Dave Pickard. He has been employed by the respondent as its operations director (assigned to quality and performance) since January 2022.

18. The respondent's evidence of fact was heard on 5 April 2024. After the weekend break, the hearing resumed on 8 April 2024. The Tribunal then heard from each party's expert.

19. The claimant called evidence from Reverend D. Paul Sullins, PhD. He is 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. His report is at pages 19 to 41 of the supplemental bundle.

20. On behalf of the respondent, expert evidence was given by Dr Hercules Eli Joubert. He currently holds the posts of clinical director of the Leeds Gender Identity Service at the Leeds and York NHS Foundation Trust, and consultant clinical psychologist, clinical psycho-sexologist and clinical lead at the Leeds Gender Identity Service. He runs a private practice as a consultant clinical psychologist and psycho-sexologist. He is also the founder of the Northern Gender Network. His report is at pages 52 to 77 of the supplemental bundle.

21. Neither party put in issue the expertise of Reverend Sullins or Dr Joubert to give expert opinion about matters falling within their expertise.

Factual findings.

The parties.

22. We now turn to our findings of fact. There is not a huge amount of factual disagreement. Where there is disagreement, the Tribunal will say how the conflict of evidence or disagreement was resolved in favour of one party or the other.

23. We shall say something, by way of introduction, about each party. We shall start by looking at the respondent.

24. Mrs Hart says this in paragraphs 8 and 9 of her witness statement:

    "8 The respondent is a charity, established in 1982, which provides mental health and well-being services to over 10,000 individuals each year across Yorkshire, covering seven local authority areas including Leeds, Bradford, Kirklees, Wakefield, Calderdale, Barnsley and Rotherham.

    9 We have over 50 services which are tailored to serve the needs of service users from a diverse range of local communities across Yorkshire. In particular, we have a strong track record of specifically adapting and tailoring our services to the LGBTQI+ community, specific faith groups such

as the Christian, Muslim and Sikh communities (for example) and to a diverse range of black minority ethnic communities as well".

25. She goes on to say within her witness statement:

"18 We are whole heartedly committed to promoting equality, diversity and inclusion within the workplace and beyond, and are very proud of our diverse and talented workforce. The respondent's workforce comprises a broad spectrum of faiths, ethnicities, nationalities and sexualities/identities (see pages 223 to 233 of the bundle) with approximately just under a third of staff forming part of the Christian community.

19 Our ultimate aim is to be representative of the diversity of the communities we serve and provide support to all, irrespective of sex, religion/belief or background and/or identity. It is, and this is not placing it too highly, literally at the heart of everything we do.

20 We are fully aware that people have different beliefs, be those religious or otherwise, and we respect each individual's right to hold whatever faith, belief or view that feels right to them.

21 The respondent has been recognised over the years for its work supporting underrepresented communities, and most recently placed 56th in Stonewall's "top employer's list for LGBTQI+" (2023).

22 We also won a gold award from Stonewall, which recognises exceptional employers who are committed to supporting their LGBTQI+ staff and customers.

23 Touchstone is an exclusive Top 50 UK Employer and has been placed third on its 2022/23 list.

24 We are really proud of our awards and recognition within the mental health sector, particularly those acknowledging our commitment to supporting and working with the LGBTQI+ community.

25 We believe our positive standing within the LGBTQI+ community demonstrates our continued hard work and commitment to support the LGBTQI+ community, and as part of this, promote awareness through providing LGBTQI+ and gender identity training to our staff on a continued basis. We also believe this work helps us to achieve the objectives set out in the public sector equality duty [in Chapter 1 of Part 11 of the 2010 Act] as outlined above.

26 Examples of our most recent TransLeeds Trans Awareness Training (from April 2023) appears in the bundle (from pages 280 to 305) and our LGB Training from May 2023 appears at pages 306 to 399 of the bundle."

(There appears to be an incorrect reference in paragraph 18 of Mrs Hart's witness statement. The respondent's Equality, Diversity, and Inclusion report dated 14 December 2022 in fact starts at page 263. This corroborates what she says about the percentage of the workforce identifying as Christian. We can see that in 2022, 31% of the respondent's employees identified as Christian).

26. In paragraph 31 of her witness statement she says that, *"Approximately a third of our workforce is from the LGBTQI+ community (and approximately 12% of our service users, as far as we are aware from the disclosures made, are too) so it is really important to us that we keep staff trained and abreast of relevant updates*

within the LGBTQI+ community, ensuring that we continue to provide a service that is exclusive." According to the diversity report (at page 265) the number of LGB staff within the respondent is 23% and the number of transgender/non-binary staff is 8%. Accordingly, this is corroborative, again, of Mrs Hart's evidence.

27. The claimant is a qualified social worker. He qualified from the University of Sheffield in October 2021. He also holds a PGCE in education. When he applied for the role with the respondent, he held the position of residential children support worker. He has held a number of positions as listed in his job application form (in particular at pages 129 to 132 of the bundle). He has been successful. The work which he has undertaken has not generated any complaints from those who he has worked with.

The Wakefield Hospital discharge mental health support worker role.

28. We now return to Mrs Hart's witness statement where she describes the Wakefield Hospital discharge mental health support worker role. This is necessary to set the scene:

> *"36 In April 2022 the respondent placed an advert on Inclusive Companies, Job Centre Plus, Indeed, Doing Good Leeds, Leeds City Council and Nova (Wakefield) and its own website, advertising for the role [of Wakefield Hospital discharge mental health support worker]. The role was advertised as being for a fixed term and was expected to end on 31 March 2023 subject to funding and the needs of the organisation (see pages 123 and 124 of the bundle).*
>
> *37 The respondent provides hospital discharge support across a number of mental health Trusts within West Yorkshire, and therefore understands that there is often a strong correlation between mental health struggles and an individual's sexuality and/or gender identity.*
>
> *38 Given our work within Leeds and Kirklees over the past 40 years or so, we have a deep understanding of the challenges faced by former in-patients when integrating back into society after hospital discharge. We have developed a host of effective approaches designed to support individuals in their recovery and reduce the risk of re-hospitalisation.*
>
> *39 We were directly approached (as opposed to having to tender for the role) by Wakefield Clinical Commissioner Group ("Wakefield CCG") who wanted to provide us with funding for the role. This approach was due to our strong reputation within the mental health care sector, and longstanding track record of working with and successfully supporting individuals from diverse communities and preventing them from being re-hospitalised.*
>
> *40 The role was the first of its kind for the respondent within the Wakefield area and was part of a pilot scheme commissioned by Wakefield CCG, the aim being to:*
>
> - *Provide mental health support and advice to the transfer of care team.*
> - *Support patients requiring discharge from hospital who have mental health needs to access support in the community upon their discharge from hospital.*

- *Reduce delays in identification of, or access to, relevant support within the local community in a bid to reduce delays in the discharge process and instability for that patient that once back in the community that could result in a deterioration in their health and well-being (which in some cases could lead to re-admission).*
- *Ensure patients who are ready for discharge have their mental health needs appropriately assessed and if applicable, offered or navigated to suitable support.*
- *Avoid delays in patient discharge and to ensure patients have the best possible chance of achieving stability and maximising their independence in the community thereby reducing hospital re-admission.*

41 *Funding for the role from Wakefield CCG was contingent upon the respondent recruiting a suitably skilled and experience member of staff. Wakefield CCG were relying upon us to create an inclusive service within the district of Wakefield, with an individual support worker committed to meeting the mental health and well-being needs of a diverse range of communities, including (but not limited to) the LGBTQI+ community.*

42 *At the time, Wakefield was an area in which the respondent had yet to establish community links with relevant services (unlike for example Leeds and Kirklees), and it was really important to us that this pilot role was a success to further support our working relationship with Wakefield CCG (with whom we had a fledgling working relationship at the time and wanted to continue working moving forward).*

43 *When considering the requirements of the role, we were determined that we would need someone who would be able to work comfortably and collaboratively with all people including LGBTQI+ organisations such as Mesmac Leeds (a sexual health organisation) and TransWakefield (who provide practical support to all Trans and non-binary people, their families and their friends within the Wakefield and surrounding areas).*

44 *The reason for this is that LGBTQI+ people are, statistically, far more likely to experience serious mental health problems due to stigma and discrimination within the workplace and/or wider community, and may self-harm, experience suicidal ideations and/or in the worst cases, attempt to take their own lives. In practice, therefore, this means that members of the LGBTQI+ community are far more likely to be hospitalised and require support from the respondent via the role than those not from the LGBTQI+ community.*

45 *The role was an individual one (funding was not available for a team at the time), meaning that the successful candidate would be working alone with a variety of NHS employees and organisations. The successful candidate would be solely responsible for the successful discharge and re-integration of the service user back into the community. It was therefore vitally important to us that we found an individual fully committed to the success of the role who was capable of supporting all individuals irrespective of their background and/or identity.*

46 *The principle aim of the role (which was outlined in the job description – see pages 116 to 119 of the bundle) was to support vulnerable service*

users with severe mental health issues during the discharge process (which can be particularly difficult) and reduce the chance of them being re-admitted to hospital as already mentioned.

47 This included identifying potential barriers to service users being discharged from Wakefield Hospital and signposting that individual to the support available on an individual, case by case basis."

29. These passages from Mrs Hart's witness statement were unchallenged by Mr Phillips. He did ask a question about paragraph 30 of her witness statement, to the effect that her statement at LGBTQI+ service users are proportionately more likely to experience mental health difficulties was one from her own personal experience. (Paragraph 48 of her witness statement is pretty much to the same effect). She maintained her position.

30. In his report dated 17 October 2023, Dr Joubert says (at paragraph 5.1) that, *"NHS Digital, a branch of NHS England, reports that people from the LGBTQI+ communities are much more likely to report mental health difficulties (16%) compared to their heterosexual counterparts (6%)".* He goes on to say that MIND (the UK based mental health charity), states that sexual orientation *per se* does not cause mental health difficulties and the reason for an increased rate of mental health difficulties is likely to be due to homophobia, biphobia or transphobia, stigma and discrimination, difficult experiences of coming out, social isolation, exclusion, and rejection.

31. In evidence given under cross-examination, it was put to Dr Joubert by Mr Phillips that no study makes a causative link between poor mental health on the one hand and being a member of the LGBTQI+ community on the other. Dr Joubert accepted that LGBTQI+ status was not a pathology but held his position that this factor does not detract from the fact that members of the LGBTQI+ community generally suffer poorer mental health issues than others. The Tribunal accepts this to be the case. As a proposition it is supported by Dr Joubert's expert evidence which was unchallenged by Mr Phillips. Mrs Hart's evidence was based upon her significant experience and Mr Pickard's evidence to this effect was from his lived experience. There was little evidence to the contrary led by the claimant. (See also paragraphs 36 to 39 below corroborative of this finding). The proposition that those from the LGBTQI+ community are more likely to report mental health difficulty is also supported by data from the NHS.

32. The job description is, as Mrs Hart says, at pages 116 to 119. This is corroborative of her evidence about the requirements of the role. The only point of note highlighted by either party during the hearing was point 7 at page 119. This requires 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."* (This point was raised with the claimant by Mr Wilson). The respondent has several policies of relevance, including a religion, faith and belief policy, an equal opportunities policy, and an equality, diversity and inclusion handbook.

33. The person specification is at pages 120 to 122. There were six competencies. The essential criteria included *"working with people experiencing mental health difficulties and challenging behaviour."* The desirable criteria included "*experience of working with black and other minority people and/or disadvantaged communities."*

34. One of the essential criteria for the competency of "*attitudes and disposition"* was a *"commitment to respecting diversity, and to discriminatory anti-oppressive practices and equal opportunities."*

35. *"Equal opportunities"* was one of the competences for the role. One of the essential criteria for that competency was being *"sensitive"* to the needs of disadvantaged groups in the planning and delivery of services.

36. Mr Pickard gave evidence largely corroborative of that from Mrs Hart. He said at paragraph 18 of his witness statement that, *"Ultimately, at Touchstone, equality and diversity underpins everything we do as a charity, and it is vitally important that we have the full buy in from all members of staff, particularly as we are working directly with some of the most vulnerable members of society and many members of staff have "lived experience", meaning that they have at some point or another struggled with their own mental health".* Mr Pickard spoke of his pride at some of the awards achieved by the respondent including the Inclusive Companies' UK top 50 *'most inclusive employer's list'* (2022) and Stonewall's Gold Award Accreditation in 2022 and 2023.

37. In paragraph 26 of his witness statement he says that, *"There are many reasons why service users are referred to the respondent for support, and we continue to see a high volume of service users coming to us for support who are members of the LGBTQI+ community, seriously struggling with their mental health as a result of stigma, discrimination and a general misunderstanding in the wider community of their lifestyles and identities."*

38. He mentions (in paragraph 29) that "*Studies show that members of the LGBTQI+ community are far more likely to experience depression and anxiety than others who are not from the community."* In paragraph 30 he goes on to say that *"Studies also show that one in eight members of the LGBTQI+ community has at some point attempted to end their own life and almost half of trans people have had suicidal ideations at one point or another due to stigma and discrimination and misunderstanding about their lifestyles and choices".* In paragraph 31 he says that "*It has also been reported that approximately 52% of young LGBTQI+ people have self-harmed at some point or another (compared to 25% of heterosexual/non-trans young people) demonstrating just how vulnerable the community can be."*

39. Mr Pickard accepted, in evidence in cross-examination, that he had not cited the studies to which he refers. Nonetheless, it was fairly and properly accepted by Mr Phillips on behalf of the claimant that there is no dispute that mental health issues affect those from the LGBTQI+ community more than those in the heterosexual community. Mr Pickard accepted Reverend Sullins' opinion that while mental health issues do affect those from the LGBTQI+ community more, it is difficult to know the cause of mental health problems.

40. In evidence in cross examination, the claimant (quite properly) recognised that a lot of the service users who contact the respondent will be from the LGBTQI+ community. The respondent does not of course work exclusively for the LGBTQI+ community. That said, there was broad agreement that many of the service users come from that community whatever the cause of their mental health issues. It is also right to observe that support of those from the LGBTQI+ community is a priority for the respondent.

The claimant's application for the role his declaration of his faith.

41. The claimant sent his application form via the respondent's online portal (page 126). The form itself is at pages 127 to 146.

42. The claimant gave his title (on page 127) as 'Rev *[Reverend]* Ngole.' On the equality and diversity form (at page 143) he declared his religion or faith to be Christian. (This part of the form and the applicants' personal details were treated separately from the body of the application itself). The claimant mentioned in the body of the form his voluntary work as a youth leader at St George's Church in Barnsley. He undertook this voluntary work between September 2014 and September 2017. Although the personal details and equality and diversity details were to be kept separate from the rest, the information was relayed to the respondent. The claimant was open about his religion and his faith.

43. The claimant was invited to attend an interview on 10 May 2022. The invite was issued by Lauren Smith, HR administrator (page 147). The claimant was one of 13 applicants for the role. A short list of five was drawn up by the respondent.

44. The claimant was interviewed by Ishrat Nazir (Leeds *Wellbea*n café manager) and Martin Bishop (peer support co-ordinator). Their scoring sheets are at pages 154 to 164 of the bundle. The candidates were asked eight questions. The claimant scored well in interview and was offered the post.

45. It was put to the claimant by Mr Wilson that there was no reference within the interview to the claimant's Christian values or beliefs. The claimant replied *"what you see is what was discussed*. *There were no direct questions [about faith] but the answers give an indication, I said I was compassionate and kind."* He was then asked whether he links his compassion to Christianity. The claimant replied*, "I didn't mention the word [Christianity], I don't go round saying 'I'm Christian'."*

46. The Tribunal did not hear evidence from Mr Nazir or Mr Bishop. It was suggested by Mr Phillips to Mrs Hart and Mr Pickford that the claimant had scored well at interview. With this they both, of course, agreed.

47. The claimant was clear in his application form about his faith. There is no reason to suppose that this would have been an issue for the respondent at this stage in any case. As has already been mentioned, in 2022 31% of the respondent's staff declared their faith to be Christian. This proportion was 28%, 26% and 29% in 2019, 2020 and 2021 respectively (according to the table at page 264). 44% of staff declared themselves as atheists and 14% as Muslim.

48. In his written statement (where he sets out his evidence-in-chief), the claimant tells us that he was born in Cameroon. He became a Christian at approximately four years of age. In paragraph 7 he says, *"I have studied the scriptures considerably. I believe that the entire Bible, including the Old Testament and New Testament is the inspired and infallible word of God. Everything that is in the Bible is part of the 'Gospel' ('good news') which Jesus has commanded us, as Christians, to 'preach' to the entire world. I always find it a privilege to share God's word, especially when called upon to do so (Matthew 28:19 KJV 'Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost')."*

49. Reverend Munby says in paragraph 5 of his witness statement that *"…. there is a duty on Christians to speak the truth lovingly to those that do not believe, especially when we are asked what we think or what the Bible teaches."* He goes in paragraph 6 to say that *"As a church, we must reach out to the entire community,*

not in judgement, but by serving them and loving them. At the same time, we cannot compromise our beliefs, even if they are unpopular. So our Christian call is to love people but to hate the sin which spoils our lives."

50. Mr Roberts asked the claimant to which denomination of Christianity he belongs. The claimant said*, "I cannot give it."* At this point Mr Phillips said that the claimant is "*an Evangelical believer."* Mrs Hart was asked by Mr Phillips if she was aware that the claimant is an Evangelical Christian. She said that she did not know that. It was then put to her that being an Evangelical Christian is part of the faith and the authentic self of Evangelicals, with which she agreed. It was suggested that *"part of being Evangelical is to spread the word."* Mrs Hart said that she was not aware of this at the time but is aware of it now. The Employment Judge then asked Mr Phillips to define the term 'Evangelical." He replied that it is "*a belief in the Bible, conservative views on homosexuality and spreading the belief."* Some of the same points were put to Mr Pickard. He acknowledged the claimant to be an Evangelical Christian. Like Mrs Hart, there is no evidence that he was aware of this at the material time. (They were of course aware that the claimant in Christian).

51. The claimant and Reverend Munby each speak in measured terms about evangelising. Both said that it is part of their faith so to do especially when called upon or asked to do so. Neither suggested that they would evangelise without being asked to do so.

52. The claimant's expert, Reverend Sullins, has expertise in sociology. He is also a former Anglican priest and was ordained under the Pastoral Provision to the Catholic priesthood in May 2002. We can see from his CV that he has authored a number of theological books and articles. The Tribunal is satisfied that he has expertise not only in sociology but also in Christian theology. He does not refer to the claimant as an Evangelical Christian (or at any rate, we were not taken to any passages within his reports where he does so). He makes no mention of that part of the Christian faith referred to in paragraph 7 of the claimant's witness statement and paragraphs 5 and 6 of Reverend Munby's witness statement. (We shall say more about other aspects of the claimant's belief in due course).

The respondent's conditional job offer and the references.

53. Returning now the chronology of events, Lauren Smith wrote to the claimant on 19 May 2022 with a conditional job offer (pages 168 and 169). She informed him that the respondent was *"very pleased to provisionally offer you the job [of Wakefield Hospital discharge-mental health support worker] subject to satisfactory written references being received and receipt of an enhanced disclosure and barring service check."*

54. One of the claimant's referees was a home manager of Cygnet Healthcare (for whom the claimant had worked). At page 172 this reference reads, "*Just to confirm that Felix worked [as] a bank night support worker from 20.11.20 to 5.7.21. This was at The Fields-Cygnet Healthcare".* (The claimant in his application form gives the dates of his employment with Cygnet as between 20 November 2020 and 20 July 2021).

55. On 24 May 2022, a reference was given by TeacherActive (page 192). This reads, *"Felix Ngole worked with TeacherActive from 2/2/21 to 13/5/22. She/he is not currently subject to any safeguarding or disciplinary investigations with us and we know of no reason why Felix Ngole cannot be engaged to work with children. As a recruitment agency, this is the only information we can provide at this time."* The

email then concluded, "*If you wish to discuss this further, please call our clearance team on [telephone number].*

56. There was nothing negative in the references. However, they were factual and did not address the points which the respondent wished to have covered. Lauren Smith's email to the referees asking for references is at pages 173 to 183. They were sent the job description and person specification. They were also sent quite a detailed reference request form. The references were therefore lacking from the respondent's perspective.

57. On 24 May 2022, Lauren Smith emailed the claimant (page 185). She said, "… *both of your references have come back, but annoyingly they are simply statements of the dates you worked. They don't really tell us anything about you or your experience. I'm sorry to ask, but do you have a third reference you are happy for us to contact? Can be a voluntary or employment history? Or maybe someone you worked with that wasn't your direct supervisor, but a supervisor who worked with you?"*

58. In reply, the claimant nominated a third referee (page 187). This referee did complete the reference request form. However, she referred to the claimant as being *a "family friend".* Mrs Hart says in paragraph 59 of her witness statement that, "*Our recruitment policy states that successful applicants must provide two references from professional referees, and we do not accept references from people known to applicants on a personal level (for example family, friends and/or neighbours)."*

59. The claimant said about the third referee that he knew her through his wife. He volunteered to support her (the referee) and her children on a voluntary basis. The claimant was not recruited to work for the referee as an employee. Mr Wilson asked whether the claimant perceived himself to be a support worker of her. The claimant simply said, "*I can only say what I was thinking*." In the Tribunal's judgment, the respondent was justified in not being satisfied with the third reference supplied by the claimant. This did go against the recruitment policy referred to by Mrs Hart.

60. It was around this time that Mrs Hart first became involved in the matter. She was approached on 6 June 2022 by Sharon Brown (business development director) at a senior leadership team meeting held on 6 June 2022. In paragraph 63 of her witness statement, Mrs Hart explains that Mrs Brown informed her "*that there were problems with the claimant's references … in particular, she explained that there had been a lack of detail in the two employer references received, and the third reference had been given by a family friend which could not be accepted for the reasons already mentioned."* Mrs Hart agreed with Sharon Brown's suggestion of trying to telephone Cygnet Healthcare and TeacherActive.

61. Mrs Brown therefore tried to contact both professional referees the next day, 7 June 2022. She could not contact the referee at Cygnet Healthcare. She was able to contact the referee at TeacherActive. This referee appeared reticent about giving more information. She put Mrs Brown on hold for about 10 minutes while she spoke to her line manager. She then reverted to Mrs Brown and said that she could not give any further information about the claimant. In paragraph 68 of her witness statement Mrs Hart says that both she and Mrs Brown were concerned about the reluctance of this referee to provide any further information about the claimant.

62. There was an additional pressure on the respondent as Wakefield CCG was keen for the respondent to commence the role as soon as possible. Mrs Hart says in paragraph 69 of her witness statement that she was aware of this pressure but, *"before we could allow the claimant to start work, we had questions about his work history and wanted to check that what he had said to us during interview and on his application form were factually correct and could be corroborated."*

The respondent's Google search of the claimant.

63. Sharon Brown then carried out a Google search of the claimant's name. She discovered information about the claimant published by *BBC News* and *The Guardian.* These articles are in the bundle commencing at page 115.

64. *The Guardian* article is dated 27 October 2017. The headline is *"Christian thrown out of university over anti-gay remarks loses appeal".* The sub-headline reads, *"Felix Ngole, who was on social work course at Sheffield University, wrote on Facebook that homosexuality was a sin."*

65. It is, we think, necessary to set out the whole of *The Guardian* article which was read by the respondent on the Google search:

> *"A devout Christian who was thrown off a university social work course after branding homosexuality a sin on Facebook has lost a high court battle. Felix Ngole, from Barnsley in South Yorkshire, was removed from a two-year MA course at Sheffield University last year after writing what the university called "derogatory" comments about gay and bisexual people.*
>
> *Ngole, 39, wrote during a debate on Facebook that "the Bible and God identify homosexuality as a sin" adding that "same sex marriage is a sin whether we like or not. It is God's word and man's sentiments would not change His words."*
>
> *He claimed that he was lawfully expressing a traditional Christian view and complained that university bosses unfairly stopped him completing a post-graduate degree. But after analysing rival claims at a trial in London this month, the deputy high court judge, Rowena Collins Rice, ruled against him.*
>
> *Ngole said his rights to freedom of speech and thought, enshrined in the European Convention on Human Rights, had been breached. His case was backed by the Christian Legal Centre, part of the campaign group Christian Concern.*
>
> *But lawyers representing the university said that he showed "no insight" and said that a decision to remove him from the course was fair and proportionate.*
>
> *They said Ngole had been studying for a professional qualification and university bosses had to consider his "fitness to practice."*
>
> *Ngole said he planned to appeal further adding: "I'm very disappointed by this ruling, which supports the university's decision to bar me from my chosen career because of my Biblical views on sexual ethics.*
>
> *I intend to appeal this decision, which clearly intends to restrict me from expressing my Christian faith in public."*
>
> *The judge was told Ngole had posted comments during a debate about Kim Davis, a state official in the US state of Kentucky, who refused to register same-sex marriages. Ngole said that he had argued that Davis' position was based on the "Biblical view of same sex marriage as a sin." He said he was*

making "genuine contribution" to an important public debate and was entitled to express his religious views.

University bosses said he had posted comments on a publicly accessible Facebook page which were "derogatory of gay men and bisexuals."

Collins Rice said: "Public religious speech has to be looked at in a regulated context from the perspective of a public readership. Social workers have considerable power over the lives of vulnerable service users and trust is a precious professional commodity."

The Judge added: "Universities also have a wide range of interests in and responsibilities for their students – academic, social and pastoral. Where, as Sheffield does, they aspire to be welcoming environments for students from a diverse range of backgrounds, they must expect to be inclusive and supportive of that diversity."

Officials at the Christian Legal Centre said the decision was wrong and would have a "chilling" effect.

Andrea Williams, the chief executive, said: "The court has ruled that though Mr Ngole is entitled to hold his Biblical views on sexual ethics, he is not entitled to express them. This ruling will have a chilling effect on Christian students up and down the country who will now understand that their personal social media posts may be investigated for political correctness."

66. The *BBC News* article is dated 3 July 2019. The headline reads *"Sheffield University student wins Facebook post appeal."*

67. Again, it is worth setting out the full article which was read by the respondent:

"A devout Christian who was thrown off his university course for posting that homosexuality was a sin has won an appeal against the decision.

Felix Ngole, 39, was removed from a postgraduate social work course at the University of Sheffield in 2016 after posting the Facebook comment.

Judges overturned a previous court ruling and said the university should reconsider Mr Ngole's case.

The university said it was considering its response to the judgement.

Mr Ngole, from Barnsley, had argued that throwing him out breached his rights to freedom of speech and thought.

He said he had been expressing a traditional Christian view that "the Bible and God identify homosexuality as a sin".

His comments were made during a debate on Facebook about Kim Davis, a state official in the US state of Kentucky, who refused to register same-sex marriages, judges heard.

Some months later, he was anonymously reported to the university and was disciplined in a fitness to practice hearing.

The university said he was taking a "professionally qualifying degree" with the aim of becoming a social worker and argued what he had said would affect gay people he might work with.

Mr Ngole took his case to the High Court in 2017 but judge Rowena Collins Rice ruled that university bosses had acted within the law.

At his appeal, judges ruled in his favour, stating that "the disciplinary proceedings were flawed and unfair" and said Mr Ngole's case should be heard by another fitness to practice hearing.

Mr Ngole said: "As Christians we are called to serve others and to care for everyone, yet publicly and privately we must also be free to express our beliefs and what the bible says without fear of losing our livelihoods."

A university spokesperson said it supported the rights of students to "hold and debate a wide range of views and beliefs".

"However, for students studying on courses that lead to professional registration, we have a responsibility to look at how any concerns raised could impact a student's fitness to practise once registered."

68. Mrs Hart and Mr Pickard both said that it was not normal practice to Google a job applicant. They justified their actions by reason of the paucity of information in the references. Further, neither of them read the judgment of the Court of Appeal. Had they done so, they would have seen the following recitation of the facts in **R (on the application of Ngole) v University of Sheffield** [2019] EWCA Civ 1127. This ruling was the subject matter of the *BBC News* article. *(We shall refer to the case now as '**Ngole'**).*

"The Facts

7 – The appellant [the claimant in our case] is a devout Christian for whom the Bible is the authoritative word of God. On 22 September 2014, he enrolled as a mature student on the MA social work course at the University [of Sheffield]. As explained above, successful completion of this course would have led to registration and practice as a qualified social worker. As part of his course, the appellant had already completed one practice placement, which brought him into direct contact with service users. He was due to undertake his second placement in the second year of the course.

8 – Upon enrolment on the course in September 2014, the appellant signed a 20 point student entry agreement confirming that he had accessed and read the HCPC's [Health and Care Professions Counsel] student guidance on standards of conduct and ethics; would strive to conform to the HCPC's expectations as set out there; at all times ensure that his behaviour does not compromise the public trust in the profession or in the University of Sheffield; not allow his views about a person's lifestyle, culture, beliefs, race, ethnicity, colour, gender, sexuality, age, social status or perceived economic status to prejudice his interaction with service users, university and practice teaching staff or colleagues; and that his conduct will reflect the standards expected of him, both as a student of the University of Sheffield and a prospective member of the social work profession. By signing the agreement, the claimant also agreed: '14. My conduct will reflect the standards expected of me, both as a student at the University of Sheffield and a prospective member of the social work profession and I will be mindful of the fact that my conduct outside the programme of study may compromise my entitlement to complete the programme or to register with the HCPC'.

9 - It is not in dispute that the appellant had ready access to all of the relevant HCPC and University guidance material relating to his course, to professional standards, and to fitness to practise (as to which see further below).

The Appellant's NBC postings

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:

"… Same sex marriage is a sin whether we accept it or not"

"…Homosexuality is a sin, no matter how you want to dress it up"

"…[Homosexuality] is a wicked act and God hates the act"

"…God hates sin and not man"

"…One 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 pursued 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."

12 - The NBC posts were brought anonymously to the attention of the University by another student. The Department of Sociological studies initiated an investigation. …"

The respondent's decision to withdraw the conditional job offer.

69. What operated upon the minds of Mrs Hart and Mrs Pickard were the contents of *The Guardian* and the *BBC News* articles. At the time of the events in question, they were unaware of the contents of the Judgment of the Court of Appeal (and indeed has still not read the Court of Appeal's Judgment ahead of the hearing before us).

70. Mrs Hart says in paragraph 72 that, "*The contents of those articles [that being the BBC News and The Guardian articles] revealed to me that the claimant held views that were not seemingly in alignment with the respondent's vision, values and*

ethos (which I have already discussed)". The Tribunal has made findings of fact about the respondent's vision, values, and ethos earlier in these reasons.

71. In paragraph 73 she expressed concern that *"In particular, the claimant outwardly expressing that 'the Bible and God identify homosexuality as a sin' during his time as a university student and the claimant being removed from the university course."*

72. She went on to say in paragraph 74 of her witness statement that, *"I was initially very concerned by the results that had come up, as they suggested to me that the claimant's values, beliefs and ethos did not align with the respondent's at all. I was also really concerned that the claimant's viewpoints on LGBTQI+ relationships and same sex marriage would be visible to all, and it was of serious concern to me how the claimant's views could potentially negatively impact the vulnerable service users (a high proportion of which would be from the LGBTQI+ community as already mentioned) as well as our staff members (again, a high proportionate of which are from the LGBTQI+ community, many of whom have their own lived experience of struggling with their mental health)."*

73. As we have observed, according to the respondent's Equality, Diversity, and Inclusion report commencing at page 263, 23% of staff in role as of 14 December 2022 identified as LGB and 8% as transgender/non-binary. In 2022, 50% of the senior leadership team identified as LGBQI+ (while none identified as transgender/non-binary). 25% of senior service managers identified as LGBQI+ (while none identified as transgender/non-binary). 27% of the team managers identified as LGBQI+ (and 9% identified as transgender/non-binary). From the statistics, Mrs Hart is plainly right to say that a high proportion of staff members are from the LGBTQI+ community.

74. Mrs Hart then sets out the thought process behind the decision that was taken by the respondent to withdraw the conditional job offer. This thought process must be accepted as a finding of fact. It was, quite properly, not challenged by Mr Phillips:

"75 – On discovering this information (which is readily available online), Sharon [Brown] and I met on 7 June 2022 to discuss the role and the claimant's future with the respondent.

76 – In particular, we discussed how the role was a new one for the respondent, the importance of our relatively new relationship with Wakefield CCG and how the claimant, if appointed, would be the only person there to provide support to patients who had either been suicidal or had been in a state of crisis.

77 – We also discussed how the role would need the successful candidate to work closely with, and develop relationships with all community groups, including LGBTQI+ organisations such as TransWakefield and Mesmac, which would require that that individual to throw themselves into the role wholeheartedly and forge genuine and meaningful relationships.

78 – We also discussed the reasons why Wakefield CCG had approached the respondent directly to fill the role in the first place, which as already mentioned, was due to our inclusive nature as an organisation and commitment to working with underrepresented communities. We were struggling to reconcile how the claimant's views would align with the requirements and desired outcomes of the role.

79 – In addition we were also concerned by the very public nature of the claimant's views and the media attention that they had attracted. It was very easy to discover information about the claimant's views online which did not require any real level of investigation or "digging" as the claimant has previously suggested. The results were readily available for all to see through minimal effort.

80 – At the time of carrying [out] the Google search, almost a third of our workforce were Christian and we have never experienced any conflicts or problems in relation to the interaction between the Christian and LGBTQI+ communities and their views, or any other religion for that matter. However, we had never had a Christian member of staff outwardly question or shame the choices of the LGBTQI+ community in the same manner as the claimant had whilst at university.

81 – I was incredibly concerned that the claimant's views on homosexuality and gay marriage could be of the "barriers" to service users being discharged from Wakefield Hospital, as identified in paragraph 46 [of my witness statement] above- [cited in paragraph 28 of these reasons].

82 – It really concerned me that our service users who have come into contact with the claimant (or indeed partners such as Wakefield CCG) might conduct a Google search of the claimant (out of curiosity) and find the same information that we have become privy to, ie that the claimant was not supportive of the LGBTQI+ community and their rights.

83 - This could have had repercussions for the supportive working relationship and the trust that was required between the respondent and its service users in order for the service to be successful and service users to recover. It concerned me that our service users may feel let down, that we had employed someone whose values did not align with the organisation's ethos and belief system.

84 – I went over hypothetical scenarios in my head, but ultimately, did not know what the impact that discovering that kind of information might have on a vulnerable service user who had been hospitalised due to their poor mental health. After much thought, I concluded that there was too much uncertainty, and it was too great a risk for the respondent to employ the claimant.

85 – When determining what to do, I tried to place myself in the position of a vulnerable service user, who was struggling with their sexuality and/or gender identity so significantly that they had been admitted to hospital due to self-harm, suicidal thoughts or having tried to take their own life in the worst cases. If we got this wrong, there could be serious consequences when dealing with what are at times very vulnerable people.

86 – I considered that the hypothetical individual would be at their lowest ebb, and tried to scope how that individual might feel, after everything they have been through, to discover that the individual appointed to work closely with them and ultimately, help them, considered their lifestyle, choice of partner and/or identity to be "sinful", or just inherently wrong.

87 – The conclusion I reached each time was that discovering this information could be the "last straw" for a person who was struggling, potentially resulting in the worst-case scenario with a service user taking their own life, a prospect which I considered to be an enormous and a very real risk, and one which I could not accept under any circumstances.

88 – It was an incredibly difficult decision for me to make and I was stuck trying to balance the claimant's rights to take up the role (as he had been initially considered to be the best candidate) and the needs of the respondent's service users. Ultimately, I found it impossible to reconcile the claimant's views with the respondent's and the prospect of appointing the claimant was untenable. I considered out of the two parties the claimant would be less disadvantaged than our service users and staff by our decision to withdraw his offer of employment."

75. Mrs Hart then says that she discussed the matter with Mr Hanif. He agreed with her that the respondent should withdraw the conditional job offer. Mrs Hart therefore emailed the claimant to that effect on 10 June 2022. The email is at page 222. Mrs Hart wrote:

"I write further 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."

76. Although Mr Phillips could not realistically challenge Mrs Hart upon her thought process and what lay behind her decision to withdraw the conditional job offer from the claimant, he did question her about the conclusions which she had reached set out in the extract from her witness statement which we have just quoted in paragraph 71 above. It was pointed out to her that the claimant had not said that being homosexual is a sin but, rather, that homosexuality is a sin. She agreed with that proposition.

77. She accepted that she was motivated by the prospect of the claimant discriminating against those from the LGBTQI+ community. It was drawn to her attention that in **Ngole** the Court of Appeal had held (at 5[10]) that *"The University wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (eg 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 anyone)."* (Although Mrs Hart was not expressly taken to the passage, Mr Phillips plainly was referring her to paragraph 5(10) of the Court of Appeal's Judgment).

78. It was suggested to Mrs Hart by Mr Phillips that the claimant would be able to adapt his style to the service users and that the Facebook postings had a different context. Mrs Hart said that she did not think that the claimant would be able to adapt his style. She said that she was *"thinking of staff and service users, we have a duty of care to them."*

79. It is we think timely, at this juncture, to mention the relevant religious beliefs held by the claimant as they are pleaded in the grounds of claim. These are in

paragraph 26 of the claimant's amended particulars of claim (at pages 36 and 37 of the bundle). The beliefs upon which he relies are:

79.1. That marriage is a divinely instituted lifelong union between one man and one woman. This belief is supported by numerous biblical texts including Matthew 19:5-6 (New International Version (NIV)) which says, *"For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh. So they are no longer two, but one flesh. Therefore, what God has joined together, let no one separate*".

79.2. That the expression of sexual relationships only accords with Biblical teaching when expressed within a monogamous marriage of one man and one woman as set out, *inter alia*, in 1 Corinthians 7:2-4 (NIV), which says, *"But since sexual immorality is occurring, each man should have sexual relations with his own wife, and each woman with her own husband. The husband should fulfil his marital duty to his wife, and likewise the wife to her husband. The wife does not have authority over her own body but yields it to her husband. In the same way, the husband does not have authority over his own body but yields it to his wife."*

79.3. That sex is a biologically immutable fact based on the Bible's teaching in Genesis 1:27 (NIV) that "*God created man in His own image, in the image of God he created him; male and female He created them".*

79.4. Lack of belief that it is possible for a person to change their sex/gender ("lack of belief in transgenderism").

80. It is accepted by the respondent that at all material times the claimant held those beliefs. It is also admitted that by reason of holding those belief the claimant has the protected characteristic of religion or belief for the purposes of section 10 of the 2010 Act. The Tribunal notes that evangelising especially when called upon to do so is not pleaded as one of the tenets of the Christian faith upon which the claimant relies as forming part of the protected characteristic of religion or belief relevant to the claim.

The claimant's response to the withdrawal of the conditional job offer.

81. Reverting again now to the chronology of events, the claimant replied to Mrs Hart's email of 10 June 2022. He did so very quickly, around 45 minutes later (page 223). He said, *"Can you provide me with the information you uncovered which resulted to you withdrawing the job offer please. This is important as I would like to challenge your decision which I believe is grossly unfair. As concerning the references, I am happy to provide further professional references if that helps."*

82. The claimant followed this up with a further email on 11 June 2022. This is at page 224. This addressed the question of references. He said that he has *"no control over how much information is provided by my referees, and that it is not unusual by any means for referees to provide basic information".* The Tribunal takes judicial notice that this is common practice and that the claimant makes a valid point. The claimant then went on to say, *"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. I would therefore like to make a freedom of information request."* The claimant then set out details of information which he was seeking pertaining to the decision to withdraw the conditional job offer.

83. On 13 June 2022, the claimant emailed Mrs Hart with a data subject access request made under the General Data Protection Regulation 2018 (pages 225 to 227).

84. Mrs Hart acknowledged the claimant's emails of 11 and 13 June 2022. She told him that she would get back to him in the next couple of days. (Her email of 13 June 2022 to this effect is at page 228).

85. On 14 June 2022, Mrs Hart emailed the claimant again (page 229). She said this:

> *"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 <u>not</u> 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."*

86. The claimant replied on 15 June 2022 (page 230). He said, "*I am pleased to hear that you may be willing to reconsider your decision about the withdrawal of your offer of employment."* He then said*, "The assurances you seek are probably best given by direct reference to the transcript of the judgment of the Court of Appeal in my case against the University of Sheffield, which I'm sure you came across if you looked me up online*." He then cited paragraph 5(10) of the judgment which we have quoted in paragraph 77 above. He went on to say, *"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."*

87. On 16 June 2022, Mrs Hart replied (page 232) she said:

> *"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."

The meeting of 11 July 2022.

88. There were then some exchanges about the proposed meeting. The claimant wanted to be accompanied by a representative (at page 234). Mrs Hart replied on 23 June 2022 (page 236) to say that *"Our meeting is only intended to be an informal discussion and I would therefore ask that you do not bring a representative (whether legal or otherwise) with you to the meeting."* The claimant accepted her position but then asked that a note taker be present. (This is also at page 236). Mrs Hart agreed to the claimant's suggestion that a person be present to take notes (page 237). In the event, the parties agreed to meet on 11 July 2022.

89. Mr Pickard said about the meeting (in paragraph 39 of his witness statement) that it was, "*a positive opportunity for the claimant to demonstrate his suitability for the role and [I] hoped, through providing real life case studies and examples, that he would be able to provide me and Kathryn with suitable and genuine assurances that his personal views would not interfere with the quality of the service provision or limit his ability to signpost our service users to a variety of organisations/support groups where needed (which ultimately, was expected by Wakefield CCG and required for the success of the role)."*

90. Mr Pickard says in paragraph 42 of his witness statement that, *"With this in mind, I spent some time preparing real life professional examples of scenarios that had arisen in practice, and also included some of the experiences that other staff members had previously highlighted to me during supervision meetings."*

91. Mr Pickard says in paragraph 45 of his witness statement that, … "*I am a member of the LGBTQI+ plus community, have my own lived experience of discrimination because of my sexuality and I am acutely aware of the various challenges the community faces through my experiences and those of friends."* He went on to say in paragraph 46 that "*After I volunteered to attend the meeting with Kathryn, [she] explained to me that she felt that my view of the claimant's responses would be really important when determining his suitability (or otherwise) for the role, in my capacity as an individual directly (and potentially) impacted by the claimant's views."*

92. It was suggested by Mr Phillips (when he cross-examined Mrs Hart) that the meeting of 11 July 2022 bore the hallmarks of a disciplinary hearing. He said this upon the basis that (amongst other things) a note taker was present. This may be considered a surprising suggestion given that it was the claimant's idea to have a note taker present in lieu of representation.

93. 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. It was suggested by the claimant (in paragraph 17 of Mr Phillips' submissions) that the meeting was a sham. The Tribunal rejects this characterisation of the meeting, not least due to the amount of preparation undertaken by the respondent in advance: see paragraph 96 below.

94. The notes of the meeting are at pages 238 to 250. It was attended by the claimant, Mrs Hart, and Mr Pickard. Lauren Smith attended as note taker. A copy of the notes taken by Lauren Smith was sent to the claimant on 18 July 2022. They were sent under cover of the respondent's email to the claimant of that date with the outcome of the meeting. The email of 18 July 2022 is at pages 259 to 262.

95. In our judgment, Mr Wilson makes a powerful point that Lauren Smith's only role was to act as note taker. Accordingly, she may be expected to have been diligent in taking the note. As significantly, the claimant did not take issue with the notes at the time after they were sent to him on 18 July 2022. He did not write to the respondent to question the accuracy of them or to point out any errors or omissions. The Tribunal therefore proceeds upon the basis that the contemporaneous notes are an accurate record of what was discussed at the meeting.

96. Before the meeting, Mrs Hart and Mr Pickard had agreed the matters to be covered. When giving evidence, the claimant said that Mrs Pickard appeared to have a notepad and some papers before her in the meeting. When she was asked about this, she said that she did have what was effectively a script and a series of questions to ask the claimant. A copy of the script and the series of questions was furnished by the respondent (by way of late disclosure) on 8 April 2024. By this stage, the Tribunal had heard the evidence of fact. Neither counsel wished to recall any of the three witnesses of fact to give evidence about the note. The script and the questions within it is a very detailed document, running to five sides of A4. A great deal of thought went into it. In our judgment, this tells against the respondent going through the motions or conducting a sham meeting.

97. We can see that, by comparing the list of questions with the notes of the meeting, the entirety of the first page of the notes (at page 238) and the first paragraph of the second page of the notes (at page 239) was effectively read by Mrs Hart in the form of the script. After doing so, she offered the claimant a break at any time should he need to take one. The claimant also fairly mentioned, when giving evidence, that he had been offered a drink. (He went on to say, however, that he had seen people being offered food and drink before being killed while growing up in Cameroon. The claimant's lived experiences will of course subjectively colour his views of such gestures. However, objectively the Tribunal accepts that in the

circumstances offering the claimant a drink was a friendly gesture by the respondent and had no sinister import).

98. It was put to the claimant by Mr Wilson that the claimant did not have to attend the meeting of 11 July 2022. The claimant replied that he did not have to attend but said that *"It was my dream job. I wanted it. I didn't say that to them, I desperately wanted the job. I went to Leeds from Barnsley. It was a very hot day. I had had a nightshift. I had to get back to my next nightshift. I had to get through the interview but I didn't mention that to them. She [Mrs Hart] did say that it would be a long meeting".*

99. The Employment Judge remarked that 11 July 2022 was a very hot day. This was anchored in his memory by a significant family event. It was not suggested by the claimant that Mrs Hart was aware that he was tired as he was between nightshifts and needed to travel back to Barnsley from Leeds (a journey of around 20 miles) to return to his place of work. However, subjectively, the Tribunal accepts that given the weather conditions and the claimant's shift system (coupled with the length of the meeting) the claimant was under some stress.

100. The first question on Mrs Hart's list was "*Can you tell us why you applied for a role with Touchstone, in particular?"* A record of this question being asked is in the final paragraph at page 239. As we have said, Mrs Hart read from her script which effectively accounts for the whole of the note at page 238 and the first paragraph of page 239. However, the meeting then effectively went off script before Mrs Hart and Mr Pickard were able to get to the first pre-prepared question. This is because, after being offered a break at any time, the claimant said that *"he felt that because of information from the references Touchstone 'went digging' to learn more about FN [the claimant]. FN stated he could provide additional professional references to give more information, which would have solved the issue."* He went on to say that *"he feels that the meeting is to find out more about FN, outside of the references"* and that *"Touchstone want to raise an issue about him."* Mr Pickard replied that the respondent has duty of care for the service users, staff, and potential staff, including the claimant himself.

101. Upon being asked why he applied for a role with Touchstone (which was the first scripted question), the claimant is recorded is saying that "*he feels being asked this is inappropriate as this was asked at the original interview. FN said he feels his working and lived experience in mental health support makes him suited for the role. He has the relevant experience and qualifications needed. FN said he is currently working in a role supporting people with their mental health at the moment. FN said if he did not have the right experience, he would not have been offered the role."*

102. When asked by Mr Wilson why he had applied for the job with Touchstone, the claimant replied that, "*they support people whether they are trans, gay, I see people as people, they support vulnerable people. Why shouldn't I apply? I've never had any issues."* He 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 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).

103. He also said, *"my faith doesn't allow me to discriminate."* The claimant touched upon this in his evidence in chief. In paragraph 6 he says that he has "*used … scripture to teach me that I have to be kind to everyone regardless of whether I*

agree with them or not. That includes people who do not agree with my faith." He goes on to say in the final sentence of paragraph 6 that, "*I value people as the Lord does regardless of their background, which includes their sexual orientation."* The Tribunal accepts that the claimant's Christian faith is tantamount to a belief in non-discrimination.

104. There is some merit in Mr Wilson's suggestion that the claimant's response to the first scripted question which was asked (to the effect that it was an inappropriate question as this had been covered in the interview of 10 May 2022) was negative and defensive. It was a theme pursued by the respondent's counsel that the claimant's performance during the meeting was lacklustre and unconvincing.

105. There is some merit in this criticism as we will see. However, the respondent certainly did not help matters with their preparation for the meeting. We accept that a very extensive list of questions was drawn up by Mrs Hart and Mr Pickard. However, they did not read the Court of Appeal's judgment which may have served to better inform matters (even after the claimant had drawn their attention to passages exonerating him from ever having discriminated in his letter of 15 June 2022 at page 230).

106. Further, neither Mrs Hart nor Mr Pickard read the notes of interview of 10 May 2022. Had they done so, they would have seen (from the notes at page 164) that the claimant mentioned the *"rainbow family"*, that he has adopted a son from Poland and gave a real-life example of work with an LGB student. When giving evidence, the claimant expanded upon this to say that he had been so supportive of one student that her friend (who was LGB) volunteered to and did join the claimant's class because she felt so safe with him. The Tribunal also notes that Reverend Munby speaks highly of the claimant's work with girls (in one of the youth groups with whom the claimant worked in a voluntary capacity) who were *"struggling with same sex attraction issues…"*

107. There was also some dispute between the parties as to the nature of the 11 July 2022 meeting. The claimant took the view that it was a second interview. The respondent's position was that it was an informal discussion to obtain the reassurances which they were seeking. In the Tribunal's judgment, the meeting of 11 July 2022 was tantamount to a second interview. To that extent, the claimant's characterisation of the meeting is, in our judgment, more accurate than that of the respondent. It was convened to test the claimant's suitability for the role. From time-to-time, we shall refer to the meeting as an interview.

108. It was suggested to the claimant by Mr Wilson that around 40 questions were posed. The claimant said that he could not disagree. He did not count the questions but did accept that a lot was asked of him. He also, with justification, added that Mr Pickard invited the claimant to address several scenarios to test how the claimant would handle matters if such occurred. In our judgment, this goes beyond what one would expect from an informal discussion.

109. The reply by the claimant to the first question asked of him (to the effect that he had already answered questions in the interview held on 10 May 2022) was not the only time that he replied to this effect. Mr Wilson (in paragraph 37(a) of his written submissions dated 8 April 2024) identified six other occasions when the claimant replied along these lines: (the second and third questions on page 240, and the fourth, fifth and sixth questions on page 241).

110. The claimant also on occasions fell back when replying to questions by saying that he would follow the respondent's policies and procedures. Again, Mr Wilson has helpfully highlighted (in paragraph 37(b) of his submissions) a number of examples of the claimant replying to this effect: (at page 244, on three occasions on page 245, on two occasions on page 246, on two occasions on page 247, and on three occasions on page 249). It was accepted by Mrs Hart that these were reasonable answers to the questions. However, Mr Wilson submitted that they were suggestive of "*a level of reluctance or a lack of enthusiasm".*

111. The respondent was particularly concerned by the replies given at page 246 to the question as to how he would create strong pathways with LGBTQI+ communities and how he would feel about attending the premises of LGBTQI+ organisations including Mesmac and TransWakefield where same sex relationships are promoted and advertised in literature. The claimant replied to the effect that he would work in accordance with the guidelines in respondent's policies and procedures. The respondent was critical of the claimant by not simply replying enthusiastically in the affirmative.

112. A similar issue arises upon the issue of addressing people by their chosen pronouns. This issue was raised in the second paragraph of page 249. Again, the claimant fell back upon an answer that when dealing with chosen pronouns he would work *"in accordance with guidelines provided by the policies and procedures, and the policy would be clear and in line with the law."*

113. The claimant said during the meeting that the interview was *"dodgy"* and *"despicable and wrong".* We refer to the sixth paragraph of page 240. He said that he felt *"ambushed"* (page 242, second paragraph). He said that he felt that the meeting was *"unfair and unjustified."* He said that "*the answers to the questions being asked can to be taken from the questions asked at the interview [of 10 May 2022]."* The Tribunal agrees with Mr Wilson that the claimant's perception that he felt ambushed was unjustified. The purpose of the meeting had been made clear to him by Mrs Hart in her email of 14 June 2022 (at page 229).

114. Criticism of adopting a somewhat formulaic approach was also levelled against the respondent. It was suggested to Mrs Hart by Mr Phillips that she and Mr Pickard were "*obsessed about LGBTQI+ rights".* He had counted that this was referenced on 31 occasions during the interview, with little reference to any of the other protected characteristics in the 2010 Act. Mrs Hart justified this upon the basis that it was LGBTQI+ issues which were particularly engaged by the *BBC News* and *The Guardian* articles.

115. This repetitive interview style led to Mr Phillips contending that the claimant formed the impression that none of his answers would be good enough hence him resorting to saying that he would rely upon the respondent's policies and procedures. This led to Mr Phillips' contention that the meeting was a sham (which the Tribunal does not accept).

116. The Tribunal will now go through some additional features of the interview in a little more detail. We do not intend to set them out *verbatim*. We shall simply refer to those matters that were drawn to us by each counsel.

117. The claimant said (at page 240 in the fourth paragraph) that *"he is a Christian and believes in the bible and takes this seriously, he believes marriage is between a man and a woman, and anything outside of the genders of male and female is a deviation of God's plan. FN said he knows others have different views. FN noted*

that no one has ever complained about his work, and he has never chosen not to work with anyone. FN said he values people, and he may not agree with their lifestyle, but he is there to help and support them. FN said wherever he is working, he abides by the policies and procedures of the organisation. FN said these policies also protect his rights, and if they do not, he is supported by the law. FN said the UK law protects people like him."

118. At page 242 (in the eleventh paragraph), it is recorded that *"FN said this meeting is a chance to ask him questions based what was found on Google. FN explained he understands some will see his strong views as "horrible views" and this is what has necessitated the meeting. FN said he won't have another interview based on what was found on Google about him. DP said FN has worked in the sector a long time, as earlier stated. DP [Mr Pickard] explained service users can look on Facebook and find FN's account or look on Google and find information about FN. DP asked FN how he would manage this. FN stated he wouldn't engage or discuss it, he would explain his role is not related to his views, and if the service user has an issue with him they can address this with FN's manager".*

119. At page 244, in the fifth paragraph, it is recorded that "*FN said he has worked with multiple services, not specifically LGBTQI+ ones. FN said he has experience of being a housing support worker and teacher and worked with multiple organisations."* In the sixth paragraph he went on to say that he *"has never needed to refer someone to LGBTQI+ specific service but has worked with them and carried out his role with no problems. FN said if he needed to he could support people appropriately and then refer them if needed."* In the seventh paragraph, it is recorded that, "*DP asked FN if he would be happy to signpost service users to LGBTQI+ services and promote these services. FN said he would do as his duty required. FN said when carrying out his duties he would follow the policies of the organisation. FN said these policies also protect his beliefs and if not the law would."* He repeated much the same sentiment about the law protecting his views as a Christian in the eighth paragraph on the same page.

120. On page 245 (in the sixth paragraph) it is recorded that, *"DP asked if the information people can access and read online about FN has ever affected professional working relationships. FN explained if anyone approached him about this he wouldn't engage or discuss this as it wouldn't be appropriate".*

121. On page 246, it is recorded that KH [Kathryn Hart] *"asked FN how he feels about promoting the rights of service users from LGBTQI+ communities. FN stated he feels this is already been covered in the interview. FN said he feels the interview and meeting so far has made clear FN meets all the needs. FN said it doesn't matter which community a service user is part of, he is more than capable of supporting them."*

122. On page 247, in the fifth paragraph, it is recorded that *"DP asked FN if a service user found his social media or press articles online, how would he manage this. FN said he wished to be clear, if any professional or service user who approached FN about his social media presence, FN would be professional and explain he is there to do a job. FN stated he does not stop being a Christian in the workplace but would remain professional. FN explained if someone expressed unhappiness about him, he would direct them to KH."*

123. On the same page, Mr Pickard is recorded as asking several case scenarios of the claimant. There is no need to set them out here. Suffice it to say that Mrs Hart accepted in evidence given under cross examination that the answer given to the

first scenario postulated by Mr Pickard (recorded in the second paragraph of page 247) was a good answer. However, she was more reticent about the answer to the second scenario (recorded in the third paragraph of page 247). She said that she would expect the claimant to have dealt with this scenario in more detail without prompting.

124. In the sixth paragraph of page 247, Mr Pickard asked "*FN if a patient/carer found the online information, how FN would build a relationship built on trust and mutual respect. DP explained some parents/carers may be unhappy that someone with FN's views is supporting their LGBTQI+ dependant. FN stated he would respond in the same way, not engage and assure the parent/carer FN is there to provide a service. FN stated he would not be the only person employed by Touchstone and he would contact another employee, as there is always another avenue."*

125. Mrs Hart expressed concerns about the answer given to this question (and that in the fifth paragraph of page 247) to the effect that if a service user or a member of their family was unhappy with the claimant because of his views, the service user could be referred on to someone else. Mrs Hart explained that the role in question is a lone role with limited opportunity to pass service users on to someone else.

126. The issue of training was then touched upon in pages 248 and 249. The following exchanges are recorded about this:

> *"DP explained Touchstone have mandatory trainings all staff must attend, including LGB awareness and transgender awareness. All staff including FN would be expected to contribute during these trainings about discrimination towards people and barriers to mental health services, that LGBTQI+ communities have experienced. DP explained trainers sometimes discuss personal experience to support the delivery of the trainings.*
>
> *FN stated he loves training and stated in his application he has several qualifications. FN stated he loves personal development and sharing knowledge in trainings and would be happy to contribute to these trainings in a professional way. FN said he would not prefer to attend LBG awareness training, as he feels marriage is between a man and a woman [we interpose here to say that this should say "FN said he would prefer not to attend LGB awareness training]. FN said he feels God doesn't make mistakes, and he would express his views professionally in the training. FN said he hopes Touchstone is an inclusive organisation and his views would be accepted, as he would like to contribute to trainings.*
>
> *DP asked FN if he means he would respond professionally, but bring his views to the trainings. FN said no, he would discuss his views in the training if others were also. KH explained these views could upset people and asked how FN would deal with this. FN said he has different views to KH and DP but has attended this meeting today. FN said people upset others, but these should be addressed in a professional way and that to force him to keep quiet unless his views were that of everyone else would be discriminatory. "*

127. Later in page 249 it is recorded that "*KH explained in training and Touchstone staff are encouraged to be allies and speak up for LGBTQI+ rights. KH asked FN if he would speak up and be an ally. FN said he would be an ally for every staff member and service user, as he has always done. FN said Touchstone won't be an exception."* He then went on to say that Touchstone could not "*make promotion of homosexual rights a condition of my employment."*

128. It is then recorded (also at page 249) that "*KH asked FN if he could empower service users and staff by informing them of their rights, including the LGBTQI+ community. FN said he would work in accordance with the guidelines provided by the policies and procedures, provided these were lawful."*

129. In evidence given during cross-examination about the meeting of 11 July 2022, the claimant said (upon the subject of training) that if given the opportunity he would state his beliefs about same sex marriage and homosexuality in a professional manner. The claimant's position was that he would only espouse his beliefs if invited to do so. He said, "*if called on I should be able express my views professionally."* Mr Wilson suggested that to do so may hurt those from the LGBTQI+ community. The claimant repeated that he would only express his beliefs *"if called upon. In a free and democratic society, people should have the right to disagree. I know not everyone agrees with me. How I deal with it is by being professional and measured."*

130. It is clear from his evidence that the claimant took the view that the respondent was seeking to shut down the expression of his Christian beliefs. The respondent's position is that they were not wishing to do so. However, it is the case that Mrs Hart expressed the view that others may be upset by the claimant's view if he expressed them. It is therefore understandable that the claimant understood this to be a restriction upon his freedom of expression which he had said would be exercised by him only if invited and then would be expressed in a measured way. Mr Wilson asked the claimant how he could express his views professionally and minimise impact upon service users. He replied, "*If I was called to, I would do it professionally. I have done it. I'd say as a Christian … and then wait to be invited to expand."* The Employment Judge then asked the claimant what he would say if invited to expand. The claimant replied, *"It's never happened. I'd give them Bible verses to read. I would not offend per se."* (He said in evidence that he had not said this in the interview because he was told by Mrs Hart that he was not allowed to express his views as they would offend others).

131. Mrs Hart and Mr Pickard both expressed the opinion that the claimant had come across before the Tribunal as more measured and reasonable than he had done at the meeting of 11 July 2022. She was asked by Mr Phillips if she would have been more likely to offer him the job had he presented as he did before the Tribunal. She said, *"I would be more likely to, I would need a professional reference as well."*

132. During cross-examination, Mrs Hart was asked about the question on page 249 concerning the claimant acting as an ally for LGBTQI+ rights. She fairly accepted that the claimant had given a good answer to that question. She said that the perfect answer would have been to have foreshadowed the reply with the words *"of course."* She was asked whether the claimant had needed to give perfect answers to all the questions for the job offer to be reinstated. Mrs Hart replied, "*It would be good enough if he had answered all of the questions well enough."*

133. It is right to observe that at times the Tribunal formed the impression that Mrs Hart was nit-picking about some of the claimant's answers at the meeting. Another example was the reply to the third scenario postulated by Mr Pickard (in the fourth paragraph of page 247). The Tribunal is unclear as to how Mrs Hart concluded the answer to be deficient and sought clarification from her. She said that she would have expected more detail to be given by the claimant without having to be prompted.

134. It was suggested to Mr Pickard that the claimant felt that his faith was under attack during the meeting of 11 July 2022. Mr Pickard fairly acknowledged this to be the case.

135. It is recorded at page 250 that the meeting drew to a close at which point*, "FN asked if the offer of employment was withdrawn, what would be the potential avenues FN could take. KH explained FN could submit an official complaint to Touchstone. FN asked if he did not wish to make a complaint, and wanted to take a legal route, what could he do? KH explained FN could make an Employment Tribunal claim. FN asked if this could happen straightaway. KH said yes."* The claimant denied that he had made these remarks. However, as we have said, we are satisfied as to the accuracies of the notes for the reasons given in paragraphs 94 and 95.

The respondent's decision not to reinstate the conditional job offer.

136. On 18 July 2022, Mrs Hart wrote to the claimant. We have mentioned this letter already. It is at pages 259 to 262. The claimant was informed that the respondent's decision to retract the conditional offer of employment stood. Detailed reasons were given for the respondent's decision.

137. The first four paragraphs set the scene. It is necessary, we think, to set out Mrs Hart's full reasoning from the fifth paragraph:

"(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.

(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 <u>not</u> 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.

(15) The meeting was intended to be an opportunity for you to demonstrate that your views would not get in the way of, or prevent you from fully embracing your role as a MH support worker at Touchstone, however you seemed to see the meeting as a pointless exercise and instead seemed to just want to have the meeting and then pursue an Employment Tribunal against us if you were unhappy with the outcome (which is of course your legal right should you wish to do so), effectively in our view seemingly threatening us.

(16) Unfortunately, due to your refusal (or inability) to provide appropriate answers to the questions asked, we do not feel assured that you would be able to support service users from the LGBTQI+ community, therefore negatively exposing Touchstone as an LGBTQI+ ally and its service users and potentially putting Touchstone at risk of legal action on the grounds of discrimination in both employment and service delivery. Put simply, we cannot afford to take that risk."

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

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

140. Before moving on to look at the expert evidence, the Tribunal wishes to pick up one or two further points which arose from the cross-examination of Mrs Hart and Mr Pickard. Mrs Hart was asked whether she had ever heard the expression *"love the sinner, hate the sin."* She said that she had not. Mr Phillips explained that this meant that a person can be loved but not their acts. She agreed that there is no uniformity of views amongst homosexual or heterosexual people about same sex marriage. She accepted there to be an incongruity between the claimant's performance at the interview of 10 May 2022 and his performance at the interview of 11 July 2022. She accepted that she told the claimant during the interview of 11 July 2022 to keep the thought of homosexuality as a sin to himself.

141. Mr Pickard accepted that the claimant had never expressed the view that homosexuality was *"disgusting"* (as it was put by Mr Phillips). Mr Pickard said that nonetheless an assumption could be made of the claimant's views by his use of the word *"sin".* Mr Pickard denied any expectation upon the part of the respondent that the claimant should disavow his Christian beliefs.

142. Mrs Hart and Mr Pickard were plainly both exercised by the claimant's expression of the traditional Christian view that the Bible and God identify homosexuality as a sin and that same sex marriage is a sin. These were words used by the claimant in the Facebook postings concerning the Kim Davis case. They are recorded in the Court of Appeal's judgment and were accurately reported both in *The Guardian* and *BBC News* articles. (*The Guardian* article was, of course, written after the High Court ruling in **Ngole** and before the Court of Appeal's ruling. The Facebook postings were cited by HHJ Collins Rice in paragraph 7 of her judgment: **[2017] EWHC 2669 (Admin)**).

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

144. Reverend Sullins said, in evidence given under cross-examination, that *"To say that something is a 'sin' is pejorative is a misunderstanding as in Christian theology all of us are subject to sin."* He went on to say that those who are, for example, in an adulterous relationship "*need love from God and support".*

145. Mr Wilson put to him that "*This is a Christian centred explanation, could it lead to psychological damage."* Reverend Sullins replied *"The word 'sin' is a Christian theological word. I can't account for the connotations others may put on it."* He went on to say that "*There may be a position of ignorance from Mrs Hart and Mr Pickard. Mr Pickard said John 3.16 [For God so loved the world that he gave His only begotten Son, that whoever believeth in Him should not perish, but have everlasting life] may be triggering, which was a message of love. God draws us into greater goodness. If that's seen as judgemental, I don't know what to say to that."*

146. In our judgment, this was unfair criticism by Reverend Sullins of Mrs Hart and Mr Pickard. They cannot reasonably be expected to view matters from the same theological viewpoint as does Reverend Sullins. They were, in our judgment, entirely justified in exploring with the claimant how the expressions of orthodox Christian belief around homosexuality and same sex marriage would impact upon their staff and service users. It is simply unrealistic to expect staff and service users to draw the theological distinction between the theological use of the word '*sin'* and the everyday sense of that word.

The expert evidence.

147. This now segues to a consideration of the expert evidence. Reverend Sullins opines that the claimant's views about homosexuality and same sex marriage *"are closely consistent with the teaching of the Bible":* (paragraphs 3 of his report at page 20 of the supplemental bundle ('*SB*')). He says in paragraph 6 (page 21 SB) that, "*The Bible unambiguously teaches that homosexual acts are sinful."* He cites in support a number of Biblical texts which need not be recited here. He also opines (in paragraph 7 on page 22 SB) that, "*the Christian response to sin is not condemnation, but love and compassion."* He then cites John 3.17 that, "*For God did not send His Son into the world to condemn the world, but to save the world through Him."*

148. At paragraphs 8 to 10 of his report (pages 22 to 24 SB) Reverend Sullins cites three other features of the claimant's religious convictions which are worth mentioning. Firstly, his views on homosexuality and same sex marriage are not "*outlier opinions but are broadly consonant with the religious norms of most Christian denominations. Although a number of Christian bodies, mostly state churches, have approved gay marriage in past decades, the large majority of Christian churches, including the Church of England continue to adhere to the longstanding Christian doctrine that marriage is restricted to relations between a man and a woman."* Secondly, the claimant is quoted as saying that "*homosexuality is 'a sin' and not that homosexuality is 'sinful'."* As he put it, *"Most Christian religious groups today distinguish between same-sex attractions, over which persons often have no control, whatever their aetiology, and which are thus*

not morally culpable, and same-sex sexual activity which, since they always involve a moral choice, are instances of sin." Thus, "*those holding this theological view are best positioned, among traditional Christians, to engage and support the homosexual person in a positive way while not forfeiting their own belief that the behaviour is a sin."* (This was the theological viewpoint put by Mr Phillips to Mrs Hart and Mr Pickard). Thirdly, Reverend Sullins opines that the claimant's "*views are entirely consistent with his ethnic and immigrant identity. Mr Ngole's views on homosexuality would be typical, unremarkable opinions in Cameroon, West Africa where he grew up."*

149. Dr Joubert expresses the opinion (at page 66 SB) that there is scope within Biblical texts for the claimant to be "*permitted to adopt a non-judgmental attitude towards people from the LGBTQI+ community and remain within his stated belief system, rather than using his selective adherence to Old Testament laws as a cloak for his homoprejudice attitudes and behaviours – masked as orthodox religious belief – and as an excuse to justify such attitudes and acts."*

150. Dr Joubert appears to have no qualifications or relevant experience to opine as an expert upon theology. Upon this basis, the Tribunal has little difficulty in preferring the theological opinions expressed by Reverend Sullins. Further, it is not in dispute (as we have said) that the claimant's orthodox religious beliefs about homosexuality and same sex marriage have the protected characteristic for the purposes of section 10 of the 2010 Act.

151. In paragraph 15 of his report (page 25 SB) Reverend Sullins gives an overview of minority stress theory (*MST*). As he says, *"The central premise of MST is that LGBT mental health is determined by the external social environment, not internal psychodynamic factors."* He then cites in support of that proposition a report published in *Psychological Bulletin* 129, number 5 (2003). Reverend Sullins' opinion is contrary to this - in summary, his opinion is that MST is purely theoretical, and that evidence does not support the proposition in the *Psychological Bulletin* article that harm will come to an individual hearing world views that do not accord with their own.

152. In paragraph 28 of his report (page 31 SB) Reverend Sullins concedes that, "*My critical opinion of MST is probably still a minority opinion among demographers and psychologists, although scholarly scepticism continues to grow as the theory continues to fail to provide an answer to the difficulties noted above."* "*The above"* was Reverend Sullins' critique of MST between paragraphs 15 and 27 of his report.

153. Dr Joubert's opinion (as summarised in the joint expert witness summary at pages 120 to 127 SB) is that "*MST is an academic theory describing and discussing generic concepts which contributes to minority stress. I questioned the relevance of this in my report as it seems an academic discussion regarding minority stress missing the point of the Touchstone Leeds context where the service users are not merely from a minority group but are, by definition of being service users, vulnerable."*

154. At pages 122 and 123 SB (at section 6 of the joint experts report) Dr Joubert expressed the opinion that, "*Expressions of negative views regarding homosexuality which position aspects related to it as sinful or wrong, are very highly likely to cause significant harm within the context of Touchstone Leeds."* In section 7, on the same page, he opined that the claimant's "*expressions will, most likely, be received as prejudiced and judgemental causing harm rather than being helpful."*

155. Reverend Sullins and Dr Joubert did not agree upon much in the joint experts' report. However, three matters were agreed upon in the expert witness summary at page 120 SB. These are that:

    - *The claimant is an orthodox Christian who is sincerely invested in his beliefs.*
    - *As a matter of religious conviction, he agrees with the Christian teaching in the Old and New Testaments that homosexual acts are sinful.*
    - *If a person expresses a difference of opinion about a matter reasonably and respectfully, then it would be unlikely to cause undue harm.*

156. In seeking to reconcile the third matter of agreement with Dr Joubert's view (in section 6 of the joint experts' report referenced in paragraph 154) it is plain that he takes the view that the open expression of religious views in a secular context is inappropriate, particularly "*when doing so in a manner where the aim is not to inform, but rather to convince that a particular view is the only correct view thus others are judged as incorrect, resulting in judging others based on different beliefs, would be inappropriate."* At paragraph 7 (page 123 SB) Dr Joubert says that the claimant's expressions will "*most likely be received as prejudiced and judgemental causing harm rather than being helpful."* Dr Joubert's view therefore is that the expression of orthodox Christian views is potentially harmful to the respondent's service users.

157. Dr Joubert said, in evidence given under cross-examination that his opinion that someone with a mental health history will be affected by the *"message of sin"* (as Dr Joubert put it) is grounded in his clinical experience. He said that *"anything that might increase risk [to health] should not be done."* He accepted that this opinion was based solely on his experience as a mental health practitioner and was not grounded in studies. However, he said that *"my assumptions about LGBT [people] are based on many years of experience of practice. With any person with these strong religious beliefs, there is an increased risk to LGBT people*."

158. It was suggested to Dr Joubert by Mr Phillips that Mother Theresa had navigated the *"choppy waters"* (as Mr Phillips put it) to provide support to the LGBTQI+ community while holding orthodox Christian beliefs. Dr Joubert fairly accepted this to be the case and that it was possible for the claimant to do likewise. However, he counselled caution (when answering a question put to him by the Employment Judge) that this would be a "*big ask"* as a service user may perceive the respondent to become an unsafe place because *"they employ someone like this"* (as he put it). If that was the service user's only support option (as is the case here, the position being a sole role) then they may be left without support. Dr Joubert commented that the risk cannot be quantified but if recognised then it should be eliminated as much as possible.

159. The Tribunal rejects Reverend Sullins' attempts to debunk MST. He himself recognises that he holds a minority opinion amongst demographers and psychologists. The converse must, therefore, be the case, that the majority of such experts hold to MST. Dr Joubert therefore has the weight of professional opinion on his side in respect of the LGBTQI+ community as a whole.

160. Further, Mr Wilson put to Reverend Sullins that Touchstone service users will by definition have a mental health issue whereas the studies which he has propounded deal with the general LGBTQI+ population (and not that sub-group).

Reverend Sullins said by way of answer that, *"there is no study that separates out clinical and non-clinical groups".* He then cited in support of this proposition a couple of studies not, it seems, mentioned in his report. Given that Reverend Sullins accepts that he has a minority view about MST anyway, we consider that Dr Joubert made a valid point when he said that he was distrusting of Reverend Sullins' proposition aired for the first time in evidence before the Tribunal.

161. In the Tribunal's judgment, Dr Joubert's expert opinion is to be preferred upon the issue of clinical experience. He is a psychologist with clinical experience of treating LGBTQI+ groups. Reverend Sullins reaches his conclusion without exposure to any clinical practice. It is based upon his sociological research, and which is in any case a minority view about MST.

162. In paragraph 5 of his expert report (pages 56 to 59 SB) Dr Joubert cites statistical evidence in support of the proposition that there is a plethora of evidence from different sources that people from the LGBTQI+ communities experience mental health difficulties more frequently than those who are not from those communities. This was not challenged by Mr Phillips and, indeed, it appears to be accepted on behalf of the claimant that this is the case.

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.

The issues in the case.

164. The issues to which this case gives rise, and which are for the Tribunal to decide are set out below *per* the Order of Employment Judge Buckley dated 6 February 2023. (There is no issue of jurisdiction arising out of the application of section 123 of the 2010 Act hence that part is omitted):

1. Direct religion or belief discrimination (Equality Act 2010 section 13)

1.1 The claimant is a Christian. It is accepted that at all material times he held the following religious or philosophical beliefs:

1.1.1 That marriage is a divinely instituted lifelong union between one man and one woman.

1.1.2 That the expression of sexual relationships only accords with Biblical teaching when expressed within a monogamous marriage of one man and one woman.

1.1.3 That sex is a biologically immutable fact based on the Bible's teaching in Genesis 1:27.

1.2 Did the respondent do the following things:

1.2.1 Require the Claimant to attend a second interview which took place on 11th July 2022;

1.2.2 Make it a term of his prospective employment with the Respondent as a Mental Health Support Worker that the Claimant should:

1.2.2.1 attend LGBT awareness training and that he would not be free to share his views during that training despite others being free to share theirs;

1.2.2.2 actively promote the rights of service users from LGBTI+ communities;

1.2.2.3 support same sex marriage;

1.2.2.4 provide examples of when he had kept his views around same sex marriage to himself and of when he had provided non-judgemental support to same sex relationships; and that

1.2.2.5 he should be an ally and speak up for LGBTQI+ rights;

1.2.3 Not offer the claimant employment in the role of Mental Health Support Worker at Wakefield Hospital.

1.2.4 Put a reverse burden of proof on the claimant to prove that he would not discriminate because of his religious beliefs.

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

1.4 If so, was it because of religion or belief?

1.5 Does the respondent have an ethos based on the belief people should be treated equally, fairly and with dignity and that there should be no discrimination, including in particular no discrimination against LGQBTI people ('the non-discrimination belief)?

1.6 Did the Respondent in relation to the Claimant's application for the role of Mental Health Support Worker at Wakefield Hospital require the Claimant to hold the non-discrimination belief?

1.7 Having regard to that ethos and to the nature and context of the work involved in that role:

1.7.1 Was it an occupational requirement that the person holding the post should hold the non-discrimination belief?

1.7.2 Was the application of that occupational requirement a proportionate means of achieving a legitimate aim?

1.7.3 Did the Claimant meet that requirement or did the Respondent have reasonable grounds for not being satisfied that he met it?

1.8 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.

2. Indirect discrimination (Equality Act 2010 section 19)

2.1 Did the Respondent have the following PCPs:

2.1.1 The requirement that all employees/workers actively promote LGBT lifestyles;

2.1.2 The requirement that all employees/workers during LGBT awareness training only share views positive and promoting of LGBT lifestyles;

2.1.3 The requirement that all employees/workers support same sex marriage;

2.1.4 The requirement that all employees/workers be 'an ally' and 'speak up for LGBTQI+ rights';

2.1.5 The requirement that employees/workers confirm his or her adherence to the said PCPs prior or during their employment;

2.1.6 The requirement for employees/workers to use the pronouns by which people wish to be identified, such as he/she, them/they.

2.2 Did the respondent apply the PCPs to the claimant?

2.3 Did the respondent apply the PCPs to persons with whom the claimant does not share the characteristic, e.g. colleagues of no faith or other faiths, or would it have done so?

2.4 Did the PCPs put persons with whom the claimant shares the characteristic (that is, those who hold the religious and/or philosophical beliefs he holds) at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, namely colleagues or prospective colleagues who do not hold the claimant's beliefs?

2.5 Did the PCPs put the claimant at that disadvantage?

2.6 Were the PCPs a proportionate means of achieving a legitimate aim?

2.6.1 Were the PCPs an appropriate and reasonably necessary way to achieve those aims?

2.6.2 Could something less discriminatory have been done instead;

2.6.3 How should the needs of the claimant and the respondent be balanced?

3. Harassment related to religion or belief (Equality Act 2010 section 26)

3.1 It is admitted that the respondent did the following things:

3.1.1 The Claimant was asked in the meeting of 11th July, whether on account of his religious and/or philosophical beliefs and/or manifestations of the same, he foresaw issues with supporting people from the LGBTQI+ community.

3.1.2 The Claimant was asked in the meeting of 11th July, if his religious and/or philosophical beliefs or manifestations of the same were in conflict with doing the job.

3.1.3 It was suggested in the Respondent's letter of 18th July 2022, that the Claimant's attitudes and behaviours (referring to his religious and/or philosophical beliefs or manifestations of such) had the potential to be very damaging to Touchstone, its staff and service users.

3.1.4 It was suggested in the Respondent's letter of 18th July 2022, that the Claimant's religious and/or philosophical beliefs or manifestations thereof could seriously exacerbate a service user's symptoms of anxiety and/or depression.

3.1.5 It was suggested in the Respondent's letter of 18th July that the Claimant's religious and or philosophical beliefs or manifestations of the same could impact severely on other attendees and the trainer's health and wellbeing at staff training sessions.

3.2 Did the Respondent do the following acts?

3.2.1 Suggest in Kathryn Hart's reply to the Claimant on 14th June 2022, that the Claimant's religious and/or philosophical beliefs might prevent him from acting in the best interests of service users?

3.2.2 Ask the Claimant in the meeting of 11th July 2022 to act contrary to his religious and/or philosophical beliefs by asking him:

3.2.2.1 to promote the rights of LGBTQI+ persons;
3.2.2.2 if he could support same sex marriage; and
3.2.2.3 asking him to be an LGBTQI+ ally?

3.3 If so, was that unwanted conduct?

3.4 Did it relate to religion or belief?

3.5 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.6 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Remedy for discrimination or harassment

4.1 Should the Tribunal make a recommendation under section 124(2)(c) EqA 2010 that the Respondent amend its recruitment procedures to align with its stated objective of being an inclusive employer so as not to preclude practising Christians from its workforce?

4.2 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.3 Should interest be awarded? How much?

The relevant law.

165. We now turn to a consideration of the relevant law.

166. There is no dispute that the provisions of the 2010 Act with which the Tribunal is concerned must be interpreted where possible in accordance the European Convention on Human Rights ('*ECHR*'). The ECHR is incorporated into UK law by the Human Rights Act 1998. The protections given by the 2010 Act and the ECHR are intended to be co-extensive (*per* the judgment of Underhill LJ in **Page v NHS Trust Development Authority** [2021] EWCA Civ 255, [2021] IRLR 391).

167. The Convention rights with which we are concerned in this case are those at Article 9 and Article 10 of schedule 1 to the 1998 Act: *freedom of thought, conscience and religion* and *freedom of expression* respectively. The articles are cited in the passages from **Higgs** in paragraphs 173(37) and 173(42) below.

168. Freedom of thought, conscience and religion are absolute rights. However, there will be cases where a religious view is expressed or has been manifested in a manner which would fall outside the protection of the ECHR to protect other legitimate interests. This is an issue which has been aired before the Courts and Tribunals on several occasions recently. As the learned editors of **Harvey on Industrial Relations and Employment Law** say (at L [213.05], *"The latest word – and the most helpful – from the Courts and Tribunals on this issue is the Judgment of Eady P in* ***Higgs v Farmor's School and the Archbishop's Council***

of The Church of England (intervening) [2023] EAT 29, [29] IRLR 708." Accordingly, it is to this case which we shall initially turn for guidance. (Eady P also gave an equally comprehensive summary in **Omooba v Michael Garrett Associates Limited (t/a Global Artists) and Leicester Theatre Trust Limited** [2024] EAT 30 passages from which are cited in paragraph 239 below).

169. In **Higgs**, the claimant, who worked in a primary school, had written Facebook posts expressing her concern about relationships education in schools. She was dismissed and complained that her dismissal was direct discrimination because of religion or belief, or was unlawful harassment related to religion or belief.

170. Mrs Higgs was an employee of the school. (In contrast, Mr Ngole was a job applicant and not an employee). She complained that the school had discriminated against her by dismissing her and had subjected her to detriment because she was suspended and subjected to a disciplinary investigation. By section 212(1) of the 2010 Act, *"detriment"* does not (subject to section 212(5)), include conduct which amounts to harassment. *(Section 212(5) provides that where the 2010 Act disapplies a prohibition on harassment in relation to a specified protected characteristic then that disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of discrimination within section 13 because of that characteristic. There is no disapplication of a prohibition on harassment for the protected characteristic of religion or belief. It was for this reason that Mrs Higgs as an employee was able to bring the complaints of harassment and detriment because of direct discrimination as alternative claims).* We shall consider further the pursuit of alternative claims by Mr Ngole in due course (see paragraphs 184and 185 below).

171. Mrs Higgs is a Christian. It was not her case that she had been directly discriminated against, or harassed, for her Christianity *per se*. Rather, she contended that she held the following beliefs (or lack of beliefs), and had suffered direct discrimination or harassment as a result:

    (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 lifelong union between one man and one woman,

    (d) Lack of belief in 'same sex marriage.' (While recognising that same sex marriage was legal, she believed this was contrary to Biblical teaching),

    (e) Opposition to sex and/or relationships education for primary school children;

    (f) A belief that when unbiblical ideas or ideologies are promoted, she should publicly be witness to Biblical truth;

    (g) A belief in the literal truth of the bible, and in particular Genesis 1 V27: "God created man in his own image, in the image of God he created him; male and female he created them."

172. The Tribunal dismissed Mrs Higgs' complaints. The Employment Appeal Tribunal upheld her appeal. The religious discrimination and harassment claims were remitted. The EAT held that the Employment Tribunal had failed to recognise there to be a sufficiently close or direct nexus between the claimant's protected beliefs and her posts (which were relied on by her as amounting to a manifestation of

those beliefs). Guidance was given on the principles underpinning the approach to be taken in such cases.

173. Eady P set out the legal framework in **Higgs** at [28] to [58]. The Tribunal really can do no better than to set this out *verbatim*. *(These passages also helpfully and conveniently recite at (28) and (29) two of the three domestic law provisions in the 2010 Act defining the prohibited conduct of relevance to this case per the list of issues at paragraph 164.1 and 164.3 above. The domestic law provision on indirect discrimination relevant to the issue in paragraph 164.2 is at paragraph 178 below*):

> *"28. By section 13 of the Equality Act 2010 ("the EqA") 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.*
>
> *29. Under Section 26 of the EqA, a person (A) harasses another (B) if (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of: (i) violating B's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *30. Section 4 EqA provides that religion or belief are protected characteristics. Pursuant to section10 of the EqA, religion means any religion; belief means any religious or philosophical belief.*
>
> *31. The right to protection in respect of religion or belief was introduced to ensure compliance with EU law; specifically, Council Directive 2000/78/EC ("the Framework Directive"). The recitals to the Framework Directive emphasise the fundamental values of liberty, democracy, and of economic and social cohesion. Thus, by recital (1), it is provided:*
>
> > *"…, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*
>
> *And, by recital (11), it is further acknowledged:*
>
> > *"Discrimination based on religion or belief … may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons."*

32. *As the case-law of the Court of Justice makes clear, the protection afforded by the Framework Directive in respect of religion and belief applies not only to the holding of a particular faith or belief, but also to its manifestation; thus, in C-188/15 Bougnaoui v Micropole SA [2018] ICR 139, it was held:*

> *"30 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the forum internum, that is the fact of having a belief, and the forum externum, that is the manifestation of religious faith in public."*

33. *Article 2 defines what is meant by "discrimination", which specifically includes direct discrimination and harassment, albeit providing that:*

> *"(5) This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."*

34. *The case-law further makes clear that the right to freedom of conscience and religion (laid down at article 10 of the EU Charter of Fundamental Rights) forms an integral part of the relevant context in interpreting the Framework Directive, corresponding to the right guaranteed under article 9 ECHR; see C-344-20 LF v SCRL [2023] ICR 133.*

35. *In domestic law, by virtue of sections 3 and 6 Human Rights Act 1998, courts and tribunals are required to read and give effect to statutory provisions in a way which is, so far as possible, compatible with the rights conferred by the ECHR. Although the ET has no jurisdiction to entertain a claim for a breach of a claimant's rights under the ECHR as such (Mba v Merton London Borough Council [2014] ICR 357), it is thus obliged to determine a claim before it compatibly, so far as possible, with those rights; see Page v NHS Trust Development Authority [2021] EWCA Civ 255, per Underhill LJ at paragraph 37.*

36. *In the present case, it is common ground that the relevant rights are those afforded by articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression).*

37. By article 9 ECHR it is provided:

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

38. The European Court of Human Rights has provided clear guidance on the foundational nature of the rights in article 9, as well as the basis for limitations that may be placed on those rights; see (for example) Sahin v Turkey (2007) 44 EHRR 5:

> *"104. … as enshrined in Art.9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.*
>
> *105. Article 9 does not protect every act motivated or inspired by a religion or belief.*
>
> *106. In democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. This follows both from para.2 of Art.9 and the State's positive obligation under Art.1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.*
>
> *107. … Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.*
>
> *108. Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a*

> *group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead states to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society"."*

39. *Before restrictions to the right to freedom of religion or belief are weighed, the essential nature of the right has to be recognised. The first question is, therefore, whether the conduct complained of involves any limitation on the claimant's article 9 rights. That, in turn, requires an assessment as to whether the actions of the claimant (that is, the actions that caused the response complained of) amount to a manifestation of religion or belief. As the European Court of Human Rights made clear in Eweida and ors v United Kingdom (2013) 57 EHRR 8:*

> *"82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a "manifestation" of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of art.9(1). In order to count as a "manifestation" within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question."*

40. *Whether or not there is the requisite link between the act in issue and the relevant belief will be a matter for the ET to assess, although its task may not always be straightforward. In particular, there can be a danger of oversimplification in the use of labels (see the observations at*

paragraph 250 R (oao Miller) v College of Policing and anor [2020] EWHC 225 (Admin), cited below), and care needs to be taken to recognise the potential subtleties that might exist in relation to the specific beliefs held (see the observations (relating to the particular facts of that case) of Underhill LJ at paragraph 18 Page v NHS Trust Development Authority [2021] EWCA Civ 255). The assessment must be undertaken in respect of the beliefs held by the claimant, not as to how those beliefs might have been interpreted or understood by the respondent (see Page at paragraph 49).

41. *If the claimant's actions have a sufficiently close and direct nexus to an underlying religion or belief, such that they are properly to be understood as a manifestation of that religion or belief, any limitation would need to be such as is prescribed by law and necessary, in one of the ways identified under article 9(2). I return to this question below.*

42. *As for article 10 ECHR, this provides as follows:*

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. …*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

43. *A similar set of fundamental values to those described in relation to article 9 can also be identified as underlying article 10. As observed in Handyside v UK 1 EHRR 737:*

> *"49. … The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that*

pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

44. *The importance of the right to freedom of expression as an essential foundation of a democracy has long been recognised by the domestic courts, as helpfully summarised by Knowles J in Miller (supra):*

> *"2. In R v Central Independent Television plc [1994] Fam 192, 202-203, Hoffmann LJ said that:*
>
> *"… a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute."*
>
> *"Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ..."*
>
> *"The reasons why the right to free expression is regarded as fundamental are familiar, but merit brief restatement in the present context. Modern democratic government means government of the people by the people for the people. But there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments. The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated …"."*

45. *In particular, the importance of freedom of political speech has been emphasised, see R (ex parte Prolife Alliance) v BBC [2004] 1 AC 185, per Lord Nicholls:*

> *"6. Freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on this freedom need to be examined rigorously by all concerned, not least the courts..."*

This is consistent with the jurisprudence of the European Court of Human Rights, which, in the case of Vajnai v Hungary [2008] ECHR 1910, made clear that there is:

> *"47. … little scope under Article 10(2) of the Convention for restrictions on political speech or on the debate of questions of public interest.".*

46. The law also grants latitude as to the manner in which political views are expressed. In De Haes and Gijsels v Belgium 25 EHRR 1, in upholding a complaint of a breach of article 10 ECHR brought by two journalists, it was observed:

> *"46. … the Court reiterates that freedom of expression is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb the State or any section of the community. In addition, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation ….*
> *…*
> *48. Although Mr De Haes and Mr Gijsels' comments were without doubt severely critical, they nevertheless appear proportionate to the stir and indignation caused by the matters alleged in their articles. As to the journalists' polemical and even aggressive tone, which the Court should not be taken to approve, it must be remembered that Article 10 … protects not only the substance of the ideas and information expressed but also the form in which they are conveyed …."*

47. Miller [v College of Policing] concerned the expression (on Twitter) of gender critical views regarding transgender issues; at first instance it was noted as follows:

> *"250. … there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.*
>
> *251. The Claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of Article 10(1). I am quite clear that they*

> *were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the Claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg's evidence, which shows that many other people hold concerns similar to those held by the Claimant.*

48. *On appeal (see R (oao Miller) v The College of Policing [2021] EWCA Civ 1926), the Court of Appeal endorsed this approach, observing:*

> *"68. The concept of a chilling effect in the context of freedom of expression is an extremely important one. It often arises in discussions about what if any restrictions on journalistic activity are lawful; but … it is equally important when considering the rights of private citizens to express their views within the limits of the law, including and one might say in particular, on controversial matters of public interest. …"*

49. *Thus, the right in article 10(1) to freedom of expression is of fundamental importance. It is, however, also recognised (see Giniewski v France 45 EHRR 23) that, via article 10(2), the exercise of that right:*

> *"43. … carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs…"*

50. *In Overd and ors v Chief Constable of Avon and Somerset Constabulary [2021] EWHC 3100 (QB), Linden J observed that the principle stated in Giniewski:*

> *"45. … focusses on the quality or nature of the speech, whether it makes a meaningful contribution to public debate and/or whether it infringes the rights of others. But, of course, other bases on which offensive speech may be restricted include public safety and the prevention of disorder or crime."*

Further noting:

> *"[Counsel for the claimants] referred on a number of occasions to the officers in this case having a 'positive*

> *duty' to protect the speaker's Convention rights even where what they say is unpopular or offensive. That may be true, as far as it goes. But as those rights are qualified any such duty does not mean, as he appeared to contend, that police officers must always side with the speaker in such a case and must always ensure that they are able to say what they wish to say. It does, however, mean that any action which they take to inhibit the speaker's freedom of expression must be 'justified' … and proportionate. Moreover, these provisions must be applied having regard to the importance of the relevant rights, and the justification for any infringement must therefore be convincing ..."*

51. *There are clear similarities between the approach to be taken in relation to complaints of infringement of rights protected by articles 9 and 10 ECHR. Both require first that the essential nature of those rights must be recognised. Both rights are, however, then qualified, with articles 9(2) and 10(2) setting out the circumstances under which the right to religion or belief, or to freedom of expression, can be limited or restricted: (i) it must be prescribed by law; (ii) it must be in pursuit of one of the legitimate aims identified; and (iii) it must be necessary in a democratic society.*

52. *As to whether the interference with rights under article 9 or 10 is " prescribed by law ", it is well established that " law " in this sense has an extended meaning, requiring that the impugned measure should have some basis in domestic law and be accessible to the person concerned, who must be able to foresee its consequences, and compatible with the rule of law (Huvig v France (1990) 12 EHRR 528 ; Kruslin v France (1990) 12 EHRR 547 ; Purdy v DPP [2010] 1 AC 345 HL). Accessibility requires that the measure must be such that " it must be possible to discover, if necessary with the aid of professional advice, what its provisions are … it must be published and comprehensible "; foreseeability means that it must be possible for a person to foresee the consequences of the law for them (see per Lord Sumption at paragraph 17 In Re Gallagher [2019] 2 WLR 509).*

53. *The legitimate aim in cases such as the present is generally identified as being concerned with the protection of " the rights and freedoms " (article 9(2)) or " reputation and rights " (article 10(2)) of others. Thereafter, consideration must be given to the question of whether restriction is " necessary in a democratic society "; that is to say, that there is a " pressing social need" (Vogt v Germany (1996) 21 E.H.R.R 205 at paragraph 52), albeit, as Lord Bingham emphasised in R v Shayler [2003] 1 AC 247 , " necessary " in this sense:*

> *"23. … is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' …. One must consider whether the interference complained of*

corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient …"

54. *It is in this regard that a proportionality assessment is required, answering the four questions identified by Lord Reed JSC at paragraph 74 Bank Mellat v HM Treasury (No 2) [2014] AC 700: (i) is the objective of the measure sufficiently important to justify the limitation of a protected right; (ii) is the measure rationally connected to the objective; (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. As Lord Bingham made clear in R (on the application of SB) v Denbigh High School Governors [2007] 1 AC 100, the judge's task is to:*

> *"30. ….make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court: R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246 para 51. … it is in my view clear that the court must confront these questions, however difficult. ..."*

55. *Returning to the particular provisions of the domestic statute with which I am concerned, guidance is provided in Page (supra), where Underhill LJ explained that:*

> *"49. … The first question for the Tribunal was what conduct on the Appellant's part caused the Authority to discipline him: that necessarily involved, in one sense, a consideration of its reasons. The answer is straightforward: it was responding to the Appellant's having expressed his views about homosexuality in the media (compounded by his having done so without giving the Trust prior notice). The next question is whether his expression of those views constituted a manifestation of his religious belief in the sense explained in Eweida … in answering that question it is not relevant to consider the [employer]'s thinking. …"*

56. *Exploring the questions arising in a claim involving the holding, or manifestation, of a belief, Underhill LJ further observed:*

> *"68. … 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…. 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 consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself."*

See also Wasteney v East London NHS Foundation Trust [2016] ICR 643 EAT at paragraphs 54-55.

57. *Thus, in establishing the reason why the relevant decision-maker acted as they did (a question requiring an investigation into that person's subjective mental processes or motivation (albeit not motive), which may be conscious or unconscious; see Page at paragraph 29), it will not be possible to rely on a distinction between an objectionable manifestation of a belief and the holding or manifestation of the belief itself if the action taken is not a proportionate means of achieving a legitimate aim. If, however, the action or response can be justified and is found to be by reason of the objectionable manner of the manifestation, then, as was noted in Page:*

> *"74. … in such a case the 'mental processes' which cause the respondent to act do not involve the belief but only its objectionable manifestation … Also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it. It is obviously highly desirable that the domestic and Convention jurisprudence should correspond."*

58. *Where, however, the reason for the employer's impugned conduct is in fact a prohibited reason arising from another party's discriminatory motivation, then that will be the reason why. The fact that the employer was responding to (for example) the (actual or perceived) demands of a customer (see Centrum Voor Gelkijheid Van Kansen v Firma Feryn NV [2008] IRLR 732 CJEU), or was seeking to avoid industrial unrest (Din v Carrington Viyella Ltd [1982] ICR 256, EAT), will not avoid such a finding: the decisive factor is the reason why the employer acted as it did, regardless whether it might have had some benign intention in doing so; if*

it acts for a prohibited reason, the respondent's intent is irrelevant (see per Baroness Hale at paragraph 82 R (oao European Roma Rights Centre) v Immigration Office at Prague Airport [2005] IRLR 115)."

174. Eady P held (at [85]) that the Tribunal had failed to engage with the nature of Mrs Higgs' rights, which included the right to hold and to express views on controversial matters of public interest (**Miller**) even where those views may *"offend, shock or disturb*" (**De Haes**). She went on to say though at [86] of **Higgs** that, "*Recognising the claimant's right to manifest her beliefs, even when expressed in terms that may disturb or offend, does not mean, however, that no restriction or limitation could be placed upon that right."* The claimant's ground of appeal that the Tribunal had failed to engage with Articles 9 and 10 of the ECHR was upheld (at [60]) was upheld. (We pause here to observe that in **Page,** counsel for the NHS Authority raised a point at [64] that Article 10 was of no relevance as the 2010 Act does not protect freedom of expression. Underhill LJ said that he "*was not sure that the position is as straightforward"* but held that it was not necessary to decide the point. The applicability of Article 10 was not an issue in **Higgs** (see paragraph 173 [36]) and in the instant case, each counsel developed arguments around Article 10. We shall therefore analyse the claimant's case by reference both to Article 9 and 10 of the ECHR).

175. Under the ECHR, rights to manifest a religion or belief are qualified rights that may be limited to the extent that is prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society. Eady P went on to hold at [87] of **Higgs** that the Tribunal's reasoning did not reveal any consideration as to whether the restriction placed on the claimant's manifestation of her beliefs was *"prescribed by law, in the sense that the basis for the respondent's actions was accessible to her, such that she could foresee the potential consequences of her conduct (see* ***Re Gallagher's Application for Judicial Review (Northern Ireland)*** *[2019] UK SC3)."*

176. As she observed at [88] of **Higgs,** the Tribunal also had not gone on to consider any assessment of the proportionality of the respondent's actions, a task that would (in summary) have required it to balance the interference with the fundamental rights of the claimant against the legitimate interests arising in respect of the rights, freedoms and/or reputation of others (per **Bank Mellat**, para [74]; and **Page** para [52]).

177. At [94] Eady P then gave some valuable guidance *"for there to be at least some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.*

    (1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.

    (2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedom of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken

because of, or relating to, the exercise of the rights in question, [but] that is by reason of the objectional manner of the manifestation or expression.

(3) Where a limitation or restriction is objectively justified will always be context specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.

*(4) It will always be necessary to ask (per **Bank Mellat**):*

(i) Whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question;

(ii) Whether the limitation is rationally connected to that objective;

(iii) Whether a less intrusive limitation might be imposed without undermining the achievement of the object in question; and

(iv) Whether balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

*(v) In answering those questions, within the context of a relationship of employment, the considerations identified by the intervener [in **Higgs**, The Archbishop's Council of The Church of England] are likely to be relevant, such that regard should be had to:*

(i) The content of the manifestation;

(ii) The tone used;

(iii) The extent of the manifestation;

(iv) The worker's understanding of the likely audience;

(v) The extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business;

(vi) Whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might represent a reputational risk;

(vii) Whether there is potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon;

(viii) The nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients;

(ix) Whether the limitation imposed is the least intrusive measure open to the employer"

178. **Higgs** was not a case (as we said at paragraph 173) of indirect discrimination. This is defined section 19 of the 2010 Act:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –

(A) A applies, or would apply, it to persons to whom B does not share the characteristic,

(B) It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(C) It puts, or would put, B at that disadvantage, and

(D) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

… religion or belief.

179. In **R (on the application of E) the Governing Body of the JFS** [2009] UK SC15 Baroness Hale explained the mutually exclusive nature of direct and indirect discrimination at [57]. In that case, the JFS (a school) had applied a criterion which was not neutral but was discriminatory on the grounds of ethnic origin. Accordingly, that was held to be a case of direct discrimination rather than one of indirect discrimination.

180. Where the criteria are neutral, the issue of indirect discrimination depends on individual and group disadvantage and then on justification. A key question in complaints of indirect religion or belief discrimination is whether it is enough for a claimant to show that they have been put at a particular disadvantage because of a rule or practice restricting their personal desired manifestation of their belief or whether they must also show that other holders of the belief are put at the same disadvantage. In **Eweida** (mentioned at [39] of Eady P's analysis of the legal framework in **Higgs** per paragraph 173 above), it was held that it was not necessary to determine whether a particular act (such as wearing a necklace or observing Sunday as a day of rest) is a mandatory duty of the religion in question. The test which has to be applied is to ask whether there is a "*sufficiently close and direct nexus between the act and the underlying belief".*

181. However, there must be a group whose beliefs as to how they manifest their religion are put at a disadvantage – a sole believer would not be enough. In **Mba** (referred to in Eady P's analysis in **Higgs** at [35]) and which was a complaint brought by a care worker who objected to working on Sunday) it was held by the Court of Appeal that Ms Mba had to show there was a group of believers, including her, who were put at a disadvantage by the requirement to work on Sundays. **Harvey** at [213.09] observes that, *"a holder of a belief will usually be able to establish that there is at least a small group of others who share the belief."* This reinforces Mr Phillips' submission that there is a low threshold to establish group disadvantage in religion or belief cases. Per **Allonby v Accrington and Rossendale College and others** [2001] ICR 1189, CA, the identification of the pool for comparison is a matter of logic rather than of discretion or fact finding. The pool for comparison logically is the one which serves the best test requirement or conditioning question. The question then is whether that apparently neutral provision put one group at a comparative disadvantage to the other. Should the claimant establish group disadvantage then it is for them to show that they suffered individual disadvantage.

182. Should the claimant establish a *prima facia* case of indirect discrimination, then the burden is upon the respondent to show that the provision, criterion, or practice is justified objectively notwithstanding the discriminatory effect. This requires an objective balance to be struck between the discriminatory effect of the requirement or condition on the one hand and the reasonable needs of the person who applies it. This imports the same considerations upon the question of justification as apply to that which arises upon the question of justification in Articles 9(2) and 10(2) of the ECHR.

183. The conduct prohibited by sections 13 (direct discrimination), 19 (indirect discrimination), and 26 (harassment) with which we are concerned are made unlawful in the workplace by provisions in Part 5 of the 2010 Act.

184. The claimant's discrimination complaints are brought pursuant to section 39(1). This provides that:

> *"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."*

185. As the claimant was never an employee of the respondent, section 39(2) is not applicable. (We touched on this issue in paragraph 170 above). This provides that an employer must not discriminate against an employee by (amongst other things) dismissing the employee or subjecting the employee to any other detriment. As section 39(1) does not refer to detriment it follows that section 212(1) of the 2010 Act is inapplicable and it is possible, accordingly, for a complaint both of discrimination and harassment to succeed in a job application case.

186. By section 40 of the 2010 Act:

> *"(1) An employer (A) must not, in relation to employment by A, harass a person (B) —*
>
> *(a) who is an employee of A's;*
>
> *(b) who has applied to A for employment."*

187. It follows therefore that the claimant's complaint of harassment is one brought under section 40(1)(b) of the 2010 Act.

188. In **Forstater v CGD Europe** [UK EAT/0105/20] Choudhury (P) observed at paragraph 68 that *"… the architecture of the [2010] Act does not precisely follow the structure of the ECHR."* It is therefore necessary to consider the complaints through the prism both of the domestic legislation and the Convention. What approach should be taken? In **Page**, Underhill LJ rejected the suggestion by Mr Page's counsel that in every case of religion or belief discrimination a tribunal should start by deciding whether there has been a breach of the claimant's ECHR rights which can then inform the tribunal's analysis of the claim under the 2010 Act. Underhill LJ said at [37] that, *"For myself, I do not think that there needs to be any such rule. It is ultimately the [2010] Act from which the claimant's rights must derive, and there can be nothing wrong in a tribunal taking that as the primary basis*

of its analysis. But of course if there is a reason to believe that a particular approach or outcome may involve a breach of the claimant's Convention rights that question must be fully considered."

189. In **Page**, the complainant was a devout Christian, a magistrate, and a non-executive director of an NHS Trust which was responsible for the delivery of mental health services. The respondent (the NHS Trust Development Authority) was responsible for the appointment and tenure of the non-executive directors of the NHS Trust in question.

190. It is, we think, helpful and illustrative to look at the facts of **Page** in a little detail to give context for the Court of Appeal's ruling in that case and because the facts have some resonance with our case. Taking the facts from the headnote ([2021] IRLR 391):

> *"In December 2014, the claimant was reprimanded by the Lord Chief Justice as a result of an incident in which when sitting as a magistrate he declined to agree to the adoption of a child by a same sex couple. The claimant had spoken to reporters about his reprimand, expressing his views about same sex adoption, namely that it was not in the best interests of any child and 'not normal.' The Chair of the NHS Trust discussed the matter with the claimant and told him that it was important that he alert him if there was going to be any further media coverage. Unbeknown to the Trust or Authority, the claimant continued to engage with the media. In March 2015, he appeared live on BBC Breakfast News and made much the same comments as he had in previous press and media appearances. That led to further disciplinary action by the Judicial Conduct Investigations Office and he was eventually removed from the magistracy. In March 2016, when the Trust learned of his removal, the Chair arranged to speak to him the following week. In the meantime, without prior notice to the Trust, the claimant gave a number of other media interviews. In particular, he appeared live on television on Good Morning Britain when he expressed his views: that 'homosexual activity' was wrong, like all sexual acts outside marriage; that he did not agree with same sex marriage; and that same-sex adoption could never be best for the child. He was suspended and the matter referred to the Authority's termination of appointments panel. That panel made findings which would normally have led to the termination of his appointment. However, by the time that it made its decision his four-year had expired: the practical effect of its findings was to prevent him from applying to serve a further term or serving as a non-executive director of a different trust … [Mr Page] brought proceedings against the Authority on the basis that the suspension, investigation and termination decisions constituted (inter alia) direct and indirect religious or belief discrimination and victimisation under the 2010 Act."*

191. It was held by the Court of Appeal that the Tribunal had not erred in finding that Article 9 ECHR had not been engaged. The Authority's actions against Mr Page were not based on his beliefs as such but on his public expression of them. Accordingly, any breach of his Article 9 rights must have been related to the qualified right (under Article 9(2)) to manifest his beliefs and not his absolute right to hold them in Article 9(1). (It will be recalled that in **Higgs**, Eady P (at [37]) cited Article 9 ECHR and at [38] the principle in **Sahin** of the necessity to place restrictions on freedom to manifest one's religion or belief to reconcile the interests of various groups and ensure that everyone's beliefs are respected: see paragraph 173 above).

192. In **Page** Underhill LJ referred to the judgment of the European Court of Human Rights (*'ECtHR'*) in **Eweida** at [82] which had been mentioned by Eady P in **Higgs** at [39]. In **Page** Underhill LJ said (at [48]):

> *"Although it will have been apparent from the interview that [Mr Page's] views about homosexuality derived from his Christian faith, it is clear from the passage which I have quoted from* ***Eweida*** *that a causative link of that kind is not necessarily enough. The primary focus of what [Mr Page] is saying is his belief about the importance of a child having a mother and a father. The fact that the belief is rooted in his religious faith is part of the context, but the interview cannot be characterised as a 'direct expression of [Mr Page'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 (on the application of 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."* (This is the judgment the subject of the *BBC News* article referred to in paragraphs 66 and 67 of these reasons. We referred to the Court of Appeal's judgment in **Ngole** in paragraph 68).

193. It is convenient, we think, to look now at paragraph 61 of the Court of Appeal's Judgment in **Ngole**:

> *"The [High Court] judge began her full and meticulous judgment by considering whether the appellant's Article 9 ECHR rights were engaged. She considered a number of authorities but did not find them to be directly applicable to the issue in this case. The postings [of Mr Ngole] were found to have been a religiously motivated contribution to a political debate; it was not a protected manifestation of religion. In such a context, it was accepted that the university's decision was not an interference with the appellant's Article 9 rights. The case was then considered on the basis of interference with the right to freedom of expression under Article 10 ECHR. The judge accepted that there had been a prima facie interference with those rights in this case and proceeded to consider the lawfulness of that interference. It was noted however, that the religious dimension of this case remained legally relevant and would have a bearing on the lawfulness of the interference with Convention rights to freedom of expression. We find this to be the correct approach in this case."*

194. In **Ngole** the Court of Appeal therefore upheld the High Court judge's finding in **Ngole** [2017] EWHC 2669 (Admin) that the Facebook postings in question (of which the respondent in this case became aware during the recruitment exercise) were made in an essentially political context. At [63] the High Court had held that the claimant *"had no religious imperative to comment on an American news website about Kim Davis; in Article 9.2 terms, there is no intimate link – no sufficiently close and direct nexus – between that act and the holding of Christian beliefs in themselves, so as to render it a protected manifestation of religion in its own right."* The High Court found (at [64]) that the claimant's postings were *"made in the essentially politically context of news media, as a religiously motivated contribution, albeit with a high religious content, to a political debate about the place of religious belief in the delivery of public services.*

195. The Court of Appeal upheld the Employment Tribunal's finding in **Page** that Article 9 was not engaged, as we have said, because the closeness and directness of the

relevant nexus with his religious beliefs was a matter for the assessment of the Tribunal which had determined that such had not been established.

196. The Court of Appeal also upheld the Employment Tribunal's alternative findings upon the question of justification should they have been wrong to conclude there to be no manifestation of Mr Page's religious beliefs.

197. In **Page**, at [53] Underhill LJ recited the factual findings upon justification made by the Tribunal. The key findings of the Employment Tribunal upon this issue were:

> *"The Trust is subject to the public sector equality duty under [section 149 of the 2010 Act] which includes a duty to advance equality of opportunity and to foster good relations between persons who share and those who do not share a protected characteristic. The claimant accepts that there were, and had been, specific issues with LGBT members of the community suffering disproportionately from mental health problems and also difficulty persuading them to engage with the Trust's services. There had also been a specific complaint from within the Trust's organisation concerning the claimant's actions. There is clear evidence that there was a specific and genuine concern on the part of the Trust and the respondent as to the impact of the claimant's actions on the Trust's ability to serve the entire community in its catchment area. Given the claimant's high profile within the Trust, the Tribunal finds that this concern was justified. The claimant himself confirmed in evidence that although he did not think about the effect of his public statements on others, even after [the Authority's chair] had raised it with him in early 2015, he accepted that those reading, listening to or watching his interviews might have made a connection with his role with the Trust and/or in the NHS in a wider sense and that could be damaging for the Trust or the wider NHS."*
>
> (Underhill LJ notes (at [55] of **Page**) that there was no challenge to the factual basis on the issue of justification found by the Tribunal. It follows therefore that it was accepted by Mr Page that the Tribunal was entitled on the evidence before it to find that the concerns felt by the Trust and the Authority about the impact of Mr Page's public statements on the Trust's ability to engage with gay service users were reasonable. Underhill LJ notes that in principle it might have been arguable that on the evidence the risk of such an impact was unreal. However, that was not an argument that was run by Mr Page).

198. At [59] to [62], Underhill LJ gives three reasons why he was of the view that the Employment Tribunal was entitled to reach the conclusion which it did upon the question of justification.

199. Firstly, Mr Page expressed views about homosexuality which went beyond *"'a sceptical opinion on same sex adoptions.' As noted … they included opinions also on same sex marriage and 'homosexual activity' and were accordingly the more likely to cause offence or invite misrepresentation. I do not say that this is by itself sufficient to justify the Trust or the Authority objecting to his expressing them in public: after all, they reflect the traditional teaching of Christianity and indeed other religions. But it is important to identify from the start what the views were."*

200. Secondly, concerns went beyond the fact that members of the public, or members of the Trust's or Authority's staff might find Mr Page's views about homosexuality offensive or disturbing. (This is commonly known as the *"heckler's veto"* and was referred to by Mr Phillips in paragraphs 74 and 75 of his written submissions: see also **Higgs** in paragraph 173 [46] to [50]). Underhill LJ confirmed the proposition

that the reaction of third parties is not ultimately determinative of the lawfulness of the message and that there is no right not to be offended). However, the concerns in **Page** were not based on some generalised perceived reputational damage to the Trust. Underhill LJ said that the concerns were "*based specifically on the risk that the fact that a member of [the Trust's] 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."* Underhill LJ went on to remind us that it was not part of Mr Page's case that that risk was unreal.

201. The third factor upon which basis the Court of Appeal upheld the Employment Tribunal's ruling in **Page** was the conduct of Mr Page himself. The Tribunal found that this made it *"in practice impossible to find a way forward that might have respected both parties' interests."* The Tribunal's factual findings were that it was *"clear from the history that neither the Trust nor the Authority could have any confidence that the Appellant would reliably co-operate [in addressing sensitivities]*." This is because he had on at least two occasions made media appearances without the Trust's knowledge or consent.

202. In paragraph 63, Underhill LJ addresses submissions made by Mr Page's counsel in reliance upon the Court of Appeal authorities of **Ngole** and **Smith v Trafford Housing Trust** [2012] EWHC 3221 (CH). He disagreed with counsel's suggestion that the facts in **Smith** and **Ngole** were so close to those in Mr Page's case that they should be treated as determinative of how the proportionality balance should be struck. Underhill LJ said, "*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 paragraph 135 of the judgment in **Ngole.**"* (We shall revert to the Court of Appeal's Judgment in **Ngole** once again shortly. **Smith** was a complaint brought in the High Court of breach of contract. It was held that the contract of employment could not (by implication) restrict freedom of expression and that the right to freedom of expression is not restricted even where offence is caused by moderately expressed views).

203. In **Page**, the issue of his rights under Article 10 ECHR appears not to have been developed. Underhill LJ held (at [66]) that there was in any case *"no real distinction between the issues raised under Article 9 and Article 10, at least as regards justification. Since I would uphold the Tribunal's conclusion about justification in the contents of Article 9 there is nothing more I need to say about Article 10."*

204. Underhill LJ (at [67]) held that the Employment Tribunal in Mr Page's case *"was entitled to find that the Authority did not infringe the Appellant's Convention rights. It might be thought to follow that it cannot have discriminated against him on the grounds of his religion or belief, since the relevant protections under the Convention and the 2010 Act must be intended to be coextensive. In my view that is indeed the case, but that does not absolve me from considering the issues through the lens of the 2010 Act, which must be the formal basis of the Appellant's claim."*

205. Underhill LJ then addressed Mr Page's complaints of direct discrimination, indirect discrimination and victimisation through the prism of the 2010 Act.

206. He began his analysis at [68]. This paragraph is cited above in **Higgs** at paragraph 173 [56].

207. He then goes on at [69] to cite *"three decisions in cases where an employee was disciplined for inappropriate Christian proselytization 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. 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 [as she then was] 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."*

208. At [29] of **Page,** Underhill LJ, after citing section 13 of the 2010 Act, said:

> *"There is a good deal of case-law about the effect of the term 'because' (and the terminology of the pre-2010 legislation, which referred to 'grounds' or 'reason' but which connotes the same test). What it refers to is 'the reason why' the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the 'mental processes' that caused them to act. The line of cases begins with the speech of Lord Nicholls in **Nagarajan v London Regional Transport** [1999] IRLR 572 … and includes the reasoning of the majority in the Supreme Court in **R (on the application of E) v Governing Body of the JFS ('**the **Jewish Free School** case') [2009] UK SC15… The cases make it clear that although the relevant mental processes are sometimes referred to as what 'motivates' the putative discriminator they do not include their 'motive', which it has been clear since **James v Eastleigh Borough Council** [1990] UKHL 6 … is an irrelevant consideration …*

209. At [78] of Page, Underhill LJ rejected Mr Page's counsel's submission that the Authority's reason for acting as it did was indissociable from Mr Page's religion or belief. Underhill LJ said that *"there is no difficulty in dissociating, in a proper case, an objection to a belief from an objection to the way in which that belief is manifested. [Counsel for the Authority] referred us to para 25 of the Judgment of Lady Hale in **Lee v Ashers Baking Company Ltd** [2018] UKSC 49 … which emphasises the limited and specific role of the concept of indissociably."*

210. In **Ashers Baking**, there was an objection by the bakery to Mr Lee's request to endorse a case with the message *'support gay rights.'* There was no objection by the bakery to Mr Lee or to any of his personal characteristics. The message therefore was dissociable from the sexual orientation of Mr Lee as support for gay marriage was not a proxy for any particular sexual orientation. Thus, there was no discrimination on the grounds of sexual orientation in that case. So too, it was held by the Court of Appeal in **Page**, there was no difficulty in disassociating Mr Page's belief on the one hand to the way in which that belief had been expressed on the other.

211. Mr Page's counsel also criticised the Employment Tribunal for declining to construct a hypothetical comparator. It was submitted on his behalf that had that been done then, by application of section 23 of the 2010 Act (which provides that on a comparison of cases for the purposes of section 13 and 19 there must be no material difference between the circumstances relating to each case) it would have

been appreciated that the correct comparison was with a director in Mr Page's position who had given a media interview but who had not expressed his views about homosexuality.

212. Underhill LJ dismissed this argument. He said at [79] of **Page** that, *"It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras 8 to 13 of the speech of Lord Nicholls in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *[2003] UK HL11.* ***Aylott [v Stockton on Tees Borough Council]*** *[2010] EWCA Civ 910] says nothing to the contrary. In any event, even if the Tribunal had undertaken the exercise the correct comparator would not have been as [Mr Page's counsel] proposes, because his formulation leaves out a material circumstance, namely that the expression of the views in question by a Director of the Trust was liable to have a serious impact on the Trust's relationship with an important group of service users, and that he or she had shown themselves wholly insensitive to the difficulties caused. In such a case the Trust would obviously have acted in the same way even if the views expressed were not the product of any religious or other protected belief."*

213. During submissions, the Employment Judge reminded the parties of the caution counselled by Underhill P (as he then was) about the perils of constructing a hypothetical comparator. The case which the Employment Judge had in mind was **D'Silva v NATFHE** [2008] IRLR 142. Underhill P said in that case that "*It might reasonably have been hoped that the Frankensteinian figure of the badly constructed hypothetical comparator would have been clumping his way rather less often into discrimination appeals since the observations of Lord Nicholls in* ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *(see in particular paragraph 11 at page 289) and the decision of this Tribunal, chaired by Elias J, in* ***Law Society v Bahl*** *[2003] IRLR 640 at paragraphs 103 to 115 (pages 652 to 654). We regard it as clear, taking the reasons as a whole, that the Tribunal made an express finding that the reason why the union acted in the way complained of was that (as regards the initial decision and the first review decision) the Appellant had expressed a lack of trust and confidence in his legal team and (as regards the subsequent review) that Mr Brian had genuinely overlooked the Appellant's further correspondence. Those findings necessarily exclude the possibility that the acts complained of were done, even in part, on racial grounds (or on grounds which would constitute victimisation). If that finding is unassailable it necessarily answers also the question whether he would have been treated more favourably if he had been white or if he had not previously supported Mr Deman or complained of racial discrimination. It is accordingly unnecessary to consider in detail the passages in which the Tribunal referred to the nature of the hypothetical comparator. We would however say that we can see no sign that it failed to appreciate any essential feature of the necessary comparison."*

214. Returning to **Page**, Underhill LJ then (at [81] to [91]) considered the provisions of the 2010 Act as they applied to Mr Page's indirect discrimination claim. After considering the case of **Mba** (which we have looked at already) Underhill LJ held that the Employment Tribunal had not erred in the rejecting the indirect discrimination claim. There was no appeal against the decision of the Tribunal on justification and in any case, he said that it was hard to see how the Tribunal's

conclusion on justification in relation to Article 9 ECHR would not have read over to the indirect discrimination claim.

215. Finally, upon our detailed analysis of **Page,** and for the sake of completeness Underhill LJ examined Mr Page's victimisation complaint at paragraphs [92] to [99]. As we are not concerned with the victimisation claim brought by Mr Ngole, we need not consider this aspect of **Page**.

216. Before leaving our consideration of the relevant law, the Tribunal will add some comments and observations about some of the cases cited by Eady P in **Higgs** in the passages in paragraph 173. Further, the Tribunal will address some other cases not yet cited but referred to by counsel in argument.

217. At [54] of **Higgs**, Eady P referred to the case of **R (Williamson) v Secretary of State for Education and Employment** [2005] 2 AC 246. In this case, Lord Nicholls explained Article 9 of the ECHR in the following way:

"15 … religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other's beliefs. This enables them to live in harmony. This is one of the hallmarks of a civilised society. Unhappily, all too often this hallmark has been noticeable by its absence. Mutual tolerances had a chequered history even in recent times. The history of most countries, if not all, has been marred by the evil consequences of religious or other intolerance.

16 … it is against this background that Article 9 of the European Convention on Human Rights safeguards freedom of religion. This freedom is not confined to freedom to hold a religious belief. It includes the right to express and practice one's belief. Without this, freedom of religion would be emasculated. Invariably religious faiths call for more than belief. To a greater or less extent adherents are required or encouraged to act in certain ways, most obviously and directly in forms of communal or personal worship, supplication and meditation. But under Article 9 there is a difference between freedom to hold a belief and freedom to express or manifest a belief. The former right, freedom of belief is absolute. The latter right, freedom to manifest belief, is qualified."

218. The same paragraph ([54]) refers to **R (on the application of Begum) v Governors of Denbigh High School** [2006] UK HL 15] where Lord Bingham commented (at [23]) that there is case-law of the ECtHR and the Commission which indicates that, if a person is able to take steps to circumvent a limitation placed on his or her own freedom to manifest religion or belief, there may be no interference by another with the right under Article 9(1) and the limitation does not therefore require to be justified under Article 9(2).

219. As noted by Eady P in Higgs (at [51] cited above) there are similarities between the approaches to be taken in relation to complaints of infringement of right protected by Articles 9(2) and 10 ECHR. Both rights are qualified with Articles 9(2) and 10(2) setting out the circumstances under which the right to religion or belief of freedom of expression can be limited or restricted. Each require the limitation or restriction to be one that is prescribed by law. What does that expression mean?

220. That the limitation or restriction must be prescribed by law is a necessary pre-condition before going on to consider the question of justification by applying Lord Reed's test in **Bank Mellat** (as set out by Eady P at [54] of **Higgs**). Essentially, the principle of legality requires any interference with convention rights to have a legal basis in domestic law.

221. This issue was addressed in **R (Purdy) v Director of Public Prosecutions** [2009] UK HL 45 (mentioned in Mr Phillips' submissions). This case in fact, concerned rights arising under Article 8 of the ECHR (which is the right to respect for private and family life). Like Articles 9(2) and 10, Article 8 is a qualified right. Article 8(2) provides that, "*there shall be no interference by public authority with the exercise of [the] right except such as in accordance with the law and is necessary in a democratic society …"*

222. The context was Mrs Purdy's wish for her husband to travel with her to Switzerland to *Dignitas* for assisted suicide. There was concern that this rendered him liable to prosecution under section 2(1) of the Suicide Act 1961. The DPP had never exercised a discretion to prosecute such conduct and had only published official reasoning for a decision to do so in one previous case. Mrs Purdy argued that she should be entitled to information on the factors the DPP will take into account to exercise a discretion under the 1961 Act as to do otherwise would be an infringement of her Article 8 rights. Her appeal succeeded.

223. Lord Hope explained (at [40] of **Purdy**) that the requirement of *'prescribed by law'* has three substantive elements:

> *"The Convention principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism that it is being applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate."*

224. The House of Lords held that the *Code for Crown Prosecutors* issued by the DPP will *"normally provide sufficient guidance to Crown Prosecutors and to the public as to how [prosecutorial] decisions should be or are likely to be taken."* This Code was deficient in respect of offences under the 1961 Act and therefore did not satisfy the Article 8(2) requirements of accessibility and foreseeability. The DPP was required to promulgate an offence-specific policy identifying the facts and circumstances to be considered in such a case.

225. Another aspect of significance from **Begum** is the question of the weight to be given to judgments made by the decision makers. Lord Hoffman in **Begum** said that the court will afford an area of judgement to the decision maker. **Begum** concerned decisions taken in a school context. Lord Hoffman said:

> *"[64] In my opinion a domestic court should accept the decision of Parliament to allow individual schools to make their own decisions … In applying the principles … the justification must be sought at the local level and it is there that an area of judgment, comparable to the margin of appreciation, must be allowed to the school. That is the way the judge approached the matter and I think that he was right.*
>
> *[65] …There are matters which the school itself was in the best position to weigh and consider.*
>
> *[68] … Article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under*

Article 9(2)? … Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade the judge that its answer fell within the area of judgment accorded to it by the law."

226. **Begum** is therefore authority for the proposition that whether a measure in question is proportionate is for the court or tribunal to decide. However, appropriate weight is to be given to the expertise of the decision makers where they have made a judgment on an issue which is within their sphere of expertise.

227. We now return to a consideration of the Court of Appeal's Judgment in **Ngole.** In our analysis of **Page**, we referred (in paragraph 202) to Underhill LJ's judgment at [63] where he mentioned paragraph 135 of **Ngole** and the consideration in that case of the question of proportionality. Irwin LJ said at [135]:

"These were [Mr Ngole's] religious and moral views, based on the Bible. Where he used his own expressions of belief, rather than Biblical quotations, they mirrored Biblical text. Indeed, as we have observed, the strongest term used in respect of homosexual acts was in direct quotation from Leviticus. [Mr Ngole] had never shown actually to have acted in a discriminatory fashion. He denied having done so and stated he would never do so. That was accepted by the university. It was not said that it would discriminate in the future. He stated, without contradiction, that he had dealt with those in homosexual relationships in the past, and done so properly. There was no evidence any actual or potential service user had read the postings. There was no evidence of any actual damage to the regulation of the profession. Although the [fitness to practice panel] and the appeals committee concluded that [Mr Ngole] and Pastor Omooba [who attempted to mediate the dispute] were intransigent and defiant, we find it hard to see how the university made sufficient efforts to engage them. We recognise of course the difficulty that any appeal court faces, that these events were not before us."

228. Irwin LJ went on to say at [137] that:

"*The swift conclusion that [Mr Ngole] was 'unteachable,' that it was for him to construe the [university's] regulations and guidance, for him to understand the impact of religious language on others unfamiliar with it, and that his failure to do so meant he must be removed immediately, do not seem to us to have to been shown to be the least intrusive approach which could have been taken. It appears to us that this approach was disproportionate on the part of the university."*

229. At [146] of **Ngole**, the Court of Appeal ordered that the case be remitted for a new hearing before a freshly constituted fitness to practice committee. Plainly, this took place, and the claimant was restored to the course, going on to successfully complete it and qualify as a social worker. (As we say in paragraph 298, the Tribunal did have evidence not available to the High Court in **Ngole** of the likely impact upon service users).

230. This ruling reflected what had been said at [5(6)] of **Ngole**. Here, Irwin LJ said (in the summary of the Court of Appeal's conclusions given at the outset of the Judgment in **Ngole):**

"At no stage did the university make it clear to [Mr Ngole] that it was the manner and language in which he had expressed his views that was the real problem,

and in particular 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 [Mr Ngole] 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."

231. In this connection, the Court of Appeal observed at [106] that:

"… the legitimate aim of such [professional] regulation must extend so far as to seek to ensure that reasonable service users of all kinds, perceive they will be treated with dignity and without discrimination. Social work service users cannot usually choose their social worker. The use of aggressive or offensive language in condemnation of homosexuality and homosexual acts, would certainly be capable of undermining confidence and bringing the profession of social work into disrepute. As the [HCPC] guidance makes clear, [Mr Ngole] had an obligation not to allow his views about a person's lifestyle to prejudice his interactions with service users by creating the impression that he would discriminate against him."

232. It is clear from reading the judgment of the Court of Appeal that where the university went wrong was in not making it clear to Mr Ngole that it was the manner and language in which he had expressed his views that was the problem. They did not discuss or offer him guidance as to how he might more appropriately and moderately express his views on homosexuality in a public forum and in a way in which it would be clear that he would never discriminate on such grounds or allow his views to interfere with his work as a professional social worker. This fed into the university's entrenched position that Mr Ngole lacked *"insight"* into matters. As has already been said, the Court of Appeal ruled [at [5](10)] that the university wrongly confused the expression of religious views with the notion of discrimination.

233. The Court of Appeal was concerned that the university was adopting the position that any expression of disapproval of same sex relations which could be traced back to the person making it would be a breach of professional guidance for social workers as far as the university was concerned. This was tantamount to placing a restriction upon the claimant from expressing such views on social media or on any public forum. The Court of Appeal was concerned that the HCPC regulates many professions (not just social workers) and that the university's position would also have implications for adherents of other faiths than Christianity with similar teachings.

234. After considering these issues at [123] to [128] the Court of Appeal held at [129] that *"such a blanket ban on the freedom of expression of those who may be called 'traditional believers' cannot be proportionate, based as it was on a perceived risk of discrimination."*

235. The importance of considering the context when looking at interferences with Convention rights was emphasised in the case of **Re Sandown Free Presbyterian Church** [2011] NIQB 26. This case was cited by Mr Phillips in his written submissions. The context of this case was that ahead of a Pride event in Belfast, a church in Northern Ireland published in a national newspaper a full-page advertisement under the heading *"The word of God against sodomy",* which called

homosexual acts "*a grave offence"* and "*an abomination".* The advertisement expressed *"regret that a section of the community desire to be known for a perverted form of sexuality"* and quoted Leviticus 18:22 and First Corinthians 6.9-11.

236. The Advertising Standards Authority held the advertisement to be in breach of their code. The court held that this interference with the church's right to freedom of expression was not proportionate. After commenting (at [73]) that the church's *"religious views and the biblical scripture which underpins those views no doubt cause offence, even serious offence, to those of a certain sexual orientation"* and observing that "*the practice of homosexuality may have a similar effect on those of a particular religious faith"* the court issued a reminder that Article 10 *"protects expressive rights which offend, shock or disturb."* The judge held that:

> *"In making this assessment I have taken into account the very particular context in which the advertisement was placed, the fact that the advertisement did not condone and was not likely to provoke violence, contained no exultation to other improper or illegal activity, constituted a genuine attempt to stand up for their religious beliefs and to encourage others to similarly bear witness and did so by citing well known portions of scripture which underpinned their religious faith and their court bear witness. Whilst such views and scriptural references may be strongly disdained and considered seriously offensive by some, this does not justify the full scope of the restrictions contained in the impugned determination."*

237. Mr Phillips also took us to the case of **Livingston v The Adjudication Panel for England** [2006] EWHC 2533 (Admin). In this case, the then-Mayor of London, upon leaving a reception, heaped abuse upon a Jewish journalist who chased him with a question, calling him *"a German war criminal"* and *"a concentration camp guard."* Colling J held that the Mayor was protected by Article 10 ECHR and that interference with his freedom of expression had to be justified by reference to Article 10(2). It was held that the Adjudication Panel was wrong to find that this conduct breached the applicable code of conduct. The comments were made outside of the Mayor's official work setting and did not bring the office of Mayor (as opposed to the individual himself) into disrepute.

238. In this connection, Mr Phillips notes that the impugned Facebook postings made by the claimant were uploaded eight years prior to his application for a position with the respondent, that the sanctions suffered by the claimant (of the withdrawal of the job offer) was more severe and that "*it would be absurd if higher professional standards were applied to a social worker than to the Mayor of London."*

239. In his submissions before the Tribunal, Mr Wilson drew our attention to another decision of Eady P in the Employment Appeal Tribunal. This is **Omooba v Michael Garrett Associates Limited (t/a Global Artists) and Leicester Theatre Trust Limited** [2024] EAT 30. This was another case of Facebook postings creating subsequent employment difficulties. The claimant in **Omooba** was an actor who was cast to play the role of Celie in the stage production of *The Colour Purple*. Celie is seen as an iconic lesbian role and when the claimant's casting was announced a social media storm then developed relating to a past Facebook post in which she had expressed her belief that homosexuality was a sin. The consequence of that storm led to the termination of her contract with the theatre and with her agency.

240. It had been found as a fact by the Employment Tribunal that there was a real concern about the social media storm which had been generated and how this might impact on the audience's ability to connect with the claimant in the role of Celie. The storm generated adverse negative publicity which was expected to grow as time went on and there was some evidence of a potential boycott of the production by LGBT groups.

241. Mr Wilson commended the Tribunal to Eady P's consideration of the relevant legal framework and principles pertaining Miss Omooba's 2010 Act claims. This is at paragraphs 78 to 106. This is now set out. We do so at this stage because, it seems to us, that this helpfully summaries and pulls together the legal principles which we have taken some time to set out in these reasons. Further, the judgment in **Omooba** refers at [96] and [97] to the occupational requirements defence which is an issue in this case per paragraphs 1.6 to 1.8 of the list of issues (in paragraph 164)). *(With a view to reducing an already lengthy judgment, we shall not set out these paragraphs in full where they consist of repetition of the citation from* **Higgs** *at paragraph 173*):

> ***"The Equality Act Claims***
>
> *78. Under domestic law, protection against certain forms of discrimination is provided by the Equality Act 2010 ("the EqA"); protected characteristics under the EqA include religion or belief (section 4 EqA), which, by section 10 , are defined…as…[**Higgs**:30].*
>
> *79. Pursuant to section 3(1) Human Rights Act 1998 (" HRA "), the ET (and EAT) must, so far as possible, give effect to domestic law in a way which is compatible with the European Convention on Human Rights ("ECHR"). In the present proceedings, reliance has been placed on articles 9 and 10 **ECHR** , which provide:*
>
> ***Article 9 Freedom of thought, conscience and religion***
>
> *[**Higgs**: 37].*
>
> ***Article 10 Freedom of expression***
>
> *[**Higgs**:42].*
>
> *80. The rights thus expressed by articles 9 and 10 **ECHR** include the right not to hold a religious belief or practise, or not to practise a religion (**Burscarini v San Marino (1999)** 30 EHRR 208 at paragraph 34), and the freedom not to express (**RT (Zimbabwe) v Secretary of State for the Home Department (UN High Commissioner for Refugees Intervening)** [2013] 1 AC 152 . As Lord Dyson MR opined in **RT (Zimbabwe)**:*
>
> *"42. … the right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and … the Convention too. There is nothing marginal about it. Nobody should be forced to have or express a political opinion in which he does not believe. …*
>
> *43. … it is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any*

particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. …"

And see per Lady Hale at paragraphs 50-53 ***Lee v Ashers Baking Company Ltd and ors*** *[2018] UKSC 39, [2020] AC 413 .*

81. The domestic protections relied on by the claimant (so far as relevant to this appeal) were those provided by the EqA at sections 13 (direct discrimination) and 26 (harassment).

82. Section 13 defines direct discrimination, as follows:

*[**Higgs**:28].*

83. Harassment is defined by section 26(1) :

*[**Higgs**:29].*

84. A comparison for section 13 EqA purposes must involve no material difference between the circumstances of each case (section 23(1)). Where no actual comparator has been identified the comparison may involve the construction of a hypothetical comparator, albeit the ET may (as in the present case) permissibly consider it appropriate to focus on the reason why the complainant was treated as she was (see ***Shamoon v Royal Ulster Constabulary*** *[2003] UKHL 11, [2003] ICR 337).*

85. In seeking to determine the reason why the respondents had acted as they had in the present proceedings, the ET noted that it needed to be careful "not to confuse "but for" causation with an examination of the "reason why" treatment occurred " (ET liability decision, paragraph 97). This distinction refers back to the reasoning of Lord Nicolls in the cases of ***Nagarajan v London Regional Transport*** *[2000] AC 501 HL and* ***Chief Constable of West Yorkshire Police v Khan*** *[2001] ICR 1065 HL; as explained at paragraph 29 of* ***Khan*** *, as follows:*

"29 … Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

86. A " but for " approach was adopted in ***James v Eastleigh Borough Council*** *[1990] 2 AC 751 , HL, where the discriminatory reason for the treatment complained of was inherent in the treatment itself (the rule in issue necessarily discriminated against men aged 60-65 in comparison to women of that age): no further inquiry was needed. Where that is not so, however, it*

is necessary to apply a subjective test to discern the mental processes (conscious or unconscious) that led the putative discriminator to act as they did; as Underhill P (as he then was) put the point in ***Amnesty International v Ahmed*** *[2009] ICR 1450 EAT:*

"36. … the ultimate question is – necessarily – what was the ground of the treatment complained of … the reason why it occurred …"

87. *Thus having regard to the mental processes of the alleged discriminator, it is important to distinguish between motive and reason; as Underhill P also observed in* ***Amnesty International*** *:*

"34. … the subject of the inquiry is the ground or, or reason for, the putative discriminator's action, not his motive … a benign motive is irrelevant. …"

And see R (oao E) v Governing Body of JFS and ors [2009] UKSC 15 , per Lord Philips at paragraph 20 (and his framing of the relevant question, at paragraph 27), and Baroness Hale at paragraphs 64-66.

88. ***Nagarajan*** *,* ***Khan*** *,* ***Amnesty International*** *and* ***JFS*** *were all cases determined under the Race Relations Act 1976 , which required the treatment in issue to be " on racial grounds ". The " because of " formulation now found in the EqA does not, however, alter that approach; see paragraph 61 of the* ***Explanatory Notes*** *to the EqA and the observations of Underhill LJ in* ***Onu v Akwiwu*** *[2014] ICR 571 CA (affirmed on different grounds by the Supreme Court at [2016] UKSC 31).*

89. *If the relevant protected characteristic is an operative reason why the alleged discriminator treated the complainant less favourably, it matters not that it is not the main reason; as Lord Nicholls made clear in* ***Nagarajan*** *(see p 513A-B), it is sufficient if the protected characteristic had a " significant influence " on the decision to act in the manner complained of, whether that influence was conscious or unconscious (pp 511A-512C). The protected characteristic must, however, be part of the reason for the less favourable treatment, it is not sufficient for it to simply be part of the context. As Underhill P held in* ***Amnesty International*** *:*

"37. … The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

And Linden J explained in ***Gould v St John's Downshire Hill*** *[2021] ICR 1 , EAT:*

"66. … the logic of the requirement that the protected characteristic or step must subjectively influence the decision maker is that there may be cases where the "but for" test is satisfied - but for the protected characteristic or step the act complained of would not have happened - and/or where the protected characteristic or step forms a very important part of the context for the treatment complained of, but nevertheless the claim fails because, on the evidence, the protected characteristic or step itself did not

materially impact on the thinking of the decision maker and therefore was not a subjective reason for the treatment. This point is very well established in the field of employment law generally where, for example, an employer may be held to have acted by reason of dysfunctional working relationships rather than the conduct of the claimant which caused the breakdown in those relationships (see e.g. the cases on the distinction between dismissals related to "conduct" and dismissals for "some other substantial reason", such as Perkin v St Georges Healthcare NHS Trust [2006] 617 CA; and the cases in relation to public interest disclosures such as Fecitt & Others v NHS Manchester (Public Concern at Work Intervening) [2012] ICR 372 CA and Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 EAT)."

90. *Separating reason from context will be for the ET as the first instance, fact-finding tribunal, see per Simler LJ (as she then was) paragraph 56* ***Kong v Gulf International Bank (UK) Ltd*** *[2022] IRLR 854 CA; albeit this may be an exercise that requires the ET to " look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer " is indeed the real explanation, per Elias LJ paragraph 51* ***Fecitt & Others v NHS Manchester (Public Concern at Work Intervening)*** *[2012] ICR 372 CA.*

91. ***Kong*** *and* ***Fecitt*** *were both whistleblowing cases, but the approach is the same in the field of equality law; see* ***Martin v Devonshires Solicitors*** *[2011] ICR 351 , and* ***Amnesty International*** *. The determination of the real reason for the impugned conduct may require a carefully nuanced evaluation of the evidence. Thus, in some cases it may be found that the relevant protected characteristic was an operative cause of the less favourable treatment, notwithstanding an otherwise benign intent to thereby avoid workforce unrest (see* ***Din v Carrington Viyella Ltd*** *[1982] ICR 256 , EAT (albeit, in* ***Din*** *, that question was remitted) and* ***R v Commission for Racial Equality, ex p Westminster City Council*** *[1985] ICR 827 CA); in others, although the protected characteristic in issue might have formed part of the relevant background to a decision taken in an attempt to resolve a workplace dispute, it might nevertheless be held not to have been a significant influence on that decision (* ***Seide v Gillette Industries Ltd*** *[1980] IRLR 427 EAT).*

92. *The distinctions in question have long been recognised in cases involving allegations of religion and belief discrimination, even allowing for the particular challenges that can arise, given that there will often be no clear dividing line between holding and manifesting a belief and it can thus be necessary to test whether the decision-taker's reason was in fact the complainant's religion or belief (as made manifest in some way) or its objectionable manifestation; see* ***Chondol v Liverpool City Council*** *[2009] UKEAT/0298/08;* ***Grace v Places for Children*** *UKEAT/0217/13;* ***Wasteney v East London NHS Foundation Trust*** *[2016] ICR 643 EAT;* ***Page v NHS Trust Development Authority*** *[2021] ICR 941 CA;* ***Higgs v Farmor's School*** *[2023] ICR 89 EAT. More generally, the importance of distinguishing between that which forms part of the context, and that which is the operative*

*reason, can be seen in **Lee v Ashers** , where Lady Hale held that the respondent's refusal to supply a cake with a political message iced onto it was less favourable treatment " afforded to the message not to the man " (paragraph 47): Mr Lee's political opinion was part of the context (it was why he commissioned the cake), but it was not the reason why the respondent refused to serve him.*

93. *The claimant's claim of less favourable treatment against the second respondent related to her dismissal and, as such, was brought under section 39(2)(b) EqA . This protection may be contrasted with that afforded by sub- section 39(2)(d) , which prohibits discrimination by the employer by subjecting the employee " to any other detriment ". Although, therefore, the claimant was not required to demonstrate that she had been subjected to " any other detriment " to show any discrimination was unlawful, it has been held that the definition of direct discrimination under section 13 EqA still connotes a need to show a comparative detriment by virtue of the requirement that the complainant has been treated " less favourably "; see **Keane v Investigo and ors** UKEAT/0389/09 at paragraphs 19-22, **Berry v Recruitment Revolution** UKEAT/0190/10 at paragraph 15, and **Garcia v The Leadership Factor** [2022] EAT 22 at paragraph 48. The point being made in **Keane** , **Berry** , and **Garcia** was that an applicant for a job in which they in fact had no interest could not sensibly complain of having been treated " less favourably " if refused the appointment, even if that was because of a relevant protected characteristic. Those cases were brought under section 39(1)(a) of the EqA (and the relevant predecessor provisions of the legacy enactments), relating to the arrangements made for deciding to whom to offer employment, but it is not suggested that there is any material distinction in respect of a claim under section 39(2)(c) .*

94. *The same points arise under section 55 EqA , which prohibits discrimination by employment service-providers such as the first respondent. To the extent that the claimant was complaining of the termination of the provision of the first respondent's agency service, her claim fell under section 55(2)(c) **EqA** ; otherwise her claims fell under subsection 55(2)(d), as subjecting her to " any other detriment ". In either case, the claimant needed to demonstrate that she had suffered a detriment or treatment that could properly be described as less favourable (as to which, see the points made relating to section 39 , above).*

95. *As for whether a complainant has suffered a detriment, it has been held that this will exist:*

*"… if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment" **MoD v Jeremiah** [1980] ICR 13 CA, at p 31*

*There is, however, a distinction between the question whether treatment is less favourable and whether it has damaging consequences; **Khan** at paragraph 52;*

Moreover:

*"… an unjustified sense of grievance cannot amount to 'detriment'" **Shamoon** at paragraph 35 (see also **St Helens MBC v Derbyshire** [2007] UKHL 16)*

96. By paragraph 1 of schedule 9 EqA , it is provided that liability under (relevantly) section 39(2)(c) will not arise where a person ("A") applies:

- *(1) … in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work— (a) it is an occupational requirement, (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).*

*97. There must thus be a requirement to have a particular protected characteristic; but this cannot be for purely subjective considerations: see **Bougnaoui and anor v Micropole SA** [2018] ICR 139 ECJ, where it was held that the requirement must be one that is:*

"40. … objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the wishes of the customer."

98. As for the claimant's claim of harassment, section 26 EqA requires that the conduct must: (i) be unwanted; (ii) be " related to " the relevant protected characteristic; and (iii) have either the proscribed purpose or the proscribed effect.

*99. In determining whether the conduct is " related to " the protected characteristic in issue, whilst of potentially very broad application, this still requires there to be some feature of the factual matrix identified by the ET which has led it to the conclusion that the conduct is related to that protected characteristic (paragraph 25 **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor** [2020] IRLR 495 EAT). That will not extend to the acts of third parties for whom the respondent would not otherwise be vicariously liable: **Unite the Union v Nailard** [2019] ICR 28 CA.*

100. In the present case, there is no appeal against the ET's finding that neither respondent had the requisite purpose under either section 26(1)(b)(i) or (ii) EqA . The question is whether the ET erred in finding that the conduct in issue (in either case) did not have the required effect . In this regard, section 26(4) provides:

"In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

101. In ***Pemberton v Inwood*** [2018] ICR 1291 , Underhill LJ provided guidance in relation to the application of section 26(4) , as follows:

> "88. … In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

102. Although Underhill LJ's observations in Pemberton were strictly obiter , they have been followed and applied by the EAT in **Ahmed v The Cardinal Hume Academies** UKEAT/0196/18, in which Choudhury P confirmed that the question whether it is reasonable for the impugned conduct to have the proscribed effect " is effectively determinative " (see paragraphs 36-39).

103. As for the relevant effect, the case-law has made clear that the language used - " violation of dignity " and " intimidating, hostile, degrading, humiliating, or offensive " – is significant:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." (per Elias LJ **Grant v HM Land Registry** [2011] EWCA Civ 769 at paragraph 47)

> "The word 'violating' is a strong word. Offending against dignity, hurting it, is insufficient. 'Violating' may be a word the strength of which is sometimes overlooked. The same might be said of the words 'intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence." (per Langstaff P **Betsi Cadwaladr University v Hughes** UKEAT/0179/13 at paragraph 12)

104. For the claimant, it is urged that " dignity " is a concept imported from European human rights law. Article 1 of the European Charter of Fundamental Rights states that " Human dignity is inviolable. It must be respected and protected ", and the case-law of the European Court of Human Rights makes clear that dignity underlies **ECHR** rights (see paragraph 65 ***Pretty v United Kingdom*** (2002) 35 EHRR 1 , where it was emphasised that: " The very essence of the Convention is respect for human dignity and human freedom "). It is the claimant's case that it necessarily follows that an unjustified interference with a right under the **ECHR** must amount to a violation of dignity for the purposes of article 2.3 of **EU** Directive

*2000/78/EC ("the Framework Directive"), which defines " harassment " and which was transposed into domestic law by section 26 EqA , which (in turn) must be interpreted purposively (and as required by section 3 HRA) to similarly require that an unjustified interference with a right under the **ECHR** is encompassed by section 26(1)(b)(i) .*

*105. It is not clear to me that this is a point that can arise in the present case. First, unless the claimant can demonstrate that the ET erred in its conclusions on her claims of direct discrimination, I am unable to see that she can make good her argument that there has been an unjustified interference with her rights under articles 9 or 10 **ECHR** . Second, to the extent that the claimant is successful in her challenge to the decision on direct discrimination detriment, no claim of harassment would arise in respect of the conduct in question (section 212(1) EqA). In any event, I am not persuaded that the claimant is right in her contention that every unjustified interference with a right under the **ECHR** must necessarily be treated as harassment for section 26 EqA purposes, not least as that would: (i) fail to give meaning to the statutory language, in particular the need for a violation of dignity; (ii) ignore the discretion afforded under article 2.3 of the **Framework Directive** , such that " the concept of harassment may be defined in accordance with the national laws and practice of the Member States "; and (iii) suggest, absent any prescription under domestic or international law, that section 26 is required to be a means of enforcement of rights under the **ECHR** for these purposes.*

*106. As for the requirement that the environment must be created by the conduct in issue, that suggests a focus on what caused the environment to begin to be as it was; per Langstaff P paragraph 27 **Conteh v Parking Partners Ltd** [2011] ICR 341 EAT. In **Conteh** , the EAT considered what this might mean where the environment in issue was initially created by the conduct of a third party, holding as follows:*

"28. … It may be that third party behaviour has created the environment in part, but the actions of an employer, to whom those third parties are not responsible, has made it worse, in which case the environment might be said to have been created by the actions of both. The extent to which the employer had by his actions assisted in that process of creation would be relevant when one came to the question of compensation, but not for the purposes of liability. Since the process of creation envisages a positive change in circumstance, can inaction ever be said to create an environment?

29. An example would be where a failure to act when an employee reasonably required that there be action had itself contributed to the atmosphere in which the employee worked, as for instance where she or he felt unsupported, to the extent that the failure to support him or her actively made the position very much worse, effectively ensuring that there was no light at the end of the tunnel in remedy of the situation with which, as a result of the actions of others, he or she then faced. In exploring that as a matter of theory we do not suggest that such cases will be common. It is perhaps unlikely that they will be readily found and an employment tribunal should

only conclude that such has happened if there is cogent evidence to that effect; but we can see it as a possibility which is covered by the wording of the statute. We have greater hesitation in concluding however that "creating" is apt to include a case where all that can be said against an employer is that he has failed to remedy a situation brought about by the actions of others for whom he is not responsible.

30. The "unwanted conduct", as it seems to us, therefore can (but not necessarily will) include inaction: but that conduct has to be taken on the grounds of race or ethnic or national origins if it is to create the hostile environment and thereby come within the heading of harassment. …" "

242. The principle that the Tribunal is bound to apply the 2010 Act in way compatible with the ECHR was highlighted in **Higgs** (see paragraphs 173 [35] and [57]) and **Omooba** (paragraph 241 [79]) as well as in **Page** (see paragraphs 166 and 204).

243. The respondent in our case is not a public authority. However, the interpretative obligations apply as much in cases involving a private employer as much as in cases involving a public employer. In **X v Y** [2004] EWCA Civ 662 (which was an unfair dismissal case brought under the Employment Rights Act 1996), Mummery LJ said that: *"There is a public authority aspect to the determination of every unfair dismissal case.*

(1) The employment tribunal is itself a "public authority" within s 6(2) of the HRA.

(2) Section 6(1) makes it unlawful for the tribunal itself to act in a way which is incompatible with article 8 and article 14.

(3) Those features of s6 do not, however, give the applicant any cause of action under the HRA against a respondent which is not a public authority. In that sense the HRA does not have the same full horizontal effect as between private individuals as it has between individuals and public authorities.

(4) The effect of s6 [of the 1998 Act] in the case of a claim against a private employer is to reinforce the extremely strong interpretative obligation imposed on the employment tribunal by s3 of the HRA. That is especially so in a case such as this, where the Strasbourg court has held that article 8 imposes a positive obligation on the state to secure the enjoyment of that right between private individuals. Article 14 also imposes that positive obligation in cases falling within the ambit of article 8." [emphasis added].

244. There is no issue that the same principle applies where other Articles of the ECHR are engaged: per **Eweida** in the case of Article 9; and **Fuentes Bobo v Spain [2001] 31 EHRR 50** in the case of Article 10.

245. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision…"*

246. Therefore, in discrimination and harassment cases, there is a two-stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205***) which is generally more favourable to claimants, in recognition of the fact that discrimination and harassment is often covert and rarely admitted to.

247. In the first stage, the claimant must prove facts from which the tribunal could decide that discrimination or harassment has taken place. If the claimant does this, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory or non-harassing reason for the treatment. This two-stage burden applies to both of the discrimination complaints and the harassment compliant made by the claimant.

248. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

249. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263,*** that a claimant is required to establish a prima facie case of discrimination to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The burden of proof provisions may not come into play unless there is room for doubt as to the reason why the complainant was treated as they were: **Hewage v Grampian Health Board** [2012] ICR 1054 at [32]. As we shall see, in our judgment the reason why the claimant was treated as he was is generally clear from the evidence such that there is limited scope for section 136 to apply in this case.

Discussion and conclusions.

The harassment complaints.

250. We shall firstly consider the complaints of harassment (in paragraph 164). We analyse them initially from the perspective of the ECHR. As we said in paragraph 188 above, in **Page**, Underhill LJ rejected the suggestion that in every case of religion or belief discrimination the Tribunal should start by deciding whether there has been a breach of the claimant's ECHR rights. However, he did not say that

this was an incorrect approach. The protections given by the 2010 Act and the ECHR are intended to be co-extensive and to correspond (per paragraph 242).

251. It seems sensible to deal with matters in chronological order and therefore we shall start with the allegation at paragraph 164.3.2.1. The issue which arises is whether Mrs Hart's reply to the claimant in her letter of 14 June 2022 suggested that the claimant's religious and/or philosophical beliefs might prevent him from acting in the best interests of service users. The relevant finding of fact upon this question is at paragraph 85 above. On any fair reading of her letter, Mrs Hart was suggesting the claimant's religious beliefs might prevent him from acting in the best interests of the respondent's service users. She says pretty much this in the second paragraph of the letter.

252. However, the letter goes on to suggest that the respondent may be willing to reconsider the position should the claimant be able to give assurances that the role would not be compromised by his views. She then invited him to meet with her and Mr Pickard.

253. There is no issue, of course, in this case that the claimant held the religious beliefs based upon his Christian faith as recited in paragraph 164.1.1. He has an absolute right to hold those religious beliefs pursuant to Article 9(1).

254. Freedom of religion extends also to its manifestation (per paragraph 173 [32]). In **Bougnaoui** there cited, it was held that the right to manifest a religion or belief is to be understood as an intrinsic part of the freedoms enshrined in Article 9 of the ECHR.

255. In democratic societies, it is recognised by the European Court of Human Rights that it may be necessary to place restrictions on freedom to manifest religion or belief to reconcile the interests of various groups per **Sahin** (paragraph 173 [38]). The right to manifest one's religion or belief in Article 9(2) is therefore a qualified right.

256. As was said by Eady P in **Higgs** (at paragraph 173 [39]) the first question is whether the conduct complained of involves any limitation on the claimant's Article 9 rights, which in turn requires an assessment as to whether the actions of the claimant (that is, the actions that caused the actions of Touchstone complained about) amount to a manifestation of religion or belief. She then cited the well-known passage in **Eweida** which is authority for the proposition that to constitute a *"manifestation"* within the meaning of Article 9, the act in question must be intimately linked to the religion or belief in question.

257. Therefore, applying this to our case, we must consider whether the actions of Mr Ngole which caused the response complained of amount to a manifestation of his Christian beliefs. The impugned actions of Mr Ngole were the posting of the Facebook messages which were reported by *BBC News* and *The Guardian* (see the findings of fact at paragraphs 63 to 67). It was those postings which were in the minds of the respondent, and which caused Mrs Hart to send her letter dated 14 June 2022.

258. As we observed in paragraph 68, neither Mrs Hart nor Mr Pickard read the judgment of the Court of Appeal in **Ngole**. (That said, the *BBC News* and *The Guardian* articles were accurate as to the contribution made by the claimant upon the debate around the Kim Davis case).

259. As we said in paragraphs 193 and 194, the Court of Appeal in **Ngole** upheld the High Court judge's findings in that case that the Facebook postings in question were made in a political context. They were not a protected manifestation of religion. Per **Eweida**, there was no sufficient close and direct nexus between the claimant's acts and the holding of Christian beliefs in themselves.

260. There was no evidence before this Tribunal otherwise. With reference to paragraph 50 of these reasons, Mr Phillips asserted that the claimant was an Evangelical Christian. There was no evidence of this. No such evidence emanated from the claimant himself or from his witness Reverend Munby. Mr Phillips defined Evangelical Christianity *as "a belief in the Bible, conservative views on homosexuality and spreading the belief."* The evidence from the claimant and Reverend Munby (summarised in paragraph 51) speaks in measured terms about evangelising. They both said that it is part of their faith so to do especially when called upon or asked to do. Neither suggested that they would evangelise without being asked to do so. Further, the claimant's expert evidence on this question (summarised in paragraph 52) does not refer to the claimant as an Evangelical Christian or that it is part of his faith it to evangelise save where asked to do so. Reverend Sullins gave no expert theological evidence that the Facebook postings made by the claimant about the Kim Davis case were a manifestation of the claimant's religious beliefs.

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

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

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

his faith to proselytise was contrary to the claimant's evidence as we said in paragraph 260. Per **Page** (cited in paragraph 192 of these reasons) the beliefs expressed in the postings were rooted in the claimant's religious beliefs but were not a direct expression of his Christianity.

264. We therefore turn on this issue to a consideration of the claimant's rights under Article 10 to freedom of expression. That the respondent may have found the claimant's Facebook postings to be disagreeable or even offensive is of course no answer to the claimant's rights to express those views. Authority for this proposition is to be found in paragraph 173 [43] to [49] and in the cases cited in paragraphs 235 to 238. However, this principle is of less applicability per **Page**- (see paragraph 200 above) - where the views in question create a risk which relates directly to the ability of a party to perform core healthcare functions. The respondent's concerns went beyond simply finding the claimant's to be offensive.

265. We agree with the claimant that his rights to freedom of expression are engaged on the facts of this case. In **Higgs**, no question arose as to the applicability of Article 10 to that case involving issues of expressions of opinion rooted in religious belief, notwithstanding the question raised about this in **Page** at [64] (see paragraph 174). The right to freedom of expression is of course a qualified right per paragraph 173 [49] and [50]. The issue which arises therefore is whether Mrs Hart's assertions in the letter of 14 June 2022 to the effect that the claimant's religious beliefs might prevent him from acting in the best interests of service users were prescribed by law and if so, were a proportionate restriction upon the claimant's rights to freedom of expression.

266. Eady P in **Higgs** looked at what was meant by the expression *"prescribed by law":* (see paragraph 173 [52]). We also looked at how this issue was addressed in **Purdy** (paragraphs 221 to 224).

267. The question is whether there is a legal basis in domestic law for the restriction upon the claimant's right to freedom of expression. Mr Wilson submitted in paragraph 20 of his written submissions that, *"it is not immediately apparent how that analysis applies in the context of an employer considering whether or not to maintain a job offer to a potential employee."*

268. Where there may be some merit in that observation, in the Tribunal's judgment there is a legal basis in domestic law for the restriction upon the right to freedom of expression. The first of these may be found in the public sector equality duty to be found in Part 11 Chapter 1 of the 2010 Act. Section 149(1) provides that a public authority must, in the exercise of its functions, have due regard to the need to eliminate discrimination, harassment, victimisation or any other conduct prohibited under the 2010 Act, advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and those who do not share it.

269. Of course, the respondent in this case is not a public authority. Nonetheless, as Mrs Hart says in paragraph 29 of her witness statement the respondent sought to achieve the objectives in the public sector equality duty anyway and of course were required by the CCG to work in compliance with that duty as the CCG themselves would be subject to it as a public authority. Further, it is of course lawful for an employer to set out their requirements in a job description and person specification such as those to be found at pages 116 to 124 of the bundle. These meet the second requirement per **Purdy** of accessibility to the affected individual - (the claimant in this case). He saw the job description and person specification and

was able to tailor his application accordingly to comply with the respondent's requirements. This, amongst other things, required the post holder to be committed to and to promote the respondent's equal opportunities and discrimination policies (at page 119, point 7) and have a commitment to respecting diversity, to anti-discriminatory, anti-oppressive practices and equal opportunities and be sensitive to the needs of disadvantaged groups (pages 121 and 122). No issue appears to arise upon the third requirement per **Purdy** that the restrictions were being applied in a way that is arbitrary such as being in bad faith. This segues now to the proportionality assessment in **Bank Mellat.**

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

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

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

273. The next issue upon proportionality per **Bank Mellat** is whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective of safeguarding service users and staff welfare. A less intrusive way of dealing with the respondent's concerns than simply withdrawing the conditional job offer (as took place on 10 June 2022) was to alert the claimant to the concerns and then to give him an opportunity to provide the assurances required by the respondent. Mrs Hart did not do this on 10 June 2022 (paragraph 75). The conditional job offer was simply withdrawn without the giving the claimant that opportunity. That this was intended to be the respondent's final word is plain from the last sentence of the letter where the claimant is thanked for his *"interest in Touchstone"* and Mrs Hart wished him well for the future. It is only because the claimant effectively pushed back that the suggestion was made by Mrs Hart of a meeting between her, Mr Pickard and the claimant. By her letter of 14 June 2022, in our judgment, that which ought to have been done on 10 June was done. (The harassment claim is pleaded upon the basis of the letter of 14 June 2022 (at paragraph 15 of the amended particulars of claim) and not based on the letter of 10 June 2022 pleaded in paragraph 11). Giving the claimant an opportunity to provide assurances and satisfy the respondent as to his suitability for the role at interview would not compromise the objective. The role was not yet on-stream. The relevant Wakefield Hospital patient group were not and could not have been aware of the claimant or of his interest in the role at this point. There was negligible risk of the patient group encountering the claimant's views. That the

claimant had applied for the role was not public knowledge. Withdrawal of the conditional job offer without more on 10 June 2022 was not rationally connected to the objective. Indeed, it ran counter to the objective as the claimant was the best candidate, there was a pressure to get the role started, and withdrawing the offer left the respondent with the issue of backfilling the role. Thus, it was an intrusive measure. A less intrusive way of proceeding was alighted upon several days later by affording the claimant a further interview.

274. The fourth and final element of the proportionality assessment in **Bank Mellat** is to consider whether, balancing the severity of the measure's effect on the rights of the person to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. Per **Denbigh High School** the Tribunal's task is to make a value judgment by reference to the circumstances prevailing at the relevant time.

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

276. On the other hand, Mrs Hart's letter of 14 June 2022 may be viewed in a different light. It does not go too far in summarising the claimant's views. It is right for her to say that he has very strong views against homosexuality and same sex marriage, and it is equally right to say that those views go completely against those of the respondent. She had well founded concerns as to how those views would impact upon his ability to act in the best interests of the respondent's service users and staff given that there are members of the LGBTQI+ community in both groups. The claimant was then told that he was to be afforded an opportunity of giving the respondent the assurances required that the role would not be compromised by his views. Per **Begum**, weight must be given to the expertise of Mrs Hart and Mr Pickard in the way in which they decided to balance the interests of the claimant by allowing him a second interview against achieving the objective of safeguarding the interests of the service users. Testing the claimant's views and his suitability for the role was rationally connected to the safeguarding objective. There was a need to ascertain and revisit the claimant's suitability for such a highly sensitive role given the new information obtained by the respondent in the Google search

after they made the conditional job offer. The consequences of not conducting further enquiries and appointing an unsuitable candidate were so serious that the adverse effect upon the claimant of calling him for a second interview was outweighed by the interests of the service users. Calling him for a second interview was also rationally connected to the safeguarding objective given that the claimant was the best candidate in the selection process in May 2022, there was time pressure from the CCG to get the role on stream, and had the claimant been able to offer assurances matters could have proceeded swiftly. Otherwise, the process of getting someone *in situ* in the role would be set back. The safeguarding concerns outweighed the impact of the measures upon the claimant's rights.

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

278. We therefore turn now to analysis of allegation 3.2.1 through the prism of the 2010 Act. The first question that arises is whether Kathryn Hart's letter of 14 June 2022 was unwanted conduct. The word *"unwanted"* is not defined in the 2010 Act. The Equality Human Rights Commission's *Code of Practice on Employment* [2011] says at paragraph 7.8 that, "*The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment*."

279. Whereas the withdrawal of the conditional job offer on 10 June 2022 would unquestionably be unwanted conduct, we take a different view about the impugned conduct of Kathryn Hart on 14 June 2022. The claimant said on 15 June 2022 by way of response that he was pleased that the respondent may be willing to reconsider the withdrawal of 10 June. We refer to paragraph 86.

280. Mrs Hart's letter of 14 June 2022 clearly related to the claimant's religion or belief. It was her concerns about what she describes as his very strong views against homosexuality and same sex marriage which caused her to send her letter of 14 June 2022 in those terms. It was because of those views that she needed and sought assurance that the claimant would be able to undertake his role. Those views are rooted in the claimant's Christian faith. This has been accepted all along by the respondent. On any view therefore, there is a causal connection between

the claimant's religious belief on the one hand and the impugned conduct of 14 June 2022 on the other. The religious belief is clearly related to that letter.

281. The Tribunal finds that Mrs Hart's conduct was not done with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. On the contrary, her intention was to give the claimant an opportunity to give Touchstone the assurances sought.

282. For the same reasons, we do not find the letter of 14 June 2022 to be a violation of the claimant's dignity or to create an intimidating etc environment for him. Per **Omooba** at paragraph 241 [100] and [103], and **Pemberton** (paragraph 101) in deciding whether conduct has the effect of violating dignity or creating an intimidating etc environment the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect must be considered.

283. The Tribunal is also mindful of the case law cited in **Omooba** at [103]. There, Tribunals were reminded that *'violation'* (in section 26 of the 2010 Act) is a strong word. It is difficult to see how the claimant's dignity could have been violated by the offer from Mrs Hart of 14 June 2022 to give him the opportunity of providing the necessary assurances. The claimant was aware of the requirements of the role and may expect to have his suitability tested. He solicited an opportunity to provide the assurances sought.

284. Likewise, it is difficult to see how that conduct could in the claimant's perception have been to create an intimidating etc environment for him. He had pushed back against the doubtless unwelcome withdrawal of the offer of 10 June 2022 and had been given an opportunity by the respondent to provide assurances and obtain a reinstatement of the job offer. While it was inconvenient for the claimant to have to go through a testing second interview, such an effect cannot be regarded as serious and marked and is truly a real but lesser consequence than a violation. Additionally, the respondent did create the environment (per **Conteh)** by agreeing to see the claimant again in a meeting but objectively for these reasons this was not the creation of an intimidating etc environment per **Betsi Cadwaladr University.**

285. Applying an objective test, the impugned conduct on the part of Kathryn Hart of 14 June 2022 could not reasonably be regarded as violating the claimant's dignity or creating an adverse environment for him. Taking into account the circumstances of the case, being the respondent's concerns about the conflict between the claimant's religious views on the one hand and the welfare of service users and staff on the other, the claimant has not made out a *prima facie* that the conduct had the proscribed effect such as to shift the burden of proof to the respondent to provide an explanation as required by section 136 of the 2010 Act pursuant to paragraphs 245 to 249. Indeed, the reason why the claimant was treated as he was is clear such that there is limited scope anyway for the application of the burden of proof provisions to apply per the case law cited in paragraph 249.

286. It follows, therefore, that upon allegation 3.2.1, the complaint fails whether viewed through the prism of Convention rights or alternatively through the prism of the 2010 Act. These conclusions take account of Eady P's guidance in **Higgs** at paragraph [94](1) to (4)(i) to (v)(i). With reference to the other relevant factors in paragraph [94](4)(v)(ii) to (ix), (cited in paragraph 177 of these reasons) the tone used by the claimant in the Facebook postings were, as the Court of Appeal noted

in **Ngole**, made in very strong terms (see paragraph 227 above). The affected audience should the claimant's views be encountered was made up of vulnerable individuals who had been in receipt of in-patient mental health services. The audience was in a weak position given that the claimant would be the only social worker available to them. This was a real and valid concern for the respondent that his views if known would undermine the respondent's objectives of encouraging engagement with their services and their reputation with the commissioning CCG. Offering a second meeting or interview was the least intrusive way of proceeding. It struck a middle course between simply terminating the process altogether while safeguarding the interests of the service users by testing the claimant's suitability, which could not be ascertained in any other way absent satisfactory references or other independent verification.

287. We now turn to harassment claims arising out of the meeting of 11 July 2022. These are at sub-paragraphs 3.1.1, 3.1.2, and 3.2.2 of paragraph 164. The facts which are the basis sub-paragraphs 3.1.1 and 3.1.2 are admitted. There is a dispute of fact about those in sub paragraph 3.2.2.

288. The issue of fact is whether the respondent asked the claimant in the meeting of 11 July 2022 to act contrary to his religious and/or philosophical beliefs by asking him:

- *To promote the rights of LGBTQI+ persons.*
- *If he could support same sex marriage; and*
- *Asking him to be an LGBTQI+ ally.*

289. The relevant findings of fact upon the first of these is at paragraph 121, upon the second at paragraphs 129, 137(13), 142 and 143 and the third is at paragraphs 127 and 132. From these, we conclude that the claimant has made out his case that the respondent asked him to promote the rights of LGBTQI+ persons and asked him to be an LGBTQI+ ally. There was no direct question as to whether the claimant could support same sex marriage, but this is the clear inference from the tenor of the discussions and the concerns raised with the claimant by the respondent. In any case, supporting same sex marriage may be viewed as the promotion of the rights of LGBTQI+ persons (albeit that the Tribunal takes on board Mr Phillips' point that not all within the LGBTQI+ community support same sex marriage and, by the same token, many from other communities are supportive of it).

290. In addressing the impugned events of 11 July 2022, the Tribunal shall adopt the same approach as with that of Mrs Hart's letter of 14 June 2022. For the same reasons, we hold that the claimant's Article 9 rights are simply not engaged. The questions and issues raised at the interview of 11 July 2022 were all directed at the compatibility of the claimant's religious beliefs with the role at Touchstone. They were not directed at the claimant's Christian beliefs in and of themselves. There was dissociation of the belief from the message and the impact of the message. In any case, as we have found, the views expressed by the claimant in the political debate about Kim Davis were not a manifestation of his religious beliefs.

291. As with the impugned act of 14 June 2022, the claimant's rights under Article 10 to freedom of expression are engaged. For the same reason as with the impugned act of 14 June 2022, the prescription by law requirement in Article 10(2) is satisfied:

see paragraphs 268 and 269. The issue which arises therefore is the application of the **Bank Mellat** proportionality test.

292. This engages much the same considerations as with the impugned act of 14 June 2022 and our conclusions are the same.

293. The objective of the questioning of 11 July 2022 was to ascertain the claimant's suitability for the role given that he would be working (albeit not exclusively) with those from the LGBTQI+ community who have mental health issues sufficient to warrant in-patient hospital treatment. The risks to service users of coming across the open expression of the claimant's orthodox Christian views presented a significant risk to service users. This was a real risk as identified by Mrs Hart, Mr Pickard, and Dr Joubert.

294. The Tribunal acknowledges that the claimant said that he would approach matters respectively and cautiously if asked to espouse his views and would not engage in any unwelcome evangelising - (paragraph 130). The Court of Appeal held (as we observed in paragraph 77) that the mere expression of views on theological grounds does not necessarily connote that the person expressing such views will discriminate on such grounds. It was not, therefore, so much a question of the claimant engaging in unwelcome evangelising or discriminating (and the Tribunal readily accepts that he would not) but rather, as Mrs Hart said in paragraph 82 of her witness statement (quoted in paragraph 74 above) the public nature of the claimant's views and the risk of a service user conducting a Google search of him out of curiosity and finding the same information uncovered by Touchstone on their Google search. The Court of Appeal observed (as we said in paragraph 231 above) that social work service users cannot usually choose their social worker. This was the case with the role in question here as it is intended to be a sole role. The claimant's suggestion therefore that another employee may be able to take over in a difficult case was unfounded.

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

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

297. Mr Ngole's case has some resonance with that of **Page**. Of course, there are factual distinctions. Mr Ngole's impugned Facebook postings were, as Mr Phillips rightly observes, made some eight years prior to the events with which we are concerned in the summer of 2022. Mr Page's actions were much more contemporaneous with the events in his case. Mr Ngole did not disregard instructions not to broadcast views and certainly did not appear on national television to espouse them. On the other hand, the position of Touchstone isas sensitive as was that of the Trust and the Authority in **Page**. We touch on this in paragraphs 197 and 200. As in the instant case, in **Page** there was evidence that

there was a specific and genuine concern as to the impact of Mr Page's actions on the ability to serve the entire community in the catchment area in circumstances where, as it was found by the Employment Tribunal in **Page**, there had been "*specific issues with LGBTQI+ members of the community suffering disproportionately from mental health problems and difficulty persuading them to engage with the Trust's services."* Plainly, there was a reputational issue. This was of concern to Touchstone who wished to develop their relationship with the Wakefield CCG in the hope of maintaining and attracting work.

298. In **Page**, the complainant in that case did not run an argument that the perceived risk was unreal. In our case, Mr Phillips cross-examined Mrs Hart and Mr Pickard to that effect and took issue with Dr Joubert's views about the reality of the risk presented. Nonetheless, the Tribunal is satisfied on the facts that there was a sufficiently real risk such as to present a matter of sufficient concern for the respondent to justify the limitation of the claimant's protected right to freedom of expression. The measure was rationally connected to the objective. The purpose of the meeting of 11 July 2022 was for Touchstone to receive the assurances which they needed before reinstating the conditional job offer. (To this extent, the Tribunal had additional evidence and material not available to the High Court in **Ngole** about the potential impact on service users).

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

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

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

302. Having considered the letter, the respondent's concession that they did the impugned acts on 18 July 2022 is one properly made. For very much the same

reasons as with the impugned acts of 11 July 2022, the Tribunal finds there to have been a justified interference with his right to freedom of expression by application of the proportionality test in **Bank Mellat**.

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

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

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

306. Looking now at the events of 11 and 18 July through the prism of the Equality Act 2022, we hold that from the claimant's subjective perspective there was unwanted conduct in the form of the letter of 18 July 2022. It was unwanted as it informed the claimant that the respondent was not going to reinstate the conditional job offer. On any view, the conduct related to his religious beliefs. The respondent's discovery of them was what, of course, precipitated the interview of 11 July and subsequent letter of 18 July 2022. There plainly is a causal nexus between the claimant's religious beliefs on the one hand and the impugned conduct on the other. It was the claimant's suggestion for there to be a second interview and therefore the granting of that request by the respondent was not unwanted. It was however related to the claimant's religious beliefs as it was those beliefs that led to the respondent's concerns and need for assurances.

307. Even if we are wrong about the interview and that it was unwanted, the Tribunal does not accept that the respondent's conduct at interview or in the letter of 18 July 2022 was with the purpose of violating the claimant's dignity or creating an intimidating etc environment for him. Plainly what was in the minds of Mrs Hart and Mr Pickard was the welfare of service users and staff members. Again, a favourable inference is drawn in the respondent's favour upon the basis that the conditional job offer was made in light of the claimant's declaration of his faith and the numbers of Christian staff within the respondent's organisation. Upon that basis it is against the probabilities that the respondent would approach matters with a view to purposefully violating the claimant's dignity or creating an intimidating etc environment upon the basis of his religious beliefs.

308. The Tribunal does not find that the conduct had the effect of violating the claimant's dignity or creating an intimidating etc environment for him. The respondent did create the environment by arranging the interview per **Conteh**. However, it is difficult to see how subjectively the claimant could regard the interview and the subsequent letter as a violation of dignity or the creation of an intimidating etc environment for him. Tribunals are reminded (per **Grant** (referred to in paragraph 241 [103])) not to cheapen the strong words of *"violating"* or "*intimidating etc".*

309. This is because claimant applied for a role with the respondent in full knowledge that he would have to work with those from the LBGTQI+ community. It was not argued on behalf of the respondent that, per **Begum** (referred to in paragraph 218) the claimant could have avoided making an application for a job with Touchstone to circumvent a limitation placed on his freedom to manifest religion or belief or freedom of expression. That said, the claimant must have been aware that the respondent would be anxious to ensure his suitability for the role given the sensitivity of service users. It is difficult to see how being properly questioned about that suitability once his orthodox Christian views had come to light reasonably could be considered a violation of his dignity or to create an intimidating etc environment for him. The respondent treated the claimant courteously by offering him refreshment (see paragraph 97). He must have been aware that his suitability for the role would be tested. That he was unsuccessful in his application because the prospective employer on reasonable and objectively justifiable grounds is not satisfied as to his suitability cannot be a violation of dignity. While subjectively failure is of course always disappointing, such is the way of the world of work.

310. Even if we are wrong on that, then on any view by application of the objective test it was not reasonable for the conduct to be regarded as having that effect for the reasons stated. The circumstances of the case of course include the interests of vulnerable service users.

311. It follows therefore that by application both law as it relates to the claimant's convention rights and the 2010 Act, that the harassment complaints fail.

Direct discrimination

312. We now turn to a consideration of the direct discrimination claims.

313. Mr Wilson made a valid point in paragraph 1 of his written submissions where he said, about the direct discrimination claim, that the issues in sub paragraphs 1.2.1 and 1.2.3 of paragraph 164 are key following which the remaining issues in the case fall into place. These two key issues are:

- *Requir[ing] the claimant to attend a second interview which took place on 11 July 2022.*
- *Not offer[ing] the claimant employment in the role of mental health support worker at Wakefield Hospital.*

314. In terms of the analysis of the claimant's claims through the prism of Convention rights, the Tribunal has already reached conclusions about some aspects of the requirement for the claimant to attend the second interview on 11 July 2022 in paragraphs 287 to 300. These focussed upon what he was asked in interview.

315. However, the allegation of direct discrimination is more broadly couched than the specific allegations of harassment pertaining to the interview of that date. The direct discrimination allegation is the requirement for the claimant to attend the second interview which took place on 11 July 2022. The restrictions placed upon the claimant's freedom of expression by the requirements in the harassment claims were, for the reasons given, prescribed by law and satisfy the four criteria in the **Bank Mellat** proportionality test. We refer to paragraphs 287 to 300 (when read with paragraphs 266 to 269 on the issue of prescription by law).

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.

318. We now turn to the second principal direct discrimination allegation. This is not offering the claimant employment in the role of mental health support worker at Wakefield Hospital. A pleading point arises upon this issue. Does the complaint relate only to the decision not to offer the claimant the role communicated on 18 July 2022, or does it encompass the steps along the way, each of which is a complaint in its own right? Mr Wilson advocated for the former, Mr Phillips for the latter.

319. To answer this, we need to look at how the case was put in the grounds of claim. In paragraph 30.2 of the amended particulars of claim, the claimant pleaded an allegation that the respondent contravened section 39(1)(c) by not offering him employment on grounds that his religious and/or philosophical beliefs might cause him to discriminate despite him giving assurances to the contrary. The pleaded case reads that, "*In doing so the respondent made stereotypical assumptions based on the claimant's religious and/or philosophical beliefs as pleaded in paragraphs 11, 15, 19, 24 … and 25.6.*"

320. Paragraph 11 of the grounds of claim refers to the letter from Kathryn Hart to the claimant dated 10 June 2022 withdrawing the job offer. Paragraph 15 refers to her letter to him of 14 June 2022. Paragraph 19 references Mrs Hart's email to the claimant of 16 June 2022 inviting him to a meeting. Paragraph 24 concerns the letter of 18 July 2022. Paragraph 25.6 concerns an excerpt from the minutes of the meeting of 11 July 2022.

321. Accordingly, on a fair reading of the claimant's pleaded case, the withdrawal of the conditional job offer on 10 June 2022 comprises part of the broad allegation (pursuant to section 39(1)(c) of the 2010 Act) that the respondent did not offer the claimant employment in the role of mental health support worker at Wakefield Hospital. Indeed, this is how the claimant's case was put by Mr Philips in his closing submissions: that there were two decisions - the withdrawal, and the refusal to reinstate. We agree that upon a proper construction of the pleaded case, it is permissible to analyse this claim in sub-paragraph 1.2.3 in its component parts.

322. When we considered this issue (in connection with the harassment claim in paragraph 275) we observed that, when considering the withdrawal of 10 June 2022 through the prism of the claimant's Convention rights, there was a breach of such rights absent at least giving the claimant the opportunity of providing him with the necessary assurances. (This was not a claim brought by the claimant). By application of the **Bank Mellat** criteria, the objective of the measure (withdrawing the conditional job offer) was sufficiently important to justify the limitation of the claimant's rights to freedom of expression and the measure was rationally

connected to that objective. At the risk of repetition, the respondent's focus was upon the welfare of service users. However, a less intrusive measure impacting on the claimant's Convention right to freedom of expression could have been used without unacceptably compromising the achievement of the objective. Rather than simply withdrawing the offer to the claimant without more, he ought to have been given the opportunity of providing the assurances sought by Touchstone. Unfortunately, the respondent's approach had a severe effect upon Mr Ngole's right to freedom of expression. It had a significant impact upon him as he really wanted the job. While the objective being pursued by Touchstone was of course very important, simply withdrawing the conditional job offer without giving him that opportunity went further than was reasonably necessary towards Touchstone's objective. To repeat what was said before, the claimant was simply not in post and therefore there was no or little risk of a service user finding him through an internet search. He would simply not have been on the radar of any service user at that point. A less intrusive way of dealing with the matter was to invite him for a further interview or discussion. This step went towards the objective for the reasons cited towards the end of paragraph 276. However, that the measure went towards the objective does not outweigh its impact upon the claimant's rights.

323. Just as the University of Sheffield acted precipitously and disproportionality by removing (in breach of his rights under the ECHR) Mr Ngole from the social work course without giving him a right of reply (per paragraph 5(6) of **Ngole** cited in paragraph 230 above) so too did the respondent in this case by withdrawing the conditional job offer without more. By application, therefore, of Article 10(1) and (2) this aspect of the claimant's direct discrimination claim upon the issue of the 10 June 2022 withdrawal must succeed. In paragraph 177, we cited from paragraph 94 of **Higgs**. By application of the principle there set out, just as where a limitation is objectively justified and (properly understood) that is not action taken because of the right in question but rather the objectionable way the right has been manifested or expressed, then the converse must be the case. If objective justification is not made out, then the reason for the impugned action must the exercise of the Convention right in question - in our case, that of freedom of expression under Article 10. The views expressed by the claimant were rooted in his religious beliefs but were not a manifestation of them. The reason why the respondent acted as they did is because of the claimant's expression of his religious beliefs. Those beliefs were a material reason for this treatment. That protected characteristic therefore was a cause of his treatment.

324. However, the complaint about the refusal to reinstate the conditional job offer must fail for the reasons given in paragraphs 290 to 305. In summary, the respondent's conclusion was that they had not received the necessary assurance as to the claimant's suitability of the role and therefore the risk of engaging him was too great. Objectively, the tribunal concludes this was a proportionate conclusion in the circumstances giving appropriate weight to the expertise of the respondent's witnesses per **Begum**. There was no less intrusive way of achieving the aim than not reinstating the job offer after the claimant had been assessed as unsuitable for the role due to the risk of service users coming across his views.

325. The Tribunal has of course found that the claimant's Article 9 rights are not engaged in this case. This is because the claimant did not suffer the withdrawal of the conditional job offer upon the basis of his religious beliefs in and of themselves or because of a manifestation of his beliefs. Rather, it was because the comments made gave rise to a concern on Touchstone's part about his ability

to fulfil the role. The views expressed in the Facebook postings about the Kim Davis case were rooted in the claimant's Christian faith but were not, on our findings, a manifestation of them. The respondent has justified its actions in not reinstating the conditional job offer. The action was not taken because of is expression of views rooted in Christian beliefs but because of the objectionable manner of the expression of them.

326. If the Tribunal is wrong upon the question of manifestation, then the same outcome would apply by application of the **Bank Mellat** proportionality test to the claimant's claims under Article 9(2) as under Article 10(1) and (2) in any case.

327. We must now consider the other allegations of direct discrimination (again through the prism of Convention rights) in sub paragraph 1.2.2 of paragraph 164. These are that it was a term of the prospective employment that the claimant should:

- *Attend LGBT awareness training and that he would not be free to share his views during the training despite others being free to share theirs.*
- *Actively promote the rights of service users from LGBTQI+ communities.*
- *Support same sex marriage.*
- *Provide examples of when he had kept his views around same sex marriage to himself and of when he had provided non-judgmental support to same sex relationships.*

328. In relation to the latter, this fails on the facts. The Tribunal is unable to locate within the notes of the interview of 11 July 2022 where the claimant was asked to provide examples of such matters. The parties did not direct the Tribunal to any passages in the notes where this question was asked of the claimant.

329. We accept that there was an expectation that the claimant would attend LGBT awareness training: the findings of fact are at paragraphs 87 and 126. Although not prohibited altogether from expressing his views on homosexuality and same sex marriage, the expectation plainly was that there were to be great constraints imposed on the claimant's freedom to express opinions about such matters which the claimant was prepared to respect to some degree (paragraphs 130 and 138). We accept that the claimant was expected to actively promote the rights of service users from LGBTQI+ communities: the findings of fact are at paragraphs 25, 32, 85, 87, 119, and 137(6) and (13). We also accept that the claimant was expected to support same sex marriage. The findings of fact upon this are at paragraphs 72, 111, 129, 137(13), 142 and 143. As with the similar harassment allegation considered at paragraph 289 above, we cannot locate where the claimant was expressly asked if he supports same sex marriage, but the inference is clear, that he was expected so to do.

330. For the same reasons as with the similar harassment allegations there was in our judgment no infringement of the claimant's Article 10 rights. The same reasoning as in paragraphs 292 to 300 is applicable by application of the **Bank Mellat** proportionality test.

331. The final allegation is at sub paragraph 2.2.4 of paragraph 164 which was that a reverse burden of proof was put on the claimant to prove that he would not discriminate because of his religious beliefs. We agree with Mr Wilson's submission (in paragraph 42 of his written submissions) that the claimant was required to provide an assurance that he would fully support LGBTQI+ service users were he to be re-offered the mental health support worker role. Whether

one calls this a reverse burden of proof or not, it is plain in our judgment that there was an expectation placed upon the claimant by the respondent to provide them with the assurances required. While we may not go so far as to call this a reverse burden of proof, the respondent was certainly placing the onus on the claimant to satisfy them. It was not the case, for example, that the respondent was seeking to convince the claimant that he was unsuitable for the role. The ball was plainly put in the claimant's court. However, we find this not to be a breach of the respondent's Convention rights to freedom of expression for much the same reason as upon the first allegation of direct discrimination, that being the requirement for the claimant to attend the second interview of 11 July 2022 in paragraphs 314 to 317. For the same reasons, we find that the respondent acted in a proportionate manner given the issues at stake.

332. For the avoidance of doubt, the same considerations would apply upon the claimant's Article 9(2) rights to manifest his religious belief were the Tribunal to be wrong to find there to be no manifestation on the facts of the case. This imports the same considerations of proportionality pursuant to **Bank Mellat** and we are satisfied for the reasons given that the respondent has discharged the burden upon them of proving a proportionate and justified interference with the claimant's qualified rights to manifestation of religious belief (were they to be applicable) and freedom of expression.

333. We must now consider the direct religion discrimination case through the prism of the 2010 Act. As Underhill LJ said at [79] of **Page** (cited in paragraph 212 above), *"It is trite law that it is not necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of …"*

334. In this case, the reason why the respondent did the impugned acts of direct discrimination listed in sub-paragraph 1.2.2 of paragraph 164 (called for shorthand during the hearing the '*terms allegation'*) is because they were requirements of the role. Quite simply, this excludes the possibility of them being done on the grounds of religion or belief.

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.

336. The evidence of Kathryn Hart and David Pickard was clear: it was these concerns which were in their minds when inviting the claimant back to see the respondent and when interviewing the claimant on 11 July 2022. These were the "*mental processes"* that caused them to act as they did after coming across the Facebook postings and appraising claimant at the second interview. These considerations were dissociable from the claimant's religious beliefs themselves *per* **Ashers Baking.** It was the impact of the Facebook messages on their services for the CCG and not the claimant's religion itself which was the reason for the impugned acts. The claimant was not treated as he was because of or on the grounds of his religion *per se* but because of the need for Touchstone to receive the assurances which

they needed as to the suitability of the claimant for the role. To borrow what was said by Lady Hale in **Ashers Baking** (cited in paragraph 241at [92]), the treatment was afforded to the message (which potentially would be viewed by service users) and not the man. After all, he had been offered the role having declared his faith and many of the respondent's employees are Christian. To import the principle in Higgs [94] (cited in paragraph 177) it was the objectionable manner of the messaging of the claimant's views which caused the respondent to do the impugned acts in paragraph 335 and not the exercise by the claimant of the right to freedom of expression itself. The manner of the claimant's messaging was the reason why the respondent acted as they did.

337. It is not necessary therefore to seek to construct a hypothetical comparator upon issues 1.2.1, 1.2.2, 1.2.3, and 1.2.4 as the reason why the claimant was treated as he was is plain from the evidence. Although we are not required to do so where the reason why is clear (per **Shamoon**, **Hewage**, **D'Silva**, and **Page**) if we were to construct a hypothesis as to how someone of a different faith or of no faith would be treated, then per **Page** (cited in paragraph 212) the comparator would be someone whose views gave rise to serious concerns and who failed to allay concerns following interview. There is nothing to suggest that they too would not have been tested for suitability in interview as was the claimant, not offered the role if found wanting following interview, and in any case the terms in sub-paragraph 1.2.2 would plainly be applicable to all given the job description and the list of essential and desired criteria. Upon the terms allegation (sub-paragraph 1.2.2) the claimant's complaint essentially is that he objected to being treated the same as any other incumbent for the role and wanted to be treated differently by being permitted not to adhere to the terms. This being the case, the terms allegation is properly one of indirect discrimination. More generally on these four allegations, there is a clear dissociation between the claimant's religion on the one hand and his lack of suitability for the role on the other given the serious safeguarding concerns which exercised the respondent's decision-makers arising not from his religion but from the Facebook postings rooted in it.

338. In his closing submissions, Mr Phillips said that on the authority of **Ladele** in the ECtHr firstly, no comparator is required in a case such as this (concerning religious discrimination) or secondly, if one is required, that the comparator is not someone of a different religion. **Ladele** was a case involving a Christian registrar of births, deaths and marriages who objected, because of her religious beliefs, to officiating at same sex civil partnership ceremonies. (**Ladele** went before the ECtHR along with **Eweida** [2013] IRLR 231 and is reported under that citation). The ECtHR ruled (at [104]) that the correct comparator is a registrar with no religious objection to same-sex unions. Mr Phillips' second proposition must therefore be correct. Where required, the comparator must therefore be someone applying for the role with no religious objection to homosexuality or same-sex marriage but who has propounded such views in a public forum. By this route, the same conclusion is therefore reached when viewing the direct discrimination claims by use of a comparator and through the prism of Convention law.

339. What of that part of the allegation at sub paragraph 1.2.3 of paragraph 164 concerning not offering the claimant employment in the role of mental health support worker at Wakefield Hospital by withdrawing the conditional offer on 10 June 2022 without giving him the opportunity to address Touchstone's concerns? The claimant has succeeded upon this complaint when analysing this through the

prism of Article 10 of the ECHR. What is the position upon an analysis under the 2010 Act?

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.

342. Construing, as we must on the Court of Appeal authority of **Page**, the 2010 Act compatibly with the ECHR, and having found that the withdrawal of the conditional offer on 10 June 2022 was in breach of the claimant's rights under Article 10 of the ECHR as it was too intrusive and disproportionate a way of achieving Touchstone's aims, it must follow that this aspect of the claimant's direct discrimination claim succeeds. Touchstone fell into the same error as did the University of Sheffield in **Ngole.** It is worth again citing the passage of Irwin LJ's judgment in **Ngole** quoted in paragraph 230 above that "*At no stage did the university make it clear to [Mr Ngole] that it was the manner and language in which he had expressed his views that was the real problem, and in particular 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 [Mr Ngole] 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" [emphasis added].*

343. The failure by Touchstone to discuss the matter with the claimant before withdrawing the conditional job offer was to make the same error as had the University. Just as the University had "*wrongly confused the expression of religious views with the notion of discrimination" (*per paragraph 5(10) of **Ngole**), so too did Mrs Hart. Applying **Higgs** [94] (cited in paragraph 177), the limitation on the claimant' s right to freedom of expression by the withdrawal of the job offer on 10 June 2022 was not justified. The reason why the respondent acted as they did cannot therefore be on the grounds of objectionable expression but rather to the legitimate expression of his views. These were rooted in his religion. That is the reason why he was treated as he was. The reason why is clear.

344. The Tribunal has not found this aspect of the matter at all easy. We have noted already there to be a tension between the ECHR and the 2010 Act as was observed by Choudhury P in **Forstater v CGD Europe** [UK EAT/0105/20] where

he said at paragraph 68 that *"… the architecture of the [2010] Act does not precisely follow the structure of the ECHR."* A justification argument is open to a party who infringes Article 9(2) and 10 (and the other qualified rights in the ECHR) but which defence is not open to a party in answer to a complaint under section 13 of the 2010 Act (except for age discrimination). However unreasonable it may seem for Touchstone to have acted as they did by withdrawing the conditional job offer on 10 June 2022 without more, a respectable argument may have been run that an individual objecting to homosexuality and same-sex marriage and expressing trenchant views about these societal issues (on non-religious grounds per **Ladele**) would have been treated in the same way. However, the Tribunal heard no 'reverse comparator' evidence from the respondent about any actual comparator cases or how any evidential comparator was treated to enable us to construct a hypothesis that a comparator job applicant expressing the same views on non-religious grounds would have been treated the same nor were any submissions received on this issue.

345. That said, a comparator is not required where the reason why is clear and we have approached the case by dispensing with the need for a comparator on the authority of **Page** and **Shammon** (at [8] and [12]). We have also derived assistance by what was said by the EAT in **Ladele v London Borough of Islington [UKEAT/0453/08]**. The EAT (Elias P) gave some helpful guidance, stating (at [40]) (approved of by the Court of Appeal **[2009] EWCA Civ 1375**) in that case:

"The following propositions with respect to the concept of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

*(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport** [1999] IRLR 572, 575—"this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.*

*(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in **Nagarajan** (p 576) as explained by Peter Gibson LJ in **Igen v Wong** [2005] EWCA Civ 142, [2005] ICR 931, [2005] IRLR 258 paragraph 37.*

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.

347. For the avoidance of doubt, the successful element of the direct discrimination claim pertains only to the decision to withdraw the conditional job offer on 10 June 2022. The other elements comprising the complaint that the claimant was not offered the role of mental health support worker fail. By way of reminder, this comprises the following elements:

    347.1. The respondent's letter of 14 June 2022. This fails for the same reasons as upon the consideration of the harassment complaints.

    347.2. Mrs Hart's email of 16 June 2022. The findings of fact about this are at paragraph 87. This reiterates the respondent's position that they needed assurances as to the claimant's ability to carry out the role and in reality, gives rise to the same considerations as in the letter of 14 June, the interview of 11 July 2022 and then the confirmation letter following the interview dated 18 July 2022.

    347.3. The 18 July 2022 letter. Again, this gives rise to the same considerations as when we considered that letter in connection with the harassment claim.

    347.4. Being asked at the interview of 11 July 2022 how the claimant felt his rights as a Christian would work alongside those promoting LGBTQI+ rights. These give rise to the same considerations as when we considered this issue upon the harassment complaint.

348. The next issue upon the complaint of direct discrimination is whether there was defence open to the respondent that it was an occupational requirement for the claimant to hold what is described as the *"non-discrimination belief".* This is that *"people should be treated equally, fairly and with dignity and that there should be no discrimination, including in particular no discrimination against LGBTQI+ people*."

349. There was no mention by Mr Wilson of the issue of occupational requirement in his written submissions and the Tribunal was left very much with the impression that this was a makeweight defence on the part of the respondent. In verbal submissions, Mr Wilson said about this matter that it is "*pleaded as an alternative".*

350. The analysis gives rise to very much the same answer by application of the claimant's Convention rights and by application of section 13 when read with section 39(1)(c) of the 2010 Act. 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. Irwin LJ said in **Ngole**, there was no evidence that the claimant had discriminated against others upon the grounds of their sexuality or that he would do so. As was said, again by the Court of Appeal in **Ngole**, (see paragraph 77 above) the mere expression of views on pedagogical grounds does not necessarily connote that the person expressing such views will discriminate on such grounds. 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 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.

Indirect discrimination

353. We now turn to a consideration of the complaint of indirect discrimination. The issues to which this complaint gives rise are in paragraph 164.2. The Tribunal finds that the respondent had the PCPs listed in sub-paragraphs 2.1.1 to 2.1.6 inclusive. These are for the reasons already given in connection with the direct discrimination and harassment claims. We have already made findings of fact about the requirement to actively promote the rights of service users from LGBTQI+ communities, the requirement to support same sex marriage, and the requirement to be an ally (summarised in paragraph 328). In addition, there was plainly a requirement on the part of the respondent for the claimant to use chosen pronouns (paragraph 87). The general tenor of the job description, the person specification and the respondent's correspondence to the claimant imposed a requirement upon him to actively promote and be positive about LQBTQI+ lifestyles. There was little scope within these stipulations for the expression of orthodox Christian views on same sex marriage and homosexuality. The Tribunal therefore has little difficulty in determining that the claimant has made out his case that those PCPs applied to him.

354. As we said in paragraph 181 above, there is a low threshold to establish group disadvantage in religion or belief cases. The claimant is an orthodox Christian. The Tribunal again has little difficulty in accepting there to be a group of believers of the same faith who would be disadvantaged by the six PCPs which may broadly be summarised as the promotion of LGBTQI+ rights. Those of no faith or of a different faith not holding the same views of homosexuality and same sex marriage would plainly be advantaged in complying with the requirements than those of the Christian orthodox faith. The PCPs 'bite harder' on those of the orthodox Christian faith. Further, the claimant himself was put at that group disadvantage is plain from

our factual findings. The comparison pool is a matter of logic rather than of evidence or fact finding per **Allonby**. On any view, within a pool of job applicants, those of the orthodox Christian faith will be disadvantaged by the PCPs compared to those of no faith or other faiths.

355. The real issue upon this matter is that of justification. It must follow that the same conclusion is reached upon the question of justification pursuant to section 19(2) of the 2010 Act when read with section 39(1)(c) as upon the consideration of the matter through the prism of the claimant's convention rights under Article 10(2). The respondent has satisfied the Tribunal of justification pursuant to the **Bank Mellat** criteria upon the harassment claims and the direct discrimination claims (save in respect of the withdrawal of the job offer on 10 June 2022). It must follow that the respondent has a legitimate aim, that being the care and welfare of the service users utilising the service at the Wakefield CCG. The PCPs broadly were appropriate and reasonably necessary to achieve the aims. Our conclusions on the PCPs engaged in the indirect discrimination claim mirror those when we looked at PCPs in the harassment and direct discrimination claims: paragraphs 288 to 300 and 326 to 329 respectively, which engage much the same considerations). It is difficult, frankly, to see how the aims could have been achieved without the application of the PCPs given the need to be supportive of those from the LGBTQI+ community who were vulnerable because of acute mental health needs.

356. Further, it is difficult to see how something less discriminatory could have been done instead. The acute sensitivity of the service users was plainly paramount. The respondent was unable to obtain the necessary assurances from the claimant that his faith would not interfere with his role in promoting LGBTQI+ lifestyles.

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. This is not to suggest that the claimant was not disappointed by the withdrawal of the condition job offer and the respondent's refusal to reinstate it. The Tribunal recognises that disappointment. However, the claimant is not prevented from pursuing his chosen career as a social worker altogether. In our respectful judgment, it is understandable why it was held in **Ngole** that the University of Sheffield had acted in a disproportionate manner as this was to effectively debar the claimant from working in his chosen field at all. The respondent's actions do not prevent him from working in that field. He has worked in his chosen profession from qualification and with success. 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.

360. It follows therefore that all the claimant's complaints fail by application to the facts of the law as it relates to his Convention rights and by application of the 2010 Act except upon the direct discrimination claim around the respondent's decision to withdraw the conditional job offer on 10 June 2022. That was a breach of the claimant's Convention rights under Article 10 and constitutes direct religion and belief discrimination under the 2010 Act. The other component parts of the allegation of direct discrimination in paragraph 164.1.2.3 and the remainder of the direct discrimination, indirect discrimination and harassment claims all fail and stand dismissed.

361. The matter shall now be listed for a remedy hearing. The parties are directed to file their dates of availability for the next four months within 21 days of the date of promulgation of this judgment. When filing their dates of availability, the parties shall indicate whether they apply for a further case management preliminary hearing ahead of the remedy hearing.

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Employment Judge Brain

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Date: 21st June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 21st June 2024

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