



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Burch

v

British Airways plc

RECORD of a PUBLIC PRELIMINARY HEARING

Heard at: Watford Employment Tribunal

On: 17 - 19 July 2023

Before: Employment Judge Coll

Appearances

for claimant: Ms. E. Banton, counsel

for respondent: Mr G Baker, counsel

PRELIMINARY HEARING JUDGMENT

1. The claimant's belief, that he is a sovereign being who has a right to breathe freely and should not be subjected to arbitrary and pointless rules which have prevented [him] from so doing, whilst having no basis in science and for which there is no supporting evidence, does not amount to a philosophical belief for the purposes of section 10 (2) Equality Act 2010.

REASONS

Introduction

2. This claim includes a complaint of unlawful direct and indirect discrimination and harassment (protected characteristic religion or belief). There is also an unlawful deduction of wages claim.
3. A preliminary hearing has been held in order to determine whether the belief claimed and relied on by the claimant for the purposes of his discrimination complaint, falls within the terms of section 10 of the Equality Act 2010.
4. The hearing was an in-person hearing attended by the claimant and both representatives. I had the benefit of reading 188 pages contained in a bundle of documents. I heard oral evidence from the claimant. I have also had the benefit of reading the claimant's witness statement (5 pages). In addition, I had the benefit of very helpful skeleton arguments and oral closing submissions on behalf of both parties.

5. At the preliminary hearing, I heard from both Mr. Baker and Ms. Banton because Mr. Baker had suggested in his skeleton argument that the respondent was making an application for strike-out/deposit order. Having heard from both representatives, I made a decision that there was no such application before me. First, there was no written application giving sufficient notice. This application has been mentioned first with notice of one working day. Secondly, correspondence immediately after the previous preliminary hearing from the respondent's solicitors indicated that if the claimant withdrew his freestanding health and safety claim, no application for strike out/deposit order would be made. The claimant had withdrawn that claim. Thirdly, relevant evidence from the claimant was not before the tribunal, given the lack of notice and formal application.

Background

5. The respondent is a global airline in the sector of air transportation services, offering scheduled air services for passengers and freights, as well as aircraft financing, maintenance, holiday packages and insurance.
6. The claimant has continuous service with the respondent from 1996. He joined the respondent in 2001, following a TUPE transfer. The claimant operated as a short-haul captain between 2001 and 2007. More recently, he has been employed as a long-haul senior first officer. The claimant continues to be employed.
7. During the COVID-19 pandemic, due to a significant downturn in operations, the respondent retained a number of pilots as employees, but did not require them to undertake flying duties. These pilots were furloughed, put in a pool and continued to be paid at a reduced salary.

Chronology of key events

8. The claimant was in the pool for 20 months. He had previously flown the retired Boeing 747- 400s. As part of facilitating the claimant's return to flying duties, he was required to undertake training at the respondent's ground school in Boeing 777s. The claimant commenced this training in or about December 2021. He was due to operate his first Boeing 777 trip on 10 February 2022 to Miami as a training trip.
9. He prepared himself to operate, but had a major stress reaction, the evening of 9 February 2022 when Captain Drake, his training captain for that trip, sent a reminder of the mask policy to which the claimant should adhere on 10 February 2022. The claimant was so stressed about seeing this reminder that he was unable to operate on 10 February 2022 and had to go sick. His next scheduled training duty was on the 24 February 2022.
10. On 10 February 2022, the claimant wrote to David Payne, B777 Line Manager, setting out his position [63 – 67].
11. On 15 February 2022, Mr Payne requested Occupational Health (Dr Wong) to assess the claimant's fitness to fly on 24 February 2022 and on all future

flights whilst adhering to the normal BA mask policy for crew in the OMB (OMB.2.35.1.B) [68 - 69].

12. On 24 February 2022, the claimant reported for work at the crew report centre without a mask. The claimant said that he was exempt from wearing a mask when asked by Captain Byass, the training captain. Captain Byass did not accept this. The claimant confirmed that he would not be able to comply with the mask wearing requirements on the trip (24 – 28 February 2022). He was stood down. The respondent marked him as being on unpaid leave.
13. On 1 March 2022, the claimant attended an appointment with a private GP, Dr Choudhry [75-76] asking to be signed off, which he was for two weeks, until 15 March 2022.
14. On 7 March 2022, the claimant obtained a report from a clinical psychologist, Dr. Storah, as a result of a self-referral on 1 March 2022 [77-81]. He was assessed and interviewed on 3 March 2022.
15. On 30 April 2022, the claimant wrote to Mr. Payne.
16. On 20 May 2022, the claimant commenced the A.C.A.S. Early Conciliation Process. The certificate was issued on 30 June 2022.
17. On 1 July 2022, the claimant was interviewed by Professor Cleare, a psychiatrist with the Civil Aviation Authority (“CAA”) who produced a report [88 – 91].
18. On 30 July 2022, the claimant presented his claim [1-22].
19. On 17 March 2023, in a case management review at a preliminary hearing, EJ Quill listed a preliminary hearing in public to determine whether the claimant held a belief protected by section 10 Equality Act 2010 [45 – 62].

The Law

20. Section 10 Equality Act 2010 states:

“(1) Religion means and religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to lack of belief.

(3) In relation to the protected characteristic of religion or belief:-

(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) A reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”

21. Both parties referred me to the EAT judgment in *Grainger PLC v. Nicholson* [2010] 2 All ER 253 (“*Grainger*”) and the limitations or criteria placed on the definition of philosophical belief as set out in that judgment by Burton P (at §24). I refer to these as the “*Grainger* criteria (i) – (v)”. I was also referred to

Forstater v CGD Europe and others [2021] IRLR 706, which stated that the legal test remains the *Grainger* test:

§24. “I do not doubt at all. There must be some limit placed upon the definition of “philosophical belief” for the purpose of the [2003] regulations, but before I turned to consider Mr Bowers’ suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above.

“(i) The belief must be genuinely held.

(ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs*, 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 (paragraph 36 of *Campbell v United Kingdom* and paragraph 23 of *Williamson*)”.

22. The reference above to “Campbell” is to the ECHR’s decision in *Campbell and Cosans v UK* [1982] 4 EHRR 293.

23. The reference to *Williamson* is to the judgment of the House of Lords in *Williamson v. Secretary of State for Education and Employment* [2005] 2 AC 246, another decision relating to Article 9 of the European Convention on Human Rights. §23 of the judgment states as follows:

§23 “Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of “manifestation” arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot

always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention”.

24. The reference to McClintock is to the EAT decision in *McClintock v. Department of Constitutional Affairs* [2008] IRLR 29. I note the following criterion identified 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.”

25. The Equality and Human Rights Commission (“EHRC”) Statutory Code of Practice on Employment (2011) at §2.59. sets out the criteria listed in *Grainger* (above). §2.57 and §2.58 also state as follows:-

“A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include Humanism and Atheism. A belief need not include faith or worship of a God or Gods but must affect how a person lives their life or perceives the world”

26. As held in *Forstater*, in light of the requirement under section 3 of the Human Rights Act 1998 to read and give effect to statute provisions in a way which is compatible with the rights conferred by the European Convention on Human Rights (“ECHR”), Articles 8, 9 and 10 will be relevant. It would appear that Section 10 of the Equality Act 2010 consciously mirrors Article 9:

26.1. Article 8 right to respect for private and family life

26.2. Article 9 freedom of thought, conscience and religion.

(1) Everyone has the right to freedom of thought, conscience and religion, this right includes the freedom to change his religion or belief and freedom, either alone or in a community with others and in public or in private to manifest his religion or belief in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or belief 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.

26.3. Article 10 freedom of expression.

27. Pursuant to the ECHR, the freedom to hold and manifest belief is to be enjoyed without discrimination as defined by Article 14 of ECHR.

28. The EHRC at §2.60 and §2.61 sets out the position on manifestation of religion or belief (at page 41).

“While people have an absolute right to hold a particular religion or belief under Article 9 of the European Convention on Human Rights, manifestation of that religion or belief is a qualified right which may in certain circumstances be limited. For example, it may need to be balanced against other Convention rights such as the right to respect for private and family life (Article 8) or the right to freedom of expression (Article 10) [2.60].

Manifestations of a religion or belief could include treating certain days as days for worship or rest; following a certain dress code; following a particular diet; or carrying out or avoiding certain practices. There is not always a clear line between holding a religion or belief and the manifestation of that religion or belief. Placing limitations on a person’s right to manifest their religion or belief may amount to unlawful discrimination; this would usually amount to indirect discrimination [2.61].

Example:

An employer has a ‘no headwear’ policy for its staff. Unless this policy can be objectively justified, this will be indirect discrimination against Sikh men who wear the turban, Muslim women who wear a headscarf and observant Jewish men who wear a skullcap as manifestations of their religion.”

Oral evidence

29. The claimant was asked a series of questions about rules. I set out below his oral evidence. Where a question and answer were similar to a previous question and answer, I do not set it out. 46 questions were asked in cross examination. I asked two questions. There was no re-examination.
30. He accepted that he was obliged to follow rules on how to operate different types of aircraft. When asked to confirm that he did not get to decide which rules of flying an aircraft adopts, he said “*it was never an issue until recently*”. He agreed that he did not “*but written into the manuals, the Captain has the opportunity to disregard anything in the manual*”. When asked about uniform rules at the respondent, the claimant said: “*We have to wear the uniform as prescribed. We accept those points when we accept the job and sign the contract*”. The claimant accepted that if taking medication which was incompatible with flying, he could not fly. The claimant stated: “*I have not had exposure to such a medical diagnosis. It is prescribed by the Civil Aviation Authority*”.
31. The claimant would follow the speed limit on a motorway at night, even though he agreed that at that time, it “*might*” seem arbitrary. He stated that this was because “*it is a law*”. He confirmed that smoking on an aircraft was prohibited, although in a past era pilots could, because “*it is a law*”.

32. The claimant accepted that some people must wear masks in their job. When asked about whether a surgeon undertaking heart surgery could opt out of mask wearing, he stated: *"I don't know if they make them wear a mask. Maybe they think it keeps them and the patients safe. I am not a surgeon"*. When asked whether a surgeon have the right to refuse to wear a mask, he stated: *"There are some studies where surgeons did not wear a mask. There are some studies where the outcomes were better"*.
33. The claimant accepted that studies might change in outcome so that for example smoking in pregnancy was no longer thought to be okay. He was asked if a study said that masks were effective, would he agree to wear a mask. The claimant stated: *"Not necessarily. Even so, it would not make me. If I were not sick, I could not pass on a respiratory virus. Why would I have to wear one if not sick. If I were sick, I would stay at home"*. It was suggested to the claimant that there was evidence to show that he would not know if he were sick. When asked if he would think he had a right not to wear a mask in those circumstances, he said: *"maybe"*. The claimant accepted that technology improves over time. When asked if he would wear a mask, where he was convinced that masks were helpful in stopping a deadly virus, he said: *"I cannot envisage that scenario. When you asked before would I accept having been given new evidence, I said maybe. On further reflection, I cannot see that would affect my judgment"*.
34. When asked if no new evidence could ever sway him, the claimant stated: *"I am not saying that. It is very unlikely I believe"*. He was asked to confirm that he had formed his view based on reading studies. The claimant stated: *I formed the belief based on the fact that no-one wore a mask ever in the entirety of human existence. I believe if cloth masks stopped the transmission of disease, humans would have worked that out when cloth was first invented. We breathe the air to keep healthy"*.
35. The claimant was asked what the studies in the bundle were for? Was he relying on those studies as having helped him form his view? The claimant stated: *"Some of them. They are examples of the evidence which helped me to form my belief. None presented to me that have contradicted those studies. That is important to me"*.
36. When asked what the skeleton argument meant when it stated that *"he had dedicated himself [to that belief] in terms of how he has been able to work"*, the claimant stated: *"I routinely refused to wear a mask and I haven't wavered. They stopped my wages. They used their bullying technique with employees or pilots making you go to their in house doctors to see if fit to fly. Even to the point of having an interview with the CAA psychiatrist. I did not shirk from any of that. I knew that my belief was real and that..more than that. It was causing me anxiety and personal harm to be told to wear a mask. There are Government exemptions"*. When asked what the skeleton argument meant when it stated that: *"he had dedicated himself [to that belief]...in what he wore"*, the claimant stated: *"it must mean what I didn't wear"*.

The claimant's belief – documentary evidence

Claimant's letter dated 10 February to David Payne

37. In a letter from the claimant to David Payne B777 line manager dated 10 February 2022, the appellant explained his position [63-67]:

"During our phone call, we discussed how, in failing to allow exemptions to crew, similar to that stated in OMB.2.35.1.b when exemption to passengers is conferred, the wording of OMB.2.35 is in breach of the Equality Act 2010. We discussed how that legislation applies equally to staff members and not just to customers" [§5 and §1 of 64-65]

*"I explained how BA has a duty of care to treat its staff with dignity and respect."
[§2, 65].*

"You went on to ask whether I felt able to fly my next rostered trip to JFK on 16 February and explained your view that I might be able to "get by" somehow (my paraphrasing within the inverted commas) and thereby increase my confidence in my ability to operate without any need for BA to make changes to OMB or to provide me with a written exemption. Although I maybe didn't verbalise it succinctly, at the time, I think this suggestion misses the point somewhat. What I need to avoid is the anxiety that I might be forced to wear a mask on UK soil and on BA aeroplanes in order to continue my duties and earn a living. Bound up in this anxiety is the fear that I might come across another trainer, or line captain, or any petty authoritarian, who believes that they can attempt to make me wear a mask because everyone else does and because it is written, illegally, in OMB. Having to face such a situation again without any recourse to written evidence that I am not required to wear a mask because I am exempt and that I should not be questioned about my exemption, would place me in a situation of further humiliation and infringe my right to be treated with dignity and respect whilst at work. BA has a duty of care to me, as it is employee to shield me as far as is possible from the potential of finding myself in any such situation again in the future" [§5, 65].

38. In the course of this letter, the claimant asked Mr Payne and Captain Cheadle to answer 14 questions which included:

- 38.1. *Does BA officially belief and assert that it is my responsibility to put myself in position of extreme anxiety, discomfort, and humiliation because "some crew" might have vulnerable folk at home? [Question 2, 66].*
- 38.2. *What is BA's view or feeling about whether "some crew" might be better advised to stay away from work themselves if they are scared of coming to work because someone on the crew who is not sick is not wearing a mask? [Question 4, 66].*
- 38.3. *How does BA justify the continuation of a mask mandate, for flying staff only, when the UK government has already repealed its pseudo-legislation (guidance) on their use? [Question 9, 67].*
- 38.4. *What scientific due diligence was done by BA when deciding that while masks are needed to be worn by pilots when visiting the passenger*

cabin, masks need not be worn whilst occupying the flight deck? Please provide examples of properly authored scientific studies to back up this decision making process [Question 11, 67].

39. After the claimant had taken part in an Occupational Health assessment concerning fitness to fly on 16 February 2022, a letter from the claimant's solicitors, Kilgannon and Partners, dated 18 February 2022, set out the claimant's position [71-73]. I summarise this:
- 39.1. The Occupational Health assessment was be treated with caution because it had a narrow purpose and its conclusion that the claimant was unlikely to be disabled was unreliable and disputed.
- 39.2. The respondent was requested to treat the claimant as disabled and to make reasonable adjustments A and B§:
- 39.2.1. A. Provide written confirmation to the claimant that he is exempt from wearing a mask; and
- 39.2.2. B. Amend the OMB policy to accommodate local government guidance and more flexibility for those like our client; allowing staff like our client not to wear a mask if they so choose.
- 39.3. Making those reasonable adjustments would avoid further stressful incidents and more serious psychiatric implications, which would otherwise entitle the claimant to claim discrimination and harassment.

ET 1 particulars of claim

40. In his ET1 particulars of claim, the claimant refers to his belief as follows:

§5 . "During the time I was absent from work, I read a lot of information about COVID-19 and found that I was increasingly in disagreement with the government response to the pandemic and experienced increasing anxiety about public health policy. I was frightened by what I believe to be government overreach and I became very concerned about the future. In July 2020, the government mandated the wearing of face masks in indoor public places. I was distressed by this new regulation. I understood this mandate to be an extraordinary regulation in the UK and, like all other COVID-19 restrictions and mandates, alien to my understanding as to what it is to live in a liberal democracy."

Claimant's witness statement

41. I set out below the paragraph in which the claimant's states his belief in his witness statement:

§3: "My claim here is that I have an inherent right to "breathe freely", a phrase I use both metaphorically and literally. Metaphorically, it implies my entitlement to freedom from undue restrictions and impositions on my personal liberty, which I argue are currently being violated. Literally, I am referring to the right to breathe without obstruction".

§4: *“In the context of my argument, the “arbitrary and pointless rules” I refer to are the mandates, directives and regulations that have, I argue, unduly impacted my personal liberties and right to breathe freely. I posit that these regulations were hastily conceived and imposed without an adequate foundation of scientific evidence, or rigorous, peer-reviewed study. The argument is not against regulation per se but against restrictions that I perceived to be without basis in solid, empirically supported science”.*

Preliminary Hearing before EJ Quill

42. In the CMO from this PH, the belief relied upon by the claimant was set out as follows [48]:

“I am a sovereign being who has a right to breathe freely and should not be subjected to arbitrary and pointless rules which have prevented me from so doing, whilst having no basis in science and for which there is no supporting evidence.”

Analysis

43. I have considered and applied the *Grainger* criteria. The burden was on the claimant to establish the nature of his belief. The claimant contended that all the *Grainger* criteria were met. The respondent disputed that any of the *Grainger* criteria were met.

Grainger criterion (i) - The belief must be genuinely held

44. The reports of the clinical psychologist, Dr. Storah and CAA psychiatrist, Professor Cleare show that the claimant experienced stress and some anxiety when faced with a situation in which he might have to wear a mask and in which he might be questioned by more senior pilots for indicating that he would not wear a mask. Professor Cleare stated:

44.1.1 *“There was no history of any abnormal beliefs or behaviours. I did not think his views about the pandemic were indicative of any psychotic processes and his views are shared by a not insignificant number of people in the general population” [90].*

45. I am satisfied that the views that the claimant has expressed were genuinely expressed.

Grainger criterion (ii) - It must be a belief and not an opinion or viewpoint, based on the present state of information available

46. I find that the claimant’s statement as set out above is an assertion which justifies the view viewpoint or opinion that a person should not be treated detrimentally for considering that there is no justification for a mask. I do not find that it amounts to a belief and meets *Grainger* (ii). I base this finding on the claimant’s written and oral evidence and the references he made to the role of scientific research:

- 46.1 His definition of his belief includes three components - the right to breathe freely, the right not to be subject to arbitrary or pointless rules and the right not to be subject to rules which are not based on scientific evidence. The claimant has presented these three components as connected in how his belief is set out.
- 46.2 The claimant formed his viewpoint or opinion, having read scientific evidence about masks. His particulars of claim sequence events in this order: he read "*a lot of information about COVID-19 and found that I was increasingly in disagreement with the government response*". The "and" suggests a causal connection on the plain meaning of those words. Reading came before finding that he disagreed.
- 46.3 The claimant admitted under cross-examination that that his stance on face masks had been formed to some degree or extent after reading articles in the bundle dealing with scientific evidence for masks. Specifically, he said that "*some of the studies in the bundle were examples of evidence which had helped me to form my belief*". I note that Ms. Banton summarised his evidence in her closing submission as his belief being in no way reliant upon scientific research. In her submission, the claimant had formed his belief and then read scientific articles. This, however, does not represent what the claimant wrote or said.
- 46.4 When asked if he would change his mind if a scientific study showed masks were effective, the claimant said "*not necessarily*". I note that the claimant did not say immediately "*no*". I would have expected that response if this were a belief.
- 46.5 Eight questions after being asked this, perhaps realising that what he had said would not satisfy Grainger ii (which he quotes in his witness statement), the claimant revised his answer and said that "*when you asked before would I accept masks, having been given new evidence, I said maybe. On further reflection, I cannot see that would affect my judgment*". In other words, he would not change his mind because of scientific research.
- 46.6 He accepted that evidence showed an individual might not know if they were sick. When asked if he would wear a mask in those circumstances, he said "*maybe*". I note that the claimant did not say immediately "*no, I would not*". I would have expected that response if this were a belief.

Grainger criterion (iii) - It must be belief as to a weighty and substantial aspect of human life and behaviour

47. For the avoidance of doubt, in case I am wrong about this, the claimant would have failed on other *Grainger* criteria.
48. There is no doubt that the pandemic was of huge significance and possessed an adequate degree of seriousness and importance, although it was a transient phenomenon.

49. The claimant's belief, however, is a narrow belief. The claimed belief does not affect how the claimant lives his life or perceives the world except in a very narrow way so does not satisfy the requirement in the EHCR code. It does not relate to other aspects of daily living such as diet, clothing, consumption, travel, financial needs and resources, and relationships. It is not at the heart of interaction between humans.

50. The belief was referred to and was centred on the claimant himself and the one step he was taking (i.e. not wearing a mask) in order to ensure that one facet of breathing without disturbance or restriction was preserved.

51. A belief must be more than a collection of concepts: *Main v Scottish Ministers'* **ET Case No 4104873/17**. The claimant's belief was a concept.

52. The claimant therefore does not meet *Grainger* (iii).

Grainger criterion (iv) - It must attain a certain level of cogency, seriousness, cohesion and importance

53. In his first written communication in the bundle with the respondent about mask wearing at work (his letter dated 10 February 2022), the claimant did not describe a belief as governing his actions. Nor did he describe the requirement for him to wear a mask at work as preventing him from manifesting a belief. Instead, he said that requiring him to wear a mask at work was a failure to treat him as a staff member with dignity and respect.

54. He continued by saying that he needed to avoid the anxiety of being forced to wear a mask at work and the humiliation that arose when questioned by more senior (unsympathetic) pilots. If the claimant had considered that underpinning this was a belief of sufficient cogency, seriousness, cohesion and importance, I find it more likely than not that he would have mentioned this belief in the letter dated 10 February 2022.

55. The solicitors' letter of 18 February 2022 requires that the claimant is treated as disabled and reasonable adjustments are made. Although it threatens a discrimination and harassment claim, this is in the context of the protected characteristic of disability. There is no reference to the protected characteristic of philosophical belief. Had the claimant's belief been of sufficient cogency, seriousness, cohesion and importance, I find it more likely than not that he would have mentioned it to his solicitors and it would have featured in the solicitors' letter. Despite what was originally asserted by the claimant's solicitors, the claimant does not appear to say that he has a disability which exempts him from wearing a mask.

56. The claimant has not lived his life by his belief, although Ms. Banton's skeleton argument suggested that he did. She wrote that "*he has clearly dedicated himself to that belief in terms of how he has been able to work, what he wears, and he has persisted in this belief*" [§13]. When asked how he had dedicated himself to that belief in terms of how he had been able to work, the claimant answered by reference to his persistence: "*I routinely refused to wear a mask and I haven't wavered.. I did not shirk from any of it*". "*Any of it*"

referred to his view of pressures from the respondent to make him conform by stopping his pay and forcing him to visit medical professionals for an assessment. When asked how he had dedicated himself to the belief in terms of what he wore, he replied: *“it must mean what I didn’t wear”*. Thus, his dedication to the belief consisted of persistently not wearing a mask. No other facet of his life was involved.

57. The claimant therefore does not meet *Grainger* (iv).

Grainger criterion (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

58. The claimant admitted in oral evidence that he would not know if he were infected with COVID-19. This would mean that he could conceivably come into contact with an individual (A) who lived with another individual (B) and who was vulnerable, without his knowing this. This could lead to A becoming infected and unwittingly, having considered they had taken all necessary precautions, infect B who might become very seriously ill and die. During the pandemic, information in the public domain showed that the course of COVID-19 at certain stages of the pandemic was unpredictable and could result in deterioration and death.

59. The claimant seems to recognise that his exercising his human rights in relation to not wearing a mask could cause a problem to those who were vulnerable. He makes the point in his letter of 10 February 2022 via two questions to Mr Payne that those living with the vulnerable should stay home and not come to work in preference to his having to stay home and not come to work [66].

60. His belief is therefore in conflict with the fundamental rights of others, such as Article 2, right to life (defined as *“no-one shall be deprived of his life intentionally”*).

61. The claimant therefore does not meet *Grainger* (v).

Conclusions

62. The claimed belief does not meet the 5 *Grainger* criteria and is not a philosophical belief within s10(2) Equality Act 2010.

63. The CMO dated 26 March 2023 listed the Full Merits hearing from 7 May 2024 – 10 May 2024 and 13 May 2024 – 15 May 2024. Both parties intend to write to the Tribunal with applications to vacate/retain these dates with reasons.

I confirm that this is my written Judgment with reasons in *Burch v British Airways Plc* No: 3309902/2022 and that I have approved the Judgment for promulgation.

Employment Judge Coll

Date: 29 July 2023

Sent to the parties on: 21/8/2023

For the Tribunal Office

N Gotecha