

Disputes Resolution Authority

An Córas Eadrána

DRA 15/2015:

Diarmuid Ó Conaghaile v An Lár Choiste Achomhairc & An Lár Choiste Éisteachta

Hearing: Regency Hotel, Drumcondra, Dublin at 7.30pm on 4 September 2015
Tribunal: Hugh O'Flaherty, Brian Rennick and David Nohilly,
Secretary to the DRA, Jack Anderson, was also in attendance

Verdict:

Claim upheld in part.*

*The Tribunal's award was by majority only (Mr O'Flaherty and Mr Nohilly). Paragraphs 1-28 were drafted and written on behalf of Mr O'Flaherty and Mr Nohilly by the DRA Secretary. Paragraphs 28-100 were drafted and written solely by Mr Nohilly and Mr O'Flaherty. A full dissent, as drafted and written by Mr Rennick, is included thereafter.

Keywords:

Presumption in favour of the Referee's Report; rebuttal by way of compelling evidence; unedited video; Rule 7.3(aa)(1)(vi) of the Official Guide 2015; Clarification of the Referee's Report; Furnishing of Documents to the Defending Party; Fair Procedure; Rule 7.3(s) of the Official Guide 2015; Hearings Committee's Sole Discretion to Seek Clarification of Referee's Report Post-Hearing; Rule 7.3(aa)(1)(viii) of the Official Guide 2015; scope and hearing of an Appeal; manifestly incorrect; Rule 7.11(o) of the Official Guide 2015; scope and hearing of a DRA Tribunal; irrationality; Rule 7.13(a) of the Official Guide 2015.

Abbreviations:

| | | |
|---------------------------|----------------------------|----------|
| An Lár Choiste Achomhairc | Central Appeals Committee | CAC |
| An Lár Choiste Éisteachta | Central Hearings Committee | CHC |
| Diarmuid Ó Conaghaile | Diarmuid Connolly | Claimant |
| Treoir Oifigiúil | GAA Official Guide 2015 | TO |

List of Attendees:

Claimant: Diarmuid Connolly (player); Jim Gavin (manager); John Costello (Secretary, Dublin GAA); Chris Farrell (video analyst); Mr Conor Dignam SC.

Respondents: Matt Shaw and Bernard Smith (Chair & Secretary, CAC); Liam Keane and Emmet Haughian (Chair & Secretary, CHC); George Cartwright and Patrick Doherty (Chair and Secretary, CCCC).

MAJORITY DECISION (O'Flaherty, Nohilly)

Factual Background

1. On 30 August 2015, Dublin played Mayo in the semi-final of the Football All-Ireland Senior Championship. The accompanying Referee's Report reported that the Claimant committed the playing infraction of "striking with the hand", which is classified as a Category III (i) playing infraction i.e., "striking or attempting to strike with arm, elbow, hand or knee." Under Rule 7.2(b) TO, a minimum penalty of a one-match suspension in the same Code at the same Level, applicable to the next game in the National League or Senior Championship, even if that game occurs in the following year, is set down for the infraction alleged.
2. In a notice of disciplinary action, dated 31 August 2015, and pursuant to its powers under Rule 7.3 TO, the CCCC notified the Claimant of a proposed penalty and informed him that he was entitled either to accept the Proposed Penalty or request a hearing before the CHC.
3. In a reply, dated 1 September 2015, the Claimant requested a hearing and in accordance with Rule 7.3(s) TO he submitted a request for clarification of the Referee's Report from the Dublin v Mayo game of 30 August 2015. Similarly, and pursuant to Rule 7.3(s), the claimant requested a copy of the Referee's Report arising from the All-Ireland Senior Football Championship quarter final match between Donegal and Mayo in Croke Park on 8 August 2015.
4. As regards clarification of the Referee's Report – and this request becomes highly relevant to the outcome of this award – the Claimant sought the following seven points of clarification
 - i. Did the Referee witness the incident?
 - ii. If the Referee witnessed the incident what did he observe?
 - iii. If the Referee did not witness the incident can he advise who brought the incident to his attention?
 - iv. In relation to the incident can the Referee provide full details of the report made to him about the incident by any Linesman/Umpire officiating at the game whether personally or by radio communication? In particular can the Referee provide full details of the incident as described to him by the Linesman located on the Hogan Stand side of the pitch?
 - v. If the Referee did not witness the incident what did the Linesman/Umpire cite the Mayo Number 5 for?

- vi. If the Referee did not witness the incident did the Linesman/Umpire report any other Mayo player (No. 5 excluded) in relation to this incident?
 - vii. If the Referee did not witness the incident did the Linesman/Umpire report any other matter concerning the incident?
5. The requested CHC hearing took place on 2 September 2015. As with Hearings generally within the GAA, the CHC's role as the primary decision maker was directed principally by Rule 7.3(bb) TO. Rule 7.3(bb) has two elements. First the CHC has the "final power to determine all matters of fact and all sources of evidence submitted [the CHC] shall be considered" and second, the infraction "shall be treated as proved if, in the opinion of the [CHC], the alleged infraction is "more likely to have occurred than not to have occurred."
6. In this instance, the CHC decided that the Category III (i) infraction as alleged was proven and that the appropriate penalty, per Rule 7.2(b) TO, was the minimum penalty of a one-match suspension in the same Code at the same Level, applicable to the next game in the National League or Senior Championship, even if that game occurs in the following year's competition.
7. More specifically, the CHC decided that the evidence (and principally video evidence) provided by the Claimant was not sufficiently compelling to contradict the Referee's Report. In this, the CHC was guided by the provisions of Rule 7.3(aa)(I)(vi). Rule 7.3(aa)(I)(vi) has two elements. First, a "Referee's Report, including any Clarification thereto, shall be presumed to be correct in all factual matters" and second, the presumption in favour of the Referee's Report "may only be rebutted where unedited video other compelling evidence contradicts it."
8. The claimant appealed the CHC's decision to the CAC on a number of grounds (14 in total). A number of these grounds of appeal were replicated at the DRA hearing and will be discussed in that context below. The CAC appeal took place on 3 September 2015. As with Appeals generally within the GAA And as discussed recently in DRA09/2015), the CAC's role is directed principally by Rule 7.11(o), which has four elements. The first element holds that "An Appeal shall be limited to the matters raised in the Appellant's Appeal as originally lodged". The second element is that an appeal "shall be upheld only where there has been a clear infringement or misapplication of Rule" by the CHC or (and this is the third element) the appeal shall only be upheld where the "Appellant's right to a fair hearing has otherwise been compromised to such extent that a clear injustice has occurred." The fourth and final element is that "No determination of fact by (the CHC) shall be set aside (by the CAC)" unless shown to be "manifestly incorrect."
9. The CAC dismissed the appeal, finding that, contrary to the Claimant's submission, the CHC did not infringe or misapply any Rules; that the

Claimant's right to a fair hearing had not been compromised; and that the evidence produced by the Claimant on appeal did not support his contention that the CHC's factual determination on his sending off was manifestly incorrect.

10. An application was then made to the DRA for an urgent hearing and this took place on 4 September, less than 24 hours before the replay of the Dublin v Mayo semi-final in the 2015 Football All-Ireland Senior Championship in which the Claimant sought to play.

Points of Claim

11. The Claimant's case consisted of 11 points. The Respondents (the CHC and CAC) denied all 11. Before the targeted discussion of each issue is undertaken, it must be noted generally that the DRA Panel considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings. Nevertheless, this majority Award refers only to the submissions and evidence the Panel consider necessary to explain their reasoning. The sub-headings used are for ease of description only. The same principles apply to the dissent.

Referee's failure to take the Claimant Name before Sending him Off

12. This sub-heading encapsulates the first point of the Claimant's case and was an argument based on procedural unfairness. Under this heading, the Claimant argued that the CHC and CAC acted in breach of, and misapplied, Rule 1.2(ix)(f) TO (Part 2) in imposing a penalty for a sending off in circumstance where, in sending off the Claimant, the match referee failed to comply with the mandatory requirement of taking the player's name before doing so. In short, the referee's omission in this regard, according to the Claimant, invalidated his subsequent Report. The CHC and CAC's response to this point was threefold in nature. First, they denied that the referee had not taken the Claimant's name. Second, they argued that even if the referee had not taken the Claimant's name, it was perfectly clear who was being sent off and the Claimant's detail were accounted for in the Referee's Report. Third, there was no prejudice suffered by the Claimant in the fact that the Referee had not taken his name before sending his off.
13. The DRA Panel dismissed this point and accepted the Respondents' arguments on the Claimant's name and details being clearly accounted for in the Referee's Report and the argument that no prejudice was suffered.

Compelling video evidence which contradicted the Referee's Report

14. This sub-heading encapsulated the second, third and eight points of the Claimant's case and was an argument based on a claim of substantial unfairness. The Claimant's argument here was that the decision by the CHC

that the claimant struck his opponent was wrong in law and fact and was unsupported by the evidence and thus there was a misapplication by the CHC of Rule 7.2 and Rule 7.3(bb). In addition, the Claimant argued that the CHC misapplied Rule 7.3(aa)(1)(vi) in deciding that the claimant had not provided compelling (video) evidence to contradict the Referee's Report. Similarly, by not upholding this part of the Claimant's appeal, the CAC had misapplied Rule 7.11(o) and ought to have deemed the CHC's decision "manifestly incorrect".

15. As previous DRA Panels have stated e.g. DRA 15 of 2008 *Paul Galvin* at paragraph 9, DRA 16 of 2008 *Paul Finlay* at paragraph 19 and DRA 3 of 2012 *Stephen McKernan* at paragraphs 29-31, a DRA Panel must be extremely careful not to trespass on the fact-finding jurisdiction of the CHC and must also take account of the supervisory appellate jurisdiction of the CAC. The DRA's jurisdiction is, unless the parties agree otherwise, generally (and somewhat residually) said to be supervisory in nature as based on a test of administrative unreasonableness. This test demands that the DRA Panel must consider whether the decision in dispute plainly and unambiguously flies in the face of fundamental reason and common sense i.e., was it an irrational decision. Proving to a DRA Panel that there was irrationality on the part of the primary decision-maker (the CHC) is a very high threshold for a Claimant to cross. For instance, a DRA Panel should never interfere with the factual determination of the CHC on the grounds that it (the DRA) might subjectively have arrived at a different conclusion based on the conflicting facts. A DRA Panel ought to intervene only if it is satisfied objectively that no reasonable, rational decision-making body, which properly instructed itself on the facts, would have reached the impugned decision.
16. In light of the above, DRA Panels (e.g., DRA18/2010) have been highly reluctant to consider video evidence in circumstances where such video evidence has been fully considered by a CHC and CAC. On rare occasions, a DRA Panel may decide that the circumstances lend themselves to permitting a review of video evidence said to be relevant to the guilty or innocence of a player e.g., DRA 13-15/2007 *Cusack, O'Sullivan and O'hAilpin* and in DRA 05/2015 *McKinless*. This DRA Panel decided that in order to properly instruct and inform itself as to whether the CHC's decision was irrational, it too should view the video evidence offered by the Claimant and as previously presented at the CHC and CAC.
17. The Claimant and his manager, Mr Gavin, presented a very thorough account of their version of what happened; noting that in the immediate lead up to the incident the Claimant had been deliberately checked by his opponent and was then dragged and pinned to the ground. The Claimant and his manager both noted that the incident occurred near the (frantic) end to the game and that the Claimant's apparent striking action on which the alleged infraction was based was more a reaction and an attempt to free himself from the grip of his opponent in order to return quickly to the game, which both parties did

without injury. The Respondents did not comment on the contents of the video evidence save to remind the Panel that their role was to decide, applying the test of unreasonableness, whether the video showed compelling evidence to contradict the account of the incident in Referee's Report.

18. The Panel's view was that the CHC's decision – that the video evidence was not compelling enough to contradict the Referee's Report of striking by the Claimant – was one that could be seen as rational and reasonable.
19. It must be noted that central to this argument was Rule 7.3(aa)(I)(vi), which has two elements. First, a "Referee's Report, including any Clarification thereto, shall be presumed to be correct in all factual matters" and second, the presumption in favour of the Referee's Report "may only be rebutted where unedited video other compelling evidence contradicts it." This Rule can be found in many other sporting codes grants special status to the Referee's Report and the presumption granted to that Report ought, for evident reasons, to be a very difficult one to rebut.
20. In plain terms, and for good sporting reasons, if a player is reported for an infraction in a Referee's Report, the presumption is that under GAA Rules the player is guilty – the legal presumption of the player being innocent until proven guilty by the referee does not apply on the GAA field. This sporting presumption can only be contradicted where there is compelling evidence otherwise in the form of unedited video evidence, which, for example, might show a case of mistaken identity. In short, there must be compelling evidence provided by the player that the referee was wrong. The referee must not, as sometimes appears to be argued at the DRA and elsewhere, be asked in his Report or by way of Clarification to supply compelling evidence that he was right. In this instance, the presumption in favour of the accuracy of Referee (McQuillan's) Report stands in full.

The Hearsay Argument

21. This sub-heading encapsulated the fourth and fifth points of the Claimant's case and was an argument based on a claim of procedural unfairness. The claimants argued that the CHC had acted in breach of, and misapplied, Rule 7.2, 7.3(aa)(1)(vi) and Rule 7.3(bb) by giving undue weight in the Referee's Report and subsequent clarification to matters which are hearsay or based on hearsay (i.e., those elements of the Referee's Report and clarification which had been seen, not by the referee himself but which had been reported to him by the linesman). Similarly, by not upholding this part of the Claimant's appeal, the Claimant argued that the CAC had misapplied Rule 7.11(o) and ought to have deemed the CHC's decision "manifestly incorrect".
22. The Respondents reply to this argument echoed the arguments made by them on this exact "hearsay" point in DRA3/2012. In that case Stephen Kernan was

sent off while playing for Crossmaglen in the All-Ireland Senior Football Club Championship semi-final played at Portlaoise on 18 February 2012. The accompanying suspension ruled the player out of the Club Final on St Patrick's Day. On seeking clarification from the referee, it was confirmed that he had been sent off on the word of a linesman. One of Mr Kernan's arguments – in his failed application to the DRA – was that the special-status presumption underpinning a Referee's Report extended only to matters witnessed first-hand by the referee and that in this instance – where the appellant had been sent off on the "hearsay" evidence of the linesman – that presumption of special status did not apply.

23. The DRA Panel in DRA 3/2012 rejected this argument on two grounds. First, in order to ensure that misconduct not seen by a referee does not go unpunished, a referee is entitled to rely on his officials to bring such misconduct to his attention and, moreover, it is a duty of linesman to bring instances of misconduct to the attention of a referee under Rules of Control 3.1(v) TO (Part 2). Second, what a linesman might report might well be hearsay in a court of law but this is a sports disciplinary process and the courts respect the fact that sports disciplinary matters are best dealt with in a way which is appropriate to the sport concerned, so long as basic fairness – in this instance the GAA's own Rules of Evidence laid out in Rule 7.3(a)(a) – is observed. This distinction between what a civil court might demand in terms of procedural fairness and that which might suffice in a sports disciplinary tribunal has been noted in the High Court in *Gould v McSweeney* [2007] IEHC 5.

24. In light of the above, this point of claim is dismissed and the Panel accepts that so-called hearsay evidence (of the type noted above) is admissible before the Hearings of the Association, subject to that evidence being properly presented to a defending party for scrutiny – see further paragraphs 61 and 62 below.

CHC's Discretion to Seek Clarification Pursuant to Rule 7.3 (aa) (1) (viii)

25. This sub-heading encapsulates the sixth and seventh points of the Claimant's case and was an argument based procedural unfairness. This sub-heading was central to this hearing and is discussed in full at paragraph 29ff.

Self defence

26. This sub-heading encapsulates the ninth and tenth point of the Claimant's case and was an argument based on procedural unfairness. The Claimant argued that the CHC ought to have considered (and the CAC was wrong not to have directed them to do so) whether the claimant was entitled to use force in the specific circumstances and whether the force used was reasonable, proportionate and lawful in all of the circumstances. This "self-defence" argument is referred to further at paragraphs 86-87 below.

Inconsistency Argument

27. This sub-heading encapsulates the final point of the Claimant's case and was an argument based on procedural unfairness. The claimant argued that CHC and CAC's decisions against the Claimant were in breach of fundamental principles of fairness and the requirement for consistency in decision making. The claimant argued that in the 2015 season the CHC (in the Kevin Keane, Mayo decision of 19 August 2015) and the CAC (in the Seamus Callinan, Tipperary decision of 16 April 2015) made decisions which are inconsistent and thus unfair *viz* the Claimant. (There was also a similar argument made by the Claimant about the CCCC's inconsistency in pursuing disciplinary actions against other players - presumably Mayo players only - arising out of other incidents in the Mayo v Dublin game of 30 August).
28. The Panel is of the view that ideally entities such as the CHC/CAC should treat like situations alike and different situations differently unless there is good reason for them not to do so. However this "like for like" consistency relates primarily to a claimant's or appellant's legitimate expectation that at the CHC or CAC s/he will be treated equally by way of the CHC's and CAC's strict compliance with its rules of operation as laid down in Rules 7.3 and 7.11 respectively. Once this consistency has been afforded, then, equally, a claimant/appellant must be aware that the CHC/CAC retain a wide discretion to choose between different lawful outcomes in any individual circumstance.

CHC's Discretion to Seek Clarification Pursuant to Rule 7.3 (aa) (1) (viii)

29. It is important that we clarify here the functions of the Disputes Resolution Authority (DRA). The powers and duties of the DRA are provided for under Rule 7.13 TO (with Disputes Resolution Code Appendix 6) and the *Arbitration Act 2010*. Arbitration is not an appeal. We are designed to replace the role of the Courts in assessing whether, amongst other things, there has been a breach of fair procedures. We are not concerned with whether a decision is right or wrong, but whether that decision was reached in a fair and procedurally correct manner.
30. The Claimant submitted eleven grounds for review in his Request for Arbitration. These have been detailed already in this decision and therefore it is not necessary for us to examine each save the ground on which the Claimant was ultimately successful, that is ground number 6, which stated:

"The CHC acted in breach of and misapplied Rule 7.3 (aa)(1)(viii) and in breach of fair procedures and constitutional justice in failing to seek clarification of matters within the Referees Report in light of the detailed evidence given by and on behalf of Mr. Connolly such as could be used to exonerate Mr. Connolly or mitigate the allegations made against him or in the alternative, having not sought such clarification, acted in breach

of and misapplied Rule 7.2, Rule 7.3 (aa)(1)(vi) and Rule 7.3(bb) in the manner set out at (iv) above and the CAC acted in breach thereof and in breach of Rule 7.11(o) in upholding the decision of the CHC and, in particular but without prejudice to the generality of the foregoing, in finding that the Claimant did not show that his right to a fair hearing has been compromised to such an extent that a clear injustice had occurred.”

31. It is the decision of the Tribunal that Central Hearings Committee (CHC) misapplied Rule 7.3(aa)(1)(viii). In order for us to ground the reasons for this, it is important to set out the chronology of the relevant facts and the Rules involved.

Chronology

32. Under the Rules, the commencement of Disciplinary Action against a member may occur in one of two ways namely (Rule 7.3 (d)):-

“Disciplinary Action shall commence where:

- (1) *A Referees Report discloses an alleged infraction*
- (2) *The Competitions Control Committee decides that Disciplinary Action is appropriate arising from Competitions or Games, subject to Rule 7.3(f) or.....”*

33. In this case, a Notice of Disciplinary Action was issued by the Central Competitions Control Committee (CCCC) to the Claimant on the 31st August 2015 which said: *“Arising from the contents of the Referees Report concerning a game in the All Ireland Senior Championship...you are notified that you have been reported to have committed the following Playing infraction, that is to say “Striking with the Hand” which is classified as a Category III Playing Infraction....”*

(Our emphasis)

34. It is noteworthy that the basis for the disciplinary action arose from “the contents of the Referees Report” wherein it stated “striking with the hand”. The video evidence introduced before the CHC was by the Claimant himself as opposed to the CCCC, presumably on the basis, according to the claimant that it would exonerate him.

35. This was rejected by the CHC who did not find the video evidence ‘sufficiently compelling’ to exonerate him and whilst they were entitled to make this decision, their ultimate decision was based solely on what was contained in the Referees Report and any clarification that may have been received.

36. Continuing, the Claimant was notified in that same notice from the CCCC that he could either:-

- (a) accept the Proposed Penalty (from the CCCC) or

(b) request a Hearing before the Hearings Committee

37. The Claimant replied on the 1st September 2015 requesting a Hearing before the Hearings Committee (CHC). This Reply was in the standard form 'Reply to Notification of Disciplinary Action'. This was not unusual.
38. In addition to the usual requests such as preferable date for hearing, request for facilities to play video evidence, names of witnesses etc., the claimant attached a document requesting additional clarification "*in accordance with Rule 7.3(s) TO 2015*".
39. It is now appropriate to set out in *verbatim* that additional information sought under that Rule by the Claimant and the subsequent Replies from the CCCC:-

"In accordance with Rule 7.3(s) I wish to seek the following clarification:-

1. Did the Referee witness the incident?

2. If the Referee witnessed the incident what did he observe?

2(sic). If the Referee did not witness the incident can he advise who brought the incident to his attention?

*3. In relation to this incident can the Referee provide **full** details of the report made to him about that incident by any Linesman/Umpire officiating at the game either personally or by radio communication. In particular, can the Referee provide full details of the incident as described to him by the Linesman officiating on the Hogan Stand side of the pitch.*

4. If the Referee did not witness the incident what did the Linesman/Umpire cite the Mayo number 5 for?

5. If the Referee did not witness the incident did the Linesman/Umpire report any other Mayo player (No. 5 excluded) in relation to this incident?

6. If the Referee did not witness the incident did the Linesman/Umpire report any other matters concerning the incident?

Furthermore and in accordance with Rule 7.3(s) I wish to be furnished with the following document in the possession of the Central Competitions Control Committee."

1. A Copy of the Referee's Report arising from the All-Ireland Senior Football Championship Quarter-Final match between Donegal and Mayo played in Croke Park on the 8th August 2015."

(Emphasis by claimant)

40. Once the Claimant's Request for Clarification was received, the Secretary of the CCCC sent an email at 16:28 hours on the 1st September 2015 to the Referee (with the Chairman of the CCCC copied) stating:-

"Seosamh, a chara,

Diarmuid O'Conghaile (Ath Cliath), in accordance with Riail 7.3(s) T.O. 2015, has requested clarification of your report of the above game played at Pairc an Chrocaigh on 30u Lunusa. In relation to the incident for which Diarmuid was dismissed can you please clarify the following:

1. *Did you witness the incident yourself? If yes, what did you witness?*
2. *If the answer to No.1 is No, can you please confirm who did.*
3. *If the answer to No.1 above is No, can you please confirm the full detail of the report made to you by your Match Official(s), including all details in relation to the Maigh Eo players.*

*Is mise,
Runai ..."*

41. The Referee responded by email to the Secretary, 31 minutes later (16:59 hours), stating:-

1. *I did not witness the incident.*
2. *Standby Referee Conor Lane witnessed the incident.*
3. *Conor Lane reported to the referee that No. 5 Green and No.12 Blue were wrestling on the ground and No.12 Blue struck with the fist."*

42. It is not known what was the reason for the delay but the Secretary of the CCCC forwarded this information to the claimant the following day (2nd September) at 10:35 hours and stated:-

"Sean, a chara,

Please find following request for Clarification sent to Referee ... and his reply.

In relation to the request for the Referee's Report from the Donegal v Mayo game played in Croke Park on 8th August, CCCC do not see how it is relevant to Diarmuid and, therefore, have not supplied it. However, it will be available at the Hearing and if the decision of the Hearings Committee is that it is relevant and should be made available then it will be.

Is mise, "

43. Later the same day, the secretary of the CCCC wrote by email again to the Referee at 11:37 hours:-

“Seosamh, a chara,

I refer to your report of the above game played at Pairc an Chrocaigh on 30u Lunusa and the clarification received. Diarmuid O’Conghaile (Ath Cliath) has requested further clarification, as follows:

- 1. As per original request can you please confirm the full detail of the report made to you by your Match Official(s), including all details in relation to the Maigh Eo players.*
- 2. Can you please confirm which side of the pitch was Conor Lane officiating at the time of the incident.*

Is mise,...”

44. The referee responded 14 minutes later (11:51 hours), again by email, as follows to the CCCC:

“Padraig, A Chara,

- 1. Full details as per previous communication.*
- 2. Conor Lane was officiating on the Hogan Stand side of the pitch when the incident occurred.*

Is mise,....”

45. The Secretary at 12:07 hours on the 2nd September forwarded this email to the claimant. The hearing took place that evening at approximately 7pm.

Rule 7.3(s) and the CCCC

46. The Rule under which the Claimant made his Request for Clarification of the Referees Report is provided under Rule 7.3(s):

“Where the Defending Party requests a Hearing, he shall indicate in his Reply any special requirements with regard to the Hearing (e.g. video playing equipment). He may also submit a written Request for Clarification of the Referee’s Report and that Request and the Clarification received shall be furnished by the Competitions Control Committee to the Hearings Committee and the Defending Party.”

(our emphasis)

47. The GAA Disciplinary Handbook 2015 which at the outset must be stated is only is ‘intended to assist in the implementation of the Rules and is not a substitute, in any form, for the Rules of the Official Guide’, states regarding Rule 7.3(s):

“Clarification of a Referee’s Report

*The defending party may request that Clarification of a Referee's Report be sought, and if the Party does, the Competitions Control Committee **must** comply with that request."*

(our emphasis)

48. The parties discussed these Rules at length; therefore, we have taken the liberty of examining them closely. According to Rule, a Request for Clarification of a Referees Report can arise in three main instances:-

1. A Request by the defending party under Rule 7.3(s) to the CCCC
(As was the case in this instance and quoted above)
2. Or a Request by the CCCC under Rule 7.3 (e)

*"The Competitions Control Committee **may** make a written Request for Clarification from a Referee: (1) where there is any ambiguity in his Report, or (2) where the Competitions Control Committee is in the course of investigating a possible Infraction not stated in his Report (even if the incident itself is disclosed)."*

(our emphasis)

3. Or a Request by the CHC after the Hearing under Rule 7.3 (aa)(1)(viii)

*"After the Hearing, the Hearings Committee may, **in its sole discretion**, seek Clarification in writing of any matters in the Referee's Report. Any written Clarification or comment by the Referee shall have the same status as the Referee's Report itself, but may only be used for the purposes of exoneration of the Defending Party or mitigation of any allegations made against him. Such Clarification may not be challenged in any way or made the subject matter of any further Hearing."*
(our emphasis).

49. In relation to Rule 7.3(s) the use of the word '**shall**' imposes a mandatory obligation on the CCCC to comply with a Request for Clarification. In other words, it does not confer discretion on them not to comply. It is well accepted that in any Act or Statutory Instrument where the word 'shall', if used to impose a duty, is used indicates that that duty must be performed. This is a well-established legal rule.

50. In relation to Rule 7.3(e) the use of the word '**may**' imposes a power on the CCCC that is discretionary. In relation to Rule 7.3 (aa)(1)(viii) there is no doubt as to the discretion afforded as it specifically states a Request can be made by the CHC "*in its sole discretion*".

51. Clearly, this has given rise to a potential anomaly. On the one hand, there is a mandatory obligation to comply under Rule 7.3(s) whilst on the other; there is

a discretionary duty to request under Rules 7.3(e) and Rule 7.3 (aa)(1)(viii). In addition, whilst we accept that we cannot look at Rule 7.3(s) in isolation but must consider it in context, the specific references to a discretionary element in Rules 7.3 (aa)(1)(viii) and Rule 7.3(e) would lead us to believe that it was the intention of the draftsman to place an obligation on the CCCC to provide this clarification to a defending party.

52. Our view is further enforced by the use of the words 'shall' and 'may' interchangeably in Rule 7.3(s) itself and the guidance note under this Rule in the Disciplinary Handbook wherein it states a request 'must' be complied with by the CCCC. Furthermore, in the decision of DRA 15/2014 it was stated that 'black letter law terms' should be given their clear and unequivocal meaning and to quote '*the Tribunal must apply the normal everyday meaning of the words used in the rules to questions of interpretation.*'
53. The reason one might suspect, for this apparent anomaly in the Rules is presumably on the basis that it was deemed necessary in order to balance the rights of the defending party verses the finality and special status of a referees report on factual matters when combined with the presumption of guilt.
54. As we see it, the CCCC has no power under Rule 7.3(s) to determine if a Request for Clarification directly relates to the Referees Report or indeed, is relevant. It only has an obligation to comply. Indeed, there is also the issue relating to the definition of '*Clarification*'; which is not defined or limited in scope. This creates an ambiguous situation, which, we find should be read in favour of the claimant and as against the draftsman.
55. If we contrast what the Request for Clarification is in the context of civil litigation, it is a request for Particulars and/or a Request for Discovery. A plaintiff or defendant in civil litigation is entitled to seek further particulars and/or discovery and we should add, not entitled to engage in a fishing expedition, but the decision to determine the relevancy or merits of a request does not befall on the party, against whom the request is being made, but rather a Registrar or Judge.
56. It is clear to us but that the Claimant did not receive the entirety of the information he requested. It is uncertain why the Claimants questions were not put to the Referee as they were presented for a comprehensive reply. Similarly, the same could be said for the attempted redrafting of those questions on two occasions.
57. Once the CCCC became aware of the comprehensive nature of the Request from the Claimant, they were on notice that this was a case that was going to be vigorously defended and therefore, contentious.

58. The function of the CCCC has been compared in previous decisions of the DRA to that of a Garda (where a hearing is requested), whose sole function is to investigate an infraction and present evidence before the Hearings Committee (CHC) to enable an informed decision be reached. They do not determine matters of fact or adjudicate on the merits of a case, their role is purely investigatory.
59. They, as the body charged with investigating the matter, should comprehensively investigate all aspects of a case including where necessary *'interview such persons (including match officials) as they deem appropriate'* (Rule 7.3 (h)).
60. A disciplinary report could have been prepared and included a brief, but informative description of what was being alleged against the Claimant. It could have stated, for example, whether the Claimant was accused of instigating the altercation or the distance between the linesman and the location of the altercation for example. This is purely a recommendation as failure to provide a disciplinary report should not in itself be grounds to challenge the validity of a decision.
61. It is also clear to us that the evidence of the Referee as to what the linesman said to him does, in law, amount to hearsay evidence. However, should the hearsay rule (in an evidential context) apply to a sporting disciplinary panel? The Official Guide Part 2 entrusts the control of games to a referee and his officials (including the linesmen). There are good reasons why this is so.
62. We believe that a Referee is entitled to rely on information given to him by his linesmen in the pursuit of maintaining order on the pitch of play. Whilst the referees report, in this case, may not have been acceptable as evidence in a Court of Law, the respondents are perfectly entitled to rely on Rule 7.3 (aa)(1)(vi) as a sporting disciplinary panel in this respect. Therefore, it is our view that hearsay evidence is admissible before the disciplinary panels of the Association subject to that evidence being properly presented to a defending party for scrutiny.
63. The basis for the disciplinary process as against the Claimant was the account contained in the Referees Report which stated *'striking with the hand'*. When this was further clarified by the Claimant with the CCCC, the linesman according to the referee stated *'Conor Lane reported to the referee that No. 5 Green and No.12 Blue were wresting on the ground and No.12 Blue struck with the fist'*. We believe that the response proffered here was not sufficient to enable the claimant to subject it to proper scrutiny. The initial clarification requested by the claimant was *'If the answer to No.1 above is No, can you please confirm the full detail of the report made to you by your Match Official(s), including all details in relation to the Maigh Eo Players?'*. It is noteworthy that there was no information

provided regarding *'all details'* in relation *'to the Maigh Eo Players'* besides a reference to the Mayo No.5.

64. To make matters worse, when the claimant requested those *'full details'* a second time the response was *'Full Details as per previous communication.'* This latter response was entirely unsatisfactory.
65. These requests are being made presumably on the basis, that the claimant feels they are valid for him to conduct his defence. We are not stating here that a referee (or match official) needs to justify their decisions but rather the facts underpinning those decisions should be provided, in the interests of complying with the Rules and due process.
66. Whilst it is not our function to comment on what those replies would have been, the situation would seem to suggest that the Claimant essentially did not receive Replies to his Request numbered 3, 4, 5 and 6. At the very least, we would have thought the Claimant was entitled to a statement from the linesman rather than a one-sentence summary from the referee, which in itself contained a slight and probably irrelevant contradiction, namely the *'hand'* verses *'fist'* contradiction (both are the same infraction). Nevertheless, it is a contradiction that should have been explored further as hitting someone with a hand is quite different to a fist, the latter denoting intent, which may have been relevant in reducing the charge, for example.
67. Furthermore, it is important to emphasise that the clarification provided by the sideline official and finding its way into the Referees Report is as binding and has to be construed as the Referee having observed the infraction himself. As such any contradictions should be fully explored and clarified.
68. If a match official cannot be required to give oral evidence or to appear for cross examination (Rule 7.3 (aa)(1)(vii)) they should provide an account of the facts at the time of the alleged infraction. This is particularly the case where hearsay evidence is relied upon.
69. It is clear that the lines of communication between the referee and the investigating body (the CCCC in this case) need significant improvement. Similarly, there was no reason why the match officials could not have been invited to give an account of events per previous decision of the DRA 15/2007.
70. One cannot but have sympathy for the referee in this case. Not alone was he required to make a quick decision on the field of play, but then the Rules stipulate a means for *'challenging'* the status of his Report. This primary Rule as currently drafted in relation to a Referee's Report in the form of Rule 7.3 (aa)(1)(vi) states:-

“A Referee’s Report, including any Clarification thereto, shall be presumed to be correct in all factual matters and may only be rebutted where unedited video or other compelling evidence contradicts it;”

71. However, this ‘special status’ is reviewable in the following circumstances: -

1. A Referees Report can be proven to be incorrect where compelling evidence contradicts it. Compelling evidence is not defined understandably; however, it may include unedited video evidence, (similarly not defined).
2. A Request for Clarification (not defined) of a referee’s report, as we discussed above, can be made by three different units of the Association at three different stages throughout one disciplinary process, involving both mandatory and discretionary obligations.

Whilst we accept that the Referees Report in a sporting context should always be regarded as sacrosanct, the rules as outlined above, qualify that concept somewhat.

Rule 7.3(aa)(a)(viii) and the CHC

72. The breach of Rule 7.3(s), as outlined above, could have been remedied by the CHC ‘after the hearing’ per Rule 7.3 (aa)(1)(viii) by making a Request for Further Clarification, but this was not done.

73. The GAA Disciplinary Handbook 2015 also provides an example, which could have applied in this instance (guide only):

“While not required by Rule, it may be useful for the Hearings Committee to make a Preliminary Decision, which would be kept private, and in the event that the Clarification received does not serve to mitigate or exonerate, the Preliminary Decision can be made Final, without the need for further discussion. This saves time, and also ensures that any ‘negative’ Clarification received does not affect the minds of the Committee Members in making a Final Decision.”

74. When the matter proceeded to Hearing before the CHC it was devoid of comprehensive information requested by the Claimant which may have resulted in the same result, exonerated the Claimant or indeed resulted in a lesser charge. We can only speculate on what the Replies would have been and consequently the result. It is not unheard of in a case for a witness to dramatically alter an account when asked to clarify testimony for example. By so doing would avoid any perceived prejudice to the Claimant.

75. Of course, there is a wide discretion on the CHC relating to requests for clarification, but as a discretion it must not be fettered, and maintaining that one should never exercise that discretion is not correct, there must be cases, and this is one where it was manifest that the discretion should have been exercised.

76. The CHC must ensure that the rights of a claimant are sufficiently protected and that would include ensuring that a claimant, who does not have legal representation, be protected from breaches of the Rules that may have occurred throughout the investigatory stage of the process.
77. It was submitted by the respondent that these were issues not formally raised by the Claimant before the CHC or CAC. The Claimant made a specific application before the CHC to make a request for further clarification to the referee under their *'after the hearing'* jurisdiction. The issue of referee's clarification therefore was before the CHC to consider. Furthermore, the CHC had possession of the Claimant's original Request and at the very least; a cursory glance would have revealed failings in the investigative stage of the process, which clearly was causing a prejudice to the Claimant.
78. Finally, in relation to the email from the Secretary of CCCC to the Claimant where it said *"In relation to the request for the Referee's Report from the Donegal v Mayo game played in Croke Park on 8th August, CCCC do not see how it is relevant to Diarmuid and, therefore, have not supplied it. However, it will be available at the Hearing and if the decision of the Hearings Committee is that it is relevant and should be made available then it will be."*
79. It is questionable what jurisdiction the CHC had to consider this as their jurisdiction under Rule 7.3(aa)(1)(viii) only arises *'after the hearing'*. It is probably superfluous, in any sense, because Rule 7.3(s) provided for a mandatory obligation to furnish the document.
80. The decision of the CAC is now largely irrelevant in light of our decision relating to the Hearing before the CHC therefore, it flows as we have found the decision CHC to be in breach of fair procedures then by consequences so to be the decision of the CAC.

Rule 7.3(bb) & Rule 7.3(z)

81. Notwithstanding that we have made our decision relating to the misapplication or Rule 7.3(aa)(1)(viii), we feel it is important that we address Rule 7.3(bb) and Rule 7.3(z) which state:
- "The Hearings Committee has the final power to determine all matters of fact and all sources of evidence submitted to the Hearing shall be considered. An Infraction shall be treated as proved if, in the opinion of the Hearings Committee, the Infraction alleged is more likely to have occurred than not to have occurred."*
82. This provision gives the Hearings Committee the entitlement to determine matters of fact. What it does not allow is for the Hearings Committee to make findings of fact based on hearsay evidence where the investigative process was compromised and a risk of a decision being made in the absence of evidence in support of the Claimant.

83. The use of the words *'the Infraction alleged is more likely to have occurred than not to have occurred'* does not entitle a Hearings Committee to rush to judgment. Each case must be considered carefully, the merits and arguments should be assessed and a reasoned, proportionate decision reached.

84. The respondents also sought to rely on Rule 7.3(z) which states:-

"The Hearings Committee will decide on all matters of procedure, and may adjourn Hearings and take such steps as are necessary and appropriate to the Hearing."

85. Whilst this may be the case, those procedures applied must be fair. We do not believe this has any significant relevance to the Rules regarding 'requests' as there is a specific rule that applies in those instances.

General Observation

86. As a general observation, in the letter to the Claimant from the CHC advising him of the Hearing dated 1st September 2015 it stated in the penultimate paragraph :-

"If any guidance is required as to the operation of the Rules, the undersigned may be contacted; however, any advices given shall not form part of the proceedings or be relied upon to challenge any aspect of the proceedings."

87. This sentence is there obviously for a reason i.e. to ensure that the impartiality of the Hearings Committee is not compromised and they are not seen to be offering advice to a defending party on how to conduct his defence. It is also there to assist the defending party if he needs advice as to the operation of the Rules but that any such advice given by them cannot be relied upon. In other words, it offers no assistance to the claimant – if the advice is incorrect and relied upon then the fault rests with the Claimant for seeking out such advice.

88. Similarly, the use of the word *'proceedings'* would indicate a more quasi-judicial process than originally believed thus requiring legal representation for a claimant, although this is something we would not wish to occur.

89. Finally, there was one further argument raised emphatically by the Claimant and Mr. Gavin that we must address, and that was the issue of self-defence. It seems this was not raised before the CHC, however it was raised before the CAC on appeal (from the minutes), but was rejected on the basis that there is no such Rule in the Official Guide. It is curious that this was the finding reached as one would have assumed the proper finding should have been the jurisdictional one i.e. this was an issue not raised before the CHC.

90. In any sense, we do not agree with the proposition that a player is not entitled to defend oneself. The Claimant gave evidence to this Tribunal of being 'choked' etc., at the time of the altercation. Whilst that may or may not have been case is not for us to decide, but to say no such defence exists absolutely is not correct in our opinion. We shall go no further on this point.

Reasoning – lack of fair procedures

91. The claimant, it should be added, also submitted that as a result of the breach and/or misapplication of the Rules (mentioned above), his right to a fair hearing had been compromised to such an extent that a clear injustice occurred. In other words, there was a lack of fair procedures.

92. It is a well-accepted principle from academic commentary, previous decisions of the DRA and Case Law that any claimant has a right to fair procedures in a disciplinary investigative and decision-making process.

93. We have no hesitation in accepting this principle. The obligations expected of sporting disciplinary panels in relation to the principles of natural justice and fair procedure are accurately set out in *Cox & Schuster, Sport and the Law Dublin; 2004* they include:-

- i. The obligation of a sports disciplinary panel to act lawfully in accordance with its own rules and regulations.
- ii. The obligation of a sports disciplinary panel to instruct itself properly as to the facts and evidence.
- iii. The obligation to act fairly in a procedural sense.
- iv. The obligation to give the party charged with wrongdoing fair notice and opportunity to be heard.
- v. The sports disciplinary tribunal must not prejudge an issue.
- vi. It must avoid conflicts of interest.
- vii. It must avoid bias.
- viii. It must act in good faith at all times.
- ix. It must not act irrationally, arbitrational, capriciously or unreasonably, (especially in terms of sanction).

94. We would expand somewhat and quote the decision of Judge McMahon (then Circuit Court Judge) in *Barry and Rogers v Ginnity and Others* (2005 Naas CC unrep):

"The truth is that the law will demand a level of fair procedure which is sufficient in all circumstances to ensure justice for the player or member affected by the decision. The more serious the consequences the higher the standard that will be required."

95. In this instance, the consequence for the Claimant was suspension from an All Ireland Semi Final (replay) match. This has to be construed as a serious sanction

and therefore a higher standard is required of the disciplinary bodies in circumstances such as this.

96. We should say here that we are not exhaustively setting out those obligations for fair procedures to apply, it is a difficult concept to define and each case will need to be judged on its own merits, but the principles of 'natural justice', 'due process' and 'constitutional justice' should be relevant considerations.

97. The Tribunal finds that the claimant's right to those fair procedures and natural justice, causing a prejudice, was breached in many ways including:-

- i. The Claimant was not given details of the entire evidence against him (as was his right under Rule).
- ii. The Claimant was not given an opportunity to test that evidence, particularly, the evidence based on hearsay.
- iii. The Claimant was not afforded any right to scrutinise and question the entire evidence against him.
- iv. The Claimant was not afforded the opportunity to present evidence in support of his position.
- v. The CHC erred and failed to take account of potential relevant considerations to the detriment of the Claimant.
- vi. The CHC erred in not exercising their discretion under Rule in making a request for clarification where it was manifest that it should have been exercised.

98. Finally, as we have made a finding that there has been a breach of a fundamental right, we are applying the test of administrative unreasonableness, introduced in Decision DRA 16/2008, more particularly and appropriately set out by Denham J in her dicta (ratio) in *Meadows v Minister for Justice Equality and Law Reform* (2010) IESC, which is as follows:

"This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective."

99. In conclusion, therefore, we find that the breach of fair procedures was a significant impairment of the rights of the claimant, which was disproportionate, irrational and unfair. The objective of those Rules governing Requests for Clarification is primarily to ensure fair procedures are followed particularly, Rule 7.3(s) and by consequence, Rule 7.3(aa)(1)(viii).

Award

100. It is therefore the majority decision (2:1) of the Tribunal to quash the decision of the first named respondent (CHC) made on the 2nd September 2015 and by consequence, the decision of the second named respondent (CAC) dated 3rd September 2015.
101. In line with DRA precedent namely, DRA 17/2009 and DRA 12/2015, the Tribunal has jurisdiction pursuant to Section 11.3 of the Disputes Resolution Code to direct all parties to take or abstain from taking steps under the Rules of the Association, we are invoking our jurisdiction now in this case to direct that no further action be taken against the Claimant in order to afford the Association an opportunity to consider its position regarding Rule 7.3(s) and requests for clarification in general.
102. The Tribunal is also cognisant of the fact that the Claimant, in exercising his legal rights, has endured a late night hearing before the CHC on Wednesday night (2nd September), a late night hearing before the CAC on Thursday night (3rd September), a late night hearing before the DRA on Friday night (4th September) all before an All-Ireland Semi Final replay match on Saturday afternoon (5th September). It would be unduly harsh and disproportionate to remit the matter back for further reprocessing in the circumstances.
103. Finally, the Tribunal wishes to commend both parties for the manner in which this case was presented over a period of seven hours late into the evening, bearing in mind the late nights that preceded them.

Costs

104. The Tribunal is reserving its position in relation to the costs of either party and the costs and expenses of the DRA pending written submissions from all parties within 7 days from the date hereof.
105. By default, if no submissions are forthcoming within the time indicated above, the Tribunal invokes its jurisdiction in relation to the making of an order for costs, per *Arbitration Act 2010* and so directs the Secretary of the DRA to attend to such matters forthwith: -
- I. The '*costs follow event*' principle applies and the Claimant is entitled to his costs, including counsel fees, as against the Respondents in equal shares.
 - II. The Respondents discharge the costs and expenses of the DRA in equal shares.
 - III. The deposit paid by the claimant of €1,000.00 to the DRA Secretary is refunded.

Date of Oral Hearing: 4 September 2015;

Date of Majority Award: 19 September 2015

Hugh O'Flaherty

David Nohilly

DISSENTING DECISION (Rennick)

This is the second Dissenting Decision in the ten year history of the DRA. All but two DRA panels therefore have delivered unanimous Decisions, generally coming to that unanimous agreement following upon discussion and debate on the merits of the case before it. In this particular case I have decided to deliver this Dissenting Decision because I fundamentally disagree with the Majority who, in my view, have decided this case on grounds that were not advanced by the Claimant before the DRA on the 4th September 2015 and in so far as their reasons may in general terms relate to a stated Ground of Claim, such Ground of Claim should not have been considered by the Tribunal, the reasons for which are set out in the body of my Decision.

Factual Background:

1. The Claimant played in the All-Ireland Semi-Final match against Mayo on the 30th August, 2015. In or about the 72nd minute, i.e. in injury time, the Claimant became embroiled in a confrontation with an opposing player as a result of which he was wrestled to the ground. The Referee did not witness the incident but his attention was drawn to it by his Linesman, Mr. Conor Lane. The Claimant received a straight red card for the alleged infraction which was recorded in the Referee's Report as "*striking with the hand*". The opposing player, Lee Keegan received a yellow card arising out of the same incident.
2. The Referee's Report was processed by An Lár Coiste Cheannais na gComórtaisí ("The CCCC"), and a Notice of Disciplinary Action was sent to the Claimant on the 31st August, 2015. The infraction alleged in the Notice was "*striking with hand*" which is classified as a Category III Playing Infraction. The penalty proposed by the CCCC was the minimum penalty provided for under Rule 7.2 T.O. namely "*a one match suspension in the same Code and at the same level, applicable to the next game in the same competition*". The Claimant was furnished with a copy of the Referee's Report with the notification.
3. The Claimant submitted his Reply to Notification of Disciplinary Action on the 1st September, 2015 and requested a hearing. In accordance with Rule 7.3 (s) the Claimant sought clarification on a number of issues namely the following:-
 - "1) *Did the Referee witness the incident?*
 - 2) *If the Referee witnessed the incident what did he observe?*
 - 3) *If the Referee did not witness the incident can he advise who brought the incident to his attention.*
 - 4) *In relation to this incident, can the Referee provide full details of the report made to him about that incident by any Linesman/Umpire officiating at the game either personally or by radio communication. In particular, can the Referee provide full details of the incident as described to him by the Linesman officiating on the Hogan Stand side of the pitch.*

- 5) *If the Referee did not witness the incident, what did the Linesman/Umpire cite the Maigh Eo No. 5 for?*
- 6) *If the Referee did not witness the incident, did the Linesman/Umpire report any other Maigh Eo player (No. 5 excluded) in relation to this incident?*
- 7) *If the Referee did not witness the incident, did the Linesman/Umpire report any other matters concerning the incident?"*

In addition the Claimant requested a copy of the Referee's Report arising from the All-Ireland Senior Football Championship Quarter Final match between Donegal and Mayo played in Croke Park on the 8th August, 2015.

4. On receipt of the request, the CCCC by email of the 1st September, 2015 wrote to the Referee in the following terms:-

"In relation to the incident for which Diarmuid was dismissed, can you please clarify the following:

- 1) *"Did you witness the incident yourself? If yes, what did you witness?*
- 2) *If the answer to No. 1 above is No, can you please confirm who did?*
- 3) *If the answer to No. 1 above is No, can you please confirm the **full** detail of the Report made to you by your Match Official(s), including all details in relation to Maigh Eo players."*

The reply received from the Referee was as follows:

- 1) *I did not witness the incident.*
- 2) *Standby Referee, Conor Lane witnessed the incident.*
- 3) *Conor Lane reported to the Referee that No. 5 green and No. 12 blue were wrestling on the ground and No. 12 blue struck with the fist".*

By email dated 2nd September, 2015, the CCCC furnished the clarifications as received from the Referee and also indicated that they did not see how the Referee's Report from the Donegal - v - Mayo match was relevant and did not therefore supply it. They did indicate however, that it would be available at the Hearing and that if the Hearings Committee considered that it was relevant and should be made available to them, then it would.

5. On receipt of this email from the CCCC, the Claimant sought further clarification which was communicated to the Referee by way of Request for further Clarification in the following terms:-

- 1) *"As per original request can you please confirm the **full** detail of the Report made to you by your Match Official(s) including all details in relation to Maigh Eo players.*
- 2) *Can you please confirm which side of the pitch was Conor Lane officiating at the time of the incident".*

The reply received from the Referee was in the following terms:-

- “1) Full details as per previous communication.
- 2) Conor Lane was officiating on the Hogan Stand side of the pitch when the incident occurred.”

6. The Hearing was arranged for the 2nd September 2015 before An Lár Coiste Éisteachta (“the CHC”). It was the decision of the CHC that “*the evidence provided was not sufficiently compelling to contradict the Referee’s Report*” and the CHC imposed the minimum penalty for a Category III infraction, namely a one match suspension.
7. The Claimant appealed the decision to An Lár Coiste Achomhairc (“the CAC”) listing 14 grounds relating to misapplication of Rules, breach of fair procedures and principles of natural and/or constitutional justice.
8. The Appeal was heard by the CAC on the 3rd September, 2015, and the Claimant was notified on the 4th September, 2015 that the Appeal had been unsuccessful for the reasons as set out in the Decision of the CAC. The Claimant commenced these Arbitration proceedings immediately on receipt of the Decision of the CAC and listed 11 points of claim relating to the misapplication of Rules and breaches of fair procedures and constitutional justice.

Preliminary Issue: Viewing of Video Evidence

9. The Claimant was in attendance with Mr. Jim Gavin and Mr. Chris Farrell (video analyst), both of whom had attended at the hearing before the CHC and the Appeal before the CAC. The Claimant wished the Tribunal to view the video footage and also to hear direct evidence from Mr. Gavin and the Claimant by way of commentary on the video footage. It was submitted on behalf of the CHC that it is not the function of the Tribunal to conduct a re-hearing of the case and the evidence adduced before the CHC and the CAC, but rather to review what had occurred during the course of the Disciplinary process to see if there was any illegality in the process and procedures applied.
10. It was submitted that if the Claimant’s case was down to the single issue as to whether or not the alleged infraction was deliberate or not, then this finding had already been made by the lower body namely, the CHC and that it stands. It was submitted that it was not open to the Tribunal to interfere with that decision. This position was supported by submissions made on behalf of the CAC. It was up to the Claimant to adduce compelling evidence before the CHC in his attempt to overturn the Referee’s Report and to establish that the decision was “*manifestly incorrect*”. The CHC had made a decision on this point, this decision was considered on appeal to the CAC and the matter has therefore been decided. In addition the Tribunal was referred to the decision in D.R.A. 18/2010 in regard to the appropriateness of considering video evidence in circumstances where such video evidence has been fully considered by both the Hearings Committee and the Appeal Committee on the

basis that it is “*outside the scope of its role to substitute its view of video evidence previously very thoroughly considered*”. The Tribunal’s attention was also drawn to the decision in D.R.A 9/2015 and in particular paragraph 8 which states that it was not the function of the CAC to consider the matter *ab initio*. The CAC must review the decision of the CHC and be satisfied that there was either a basis for the decision made by the CHC or no basis for their decision. In fact, it was pointed out that even in an instance where the CAC may in fact disagree with the decision reached by the CHC, it cannot in fact impunge that decision unless it is satisfied that the decision is “*manifestly incorrect*”.

11. It was further submitted in this regard, that the Claimant has already made the case to the CAC that the decision was “*manifestly incorrect*” and that this has been dealt with. It was submitted that the jurisdiction of the CAC is very similar to the jurisdiction of the D.R.A. The Claimant had got every chance to make his case and that case had failed.
12. In response, the Claimant submitted that it was not accepted that the function of the D.R.A is as limited as that which has been submitted by both Respondents. The Claimant submitted that if the function of the D.R.A was to review the decision, that they could not possibly do so without reviewing and hearing evidence.
13. I put it to both Respondents that if the case was being advanced by the Claimant that the decision of the CHC and on appeal, the Decision of the CAC was “*irrational*” then was it not the case that any body sitting as a review body could only assess the rationality of the Decisions by viewing the evidence, in this case the video evidence. I suggested therefore that the viewing of the video evidence would be limited to that particular point.
14. At this stage, the matter of the difference between the Referee’s Report and the clarification sought were referred to, namely the difference between “*striking with the hand*” and “*striking with the fist*”. It was accepted that both fall into the same category, i.e. Category III infractions.
15. The Tribunal adjourned to make a decision on whether or not it would view the video evidence for the purpose of determining if on the evidence that the decision of the CHC and the CAC in holding that the alleged infraction occurred was an irrational decision such as should be impunged. The Tribunal determined that the video evidence should be reviewed and following upon some discussion it was agreed as and between the Claimant and both Respondents that both Mr. Gavin and the Claimant would provide commentary on the video evidence.
16. Having viewed the video evidence, the Tribunal then heard submissions from the parties.

Claimant’s Submissions

17. The Claimant submitted that he appreciated that a Referee or Match Official must make a decision in a split second. However, the CHC did have the benefit of the video analysis and the evidence of Mr. Connolly and Mr. Gavin. The CHC decided that this evidence was not compelling or sufficiently compelling to overturn the Referee's Report. It was submitted that this was an utterly unreasonable decision as it was a mere presumption based on the video that there was a deliberate strike of an opposing player, and, as per the Linesman's clarification, a strike with the fist. What the Linesman could only have seen is an arm coming out from the wrestle and going back in again and on that basis assuming that it was a strike. It was submitted that that is not a reasonable assumption to make. The Claimant further submitted that the Tribunal has a much broader jurisdiction than the High Court in hearing Judicial Review proceedings and that therefore the "irrationality" test is not the test that applies. He submitted that even if the Tribunal however, considers that it is a Judicial Review type function that the standard by which the decisions made by the CHC are reviewed is the reasonableness test.

Respondent's Submissions

18. The CHC submitted that it was important that the Tribunal view the arguments made by the Claimant in the context of the Official Guide which sets out the Rules of Evidence and how they must be applied pursuant to Rule 7.3(aa)1(vi) in particular. This Rule sets out the status afforded to a Referee's Report. The Referee's Report in this instance stated that the Claimant struck with the hand and the clarification sought from the Referee reinforced that view. It does not matter whether it was seen by the Referee or the Linesman. It was submitted that the clarification received by the CCCC has the same status as the Referee's Report in accordance with that Rule as it expressly states so. It is the case therefore that the content of the Referee's Report is presumed to be factually correct unless there is compelling evidence to overturn it. The evidence presented to the CHC comprised of four video clips and a video clip from an undetermined source. The CHC considered all of that evidence pursuant to Rule 7.3(aa)(1)(ii). It was submitted that the burden of proof in the context of compelling evidence is quite a high standard and that having considered all of the evidence presented on the Claimant's behalf the CHC considered that the evidence was not sufficiently compellable to as to determine that the Referee's Report was incorrect. In this regard they considered the question "*does the video evidence show to us in a compelling way that Mr. Connolly did not commit the infraction?*" The CHC considered on the evidence that Mr. Connolly did in fact strike and that the suggestion that he didn't strike the opposing player and that the Referee's Report was incorrect in this regard on the evidence was an outrageous suggestion. It was submitted that unlike a Criminal Court, there is no presumption of innocence within the disciplinary procedures. In fact the contrary is the case where it is presumed that, as in this instance, the player did strike the opposing player simply because that is what is stated in the Referee's Report. He finally submitted that it would have been impossible and irrational to come to any other conclusion on the evidence.

19. It was submitted on behalf of the CAC that they had been taken through all of that evidence in the course of the Appeal and the argument put before them was that the Decision reached in this regard by the CHC was “manifestly incorrect”. He said that was the basis on which they actually viewed the video evidence. The test to be applied by the CAC on Appeal is, “was the decision reached by the CHC, based on the evidence before it, a decision which was open to the CHC to make”. The CAC considered the provisions of Rule 7.11(o) which provides that “No determination of fact by the Decision Maker shall be set aside unless shown to be manifestly incorrect”. Accordingly, it was not the function of the CAC to consider any other evidence but merely to consider as to whether the decision reached by the CHC was a decision that was open to them to be made and was not “manifestly incorrect”.

Preliminary Decision

20. Having heard the Claimant’s and Mr. Gavin’s evidence in conjunction with the viewing of the video footage and following upon a further lengthy adjournment, the Tribunal decided that there was a basis for the decision reached by the CHC and the CAC and that it should not therefore be interfered with.

The Claimant was then invited to present his case in respect of the procedural issues.

The Claimant’s Case:

21. The Claimant submitted 11 grounds for review in his Request for Arbitration as follows:

Failure to take the Claimants name

(i) The Claimant submitted that the CHC and the CAC acted in breach of and misapplied Rule 1.2.(ix)(f) of the Official Guide Part 2 in imposing a penalty for a sending off in circumstances where the match referee failed to comply with, what the Claimant submitted is, a mandatory requirement to take the players name before issuing a red card if that players name had not already been taken previously during the match. The Claimant submitted therefore that non-compliance with this requirement invalidated the Referee’s report and that the CHC was not therefor entitled to up-hold the Referee’s decision in that regard and no penalty could therefore be imposed.

Response

It was submitted on behalf of the CHC that in a circumstance such as this, where the player’s identity is known to the referee, that this did not matter and that there was no prejudice to the Claimant as a consequence. It was further submitted that Rule 1.6 provides that “any errors/omissions shall not invalidate the Report as a whole”. It was submitted that if those who drafted the Rules had intended there to be such a consequence i.e. the invalidation of the Referee’s Report or some other consequence, that it would be provided for in the rules.

Finding

The Tribunal was satisfied that the decision made by the CHC and on appeal by the CAC was not in breach of the rules referred to.

Allegation of striking was wrong

(ii) The CHC acted in breach of and misapplied Rule 7.2., Rule 7.3 (aa) (1)(vi) and Rule 7.3(bb) in deciding that the infraction against the Claimant was proven, that the Claimant had committed the infraction alleged and that the CAC erred, misapplied and acted in breach of the Rules and misapplied and acted in breach of Rule 7.11(o) in upholding the decision of the CHC. It was submitted that the decisions by both the CHC and the CAC were unreasonable, dis-proportionate and manifestly incorrect. The decision that the Claimant struck the opponent was wrong in fact and in law and was unsupported by sufficient evidence.

Compelling video evidence in contradiction of Referee's Report

(iii) That the CHC acted in breach of the same Rules as referred to at (ii) above in deciding that the evidence provided before the CHC was not sufficiently compelling to contradict the Referee's report and that the CAC erred, misapplied and acted in breach of the said Rules and further misapplied and acted in breach of Rule 7.11(o). Likewise it was submitted that the decisions reached in that regard were unreasonable, dis-proportionate and manifestly incorrect and that the decision by the CHC determining that the Claimant struck his opponent was wrong in fact and in law and unsupported by sufficient evidence.

Response and Finding

Both of these claims, it was submitted, had in fact been determined by the preliminary issue in this case, the Tribunal having determined that there was a basis for the decisions reached by the CHC in this regard and that those decisions should not be interfered with.

Referee's Report based on hearsay

(iv) That the CHC acted in breach of and misapplied Rule 7.2, Rule 7.3 (aa)(1)(vi) and Rule 7.3(bb) and in breach of the principles of fair procedures in the weight they attached to those matters contained in the Referee's Report and subsequent clarification which are hearsay or based on hearsay. They also applied the incorrect burden and standard of proof to the Claimant in the circumstances. The CAC erred and acted in breach thereof and in breach of Rule 7.11(o) in upholding the decision.

Lesser weight should apply to "hearsay evidence"

(v) That the CAC erred, misapplied and acted in breach of Rule 7.3(bb) and of fair procedures and acted manifestly incorrectly in finding that the CHC was correct in not attaching a lesser weight to those parts of the Referee's Report that are based on hearsay. The Claimant submitted that the special status afforded to a Referee's Report under Rule 7.3(aa)(1)(vi) only applies to matters that the Referee saw himself. There

is a general rule in law against hearsay and a report from a match official to a Referee and a subsequent recording of that information in a Referee's Report it was submitted is hearsay. As such, it should not be afforded the special status of a Referee's Report under the Rule. It was submitted that as a matter of contract law, the rule against hearsay stands unless it is expressly excluded. This is recognised as a protection of fair procedures generally. It was submitted that a request for clarification sought from the Referee in respect of matters reported by a match official, such as a linesman, is likewise hearsay. The Claimant did not go so far as to suggest that a Referee's Report cannot include hearsay. It was merely submitted that it should not be afforded the weight of that which has been witnessed by the Referee himself. In this instance the Claimant submitted that what they sought from the CCCC was the "full detail" of the incident and this had not been given. It was submitted that whilst the Claimant accepted that the DRA considers that it applies a judicial review type standard in reviewing decisions that where those decisions are based on hearsay, that a lower standard should apply.

Response

In response the CHC submitted that the rule states that "*a Referee's Report including **any** (emphasis added) clarification thereto shall be presumed to be correct in all factual matters*" and that therefore the clarification sought in this instance was not hearsay and had to be treated under the Rule by the CHC as being correct in fact unless there was "*unedited video or other compelling evidence*" to contradict it. It was submitted that there was nothing unusual about such a Rule in the context of rules governing other sports. The Rule is intended to provide for instances where infringements are not seen by the Referee and provides a mechanism by which such infringements can be dealt with. The Tribunal was referred to Rule 2 of the Official Guide Part 2 and in particular 2.2. the "DUTIES OF UMPIRES". Under this rule an Umpire is bound to bring any such infringements to the attention of the Referee. A sports body such as the G.A.A. does not apply the rules of criminal evidence as such a burden could not be expected in any sporting organisation. A sporting body is entitled to apply robust disciplinary procedures and this is consistent with the often quoted extracts from Judge McMahon in "*Barry and Rogers -v- Ginnity and Ors (2005) (unreported)*". The Rule is drafted as is common with rules governing other sports to provide that the Referee and Match Officials shall not be required to attend at hearings for the purpose of cross-examination or otherwise. To provide in the Rules therefore that the Referee's Report and any clarification thereto shall be factually correct does place a heavy onus of proof on the Claimant but that is what the Rule provides for.

Finding

The Tribunal was satisfied that there had been no breach or misapplication of the relevant rules in respect of these claims and did not see any basis on which those decisions should be interfered with.

Failure on part of CHC to seek further clarification

(vi) & (vii) That the CHC acted in breach of and misapplied Rule 7.3(aa)1(viii) and in breach of fair procedures and constitutional justice in failing to seek clarification of matters within the Referee's Report in light of the detailed evidence given by and on behalf of Mr. Connolly such as could be used to exonerate Mr. Connolly or mitigate the allegations made against him or in the alternative, having not sought such clarification, acted in breach of and misapplied Rule 7.2, Rule 7.3.(aa) (1)(vi) and Rule 7.3(bb) in the manner set out at Claim (iv) above and the CAC acted in breach thereof and in breach of Rule 7.11(o) in upholding the decision of the CHC and, in particular but without prejudice to the generality of the foregoing, in finding that the Claimant did not show that his right to a fair hearing had been compromised to such an extent that a clear injustice had occurred. The Claimant submitted that the power that the CHC has under this Rule to seek clarification, is a discretionary power. It is a power however it was submitted, that must be exercised where necessary in circumstances such as these in the interest of complying with principles of constitutional and natural. In this particular instance, the Linesman told the Referee that the Claimant had struck with "the hand" and then on clarification the linesman said that the Claimant had struck with "the fist". There was a clear conflict of evidence. It was submitted that the CHC could have sought clarification on this point. The reply could have been such as to exonerate the Claimant. The Rule states that such clarification can be used in mitigation or to exonerate a Claimant. To have failed to have exercised their discretion in favour of the Claimant in this instance amounts to a breach of fair procedures and constitutional and natural justice.

Response

In response the CHC submitted that the Claimant had exercised his right to seek clarification in advance of the hearing before the CHC. In circumstances where the Claimant was not satisfied with the replies, he could have pressed the issue before the conduct of the Hearing and/or he could have raised the matter at the Hearing but chose not to. It was submitted that it was unfair to castigate the CHC before the DRA in circumstances where the Claimant could have addressed this issue at CHC and CAC levels. Had this been raised before the CHC, the CHC could have and would have made a decision on the matter. As it had not been canvassed at the Hearing no decision was in fact made on the matter and therefore it was not a matter that should be the subject of a review before the DRA. Notwithstanding the Tribunal was referred to the decision in the Paul Finlay case DRA 16 of 2008 and in particular paragraph 19:

"We think that if the decision not to seek clarification is irrational (i.e on the test of administrative unreasonableness), then the DRA should review it That is of course, an extremely stiff test to overcome, and in the result we do not think that the decision of the CHC in this case came close to the degree of irrationality required in order to warrant interference by this Tribunal. A mere conflict of evidence is not enough. If the conflicting evidence was extremely strong (perhaps sufficient to carry the label "compelling"), then one might argue for irrationality, but the DRA must be extremely careful not to trespass on the fact finding jurisdiction of the internal disciplinary bodies of the GAA. In this case the conflicting evidence bears no special characteristics that cause either for an ambiguity to be removed or for a decision to be re-evaluated, still less, in our opinion could it amount to an example of what constituted "compelling evidence"."

In this instance, the conflicting evidence complained of is whether the claimant stuck with “*the hand*” or “*the fist*”. Irrespective of which, both are category III infractions which carry the same penalty. It was submitted that it was not an irrational decision on the part of the CHC therefore not to seek further clarification as it was considered that there was actually nothing to seek clarification on which could either mitigate the penalty or exonerate the Claimant. To apply the standard as set out in the Finlay case, what further evidence could be adduced on clarification such as to satisfy the standard of “*compelling evidence*” and such as might mitigate the penalty or exonerate the Claimant? It was submitted that the conflict was not such a conflict as would have merited a further request.

Finding

The Tribunal did not reach a unanimous decision in the respect of the review of the decision made by CHC not to seek clarification under Rule 7(aa)(1)(viii). Accordingly, my dissenting decision in this regard is set out at the conclusion.

Incorrect weight applied to direct evidence in support of the video evidence

(viii) That the CHC acted in breach of Rule 7.2. and 7.3(aa)(1)(vi) and in breach of fair procedures in deciding that the evidence submitted by the player namely, his own evidence, the expert witness evidence of Jim Gavin and video evidence was not sufficiently compelling to contradict the Referee’s Report particularly though not exclusively, in light of the absence of any detail in relation to the alleged incident and the fact that the Referee did not witness the incident and that this section of his Report is based on hearsay.

Finding

This aspect of the claim has been dealt with under Claim (iv) and (v) above.

The Claimant acted in self-defence

(ix) That the CAC acted in breach of and misapplied Rule 7.2 and 7.3(bb) and (dd) in imposing a suspension for a Category III infraction in circumstances where any contact or strike which may be alleged and found to have occurred(which is denied) was reasonable, proportionate and lawful in all of the circumstances.

(X) That the CAC acted in breach of and misapplied Rule 7.2 and 7.3(bb) and (dd) and Rule 7.11(o) and in breach of Rule in finding that the CHC could not consider whether the Claimant was entitled to use force in the specific circumstances and whether the force used was reasonable, proportionate and lawful, “*the self-defence*” argument as described by the CAC. It was submitted on behalf of the Claimant that a player in limited circumstances is entitled to take steps to protect himself where he is in fear of “*life or limb*”. In this instance the Claimant was in a chokehold and was entitled to take protective measures. It was submitted that the action taken by the Claimant was a reasonable response to the circumstances that he found himself in and

should be judged on that basis. It was submitted that it would be a preposterous interpretation of the Rules that under such circumstances a person is not entitled to take action to extricate himself where he is in danger.

Response

On behalf of the CHC it was submitted that no such argument was canvassed before it at Hearing, that they did not and were not in a position therefore to make a decision on it and that it was not open to the Claimant to make such an argument *de novo* before the Tribunal.

Finding

The Tribunal agreed that it could not consider this point of claim as it is not a point of claim that is properly before the Tribunal as it had not been canvassed at the CHC hearing.

CHC's decision inconsistent with recent precedent

(xi) That the decisions are in breach of fundamental principles of fairness and the requirement for consistency in decision making in that the same Committees made recent decisions both in relation to this match and other matches which are inconsistent with the decisions in this case. The Claimant is entitled to have his case determined in a like and consistent manner as other cases and that has not occurred. The Claimant submitted that other incidents had happened in this game that had not been dealt with. It is a fundamental principle that there should be consistency in dealing with incidents by the Referee. It was submitted that in this particular circumstance that it was the player who was actually wrestled to the ground, who was given a red card and the player who wrestled him, walked free. This was a flagrant inconsistency in the application of Rules. Other cases were mentioned by way of comparison where Referee's Reports had been overturned. The Claimant again advanced the argument that the Tribunal was not restricted to a judicial review type function and that there was nothing in the DRA code to suggest that its jurisdiction is restricted to a Judicial Review standard. Its function is to determine a dispute between parties and nothing more. Rule 1.3 of the Code simply provides that the Rules of the Association and the Laws of Ireland shall apply. The purpose of the DRA is simply to provide a forum for the resolution of disputes so as to prevent those disputes going to the Courts. Such a function, it is submitted, cannot be delivered if it is limited to a Judicial Review standard. The function of the DRA is in contrast with the function of the CAC. Rule 7.11(o) provides for an express limitation for the conduct of the hearing of an Appeal. The DRA deals with disputes between parties that have exhausted all available avenues of Appeal under the Official Guide. Accordingly, unless there are limiting provisions in the DRA Code it has in fact AN unlimited jurisdiction. It was submitted that it does not have to be satisfied on the irrationality of a decision of the CHC or the CAC before quashing that decision but it simply can decide that the decision of the lower body was wrong.

Response

It was submitted in response by the CHC and CAC that it is not possible or desirable to re-referee games for the purpose of applying consistency. A review of any game would surely show many infractions that had gone unnoticed by the Referee and Match Officials. That however is not what is at issue in this case. What is at issue is that the Claimant came before the CHC as there was a disciplinary charge brought against him. That is not to say that there were not other incidents in that game which had not been noticed. It is not the function of the CHC to re-referee the game and make decisions. Likewise the CAC has no power to investigate and initiate actions. The only issue that was to be determined before the CHC was whether the infraction as referred to in the Referee's Report was proven or not in accordance with and by reference to the Rules in the Official Guide. Neither is it practical to compare the circumstances of the conduct of hearings in other cases in circumstances where none of the parties present at this hearing were there, are not aware of the evidence given, the manner in which it was presented and neither do any of the parties present know the reasons for those decisions. The CHC heard this case and made its determination based on the evidence before it. The Claimant pursued his right to Appeal before the CAC and the CAC upheld the decision of the CHC.

The Tribunal was referred to the specific wording in Rule 7.13(a) which provides as follows *"In the event of any dispute or difference between any member or unit of the Association with any other member or unit of the Association as to the legality of any decision made or procedure used by any unit of the Association in pursuance of the Rules and Bye-Laws of the Association, which cannot be settled by amicable means within the Rules of the Association, such dispute may be referred by either party to arbitration under the Dispute Resolution Code"* Accordingly, the jurisdiction of the DRA is limited to determining disputes regarding the legality of the decisions reached by the lower bodies and the procedures by which those decisions were made. There is a long line of DRA Authorities dealing with the role of the DRA and it is well established now that that role is a similar role to that of the High Court in judicial review proceedings. It was further submitted that the standard which applies for a decision of the CHC to be overturned is that it must be shown to be *"unreasonable and perverse and plainly and unambiguously flies in the face of reason and common sense"* being the standard as set out by Mr. Justice Henchy in *the State (Keegan -v- The Stardust Victims Compensation Tribunal)*" DRA/2008. It was further submitted that the Courts have expressed great reluctance to become involved in dealing with disputes from sporting organisations on the basis that sporting organisations are best placed to deal with their own internal disputes.

Finding

The Tribunal was satisfied that the CHC and the CAC were entitled to adjudicate on the Claimant's case without reference to the other cases that had been referred to and without reference to the fact that other infractions had gone unnoticed and unpunished during the match.

Dissenting Decision. (Ref to points (vi) and (vii))

22. It is important to emphasise the function of the DRA as referred to above and as set out in Rule 7.13 (a) of the DRA Code. The function is to determine the legality or otherwise of decisions made or procedures used by decision making bodies within the Association. In this regard, it does not matter whether the DRA agrees with the decisions made by those decision making bodies and in fact, it can and may frequently disagree with those decisions. The decisions made however, stand good provided they have been made in accordance with principles of fair procedure, constitutional and natural justice. In this regard I refer to paragraph 39 of DRA Case No. 1 of 2005 which was in fact the very first case before the DRA and which provides

“as a matter of general principle, where a decision with the jurisdiction of an agreed decision maker is under review, the Courts (and consequently the DRA) will afford great latitude to the decision maker concerned and unless the decision is unreasonable, nay irrational, then it will not be disturbed, notwithstanding the fact that the DRA may have a different view on the merits of the decision”.

This standard therefore is that standard that has applied in DRA cases from the very outset and for the ten years of the history of the DRA.

Rule 7.11(o) provides that *“an appeal shall be limited to the matters raised in the Appellants appeal as originally lodged and shall be upheld only where:-*

- (i) There has been a clear infringement or misapplication of rule by the decision maker, or,*
- (ii) The Appellant’s right to a fair hearing has otherwise been compromised to such an extent that a clear injustice has occurred. No determination of fact by the decision maker shall be set aside unless shown to be manifestly incorrect.*

Accordingly, a decision maker in this disciplinary process is the CHC. The CCCC is not a decision maker. The Appellant body, namely the CAC on Appeal could only have interfered with a decision made by the CHC on the grounds stated above i.e. where there was a clear infringement or misapplication of rule, or, where there was a breach of fair procedures resulting in a clear injustice, and was as such manifestly incorrect. Once the Appeal has been determined it falls therefore only on the DRA to determine the legality of the decisions made below with the proviso that it will only interfere with those decisions where those decisions are found to be irrational.

Can the processes of the CCCC be subject to review?

In the instant case the majority of this Tribunal have found that the CCCC breached Rule 7.3(s) in that it:

- a) Failed to comply with its obligation to seek clarification in the form as requested by the Claimant
- b) As a consequence thereof the Claimant did not receive all of the information that he requested and in particular in respect of questions 3,4, 5, and 6.

- c) That the CCCC failed to discharge its investigative functions in conducting a more thorough investigation of the facts and particularly so given that they should have known that this case would be vigorously defended.
- d) That such investigation should have included interviewing such persons including Match Officials as they deem appropriate pursuant to Rule 7.3.(h).
- e) That the clarification received was not an appropriate full response to the question asked
- f) That where a Match Official cannot be required to give oral evidence pursuant to the Rules, that they should be obliged to provide a full and proper account of the facts relating to the alleged infraction and as a consequence of the foregoing the Claimant was prejudiced in the conduct of his defence.

Reasoned Dissenting opinion

(a) It was submitted by the CHC that no argument was canvassed before them or issue taken with the fact that the Claimant was not satisfied with the extent of the investigation undertaken by the CCCC or that the Claimant was not satisfied with the extent of the clarification that he had received. That was the correct forum in which to take issue with the CCCC, and it would have been a matter for the CHC to deal with that issue. The Claimants failure in that regard means that the issue could not form part of the Claimants Appeal before the CAC and neither therefore is it a matter for the DRA to consider.

(b) In fact, it is the case that no argument or submissions were made by the Claimant before the CHC or this Tribunal in respect of any of the alleged failures of the part of the CCCC in respect of the manner in which it sought the clarification from the Referee.

(c) No such arguments were included in the Grounds of Claim as submitted to the DRA.(d) The only submissions made before this Tribunal in relation to the matter of the clarification of the Referee's Report was in fact in regard to alleged failures on the part of the CHC in not exercising its discretion under Rule 7.3(aa)(viii). The argument being that having concluded the hearing, and, there being an apparent conflict of evidence the Claimant submits should have merited a request for further clarification.

(e) The CCCC is not a decision making committee. It has investigative functions and does not make any findings. It is entirely questionable therefore as to whether the workings of the CCCC can be subject to review in the same way as the workings of the CHC can.

(f) The finding that the breach by the CCCC of Rule 7.3(s) is an argument of form over substance. The substance of the request was in fact included in the email from

the CCCC to the Referee, likewise the substance was included in the Reply. Substance must prevail over form (*see further below*)

(g) The request for “full detail” in so far as it relates to the infraction was given. What was not given was detail relating to the lead up to the infraction. That is not relevant for the purpose of determining as to whether an infraction occurred or not in the absence of a permitted defence of provocation or self-defence. There are no such defences and as such the substance of the clarification given was sufficient for the Claimant to conduct his defence.

(h) A criticism, such as it is of the CCCC (and the failure of the referee to furnish more detail) is unfair and unbalanced notwithstanding the investigative functions of the CCCC. Had the argument been advanced at the CHC then in that instance the CHC could have remitted the matter to the CCCC. The fact remains that no such argument was advanced at the CHC. That is a failure on the part of the Claimant.

(i) The Claimant should not rely upon the CCCC alone to investigate the incident. The Claimant could have brought other witness evidence to the Hearing.

(j) A comparison has been made in respect of the Request for Particulars that is made in a civil case in the conduct of legal proceedings. The law that applies in that regard is that a party is entitled to “*Such particulars as will inform him of the range of evidence (as distinct from any particular items of evidence) which he will have to deal with at trial*”. *Cooney v Brown 1986 IR 185 Henchy J*. That test was certainly satisfied in the context of the clarification given.

Accordingly, there is no basis for this Tribunal, in my view to make a determination in regard to the discharge by the CCCC of its functions pursuant to the Rules in circumstances where not only was no such argument advanced before the CHC, and where no such points were set out in the Claimants Grounds of Claim and argument was advanced before this Tribunal.

The CHC had to deal with a single alleged infraction and made its determination on the evidence and in accordance with the Rules.

Form -v- Substance

Notwithstanding the foregoing I believe that it is important from the point of view of the criticism of the CCCC to put the Majority view (as it was not a view expressed by the Claimant) into context. My view is that this is an argument of form over substance. As a matter of fact and as is recited at paragraphs 3 and 4 above the CCCC did paraphrase the request for clarification as received from the Claimant. The request for clarification as sent to the Referee however in substance was the same. The Claimant asked if the Referee witnessed the incident. It is clear from the reply received that he did not. The Claimant asked if he did not witness the incident to advise as to who brought the incident to his attention and he was advised that the Stand-by Referee, Conor Lane, witnessed the incident. The Claimant asked for full details of the report made to him and this request was communicated to the Referee by the CCCC. The Referee did not reply with the full detail other than to say, “*Conor Lane reported to the Referee that No. 5 Green and No. 12 Blue were wrestling on the ground and*

No. 12 Blue stuck with the fist." The Claimant asked what the linesman cited the Maigh Eo No. 5 for and this was not specifically put to the Referee in those terms. The Referee with the request for clarification was however, asked in providing full details, to include "all details in relation to Maigh Eo players". The Claimant asked if the linesman reported any other Maigh Eo player excluding No. 5 in relation to this incident and this was not specifically put to the Referee in those terms but was adequately covered in the question put. The Claimant asked if the linesman reported any other matters concerning the incident and this was not put to the Referee.

The main contention is that the Referee did not in fact provide or the CCCC did not procure that the Referee provide as full and comprehensive detail as the Claimant may have expected. This however must be considered in the context of the Official Guide and the infraction for which the Claimant was reported. The Hearings Committee was charged with determining whether the alleged infraction "is more likely to have occurred than not to have occurred" Rule 7.3(bb). The Hearings Committee is not charged with reviewing or assessing other incidents leading up to or immediately after the incident referred to in the Referee's Report.

The deficit of information, such as it is, relates to what the Linesman saw, or may have seen, in the lead up to, and in the immediate aftermath of the incident. Notwithstanding the fact that this was not furnished the Claimant adduced comprehensive video evidence and oral testimony from the Claimant and Mr Gavin before the CHC, which included vivid footage of the lead up to and the aftermath of the incident.

There was therefore no prejudice whatsoever to the Claimant in the preparation for and the conduct of the Hearing, and if there had been the Claimant would have made such an argument before the CHC.

Failure on the part of the CHC to seek clarification

23. The majority of this Tribunal have also found that the CHC misapplied Rule 7.3 (aa)(1) (viii) in that it failed to exercise its discretion in favour of the Claimant and having concluded the hearing should have sought clarification from the Referee because of the conflict in the evidence in respect of the alleged infraction. This is a discretion which is in the "sole discretion" of the CHC **after having heard the evidence**. In this instance, the Hearings Committee were satisfied that the alleged infraction was more likely to have occurred than not to have occurred. I disagree with the Majority view for the following reasons:

(a) There was no application before the CHC by the Claimant to make a request for further clarification to the referee. This particular point (as distinct from a general Claim under the Rule) is not included in the Claimants Grounds of Claim as submitted to the DRA and neither is it referred to in the Grounds of Appeal as submitted to the

CAC. The reasoning as recited by the Majority was not advanced by the Claimant before the DRA on Friday the 4th September.

(b) Notwithstanding the foregoing it is a complete misunderstanding of the discretion afforded to the CHC and the purpose of such a request under the Rule. Any clarification sought by the CHC could only have been sought upon the conclusion of the hearing and *“for the purposes of exoneration of the Defending Party or mitigation of any allegations made against him”*. Such clarification therefore has no other evidential value. It *“may not be challenged in any way or made the subject matter of any further Hearing”*. Accordingly it is completely different to clarification sought and received under Rule 7.3(s). Such clarification is available in advance of the Hearing, it is afforded the evidential status of Rule 7.3(aa)1(vi) and as such it can be challenged and be scrutinised in the Hearing process.(c) This evidence could not under any circumstance remedy the alleged breach of Rule 7.3(s) (ie the alleged failure on the part of the CCCC in regard to the form by which it sought the clarification from the Referee). To make the case that it could *“have remedied the breach of Rule 7.3(s)”* by the CCCC is also an argument that was not advanced by the Claimant at any stage of the process. It was not made before the CHC, the CAC and neither was it included in the Claimants Grounds of Claim as submitted to the DRA. In addition it is not an argument that was canvassed before the DRA on the 4th September.

(d) What possible clarification could have been adduced by such a request that would have mitigated the penalty or exonerated the Claimant? Whether the Claimant struck with the hand or the fist is not a material issue as they are both Category III infractions. The CHC determined that the infraction occurred and imposed a 1 match penalty. One cannot mitigate a 1 match suspension and it is certainly unlikely in the extreme that the third Request for Clarification would have elicited a response from the Referee that would have exonerated the Claimant.

(e) The issue for this Tribunal is as to whether or not the decision not to exercise that discretion by seeking further clarification from the referee was under the circumstances an irrational decision – it clearly was not. It was a decision that was open to the CHC to make after having heard the evidence and whether we agree with that decision or not is not relevant. The standard by which this Tribunal must judge that decision by the CHC not to seek further clarification is whether, under the circumstances, it was a decision which was irrational. It may be a decision on which this Tribunal or individual members of the Tribunal may disagree with but that is not sufficient to interfere with it. The Tribunal must be satisfied that it was an irrational decision and one that flies in the face of common sense. I do not believe that it was such a decision; it was a reasonable decision under the circumstances and one that this Tribunal should not interfere with.

The “Higher Standard” argument

24. What must be accepted is that this Tribunal is adjudicating on the legality of decisions made by a disciplinary panel in a sporting organisation. The organisation is governed by the rules contained in the Official Guide Part 1 and the Playing Rules set out in the Official Guide Part 2. The GAA like all other field sport organisations, has a Rule Book which is robust but fair and its volunteers, at every

level of the disciplinary process, endeavour to apply those rules in accordance with fair procedures. The same rules and standards apply whether on the adjudication of disciplinary matters arising at Club level as apply to disciplinary matters at the highest level of inter-county competition. The Majority have found that a very high standard should apply given what was at stake for the Claimant. In this regard they rely on the extract from Judge McMahon in *Barry and Rogers v Ginnity and Ors.*

“the truth is that the law will demand a level of fair procedure which is sufficient in all circumstances to ensure justice for the player or member affected by the decision. The more serious the consequences, the higher the standard that will be required”.

This extract is relied upon as authority for applying a considerably onerous level of investigation on the CCCC in this instance and on the conduct of a Hearing. It contemplates the calling of evidence from Match Officials and the Referee because of what is at stake for the Claimant, potentially missing an All-Ireland Semi Final replay. I do not subscribe to that view as to do so would be to draw a clear distinction as and between those who play our games at a local level and those elite players who play at the highest level of inter-county competition. For any player to play in a county final or semi-final in whatever division or at whatever age level is just as important to that player as it is for an elite player to play at the highest level of inter-county competition. The club player deserves no less a standard in respect of the application of the Rules and the principles of natural and constitutional justice.

Fair procedures and natural justice

25. The Majority found that the Claimant's right to those fair procedures and natural justice was breached in many ways including:-
- a) The Claimant was not given details of the entire evidence against him (as was his right under Rule).
 - b) The Claimant was not given an opportunity to test that evidence, particularly, the evidence based on hearsay.
 - c) The Claimant was not afforded any right to scrutinise and question the entire evidence against him.
 - d) The Claimant was not afforded the opportunity to present evidence in support of his position.
 - e) The CHC erred and failed to take account of potential relevant considerations to the detriment of the Claimant.
 - f) The CHC erred in not exercising their discretion under Rule in making a request for clarification where it was manifest that it should have been exercised.

The obvious question arises as to what information was withheld from the Claimant in respect of the infraction that was alleged? The answer is none. The only evidence on which the Claimant was dealt with was that which was before the CHC. There was no other evidence against him. What was not put before the CHC was the detail of the

altercation between the two players before the infraction occurred. There was no prejudice to the Claimant as such evidence was not considered by the CHC either. In addition the blame for this appears to be left at the door of the CCCC, the Referee and the CHC. That is to ignore the fact that the Claimant could have taken issue with this before the CHC who could in turn have remitted the matter to the CCCC if they saw fit. This was open to the Claimant had he considered that all of this information was in fact relevant to the conduct of his defence.

The Claimant was not in any way inhibited from presenting evidence (d) and made no such argument at any stage in this process including before the DRA on the 4th September. The first three grounds (a,b & c) relate to other evidence that there may have been "against him" as if it was withheld. The Claimant was at liberty to adduce any evidence that he saw fit, within the parameters of the Rules in support of his position. There was no failure on the part of the CHC and the CAC as regards (e) & (f)

26. It is my view that the Claimant in this instance was afforded fair procedures, there being no misapplication of any of the rules complained of and there being no breach of accepted principles of fair procedures, natural and constitutional justice, such as would entitle this Tribunal to interfere with any of the decisions made. I strenuously disagree therefore with the majority decision which finds that there was "*a significant impairment of the rights of the Claimant, which was disproportionate, irrational and unfair*". I am further of the view that the Decision and Reasons of the Majority in this case is fundamentally wrong in that it is in fact based on reasoning the arguments which were not canvassed by the Claimant at all and as such are in fact the construct of the Majority in circumstances where in fact the Tribunal did not find in favour of the Claimant in respect of 10 of the 11 Grounds of Claim as submitted. The single Ground of Claim on which the Majority have found in favour of the Claimant is firstly a Ground that should not have been considered by the Tribunal as it had not in fact been advanced before the CHC
27. Finally, it is my view that in instances where the DRA finds that there has been a breach of fair procedures that can be remedied that the case should be remitted to the CHC for re-hearing with directions as to how to correct the breaches complained of. It was my express view that the Majority of this Tribunal having found, following upon the hearing on the 4TH September, that there had been a breach of procedures that the Claimant's case should have been remitted to the CHC for re-hearing with directions as to the proper procedures to be applied in accordance with Rule 11.3.
28. It is open to a Tribunal under 11.3 to direct any party to the dispute to abstain from taking any further steps within the Rules. The Tribunal has a discretion in this regard. It is my view that such a direction was not in fact appropriate in this case. To direct that no further action be taken, having quashed a decision, should be reserved to those cases which have already been remitted for re-hearing and come before the Tribunal again or in cases where the special circumstances of a case would so direct. There are no special circumstances in this case which merit a direction that no further action be taken. This is particularly so based on the finding of the CHC, the CAC,

and a finding which has not been interfered with by the DRA that the infraction, as alleged, did in fact occur. The consequence of such a direction in a case such as this, is that the Claimant having committed a Cat III infraction is unpunished. That in my view is an unjustifiable and undesirable precedent to set in the context of a disciplinary process.

Date of Oral Hearing: 4 September 2015;

Date of Majority Award: 19 September 2015

Brian Rennick