



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Islam  
**Respondent:** Nestle UK Limited  
**Heard at:** East London Hearing Centre (by CVP)  
**On:** 11, 12 & 13 October 2022  
**Before:** Employment Judge Emery

## Representation

For the claimant: In person  
For the respondent: Ms C Millns (counsel)

## PRELIMINARY HEARING RESERVED JUDGMENT

**The claimant's conditions of Type 2 Diabetes and Plantar Fasciitis are not disabilities for the purpose of s.6 Equality Act 2010.**

## REASONS

### The Issues

1. The issues to be determined at this open Preliminary Hearing are as set out in Order dated 4 April 2022 (page 208 - (c) & (d) are withdrawn):
  - a. Whether C was disabled with Type 2 Diabetes and/or Plantar Fasciitis during the relevant time - June 2019 to 7 September 2020 (dismissal).
  - b. Whether R did not know and could not reasonably have been expected to know that C was disabled by reason of either/both of the impairments at the relevant time;
  - c. Whether any of the disability discrimination claim should be struck out as having no reasonable prospects of success; (*withdrawn*) and

- d. Whether any of the disability discrimination claim should be subject to a deposit as having little reasonable prospects of success (withdrawn).
2. It is agreed that the claimant was diagnosed with type 2 diabetes on 8 July 2017 and the respondent became aware in 2018 of this condition. The respondent accepts that it became aware of the condition of Plantar Fasciitis during his employment.
  3. The respondent denies that either condition have a substantial effect on the claimant either individually or cumulatively. The respondent also denies knowledge of substantial effect.
  4. The issues to determine on disability are therefore:
    - a. Did either condition, or the combination of both conditions, have a substantial effect on the claimant's ability to undertake day to day activities?
    - b. Did the respondent have actual or constructive knowledge that the condition(s) had such a substantial effect?

### **Witnesses**

5. I heard evidence from the claimant. For the respondent, I heard from:
  - a. Mr Donovan Shores, Boutique Assistant Manager and the claimant's Line Manager from November 2019 to dismissal
  - b. Ms Joana Passeira, a multi-site manager, responsible for the Stratford Westfield site
6. I spent the first morning reading witnesses statements and the documents referred to in the statements. This judgment does not recite all of the evidence I heard, instead it confines its findings to the evidence relevant to the issues at this hearing. The judgment incorporates quotes from my typed notes of the evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

### **Preliminary Issue**

7. The correct identity of the claimant's employer is at issue. The respondent says his employer was Nespresso UK Limited; the claimant expressed no view but argues that his P45 says his employer was Nestle UK Limited. There was no evidence or submissions on this issue, which will have to be addressed at the full merits hearing.

### **The relevant facts**

8. The claimant was employed as a Boutique Coffee Specialist from February 2013. He was located at the respondent's concession at Selfridges London until June 2019, and reports no work-related issues at Selfridges. Because it was an easier commute he asked to transfer and on 10 June 2019 he moved to Westfield Stratford in the Nespresso Boutique.

9. The claimant contends that when he moved to Stratford issues at work arose, related to his medical conditions.

#### Knowledge

10. The claimant argues that he told his managers of his medical conditions shortly after starting at Westfield. There is no evidence what he told his managers prior to Mr Shores. While at Selfridges, the claimant had been referred to Occupational Health because of heel and back pain. The OH report dated 21 March 2018 says that there has been no diagnosis of a condition: it recommends a review of the manual handling practice (suggestions - reduce weight of rubbish bags, use a trolley, opportunity to relieve pressure from feet). It also said the claimant should ensure his footwear is "*appropriate and supportive*", that he should exercise and "*engage with the exercises recommended by the Nestle physiotherapist*" (244-5).

11. The medical records show a diagnosis of Plantar Fasciitis on 13 April 2018.

12. I accepted that in the claimant's mind, the condition was manifesting as shoulder, back and lower body pain. I accepted that the OH report of 21 March 2018 appears not to differentiate between these symptoms when referring in particular to issues with feet and shoes.

13. The claimant's evidence is that he discussed his medical conditions with Mr Shores "*to make him aware*". Mr Shores accepts that the claimant did discuss "*problems with his back*" and that he could not deal with lifting/ deliveries. The claimant's evidence was that back pain was just one of the issues he highlighted.

14. I accepted the claimant's evidence that when discussing symptoms, the claimant mentioned the name of the condition, Plantar Fasciitis. These were conversations, and I accept that this is a name which Mr Shores did not memorise or write down. The main focus of these conversations was on the discomfort Mr Islam was experiencing, rather than the name of the condition.

15. When the claimant discussed this condition with managers, he often referred to back pain, and I accepted that his comments to his employer were often a general reference to the different symptoms he experienced from Plantar Fasciitis.

16. The respondent denies knowledge of any substantial adverse effect of diabetes. The claimant's case is that they were fully aware of his need for toilet breaks and water breaks. The claimant says that he was reprimanded for taking too many breaks, that this was raised in a performance meeting.

17. A Performance Improvement Plan in early 2020 refers to "*behaviours*" being an issue: that he is "*arguing*" with staff and managers; and that he has been "*regularly*" going back of house for water when it had been "*agreed*" he should keep a water bottle in the stockroom "*causing staff to feel like you're not pulling your weight*" (292e).

#### Diabetes – substantial adverse effect on day to day activities

18. The claimant's impact statement states that he needs to repeatedly use the toilet, often once an hour; that he also needed to regularly drink water as part of management

of type 2 diabetes. He accepts that a change of diet and exercise were recommended for him as a way to manage this condition which may lead to him not needing to take medication. He regularly walked or ran to work as part of his management of this condition.

19. There was a dispute about when the claimant started taking medication for this condition and for how long. The respondent's case is that there is no evidence he took medication long-term.

20. An OH report dated 18 June 2019 states he was managing his diabetes with diet, *"but had had to go on medication as his blood results not positive"* (263). It says he is under the care of a diabetes specialist, that his *"treatment regime is established and effective"*. It says he may be more susceptible to infections as a consequence (264).

21. During the relevant time, the claimant had blood-checks every 3 months from his GP, and he occasionally checked his bloods at home to help monitor his exercise and food intake, to see what may cause a trigger; *"it gives me support to maintain my lifestyle"*.

22. A Capability Management Meeting on 18 January 2020 states that the claimant had been on medication since 2018, that he was hopeful at this date that he would soon be able to decrease the medication. His medical records show he was on repeat prescriptions in 2021 of Sukkarto SR 500mg x 2 twice a day; Gliclazide 30mg twice a day (378). The disclosed records do not show the history of prescriptions.

23. The claimant's case is that the substantial impact of his condition manifested itself at work because of the toilet breaks and water breaks he was forced to take, that he needed to drink a lot because he was diabetic. He accepted in his evidence that if he was able to take regular breaks he functioned *"better"*, that his condition was *"under control"*.

24. The claimant also says that the need to regularly use the toilet at night disrupted his sleep, which meant he was *"tired and anxious"* the next day (paragraph 24 disability impact statement).

### Plantar Fasciitis

25. The claimant's impact statement states that this condition is *"so severe that I cannot stand for long periods of time due to the pain..."*. He refers to shoulder pain becoming *"unbearable"* if he stands long periods of time *"especially wearing uncomfortable shoes."*

26. The 21 March 2018 OH report says there should be a review of manual handling (as above) and that the claimant should ensure his footwear is *"appropriate and supportive"*, and he should engage in exercises recommended by the physiotherapist (244-5).

27. When he transferred to Westfield the claimant made his managers aware of that he had difficulties lifting, and there were internal discussions about how to deal with this: the recommendations from the March 2018 report were provided to his managers (335-7).

28. An OH report dated 18 June 2019 states that Plantar Fasciitis was causing him heel pain: *“It is unusual for Plantar Fasciitis to continue beyond 12 months, although [the claimant’s] symptoms have improved considerably...”*. he had seen a physiotherapist and had been prescribed exercise (264). On prognosis it said that this condition could now be seen as a *“long-term condition”* that while he continues to experience symptoms he should not undertake weightbearing activities and all to have short breaks.

29. An NHS Podiatrist’s report (373) sets out the relevant history of his condition: an ultrasound scan in 2019 showed that he suffered *from “mild enthesopathy but no other pathology”*; the podiatry clinic noted no significant biomechanical concerns. His symptoms then improved, in part because he had been following an exercise regime, including running. The report says condition worsened following lockdown in March 2020 and were then aggravated by his work shoes.

30. In September 2019 the respondent’s uniform changed and his work shoes were changed, from black to brown. Despite trying several sizes of the new shoes he could not find a comfortable fit. As a result, he continued to wear his comfortable black workshoes and there was a period of trying new brown shoes of different sizes and switching back to the comfortable black shoes. He also bought some insoles for which he was reimbursed by his employer (he says these did not assist).

31. At a Capability Management Meeting on 18 January 2020 the claimant says this about this condition: That the condition had improved a lot in 2019, *“and for 5/6 months I had no issues, but in July/September 2019 it started coming back, but it’s not that bad anymore, it’s much improved. If I’m tired or stressed or standing for a long period of time, I feel it, but it’s not every day”*. He says he has stopped taking the painkillers. In his evidence, the claimant clarified that the pain started coming back in September 2019, when he had to change his work shoes.

32. An OH report dated 14 July 2020 states that the *“heel and foot pain ... appears to be intermittent and only related to work provided footwear”*; the recommendation was to ‘break in the shoes’ and source shock-absorbing insoles. The report says that the claimant *“reports he has been advised ... to sit for a few minutes ... he states he will do this, something he has not done already”*. It says the claimant reported an *“immediate resolution of symptoms”* when he wears different shoes. The report refers to him needing to perform exercises to reduce injury and prevent back pain (308-9); it concludes that he is fully fit to perform his role.

33. In his evidence, Mr Islam accepted that there were discussions with Mr Shores about his back pain and Mr Shores encouraged him to take breaks. He said his condition was worse when he was standing at the till, he again reiterated that Mr Shores offered breaks whenever he said he was in pain.

34. In November 2020 the Podiatry clinic referred to his condition being *“aggravated by his work footwear”*: and he was advised he should wear shoes with a slight heel pitch, soft upper and cushioned heel counter. He was told he should consider a return to running via the Couch to 5k programme.

## Closing arguments

35. Ms Millns referred to and provided several legal cases, which I considered and incorporated into my conclusions, where relevant.

36. Ms Millns argued that the claimant has tried to introduce additional evidence in articles linked in his 'Comments on Respondent's Argument'. This is not appropriate there is no expert opinion in these articles and the claimant cannot introduce these articles now.

37. Plantar Fasciitis: Ms Millns argued that there was 'no evidence' that the claimant's back condition was linked to the Plantar Fasciitis; this is not mentioned in any of the previous documentation, and the claimant "cannot rely" on back pain as part of this condition.

38. The respondent does not accept that he had this condition throughout the relevant time, there is no evidence that this condition continued during the period June 19 to September 2020; and in fact there is no evidence that there was any adverse effect on day to day activities. It's a fluctuating condition which ever meets the threshold for disability; the claimant's own evidence is before July 2019 there were 5 - 6 months with no issues.

39. Ms Millns also argued that the claimant gave contradictory evidence of when this condition was severe; she pointed to paragraphs 10, 18 and 19 of his disability impact statement which suggests very severe symptoms; that the claimant "*became confused*" when challenged on this evidence. She argued that the claimant's first evidence was that the condition was severe in September 2019; then in March-September 2020 when the shoe rule was enforced; he then changed his evidence again, that it was severe from March – July 2020 "*this undermines his credibility and is also inexplicable as the claimant was not in work and in lockdown*".

40. Ms Millns argued that if there is a problem, it is one of footwear. The claimant has presented no evidence of a substantial adverse effect – the July 2020 OH report says that the claimant should take occasional breaks to rest his feet "*something he has not done already...*". The claimant was walking to work, there is "*no evidence*" that there was any adverse effect which was not resolved by a change of footwear. At its height the issue is one of pain when he wears some work shoes, an issue of comfortable shoes, the claimant cannot show this amounts to a substantial adverse effect. There is no evidence of his day to day activities being affected as a consequence.

41. Additionally, this was not a long-term condition, it has lasted on the claimant's evidence 5-6 months. There is no evidence that the condition has lasted 12 months and no evidence that at the time it was likely to last 12 months.

42. Diabetes: The respondent accepts diagnoses on diabetes 8 July 2017 and became aware in 2018 of condition. It accepts that this condition is long term.

43. Ms Millns said that it was "*not in dispute*" that the claimant's diabetes caused him to go to the toilet, but that there is a difference between this and an adverse effect on his ability to undertake day to day activities.

44. Ms Millns argued that type 2 diabetes is not an automatic disability: Deduced effect is of “*central importance*” – what would the position have been had the claimant not been taking medication?

45. Ms Millns argued that there is no evidence that the medication the claimant was on was to reduce any adverse effect of the condition, that “*it would be dangerous*” to reach this conclusion. I was reminded that I cannot use a search engine to look for answers to this question.

46. The claimant was ordered (page 118 paragraph 7) to disclose medical evidence and has disclosed little. The questions to address are:

- a. the effect that C’s type 2 diabetes on his ability to carry out day to day activities;
- b. the effect of medication and diet on this condition;
- c. the effect on C’s ability to undertake day to day activities if he did not take medication or take dietary advice;

47. The only evidence of medication postdates the relevant time, there is “*no evidence*” about medication prescribed during the relevant time: the medication at 378 show the last medication issued on 15 September 2021.

48. While the prescriptions for two of the potential diabetes medication, and its accepted that these are repeat prescriptions, there is “*no evidence when they were first prescribed*”.

49. Ms Millns argued that there was “*no evidence*” what the effect of his condition would be but for the medication. She argued that on the claimant’s own account he was managing by diet, that at worse the healing period would be longer for colds.

50. The fact that he has to drink water regularly is not evidence of a substantial adverse effect.

51. While the claimant says that the condition has a serious effect on his sleeping pattern, this is not in the medical evidence or OH reports. While the absence of sleep can be a substantial adverse effect, there is “*no evidence*” of this.

52. The claimant’s evidence in fact that if he takes breaks and drinks fluids he can function: see the Guidance on Disability – B7, drinking water is a “*coping strategy*”. Also, he did not take the rest breaks he accepts were offered.

53. The claimant’s case in cross-examination of the respondent’s witnesses was that he went to the toilet for short periods 3-4 times a day, “*this is not enough to conclude there was an adverse effect on his day to day activities*”.

54. On knowledge of the effect on the claimant: all the respondent knew was that the claimant needed rest-breaks, but that the claimant did not take these breaks. It did not know about the lack of sleep.

55. Ms Millns referred to Woodrupp – that there is need for medical evidence to address deduced effect.

56. Mr Islam argued that medical records and meeting minutes in the bundle did show he was disabled, but he accepted that not all of his medical records were in the bundle. He says his employer were aware that he had type 2 diabetes, that the OH report confirms he has these conditions. He argued that his disability impact statement shows the substantial effect on his day to day activities.

57. On the Plantar Fasciitis he argued that he needed reasonable adjustments, that different shoes is a reasonable adjustment. His back and shoulder pain was related to this condition, he needed thermals also to keep warm. This condition was referred to OH because it was “affecting me severely at work - they were forced to refer me to OH”. The effect of this condition was causing concerns at work – absences/issues with performance.

58. Mr Islam said that the reason why his there was reference to shoes at the OH July 2020 appointment was because “this was on my mind” as there had been significant issues with shoes at work. *“I had adjustments made and I did exercise, and so I did not feel pain during this period - July 2020”*.

59. Mr Islam argued that rest breaks for toilet breaks, water breaks and to rest his feet should also be considered together as the cumulative effect of both conditions.

60. There was evidence from Mr Islam that he was often cold at work – that this triggered and exacerbated his back pain. He argued that being cold meant he would not be able to concentrate at work.

61. Mr Islam argued that the Plantar Fasciitis “triggered back and shoulder pain ...”. He also argued that this pain was also *“directly related”* to diabetes.

62. On medication for diabetes 0 he said that he was on medication from 6 June 2019 for diabetes, it having been controlled prior to this. (263????). see also letter to/fro??? GP (dated 19 August 2021 *“he is on regular medication”* (375). He says he was on medication throughout, that he did not know he was required to prove he was on medication *“every single month”*. He argued that he was a diabetic, on treatment, *“I cannot stop taking it”*.

63. Mr Islam argued that the ??? report shows that his blood sugar was high during the whole of the relevant time – that it was clear he did not stop medication during this period.

64. On shoulder pain – 264 OH report 264 - 2nd para = PE of absences related to shoulder pain. But this is about 2nd stage review = which means a number of absences - Judge -these are one - and in part...

65. On stopping medication: Mr Islam argued that if he stopped medication, this would “kill me”, it’s a progressive condition.

66. Mr Islam argued that he did not say he only went to the toilet 3-4 times a day at work – this was Mr Shores comment.



67. Mr Islam clarified that if he did not take breaks and drink water this can damage his conditions – for example it can lead to kidney problems. He said that he may need to go to the toilet every 2-3 hours if he moderates his drinking, “it can be more or less than 10 times a day ... if I drink moderately it’s at least every 2/3 hours; and this will disturb my sleeping pattern...”

## **The law**

### **Treatment of impairment**

68. The legal issue is whether, but for his treatment, the claimant would have been suffering substantial adverse effects during the relevant period.

69. Equality Act 2021 Sch 1 paragraph 5: If an impairment is being treated or corrected, the impairment is deemed to have the effect it is likely to have had without the measures in question.

70. Sch 1 para 6(1)) says that 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 such measures, the impairment would be likely to have that effect.

71. Para 5(2) - 'measures' includes medical treatment and the use of a prosthesis or other aid.

72. Guidance on the definition of disability 2010:

*“B6: A person may have more than one impairment, any one of which alone would not have a substantial effect. In such a case, account should be taken of whether the impairments together have a substantial effect overall on the person’s ability to carry out normal day-to-day activities. For example, a minor impairment which affects physical co-ordination and an irreversible but minor injury to a leg which affects mobility, when taken together, might have a substantial effect on the person’s ability to carry out certain normal day-to-day activities.*

*“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.’*

*“B12... where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, ‘likely’ should be interpreted as meaning ‘could well happen’.*

*“B13. This provision applies even if the measures result in the effects being completely under control or not at all apparent. Where treatment is continuing it may be having the effect of masking or ameliorating a disability so that it does not have a substantial adverse effect. If the final outcome of such treatment cannot be determined, or if it is known that removal of the medical treatment would result in either a relapse or a worsened condition, it would be reasonable to disregard the medical treatment in accordance with paragraph 5 of Schedule 1*

*“B14. For example, if a person with a hearing impairment wears a hearing aid the question as to whether his or her impairment has a substantial adverse effect is to be decided by reference to what the hearing level would be without the hearing aid. Similarly, 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.”*

73. The tribunal must consider how the claimant's abilities had actually been affected during the relevant time while receiving medication, and then must decide the effects which they think there would have been but for the treatment.

74. *Sussex Partnership NHS Foundation Trust v Norris* UKEAT/0031/12, [2012]- the claimant had a condition which meant, absent medication she was more susceptible to infection. Para 40: the EqA

*“requires a causal link between the impairment and a substantial adverse effect on ability to carry out normal day to day activities. In many cases that link will be direct. However in our judgment the EqA does not require that causal link to be direct. If on the evidence the impairment causes the substantial adverse effect on ability to carry out normal day to day activities it is not material that there is an intermediate step between the impairment and its effects provided there is a causal link between the two. In this case the ET ought to have asked whether the deduced effect of the claimant's impairment, of suffering more frequent infections, would itself have a substantial adverse effect on her ability to carry out normal day to day activities”.*

75. *SCA Packaging Ltd v Boyle* [2009] UKHL 37: Is a condition likely to recur and have a substantial effect but for treatment? The HoL upheld the NICA judgment:

*“The prerediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of para 6(1) in the disability legislation the word “likely” is used in the sense of “could well happen”.*”

76. *Kapadia v London Borough of Lambeth* [2000] IRLR 699, CA. It is not enough for a claimant to maintain that he or she would be badly affected if treatment were to stop—proof, preferably of an expert medical nature, is necessary.

77. *'Woodrup v London Borough of Southwark [2002] EWCA Civ 1716'*: The claimant's argument was that her condition would deteriorate if her medication stopped: the court of appeal accepted that the claimant had not done enough to prove that the condition would have a substantial adverse impact on her ability to undertake day to day activities if she stopping her treatment

*"13. ...I would just add this. 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 paragraph 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 ..."*

*"22. ... it can be seen that the evidence of the appellant as to what would have happened if the treatment were stopped is of no real value. That is because she could not possibly know what the answer to the question was. She could have no relevant experience upon which to base her answer. The position might have been different if the treatment had in fact stopped in the period ... because she would then have had experience upon which to base an answer. Absent such experience, her statement ... that if medical treatment were to be stopped she "would deteriorate and full symptoms would return" was little more than speculation"*

78. *Metroline Travel Ltd v Stoute [2015] IRLR 465* – following a diet to avoid sugary drinks by a person suffering from Type 2 diabetes is not treatment which must be disregarded. This behaviour was a "strategy" to alter the effects of the impairment so that they are no longer substantial.

## **Conclusions on the facts and the law**

### Plantar Fasciitis

79. In March 2018 the claimant was referred to OH with symptoms of back and foot pain. The recommendation at this time was appropriate footwear, exercise and physio. Shortly after he was diagnosed with Plantar Fasciitis.

80. The OH report does not differentiate between the two sources of pain when recommending he take pressure off his feet, review manual handling and adjust his footwear. This suggests that OH considered that the two may be linked. I accepted that this was evidence that the claimant's upper body pain was linked to the Plantar Fasciitis at least in OH's mind.

81. The June 2019 OH report says that the claimant has some pain, but that it has "*improved considerably*"; also that while he continues to experience symptoms he should not undertake weightbearing activities.

82. The evidence shows that the claimant had intermittent pain in some parts of the relevant time, with medical tests showing some physical changes to his Achilles heel. The evidence shows that the claimant experienced pain during particular periods of his working life if he wore the wrong shoes and he stood for long periods. For lengthy

periods of time during the relevant time this condition did not trouble the claimant, who regularly walked and ran to work.

83. By September 2019, the claimant had virtually no symptoms; any symptoms that he did have of Plantar Fasciitis was that they were not continuous, and that they were manageable without the need for adjustments, and they did not have any substantial effect on his ability to undertake day to day activities.

84. I accepted that the claimant's back pain, while not continuous, may have limited his ability to lift heavy boxes or lift items above head height, because he may have been in some pain in doing so. But I did not accept that there was any evidence that his limited ability to lift heavy items above head height because of back pain amounted to a substantial effect on his ability to undertake day to day activities. Lifting bulky or heavy items above head height is rarely/ if ever a day to day activity – it is at best an occasional activity.

85. In addition, the OH report of June 2019 says that he should not lift heavy items while he has symptoms. He rarely had symptoms during this period. It follows that there was no substantial effect on the claimant's day to day activities when he was in a period of no symptoms.

86. The evidence also shows that the Plantar Fasciitis was exacerbated slightly from September 2019 by the new work shoes and that to March 2020 the claimant experienced some symptoms of pain from wearing inappropriate work shoes. On occasions he could have taken breaks but he rarely did. The symptoms resolved when he changed into more comfortable shoes, footwear which suited his feet. He was able to regularly change his footwear.

87. I concluded from the evidence that during the relevant time the claimant:

- a. had the long-term condition of Plantar Fasciitis;
- b. he managed the condition by going for long walks and often running;
- c. he was symptom free from June – September 2018;
- d. inappropriate shoes can exacerbate the condition and cause the claimant pain, particularly when standing for long-periods;
- e. he may experience back pain if he lifts heavy or bulky items;
- f. the symptoms resolved when wearing more comfortable shoes.

88. I concluded that by being able to resolve any pain by changing shoes, this condition did not cause a substantial adverse effect on the claimant's ability to undertake day to day activities.

89. For these reasons, the claimant's argument that his long-term condition of Plantar Fasciitis amounts to a disability fails.

Diabetes

90. I accepted the claimant's evidence that he was on medication continuously for diabetes since 2018 – as set out in the January 2020 capability meeting.

91. The claimant's evidence was that on medication he needed to go to the toilet once an hour, that the amount of times day and night that he needed to use the toilet amounted during the relevant time to a substantial impact on his day to day activities. He refers to having to organise his days "*very carefully*" as a consequence, and that he was often tired and stressed at work as a result.

92. I did not accept that the claimant used the toilet every hour. His own cross-examination of the respondent's witnesses said he used the toilet maybe 4 times on a working day.

93. I accepted that he needed the toilet more often than a person without type 2 diabetes. But there is no evidence that this, in-itself, had a substantial impact on his day to day activities. Even if the claimant was more tired as a result, again this does not manifest as a substantial impact on his day to day activities.

94. I accepted that I must consider the deduced effect of the condition – as it would have been but for medication. The claimant's impact statement contains a general statement on possible prognosis for unmanaged diabetes – including stroke, heart-attack. I did not accept I needed to consider long-term prognoses, instead I should consider only the period June 2019 – September 2020 – what would have been the effect on the claimant 'but for' medication?

95. There was no medical evidence on this issue: all the claimant says is at paragraph 38 - "*I would be too tired or otherwise disproportionately regularly have to use the toilet ... such as I could not perform any day to day tasks.*"

96. I considered Woodrup – was it possible for the claimant to answer the question on deduced effects – could he know the answer? Alternatively, is it possible to answer this question on the evidence I have available? Was there likely to be a deterioration of the condition if he came off medication, such that this condition would have a substantial impact on his ability to undertake day to day activities?

97. Taking the claimant's case at its highest, the claimant says he may have an increased use of toilet. He does not say how much, or the way his day to day activities may be substantially affected by this, or the way in which they may be impacted by further sleep disruption.

98. There was also no evidence on the way that this may be mitigated – by dietary changes or increased exercise. While I accepted the Guidance B14 refers to control of a condition by diet should be disregarded, it also refers to "following the required diet". As I understand it, the claimant was told to avoid certain foods and drink; I did not accept that this was a required diet – i.e. only eating certain foods on medical advice.

99. There was no evidence of what if any the medical decline may have been and how long this would have taken, and the impact on the claimant's day to day activities during the relevant period, or beyond this period.

100. The only evidence comes from the claimant, who at the January 2020 capability meeting suggested that his doctors may decide to withdraw the medication. While this did not happen, it suggests that the claimant's condition was relatively well controlled such that withdrawing the medication may well not have had a substantial adverse effect on the claimant's ability to undertake day to day activities.

101. I concluded that the claimant's day to day activities were not substantially impacted by the condition of diabetes when he was on medication. I have further concluded that the claimant has not been able to prove there would have been a substantial impact on his ability to undertake day to day activities if he failed to take his medication during the relevant time.

102. Accordingly, the claimant's type 2 Diabetes did not amount to a disability during the relevant time.

103. The respondent's case was that it was only pursuing strike-out and/or deposit orders in respect of the disability claims. Given the judgment on disability, these are withdrawn.

104. A separate listing and directions has been sent out for a 3 day full merits hearing, to deal with the claimants unfair dismissal and wrongful dismissal claims.

**Employment Judge Emery  
22 November 2022**