THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Parker**

Respondent: **Elring Clinger (Great Britain) Limited**

Heard at: **Teesside Justice Hearing Centre** **On:** **Tuesday 26th February 2019**

Before: **Employment Judge Johnson sitting alone**

Members:

Representation:

Claimant: **No attendance no appearance**
Respondent: **Mr P Wilson of Counsel**

JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

The claimant's complaint of breach of contract (failure to pay notice pay) is not well-founded and is dismissed.

REASONS

1. This matter came before me this morning on what was listed to be the first day of a 2-day hearing to consider the claimant's complaint of unfair dismissal and breach of contract. The parties had been informed of the hearing date by notice sent on the 12th December 2018, stating that the case would be heard on Tuesday 26th and Wednesday 27th February 2019, to start each day at 9.45am. By 10.00am this morning the claimant was not present and no-one appeared on his behalf. The respondent was represented by Mr Wilson of Counsel, who had with him the two witnesses whom he intended to call to give evidence. Both Mr Wilson and I were aware that the claimant had in the last two weeks made several applications to postpone this hearing. The first application to postpone was made on 11th February, on the grounds that the claimant had been unable to obtain statements from his witnesses as they had been "compromised and basically threatened to supply witness statements it would impact on their jobs". That application was refused by

myself on 18th February, when the claimant was informed that if he had any difficulty in securing the attendance of any witnesses then he may apply for a witness order. The claimant applied again on 18th February, stating that it would not be possible to provide the names and addresses of the witnesses so that they could be served with a witness order at least seven days before the hearing. The claimant also mentioned that his father was due to undergo surgery that day. That application was refused by Judge Buchanan on 18th February, when the claimant was told that he must disclose his own witness statement and those of any other witnesses by 21st February and that if he wished to pursue his application for a postponement then the application should be made at the commencement of the hearing on 26th February. The claimant applied again for a postponement on 25th February, stating that he needed time to obtain witness statements, that he had just started a new job and that his father was still recovering from his operation. The claimant also said that he remained a single parent who was dealing with depression and that this was "reason enough to postpone until all the evidence is gathered". That request was refused by myself on 25th February, when the claimant was told that if he wished to pursue the application, he must attend the hearing on the morning of 26th February to give evidence under oath as to the matters referred to in his application to postpone.

2. The claimant did not attend this morning by 9.45am, had not attended when the hearing began at 10.00am and had not attended by the time the hearing finished at 12.30pm. Mr Wilson produced to me a copy of a further letter from the claimant which apparently been sent to the Tribunal after close of business hours on 25th February at 17:09pm:-

> "I cannot get the time off work in my new job so the circumstances has definitely changed. The other party has had a venue changed and also a date change accepted so I cannot see what the issue is. My reasons for a postponement are family and case-related and entirely justified. The accused knows full well my witness statements will confirm my accusations and claims and will certainly push for the case to go ahead or be cancelled. As previously stated, I cannot attend at this time.".

3. Mr Wilson for the respondent invited me to strike-out the claims on the grounds that they were not being actively pursued by the claimant and because the claimant had acted unreasonably, pursuant to Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I indicated to Mr Wilson that I would be unwilling to strike-out the claims on that basis, but may be prepared to hear the respondent's evidence and decide the case on its merits, taking into account the contents of the claimant's claim form ET1.

4. I then raised with Mr Wilson a potential difficulty, in that one of the respondent's two witnesses is Mr Kevin John Fletcher, a non-executive director of the respondent company who, until his retirement in 2012, was a solicitor specialising in employment law, a senior partner of Jacksons Law Firm and a fee-paid Employment Judge in the Leeds region from 1991 to 2016. Since the merger of the two regions in September 2017, I have been a salaried Employment Judge in what is now known as the north-east region. I informed Mr Wilson that I immediately recognised Mr Fletcher as a fee-paid Employment Judge with whom I have attended regional training courses in the past. I informed Mr Wilson that, had the claimant been

present, I would have felt duty-bound to inform him of my knowledge of Mr Fletcher and I would have invited the claimant to make any representations about whether he considered there to be a conflict of interest and if so whether that may prevent me from dealing with this case. Mr Wilson referred me to correspondence on this point and in particular to a letter from the respondent's representative to the Employment Tribunal dated 26th September 2018 and the reply on behalf of Regional Employment Judge Robertson dated 16th November 2018 in which REJ Robertson stated that he considered the connection between Mr Fletcher and the region to be "sufficiently remote that there is no need to relist the case before an out-of-region judge or to hear it out of region.".

5. On my examination of the claimant's claim form, the response form, the witness statements and the documents in the bundle, I cannot see whether the claimant challenges the fairness of the appeal procedure or the appeal hearing which was conducted by Mr Fletcher. The claimant's case throughout the proceedings has been that he was authorised to change the specification of the materials for the subject matter of the order which he was handling and/or that it was common practice for the specification to be changed in such circumstances. There appeared to be no criticism by the claimant of Mr Fletcher's conduct of the appeal process or the appeal hearing. Mr Fletcher was not proffered as a witness who had any knowledge of the day to day operation of the role carried out by the claimant. Mr Fletcher could only recite what he was told by other employees during his investigation into the appeal points raised by the claimant. On the basis that it was highly unlikely that I would have to make any finding of fact on any dispute between the claimant's evidence and that given by Mr Fletcher, I was satisfied that I could proceed today to hear the case to deal with Mr Fletcher's evidence in the normal way.

6. I heard evidence from Mr Glen Pearson, the general manager of the respondent who at the relevant time was the respondent's Head of Logistics. It was Mr Pearson who conducted the disciplinary hearing into the allegations against the claimant and it was he who made the decision to dismiss the claimant for gross misconduct.

7. Mr Pearson had prepared a formal signed witness statement, which was supplemented by a short statement today. Mr Pearson confirmed that the claimant had been employed within the respondent's Production Planning/Logistics Department, originally as a production planner but later as a MRP controller.

8. Between December 2017 and January 2018 the respondent received notification from a customer in Germany of a claim for the cost of rectification charges in respect of gaskets which had been ordered by that customer from the respondent. The order had been handled by the claimant. It was common ground that the order had been for a particular gasket with a thickness of 0.5mm, but because the respondent did not have a stock of those gaskets, the claimant changed the specification to 0.3mm. As a result of that incorrect specification of gaskets being supplied, the respondent suffered a loss of approximately 24,000 Euros.

9. An investigation was carried out and the claimant was asked to provide his explanation for the change in specification. The claimant originally stated that he had received authorisation to change the specification, by e-mail. However, the

claimant was unable to produce a copy of any such e-mail. The claimant subsequently alleged that his e-mails had been tampered with and the relevant document had been deliberately deleted by another employee of the respondent with a view to causing trouble for the claimant. The investigation carried out by the respondent found that there was no evidence of any such e-mail and that the claimant's allegations about its deliberate deletion were unfounded. It was decided that the claimant should be the subject of formal disciplinary proceedings.

10. The disciplinary hearing was conducted before Mr Pearson. Mr Pearson considered the claimant's explanations as part of the investigation. Mr Pearson was satisfied that the claimant had failed to provide any meaningful explanation for the change of the specification. Mr Pearson concluded that the claimant was responsible for the change in specification and that as a result of his behaviour, the company had suffered a loss of 24,000 Euros. Mr Pearson considered the claimant's actions to amount to gross negligence which amounted to gross misconduct for which he should be summarily dismissed. By letter dated 15th June 2018 (page 106-107) the claimant was dismissed without notice for reasons of gross misconduct.

11. The claimant appealed against his dismissal (page 108 -110), again stating that changes to specification in the absence of the correct materials was "common practice" and also that he had received "no training to advise me that this is not the correct way to proceed". The claimant further alleged that there were three other employees who had access to his e-mails and that one of them had said, "what wouldn't she do to get rid of me".

12. The appeal hearing took place on 5th July before Mr Fletcher. Minutes of the meeting appear at pages 111-117 in the bundle. It is clear upon reading those minutes that this was a detailed and thorough appeal hearing, at which Mr Fletcher gave careful consideration to the points raised by the claimant and his representative. Mr Fletcher undertook additional investigations of his own, following representations made by and on behalf of the claimant at the appeal hearing. Following those investigations, Mr Fletcher was satisfied that there was no merit in any of the claimant's grounds of appeal and that the appeal should be dismissed. The claimant was informed of the outcome of his appeal by letter dated 9th July 2018 (page 121-123).

13. The claimant presented his claim to the Employment Tribunal on 31st July 2018. The claim form was served upon the respondent on 28th August 2018, upon which date standard case management orders were made by the Tribunal, requiring documents to be exchanged by 9th October, a bundle of documents to be prepared by 23rd October and witness statements to be exchanged by 6th November. The parties were told that the case had been listed for a one-day hearing on 18th December.

14. The response was served on 24th September, followed by the letter relating to Mr Fletcher's involvement on 26th September. The respondent indicated that they did not believe the case could be heard within one day and as a result, the hearing was postponed on 18th December and listed for two days on 26th and 27th February. The case management orders remained in place.

15. On 11th February 2019 the respondent applied to the Employment Tribunal for an "unless order" because the claimant had failed to provide any statements from himself or any witnesses whom he wished to call at the hearing. It was following this request for an "unless order" that the Tribunal received a series of applications to postpone the hearing.

16. Having heard the evidence of the respondent's witnesses, the Tribunal was satisfied that the respondent had established that its reason for dismissing the claimant was a reason related to his conduct. That is a potentially fair reason under S. 98 of the Employment Rights Act 1996. The Tribunal was satisfied from the respondent's evidence that both Mr Pearson and Mr Fletcher genuinely believed that the claimant had committed an act of gross negligence, which amounted to an act of gross misconduct. The Tribunal was satisfied that the investigation carried out by the respondent was reasonable in all the circumstances. The Tribunal was satisfied that some reasonable employers in those circumstances would have dismissed its employee, principally due to the 24,000 Euro loss caused by the claimant's negligent behaviour. The Tribunal was satisfied that some reasonable employers would have categorised the claimant's conduct as gross misconduct justifying summary dismissal. For those reasons the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

17. The Tribunal was satisfied that the respondent had established on the balance of probabilities that the claimant had committed an act of gross negligence, which amounted to an act of gross misconduct, which showed that the claimant no longer intended to be bound by the essential terms of his contract of employment. The claimant's behaviour amounted to gross misconduct which entitled the respondent to discharge him without notice. Accordingly, the claimant's complaint of breach of contract (failure to pay notice pay) is not well-founded and is dismissed.

EMPLOYMENT JUDGE JOHNSON
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21 March 2019