EMPLOYMENT TRIBUNALS

Claimant: Mr F Martey

Respondent: Peninsula Heights Management Company Ltd

Heard at: Croydon (preliminary hearing in public via CVP)

On: 11 October 2022

Before: Judge Brian Doyle (sitting alone)

Representation:
Claimant: Ms E Godwins, Solicitor
Respondent: Ms B Omotosho, Solicitor

JUDGMENT having been sent to the parties on 20 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

Introduction

1. These are the written reasons for an oral, *ex tempore* judgment delivered in summary form at the conclusion of a one-day preliminary hearing to determine whether the claimant was a disabled person for the purposes of his disability discrimination complaint and, if so, at what relevant times.

2. The claimant made a request for written reasons under rule 62 at the hearing itself.

3. References in square brackets below are to pages in the documents bundles put before the Tribunal.

The preliminary issue

4. The claimant was employed by the respondent as a Night Porter at a residential apartment block in central London. He commenced his employment on 1 October 2006. His employment was terminated with effect from 13 August 2020. He brings complaints of unfair dismissal, disability discrimination, wrongful dismissal and unlaw deductions from wages.

5. The claimant's disability discrimination complaint relies upon his case that he was at the relevant times a disabled person by virtue of having Type 2 diabetes, resulting in sleepiness, tiredness, fatigue, lack of control of urination, impotence and vision problems. The relevant times for this purpose are said to be between October 2019 and August 2020.

6. It is not clear from the claimant's particulars of claim [15] when he began to experience these symptoms or effects. See paragraph 9 and onwards of the particulars. Was it from 2017 or only from 2018? – the particulars are not clear. He asserts that from February 2020 he was reporting frequent urination, tiredness and severe headaches; and from March 2020 tiredness, sleepiness and blurry vision.

7. The Tribunal had before it a bundle of documents comprising 100 pages, the claimant's witness statement and the claimant's disability impact statement. The claimant gave tested evidence. The Tribunal heard submissions from both parties.

The claimant's evidence

8. The claimant's evidence in his witness statement is as follows.

9. He believes that he began to suffer with blurry vision, frequent toilet use and sleepiness from around 2017. He believed at the time that his blurry vision was to do with becoming older. He says that his symptoms started getting worse. He went to the GP, and he told them about the symptoms, and the frequent toilet use, especially at night. His medical record shows that he went to the GP on 20 February 2020 to report the problem about his frequent toilet use [66].

10. On 26 February 2020 he met with his GP [65]. He says that he described all his symptoms to him of extreme fatigue, sometimes falling asleep without control, not being able to control his bladder, going to the toilet all the time and blurry vision. The GP told him that he believed that he is diabetic because of his symptoms. He put him on medication for diabetes and sent him for a blood test. The claimant's evidence is that he was having lots of problems with his bladder. He went to the GP again on 4 March 2020 [64].

11. Then on 13 May 2020, following his blood test, he received medical confirmation that he had Type 2 diabetes [63]. On 18 May 2020, he was signed off work for his diabetes, poor bladder control and visual symptoms [63]. He says that he gave the sick note to his employer and that he does not have a copy of it. His evidence is that at that time he was suffering from extreme fatigue and blurry vision, and that he was frequently using the toilet and did not have a lot of control with his bladder.

12. His evidence continues that he had a meeting with occupational health on 12 June 2020 [49-53] when he described his symptoms to them and the improvements to his health since taking the medication.

13. On 14 July 2020 [62], he went to his GP because he was suffering from diarrhoea because of the medication. He reported that the medication had been

helping him and he had seen improvements. He was feeling suicidal about potentially losing his job, which he believed was because of his diabetes.

14. The claimant's evidence is that he changed his diet because of his diabetes diagnosis. Although it has helped with his symptoms, he is still dependent on medication. Without medication, he says, he suffers primarily from tiredness, blurry vision, and frequent toilet use.

15. The claimant's disability impact statement restates his belief that he has suffered from the symptoms of diabetes since 2017. Due to the change in sugar levels towards the end of the day or at the end of a meal, he would suddenly feel disorientated and confused. He would not be able to control sleep at work or in the presence of others. He suffered from extreme tiredness and would sleep more than 8 hours. Even after sleeping for so long, he would still feel tired and sleepy, especially after he had eaten or at night.

16. His impact statement continues that he would have blurry vision. It made it difficult for him to see or concentrate on what was in front of him. It would make it difficult for him to see objects or people properly or to read anything. He would frequently go to the toilet, and he was unable to hold his urine for any period of time. He was also always thirsty, and his mouth and throat would continuously be dry, so that he would have to drink all the time, as his throat was dry, making it difficult for him to speak and it would sometimes cause pain. He suffered from impotence, which affected his relationship with his partner as he was not able to engage in normal sexual activity. He cannot eat food like others – for example, sugary foods and carbs – without it having an impact on his sugar levels, with him becoming very tired, suffering from blurry vision, and being disorientated.

17. The claimant repeats his belief that he began to suffer from the symptoms around 2017. He says that he could not control his sleepiness and he would have blurry vision and frequent toilet use. He is currently taking medication and he has changed his diet to control the symptoms of his diabetes. He was advised that, if he was able to stop taking medication for a year, his diabetes will be classified as being in remission. He is not yet able to stop taking the medication as, when he stops taking it, he feels the effects of the diabetes, with extreme fatigue, blurry vision and frequent urination.

18. He began taking Atorvastatin, which is medication for high cholesterol, from around 14 July 2017. He was prescribed this because his cholesterol was high. He says that this was tested after he was experiencing symptoms such as extreme tiredness. He continues to take this medication to date on a repeat prescription.

19. He was first prescribed Metformin on 26 February 2020, when he was given a preliminary diagnosis of diabetes. The dosage he was prescribed had severe side effects, but this dosage has now been reduced and has stabilised his symptoms. Metformin is for diabetes and it helps to control his sugar levels. He continues to take this medication on a repeat prescription.

20. He began taking Solifenacin when it was prescribed on 4 March 2020. This drug helps to control his bladder, due to the frequent urination and incontinence. He continues to take this medication on a repeat prescription.

21. He takes Sildenafil to aid his impotence which is because of the diabetes. He was prescribed this from 27 August 2020. He continues to take this medication on a repeat prescription.

22. He was prescribed Mirtazapine from 2 October 2020 to manage the symptoms of depression, as he was suffering from suicidal thoughts and depression after his dismissal. He continues to take this medication on a repeat prescription.

23. He changed his diet when he was diagnosed with diabetes. He no longer eats sugary foods, and he maintains a low carb, primarily keto diet. He only eats twice a day, and he regularly does intermittent fasting.

24. The claimant says that the worse case scenario if he was not taking medication to control his diabetes is death, although he could also suffer from blindness, heart disease, kidney damage, amputation of body parts or stroke. Before he began to take medication, he was suffering from blurry vision, he would feel disorientated and confused when there was a spike in his sugar levels, and he would not be able to control his sleep – it was like he would pass out.

25. The claimant concludes his impact statement by stating that the symptoms of his diabetes without the right medication are that he suffers from blurry vision; a confused state where he does not know what is going on around him; he feels extremely tired all the time; he cannot control when he falls asleep; he suffers from sleep abnormalities; he experiences impotence; he is often disorientated; he suffers from extreme thirst; and he cannot control his bladder and he frequently has to urinate.

The medical evidence

26. The claimant's GP records before the Tribunal commence in April 2015. It appears that the claimant is subject to an annual review and blood test. There is nothing remarkable reported in 2015 or 2016 [88]. A Hba1c test of his blood sugar in April 2015 is recorded as being normal.

27. There is also nothing remarkable in 2017, except to note that his blood sugar levels are recorded as normal [87].

28. There is also nothing remarkable in 2018, except again to note that his blood sugar levels are recorded as normal [86]. There is only one entry for 2019, which is not relied upon. It does not appear that he saw his GP during that year. He was not subject to an annual review or tests [86]. He did attend hospital for chest pains in December 2019 [89].

29. On 20 February 2020 he presented to his GP reporting for the first time an urgent desire to urinate ("6/12 hx of urge to void" and "goes to loo overnight") [86]. A urine dipstick test revealed nothing of report. Blood tests were ordered, which did not appear to show anything requiring action. The claimant was given

general advice and a visit to a STI clinic was suggested. An antibiotic was prescribed.

30. Then on 26 February 2020 the claimant presented again to his GP [85]. The GP describes the problem as "Type 2 diabetes mellitus (First)". The GP records: "I think diagnosis can be made straight away as he is symptomatic, polyuria". The Tribunal takes judicial notice that polyuria is a condition where the body urinates more than usual and passes excessive or abnormally large amounts of urine each time someone urinates. The GP recorded that the claimant's PSA was not raised (that is a reference to the claimant's prostate). He added: "Possibly detrusor instability contributing – he is getting urge incontinence". That is a reference to the muscle that pushes urine out of the bladder. Metformin was prescribed for 2 months. That is a medicine to treat Type 2 diabetes.

31. On 3 March 2020, on examination by the GP, there is evidence of weight gain and an excessive BMI (Body Mass Index) [84].

32. The claimant's urination problem was reviewed on 4 March 2020 [84]. The GP recorded that Metformin had been commenced, but there was still bladder instability. He suggested a trial of a second or alternative medicine, anticholinergic, a medicine for an over-active bladder. Solifenacin was prescribed.

33. The claimant presented again on 13 May 2020 for a diabetes review [83]. The GP recorded that the claimant's Hba1c had gone up – that is, that his blood sugar had increased. The GP proposed to add Sitagliptin to his medication. That is a medication used to treat Type 2 diabetes.

34. On 18 May 2020 the GP issued a Fit Note recording that the claimant was not fit for work by reason of "diabetes, poor control and visual symptoms". This is the first reference in the medical history to "visual symptoms".

35. An occupational health report is dated 12 June 2020 [57-61]. This refers to the claimant having diabetes and a separate bladder condition. The claimant reported that he was feeling better in himself and not as fatigued since additional medication had been prescribed. He reported sleep disturbance, possibly as a side effect of the medication. He also reported blurred vision, which was noted as a typical sign of (unstable) diabetes. The report questioned whether continued night work would be suitable for a diabetic. It also noted that there was no drowsiness as a side effect of medication.

36. On 25 June 2020 the GP records, among other things, that the claimant had lost weight because of changes to diet and exercise [83]. The claimant's fears about his job security are recorded. The GP agreed to repeat the Hba1c test.

37. The GP records show that from June or July 2020 the claimant was on repeat prescriptions for diabetes, depression, cholesterol, erectile dysfunction (impotence) and an over-active bladder.

38. On 14 July 2020 the GP noted a noticeable improvement in the Hba1c in one month after medication [82]. However, the claimant reported diarrhoea and

abdominal discomfort, presumably as a side effect of the medication, which the GP adjusted. The claimant reported feeling low and having suicidal thoughts, implying that this was linked to his concerns about his job security. Advice and contact for help were provided.

39. On 12 August 2020 the claimant was referred for diabetic retinopathy screening [82]. This is a test to check for eye problems caused by diabetes. The results are dated 14 August 2020 [90]. They show good visual acuity in his right eye and relatively less good visual acuity in his left eye. The test notes the early stages of retinopathy, but with a low risk and requiring no treatment.

40. On 26 August 2020 the claimant had a telephone consultation with his GP [81]. The claimant was enquiring about the eye test results. By this stage the claimant had been dismissed by the respondent. He discussed this with his GP, including his suspicion that it was because of his diabetes. The claimant suggested that he should have been told in 2015 that he was borderline (presumably that is a reference to being "pre-diabetic", where blood sugars are higher than usual, but not high enough to attract a diagnosis of diabetes, although signalling a high risk of becoming diabetic). The GP wrote that he could see an entry (the Tribunal has referred to that above) and the claimant had yearly blood tests between 2015 and 2018. The GP queries why he was not seen at the surgery in 2019. The Tribunal notes that there is no record of the claimant being borderline or pre-diabetic in 2015.

41. On either 26 or 27 August 2020 (it is not clear from the GP printout) the claimant first reports impotence as a problem [81]. In any event, on 27 August 2020 there is a diabetes review with him by telephone. The claimant reports feeling depressed following his dismissal and that he intends to go to an employment tribunal. Sildenafil is prescribed (this is the drug Viagra used for erectile dysfunction). A referral to the diabetic nurse was made and advice was given.

42. On 14 September 2020 there is a further diabetes review by telephone [81]. There is nothing of note in this entry, although the claimant reports side effects of the medication.

43. On 1 October 2020 the claimant reports feeling suicidal, lost libido and not sleeping [80]. A referral is made to the community dietician and a further referral for diabetes education.

44. On 2 October 2020, in a telephone consultation, the claimant reports "depressed mood" [79-80]. The claimant says that he is not sleeping and has suicidal thoughts, but he is not intending to act upon them. There is a further discussion about his dismissal and its aftermath. He reports a low libido for a couple of months; that dealing with a diabetes diagnosis was a bit difficult; that initially he was feeling very tired either due to the diabetes or the medications. He refers to being dismissed for being asleep at work. The GP records that the Hba1c has come down "nicely" because of the medications.

45. By 29 October 2020 the claimant is reporting that he feels in a better place [79]. An over-the-counter medicine is helping him sleep. The following day his Hba1c is recorded as "very good" [79]. As a result, the GP reduces one medication and stops the other.

46. On 22 December 2020 the community diabetes team records that the claimant has made drastic changes to his diet and exercise; has lost weight; has excellent control of his diabetes via lifestyle changes; and that there was no need to refer him to the diabetes specialist service [99-100].

47. By 5 January 2021 the GP records the claimant as requesting to be treated as in remission from diabetes, but he is being told that first he needs to be off medication for a year [78].

Other evidence

48. The other evidence that might assist the Tribunal with the threshold question regarding disability and its timing is that of the internal employment procedures. That evidence may be summarised as follows.

49. In March 2019, as part of an investigation meeting, the claimant made no mention any illness or disability to his employer because of having been found asleep at work [52-56]. In April 2019, there is a reference to a conversation in November 2018, concerning an earlier incident, when the claimant suggested that his blood pressure may be the cause of his sleeping [49-51].

50. In July 2020 [62-69] as part of a grievance investigation there is a reference to the claimant's "medical condition" [66]. The claimant confirms that in May 2020 he had been diagnosed as diabetic. However, the claimant's concern here appears to be that his revelation of his diabetes had not been treated as confidential. This evidence does not assist the Tribunal regarding the preliminary issue. There had been a referral to occupational health.

51. In September 2020 as part of an appeal hearing [70-73], there is a reference to the claimant's underlying health condition and medication, with a suggestion that sleeping is a feature of diabetes.

Claimant's submissions

52. On behalf of the claimant, Ms Godwins submitted that he is a disabled person within the meaning of section 6 of the Equality Act 2010 at the relevant times. The claimant has been diagnosed with Type 2 diabetes. The Tribunal is concerned with whether there have been substantial adverse effects on his normal day-to-day activities.

53. The respondent challenges this, contending that there have been no substantial adverse effects and it relies upon the claimant's medical records in support of its position. The respondent did not highlight this until 5 October 2022. Information had been provided by the claimant to the respondent in July 2022. The respondent did not communicate its view that the medical evidence was insufficient. Nevertheless, it is the claimant's position that the medical evidence is sufficient to the purpose.

54. The claimant has given an account of his sleepiness and tiredness from 2017 onwards. He raised this with the respondent at the time. He had been falling asleep at work. See [51] (the minutes of an investigation meeting on 2 April

2019). At the time he believed it was because of high blood pressure. This is a well-known symptom of diabetes. He communicated this to his GP. His condition improved with medication.

55. Even if the claimant had not reported all the relevant matters, he had the condition. See the GP's diagnosis on 26 February 2020 [85]. See also the claimant's evidence as to how he felt before that diagnosis. See also the medication that he was then prescribed. The medication reduced the effects of the condition and his condition improved. See the occupational health report and the evidence at [100]. He asked his GP about this. He continues to be on medication. The claimant made substantial changes to his diet. He also had the benefit of medication.

56. As to the urination issue, see the medical evidence at [85] and [86]. That dates from 20 February 2020. He is still on medication for that.

57. As for the blurred vision, he had signs of this from 18 May 2020 and issues with his sight. The occupational health report recognised it as a symptom of diabetes. See also the eye screen test result.

58. So far as impotence is concerned, the claimant raised this, as is apparent from the medical reports. See [81] on 26 August 2020.

Respondent's submissions

59. For the respondent, Ms Omotosho submitted that the burden of proof is upon the claimant. It is for him to provide evidence. It is not for the respondent to specify what that evidence should be. That is for the claimant. Both parties were late in complying with the case management timetable. The respondent put its position to the claimant of 5 October 2022. The claimant was on notice of the respondent's position.

60. The material times for present purposes are October 2019 to 13 August 2020 (the date of the dismissal). The claimant was employed as a Night Porter. He worked 12-hour night shifts, 3 days on and 3 days off. He began falling asleep while at work on duty. This put his employment at risk. He has over-emphasised the impact of his condition, which is Type 2 diabetes, first diagnosed in February or May 2020.

61. The substantial adverse effects upon which he relies are said to be as follows. He says that blurred vision began in August 2019; impotence in August 2020; fatigue in 2017; and frequent toilet use in February 2020. However, the impacts were not substantial. There is nothing in his evidence or his disability impact statement to support his assertions as to 2017, 2018 or 2019.

62. As for the period October 2019 to August 2020, there is nothing in the medical evidence as to the severity of the condition or its effects. He did not go to his GP until February 2020. He is exaggerating his condition. There is no evidence that his treatment was masking the effects of his condition, from 2017 or from October 2019 onwards.

63. As to the blurred vision, see the disability impact statement. From August 2019, there is no medical evidence to support it at the relevant times. See [90]. There was no need to be under the specialist diabetes team. Again, the claimant has exaggerated the effects.

64. The Diabetes UK website suggests that in the UK there are 3.2m people with diabetes, 90 per cent of whom have Type 2. It is a condition managed by diet, exercise and medication.

65. See [85] and [86]. On 4 March 2020 the claimant was being provided with specific treatment for an over-active bladder. This was not because of diabetes. He told the occupational health practitioner that it was a separate condition. Then in May 2020, because of his blood sugar count, he is put on treatment. In the background are the disciplinary proceedings at work.

66. Ms Omotosho referred the Tribunal to *Metroline Travel Ltd v Stoute* [2015] IRLR 465 EAT (paragraph 6). Once the claimant was discharged, he had control of his diabetes.

67. As for the occupational report, this was a telephone consultation. There was no examination of the claimant. There was no review of his medical records. It was not an expert opinion. In any event, the medical evidence does not support the claimant's case as adverse effects or a progressive condition. There is insufficient evidence. In respect of impotence, there is nothing sufficient in the medical evidence to make a link to diabetes. It is not relied upon as a standalone condition.

Claimant's reply

68. Ms Godwins replied that the respondent did not challenge the medical evidence provided. See the emails between the parties in September 2022. It was not until 5 October 2022 that the sufficiency of the medical evidence was challenged.

69. The claimant accepts that the bladder issues alone would not amount to a diagnosis of diabetes. The claimant puts his case based on a progressive condition. See his witness statement and his disability impact statement.

70. As for *Metroline*, the claimant points to paragraph 8 of the judgment (a medicated diabetic would regularly be treated as a disabled person).

Relevant legal principles

71. Section 6(1) of the Equality Act 2010 provides that 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. The term "normal day-to-day activities" is no longer statutorily defined or limited by categorisation. It is at large.

72. 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 (Schedule 1, paragraph 5(1)). Measures include medical treatment and the use of a prosthesis or other aid (paragraph 5(2)).

73. In circumstances where a person (P) (a) has a progressive condition, (b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out normal day-to-day activities, but (c) the effect is not (or was not) a substantial adverse effect, then P is to be taken to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment (Schedule 1, paragraph 8(1) and (2)).

74. The Tribunal has had regard to the Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128; to the statutory *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (2011); and the EHRC Employment Code. It also draws upon the relevant commentaries in *Harvey* and the *IDS Employment Law Handbook (Discrimination at Work)*.

75. The time at which to assess whether there is an impairment which has a substantial adverse effect on normal day-to-day activities is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long-term effect. It may be necessary for the Tribunal to draw inferences, based upon the evidence before it, as to the relevant time at which an impairment existed and/or produced substantial adverse effects. However, the key question is whether, at the time of the alleged discrimination, the adverse effects of an impairment have been established as both substantial and long-term. That is to be assessed by reference to the facts and circumstances existing at that date. The Tribunal is not entitled to have regard to events occurring subsequently: *McDougall v Richmond Adult Community College* [2008] ICR 431 CA; *All Answers Ltd v W* [2021] IRLR 612 CA.

76. The term “impairment” is not defined. It bears its ordinary, natural meaning: *Rugamer v Sony Music Entertainment UK Ltd* [2002] ICR 381 EAT; *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498 CA; *Guidance* paragraph A3.

77. It is the degree to which a person is affected by a particular impairment that in most cases will determine whether that person is afforded protection. It is not enough to say that diabetes is a potential disability under the Act – it is. It is for the claimant to show that he is affected by that condition to an extent that brings him within the Act.

78. The general approach to the issue is to pose four separate and sequential questions: *Goodwin v Patent Office* [1999] ICR 302 EAT; *J v DLA Piper UK LLP* [2010] ICR 1052 EAT. (1) Did the claimant have a mental and/or physical impairment? (the impairment condition). (2) Did the impairment affect the claimant’s ability to carry out normal day-today activities? (the adverse effect condition). (3) Was the adverse condition substantial? (the substantial condition). (4) Was the adverse condition long term? (the long-term condition). In practice, it may not matter whether the Tribunal starts with the impairment condition and works forwards, or starts with the adverse effect condition and works backwards, provided all elements of the definition are addressed.

79. It will not always be essential for the Tribunal to identify a specific impairment if the existence of one can be established from the evidence of an adverse effect on the claimant's activities. It may be possible in some cases to deduce the existence of an impairment from the effect that it has on an individual's day-to-day activities. It is not always necessary to identify an underlying condition where a claimant's symptoms clearly indicate that he is suffering an impairment. See *College of Ripon and York St John v Hobbs* [2002] IRLR 185 EAT. Nevertheless, it is important that the Tribunal makes clear findings as to the nature of the disability and which adverse effects were attributable to it and when.

80. It is not necessarily a requirement that the claimant must establish a medically diagnosed cause of an impairment. What matters is to consider the effects of the impairment rather than its cause. An impairment could be an illness itself or it might be the result of an illness. The approach is a functional one – what are the effects upon the claimant? It is an evidential question in the final analysis.

81. To amount to a disability the impairment must have a substantial adverse effect on the person's ability to carry out normal day-to-day activities. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, but that effect is likely to recur, it is to be treated as continuing to have that effect. Substantial is defined in section 212(1) Equality Act as meaning "more than minor or trivial".

82. 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means "could well happen": *Boyle v SCA Packaging Ltd* [2009] ICR 1056 HL. In assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

83. A person who has a progressive condition because of which he has an impairment that has (or had) some effect on his or her ability to carry out normal day-to-day activities, but not a substantial effect, will be taken to have an impairment that has a substantial adverse effect if the condition is likely to result in such an impairment. Again, here likely means "could well happen".

84. The substantial adverse effect of an impairment has to be long-term to fall within the definition of disability. As the respondent has not put this element in contest, the Tribunal will not explore the relevant legal principles of this aspect of the definition.

85. In determining whether a person's impairment has a substantial effect on his ability to carry out normal day-to-day activities, the effects of measures such as medical treatment or corrective aids on the impairment should be ignored. If an impairment would be likely to have a substantial adverse effect but for the fact that measures are being taken to treat or correct it, it is to be treated as having that effect. This is so even where the measures taken result in the effects of

the impairment being completely under control or not at all apparent (see paragraph B13 of the *Guidance*).

86. The measures envisaged include (in particular) medical treatment. Examples of impairments that might be covered by this provision include diabetes that is controlled by taking insulin. The effects of diabetes must be judged by reference to what the condition would be without being controlled by medication or diet (paragraph B14 of the *Guidance*). Medical treatment is not defined, but it has been broadly interpreted: *Abadeh v British Telecommunications plc* [2001] ICR 156 EAT; *Kapadia v London Borough of Lambeth* [2000] IRLR 14 EAT. As the *Guidance* suggests, a special diet may constitute a measure. The Tribunal searches for the deduced effects of a condition but for its treatment (for example, with medication): *Goodwin v Patent Office* [1999] ICR 302 EAT.

87. As the respondent's solicitor has referred the Tribunal to *Metroline Travel Ltd v Stoute* [2015] IRLR 465 EAT (paragraph 6), the Tribunal addresses that legal authority here.

88. As the IDS Employment Law Handbook, Volume 4, *Discrimination at Work* recognises (6.162-6.163), difficulties arise when assessing what account should be taken of "measures" taken to control diabetes. The statutory *Guidance* suggests that the effects of diabetes should be considered by reference to what the condition would be without being controlled by medication or diet (see the *Guidance* paragraph B14). Where only minor adjustments are required to a person's diet, are these "measures" or are they merely a coping or avoidance strategy that someone might reasonably be expected to carry out to mitigate the effects of an impairment?

89. In *Metroline,* the EAT held that neither Type 2 diabetes nor Type 2 diabetes controlled by diet alone is necessarily a disability for the purposes of the Equality Act 2010. The EAT noted that paragraph B12 of the *Guidance* must be read in conjunction with paragraph B7. This requires account to be taken of how far a person can reasonably be expected to modify his or her behaviour to prevent or reduce the effects of an impairment. A coping or avoidance strategy might alter the effects of the impairment such that they are no longer substantial, and the person would no longer meet the definition of disability. A particular diet may be a "treatment or correction" that must be ignored when assessing the effect of an impairment. However, the impact on day-to-day activities of a "diabetic diet" might be sufficiently small that it could not constitute a treatment or correction. It would be a reasonable behavioural modification of the type contemplated in paragraph B7.

90. The EAT in *Taylor v Ladbrokes Betting and Gaming Ltd* [2017] IRLR 312 EAT, however, places *Metroline* in its proper context. The EAT in *Metroline* appeared to be concerned not to open the floodgates to a condition that might be easily controlled by lifestyle modifications alone. Whether diabetes gives rise to a disability must be assessed on a case-by-case basis. If it is genuinely the case that a particular individual can manage his or her condition without medication and simply by adopting reasonable dietary modifications, then it may well be that the question whether the condition has a substantial adverse effect should be determined after taking those modifications into account. However, the principle relating to deduced effects in paragraph B12 of the *Guidance* stems

from the statutory provision in paragraph 5(1) to Schedule 1 of the Equality Act 2010, whereas paragraph B7 has no such provenance. It is important to consider the statutory language rather than a gloss upon it.

91. The Tribunal considers that *Metroline* is unhelpful in the present context. The claimant was not controlling his diabetes by diet or exercise alone. He was on a regime of medication, supported by diet and exercise. The case is not on all fours with *Metroline*.

Discussion and decision

92. The Tribunal starts with its assessment of the evidence. This has taken various forms. First, the claimant's witness statement and disability impact statement. Second, his GP medical records. Third, the occupational health evidence. Fourth, the evidence of the internal investigations and other meetings.

93. Looking at this evidence as a whole, it is easy to see why the respondent did not concede the disability question. There are obvious gaps in the medical evidence prior to February 2020. Those gaps required to be filled by the claimant's own evidence. In turn, there are gaps in his evidence that are not filled by the medical records.

94. It would have been better if the respondent had made its position known earlier. The claimant might have asked for the preliminary hearing to be postponed so that the claimant could have obtained further evidence. That might have been narrative evidence from his GP, or it might have involved an expert witness reviewing the medical and personal evidence. Nevertheless, no application to postpone this hearing was made before or at the hearing. The Tribunal must decide the threshold question on the foundation of the material that has been placed before it. It cannot decide it on generic evidence, without more, such that feeling very tired is a common symptom of Type 2 diabetes (see the NHS and Diabetes UK websites and their descriptions of diabetes symptoms).

95. The claimant was an obviously honest witness, doing his best to assist the Tribunal while trying to establish his status as a disabled person at the relevant time. However, he was not a compelling or persuasive witness. He did not perform well under cross-examination. His witness statement and disability impact statement are strong on assertion, but weak on evidence.

96. The Tribunal does not always need medical evidence. A convincing or persuasive witness can more than make up for any gaps in the medical record, especially where a claimant has been neglectful of or reluctant to visit his GP earlier than he did. A detailed disability impact statement can create a positive impression of the adverse effects of an undiagnosed condition long before there has been a tentative or formal diagnosis of an impairment or condition. That was not the case here.

97. There really is very little corroborating evidence that the claimant was experiencing involuntarily falling asleep from as early as 2017 or that he was exhibiting signs of a progressive condition that was interfering with his ability to discharge his duties on a night shift. His evidence as to when he began to experience blurry vision and frequent urination is inconsistent and

contradictory. None of this is supported by the medical evidence until February 2020 at the earliest. The Tribunal does not feel confident in drawing inferences from the February 2020 diagnosis. It is unable to conclude that the claimant must have been experiencing sleepiness, tiredness or fatigue, blurred vision, lack of urination control or impotence during 2019 or earlier. The claimant has not discharged the burden of proof upon him on the balance of probabilities.

98. The Tribunal concludes that the claimant had a physical impairment. That impairment was Type 2 diabetes, first diagnosed in February 2020. It is not possible or safe to extrapolate from that diagnosis that he had an impairment or adverse effects in 2019 or earlier. By 2020, the impairment did affect the claimant's ability to carry out normal day-to-day activities. It affected his urinary functions; his vision; and his impotence. The adverse effects were more than minor or trivial (and that is not really in dispute). The adverse condition was long term, in that it was expected to last for at least 12 months (and, again, that is not really in issue).

99. Having given that oral decision, the respondent's representative asked the Tribunal to rule on when the individual adverse effects could be said to have arisen. That is obviously important to the substantive issues between the parties in the disability discrimination complaint. The Tribunal adjourned briefly to address that question.

100. There is no reference in the medical records to the claimant's difficulty in staying awake or of his falling asleep involuntarily. The Tribunal would expect some reference to this adverse effect when an informal diagnosis of diabetes was made in February 2020 and then confirmed in May 2020 – whereas there is reference to the adverse effects of blurred vision, urinary control and impotence elsewhere in the record. There is a reference to sleep disturbance in the occupational health evidence in June 2020, but this is not a reference to difficulty in staying awake or of his falling asleep involuntarily. There is also a reference to there being no evidence of drowsiness arising as a side effect of medication. In October 2020 there is evidence of the claimant having difficulty in sleeping (but not present or historical difficulty in staying awake). In the internal employment evidence, there are three inconclusive references to sleep (March 2019, April 2019 and September 2020), which take us no further.

101. The Tribunal concludes that the claimant was a disabled person no earlier than 20 February 2022 by reason of a physical impairment of Type 2 Diabetes Mellitus and continuing up to and including the date of termination of employment. For this purpose, the substantial and long-term adverse effects of the impairment were in respect of the normal day-to-day activities of urination and, from 18 May 2022, vision. The Tribunal is unable to find on the balance of probabilities a substantial and long-term adverse effect of an impairment in respect of the normal day-to-day activity of being voluntarily or involuntarily awake or asleep.

102. The claim now proceeds to Final Hearing in accordance with earlier case management orders and listing.

Judge Brian Doyle

DATE: 27 October 2022

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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