

Neutral Citation Number: [2026] EAT 77

Case No: EA-2024-000972-JOJ

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 29 May 2026

**Before:**

**HIS HONOUR JUDGE AUERBACH**

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**Between:**

**LONDON AMBULANCE SERVICE NHS TRUST**

**Appellant**

**- and -**

**MR RICKY GARRETT**

**Respondent**

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**Lance Harris** (instructed by Capsticks Solicitors LLP) for the **Appellant**  
The **Respondent** appeared in person

Hearing date: 24 March 2026

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**JUDGMENT**

## **SUMMARY**

### **Religion or Belief Discrimination; Race discrimination**

The employment tribunal erred in concluding (by a majority) that the factual reason found for three particular instances of treatment complained of by the claimant was something amounting to a manifestation of the protected belief on which he relied. It therefore erred in upholding complaints of direct discrimination because of belief in respect of those instances.

The majority also erred in upholding a complaint that one of those instances also amounted to an act of direct discrimination because of the claimant's race. There was no proper factual basis from which to infer direct race discrimination or that the burden of proof had shifted in that regard. The majority also wrongly stated that no non-discriminatory reason was advanced.

## **HIS HONOUR JUDGE AUERBACH:**

### **Introduction**

1. I will refer to the parties as they were in the tribunal, as claimant and respondent. The respondent appeals from a majority decision upholding three complaints of direct belief discrimination and one overlapping complaint of direct race discrimination, and awarding £3750 for injury to feelings. At the hearing of this appeal, as before the tribunal, the claimant appeared in person, and the respondent was represented by Mr Harris of counsel.

### **The Facts**

2. I take the following summary from the tribunal's findings of fact.

3. The claimant's employment with the respondent began in 2015. In 2020 he was a member of the emergency ambulance crew. He identifies as white British.

4. On 30 January 2020 the claimant was working with a colleague, Omar Joe, who is black. An emergency call came in. Mr Joe had gone to a shop to get some snacks, causing a delay in them responding to the call. The claimant and Mr Joe got into a heated argument during the course of which the claimant used the word "roadman" with reference to Mr Joe.

5. I will set out the tribunal's findings of fact about events on 4 and 7 June 2020 in full:

#### ***"Death of George Floyd"***

**27. On 4 June 2020 an email was sent on behalf of the Respondent's COO, Mr Khadir Meer, in relation to the recent death of George Floyd and the global wave of condemnation that followed it. Mr Meer said "*The sad fact is, this is not a new issue. The history of systemic racial prejudice spans centuries and continents and is not exclusive to the USA*".**

**28. Mr Meer invited Black Asian and Minority Ethnic employees to attend a virtual drop in session and invited all staff to attend an allyship workshop. Mr Meer set out the Respondent's zero tolerance of racism, acknowledged that there would be debates about racism and invited staff to conduct them respectfully.**

#### ***7 June 2020***

**29. On 7 June 2020 the Respondent's CEO, Mr Garrett Emmerson, sent an email to all staff. Mr Emmerson said that:**

**"We must all challenge unacceptable behaviours – whether deliberately mal-intentioned or thoughtlessly said or done, and change this organization for the better once and for all. To do this we**

need to start by having open, honest and inevitably sometimes difficult conversations right across the organization. From mess rooms to board rooms, we need to listen, learn and redouble our efforts to challenge unacceptable behaviours and achieve genuine equality in the workplace.”

30. On the same day the Claimant was in the mess room with other staff. He was discussing the recent actions of Black Lives Matter. He was engaged in this discussion when he was approached by a colleague, Sonal Shah. The two had a brief conversation on the subject.

31. The conversation was overheard by another member of staff, Evangeline Chalwell. Ms Chalwell was not part of the conversation between the Claimant and Ms Shah. Ms Chalwell submitted a complaint about what the Claimant had said that very same day.

32. The Claimant agrees that he said that he did not agree with the concept of systemic racism. He rejected that concept. He made reference to his friends, particularly his two best friends, who were not white but had achieved success in their lives. This is consistent with Ms Chalwell’s complaint.

33. Ms Chalwell also alleged that the Claimant had said:

(a) That a person needs to accept that it is their own actions that lead them to a place of higher incarceration rates, lower levels of education, lack of opportunity and poverty.

(b) That black people should not “hide behind their race”.

34. The Claimant denies saying these things.

35. We find that it is more likely than not that the Claimant did say these things. We do so for the following reasons. First, because they were recorded in a contemporaneous note, an email sent within hours of the incident. Second, because Ms Chalwell had no obvious motive to exaggerate anything or make up things that the Claimant had not said. Third, because they are logically consistent with the Claimant’s admitted rejection of systemic racism.

36. Ms Chalwell in her complaint also says that the Claimant had said that you cannot be racist and work for the Respondent. The Claimant says that he said that a racist would find it hard to work for the Respondent due to the multicultural make up of its staff. We find that the one is a paraphrase of the other and that neither could be properly considered to be offensive.

6. In a footnote to its para. [33(b)], above, the tribunal wrote: “This is attributed as a direct quote from the Claimant in Ms Chalwell’s complaint.”

7. On 29 July 2020 Mr Joe put in a complaint about the incident of 30 January 2020.

8. On 5 August 2020 John Chilvers was asked to investigate the incidents of 30 January and 7 June. On 11 August the claimant was suspended on full pay. Mr Chilvers interviewed a number of people and then interviewed the claimant on 7 September 2020. The tribunal said:

“44. In the interview the Claimant is said to have changed his language and tone when describing what Mr Joe has said. Mr Chilvers at the disciplinary hearing described this as the Claimant using “a black man’s voice”. In his evidence Mr Chilvers said that it was a Jamaican accent. The Claimant says that he had been attempting to illustrate what Mr Joe had said and how he suddenly became aggressive. His language and tone changed because he was repeating the roadman slang he had heard from Mr Joe.

45. In the interview the Claimant also told Mr Chilvers that he had been in a conversation in the mess room on 7 June 2020 with Ms Shah. This was the first time that Mr Chilvers knew who the Claimant was speaking to.

46. Mr Chilvers decided not to interview Ms Shah. In his evidence he said that this was because he did not think she could provide any further information. In his evidence he also claimed to have been concerned about the financial impact of the suspension on the Claimant so he wanted to wrap up the investigation as quickly as possible.

47. We consider that the failure to interview Ms Shah at the time was unacceptable. It would have been obvious that as the person who was actually in conversation with the Claimant, she would be able to provide more information about it than somebody who overheard it in the same room or in the next room. To his credit, Mr Chilvers accepted that in hindsight he should have done so.

48. Mr Chilvers in his report, submitted in September 2020, made a number of assumptions:

(a) That the term ‘roadman’ was a racial slur. In fairness to Mr Chilvers, he had been told during his investigation that it was a racial slur by Melissa Berry, who was described as a ‘diversity consultant’.

(b) That denial of systemic racism was one of a number of incidents of racially charged language spoken by the Claimant.

49. We were invited to look at the events in the context of the time they happened. It is correct that there was widespread disruption caused by the pandemic, but there was also widespread pressure on employers and leaders to make statements against and tackle the issue of racism. Given that, and given the assumptions made by Mr Chilvers in his report, we find that the real reason Mr Chilvers did not interview Ms Shah is because he thought he had enough information to determine the complaint and wanted to move it forward to the next stage.”

9. The matter proceeded to a disciplinary hearing before Darren Farmer on 5 October 2020. Mr Farmer adjourned the hearing in order to have Mr Chilvers interview Ms Shah. She was not able to recall much of the 7 June conversation but did recall the claimant “disagreeing with the concept of systemic racism.” The tribunal continued:

“59. By way of an outcome letter dated 23 November 2020 Mr Farmer upheld the complaints, giving as his reasons:

(a) He found the use of ‘roadman’ was a term of abuse but not racial in nature.

(b) The Claimant had made the comments that he denied making. He preferred the evidence of Ms Chalwell over the Claimant because Ms Chalwell would have no reason to have made up these comments. She did not know the Claimant and had no animosity towards him.

(c) He found that the Claimant had inappropriately mimicked Mr Joe.

(d) He found that all of these were offensive to colleagues, that the Claimant did not treat them with respect, and this was gross misconduct.

60. Mr Farmer was very clear in his evidence that he did not use the Claimant’s denial of systemic racism as evidence of any misconduct. What was misconduct was the offensive manner in which he acted towards other colleagues. Mr Farmer accepted that it would not be gross misconduct to have a conversation about the Claimant’s views on systemic racism as long as that conversation was conducted sensitively so as not to give offence.

61. Mr Farmer accordingly made three findings against the Claimant. In his evidence he agreed that all three findings stood or fell with the conclusions he had made about the conversation on June 2020.

62. Mr Farmer issued the Claimant with a final written warning, to remain on the Claimant's file for 18 months, and required him to complete unconscious bias training, a black allyship workshop, and a written reflective practice.

63. The latter was described by Mr Farmer as "*a reflective practice in writing ... that explores your learning in relation to acceptable language for the workplace and systemic racism. This needs to be created through a robust academic process including formal referencing.*"

64. Mr Farmer was asked what the aim of this written reflective practice was. He said that the whole package was there to enable the Claimant to learn from his experience, to learn when his language might be offensive to colleagues, to prevent the Claimant from being offensive in the future and to "open up to the potential that you were wrong". He described it as an "excellent opportunity" for the Claimant to "make a balanced decision" and see "if the position changed".

10. On appeal the period of the final written warning was reduced to 18 months but the other sanctions were upheld. Thereafter the claimant refused to participate in the training, black allyship workshop and reflective practice, with, the tribunal said, "no apparent consequence".

### **Direct Discrimination because of Race, Belief or Manifestation of Belief**

11. Section 39 **Equality Act 2010** includes provision that an employer must not discriminate against an employee by subjecting the employee to a detriment. Section 13(1) provides: "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."

12. Protected characteristics include race and religion or belief. Section 9 defines "race" as including colour, nationality and ethnic or national origins. Section 10(2) defines "belief" as "any religious or philosophical belief and a reference to belief includes a reference to a lack of belief". In

**Grainger plc v Nicholson** [2010] ICR 360 the EAT (Burton J), drawing upon earlier authorities, set out at [24] the criteria which such a belief must meet:

**"(i) The belief must be genuinely held.**

**(ii) It must be a belief and not, as in McClintock, an opinion or viewpoint based on the present state of information available.**

**(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.**

**(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.**

**(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others"**

13. These are the so-called *Grainger* criteria. *Grainger* (ii) refers to **McClintock v Department of Constitutional Affairs** [2008] IRLR 29, in which the EAT said at [45]:

“As the Tribunal in our view correctly observed, to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes; it is not enough “to have an opinion based on some real or perceived logic or based on information or lack of information available.” Mr McClintock had not as a matter of principle rejected the possibility that single sex parents could ever be in a child's best interests; he felt that the evidence to support this view was unconvincing but did not discount the possibility that further research might reconcile the conflict which he perceived to exist. We do not think it was perverse for the Tribunal to find that such views did not fall within the scope of the Regulations.”

14. In **Mackereth v DWP** [2022] ICR 1069 the EAT said at [77]:

“It seems to us that difficulties can arise in seeking to define in general terms the precise distinction between a philosophical belief, on the one hand, and an opinion or viewpoint based on the present information available, on the other. As a minimum, however, a philosophical belief implies the acceptance of a claim, whether founded on science or faith, and - as something that amounts to a protected characteristic - it must be capable of being understood as a characteristic of the individual in question. As we consider the EAT allowed in Harron, an opinion or viewpoint might be a manifestation of a belief but, where it is dependent upon the present information available, it may be found, as in McClintock, that there is in fact no link between that opinion or viewpoint and any religious or philosophical belief. Moreover, the additional test of cogency, seriousness, cohesion and importance (Grainger (iv)) may mean that the more narrowly a belief is defined the less likely it is to be found to be a philosophical belief for the purposes of section 10 EqA.”

15. Section 3(1) **Human Rights Act 1998** requires that, so far as possible, legislation must be read and given effect in a manner compatible with relevant Convention rights.

16. Article 9 concerns freedom of thought, conscience and religion, which includes, at Article 9(1), freedom to “manifest” a religion or belief. However, by Article 9(2) the freedom to manifest is “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.”

17. In **Eweida v United Kingdom** (2013) 57 EHRR 8 the ECHR Grand Chamber said [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 Article 9 § 1 ... . In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. ... 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. ...”

18. Article 10 confers the right of freedom of expression, which is qualified in Article 10(2) in terms that are materially similar to Article 9(2).

19. How section 13 applies in cases where the treatment complained of is claimed to be because of a relevant manifestation has been the subject of detailed consideration by the Court of Appeal in **Page v NHS Trust Development Authority** [2021] EWCA Civ 255; [2021] ICR 941 and **Higgs v Farmor’s School** [2025] EWCA Civ 109; [2025] ICR 1172. For the purposes of the present appeal it suffices to set out the following passages from the speech of Underhill LJ in **Higgs** (Falk LJ made a short concurring speech. Bean LJ agreed with them both).

20. At [55] Underhill LJ said this (footnote omitted):

**“There will be cases where the treatment complained of by the employee was ostensibly on the ground of conduct which manifested a religious or other belief but where it is found that the real reason was an animus against the belief in question. Such a finding may be straightforwardly because the employer’s account of its reasons is disbelieved; but it may also be because, as I put it in *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106/09/3011, [2010] ICR 507, it is in the circumstances of the particular case “impossible to see any basis for the objection other than an objection to the belief which it manifests” so that “[the employer’s claim] to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference” (see para. 18). Neither kind of case is in truth a manifestation case at all, because the employer is motivated simply by the fact that the employee holds the belief. In a manifestation case proper the employer genuinely has no objection to the employee holding the belief and is motivated only by the conduct which constitutes its manifestation. Most claims of discrimination on the ground of religion or belief are likely to be genuine manifestation cases of this kind.”**

21. At [57] – [60] Underhill LJ discussed the “separability principle”. At [57] he said:

**“In a case where the 2010 Act (or its predecessors), and other analogous legislation, affords protection to particular kinds of conduct by an employee – for example, in victimisation or whistleblowing cases, for making complaints of discrimination or making protected disclosures – the case-law recognises that it may be necessary to decide whether the real cause of the treatment is the conduct itself or is some properly separable feature of it. This is sometimes referred to as “the separability principle”. This line of authority is potentially applicable in a (true) manifestation case, since in such a case the court is concerned (untypically for a direct discrimination claim) with a motivation based not on the possession of the protected characteristic but on particular conduct on the part of the employee.”**

22. Underhill LJ noted in this passage that the authorities make clear that the “separability principle” is not a rule of law, but rather, as Simler LJ (as she then was) put it in an earlier case, “a label that identifies what may in a particular case be a necessary step in the process of determining what as a matter of fact was the real reason for impugned treatment.”

23. At [74] Underhill LJ identified what **Page** had decided in this way:

**“In summary, *Page* was decided on the basis that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something "objectionable" in the way in which the belief was manifested: it thus introduced a requirement of objective justification into the causation element in section 13 (1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention. I should clarify two points about language:**

**(1) The word "objectionable" in para. 74 is evidently a (possibly rather inapt) shorthand for the phrase in para. 68 "to which objection could justifiably be taken". Both have the same effect as the word "inappropriate" which is also used.**

**(2) The "way" in which the belief is manifested is a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs.”**

24. At [175] Underhill LJ summarised his essential conclusions, including the following:

**“(1) The dismissal of an employee merely because they have expressed a religious or other protected belief to which the employer, or a third party with whom it wishes to protect its reputation, objects will constitute unlawful direct discrimination within the meaning of the Equality Act.**

**(2) However, if the dismissal is motivated not simply by the expression of the belief itself (or third parties' reaction to it) but by something objectionable in the way in which it was expressed, determined objectively, then the effect of the decision in *Page v NHS Trust Development Authority* is that the dismissal will be lawful if, but only if, the employer shows that it was a proportionate response to the objectionable feature – in short, that it was objectively justified: see para. 74 above.”**

### **The tribunal's identification of the belief relied upon and the issue of manifestation**

25. In the claim form, in the course of setting out his complaints of direct discrimination on grounds of belief and race, the claimant wrote:

**“My beliefs are I do not believe systemic racism exist and that social, financial and culture play a bigger role in outcomes regardless of colour.”**

26. The respondent's grounds of resistance included the following at [33]:

**“The Respondent contends that the Claimant's alleged belief that 'systemic racism does not exist' is not a 'belief' within the meaning of section 10 of the Equality Act 2010 because: (a) it is not admitted that this is a belief genuinely held by the Claimant; (b) it is no more than a viewpoint or opinion; (c) it is not something that has attained a sufficient level of cogency or cohesion; and/or (d) it is not worthy of respect in a democratic society given the wealth of evidence indicating the existence of large scale societal systems, practices, ideologies and programmes that produce and perpetuate inequities for those of a minority ethnic background.”**

27. At [34] the respondent contended that, even if the claimant could establish that the belief he alleged that he held “about systemic racism” was capable of protection, he had been subjected to disciplinary process because of what he had said and the way he had expressed that belief, not because he held the belief, which was not known to the respondent at the time.

28. There was a case-management preliminary hearing (CMPH) on 17 March 2023 before EJ Le Grys. The claimant was in person and the respondent was represented by Mr Harris. In the course of its summary of the background the tribunal wrote at [57]:

**“The Claimant does not believe that systemic racism exists and is of the view that social, financial, and cultural issues play a bigger role in outcomes, regardless of colour.”**

29. In setting out the complaints and the issues, the minute recorded (at [2.2] of this section):

**“The Claimant describes his belief as a philosophical belief that you should treat people how you would want to be treated, and that all people should be treated with respect. That we are all one race and while we may have different colours and cultures we should all be treated as one.”**

30. At [2.3] the minute set out issues as to whether the claimant’s belief was within section 10 **Equality Act 2010**, by reference to the *Grainger* criteria. The minute then set out factual issues as to whether the respondent did eleven things, and, if so, whether such treatment was because of race and/or belief, noting that the claimant relied upon a hypothetical comparator.

31. The section of the Atkins tribunal’s reasons setting out the issues began, at [10]:

**“The Claimant alleges: (a) That he was discriminated against because of his race, contrary to section 13 of the Equality Act 2010. He identifies as White British. (b) That he was discriminated against because of his belief, contrary to section 13 of the Equality Act 2010. The Claimant describes his belief as a philosophical belief that you should treat people how you would want to be treated, and that all people should be treated with respect. That we are all one race and while we may have different colours or cultures we should all be treated as one.”**

32. At [11] the tribunal set out extracts from the CMPH’s record of the issues, including [2.3] (referring to s.10 and the *Grainger* criteria), the alleged acts complained of, and the further issues as to whether any such conduct amounted to direct belief and/or race discrimination.

33. At [13] the tribunal wrote that it would be necessary to describe the theory of “systemic racism” and that “[i]t is this theory that the Claimant rejects.” It made it clear that it expressed no opinion on the merits of the theory [14]. It described the theory as follows [15]:

**“The concept of systemic racism comes from the school of thought known as critical race theory. It is that the status quo in the society of the UK is that of privilege held by white people, and of oppression directed towards non white people, with the inevitable result that non white people are disadvantaged compared to white people. As well as active acts of racist discrimination or abuse, this also manifests the form of unconscious bias held and demonstrated by people and institutions.”**

34. The tribunal said at [19] that it was clear that the respondent had “adopted the concept of systemic racism”.

35. The tribunal began a further section under the sub-heading: “The Claimant’s belief”:

**“20. The Claimant defines his belief as that:**

**(a) We are all one race and all colours and cultures should be treated as one.**

**(b) All people should be treated with respect and how you would want to be treated.**

**21. The Respondent says that this is not a controversial statement of belief. We agree. It was perhaps summed up most succinctly by Martin Luther King Jr, who said:**

***“I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”***

**22. The question which we will turn to in due course is whether, and if so to what extent, the Claimant’s rejection of systemic racism is a manifestation of that belief.”**

36. I pause to note the following.

37. As noted, in the claim form the claimant identified the belief relied upon as being, in short, that systemic racism does not exist. I will call that the “no-systemic-racism” belief. In its response the respondent contended that that belief did not meet the *Grainger* criteria.

38. At [57] of the CMPH minute EJ Le Grys referred to the claimant holding the “no-systemic-racism” belief. However, at [2.2] it set out a different belief: that all people should be treated in the same way because all people are part of the same race. I will call that the “treatment belief”. That was followed by issue [2.3] asking, in substance, whether the claimant’s belief fell within s.10. The Atkins tribunal referred at [10(b)] and [20] to the treatment belief as the protected belief on which the claimant relied.

39. Mr Harris told me that the belief that the claimant relied upon only “crystallised” at the CMPH and was accurately captured at [2.2] of the CMPH list of issues, and [10(b)] of the Atkins tribunal’s reasons. The claimant told me he agreed that the treatment belief was correctly identified on both occasions, as the protected belief on which he relied. In the course of a passage at [108] – [119],

which I set out below, the Atkins tribunal also concluded that the treatment belief fell within section 10. Mr Harris told me that the respondent had in fact conceded this before the Atkins tribunal; but in any event it does not challenge that conclusion.

40. Next, I note that, although the CMPH minute had not referred to the subject of manifestation at all, the Atkins tribunal also said at [22] that what it had to decide was whether the no-systemic-racism belief was a *manifestation* of the treatment belief. Once again, the parties told me that they agree that this *was* an issue that the Atkins tribunal had to decide.

41. I note that what did *not* change was the claimant's *factual* case that the no-systemic racism belief was a factual reason for the treatment of which he complained. I also observe that, had that belief simply been identified as the protected belief on which he relied, then the Atkins tribunal would not have found itself wrestling with the issue of whether one (claimed) belief was the manifestation of another (claimed) belief. But, conversely, what it *would* in that case have had to decide, was whether the no-systemic racism belief satisfied the *Grainger* criteria and fell within section 10, something which, as its response made clear, the respondent would, in that case, have disputed.

42. However, the adoption of the different analysis, that the claimant relied upon the treatment belief as protected, and the no-systemic racism belief as a manifestation of it, has not been challenged at any point by either party; and so there was no determination (and no challenge to the failure to determine) whether the no-systemic racism belief was itself protected. As I have also noted, the respondent does not challenge the tribunal's conclusion that the treatment belief was protected. Accordingly neither question falls to be considered by me.

### **The Tribunal's Conclusions**

43. In summary, the tribunal's material conclusions, by a majority, were as follows.

- (1) The no-systemic racism belief was a manifestation of the treatment belief.
- (2) What the tribunal called the interference with the claimant's protected belief was, for various

reasons which were set out at [120], “not proportionate”.

- (3) The respondent directly discriminated against the claimant because of that manifestation of belief by doing the following things, all relating to the June incident:
- (a) Mr Childers concluding his initial investigation without interviewing Ms Shah;
  - (b) Mr Farmer failing to take into account certain evidence on which the claimant sought to rely in support of his stance on the systemic-racism issue;
  - (c) Imposing the particular disciplinary sanction of requiring the claimant to carry out a written reflective practice.

44. The reasons for the majority’s conclusions on each of these matters were as follows:

**“126. In respect of 2.4.5 (failing to conduct an adequate investigation), we considered that there was less favourable treatment. We have found that Mr Childers concluded his investigation because he considered that he had enough evidence to move it on and wanted to move it on to the next stage. He did not interview Ms Shah. This was less favourable treatment. We have also found that part of this evidence was his assertion that the Claimant’s rejection of systemic racism was one of a number of racially charged statements. In other words, there was a direct connection to a manifestation of the Claimant’s protected belief. The investigation moved on without interviewing Ms Shah – the less favourable treatment – at least in part because the manifestation of a protected belief. The Respondent does not offer a non-discriminatory reason for this treatment.**

... ..

**130. In respect of 2.4.9 (failing to take the Claimant’s evidence into account), we did consider that there was less favourable treatment. The Claimant brought forward evidence to show that his view (which was a manifestation of his belief) was shared by other people and so may be thought acceptable. The decision letter does not attempt to engage with the evidence but simply says that it is not credible and dismisses it accordingly. We have considered whether this was because of the Claimant’s belief. We note that the letter goes on to say that “It is clear to me that [the Claimant] holds views that are at odds with the views of the [Respondent] and established evidence.” This indicates to us that this evidence was dismissed because of its content, which the Trust considered to be at odds with its views and therefore unacceptable. The Respondent does not offer a non-discriminatory reason for this treatment.**

... ..

**134. We did consider that the direction to carry out a written reflective practice was less favourable treatment. It is directed specifically against the Claimant’s rejection of systemic racism, a manifestation of his belief, and would not have been directed against a colleague in the same situation who did not have that belief. Its explicit aim was to try to change the Claimant’s belief. It was clearly because of his belief. The Respondent does not offer a non-discriminatory reason for this treatment.”**

45. In addition (b) was found to be an act of direct race discrimination. The majority’s conclusion about that complaint was set out in the following paragraph:

**“144. In respect of 2.4.9 (failing to take the Claimant’s evidence into account), we did consider that there was less favourable treatment. The Claimant brought forward evidence to show that his view**

was shared by other people who were not white. The decision letter does not attempt to engage with the evidence but simply says that it is not credible and dismisses it. This is in contrast to the approach taken to the views of the diversity consultant about the term ‘roadman’, which did engage with the origin and weight of those views. We do not think it is controversial to say that when evidence is presented to an investigation it should be engaged with, even if that engagement does not need to be particularly complex. We have considered whether this was because of the Claimant’s race. We conclude that it was. We do not believe that similar evidence brought forward by a non white employee would have been dismissed without at least some engagement with it. We are supported in that view by the evidence we have seen of the Respondent’s senior management, who have written to all staff to affirm that they wish to listen to the voices and experiences of BME colleagues. The Respondent does not offer a non-discriminatory reason for this treatment.”

### **The Grounds of Appeal, the Tribunal’s Further Reasons, Discussion, Conclusions**

46. Ground 1 contends that the tribunal erred in holding that the no-systemic racism belief was a manifestation of the treatment belief. Relevant further passages in the decision are as follows.

47. The claimant submitted that his rejection of systemic racism was “part of his overarching belief” [90]. Mr Harris submitted that it “did not form part of his belief” but was “simply an opinion that he had”. He referred to the claimant’s evidence to the effect that he was open-minded, based his opinions on evidence, and when asked what would change his mind about systemic racism, had said “evidence of multiple claims, procedures and policies set out predominantly within a group, would agree if I saw it in a particular organisation.” [93] The tribunal added at [94]: “It is fair to record at this point that after giving this evidence, the Claimant subsequently said that he would not change his stance on systemic racism because it conflicted with the central themes of his belief.”

48. The tribunal’s conclusions included a section headed: “Whether the Claimant’s belief was a protected characteristic”, which I will set out in full.

**“108. We must first decide whether or not the Claimant’s belief was a protected characteristic within the meaning of section 10 EA 2010.**

**109. We address the five Grainger criteria in turn.**

**110. In respect of the first Grainger criterion, we consider that the Claimant’s beliefs, as he has described them, are genuinely held. This was not contested by the Respondent, and indeed Mr Chilvers, Mr Farmer and Ms Wills all agreed that it was a genuinely held belief.**

**111. In respect of the second Grainger criterion, we have borne in mind the guidance from McClintock and Mackereth. We had to decide whether the Claimant’s rejection of systemic racism was a manifestation of his belief, or whether it was simply an opinion based on the evidence in front of him. We reminded ourself that if it was simply an opinion based on evidence, without a link to his philosophical belief, it would not meet the test.**

112. We have considered the philosophical belief as set out by the Claimant. It is clear to us that this is a philosophical belief: that all humans are one race and should be treated equally with respect. The Respondent acknowledges that this is not a controversial belief. We will however return to these principles when we consider the question of whether the Claimant's rejection of systemic racism is a manifestation of his belief.

113. The Claimant's rejection of systemic racism is wholly consistent with his belief in equal treatment for all races regardless of colour. There is an undeniable link between the two – it flows logically from a belief in equal treatment for all races that a person who holds that belief would reject a theory which attributes specific characteristics to people solely because of their race. Both are consistent in internal logic and structure.

114. We carefully considered whether the Claimant's evidence demonstrated that his rejection of systemic racism was an opinion. Made out from facts before him, which he might change if new evidence presented itself. We were ultimately not satisfied that the Claimant had indicated that this belief was founded on evidence and capable of being changed by further evidence. This is because:

- (a) The Claimant accepts that racism exists on a personal level but this is not the same as accepting that it exists as the status quo in society.
- (b) The Claimant also accepts that racism can exist within an institution but this is not the same as accepting that it exists as the status quo in society.
- (c) The evidence relied upon by the Respondent shows that the Claimant would be prepared to accept racism exists within an institution, but does not go so far as to say that the Claimant would accept it exists as the status quo in society.
- (d) The Claimant has never accepted that evidence would change his belief that systemic racism is [not] the status quo in society and denies it.

115. We were therefore satisfied that the Claimant's rejection of systemic racism was a manifestation of his belief, and not simply an opinion he had formed from the evidence and might change.

116. In respect of the third Grainger criterion, we consider that beliefs which touch on the concept of racial equality are beliefs as to a weighty and substantial aspect of human life and behaviour. We should note in fairness that the Respondent does not suggest otherwise.

117. In respect of the fourth Grainger criterion, we considered that the belief does attain a certain level of cogency, seriousness, cohesion and importance. It is clearly set out, consistent, and understandable. Again, in fairness, the Respondent does not suggest otherwise.

118. In respect of the fifth Grainger criterion, we considered that the belief was worthy of respect in a democratic society, was not incompatible with human dignity and did not conflict with the fundamental rights of others. We noted that there are only modest threshold requirements for this test to be met. The Court in *R (Williamson)* said that those requirements "should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention" and in *Forstater* the EAT said that it would only be "in extremely limited circumstances in which a belief would be considered so beyond the pale". The Respondent does not argue that it is not worthy of respect in a democratic society.

119. The majority of the panel therefore concluded that the Respondent's rejection of systemic racism is a manifestation of his wider belief, that this belief came within the definition of section 10 of the EA 2010, and as such it was a protected characteristic."

49. The "not" that I have added in square brackets within [114(d)] reflects what the parties agreed (as do I) that the tribunal must have meant to say there.

50. This ground contends that there are two errors in the tribunal's reasoning. First, it is said that the tribunal erred in concluding, at [113], that there was an "undeniable link" between the no-systemic

racism belief and the treatment belief, and that the former “flows logically” from the latter. Secondly, the conclusion at [114] that the claimant’s “no-systemic-racism” belief was not an opinion founded on evidence is said to be perverse, having regard to the evidence that he gave, and on which the respondent had relied, as identified at [93].

51. My conclusions on this ground follow.

52. As to the first strand, it is important first to note precisely how the two beliefs that were said to be in play were described by the tribunal, because it is *those* particular beliefs (only) that the tribunal was considering; and I note also that there was no challenge by either party before the EAT to the accuracy of the way in which the tribunal described either of those beliefs.

53. The treatment belief, as described at [10(b)] and [20], is, on its face, a belief about what *should* happen, namely that all people should be treated the same regardless of their colour or culture. It is, as Mr Harris put it, a normative belief – a belief about how things ought to be.

54. This belief, as described by the tribunal at [10], includes the statement that “we are all one race”, clearly there using “race” in its discrete meaning of “human race”. In some contexts, that proposition may be intended, or perceived, as, by a play on the different meanings of “race”, having as its real point an implied descriptive proposition about the social significance (or not) of differences of “race” in the sense of colour, ethnicity or other concepts of race in the section 9 sense. But the tribunal plainly did not regard *this* particular formulation as being of that kind. As the closing words of [10(b)], and its reference to Martin Luther King, made clear, the tribunal clearly regarded the point of *this* formulation as being – solely – the normative proposition that, because of our common humanity, people of different colours or cultures *ought not* to be treated differently because of such differences of race, in that latter (section 9) sense.

55. Turning to the no-systemic racism belief, that was described by the tribunal, at [13], as the

rejection by the claimant of the belief described at [15]. It is, on its face, a belief, not about what ought to be, but about what is. The belief described at [15] is about a phenomenon said to exist, in society and/or within particular institutions. Correspondingly, the no-systemic-racism belief is a rejection of the belief that such a phenomenon in fact exists. It is, as Mr Harris put it in his skeleton, not a normative belief, but a descriptive belief.

56. Against that background, the difficulty with the majority's reasoning at [113] is that the majority's description *there* of systemic racism theory does not accord with the tribunal's description of the theory at [15], which was the theory which it found, as a fact, at [13], that the claimant rejects. It is not, as described at [15], a theory "which attributes specific characteristics to people because of their race". This error may be what led the majority into the logical error of reasoning of concluding that there was an "undeniable link" between the two beliefs and that one "flows logically" from the other. Rather, as the ground of appeal puts it: "A person who holds the same belief relied upon by the Claimant could equally be of the opinion that systemic racism *does* exist."

57. This was a fundamental flaw in the majority's logical chain of reasoning, and for this reason ground 1 must be upheld. Nor, in light of the normative / descriptive dichotomy, do I consider that it would have been open to the tribunal, in light of its findings of fact that the claimant held both the treatment belief (as described by the tribunal) and the no-systemic-racism belief (as described by the tribunal) to have concluded that the latter was a manifestation of the former, satisfying the "intimately linked" test in **Eweida**. The only proper conclusion that the tribunal could have reached, on the facts found, was that the claimant's (descriptive) no-systemic-racism belief was *not* a manifestation of the (normative) treatment belief on which he now relied (and which the tribunal found, in this particular form, to be protected).

58. The outcome of this ground does not therefore in fact turn on the second strand. But I make the following observations about it. First, as to [94], without assistance I would read that paragraph

as making a reference to a submission by the claimant, as opposed to further evidence given by him. Mr Harris told me that was correct. The claimant was unable to recall either way. But in any case I do not think the conclusion at [114] turned on this. Rather, it turned on the conclusion, based on his evidence, that, while the claimant might be open to persuasion by evidence that systemic racism could exist within a particular institution, he would not be open to such persuasion by evidence that it is a more general phenomenon within society at large. I cannot say that that factual conclusion, about what he subjectively thinks, was perverse in the legal sense.

59. Nevertheless, the tribunal did, for the reasons I have given, in any event err in going on to conclude at [115] that the claimant's rejection of systemic racism was a manifestation of the belief that he relied upon at the Atkins hearing as the protected belief.

60. For these reasons I uphold ground 1.

61. Because ground 1 succeeds, the appeal against the majority's decisions upholding the three complaints of direct discrimination because of belief must, for that reason alone, succeed. That is because an essential link in the majority's reasoning in all three cases was the majority's conclusion that the no-systemic-racism belief was a manifestation of the protected belief relied upon, as in all three cases the majority found that the treatment was direct discrimination because of belief, because it was a disproportionate unjustified reaction to that manifestation.

62. However, as they were all fully argued before me, and for good order, I will also consider the other grounds of challenge to those decisions.

63. Ground 2 contends that the majority erred in upholding the belief complaint in relation to Mr Chilvers concluding his investigation without interviewing Ms Shah. It contends that, had the majority considered the appropriate hypothetical comparator, they would have been bound to conclude that Mr Chilvers did so, not because the claimant had (as they found) manifested a belief,

but because he had, in Mr Chilvers's view, said something racially charged.

64. In the course of its fact-finding the tribunal said the following.

**“46. Mr Chilvers decided not to interview Ms Shah. In his evidence he said that this was because he did not think she could provide any further information. In his evidence he also claimed to have been concerned about the financial impact of the suspension on the Claimant so he wanted to wrap up the investigation as quickly as possible.**

**47. We consider that the failure to interview Ms Shah at the time was unacceptable. It would have been obvious that as the person who was actually in conversation with the Claimant, she would be able to provide more information about it than somebody who overheard it in the same room or in the next room. To his credit, Mr Chilvers accepted that in hindsight he should have done so.**

**48. Mr Chilvers in his report, submitted in September 2020, made a number of assumptions: (a) That the term ‘roadman’ was a racial slur. In fairness to Mr Chilvers, he had been told during his investigation that it was a racial slur by Melissa Berry, who was described as a ‘diversity consultant’. (b) That denial of systemic racism was one of a number of incidents of racially charged language spoken by the Claimant.**

**49. We were invited to look at the events in the context of the time they happened. It is correct that there was widespread disruption caused by the pandemic, but there was also widespread pressure on employers and leaders to make statements against and tackle the issue of racism. Given that, and given the assumptions made by Mr Chilvers in his report, we find that the real reason Mr Chilvers did not interview Ms Shah is because he thought he had enough information to determine the complaint and wanted to move it forward to the next stage.”**

65. I have already set out the conclusion that the majority reached on the manifestation of belief complaint about this conduct at its [126]. The whole tribunal, however, rejected a complaint of race discrimination about it, holding at [140] that: “The failure to interview Ms Shah” was “due to incompetence, oversight, or the rush to move the process forward.”

66. As the tribunal recorded at [32], [33] and [58] the claimant did not dispute that in his conversation with Ms Shah he had said that he did not agree with the concept of systemic racism. What he disputed was making the other remarks attributed to him by Ms Chalwell, which were set out at [33]. It was on that question that, when she was ultimately interviewed by Mr Chilvers at the behest of Mr Farmer, Ms Shah was unable to recollect or assist.

67. The sense of these passages is that Mr Chilvers decided he did not need to interview Ms Shah, because he considered that the conduct which the claimant had admitted already supported a case that he made a racially-charged statement, and he was keen to move forward. But the tribunal did not

consider whether, had the claimant made some other statement which Mr Chilvers also considered to be racially charged (but which was not the manifestation of a protected belief), Mr Chilvers would equally, in that hypothetical case, also have concluded the investigation without interviewing Ms Shah; and hence, whether that conduct was, in the material sense, *because* the admitted statement was (as found) a manifestation of belief.

68. For these reasons, ground 2 is well founded.

69. Ground 3 challenges the upholding at [130] of the complaint of discrimination because of (manifestation of) belief, by Mr Chilvers failing to take into account certain evidence on which the claimant sought to rely at the disciplinary hearing. The tribunal is said to have failed to consider adequately, or at all, the reason put forward by the respondent in this respect.

70. The respondent refers in particular to the fact that Mr Farmer's decision letter stated:

**“You had indicated earlier that you had undertaken research and had evidence that disproved the existence of systemic racism, I challenged you on this point and asked you to explain what research you had done. You indicated that you had seen some videos on YouTube and articles on the internet disputing its existence. I pointed out that this was not credible research and that there was a complete absence of academic rigour.”**

71. I was also shown a passage in Mr Farmer's witness statement to the tribunal to similar effect. Mr Harris also referred in his skeleton to another passage in the letter in which Mr Farmer (in favour of the claimant) rejected the statement of a diversity consultant, that the term “roadman” (the subject of the charge relating to the January incident) was racist, on the basis that it was not supported by any academic references. He submitted that this, as well as the fact that Mr Farmer did consider *other* evidence put forward by the claimant, supported the argument that it should have considered his stated explanation for discounting this evidence.

72. At [130] the tribunal majority relied upon Mr Farmer's statement elsewhere in the letter that the claimant held views that were at odds with the respondent's views and “established evidence”. It reasoned from this that the evidence the claimant sought to rely upon was dismissed, because its

*content* was contrary to the respondent's views, and unacceptable.

73. However, the tribunal plainly found that the claimant had, in fact, made *all* the remarks that Ms Chalwell claimed he had made, including those it had set out at [33], and that Mr Farmer had formed that same view. It also found, at [59(d)], that Mr Farmer considered that all these views were offensive to colleagues and that the claimant did not treat them with respect. Further, what the tribunal was concerned with here was the reason why Mr Farmer discounted this *particular* evidence relied upon by the claimant in support of his (the claimant's) views being legitimate. The respondent's case – and Mr Farmer's evidence – was that he discounted this *particular* evidence because he did not consider it to be academically supported.

74. It is trite law that a tribunal is not bound to address *every* feature of the evidence put forward on one side or the other. But this was a specific feature of the evidence relied upon by the respondent as showing a non-discriminatory explanation for this conduct. That being so, I consider that it was an error to conclude that this material was simply dismissed by Mr Farmer because it was, in substance, contrary to the respondent's position; and it was incorrect to state that no non-discriminatory explanation was put forward. Ground 3 is well founded.

75. Ground 4 contends that the tribunal erred in concluding at [134] that the requirement to carry out a reflective written practice was because of the claimant's rejection of systemic racism and that its aim was to try to change the claimant's belief. The tribunal is said to have erred by failing to consider whether this requirement was imposed due to the objectionable *manner* in which the claimant expressed himself in the course of the discussion on 7 June 2020.

76. In his argument in response to this ground the claimant relied on the evidence before the tribunal that Mr Farmer, in his written decision, required the claimant to provide a written reflective practice "that explores your learning in relation to acceptable language for the workplace and systemic racism in the UK. This needs to be created through a robust academic process including

formal referencing.” He also showed me passages in training materials issued by the respondent to which he objects. He submitted that the majority was entitled to consider that the point of the sanction was to require him to demonstrate that he had changed his views.

77. However, as I have set out, the tribunal found that the claimant made *all* the remarks alleged by Ms Chalwell, including both remarks referred to by it at [33] (set out at my [5] above). The tribunal also found, at [59], that Mr Farmer concluded that he had made all the comments of which he was accused, and that Mr Farmer found that **“all of these were offensive to colleagues, that the Claimant did not treat them with respect, and this was gross misconduct”**, and, at [60], that: **“Mr Farmer was very clear in his evidence that he did not use the Claimant’s denial of systemic racism as evidence of any misconduct. What was misconduct was the offensive manner in which he acted towards other colleagues.”**

78. I consider that it was incumbent on the majority to engage with those earlier findings, when coming to their conclusion on this complaint. Ground 4 is also well founded.

79. Ground 5 challenges the majority’s upholding at [144] of the complaint of race discrimination by failing to take into account the same evidence referred to at [130]. The challenge mounted by ground 5 is in substance the same as that raised by ground 3. I consider that ground 5 is also meritorious. The tribunal failed to engage with evidence specifically put forward by the respondent, which it said provided a non-discriminatory explanation for the conduct: that Mr Farmer was actuated by his view that this particular material lacked academic rigour, and not (so far as this ground is concerned) because of the claimant’s race.

80. Ground 6 contends that the conclusion reached at [144] was perverse. The ground relies in support on the finding at [130] that the treatment was because of the belief manifestation; the finding at [156(b)] that much of the evidence put forward by the claimant *was* considered; and the fact that the evidence of the diversity consultant, that “roadman” was a racist term (referred to by the tribunal

in the course of [144]) was (in the claimant’s favour) rejected by Mr Farmer.

81. Mr Harris acknowledged the well-established high hurdle that any perversity challenge of this sort faces. I note also that, for the purposes of a section 13 complaint, it is sufficient if the characteristic materially influenced the impugned conduct, and so it can potentially be one among a number of material reasons found. However, there has to be some specific fact or facts identified by the tribunal and properly relied upon to support the drawing of an inference that the characteristic in question – here, the claimant’s race – materially influenced the treatment in question, or a shifting of the burden to the respondent to show that it did not.

82. The majority at [144], as at [130], stated that the decision letter “simply” stated that the evidence put forward by the claimant was not credible, and dismissed it. But, as I have noted, this did not reflect, or engage with, the evidence of the letter’s comment that the material in question lacked academic rigour (and the similar statement that the letter contained about the diversity consultant’s statement concerning the word “roadman”).

83. The majority referred also at [144] to the evidence that, in the wake of the killing of George Floyd, the respondent’s management affirmed that they wished to listen to the voices and experiences of BME colleagues. The claimant, in argument on this appeal, referred also to the tribunal’s finding at [19] that the respondent adopted the theory at [15], with which, as it found at [13], he disagrees. However, I do not see how these aspects of the findings could properly support an inference that Mr Farmer discounted this particular evidence put forward by the claimant *because of the claimant’s own race*, nor a shifting of the burden to the respondent to show otherwise. As already noted, the majority were also in any event wrong to say that it had not put forward a non-discriminatory explanation.

84. I therefore conclude that the majority’s conclusion upholding this complaint of direct race discrimination was indeed perverse, in the sense that it was not, and could not properly be, supported by the findings of fact, or evidence, upon which the majority stated they had relied.

## **Outcome**

85. In light of my overall conclusions the respondent's appeal is upheld in respect of the upholding of the three complaints of direct discrimination because of (manifestation of) belief, and the one complaint of direct race discrimination, which it challenges. Those decisions, and the consequential award of compensation for injury to feelings, will therefore be quashed.

86. For reasons I have set out, the only conclusions properly open to the tribunal, in light of how the complaints and issues were framed, and the facts found, were to dismiss all of those complaints. Applying the guidance in **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920, there is therefore no need to remit any of these complaints to the tribunal for fresh consideration. Instead I will substitute a decision dismissing them all.

## **Postscript**

87. The tribunal's written reasons did not set out the reasoning of the minority. That failure was not a ground of appeal; but it was not good practice. See: **Morgan v Welsh Rugby Union** [2011] IRLR 376 at [43] and earlier authority there referred to. This decision in fact did not even identify which of the three tribunal members formed the two-person majority, and which of them was in the minority. That, too, should have been done.