



# EMPLOYMENT TRIBUNAL

**Claimant:** Mr. Domingo Da Costa

**Respondent:** Imperial College Healthcare NHS Trust

**Heard at:** London Central ET (via video/CVP) **On:** 7 April 2022

**Hearing:** Open Preliminary Hearing

**Before:** Employment Judge Tinnion

**Appearances:** For Claimant: Mr. Bennett (union representative)  
For Respondent: Ms. Van den Berg (Counsel)

## JUDGMENT

1. The relevant time for the purpose of determining whether the Claimant was disabled because he had Type 2 Diabetes was the period 6 April 2021 – 10 October 2021.
2. In the relevant time, the Claimant was not disabled because he had Type 2 Diabetes.
3. Because the Claimant's claims of direct disability discrimination under s.13 of the Equality Act 2010 and discrimination arising from disability under s.15(1) of the Equality Act 2010 both rely on the Claimant being disabled because of his Type 2 Diabetes in the relevant time, those claims are not well-founded and are struck out under Rule 37(1)(a) (no reasonable prospect of success).

## REASONS

### Claims

1. By his ET1 [2-10], Claimant Mr. Domingo Da Costa presented claims against the Respondent, his current employer, for (i) direct disability discrimination under ss.13 and 39(2) of the Equality Act 2010 (**EqA 2010**) (ii) discrimination arising from disability under ss.15(1) and 39(2) of EqA 2010 (iii) indirect disability discrimination under ss.19 and 39(2) of EqA 2010. The disability the Claimant relies upon is Type 2 Diabetes (**D2**) - a well-known, clinically recognised, not uncommon medical condition. The Tribunal takes judicial notice of the fact that D2 is an impairment in the way the human body regulates and uses sugar (glucose) as fuel.
2. In its ET3 [28-43], the Respondent denied the Claimant was disabled at the relevant time. It did not dispute the Claimant had D2 in 2021 (the year in which the Claimant

alleges the Respondent subjected him to unlawful disability discrimination) – what the Respondent disputes was the Claimant’s case that his D2 had a substantial adverse effect on his ability to carry out normal day-to-day activities in this period.

3. By a Judgment dated 27 January 2022 [55], the Tribunal dismissed the Claimant’s indirect discrimination claim following its withdrawal by the Claimant.

#### Open Preliminary Hearing

4. By para. 1 of a Case Management Order (**CMO**) [46-54] made following a Preliminary Hearing (Case Management) on 27 January 2022, the Tribunal ordered an Open Preliminary Hearing (**OPH**) on 7 April 2022 to consider (if the Respondent did not concede disability – which it did not) the issue of whether the Claimant was a disabled person within the definition of the EqA 2010 at the relevant time.
5. The OPH was held on 7 April 2022. Both parties were represented. An unpaginated PDF bundle of 67 pages was produced. References in square brackets refer to the relevant page of that PDF (which may not match any internal page numbers shown on the underlying documents). The Claimant further relied upon a relatively brief disability impact statement (entitled “*Claimant’s Further Information*”) dated 17 February 2022 (prepared by his union, presumably after having taken instructions from him).
6. One of the notable features of the evidence at the OPH was a general lack of medical evidence when went much beyond (i) a diagnosis of the Claimant’s D2 [61-63] (ii) the medication the Claimant has been taking [64-65]. There was no evidence before the Tribunal from the Claimant’s GP, or a consultant, or any attending physician(s), which addressed:
  - a. the effect the Claimant’s D2 had (or might be expected to have) on the Claimant’s ability to carry out normal day-to-day activities;
  - b. the effect the Claimant’s medication and/or diet was having on his D2 and any associated symptoms or effects;
  - c. what the effect on the Claimant’s ability to carry out normal day-to-day activities would be if he did not take his prescribed medication and/or failed to follow the dietary advice he had been given;
  - d. the likely future prognosis of the Claimant’s D2.

#### Findings of fact

7. The Tribunal makes the following findings of fact, including any contained in its Discussion/Conclusions, on the civil balance of probabilities.
8. In 2018, the Claimant worked at Charing Cross Hospital as a Private Patient Host employed by Sodexo Ltd. His duties included moving patients, and moving/retrieving equipment and supplies.

9. In 2018 or 2019 (he does not know which year), the Claimant went to register with a new GP practice. As part of the registration process he was given a routine blood test, as a result of which the Claimant was clinically diagnosed as having D2.
10. The Claimant does not allege that his D2 had any effect on his ability to carry out normal day-to-day activities prior to the date on which he received his D2 diagnosis (whatever date that was). On that basis, the Tribunal infers and finds that that is because prior to his diagnosis, the Claimant's D2 had had no effect on his ability to carry out normal day-to-day activities (at least, none he was aware of at the time).
11. After his D2 diagnosis, on a date unknown, the Claimant was initially prescribed Metformin to treat his blood sugar levels, which he began taking.
12. After his D2 diagnosis, again on dates unknown, the Claimant was advised by his GP and a dietician (i) to avoid food with a high sugar content (ii) to avoid red meat (iii) to keep his consumption of starchy food – white bread and rice – to a minimum.
13. The Tribunal infers the Claimant generally adhered to the dietary advice above, but does not make a finding of fact that he always did so. The Tribunal draws a distinction between dietary advice to avoid certain types of food and drink – advice which someone can follow whilst occasionally consuming discouraged types of food and drink - and dietary advice never to consume certain types of food and drink.
14. Following his diagnosis, the Claimant was given a home-testing kit which he used on average three times a week to monitor his blood sugar levels. The Claimant did not allege that having to conduct these regular home blood tests itself affected or impaired his ability to carry out his normal day-to-day activities, hence the Tribunal infers and finds that taking these tests did not have that effect.
15. In 2020, the Claimant became an employee of the Respondent at Charing Cross Hospital working as a Private Patient Host (possibly – although the Tribunal makes no firm finding to this effect – because of a 'TUPE transfer'). Following the onset of the Covid-19 pandemic, the Claimant began shielding (because of his heightened vulnerability because of his D2) in late June 2020.
16. By mid-2021, the Claimant's D2 medication had widened in scope, and now included the following daily drugs:
  - a. Trajenta 5mg (one tablet/day)
  - b. Metformin 500mg (2 tablets/day)
  - c. Gliclazide 80mg (1 tablet/day)
  - d. Ramipril 1.25mg (one capsule/day)
  - e. Amlodipine 5mg (one tablet/day)
17. The Tribunal had no information before it addressing what each of these specific medications is for, what effect taking them has on the Claimant (other than to treat his D2 and keep his blood sugar levels under control), or what effect there would be on the Claimant's ability to carry out normal day-to-day activities if he stopped taking one or more of these medications.

18. On 10 October 2021, the Claimant presented an ET1 attaching Particulars of Claim (**POC**) which alleged that his D2 constituted a disability under the EqA 2010 and which asserted the following disability-related claims in relation to his D2:

- a. in paras. 39-40 of the POC, the Claimant asserted a claim of direct disability discrimination under s.13 of EqA 2010, the earliest allegation of less favourable treatment (not being allowed to work in his contracted role of Private Patient Host) appearing to have taken place on/after 6 April 2021;
- b. in paras. 41-44 of the PoC, the Claimant asserted a claim of discrimination arising from disability under s.15(1) of EqA 2010 – again, the earliest allegation of unfavourable treatment (not being allowed to work in his contracted role of Private Patient Host) appears to have taken place on/after 6 April 2021.

19. At the OPH, it became clear the parties did not disagree the following facts:

- a. the Claimant's D2 constitutes a physical impairment;
- b. the Claimant had D2 from its date of diagnosis (whatever date that was), and neither party knew when the Claimant first 'contracted' D2;
- c. the Claimant's D2 (although not necessarily its effects) is long-term (ie, the Claimant's D2 had lasted more than 12 months by the "relevant time", and is likely to continue into the foreseeable future);
- d. the Claimant has been advised to follow a healthy diet, eat healthy food, and avoid certain types of food and drink.

### Relevant law

20. Section 6 of the Equality Act 2010 (EqA) 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.

*Duration*

21. The effect of an impairment is “long-term” if it (a) has lasted for at least 12 months (b) is likely to last at least 12 months or (c) is likely to last for the rest of the life of the person affected. EqA 2010, Schedule 1, para. 2(1).

*Date of assessment of disability*

22. The date to assess whether a person’s impairment constitutes a disability is the date of the discriminatory act. Cruickshank v VAW Motorcase Ltd [2002] ICR 729, EAT. That is also the correct date to determine whether the impairment has had, or is likely to have, a long-term effect. All Answers Ltd v W [2021] EWCA Civ. 606, CA.

*Substantial*

23. “Substantial” means more than minor or trivial. EqA 2010, s.212(1).

*Ability to carry out normal day-to-day activities*

24. The EqA 2010 does not define “normal day-to-day activities”. In 2011, the Government issued ‘*Equality Act 2010 Guidance – Guidance on matters to be taken into account in determining questions relating to the definition of disability*’ (2011) (**Guidance**), which the Tribunal should take into account where it considers it to be relevant. EqA 2010, s.6(5). Section D of the Guidance notes:

*“D2. The Act does not define what is to be regarded as a ‘normal day to-day activity’. It is not possible to provide an exhaustive list of day to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.*

*D3. In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”*

*Diet and normal day-to-day activities*

25. If the only effect of a person’s D2 on their normal day-to-day activities is to require the person to abstain from sugary drinks (cola, fruit juice) and/or to “*watch*” what they eat/drink, evidence of that alone may be insufficient to establish that that impairment has a substantial adverse effect on the person’s ability to carry out normal day-to-day activities. Metroline Travel Ltd. v Stoute [2015] UKEAT/0302/14, paras. 6-7.

*Relevance/effect of medical/corrective treatment*

26. An impairment is to be treated as having a substantial adverse effect on a person's ability to carry out normal day-to-day activities if (a) measures are being taken to treat or correct it, and (b) but for those measures, the impairment would be likely to have that effect. EqA 2010, Schedule 1, para. 5(1). The word "*likely*" means "*could well happen*" not "*more likely than not to happen*". SCA Packaging Ltd v Boyle [2009] UKHL 37.

27. Para. B7 of the Guidance states:

*"B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities. For example, a person who needs to avoid certain substances because of allergies may find the day-to-day activity of eating substantially affected. Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities."*

28. Para. B14 of the Guidance states:

*"in the case of someone with diabetes which is being controlled by medication or diet should be decided by reference to what the effects of the condition would be if he or she were not taking that medication or following the required diet."*

29. As a general rule, it is not enough for a claimant to maintain that they would be adversely affected if their treatment were to stop – medical evidence to that effect is usually necessary. Woodrup v London Borough of Southwark [2002] EWCA Civ. 1716 (claimant claimed her mental condition would deteriorate if her medical treatment for anxiety were to stop, making her a disabled person; Court of Appeal affirmed ET's judgment that claimant had not done enough to prove that stopping treatment would result in the relevant adverse effect). Per Brown LJ at para. 13:

*"In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this peculiarly benign doctrine under para 6 of the schedule should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."*

*Status of diabetes as a disability*

30. Unlike cancer, HIV infection or multiple sclerosis, diabetes of either Type 1 or Type 2 is not statutorily defined as a disability. EqA 2010, Schedule 1, para. 6(1). Cf. Metroline Travel Ltd at para. 10 (having D2 is not a disability per se).

*Progressive conditions – deemed substantial adverse effect*

31. If (a) a person has a progressive condition (b) as a result of that condition, that person has an impairment which has (or had) an effect on that person's ability to carry out normal day-to-day activities, but (c) the effect is not (or was not) a substantial adverse effect, that person is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in that person having such an impairment. EqA 2010, Schedule 1, para. 8(1)-(2).

32. Paras. B18-20 of the Guidance state:

*"B18. Progressive conditions, which are conditions that have effects which increase in severity over time, are subject to the special provisions set out in Sch1, Para 8. These provisions provide that a person with a progressive condition is to be regarded as having an impairment which has a substantial adverse effect on his or her ability to carry out normal day-to-day activities before it actually has that effect.*

*B19. A person who has a progressive condition, will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is likely to become substantial. Medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The effect need not be continuous and need not be substantial. [ ] The person will still need to show that the impairment meets the long term condition of the definition. (Sch1, Para 2).*

*B20. Examples of progressive conditions to which the special provisions apply include systemic lupus erythematosus (SLE), various types of dementia, and motor neurone disease. This list, however, is not exhaustive."*

*Burden of proof*

33. The burden of proof rests on the employee claiming disability to establish that they were disabled at the relevant time.

Issues

34. The issues the Tribunal has to determine are as follows:

35. First, what is the "relevant time" to determine whether the Claimant was disabled?

36. Second, at the relevant time, was the Claimant's D2 a physical impairment?

37. Third, at the relevant time, did the Claimant's D2 have a substantial adverse effect on his ability to carry out normal day-to-day activities?

38. Fourth, at the relevant time, was any such substantial adverse effect long term, ie, had that substantial adverse effect lasted at least 12 months, or was it likely to last at least 12 months, or was it likely to last for the rest of the Claimant's life?

Discussion / Conclusions

39. First, the Tribunal concludes that the “relevant time” to determine whether the Claimant was disabled is the period 6 April 2021 – 10 October 2021. The earlier date is the date upon which the Claimant first alleges unlawful disability discrimination on the Respondent’s part. The later date is the date on which the Claimant presented his ET1. It is the period between these two dates in which the Claimant alleges he was subject to unlawful disability discrimination by the Respondent, accordingly it is the period between these two dates in which the Claimant must establish that he was disabled by virtue of his D2.
40. Second, it is not in dispute that during the period 6 April – 10 October 2021 (i) the Claimant had D2 (ii) the Claimant’s D2 constituted a physical impairment. It is also not in dispute that these facts alone do not render the Claimant disabled under current statute or case law. EqA 2010, Sch. 1, para. 6(1); Metroline Travel.
41. Third, the parties dispute whether the Claimant’s D2 during this period had – or would have had, absent his medication and/or diet – a substantial adverse effect on the Claimant’s ability to carry out normal day-to-day activities.
42. The Tribunal’s conclusion on this issue is that the Claimant has failed to establish that during the period 6 April – 10 October 2021 his D2 had - or would have had, absent his medication and/or diet – a substantial adverse effect on his ability to carry out normal day-to-day activities. The Tribunal reaches that conclusion on the following grounds:
- a. the Claimant’s D2 had no effect on his ability to carry out normal day-to-day work or non-work related activities *before* he was diagnosed with D2, and there is no evidence that *after* he was diagnosed with D2 (whether that was in 2018 or 2019) his ability to carry out normal day-to-day activities during the relevant period changed or reduced in any material way;
  - b. other than in respect of his diet (addressed below), there is no evidence nor is it suggested by the Claimant that the Claimant’s D2 adversely affected his ability to carry out normal day-to-day activities in the period 6 April – 10 October 2021 either substantially or indeed at all - the Claimant has not identified a single normal work or non-work related activity in this period which he could no longer do, or could no longer do as well, or do as easily, or now sought to avoid, because of his D2;
  - c. while the Tribunal accepts it is *possible* that the reason the Claimant was able to carry out the full range of normal work and non-work related activities in the period 6 April – 10 October 2021 was because of the medication he was taking at the time and/or the diet he was on, the Claimant has failed to establish with adequate evidence that these treatment/corrective measures are *likely* the reason for the absence of any such adverse effect in this period – the Claimant has not put before the Tribunal any medical evidence which identifies any normal day-to-day activity which the Claimant carried out during this period which would be adversely affected (either substantially or at all) if he ceased taking one, or a combination, or all of the five medications listed at



para. 16 above, and/or ceased following the dietary advice he was given. The absence of medical evidence to that effect presents a serious impediment to the Tribunal accepting the Claimant's case. Woodrup v London Borough of Southwark applied.

43. Regarding the Claimant's diet, para. B7 of the Guidance contemplates that a coping strategy may alter the effects of an impairment to the extent that they are no longer substantial and the person with the impairment would no longer meet the definition of disability. The Claimant's diet is itself a relatively moderate one (there is no food or drink which the Claimant is absolutely prohibited from ever consuming), and in the Tribunal's judgment is sufficiently close to the diet which HHJ Serota QC found in Metroline Travel was not a substantial adverse limitation on a claimant's ability to carry out normal day-to-day activities and sufficiently distant from a more extreme diet which might reasonably be deemed to have that effect (eg a nut allergy where the consumption of nuts create a real risk of breathing difficulties, resulting in a diet where all nut and nut-based products eg certain types of cooking oil must be avoided at all costs).

*Progressive condition*

44. Relying on EqA 2010, Schedule 1, para. 8(1)-(2), the Claimant sought to put his case on the alternative basis that even if his D2 impairment did not have a substantial adverse effect on his ability to carry out normal day-to-day activities in the relevant time, that the Tribunal should take him to be a person with an impairment which had a substantial adverse effect because (a) his D2 is a progressive condition (b) as a result of his D2, the Claimant had an impairment which had an effect (even if it was not substantial) on his ability to carry out normal day-to-day activities (one effect here would be on the Claimant's diet, where there clearly has been some effect).

45. The Tribunal rejects the Claimant's alternative case. In order to make it out, the Claimant must establish his D2 impairment was a progressive condition at the relevant time (6 April – 10 October 2021). There is no medical evidence before the Tribunal that at the relevant time the Claimant's D2 was a progressive condition. The only medical evidence the Claimant adduced related to this issue was a letter from the North West London Diabetic Eye Screening Programme dated 4 November 2021 – ie, after the relevant time – which thanked the Claimant for attending a recent diabetic eye screening test and which stated that his test results "*showed signs of diabetic maculopathy. This means there are changes to the small blood vessels on the macula, the central part of the retina at the back of your eye. This means we need to check your eyes more often than every 12 months.*" It should be noted that this letter was disclosed to the Respondent late on the morning of the OPH. There is no mention in the Claimant's impact statement of any problems with his eye-sight or ability to read, watch TV or look at a computer/mobile phone screen.

46. Para. B19 of the Guidance states that medical prognosis of the likely impact of the condition will be the normal route to establishing protection under this provision. The Claimant did not put a medical prognosis before the Tribunal stating that his D2 was a progressive condition (either during the relevant time or at all), and the Tribunal does not accept that the letter referred to above constitutes a medical prognosis to that effect. Without any form of medical explanation of the various medications which

the Claimant has been taking since mid-2021, the Tribunal is not willing to infer that the increased range of medications must be because the Claimant's D2 is a progressive condition and/or must have been progressively deteriorating during the relevant time.

47. Fourth, the Claimant having failed to establish that during the period 6 April – 10 October 2021 his D2 had - or would have had, absent his medication and/or diet – a substantial adverse effect on his ability to carry out normal day-to-day activities, the issue of whether any substantial adverse effect was “long-term” under any of the three possible definitions does not arise for determination.

48. Finally, the Respondent applied for a deposit order as a condition of the Claimant being allowed to pursue his separate age discrimination claim. The Tribunal declines that application. The overwhelming focus of the parties' attention at the OPH was (for obvious reasons) the disability issue. The Tribunal is not satisfied, based on the very limited submissions it heard in respect of the deposit application, that the Claimant's age discrimination claim lacks reasonable prospects of success.

Signed (electronically):            Employment Judge – Antoine Tinnion

Date of signature:                    10 May 2022

Date sent to parties:                10 May 2022