DISPUTES RESOLUTION AUTHORITY

Record No. DRA/3/2010

IN THE MATTER OF THE ARBITRATION ACTS, 1954 – 1998

BETWEEN:

ÉAMON Ó FIONNAIL

Claimant

-AND-

SEÁN Ó COISDEALBHA (mar ionadaí ar son Cumann Luthchleas Gael Bord Chontae Áth Chliath)

Respondent

INTERIM AWARD AND STATEMENT OF REASONS[1]

Introduction

1. This arbitration arises out of a refusal by the Respondent (a nominee on behalf of the Dublin County Committee (hereinafter referred to as "the County Committee"), at its meeting of on 25 January 2010, to grant a transfer on foot of an application in that behalf of the Claimant.

2. To properly understand the facts of the case, one must consider two parallel histories, and it is perhaps best to describe these separately. The first is the regulatory background to transfers between clubs in County Dublin between 2007 and 2010. The second is a series of events concerning the Claimant, which took place against that background.

First History: Rules and Bye-Laws

3. Transfers within a county are dealt with under Rule 6.8 of the Official Guide 2009, Book 1. This rule, in identical terms, was to be found at Rule 38 of the Official Guides of 2007 and 2008. So far as may be relevant here, the Rule provides:

> ***"Transfers Within County***
>
> *(a) A County shall have a Bye-Law governing the transfer of players from one Club to another within the County.*
>
> .....

[1] This is the statement of reasons of the majority of the Tribunal and should be read in conjunction with the additional statement of reasons of Dara Byrne.

(c) A player who wishes to leave one Club to join another in the same County must apply to the County Committee for a transfer.

(d) A County Committee has the right, acting within its Bye-Law, to grant or not to grant an application for Transfer.

(e) A County Committee may delegate to a Sub-Committee the authority to deal with applications for Transfer, but a County Committee shall retain the right to make final adjudication on an application...."

4. At the times relevant to this arbitration prior to 5 October 2009, Dublin County Committee maintained a Bye-Law , which provided as follows:

> "*In the case of all players (at every age level) a transfer shall not be granted unless the consent of his present club is obtained, or, if the player has not played with his club for a period of twelve months. The only exception to this shall be for a player up to and including minor grade, when a transfer shall be granted if there is a permanent change in residence.*"

5. There was a dispute of interpretation as to whether, on a proper construction of this Bye-Law, (a) the County Committee was *bound* to allow a transfer where any one of the three conditions identified was met (as argued on behalf of the Claimant), or (b) satisfying those conditions was merely a condition precedent to the County Committee actually considering the transfer application at all (as argued on behalf of the County Committee). We will return to that dispute in due course.

6. There was also a dispute of evidence as to whether – as the Claimant alleged – the universal practice of the County Committee was to allow a transfer where one of those three conditions was met. The County Committee gave evidence that no such a universal practice existed, although it was conceded that a transfer would usually be granted in such circumstances. One example of a transfer having been refused notwithstanding that the player had not played with his club for over 12 months was given. We consider – on the basis of the evidence adduced – that the practice was not universal and that the County Committee did reserve unto itself the right to refuse transfers by "qualifying" transfer applicants. Whether it was entitled to do so depends on the question of interpretation identified above and whether – in any event – the practice is relevant, will both be considered at a later point in this decision.

7. At a Special Convention held on 5 October 2009, the previously existing Bye-Law was replaced with a new Bye-Law (no. 22) which provided as follows:

> *"22.1 As the GAA is community centred, based on the allegiance of its members to their local clubs, the object of which is to promote the Association's aims at local level, the transfer rules in the Official*

Guide and this bye-law reflect that ethos. A player is considered to always owe allegiance and loyalty to the club he first legally participated with in club competition.

The County Committee, when adjudicating on a transfer application, shall give serious consideration to the response of his current club, and:

(a) be cognisant of the role played by his current club in nurturing and developing the player;

(b) consider the potential impact of the transfer of a player on his current club and

(c) consider the potential impact of the transfer of a player on the promotion of the Association's aims in Dublin

in reaching their determination ....

22.3 An application shall be submitted and accepted only on the form as currently approved by county committee. The application shall be completed in the prescribed manner as indicated on the form and in accordance with the Official Guide and this bye-law ...

22.5 The County Secretary, or the Coiste na nÓg Secretary (as appropriate) shall forward the transfer request to the applicant's club, which club shall be required to respond in writing within seven (7) days of the date of receipt, indicating their refusal, or otherwise, to consent to the transfer application. A club failing to so reply in writing will be deemed to have consented to the transfer application.

22.6 *A sub-committee shall process and make recommendations to the County Committee on applications for transfers within the county, which recommendations shall be communicated to the members of the County Committee in advance of the relevant County Committee meeting considering the applications. A transfer applicant or a transferor club not satisfied with such recommendation shall be afforded one opportunity for a hearing at County Committee level before a decision is taken (which function shall be exercised by the County Management Committee in accordance with bye-law 3, who will affirm, or otherwise, the recommendation to County Committee). A player shall attend such hearing personally and be unaccompanied*

(except in the case of underage players who may be accompanied by their parent(s)/guardian(s)). A transferor club shall be represented at a hearing by a maximum of 1 full member. For the avoidance of doubt; a prospective transferee club, not satisfied with the recommendation to the County Committee, shall have no right to a hearing on the matter before the County Committee adjudication".

8. There was a lot of discussion as to the motivation for this change. It certainly appears to have been indicated to the County Committee by representatives by Central Council that the existing Bye-Law was somehow contrary to the provisions of the Official Guide. It is not immediate apparent where the inconsistency is to be found, and an email from the Central Council's Bye-Laws, Sub Committee to Mr. Costello of the Dublin County Committee on 13 January 2009 (with its attachment) could have been more clearly expressed. The motivation for the change of Bye-Law is not of any great significance to the present Arbitration; however, if the previous Bye-Law is in fact outside the scope of what is permissible under the Official Guide then that might have some significance for certain of the reliefs sought by the Claimant. We will return to this at a later point.

Second History: the Claimant's endeavours to transfer

9. The Claimant was at all material times a registered member of Cumann Uí Tuathall (O'Toole's) and was a member of its Senior Football Team since the year 2000. The Claimant has, since about 2006 harboured a desire to change clubs, principally – it would appear from his evidence – because he was unhappy with the development of football in O'Toole's. Evidence was also given by the Secretary of O'Toole's, who did not accept that football was being neglected in the Club. It is unnecessary for this Tribunal to express any view on these differences of opinion in order to adjudicate on the dispute.

10. The Claimant had been persuaded not to seek a transfer to another club on certain earlier occasions, but by an application made on 6 December 2008, he proceeded to seek a transfer to Cumann Peil Naomh Uinsionn (St. Vincent's). The Bye-Law in force at that time was the first Bye-Law set out above. On the transfer application form (reference no. 924), the Claimant indicated that the last game he had played was on 8 November 2008. The form provided a space where the transfer applicant was asked to give reasons for seeking a transfer. In this space, the Clamant stated as follows:

> "*I want to play Club Football at higher level on a regular basis to improve myself."*

11. The procedure used by the County Committee involved the transfer application form being sent to the transfer applicant's existing club for comment. On this occasion, O'Toole's objected to the transfer application and gave the following as its reason:

> **"***Our Club believes that the GAA is based on Parish and local loyalty. Allowing transfer to bigger more successful clubs would undermine the basic unit of the GAA – the Club. By giving assent to this request would lead [sic] the formation of a number of super clubs which would not be in the long term interest of Dublin GAA.*
>
> ** We are building our football team and do not want to loose* [sic] *our better players.*
>
> **We have invested time and effort in developing this players* [sic] *which should be used for the furtherance of this Club."*

12. It appears that the matter came to be dealt with by the Management Committee of the County Committee on or about 12 January 2009. The Management Committee appears to have recommended refusal of the transfer, which recommendation was followed by the County Committee. Formal notice of the decision was not given to the Claimant, and those events were not dealt with in any great detail at the arbitration hearing, which perhaps explains the certain lack of clarity in this paragraph. It would appear that the transfer was refused on the basis of O'Tooles' objection alone; such an explanation being consistent with the County Committee's interpretation of the Bye-Law in place at that time. It seems that the Clamant sent a letter to the Management Committee asking that the decision be reconsidered, and that at a meeting on 2 February 2009, the Management Committee refused to do this.

13. Although the "transfer window" had been closed, it appears that – due to dissatisfaction expressed by a number of members of the Association, the Clamant included – the Management Committee were urged to consider re-opening that transfer window at a later stage. A motion to this effect appears to have been defeated in March of 2009. Some correspondence from the Claimant is stated in Management Committee minutes to have been considered at its meeting of 18 May 2009. Again, no change appears to have emerged from these events.

14. Around this time, in a separate development, it seems that steps were taken to preclude the Clamant, by now a member of the Dublin County Senior Football Panel, from representing the County, on the grounds that he was – at that time – refusing to play for his club. It seems that the Claimant was in fact excluded from the County Committee for a period of time, although for some of the time in question he was in fact injured and would not have been in a position to play for either club or county. At all events, while opinions were sharply divided about this issue, we consider little turns on these events for the purpose of resolving the issues properly before this Tribunal.

15. It appears that the Claimant did not play for O'Toole's in 2009, and indeed has never played for O'Toole's or any other club since.

16. As noted above, the new Bye-Law governing transfers within the County of Dublin was passed on 5 October 2009.

17. On 14 December 2009, the Claimant submitted a further transfer application form (reference no. 3310), in which he again sought a transfer to St. Vincent's. It is indicated on that form that the last game played was in November 2008. The reason for the transfer application is stated as follows:

> "*I had a number of serious disagreements with the Club personal* [sic] *since 2004 regarding the management of senior football leadings to a complete breakdown in trust between all concerned and culminating in me not playing with the club since November '08. My grandfather played with St. Vincent's and I want to progress my career by joining them."*

18. The response of the Club to the Application was as follows:

> "*We feel there is no breakdown in trust with Éamon and the reasons outlined are different to those he listed in his previous transfer applications. O'Toole's has currently outlined our reasons for refusing Éamon's transfer on previous occasions and those still stand."*

19. As prescribed, the application was dealt with, in the first instance, by the Competitions Control Committee. This Committee recommended rejection of the application. The Claimant, as he was entitled to do, sought and obtained an oral hearing before the Management Committee. The Claimant spoke on his own behalf at this meeting and Mr. Kelly spoke on behalf of O'Toole's. Evidence was given that this meeting took about fifteen minutes and was reasonably efficient. The result of this hearing was that the Management Committee recommended to the County Committee that the transfer application be granted. No reasons were given for this recommendation: it was simply listed as one recommendation among over a hundred that might have been considered *en bloc* had no objections later been raised at the County Committee meeting in question.

20. This meeting took place on 25 January 2010. A motion was proposed by a member of the O'Toole's Club and seconded by another member of that club to reject the recommendation of the Management Committee and to refuse the transfer application. It should be noted that the members of O'Toole's were properly appointed delegates of the County Committee and that they were entitled to be present at the meeting in that capacity. The Claimant was not, of course, at that meeting. The minutes of the meeting, so far as relevant to this issue ruled as follows:

> "*Coiste Bainsti 22/23/25 January 2010*
> ***ADULT TRANSFERS***
> *The Chairman stated that the Competitions Control Committee had processed the transfer applications and made a recommendation on each*

application. A number of individuals were not satisfied with the recommendation of the Competitions Control Committee and were afforded a hearing with the Management Committee. The Management Committee arranged these hearings for Friday, Saturday and Monday, 22, 23 and 15 January and their recommendations are attached – see appendix 'A'. Con Clarke opposed the recommendation of the Management Committee in relation to the applications by Eamon Fennell and Robert Fennell to transfer from O'Toole's to St. Vincent's and Maomh Mearnóg respectively and it was agreed to debate the matter. Delegates did not request a discussion on any other transfer application and an overwhelming majority (three votes against) approved them following a proposal by John O'Neill and seconded by Joe Lyons.

Con Clarke referred to the byelaw and stated that the Management Committee decision is flawed as it could not possibly have given serious consideration to the response of O'Toole's, the role played by O'Toole's in nurturing and developing both Eamon and Robert Fennell or be conscious of the impact on O'Toole's if the transfers were granted. He said that the County Committee has the right, acting within its Bye-Law, to grant or not to grant an application for transfer. He stated that Eamon Fennell had played for Dublin in the O'Byrne Cup contrary to a decision in June 2009 of the County Committee. He proposed that the County Committee do not accept the recommendation of the Management Committee, in relation to the Fennell Brothers, and to accept the recommendation of the Competitions Control Committee. Andy Cunningham seconded the proposal. A wide ranging discussion ensue with contributions from ...

Decision:

The proposal received 33 votes in favour and 33 against. In accordance with rule 4.3 official Guide 2009 the Chairman exercised his casting vote in favour of the proposal. Accordingly the transfers of Eamon Fennell and Robert Fennell from O'Toole's to St. Vincent's and Naomh Mearnóg respectively were refused."

21. Under the Rules of the Association (See Official Guide, Book 1, Rule 7.11 (c)(1)(i)), there is no appeal from a decision of County Committee in relation to a transfer. Accordingly, on 1 February 2010, the Claimant issued a request for Arbitration and delivered same to the Secretary of the Disputes Resolution Authority and the Respondent.

The Claim

22. The claim as initially pleaded was somewhat broader in scope then the claim ultimately pursued. For example, it was alleged that the refusal of a transfer in January 2009 was unlawful. That particular ground of complaint is, of course, considerably out of date and it was not proceeded with.

23. The Claimant's claim as ultimately advanced may be summarised as follows:

    a. The Respondent erred and acted *ultra vires* in enacting a new bye law which did not respect and/or vindicate and/or take adequate or any account of the Claimant's constitutional rights or which breached those constitutional rights;
    b. It erred in dealing with the Claimant's application for a transfer under the said Bye-Law;
    c. In the alternative, it applied the said Bye-Law in a manner (a) which did not respect and/or vindicate and/or take adequate account of the Claimant's Constitutional Rights, (b) which directly breached the Claimant's Constitutional Rights, (c) which failed to take account of all relevant considerations;
    d. It did not act in accordance with its own Bye-Law;
    e. The decision is unreasonable and irrational.

24. A preliminary objection was made on behalf of the applicant that the Respondent did not file its Reply within the time prescribed by Section 3 of the Code of the DRA. It was clarified in the course of the hearing that the Secretary of the DRA had in fact extended time for the delivery of the reply, and that the reply was in fact delivered by email within the extended time. That would appear to put an end to the objection. Nonetheless, if there were any remaining difficulty involved, we would have little hesitation in granting leave to defend the proceedings notwithstanding the delay, as we are entitled to do pursuant to Section 7.6 of the Code, on the grounds that little if any prejudice was caused by the default.

Constitutional rights

25. A significant component of the Claimant's legal submissions was his appeal to constitutional rights. First, there was reliance on natural and constitutional justice, i.e. the right to a fair and impartial hearing (encompassed by the latin phrases *nemo iudex in causa sua* and *audi alteram partem*). We have little hesitation in accepting the general principle that a member of a sporting organisation whose position in relation to a serious matter is being adjudicated on is entitled to a fair and impartial hearing. What constitutes a fair and impartial hearing in any given circumstances will depend on different factors, including the gravity or importance of the subject matter of the adjudication, viewed from the perspective of the person whose position is the subject of the adjudication. This need not always be an oral hearing although in the present case, oral hearings are provided for.

26. Secondly, and less obvious is the Claimant's appeal to the right of freedom of association, which is enshrined in Article 40.6.1.iii of Bunreacht na hEireann. This provides as follows:

> "*The State guarantees liberty for the exercise, subject to public order and morality of…*
>
> *iii. The right of the citizens to form associations and unions.*
>
> *Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right".*

27. On its face, this constitutional right is not absolute. It is implicit also, and it was accepted by the Claimant that the right to associate and dissociate are not rights, which can be deployed to prevail over every situation in which an individual might find himself. Quite properly the Claimant did not advance any argument that their was no benefit to maintaining some form of control over transfers between Clubs: if sporting organisations were not in a position to do so, then the result would be chaotic; and this is particularly significant in the context of an organisation such as the GAA which is founded upon close parochial and indeed familial ties.

28. A question of some significance is the extent to which the right to freedom of association may be asserted by one private individual against another; the terms of Article 40.6.1.iii are expressly directed toward "*the State"*. Counsel for the Claimant explained that the reference to "*the State"* included the judicial system and that the Courts themselves protected private individuals (and were obliged to do so) even where the potential breach of constitutional rights was committed not by the State but by another private individual or organisation. In addition, he cited the decision in *Meskell v CIE* [1973] IR 121 and *Educational Company of Ireland v Fitzpatrick [No. 2]* [1961] IR 345 in support of the proposition that freedom of association, as a substantive right, performed the basis of a claim by one private individual against another private individual or organisation. While one might argue that the decision in *Fitzpatrick* was essentially concerned with the protection afforded by a statute to actions that compromised the constitutional rights of the plaintiffs in that case, there is no question but that the *Meskell* decision saw a direct enforcement of constitutional rights by one private party against another sounding in a remedy in damages. Subsequent decisions of the Superior Courts have confirmed that this is so.

29. Obviously the balancing of such rights against the rights of other members of the Association and the common good of those other members is a necessary component of any debate on the applicability of the constitutional principles. It proved unnecessary, however, to engage in a wide-ranging debate on the issue however, for when it came to the present set of circumstances, the demands of the Constitution – as put forward on behalf of the Claimant – were not of an absolute sort that were intended to prevent the Association or effecting control over transfers between Clubs. Rather, the breach of constitutional rights alleged here was what the Claimant

contended was the failure of the County Committee to consider the individual circumstances of the Claimant in coming to its decision; in essence, by having no regard to the personal circumstances of the Claimant, the County Committee effectively set at naught his constitutional right to freedom of association. Thus expressed, the issue becomes less controversial, and indeed it might be said that the nature of the constitutional right, in practical terms, goes to his procedural rather than his substantive rights i.e. as an implied component of his contractual rights in the context of a hearing as distinct from a stand-alone cause of action independent entirely of the contractual basis of the claimant's relationship with the Association and its units.

30. Thus expressed, there is considerable merit in the Claimant's reliance upon his right to freedom of association; it would indeed be inappropriate to disregard entirely the personal circumstances of the transfer applicant in the context of such an application. We must, of course, qualify this by stating that the County Committee cannot be expected to consider personal circumstances of the transfer applicant that are not disclosed by him when making his application. Thus, if the transfer applicant has reasons relating to his personal circumstances that he thinks ought to weigh upon the minds of those considering his application, he is obliged to state them, and indeed it would appear that the transfer application form used by the County Committee allows an applicant to do this.

Relevant considerations under Bye-Law 22

31. The parties were divided on the question whether the Bye-Law 22, in force in January 2010, actually allowed for the personal circumstances of the transfer applicant to the taking into account. The Claimant maintained that the express terms of Bye-Law 22.1 were exhaustive as to the considerations to be taken into account. The County Committee disagreed; although it was less than clear about what considerations *other than* the items expressly mentioned in Bye-Law 22.1 were properly a matter for consideration on a transfer application. Reference was made to the long-standing experience of the club delegates to whom the ultimate decision on transfer applications was entrusted. The County Committee is a large body of persons with wide ranging and diverse experience within the organisation of the association and their collective view, expressed in a vote was wisdom enough to ensure that the matter was properly debated and dealt with.

32. While there is certainly merit in the proposition that the experience of club delegates is a valuable component of the decision-making process, it would seem unfair if matters were taken into consideration in coming to a decision, which a transfer applicant had no opportunity to address. Obviously, it will be extremely difficult, if not impossible, to analyse the mindset of a large number of delegates voting at a meeting of the type that occurred here; where matters such at this is voted upon by 66 club delegates, there may be motivations that are improper but nevertheless do not invalidate the decision (otherwise it would be impossible to respect the democratic nature of such processes).

33. We believe that there are two propositions in relation to the procedure mandated by Bye-Law 22 that are of significance here. The first of these is that we do not consider that the Bye-Law, properly construed, prohibits consideration of the individual circumstances of a transfer applicant, and if it did, we consider that such prohibition would be unlawful as being contrary to public policy and therefore unenforceable (the legal basis for taking such an approach need not be discussed because we do not feel that the rule actually contains a prohibition). We would add that there is no obligation to consider personal circumstances of a transfer applicant which have not been brought to the attention of the decision making body. The second proposition is that, where a significant matter arises the decision making body, which is not one of the factors stated in the Bye-Law and has not been addressed at all by the transfer applicant, natural and constitutional justice may in limited circumstances require that the transfer applicant be given an opportunity to address that issue. One cannot be categorical about the types of circumstances which might give rise to such need. They would be limited, and the new issue would have to be one that was not readily foreseeable to the transfer applicant. In a case under the regime sought to be put in place by Bye-Law 22, this opportunity of reply could readily be afforded to a transfer applicant at the stage of an oral hearing before the Management Committee. It would be somewhat more difficult if an unanticipated issue arose at a County Committee meeting at which the transfer applicant was not present. We will return to that issue in due course.

Validity of Bye-Law 22

34. The first issue raised by the Clamant is that Bye-Law 22 is invalid or unenforceable and/or the County Committee acted *ultra vires* in making it. The first basis upon which this is alleged is that the Bye-Law enshrines breaches of the constitutional rights of the Claimant. More specifically, it is contended that, because the personal circumstances of the transfer applicant cannot be considered, the constitutional right to freedom of association as breached. It is not necessary to determine the extent to which the constitution can reach directly into the contractual relationship between a sporting organisation and its members, because, as we have held above, we do not consider that the personal circumstances of a transfer applicant cannot be considered under Bye-Law 22.

35. The second basis of criticism is that the new Bye-Law denies the transfer applicant the opportunity of being attended at the hearing before the Management Committee. We do not consider that this is a basis upon which the Bye-Law could said to be invalid. In particular, no authority has been advanced to suggest that a right to be represented or accompanied is an absolute entitlement under the rules of natural and constitutional justice. The fact that – by virtue of happenstance – one side or other to a hearing might gain some advantage due to, for example, a club delegate being a lawyer, is said to give rise to what the Claimant maintains to be an "inequality of arms". However, this does not of itself render a hearing so unfair as to warrant interference by the law. Moreover, there is no evidence that the Claimant in fact

suffered any detriment by virtue of his requirement to appear unattended: indeed, he was successful in his efforts before the Management Committee. The Claimant is a well-educated and articulate gentleman who carries no disability that might bring him within a category of persons that could be described as disadvantaged. One can, of course, envisage situations where a need for representation or assistance would arise. Thus, for example, if a transfer applicant had a serious speech impediment, the circumstances might dictate that his entitlement to a fair hearing would be compromised by the provisions of this Bye-Law. As that does not arise here, it is not necessary for us to assess particular instances, and in these circumstances, it is inappropriate for us to suggest that the Bye-Law is in some way unenforceable by virtue of damage which has not occurred.

36. The third ground of challenge to the validity of the Bye-Laws is the absence of any provision for an oral hearing at the final stage of the application process. As we have seen, after the oral hearing before the Management Committee, the Management Committee makes a recommendation to the County Committee, which is open to debate if appropriate. In this case, there was such a debate. Under the Bye-Law, it is clearly provided that the transfer applicant is entitled to "*one oral hearing*" which, on its face, excludes a second oral hearing before the County Committee. As we have seen, by virtue of its having delegate members of the County Committee, The Claimant's Club was in a position to express orally at the County Committee meeting its views in relation to the matter as well as to comment upon and indeed criticise the recommendation of the Management Committee. The Claimant was not present and therefore unable to answer these points. While speakers a the meeting might have supported the Claimant's position on the application, there is no guarantee that all of these facts will find their way into the debate, as only the recommendation of the Management Committee is formally given: there is an element of chance as to whether and to what extent the remaining matters arising at the oral hearing are disclosed. Likewise, while members of the Management Committee and indeed delegates from other clubs might argue in favour of its recommendation, that is also a matter of luck from the perspective of the transfer applicant.

37. The County Committee submitted that the Claimant might have been afforded an opportunity to appear had he sought it. We do not feel that this particularly persuasive given the terms of the Bye-Law and the absence (it would appear) of any publicly available information to suggest that such a right of audience might have been afforded.

38. In those circumstances, we consider that there is an inherent unfairness in the process. Does this mean that the entire Bye-Law must be treated as invalid? We do not think so. Where, as here, a Bye-Law appears to prohibit fair procedures being afforded to the member of an organisation, a Court (and by extension an Arbitral Tribunal with the powers conferred on the Disputes Resolution Authority) is entitled to consider that provisions within a contract are unenforceable as being contrary to public policy. In the course of the hearing we cited the case of *Lee v Showman's Guild of Great Britain* [1952] 2 QB 329, as authority for the proposition that this might be done. While

neither party was in a position to address this authority or to provide any authority one way or another on the question, we are satisfied having regard to this decision and others related to it, that a Court (and consequently an Arbitrator with equivalent jurisdiction) is entitled to treat as unenforceable a clause that is contrary to public policy. It is not necessary to rescind an entire contract in order to deal with such a situation, provided the clause is severable. In this case, the Claimant wishes to strike down the entire Bye-Law by virtue of this defect. We consider that this is excessive, and we feel that in as much as striking down the Bye-Law would itself amount to severance of portion of the rules, there is no obligation to sever the good with the bad.

39. What we feel we have authority to do to remedy this problem would be to declare that the County Committee are not entitled to reply upon the limitation contained in the Bye-Law which prevents the Claimant from appearing at the meeting of the County Committee. We are not authorised to, and would not propose to, rewrite the rule in any way. It is for the County Committee to supply any gaps in the rule that arise from the unenforceability of severed clauses and to assume such implied terms as would follow as a matter of law from the facts and circumstances.

40. In this case, as the defect arose at the County Committee level and not at the Management Committee meeting, we do not feel it is appropriate (as might in other cases be appropriate e.g. in the recent decision in DRA/1 & 2/2010) to remit this matter to the Management Committee. After all, there is little benefit to the Claimant in that: he was successful at that stage in the process. Where fair procedures have been compromised and a matter comes before the DRA, the solution will depend on the individual facts, and in that respect the facts of this case are materially distinguishable from the circumstances arising in DRA 1 & 2/2010.

Legitimate Expectation/Promissory Estoppel

41. The Claimant asserts, independently of the challenge to the validity of the Bye-Laws themselves, that the same may not be applied to his case. He says this because in November 2008 he made a decision (and continued to adhere to that decision throughout the year thereafter) not to compete with a view to bringing himself with the scope of what we will call the "twelve month rule" that was then a part of the Bye-Law. As indicated previously, there is a dispute between the parties as to whether that "twelve month rule" gave rise to an automatic right to a transfer or was merely one of three preconditions to an application being considered.

42. The Claimant asserts that they Bye-Law is not properly applicable to him on the grounds of legitimate expectation and/or promissory estoppel. The Claimant is quite clear that it is not suggested that the County Committee or any of its offices represented expressly any particular fact or circumstances. Rather, he relies upon the universal (as he saw it) practice obtaining at that time as well, indeed, as the meaning of the rule itself, which he contended gave prospective transfer applicants a means of ensuring that a transfer would be allowed. We have of course determined earlier that the practice of the County Committee was not in fact universal and that – whether or

not they were entitled to, having regard to the meaning of the Bye-Law – the County Committee did indeed treat the pre-conditions in the old Bye-Laws (including the "twelve month rule") as pre-conditions to an application rather than an automatic ground of entitlement.

43. In support of his position, the Claimant relies on a number of authorities, including *Council of Civil Service Union v Minister for the Public Service* [1985] AC 374; *Webb v Ireland* [1988] IR 353, *Cannon v Minister for the Marine* [1991] ILRM 261, *Philips v Medical Council* [1991] 2 IR 115, *Abrahamson v Law Society of Ireland* [1996] I IR 403, *Fitzpatrick v Minister for Industry and Commerce* [1931] IR 457 and *Hamilton v Hamilton* [1982] IR 467.

44. Under both the public concept of legitimate expectation and the private law concepts of estoppel (of varying types) the concept of a promise or assurance (whether express or by implication from circumstances) must be proved. The question here is, what is the assurance? It would seem necessary to the Claimant's case that he demonstrate that the assurance was that the rule or practice would not change. It needs to be shown that the events gave rise to (a) a reasonable expectation arising from the conduct of the County Committee that the rule or policy would not be changed and (b) that it would be inequitable to allow the County Committee from resiling from such implied assurance. In our view, to demonstrate that particular assurance, it is not sufficient to show merely that the rule existed for any particular length of time (how long the old Bye-Law was in place was never clarified at the hearing). Something more is required.

45. Here, however, it would seem that the reliance placed on the continued existence of the rule or practice was based on its existence rather than any suggestion that it would not change. As such, we do not believe that the Claimant has demonstrated that the expectation he now advances was reasonably held, or that if it was, that it would be inequitable to allow the County Committee to change the rule or practice. Any member of the Association will be aware that Bye-Laws may be changed. If there was an automatic right to a transfer (whether under the Bye-Law itself or the practice under that Bye-Law)(and we are not deciding the question here), that right was founded upon its appearance in the old Bye-Law. But since Bye-Laws may always be the subject of motions to change (at Annual and Special Conventions), there cannot have been an assurance (on the facts given to us) that the existing right under the Official Guide would not be exercised by the County Committee on any given occasion.

46. It might be different if the practice was not enshrined by rule or Bye-Law but was a long standing convention. In that case, an argument might arise that some sort of notice might be required prior to the changing of such convention. However, without truly investigating that question, it is not relevant to the present circumstances, where the Bye-Law by its nature was capable of change and that possibility must be taken to have been appreciated by all members of the Association.

47. In those circumstances, while it was perhaps unfortunate that the rule was changed eleven months into the Claimant's "sitting out period", the fact that he was in the process of acquiring an entitlement (whether to an automatic transfer or to be considered for such a transfer) does not entitle him to restrain the County Committee from applying its new Bye-Law.

48. We would comment, additionally, that if, as appears to be the case, the Bye-Law was changed arising from concerns that it was not compliant with the Official Guide, then we might in any event exercise our discretion not to grant the relief sought, as to do so might be to promote a rule that was of questionable validity having regard to the terms of the Official Guide, over one which was not.

49. The County Committee argued that the Claimant himself was not entitled to seek to have the new Bye-Law disapplied so far as it related to him, having proceeded under it and raised no complaint as to its applicability until the ultimate decision was made. We do not need to resolve that particular issue having regard to our findings above.

Irrationality

50. We do not accept that it was irrational of the County Committee to refuse to grant the transfer application of the Claimant on 29 January 2010. The test, equivalent to that under public law, would appear to be whether there was any evidence to support the decision: provided there is, then an arbitral tribunal will not substitute its view on the merits of the application for those of the County Committee, which is specifically identified in both the Official Guide and the Bye-laws of all County Committees as having the expertise to determine such questions. In this case, it is evident that, whatever the weight of evidence to the contrary, the principle of discouraging transfers from clubs that had fostered and developed players from an early age was considered in the specific circumstances of the Applicant and that is a relevant consideration, both in logic and under the express terms of the Bye-Law. That the Claimant *would not* play for O'Tooles does not deprive the foregoing consideration of its weight: if we determined otherwise, we would effectively be saying that the force of will of the transfer applicant would ultimately determine what was or was a relevant or proper consideration in the context of a transfer application.

51. There are indeed significant factors in favour of granting the transfer application and to say that the decision of the County Committee on 25 January 2010 was not irrational in the legal sense of the word is in no way to diminish his arguments. However, where the merits of a decision fall to be assessed, a Tribunal of the DRA can only reassess those merits on a very limited basis.

Determination

52. Arising from the foregoing considerations, the following determinations are made:

a. No declaration of invalidity will be made as to validity of Bye-Law 22 enacted on 22 October 2009 in its totality.

b. No declaration will be made that the Claimant is entitled to have his transfer application determined in accordance with the Bye-Law in place immediately prior to 5 October 2009.

c. However, we declare that the Claimant is not bound by so much of Bye-Law 22.6 as would prevent him from appearing at a meeting of the full County Committee making the final determination on his transfer application. This is not a declaration having universal effect: in Cases DRA/1&2/2010 no such entitlement to a personal hearing was found (rather a full note of the hearing before the Management Committee was directed to be made). In the particular circumstances of this case, a different approach is appropriate.

d. The provisions of Bye-Law 22.6 requiring a transfer applicant to appear unaccompanied are not invalid or inapplicable in the case of this Claimant. However, each case should be considered on its own merits, and there may be cases where it is appropriate to allow a transfer applicant to be assisted or even represented.

e. The decision on the Claimant's transfer application is to be remitted to the County Committee for reconsideration at the next available opportunity. The Claimant shall be entitled to appear personally and address the meeting. His personal circumstances and reasons for seeking a transfer are relevant considerations and should be taken into account in the making of the decision.

53. The Tribunal has not agreed on all matters and a separate statement of reasons is being prepared by Dara Byrne.

54. This is an interim award inasmuch as costs remain to be determined.

_____
Jim Berry

_____
Micheál O'Connell