EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Riley-Heenan**
Respondent:	**Safety-Kleen UK Limited**
Heard at:	Tribunals Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG
On:	17, 18 and 19 October 2022
Before:	Employment Judge Adkinson sitting with
	Ms J C Rawlins
	Mr A Saddique
Appearances	
For the claimant:	In person
For the respondent:	Ms L Millin, Counsel

JUDGMENT having been sent to the parties on 2 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Mr Luke Riley-Heenan presents one claim of direct race discrimination and a claim for constructive unfair dismissal. The respondent denies the claim of direct race discrimination. The respondent admits that it had constructively dismissed the claimant but denies that dismissal is unfair. The respondent argues that if remedy is appropriate, then it should be altered to reflect the chance that the respondent could or would have dismissed the claimant fairly in any event.

Hearing

2. At the hearing before us, Mr Riley-Heenan has represented himself and the respondent has been represented by Ms L Millin of Counsel. The Tribunal would like to express its thanks to both parties for the help that they have given to the Tribunal.

3. The Tribunal has heard oral evidence from Mr Riley-Heenan and on his behalf from Mr Brandon Blair-King. On the respondent's behalf, we heard oral evidence from Mr Paul Young, the Regional Director of the respondent, and Miss Laura Wiggans, the Finance Director of the respondent. The

respondent also relied on the written evidence of Miss Clarissa Sigl, who is the Group Chief People Officer at Safetykleen International, the company that owns the respondent. We have taken that into account in our decision.

4. There is a bundle of documents before the Tribunal that consists of approximately 190 pages. In addition, we have been provided with a bundle of correspondence between the parties and the Claimant has produced some extra emails. We told the parties they should take us to documents they wanted us to consider. They did that, and we can confirm that it has taken into account the documents that the parties have referred the Tribunal to.

5. Each party has made closing submissions and we have taken those into account as well in reaching our decision.

6. The hearing has been an attended hearing, with the exception of Miss Wiggans, who gave evidence by Cloud Video Platform. There were no technical problems of note in relation to her evidence.

7. We dealt with liability first, and remedy separately.

8. Nobody has complained that this has been an unfair hearing. We are satisfied that the hearing has been a fair one.

The issues

9. The issues the Tribunal has to decide were identified by Employment Judge Brewer at a Case Management Hearing on 25 May 2021.

10. Since that hearing, the respondent has conceded that it constructively dismissed the Claimant by failing to properly deal with his grievances. During the hearing, the respondent also conceded that the only potentially fair reason on which it relies for that dismissal being fair was some other substantial reason.

11. After we raised the issues, it is now agreed by the parties that the claim was presented to the Tribunal in time. We are satisfied this is correct, because the claim was issued within one month of the early conciliation ending and early conciliation began within the three-month time limit of the alleged act of discrimination and therefore time was extended under **Equality Act 2010 section 140B**.

12. There is no allegation of contributory conduct.

13. The issues therefore for the Tribunal to decide are as follows.

    13.1. What was the reason, or principal reason, for the dismissal; that is what was the reason for the breach of contract. The respondent says some other substantial reason.

    13.2. Was it a potentially fair reason?

    13.3. If so, was the dismissal fair or unfair in accordance with the equity and substantial merits of the case.

    13.4. If the dismissal was unfair, is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason.

13.5. As for direct race discrimination,

13.5.1. the claimant defined his race is white/black Caribbean before Employment Judge Brewer.

13.5.2. Did the respondent do the following thing - not bringing him back to work from furlough before the end of October 2020.

13.5.3. Was that less favourable treatment?

13.5.4. If so, was it because of race.

Findings of fact

14. The Tribunal goes on to make the following findings of fact on the balance of probabilities that we believe are needed to resolve the issues.

Witnesses

15. Firstly, we make observations about all of the witnesses. We are quite satisfied that each witness has done their best to tell the Tribunal what they believed to be true. Each witness has made concessions when appropriate and did not attempt to hide when something is outside of their knowledge. We are quite satisfied that each witness has been genuine and reliable in their evidence.

About Mr Riley-Heenan

16. The claimant began work on 19 January 2015 as a Sales and Service Representative.

17. On 1 February 2016, he became an Automotive Waste Representative. The job involved going from the respondent's clients to respondent's clients collecting and removing automotive waste for proper disposal.

18. His job involved him driving a 3½ tonne vehicle, for which he had an appropriate licence. During his employment the respondent trained him to drive a 7½ tonne vehicle and to obtain the appropriate authorisations, with a view to him driving such vehicles. However, at no relevant time did the claimant drive such a vehicle because the respondent never obtained one before his employment ended.

COVID-19

19. In early 2020, the COVID-19 pandemic struck the United Kingdom. The UK Government introduced a number of rules that, in short, required people to stay at home wherever possible. In order to facilitate this, the Government introduced a scheme by which the Government would reimburse employers 80% of an employee's wages up to a financial limit, which does not apply in this case. Many employers, the respondent included, then agreed with their employees that they would receive 80% of wages, not have to provide any productive work, and be allowed to keep their jobs. Such employees were said to be furloughed.

Claimant's furlough

1. On 3 April 2020, Mr Riley-Heenan agreed to the respondent furloughing him. The letter setting out the furlough was written and signed by Mr Mark Cawley, the then Managing Director. In it, he set out the reasons as follows:

   "I am writing to you, because as you will appreciate, many of our customer sites are closed or unavailable for service visits from us and therefore the amount of work we have for employees to do has significantly decreased. This is having a significant impact on our revenue and cash flow in particular.

   "…

   "In relation to your employment with the company, it is our intention with effect from Monday 6 April 2020 to move you to furlough leave as an alternative to considering unpaid lay-off or making redundancies. We believe that putting you onto furlough leave, is clearly the most beneficial option for you and retains all your employment rights with us. We propose that your furlough leave will last for an initial period to 31 May 2020."

2. On 24 July 2020, the claimant's furlough leave was extended by agreement. That was confirmed in a letter that was signed by Ms Lynn Cowling who at the time was Head of Human Resources.

Concerns at end of initial period of furlough – potential redundancy

3. It was unclear in October 2020 whether the government would extend the scheme described above. Many employers, the respondent included, had concerns about what to do if the furlough scheme was not continued by the Government.

4. On 30 October 2020 Ms Cowling telephoned Mr Riley-Heenan and warned him that there may be a redundancy situation. The call was simply to say there may be a redundancy situation; it did not begin any form of consultation and no proposals or schemes were put forward for him (or other affected employees for that matter) to comment on.

5. On 6 November 2020, there Ms Cowling and Mr Riley-Heenan spoke by telephone again. The claimant recorded this call and we have seen a transcript of it. We have been given no reason to doubt its accuracy and so accept that it accurately captures, at the very least, the gist of what was said.

6. During the call, Ms Cowling said (so far as relevant):

   "No, No, no you're missing the point… as I've said all the way through it was a redundancy proposal. The proposal was that we were reducing our headcount that was the proposal, given the circumstances at the time of that conversation, following that conversation there have been two changes made by the government, the first one was to extend the furlough until 2nd December and then the additional announcement yesterday was to extend it until the end of March.

   "Given those changes the business has taken a step back and said you know we can place people on furlough and hopefully at the end of March the business will be in a position where we don't need to release any

headcount, equally if we can maintain the right level of business throughout the lockdown and going forward, then we will do as we've done previously and brought people back off furlough"

"…

"Look you have three options, one you can go back on furlough, two you can ask us to continue the redundancy process and we will make that decision as to whether that is viable for both you and for the business and thirdly you can terminate your employment, they're the options you have.

"…

"OK, alright Luke, you know, I'm not gonna split hairs with you, I'm not giving you an extra period of time to review it …um I think that what I'm doing is reasonable, um you know you come back to me as I said … you know if you really want to split hairs, if you come back to me by 11 o'clock on Tuesday morning that gives you ample time to consider the options that are on the table and then depending on what you want to do will determine the way we go forward. I think that is being reasonable."

7. We find as a fact that Ms Cowling's words

"we were reducing our headcount"

Can only sensibly mean that she was floating the possibility of redundancies and that he might be redundant.

8. The Tribunal also notes that it is common ground that at the time of this case no process that might be recognised as even a beginning of a redundancy process was actually in place or being followed. There was no consultation, no proposals or anything that could be described remotely as resembling a redundancy process at that stage.

Claimant placed back on furlough and grievance

9. On 10 November 2020 Mr Riley-Heenan accepted being placed back on furlough. At the same time, he also lodged a grievance. He wrote:

"The reason for this potential redundancy was explained to me as a necessity in order to "reduce head count". Although this may look like a necessary step to take mid pandemic, it is at odds with other decisions made within my branch. Two new employees have started with the machine side of the business since I have been placed on furlough and there remains a temporary staff member who I believe is currently undertaking my role.

"…

"You were also very quick to tell me that the company takes the "legal stance" that Pete undertakes a 'completely different role' to that of mine. That statement is a complete lie however as you alluded to I am no match for your legal team."

10. He raised no suggestion that there might be any form of discrimination.

11. The Tribunal notes that the two new employees to whom Mr Riley-Heenan referred were in a totally separate side of the business to that in which he worked. We therefore do not think they are comparable, or relevant.

Pete

12. Mr Riley-Heenan mentioned Pete (we were never given his surname). Pete was a temporary employee whose job involved collecting waste from various clients of the respondent. Some of those clients were people whom Mr Riley-Heenan previously attended. Some were different. We accept the evidence however that Pete's role was materially different. Pete was driving vehicles up to 15 tonnes, which requires another type of licence which Mr Riley-Heenan did not have. Mr Riley-Heenan could not do Pete's role therefore because he was not qualified to do so. The vehicle size allowed efficiencies because, in short, it could carry more waste and so required fewer operators per tonne of waste that could be collected. While no-one was able to identify to us Pete's race, in our view it does not matter because he is not properly comparable to the claimant: he was a temporary employee; he was driving different vehicles and undertaking different work.

Lack of progress on grievance

13. The grievance was not progressed. On 25 November 2020 the claimant sent another email to Ms Cowling chasing it. Again, in that email the claimant made no mention of race being a factor.

14. In response to that email, Ms Cowling tried to speak to Mr Riley-Heenan by telephone. It was unproductive because Mr Riley-Heenan said he wanted to record it, and Ms Cowling did not consent. She said that they should communicate by email as a result. Mr Riley-Heenan agreed. However, in spite of that assurance by her, she made no progress on the grievance.

15. On 10 December 2020, Mr Riley-Heenan further chased Ms Cowling to progress his grievance. Ms Cowling replied saying that she was still investigating it. She provided no explanation about the reasons for the delay in that investigation.

The managing director's video

16. On 22 December 2020, the respondent's then Managing Director, Mr Mark Crawley, issued a video to members of staff. In the video he said, so far as relevant, as follows:

> "2020 hasn't questionably been a tough year both personally and professionally for us all. Although yet again we have seen the key reason why we have fared (sic) so well throughout, this is quite simply down to you, thank you.
>
> "…
>
> "One key task for me this year was to improve the number of sales and service engineers we have in the business … and despite the challenges we have been successful in this area, we now have 80 people which is a huge improvement on where we were a year ago … our success in this area is fundamental to the overall growth of our business and when you combine that with the success we're seeing in our direct sales and key accounts, we are set well for a strong 2021. …"

17. The Claimant suggests that this shows that people were being recruited from outside. We do not accept that, instead preferring the evidence of the

respondent. Mr Young told us there was no external recruitment. Nobody has shown us any adverts of external recruitment. In addition it seems inherently implausible that in a time when business has dropped because of the impact of COVID-19, there would be an exercise to recruit externally.

18. The second thing the claimant suggests is that it shows there were vacancies in sales and service engineers' roles. He alleges this was suitable for him and he should have been reallocated to that role because this is a job he did in the first place. We cannot accept that and so decline to draw that inference. There is no evidence that there were such vacancies beyond the inference Mr Riley-Heenan seeks to draw from the video. The words however do not support that inference in our view. In addition we have no other evidence to show such vacancies exist. In any case, whatever role he may have started in, the fact is that it was not his job at this time, and had not been for a number of years. We do not accept that simply because he began in that role it follows he remains suitable for it.

Still no progress in grievances

19. By 4 January 2021 there had still been no progress by the respondent of dealing with the grievance and so Mr Riley-Heenan chased it this time with Mr Crawley. Mr Crawley said that he would look into the matter and see if it could be progressed. Nothing happened and so on 15 January 2021, the claimant chased again. Nothing happened in response to that and so on 19 January 2021, the claimant chased again. On 20 January 2021, the respondent replied making references to their legal team and saying the legal team would be in touch.

Claimant's resignation

20. On 22 January 2021, the claimant resigned. In his letter of resignation, he mentions for the first time the suggestion of discrimination. He wrote:

> "I feel as though there may be underlying race discrimination issues that have led to myself and another ethnic minority member of staff being the only two at my branch who have remained on furlough despite you employing other people at the branch.…"

21. It appears that the other ethnic member of staff is Mr Blair-King. What we note, however, is that although he remained on furlough for a while longer, he returned to work for the respondent from furlough and has never been furloughed again since mid-2021. It seems to us that he cannot be said to be a proper comparator in this case for the reason that his employment resumed.

Acknowledgement of resignation

22. It was not until 1 March 2021 that his resignation was finally acknowledged by Ms Cowling.

Lack of link between dismissal and COVID-19

23. The respondent has said the dismissal (which arises from the failures to deal with the grievances) was for a good business reason i.e. because of the impact of the COVID-19 pandemic. We find as a fact there is no link between the two. The Tribunal has seen no evidence that shows the failure

to deal with the grievances for a prolonged period is in any way linked to the respondent's business situation caused by the COVID-19 pandemic. We see it as inherently plausible there may be some disruption. However the failure here was stark, and it is not inherently plausible there would be suit a start failure.

Lack of evidence about future plans

24. The Tribunal also makes the observation the respondent did not adduce:

    24.1. any evidence about the future plans for the business, either at the time or now. We therefore conclude that any such plans would not have affected the claimant;

    24.2. any restructuring. Likewise we conclude that any such plans would not have affected the claimant;

    24.3. any evidence to show that a dismissal or disciplinary dismissal (e.g. to show it was contrary to a policy) might have occurred in this case for the claimant recording the telephone conversations. We conclude this is not something that would have resulted in dismissal;

    24.4. any evidence to show that Mr Riley-Heenan may well have been made redundant. We have seen no evidence of any redundancy proposals; any restructuring plans or anything that suggests there may even possibly have been a situation in which the need for work by Mr Riley-Heenan had diminished to such an extent that redundancy was a real prospect at the time he was dismissed or since.

The respondent's criticism of Ms Cowling

25. The respondent's case has been very much focussed on Ms Cowling's alleged failures. The respondent has accused her of having been grossly incompetent and grossly negligent.

26. So far as we are aware, these allegations have never been put to Ms Cowling. She was not called to give evidence and she has not therefore been given an opportunity to reply to what are the serious allegations.

27. Therefore while her conduct forms part of the factual matrix, we expressly make no finding of fact about Ms Cowling's performance and in particular whether she was grossly incompetent or grossly negligent. We do not have her answer to the serious allegation and no evidence about what was happening on the respondent's side to put her conduct in context. Besides the Tribunal does not have to make such findings. The facts as found speak for themselves; that the two grievances were lodged, and they were never progressed in any meaningful way by the respondent. How or why that happened does not matter. Ms Cowling was clearly acting in her employment under the respondent's direction and on the respondent's behalf at all times. Whether she was grossly incompetent or negligent is neither here nor there. The respondent is bound by her conduct.

Law

Constructive unfair dismissal

28. The **Employment Rights Act 1996 Part X** provides a right not to be unfairly dismissed. If an employer fundamentally breaches an employee's contract of employment, the employee may resign. Provided the breach played a part in the resignation (**Wright v N Ayrshire Council [2014] ICR 77 EAT**), the employee may be able to claim he was constructively and unfairly dismissed.

29. Where there has been a breach of contract that played a part in the resignation, the Tribunal must determine why the respondent has breached the contract: **Berriman v Delabole Slate Ltd [1985] IRLR 305 CA**.

30. The employer bears the burden of proving on the balance of probabilities the claimant was dismissed for some other substantial reason: **Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA** and **W Devis & Sons Ltd v Atkins 1977] ICR 662 HL.** This is to be determined based on facts known to the employer at the time (**Devis & Sons**). If the employer failed to persuade the Tribunal that it had a genuine belief, then the dismissal is automatically unfair.

31. When it comes to reasonableness, the burden of proof is neutral. The Tribunal has to consider all the circumstances, including the employer's size and administrative resources. The Tribunal must not substitute our own view for that of the employer

32. It has been held that, when considering some other substantial reason akin to a conduct dismissal, there is no reason why the principles that apply for example to misconduct set out in **British Home Stores v Burchell [1978] IRLR 379 EAT** should not apply to some other substantial reason: **Perkins v St George's Healthcare NHS Trust [2005] IRLR934 CA**. The court reasoned it was a guard against some other substantial reason being used as an excuse to dispense with proper processes. Therefore by analogy we think that if one is looking at a dismissal for some other substantial reason that is akin to a redundancy, there is no reason why the redundancy principles in **Williams v Compair Maxam Ltd [1982] IRLR 83 EAT** should not be considered either.

33. Despite the code of practice and guidelines in the cases, ultimately each case must turn on its own facts and be broadly assessed in accordance with the equity and substantial merits: **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 EAT; Bailey v BP Oil Kent Refinery [1980] ICR 642 CA**.

34. As to the principle that compensation should reflect the prospect that an employee might have been fairly dismissed by this employer (the **Polkey** principle), we have considered **Hill v Governing Body of Great Tey Primary School [2013] ICR 691 EAT** and **Software 2000 Ltd v Andrews [2007] IRLR 56 EAT**. In summary we should, if possible, make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. We need only sufficient conclusions to allow us to consider how the picture might have developed."

Direct discrimination because of race

35. The **Equality Act 2010 section 13** provides that A discriminates against B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

36. It is an objective assessment whether treatment is less favourable (**Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT**).

37. We need a comparator who is in the same position in all material respects as the putative victim, except that he or she is not a member of the protected class. If there is no real comparator, we must construct our own, unless the reason for the treatment is plain: **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL**; **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646 CA**; **Stockton on Tees Borough Council v Aylott [2010] ICR 1278 CA.**

38. The protected characteristic does not need to be the only reason for the treatment provided it has a significant inference on the outcome: **Nagarajan v London Regional Transport [1999] ICR 877 UKHL**; **The Equality and Human Rights Employment Code (the Code) [3.11].**

39. Motive of course is irrelevant: **the Code [3.14]**; **R(E) v Governing Body of JFS aors [2010] 2 AC 728 UKSC**.

40. As to the burden of proof, the **Equality Act 2010 section 123** requires a claimant to prove facts on which the Tribunal could properly conclude that he has been the victim of discrimination. If he does that, then the respondent bears the burden of proving that it is not discriminatory.

41. It is not enough for the claimant to simply point to an unfavourable outcome and the fact that he has a particular protected characteristic. That simply points to the possibility of discrimination, but it is not enough to shift the burden of proof: in **Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC**. In **Efobi**, the Supreme Court also affirmed the burden of proof only really becomes relevant when it is not clear what the answer is one way or the other.

Conclusions on liability

Unfair dismissal

Has the respondent shown that they breached the claimant's contract by failing to deal with his grievances and dismissed him thereby for some other substantial reason?

42. No. as we noted above in our factual findings, there is nothing that links the respondent's breach of contract by failing to deal with Mr Riley-Heenan's grievances to COVID-19 and its impact on the business. The facts show that, simply, the respondent did not progress Mr Riley-Heenan's grievance and had no reason that we can see for that failure – yet alone a good reason.

43. We conclude the grievance was in effect simply ignored despite what we see as reasonable attempts to have the respondent progress it.

44. Because the respondent has failed to establish some other substantial reason; the dismissal is consequently unfair.

45. Even if we had to go on to consider whether the dismissal was fair or unfair, we would still have come to the conclusion that it was an unfair dismissal. Applying the principles of **Perkin** and **Compair Maxim**, we would have concluded this is a situation akin to redundancy. The need for him to do work of a particular kind had clearly diminished. We would have expected therefore to have seen something at least like a consultation with him to consider the different options and proposals. There simply is none.

46. Though touted that there may have been misconduct by recording the calls, we noted there is no evidence of any consideration of a disciplinary process.

47. In short, the respondent failed to follow any process. No reasonable employer would have behaved like the respondent did, whatever their size or administrative resources. Therefore the finding the dismissal is unfair in our view is inevitable.

The respondent's concession about breach of contract

48. The respondent has described its concession that there was a breach of contract by its failure to deal with Mr Riley-Heenan's grievances as a generous concession. It has emphasised how grievances are often never responded to in time as a general practice. We do not want the respondent to be under the illusion we agree or accept the concession was in our view generous. Rather, we are quite satisfied it was a moment of realism. Had the concession not been made, we are satisfied we would have reached the same conclusion anyway.

49. We do not consider that the concession could have been described as generous. The Tribunal is clear in its own mind that had the matter been contested, it would have concluded without hesitation that the respondent had breached the claimant's contract in such a fundamental way that the claimant was entitled to resigned. Grievances have to be dealt with in a reasonable time. They were not in this case and there is no good explanation for that.

50. As for the fact that grievances are often delayed, the lay members in particular in their experience emphasise that is not a good excuse. Of course, delays do happen from time to time. However, firstly there is no point having a policy if you are going to routinely breach it and ignore the time limits. Secondly, if you are going to require extra time, the Tribunal and the lay members in particular would have expected there to be some written evidence to explain why there were delays and seek agreement to extensions of time. In this case there is simply nothing. It seems very much as though Mr Riley-Heenan's grievances were simply being ignored.

*Should there be a reduction under the **Polkey** principle?*

51. No. We acknowledge the law encourages speculation – we do not have to be certain at all. However as we noted in our findings of fact we have absolutely nothing on which we could sensibly speculate whatsoever. We do not have for example the evidence or facts upon which we can say how

the company has been restructured; how things have progressed since; what things look like now; what would have happened to the claimant. What happened to other employees at the time in a similar situation or the like. There is no evidence on which we could speculate about possible disciplinary proceedings. Therefore if we were to speculate we would be doing no more than sticking the Tribunal's proverbial finger in the air and plucking a figure at random. We do not understand that to be what the case law contemplates.

52. In the absence of any evidence upon which we can base our speculation, we come to the conclusion that we cannot make a ***Polkey*** reduction.

Direct discrimination because of race

Is there evidence from which the Tribunal could properly conclude that the respondent discriminated against the claimant because of race?

53. No. The two people to whom the claimant compares himself are not true comparators.

54. Therefore, we constructed one: it needs to be somebody who is not white/black Caribbean but who was placed on furlough and who also raised grievances like Mr Riley-Heenan did, and likewise the respondent ignored.

55. We cannot see any evidence that has been adduced in this case that suggests that Mr Riley-Heenan's race any part of this in what happened whatsoever. Other employees in his situation would have been treated the same as him in our view, and grievances would similarly not have progressed. We also think there is support in this conclusion because Mr Riley-Heenan did not mention race until the very end. Even then he gave no detail about it beyond a bare assertion. He gave us no evidence on what it may have been that changed his mind. We can see no explanation from the evidence we do have. In our opinion it is pure speculation.

56. In essence, Mr Riley-Heenan's case is no more than a bear assertion that race must be involved. It is not enough to even begin to shift the burden of proof.

57. The race discrimination claim must fail.

Remedy for unfair dismissal

The basic award

58. The parties have agreed between them that the calculation of the basic award is £2,361.46. We are satisfied this is accurate amount and what we award, therefore.

Compensatory award

Loss of statutory rights

59. The parties agree the sum of £500 is appropriate. We make that award, therefore.

Loss of earnings

60. We have heard submissions from both parties, but we only set out the information necessary for us to explain our decision.

61. Between 23 February 2021 and 30 September 2021, had the claimant remained employed he would have remained on the furlough scheme. That is a period of 31 weeks. We find that during this period he would have been paid at 80% of normal wages. His net pay therefore would have been £271.03 per week. Over that period, he would also have benefitted from pension contributions of £1,171.30.

62. The claimant has throughout that period received universal credit with the employment seeker's element.

63. In response to the respondent's enquiries on 28 June 2022, Mr Riley-Heenan told them on 12 July 2022 as follows:

"I have taken a break from my tribunal case to focus on my mental health and finding employment. I have also been working on my amended schedule of loss."

64. On 11 October 2022 the respondent requested Mr Riley-Heenan provide evidence of the search of new employment from the date of resignation, evidence of any offers of employment, details of all social welfare benefits received, income details of alternative employment and any additional medical records that the claimant wished to rely upon. Apart from three invoices showing the claimant now has self-employed work, no mitigation documents were provided.

65. On 14 October 2022, there was a telephone call between the claimant and Mr Quantrill, solicitor for the respondent, which is recorded in an attendance note. We have been given no reason to doubt the accuracy of the summary within in. We accept it therefore as accurate. It notes

"[Mr Riley-Heenan said that he was seeking] clarification … and what mitigation documents he should email me today. Discussed and agreed he only had invoices to send to me.

"…

Claimant said that he did not look for any alternative work saying 'I did not want to work for a company. I was not job searching'. 'I only verbally searching'. 'I have no other [mitigation] evidence.'

"..

"Claimant said re his Universal Credit he was subjected to penalties for not attending meetings because of 'when my mental health was really bad'. He said he was not claiming the 'money lost' … from the respondent."

66. Mr Riley-Heenan confirmed in evidence that he did not wish to seek work from companies, and that he felt his mental health was so bad he should not have sought employment, is that the claimant held off looking for alternative employment with companies who might be able to provide suitable alternative employment.

67. Mr Riley-Heenan's medical records record issues about mental health and there are some fit notes that have been issued. However, we cannot deduce from the medical records any evidence that shows he was unable to work for a company, or anybody else, during the latter part of the period of 23 February through to 30 September. It is also notable Mr Riley-Heenan

confirmed that his Universal Credit was always related to seeking employment rather than being unable to work because of ill health. We have no evidence before us of the steps Mr Riley-Heenan has taken to look for alternative employment and no evidence of any applications he may have made through the Job Centre, visits to the Job Centre or appointments he has had with the Job Centre.

68. We do not accept Mr Riley-Heenan's suggestion that he should not have been looking for work with companies because he does not want to work with them is a reasonable step. We can understand why he might be unhappy having been unfairly dismissed by the respondent in the manner that his employment did come to an end. However, we do not accept that it was reasonable therefore to exclude a significant number of employment opportunities on the basis that they were companies.

69. We do not have in the bundle any evidence from the respondent to show that appropriate alternative employment would have been available to Mr Riley-Heenan. However we do have the evidence that shows that the claimant was holding off, in our view unreasonably, from seeking alternative employment. The Tribunal has also reflected on what we do know from the substance of the case and our own experience. Firstly, we know from this case that the claimant was qualified to drive 3½ tonne and 7½ tonne vehicles and we note from our experience that during the COVID-19 pandemic the drivers of such vehicles were exempt from the requirement to stay at home. We also note that there is often regular demand for such drivers, and we think it is unrealistic to suggest that no such employment would have been available. We also reflect that the COVID-19 pandemic was nonetheless still in progress during 23 February to 30 September and that would have made it more difficult to find employment and alternative opportunities because of the impact it had on numerous businesses across the UK.

70. Taking a step back and looking at everything in the round, we do not accept the suggestion that there should be a significant reduction of 80% or 100% to reflect mitigation of loss, as the respondent suggests. That seems to us to be wholly unrealistic and does not properly reflect the fact that any employee they unfairly dismiss is entitled to some time to get their affairs together, and it does not reflect properly on the COVID-19 pandemic or its impact on looking for alternative employment. However we believe that Mr Riley-Heenan had a good chance of finding employment because he was qualified to drive and those roles were not prohibited during the pandemic. It seems to us he has unreasonably ruled out a number of appropriate employers for no good reason. He has also taken too long before he even started to look for work. We believe that an appropriate award in this case would be 16 weeks' pay for the furlough period. That will do justice in this case. Therefore we award a compensatory award calculated as follows:

70.1. 16 weeks at £271.03 per week = £4,336.48. We use that lower figure because if the Claimant had remained employed he would have remained on furlough and receive therefore that lower amount. This covers the period 23 February 2021 to 14 June 2021.

71. As to the pension contributions, we do not have a weekly figure but the approach we have taken is to take $^{16 \text{ weeks awarded}}/_{31 \text{ weeks claimed}}$ of the total pension contributions which comes out at £604.57.

72. Adding them together comes to £4,941.02 from which there will be a recoupment order in respect of Universal Credit since that is one of the elements to which recoupment applies.

Employment Judge Adkinson

Date: 15 December 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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