

THE INDUSTRIAL TRIBUNALS

CASE REF: 1118/19

CLAIMANT: Marius Jasinskas
RESPONDENT: Sebden Steel Service Centre Limited t/a Sebden Steel Ireland

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for unfair dismissal and notice pay are dismissed.

CONSTITUTION OF TRIBUNAL

Employment Judge: Employment Judge Greene
Members: Mrs D Adams
Mr A White
Interpreter: Ms Anna Andrijauskiene

APPEARANCES:

The claimant was represented by Mr J Corry, of counsel, instructed by Terence McCourt Solicitors

The respondent was represented by Mr S Morris of Peninsula Business Services Ltd.

SOURCES OF EVIDENCE

1. The tribunal heard evidence from the claimant and on behalf of the respondent from Egigius Bucys, Michael Jeffrey, Mark Witby, Mark McCausland and Matthew McCammond. The witness statement of Loretta McCausland was submitted without her attendance to be cross-examined. The tribunal also received a schedule of loss and submissions from both parties. Though the interpreter was present throughout the hearing the claimant only availed of her services when giving his evidence.

THE CLAIM AND DEFENCE

2. The claimant claimed ordinary unfair dismissal, automatically unfair dismissal and for notice pay. The respondent disputed the claimant's claims in their entirety.

3. The respondent's title was amended by consent, to what appears in this judgment.

THE ISSUES

4. The issues for determination were:-

- (i) Did the respondent unfairly dismiss the claimant?
- (ii) Did the respondent follow a fair procedure when deciding to dismiss the claimant within the meaning of Section 98(4) of the Employment Rights (Northern Ireland) Order 1996?

Namely

- (a) Was there a reasonable investigation?
- (b) Was there a reasonable disciplinary hearing?
- (c) Was there a reasonable appeal process?
- (iii) If the tribunal finds that a fair procedure was not followed would the claimant still have been dismissed or is there a percentage likelihood that the claimant would still have been dismissed, if a fair procedure had been followed?
- (iv) Is the claimant entitled to be paid, by the respondent, notice pay?
- (v) If yes, what is the quantum of notice pay?

The parties agreed that if the tribunal found that the claimant had been unfairly dismissed that he was entitled to notice pay and if the tribunal found that he had not been unfairly dismissed that he was not entitled to notice pay.

FINDINGS OF FACT

- 5.1 The claimant was born on 14 February 1977. He worked for the respondent as a production operative from 10 June 2012 until 4 October 2018 when he was dismissed for gross misconduct.
- 5.2 His weekly earnings were £500.00 gross and £420.00 net for a 37 hour week.
- 5.3 The respondent is a large privately owned independent steel processor and stockholder with multiple sites under the name of Sebden Steel Services Centre Limited trading as Sebden Steel Ireland from its Northern Ireland site. The Sebden Steel Group employs some 250 persons.
- 5.4 On 20 September 2018 the claimant was carrying out his duties of making wooden pallets using a pneumatic nail gun. In the course of carrying out this task one of the nails from the pneumatic nail gun was caused to enter the claimant's left foot.
- 5.5 The respondent has its own Safe Working Procedure (ref. SWP 1007) for employees which is entitled "PALLET MAKING. Including the use of a nail gun and wood saw."

5.6 The directions in the procedure that deal with pallet making set out the standard procedure which must be followed. Employees must be trained and authorised to carry out the procedure.

5.7 The procedure gives the following directions:-

- “2 *The nail gun and wood saw pre-use check must be recorded on the applicable check sheet, all defects should be noted.*
- 3 *If any defect or fault is found (eg defective or missing guards) which affects the operational safety of the tool, then the tool should not be used but should be isolated and the fault reported to your supervisor/manager immediately.”*

In relation to the nail gun the safety instructions are as follows:-

- “1. *The air supply must be disconnected or isolated at source (not just at the gun) before loading nails into the magazine. When loading the nail gun, rest it on the floor or other solid surface, not on any other part of your body.*
2. *Make sure that there is no air under pressure in the air line if reconnecting the air line at any time; ensure it is isolated at source.*
3. *Never point the nail gun towards yourself or at anybody else. When nailing always nail with the nail gun pointing vertically down into the timber, never hold the gun diagonally to the pallet as the nail could exit through the timber and strike yourself or someone else in the area.*
4. *Only use the nail gun to nail wood, if re-using timber or repairing pallets make sure that you do not fire nails into any metal plates or existing nails.*
5. *Always keep the airline away from the area in front of the wood saw, retract or tidy the hose when not in use.*
6. *Nail guns must be used responsibly and with great care: ‘Horseplay’ or any fooling around with this tool may have serious consequences and will not be tolerated.*
7. *Do not leave the nail gun unattended whilst loaded and connected to the air supply, always isolate when not in use.*

5.8 In the respondent’s Safe Working Procedure (REF. SWP 1056) in relation to the, “USE OF ELECTRIC HANDTOOLS” the following direction is given:

- “9. *Always hold tools with both hands using all handles which are fitted to prevent it slipping/spinning whilst in use, such as a drill catching in the material being drilled and causing a twisting or impact injury, side handles where fitted must be used and should never be removed.”*

- 5.9 Down Forklift Training Limited has provided health and safety training to employees of the respondent for some 18 years.
- 5.10 Michael Jeffrey, a training co-ordinator, registered ITSSAR instructor/ examiner and tutor with Down Forklift Training Limited gave training to employees of the respondent, including the claimant.
- 5.11 The claimant received training on the use of nail gun on 22 June 2015 for which he was certified as, having completed a basic nail gun operator's course and having passed a theory test of safety awareness and knowledge.
- 5.12 Following a request from the respondent on 25 September 2018 Michael Jeffrey set out, by letter of 26 September 2018, the details of the training given to the claimant on 22 June 2015. In the course of that letter he stated:-

“The Nail Gun is classed as a potential weapon due to the velocity of the nails that are fired from it, and as such training is geared to that end.”

- 5.13 The letter also stated that employees are taught the following:-

- “1. The correct use of PPE when using the gun.*
- 2. Loading and unloading of the nail coils into the magazine.*
- 3. Attaching the air line to and from the gun.*
- 4. The use of the nail gun itself.*
- 5. Storage of the gun when not in use.*
- 6. The fault reporting procedure.”*

- 5.14 Mr Jeffrey, in his letter of 26 September 2018, stated that the main points of the training are as follows;

- “(1) The stability of the gun and the dangers in pointing it in an unsafe direction.*
- (2) The use of the pistol grip and the stabilising handle to ensure the complete control of the machine is kept at all times by the operator.*
- (3) The correct way to apply the gun to the target to ensure that the nail does not bounce back or partially insert. (ie taking up the initial pressure of the muzzle onto the target).*
- (4) The correct way to load and unload the magazine, ensuring that the initial nail is located correctly into the chamber of the gun.*
- (5) The correct way to attach and detach the air line and the importance of the gun pointing in a safe direction. (Note: This is the only time when the operator is told that they do not have to have two hands on the gun, hence the importance of the gun pointing in a safe direction.*

(6) *The correct fault reporting procedure, in that they report all faults, however small to a supervisor immediately and under no circumstances are they to try and repair the gun by themselves.*"

5.15 Once the training has been delivered a practical assessment is done by Mr Jeffrey and the candidate will only be "signed off" when they are deemed to be competent in the use of the nail gun.

5.16 In relation to the operation of the nail gun using one hand Mr Jeffrey stated in his letter of 26 September 2018:-

"To answer your initial query. At no point is the operator told to operate the Nail Gun with only one hand on the gun. This is a definite fail on any testing process and would have been picked up immediately by me resulting in a fail or retraining of the individual.

The operator is told that the only time that they keep one hand on the gun is when they are attaching or disconnecting the air hose to the gun. In which case the gun must be rested and pointing in a safe direction in case the operator inadvertently pulls the trigger mechanism."

5.17 Mr Jeffrey observed the CCTV footage of the claimant using the nail gun with only one hand. He commented that the claimant was using the gun at an angle to the wood. He maintained that the training was clear that a nail gun must be directly vertically above the surface. He stated that the CCTV footage shows the claimant using the nail gun recklessly and he opined that it was not a surprise to him that the claimant was injured. He added the further comment that had the claimant used the nail gun in the way revealed in the CCTV footage during the training he would not have passed the course.

5.18 The tribunal considered Michael Jeffrey from Down Forklift Training Limited to have been an honest witness who gave his evidence in a frank and straightforward manner. In the course of giving his evidence he was not shaken on the essential thrust of his evidence that he had trained the claimant to operate the pneumatic nail gun with two hands and that through practical instruction and theory the claimant was made aware of that requirement and carried it out as instructed to the standard of successfully completing the course.

5.19 Though the claimant rejected Mr Jeffrey's evidence the tribunal found at times the claimant's evidence lacked clarity eg not knowing whether he received the letter of 27 September 2018 inviting him to a disciplinary meeting, yet seeking to rely on an error in the contents of the letter he was not sure that he had received but going on to raise the possibility that there was another different letter received by him, which letter was never produced to the tribunal.

5.20 Where the evidence of Mr Jeffrey and the claimant clashed on the issue of the need to operate the pneumatic nail gun with two hands the tribunal preferred the evidence of Mr Jeffrey. It therefore concluded that the claimant did in fact receive training on 22 June 2015 from Mr Jeffrey instructing him to use two hands when operating the pneumatic nail gun.

- 5.21 The claimant contended that he had complained about the nail gun being defective to Egigius Bucys and Matthew McCammond, the Health and Safety Manager. The claimant believes the nail gun malfunctioned on 20 September 2018 and caused him to be injured.
- 5.22 The respondent denied that the claimant had made any complaints about the nail gun previously. Furthermore, it alleged that there was not any record of any complaint having been made.
- 5.23 The CCTV footage of the incident shows the claimant building the pallet and using the nail gun before the injury occurred. It is clear from the CCTV footage that at times the claimant had only one hand on the nail gun as he inserted the nails into the pallet and at other times he used both hands. At the time of the injury the claimant was using only one hand to operate the nail gun. There did not appear to be any impediment at the time of the injury that would have prevented the claimant from operating the nail gun with two hands. The claimant was of the opinion that it was not necessary to hold the nail gun with two hands.
- 5.24 The claimant informed the tribunal that on 20 September 2018 he had to stop on a number of occasions to fix the nail gun as it was jamming. He said that the problem with the nail gun was that it would either misfire and then load a second nail into the chamber which would cause it to jam or try to fire two nails at once and then jam. The claimant said that he had to open up the nail gun and fix it on more than one occasion. The CCTV footage does not show the claimant doing any of these actions. However, the CCTV footage available to the tribunal showed a very short period of time prior to the actual injury to the claimant.
- 5.25 Mr Egigius Bucys, a maintenance engineer, at the respondent premises, told the tribunal that at the start of each shift each machine or tool that will be used, including the nail gun, is tested and the staff member fills in a pre-use checklist which is then signed by him or another supervisor. The nail gun used by the claimant was tested and checked on 20 September 2018. The significance of that was that there was not any fault detected on the nail gun on that day. Mr Bucys also informed the tribunal that there had not been any fault detected on that nail gun since 20 September 2018. He indicated that the advice to employees was that if there was a fault in a nail gun the operator should use the spare nail gun.
- 5.26 Mr Bucys, in the course of his evidence to the tribunal, accepted that in the course of the six and half years during which the claimant was working for the respondent he may have made a complaint about the nail gun to him but that he could not remember any such complaint. He did accept that the claimant had discussions with him about the nail gun but he told the tribunal that the discussions were in relation to the air pressure within the nail gun and whether it could be increased. Mr Bucys characterised those discussions as the claimant making a request rather than a complaint. However, he accepted at a previous hearing of this claim, before a different panel and which had to be aborted, that he had accepted that the claimant had complained to him over the six years that there was a defect in the nail gun. He stated to the current tribunal that his earlier evidence was not correct.
- 5.27 The claimant did not report the particular difficulties with the gun on 20 September 2018, that he asserted had occurred, to anyone or to the Health and Safety department. Nor did he check the nail gun before using it. The nail gun was

not checked after the accident, though the daily checklist has a tick for 20 September 2018 and 21 September 2018 that the nail gun was operating correctly free from defects, misfires or jamming of nails.

5.28 Following his injury the claimant, at the request of the respondent, signed a statement about what had happened and left to attend Lagan Valley Hospital. The statement is a bare description of what he was doing and having being injured by a nail from the nail gun going through his left boot. There is not any complaint about the nail gun being defective recorded.

5.29 In the claimant's statement, as taken by Matthew McCammond on 20 September 2018, the following points were recorded:-

- “● *MAKING PALLETS AT PALLET AREA.*
- *WITH AURI & VIADAS.*
- *LABT PALLET – AROUND KNEE HEIGHT.*
- *Pallet ON HIS RIGHT.*
- *WENT TO NAIL TOGETHER.*
- *FIRST NAIL WENT IN OK.*
- *SECOND NAIL WENT THROUGH SIDE OF WOOD, CAME OUT AND WENT THROUGH HIS BOOT INJURING BOTTOM OF LEFT FOOT, BELOW BIG TOE.*
- *WOUND CLEANED AND PLASTER APPLIED.*
- *ASKED IF WANTED TO GO TO HOSPITAL, REFUSED BY MARIUS, HAPPY TO GO HOME JUST.*
- *ADVISED TO GO FOR TETNIS SHOT.”*

5.30 The claimant was off work on Friday 21 September 2018 and Monday 24 September 2018 and returned to work on Tuesday 25 September 2018.

5.31 Matthew McCammond was appointed by Loretta McCausland (Site Director) to investigate the claimant's accident. Mr McCammond was advised as to which steps to take by John Hill, the Group Health and Safety Senior Manager. Mr McCammond took statements from the claimant, Aurimas Stilpa, Viadas Lesmanavicius, Joanna Statkevicianto, Egigius Bucys, and Loretta McCausland. He also made a statement. He viewed the CCTV footage. He sought information, about the training of the claimant and whether the nail gun should be used with two hands, on 25 September 2018 from Down Fork Lift Training Ltd and the details were provided to him in the letter of 26 September 2018 from Michael Jeffrey from Down Fork Lift Training Ltd.

5.32 In his statement, as recorded by Matthew McCammond on 24 September 2018, Aurimas Stilpa stated:-

- “- *MARUIS USING NAIL GUN WITH ONE HAND.*
- *NOT CENTRED ON SKID.*
- *QUITE A FEW NAILS HAD COME OUT THE SIDE OF SKIDS AND NOT FULLY INTO BOTTON SKID.*
- *HOLDING GUN ONE HANDED WHEN INJURY HAPPENED*
- *NOT LEVEL; NAIL FIRED AT ANGLE.*
- *NAIL CAME OUT THE SIDE OF SKID AND INTO MARIUS FOOT”*

5.33 Mr McCammond recorded a statement from Viadas Lesmanavicius on 24 September 2018 also. In that statement Mr McCammond recorded:-

- “- *Maruis using nail gun very quickly.*
- *Nail gun looked straight from Viadas view point.”*

5.34 Matthew McCammond spoke to John Hill on a number of occasions throughout the investigation. John Hill suggested to Matthew McCammond that there might be a disciplinary issue and that the claimant should be suspended on full pay until the investigation was completed. He also suggested that Matthew McCammond should have an investigatory meeting with the claimant.

5.35 When the claimant attended work on 25 September 2018 he was informed in the boardroom, by his supervisor Donatas Grauzinis, that he was being suspended on full pay and asked to remain at home during working hours as there was an ongoing investigation.

5.36 On 26 September 2018 the claimant, at the request of Matthew McCammond, attended an interview at 9.30 am. The interview was conducted by Matthew McCammond. Donatas Grauzinis was present as a witness and took the notes of the meeting. The claimant said that he was not told the purpose of the meeting. Mr McCammond says that the claimant was told that it was to gather facts about the incident.

5.37 The tribunal does not accept that in the context of an ongoing investigation into the accident and the claimant’s suspension that he would have been unaware of the purpose of the meeting or that if he were ignorant of the purpose that he would not have asked what was the purpose of the meeting.

5.38 The respondent’s employee handbook sets out the procedure for investigation at page 30 paragraph 4d:

“On occasion it may be necessary for the company to conduct an investigation meeting to clarify a particular incident or occurrence prior to any potential disciplinary hearing. The purpose of this investigatory meeting is to establish the facts about a particular incident or occurrence, and the details of which will remain completely confidential. The investigation will be carried

out by a designated member of the Management team or, if necessary, in the case of a possible conflict of interest, an agreed external third party. In either case the person nominated will have appropriate training and experience and be familiar with the procedures involved. The designated investigator will meet with you and any witnesses or other relevant persons individually. The person investigating the complaints will make every effort to carry out and complete the investigation as quickly as possible. This investigation meeting itself should not be interpreted as a disciplinary hearing as no disciplinary sanction would ever be issued on foot of an investigatory meeting. Instead, the facts established in an investigatory meeting may be used to identify whether or not a formal disciplinary hearing ought to be conducted.”

- 5.39 At the end of the investigation meeting the claimant refused to sign the handwritten notes which had not been agreed with him. Matthew McCammond refused the claimant’s request to provide a copy of the rough notes to the claimant or to allow him to photograph them, after he had visited the office. It appears that the original notes were destroyed. Subsequently the claimant was provided with a typed summary of the meeting which he contended did not represent all that was said. He also contended that he had not been told that the meeting was an “*informal investigation meeting*”. The file in the investigation, including the CCTV footage, was sent to Mark McCausland.
- 5.40 The claimant only identified two specific comments in the summary notes of the investigation meeting which he denied were said. They were that; he knew he had to hold the gun with both hands and could remember this from his training; and the reason for him holding the nail gun with one hand was that it was more comfortable and that was his stronger arm. There was a number of other comments in the summary notes and the claimant could not remember whether they were correct or not. The claimant also contended that the investigation should have included an examination of the nail gun and the pallet.
- 5.41 Because the claimant alleged that the nail gun was defective after the investigatory meeting Matthew McCammond got the pre-use checklist for 20 September 2018. The checklist did not reveal any problems with the nail gun on 20 or 21 September 2018.
- 5.42 Matthew McCammond formed the view that the claimant had used the gun carelessly and in breach of the SWPs. He put together a file on the incident with all the documents that he had collected and the CCTV footage and forwarded it to Mark McCausland.
- 5.43 In his investigation report, to Mark McCausland, in one of his conclusions Matthew McCammond stated:

“Marius was not following his training or the Safe Working Procedure, by using his nail gun one handed and not ensuring the nails were fired vertically into the wood.”

The SWP does not make any comment about operating the nail gun with two hands and Matthew McCammond’s conclusion is in part incorrect.

- 5.44 In the same report in the section RECOMMENDATIONS TO PREVENT

RECURRENCE Mr McCammond included the following:-

“Marius will be suspended pending him attending a disciplinary hearing for his conduct, not following his training nor the SWP.”

This statement perpetuates Mr McCammond's previous error in that it again alleges the claimant did not follow the SWP, implying that one of the respects in which he did not follow the SWP was by not operating the nail gun with both hands.

5.45 Mark McCausland, the Group Managing Director, received the accident file, including the CCTV footage, from Matthew McCammond on 26 September 2018. He believed that the claimant had been using the nail gun very unsafely and in breach of the respondent's health and safety rules and that a disciplinary hearing was appropriate. He spoke with John Hill and Tony Smith (HR Director) and explained to them his view. They were happy for Mr McCausland to proceed with the disciplinary process. The charge was based on advice from John Hill.

5.46 Mark McCausland wrote to the claimant on 27 September 2018 inviting him to a disciplinary meeting. He included in the letter the following documents:-

- (a) the claimant's training certificate for basic use of nail guns;
- (b) the letter setting out the details of the training course from Mike Jeffrey of 26 September 2018;
- (c) SW 1007 (Pallet Making) and SWP 1056 (Electric Hand Tools);
- (d) the claimant's statement of 20 September 2018, recorded by Matthew McCammond; and
- (e) notes from the investigating meeting.

5.47 The letter informed the claimant that the matter of concern was:-

“A breach of health and safety rules that may cause serious injury to yourself, colleagues or any other person.

Specifically, that on Thursday 20 September, you operated a nail gun when making pallets, in a careless and dangerous manner with complete disregard of your training and the Safe Working Procedures for this activity.

If this allegation is substantiated, we will regard your actions as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice.”

5.48 The letter also informed the claimant that he was entitled to be accompanied by a fellow employee.

The letter did not include the statements of the claimant's colleagues which Mark McCausland could not explain and described to the tribunal as an “oversight” and due to insufficient diligence on his part.

5.49 The alleged breach of health and safety appears to be a reference to the respondent's employee handbook, page 20, Health, Safety, Welfare and Hygiene, A Safety paragraph 2;

"2. It is your legal responsibility not to take any action which could threaten the health and safety of yourself, other employees, customers or members of the public."

5.50 The respondent's disciplinary policy sets out Rules Covering Gross Misconduct. They provide:-

"Occurrences of gross misconduct are very rare because the penalty is dismissal without notice and without any previous warning being issued. It is not possible to provide an exhaustive list of examples of gross misconduct. However, any behaviour or negligence resulting in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship will constitute gross misconduct. Examples of offences that will normally be deemed as gross misconduct include serious instances of:-

a.

f. breach of health and safety rules that endangers the lives of, or may cause serious injury to, employees or any other person.

....

(The above examples are illustrative and do not form an exhaustive list.)"

5.51 The disciplinary hearing took place on 1 October 2018. It was conducted by the Managing Director, Mark McCausland with Michael Taylor present to take notes. The claimant declined the offer to be accompanied at the disciplinary hearing. During the meeting the claimant alleged that he was not allowed to see his colleague's statements and that Mr McCausland read extracts from the statements and asked him to comment on them. The claimant alleged that when Mr McCausland read the statements that he was not provided with a copy of them. He also said that he did not fully understand the statements and he was not allowed an opportunity to properly consider them. Mark McCausland also raised the issue of SWP 1056 instruction to use two hands on an electric hand tool even though this was not relevant to a pneumatic nail gun. The claimant did not raise any issue about having an interpreter present or raise any objection in relation to his concerns at the meeting.

5.52 The claimant was found to have committed an act of gross misconduct and was dismissed. Mr McCausland informed the tribunal that his "working assumption" was that the claimant had never operated the nail gun with one hand before the day of his injury. Throughout the disciplinary meeting Mr McCausland considered the claimant to be unco-operative, uncommunicative and slouched in his chair with an attitude. This was a factor in the decision to dismiss the claimant.

5.53 The claimant criticised the disciplinary hearing for a number of reasons including

that; he had not been provided with the statements of the witnesses in relation to the incident; had not been provided with an interpreter; did not fully understand the statements; and was not allowed an opportunity to properly consider the witness statements.

5.54 In a letter dated 4 October 2018 the claimant was informed that he had been dismissed for gross misconduct with immediate effect. The letter had been drafted with the involvement of Mr Hill and Mr Smith. Mr McCausland accepted at the tribunal that to a degree that he had sought the approval of Mr Smith and Mr Hill for the decision to dismiss the claimant. Indeed in describing the contact that he had with Mr Hill and Mr Smith throughout the disciplinary process he repeatedly told the tribunal that three heads are better than one.

5.55 The letter of dismissal stated:-

“At the hearing your explanations were that the nail gun was defective and that you used it one handed because your right arm is stronger than your left.

I consider your explanations to be unsatisfactory because your behaviour was a clear serious breach of health and safety rules:

You disregarded your training and ignored the various Safe Working Procedures issued to you, in particular SWP 1002 (Working in the Production and Storage Areas), SWP 1007 (Pallet Making, including the Use of a Nail Gun) and SWP 1056 (Use of Electric Hand Tools). You had signed all three SWPs to confirm that you understand and agree to comply with all the safety measures detailed in those SWPs. Reference to your training and the relevant SWPs instructs you not to use the nail gun with one hand. Both hands are needed for stability, regardless of whether you have one arm stronger than the other.

I have checked the pre-shift inspection records for the nail gun that you used and can confirm that it was not defective either before or after this incident. In any case, you have been instructed not to use work equipment that you may believe is defective and I therefore cannot accept this explanation for your behaviour.”

The letter of dismissal then stated:-

“Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal. I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction.

You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.”

The claimant was also informed of his right of appeal.

- 5.56 The claimant appealed the decision to dismiss him on 16 October 2018. His reasons for appeal were as follows that:-
- (a) he did hold the gun vertically;
 - (b) during the recent training the requirement to hold the nail gun with both hands was not addressed;
 - (c) even if he were partially at fault, the action taken against him was too severe by reason of his length of service and clean record;
 - (d) the nail gun was defective and he had complained about that previously and he believed that he was dismissed because the company was not willing to admit the nail gun was defective.
- 5.57 The claimant was not provided with the minutes of the disciplinary meeting. He did not complain about not getting copies of his colleagues' statements or the absence of an interpreter.
- 5.58 The appeal was heard by Mark Whitby, the respondent's director, on 23 October 2018. Mark Whitby had considered the case file before the appeal hearing. Michael Taylor was present to take notes. The claimant confirmed at the start of the appeal that he did not want to be accompanied. At the hearing each of the points in the claimant's notice of appeal was considered in turn and the claimant was allowed to elaborate on them.
- 5.59 The claimant was not provided with the witness statements. According to the minutes of the appeal hearing, which were not challenged, the only reference to the witness statements was from Mr Whitby in relation to the witness statement of Aurimas Stilpa as follows:-
- "MW [Mark Whitby] made a reference from a statement from Auri which he stated there were several nails sticking out the side of the pallet MJ [the claimant] was making which indicated that the pallet making process that day was dangerous and there was simply not enough attention and time taken."*
- 5.60 On 26 October 2018 the claimant was informed by letter that his appeal had been dismissed.
- 5.61 In the outcome appeal letter, of 26 October 2018, Mark Whitby addressed each of the grounds of the claimant's appeal. In relation to the ground that he did hold the gun vertically Mr Whitby concluded that the CCTV coverage showed that the nail gun was not being held vertically and in addition to that the angle at which the nails went into the pallets was evidence that the nails were not being fired vertically.
- 5.62 In relation to the ground that the requirement to hold the gun with both hands was not addressed at the training, Mr Whitby found that the training had resulted in the claimant being awarded a certificate of having completed the training. During the training to have used the gun with one hand would have led to a failing of the course. In addition the nail gun itself had two handles for the obvious reason that it should be held with two hands, Mr Whitby concluded.

- 5.63 In relation to the ground that the action taken was too severe given the claimant's length of service and good disciplinary record, Mr Whitby concluded that where there was a breach of health and safety rules that could cause serious injury that the respondent was entitled to conclude that that was gross misconduct warranting dismissal.
- 5.64 In relation to the ground that the claimant's dismissal was because the respondent was unwilling to concede that the nail gun was defective, Mr Whitby concluded that the nail gun had been checked on the day of the incident and the pre-use check had been signed by a supervisor, neither of which revealed any defect. In addition Mr Whitby checked the nail gun before the claimant's appeal and no repairs had been made to the nail gun since the claimant had last used it. Further the claimant's colleagues to whom the claimant alleged reporting the defect had no recall or record of the reporting of any defect. Mr Whitby was of the view that had the claimant believed the nail gun was defective that he would not have used it at all or if he had used it that he would have exercised extreme care.

Mr Whitby also stated that it was absolutely clear in the Safe Working Procedures, that if any defect is found by the operator than the equipment should not be used.

- 5.65 For the above reasons the claimant's appeal was dismissed.
- 5.66 The claimant subsequently obtained work through Industrial Temps on 6 November 2018. It was a temporary job and the employment finished on 15 April 2019. His earnings varied between £298.14 and £520.75 per week. He secured further employment through Industrial Temps from 29 April until 5 May 2019 and received £274.82 for that work. He obtained another job with Industrial Temps which he began on 10 June 2019. His salary is in the region of £300.00 per week.
- 5.67 The claimant alleged that the respondent failed to conduct a proper investigation by failing to inform him in good time about the correct procedures to be followed at the investigation meeting, by failing to properly disclose evidence and failing to provide an interpreter. He further believes that to classify the matter as gross misconduct had not been explained nor had the decision to dismiss him, as opposed to imposing a lesser sanction, been explained to him either.
- 5.68 The claimant is claiming £3,000.00 in respect of notice pay and £500.00 in respect of loss of statutory rights. He further believes that he is entitled to additional monies in relation to his financial losses due to having a new job at a lower salary and not having had continuous employment since his dismissal.

THE LAW

- 6.1 To establish that a dismissal is not unfair an employer must establish the reason for the dismissal and that it is one of the statutory reasons that could render the dismissal not unfair or is for some other substantial reason of a kind such as is justified by the dismissal of an employee holding the position which the employee held. If an employer establishes both of these requirements, then whether the dismissal was fair or not depends on whether in all the circumstances the employer acted reasonably or unreasonably in treating them as a sufficient reason for dismissing the employee (Article 130 The Employment Rights (Northern Ireland)

Order 1996).

- 6.2 Where an employee is dismissed and the statutory dismissal procedure is applicable but has not been completed and the non-completion is wholly or mainly attributable to the failure of the employer to comply with its requirements the dismissal is automatically unfair (Article 130 The Employment Rights (Northern Ireland) Order 1996).
- 6.3 Where the employer has failed to comply with the statutory dismissal procedures and it is mainly or wholly responsible for the failure a tribunal shall increase any award to the employee by 10% and it may, if it considers it just and equitable in all the circumstances, increase the award by up to 50%, unless there are exceptional circumstances which would mean an increase unjust or inequitable (Articles 17(3) and (4) The Employment Rights (Northern Ireland) Order 2003).
- 6.4 When a potential disciplinary matter arises, the employer should make necessary investigations to establish the facts promptly before memories of events fade. It is important to keep a written record for later reference. (Code of Practice on Disciplinary and Grievance Procedures – Labour Relations Agency, paragraph 9).
- 6.5 In a formal disciplinary process it is important that an employee is given sufficient information to understand the basis of the case against them. If applicable, it would normally be appropriate to provide copies of any written evidence, which may include any witness statements. There may be exceptional occasions where an employer may decide not to provide copies of witness statements. Where witness statements have been withheld the employee should still know the substance of the witness statements before any meeting takes place. (Code of Practice on Disciplinary and Grievance Procedures – Labour Relations Agency, paragraph 15).
- 6.6 Copies of records of meetings should be given to the employee including copies of any formal minutes that may have been taken. (Code of Practice on Disciplinary and Grievance Procedures – Labour Relations Agency, paragraph 55).
- 6.7 “... Length of service will almost always be a relevant factor. In misconduct cases it may influence the question whether dismissal is a fair sanction to impose (**Johnson Matthey Metals v Harding [1978] IRLR 248**), and it may lead a tribunal to take the view that a reasonable employer ought to give the benefit of the doubt to long serving employees where evidence is in conflict (**O’Brien v Boots Pure Drug Co [1973] IRLR 261**). Obviously, however, it will not be a factor of any, or any significant, weight where gross misconduct is concerned: see the decision of the Inner House of the Court of Session in **AEI Cables Ltd v McKay [1980] IRLR 84**. As the EAT put it in **Harrow London Borough v Cunningham [1996] IRLR 256**, this means that in gross misconduct cases, length of service will not save the employee from dismissal. (Harvey on Industrial Relations and Employment Law D1 [1035])
- 6.8 The Employment Rights (Northern Ireland) Order 1996 provides at Article 130(4):-

“Where the employer has fulfilled the requirements of paragraph (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) *shall be determined in accordance with equity and the substantial merits of the case."*

- 6.9 Article 130(4)(b) of The Employment Rights (Northern Ireland) Order 1996 conveys that even if an employer is guilty of one or more errors in procedure nevertheless that should not be equated with unfair dismissal unless those errors have indeed led to unfairness to the dismissed employee which would render it inequitable or contrary to the substantial merits of the case to dismiss them. (**Connolly v Western Health and Social Care Trust [2017] NICA 61 at (41)**).
- 6.10 In **Polkey v AE Drayton Services Ltd [1987] 3 All ER 974, [1987] IRLR 503, [1987] ICR 142**, the House of Lords said that the only test of the fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the decision takes effect. A tribunal was not bound to hold that any procedural failure by the employer rendered the dismissal unfair: it was one of the factors to be weighed by the tribunal in deciding whether or not the dismissal was reasonable within [The Employment Rights (Northern Ireland) Order 1996 Article 130(4)]. The weight to be attached to such procedural failure should depend upon the circumstances known to the employer at the time of the dismissal, not on the actual consequence of such failure. (Harvey on Industrial Relations and Employment Law D1 [1016] – [1034]).
- 6.11 However, the Court of Appeal in **Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] ICR 1602, [2006] IRLR 613** has stressed that tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, a tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The Court of Appeal said the following dicta of Donaldson LJ in **Union of Construction, Allied Trades and Technicians v Brain [1981] IRLR 224** was worth repetition:

"Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."

(Harvey on Industrial Relations and Employment Law D1 [1011])

- 6.12 In circumstances where an appeal follows a badly handled initial disciplinary hearing the following considerations apply;-

*“... The important point here is that there is a general acceptance that procedural defects in that initial disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness. This has been the general understanding in this area for many years and was reaffirmed in the decision of the Court of Appeal in **Taylor v OCS Group Ltd [2006] EWCA Civ 702, [2006] IRLR 613**. In that case it was stated that ultimately a tribunal must look at the overall fairness of the procedure, in particular the ‘thoroughness and the open-mindedness of the decision maker’ and not just consider whether the appeal had taken the form of a rehearing rather than a review as had been the earlier received wisdom following the decision of the EAT in **Whitbread and Co plc v Mills [1988] IRLR 501; [1988] ICR 776**.”*
(Harvey on Industrial Relations and Employment Law D1 [1528])

THE APPLICATION OF THE LAW AND THE FINDINGS OF FACT TO THE ISSUES

- 7.1 The respondent has shown that the reason for the claimant’s dismissal was misconduct.
- 7.2 Misconduct is one of the statutory grounds that can render a dismissal not unfair.
- 7.3 In considering whether the respondent acted fairly or unfairly in dismissing the claimant the tribunal’s attention was directed to the essence of this unfair dismissal claim which revolves around the issue of whether the manner in which the claimant used a pneumatic nail gun on 20 September 2018 amounts to gross misconduct because it was in breach of the respondent’s health and safety requirements or the respondent’s policy.
- 7.4 While the claimant criticised the extent of the CCTV footage that was available to the tribunal he did not dispute that the footage available did show him operating the pneumatic nail gun at times with one hand as he inserted nails into wooden pallets on 20 September 2018 prior to him sustaining an injury.
- 7.5 The respondent maintains that, as part of its policy and training, an operator is required to use both hands when using the pneumatic nail gun. It asserted that failure by an operator to use both hands when using a pneumatic nail gun is a breach of its policy; a breach of the training received by operators; and is a health and safety breach. Such breaches, it maintained, amounted to acts of gross misconduct.
- 7.6 The claimant, for his part, denied; that he was trained to use two hands when operating the pneumatic nail gun; or that it was a requirement of the respondent’s policy so to do; or that to use the gun with one hand by him was unsafe or a breach of health and safety; that the essential cause of the injury on 20 September 2018 was that the nail gun was defective; and that he had complained that it was

defective in the past on a number of occasions to different people within the respondent company.

- 7.7 The respondent preferred charges against the claimant, in connection with his use of the pneumatic nail gun with one hand, on 20 September 2018, which led to him sustaining an injury to his left foot. The respondent, following the application of its disciplinary policy, upheld the charges against the claimant which it had characterised as gross misconduct and summarily dismissed the claimant.
- 7.8 The claimant challenged the respondent's conclusion and brought the instant proceedings before the tribunal claiming that he had suffered an unfair dismissal and that he did not receive the notice pay to which he was entitled.
- 7.9 The claimant contended that the respondent had failed to carry out a reasonable investigation, a reasonable disciplinary hearing, a reasonable appeal hearing and that even if the claimant had committed an act of misconduct the sanction was outside the band of reasonable responses.
- 7.10 As stated in the Findings of Fact above the tribunal is satisfied that the claimant was trained by Michael Jeffrey on 22 June 2015 how to use a pneumatic nail gun.
- 7.11 The tribunal is also satisfied that part of the training received by the claimant was that he was to operate the pneumatic nail gun with two hands. This is a conclusion that the respondent was entitled to make on the basis of the evidence before it at the time of the disciplinary process.
- 7.12 There was not any dispute that the CCTV footage shows the claimant operating the pneumatic nail gun on 20 September 2018 at the time he was injured with one hand only.
- 7.13 The absence of an interpreter at different stages of the investigatory and disciplinary processes has been raised by the claimant as a criticism of those processes. The tribunal does not accept that criticism. In so concluding the tribunal had regard to the following matters:-
- (a) The claimant did not identify any specific difficulty that he had by reason of the absence of an interpreter at the different stages of the investigatory and disciplinary processes.
 - (b) Specifically the claimant did not make any criticism of not having understood any aspect of the investigatory or disciplinary processes, or that the absence of an interpreter had prevented him from fully engaging in the processes.
 - (c) Having seen and heard from the claimant through the course of the hearing it is clear that the claimant has a good command of English.
 - (d) The claimant only sought to avail of the services of the interpreter at the tribunal hearing when he was giving evidence and even then it was not necessary to have everything translated.

The Investigation

- 7.14 The tribunal concludes that the investigating process had a number of defects which cumulatively render the investigation not reasonable. In so concluding the tribunal had regard to the following matters;-
- (a) The policy applicable to the use of the pneumatic nail gun is Safe Working Procedure (Ref. SWP 1007) Pallet Making including the use of a nail gun and wood saw.
 - (b) The policy applicable to the use of electric hand tools, Safe Working Procedure (Ref. SWP 1056) Use of Electric Hand Tools did not apply to the use of a pneumatic nail gun and is therefore irrelevant to the alleged misconduct committed by the claimant.
 - (c) SWP 1007 does not instruct operators to operate the pneumatic nail gun with two hands.
 - (d) SWP 1007 instructs the operator to use the nail gun pointing vertically into the timber and never to hold the gun diagonally to the timber. It also instructs the operator not to use a defective tool.
 - (e) Matthew McCammond, who was appointed to investigate the accident and to make recommendations, sought advice from John Hill, the Group Health and Safety Manager. Mr Hill was not a witness before the tribunal. He was not a member of the investigating authority. Nor was the tribunal told that he had any expertise in investigating accidents which could have disciplinary implications or in disciplinary matters in general.
 - (f) While the tribunal accepts that because of his seniority and presumably experience he could be someone from whom advice is taken about procedure before an investigation, it is not clear why he should be otherwise involved as he did not provide any health and safety advice upon which Mr McCammond relied or that was used in the disciplinary process, as far as the tribunal was made aware.
 - (g) Despite Mr Hill's, supposed non-involvement in the investigation Mr McCammond spoke to him on several occasions throughout the investigation. Mr McCammond's evidence to the tribunal was that Mr Hill suggested that there might be a disciplinary issue and that the claimant should be suspended on full pay.
 - (h) Matthew McCammond, as part of his investigation, failed to take a number of obvious steps. He did not examine or cause to have examined promptly the pneumatic nail gun that the claimant was using on the 20 September 2018. Nor did he examine or cause to have examined the pallet into which the claimant had been inserting nails when he was injured. Nor did he obtain a medical report on the details of the claimant's injury which could have assisted in determining the mechanism of the claimant's injury. Nor did he retain the original notes of his interview with the claimant.
 - (i) In Matthew McCammond's accident report, which was forwarded to the disciplining person, Mark McCausland, his conclusion was wrong where he stated that the claimant was not following the SWP by using the pneumatic

nail gun single handed. In his recommendations he perpetuated the error by recommending disciplinary action for the claimant's conduct, inter alia, in not following the SWP without making clear that such a breach could not relate to not operating the pneumatic nail gun with two hands.

The Disciplinary Hearing

- 7.15 Mark McCausland was charged with considering Matthew McCammond's report, deciding whether disciplinary proceedings were appropriate and, if so, arranging those disciplinary proceedings, including the drafting of the charge.
- 7.16 The tribunal concludes that the disciplinary process also had a number of defects thereby cumulatively rendering it not a reasonable disciplinary hearing. In so concluding the tribunal had regard to the following matters:-
- (a) On the basis of the investigation report, from Matthew McCammond, Mark McCausland formed the view that the claimant had been using the nail gun unsafely, was in breach of the respondent's health and safety policy and that a disciplinary hearing was appropriate.
 - (b) Before going further Mr McCausland spoke to John Hill, the Group Health and Safety Manager and Tony Smith, the HR Director. Neither of the latter persons was part of the disciplinary panel. Despite that Mr Mark McCausland appears to have sought their approval to proceed to disciplinary action against the claimant and indeed it was Mr Hill who advised on the disciplinary charge.
 - (c) In the invitation letter to the disciplinary meeting of 27 September 2018 Mr McCausland provided the claimant with certain documents. He did not provide him with the statements of the witnesses, which Mr McCausland said arose from insufficient diligence on his part. Nor was the claimant provided with an oral explanation of the contents of the absent witness statements before the disciplinary meeting as the LRA recommends in its Code of Practice where statements are not provided.
 - (d) Mr McCausland, at the disciplinary meeting on 1 October 2018, did not provide the claimant with copies of the witness statements, upon which the respondent was relying. Mr McCausland's "insufficient diligence" in not providing copies of the witness statement to the claimant seems hard to understand as he read from the witness statements during the disciplinary meeting and invited the claimant to comment on their contents.
 - (e) Having failed to provide copies of the witness statements to the claimant or an oral explanation as to their contents before the disciplinary hearing Mr McCausland failed to give the claimant an opportunity to consider the statements. Reading portions of the statements and inviting comments, particularly to someone whose first language is not English and who was not accompanied, by his own choice, at a disciplinary meeting where the claimant's employment was at risk, was an unnecessary, avoidable and flawed way to conduct a disciplinary meeting.

- (f) At the disciplinary meeting Mark McCausland questioned the claimant about the use of two hands when operating an electric hand tool (SWP 1056). He erroneously applied that requirement to a pneumatic nail gun despite SWP 1056 not having any relevance to pneumatic nail guns.
- (g) The claimant was notified by letter of 4 October 2018 that he had been summarily dismissed following the disciplinary hearing of 1 October 2018. Mr McCausland informed the tribunal that the decision to dismiss had been taken to a degree with the approval of Mr Hill and Mr Smith. The dismissal letter was drafted with the involvement of John Hill and Tony Smith even though neither of them was part of the disciplinary hearing panel nor had attended the disciplinary meeting.
- (h) The dismissal letter stated that the claimant had breached SWP 1002 (Working in Production and Storage Areas) even though he was never charged with such a breach. It also repeated the error that the applicable SWP 1007 instructed the claimant not to use the nail gun with one hand.
- (i) Mark McCausland, as stated in the dismissal letter, found that the claimant's conduct had resulted in a fundamental breach of his contractual terms which irrevocably destroyed the trust and confidence necessary to continue the employment relationship. However, the claimant had never been so charged. Indeed, on the basis of the evidence before the tribunal, this was the first time this charge was ever mentioned.
- (j) Mark McCausland appears to have misconstrued the respondent's own disciplinary procedure and his own role when he stated in the dismissal letter that it did not permit a lesser sanction.

The Appeal

7.17 The claimant appealed the decision and findings of Mark McCausland on 16 October 2018.

7.18 The grounds of the appeal were that:-

- (a) he did hold the nail gun vertically,
- (b) during the recent training that the requirement to hold the nail gun with both hands was not addressed,
- (c) even if he were partially at fault that dismissal was too severe given his length of service and clean record, and
- (d) the nail gun was defective about which he had complained and the respondent was unwilling to admit the same.

7.19 The appeal hearing took place on 23 October 2018 and was heard by Mark Whitby.

7.20 Mark Whitby upheld the decision to dismiss the claimant for gross misconduct.

- 7.21 In advance of the appeal hearing Mr Whitby did not provide the claimant with copies of the witness statements nor meet with him before hand to inform him of their contents as the LRA recommends in its Code of Practice.
- 7.22 Nor did Mr Whitby provide the claimant with a copy of the minutes of the disciplinary meeting as the LRA Code of Practice also recommends.
- 7.23 The tribunal, having weighed up the evidence carefully, concluded that the appeal hearing was carried out fairly and cured the earlier defects. In so concluding the tribunal had regard to the following matters;-
- (a) The claimant appealed the decision on four specific grounds.
 - (b) In the letter of invitation to the appeal hearing the claimant's four grounds of appeal were set out. The letter also informed the claimant that if he wished Mr Whitby to consider anything further that he let him know before the appeal hearing. It further gave the claimant the opportunity to bring to the appeal hearing any paperwork or other evidence that he wished Mr Whitby to consider. The claimant was also informed of his right to be accompanied.
 - (c) There was therefore not any limit imposed on the matters that the claimant could raise as part of his appeal.
 - (d) At the appeal Mr Whitby went through the four grounds of appeal relied on by the claimant. The claimant was allowed to comment on each ground as he wished.
 - (e) Though the claimant was asked at the appeal if he had anything further to add he did not add anything.
 - (f) The claimant did not raise any issue about the procedure at the disciplinary hearing or that it had regard to matters that it should not have had or failed to have regard to matters it should have taken into account and therefore while the failure to provide minutes of the disciplinary hearing to the claimant is an important matter as the LRA Code of Practice makes clear, it did not have any practical bearing on the claimant's appeal and ability to raise any matter he considered relevant.
 - (g) At the hearing of this claim the claimant did not make any criticism of the respondent's failure to provide him with a copy of the minutes of the disciplinary hearing and this failure by the respondent did not have a practical effect and thus did not compromise the fairness or thoroughness of the appeal hearing.
 - (h) According to the minutes of the appeal hearing, which were not challenged, the only comment related to the two witness statements, not provided to the claimant, was a comment by Mr Whitby that in the witness statement of Aurimas Stilpa there was a reference to nails sticking out of the side of the pallet on which the claimant was working. Mr Whitby, according to the minutes, stated that the evidence from Aurimas Stilpa indicated that the pallet making process that day was dangerous and that insufficient attention and time given was taken. Despite Mr Whitby's comment about a dangerous

process and a lack of attention and time given to the work he did not make any findings in relation to either of these matters in his decision. Rather his conclusion on the point was much more limited, "... There were actually several nails sticking out of the side of the pallet which is evidence that the nails were not being fired vertically." That comment seems to the tribunal to be a not unreasonable comment that Mr Whitby was entitled to make but it does not appear to have been the crucial point in the decision to uphold the dismissal of the claimant.

- (i) The import of this is that the respondent's failure to provide the witness statements to the claimant or inform him of their contents before the disciplinary hearing, as the LRA Code of Practice recommends, while a noticeable failure did not have a significant effect on the claimant's ability to conduct his appeal in a fair manner.

Fairness at the Appeal Hearing

- 7.24 The tribunal considers that the defects in the investigation and disciplinary hearing identified above were either not present at the appeal hearing or were not relevant to the appeal.
- 7.25 There was not any evidence before the tribunal of involvement of any other person in the appeal decision made by Mr Whitby and specifically any involvement by either John Hill or Tony Smith.
- 7.26 There was not any doubt from the CCTV footage that the claimant had used the pneumatic nail gun with one hand on a number of occasions on 20 September 2018, including immediately before he was injured.
- 7.27 Whilst the claimant disputed that he was ever trained or instructed to use both hands when using a pneumatic nail gun there was evidence before the appeal panel from Michael Jeffrey, who is not an employee of the respondent, that he had so trained the claimant and that had the claimant not followed that instruction he would have failed the training.
- 7.28 At the appeal hearing this evidence was capable of being accepted. In passing the tribunal would say that it found Mr Jeffrey's evidence to it compelling.
- 7.29 At the appeal hearing the claimant was given the opportunity to address this piece of evidence. Apart from a denial of having received such training the claimant did not advance any evidence or argument in support of his contention. If he were right that the training in the use of the pneumatic nail gun did not instruct operators to use both hands then such evidence should have been available from other operators.
- 7.30 Though the claimant has firmly maintained the view that the pneumatic nail gun was defective and that he had reported the same there was not any persuasive evidence to support either contention. Indeed what evidence that was available in relation to whether the gun was defective or not tended to undermine that assertion.

- 7.31 The description of the defect which the claimant gave of the pneumatic nail gun jamming or firing out two nails does not seem to be consistent with the claimant's account of a single nail going astray and injuring him on 20 September 2018.
- 7.32 There was not any evidence before the tribunal that Mr Whitby did not approach his task in hearing the appeal with an open mind or was not thorough. Indeed the evidence suggests the contrary.
- 7.33 The tribunal is satisfied that the respondent complied with the statutory dismissal procedures.
- 7.34 The tribunal therefore finds that the respondent's dismissal of the claimant was not unfair and his claim for unfair dismissal is dismissed.
- 7.35 The parties had properly agreed at the outset that if the claimant failed in his claim for unfair dismissal that his claim for notice pay would also fail. Accordingly, the tribunal dismisses the claimant's claim for unpaid notice pay.
- 7.36 If, however, the tribunal is wrong in concluding that the appeal hearing cured the earlier defects in the investigation and disciplinary hearing and that the dismissal is deemed to have been procedurally unfair the tribunal is clear in its view that had proper procedures been applied the claimant would have been fairly dismissed. For there is not any doubt that at the time the claimant sustained his injury he was using one hand only to operate the pneumatic nail gun which is a breach of what he was trained to do and amounts to a breach of the respondent's health and safety procedures.
- 7.37 Had any award of compensation been considered it would have been reduced to nil.

Employment Judge:

Date and place of hearing: 12, 13, 14 and 27 November, 13 December 2019 and 29 January 2020, Belfast.

Date decision recorded in register and issued to parties: