Neutral Citation Number: [2025] EAT 73

Case No: EA-2023-001452-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 May 2025

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

- -

Between:

AB

Appellant

- and -

CD LTD

Respondent

- -
- -

The Appellant appeared in person
Mr Andrew Edge (instructed by Clyde & Co) for the **Respondent**

Hearing date: 4 March 2025

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JUDGMENT

SUMMARY

Disability Discrimination

Religion or Belief Discrimination

The Appellant (who was the Claimant below) claimed that the Tribunal had erred in rejecting his claims of disability and belief discrimination. During the pandemic, the Respondent imposed a policy requiring employees to wear a face mask whilst attending the office for work. The Claimant was unable to comply allegedly because of disabilities arising from two impairment, the first being a propensity to suffer panic attacks and the second being a profound psychological aversion to wearing face coverings. The Claimant also contended that being compelled to wear a face mask was contrary to his philosophical belief in freedom, dignity, bodily autonomy and integrity. At a preliminary hearing convened to determine the issues of disability and belief, the Tribunal, noting that the Claimant had ceased to take any medication for panic attacks in about 2013, found that a propensity to suffer panic attacks in connection with wearing a face covering had not been established. It also found that in the absence of any medical evidence as to the purported psychological aversion, there was no impairment in that regard either. Accordingly, the claims based on disability were rejected. As to belief discrimination, the Tribunal concluded that the belief as presented to the Tribunal was insufficiently cogent or cohesive to satisfy the *Grainger* criteria (*Grainger PLC v Nicholson* [2010] ICR 360). In coming to that conclusion, the Tribunal noted, in particular, that the Claimant's beliefs were closely associated with spurious notions about mask-wearing being necessarily associated with slavery, subjugation and Munchausen's Syndrome by proxy. The Tribunal also considered that, in any event, the Claimant's claims of discrimination were bound to fail due to the absence of any disparate treatment or any group or individual disadvantage. The Claimant appealed.

Held, dismissing the appeal, that the Tribunal had not erred in concluding that the Claimant had failed to establish the existence of an impairment and therefore any disability, within the meaning of the *Equality Act 2010*. The Tribunal could not simply assume, in the absence of medical evidence, that the Claimant's claimed reaction to mask-wearing was such as to amount to an impairment. As to the

Claimant's belief, the Tribunal was entitled to consider the evidence of the belief as it had been presented, even if the Claimant now contends that the matters which the Tribunal found lacked cohesion or cogency did not in fact form part of his belief. There was no error in respect of the Tribunal's conclusions as to direct and indirect discrimination.

THE HONOURABLE MR JUSTICE CHOUDHURY:

Introduction

1. I shall refer to the parties as "the Claimant" and "the Respondent" as they were below.

2. This is an appeal against the Judgment of the Huntingdon Employment Tribunal, Employment Judge Ord presiding, that:

i. the Claimant did not have a disability within the meaning of s.6 of the *Equality Act 2010* ("the 2010 Act")

ii. the Claimant's philosophical belief in "every individual's fundamental right to freedom, dignity and bodily autonomy and integrity" is not a protected belief within the meaning of s.10 of the 2010 Act; and

iii. the Claimant's claims of discrimination should be struck out.

3. The Claimant contends that the Judge erred in coming to those conclusions. The Claimant represented himself, as was the case below, and did so with clarity and conciseness. The Respondent was represented by Mr Andrew Edge of Counsel, who also appeared below. I am grateful to both of them for their helpful written and oral submissions.

Factual Background

4. The background to this matter may be briefly stated as follows. The Respondent is part of a group of companies that specialise in the management of legacy and run-off insurance / reinsurance portfolios. The Claimant is a claims adjuster based in the Respondent's Ipswich office and has been employed by the Respondent since 2018. The Claimant's work was, prior to March 2020, entirely office based.

5. In March 2020, when the pandemic struck, the Respondent closed all of its offices in accordance with the Government's instructions. The Claimant, like all of his colleagues, was instructed to work from home. The Claimant complied with this instruction despite finding it difficult

to do so.

6. On 7 April 2020, the Claimant was sent a workstation self-assessment form in relation to home working. He completed that on 18 June 2020, stating that he did not have any special requirements that needed consideration. The Claimant made it clear to his employer in communications around this time that he did not agree with the lockdown as a response to the pandemic, describing it as "illegal and suicidal". He did not disclose anything that would have alerted his managers to any potential disability.

7. On 14 July 2020, the Government issued Guidelines in relation to the wearing of face coverings or masks. Businesses and employers were informed (in the July 2021 version of the Guidelines) that they:

> "…must complete a risk assessment and take reasonable steps to manage risks to the health and safety of their workforce and customers in their workplace or setting, including the risks of Covid 19. Businesses can require or encourage customers, clients, or their workers to wear a face covering.
>
> When completing a risk assessment, you would need to consider the reasonable adjustments needed for staff and customers with disabilities."

8. Around that time, the Respondent indicated that upon the office reopening, staff would be required to wear facemasks while moving around the office. The Claimant wrote to his managers in October 2020, objecting to any requirement to wear masks, stating, amongst other matters, that the wearing of masks was "pointless" as studies had shown them to be "useless against viruses"; that they amounted to a "non-pharmaceutical medical intervention"; and that "forcing healthy people to act as if they are sick is Munchausen Syndrome by proxy which is a crime in certain circumstances… [and] certainly constitutes physical and psychological abuse…".

9. He further stated that:

> "Given the physical and psychological harm they cause, I cannot wear a mask without there being any sound medical reason to do so, and, with all the evidence available, I firmly believe that no employee should be made to wear one against their will".

10. The Respondent's Ipswich office did not reopen in 2020 and in fact remained closed until 10 May 2021. The Respondent carried out risk assessments prior to the gradual reopening of the office and issued documents setting out its policy on the wearing of masks. The policy provided:

> "Will masks be required? and, if so, will they be supplied?
>
> Face coverings will be supplied, and the general rule will be to wear the mask whilst moving around the office, unless you are exempt for medical reasons. You will be supplied with a face covering or you can choose to wear your own. This requirement will be reviewed after 19 July".

11. As to exemptions, the policy stated:

> "Do people have to show a doctor's note to prove that they are medically exempt?
>
> Yes, a doctor's note will be required if you won't be wearing a face covering because you are medically exempt. Please advise your line manager of your exemptions so they are aware, and they will advise you to provide the note directly to [EF]. If you are unable to obtain a doctor's note in time for this weeks' return to the office, we kindly ask that you continue to work from home until you can provide the note. By way of reminder, unless you are medically exempt, face coverings are mandatory whilst moving around all our offices. They are not required when seated at your desk or in the meeting rooms."

12. This policy was applied to Respondent's employees based in Ipswich from 10 May 2021, when the process of gradual reopening commenced. The Claimant wrote to his managers in June 2021, stating that he was "legally exempt" from wearing a mask, and in August 2021, he stated that:

> "Requiring employees to wear masks is unnecessary, perverse, physically and psychologically harmful and an infringement of the right to bodily autonomy".

13. On 18 August 2021, the Claimant told one of his managers for the first time that he felt he could not wear a mask because he had "experienced panic attacks whilst at University". However, he declined to inform HR about this.

14. The Claimant had experienced panic attacks earlier in his life and took medication to control the onset of such attacks between 2004 and 2013. However, the Tribunal found the Claimant had not suffered any such attacks "since 1995" and that there was no medical or other evidence before it to support the Claimant's contention that wearing a face covering would cause a panic attack. I should make it clear that the Claimant says that his contention was not that wearing a face mask *would* cause

a panic attack but that it *could* do so, given his history.

15. The Claimant did not attend the office because of the requirement to wear a mask when not at one's desk. Whilst the Claimant's managers had requested that he provide a doctor's note to exempt him from that requirement, the Claimant stated that doctors did not provide such notes.

16. The Respondent's Ipswich office remained closed until 23 February 2022, when all restrictions on attendance, including any requirement to wear a mask at work, were lifted.

17. By a Claim Form and Particulars dated 21 May 2022, revised on 26 July 2022, the Claimant brought a number of claims against the Respondent, including claims of discrimination. The precise nature of the discrimination claims was not entirely clear, although in a section of the Revised Particulars entitled, "Addendum to provide clarification of the original particulars", the Claimant contended that he was disabled within the meaning of the 2010 Act throughout the period that the Respondent required its employees to wear masks while carrying out day to day activities:

> "…owing to his pre-existing impairment and also, separately and independently from his medical history, the Claimant's severe psychological revulsion and disgust at the prospect of being forced to wear a mask."

18. The Claimant relied on three protected characteristics set out in the Revised Particulars as follows:

> **"Protected Characteristic – Disability (Medical)**
>
> 152. Purely medical and relating to the Claimant's personal medical history of panic attacks, hyperventilating etc. The disability as defined by Section 6(1) of the 2010 Act arises from the Claimant's existing long-term impairment combined with the new "normal day to day activity" required by the Respondent.
>
> **Protected Characteristic – Disability (Non-medical)**
>
> 153. For the Claimant and many others mask requirements amount to a physical and psychological assault causing severe distress and humiliation regardless of their medical history. That susceptibility amounts to a "disability" as defined under Section 6(1) of the 2010 Act but is not necessarily related to medical history so would not be confirmed by a doctor even if they did provide exemption letters.
> 154. This is also covered by common law duty of care: The Claimant is entitled to refuse to commit significant physical or psychological self-harm and cannot be penalised by

> exclusion from his contractual place of work for refusing to do so. Forcibly covering someone's nose and mouth is a trespass to the person and would likely amount to the offences of assault and battery were it imposed directly and caused distress. It is difficult to see how forcing someone to do this to themself via coercion is not also assault and battery if the victim is unwilling.
> 155. Forced mask wearing is a trespass to the person and a breach of the right to refuse medical interventions.
> 156. As well as the physical, visceral revulsion, the distress caused is also closely related to the Claimant's philosophical beliefs:
>
> **Protected Characteristic - Belief**
>
> 157. The Claimant has always believed that every human has the fundamental right to freedom, including medical freedom, dignity, bodily autonomy, and integrity. These rights are so fundamental that the Claimant had believed they were uncontroversial and universally accepted prior to Covid.
> 158. No one has the right to interfere with intimate parts of another's body. The nose and mouth are intimate areas. One does not touch another's nose, mouth or face without consent. To do so is a trespass to the person and can amount to assault and battery in law.
> 159. Given that a mask interferes with rhythm of the wearer's breathing and what is inhaled and exhaled in constitutes a de facto medical intervention. Forced medical interventions are a breach of fundamental medical ethics. People whose occupations require them to wear masks have implicitly consented to do so. People who work in offices do not.
> 160. The right to refuse unwanted medical interventions is protected by law.
> 161. The Claimant's application of his beliefs to the issue of masks is entirely consistent with his approach to other issues of personal freedom, bodily integrity, human dignity and medical ethics, such as the issue of forced/coerced vaccinations for example.
> 162. The Claimant possesses substantial evidence of his campaigning for and promotion of his beliefs over the last two years."

19. By the stage of the hearing before the Judge and before the EAT, the Claimant had refined his case, by stating that his inability to wear a face mask arose from the following protected characteristics:

> "Disability, owing to two separate impairments, each sufficient in itself:
> - My medical history of panic attacks ("First impairment") and
> - My profound psychological aversion to invasive bodily impositions such as being required to wear a mask ("Second impairment"), and because of my philosophical beliefs.
>
> My philosophical beliefs, described broadly as "Every individual's fundamental right to freedom, dignity and bodily autonomy and integrity."

20. It can be seen that the Second Impairment relied upon, namely the "profound psychological aversion" to being required to wear a mask, was not, even on the Claimant's own case, entirely separate from his philosophical beliefs, which appear also to have contributed to the claimed aversion.

Case Management History

21. By a Case Management Order (CMO) made on 23 August 2022, shortly after the Claimant had lodged his Revised Particulars of Claim, the Tribunal required the Claimant to provide further details of the impairments, their effect on the Claimant's ability to carry out day-to-day activities, and any measures to treat or correct the impairments. By paragraph 3 of the 23 August 2023 Order, the Claimant was required to provide GP and other medical records "relevant to whether they had a disability at the time of the events the claim is about…"; anything they have in writing which will help show that they have the relevant disability or the effect which the disability has on them (including a letter from a doctor); and "any other evidence relevant to whether they had the disability at that time".

22. This CMO was not confined to the production of evidence for any specific hearing but was clearly intended to provide the Claimant with the opportunity to adduce all of the evidence on which he intended to rely on at trial in support of his claim that he was disabled at the relevant time.

23. The Claimant duly complied with that CMO on 12 September 2022, providing the Tribunal and the Respondent with his medical records (including his GP records) and a Disability Impact Statement.

24. As to the Second Impairment, the Claimant said that he cannot wear a mask without the risk of suffering significant psychological distress. He stated that a significant minority of people, including himself, find the practice of being forced to wear masks against their will "profoundly humiliating and degrading given their historical and cultural associations with slavery, imprisonment and subjugation." The Claimant goes on to say that:

> "41. This is significantly compounded by the fact that there is very little evidence that masks prevent viral infection in community settings and that masks were imposed primarily for political and psychological reasons after they were originally specifically advised against. Being required to do something inherently degrading is bad enough but when you know that it is primarily for manipulative rather than genuine medical reasons

> it is intolerable.
> 42 Forcing people to carry out degrading, performative rituals that serve no real purpose is a recognised form of torture used by totalitarian regimes to break people's spirits.
> …
> 46. It is therefore entirely reasonable to regard causing people significant personal humiliation and distress by forcing them to wear masks as not only a physical trespass to the person but as a psychological assault.
> 47. The Respondent has a common law duty of care not to harm its employees, either physically or psychologically.
> 48. Furthermore section 6(1) of the Equality Act 2010 gives a very broad definition of what constitutes an impairment. It is not restricted to medical conditions. Under that definition it is entirely logical and reasonable to include anyone who would suffer genuine psychological distress at having to carry out the "normal day-to-day activity" of wearing a mask."

25. By letter dated 24 September 2022, the Respondent made an application to strike out the Claimant's claims of disability and belief discrimination, on the grounds that neither had any reasonable prospect of success.

26. The Tribunal directed that there be a case management hearing on 6 December 2022. In preparation for that hearing, the Claimant provided an agenda in which he said (at [6.4]) as follows:

> "The Claimant has already submitted redacted medical records evidencing the first of his two impairments, the second being non-medical. He does not believe a medical expert is necessary to establish that he has a long-standing medical impairment as defined under the Equality Act 2010."

27. At the preliminary case management hearing on 6 December 2022, the Tribunal listed a one-day Preliminary Hearing to take place on 2 August 2023, the purpose of the hearing being "to hear the Respondent's application for the claim to be struck out on the basis that the Claimant's reliance on his claimed disability and philosophical belief is not tenable to the extent that his claim has no reasonable prospect of success." The Claimant was further directed to write to the Respondent confirming what physical or mental impairments he relies on. The Tribunal noted that at the hearing the Claimant had described his disability as being "a phobia of having panic attacks, which were historically triggered by hyper ventilation." Directions were given as to the specific details to be included in the Claimant's witness statement and the Claimant was permitted to adduce "Any other information Claimant relies on to show that he/she had a disability". In particular, by paragraph 7.1

of the order the Claimant was directed to send to the Respondent:

> "7.1 copies of the parts of his/her GP and other medical records that are relevant to whether he/she had the disability at the time of the events the Claimant is about.
> 7.2 any other evidence relevant to whether he had the disability at that time."

28. As to his claim of belief discrimination the Tribunal noted that the Claimant described his philosophical belief as "a fundamental belief in a universal right to bodily integrity and autonomy and dignity". The Claimant was further directed to establish that this was a philosophical belief held by him.

29. Following further correspondence between the parties and the Tribunal, on 13 June 2023 Employment Judge Fredericks-Bowyer directed that the one-day preliminary hearing then currently listed was to be vacated and a 3-day private preliminary hearing be listed instead. The reason for that decision to relist was said to be that:

> "The hearing is to consider the Claimant's disability status and his philosophical belief, to make determinations about those, and then to consider whether or not any of the claims should be struck out following that exercise. This is going to require hearing evidence from the Claimant, as well as evidence about his beliefs which he seeks to rely upon as a protected characteristic. The hearing should be listed in private for consistency with the anonymity order previously given." (Emphasis added)

30. As to medical disclosure, the Tribunal said as follows:

> "I am concerned that the remains an issue in relation to the disclosed medical evidence. If the evidence the Claimant seeks to rely upon at the hearing is partial, or the Judge hearing the cases considers that matters are concealed which should be open, the Claimant should be aware that this could affect the weight given to that evidence. This could lead to a decision which he considers to be adverse to his case."

31. It is clear from this further order made by Employment Judge Fredericks-Bowyer that the purpose of the preliminary hearing would be not only to consider the Respondent's application to strike out the Claimant's claims but also to make "determinations" as to the Claimant's disability and philosophical belief. This was further confirmed by the Tribunal's Notice of Hearing and CMO dated 14 June 2023, which stated that:

> "4. The purpose of the hearing is to hear the Respondent's application for the claim to be struck out on the basis that the Claimant's reliance on his claimed disability and philosophical belief is not tenable to the extent that his claim has no reasonable prospect

> of success. This will involve:
> 4.1 Hearing the Claimant's evidence about his disability and his religious and philosophical belief;
> 4.2. Making a determination about whether the Claimant is disabled or benefits from protection in relation to his philosophical belief;
> 4.3 The Respondent's application for the Tribunal to strike out all part of the Claimant's claim; and
> 4.4 To case manage the claim to final hearing, if the claim continues." (Emphasis added)

32. The Tribunal confirmed that previous orders continued to apply and should be complied with. At paragraph 6 of the CMO, the Tribunal said as follows:

> "6. There is a disagreement about how the Claimant described or characterised disability in the last telephone hearing. He has since sought to provide clarification and should have provided evidence to show that he has the disability alleged. The hearing will therefore consider disability(ies) which the Claimant has set out in his disability statement."

33. By letter 20 June 2023 to the Tribunal, the Claimant expressed concern that the change in the length of the hearing from 1 to 3 days may prejudice his preparation for it, and in particular that, had he known that this would be a three-day hearing, he would have submitted a "significantly greater volume of evidence and might have taken a very different approach altogether." The Claimant did not, however, seek an adjournment of the hearing or further time to prepare his case. I note that at the time of this letter being written there remained almost two months before the preliminary hearing was to be heard. The Tribunal does not appear to have responded to that letter.

34. In preparation for the hearing, the Claimant prepared a lengthy skeleton argument. In it he acknowledged that the purpose of the preliminary hearing was to "determine" whether the Claimant possessed the protected characteristics of disability and a belief within the meaning of the 2010 Act.

The hearing on 14th and 15th August 2023.

35. Although the hearing had been listed for three days, the Tribunal made clear at the outset of the hearing that it would be concluded in two days. The Claimant gave evidence and was cross-examined by Mr Edge. There is a note of that cross-examination prepared by the Respondent's Solicitor. The Claimant accepts that the note is accurate "in part", although he did not, in the course of the hearing before me, identify any part of the note with which he expressly disagreed, or which

was said to be incorrect. At the conclusion of the hearing, both sides were given the opportunity to make written closing submissions. The Claimant's written submissions extended to 350 paragraphs over 30 pages.

36. The Tribunal gave a reserved judgment handed down on 6 November 2023. The Tribunal concluded that the Claimant had not established that he was a disabled person at the material time and that the Claimant's belief was not a protected belief under s.10 of the 2010 Act.

37. As to the First Impairment, the Tribunal found, amongst other matters, that it had been a "number of years since the Claimant had suffered any panic attacks" and that he had "produced no evidence … that they would be "likely" to recur, nor any evidence in support of his contention that they would be triggered by the wearing of a face covering". The Tribunal considered the Claimant's allegation to be contrary to the fact that one of the strategies to be used to counter the onset of a panic attack was breathing into a paper bag, which, like a mask, would involve covering the mouth and nose.

38. As to the Second Impairment, the Tribunal agreed with Mr Edge that this was not an impairment, but in effect, an attempt by the Claimant to redefine his philosophical belief as a medical condition. The Tribunal went on to find that the alleged "psychological aversion" to wearing masks is "not supported by any medical evidence whatsoever" and was little more than an unsupported statement from the Claimant. The Tribunal considered that the Claimant could have called medical evidence or provided a report from an appropriate psychologist in support of his contention but failed to do so. Furthermore, the Tribunal found in relation to the Second Impairment that, far from relying upon any physical or mental impairment, the Claimant's reasons for refusing to wear a mask were more to do with his belief that the medical evidence did not support the wearing of such masks as a measure to prevent the transmission of Covid 19.

39. The Tribunal went on to find, in the alternative, that even if the Claimant had established that

he was a disabled person, his claims of direct and indirect disability discrimination and discrimination arising from disability would be bound to fail. This was because there was no disparity of treatment, in that all employees of the Respondent were subject to the same policy in respect of the wearing of masks in the office, and, in any event, the relevant managers had no knowledge of the Claimant's alleged disability at the material time. As to the claim of indirect discrimination, the Tribunal found that the policy of requiring everyone to wear masks whilst attending the office clearly touched on an important and serious matter, namely the pandemic, and non-compliance with the policy would amount to acting contrary to Government guidance which would have had an adverse effect on other members of the workforce. In other words, there was justification for the Respondent's actions.

40. In relation to the Claimant's claim of belief discrimination, the Tribunal found his belief in freedom, dignity, bodily autonomy and integrity was something so wide-ranging as to be "meaningless", and that in reality, the only possible sustainable beliefs which the Claimant has put forward are that: "Masks are associated with slavery, imprisonment, subjugation, aversion and humiliation" and that "they are ineffective in preventing the transmission of Covid 19 virus".

41. The Tribunal found that the first of these beliefs failed to satisfy the test in *Grainger PLC v Nicholson* [2010] ICR 360, and the second belief is a mere view or opinion of the Claimant on the basis of his understanding of the information available. The Tribunal found that, in any event, the Respondent's policy was proportionate in the face of the Government guidelines and the pandemic, and also found that there was no evidence of any group disadvantage or that the Claimant suffered any particular disadvantage as a result of any provision, criterion or practice.

The Grounds of Appeal.

42. By Notice of Appeal dated 18 December 2023, the Claimant sought to rely on 11 grounds of appeal against the Tribunal's judgment. Following a Rule 3(10) Hearing before HHJ Tayler, permission was granted in respect of all but Ground 1, which was a challenge to the two orders setting

up the Preliminary Hearing. Although permission was refused for Ground 1, HHJ Tayler considered that the orders for the Preliminary Hearing changed its purpose in a manner that may have been unfair to the Claimant given that the change occurred after much of the preparation for the Preliminary Hearing had already occurred and had left the nature of the hearing unclear.

43. The remaining grounds of appeal for which leave was granted are as follows:

> 2. The Judge wrongly dismissed the expanded definition of the Claimant's beliefs and summarily dismissed other highly pertinent documents;
> 3. The Judge wrongly refused the Claimant permission to cross-examine the Respondent's witnesses;
> 4. The Judge applied the wrong test for disability arising from the Claimant's First Impairment;
> 5. The Judge wrongly characterised the Claimant's profound psychological aversion to being compelled to wear a mask as an opinion or belief rather than an impairment;
> 6. The Judge applied the wrong test in determining whether the Second Impairment amounted to an impairment within the meaning of the 2010 Act;
> 7. The Judge misstated some of the evidence, made findings that were unsupported by the evidence, and relied upon a number of disputed assumptions unsupported by any evidence and/or which were contradicted by other evidence;
> 8. The Judge wrongly and perversely dismissed the relevance of the Claimant's beliefs by conflating his philosophical objection to anyone being compelled to wear a mask with a supposed objection to people wearing masks *per se*, something which was not alleged;
> 9. The Judge erred in failing to conclude that the Claimant's belief satisfied the *Grainger* criteria;
> 10. The Judge erred in his analysis of the claim of direct discrimination; and
> 11. The Judge erred in concluding that the Claimant suffered no particular disadvantage in the context of his claim of indirect discrimination.

44. I shall deal with each ground of appeal in turn.

Ground 2 - The Judge wrongly dismissed the expanded definition of the Claimant's beliefs and summarily dismissed other highly pertinent documents.

45. There are two aspects to this Ground of Appeal, the first being that the Judge wrongly dismissed the "expanded definition of the Claimant's beliefs". The Claimant claims that the Tribunal's Order of 14 June 2023 "invited the Appellant to expand upon" the nature of his beliefs in a further statement. That Order (at [7] thereof), did not in fact use the word "expand" at all, but merely invited the Claimant to "explain" the philosophical belief held, what that belief means to him and how it informs him day-to-day during his life. The Claimant had already had several opportunities by that stage to set out the belief relied upon. The belief was set out in his original claim form, albeit somewhat overlapping with what was said to be his non-medical Second Impairment, where it was said that "being forced to wear an unnecessary mask against one's will [was] a profoundly humiliating and degrading imposition and, given its very intimate nature, an assault on bodily integrity…". The Claimant went on to say that this belief was "not an obscure belief" given its long-standing historical and cultural precedent.

46. A further statement of his belief was set out in his Revised Particulars of Claim where it was stated that the Claimant has always believed that every human has the "fundamental right to freedom, including medical freedom, dignity, bodily autonomy and integrity". It is noted that this last description of his belief is precisely that which the Tribunal considered: see Judgment at [2] and [111]. The Claimant described his belief in similar terms at the Preliminary Hearing on 6 December 2022. There was no complaint following the case management order arising out of that hearing that the Tribunal had wrongly stated the Claimant's belief. In his witness statement dated 16 May 2023, the Claimant again referred to his belief in "body autonomy and personal medical freedom", and in his supplementary witness statement dated 24 July 2023, he once again referred to his belief in "the right to freedom, dignity and bodily autonomy and integrity", which he said was a "natural corollary" of his libertarian beliefs.

47. In that supplementary statement, the Claimant sought, for the first time, to describe a further belief in a section of the statement entitled "lack of belief". This was said to derive from the

Claimant's vehement opposition to what he described as a set of core beliefs "impervious to logic or evidence" surrounding the response to the pandemic, such as the belief that the lockdown and the wearing of masks were effective. In identifying this lack of belief, the Claimant was undoubtedly seeking to go beyond explaining his belief, as the Tribunal's order required him to do, and was seeking to introduce an entirely new belief not previously pleaded. It was in that context that the Judge refused to countenance the Claimant's reliance upon this additional belief. It can be seen from the notes of the hearing that once it was explained to the Claimant that he was seeking to introduce a belief not referred to in the claim form, he accepted that position and did not pursue the matter.

48. I can see no error or irregularity in the Tribunal's approach to this issue. Whilst the Tribunal would confer a degree of latitude on an unrepresented party, that latitude would not (without good reason) extend to permission to alter the nature or scope of a claim at this late stage in proceedings. As stated by Langstaff P in *Chandok v Tirkey* [2015] IRLR 195:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond.
> A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

49. Having had the opportunity - indeed several opportunities - to set out the nature of his belief and to explain it, the Tribunal was entirely correct, in my judgment, in refusing to allow the Claimant to include a belief that had not hitherto been pleaded. The Claimant contends that, far from being a different belief, his claimed lack of belief was merely a corollary to the belief in bodily autonomy. However, the Claimant's supplementary statement does not refer to his lack of belief as being a mere corollary to his belief in bodily autonomy; it is quite apparent that the claimed lack of belief stemmed from the Claimant's belief that the government's response to the pandemic was ineffective and had nothing to do with bodily autonomy.

50. The second aspect of this ground is that the Judge summarily dismissed "other highly pertinent

documents". This contention appears to be based on a misunderstanding of the Tribunal's decisions. As I understand the Claimant, the documents on which he intended to rely are those which relate to his Second Impairment and his belief and which explain why, according to him, many people are ideologically and morally averse to wearing masks in the context of the pandemic. However, the Tribunal did not "dismiss" these documents as suggested; they were considered but thought to be of no assistance to the Claimant's claims. For reasons which I will come to, that conclusion was not surprising. For present purposes it is clear that there is no substance to the Claimant's contention that the Tribunal "dismissed" any of his documents or evidence 'out of hand'.

51. For these reasons, Ground 2 is not upheld.

Ground 3 - The Judge wrongly refused the Claimant permission to cross-examine the Respondent's witnesses.

52. This complaint stems from the fact that the Claimant wished to cross-examine two of the Respondent's witnesses who in the event were not called to give evidence. Whether or not a party chooses to call evidence is a matter for that party, subject to any orders that the Tribunal may make, and the fact that another party is thereby deprived of the opportunity to question a witness does not necessarily give rise to any irregularity or unfairness.

53. The Claimant contends that there was unfairness here in that the Tribunal appeared to him to rely upon the content of the statements notwithstanding the fact that such content was contested by the Claimant. However, it is far from clear what content is said to have been relied upon in this way to the Claimant's detriment. The Claimant accepts that the Tribunal's findings of fact at paragraph 44 to 78 of the Judgement are "mostly correct in themselves". He contends, however, that some crucial facts are omitted from the Tribunal's findings. It cannot be said that such omissions (if there are any) derived from a reliance upon the content of the Respondent's witness statements. In the circumstances it is difficult to see that the Respondent's decision not to call its witnesses led to any particular

unfairness and/or disadvantage for the Claimant. The Tribunal expressly noted that, "when considering strike out, the Claimant's case must be taken [at] its highest. (*Mechkarov v Citibank NA* [2016] ICR 1211)": see Judgment at [35]. I can see no basis for inferring that the Tribunal did other than take that approach.

54. For these reasons, Ground 3 is also not upheld.

Ground 4 - The Judge applied the wrong test for disability arising from the Claimant's First Impairment.

55. The Claimant's contention under this ground of appeal is, firstly, that the Judge wrongly required him to prove that his impairment constituted a disability prior to the time that masks became mandatory requirement at work and elsewhere. He submits that given that the substantial adverse effect of his impairments only manifested once it became a requirement to wear a face mask in certain situations in 2020, he was not required to prove that he had satisfied s.6 of the 2010 Act at any time before that point. When probed (by me) as to what had led him to believe that he was being required to prove any disability before 2020, the Claimant responded that this arose primarily from the contents of paragraph 58 of the Judgment. This provides:

> "58. At that time [namely on 4 June 2020] the Claimant had not disclosed anything that would alert [Ms M or Mr D] to any potential disability. [Mr D], reasonably, formed the view that his issues appeared to be linked to political opinions and the Government's response to the Covid 19 pandemic."

56. On any objective reading of that passage, the Tribunal was not requiring that the Claimant prove that he was disabled prior to 2020. When I suggested to the Claimant that he may perhaps be reading too much into that passage, he agreed that that might be doing so but maintained that that was his interpretation.

57. In my judgment, this ground of appeal is based on an erroneous reading of the Judgment. As already stated, no objective reading of the passage relied upon could provide support for the Claimant's contention. Moreover, it is clear from paragraph 80 of the Judgment that the Tribunal

considered that the "material time" for the purposes of determining whether the Claimant was disabled, was "between the closure of the Respondent's office in Ipswich on 23 March 2020 (the announcement of the first national lockdown) and 23 February 2022 when all restrictions on attendance at the Respondent's premises, including any requirement to wear a mask, were lifted." When the Judgement is read properly and as a whole, there can be no doubt whatsoever that the Judge did not err in the way suggested by the Claimant.

58. The second, and more fundamental, challenge arising under ground 4 is that the Judge applied the wrong test in determining whether the Claimant had a disability. In particular, the Claimant contends that instead of considering whether avoiding masks was *reasonable* given the Claimant's medical history, the Tribunal applied the test of whether wearing a mask *would* have caused him to suffer from panic attacks. The Claimant submits that there was a very well-established nexus between interference with breathing and panic attacks, as supported by evidence which he placed before the Tribunal, including evidence from a charity for those who are prone to suffer panic attacks. The Claimant submits that that evidence establishes that the allegation of disability was entirely "tenable" as required by the original order for the Preliminary Hearing and that this satisfied the objective test for determining whether a disability existed. The Claimant further submits that the Judge ideologically and unreasonably inferred that his long-standing propensity to suffer from panic attacks had disappeared completely at the point he became able to cope without medication in around 2013. Furthermore, the Judge was wrong in concluding that he had suffered no panic attacks after that and in deducing therefrom that the propensity to suffer them had also ceased. The Tribunal's conclusion in this regard, submits the Claimant, ignores the fact that the Claimant had learnt to control his condition without medical assistance by avoiding triggers for such attacks and also ignores the evidence from his GP's surgery that the Claimant was not be required to wear a mask when attending the surgery because of his history of panic attacks.

59. The Respondent submits that the Claimant has failed to establish that he in fact suffered from

the impairment relied upon, i.e. the propensity to suffer from panic attacks. As such the Tribunal was not required to go on to consider whether that impairment had the requisite adverse effect on the Claimant's ability to carry out normal day-to-day activities. The Respondent further submits that, in any event, that question is an objective one and matters of reasonableness simply do not arise. Mr Edge placed reliance in this regard on paragraphs 62 and 76 of *Primaz v Carl Room Restaurants* [2022] IRLR 194:

> 62. I agree with [Counsel] that the test is objective, as it is one of causation. The impairment has to be found by the Tribunal to, in fact, have had the requisite effect.
> In many cases, the answer will be straightforward and uncontroversial. But where there is a dispute about it, then whether the impairment does or not does not have the claimed effect must be determined by the Tribunal on the evidence before it. It is not enough that the Claimant truly believes that it does. The Tribunal must decide for itself. This means that, in a case where the Claimant asserts that engaging in a certain activity will risk triggering or exacerbating some adverse effect of the impairment itself, such as bringing on a seizure or an adverse skin reaction or something of that sort, and that is disputed, the Tribunal must consider whether it has some evidence that objectively makes good that contention.
> …
>
> 76. As to ground 3, it follows from what I have hitherto said, that I agree with it insofar as it relies on the proposition that the Tribunal did not find there to be any objective foundation for the Claimant's belief, that cosmetic products would trigger some negative effect of her vitiligo. That being so, even if its view that her decision to refrain from using them was not unreasonable or surprising was not necessarily perverse, it could not properly be relied upon to support its conclusion that her vitiligo had the requisite adverse effect."

Ground 4 - Discussion

60. Section 6 of the 2010 Act, so far as relevant, provides:

> "**6. Disability**
> (1) A person (P) has a disability if –
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
> (2) A reference to a disabled person is a reference to a person who has a disability.
> (3) In relation to the protected characteristic of disability –
> (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
> (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
> (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6) Schedule 1 (disability: supplementary provision) has effect."

61. Schedule 1, so far as relevant, provides:

"**Effect of medical treatment**
5. (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day
activities if –
(a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.
(2) "Measures" includes, in particular, medical treatment and the use of a prosthesis or other aid.
(3) Sub-paragraph (1) does not apply –
(a) in relation to the impairment of a person's sight, to the extent that the impairment is, in the person's case, correctable by spectacles or contact lenses or in such other ways as may be prescribed;
(b) in relation to such other impairments as may be prescribed, in such circumstances as are prescribed."

62. There are thus two questions to be considered in determining whether a person has a disability: the first is whether a person has a physical or mental impairment (I refer to this as the "impairment question"); and the second is whether that impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities (I refer to this as the "causation question"). It has been held that in many cases the analysis can focus on the second causation question, namely on whether there was an adverse effect on the ability to carry out normal day-to-day activities. If it is found that there was such an effect, then in many cases it may be reasonably inferred that the Claimant *is* suffering from some impairment which has produced that adverse effect even if that impairment is not specifically named or identified. In such cases, it is open to the Tribunal to, as it were, "park" the impairment question and focus on the causation or adverse effect question: see *J v DLA Piper UK LLP* [2010] ICR 1052 at [38], per Underhill P (as he then was). However, the EAT in that case emphasised that that did not mean that the impairment question could simply be ignored. That is because:

"The distinction between impairment and effect is built into the structure of the 2010

> Act, not only in [the relevant section] itself but in the way in which its provisions are glossed in Schedule 1."

63. Furthermore, as set out in the case of *Primaz*, cited above, the Tribunal must itself be satisfied that both the impairment requirement and the causation requirement are met on the evidence before it and that it is insufficient for the Claimant merely to rely on assertions to that effect.

64. The First Impairment was the Claimant's alleged propensity to suffer panic attacks. The Tribunal considered the evidence in this regard and made the following findings of fact:

> "81. The first impairment upon which the Claimant relies is "a longstanding propensity to suffer panic attacks". The Claimant refused to wear a mask stating that this would trigger his panic attacks.
> 82. There is no evidence other than the Claimant's submission of that allegation in support of that contention.
> 83. By the time of the relevant period, there had been a number of years since the Claimant had suffered any panic attacks. He has produced no evidence in support of any contention that they would be "likely" to recur, nor any evidence in support of his contention that they would be triggered by the wearing of a face covering.
> 84. Indeed, this is an allegation which is entirely contrary to two important matters,
> 84.1 The fact that when suffering or feeling the onset of a panic attack, the Claimant used as a strategy, placing a paper bag over his nose and mouth and breathing into and out of the paper bag thus covering his nose and mouth; and
> 84.2 Accordingly, if wearing a mask was a trigger for a panic attack, then so would be the covering of the nose and mouth with a paper bag, yet this was advised and used by the Claimant as a strategy to deal with a panic attack.
> 85. Further, the Claimant told [JW] of the Respondent on 16 October 2020, that:
> "I cannot wear a mask without there being any sound medical reason to do so, and, on all the evidence available, I firmly believe that no employee should be made to wear one against their will".
> 86. This is a clear indication that the Claimant objected to wearing a mask because he did not consider there was a sound medical reason to do so. That is very different indeed from any medical reason preventing the wearing of a mask or face covering and the unsupported (on any medical evidence) allegation that wearing a face covering would trigger a panic attack."

65. In my judgment, each of those findings was open to the Tribunal to make. The evidence which the Tribunal considered included the detailed history of the Claimant's panic attacks as set out in his Disability Impact Statement. The Claimant said that he suffered from panic attacks from the age of 15 but that these had "no obvious cause" although they were often associated "with being in a confined claustrophobic space or situation." He described the symptoms of having a panic attack, which included "over breathing in the form of short, fast shallow breaths". The Claimant stated that

he believed that his propensity to have panic attacks arose from the fact that he has a "very analytical and philosophical disposition which resulted in a fixation upon the nature of reality, existence and consciousness." He referred to breathing techniques which he was taught to prevent such attacks and to cope with them when they did occur. One such technique was to place a paper bag over his nose and mouth in order to try to rebalance oxygen and carbon dioxide levels in the blood, although the Claimant "cannot say that [he] found it particularly beneficial." The Claimant refers to being prescribed a large daily dose of Dothiepin (a sedative) in the final year of university to prevent and cope with the attacks. He continued to take that medication until he reached his early forties (the Claimant is now aged 51). The Claimant's records suggest (and the Tribunal so found) that the Claimant ceased taking medication for panic attacks in about 2013.

66. On the basis of that evidence, it is clear that the Claimant did not suggest that the wearing of a face mask had in fact ever been a trigger for a panic attack. On the contrary, as the Claimant himself states, there was "no obvious cause" initially for such attacks. Whilst subsequently, there was an association between panic attacks and confined spaces, face coverings were not cited as a cause. Indeed, as the Tribunal identified, one of the very techniques used by the Claimant to deal with a panic attack was one which involved covering the mouth and nose with a paper bag, albeit the Claimant could not say whether he found it beneficial.

67. It is right to say that there was evidence, to which the Tribunal did not expressly refer, that the Claimant had tried snorkelling on holiday in 2001, but that despite several attempts "found the sensation intolerable" and it caused him to hyperventilate. That was the only evidence of panic attacks being associated with any sort of face covering; and it predated, by several years, the point at which the Claimant ceased to take medication to control his anxiety. There was of course no medical evidence that the Claimant had in fact suffered a panic attack in recent years (albeit the Claimant had asserted in his witness statement that these had continued) or that there was any connection between the wearing of a face mask and the onset of panic attacks.

68. A further significant factor in this case is that the Claimant was not suggesting that he was disabled at any time before 2020, the reason being that it was only at that stage that wearing a face mask became a day-to-day activity. This is not a case, therefore, where it was being suggested that there was, before 2020, a propensity to suffer panic attacks generally or in any specific circumstances such as would adversely affect his ability to carry out day-to-day activities. Given that the claimed disability only arose in the narrow context of being required to wear a face mask, the Tribunal was fully entitled to focus its inquiry on that matter and, effectively, ask itself, "What is the evidence that establishes a connection between panic attacks, which this Claimant suffered from in the past, with the wearing of face masks?" There was, in fact, little or no evidence in support of such a connection.

69. The Claimant accepts that he has never worn a face mask but believes that doing so would risk causing a panic attack. However, the question for the Tribunal was not whether the Claimant believed that there was such a risk (which he obviously did) but whether, objectively, there was evidence to support that contention. The preponderance of evidence before the Tribunal did not support it. As such, the Tribunal was entitled to reach the conclusion that it did.

70. Dealing briefly with the other points raised by the Claimant under this ground, my views are as follows:

i. The Claimant submits that the Tribunal ought to have considered and attached weight to the fact that there was evidence from specialists, including the specialist charity "No Panic", as to the connection between panic attacks and mask-wearing. However, such evidence, which does no more than establish that for *some* people there is such a connection, is of limited value in assessing whether the Claimant has established that there is such a connection in his case. As stated in *Primaz*, at [26], there is a significant difference:

> "…between generalised material relating to medical conditions, and material in relation to a particular individual that is the product of direct investigation of their condition and/or the expert assessment of primary medical evidence specifically relating to them".

ii. The Claimant submits that it should be inferred from his GP Record, which refers to his Anxiety State as being an active problem, that one manifestation of such anxiety is panic attacks. However, an Anxiety State could produce a range of symptoms in different people, and it would not be correct, in the absence of other evidence, to draw any such inference in this case;

iii. The Claimant also relies on an entry on the home screen of his GP medical records to the effect that the Claimant is unable to wear a face mask "due to panic attacks". This entry was made following a complaint made by the Claimant to his surgery after being asked by the receptionist to wear a mask. It would appear that the entry was made following a discussion between the Claimant and the GP practice over the phone and not after any sort of examination or consultation as such. Whilst it might be said to provide some support for the Claimant's claim, its non-diagnostic nature somewhat limits the evidential value of this material;

iv. The Claimant submits that the Tribunal failed to have regard to the Guidance on matters to be taken into account in determining questions relating to the definition of disability ("the Guidance"). Particular reliance is placed on paragraph B8 of the guidance. This provides:

> "B8. Similarly, it would be reasonable to expect a person with a phobia to avoid extreme activities or situations that would aggravate their condition. It would not be reasonable to expect him or her to give up, or modify, normal activities that might exacerbate the symptoms.
>
> A person with acrophobia (extreme fear of heights which can induce panic attacks) might reasonably be expected to avoid the top of extremely high buildings, such as the Eiffel Tower, but not to avoid all multi-storey buildings."

The submission, as I understand it, is that was reasonable that the Claimant avoid an activity that *could* have caused him to suffer a panic attack. However, the Guidance at B8 applies to a person who has an impairment but who might reasonably be expected to modify his or her behaviour in order to prevent or reduce the effect of that impairment on day-to-day activities. In the present case, the

Tribunal was not satisfied that there was an impairment at the material time. In those circumstances, paragraph B8 of the Guidance is of little, if any, assistance. There may be cases where evidence of avoidance behaviour, could, in conjunction with other evidence, provide support for the existence of an impairment. However, in this case, the avoidance strategy adopted is in respect of an impairment supported mainly by the Claimant's assertion of a connection between mask-wearing and panic attacks.

v. The Claimant also relies upon paragraphs B12 to B17 of the Guidance which provide guidance on measures being taken to treat or correct an impairment. The 2010 Act provides that where such measures are being taken, the impairment is to be treated as having a substantial adverse effect on the ability to carry out day-to-day activities if, but for those measures, there would be such effect. "Measures" for these purposes include, in particular, medical treatment and the use of a prosthesis or aid. The Claimant's submission is that such measures are present in his case, and that these have reduced the onset of panic attacks. However, it was no part of the Claimant's case that he was disabled before 2020 such that any measures were being taken which, if not taken, would have adversely affected his ability to carry out normal day-to-day activities. It is not in dispute that the Claimant has not taken medication since 2013. No other treatment or aid since then has been referred to in the evidence. The avoidance strategies referred to in B7 to B10 of the Guidance are not necessarily synonymous with "measures" for the purposes of B12 to B17, although in certain cases an avoidance strategy could also be seen as a measure. In the absence of any significant evidence that panic attacks were linked to the wearing of a face mask, the avoidance of that activity cannot be regarded as a measure within the meaning of the 2010 Act and/or Guidance. In any case, the Claimant's case in this regard still suffers from the flaw that the impairment on which it relies was not established on the facts as at the material time.

vi. The Claimant further argues that insofar as he had the propensity to suffer panic attacks in the past, such propensity was likely to recur thereby bringing him within the definition of disability in s.6 of the 2010 Act. Reliance was placed on the case of *Boyle v SCA Packaging Ltd* [2009] ICR 1056 (HL(NI)), in which it was stated:

> "49 Also relevant for our purposes is paragraph 2(2):
>
> "Where an impairment ceases to have a substantial adverse effect on a Person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."
>
> In other words, if the underlying condition fluctuates in the severity of its effects, the fact that they are not currently substantial does not matter if they are likely to become so again in the future. A person with multiple sclerosis may enjoy periods of remission in which the manifestations of her disease are not sufficiently severe to constitute a disability but there is always a risk that they will do so again. A person with congenital degeneration of the spine may be able to function quite normally as a result of surgery or other treatment but there is always a risk that further degeneration will result in further disability.
> 50 These two provisions are quite different from one another. In one the adverse effects of the impairment would still be there if they were not being treated or corrected in some way. In the other the adverse effects are no longer there but there is an underlying susceptibility which means that they may recur."

I do not consider this provision (now contained in Schedule 1 to the 2010 Act) to be relevant in the present case. The provision applies "where an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities". On the Claimant's case, there was no such cessation. The Claimant does not claim that prior to 2020 he was disabled or that his impairment had at that stage any adverse effect on his ability to carry out day-to-day activities, and so the question of cessation did not arise; the claim to disability only arose as a result of mask-wearing becoming (in 2020) a day-to-day activity. The claim is that throughout the material time (2020 to 2022), there was a substantial adverse effect; there was therefore no "cessation" of that effect at any time in that period that would have required the Tribunal to consider whether recurrence was likely.

71. For all of these reasons, Ground 4 also fails.

Ground 5 - The Judgment wrongly characterised the Claimant's profound psychological aversion to being compelled to wear a mask as an opinion or belief rather than an impairment.

Ground 6 - The Judge applied the wrong test in determining whether the Second Impairment amounted to an impairment within the meaning of the 2010 Act.

72. The Claimant addressed these two grounds of appeal together as they are closely related. These grounds concern the Claimant's claimed Second Impairment, namely his "profound and absolute psychological aversion" to being required to wear a mask. The Claimant submits that this was a purely psychological impairment, which gave rise to an involuntary visceral reaction. The fact that he is able to articulate some of the reasons for his aversion makes it no less genuine or distressing than some inexplicable phobia. It is further submitted that the fact of his profound visceral reaction is sufficient in and of itself to amount to an impairment irrespective of any precise cause (medical or otherwise) being identified.

73. The Respondent submits that whilst the 2010 Act does not define "impairment", it is clear from the authorities that what is required is:

> "… some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal condition" or "having … something wrong with them physically, or … mentally": see *Rugamer v Sony Music Entertainment UK Ltd* [2002] ICR 381 at [34].

74. It is said that in the present case, the Claimant's case simply failed on the facts in that he failed to establish that he in fact had the 'profound and absolute visceral reaction' that he claims. His positive case before the Tribunal was in fact that there was nothing wrong with him physically or mentally as such; instead, the Claimant's reluctance to wear a mask appeared to be related to his opinions as to their ineffectiveness and the cultural and historic stigma association with the wearing of masks.

Grounds 5 and 6 –Discussion

75. It is borne in mind that *Rugamer* was decided before the removal of the requirement that in order for there to be a mental impairment there has to be some clinically well-recognised illness.

Notwithstanding that amendment, the 2010 Act still very much requires, as a precondition of there being a disability, that there is an "impairment". The term "mental or physical impairment" is to be given its ordinary meaning, and "… it is left to the good sense of the Tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects": see *McNicol v Balfour Beatty Maintenance Ltd* [2002] ICR 1498 (CA) at [19] and A3 of the Guidance.

76. The Tribunal found, in relation to the Second Impairment:

> "89. This alleged psychological aversion is not supported by any medical evidence whatsoever. It is a statement from the Claimant. If he had wished to call medical evidence or provide a report from an appropriate psychologist in support of this contention, he could have done so but he has not.
> …
> 93. The Claimant does not advance the argument that there was anything wrong with him or his physical and mental equipment but rather says that his aversion to wearing a mask was entirely "logical". He, at the relevant time, stated: "I cannot wear a mask without there being any sound medical reason to do so".
> Which demonstrates that the Claimant here was, I find, able to wear a mask. He was not disabled or suffering any physical or mental impairment which prevented him from doing so but was refusing to do so because he did not consider the medical evidence in support of mask wearing at the time of the Covid 19 pandemic compelling or sufficiently cogent to warrant the requirement of mask wearing in public places."

77. The Tribunal was correct to find that there was no medical evidence to support the alleged psychological aversion. Was it wrong for the Tribunal to expect there to be such evidence in support of the claim? In my judgment, in the particular circumstances of this case, it was not wrong to do so.

78. The Claimant had claimed that his visceral reaction to wearing masks was a "psychological" reaction, which went "far beyond mere embarrassment, discomfort, irritation or displeasure." His aversion was said to be "fundamental and absolute, far more serious than a mere phobia". However, the Claimant is not a psychologist and does not claim to have any specialist knowledge of what constitutes a psychological reaction equivalent to or more serious than a phobia. Where, as in this case, an impairment of this nature is disputed, the Tribunal would generally require evidence from a psychologist or other medical professional that the reaction to wearing masks is as profound as being

described. The difficulty with not adducing such evidence in support is that the reaction cannot be assumed on the Claimant's assertion, to fall outside the normal range of reactions to objectionable situations which all persons experience from time to time. A person may have a profound disgust of, for example, using any public toilet, so much so that the thought of having to do so causes them to feel nauseous. Such a reaction could be said to be "visceral". However, that would not necessarily mean that there was anything wrong with that person so as to lead to the conclusion that there was an impairment within the meaning of the 2010 Act. If, however, there was expert psychological evidence to suggest that the person's reaction went beyond extreme disgust and amounted, e.g. to a phobia of using public toilets, then the impairment may be made out. This is not to impose a requirement that a mental impairment is a clinically well-recognised illness, but merely to apply the legislative requirement that there is an impairment of some sort. The situation is not unlike that which arose in *J v DLA Piper* in which the issue was whether the symptoms suffered by the Claimant in that case, namely low mood and anxiety, were the result of a depressive illness or were simply a reaction to adverse life events. At [42] to [43] of that case, the EAT said as follows:

> "42 The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at para 33(3) above,
> between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety.
> The first state of affairs is a mental illness - or, if you prefer, a mental Condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the 2010 Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven – "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the 2010 Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the 2010 Act. This is because of the long-

> term effect requirement. If, as we recommend at para 40(2) above, a Tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long-lived.
>
> 43 We should make it clear that the distinction discussed in the preceding paragraph does not involve the restoration of the requirement previously imposed by paragraph 1(1) of Schedule 1 that the Claimant prove that he or she is suffering from a "clinically well recognised illness"; and we reject the contention pleaded at para 6.1.4 of the notice of appeal that the Tribunal erred in law by applying such a distinction. The impact of the repeal of paragraph 1(1) is in cases where it is evident from a Claimant's symptoms that he or she is suffering from a mental impairment of some kind but where the nature of the impairment is hard to identify or classify. Under the unamended Act, proving the nature of the impairment and that it was "clinically well recognised" might involve parties and Tribunals in difficult, and correspondingly expensive, issues of diagnosis and of psychiatric theory. It is understandable that Parliament should have taken the view that the exercise required by paragraph 1(1) was unnecessary and constituted an obstacle to justice. But the problem arose from the requirement for the precise identification and classification of the impairment. The distinction applied in the present case relates to whether there is an impairment at all, which is a different matter." (Emphasis added)

79. As in *J v DLA Piper*, the issue in the present case is whether there is an impairment of the type described at all. It is noteworthy that the EAT in that case considered that an analysis of the long-term effect requirement would in most cases enable one to conclude whether the state of mind in question amounted to "clinical depression" or simply a reaction to adverse life events. Any such analysis would be meaningless in the present case because the longevity of the effect here is entirely dependent, not on the state of mind of the Claimant, but on the length of time for which the requirement to wear masks remained in place, a matter that was determined by Government and had nothing to do with the Claimant's condition, physical or mental. Not only does that perhaps provide a further reason for rejecting the Claimant's claim that there was an impairment within the meaning of the 2010 Act, it also highlights the need for proper evidence to establish that the claimed reaction was something outside the normal range of reactions a person might experience in relation to being required to do something which they strongly dislike or consider to be unjustified. If that distinction is not maintained then any person with an intense dislike for something or some situation could claim

to have a disability; that would, in my view, render the statutory requirement that there be an impairment entirely nugatory.

80. The Tribunal considered that the Claimant could have called medical evidence but did not do so. Was it right to take that view? In my judgment, it was. The Claimant submits that the late notice of the change in the nature of the hearing from one that was merely going to determine whether his claims were "tenable" to one where there would be a "determination" as to whether his claims to disability and belief were made out, prejudiced him because it was by then too late to produce a medical report. However, it is clear from the procedural history of this matter (as summarised above) that the Claimant had decided at an early stage of the proceedings that, as a result of having already submitted his medical records in respect of the First Impairment, and the Second Impairment being (as he put it) "Non-Medical", there was no need to adduce evidence from a medical expert: see Claimant's Agenda for CMH, 28 November 2022 at [6.4].

81. The change in the nature of the hearing was clearly understood by the Claimant at the time the Notice of Hearing was sent out: he refers in his skeleton argument for the Preliminary Hearing to the purpose of the hearing being "to determine whether the Claimant possessed the protected characteristics of a disability … and a belief…" (emphasis added). I do not consider that there was any real uncertainty about the nature of the Preliminary Hearing and the Claimant is clear that he was not confused about the position. When asked why he did not seek to adduce medical evidence he said he did not have enough time to obtain such evidence and was very reluctant to ask for an adjournment because he was under stress and he "just wanted to get through the hearing". However, he also said that he did email two psychologists at the time, which demonstrates a clear recognition of the potential value of such evidence in his case. The Claimant had just under two months before the hearing, and if that was considered insufficient, he could have sought an adjournment, but did not do so. The reason he did not do so was not that he was prevented from seeking an adjournment but because of a litigation decision on his part to proceed without further delay.

82. The change in the nature of the hearing undoubtedly presented a challenge for a litigant in person having to do all the preparatory work themselves. However, the Claimant evidently understood what the hearing would now involve, recognised that he could obtain further evidence, but took a litigation decision not to seek an adjournment to enable him to do so. In these circumstances, the Tribunal cannot be criticised for proceeding as it did. Given the background of the matter, and the numerous opportunities afforded to the Claimant to produce all the evidence he wished to rely upon in support of his claims, and in the absence of any application to adjourn to adduce more, it was not unfair for the hearing to proceed.

83. Instead of obtaining e.g. a psychologist's report, the Claimant sought to rely upon an article written by psychiatrists as to the pathological effects of significant humiliation upon a person's mental health. For reasons already discussed under Ground 4, such generalised material is unlikely to be of assistance as it says nothing about the Claimant's own state.

84. The Claimant contends that the Tribunal wrongly used the fact that he had entirely separate rational and scientific reasons to oppose the wearing of masks as a reason to dismiss his "innate psychological reaction" as a belief or opinion. This line of argument does not advance the Claimant's case because the Tribunal was not satisfied on the evidence (which comprised only the Claimant's assertion) that there was any such "innate psychological reaction". The Tribunal also considered what the reasons for not wearing a mask might involve. It is unsurprising that it did so given that the Claimant himself sought to explain at length his reasons (or some of them) for not wearing a mask: see e.g. [37] to [51] of his Disability Impact Statement, where the stated reasons range from an aversion to being forced to participate in behaviour that is "stupid" to the negative cultural associations with the wearing of masks. The fact that the Tribunal considered such reasons in determining whether there was an impairment was an understandable consequence of the way in which the Claimant's case was put and does not amount to an error of law. Having found that there was no impairment as alleged, the Tribunal was entitled to make findings as to what were, in its view,

some of the real reasons for the Claimant's refusal to wear masks.

85. For these reasons, I consider that there was no error on the part of the Tribunal in relation to the Second Impairment, and Grounds 5 and 6 are not upheld.

Ground 7 - The Judge misstated some of the evidence, made findings that were unsupported by the evidence, and relied upon a number of disputed assumptions unsupported by any evidence and/or which was contradicted by other evidence.

86. I shall return to this ground, which concerns the evidence, after dealing with Grounds 8 to 11.

Ground 8 – Dismissal of the Claimant's belief by wrongly conflating his philosophical objection to anyone being compelled to wear a mask with a supposed objection to people wearing masks *per se*.

87. This ground of appeal relates to the Claimant's claim that he was unlawfully discriminated against in relation to his philosophical belief. The Tribunal identified the nature of this claim as being that of "indirect discrimination based on his stated philosophical belief" (Judgment at [109]). The Claimant does not dispute that that is the nature of his claim. He submits that the Tribunal incorrectly concluded (at [123]) that there was no Group Disadvantage for the purposes of establishing a claim of indirect discrimination. His case is that there was a "small but very vehement section of society who were philosophically and fundamentally opposed to the various Covid restrictions precisely because they breached human rights and in particular the right to bodily autonomy". The Claimant's claim therefore was that the Respondent's requirements as to the wearing of face masks when in the office put others who shared the Claimant's belief at a particular disadvantage and put him to that same disadvantage. The Claimant also submits, however, that the cohort so affected "was largely invisible" and that there may have been others (apart from two identified during cross-examination) who were also affected but that "there was no way of knowing". He also agreed that his beliefs are "entirely neutral as to whether any individual could or could not wear a mask" and that this "neutrality

was precisely in accord with [his] philosophical belief in every person's right to choose…".

88. The Respondent submits that by the time of the hearing, the Claimant had sought to define his alleged belief as one that was entirely compatible with mask-wearing and the issue was that all persons should have the freedom to choose whether to wear masks or not. Put in those terms, the belief tells one nothing about whether or not any person sharing the Claimant's belief would be put at a disadvantage by the Respondent's policy. In these circumstances, a claim of indirect discrimination cannot succeed, and the Tribunal was correct to so find.

Ground 8 – Discussion

89. Section 19 of the 2010 Act, so far as relevant, provides:

> **"19 Indirect discrimination**
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
> (3) The relevant protected characteristics are—
> …
> religion or belief;…" (Emphasis added)

90. The highlighted words establish the need for there to be some group disadvantage in order for a claim of indirect discrimination to be made out. The application of these provisions in the context of a belief claim was considered by the Court of Appeal in *Gray v Mulberry Co (Design) Ltd* [2020] ICR 715:

> "43. Like Sedley LJ in *Eweida v British Airways plc* [2010] ICR 890 CA, we endorse the statement of Elias J, as he then was, in the EAT in that case (at [24]) that:
>
> "… in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision

> may have a disparate adverse impact on the group."
>
> 44. However, as the court held in *Mba*, there is no reason why the concept of justification should not be read compatibly with article 9 where that provision is in play. In that context, it does not matter whether a Claimant is disadvantaged along with others or not and it does not weaken her case with respect to justification that her beliefs are not more widely shared.
>
> 45. Moreover, we do not accept [Counsel'] incompatibility arguments in the present context. We accept that there may be cases where it is sufficient for a Claimant to show hypothetical 'group disadvantage' because the impact of a PCP on the holder of a particular religious or other belief is so obvious that, in effect, judicial notice can be taken of it (as was the case, for example, in *Pendleton v Derbyshire County Council* [2016] IRLR 580).
>
> 46. Nonetheless, in every case the disadvantage must result from action on the part of a Claimant that is intimately linked to the religion or belief; or to put it another way, on the facts of the case there must be a sufficiently close and direct nexus between the action of the Claimant (here, a crisis of conscience about signing and or a refusal to sign) and the underlying belief, that results in shared disadvantage to her and other holders of her belief: see *Eweida v UK* at [82]."

91. The Claimant's belief was not one whose tenets were so obvious that judicial notice could be taken of them. The issue, therefore, was whether it was possible to make some general statements about the group sharing the Claimant' belief such that the employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse effect on the group. The disparate adverse effect contended for in the present case was the inability to comply with the Respondent's policy on face masks. However, the Claimant's own case was that his belief was "entirely neutral" as to whether any individual having that belief could or could not wear a mask. As Mr Edge submits, the Claimant's belief, even if the Respondent had been aware of it, would have told it nothing about the ability or otherwise of adherents of that belief being able to comply. Indeed, the Claimant accepts that there was "no way of knowing" whether any others were adversely affected in the way that the Claimant claims he was. There is, to use the language in *Gray*, no "sufficiently close and direct nexus" between the refusal to wear a mask and the belief that gives rise to any shared disadvantage. In these circumstances, it cannot be said that the group disadvantage requirement could be made out.

92. The Tribunal's findings on this issue included the following:

> "112 Most importantly, [the belief] does not deal with the issue at hand, the wearing or not of a face covering. Accordingly, it does not support any of the Claimant's discrimination claims.
> …
> 123 Further, there is no evidence provided of any group disadvantage or that the Claimant suffered any particular disadvantage as a result of this PCP."

93. Given the way in which the belief was put before the Tribunal, and the Claimant's submissions, it seems, in my judgment, that the Tribunal's conclusions in this regard (at least in relation to group disadvantage) were inevitable. There was no error of law, and this ground of appeal therefore fails.

Ground 9 - The Judge erred in failing to conclude that the Claimant's belief satisfied the *Grainger* criteria.

94. The failure of Ground 8 of the appeal means that any appeal against the Tribunal's conclusion that there was no protectable belief is rendered academic. Even if the Tribunal was wrong about protectability (or the lack thereof) the fact is that the claim could not succeed in any event. For reasons of completeness, however, and in view of the fact that a large part of the Claimant's submissions under Grounds 8 and 9 addresses what he contends amounted to a misrepresentation of his belief by the Respondent, which misrepresentation was then said to have been adopted by the Tribunal, I deal briefly with this ground as well.

95. The Claimant submits that some of the reasons he gives for finding it psychologically distressing to wear a mask have been stated to be his belief or part of his belief, whereas that is not in fact the case. He further submits that his belief, when properly understood, and in particular his belief in the right to bodily autonomy and/or integrity, clearly meets all five of the *Grainger* criteria so as to amount to a protected belief under s.10 of the 2010 Act.

96. The Respondent submits that the Claimant's own case as pleaded included, as part of his belief, the association between facemasks and slavery, perversion and Munchausen's Syndrome by proxy. These matters were, as the Claimant accepted in cross-examination, a "subset" of his belief in

bodily autonomy. In these circumstances, the Respondent submits that the Tribunal was correct to conclude that the Claimant's belief did not satisfy the *Grainger* criteria, in particular, the fourth of those criteria, ("Grainger IV"), namely that the belief attains a certain level of cogency, seriousness, cohesion and importance. The Claimant's belief, involving as it does, the negative historical and cultural associations with wearing a facemask, is said to lack internal cohesion because it does not follow from that association that mask-wearing in the context of a pandemic should carry with it the same association, and the Claimant's views are more correctly described as being no more than his opinion on the effectiveness (or lack thereof) of wearing facemasks.

Ground 9 – Discussion.

97. Section 10(2) of the 2010 Act provides:

> "Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief."

98. The EAT in *Grainger plc v Nicholson* [2010] IRLR 4, [2010] ICR 360 reviewed the jurisprudence and set out the criteria to be applied in determining whether a belief qualifies for protection. At para 24, Burton P held as follows:

> "24. I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the [2003] Regulations, but before I turn 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* [2008] IRLR 29], 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* (App 7511/76) (1983) 4 EHRR 293] and paragraph 23 of *Williamson* [[2005] 2 AC 246])."

99. These five criteria, referred to here as 'the *Grainger* Criteria', have since been applied in several cases and are reflected in the guidance on philosophical belief contained in the Equality and

Human Rights Commission's Code of Practice: see 2.59 of the Code. It is not in dispute that these are the appropriate criteria by which to assess whether the Claimant's belief qualifies for protection under s.10 of the 2010 Act. Further guidance as to what is required in terms of cogency (Grainger IV) was provided by Lord Nicholls of Birkenhead in *Williamson* [2005] 2 ACT 246 at [23]:

> "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 I 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: see [2003] 1 All ER 385 at [258] per Arden LJ."

100. As to the precision with which a claimed belief is to be identified, the Court of Appeal gave this guidance in *Gray v Mulberry Co (Design) Ltd* [2020] ICR 715:

> "26. Precision in pleading is not equally important in every case heard by employment Tribunals, but in our view, it is essential, before considering whether a belief amounts to a "philosophical belief" protected under ss 4 and 10(2) of the 2010 Act, to define exactly what the belief is…"

101. In *Forstater v CGD Europe* [2022] ICR 1, the EAT commented on the need for exactitude in this context:

> 45. In [*Gray*] the belief relied upon was capable of being summed up in a single sentence. Most religious or philosophical beliefs will not be capable of such pithy encapsulation. Indeed, any belief that affects a number of aspects of a person's life and how they live it is likely to comprise a diffuse and diverse range of concepts and principles that would defy precise or concise definition. The Claimant's belief is a case in point. It was described across two detailed witness statements running to almost 50 pages. That evidence was supplemented by oral evidence which was subject to cross-examination. The Tribunal did not reject any part of that evidence. However, that did not mean that the Tribunal was obliged to set out the entirety of the Claimant's written and oral evidence in its reasons in order to satisfy the requirement to "define exactly" what the belief is. The standard of exactitude cannot mean, in our judgment, setting out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question would, in our judgment, suffice. In this regard, we do not consider it incorrect for a Tribunal to seek to identify the "core" elements of a belief in order to determine whether it falls within section 10 of the EqA . There may be aspects of a belief that are peripheral or merely practical instances of its main tenets,

> which need not form part of the definition of the belief that falls to be tested against the *Grainger* criteria."

102. The Claimant's belief is concerned with bodily autonomy and ought to be capable of reasonably precise and concise expression. However, the Claimant's expression of his belief has been far from clear, precise or consistent:

i. Initially, as he accepts, his Claim Form and Particulars did not set out his belief in any detail. To the extent that any belief was alluded to, it overlapped with the statement of his Second Impairment. Furthermore, it was expressly stated that the wearing of masks was considered to be "an assault on bodily integrity" for a number of reasons, which included its association with slavery, imprisonment and subjugation. The Claimant submits that these reasons, read as a whole are "quite clearly, not my philosophical beliefs". However, on any objective reading of the Particulars, that is not clear at all. That is particularly so because the relevant passage in the Particulars, having set out various negative associations with mask wearing, goes on to **say** this:

> "Therefore, many entirely fit and healthy people with no breathing problems cannot wear a mask without suffering immense personal distress, humiliation and degradation as a result. This is not an obscure belief, has longstanding historical and cultural precedent and easily meets the criteria of a protected characteristic under the Equality Act 2010." (Emphasis added)

ii. The highlighted words clearly relate to what precede them, which would include those negative associations. Similar wording appears in the Claimant's Revised Particulars of Claim, although there is an Addendum that seeks to provide clarification.

iii. In response to the Tribunal's direction to provide further evidence as to his belief, the Claimant said this:

> "3.3 – Evidence disclosed in section 3 of the Schedule of Evidence provides evidence of the extremely negative social and cultural connotations of enforced mask wearing. This evidence is relevant to both his second impairment for the purposes of disability under Section 6(1) of the Equality Act 2010 and also his fundamental beliefs in bodily autonomy and dignity and the requirement for consent for any kind of medical intervention, evidence of which has not yet been requested.

iv. The evidence so disclosed included an article entitled "*The mask of your enslavement: Escrava Anastacia and COVID Mandates*", which sought to draw direct comparisons between the forced muzzling of slaves and the use of masks in

the pandemic. The Claimant's submission that these matters are merely "examples" of the breach of bodily integrity is difficult to square with express statements that they form part of and/or are relevant to his belief.

v. When the Claimant had the opportunity at the hearing to explain his beliefs, he accepted that his belief that facemasks were associated with perversion, slavery and Munchausen's by proxy were a "subset" of his belief in bodily autonomy. The Claimant now seeks to distance himself from that evidence by describing it as "not a particularly good choice of words in the moment". However, that was the evidence before the Tribunal.

vi. As the Tribunal also noted, the Claimant has repeatedly expressed the view that mask-wearing was ineffective against Covid 19.

vii. In correspondence with the Respondent even before his claim was lodged, the Claimant said that mask-wearing was "fundamentally contrary to … deeply held moral beliefs which may arise from one or more of the following points." There then followed a list of matters, only one of which is "bodily autonomy". The list included that mask-wearing constitutes "psychological torture"; it is "associated with various occult practices"; it is associated with political beliefs associated with support for lockdowns; it has "no meaningful medical value"; and it is "supporting a lie and spreading disinformation".

viii. The Claimant very fairly accepts that if these other matters did in fact form part of his belief, then it would not meet the *Grainger* criteria, in particular Grainger IV. He relies, however, on the statement of his belief set out in the Addendum to the Revised Particulars which was intended to provide clarification as to the nature of his beliefs. This contained a description of his belief that avoided reference to these negative associations and focused on bodily autonomy and integrity and the need not to be compelled to undergo "medical intervention".

103. Mr Edge submits that, notwithstanding the way in which the Claimant's beliefs were presented by the time of the hearing, the Tribunal was entitled to consider whether the claimed beliefs were "infected" by things which undermined the cogency of the belief. He relied on the case of *Thomas v Surrey and Borders Partnership NHS Foundation* [2024] IRLR 938 in which the Tribunal, in deciding whether the Claimant's belief in English Nationalism was protected under s.10 of the

2010 Act, did not confine itself to the content of the Claimant's witness statement, but also took into account evidence of the Claimant's anti-Islamic sentiments. Whilst the issue in *Thomas* was somewhat different in that there the Claimant was seeking to cloak his real views, the principle that the Tribunal can go beyond that which the Claimant would prefer the Tribunal to consider, does apply here. The burden of establishing the protectability of the belief lies on the Claimant and in reaching a conclusion on that issue, the Tribunal is entitled to have regard to all of the evidence presented on that issue. That evidence included the various statements referred to above about negative associations such as slavery forming part, or being a "subset", of the claimed belief.

104. In these circumstances, the question is whether the Tribunal erred in determining that the Claimant's belief was not protected under s.10 of the 2010 Act. The Tribunal's reasoning in this regard was not entirely clear and appears at times to elide the question of whether the belief was protected with whether the claim of indirect discrimination on that ground could be made out. However, that was probably due, in no small measure, to the way in which the Claimant presented his belief (see above) and the fact that the Claimant appeared to have a number of reasons for not wearing a mask, including his belief as to their ineffectiveness. Where, as in this case, a person's reasons for acting or not acting in a particular way are said to include, but are not confined to the claimed belief, the Tribunal is entitled to consider which, if any, of the reasons were operative, bearing in mind of course that a person may have more than one reason for their actions. In this case, the Tribunal found that the Claimant's objection to wearing the mask was not based on any philosophical belief but because of his view that "the most convincing evidence" suggests they are not effective in preventing viral transmission. On the evidence, that was a finding that it was open to the Tribunal to make.

105. Having made those findings as to the Claimant's reason for not wearing a mask, the Tribunal said this at [118]:

> "118. In any event, the belief expressed by the claimant lacks the necessary cogency, seriousness, cohesiveness and importance to satisfy the Grainger test. It is so wide-

ranging as to be meaningless."

106. There is no express reasoning in support of that conclusion, and it is not entirely clear what is meant by it. It may be right to say that a generalised belief in freedom or dignity alone might be so broad as to be meaningless or (to put it in *Grainger* terms) insufficiently coherent to amount to a belief for these purposes. Indeed, the Claimant implicitly accepts that those aspects of his belief (i.e. the belief in freedom and dignity) were too broad, as he focused his argument before the EAT on his belief in the "right to Bodily Autonomy and, in particular, Bodily Integrity (a right recognised in common law)" saying that *those* aspects "fully and self-evidently meet all five of the Grainger criteria". It could be said that this yet further attempted refinement of the claimed belief (this time before this EAT) itself undermines the cogency and cohesion of that belief. The belief as pleaded and as presented to the Tribunal was not as narrow as the one on which the Claimant now seeks to rely; the pleaded belief encompassed, as I have said, all of those aspects from which the Claimant now seeks to distance himself. The person who, by the time of the hearing, has 'chopped and changed' their belief, or who invites the Tribunal to focus only on an aspect or certain aspects of it, inevitably runs the risk that the pleaded belief as a whole may be found to lack cogency and cohesion.

107. The Tribunal's conclusion on Grainger IV is not fully reasoned. However, notwithstanding that inadequacy of reasoning, the Tribunal's conclusion as to the lack of protectability was unarguably correct. The Claimant's own case, by the time of the appeal hearing, sought to focus on that part of the pleaded belief relating to bodily autonomy and integrity and thereby implicitly acknowledged that the broader elements of the belief were unsupportable as part of a cogent or cohesive belief system. One cannot ignore the fact that the belief was put before the Tribunal on the broader basis. The Tribunal cannot fairly be criticised for not analysing the belief solely by reference to the narrower aspects of the belief on which the Claimant would now prefer to focus.

108. In any event, even if the Tribunal could be said to have erred in concluding that the belief as pleaded was so broad as to be meaningless, it seems to me that Mr Edge is correct to submit that the

Claimant's belief should, in the alternative, be considered to lack cogency or cohesion by reason of the fact that it includes or encompasses (as set out above) such notions as associations with slavery and subjugation and Munchausen's Syndrome by proxy. Indeed, the Claimant himself accepts that it was "inevitable" that a belief in those terms would not satisfy the *Grainger* criteria.

109. For these reasons, Ground 9 fails and is dismissed.

Ground 10 – The Judge erred in his analysis of the claim of direct discrimination

110. This ground of appeal attacks the Tribunal's conclusion at [101]:

> "101. There is no disparity of treatment in this case. The Claimant was treated the same as every other employee. Further, the Claimant withheld, and did not disclose any medical evidence or other information which would lead the person who applied that policy ([Ms W]) to have any knowledge of his disability at the material time."

111. The Claimant's first challenge under this ground is as to the finding that there was no disparity of treatment for the purposes of a claim of direct discrimination. He contends that whereas he was instructed not to return to the office and to continue working from home, others were permitted to return to work, and that this difference in treatment amounted to direct discrimination, as the Tribunal ought to have found.

112. The Respondent submits that this ground of appeal is misconceived in that the reason for the treatment was the application of the Respondent's policy, which was applied equally to everyone. The treatment was not *because of* the Claimant's disability.

Ground 10 – Discussion

113. Section 13 of the 2010 Act, so far as relevant, provides:

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

114. The treatment complained of in this case is the requirement to wear a mask if working in the office. The reason for that treatment was the application of the Respondent's policy. That policy was applied equally to everyone. It follows that the claim of direct discrimination must fail there was, as the Tribunal found, no disparity in treatment.

115. The fallacy in the Claimant's claim lies in trying to attribute to the Respondent a reason for the treatment, namely his disability, which was not in fact the reason found by the Tribunal, i.e. the application of the policy. That finding cannot be said to be perverse or wrong. The Claimant might have had a *prima facie* case of disability discrimination if the Respondent, knowing that he had a disability which prevented him from wearing a mask, required him to wear one without requiring others to do so. However, that is not this case. In fact, the application of the policy amounts to the application of a "provision, criterion or practice" within the meaning of s.19 of the 2010 Act, which, on the Claimant's case, put him and others with his disability at a disadvantage as compared to those not having the disability. This is, in other words, a claim of indirect discrimination.

116. The Claimant also contends that the Respondent ought to have been found to have actual knowledge of his disability. Even if the Tribunal had erred in this regard, it would not advance the claim of direct discrimination because the absence of any disparity in treatment is fatal to that claim. In any case, it was open to the Tribunal to conclude, as it did, that the Claimant "had not disclosed anything that would alert [his employer] to any potential disability" and that his issue with mask-wearing "appeared to be linked to political opinions and the Government's response to the Covid 19 pandemic": see Judgment at [58]. The Tribunal further found that the Claimant had not informed his employer of his history of panic attacks or that such attacks were triggered by wearing face coverings. In these circumstances, it can hardly be said that the Tribunal's finding that there was no knowledge of disability was perverse, which is the threshold that the Claimant would have to meet in order for the EAT to interfere with a conclusion of fact.

117. For these reasons, Ground 10 fails and is dismissed.

Ground 11 - The Judge erred in concluding that the Claimant suffered no particular disadvantage in the context of his claim of indirect discrimination.

118. The Tribunal's findings at [104] and [123] were that there was no evidence that the Respondent's policy had placed the Claimant at any particular disadvantage either in relation to his claimed disabilities or his belief. The reason cited in those paragraphs is that the Claimant could have obtained evidence that he was medically exempt from the requirement to wear a face mask but did not attempt to do so.

119. The Claimant submits that this finding was perverse given that it was not possible, in the circumstances prevailing at the time, to obtain such medical evidence. The Claimant referred me to Government Guidance dating from July 2021, which provides:

> "You are no longer legally required to wear a face covering in any setting. Therefore, you do not need to rely on an exemption if you need one.
> However, you may feel more comfortable if you can show something to reflect that you're not able to wear a face covering. For example, in circumstances where the government recommends and expects you to continue to wear face coverings such as in crowded and enclosed spaces like public transport.
> If you have an age, health or disability reason for not wearing a face covering you do not need to show:
> - any written evidence of this
> - an exemption card
>
> This means that you do not need to seek advice or request a letter from a medical professional about your reason for not wearing a face covering."

120. Guidance to medical practitioners from the BMA at that time said this about "Supplying face mask exemption letters to patients":

> "Practices are receiving requests from patients for letters of exemption to wearing face masks in various public settings.
>
> The Government guidance suggests there is no requirement for evidence for exemption. It should be sufficient for someone to declare that they are eligible for an exemption direct with the person questioning them (e.g. bus driver).
>
> Practices are therefore not required to provide letters of support for those who fall under the list of exemptions, or to those who do not fall under the list of exemptions."

121. Whilst this guidance does not suggest that exemption letters were unobtainable, they do

provide some support for the Claimant's contention in that that these could not be obtained with ease. The Tribunal did not expressly refer to this evidence, and it may be said that its conclusion that the Claimant could have obtained evidence that he was medically exempt, but did not attempt to do so, failed to take account of the reality of the situation facing those wishing to obtain such exemptions. That said, the conclusion that the Tribunal reached cannot be said to be one that no reasonable Tribunal would have reached. As stated already, this guidance did not mean that such exemption letters were unobtainable, and there was no evidence that the Claimant had attempted to obtain one from his GP practice. The Tribunal's conclusion in this regard was not therefore perverse. Even if that were not the case, it would not assist the Claimant as his claim would fall at the earlier hurdles of establishing a disability or a protected belief, or at the stage (in respect of the claims of indirect discrimination) of establishing group disadvantage.

122. Ground 11 therefore also fails and is dismissed.

Ground 7 – Flawed approach to some of the evidence.

123. Under this ground of appeal, the Claimant criticises the Tribunal's approach to aspects of the evidence. Of course, in view of the Claimant's failure to establish any error of law in respect of the Tribunal's conclusions on disability, protected belief and discrimination, this challenge to the Tribunal's approach to the evidence is rendered somewhat academic. For completeness, however, I shall deal with this ground briefly by reference to the eight subheadings in the Claimant's skeleton argument. Although these were said to be non-exhaustive examples, the Claimant did not seek to expand upon them at the hearing of the appeal:

Important facts and evidence ignored in the judgment

Government Guidance

124. Contrary to the Claimant's submission, the Tribunal did refer to the Government Guidance: see e.g. [48] and [103] of the Judgment. The Tribunal was not required to set out every piece of

evidence considered. The Government Guidance did provide that businesses can ask their employees to wear face coverings. The Respondent had asked its employees to do so. It was not therefore incorrect for the Tribunal to state that being around colleagues without a face mask would be acting contrary to the guidance, albeit that the guidance itself did not mandate the wearing of masks in employment settings.

Risk Assessments

125. The fact that the Respondent's internal risk assessment did not stipulate that masks should be mandatory did not preclude it from adopting a policy which did.

Exemption Letters

126. This issue has been considered already under Ground 10 above.

Stating that there was no evidence when there was

127. Complaint is made here of the fact that the Tribunal on several occasions stated that there "no evidence" to support some of the Claimant's contentions. Particular reference is made to the Tribunal's judgment at [77], [82] and [83]. However, at [72], it is clear that the Tribunal was concerned with the absence of medical evidence. The subsequent references to there being "no evidence" must be considered in that light. As to the Claimant's argument that it had never been claimed that panic attacks had ceased entirely, see the analysis above under Ground 9.

Findings made with no evidence

128. The points raised under this heading amount to a repetition of points already made.

Misstating the evidence.

129. The Claimant contends that the Tribunal reached the wrong conclusion as to the occurrence of panic attacks, disregarding the evidence contained in his witness statement in doing so. Mr Edge

accepts that the Tribunal may have concluded incorrectly in this regard but submits that this does not advance the Claimant's case in circumstances where no medical evidence was adduced to establish the assertion that there had been an increase in panic attacks since 2020 and he had failed to establish any link between mask-wearing and the onset of such attacks. I agree with that submission.

Witness evidence allowed to go unchallenged.

130. No particulars are identified in the skeleton and the issue was not expanded upon at the hearing. This is, in any event, an issue already considered under Ground 3.

Conclusion

131. For all of the reasons set out above, and notwithstanding the Claimant's helpful submissions, this appeal fails and is dismissed.