EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		CASE NO.
EMPLOYEE	*Appellant*	UD1158/2009

against

EMPLOYER *Respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr E Handley
Ms M Maher

heard this claim at Dublin on 12th April, 24th and 25th November 2010.

Representation:

Claimant: Mr Stephen O'Sullivan BL instructed by
Sheridan Quinn Solicitors, 29 Upper Mount Street, Dublin 2

Respondent:

The determination of the Tribunal is as follows:

Opening Statement on behalf of the Respondent

The respondent had employed the claimant since 1984. An incident occurred on 1st February 2008 that ultimately resulted in the dismissal of the claimant.

The claimant had been scheduled to work from 7am to 7pm but the claimant arrived at 11.23am instead. The claimant admitted that his late arrival was due to his own error. The respondent had accepted the claimant's explanation and this late arrival did not result in any disciplinary sanction and did not form any part of the decision to dismiss the claimant.

The claimant and a female colleague were seen to leave the workplace at around 2pm. The female colleague did not return for work and claimed *force majeure* leave. The claimant telephoned the duty section at 3.15pm to say his car had been clamped near the Castle Centre in Clondalkin and as a result he did not expect to be back to work on time. The respondent concluded that the claimant fabricated the story that his car was clamped and as a result there has been a fundamental breakdown in trust and therefore the claimant was dismissed. For the respondent, it was clearly emphasised to the Tribunal that the reason for the dismissal not the failure to return to work on time but was because the claimant had attempted to deceive the respondent employer with a false

account as to why he had not returned on time and had supported this false account with bogus documentation and had further compounded his offence by meeting challenges to his initial account with additional attempts at deceit such that the relationship of trust fundamental to the employment had been irretrievably destroyed.

The claimant attended a preliminary meeting held on 14th March 2008 where the claimant was asked to explain his unauthorised absence. The claimant was then suspended on full pay pending investigation. The Superintendent of Duty Section carried out an initial investigation. In a letter dated 26th March 2008 the claimant was advised that disciplinary proceedings were being commenced with his dismissal being a possible outcome. An oral hearing took place on 10th April 2008. The claimant attended the oral hearing accompanied by two trade union representatives. A recommendation to dismiss the claimant was made. The Human Resources Manager confirmed the decision in writing to the claimant.

The claimant appealed the decision to dismiss to the Human Resources Director. At the appeal meeting with the Human Resources Director the claimant introduced extra matters. As a result these matters were investigated by the Head of Human Resources Programmes who then made a report to the Human Resources Director. On consideration of all the evidence the Human Resources Director affirmed the decision to dismiss the claimant in a letter dated 3rd March 2009.

The respondent admitted that the claimant had been dismissed and stated that this decision had been reached at the end of a lengthy and sophisticated disciplinary process which was procedurally fair.

Opening Statement on behalf of the Claimant

For the claimant it was accepted that he had been due at work at 7am on 1st February 2008. The claimant actually arrived at approximately 11.20am. The late arrival of the claimant was principally caused by an innocent error for which he accepted full responsibility. The claimant's usual shift was from 11am to 11pm, but he had requested a change to a 7am start. This change had been granted but he then forgot about the change and drove to work for his usual time. The claimant was further delayed by heavy traffic by approximately 20 minutes. The claimant had given this explanation to the Superintendent of Duty Section who appeared to have accepted the claimant's explanation.

The claimant left work on his meal break which was scheduled from 2pm to 3pm. The claimant left by car and went to Clondalkin to purchase items from a hardware shop. The claimant had acquired a property which he was renovating with the intention of reselling for gain. While the claimant was making his purchases his car was clamped. Upon his return to the vehicle the clamper asked for€150.00 before he would release the car. The claimant had insufficient money in his possession andso he took a taxicab to his home in Meath to get a cheque to pay the clamper. It was only byapproximately 7.45pm that the claimant had finally returned to his station at work. The claimanthad telephoned work earlier to explain what had happened and that he would be delayed.

The claimant accepted that the clamping receipt, which he produced to his employer, was a bogus receipt. A bogus clamper was operation in Clondalkin at that time and the receipt, which the claimant produced to the respondent, was the receipt given to him by that clamper. The claimant denied any attempt to mislead the respondent. The claimant had worked for the respondent for 25 years and the job was his life. The claimant sought reinstatement or re-engagement as his preferred remedies.

Respondent's Case

The first witness for the respondent was the Area Manager. The Area Manager had been at work from 3pm to 11pm on 1st February 2008. The first time the Area Manager saw the claimant was when he met the claimant coming out of the staff canteen at approximately 10.25pm. The claimant said to the Area Manager that 'I am out of here'. The Area Manager replied 'you are on from 11am to 11pm'. The claimant said he had a swap to 7am to 7pm. The claimant did not mention his problem. The Area Manager had heard about the claimant's telephone call stating that he had beenclamped. Normally, if an employee was absent he would tell the Area Manager upon his return.The claimant did not and the Area Manager did not ask him about his absence.

The Superintendent of Duty Section was the second witness for the respondent. The Superintendent of Duty Section wrote to the claimant on 4th February 2008 asking for an explanation of his absence from work on 1st February 2008. The claimant enclosed with his letter of reply a copy of the duty roster scheduling the claimant as due to work from 11am to 11pm. The Superintendent of Duty Section investigated and found that the duty roster had been changed at the claimant's request.

The Superintendent of Duty Section had been shown a photocopy of the cheque which the claimant said he had written to pay the clamper. The Superintendent of Duty Section thought it strange that the amount of the cheque had been written in words but the amount had not been written in numerals. The receipt from the clamping company appeared dubious. The clamping company was known as a large and long established firm but the receipt was hand-written on a jotter of the same type as the ones used in the respondent's premises. The clamping company's logo looked like a photocopy or stamp. There appeared to be two different handwritings on the receipt. The Superintendent of Duty Section did not see the original receipt but only a photocopy of it.

The Human Resources Manager gave evidence that the claimant and a female colleague had been observed going to lunch at approximately 2pm by car. At some time between 3pm and 4pm a staff member received a telephone call from the claimant stating that he would be late back from lunch as his car had been clamped. Approximately ten minutes later the female colleague telephoned the respondent to say that she would not be returning to work as one of her children had suffered an accident.

A meeting was convened for 14th March 2008 to discuss the claimant's absence on 1st February 2008. The claimant was given an opportunity to explain and add to the claimant's written response. The Human Resources Manager stated that if a staff member had a genuine reason for being absent then the employee would be given the opportunity to work back hours. The crucial issue for him was that he had noticed that the receipt provided by the claimant was not genuine. The claimant did not have anything in writing documenting a complaint made to the Gardaí. The claimant made numerous accusations of having been bullied and harassed by the Floor Operations Manager. The Floor Operations Manager had observed someone was missing and the claimant took exception to this. After a short break the meeting reconvened at approximately 12.15pm and a decision was taken that the claimant should be suspended on full pay pending a full investigation.

The Human Resources Manager was cross-examined about the minutes of the meeting on 14th March 2008. The claimant's female colleague was given *force majeure* leave. The Human Resources Manager JH stated he did not recommend that the claimant be dismissed but that he did write the memo stating that it was his belief that "a serious disciplinary sanction up to and including the threat of dismissal must be served upon him." Nine hundred members of staff were employed at that workplace and the Human Resources Manager JH said he did not engage in telephoning

people. The Human Resources Manager JH said he was not aware on 14th March 2008 that the claimant had a bullying and harassment case before the High Court.

The Human Resources Manager ST told the Tribunal that he became involved in the case when he received papers from Human Resources Manager JH. His first function was to read the papers to establish the facts. The Human Resources Manager ST sent a letter dated 26th March 2008 by registered post to the claimant and allowing the claimant the opportunity to respond to the allegations set forth in the letter within fourteen days and stating that if the claimant wished to havean oral hearing the claimant was to respond within three working days of receipt of the letter. TheHuman Resources Manager ST told the claimant that the respondent did not accept the claimant'sexplanations. The claimant attended an oral disciplinary hearing on 10th April 2008 and wasrepresented by S McD National Officer, Communications Workers Union. The claimant gave twodifferent versions of what had occurred. The claimant stated that he had personal computerequipment in the boot of his car and the claimant had scanned a cheque into his computer. At theoral hearing the claimant said that he took a picture of the cheque on his mobile telephone. Theclaimant stated that JOR told him that he might have been the victim of a clamping scam. TheHuman Resources Manager ST asked the claimant to provide proof of evidence and the claimanttold him that he could send it to him. The claimant did not mention that the clamping occurred inWatery Lane and in the 14-day letter it was stated by the respondent that it was at the CastleShopping centre. The Human Resources Manager ST let the claimant know that it was a veryserious situation. He put it to the claimant that he had given a totally new account of what hadhappened and that this information was never mentioned previously. It did not seem credible to theHuman Resources Manager ST that the claimant would have taken a taxicab from Clondalkin to hishome in Meath. The Human Resources Manager ST did not know that the claimant had a case inthe High Court.

The Human Resources Manager ST was aware that the claimant had made a complaint against KD the Floor Operations Manager and that the claimant had also complained about BA in the past and that ST and MF met with him about that and also that the claimant had said that ST's notes were inaccurate. The Human Resources Manager ST formed the opinion that the claimant had provided false documents and this went to the heart of trust and confidence. The respondent placed a high emphasis on trust and confidence in its employees. After the meeting the Human Resources Manager ST sent a letter and copy to his union representative on 18th April 2008 and invited them to make amendments. If the claimant and his representative had any issues they could be addressed in writing. He sent further correspondence to the claimant and his Trade Union Representative on 30th April 2008 in which he outlined that he intended to make a recommendation for the claimant's dismissal to the Head of Employee Relations. The Human Resources Manager ST sent an internal memo to Head of Employee Relations MG in which he recommended that the claimant be dismissed. The Human Resources Manager ST sent the claimant a letter on 26th May 2008, which informed him that he was dismissed. The Human Resources Manager ST was not aware that the claimant's female colleague had asked for *force majeure* leave and he did not make enquiries about this aspect of the matter.

In cross-examination the Human Resources Manager ST stated that he was aware that bogus clampers were possibly involved when the claimant brought the matter to his attention. He had looked for documentation in the matter and none was ever presented to him. The Human Resources Manager ST asked a manager to take photographs of the area and the photographs were not shown to him. The claimant did not bring his wife forward as a witness and the claimant had three union representatives with him who were very well qualified. There was no such thing as a dismissal in An Post without a lengthy and considered disciplinary process.

In answer to questions from the Tribunal the Human Resources Manager ST stated if the claimant had requested the CE for the appeal that the policy of the respondent would have been pointed out to him. The claimant's Trade Union Representative was satisfied with his understanding of the situation. No reference was made at the oral hearing to Watery Lane and the claimant would havebeen given an opportunity to clarify the location but he did not do so.

The Plant Manager gave evidence to the Tribunal that a fund or chequebook account system existed within the respondent for the purposes of assisting staff in hardship cases. This system was known to staff and the trade unions and had been used on numerous occasions. The Plant Manager commented that had the claimant's case been presented then "without a shadow of doubt" a cheque would have issued to him in those circumstances. He was not aware of any prohibition on staff seeking loans from work colleagues. The Plant Manager had no knowledge that the claimant ever used that system.

The Head of Human Resource Programmes gave evidence that he had no involvement in this case up to the initial dismissal decision and oral appeal hearing. References were made to the respondent's disciplinary code and the appropriate authority to implement that code. The meaningand interpretation of words such as serious offence, gross misconduct, and extreme serious misconduct and their implementations were aired.

Acting on instructions from the Human Resources Director the Head of Human Resource Programmes made further enquiries into this case and submitted a report to him dated 22nd August 2008. Those enquiries included the taking of pictures in a car park and interviewing local business operators there. While there was a denial from at least one local that a bogus clamper locally, others including an identified shop owner stated that a bogus clamper was indeed active in the area. This account supported the claimant's version of events.

The Floor Operations Manager gave evidence that he had no direct control over the claimant's work. He told the Tribunal that he did not bully, harass or act in any adverse way against theclaimant. The Floor Operations Manager had no knowledge of a letter written by the claimant to thehuman resource section in 2007. That letter detailed an incident where the claimant complained ofthe Floor Operations Manager behaviour towards the claimant.

The Human Resources Director PK gave evidence to the Tribunal that he had attended an appeal hearing with the claimant who was accompanied by his union representative on 9th July 2008. He ensured that the process was fair and that he had made a considered decision. The claimant stated that his car was clamped and after this he travelled a long distance to his home to get a cheque to pay the clampers. He had the authority to overturn the decision to dismiss the claimant but he did not. He did not find the claimant's presentation credible. The Human Resources Director PK didnot believe that the claimant was clamped on the date in question. The name and number of thetaxicab that the claimant used was not available. The issue of trust was paramount for therespondent. If employees lied in an investigation it was considered a serious misdemeanour. Theissues of honesty and integrity were a key part of the success of the respondent. The HumanResources Director PK issued a dismissal letter to the claimant on 3rd March 2009.

In cross-examination the Human Resources Director PK stated that in relation to the taxicab fare the Head of HR Programmes JK mentioned a taxicab fare of €70 as being more accurate. TheHuman Resources Director PK was asked how the respondent's error concerning the taxicab farewas dealt with he said he discounted the managements estimation in reaching his decision.

TheHuman Resources Director PK was very familiar with the steps of the disciplinary procedure andemployees were rarely dismissed except for grave misconduct. It was put to the Human ResourcesDirector PK that what the claimant did was not more serious than sexual harassment, which did notalways result in dismissal, he replied that a decision had to be made on the uniqueness of eachsituation. Even though the claimant had given an explanation for his failure to attend at work hecould no longer trust the claimant. Approximately eight to ten employees were summarilydismissed in a year. A delegated authority is in place to deal with appeals. When asked whodecided that he would deal with the appeal he replied that was the decision subject of the board.The Human Resources Director PK dealt with all appeals. The claimant spent a considerableamount of time dealing with registered post and this was a very sensitive area.

In answer to questions from the Tribunal the Human Resources Director PK stated that the claimant had made the point that he believed that it was a dismissible offence to borrow money. The Human Resources Director PK did not accept that this was a dismissible offence. When asked if it was an offence of any kind to borrow from a colleague he replied that it depends. He stated generally that borrowing from a colleague was not a dismissible offence. There was nothing in the disciplinary code regarding borrowing as far as he was aware. The Human Resources Director PK did not think that if the claimant had borrowed €150 it could expose him to the disciplinary procedure. TheHuman Resources Director PK accepted that if an employee had complained that a fellowemployee wanted to borrow money the respondent would investigate it. When it was put to him thatthe claimant gave a reason that this was too much money to borrow as it would put him at risk ofdisciplinary proceedings he replied that he did not consider that a serious matter. He did not acceptthe claimant's explanation of this. It was not a dismissible offence for the claimant to borrow money form a work colleague. If someone did it with menace it was a different matter. The respondent did not give temporary loans in certain circumstances. He was not aware of the policy inthe respondent regarding the granting of loans to employee. He accepted that the claimant had madecontact with the respondent at 3pm. The claimant was not being granted leave.

The Human Resources Director PK had been given a file regarding the claimant's dismissal and was given numerous explanations and changing stories. The claimant had alleged that the clamping incident had occurred in Clondalkin. There was no record of the claimant having made a complaint to the Garda Station but he accepted that a call was made to the Garda station in Clondalkin.

The Human Resources Director PK accepted the contribution that the claimant had made in his work over the years to the respondent.

Claimant's Case

The first witness for the claimant was his wife. She gave evidence that by 1st February 2008 she and the claimant were going through a separation process. That process had not given rise to a fraught atmosphere between them. At that time they were sharing the same property with the claimant residing in the gate lodge and the claimant's wife occupying the main dwelling. While she wascapable and qualified to drive the claimant's wife rarely drove for what she described as health andwelfare reasons. In giving her evidence to the Tribunal she stated that she had nothing to gain fromdoing so. She asserted that as a result of the respondent's decision to dismiss her former husbandtheir domestic situation had developed in a way that was not planned.

On that day her ex-husband departed her house no later than 10.00am after finishing breakfast. At

15.10am she received a telephone call from him informing her that his vehicle had been clamped and seeking monetary assistance. Approximately one hour later the claimant arrived back on the property in the company of a taxicab driver. The trio fell into conversation and shared some tea and sandwiches for a period of approximately twenty minutes. The claimant's wife gave the claimant some cash to allow him to pay for the round trip. She also furnished him with a cheque. While the claimant also kept a credit card in her house the claimant neither asked for it nor she did she offer it.

The claimant's wife was never asked by the claimant to support the version of events he had presented to the respondent in this case. The respondent also never contacted her as it investigated and then disciplined her ex-husband. Her recollection of events that day reflected what she actually experienced and what had happened in relation to this case.

The claimant then gave evidence on his own behalf. The claimant commenced employment with the respondent in 1984 and had worked as a postal sorter at its main centre for the Dublin region. He was chiefly engaged in the handling of registered post and generally worked from 11am to 11pm. The claimant told the Tribunal that at no time during his employment with the respondent was he ever made aware of nor had he any knowledge of a loan or chequebook system for staff for the purposes of "hardship cases". On the contrary it was his belief that seeking money from other employees was an offence for which he could be dismissed.

The claimant had some problem relating to the payment of wages for work done in December 2007 and so he acted on a suggestion from a colleague and applied to work from 7am to 7pm on certain shifts. Those shifts included 31st January 2008 and 1st February 2008. Despite that arrangement the claimant worked from 11am to 11pm the previous day without comment and reported for work at 11.23am on 1st February 2008. A swipe card system was used to record the working times of employees. However due to a local arrangement and the way the system was designed the claimant only used that device when recording the first of his two allowable breaks. He did not swipe in or out for his break on 1st February 2008 when he vacated the premises shortly after 2pm. Road and traffic conditions prevented his punctual arrival at work that morning. By that date he had made complaints to the respondent that were ongoing against the floor operations manager who supervised him. The claimant had been dissatisfied with the lack of progress and indeed attention that the respondent appeared to be giving to his complaints.

It emerged during the claimant's evidence that three car parks were involved in the ensuing events. While the claimant was familiar with the area in question he could not identify and name the different roads and locations there. He vacated his post on a break at approximately 2.12pm and drove to a car park called Watery Lane and spent some minutes there conducting purchases. When he returned to his vehicle he found it to be clamped. The clamper told him what the release fee was and knowing he did not have enough to discharge the fee he telephoned his wife to seek assistance. He also telephoned the respondent to appraise it of the situation and a male voice answered his call. The claimant thought it was the person against whom he had made a complaint of bullying. Based on that belief the claimant terminated the call and contacted the duty section who in turn directed him back to the plant manager. He then contacted the Human Resource Manager and left a message on his voice mail telling him of the current situation. He never received a response to that call.

En route back to the car park the claimant made a copy of the cheque he was using to pay the clamper. He was not used to doing writing cheques he omitted to write in the amount in numerals. This was not the first time he neglected to do so. While expressing his annoyance at receiving that form of payment the attendant took the payment and issued a receipt to the claimant. It was some

time later that he realised that this receipt contained certain inaccuracies. These included the wrong location of the clamping incident and the registration number of his vehicle. There also appeared to be at least two different types of handwriting on that document. However at that time it did not occur to him that he was a victim of a possible scam. The respondent in their case against him used the incomplete cheque and the receipt to further their contention that he acted in such a manner as to breach their trust and confidence in him as an employee. However had originally the respondent had "made of laugh" of the way he wrote his cheque.

The claimant returned to his work place at 6.55pm and reported for work at 7.45pm and remained there until 10.28pm. The work area manager approached him at 10.25pm and mumbled something about the swipe card and the roster from 7am to 7pm. Another attempt to contact the Human Resource Manager the following morning proved fruitless. The claimant wanted to offer to work extra hours to make up for the ones he lost due to this unanticipated event. A letter was then sent to the claimant dated 4th February 2008 from the Superintendent of Duties seeking an explanation for his movements on 1st February 2008. He replied the next day explaining his situation. As a result of a discussion between the claimant and that Superintendent in early March the claimant felt that the issues surrounding 1st February 2008 had now been "done and dusted".

Further correspondence ensued between the parties prior to a meeting between the claimant, the Plant Manager and the Human Resources Manager on 14th March 2008. The claimant had been informed that disciplinary measures could possibly be taken against him. The correspondence included the claimant's receipt and a copy of his cheque. The receipt indicated that the clamping incident had taken place in the Castle Shopping Centre. The receipt named a particular parking company. The parking company stated that it did not operate in the area where the alleged clamping took place nor was the receipt one of theirs. The parking company also stated that payment had not been received by them for that clamping incident nor had it any record for the registration number as a given on the receipt.

The claimant described both the content and result of that meeting as "a bolt out of the blue" and added that it was a heated exchange. The claimant formed the opinion at that meeting that the respondent was acting in a way so as to get the manager against whom the claimant had made a complaint "off the hook." The respondent indicated to him that it had serious doubts about the veracity of his submitted documentation. In turn the claimant aired his view that there was a conspiracy against him due to his complaint against a manager. At the end of the meeting the claimant was suspended with pay pending the outcome of disciplinary procedures. The suspension was based on the grounds that the claimant had allegedly provided the respondent with false documentation in support of his explanation for unauthorised absence from duties on 1st February 2008. The minutes of that meeting were not forwarded to the claimant. At no time during that meeting did the claimant mention his trip home to collect the money for the taxicab fare. The claimant subsequently contacted the local Garda station to enquire about clamping in the area. The claimant submitted a record of that telephone call. Mention was made of bogus clampers possibly operating in the area.

In a letter dated 26th May 2008 a human resource manager informed the claimant that the respondent had decided to dismiss him. No specific reasons were stated for that decision. That letter followed an oral hearing into his case on 10th April 2008 and a recommendation to the head of employee relations that this action be taken. The Human Resources Director chaired an appeal hearing against that decision on 9th July 2008. Subsequent to that the claimant submitted photographs of a car park referred to at that hearing, copies of other cheques and other documentation to that director. The claimant also identified a local shop owner who could verify

that a non-Irish person had been operating a bogus clamping operation in the area.

The Head of Human Resource Programmes acting on the director's instructions made enquires into the contents of that new information and submitted a report to him. His memo appeared to add credence to the claimant's version of events and the respondent's shortcomings in their investigation. The claimant felt that the Head of Human Resource Programmes had taken photographs at a third car park at Monastery Shopping Centre which was close but unrelated to where he had been clamped. The claimant received a letter from the Human Resource Directordated 3rd March 2009. In the letter the Human Resource Director said that he had reviewed all ofthe information related to the case and after giving it careful attention he had decided to reject theappeal and that the decision to dismiss stood based on the grounds that the respondent could nolonger have trust and confidence in the claimant. The claimant's employment was terminated threedays later.

In hindsight, the claimant acknowledged that he had been the victim of a scam. Nevertheless he maintained that he had done nothing wrong to deserve the sanction of dismissal. He stood by his version of events and pointed out that the respondent had made several errors in dealing with his case. These included focussing on the wrong car park, using a wrong taxicab fare, lack of response to his offers and explanations and conducting an incomplete and improper investigation.

Determination

It was admitted by the respondent that the claimant had been its employee and had been dismissed. It therefore fell to the respondent to satisfy the Tribunal that the dismissal was fair in all respects.

Both parties accepted the fact that the claimant had attended at work considerably later than scheduled was due to mere inadvertence by the claimant and formed no part of the grounds of the dismissal and therefore the Tribunal does not involve itself in this particular matter any further.

The Tribunal heard evidence relating to the alleged failure of the claimant to clock out when he left the premises on his lunch break and also evidence of local practices and the alleged lack of a requirement to clock out at certain times. The Tribunal does not seek to resolve this issue as it was the evidence of the respondent that the claimant was seen to leave and the time of departure of the claimant was therefore known to the respondent.

The case was opened by the respondent stating that the claimant and a female colleague had left the workplace at around the same time and both had made excuses for not returning from work; each excuse made in close succession to the other. This matter was presented as if it was a matter of some moment. The Tribunal was therefore surprised to discover that no disciplinary was ever attempted against the female colleague and that her application for force majeure leave was granted by the respondent without demur. The Tribunal therefore concludes that the presentation of this matter was an attempt by the respondent to create a baseless imputation against the claimant that he had spent his time with his colleague and that was the real reason why he had not returned to work on time.
The respondent stated that the failure by the claimant to return after to work after lunch in a timely fashion was not the reason for the dismissal but rather the alleged deceitfulness of the claimant in fabricating an excuse. The Tribunal understands that the workplace is a large one with many employees and that it was a practice to allow employees to make up missed hours at a later date.

Nonetheless, the Tribunal is somewhat surprised at the impression that was created in which an employee whose car was clamped delaying his return to work could decide to take a taxi quite some distance to his home, have a light meal and conversation with his wife and taxi driver, regard the day as having been wasted through no fault of his own and return in his own good time, some seven hours later, confident in the belief that he could make up his hours and pay at a later and more convenient time and that all would be acceptable to his employer. Neither the claimant nor the respondent appeared to take issue with this picture of a rather relaxed work environment and therefore the Tribunal approaches this case on the basis that this behaviour was either acceptable or at least not germane to the case before this division.

The Tribunal also heard mention of the "McNeill procedures" which the Tribunal understands to refer to some agreement which prescribes how certain disciplinary matters may be managed and in particular these procedures seem to preclude the respondent from taking into account matters which may have been part of an employee's prior disciplinary record, for reasons and according to criteria which were not explained. The respondent assured the Tribunal that these matters, whatever theymay have been, were not taken into account and the claimant did not disagree with this contentionand so the Tribunal is content to respect this compartmentalisation of the issues in reaching itsdetermination.

The Tribunal was also told by the parties that the claimant had initiated proceedings in the High Court claiming that he had been harassed by a manager employed by the respondent. It is the practice of the Tribunal not to hear cases in which matters of relevance to the Tribunal's determination are coming before the courts. The Tribunal was assured by both parties that thematters before the High Court were entirely separate and distinct to those before the Tribunal and itwas on the basis of this assurance that the Tribunal agreed to hear this case rather than adjourn itpending the outcome of the High Court proceedings. The final witness in this case was the claimanthimself and the Tribunal was surprised to hear, towards the end of his evidence, his assertion thathe had been unfairly dismissed by the respondent because he had pursued a case against thismanager before the courts and the matters the subject of this case were of a piece with what hadgone before. The Tribunal is satisfied that it can fairly reach a determination without coming to anyfinding as to the alleged motive of the respondent or as to there being a continuing pattern from thematters the subject of the High Court action.

The claimant had sought to excuse his failure to return to work on time on the basis that he had been clamped. The respondent almost immediately thereafter initiated a process of inquiries and disciplinary appeals that continued for approximately a year and a half prior to the claimant being dismissed with finality from his employment. The respondent claimed that it did not believe the claimant's explanation and that the explanation was a fabrication and involved the creation of a false document, specifically the clamping receipt furnished by the claimant. It was this belief thatforms the essence of the respondent's purported reason for the dismissal of the claimant.

In reaching a determination as to whether or not a dismissal has been unfair the Tribunal applies a reasonableness test. The Tribunal does not seek to substitute for the decision actually made by the employer the decision which the Tribunal estimates it would have made had the Tribunal been the decision maker. Instead, the Tribunal asks if the employer has acted reasonably in reaching its decision. Therefore the Tribunal has considered the rationale of the respondent for its decision as to the credibility of the claimant and the basis for its conclusion that the claimant had endeavoured to deceive the respondent with an involved lie told persistently and supported by the fabrication of a document.

The claimant stated to his employer that he had been clamped and furnished a document which he stated had been given to him by the clamper as a receipt for the payment of the clamping fee. On foot of this explanation the respondent began its enquiries and in reply to the respondent's further queries and contentions the claimant provided additional explanation. The respondent has characterised these additional explanations as the changing of his story by the claimant in a manner justifying an adverse disciplinary finding. The Tribunal rejects this characterisation as unreasonable.

The claimant excused his absence by reason of his car having been clamped and provided the clamping receipt in support. The respondent made enquiries and discovered that the clamping company named on the receipt did not operate in the area and that the receipt was bogus. The claimant made his own enquiries and concluded that he had been to victim of a bogus clamper. The Tribunal finds that there was no inconsistency in the claimant's explanation that his car was clamped and with the additional information that the clamping was carried out by a bogus clamper.The Tribunal finds that the production of a bogus receipt to the respondent is wholly consistent withthe claimant's excuse of having had his car clamped by a bogus clamper. The Tribunal regards thisline of reasoning by the respondent as lacking sufficient rationality and failing to satisfy thereasonableness test.

It was a point repeatedly made by the respondent that the explanation provided by the claimant could not be independently corroborated in all its aspects and therefore the respondent chose to disbelieve the uncorroborated elements of the claimant's explanation. The Tribunal finds as amatter of fact that the claimant's explanation, in every aspect where the explanation was capable ofbeing independently tested, was supported by the independent test and in no material respect did independent testing indicate that the claimant's case was a falsehood. It is perfectly normal for individuals to go about their ordinary lives in a manner which is not capable of independentcorroboration in all respects. The Tribunal finds that there was no aspect of the claimant's explanation which a reasonable employer would expect to be supported by independent corroboration which was not so corroborated. The respondent drew an obviously perverseconclusion in deciding to regard as a lie an explanation which was supported by independentcorroboration at all points where independent corroboration might reasonably be expected to beavailable. It is a notable feature of the respondent's reasoning that the employer was entirelyunembarrassed by drawing its own conclusion unsupported by any corroboration whatsoever, whilemaking a major point of a mere partial lack of corroboration by the claimant.

One element of the respondent's rationale was that the claimant alleged he had paid a taxi fare to return home well below what the respondent was being quoted. The claimant obtained further evidence from the taxi regulator which corroborated the claimant's figures and as a result the respondent, a very large state enterprise, discovered that it was being severely overcharged for taxiservices by its own supplier. The Tribunal notes the inconsistency of the respondent in regardingthis test of the claimant's credibility to be of great significance when an adverse conclusion couldbe drawn and to be of no significance when it supported the claimant's case.

The respondent examined the receipt and noted that it mentioned a particular location. The respondent assumed that this location was where the incident occurred and examined the locationand found that the facts did not correspond with the claimant's description and so drew a conclusion adverse to the claimant's credibility. At no stage did the claimant state that the locationexamined by the respondent was actually where the clamping incident occurred, nor

was theclaimant asked. When the claimant realised where the respondent had conducted its examinationthe claimant advised the respondent that this was not in fact the locus in quo and clearly identifiedthe correct locus to the respondent. The respondent's own investigator then found, at the correctlocus, that there were signs warning of clamping as the claimant had described, that the amount ofthe fine was exactly what the claimant had said he had paid and that there was no telephone contactnumber provided on the sign as originally contended by the claimant . Furthermore the respondent'sown investigator spoke with a shop-keeper in the correct area who confirmed that there was indeed a bogus clamper operating in the area and that this person appeared to be of Eastern European origin, all such details entirely consistent with the claimant's description of events. The Tribunal finds that the respondent failed to have proper regard for this corroborating evidence and having reach a sceptical conclusion as to the claimant's credibility, based upon the respondent's own errorand unwarranted assumption, the respondent persisted in its original conclusion, merely changing the rationale for the decision.

A ground for scepticism advanced by the respondent was that the bogus receipt allegedly provided by the clamper was written on what appeared to be note paper of a type used in the claimant's workplace. The Tribunal is satisfied that the notepaper in question is of a type, and carries a brand logo, that is widely available in shops throughout the country and is not of sufficient particularity to the workplace to justify an adverse inference against the claimant.

The claimant alleged that in providing a copy of the cheque he variously described himself as using a printer, scanner, photocopier and camera. The respondent claims to have regarded this as a changing explanation indicating the claimant was being untruthful. The Tribunal is aware that there is a commonly available device widely owned by domestic users as an attachment for personal computers known as a "3-in-1 printer", which combines a printer and scanner so that by scanning in the document and printing it out it can function as a photocopier. The claimant gave evidence to the Tribunal explaining that he used the camera on his mobile telephone to copy the cheque and used this "3-in-1 printer" to print out the copy. This account involves no contradiction proving dishonesty. It is normally regarded as an indication of truthfulness that a witness can furnish further and more detailed explanation, adding extra information and describing matters in different ways without actual contradiction. The more rigidly a witness sticks to one unvarying narrative the more suspicion is justified. The respondent took exactly the wrong approach.

Further grounds for scepticism advanced by the respondent were that the claimant could no longer identify the taxi driver he used and that the Garda station had retained no record of a report given over the telephone by the claimant concerning him being the victim of a bogus clamper. The Tribunal finds it perfectly normal and credible that a person who has hailed a taxi on the street would not be in a position to identify the driver or taxi firm at a later date. The Tribunal is not in the least bit surprised by the lack of a record being kept by An Garda Síochána of such a telephone conversation and notes that the respondent was not in possession of any evidence to suggest that such a record ought to exist. The respondent accepted that the claimant provided it with a record from his own bill of a telephone call from the claimant's telephone to the relevant police station atthe relevant time and the Tribunal is mystified to know what else the respondent thinks the call wasabout or what else the claimant could furnish to his employer.

In reaching a final decision terminating employment of the claimant the respondent found it stretched credulity that a bogus clamper would give his mobile number and return to unclamp the vehicle at a later time to unclamp the vehicle and accept payment risking being caught by the police. The Tribunal is of the view that it is commonplace for persons engaged in a criminal enterprise to be at some risk of being apprehended. The respondent advanced no credible

alternative explanation as to how a person who has attached a clamp to a car with the intent of obtaining money might do so without awaiting the return of the driver. The respondent did not possess any evidence that the methodology of this particular bogus was abnormally risky and no opportunity was presented to the claimant that would have allowed the claimant the opportunity to rebut this argument, in breach of the principle of *audi alteram partem.*

Throughout a year and a half of investigation, hearings, correspondence and appeals the respondent varied the rational for its original decision while persisting with the original decision, which was to disbelieve the claimant notwithstanding the fact that at every point where his explanation could be independently checked it was verified and at no point did the respondent obtain any corroboration of its own entirely speculative hypothesis, that the claimant had engaged in an elaborate deceit.

Even had the claimant lied about his reasons for not returning to work on time, and persisted in such a lie the Tribunal does not accept that such a deceit goes essentially to the relationship of employer and employee or could be regarded as constituting gross misconduct.

In some cases where there is an allegation that there is deceit by an employee as to his comings and goings from work, particularly where there is a question regarding clocking in and out, there is the suggestion that the employee has done so in order to obtain payment for hours not worked. The Tribunal finds that there was no valid basis for such a concern in this case since the employee was seen to leave.

It is appropriate that an employee make all reasonable efforts to maintain good relationships in the workplace. The Tribunal is satisfied that the claimant contributed to his dismissal in that his attitude and behaviour was less than fully appropriate.

The claim under the Unfair Dismissals Acts 1997 to 2007 succeeds and the Tribunal orders that the claimant be re-engaged from a date six months after the date of dismissal. The Tribunal finds that the claimant was dismissed from his employment on 6th March 2009. The Tribunal makes a non-binding recommendation that the claimant be redeployed within the respondent's organisation as it is clear that the claimant has a difficulty in responding to his managers.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)