



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Harrop

**Respondent:** Anwyl Construction Company limited

**Heard at:** Cardiff (CVP) **On:** 14 June 2021

**Before:** Employment Judge R Brace

**Representation**

Claimant: In person

Respondent: Mr T Wood (Counsel)

## RESERVED JUDGMENT

The claim of unfair dismissal is not well founded and is dismissed.

### WRITTEN REASONS

#### Introduction

1. The hearing was conducted as a wholly remote hearing by video (CVP) which was not objected to by the parties.
2. The claim before me is one of unfair dismissal arising from the dismissal of the Claimant on grounds of redundancy. In the alternative the Respondent pleads that the dismissal was for some other substantial reason of a kind justifying dismissal, namely a business reorganisation carried out in the interests of economy and efficiency.
3. The Tribunal heard evidence from the Claimant and from the following witnesses on behalf of the Respondent: Jane Brooks, Sales Manager and Graeme Gibb, Sales Director. All witnesses relied on witness statements,

which were taken as read and the witnesses were subject to cross examination, Tribunal questions and re-examination.

4. In terms of witness evidence, it is not necessary to reject a witnesses' evidence in whole or in part by regarding the witness as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with documentary evidence. I found all witnesses to be candid and seeking to assist the Tribunal reach its decision.
5. There was a Tribunal bundle of 127 pages and an additional document, an email from a customer of the Respondent sent to the Claimant dated 10 June 2021 was also emailed to the Tribunal and added by consent as page 128 of the bundle. References to the hearing bundle appear in square brackets [ ] below.
6. There had been no case management preliminary hearing prior to this full merits hearing when the issues for determination may have been discussed and so at the outset of the hearing the issues for determination were discussed. It was agreed with the parties that the hearing would deal with liability only initially, moving onto remedy if I found in favour of the Claimant and the following were agreed to be the issues for determination arising out of the unfair dismissal claim:
  - a. *What was the reason or principal reason for dismissal?*
  - b. *Was it a potentially fair reason?*
  - c. *Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?*
  - d. *What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy or some other substantial reason.*
  - e. *If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:*
    - i. *The Respondent adequately warned and consulted the Claimant;*
    - ii. *The Respondent adopted a reasonable selection decision, including its approach to a selection pool;*
    - iii. *The Respondent took reasonable steps to find the Claimant suitable alternative employment;*
    - iv. *Dismissal was within the range of reasonable responses.*
  - f. *The burden of proof is neutral but it helps to know the challenges to fairness. The Claimant does not challenge the way in which the redundancy procedure was implemented or the way in which the selection matrix was set out but identifies challenges to fairness in terms that:*

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- i. Evidence taken and used that was outside the assessment period of 1 April 2019-31 March 2020;*
    - ii. His matrix scores were based on matters outside the way Matrix worked;*
    - iii. Suitable alternative employment was not offered.*
  - g. If the reason was SOSR, what was the reason or principal reason for dismissal? The Respondent says the reason was a substantial reason capable of justifying dismissal, namely a business re-organisation carried out in the interests of economy and efficiency.*
  - h. Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?*
7. How the case was to proceed was also discussed with the Claimant as a litigant in person and a copy of the authorities that the Respondent was seeking to rely on had been provided in advance to the Claimant on the previous Friday, and to the Tribunal on the morning of the hearing.

### Claim

8. On 22 September 2020 the Claimant commenced early conciliation and on 20 October 2020 an Early Conciliation Certificate was issued by ACAS. On 28 October 2020 the Claimant issued an ET1 claiming unfair dismissal with details of his claim set out in Box 8.2 of the ET1 Claim form.

### Facts

9. The Respondent is a company engaged in contracting, house development and joinery in North Wales and the North West. It employs approximately 235 employees at various sites.
10. The Claimant started his employment on 17 October 2014 and at the time of his dismissal on 23 August 2020, he was employed as a Sales Adviser for new sales on the Respondent's Cheshire and North West Division on terms and conditions set out in a letter dated 16 January 2018 [30]. He worked 4 days a week and was paid salary and commission based on sales. Targets for sales was set on a site by site basis and the Claimant was not given an individual sales target.
11. In January 2020, the Respondent proposed a variation to the Claimant's working week, reducing his working days from 4 days per week, down to 2. The Claimant objected and the reduction in days was not implemented [35]. The Claimant holds a belief that this was the first attempt by the Respondent to dispense with his services.
12. This is disputed by the Respondent. The Respondent witnesses dealt with this dispute in cross-examination and on further examination in chief of Graeme Gibb, which had been allowed at the outset of his live evidence.

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13. I accepted the evidence from the Respondent witnesses that the Claimant was asked to agree a temporary reduction for a short period to accommodate another member of staff that had been working on another development site that had completed and that following objection by the Claimant to a temporary reduction in his working week, this had not been implemented and that the other member of staff had agreed a reduction in her working days.
14. On 2 July 2020, the Respondent announced that due to market conditions and reduction in conveyancing completions brought on by the Covid-19 pandemic, the majority of sales staff and show homes would have reduced opening days, from 7 days per week down to 5, and that the Respondent was as a result considering a reduction in the number of Sales Advisers.
15. A letter confirming the announcement was provided on the same day to staff affected, including the Claimant [42]. In brief, it confirmed:
  - a. A possible redundancy of 3 Sales Advisers from a total pool of 17 Sales Advisers;
  - b. That the Respondent sought volunteers by 6 July 2020;
  - c. That if no alternatives to redundancy and/or insufficient volunteers the Respondent would undertake a selection process.
16. Selection criteria was proposed and comments or questions on the proposed selection criteria was requested 6th July 2020.
17. No employee volunteered and on 6 July 2020 the Respondent wrote to the staff affected to confirm that the pool for consultation was all 17 Sales Advisers and that there would be further consultation. A copy of the selection criteria was attached [41]. These were:
  - a. Achievement of set sales targets/performance;
  - b. Adhering to training;
  - c. Customer service;
  - d. Administration;
  - e. Time keeping;
  - f. Absence Records; and
  - g. Disciplinary records.
18. The Claimant was asked to attend a meeting on 9 July 2020 to discuss:
  - a. Why the Respondent had decided that it is necessary to make redundancies;
  - b. How the Respondent identified the selection pool;
  - c. The selection criteria;
  - d. How the Respondent would apply the selection criteria;
  - e. Possibilities for alternative employment within the Respondent; and
  - f. Any ideas employees may have for avoiding redundancy or reasons why the Respondent should not select them for redundancy.

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19. At that meeting Jane Brook met with the Claimant. It appears that little additional information was provided to or requested by the Claimant at that meeting [44] save that the Claimant was informed that:

- a. The selection process would be carried out by Jane Brook in conjunction with Graeme Gibb; and that
- b. The scoring process would be completed following the first consultation meetings.

20. In terms of the selection criteria and process of scoring, I made the following findings.

- a. *Achievement of set sales targets/performance* – Whilst individual targets were not set for any Sales Adviser, only team sales targets for each development to foster good working relationships between the Sales Advisers, the redundancy assessment and scoring was based on individual sales performance i.e. the amount of customer reservations that were personally signed off by each Sales Adviser to achieve that team target. There was no evidence or suggestion that this method of assessment of performance had not been applied to all Sales Advisers.
- b. *Adherence to training* – The results of ‘Mystery Shop’ assessments were taken into account for the period of assessment 1 April 2019 – 21 March 2020 and their contents were reviewed. Whilst the Mystery Shop Reports provided percentage results for individuals, assessment was not aligned to those percentage scores, but the overall performance as it related to training to assess whether the individual had followed the correct process as identified during sales training.
- c. *Customer Service* - Assessments had been made based on customer complaints and feedback, including Customer Service books;
- d. *Administration* – Assessments had been made based on completion of the administration process in relation to the HouseBuild, a customer database used by the Respondent, and Customer Service Books.
- e. *Timekeeping* - Assessments were based on whether the Sales Advisers were constantly late for no good reason rising to whether they were always on site and willing to stay late/work overtime when required;
- f. *Absence Records* – Assessment scores ranged from 5 or more separate absences to 100% attendance for a maximum score;
- g. *Disciplinary records* – Assessment scores ranged from Final Written Warning to No current disciplinary or capability warnings.

21. Scores for selection criteria were given out of 5 save for criteria of ‘Achievement of set sales targets/performance’ and ‘Disciplinary’ which were weighted in that these were scored out of a total of 10 points.

22. On 13 July 2020, the Claimant was sent a letter confirming that he had been provisionally selected for redundancy and he was invited to a further meeting with Jane Brook to provide feedback on his provisional selection [46]. The Claimant was provided with a copy of his scores. [48] scoring a total of 24 out of potential maximum of 45 as follows:

- a. *Achievement of set sales targets/performance* – 2/10
- b. *Adherence to training* – 2/5
- c. *Customer Service* - 3/5
- d. *Administration* – 2/5
- e. *Timekeeping* - 4/5
- f. *Absence Records* – 1/5
- g. *Disciplinary records* – 10/10

23. The meeting took place on 17 July 2020. Kasia Kondrat HR Executive accompanied Jane Brook and the Claimant chose to attend without a companion. The Tribunal was provided with a copy of the notes of the meeting and there has been no suggestion by the Claimant that the notes do not accurately reflect the matters discussed [77].

24. The meeting was considered to be a difficult meeting by both the Claimant and Jane Brook and the notes reflect that the Claimant was unhappy with his scores as included in the selection matrix and that he sought to challenge those scores. In brief:

- a. He was informed that his score of 2 for '*Achievement of Sales targets/performance*' was based on his personal sales. He objected on the basis that sales were based on team work not individual sales and that he had received a bonus for sales targets; that the criteria heading did not indicate 'individual sales'. The Claimant was unhappy with this method of assessment and criterion as he believed that his colleague had orchestrated higher reservations from customers by arranging for customer appointments on days that she, not the Claimant, had worked. In the assessment period, the Claimant had achieved 9 sales, working 4 days a week, towards the team target [127], his colleague achieved 15 sales, working 3 days a week over a shorter time period, on the same development and the team had achieved 50% of the last four quarterly bonus targets. On that basis that the Claimant believed his score should have been 8 not 2.
- b. He also raised concern with regard to his '*Adherence to training score*' and was informed that this was as he 52% and 77% on the Mystery Shop scores. Whilst Jane Brook (and later Graeme Gibb at the appeal) had referred to a Mystery Shop that had been undertaken in January 2019, outside the assessment period, I accepted the evidence of Jane Brook that her reference to a Mystery Shop of January 2019 (in the later confirmation of redundancy letter that was later sent to the Claimant [89]) was an error, and error that was repeated by Graeme Gibb, and that she only used information from within the assessment period that had been set out by the Respondent in its letter to the Claimant of 13 July 2020 [46].

- c. He questioned why he had not been given a higher score for '*Customer Service*'. He was informed that the Respondent had a letter of complaint and that he didn't like doing 'choices' with the customer i.e. home choices tailored for each customer.
  - d. He questioned his '*Administration*' score although conceded that he was '*not the best on HouseBuild*', a customer data base software
  - e. He questioned why had not been given the full 5 points for '*Timekeeping*' and Jane Brook confirmed that he had been late on occasions
25. The meeting was adjourned and the Claimant was invited to a further consultation meeting on 20 July 2020 [85]. Again, notes of that meeting were provided in the bundle [86] and reflect that the Claimant was informed that his score for '*Attendance*' had increased from 1 to 2 out of 5, but that no other scores were being increased. The increased score meant that the Claimant had an overall score of 25 points [48]. This did not increase his score sufficiently to a breakpoint of 33 and his score was the lowest scoring out of the pool of 17 Sales Advisers [119].
26. The Claimant had no further questions or comments on the scoring or selection. He was informed that the Respondent had been unable to identify any suitable alternative employment and, as he had no further suggestions on suitable alternative employment, the termination of his employment was confirmed with a termination date of 23 August 2020 following 5 weeks' notice.
27. Whilst the notes from the first consultation meeting reflected that the Claimant had been informed at that consultation meeting that both Jane Brooks and Graeme Gibb had completed the selection matrix and that all scores had been done by them, in live evidence both Jane Brook and Graeme Gibb were emphatic that Jane Brook alone had undertaken the scoring exercise and that the Claimant had been provisionally selected for redundancy on the basis of her work alone on the scoring. The notes of the 20 July meeting also reflected that the Claimant had commented at the end of that meeting that he had been surprised to note that the scoring on the matrix had been Jane Brook's work alone.
28. I accepted the live evidence and found that whilst Graeme Gibb had involvement in the initial preparation of selection criteria and scoring/marks that would be applied in the selection exercise, only Jane Brook undertook the personal scoring for the Claimant.
29. On 22nd July 2020, the Claimant was provided with written notice of termination, a breakdown of his redundancy entitlement and advised of his right of appeal [89]. The letter also attached a summary of his selection scores as an Appendix in relation to each criterion [91].

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30. The Claimant appealed against the decision to terminate his employment by reason of redundancy by way of letter challenging the selection criteria scores in relation to all but Absence and Disciplinary Record criteria [94].
31. The Claimant was invited to an appeal hearing before Graeme Gibb [197] which took place on 29 July 2020. Again, notes of that meeting were included in the bundle and as the Claimant did not challenge the notes I accepted them as a reflection of the matters that had been discussed [98].
32. Graeme Gibb was accompanied by the HR Manager and the Claimant attended without a companion. The Claimant raised a concern regarding his reduction in days the previous January considering it relevant and the explanation that has been repeated in live evidence was provided to the Claimant. The Claimant's scores were also discussed with the Claimant complaining that with regard to selection criteria of:
- a. *Achievement of set sales targets/performance*, he had never been given an individual performance target and that team targets had been met;
  - b. *Adherence to training*, the first Mystery Shop of January 2019 should not be taken into account as outside the assessment period of 1 April 2019 to 31 March 2020;
  - c. *Customer Service*, the Claimant complained that he had not been given a higher score because of one difficult customer, ignoring the positive emails from customers praising his service.
  - d. *Administration*, whilst the Claimant accepted that there had been occasional errors, there had been very few reminders from management; and
  - e. *Timekeeping*, the Claimant indicated that he was on site early and rarely left on time.
33. On 3 August 2020 the Claimant was sent confirmation in writing that his appeal was not upheld [109]. The rationale for that decision was included within the letter.
34. On the following day the Claimant was informed that a position in Longridge, Lancashire had become available and was asked whether he wished to express an interest in that position by 6 August 2020 [122]. The Claimant did not confirm an interest and his employment ended on 23 August 2020, subsequently bringing his unfair dismissal claim.

### Issues and Law

35. With unfair dismissal, I first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.
36. In this regard, the respondent bears the burden of proving on balance of probabilities, that the claimant was dismissed for one of the potentially fair reason set out in section 98(2) Employment Rights Act 1996 (ERA 1996). The respondent states that the claimant was dismissed by reason of his redundancy which was a potentially fair reason for dismissal pursuant to



section 98(2)(b) Employment Rights Act 1996 (the “Act”). In the alternative, some other substantial reason.

37. After considering the reason for dismissal, on the presumption that I identified a potentially fair reason for dismissal, I then have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent’s size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.
38. Taking into account this is a redundancy case, the factors suggested by the EAT in **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, EAT that a reasonable employer might be expected to follow in making redundancy dismissals, are to be considered, being mindful that it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead we have to ask whether ‘the dismissal lay within the range of conduct which a reasonable employer could have adopted’.
39. In **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 the House of Lords held that in the case of redundancy, an employer will not normally be acting reasonably unless:
- a. employees were warned and consulted about the redundancy
  - b. there was a fair basis on which to select for redundancy which will include;
    - i. whether the selection criteria were objectively chosen and
    - ii. fairly applied (Compair Maxam)
  - c. whether any alternative work was available
40. In **Langston v Cranfield University** 1998 IRLR 172 EAT, (a case also involving a litigant in person) the EAT viewed it ‘implicit’ that unless the parties had agreed otherwise, an unfair redundancy dismissal claim incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer, whether or not each of these issues was specifically raised before the employment tribunal.
41. Counsel for the Respondent has also relied on the following authorities:
- a. **Buchanon v Tilcon Ltd** 1984 SLT 134
  - b. **Eaton Ltd v King and others** [1995] IRLR 75
  - c. **British Aerospace PLC v Green and others** [1995] ICR 1006 and
  - d. **Dabson v David Cover and Sons Ltd** UKEAT/0374/10 in particular paragraph 58 and 59.

## **Conclusions**

Reason for dismissal

42. In applying my findings to the issues identified at the outset, I needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal.
43. The Respondent has asserted that the reason for the dismissal was redundancy (or in the alternative some other substantial reason). The reduction in numbers down from 17 to 14 Sales Advisers was not challenged by the Claimant.
44. The Claimant did seek to indicate that the Respondent had attempted to 'dispense with his services' earlier on in 2020, when the Respondent sought to reduce his working week from 4 days down to 2 days. I accepted the evidence from the Respondent, that the reduction in working days was driven by a need to seek a temporary resolution to staffing and following the Claimant's objections, this was not put into place. I did not consider that this inferred or undermined the Respondent's evidence that the Claimant was dismissed by reason for redundancy as a result in the reduction of Sales Advisers from 17 down to 14, and I was satisfied that the reason for dismissing the Claimant was redundancy, which was a potentially fair reason for dismissal.

#### Overall Fairness

45. Moving on to assessment of overall fairness, in considering the section 98(4) test, I was satisfied, and the Claimant has not challenged, that he was warned and consulted about redundancy. The pool for selection, of all 17 Sales Advisers employed by the Respondent in that region, was likewise not challenged by the Claimant and, for the avoidance of any doubt, I concluded in any event that this was a reasonable pool for selection.
46. Whilst the Claimant had indicated in his statement that he did not challenge the '*way that the matrix set out*'<sup>1</sup>, my deliberation was not just on whether the manner of selection had been fair, but also whether the selection criteria was objective as the Claimant had challenged the formulation of the first criterion, '*Achievement of set targets/performance*' and the assessment period.

#### *Selection Criteria*

47. Dealing firstly with the question of whether the selection criteria was objective, I concluded that the selection criteria were clear and objective.
48. Whilst the Claimant, at the initial stage when the redundancy programme was first announced, may very well not have realised that individual sales were being taken into account in the assessment as opposed to achievement of team targets, he was aware that individual sales was being assessed by, at the latest, the consultation meeting on 13 July 2020.

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<sup>1</sup> Claimant WS§4

49. I also concluded that the selection criteria was verifiable by reference to data such as:

- a. Individual sales reservations;
- b. Information contained in Mystery Shop reports; and
- c. Customer complaints and comments;
- d. Adherence to completion of the HouseBuild database.

50. Whilst the Claimant was of the belief that the formulation criteria of *'Achievement of set targets/performance of individual sales'*, of using personal sales was an attempt to amend the scoring system in order to downgrade his scores, I did not form this conclusion for the following reasons:

- a. Whilst the Claimant had raised concerns with Jane Brook that his team colleague had operated a system whereby she would ensure that appointments for customers were made on days that she was working not the Claimant to ensure that she recorded the reservation, this did not lead me to conclude that the criterion itself was subjective or involved any element of personal judgment on the part of Jane Brook.
- b. This was an historic matter and I did not infer from that or conclude that the criterion had been set purposefully to work against the Claimant or that it negated the essential objectivity of the criterion.

51. In terms of the length of the assessment period, whilst I concluded that errors had been made in the information that had been communicated to the Claimant, namely that Jane Brook had used the Mystery Shop assessment from January 2019 as part of her assessment, I had also found that she had not used that information within her assessment and that her error, whilst unfortunate, did not lead to any unfairness in the selection criteria or in the manner of selection.

*Manner of Selection and employee assessment*

52. Turning to the manner of selection more generally, I again turned to the first criterion and whilst I accepted that the Claimant was unhappy that, having been given team or site targets for sales, the first criterion of *'Achievement of set sales targets/performance'* related to individual sales in terms of personal contribution to that team target, I did not consider that such an approach to be inherently unreasonable. I did not conclude that there had been any underlying error in the assessment. Whilst there may have been team practices that may have led to some Sales Advisers gaining more reservations than others, this did not lead me to conclude that the application of the scoring, based on individual reservations, was inherently unfair;

53. With regard to the criterion of *'Adherence to training'*, I accepted the evidence from Jane Brook that she did not take into account information from outside the assessment period from 31 March 2019 to 1 April 2020 and that she did not take into account the mystery shop from 10 January 2019 and that she had scored the Claimant taking into account her conclusion that the Claimant had not always put into practice his sales training. Again, the Respondent's

approach to scoring in relation to this criterion was reasonable and that there was no error in the scoring of the Claimant.

54. With regard to '*Customer Service*', there appeared to be no challenge to the criterion itself, simply to the score that the Claimant had been awarded. The Respondent had used a variety of customer emails and comments made regarding the Claimant's manner and management of them and whilst I accept that the Claimant was unhappy that these had been taken into account, on the basis of the information that was before the Respondent at the time of the assessment, I did not conclude that there had been any unfairness with regarding to the application of this criterion to the Claimant
55. Likewise, my same conclusions applied in relation to the selection criteria of '*Administration*' and '*timekeeping*'.
56. The Claimant sought to argue that the formulation of the first criterion, and indeed the scoring against that criterion was biased relying on the attempted reduction in working days in January 2020. I accepted the Respondent's evidence that this was to assuage a temporary staffing difficulty and that once the Claimant had objected, this was not progressed, I did not infer from that exercise any bad faith on the part of the Respondent in the scoring exercise that had been undertaken by Jane Brook. Indeed on cross examination, the Claimant was clear that he did not consider that Jane Brook had an agenda stating '*I don't think she wanted me out*' and confirming in response to questioning, that he had no evidence that anyone wanted him out of the Respondent's employment.
57. Whilst the Claimant sought to introduce argument during submissions that Graeme Gibb had some form of agenda in the Claimant leaving due to some house price reductions, I reminded the Claimant that he had adduced no evidence in relation to that matter (whether in his witness statement, in answers to cross examination or indeed in his own cross-examination of the Respondent's witnesses,) and the Respondent had not had the opportunity to challenge that argument on cross-examination of the Claimant. There was no evidence before me on that submission. In any event Graeme Gibb had not scored the Claimant and had played no part in the original selection exercise that had been undertaken by Jane Brook.
58. I found no bias or obvious error in the scoring. On that basis I concluded that the Respondent had set up a system of selection that could reasonably be described as fair.
59. Bearing in mind the EAT decision in **Inchcape Retail v Symonds**, as referred to in **Dabson** I have abstained from close scrutiny of the actual marking given to the Claimant, as even if I concluded that some of the scores could have been higher, I am reminded that it is not for me to substitute my view as to what the scores should have been and I decline to do so.

*Suitable alternative employment*

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60. Finally, with regard to suitable alternative employment I was satisfied that, at the point that the Claimant was informed that his employment was being terminated, no suitable alternative employment was available. In those circumstances, dismissal was the only potential outcome. However I also concluded that when the Respondent had a potential source of suitable alternative employment that was raised with the Claimant and was not progressed due to lack of response from him.
61. Again in those circumstances I concluded that dismissal was a reasonable outcome and that the Claimant's dismissal fell within the band of reasonable responses.
62. In conclusion the Claimant was therefore fairly dismissed and the claim is not well founded.

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Employment Judge R Brace  
Date: 15 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
17 June 2021

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FOR EMPLOYMENT TRIBUNALS Mr N Roche