EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
		MN1330/2010
EMPLOYEE	- claimant	UD1383/2010

Against

EMPLOYER - respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms O. Madden B.L.

Members: Ms A. Gaule
Mr J. Maher

heard this claim at Dublin on 23rd November 2011 and 17th May 2012.

Representation:

Claimant: Mr. Owen Keany BL, instructed by Mr. David Tansey, Becker Tansey & Co, Solicitors, Jubilee House, New Road, Clondalkin, Dublin 22

Respondent: Mr. Michael McNamee BL instructed by
Ms Vivienne Matthews O'Neill, DAS, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is a retail outlet that supplies baby care products. It has two stores, one located in the south of the city and one store on the north of the city. The claimant worked in the south city store.

The manager of the south side store is BOC. In 2008 the claimant enquired from BOC if she could borrow a car seat from damaged stock. The car seat was required for her grandson. BOC asked the Managing Director (PK) if the claimant could take one out of the damaged stock but PK refused this as it was unsafe but said the claimant could borrow a seat out of stock. He would have indicated to PK that the loan was for a short time. His recollection was that it was for the short term, possibly one or two days or even possibly for some emergency.

BOC's job entailed logging every item leaving the store on to the stock system. Assistants also help him in this role. Staff purchases are also logged on to the system and an order is created.

BOC could not recall if the claimant had ever borrowed any other items during her tenure. It was not the procedure for staff to borrow items.

There was no record of the car seat being logged out of the store. It was possibly human error that it was not logged out on the stock system.

BOC was not asked to give a written statement on the matter.

PK had a vague recollection of a conversation he had with BOC in relation to the claimant's request to borrow a car seat. This was a rare request in the store. He contended that an item would not be lent out forever. His recollection was that BOC said the car seat was possibly for an emergency situation or for a short period of time. He would expect a loan to be for no more than a week or so.

PK recalled some discussion around the claimant's wages but never felt the claimant was aggrieved. The claimant had been given a contract of employment. Unfortunately, approximately six months after the termination of her employment, PK shredded her contract. PK accepted that the claimant had not been given disciplinary procedures.

On 1st February 2010 the claimant called into his office. She told him that she was going through an acrimonious separation with her partner. He offered her support in the circumstances. She told him that she had borrowed a car seat, PK had vague recollection of lending the car seat to the claimant and expected that she would return it. The claimant said that the car seat had been used, it was lent on to a friend and that friend subsequently lent it on to a friend's mother. The claimant contended that she had forgotten about it.

PK thought about it during the day. It did not make sense to him that the claimant had forgotten about the car seat. She had it for approximately a year and a half. He did not carry out a stock check at the time. It was possible that the item had been logged on to the system and possibly deleted in error. He did not speak to BOC again about the car seat loan. He spoke to TK, his father and Director of the company. TK suggested they talk to the claimant the following day to tease it out.

On 2 February 2010 PK asked the claimant to come into the office. She told TK what she had told PK the previous day. Both TK and he discussed the claimant's version of events. It still did not make sense as there were too many opportunities for her to forget about the car seat. While one can forget about something one can also remember. He contended the claimant should have remembered that the car seat had been borrowed when she lent it on. At no stage did the claimant offer to pay for the car seat. Both PK and TK felt they no longer could trust the claimant. He believed the claimant made a conscious decision to forget about the car seat. While PK had an input into the decision to dismiss the claimant, TK made the decision to terminate the claimant's employment that day.

At that meeting TK told the claimant that he was terminating her employment, there had been a breakdown in trust, her notice was being paid, that she would be supplied with a reference and to leave the premises straight away.

On 2 February 2010 TK together with PK had a meeting with the claimant. TK asked the claimant to tell him what she had told PK the previous day. The claimant had told BOC that she had needed a car seat temporarily to get over an emergency and wished to borrow a damaged seat, that BOC had spoken to PK and he agreed to give her a loan of a new car seat. The claimant had lent it on to a friend and subsequently the car seat was lent on to a friend's mother and that the claimant had forgotten to return it. He then asked the claimant to leave the room for a few minutes and he discussed the matter with PK. The opportunity had arisen for the claimant to remember that she had borrowed the car seat when it had been lent on. Also he felt it could not slip her mind when she saw her grandson in the car seat.

TK discussed the matter with PK and then called the claimant back into the room. He told the claimant that he could no longer trust her, that he had lost trust and confidence in her and that she had not offered to pay for the car seat. He did not think it was credible.

TK did not offer the claimant representation at that meeting. No notes were taken. The claimant was not informed in advance of that meeting that she could be dismissed. TK contended that the claimant would not have told them about the borrowed car seat except her partner had threatened to tell the company. TK did not think about alternatives to dismissal.

Claimant's Case:

The claimant commenced employment in October 2004 in a part time capacity. During her first year of employment she had a good working relationship with the respondent.

Following the hiring of two female employees with no experience by the respondent it came to light that these two colleagues were being paid €9.00 per hour while the claimant who had only recently received a pay rise was only being paid €8.75 per hour. These employees had been told not to discuss their rate of pay with their colleagues.

The claimant was most annoyed and spoke to PK about the matter. Her hourly rate was subsequently increased to €9.00 per hour. She felt unappreciated and felt her relationship then changed towards PK.

The claimant loved her job and it meant everything to her. She had job satisfaction and her job was her life.

In 2005 she borrowed a light foldaway buggy for a holiday and the respondent had no difficulty with this. Neither did she encounter any difficulty with the respondent when she borrowed a baby sling around Christmas 2007 which she returned the following day. This item was a floor model.

In or around 2008 the claimant approached BOC and asked him if she could have one of the car seats for her grandson which were being thrown out or borrow one or purchase one. BOC asked PK. PK said she could take a loan of a new one. The claimant was gobsmacked. Her grandson was seven months at the time and the child could use the seat for another four months. The claimant contended that she could not be sure during the course of the discussion as to the time span for the loan.

All stock is recorded on the stock system by the Manager. The claimant did not have access to this system. Regular discrepancies occurred on the stock system. Both BOC and PK discussed

these.

The car seat was not in the claimant's possession. She had given it to her daughter in law for her grandson and they lived in Naas. The claimant saw her grandchild about once a week. After her grandchild had outgrown the car seat the seat was left in her daughter in law's house and subsequently thrown out. Her daughter in law did not want to tell her this and it never entered the claimant's head the need to return the car seat at any time.

During the course of separation proceedings in Court between the claimant and her partner, a heated argument ensued. Her partner threatened to inform the respondent that she had not returned the car seat. This had been said in the heat of the moment. This was the first time the claimant had thought about the car seat and it jogged her memory.

On 1st February 2010 the claimant informed manager G of the outcome of her Court case. While things had been said in the heat of the moment, there was no animosity and she went for a meal with her partner and a friend after the event. She went straight to PK and explained to him that she was going through a bad break up of her relationship and that her partner was going to inform the respondent that she had not returned the car seat. The car seat had been left in her daughter in law's house but was now gone. The claimant offered to pay for it there and then. PK said not to worry about it and was totally supportive of her circumstances.

The following day, 2nd February 2010 PK asked her to step into the office. TK was sitting there. He asked her to repeat what she had said to PK. She was asked to step back out of the office for a few minutes and when she returned TK was quite aggressive and he told her that he had built up the business on trust and that she had been untrustworthy. She was asked to leave the premises and not make a scene. The claimant contended that she was an honest person. She then became hysterical. She had not been afforded a right to representation at the meeting or a right of appeal to her dismissal. She was not replaced in her job.

Since the termination of her employment she applied for numerous jobs and only secured a new position on 5th May 2011.

Determination:

The Tribunal carefully considered the evidence adduced during the course of the hearing. The Tribunal is satisfied that the respondent failed to adhere to proper procedures in dismissing the claimant and in particular the Tribunal is not satisfied that the respondent gave the claimant an adequate opportunity to put forward all the facts of her case. Furthermore, the respondent failed to have regard to her personal circumstances at that time.

On that basis the Tribunal determines that the claimant was unfairly dismissed, however, it isconsidered that she contributed to her own dismissal. In the circumstances, the Tribunal awardsthe claimant €6,800.00 under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal notesthat the claimant was already paid two weeks notice and awards her €378.00 being the equivalent of a further two weeks pay under the Minimum Notice and Terms of EmploymentActs, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)