



## EMPLOYMENT TRIBUNALS

Claimant  
**Ms N Mahmood**

v

Respondent  
**Plusnet Limited**

### PRELIMINARY HEARING BY TELEPHONE

Heard at: **Remotely**                                      On:                      **26 June 2020**  
Before:           **Employment Judge Davies**

**Appearances:**  
**For the Claimant:**                      **Ms N Platts (trainee solicitor)**  
**For the Respondent:**                      **Ms L Gould (counsel)**

### RESERVED JUDGMENT

At all relevant times the claimant met the definition of disability in the Equality Act 2010 because of the physical impairment of Trigeminal Neuralgia.

### REASONS

#### **Technology**

1. This hearing was conducted by telephone (A - audio). The parties did not object. A face to face hearing or video hearing was not held because it was not practicable and all the issues could be dealt with by telephone. The respondent had very helpfully prepared a hearing file and everybody had a copy of it.

#### **Introduction and issues**

2. This was a preliminary hearing in public, held by telephone, to decide whether the claimant, Ms Mahmood, met the definition of disability in the Equality Act 2010 at the time of the events in this claim. The claimant was represented by Ms Platts (trainee solicitor) and the respondent was represented by Ms Gould (counsel). I had in front of me the agreed preliminary hearing file of documents, and additional occupational health report and the claimant's impact statement. I heard evidence from the claimant.

3. The respondent accepted that at the time of the events complained of the claimant had a physical impairment, Trigeminal Neuralgia ("TN"), that had a substantial adverse effect on her ability to carry out normal day-to-day activities. The only issue for me to decide was whether at that time (May 2019) the adverse effects were likely to last 12 months.

### Findings of fact

4. The claimant started experiencing symptoms on 14 November 201. She had excruciating pain and sensitivity in her left ear. She went to an out of hours GP that night and was referred on to Accident and Emergency at Bradford Hospital. She had had mastoid surgery in 2017, and initially doctors thought the pain related to that. She was given medication for treating an ear infection.
5. The symptoms continued and got worse. The claimant started to lose hearing in her left ear and became very sensitive to noise. She started experiencing issues with her balance. She spent two nights in hospital between 21 and 23 November 2019. There was no evidence of infection and her mastoid cavity was clear. She was discharged with pain relief and antibiotics. At some point she was taken off the high doses of pain relief and put on amitriptyline.
6. The claimant attended the out of hours service again on 28 December 2018. The out of hours doctor seems to have been the first person to identify TN as a possible cause of her symptoms. He recorded a diagnosis of "chronic ear pains - ? atypical TN." He started the Claimant on carbamazepine, which is a recognised treatment for TN. The claimant was taken off amitriptyline.
7. The claimant was referred to the ENT clinic. At that stage, it was still thought possible that her symptoms were associated with her surgery in 2017. She was still experiencing pain and sensitivity to noise and other sensations. She was seen by the ENT specialist on 25 January 2019. Her mastoid cavity was clear and she was to be seen for her standard review in a further six months. The ENT specialist thought the explanation might be TN. The claimant had already been referred to the pain specialists, and the ENT doctor asked for that to be chased again.
8. The claimant was seen by the pain consultant Dr Taylor on 27 February 2019. Dr Taylor's notes record under working diagnosis, "facial pain - ? TN ? TMJ related pain." The claimant was referred for an ENT opinion about hearing loss and tinnitus, a max-fax opinion about TMJ and an MRI of her trigeminal nerve. Dr Taylor reported that the claimant was experiencing a sharp, intermittent pain that sounded like TN in some ways but was also exacerbated by chewing. She had some reduced sensation of the trigeminal nerve and some hearing loss. Dr Taylor was asking the ENT surgeons to look into the hearing loss, but thought it might be related to her previous surgery. Dr Taylor had also requested an MRI of the trigeminal nerve to rule out any trigeminal compression. The claimant's carbamazepine was to be increased and she was to be seen in the pain clinic in 6 months' time, when hopefully all treatable causes for the pain would have been ruled out and they could continue to try to resolve things with changes in analgesia. Dr Taylor recorded that the pain could be TN. It could also be related

to a TMJ or relate to previous surgery, although Dr Taylor thought the latter less likely.

9. The claimant said that she spoke to her dentist about TMJ and it was ruled out as a cause of her pain. A note in her GP records on 7 March 2019 refers to an imminent appointment with her dentist.
10. The claimant had an MRI of her trigeminal nerve on 9 May 2019. No issues were identified. The claimant told me that sometimes something shows up on an MRI scan, such as a cyst putting pressure on the nerve, and sometimes it does not. If nothing shows up, that does not mean the patient does not have TN. It simply means that the MRI has not identified a specific cause of it.
11. On 15 April 2019 the claimant had an occupational health assessment by telephone. The OH advisor noted that the claimant had been diagnosed with "possible TN". She explained that TN is a chronic pain condition affecting the trigeminal nerve. At that time the claimant's pain was not being controlled with medication. She had severe facial pain, swelling, hearing loss, and noise and cold sensitivity. Her activities of daily living were affected, she spent much of her time indoors and had a loss of balance. The OH advisor was not able to indicate a specific return to work date, because that would depend on the successful management of the claimant's pain. She did not think that the claimant's work performance would be affected in the long-term, with medical management of her symptoms and workplace adjustments.
12. I note that on 30 May 2019, the date on which the claimant received a letter informing her that she was to be dismissed, the claimant's GP wrote asking for her appointment at the pain clinic to be brought forward because she was still struggling with facial pain "thought to be TN."
13. From February 2019 onwards, the claimant's GP referred in her records to her having TN. Fit notes issued from 20 February 2019 onwards referred to TN as the cause of the claimant's absence from work. The claimant was clear in her evidence that there had never been certainty about the diagnosis of TN. Some doctors thought that was the cause of her symptoms and others did not. People thought it could be TN, but because she had a history of mastoid surgery, they also thought it could be connected to that. She was also told it can take years to diagnose TN. It was her GP's opinion from February 2019 that it was TN.
14. The claimant has never been told how long the TN will last. She has been told that there is not a proper cure and that the doctors can only help her manage it with medication. A later report by her GP confirms what the OH advisor said – that TN is a chronic condition.

## **Legal principles**

15. Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that disability is a protected characteristic. By virtue of s 6, a person has a disability if she has a mental impairment that has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. Section 6 is supplemented by schedule 1 of the Equality Act 2010, and by

Guidance made by the Secretary of State pursuant to those provisions: “Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)” (“the Guidance”). The Tribunal is obliged to take the Guidance into account.

16. Schedule 1 provides that an adverse effect is “long-term” if it has lasted twelve months, or is likely to do so. “Likely” in that context means it “could well happen”: see paragraph C3 of the Guidance and the decision in *SCA Packaging Ltd v Boyle* [2009] ICR 1056, HL. This is to be judged at the date of the alleged discriminatory act and not at the date of the Tribunal hearing. The Tribunal must apply an objective test based on all the contemporaneous evidence. Whether or not the condition has been diagnosed is one factor, but not the only factor, to take into account.

### Application of the law to the facts

17. Applying those legal principles to the findings of fact I have concluded for the reasons that follow that in May 2019 the substantial adverse effects of the claimant’s impairment were likely to last 12 months; that could well happen.
18. By May 2019 the effects had lasted around 6 months. There was no certainty about the diagnosis, but TN seems to have been the main contender. The ENT specialists had ruled out a link with her previous surgery and, indeed, in January 2019 the ENT specialist thought that the explanation could be TN. The pain specialist had identified two other possible causes: TN and TMJ. The claimant’s dentist had apparently ruled out TMJ, although there was an outstanding referral to the max-fax specialist. The claimant was being treated for TN from the end of December 2018 onwards and the pain specialist continued that treatment. The GP identified the condition as TN in the claimant’s fit notes. The MRI scan did not identify a specific cause for TN, but that did not mean that TN was ruled out.
19. If the claimant had TN, that is a chronic condition, i.e. it is long lasting. There is no cure, it is a case of treating it with medication. On the simple basis that the most likely explanation for the condition in May 2019 was TN, it seems to me that at that time the substantial adverse effects she was experiencing “could well” have lasted another six months. TN was the most likely cause, and it is a long-lasting condition. It had already lasted 6 months. Further, the effects of medication are to be disregarded.
20. The other possibility as of May 2019 is that the claimant did not have TN. In that case, she had some other unidentified cause of her symptoms. Applying the test that it “could well happen”, even on that basis it seems to me that the substantial adverse effects were likely to last another six months. They had lasted six months with no improvement. The claimant had tried a range of medication and was still not controlling the symptoms. The doctors were not talking about a possible diagnosis that could be simply treated and cured. In February 2019 the pain specialist was talking about ruling out other possible causes and then seeing the claimant in six months to continue to try to resolve things with changes in analgesia. The assumption seems to me to have been that it was likely the claimant’s pain would be ongoing and would need to be treated with pain relief in August 2019. The OH specialist in April did not think the claimant’s

ability to work in the long term would be affected, but she was clear that her return to work would depend on the successful management of her pain, and she noted that it was not being controlled at all at that stage. All of those factors point to it being likely that the substantial adverse effects would last another six months, i.e. that could well happen.

21. That means all the elements of the definition of disability were satisfied. The claimant had a disability at the time of the events in this claim, May 2019.

**Employment Judge Davies  
2 July 2020**