



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Karen Ward  
**Respondent:** Peninsula Business Services Limited  
**Heard at:** Leicester  
**On:** 4, 8 – 11, 14 – 17 May 2018  
**Before:** Employment Judge Ahmed  
**Members:** Mr K Rose  
Mr A Wood

## Representation

**Claimant:** In Person  
**Respondent:** Ms Gemma Roberts of Counsel

## JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. All of the complaints of failure to make reasonable adjustments with the exception of the delay in the provision of an ergonomic keyboard in 2013 are dismissed.
2. The complaints of direct disability discrimination, discrimination arising from disability, indirect discrimination, victimisation and harassment based on the protected characteristic of disability are all dismissed.
3. The complaint of constructive unfair dismissal is dismissed.
4. The Respondent is ordered to pay to the Claimant compensation and damages of £3,177.00 (net) in accordance with the schedule below.
5. The Recoupment Regulations do not apply.

### SCHEDULE

Compensation for loss of income	-	£ 434.72
Injury to feelings	-	£2,000.00
Interest on injury to feelings	-	£ 742.28
<b>TOTAL</b>		<b>£3,177.00</b>

# REASONS

1. By a claim form presented to the Tribunal on 25 January 2016 Mrs Karen Ward brings complaints of disability discrimination and constructive unfair dismissal.

2. Mrs Ward was employed as an Employment Law Consultant at the Respondent's Hinckley office from 7 November 2011 until her resignation on 28 September 2015. The Respondent is a well-known employment law consultancy operating from its Head Office in Manchester but with satellite offices throughout the UK. The Claimant's role was to provide advice on employment and HR matters by telephone and e-mail to the Respondent's clients. Employment Law Consultants are required to make a note of the advice given and there is a set period of time (known as 'wrap-up' time) following the call in which to do this.

3. The Respondent accepts that by reason of dermatitis to her hands, the Claimant is a disabled person for the purposes of the Equality Act 2010 ('EA 2010'). The condition predates her employment with the Respondent. It is a lifelong condition exacerbated by various matters including contact with chemicals and irritants. During her employment the Claimant also suffered from other ailments such as an undiagnosed ear or neurological condition, migraines and Meniere's disease. Those conditions were not, according to the Claimant's own GP and in our view, related to her dermatitis.

4. The Claimant apparently worked without any issue at work concerning her dermatitis between November 2011 (when she joined) until June 2013 when she had a six day period of absence for dermatitis. On her return to work she had the usual interview with her line manager in which there was a discussion about "looking to get some gloves and the need to purchase a more suitable keyboard which would place less stress upon her fingers and broken skin". The Claimant's use of various steroids and chemicals had resulted in her skin becoming thinner and susceptible to splitting. The Claimant began to wonder whether the exacerbation of her condition in June 2013 was due to chemicals used to clean her desk area and keyboard. It was confirmed by the Cleaning Company that the keyboards were not cleaned with any chemicals at all. A dry cloth was provided for cleaning the Claimant's keyboard and work area.

5. Mrs Ward had a further period of absence between 15 and 26 July following which an occupational health referral was made on 19 August 2013. The occupational health report of 20 August recommended the Claimant be provided with a soft touch keyboard and that she continue to wear cotton gloves which the Claimant had purchased herself. Following a medical capability meeting on 30 September 2015 the ergonomic keyboard was ordered. The Claimant was off sick for approximately a week in September 2013. The keyboard was supplied on 4 October. Unfortunately the keyboard was not regarded by the Claimant as suitable. A further keyboard was sourced in November 2013 which was satisfactory.

6. Mrs Ward had further periods of absence of a week in November 2013. Following a return to work meeting the Respondent contacted its cleaning contractor who confirmed that no chemicals were being used in relation to the Claimant's keyboard or work area. Mrs Ward also complained that her condition was being exacerbated by the air conditioning vent. She was moved to a different

location in the same office to overcome the problem.

7. In December 2013, there was a documented discussion with the Claimant regarding mis-logging of advice to clients. She was absent for two days around Christmas 2013 with a stomach virus. In January 2014 the Claimant reported a 'massive improvement' in her hands and confirmed that the new keyboard was helping. In September 2014 a further replacement keyboard was supplied as the one used was wearing away.

8. In February 2015 the Claimant was absent for a period of 40 days due to "menopause/high blood pressure/cholesterol and Meniere's". The Claimant was scheduled to observe an Employment Tribunal hearing as part of her work objectives in April 2015 but this was cancelled due to excessive workload. Mrs Ward was very unhappy about this cancellation and wrote several e-mails complaining about it. By this point the Claimant's absences were significant and on 30 April 2015 a meeting was arranged with her line manager to discuss the matter. It was proposed that there should be a further referral to occupational health to determine what further reasonable adjustments were required. Mrs Ward initially declined to give her consent arguing that the occupational health company (Health Assured) were not independent as they were also owned by Peninsula. The Claimant alleges that she was bullied and harassed at that meeting.

9. The Claimant did eventually agree to an occupational health referral and there was a further occupational health assessment on 1 May 2015. The referral form had a box which asked whether a reason for the referral was potential disciplinary proceedings. The occupational health report noted that dermatitis had largely settled but from time to time Mrs Ward could be affected by a flare-up of symptoms. However she also had other conditions such as vertigo and associated symptoms with her ears causing fatigue, nausea, headache and intermittent deafness. The Claimant was absent from work from 5 May 2015. As it transpired she did not return to work thereafter.

10. On 18 May 2015 the Claimant presented a lengthy grievance complaining of a whole range of matters, some of which are unrelated to these proceedings. The grievance was handled by Mr Richard Prior, a Team Manager. In preparation for the grievance the Claimant made a request for a number of documents. The Respondent suggested that she make a subject access request which the Claimant did receiving the information and documentation on 11 July. A welfare meeting was held with her on 12 June and a grievance meeting on 16 July 2015. Mr Prior wrote to the Claimant on 31 July 2015 dismissing all of the grievances.

11. On 18 August 2015 the Claimant appealed against Mr Prior's decision. The appeal process was undertaken by Ms Kate Palmer, Assistant Head of Employment Advice. Ms Palmer sent her decision by e-mail on 25 September 2015 dismissing the appeal. On 28 September 2015 Mrs Ward submitted her resignation. On 25 January 2016 she presented her claim to the Tribunal. Sadly, the Claimant was violently attacked by her former husband in September 2016 and suffered very severe injuries. Consequently the proceedings in this case were stayed for some considerable time, hence the delay in the hearing of this case until May 2018.

**THE LAW**

Relevant statutory provisions under the Equality Act 2010

Section 13 - Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 15 - Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if:-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Section 19 - Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Section 26 - Harassment

(1) A person (A) harasses another (B) if:-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

Section 27 - Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because:-
  - (a) B does a protected act, or
  - (b) A believes that B has done, or may do, a protected act.

Section 123 – Time limits

- 1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of:-
  - (a) The period of 3 months starting with the date of the act to which the complaint relates, or
  - (b) Such other period as the Employment Tribunal thinks just and equitable.
- (3) For the purposes of this section:-
  - (a) Conduct extending over a period is to be treated as done at the end of the period;
  - (b) Failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:-
  - (a) When P does an act inconsistent with doing it, or
  - (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136 - Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Section 124 - Remedies

- (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
- (2) The tribunal may:-
  - (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
  - (b) order the respondent to pay compensation to the complainant;
  - (c) make an appropriate recommendation.

Section 20 - Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Section 21 - Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

Relevant provisions under the Employment Rights Act 1996

Section 95

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if):-

[(a) – (b) not relevant]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

**12. THE ALLEGATIONS**

Failure to make reasonable adjustments

12.1 Failing to provide cotton gloves.

12.2 Failing to adjust spell checker, call assessments and call appraisals.

12.3 Failing to provide an appropriate soft touch ergonomic keyboard within a reasonable timeframe.

12.4 Failing to adjust the amount of wrap up time and off line time and/adjusting the flow of calls to the Claimant.

12.5 Failure to adjust cleaning products used by external cleaning contractor.

12.6 Failing to adjust scoring appraising to allow for disability and sickness absence.

12.7 Failure to make adjustments in respect of temperature in the office.

12.8 Failure to allow phased return or offer alternative duties.

12.9 Failure to allow temporary reduction of hours or disability leave for a GP appointment on 30 April.

12.10 Failure to allow the Claimant to attend an ET visit or perform alternative duties.

12.11 Failure to consider other roles.

12.12 Failure to adjust grievance process.

Discrimination arising from disability

12.13 Failing to deal with the Claimant's disability resulting in loss of pay and/or bonus.

12.14 The allegations of victimisation based upon the protected act of a grievance of 18 May 2015 are as follows:

12.15 Failure to provide requested information in a timely manner so as to purposefully delay or prevent the Claimant's return to work.

12.16 A referral to occupational health so that disciplinary action could be commenced.

12.17 Inappropriate remarks in a grievance decision suggesting that the Claimant could/should be disciplined.

12.18 Claimant being issued with a documented discussion and a warning on 30 April because she had asked to leave early.

12.19 Deducting the Claimant's holiday pay while on sick leave.

Direct Discrimination

12.20 That whilst investigating her grievance Mr Prior asked staff in the office whether she wore gloves

12.21 That the Claimant was the butt of jokes for wearing gloves, being called 'Michael Jackson' or 'snooker ref'.

Harassment

12.22 That the Claimant was harassed at the meeting on 30 April 2015.

12.23 That her managers were aggressive and pressured her to consent to an occupational health referral.

Victimisation

12.24 Failing to provide information in a timely manner delaying a return to work

12.25 Referring the Claimant to OH so that disciplinary action could be commenced

12.26 The grievance decision suggested that the Claimant could have been disciplined.

12.27 On 30 April issued with a documented discussion and a warning because she asked to leave work early

12.28 A deduction of holiday pay whilst on sick leave

### Constructive Dismissal

The Claimant claims she was constructively dismissed because the Respondent breached the implied term of trust and confidence in that:-

12.29 There was a breach of the data protection Code of Practice in terms of the delay in providing documents under the subject access request.

12.30 There was a breach of health and safety in failing to supply appropriate equipment or investigating her concerns.

12.31 That there was a breach of the grievances procedures because of delay in not providing all necessary information and not investigating the grievance properly.

### **13. THE ISSUES**

The issues are agreed as follows:

#### Failure to make reasonable adjustments

13.1 Did the Respondent apply a relevant provision, criterion or practice ('PCP') or were there any physical features of the premises which put the Claimant, a disabled person, at a substantial disadvantage?

13.2 If so what was the nature of the substantial disadvantage suffered?

13.3 Did the Respondent take such steps as were reasonable to avoid that disadvantage?

#### Discrimination arising from disability

13.4 Did the Respondent treat the Claimant unfavourably by not paying her a bonus from its profit share scheme?

13.5 Can the Respondent demonstrate that the profit share scheme was a proportionate means of achieving a legitimate aim?

#### Victimisation

13.6 Did the Respondent subject the Claimant to detriment because she performed a protected act?

#### Harassment

13.7 Did the Respondent engage in unwanted conduct in relation to the Claimant's dermatitis which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment? In particular the Claimant relies upon:-

13.8 The meeting on 30 April and the conduct of Ms Powell and Ms Ricards of the Respondent.

13.9 Did Ms Monroy, formerly the Claimant's Line Manager, make jokes about the Claimant calling her Michael Jackson or a snooker referee when the Claimant was wearing gloves?

13.10 Did Mr Prior whilst investigating the grievance "go round the office asking



staff if the Claimant wore gloves all the time at work?"

#### Direct discrimination

13.11 Did the Respondent treat the Claimant less favourably because of her disability?

#### Indirect Disability Discrimination

13.12 Did the Respondent apply a PCP which put the Claimant at a particular disadvantage due to her dermatitis?

13.13 If so was the PCP a proportionate means of achieving a legitimate aim?

#### Constructive unfair dismissal

13.14 Did the Respondent commit a repudiatory breach of the Claimant's contract of employment?

13.15 Did the Claimant resign in response to that breach or for some other reason?

#### Time limits

13.16 Are the Claimant's complaints out of time?

13.17 If so is it just and equitable to extend time?

### **CONCLUSIONS**

#### Time Limits

14. In coming to our decision, we have taken into account the main authorities on time limits such as **Commissioner of Police for the Metropolis v Hendricks** [2003] IRLR 96, **Robertson v Bexley Community Centre** [2003] IRLR 434 and the recent judgment of the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640. In the **Morgan** case the Court of Appeal makes it clear that the language of section 123 EA 2010 gives Tribunals "the widest possible discretion". Although a Tribunal may find it useful in considering the list of factors set out in Section 33(3) of the Limitation Act 1980 (the so called 'Keeble factors' following the decision in **British Coal Corporation v Keeble** [1997] IRLR 336) a Tribunal is not required to go through such a list in a tick box manner.

15. The Claimant was engaged as an Employment Law Consultant and might therefore be expected to advise her clients on time limits. She could not reasonably have been ignorant of the need to bring a claim in time or within statutory time limits. Certainly her knowledge of employment law would be greater than the average litigant in person. She may not have been an advocate but there was an expectation and requirement for her to have a sound grounding of employment law as part of her job. On the other hand there has been no real prejudice to the Respondent by reason of the delay. There was significant delay *after* issue of proceedings due to the unfortunate events in September 2016 when the Claimant was violently attacked by her former husband but that is not relevant for these purposes. Also, whilst there is significant delay in relation to allegations going back to 2013, the Respondents have been able to marshal their evidence and to present their case based upon the documentation and records

available. It is certainly arguable that the issue as to the ergonomic keyboard, which was the subject of a grievance and an appeal, was an act extending over a period.

16. We find that whilst all of the disability discrimination allegations are out of time we are satisfied that it is just and equitable to extend time for the following reasons:

16.1 There is no real or significant prejudice to the Respondent in extending time;

16.2 The Respondents have documented matters very thoroughly and thus the evidence is not affected by memories fading. The cogency of the evidence is unaffected. This case does not depend upon witnesses recalling events;

16.3 The claimant could not reasonably be expected to damage her relationship with her employer over ongoing issues by starting proceedings on what were after all relatively minor matters;

16.4 It was reasonable for the claimant to exhaust internal procedures before launching Tribunal proceedings.

#### Failure to make reasonable adjustments

17. We will deal firstly with the delays in the provision of the ergonomic keyboard. It is clear from the return to work meeting on 11 July 2013 that an ergonomic keyboard was necessary and was a reasonable adjustment. The Claimant was off work for dermatitis matters shortly thereafter between 15 - 26 July and so the need was both urgent and evident. There was however a significant unexplained delay in referring the matter to occupational health until 19 August before any decision was made to order the keyboard. The OH report (issued promptly a day after the assessment) recommended the provision of a keyboard. The keyboard did not arrive until 4 October 2013.

18. Ms Roberts on behalf of the Respondent realistically accepts in her submissions that "it took some time to find the best keyboard to suit the Claimant". We would go further and say that the delay was both unreasonable and excessive. The provision of a keyboard was a relatively simple matter and a keyboard, which cost no more than £50, did not reasonably require a referral to occupational health. Ordered online it would have arrived in a few days. In any event the keyboard ordered was clearly unsuitable and thus caused the Claimant further difficulty at work.

19. Even if an occupational health referral was necessary, there was unreasonable delay in making the referral (from 11 July to 19 August) and then further unreasonable and unexplained delays in ordering the keyboard until 4 October. As it was the whole process took 12 weeks.

20. We are satisfied that the delay was unreasonable and amounted to a failure to provide an auxiliary aid within a reasonable period. Whilst we recognise that the EA 2010 does not set a time period on making adjustments, the requirement must import a degree of reasonableness. In that respect, the Respondents were unreasonably tardy and failed to comply with the duty to make reasonable adjustments. We are satisfied that complaint succeeds.

21. All of the remaining complaints however fail for the reasons set out below.

Failing to provide cotton gloves

22. The evidence was that the Claimant always had gloves to wear at work which she had sourced from a local supplier. The Respondent agreed to reimburse their cost. The Claimant accepts on one occasion she did receive reimbursement. There was clearly an agreement that the Claimant would purchase the gloves and would be reimbursed. We see no difference in principle between the provision of gloves directly by the Respondent or by the Claimant buying them and being reimbursed. As to the complaint that the gloves got dirty, the answer to that was quite simply that the Claimant could either wash them or replace them.

Failing to adjust spell checker

23. The PCP appears to be the assessing of calls. The spell checker was standard across the business and the Claimant did not suffer any substantial disadvantage because she merely had to slow down in typing. The Claimant typed fast and this caused her errors, not the skin condition. Adjusting the spell check was not a reasonable adjustment. The solution was for the Claimant to slow down and be more accurate.

Failure to adjust the amount of wrap up time

24. Whilst the Claimant found it difficult to meet her target within wrap up times this was not related to her disability. Complaints about wrap up time were common across the board with other employees and the Claimant suffered no substantial disadvantage. She regularly met her targets.

Failure to adjust cleaning products used by external cleaning contractors.

25. All of the evidence clearly points to the fact that no chemical cleaner was used on the Claimant's desk. A cloth was supplied and stored separately in her desk to avoid it being cross-contaminated. The Claimant used gloves or barrier cream. Her keyboard was not cleaned. She had the option of buying wipes that she could tolerate and reclaiming the expense but she does not appear to have ever done so suggesting it was not an important issue.

26. The evidence was also that whilst the cleaners used a chemical spray elsewhere they did not do so with the Claimant's desk and the keyboard was merely dusted down. The Claimant's view has not doubt been affected by the COSH sheets which she obtained in the grievance process but these do not establish any causal link with the condition affecting her hands. The Claimant made no complaints about chemicals being used on her desk from October 2013 until her grievance in May 2015. In 2014 she had very few absences from work when we would expect there to be if the cleaners were using chemical. The absences in 2015 were unrelated to her dermatitis. When the Claimant was not in the office environment her hands still suffered. At a welfare meeting on 12 June 2015 when the Claimant had been away from the office for 6 weeks her hands were still noted to be very swollen and sore. In short, there is no link between the Claimant's skin condition flaring and being at work.

27. In any event we are satisfied that the Respondent made such adjustments as were reasonable. It spoke to the cleaners and instructed them not to clean the Claimant's desk with any chemicals. The Claimant was invited to obtain cleaning wipes of her own choosing which would be satisfactory to her but she did not action that suggestion.

Failing to adjust scoring appraisal to allow for disability and sickness absence

28. It is clear that a number of disability related absences were excluded during appraisals. The Claimant had a number of non-disability related reasons which affected her scoring.

Failure to make adjustments in respect of the air conditioning system

29. There was disagreement between staff in the Claimant's work locality as to the optimum temperature in the office. The Claimant was free to adjust the thermostat if she wished. Ultimately her desk was moved from a location under an air conditioning vent to another location which was a reasonable adjustment. The Respondent then put up a notice to tell other employees not to adjust the thermostat.

Loss of pay or benefits

30. There was no evidence that the Claimant's scores or appraisals were detrimentally affected by her dermatitis and her inaccuracy was often as a result of trying to type too fast. The Claimant regularly received pay rises based upon the performance.

31. As to the suggestion that sickness absence should have been excluded, this did not affect her pay rises, only the bonus. She did not obtain a pay rise in 2013 because there was a client complaint against her. In 2014 she was awarded a lower than recommended pay rise because she needed to improve on quality and calls. In August 2014 she received a substantial £2,000 salary increase. There is nothing to suggest the Claimant was detrimentally affected in relation to pay because of her condition. The failure to achieve bonuses and pay rises was because of her performance which was not disability-related.

Failing to allow a phased return or offer alternative duties.

32. Following an extended absence in Spring 2015 the Claimant was offered a phased return. There were no alternative duties that were available at the Hinckley office. The Claimant gave no indication at the time that she was willing to relocate, for example, to Manchester which would be the nearest centre where there may be alternative vacancies. The Claimant was an Employment Law Consultant and the majority of roles at Hinckley were of that type.

Failure to allow a temporary reduction in hours or disability leave for a GP appointment.

33. The Respondent does not recognise the concept of 'disability leave' in its procedures. It is not clear what the Claimant was seeking. The Claimant asked to leave early on 30 April 2015. She indicated that she wished to see her doctor but she did not have a prior appointment. The office was busy and there was a need for the Claimant to be at work. She was informed that she could leave if she could provide confirmation of a GP appointment. As it transpires her appointment was actually on the following day when she was permitted time off.

Failure to allow the Claimant to attend an ET.

34. The Respondent had as one of its objectives a visit to an Employment Tribunal. These visits were fitted in when workload permitted. Several planned visits were cancelled due to an excessive workload.

35. The Claimant's principal complaint appears to be that she was not given the opportunity to avoid a day's work (and thus not having to type with her damaged skin) by attending an ET visit rather than undertaking her normal responsibilities. There was no failure to make reasonable adjustments.

Failure to consider other roles.

36. The Claimant did apply for a Field Service role which oddly would have meant less control in relation to exposure to chemicals and irritants. There is nothing to suggest that this role would have alleviated the Claimant's difficulties.

Failure to adjust the grievance process

37. This is a complaint that the subject access request took too long. The delay was relatively short – at worst 5 days outside the statutory time limit and at best 2 days. The grievance meeting was arranged promptly after the Claimant was provided with documents. Despite the very large number of allegations Mr Prior had to deal with the grievance decision was delivered with commendable speed.

Discrimination arising from disability

38. The Claimant appears to have misunderstood the terms of the scheme for pay increases. Good attendance was not a factor taken into account in determining pay increases, only bonuses.

39. As to bonuses, attendance was a reasonable factor to take into account to incentivise employees. It was a proportionate means of achieving a legitimate aim.

Harassment

40. The allegation of harassment principally relates to a meeting on 30 April 2015 although at the hearing it appeared to extend to allegations about the Claimant being called Michael Jackson or a snooker referee (and at one point a Magician) because of her wearing gloves at work. It is also alleged that Mr Prior "went around the office asking staff if the Claimant wore gloves all the time".

41. There is nothing to suggest that the Claimant's managers were aggressive at the meeting on 30 April 2015. Indeed we accept Ms Kelly Powell's evidence that she was rather intimidated by the Claimant and as support took Ms Claire Ricard with her. If there was any aggression we find it was on the part of the Claimant and not the Respondent's employees.

42. In relation to the 'Michael Jackson' comments, there is a conflict of evidence. Ms Corbett who gave evidence on behalf of the Claimant confirmed that comments as to the Claimant being called Michael Jackson were made but also agreed that the Claimant joined in those remarks as office banter. Mrs Monroy, the Claimant's former Line Manager and the person alleged to have made the comments on behalf of the Respondent vehemently denied making any such remarks.

43. Having heard the evidence, we prefer the evidence of Mrs Monroy. We found her to be a reliable witness. She was genuinely surprised at the allegation. We accept that Mrs Monroy did ask the Claimant where her gloves were once but that does not constitute harassment and was a reasonable enquiry to make.

44. The Claimant's evidence on these allegations was vague, unparticularised and has changed in content over time. The allegation as to being referred to as a Magician was not made originally. The Michael Jackson remark was not even the subject of an otherwise very lengthy grievance. The alleged remarks were not even mentioned at the grievance meeting. There was a passing remark to it in the appeal meeting but it is clear that it is not a formal part of the appeal. Moreover, we do not find that the comments amounted to harassment because they did not create an intimidating, hostile, degrading, humiliating or offensive environment. The Claimant joined in the banter and according to Mr Prior's investigation she was the original author of the comments, saying she looked like Michael Jackson.

45. We do not accept that Mr Prior 'went round the office' during the investigation asking all the staff whether the Claimant wore gloves. The only members of staff he asked were those who were involved in the grievance and a list of them is contained in his letter. We do not accept that he made an enquiry wider than that.

#### Victimisation

46. Any delay in relation to the provision of information was not because the Claimant had made a grievance. The procedure was put on hold at the Claimant's request whilst she received the documentation.

47. All the referrals to OH and the meeting of 30 April predate the protected act and cannot therefore have been as a result of the protected act

48. The grievance letter did make a reference to how lenient the line managers had been over the Claimant's absences. That was fair comment and there was no detriment.

49. The Respondent acted within its procedures in relation to sick pay. In any event they have nothing to do with the protected act.

#### Indirect discrimination

50. The allegation of indirect disability discrimination is difficult to follow and it has not been clarified in the Claim Form, further particulars or the very lengthy skeleton arguments. The Claimant fails to identify a specific provision, criterion or practice in relation to the indirect discrimination complaint. As such this complaint is dismissed.

#### Direct discrimination

51. It was entirely reasonable for Mr Prior to ask some staff if the Claimant wore gloves. The enquiry was not because the Claimant was disabled but to check if the adjustments were operating. The Michael Jackson comments are dealt with above and for the same reasons the complaint of direct discrimination is also dismissed.

52. The only additional direct discrimination complaints appears to relate to the provision of gloves, adjusting KPI's and pay increases. The Respondent came to an arrangement with the Claimant as to the provision of gloves. The Claimant suffered no substantial disadvantage by failing to adjust KPI's. The Respondent provided an ergonomic keyboard which was subsequently replaced when the key markings wore out. The Claimant's pay rises were unaffected by absences. A significant number of her absences were not disability related.

Constructive unfair dismissal

53. The Claimant relies upon a breach of implied term of trust and confidence which is that the employer shall not without reasonable and proper cause conduct itself in a manner calculated and [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The Claimant relies upon the outcome of the appeal as the last straw.

54. Although the subject access request took a few days longer than the 40 days permitted, the short delay cannot reasonably amount to a breach of the implied term of trust and confidence or of any express term.

55. There is no breach of health and safety as the Respondent not only came to an agreement with the Claimant in relation to gloves but also supplied a keyboard, it did not clean her desk at her own request and agreed to pay for specified cleaning wipes. The Claimant complained of ear problems due to using old headsets but she was the one who had selected the headsets in question. There is no link between the headsets and the Claimant's dermatitis.

56. The grievance procedure was detailed and thorough. Having regard to the considerable number of allegations the Claimant raised it was dealt with reasonably quickly.

57. There was nothing in the appeal outcome which is objectively wrong or can constitute a breach of the implied term of trust and confidence. The Claimant was unhappy with the outcome but that alone does not constitute a breach of the implied term. The grievance was long and complicated and there were a number of people to be interviewed. The appeal meeting was conducted fairly. There were full and lengthy discussions both with the Claimant and with other interviewees. There is no reasonable basis on which the appeal can be criticised. The decision was issued within a reasonable timescale. The Claimant did not in our view resign because of anything in connection with the grievance.

58. For the reasons given the complaint of constructive unfair dismissal is also dismissed.

59. Following the announcement of the decision, we considered the issue of remedy. The parties were given time but the issue could not be agreed. They were content to make submissions on the issue without calling additional evidence.

60. The Claimant has succeeded on one element of her claim only. We have considered the award for injury to feelings having regard to the guidance in **Prison Service v Johnson** [1997] IRLR 162. The Claimant argues that Peninsula is a large organisation whose business is to give advice on employment law and they should get it right. However, injury to feeling awards are compensatory and not punitive. The size or the type of undertaking is irrelevant. We note that awards should not be too low so as to diminish respect for the policy of anti-discrimination legislation.

61. In **Vento v Chief Constable of West Yorkshire Police** [2003] IRLR 102, three bands for awards were identified. The amounts of the bands were updated by the decision in **Da'Bell v NSPCC** [2010] IRLR 19, where the bands were raised to £600 - £6,000 (lower band), £6,000 - £18,000 (middle band) and £18,000 - £30,000 (upper band).

62. In **Simmonds v Castle** [2012] EWCA Civ 1039 the Court of Appeal declared that the 10% uplift should apply for civil claims and subsequently in **De Souza v Vinci Construction Limited** [2017] EWCA civ 879 the Court of Appeal ruled that same 10% uplift should apply to Employment Tribunal awards too. There have been two Presidential Guidance Notes in relation to the impact of inflation since then both of which relate to claims made after the date of the presentation of this claim. We consider that the first of the Presidential Guidance Notes is probably the closest which would mean that that the bands would be as follows: £800.00 - £8,400.00 (lower band), £8,400.00 to £25,200.00 (middle band) and £25,200.00 - £42,000.00 (higher band).

63. This is clearly a lower band case and in the lower part of the lower band at that. The discrimination was a single one-off act. It was remedied. At the end of the day the Claimant was provided with an ergonomic keyboard which appears not to have been the subject of any complaint from November 2013 onwards. The Claimant did suffer some time off work for which she will be compensated separately. We consider that an appropriate award for injury to feelings should be £2,000.00. It is not appropriate to make an aggravated damages award.

64. The Claimant was absent from work as a result of the act of discrimination and lost £434.72 in earnings.

65. Interest on the injury to feelings award comes to £742.28.

66. The total award of compensation and damages is £3,177.00

67. The Recoupment Regulations do not apply.

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Employment Judge Ahmed

Date: 6 June 2018

JUDGMENT SENT TO THE PARTIES ON

11 June 2018

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FOR THE TRIBUNAL OFFICE