

**EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:  
Employee                    -claimant

CASE NO.  
UD316/2008  
MN291/2008  
WT154/2008

against

Employer                -respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. G. Phelan  
              Mr. A. Kennelly

heard these claims in Nenagh on 8 January 2009

Representation:  
\_\_\_\_\_

Claimant(s) :  
    Mr. William O'Brien BL instructed by  
    O'Meara & Co., Solicitors,  
    Nenagh, Co Tipperary

Respondent(s) :  
    Mr. John Brennan, IBEC,  
    West Regional Office, Ross House,  
    Victoria Place, Galway

The determination of the Tribunal was as follows:-

The claimant commenced employment with the respondent in May 2005. His gross pay was €332.50 per week. The respondent's case was that he was dismissed for gross misconduct after an assault on his shop manager which was captured on closed circuit television.

The claimant's representative acknowledged that the claim that had been lodged under the Organisation of Working Time Act, 1997, was not being prosecuted.

## **Respondent's Case**

Giving sworn testimony, the claimant's manager (hereafter referred to as TX) said that he managed two locations for the respondent. The one in which the claimant worked had been an amusement arcade and had become a casino. TX said that he had managed the respondent's Nenagh casino since June 2007. The respondent's holding company (SPMC) had a managing director (PMCD) who had approached TX to take over the Nenagh premises which had previously been owned by the claimant.

TX was not at the Nenagh casino five days per week. He went there when needed. He managed two other shops. He did the accounts in Nenagh on Tuesdays and Thursdays. There were about six employees in Nenagh. Most were fulltime. The claimant had "a sort of senior cashier role" and worked five days per week.

Asked about an incident on Tuesday 11 December 2007, TX said that he would have been there at about 8.00 a.m.. Asked when the claimant had been due in, TX said that there had been a staff meeting about two weeks before and that staff had been asked to be there no later than 10.30 a.m.. There were over thirty machines on the premises. Tills and safes needed to be checked. The casino opened at 11.00 a.m..

On 11 December 2007 TX had noticed there were no staff there at 10.35 a.m.. He saw this from the cameras. He saw that the claimant was rostered for that time. The claimant had been late on the previous Tuesday. At 11.15 a.m. the claimant came in. The claimant was dressed poorly. The claimant's trousers and shoes were covered in dust. TX said to the claimant in a quiet manner that he (the claimant) was meant to be there at 10.30 a.m..

The claimant immediately "went ballistic" and said that nobody would tell him what to do. The claimant said that he could take TX on and that he knew people who could do it for him. The claimant was intentionally "scary" and put his hand on TX's shoulder. TX was calm. The claimant had pushed him. People were coming in. This was about 11.10 a.m.. The claimant was "completely threatening". TX did not know what would happen. He thought that the claimant would strike a blow.

This lasted about ten minutes. TX wanted the situation settled. The claimant said he would be looking for two weeks' notice. TX told the claimant that all that TX was saying was that the claimant had to be there by 10.30 a.m.. TX told the claimant that he (the claimant) had been late the previous Tuesday.

TX told the Tribunal: "To my recall, he said he should not have done that in front of customers and that he supposed that he would be sacked now."

After the incident, TX went back to his office, rang the respondent's area manager (hereafter referred to as FX) and reported what had happened. FX felt that it was serious and said to ask the claimant to leave the premises. TX told FX that he did not want to risk confrontation. FX said that he would travel from Galway to the premises.

It stuck in TX's mind when the claimant had said, if he could not take care of TX, someone else would do so. TX felt afraid. He and the claimant had not had such an incident before. TX had been in business a long time (some thirty years). He had never had anything resembling a physical threat.

He told FX that he could not work with the claimant again. That ended TX's involvement in the matter.

Giving sworn testimony, SM (the abovementioned HR manager for the respondent's parent company) said that she had heard of the incident between the claimant and TX when FX had rung her to say that there had been an incident at the respondent's Nenagh casino and that TX had felt concerned and quite intimidated. SM spoke to him on the phone. He told her his version. TX said that he could not see how to work with the claimant again after the incident.

SM attended the Nenagh premises on the Friday. She saw the cctv footage. She and FX then met the claimant. SM introduced herself to the claimant because she had not met him before. She told the claimant that she was the HR manager of the respondent and told him the nature of the complaint. The claimant said were they not grown men and that there was no need for SM to be involved. SM said that TX had a right to an investigation and that the claimant could have a representative. The claimant said that he had got to his stage (in life) without needing a representative. He did not want a representative. SM told the claimant that TX had made a complaint and that she had seen the video footage. She said that she wanted the claimant's side of it. Again the claimant said what was all the fuss about.

SM told the claimant that a serious allegation had been made. It seemed that the claimant was not taking it seriously. She got a lot of answers like that the claimant was an old man and to look at the height difference between TX and the claimant (TX being much taller). SM then told the claimant that there could be a disciplinary process which could lead to a finding of gross misconduct followed by termination of the claimant's employment.

Asked to tell the Tribunal if the claimant had made admissions, SM replied that the claimant had admitted that he had lost "the rag", had been vocal and had put his hands on TX. SM had then explained to the claimant that TX had been quite fearful about some things that had been said. The claimant had then laughed and had said that he had no problem working with TX. SM had then asked the claimant if he would apologise whereupon the claimant had said that there was nothing for which he had to apologise. When SM had asked the claimant if he had anything to add the claimant had just said that he was an old man and that there was no need for SM to drive from Galway.

Asked at the Tribunal hearing if there had been a mention of a judge, SM replied that, when the claimant was giving no explanation, she had said that the respondent would look at all the evidence. The claimant had asked SM if she was a judge and he had said that there was "only one judge for us all". SM had then told the claimant that the respondent would not communicate its decision there and then. She had then told the claimant what the procedure was.

Asked how the meeting had ended, SM replied that she had told the claimant that the respondent would examine all the evidence and let him know the next week. SM and FX were still at the Nenagh premises. They said that they would talk on Monday. SM spoke to PMCD (the abovementioned principal of the respondent's parent company) at the weekend. PMCD just asked

to be let know what evolved.

The claimant had been suspended with pay pending a full investigation. Asked why the claimant had been dismissed and if there had been alternatives, SM said that the claimant had admitted to verbally abusing an employee, that TX had been “left in a lot of fear” and that, “as a company”, there was a duty of care to employees to provide a safe system of work.

SM told the Tribunal that vouchers were given to staff each Xmas, that the claimant had been put “at assistant manager to get him extra” and that the claimant “was a senior person but not a manager”. TX, who was senior to the claimant, was responsible for the Nenagh shop and two other shops for their financial and other operations.

SM stated to the Tribunal that her notes had been “typed about twenty-five minutes after the meeting from memory” and that she “took a diary note on Thursday 13 December 2007 also” after talking to the claimant. She added that sixty-five was the normal retirement age in the respondent.

Giving sworn testimony, FX said that he was just over ten years with the respondent and that he was the area manager for Ballinasloe, Limerick and Nenagh. TX was manager of Nenagh from when he was recruited in 2007. TX went there every day and was responsible for operational decisions. TX’s main role related to the cash but he was also “over” the premises, staff, cleaning and hygiene in Nenagh where there were four full-time staff and two part-time staff.

The doors of the Nenagh casino were open to the public from 11.00 a.m. to midnight. To get the premises ready there was “up to half an hour’s preparation”. Asked what the claimant had been expected to do, FX replied that the claimant had been “meant to have the premises ready for 11.00 a.m. whether that took an hour or twenty minutes” and that the claimant would be expected to be “there at 10.30 a.m. if a half-hour was needed”. There was “an a.m. shift and a p.m. shift” which covered the opening hours of 11.00 a.m. to 5.30 p.m. and 5.30 p.m. to midnight. Staff were paid to clean up after midnight. The roster was left to staff. They could “chop and change”. TX and FX only got involved if there was a problem.

There was a meeting about two weeks prior to 11 December 2007. TX and FX met all staff and TX “led the meeting”. The most important issue concerned “time and attendance”. The premises had to open at 11.00 a.m. and to be “ready to go” then.

FX would see the roster sheet. It would not have a start time. The respondent would say that staff had to be there by 10.30 a.m.. TX had said that there was an issue about time. The claimant was coming just before or just after 11.00 a.m.. The respondent said that staff had to be in by 10.30 a.m. (quarter of an hour for the front and quarter of an hour for the back) for preparation. Some staff could be there at 10.00 a.m. and others would come at 11.00 a.m.. The respondent had other issues e.g. the shop being left unattended.

FX thought that he had been in Eyre Square in Galway when, at about 11.20 a.m. on Tuesday 11 December 2007, he received a call from TX who was very distressed. TX said that he had been verbally attacked and almost physically assaulted. TX said that he would not approach the claimant and asked FX to come.

At about 1.00 p.m. FX arrived in Nenagh. The claimant was not on the premises. FX spoke to TX

who was very anxious to leave. TX said that the claimant had been very abusive to him. FX got TX “calmed down a bit” and “got him to stay”. FX looked at the video evidence. The claimant was still not there. FX thought that the claimant had gone for a sandwich FX “did not want another flare-up”.

When FX saw the claimant FX asked him about the incident that had been recorded on video. The claimant said that he and TX might have had a few words. The claimant ate his sandwich.

The claimant “was on paid leave while the investigation was on”. FX was “pretty sure” that it was on Wednesday 12 December 2007 that he had rung the claimant and said that the respondent would need the claimant’s point of view and that SM would be coming from HR. The claimant asked if he would be dismissed on Friday 14 December. FX said that he would not and that the respondent would just get his “side” but that it was quite a serious matter and that TX did not want to work with him again.

FX told the Tribunal that he agreed with SM’s version of the meeting. He recalled SM putting TX’s version to the claimant, twice asking the claimant if he wanted representation and trying to “get the facts” from the claimant. The claimant admitted that he had verbally assaulted TX and that he “may have pushed” TX.

FX told the Tribunal that at the meeting SM said that she was “head of HR” and told the claimant “of the range of possible outcomes”. She even reiterated this at the end of the meeting. However, the claimant was jovial and “did not take it seriously”. SM “had a problem getting answers”. SM made mention of an apology but the claimant “did not see what to apologise for”. The meeting happened in the Nenagh office. It took about an hour. The claimant was told that he would be let know the result.

SM and FX did not make an immediate decision. They met on Monday 17 December in the Galway head office and decided that the claimant would have to be dismissed. FX drove from Galway to Nenagh to give the claimant his dismissal.

Asked why the claimant had been dismissed, FX said that dismissal was “very serious” and that, if the respondent had had an option, it would “ideally” have availed of it but that the respondent had a manager who would have been undermined. TX was not prepared to work with the claimant again. FX had not thought that the respondent had any choice.

FX told the Tribunal that, after the dismissal, the claimant was in touch with a citizens’ advice centre and that someone from there was in touch with PMCD whereupon a meeting was set up but that the claimant “did not show for the meeting”.

### **Claimant’s Case**

Giving sworn testimony, the claimant confirmed that he had sold the Nenagh premises to PMCD (the abovementioned principal of the respondent’s parent company). The claimant had been in the business for about twenty-five years but PMCD had thought the business could be grown on a different scale. PMCD took over (by buying the premises) in November 2004. The claimant and PMCD had negotiated across the counter and PMCD had offered an amount. PMCD said to sell the premises to him and that the claimant would have a job for life with the respondent thereafter.

In May 2005 the claimant started working for PMCD. The claimant had no job title. The abovementioned CB and FX were the only two of the respondent's team who "were there all the time" i.e. during the claimant's employment. PMCD "would put his head in now and again". CB and FX collected the money. The claimant rarely saw them. For example, the claimant often did not see CB "in a month". CB would empty the machines and be gone before the premises would open. CB told the claimant that he was the claimant's boss. Also, if FX gave the claimant an order, the claimant would obey it. They were "the bosses". The rest of the staff thought that the claimant was their boss. There were foreign nationals working there. They might sometimes have a tax problem. The claimant "tried to tell them that he was not their boss and to get in touch with them" (CB and FX).

If staff ran out of money the claimant would give them money out of a safe to which only the claimant had access. When the claimant was on holiday in Singapore he got a text message about fixing a cash machine. They had been told to ring the claimant. "Head office" would say to ring the claimant.

Referring to the abovementioned document regarding Xmas vouchers, the claimant said that that was the first time that he "was down as assistant manager". He had not thought that he was "assistant manager". He had "felt equal to all who were there and a friend of them all".

As regards the premises opening at 11.00 a.m. the claimant said that he was told that PMCD "did not ask" what time he arrived. Asked what had been his habit, the claimant said that, when he had the early shift, he would come in at about 10.45 a.m., do "housekeeping" and have the premises open at 11.00 a.m..

The claimant said to the Tribunal that "the goalposts changed" when the back part of the premises got busy. Both parts opened at 11.00 a.m. and, therefore, two people had to go in. This happened shortly before TX "came on the scene". The claimant told the Tribunal that CB "came one day" with TX, introduced TX and said that TX would be doing CB's work while CB was "out on the road".

Asked if he and TX had had a good relationship (as exemplified by their discussion about a garden water feature), the claimant replied:

"You could not be knocking the nose off each other. I used to try to get him to talk to me. He was behind a locked door. He had to pass me to get in and out of the office. For a maximum three hours he and I would be there at the same time – two hours at the most."

The claimant disagreed when it was put to him that FX had said that the claimant had been told that TX was the claimant's manager. The claimant told the Tribunal that CB had told him that TX was helping him out with his role and that the claimant had thought that CB "might come back".

Regarding the meeting two weeks prior to Tuesday 11 December 2007, the claimant said that he had been at the meeting but that he had come in at 10.40 a.m. and had been late for the meeting. ("Q.E.D.!" commented the respondent's representative.)

Speaking about the late November meeting, the claimant said that FX had run the meeting and that TX had been "two or three steps behind nodding". The claimant told the Tribunal that he would not deny that he had been absent for the first ten minutes. The claimant stated to the Tribunal that he

had been told that “things were going bad” and that the respondent was “looking for changes”. He added: “Nobody was on to me ever about my timekeeping or about anything else.”

It was put to the claimant that on Tuesday 11 December 2007 he appeared to have opened just before 11.05 a.m.. He replied: “I can’t give you the time I turned up.” The claimant stated that he had gone to a Nenagh outlet of the respondent’s parent company to get keys, had brought a girl in out of the rain and had opened the inner door of the premises. TX was “in behind glass” and “muttered something”. The claimant told the Tribunal: “I could not hear him right because of the television and radio and machines.”

TX told the claimant that he was “late again”. The claimant replied that the clock had not been put back since summer time ended and said: “I was fifteen minutes late if that’s the one you’re looking at.”

The claimant told the Tribunal: “I went to go away. He kept driving me back. I said if this keeps up we’ll be rolling around the floor. I said to him to do his work and I’d do mine.”

Asked about the suggestion that he had “touched” TX, the claimant referred to the step of the door in the video footage and said that TX had come forward as the claimant had been going in, that TX had put his foot on the step and that the claimant’s hand had gone up to stop TX stumbling down off the step. TX had then said: “Hand up!” The claimant then took his hand back to let TX fall. The claimant wanted to get away.

Asked if he had been questioning TX’s authority, the claimant admitted that he had said: “Who the hell are you to tell me?” TX then said that he was the manager and the claimant said that he (the claimant) was the assistant manager which was something the claimant had not known until he had got the document about Xmas vouchers.

The claimant told the Tribunal that he then said to himself that he was “gone” because he had just had a row with the manager. TX had never previously given him an order. For most of that morning the claimant did his work looking after customers. At about 2.00 p.m. he was entitled to get a sandwich. He locked both counters. He got a take-away sandwich and soup.

FX rang the claimant and said that he wanted a word with him. The claimant said that FX would have to wait until he had had his lunch. FX sent the claimant home and said that the claimant would be paid. The claimant was told to come back on Friday. The claimant told FX what had happened. FX said: “We’ll take that back and mull over it for the weekend.”

Asked if he had been told of a “menu of options” such as “verbal warning, written warning, final written warning et cetera”, the claimant said no, that he had done more talking to FX than anyone else and that he had thought that SM was there to take minutes.

The claimant told the Tribunal: “It never occurred that I was given the option of a representative.” Regarding his version of events, he had said to the respondent that they could refer to the video footage if he had forgotten anything. They wanted the claimant’s version of events but told him nothing of TX’s version of events.

The claimant said to the Tribunal that, when he had gone over to TX, TX had repeated that the claimant had been “late again” whereupon the claimant had said that he had not been late and that he was early if TX were not going by the inaccurate clock which had not been adjusted after the

end of summer time.

Asked at the Tribunal hearing if there had been verbal abuse, the claimant replied that he had asked TX “who the hell” he was. It was put to the claimant that SM had said that the claimant had admitted “losing the rag” and putting his hands on TX. The claimant replied: “I didn’t say that. I put my hand up to stop him falling down the step. I explained to them about that.” Asked if he had used bad language, the claimant agreed: “I did, I suppose.”

The claimant stated to the Tribunal that all he could say was that there had been a meeting a couple of weeks previous to the incident, that two people had “gone from the job” and that he had known that he “would be harder to get out of the business”. He gave two names as being people who “were both sacked by text about a week before I was”.

The claimant told the Tribunal that, subsequent to the events described, FX told him that the respondent had “mullered over it” and had decided that it would be better if the claimant left. This was formally communicated to the claimant who in turn informed a citizens’ information centre. The claimant received an envelope from PMCD and a dismissal letter. PMCD phoned the claimant “for a chat” but the claimant said that it would be better not to have one.

### **Determination:**

Having carefully considered the evidence, the Tribunal did not find the respondent’s procedures to be adequate. The Tribunal was not satisfied that there was any written agreement as to the exact time at which the claimant’s working day was to start. Neither was the Tribunal satisfied as to the procedural thoroughness or completeness of the respondent’s investigation. The Tribunal finds that the claimant was unfairly dismissed within the meaning of the Unfair Dismissals Acts, 1977 to 2007.

In deciding that compensation was the appropriate redress to award given the breakdown in the relationship between the parties, the Tribunal determines that it is just and equitable to award compensation in the amount of €5,000.00 (five thousand euro) to the claimant under the said Unfair Dismissals Acts, 1977 to 2007. This takes account of his contribution to his dismissal and his efforts to mitigate his financial loss.

In addition, the claimant awards the claimant the sum of €665.00 (this amount being equivalent to two weeks’ gross pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Regarding the claim lodged under the Organisation of Working Time Act, 1997, the Tribunal acknowledges that it was not prosecuted and deems it to have been withdrawn.



Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

