EMPLOYMENT TRIBUNALS

Claimant: **Ms J Brown**

Respondent: **Deerlands Day Nursery Ltd**

Heard at: **East London Hearing Centre**

On: **26 and 27 November 2020**

Before: **Employment Judge Burgher**
Members: **Mr J Webb**
Dr L Rylah

Appearances

For the Claimant: **Mr G Brown (Husband)**

For the Respondent: **Mr D Isherwood (Legal Services Manager)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing Cloud Video Platform and was fully remote. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

1. The Claimant's claim for unfair constructive dismissal succeeds.

2. The Claimant was not disabled for the purposed of the Equality Act 2010 at the relevant time. Her claims for failure to make reasonable adjustments fail and are dismissed.

3. The Claimant accepted that she has been paid her notice and this claim is dismissed on withdrawal.

4. **The Claimant is entitled to a basic award of £1920.00 and a sum for loss statutory rights of £500.00 in respect of her claim unfair constructive dismissal. Any further elements of her compensatory award will be considered at a separate remedy hearing to be listed after 30 March 2021 if necessary.**

REASONS

1. At the outset of the hearing the following issues were identified as relevant.

Unfair constructive dismissal

2. Did the Claimant suffer a repudiatory breach of contract entitling her to resign. This includes consideration of whether the Respondent:

2.1 had a legitimate reason to terminate the temporary fixed term contract that the Claimant was undertaking; and

2.2 whether the Respondent failed to make reasonable adjustments by terminating this contract and keeping the Claimant on her zero hours contract to enable her to work what hours she was able to do.

2.3 Whether the respondent comply with the ACAS code of conduct in these proceedings

Disability

3. Was the Claimant disabled as defined by section 6 of the Equality Act 2010 at the relevant time by reason of her knee and ankle injury.

Failure to make reasonable adjustments

4. If the Claimant was disabled did the Respondent fail to make reasonable adjustments. In order for there to be a claim for reasonable adjustments failure to make reasonable adjustments there needs to be a provision, criterion or practice that places the Claimant at a substantial disadvantage when compared to nondisabled persons. The Claimant alleges the following PCPs

4.1 being required to kneel as part of her duties

4.2 being required to lift and bend, in particular children toys in the toy room and beds from the storeroom.

5. The Claimant alleges the following reasonable adjustments:

5.1 get someone else to do the lifting for the Claimant and;

5.2 the provision of a chair to change nappies and thereby avoid bending and lifting.

6. The Claimant accepted that she has been paid her notice and no claim for notice pay is being pursued.

Evidence

7. The Claimant gave evidence on her own behalf.

8. The Respondent called Mrs Heidi Cook Managing Director and Ms Samantha Styles, Nursery Manager to give evidence on its behalf.

9. All witnesses gave evidence by way of affirmation and were subject to cross examination and questions from the Tribunal.

10. The Tribunal was also referred to relevant pages in an agreed bundle of over 100 pages.

Facts

11. The Tribunal has found the following facts from the evidence.

12. The Respondent is purpose-built private day nursery, established in 2001, providing care and education for children aged three months to five years in and around the Essex area.

13. The Claimant commenced employment with the Respondent on 24 March 2014 as an Assistant Nursery Practitioner (Relief). She worked on a zero hours contract working with babies and children up to 5 years old. The Claimant covered lunchtimes, holidays and sickness cover. She had been covering with the under 2s often, but raised an issue after a number of days working consecutively in the under 2s room. She said with all the lifting, bending and kneeling her back was hurting so she would prefer not to work in that room for that many hours. The Respondent sought to accommodate this by allowing for the Claimant to cover in rooms with older children after that.

14. Whilst the Claimant was employed on a zero hours contract the Claimant in fact averaged 20 hours a week and at times worked up to 40 hours a week.

Fixed term contract

15. Ms Cook offered the Claimant the opportunity to cover maternity leave on a fixed term contract, initially part time in May, June and July going to full time from 1 August 2018. The fixed term contract was for 9 months to 1 year. The Claimant signed a contract in this regard on 5 July 2018 and this contract was terminable on 1 months notice. The

Claimant had worked a short time on the fixed term contract working the 40 hours per week but needed regular time off for appointments at her child's school and it was agreed for the Claimant to reduce to 4 days a week and be paid for 32 hours a week.

Accident at work

16. The Claimant suffered an injury at work in a poorly lit area the Respondent's car park on 17 December 2018. The Claimant injured her ankle. The Claimant reported this accident to employer on 21 December 2018 and subsequently saw practice nurse at her doctor's surgery 24 December 2018. After the Christmas closure of the nursery the Claimant commenced absence from work and went on statutory sick pay from 2 January 2019.

17. Ms Cook informed the Respondent's insurance company of the Claimant's accident and all evidence and matters relating to this were forwarded onto them and she continued to update them as events arose. The pack of witness statements and risk assessments were sent on the 5 February 2019. On 8 April 2019 the Respondent's insurers, Covea Insurance accepted full liability should a claim be submitted.

Sickness absence and return

18. Ms Cook sent a text to the Claimant on the 9 January 2019 asking how she was and if she would be in work on the Friday 11 January 2019 as it was over the 1 week that she had been signed off. The Claimant replied that she is slowly healing and would not be in for a further week. Ms Cook then arranged as telephone catch up with the Claimant on 23 January 2019 after the Claimant's Xray the previous day. The Claimant stated that things were taking a while to heal and she was getting fed up at home. She said she had to wait for the Xray results. They discussed if the Claimant could come back to see how she gets on depending upon the results and what GP advised.

19. A further sick note was submitted. Once the sick note had expired and Ms Cook invited the Claimant to a face to face welfare meeting on 7 February 2019 to find out how the Claimant was recovering and to see when her expected return would be.

20. Ms Cook and Ms Styles held the meeting on the 7 February 2019. The Claimant produced a new sick note from her GP stating that the Claimant had a 'Leg injury' and that she may return to amended duties with 'reasonable adjustments' to be discussed with line manager. The amended duties were said to last between 8 February 2019 and 22 February 2019. Ms Cook had not previously been notified that the Claimant had a 'leg injury', previous sick notes stated torn ligaments or foot/ankle injury.

21. The Claimant was questioned on her current ability to do the everyday tasks required of her as a Nursery Practitioner and she said that she could not kneel or lift heavy objects and would just have to see how she got on being on her feet but she could sit to do most tasks and her colleague to do more of the running around and tasks she could not do. Ms Cook stated that if the Claimant was not able to come back to full duties then she was not fit to work. However, the Claimant expected to return to work to see what she would and would not be able to do.

22. The discussion continued with Ms Styles giving the Claimant a list of duties and being asked to confirm which duty she could and could not do. The Claimant ticked some tasks and crossed others and discussion ensued about practical working the Claimant stated that she would not really know until she had a go at doing them. The Claimant stated that she could do most of the duties apart from lifting beds, making beds and questioned whether she could get the children to sleep, toileting, changing nappies on the floor and wiping children. The Claimant maintained that she was able to do activities with the children including sitting with them and doing observations and paperwork.

23. Ms Cook was concerned by this. Due to the change in diagnosis, she did not wish to exacerbate any injury or condition or any underlying condition namely sciatica that the Claimant admitted she had from time to time. The Respondent did not wish to make the Claimant's recovery worse by her undertaking required tasks too early. She felt that a professional opinion and a detailed medical report would be of assistance in ensuring a safe return to work for the Claimant. Ms Cook asked the Claimant for more details as to what the suggested adjustments of the Claimant's GP were to ensure the continued recovery of the Claimant's injury back to full duties.

24. The Claimant informed Ms Cook and Ms Styles that she would need to start a course of physiotherapy on 22 February 2019 before she would be fully fit but she had not heard about how long it could be. Ms Cook stated that she needed more information on the sick note or a medical report from her GP and the Claimant became annoyed and said that she was not being helped back to work and she would get another sick note. but she did not give the Respondent permission to contact her GP direct on this matter.

25. Ms Cook stated that she will would email the Claimant in respect of the request for further information and a required a letter of authority for her medical information. The Claimant was given an indication that she would not be able to even undertake any work, including light duties, until such matters were resolved. This upset the Claimant who perceived that she was being obstructed from returning to work. She had a doctor's note that said she was fit to work amended duties but was being informed that she would not be able to do an any work until further medical evidence was provided. The claimant did not provide permission for medical information became more upset. The Claimant said she was not happy to continue with the meeting and stated what they were doing was wrong before leaving the meeting visibly upset.

26. The Claimant was clearly able to undertake some light duties but it was clear that she was indicating that she would not able to undertake the full duties including floor-based nappy changing and lifting. We find that the Claimant was feeling unsupported at this stage, she expected to return to work and was feeling that she had been met with resistance from Ms Cook and Ms Styles. On the other hand we find that Ms Cook had genuine reasons and reservations against immediately allowing the Claimant to return, including health and safety considerations relating to the Claimant and commercial considerations regarding staff ratios in nursery rooms.

27. The Claimant returned to her general practitioner and obtained a revised sick note that stated that the Claimant was fit for amended duties, that she has an ankle injury and that she cannot kneel down or lift anything heavy. was unable to kneel or lift. This was sent to the Respondent on the same day, 7 February 2019.

28. Email conversations ensued, reiterating the different positions and perceptions that the parties held. flowed between the parties setting out the parties respective positions. On 7 February 2019, following the meeting Ms Cook emailed the Claimant stating

> *It is not our intention to prohibit you from returning to work. We are keen for you to return as soon as possible, but equally, we need to ensure that when you do return, you are in a position to do so and that your health will not be affected further.*
>
> *I can appreciate your frustration; however, your behaviour today is not acceptable, especially given that I am trying to ensure that when you return to work, you are not put in a position that will exasperate your condition.*

29. On 8 February 2019 Ms Cook wrote to the Claimant stating:

> *I'm sorry you have the impression that I do not want you to return to work. As I have explained several times, I am keen that you return to work as soon as you can, but I need to be confident that you able to do so comfortably. The doctor may be happy for you to return, but as I have explained, he / she has not indicted what adjustments need to be made. It is not a case of doubting you or feeling that you are not being truthful, but I need to be guided by your GP, not you, as to what the adjustments need to be.*
>
> *My further concern with your suggestion that you should not lift or kneel, is that in order for you to interact with the children, you have stated you will sit on a chair and bend to them. I am aware you have issues with your back and I am concerned that this will exasperate that condition. Again, I will need to be confident that any adjustments made do not have a detriment on another condition or issue.*

30. The Claimant signed off work for work related stress on 8 February 2019. Her sick note for this expired on 28 February 2019.

31. On 11 February 2019, Ms Cook wrote the following email to the Claimant.

> *Thank you for your email.*
>
> *Our previous meeting was to discuss your return to work. The meeting you are to attend today is to discuss how the restrictions outlined on your fit note will have an impact on you being able to fulfil the terms of your fixed term contract.*
>
> *If you refuse to attend this meeting, we will be forced to consider your suitability to continue with the fixed term contract without the benefit of your input. Furthermore,*

please be advised that refusing a reasonable request is a disciplinary offence and may be addressed through the disciplinary procedure.

Again, I hope this makes my position clear but if you have any questions, please do not hesitate to get in touch.

32. We find that the reference to possible disciplinary proceedings in the context of what went before was unhelpful and increased the tension and distrust that building by the Claimant towards the Respondent.

33. On 14 February 2019, Ms Cook wrote a formal letter to the Claimant outlining what they considered to be concerns of the Claimant's continued employment under the fixed term contract and invited her a meeting so that this and any potential reasonable adjustments could be discussed. The meeting was planned to take place on 18 February 2019. The Claimant was informed that she was required to confirm her attendance at this meeting by 4pm on Friday the 15 February 2019. The Claimant was informed that if she failed to attend this meeting it may go ahead in her absence and a decision made on the continuity of her fixed term contract without the benefit of her input.

34. The Claimant responded by email on 14 February 2019 stating that she was feeling so stressed over this to come in for a meeting and she would rather the meeting go-ahead through emails or letter format. The Claimant expressed concern that Ms Cook was still mentioning the Claimant's sciatica.

Termination of fixed term contract and resignation

35. On 15 February 2019 Ms Cook emailed the Claimant stating that the meeting planned for the 18 February 2019 was brought forward. She stated that the situation had been reviewed and that she decided to give notice that the fixed term contract is coming to an end and the Claimant was given four weeks notice and paid in lieu. Ms Cook informed the Claimant that from 18 February 2019 she would be returned to her substantive zero hours contract. Given that the Claimant was unfit for work until 28 February 2019 she should inform them when she is fit for work so available hours could be discussed. The Claimant was given a right of appeal to this decision. The appeal was to Ms Cook, who took the initial decision.

36. The Claimant appealed against the termination of her fixed term contract stating that there was the wrong procedure; there was a failure to make reasonable adjustments; and she was very upset by the whole situation. The Claimant indicated that she could not see how she could possibly work for the Respondent and was sure that they did not want her there either.

37. Despite this communication a telephone appeal was held on 28 February 2019. During the meeting Ms Cook stated that, in respect of the fixed term contract, they wanted to bring that to an earlier end than the proposed April end date and bring the Claimant back to her original zero contract for the adjustments to be more easily accommodated as shorter hours, and different roles and to get those adjustments made to integrate you back

into work more safely and bearing in mind those unknown length of time this will be for those adjustments to be undertaken. Ms Cook stated that they were certainly not dismissing the Claimant. Ms Cook stated that the Respondent could not sustain adjustments for 32 hrs of adjustments at this present time having someone on call to help your work colleague at any given times to do things.

38. Ms Cook set out the decision on appeal by letter dated 4 March 2019.

> *As discussed in the meeting, the reasoning for returning you back to the zero hours contract was to ensure we could work more easily around your adjustments with shorter shifts and varied duties to help us gauge how you got on and you acknowledged that this will allow for you to see what you can do. Additionally, as you would not be room based for long periods of time to start with, if you needed time out to rest your leg up, or anything else, then this can be more easily accommodated on this contract as a few hours are easier to accommodate than an 8-hour day. We have, of course, also taken into consideration the wellbeing of the children, as they need a consistent carer to meet their needs and work with the families. This is unlikely to be achieved if things did not work out during this adjustment period.*

39. On 6 March 2019 the Claimant submitted her resignation. She stated:

> *You have given me notice of my fixed term contract because you as my employer were unable to make reasonable adjustments. Given that the zero hour contract would require the same duties in my role as a level 3 child care practitioner I have no option but to resign. Therefore for clarity I resign with immediate effect.*

40. The Claimant presented her claim to the Tribunal on 22 May 2019. The Claimant stated at paragraph 9 of her details of complaint.

> *I believe my employer had a duty of care to me to assist me back into the work place with reasonable adjustments, they did not and have discriminated against me due to injury and temporary disability*

Disability - Medical evidence

41. The Tribunal considered the Claimant's disability impact statement and related medical records. The Claimant state that for about four months after the accident she was in constant pain and discomfort. She was prescribed pain killers and physiotherapy was arranged. The Claimant attended the doctor and was referred for physiotherapy. The diagnosis at the time was that there were believed tears to the ligaments in my knee and ankle. There was still swelling and pain when walking, but it had the added impact of making the limb very unsteady, meaning that even standing still was often a painful struggle and bending or kneeling was almost impossible. As a result of the prolonged periods of inactivity, the Claimant also developed plantar fasciitis, meaning that my foot was frequently cramping and painfully tight.

42. The Claimant was able to undertake cleaning work with a friend in summer 2019 and was able to commence full time work with Shoe Zone in September 2019.

43. More recently the Claimant reports that she has seen several doctors and other medical practitioners and that she is still currently suffering with pain in her knee that ranges from dull to extreme, depending on any number of variables. She is about to attend another course of physiotherapy for what they currently believe may be trapped nerve.

44. We carefully reviewed the medical records. The Claimant was certified as being able to return to work on amended duties from 7 February 2019. On 31 May 2019 the medical records show there were still tenderness present and it was reported that there was improvement in foot pain, the Claimant is recorded as managing at the exercises well. The next physiotherapy for 21 June 2019 states that the Claimant has not been able to do the exercises due to being on holiday. On 29 July 2019 the Claimant reported that she has more pain in her knee recently whilst away on holiday ankle and reported a swelling up. She stated that she has been managing the exercises but it has been very painful. The final entry we were referred to was August 2019 demonstrating that the Claimant was still suffering pain.

45. Separately, there was also a report from Mr J E Hambidge, Consultant Orthopaedic Surgeon, dated 16 August 2019 that states that a period of up to six weeks of symptoms would ordinarily attribute for the ankle accident. We also note that at the time the Claimant submitted her ET1 she asserted that her disability was temporary

46. There is no suggestion that the injury was expected to be long term. We find that, at the time, it was hoped that with physiotherapy treatment the Claimant was likely to recover.

Law

Constructive dismissal

47. The Court of Appeal in Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 set out the three steps necessary to establish constructive dismissal, namely:

47.1 That there was a fundamental breach of contract on the part of the employer;

47.2 That the employer's breach caused the employee to resign;

47.3 That the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

48. A breach of contract may be in the form of a breach of an express or an implied term. The relevant fundamental implied term in this matter is the implied term of mutual trust and confidence.

49. Every contract of employment contains an implied duty that neither employer nor employee will act so as to breach the duty of mutual trust and confidence that exists

between them without good reason. In Malik v BCCI [1997] UKHL 23, the House of Lords stated

> *"… the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

Disability

50. The Tribunal considered the EAT case of Sullivan v Bury Street Capital Limited UKEAT/0317/19/BA where Choudhury J helpfully summarises the legal framework when considering the definition of disability. He states at paragraphs 14 – 18 as follows:

> *14 Section 6 of the EqA, so far as is relevant, provides*
>
> *"(1) A person (P) has a disability if-*
> *(a) P has a physical or mental impairment, and*
> *(b) The impairment has substantial long-term adverse effect on P's ability to carry out normal day-to-day activities. …"*
>
> *15. Section 212(2) of the EqA provides that an effect is substantial if it is more than minor or trivial.*
>
> *16. Paragraph 2 of Schedule 1 to the EqA sets out the definition of "long-term" in this context.*
> *It provides: "(1) The effect of an impairment is long-term if –*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months,*
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) 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 if that effect is likely to recur…"*
>
> *17. It is not in dispute that the term "likely" in this context means something that "could well happen", and is not synonymous with an event that is probable: see SCA Packaging Ltd v Boyle [2009] ICR 1056 per Lord Hope at [2], Lord Rodger at [35], Baroness Hale at [73] and Lord Brown at [78]. The likelihood of recurrence within the meaning of paragraph 2(2) of Schedule 1 to the EqA is to be assessed as at the time of the alleged contravention: see McDougall v Richmond Adult Community College [2008] ICR 431, per Pill LJ at [24] and Rimer LJ at [33].*
>
> *18. An impairment is to be treated as having a substantial adverse effect on the ability of an employee to carry out normal day-to-day activities if measures are taken to treat or correct it and, but for such measures, it would be likely to have the prescribed effect: see para 5 of Schedule 1 to the EqA.*

51. In respect of reasonable adjustments Section 20(3) of the Equality Act 2010 states:

(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.

52. Section 21 of the Equality Act 2010 states:

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.
(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Conclusion

Unfair constructive dismissal

53. The Claimant alleged that the Respondent failed to make reasonable adjustments in order to facilitate her return to the workplace. The Claimant alleged that she was able to return and do light duties and was obstructed from doing so by the resistance of the Respondent. The Claimant further stated that the reason for this was that she had indicated she was bringing a personal injury claim and that the Respondent took umbrage towards her for this. Miss Cook denied that she was aware of the personal injury claim in questioning, however her witness statement clearly and indicated that she was aware of the personal injury claim by 5 February 2019 at the latest and this was before any return to work meeting.

54. It is clear that there was a disengagement by the Respondent with the Claimant's attempts to return to work with adjusted duties. We considered whether this disengagement was unreasonable and/ or due to her personal injury claim or whether it based on proper grounds namely the commercial considerations and health and safety considerations.

55. We conclude that the Respondent was entitled to seek a proper assessment and detailed medical evidence or to facilitate a Proper risk assessment before the claimant was able to return to undertake the full duties of the fixed term contract. The fixed term contract was in fact for maternity cover for at eight hours in a particular room not roaming duties which were undertaken on the zero hours contract. In any event, the fixed term contract was brought to an end by the Respondent in accordance with the contractual provisions and there cannot be constructive dismissal in relation to contractual termination, the Claimant was given proper notice of the end of the fixed term contract and she did not resign from that contract. To the extent that there were any failures to make reasonable adjustments in respect of the ending of fixed term contract there was no constructive dismissal from that contract. In respect of the ending of the fixed term contract itself, the

Respondent had provided contractual notice of termination and as such there was no constructive dismissal in respect of matters relating to that contract.

56. When considering with how the fixed term contract was ended and the manner of communication between the parties, the Tribunal consider that this is relevant to the ongoing relationship of her substantive zero hours contract. The Claimant was indicating at all material times that she was stressed and that she was feeling unsupported. The meetings and communication referred to shows that the Claimant believed that she could do light duties as part of the fixed term contract going forwards and that she was not given the opportunity to do so. The Claimant was given an explanation as to why and she could not continue to do any light duties before being sent home.

57. When the Claimant left the meeting on 7 February it is clear there was tension between both parties. The Claimant was upset when she left that meeting and the Respondent would have been no about that. However, Ms Cook sent an email on 11 February 2019, including a threat of disciplinary action against the Claimant in respect of not attending meetings. This was unreasonable in the context of what has occurred previously.

58. The next instance of unreasonable conduct by the Respondent is 14 February email where the Claimant was definitively informed that if she does not attend the meeting on the 18 February, the matter will go ahead without her. This was without any consideration as to whether there could have been a need for delay or need further information. The Claimant notified the Respondent in her email of 14 February stated that she was stressed and she want the meeting by email or letter.

59. The Respondent ignored the Claimant's on 14 February and decided the issue without a meeting in the Claimant's absence without attempting to ask her questions by email or in letter format as the Claimant had suggested. Whilst letter format may have been impractical in the circumstances there is no reason why the meeting could not have been assessed by email. This was unreasonable.

60. The Respondent also acted unreasonably by bringing the meeting forward to the 15 February 2020, without notifying the Claimant, and concluding that the fixed term contract would be brought to an end without further input from the Claimant.

61. The Claimant appealed. She was concerned that she was appealing to the same people who took the original decision to end the fixed term contract. The Claimant was concerned that the removal of her at fixed term contract was not reasonably explained or in good faith. She was concerned in particular about the amount of hours she would be required to do and believed that there would be no hours offered to her if she was returned to the zero hours contract. Whilst this may have been premature assumption made, in that the Claimant did not give the Respondent the opportunity to offer any hours we conclude that Ms Cook clearly communicated in the appeal outcome meeting and appeal outcome letter was that there would be a reduction in the Claimant's hours of work going forward. Ms Cook and clearly indicated to the Claimant that the reason for the removal of fixed term

contract was for there to be reasonable adjustments and that would have necessitated shorter hours the Claimant to build up. As such the Claimant was being clearly informed that her income would be reduced going forward because fewer hours would have been able to be accommodated by the Respondent.

62. Given the nature of this communication, and the lack of a reasonable engagement with the Claimant by the Respondent and the impact on the Claimant's future earnings income we conclude that the Respondent had acted in breach of the implied term of trust and confidence.

63. In these circumstances the Claimant's claim for unfair constructive dismissal succeeds.

Disability

64. In respect of the claim for a disability discrimination the first consideration is whether the Claimant is disabled. It is for the Claimant to establish that she is disabled and the Claimant is required to produced evidence before the Tribunal to establish the relevant statutory matters.

65. The Tribunal considered the Claimant's impact statement and the medical evidence which has been summarised above. We conclude the Claimant has established that she had a substantial adverse effect of normal day-to-day activities at the relevant time, between 7 of February to 6 March 2019, namely her ankle and knee injury.

66. When considering whether that substantial adverse effect was likely to last longer than 12 months the Claimant has not satisfied the burden upon her in this regard. The Claimant was required to provide evidence that the effects of her injury was likely to extend the beyond 12 months and she has not done so. The Claimant referred to medical evidence and which sets out a number of physiotherapy appointments but she has not provided any medical evidence indicating that she expected he injury to last 12 months or longer in this regard. We note that the Claimant was able to return to work on amended duties on 7 February 2019 and take note Claimant's grounds of complaint sent to the Tribunal on 22 May 2019 where she considers that she has a temporary disability.

67. We therefore do not conclude that Claimant has not established that her ankle and knee injury was likely to have continued in 12 months as at the relevant time. The fact that unfortunately for her, her injury has continued does not affect our consideration because we are required to assess what was considered likely to have happened at that at the relevant notwithstanding time.

68. Notwithstanding the fact that the Claimant has not established that she is disabled we still considered whether the Respondent failed to make reasonable adjustments at in respect of the ending the fixed term contract. We assess this specifically against the fixed term contract and not in respect of the zero hours contract because we do not know what duties the Claimant would and would not have been assigned under her zero hours contract.

Reasonable adjustments

69. The Claimant asserted that the Respondent failed to make reasonable assessment in the room that she was working for as maternity cover. We do not consider that it would have been a reasonable adjustment to appoint someone else in the room to do the lifting and bending instead of the Claimant. The financial constraints, continuity of child care and health and safety of children considerations of dealing with any emergencies in the room precluded this. There would have need to be increased staff ratios would have required and particular people assigned particular duties which would not have been reasonable on a long term basis. The fact that there very short term accommodations could be made in some circumstances arose from the ability of the Respondent to use floating zero hours contract workers to assist when available and affordable.

70. We do not consider it have been reasonable to expect the Claimant to seek to change nappies on a chair. Changing nappies on children over 2 years old on a chair instead of the floor would have required them to stay still which is unlikely and could result in serious injury risk to the Claimant and children if the child did not do so. To that extent, the provision of a chair would not have avoided the need to bend and lift to change nappies.

71. Therefore, had it been necessary to do so, we would have concluded that the Respondent did not fail to make reasonable adjustments in respect of the continuation of the fixed term role. Offering the Claimant roaming room duties compatible with her injury, could have been made as part of the Claimant's return to her zero hours contract. However, the Claimant resigned before this.

Decision

72. The Claimant's claim for unfair constructive dismissal succeeds and her claims that the Respondent failed to make reasonable adjustments fails and is dismissed. The Claimant accepted that she has been paid her notice and this claim is dismissed on withdrawal.

Remedy

73. The Claimant is entitled to a basic award of £1920.00 and a sum for loss statutory rights of £500.00 in respect of her claim unfair constructive dismissal. Any further elements of her compensatory award will be considered at a separate remedy hearing to be listed after 30 March 2021 if necessary.

74. The parties are ordered to notify the Tribunal by **30 March 2021** whether a remedy hearing to consider the remaining compensatory award is required. The following issues remain live:

74.1 The question of any overlap of damages with the Claimant's personal injury compensation;

74.2 The calculation of the Claimant's loss of earnings including whether it should be based on 32 hours a week (fixed term contract) or 20 hours a week average (zero hours contract). Given the termination proper termination of the fixed term contract it is likely that the average 20 hours will form the basis of calculation although the Tribunal will hear representations in this regard.

74.3 The earnings of the Claimant and mitigation during the relevant 12 month maximum compensation period will be considered. If a remedy hearing is necessary the Claimant will be expected to disclose her payslips and bank statements setting out her income for the period 15 March 2019 to 6 March 2020.

75. If necessary, a remedy hearing will be listed after 30 March 2021 and separate case management orders will be made covering the schedule of loss, counter schedule of loss, relevant documents, bundle and witness statements.

Employment Judge Burgher
Date: 9 December 2020