EMPLOYMENT TRIBUNALS

Claimant: Mr S Bruce

Respondent: Civil Nuclear Constabulary

HELD AT: Manchester **ON:** 18 and 19 September 2017

BEFORE: Employment Judge Sharkett
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr J Cavanagh QC

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant is not disabled for the purpose of s6 of the Equality Act 2010

REASONS

2 This is a preliminary hearing to decide whether the claimant was, at the relevant time, disabled for the purposes of the Equality Act 2010 (the Act). The preliminary hearing has been listed pursuant to the order of Employment Judge Porter, following a first preliminary hearing on 16 May 2017. The hearing has been ordered to determine the following issues:

(1) Does the claimant have a physical or mental impairment? At the preliminary hearing of 16 May 2017 permission was given for the claimant to submit further and better particulars of his claim to include not only the physical impairment of Type 2 diabetes but also an impairment of a frozen shoulder.

(2) Did either or both impairments have a substantial long-term adverse effect on the claimant's ability to carry out his normal day-to-day activities at the relevant time?

(3) What, if any measures are being taken to correct each impairment?

(4) But for those measures, would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out his normal day-to-day activities?

(5) Whether the claimant was at the relevant time disabled within the meaning of the Act.

3 At the beginning of the hearing Mr Cavanagh, advised the Tribunal that the respondent accepted that the claimant suffered from type 2 diabetes and had a frozen shoulder, but disputed the fact that either of these physical impairments amounted to a disability under section 6 of the Act

4 Mr Cavanagh also advised the Tribunal that in respect of the need to amend the claim to include the impairment of a frozen shoulder, the respondent accepted that an amendment to the claimant's particulars of claim had been made.

5 In preparation for the hearing, the parties have prepared a bundle of documents which is in accordance with its index and consists of 159 pages plus a letter at the back of the bundle dated 25 December 2016 to the Chief Constable of the Civil Nuclear Constabulary from the claimant which is not paginated. All references to page numbers in this Judgment are references to pages in the joint bundle of documents prepared for this hearing unless otherwise stated.

6 During the course of the hearing, some of the redacted documents contained within the bundle, were replaced with either clean copies of the documents or, amended redactions disclosing further information. The documents were added to the bundle at the pages where the existing documents had been placed.

7 Prior to hearing oral evidence, the claimant confirmed that he did not wish to cross-examine the medical expert that had been instructed by the respondent and therefore there would be no need to call him as a witness.

8 The purpose of this hearing is to establish whether the claimant, during the period of early 2015 through to 7 October 2016, had a physical or mental impairment that satisfied the definition of disability contained in section 6 of the Equality Act 2010.

9 The two physical impairments that the claimant seeks to rely upon those of type 2 diabetes mellitus and a frozen shoulder.

10 In addition to the question of whether the claimant was disabled at the relevant time for the purpose of the Act, it also falls to be considered as to whether either or both of the impairments complained of, amount to progressive conditions for the purpose of the Act. It is the claimant’s case that both physical impairments relied on, amount to progressive conditions for the purpose of the Act.

11 The claimant gave evidence in chief, by way of a written witness statement which was taken as read. He answered questions of Mr Cavanagh QC, in cross examination and I asked questions for the purpose of clarification

12 I then heard closing submissions from Mr Cavanagh for the Respondent and the Claimant in person. I have made a full note of the submissions in the record of

proceedings and had regard to the same together with the written skeleton argument of Mr Cavanagh when reaching my decision.

Findings of Fact

The Tribunal make the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given; these findings are a summary of the principle findings of fact from which the Tribunal draws its conclusions.

13 The claimant is employed by the Civil Nuclear Constabulary (the CNC), which is a statutory armed force, responsible for securing and maintaining the effective functioning of the force. The claimant is based at Sellafield Nuclear site and is part of a highly trained team of officers responsible for ensuring the safety and security of the site. Given the serious security risks associated with this type of industry all officers are trained in the use of firearms and responding to emergency situations.

14 Prior to joining the respondent as a constable in 2012, the claimant served as a police officer with the Metropolitan Police. On joining the respondent he quickly progressed to the position of sergeant in January 2013 and was thereafter promoted to the position of inspector in August 2014 (p55). At the commencement of his employment in 2012, the claimant disclosed the fact that he suffered from Type 2 diabetes.

15 The claimant did not have any sickness absence as a result of his type 2 diabetes and on 4 December 2013 it was recorded, following an occupational health assessment that his diabetes was controlled by diet alone (p92).

16 In his role as a Sergeant, the claimant was required to undergo regular firearms training. During the course of such training on 11 March 2014, the claimant suffered an injury to his right shoulder. Immediately following the injury, he was examined by the workplace nurse who recorded that the claimant had a full range of movement to his shoulder and required no analgesia as he was experiencing very little pain (p90). He was advised to attend his doctors' surgery, but there is no reference within the limited medical records produced for this Tribunal of him attending his doctor in relation to his shoulder until 13 October 2014.

17 In oral evidence, the claimant said that he did not report the pain that he was suffering because he did not want to be placed on restricted duties; he knew that the respondent was intending to take firearms away from inspectors and was keen to ensure that he was not stopped from carrying a firearm. I do not accept the claimant's evidence, because according to his amended further and better particulars of claim (p55), at the time of the training when the accident took place the claimant had not been promoted to the rank of inspector. His promotion to inspector only occurred in August 2014 (p35). I accept that he may have had temporary promotions to inspector prior to his permanent appointment before that but at the time of the training any promotion was only temporary. In addition when questioned by Mr Cavanagh, the claimant was adamant that he would never jeopardise the safety of others. I find that if the claimant's pain and symptoms had been as he now claims they were, there would have been a significant risk of the safety of others being compromised. I have no doubt that the claimant is a conscientious officer who, as he quite clearly says, would never jeopardise the safety of others, and, for that

reason I find on the balance of probabilities, that the notes recorded by the nurse at the time of the accident, reflect with reasonable accuracy the result of his injury and the symptoms experienced by the claimant at that time.

18 For the same reason as above, I find that the content of the CNC Task Related Health Screening Questionnaire, which refers to the claimant's shoulder, also accurately reflects the effect of the injury on the claimant at that time. The form records that the claimant is *"having physio for a right shoulder injury not affecting movement on job".* It was completed on 4 November 2014 and is signed by the claimant who declares that the information is true to the best of his knowledge (p96).

19 I do not accept the Claimant's oral evidence that he did not feel the need to raise the issue of his arm when completing the questionnaire on 4 November 2014, because the test he was about to undertake was only to test his ability to run. His evidence is that as neither of his impairments affect his ability to run the need to mention either was not an issue. I do not accept his evidence, which I find to be disingenuous, because the questions are specific, i.e. *"Has a doctor ever told you that you suffer from any of the following conditions"* (p95) and *"Please give details of anything you think might affect [sic] your ability to work*". The questions are not restricted to whether the claimant is able to complete a sports test they are clearly exploring the claimant's ability to carry out his job.

20 The claimant offers the same explanation as to why on 4 December 2015**,** when completing a further medical clearance form in preparation for his personal safety training (p79) he answered 'no' in response to the question "*do you get pain or have limited movement in any joints that is made worse by changing your physical activity levels".* In oral evidence, the claimant once again said that the question was only in relation to the test that he had to undertake and he did not need to give any further information about this because the respondent was already aware that he had a shoulder injury. I do not accept this explanation for the same reasons as given above and also because as a senior officer holding the rank of inspector he would know that the question meant "was there anything that might limit your physical activity in the job in its entirety". I do not accept that it meant "does it limit your physical ability to run".

21 Within the body of the same questionnaire the claimant was asked *"are you aware of any medical condition that may affect your ability to take part in personal safety training or the multistage fitness test"* the claimant once again answered "no". He gave this answer despite the fact that it is his oral evidence today that he constantly suffered from extreme tiredness and an inability to retain urine because of his diabetes. Despite the fact that the claimant maintains that his condition is constantly deteriorating he also records in the same questionnaire that since his last AFO medical was completed in October 2015, he was not aware of any changes to his health nor were there are changes in medication or reported injuries or illnesses (p79&80).

22 There is very little medical evidence in relation to the claimant's shoulder injury save for the two letters from the orthopaedic hospital, the entries in the GP's records, entries that are recorded by the respondent's Occupational Health nurse and entries in preparation for fitness tests. In respect of the medical records relating to the claimant's shoulder; the transcript of the consultation that took place on 13 October 2014 (p83) reports a reduction in rotation with mild arch pain and a definite

rotator cuff irritation with some posterior impingement. The GP recommended physio and an x-ray of the shoulder. There is no further evidence of the claimant receiving any medical treatment or experiencing any difficulties with his work because of his shoulder, until October 2015 when he visited his General Practitioner again and was referred to a consultant orthopaedic surgeon for assessment of the shoulder injury (p84).

23 I note that despite the fact that the claimant had been promoted to the rank of inspector in August 2014, over a year prior to the consultation and it is the claimant's evidence today, that as an inspector he is not required to carry firearms or attend firearms training, the report from the orthopaedic consultant of 6 November 2015 identifies the claimant as a police firearms officer and takes account of the nature of the job he does when deciding on appropriate treatment (p84). I find that on the balance of probabilities, it is clear from this letter that when the consultant examined the claimant he did so with a view of what may be required of the claimant as a firearms officer

24 Following the examination of the claimant on 26 October 2015, the consultant reports that the claimant had suffered from pain for about a year but he did not take regular painkillers. He reports that the claimant had described that the pain was mainly at the back of his shoulder and was worse when he used it. He had had some physio, which had helped a little and he was able to brush his hair but found it difficult to put his coat on. The x rays had shown some joint arthritis and the consultant decided that due to his age and occupation he would order an MRI scan to rule out a cuff tear. The consultant indicated that in the absence of a tear the claimant would probably benefit from a sub acromial injection when he next attended (p84).

25 Although there are no further entries or medical records in relation to the claimant's shoulder injury until 9 January 2017, it is reasonable to assume that the MRI did not show any cuff tear because the claimant went on to have a sub acromial injection. This injection is referred to in the letter from the orthopaedic clinical specialist therapist of 9 January 2017. The letter from the therapist reports that the claimant had responded well to the injection, that his pain had settled and that he had noticed an improvement in his function. The letter went on to say that he had some minor end range lack of full forward flexion compared to his left shoulder and some loss of functional internal rotation behind his back, equivalent to two spinal segments. His impingement signs were negative and his supraspinatus was functioning well. He was able to attend physiotherapy regularly and was working hard at it. The therapist explained that the claimant was happy with the progress he had made so far and expressed a view that this should continue as he works through his rehabilitation. The therapist found that there was nothing further that they needed to add to his management and discharged him from the clinic, with a view to reviewing him again should any further problem arise. The claimant has not since needed to be referred back to the hospital and it is his oral evidence that he takes Nurofen when needed.

26 The only other medical evidence relating to the shoulder injury is a letter from the claimant's general practitioner dated 23 June 2017 which has been prepared at the request of the claimant and it is addressed '*to whom it may concern'*. I have found this letter to be of little assistance in assessing whether the injury amounts to a disability for the purposes of the Act, because although it refers to the shoulder injury

impairing the claimant's ability to carry out normal day to day activities, it is lacking in any detail, save for the reference already made about difficulty in the claimant putting his coat on.

27 The GP's letter also refers to finding that the claimant had extremely poor rotation of the shoulder and quite obvious weakness, when he referred him to the consultant in October 2015. However, I find this evidence is inconsistent with the contemporaneous findings of the consultant who saw him and the evidence provided by the claimant to his employer at the time. The consultant reports his finding, that the claimant had only slight weakness (p84), and the claimant's own assessment of his medical suitability to take part in the PST and MSFT on 4 December 2015 was that he did not suffer from any pain or limited movement in any joints made worse by a change in physical activity levels. I do not accept the claimant's evidence, that he did not need to mention his shoulder on this form as his shoulder did not affect his ability to run; because if that was the case he would not have needed to mention the fact that he had a small injury to the little finger on his left hand (p80). It is the claimant's oral evidence that he mentioned his little finger because it meant he would not be able to go into separation. I do not accept this evidence because it is inconsistent with his prior oral evidence that inspectors only had to watch at the training and they did not participate.

28 The letter from the claimant's GP of 23 June 2017, also states the following:

> *"The shoulder certainly isn't perfect and unfortunately it is very difficult to restore someone's shoulder after such an injury to its previous state. He will need to carry on with his exercises and strengthening for some time to help maintain his improvement.*
>
> *The problem could recur, but this would only be likely should he sustain a further injury"*

The claimant relies heavily on the statement that his shoulder "certainly is not perfect"; however, I find it is reasonable to conclude in the absence of evidence to the contrary, that as the GP goes on to say in his letter that the problem "could recur" this is a problem that is not current. (p87). The GP quite clearly states that it is only likely to recur should the claimant sustain a further injury. I accept that the claimant's shoulder may never return to its original function. It is common to find that once injured, a body part may never recover to how it was before the injury, however, before the impairment can amount to a disability for the purpose of s6 of the Act the claimant needs to show more than just a finding that the shoulder is not perfect.

29 It is the claimant's evidence that as an inspector he was not required to, physically respond to incidents or emergencies and that is how he was able to continue working with the problems with his shoulder and without the need to go on restricted duties. It is the claimant's oral evidence he was always behind a desk and his disabilities did not prevent him from picking up a pen at work or typing a report. He explained that if there was an incident that could potentially put his life at risk, for example if there were firearms involved, he would not go out; he would he said be firmly placed in his office from where he would command his officers. I do not accept this evidence as it is inconsistent with his earlier oral evidence that he wore body armour if he was going outside the wire or if attending something that would put his life in danger. Whilst I accept that in the role of inspector in the CNC, the claimant

may have spent a considerable amount of his time at a desk, I do not accept that it was his choice whether he was required to physically respond to incidents or emergencies or whether he could just leave it to his subordinates. It is the nature of the role of the CNC that all officers are able to respond to emergency situations where needed, if that was not the case he would not have been supplied with body armour or required to pass the 'running or sports tests' that he refers to in his oral evidence. As an operational officer I find it is implicit that he may be expected to physically attend emergency situations where needed.

30 In addition to the demands made on the claimant in his current role, the claimant accepts that prior to being suspended in October 2016, he had indicated to his employer that he wanted to transfer to the Special Escort Group of the CNC, which is an elite group that carry firearms and clearly need to be physically fit to carry out the role.

31 Given the nature of the job carried out by the claimant, and the role he was seeking to be transferred to, and taking into account the fact that he had an exemplary attendance record and was never placed on restricted duties, by reason of a physical impairment or otherwise, I find that on the balance of probabilities, the claimant did not suffer the pain or difficulties he now describes as a result of his shoulder injury. In making this finding, I also have regard to the declarations the claimant made in his various pre-assessment questionnaires about his current health, the fact that he was eager to get back to carrying firearms even when working as an inspector, the fact that he wanted to transfer to the special escort group, and his oral evidence that he would 'certainly not', ever jeopardise the safety of others.

32 If the claimant had been restricted by his shoulder in the manner described by him he would not have been fit to carry firearms or work in the special escort service. The fact that he continued to strive to be allowed to do both these things is indicative of the fact that he was not so restricted. Whilst it may be possible to 'tough things out' as explained by the claimant, it would have been irresponsible of him to put other lives as risk by him doing so in such circumstances. Having heard evidence from the claimant about his commitment to his responsibilities, I do not find on the balance of probabilities, that it would be in his nature to pursue his own desires at the expense of the lives of others.

33 As indicated above, when the claimant joined the respondent in January 2012 he told them that he suffered from type 2 diabetes and had been diagnosed in 2009. It is the claimant's case that whilst type 2 diabetes is not a deemed disability, the effects of his condition are such that his illness satisfies the definition of disability for the purposes of the Act or alternatively it is a progressive illness and therefore protected by the Act.

34 In December 2013, the claimant informed the respondent through completion of a Health Screening Questionnaire that his diabetes was controlled with exercise and diet and his urine was negative to glucose (p9&94). In November 2014 the claimant was taking Metformin to control his diabetes and his urine was negative to glucose (p96&97). On 24 March 2015, the claimant's superior officer Chief Inspector Harris completed a Disability Management Report in relation to the claimant (p121). In full, the form contains the following information

> *Inspector BRUCE reported that he was diagnosed with Type 2 (non-insulin dependent diabetes) approx. six years ago. He reports that his physical impairment is not severe and excepting lifestyle changes such as taking regular exercise and controlling his diet, it has little or no impact on his ability to perform normal day to day activities. Indeed since his transfer to the Sellafield OPU approx. eighteen months ago, his attendance record has been exemplary with no absences for sickness recorded. He is currently medication free.*
>
> *Despite not requiring any adjustments at the moment we discussed how his refreshment periods and allowing additional breaks could easily be implemented.*
>
> *Finally, I highlighted the importance of him providing information on any changes in his condition*

The form is electronically signed by chief inspector Harris but not by the claimant. It is the claimant's evidence that this form does not accurately reflect what he told his superior at that time. It is the claimant's case that he told his superior that because of his impairments he was struggling at work and had asked for adjustments to be made and for a referral to occupational health. Whilst it is not the role of this Tribunal to address the issue of reasonable adjustments at this hearing, the content of the form at p121 is evidence of the effect of the claimant's condition as at 24 March 2015. I consider the content of this form in light of all the evidence before me including the oral evidence of the claimant, the medical evidence produced on behalf of the claimant, and the report produced by Dr Younis (p105).

35 The respondent has experienced some difficulty in obtaining the consent of the claimant to disclose medical notes in relation to the impairments that form the basis of his claim. Although at the previous preliminary hearing the claimant expressed his agreement to disclosure of his medical records, he subsequently withdrew consent and hence there was a delay in obtaining medical evidence whilst a restricted level of disclosure could be agreed. Consequently, the respondent has been unable to obtain the expert report it had anticipated and instead is only able to rely on a 'desktop' report prepared by an alternative doctor, the original preferred doctor engaged, being no longer available. The report is prepared on the basis of the medical notes that have been disclosed to Dr Younis by the claimant's medical practitioner and he has not physically examined or spoken to the claimant. The medical notes relied on, have not been seen by the respondent or this Tribunal. Dr Younis does not comment on the claimant's frozen shoulder as this is not his area of expertise and does not form part of my findings below, the same having been addressed above.

36 In considering the medical evidence before me including the report of Dr Younis, I remind myself that the relevant date for establishing whether the claimant is disabled for the purpose of the Act is early 2015 – 7 October 2016. The claimant's impact statement sets out history of his type 2 diabetes and the effects of the same on him.

37 It is not disputed that the claimant suffers from Type 2 diabetes. However, prior to assessing the evidence about any substantial long term effect the condition has on the claimant's ability to carry out his normal day to day activities I first turn to

what, if any measures are being taken by the claimant to avoid or correct the impairment of type 2 diabetes.

38 It is clear that for some time at least, the claimant was controlling his condition with exercise and diet. It is the claimant's evidence in his impact statement (p99) that he has been taking Metformin twice daily for the last 3 years. Given that his statement is dated June 2017 I will take that to mean he has been taking Metformin since approximately June 2014. Whilst this evidence is consistent with his evidence in November 2014 (p97) it is inconsistent with his oral evidence, which is supported by the record of his general practitioner (GP) in October 2014, that he decided to stop taking Metformin and instead attempted to control his condition with diet (p83). It is the claimant's oral evidence that this was an extreme diet advocated by Professor Taylor of Newcastle. I note however that this is the first time that the claimant has made mention of this type of diet, Dr Younis makes no reference to it in his report and there is no mention of this in the GP consultation narrative referred to above.

39 The report of Dr Younis is of some assistance with the history of the control of the claimant's condition. It is clear that up until the end of 2013, the claimant's condition was controlled with diet and exercise and he was not complaining of any adverse effects from his condition. He was encouraged to start medication because his blood glucose level was not well controlled but he did not collect the prescription that was left for him at the dispensary. By November 2014, the claimant advised occupational health that he was taking Metformin 500mg twice daily. The same month he had a diabetic assessment by the practice nurse and he was advised to increase his Metformin to the maximum dose. In January 2015, he had normal visual acuity and by March 2015 he reported to Chief Inspector Harris that he was medication free.

40 There are no further medical records referred to in the report of Dr Younis until January 2016 when the claimant was invited to, but did not attend a diabetic review. He was invited again in February 2016 but did not attend on the basis that he was working away at the time. On 25 April 2016, it is recorded that the claimant had not been taking medication for his condition since December 2014. In April 2016, the claimant requested a prescription for Metformin but this was refused pending a review of his condition. The date when Metformin was restarted was not made known to Dr Younis nor the level of control of his blood sugar. In oral evidence the claimant said that he had been taking medication before he asked for it in April 2016. The claimant explained that his conformity to taking his medication was not great and therefore he had sufficient medication 'left over' to use before needing to ask for a further prescription. Although I accept that it is possible that the claimant may have had some Metformin available to him, especially as he accepts that his compliance with his medication was poor, I do not accept on the balance of probabilities that he would have had sufficient to cover him from his previous prescription some 16 months before. I further find that if he had been consistently taking his medication and had simply 'run out', his GP would not have refused to give him another prescription until he attended the surgery for a diabetic review, as to do so would have potentially placed the claimant at risk.

41 There are no medical further entries disclosed to Dr Younis save for the letter prepared by the claimant's GP of 26 June 2017. The letter addressed 'to whom it may concern' states that the claimant takes Metformin daily. It does not state the

dosage or frequency with which it is taken or when he has taken it since. It is the claimant's oral evidence that he takes the maximum dose of Metformin twice daily which is inconsistent with his GP's record that he takes it daily.

42 In the absence of medical evidence to the contrary, I find on the balance of probabilities that the claimant has only taken Metformin to control his condition intermittently and not in compliance with the terms of his prescription. In December 2014 he stopped taking it completely and it is not known when he started to take it again as there are no medical records to show it commenced before June 2017.

43 Despite his non-compliance with prescribed medication, throughout the period between the beginning of 2015 to October 2016, the claimant did not have any sickness absence from work and was not placed on restricted duties. There is no evidence that his conduct at work gave his colleagues any cause for concern or that he was unable to perform his duties in accordance with normal practice. There is no evidence that the claimant suffered any adverse effects during this period i.e. there is no evidence to show that as a result of his failing to take his medication and thus becoming hyperglycaemic, he has suffered any of the conditions he could potentially be at risk of, e.g. damage or impairment to his feet, kidneys or other organs, visual impairment or any other illnesses.

44 In his impact statement (p100), the claimant complaints of:

b. Extreme thirst

c. Extreme exhaustion

d. Unexplained weight loss

e. Cut or wounds heal slowly

f. Blurred vision

Whilst his impact statement refers to the claimant's sleep being disturbed 3 times a night as a result of his need to pass urine frequently, his oral evidence is that his sleep is disturbed up to 8 times a night. As a result of his disturbed sleep the claimant complains that he suffers from such extreme exhaustion that he needs to spend whole days in bed when he is not in work. The claimant's oral evidence is not supported by that of his GP who refers only to the claimant suffering from poor sleep and skin rashes. There is no reference to any of the other symptoms the claimant attributes to his diabetes. In particular the GP says *"Obviously, if it was untreated or out of control he might develop more significant symptoms"*. From this statement, I find it is reasonable to assume on the balance of probabilities that the claimant has not complained of more significant symptoms. The claimant confirmed that he has never consulted his GP about his frequency of micturition nor would it seem has he told his GP of his debilitating exhaustion which is caused by this symptom. Given that there are many reasons for frequency of micturition, and given that kidney damage is possible when type 2 diabetes is uncontrolled, I do not accept that the claimant would not have reported this significant symptom to his GP.

45 I find, on the balance of probabilities, that the claimant may suffer from broken sleep and this may be because of the need to pass urine more frequently, however waking for this reason during the night is quite common in people of the claimant's

age and whilst Dr Younis reports that frequency of micturition can be a symptom where blood glucose levels are poorly controlled, there is no evidence to suggest that his frequency of micturition to the extent that is described by the claimant is attributed to his diabetes. I also do not accept that his symptoms are as severe as those complained of because it is unlikely that the claimant would have been able to function at a responsible level at work if his sleep deprivation was such that he had need to spend all day in bed when he was off duty.

46 In respect of the unexplained weight loss, slow healing of cuts and wounds and blurred vision, there is no mention of any of these problems in the claimant's medical records and those records referred to in the report of Dr Younis record the claimant's visual acuity as normal and his BMI on the last three recordings as consistent.

47 On the balance of probabilities, I do not accept that the claimant would have continued to attend work if he was suffering from the level of sleep deprivation he describes, or if he had limited concentration and needed time to process information. I make this finding because as the senior officer in charge of his shift, he was responsible for making decisions in emergency situations to ensure the safety of the site and more importantly his officers. If his ability were limited, to the extent that he describes, his continued attendance at work would have potentially compromised the safety of everyone, a position that he has been adamant he would never place his officers in.

48 I further find, on the balance of probabilities, that if the claimant had been suffering from any of the symptoms he now relies on in respect of either his frozen shoulder or his type 2 diabetes, he would not have expressed an interest in joining the Special Escort Group where he would have been required to carry firearms. I make this finding because the symptoms he complains of in his shoulder would have prevented him from either passing the required physical test for firearms officers, or being able to competently or safely, handle a gun. In addition, the symptoms he complains of caused by his diabetes would have had a significant impact on his ability to make decisions in high pressured emergency situations. If he were suffering from the symptoms now described, unless he was prepared to put his own life at risk and the lives of his fellow colleagues, which I find that he was not, he would not have put himself forward to do the job.

Submissions

49 In addition to his written submissions, Mr Cavanagh QC for the respondent, accepts that the claimant has type 2 diabetes and suffers from a 'frozen shoulder' as it has been referred to in these proceedings. In particular, in addition to the relevant statute and statutory guidance Mr Cavanagh draws my attention to the legal authorities referred to in his skeleton argument. He asks me to have regard to the fact that type 2 diabetes is not a deemed disability but that does not mean that no one with type 2 diabetes can meet the definition of disability under s6 of the Act. It all depends on the circumstances of each individual. He also reminds me of the evidence before the Tribunal today, both oral and documentary and submits that the best evidence the claimant is able to rely on is his own oral evidence, which is not supported by the documentary evidence referenced by him. In particular, Mr Cavanagh reminds me of the evidence of the claimant's GP that the he was not on medication from December 2014 until sometime after April 2016 and reminds me

that throughout that period, the claimant never lost a days' work. He also refers me to the un-paginated letter at the back of the bundle from the claimant to the chief constable of the CNC, dated 25 December 2016. In that letter he refers to his diabetes as something which has been to his minor discomfort and makes only passing reference to his injured shoulder. Mr Cavanagh was at pains to say that he was not accusing the claimant of telling lies in respect of his evidence but suggested that he had perhaps remembered things incorrectly whilst genuinely believing the evidence he gave to be true. The respondent's best evidence he submits is the report of Dr Younis. He asks me to have regard to the fact that the respondent had hoped to have the claimant properly examined prior to this report being prepared but due to the difficulties in obtaining consent from the claimant, the report before the Tribunal was the best the respondent was able to achieve in the circumstances. Finally, Mr Cavanagh submits that there is no evidence to support the claimant's contention that both impairments are progressive. He submits that the claimant is unable to show that he has suffered any adverse effect from his conditions at all. Whilst his blood sugar levels may not have been well controlled during the relevant period, there is no evidence that this had any impact on the claimant's ability to carry out his normal day to day activities and certainly no evidence of a substantial adverse effect.

50 The claimant submits that he knows his illness better than anyone. He argues that, although the Disability Management Record at p 121 refers to his condition as not severe, this in police terms is usually used to signify that a matter is above substantial and below critical. I note that this was not something that the claimant explained in evidence prior to submissions and therefore the respondent has not had the opportunity to challenge his interpretation of the phrase

51 In respect of the report of Dr Younis, the claimant submits that he is unaware of the content of the letter of instruction to Dr Younis or the questions asked of him. Dr Younis was not one of the doctors listed originally and he was not aware that the respondent had written to him.

52 The claimant submits that the NHS Diabetes UK and other organisations all state that type 2 diabetes is a disability and is a progressive condition. He accepts however, that in respect of his claim the test is based on the legal definition of disability. He submits that whilst he accepts that medical evidence is important, it is his evidence that is more important because he knows how his conditions affect him. He maintains that it is clear that he is likely to have to go on insulin in the future and that his condition does impact on his day to day life in that it affects his sleeping, he has skin rashes and the has a need to use the toilet frequently. All this he says has a massive impact on him. He submits that his is not a case like Metrolink Travel Ltd – v- Stoute [2015] IRLR 465, (Metrolink), as his condition is not a matter of just controlling it by diet and cutting out sugary drinks. He has tried to control his condition with diet but has been unsuccessful. It is clear he says from both the report of his GP and Dr Younis that if he stops his treatment, his condition will get worse and he will develop more significant symptoms. In respect of his shoulder he submits that as his GP has mentioned that his shoulder "*certainly isn't perfect",* he need say no more in respect of that impairment. He continues to struggle to put his coat on but that is something that he has learnt to put up with.

53 The claimant submits that his case can be distinguished from the case of Metrolink as his condition cannot be controlled by diet and cutting out sugary drinks.

He relies on the case of Taylor –v- Ladbrookes Betting and Gaming Ltd [2017] IRLR 312 to show that as he now needs medication for his diabetes, he has a progressive illness which is covered under s6 of the Act. The claimant refers me to B14 of the guidance and reminds me that it is necessary to consider what is the effect of his condition without medication. He has tried diet and this is not working, he is likely to need insulin as his blood sugar levels are out of control.

The Law

54 Section 6(1) of the Equality Act 2010 sets out the definition of disability as

> *A person has a disability if the person has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.*

55 Section 212 of the Act, confirms the interpretation of substantial to be more than minor or trivial. The question of what is more than minor or trivial is a matter of degree to be decided by the Tribunal having regard to the statutory guidance available and all the circumstances of the case.

56 Schedule 1 para 2(1) of the Act defines long term as an impairment having lasted for 12 months, likely to last for at least 12 months or, it is likely to last for the rest of the life of the person affected. The paragraph goes on to explain that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities it is to be treated as continuing to have that effect it if the effect is likely to recur.

57 Schedule 1 para 5 provides 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 the impairment and, but for that (treatment or measure) it would be likely to have that effect. This means that if the Claimant is taking medication to control his Type 2 diabetes, the Tribunal must, when considering whether the diabetes has a substantial adverse effect, consider what the effect of the condition would be on his ability to carry out normal day-to-day activities if he was not taking the medication. It was however, established in **Paterson v Commissioner of Police for the Metropolis** [2007] ICR 1522 (EAT) para 46,(**Paterson)** which is now also found at B7 of the Guidance, that unlike medication, which should be discounted when carrying out an assessment, coping and avoidance strategies can be taken into account if the effect of adopting such a strategy means that a person does not suffer a substantial adverse effect and is therefore not disabled under the definition in the Act.

58 B7 of the guidance provides that account should be taken of how far a person can reasonably be expected to modify his behaviour, for example by the 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. The guidance gives as an example that when considering modification of behaviour it would be reasonable to expect a person who has chronic back pain to avoid extreme activities

such as skiing. It would not be reasonable to expect the person to give up or modify more normal activities such as shopping or using public transport.

59 B9 goes on to say that account should also be taken of where a person avoids doing things which for example, cause pain, fatigue or substantial social embarrassment, or avoids doing things because of a loss of energy and motivation. It would not be reasonable in those circumstances to conclude that a person who employed an avoidance strategy was not a disabled person. In determining the question of whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty. When considering what a person is able to do or not do it is by reference to normal day-to-day activities (section D of the Guidance) and not by reference to what might be normal activities for a small or particular group of people. In addition, it is not by comparison to what the average person is able to do or not do, nor by comparison of the effect the impairment/s would have on the average person. The test is the effect of the condition on the Claimant and what he personally cannot do as a result of the impairment/s or can only do with difficulty. In Condappa –v- Newham Health Care Trust EAT/452/00 it was established that where a person carries out normal day to day activities in pain or with difficulty this may amount to a substantial adverse effect but will not necessarily do so. The test is not whether the impairment had an adverse effect on the claimant's ability to carry out normal day-to-day activities but rather is whether the impairment had a substantial effect on his ability to carry out normal day-to-day activities.

60 In determining disability for the purpose of analysing whether each impairment is a progressive condition, paragraph 8 of Schedule of the guidance provides that:

(a) if a person 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 substantive adverse effect,

(2) P is to be taken as having an impairment which has a substantial adverse effect, if the condition is likely to result in P having such an impairment

61 At B19 of the Guidance, 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 ability to carry out normal day to day activities, provided that, in the future the adverse effect is likely to become substantial. The guidance goes on to explain that medical prognosis of the likely impact of the condition will be the normal route to establishing protection under schedule 1 paragraph 8 of the EqAct2010.
Guidance on the meaning of likely can be found at C3 of the Guidance, which provides for the purposes of this exercise 'likely' should be interpreted as 'could well happen'

Application of Law

62 The Claimant relies on two physical impairments
(1) Frozen shoulder

(2) Type 2 diabetes

The claimant maintains that both impairments satisfy the definition of a disability under s6 the Act in that both have a substantial long-term adverse effect on his ability to carry out normal day-to-day activities. In addition, it is the Claimant's case that both conditions are progressive conditions in accordance with Schedule 1 paragraph 8 of the Act.

63 In order to be protected under the Act, the burden is on the Claimant to show that he has a physical or mental impairment that has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. The period of time which is relevant when determining disability, is the time when the alleged acts of discrimination took place.

64 In this claim, the relevant period is between early 2015 and 7 October 2016 when the Claimant was suspended from work. Whilst the collective effect of both conditions on the Claimant is relevant for the purpose of assessing whether or not the Claimant is disabled for the purpose of the Act, as above I deal separately with each condition below for the sake of clarity.

Frozen shoulder

65 Whilst the claimant has referred to this impairment as a frozen shoulder in these proceedings, the impairment is the residual damage caused as a result of an injury to the claimant's right shoulder that occurred during firearms training on 11 March 2014. The claimant complains that this impairment has a substantial long-term adverse effect on his ability to carry out his normal day-to-day activities in that he has restricted movement to the side and cannot put his arm up his back. He is unable to put his clothes on without difficulty due to the degree of pain he experiences when doing so. He is unable to lift heavy shopping bags and finds it difficult to swim, play golf and experiences pain when he is cleaning the windscreen of the car.

66 Dr Younis has been unable to comment on the claimant's shoulder as it is outside his area of expertise, and the delay in the disclosure of medical evidence, together with the late stage at which the claimant added this impairment to his claim has meant that the respondent was unable to instruct a doctor who would be able to offer an expert opinion. Consequently, in addition to the claimant's oral evidence, I am reliant on the limited medical evidence provided by the claimant and the respondent's records held relating to the claimant's accident and subsequent abilities at work.

67 It is not disputed that the claimant suffered an injury to his shoulder while taking part in firearms training on 11March 2014. Immediately following the injury, he was examined by the workplace nurse who recorded that the claimant had a full range of movement to his shoulder and required no analgesia as he was experiencing very little pain (p90). The claimant does not appear to have consulted his doctor about the matter immediately but when he does some 6 months later on 13 October 2014, the doctor ordered an x ray of the shoulder and recommended physiotherapy. It was not until October 2015 that the claimant was referred to a consultant orthopaedic surgeon who examined the claimant on 26 October 2015.

68 It is of note, that despite the fact that the claimant had been promoted to the rank of inspector in August 2014, over a year prior to the consultation with the consultant, and it is the claimant's evidence that as an inspector he is not required to carry firearms or attend firearms training, the report from the orthopaedic consultant assessed the claimant's injury on the basis that he worked as a Police Firearms Officer (p84).

69 The claimant did not require surgery to his shoulder nor did the consultant, who on the balance of probabilities, understood the claimant to be someone who carried firearms, recommend that he should refrain from his duties at that time. He subsequently had a sub acromial injection, which he is reported as responding well to and was subsequently discharged from the care of the consultant in January 2017. It is noted that the letter also refers to the claimant being *"able to spend much more time doing his exercises and is able to swim, all of which is proving beneficial"*

70 There is an abundance of evidence to show that the claimant did not report any difficulty with his shoulder following his initial injury for example, in November 2014 he reported that he was *"having physio for a right shoulder injury not affecting movement on job".* The form is signed by the claimant, who declares that the information is true to the best of his knowledge (p96). As indicated in my findings of fact I find the claimant to be somewhat disingenuous when he says that he did not feel the need to raise the issue of his shoulder when completing the questionnaire on 4 November 2014, because the test he was about to undertake was only to test his ability to run. His evidence is that as neither of his impairments affect his ability to run the need to mention either was not in issue. I find that the questions asked on the form are specific, i.e. *"Has a doctor ever told you that you suffer from any of the following conditions"* (p95) and *"Please give details of anything you think might effect [sic] your ability to work*". The questions are not restricted to whether the claimant is able to complete a sports test they are clearly exploring the claimant's ability to carry out his job. The claimant offers the same explanation, which I do not accept for the same reasons, as to the reason why in December 2014, he answered 'no to the question "*do you get pain or have limited movement in any joints that is made worse by changing your physical activity levels".*

71 Throughout the period of March 2014 to 7 October 2016, the claimant did not take any time away from work or ask to be placed on restricted duties. It is the claimant's evidence that he was able to 'tough it out at work' because he did not want to be placed on restricted duties. It is also clear that even when he first attended the consultation with his consultant he did not require any regular pain killers to control his pain (p84). nor is there any evidence to support his claim that he struggled to put his body armour on at work, an action that would have involved the same movements as putting on a coat or other clothes. Although the claimant says that he did report his difficulty putting on body armour to his senior officer, I have not accepted this evidence because it is not referred to in the Disability Management Record (p121), and if he had reported it he would clearly have been excluded from consideration of transfer to the special escort group, which he was not.

72 I find that the claimant is an officer who takes his responsibility to his fellow colleagues seriously, and I readily accept his evidence that he would never

jeopardise the safety of his colleagues. Having considered all the evidence in relation to his shoulder in the round, and considering all the relevant circumstances of this particular claimant, I find for the reasons given above that he did not experience the difficulties with his shoulder that he describes. If the claimant had carried on working with the restrictions on his shoulder he describes, he would have known he would potentially be placing his colleagues in danger and in addition, he would have known that it would not have been safe to transfer him to the special escort group. In the special escort group, he would have been required to routinely wear body armour and carry firearms both of which would have caused him significant problems if he suffered from the adverse effects described, yet his request to transfer and an expressed desire to be allowed to carry firearms remained current up to the date of his suspension in October 2016.

73 I find for the reasons given above, that the claimant has failed to show on the balance of probabilities that the impairment of his damaged shoulder has or had a substantial and long term effect on the claimant's ability to carry out his normal day to day activities and his impairment does not satisfy the definition of disability under s6 of the Act.

74 It is the claimant's case that his damaged shoulder is a progressive impairment that he has been advised will only get worse. The medical evidence before me does not support that argument, and although the claimant's GP does say that the shoulder is not perfect he quite clearly refers to the fact that *'the problem could recur, but this would only be likely should he sustain a further injury" (p86)* It is reasonable to conclude in the absence of evidence to the contrary, that as the GP refers to the fact that his problem "could recur" this is a problem that is not current nor is it an impairment that is in an asymptomatic stage with a potential to recur. (p87). The GP quite clearly states that it is only likely to recur should the claimant sustain a further injury. I accept that the claimant's shoulder may never return to its original function but for the reasons stated above, I find that the injury to his shoulder is not a progressive condition as anticipated under the legislation.

Type 2 diabetes

75 It is not disputed that the Claimant was diagnosed with type 2 diabetes in 2009; nor is it disputed that type 2 diabetes is a physical impairment for the purpose of the Act.

76 The question then to be determined by the Tribunal is whether this condition has a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities. In determining these issues the Tribunal is again assisted by the provisions of the Equality Act, including Schedule 1, and the Guidance on matters to be taken into account when determining Disability (2011)

77 I consider in turn, whether the claimant's diabetes has a substantial long term adverse effect on his ability to carry out his normal day to day activities at the relevant time i.e. early 2015 to 7 October 2016, and in addition, whether his diabetes can be identified as a progressive illness because as a result of his diabetes, he has suffered an adverse effect on his ability to carry out normal day to day activities, and that in the future the adverse effect is likely to become substantial.

In this respect I have regard to the medical evidence of the claimant's GP (p85) and the report of Dr Younis (p105) and their respective positions on the likely prognosis of the claimant's diabetes.

78 I turn first to whether at the relevant time the claimant was disabled under s6 of the Act by reason of his type 2 diabetes. It is accepted that type 2 diabetes is a physical impairment but it is not a deemed disability and will not satisfy the definition of disability under s6 of the Act unless the claimant can show that during the period of early 2015 to 7 October 2016, his diabetes had a substantial long term adverse effect on his ability to carry out his normal day-to-day activities. In doing so, the Tribunal has regard to the definition of the word substantial, as something more than minor or trivial (s212 of the Act) and that whether it is more than minor or trivial is a matter of degree to be decided by the Tribunal having regard to the statutory guidance available and all the circumstances of the case.

79 Schedule 1 of paragraph 5 of the Act also requires the Tribunal to consider any measure including medical treatment being taken to treat or correct the condition and whether in the absence of such measures the condition would have a substantial adverse effect on the claimant's ability to carry out his normal day-to-day activities. In considering this aspect of the claimant's condition I also have regard to the guidance in **Paterson v Commissioner of Police for the Metropolis** [2007] ICR 1522 (EAT) para 46,(**Paterson)** which is now also found at B7 of the Guidance, that unlike medication, which should be discounted when carrying out an assessment, coping and avoidance strategies can be taken into account if the effect of adopting such a strategy means that a person does not suffer a substantial adverse effect and is therefore not disabled under the definition in the Act.

80 Although in his impact statement the claimant states he has been taking Metformin to control his diabetes for the last 3 years, it is clear from the medical evidence that this is not so and that during the period of December 2014 to sometime after April 2016 the claimant was not taking Metformin at all (p114). For the reasons I have stated in my findings of fact above I do not accept that the claimant was using up medication he already had during this time.

81 I find that from the medical evidence relied on by Dr Younis, it is reasonable to assume on the balance of probabilities that for at least all but 6 months of the relevant period the claimant was not taking medication to control his diabetes. The claimant was made aware at a previous preliminary hearing that it was he who was required to produce evidence to show that his type 2 diabetes met the definition of disability for the purpose of the Act. Despite knowing this he has been reluctant to engage in allowing disclosure of medical evidence which has resulted in him not producing any medical evidence which would show when it was, after April 2016, that he started to take Metformin during the relevant period. After the medical entry of 25 April 2016 there are no further medical reports made available to Dr Younis until the letter of 26 June 2017. This letter does confirm that the claimant is currently taking Metformin, however it does not say when this commenced or the prescribed dosage. Consequently, I find that in assessing whether the claimant's diabetes caused a substantial long term adverse effect on his ability to carry out his normal day-to-day activities during the relevant period, it is not necessary or even possible to consider the effect of Metformin on his condition at that time because, on the balance of probabilities, he was either not taking it at all or if he was it was on an

intermittent basis only and not in accordance with the terms of his prescription. In respect of his attempts to control his condition by diet and exercise, I find these are lifestyle changes, which are reasonable for the claimant to adopt, and as such should not be discounted when considering the effect of his diabetes.

82 The claimant has listed a number of symptoms he claims to suffer from as a result of his diabetes, I note that save for the difficulty sleeping and his skin rash, his GP in his letter of 26 June 2016 did not make reference to any of the more significant symptoms the claimant relies on today (p85).

83 I accept that type 2 diabetes may result in symptoms of thirst, tiredness, poor wound healing and frequency of micturition when there is poor diabetes glucose control (p117). In respect of his diabetes, the claimant complains that during the relevant period his ability to carry out his normal day-to-day activities was adversely affected to a substantial long-term extent because:

(a) He had blurred vision and was unable to read long repots
(b) Walking and driving sometimes can become a real effort needing to ensure that a toilet was not too far away.
(c) Extreme exhaustion due to the need to go to the toilet frequently during the night
(d) Lack of concentration and needing time to process information.

84 In respect of the claimant's complaint of blurred vision, Dr Younis confirmed in his report that the claimant was diagnosed with diabetic background retinopathy in September 2010. Dr Younis reports that

The presence of diabetic retinopathy is compatible with normal vision and normal acuity. The presence of background diabetic background retinopathy is indicative of early eye changes and has no effect on vision (p116) and

The presence of diabetic background retinopathy would unlikely lead to any significant impairment of vision or disability (p117)

According to the medical records provided to Dr Younis, in January 2015 the claimant had normal visual acuity in both eyes. He has not provided any medical evidence of a deterioration in his vision since that time that is attributed to his diabetes or otherwise. In the absence of any evidence to the contrary, I find that the claimant has been unable to show that any difficulty he may have with his vision is, on the balance of probabilities, caused by reason of his diabetes because it is the opinion of Dr Younis that background retinopathy is unlikely to lead to any significant impairment of vision.

85 In respect of the claimant's exhaustion and need to pass urine frequently. As mentioned above, in my findings of fact, whilst the claimant's GP does confirm that the claimant suffers from poor sleep, there is no reference to the extreme symptoms he says he suffers nor is there any reference to the reason for the poor sleep being as a result of his need to visit the toilet up to 8 times a night. The claimant by his own evidence confirms that he has never sought advice from his GP about his need to pass urine frequently or the fact that needing to do so leads to him having to spend whole days in bed due to the exhaustion it causes. Whilst walking and driving are

normal day-to-day activities, there is no evidence that the claimant can only walk or drive with difficulty. At best he says that he needs to adjust the distance he travels to accommodate his need to visit a toilet. I do not find that this is an adverse effect on either his ability to walk or drive, although I accept it may be an inconvenience.

86 In respect of his extreme exhaustion, lack of concentration and needing time to process information. For the reasons I have stated in my findings of fact I do not accept that the claimant suffers from these adverse effects. I make this finding on the basis that the symptoms complained of by the claimant are, given the nature of the industry, the type of symptoms that would be likely to have an adverse effect on his ability to do his job. The claimant has never taken time off work from his role as a serving officer in the CNC. His role involves making decisions which ensure the safety of his officers, the site he works at and the more wider general public. If his diabetes had such an adverse effect as he describes, to continue to work without bringing these factors to the attention of his employers would seriously compromise the safety of others and I do not find, for the reasons set out above that the claimant would do that.

87 The claimant also complains that he is required to test his blood sugars twice a day and ensure he eats when he is hungry. He also complains of being overwhelmed by his illness. Whilst ill health is something that no one welcomes it is an unfortunate fact of life that it exists but it does not necessarily effect the ability to carry out normal day to day activities. The claimant has not explained how the need to tests his blood sugars twice daily or eat when hungry has an adverse effect on his ability to carry out his normal day-to-day activities. I accept that needing to prick his thumb twice a day would be unwelcome and an inconvenience but he has not shown how it adversely affects his ability to carry out his normal day-to-day activities.

88 I remind myself that when considering what a person is able to do or not do, it is by reference to normal day-to-day activities (section D of the Guidance) and not by reference to what might be normal activities for a small or particular group of people. The test is the effect of the condition on the Claimant and what he personally cannot do as a result of his diabetes, or can only do with difficulty. Having carefully considered all the evidence both oral and documentary, I find for the reasons set out above, that the claimant has failed to show that between early 2015 and 7 October 2016 his type 2 diabetes has a substantial long term adverse effect on his ability to carry out his normal day to day activities.

89 It is then necessary to consider whether type 2 diabetes is a progressive illness and whether, as a result of that illness, the claimant has suffered an adverse effect on his ability to carry out his normal day-to-day activities. If the answer is yes, it is then necessary to consider whether that adverse effect is likely to become substantial in the future. If it is, then the claimant will be protected under s6 of the Act.
In determining the issue of whether the claimant's type 2 diabetes is a progressive illness I have regard to the guidance of the EAT in Taylor –v- Ladbrookes Betting and Gaming Ltd [2017] IRLR 312. In considering this aspect of the claimant's claim, it is necessary to establish, on the basis of the evidence before me, whether the claimant's type 2 diabetes is likely to result in a substantial adverse effect on his normal day-to-day activities, in other words it is necessary to look to the claimant's future prognosis as opposed to the period between early 2015 and 7 October 2016.

90 Paragraph 8 of Schedule 1 provides that
(d) if a person has a progressive condition
(e) 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,
(f) the effect is not, (or was not) a substantive adverse effect,

2 P is to be taken as having an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment

The effect of para 8 is that, as soon as a person with a progressive condition experiences symptoms which have any effect on his or her ability to carry out normal day-to-day activities, he or she will be taken as having a disability. The guidance at B19 points out that a medical prognosis of the likely impact of a condition will be the normal route to establishing protection under this provision

91 The first question to establish is, whether as a result of his type 2 diabetes the claimant has experienced any symptoms to date which have had an effect on his ability to carry out his normal day to day activities. Unfortunately, there is little medical evidence to assist in the assessment of what effect the type 2 diabetes currently has on the claimant. I accept that the claimant's GP confirms that he is currently taking Metformin to control his diabetes. However, his GP has previously prescribed Metformin that the claimant has failed to take, and it is the claimant's evidence that his compliance with his medication has been poor.

92 It is the claimant's oral evidence and submission that his blood sugar remains out of control and he will be going on to further medication and that the further medication is likely to be insulin. This is however, not supported by the evidence of his GP (p85) who reports that the Metformin 'should' control his blood sugars for now. In the absence of any up to date records I find it is reasonable to assume that the claimant's GP does not know whether the claimant's blood sugar is currently controlled or not. The most the GP letter is able to provide is that if the claimant's condition was untreated and out of control, he might develop more significant symptoms. I find that this letter is of little assistance, if any, in providing an up to date briefing on the claimant's condition. I am therefore reliant on the report of Dr Younis who states that the claimant has no significant complications of diabetes apart from early diabetic retinopathy that would have no effect on his vision.

93 The claimant maintains that the effect of his condition does have an effect on his ability to carry out his normal day-to-day activities because he has poor sleep, suffers from skin rashes and has to pass urine frequently. I have already found that these complaints whilst inconvenient do not substantially adversely affect the claimant's ability to carry out his normal day-to-day activities nor do I find that they have any effect on them to a lessor. Whilst the matters complained of may be inconvenient or cause him some level of discomfort, I do not find that he has been able to show, on the balance of probabilities that any of his normal day-to-day activities have to date been affected by his diabetes. I have considered however, whether, if I am wrong on that point, the matters complained of are likely to become substantial adverse effects on the claimant's ability to carry out his normal day-to-day activities in the future. There is nothing in the evidence before me that leads me to a conclusion that poor sleep, lack of concentration or ability to process

information, skin rashes or frequency of micturition are likely to, become substantial as a result of the progressive nature of type 2 diabetes. To date, the claimant has not yet experienced any of the complications associated with diabetes, save for diabetic background retinopathy which has not affected his vision, although these would be likely to occur in the future. I find that the claimant is not currently experiencing any adverse effects from his condition, nor has he done so to date therefore paragraph 8 does not apply.

Conclusion

94 In conclusion and for the reasons stated above I find that neither the claimant's shoulder condition nor his type 2 diabetes are physical impairments that had a substantial long term effect on the claimant's ability to carry out his normal to day to day activities at the relevant time of early April 2015 to 7 October 2016.

95 I find for the reasons stated above that the claimant's shoulder condition does not amount to a progressive condition and that paragraph 8 of Schedule 2 of the Act does not apply

96 For the reasons stated above, whilst I accept that type 2 diabetes is a progressive condition, the claimant is not currently experiencing, nor has he experienced, any adverse effects from his type 2 diabetes that affect his ability to carry out his normal day to day activities and paragraph 8 of Schedule 2 of the Act does not apply.

Employment Judge Sharkett

23 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
23 October 2017

FOR THE TRIBUNAL OFFICE