

Disputes Resolution Authority

An Córas Eadrána

DRA 02 of 2012

**In the matter of the an arbitration under the Disputes Resolution Code
and the
Arbitration Act 2010**

Between

**Coiste Chontae Mhuineacháin (Monaghan County Committee)
Claimant**

Mr Feargal Logan for the appellants with Mr Paul Curran (Cathaoirleach CLG Mhuineacháin); Mr Seán McKenna (Rúnaí CLG Mhuineacháin) and Mr Gerry Duffy (Ionadaí Do Comhairle Uladh, CLG Mhuineacháin)

And

**An Lár Choiste Éisteachta (Central Hearings Committee or CHC) agus An Lár
Choiste Achomhairc (Central Appeals Committee or CAC)
Respondents**

Mr Liam Keane (CHC), Mr Simon Moroney (CAC) and Mr Stephen Browne (CAC).

**Hearing: Carrickdale Hotel, Carrickcarnon, Ravensdale, Dundalk, Co. Louth at
8pm on 7 March 2012**

Factual Background

1. The matter arises out of incidents that occurred at an Allianz Football League Roinn 2 game between Monaghan and Kildare at Clones on 12 February 2012. The incidents were described in the “additional comments” section of the referee’s report where he noted: “As the half time whistle was blown, a scuffle started involving players from both sides. The officials discussed it at half time and the referee issued the cards we thought were appropriate before the second half started.”
2. Arising from the events described a disciplinary report was compiled and An Lár Choiste Cheannais na gComórtaisí (CCCC) commenced disciplinary action against Monaghan for breach of Rule 7.2(d)(3) of the GAA Official Guide 2011 which holds as follows:

“Disruptive Conduct by Players, Team Officials or Supporters (not causing the Premature Termination of a Game).

Penalties shall be at the discretion of Council of Committee-in-Charge”

The CCCC notified Monaghan in writing of the disciplinary action on 14 February 2012. In that disciplinary notice the CCCC proposed – having regard to the applicable rule, the powers of sanction under that rule, the disciplinary report, and Monaghan’s record – a penalty of a €5,000 fine.

3. Monaghan exercised their entitlement to request a hearing before the CHC. That hearing took place on 17 February. At that hearing all relevant reports (referee’s report, disciplinary report etc) were considered. In addition, witness evidence was heard from the secretary and chairman of Monaghan County Board and video evidence, considered reliable and unedited in nature, was submitted by the CCCC. The CHC – on deciding that the infraction was more likely to have occurred than not – imposed the following penalty: “Forfeiture of Home Advantage to the opposition in the next scheduled Allianz Football League home fixture.” As a consequence, Monaghan’s “home” match against Louth, fixed for Clones on 11 March 2012, would now take place on the same day in Drogheda.
4. Monaghan then exercised their right under Rule 7.11(a)(4) to appeal the CHC’s decision to the CAC. That appeal was heard at Croke Park on 29 February. Having heard and considered submissions on behalf of both Monaghan as the appellant and the CHC as the decision-maker, the CAC, operating in accordance with the procedures laid down in rule 7.11 (n) and (o), dismissed the appeal.
5. Monaghan then requested that the matter go to arbitration under the Disputes Resolutions Code (rule 7.13) and requested an urgent hearing given the imminent 11 March fixture against Louth. The DRA hearing took place on 7 March. The Claimant’s case and Respondent’s reply are noted below. For reasons that will become apparent, but mainly to do with the manner in which the CHC might, at their authority and in their discretion under Rule 7.2(d)(3), be guided in dealing with future infractions of that rule, there has been some urgency with the writing of this award and thus the below sections are summarised as accurately and concisely as possible.

Appellant’s Case

6. It must be noted at the outset that the Claimants admitted at the DRA hearing that a breach of Rule 7.2(d)(3) had occurred. They were however of the view that the infraction was of a minor nature as evidenced by both the referee’s description of it in his report (“a scuffle”) and that the second half of the match passed largely without incident thereafter as, indeed, had the first half. The thrust of their appeal was however the “invented” (to use Mongahan’s

words) nature of the accompanying penalty (the forfeiture of home advantage) and in particular that the penalty was of such scope that, in effect, the CHC had acted *ultra vires* (beyond its powers) and thus that aspect of the CHC's decision should be quashed. The *ultra vires* point argued by Monaghan was twofold in nature and these are now dealt with separately. Monaghan also claimed that bias (perceived not actual) tainted the CHC proceedings to their detriment.

Ultra vires: usurping the role of the CCCC

7. The first part of Monaghan's *ultra vires* argument was that the CHC's penalty (to reverse home advantage for the March 11 fixture) could not be reconciled with and was contrary to the following: the general powers of competition and fixture scheduling delegated by Central Council (under Rule 3.47 (d), (f) and (g)) to the CCCC; the "delegated" powers of the CCCC regarding competition and fixture scheduling under Rule 3.51(b); and the CCCC's specific powers of advice to Central Council regarding the scheduling and fixing of National Hurling and Football league matches under Rule 6.38. In short, Monaghan's argument was that the effect of the CHC's "forfeiture of home advantage" penalty was to usurp the expressly reserved role of the CCCC with regard to fixtures and thus the CHC had also breached Rule 7.3(cc) which states (italics for emphasis only): "where the infraction alleged is proven to the satisfaction of the Hearings Committee, the Hearings Committee shall be entitled to impose such penalties as it sees fit, *subject to Rule...*"

Ultra vires: Disproportionate penalty

8. The second aspect of Monaghan's *ultra vires* argument concerned the CHC's exercise of its power to impose penalties *at its discretion* under Rule 7.2(d)(3). In sum, Monaghan argued that, although acknowledging fully both that the CHC has discretion on penalty in this regard and that the CHC had not in any way acted in bad faith or with impropriety; nevertheless, the penalty was unreasonable, unfair and disproportionate. Further, the novel and invented nature of the penalty - not one seen generally in the Official Guide or widely, if ever, they claimed, used in the GAA world - was of such a disproportionate nature that it could again equate to the CHC acting beyond its powers. In addition, Monaghan noted that the penalty had unintended and largely negative consequences for the following: "innocent" third parties (the travelling expenses for Monaghan supporters to Drogheda); "interested" third parties (the other counties bar Louth in Roinn 2); and parties with whom the GAA might be said to have a contract e.g., with season ticket holders who purchased tickets on the expectation of Monaghan would play three of their 2012 league games in the county.

Perception of bias

9. Here Monaghan argued that a perception of bias in breach of natural justice tainted the CHC hearing. The thrust of this point on perceived bias was that because the Chair of the CHC, Mr Liam Keane, was from Meath, and Meath are one of the other teams in Roinn 2 of the Allianz National Football League,

it followed that in a general way a conflict of interest arose adversely affecting the fairness of the running and outcome of the CHC proceedings.

Respondents' Reply

10. The principal reply by the Respondents rested with Mr Liam Keane for the CHC. Mr Simon Moroney made a brief representation for the CAC confirming concisely that in dismissing Monaghan's appeal the CAC operated in accordance with the procedures laid down in rule 7.11 (n) and (o). In this, Mr Moroney noted that the scope of appeal to the CAC is very much of a "judicial review" nature in that the sense that the appeal is limited exclusively to matters raised in an appellant's appeal as originally lodged. In addition, and in terms that may be of interest to those thinking of availing of such a route, Mr Moroney outlined the tightly drawn scope of the CAC: in order to be upheld an appellant must show that a decision-maker, such as the CHC, clearly infringed or misapplied a rule; that the right to a fair hearing was compromised to a clearly unjust extent; or that a determination of fact by the decision-maker was shown to have been manifestly incorrect.

Ultra vires: usurping the role of the CCCC

11. On this aspect of the *ultra vires* argument, Mr Liam Keane for the CHC argued that the CHC had acted at all time on *intra vires* basis i.e., within its powers, as captured within the widely drawn "disciplinary jurisdiction" granted under Rule 7.1(a).

Ultra vires: Disproportionate penalty

12. On the second part of the *ultra vires* argument, Mr Keane argued that the DRA's jurisdiction to review disciplinary decisions of primary fact-finding bodies such as a hearings committee should be set against the "irrationality" of the disputed decision. Outside of that, he argued, a margin of appreciation should be granted to the decision-maker beyond which the DRA's jurisdiction should not encroach i.e., so long as a disputed CHC decision is not irrational, the DRA has no jurisdiction to review it. In default, Mr Keane argued that in any event the penalty in question was reasonable and fair and in line with a number of other "imaginative" and "creative" sanctions found in, for instance, numerous decision of hearing committees around the GAA world and noted in DRA decisions such as DRA 31 and 32 of 2006; DRA 18 of 2009; and DRA 14 of 2010.
13. Moreover, Mr Keane argued that it could not reasonably be expected, nor should it be expected on the merits of an individual case, that the CHC might now potentially have to take into account all third party repercussions of a penalty. In fact, Mr Keane noted, the inconvenience suffered by Monaghan supporters in having to travel to Drogheda would he hoped *add* to the deterrent effect of the disputed penalty in that it might remind inter-county team managers and their players that their good, disciplined conduct was not just in their interests but in the interest of their county and supporters.

Bias

14. On this matter, which Mr Keane forcefully contested, Mr Keane drew attention to the excerpt from the draft minutes of the CHC hearing on “declaration of possible conflicts”: “Liam Ó Catháin stated that Muineacháin and An Mhí are both in Division 2 of the National Football League. There was no objection to him remaining on the Committee for the hearing.”
15. In any event, Mr Keane argued that, although breach of natural justice and lack of “fair play” was in a general way one of the grounds of Monaghan’s appeal to the CAC, the issue of bias was not specifically pleaded nor was the issue of bias argued to any degree at the CAC appeal (confirmed by Mr Moroney). Consequently, and in line with previous DRA authority such as DRA 30, 31 and 32 of 2005, the DRA was, he argued, precluded from hearing argument on a matter that should, more properly, have been raised on internal appeal. In short, Mr Keane claimed that not all internal avenues of appeal had been exhausted by Monaghan as required under section 2.1(e) of the Disputes Resolution Code and thus the DRA should not entertain this argument.

Reasoning: general principles

16. The decision of the DRA in this regard, which took place under the DRA Code and the Arbitration Act 2010, has also been guided by analogy by the following well-established principles of Irish administrative and sports law.

Administrative law

17. It is a well-held general point of administrative law that even where a delegated power (in this case, to the CHC) is exercised in accordance with the correct scope of its empowerment, it may still nevertheless be invalid as ultra vires if any discretion accorded thereunder as to how that power is exercised is so misused as to render it vitiated by bad faith, arbitrariness, improper purpose or because the manner in which its exercise is so clearly unreasonable (including disproportionate), unjust or oppressive as to result in the conclusion that it could not have ever been intended (in this case, by Central Council) that the power to be exercised in that manner.
18. The administrative law case of most interest and relevance is that of *Island Ferries Teo v the Minister for Communications & Ors* [2011] IEHC 388 where the law or test as to reasonableness in the exercise of statutory powers (expressly granted or in discretion) to take administrative decisions affecting the rights or interests of members of the public has been confirmed as encompassing “the proportionality of the result to the objective for which the power has been conferred” (Cooke J at paragraph 53).
19. In the course of that judgment the High Court also cited the recent Supreme Court authority of *Meadow v Minister for Justice* [2011] 2 ILRM 157, 173-174, Murray CJ which is of use by analogy to this dispute on the reasonable and proportionate use of discretionary powers by the CHC:

“I am of the view that the principle of proportionality is a principle that may be applied for the purpose of determining whether, in the circumstances of a particular case, an administrative decision may properly be considered to flow from the premises on which it is based and to be in accord with fundamental reason and common sense. In applying the principle of proportionality in this context I believe the court may have regard to the degree of discretion conferred on the decision-maker. In having regard to the degree of discretion a margin of appreciation should be allowed to the decision-maker in choosing an effective means of fulfilling any legitimate policy objectives.”

20. Applying the above, Cooke J held in *Island Ferries Teo v the Minister for Communications & Ors* that the defendants had acted beyond its powers because their actions had a cumulatively adverse, manifestly severe and unreasonably oppressive impact upon the plaintiffs and others (paragraph 55).

Sports law

21. Leading Irish sports law cases of note are *Barry and Rogers v Ginnity and others* (Unreported, Naas Circuit Court, 13 April 2005; Irish Times Law Reports, 6 June 2005) and *Gould v McSweeney* [2007] IEHC 5.

22. In *Barry and Rogers*, McMahon J acknowledged that:

“one must expect that laymen applying disciplinary rules will occasionally do so in a somewhat robust manner. Provided those administering the rules operate in a bona fide fashion, giving each side a fair opportunity of participating in the process, the onus on the member who subsequently wishes to litigate upon the findings and decisions is a heavy one.”

23. In *Gould*, a road bowler challenged a disciplinary decision by the executive committee of the sport’s governing body suspending him for two years for dangerous play and verbal abuse of an umpire. The claimant sought a declaration that the decision was made contrary to the rules of natural and constitutional justice. The relief sought was refused. The reasoning used and applied by Smyth J in his decision informs this award. A footnote at the conclusion of Smyth J’s judgment encapsulated the thrust of his decision:

“Sports organisations do best to resolve differences under their own governing codes, rather than resort to courts of law. Issues of natural justice are important, but the substance of matters rather than their form are important ...and recourse to the courts should be a last resort, and that only in the rarest of cases.”

24. In the context of the above authority, the stated dispute can be distilled into three questions: did the CHC act within its powers i.e., intra vires its delegated jurisdiction on disciplinary matters; did the CHC exercise its discretion under Rule 7.2(d)(3) in a proportionate and reasonable manner; did

the CHC at all times conduct itself within the parameters of the fundamental requirement of fairness?

Reasoning: specific grounds

Ultra vires: usurping the role of the CCCC

25. On this ground the Tribunal agrees and upholds the arguments made by the Claimant in paragraph 7 i.e., the CHC's "forfeiture of home advantage" penalty for breach of under Rule 7.2(d)(3) usurped the expressly reserved scheduling and fixture role of the CCCC with respect to the National Football League.

Ultra vires: Disproportionate penalty

26. Given that what we have decided above in paragraph 25 (that the CHC acted beyond its powers) the issue of proportionality on penalty is rendered moot but only partially so and see paragraphs 34-41 below.

Bias

27. On this ground the Tribunal agrees and upholds the arguments made by the respondents in paragraphs 14 and 15. In this, the preclusion of "retrospective pleading" at the DRA is duly noted.

Award (with Directions)

28. The Tribunal awards and determines to quash the decision of the CHC to impose on Monaghan a penalty of forfeiture "of home advantage to the opposition in the next scheduled Allianz Football League home fixture". The relief is in the form of a remittal and is accompanied by directions.
29. The dispute is remitted to the CHC (and as far as is practicable the same CHC panel should be used) for reprocessing in respect of penalty only for the infraction committed.
30. The admission by Monaghan that an infraction of Rule 7.2(d)(3) happened (albeit in their view at the lower end of the scale) is noted.
31. It is also noted that on delivering an oral summary of this award on the night of the hearing, the Respondents immediately requested that the matter be dealt with expeditiously on full hearing by the DRA Panel as per section 11.4 of the Disputes Resolution Code. The Claimants did not, however, as is their right, consent to this.
32. There are two sets of directions. These directions are non-binding and advisory only.
33. The first direction is that, in many ways, the dispute at hand was a "test case" regarding the discretionary powers of the CHC under Rule 7.2(d)(3). The CHC has internal means of "stress testing" or availing of advice on new,

imaginative or creative disciplinary initiatives and how they might be reconciled with the Official Guide and, crucially, how such initiatives might be made "Subject to Rule". It may also be possible to expand the role of the DRA in this regard by way of amending the Disputes Resolution Code to include a consultation procedure allowing certain parties to request an advisory opinion from the DRA, in the absence of any dispute, on any legal issue concerning the practice or development of internal regulatory policy. The advisory opinion would not constitute an award and would not be binding. The Court of Arbitration and other sports arbitration bodies provide such a consultative procedure and the underlying idea is that rather than having to consider the interpretation of a rule in the sometimes hurried and fraught atmosphere of a hearing, a more considered opinion can be given on the disputed rule's possible wider implications and/or vulnerability to challenge on appeal.

34. The second set of directions refers to the fact that as a result of this award the CHC is unsure of the degree or extent of discretion it can use as a disciplinary decision maker in choosing an effective means of punishing violations of Rule 7.2(d)(3). Put simply, as a result of this award, the CHC now knows what it *cannot* do but it does not necessarily know what it can do. In brief, the CHC does not have any guidance as to what might be considered an *intra vires*, proportionate penalty under the extant Rule 7.2(d)(3) and one that might not subsequently be susceptible to later challenge at the DRA.
35. What follows are what this Tribunal deems, in effect, sentencing guidelines for infractions of Rule 7.2(d)(3). These guidelines are informed by the following four points.
36. First, and in a general administrative law sense, a decision-maker's degree of discretion includes a margin of appreciation to that decision-maker in choosing an effective means of fulfilling any legitimate policy objectives, which in this case means that the CHC's degree of discretion under Rule 7.2(d)(3) includes a certain latitude in choosing what it thinks is an effective means of both punishing breaches of Rule 7.2(d)(3) and in deterring others from future breaches of that rule.
37. Second, these guidelines are based both on best practice in other sports and generally on those penalties used typically for similar infractions in the GAA world. Two things are noteworthy here. First and foremost, the general identifiable principle is that every effort should be made to identify those who were involved in or contributed to a melee and to deal with the culprits individually under the relevant rule. Second, it is noteworthy that a penalty where home advantage is conceded to another team is not a feature of sports disciplinary regulations of other codes or of the GAA (as opposed, for instance, to a match being fixed for another nominated or neutral venue). The general view appears to be that such a penalty can often have a wide and unpredictable number of follow-on and unintended consequences leading, for example, to uncertainty for and unfairness towards others.

38. Third, and as is typical of sentencing guidelines in other areas, these guidelines are very much instructive and indicative and they are certainly not mandatory or prescriptive in nature. On the other hand, if adopted in some form and made known to interested parties in advance, these sentencing guidelines would have the benefit of putting infracting parties on due notice and expectation of the type of sanction they might face for violation of the stated rule. In this, by raising awareness of the gravity with which the CHC (and this Tribunal) might view an infraction of Rule 7.2(d)(3), express reference to and notice of these sentencing guidelines would of itself act as a deterrent, as opposed to the vagueness and vulnerability of a discretionary power.
39. Fourth, although forfeit of home advantage to the opposition has been quashed because it usurps the role of the CCCC there is, of course, nothing to stop the relevant parts of the Official Guide being amended subsequently so that such a forfeiture of home advantage penalty could be made subject to rule. That being said, and to reiterate, this Tribunal has concerns about the proportionality, practicality and unintended consequences surrounding such a penalty.
40. Given the above context outlined in paragraphs 34-39, penalties that might, as Rule 7.2(d)(3) currently stands, be considered by the CHC in their discretion for disruptive conduct by players, team officials or supporters (not causing the Premature Termination of a Game) include the following. The penalties are in order of seriousness.
- a) Cautions, reprimands or written warnings that may remain on file as endorsements of disciplinary record;
 - b) Fines;
 - c) Match day restrictions of the kind used by the CHC in a decision of 22 January 2012 against Doire Treasc at this year's All Ireland Junior Club Championship final;
 - d) Next home match to be played behind "closed doors" i.e., attendance restricted to, for instance, immediate team personnel, those required for health and safety purposes at the venue and media;
 - e) Next home match to be played at a nominated or neutral venue selected by the CCCC;
 - f) Annulment of the result of a match and order that it be replayed at a neutral venue and/or behind closed doors at a venue selected by the CCCC;
 - g) Deduction of one league point; or
 - h) Combinations of the above including suspended sanctions may be considered. In the case of suspended sanction, the probationary period would typically be a minimum of one year and a maximum of five though it could be extended in exceptional circumstances. If a further offence is committed during the probationary period, the CHC, as a

rule, would then order the original sanction to be executed. This may be added to the disciplinary sanction imposed for the second offence.

41. Finally, and consistent with paragraph 39, it would be advisable that if the CHC were to consider penalties or deterrents over and above those outlined in paragraph 40, (e.g., disqualification from competitions in progress and/or exclusion from future competitions or withdrawal of a privilege such as the right of the infracting party's nominated county ground to host neutral championship matches) those sanctions should, in natural justice, be inserted expressly into (an amended) Rule 7.2(d)(3) so that parties would have due notice and expectation of these (very serious and all encompassing) types of sanction.

Costs

42. The Tribunal was mindful that, pursuant to the general principles in section 11.2 of the Disputes Resolution Code, the normal rule on costs following the event should apply. The appellants' legal representative however quickly put on record that neither he nor the Monaghan County Board would be pursuing their party legal expenses. The respondents at this point thanked the appellants and stated that they would willingly bear the costs associated specifically with the holding of the arbitration hearing.

Dated: 13 March 2012

Signed:

Jack Anderson

Aaron Shearer

Patrick McCartan