Disputes Resolution Authority

An Córas Eadrána

DRA 03 of 2012

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

Between

Stoifán Mac Thiarnain (Stephen Kernan)

Appellant

Mr Donough M. McDonough BL for the appellant

And

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

Respondents

Mr Liam Keane (CHC), Mr Simon Moroney (CAC) and Mr Stephen Browne (CAC) for the respondents

Hearing: Carrickdale Hotel, Carrickcarnon, Ravensdale, Dundalk, Co. Louth at 8pm on 15 March 2012

Tribunal: Mr Pat Purcell BL (Chairperson); Mr Jack Anderson (reasoned award); and Mr Sean McCague

Secretary to the DRA, Mr Matt Shaw, was also in attendance

Factual Background

1. The appellant was playing for Crossmaglen in the All-Ireland Senior Football Club Championship semi-final played at Portlaoise on 18 February 2012. During the course of the game, which Crossmaglen won, he was sent from the field of play for, according to the referee's report, "striking with the hand". An Lár Choiste Cheannais na gComórtaisí (CCCC) charged the appellant with said infraction.

2. The appellant sought a hearing before the CHC. That hearing took place on 1 March. Prior to the hearing, the appellant exercised his right to seek

clarification from the referee, through the CCCC, and as a result the referee confirmed that the appellant had been sent off following information received from his linesman. At the CHC hearing, all relevant reports (referee's report, CCCC disciplinary report etc) were considered. In addition, witness and video evidence was heard. The CHC – on deciding that the infraction was proven as more likely to have occurred than not – imposed the following penalty: a four weeks' suspension to include the next game in the same competition. This was the minimum suspension provided for in the Official Guide.

3. The appellant then exercised his right to appeal the CHC's decision to the CAC. That appeal was heard on 8 March. The appeal was dismissed.

4. On 12 March, the appellant served a request for arbitration under the Disputes Resolutions Code and requested an urgent hearing given that the All-Ireland Senior Football Club Championship final was scheduled for St Patrick's Day. The DRA hearing took place on 15 March. The appellant's case and respondents' reply are noted below, as followed by an outline of the general principles (legal, administrative and sporting) that informed this decision and the specific reasoning underpinning this award. First, a preliminary matter relating to submissions was raised by the respondents.

Preliminary Matter

5. As the formalities of this DRA hearing was about to begin, the appellant's representative informed the Tribunal that he would, in making his case, be referring to his "statement of claim" made in his formal request for arbitration (FORM 1: Request for Arbitration, "the Claim") and further he would also be (a) drawing from a separate 8-page written submission elaborating on points made in his statement of claim and including reference to legal authority and commentary and (b) availing of witness evidence.

6. Notice of the additional written submission and of the possibility of witness use was only furnished to the respondents in the minutes before the hearing. Mr Liam Keane for the CHC, on referring to sections 2.1(c), 7.5 and 10.1 of the DRA Code, made the point that in the interests of fairness and equality between the parties and to prevent what he termed an "ambush" before the Tribunal, the Tribunal should seriously consider whether the additional submission or witness evidence was, in effect, admissible and, failing that, he should be given the right to reserve his position where points of law were argued by the appellant which had not been referred to in the original statement of claim.

7. Mr Simon Moroney, for the CAC, also made that point that he had no law related qualification or experience and that if he had been given prior knowledge of the content of the additional submission, and especially its reference to legal authority and commentary, he might well have sought legal advice or support in preparing for the Tribunal hearing.

8. In response, the appellant's representative stated that it was not in any way his intention to "ambush" the other side and that the additional submission was merely an elaboration on points made in the original statement of claim and that, in any event, the legal authority referred to in the additional submission would have been well known to Mr Keane.

9. The Tribunal, on taking a short adjournment, noted that under section 7 of the DRA Code it has a wide discretion as to the conduct of proceedings and especially so in cases of special urgency (such as this). Accordingly, the Tribunal permitted the appellant to proceed by way of reference to his supplementary submission though it did put the appellant on notice that the respondents, and Mr Moroney in particular, could reserve their position with regard to any argued points of law beyond those contained in the original statement of claim.

10. The parties accepted this preliminary ruling. It must be pointed out that in cases where there is not "special urgency" then in line with due politeness to the other side and due process in the arbitration, parties should make every effort to comply with all aspects of section 2.1, section 10.1 and the general thrust of section 7.5 of the DRA Code. Where a party does not comply in this manner or does so to the obvious detriment and objection of the other party, then at the very least an adjournment might be necessary and one that would in all likelihood inconvenience all parties and hinder the expeditious completion of the arbitration proceedings. In short, it is in everyone's interest that every effort is made to ensure that claims and responses to the DRA are filed on time and with all relevant documentation as is reasonable to include.

Appellant's Case

11. The appellant had a number of grounds of appeal. Collapsing some of the grounds of appeal into others, the appellant raised points in appeal against the substance of the CHC's decision against him and the manner in which the CAC interprets and uses its appellate jurisdiction. What follows is a summary of the points made in support of the various grounds.

Against the CHC

12. Under Rule 7.3(bb) of the Official Guide the CHC (as a Hearings Committee) has the "final power to determine all matters of fact and all sources of evidence submitted to the Hearing...and...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." Under the Official Guide's rules of evidence applicable to such hearings, Rule 7.3(aa) (1) (vi) states that the Referee's Report has, in effect, special evidential status in that "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."

13. The appellant argued that the special status presumption underpinning a referee's report extended only to matters witnessed firsthand 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. Accordingly, and as a matter of evidential and substantive fairness, the appellant argued that the CHC should have given him the opportunity to have the hearsay evidence against him given orally and tested by cross examination. In this, the appellant cited from Keane CJ's judgment in *Borges v The Medical Council* (2004) 2 ILRM 81 where the then Chief Justice noted that to deprive the person concerned the right to test hearsay evidence might amount to a breach of fair procedure to which he is entitled by virtue of Article 40.1 of the Constitution.

14. In addition to the above, the appellant argued that, in any event, he had (mainly through video and witness evidence relating to, for instance, the positioning of the linesman) adduced compelling evidence such as contradicted the contents of the referee's report and clarification and thus the charge had not been proven by the CHC to the standard of proof required by Rule 7.3(bb). In addition, and in a similar vein, the appellant argued that the Hearings Committee breached Rule 7.2(b) in deeming the conduct of the claimant to amount to a Category II infraction. The appellant denied absolutely that he had committed any infraction; at best, he claimed, the evidence supported a finding that he was guilty of an offence punishable by a caution.

Against the CAC

15. The thrust of the appellant's case here surrounded what he argued was the overly narrow interpretation by the CAC of its duties in Rule 7.11 and particularly the scope of a CAC appeal outlined in Rule 7.11(n). The appellant argued that although Rule 7.11 and the various sub sections thereunder referred regularly to the word "appeal", the CAC's interpretation of its role – as experience firsthand by the appellant on 8 March – was that it acted as a (judicial) *review* type body only. While the appellant acknowledged that a *de novo* hearing could not be expected, nevertheless, the CAC had incorrectly interpreted its remit so as to overly restrict itself to a procedural review only of CHC decisions.

16. Further, the appellant argued the CAC's refusal to hear any of the evidence – oral or video – presented at the CHC hearing, made it difficult to see the basis on which they could assess the decision reached by the CHC and in particular whether the CHC had misapplied or infringed any rule in this case or whether the decision was manifestly incorrect pursuant to Rule 7.11(n).

17. In summary, the appellant argued that, such was the conduct of the CAC on the night in question and such is its overall interpretation of its powers, that the CAC's current way of operating might be said to be unreasonable, irrational and even ultra vires as per the analogous test laid down by the

Supreme Court in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] IR 642, where Henchy J stated at p.658:

> *"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."*

Respondents' Reply

18. Again, what follows here is a summary of the respondents' reply (CHC and CAC).

Central Hearings Committee

19. The CHC, through Mr Liam Keane, denied all of the appellant's grounds of appeal. In a general sense, the CHC submitted that the applicable rules in the Official Guide accord with law and with the principles of natural and constitutional justice and that the CHC, in dealing with this matter, did not breach any of the rules of the GAA and neither did it breach the principles of fair procedure, natural and constitutional justice. In addition, the CHC argued that the penalty imposed was appropriate and in accordance with the rules of the GAA as set out in its Official Guide.

20. In a specific sense, the CHC noted that hearings before it are not criminal trials. The rules of evidence to be applied are set out in Rule 7.3 (aa) of the Official Guide. In addition, Rule 7.3 (z) permits the CHC to take such steps as are necessary and appropriate to the hearing. The CHC accepted that the content of the referee's report may well be hearsay and might not be acceptable as evidence in a court of law; nevertheless, at issue here is a sports disciplinary system. It is perfectly permissible, according to the CHC for the GAA to adopt a rule such as Rule 7.3 (aa) (1) (vi) and, as a member of the Association, the appellant is bound by the provisions of the Official Guide.

21. As regards the presumption of accuracy attaching to Rule 7.3 (aa) (1) (vi) and the contents of "a Referee's Report", the CHC pointed out that in adopting this rule, Congress did not limit this presumption to, for example, "any assertion by a referee", a "referee's opinion" etc. In addition, Rule 7.3 (aa) (1) (vii) provides that a referee or other official shall not be required to give evidence. Rule 7.3 (aa) (1) (vi) requires the CHC to accept that what is contained in the referee's report is presumed to be correct in all factual matters. The appellant was therefore incorrect in suggesting that the CHC had a discretion in this regard. In addition, Rule 1 of the Rules of Control Official Guide Part 2 entrusts the control of games to a referee and his officials (including his linesmen). The referee is perfectly entitled to rely on

information give to him by his linesman. This is supported by Rule 3 of the said Rules of Control.

22. The CHC then argued that it had afforded the appropriate weight to the referee's report as required by Rule 7.3 (aa) (1) (vi); it had considered the evidence presented; and duly found that it was not sufficiently compelling to contradict it. They then found as a matter of fact that the infraction alleged was more likely to have occurred than not to have occurred in accordance with Rule 7.3 (bb). The CHC reminded the Tribunal that it had heard evidence from the appellant, Tony McEntee, Gerry McEntee and Martin Donnelly. It had considered the video evidence submitted by the appellant. It had also considered the content of the Referee's Report and the submissions made by all parties. It then found, as a matter of fact, that the infraction was proven.

23. If required, the CHC stated that it was prepared to explain to the Tribunal why it found the evidence presented by the defending party failed the "compellability test". In any event, once the CHC found that the infraction alleged was proven, then clearly, it argued, the appellant was guilty of a Category II infraction. It is noteworthy, the CHC said, that the appellant did not set out what infraction he may have been guilty of if not that of "striking with the hand". It is also noteworthy, the CHC argued, that he was unable or unwilling to identify such infraction at the CAC. In sum, Mr Liam Keane concluded that there was no basis for the appellant's contention that the decision of the CHC was unreasonable and/or irrational.

24. In further submissions to the Tribunal the CHC said that the case made by the appellant sought to strike at the heart of the right of the GAA, as a sports body, to regulate its disciplinary affairs. The Association gives control of its games to a referee and his officials; it affords a certain status to a Referee's Report; it has adopted certain Rules of Evidence; it has provided for a limited appeal (a review rather than a rehearing) and it has provided for independent arbitration before the DRA in relation to "the legality of any decision made or procedure used". The appellant, the CHC surmised, was seeking to have the rules and standards which apply in Court made applicable to Hearings Committees which deal with disciplinary matters at all levels of the Association (from central level right down to local and under age level).

25. Moreover, the CHC reiterated that the control of a game is given to a referee and his officials. This is the standard in most sporting codes. 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. Indeed, such a process has greatly assisted in improving discipline. In a similar vein, and for very good policy reasons (the interest of ensuring that Gaelic Games are played in disciplined manner devoid of misconduct) the GAA, through its annual Congress, has given a special status to a Referee's Report. This ensures respect for the referee and his officials as well as helping to ensure good order and discipline in the playing of games. Clearly such a rule might well offend against the rule against hearsay were

this a matter before a Court; however it is not such as matter. The law, Mr Keane observed, respects 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 is observed and in this Mr Keane cited extracts from *Barry and Rogers v Ginnity & Others* (2005); *Gould v McSweeney & Others* (2007); and *Jacob v Irish Amateur Rowing Union Limited* (2008).

Central Appeals Committee

26. The CAC was represented by Mr Simon Moroney who explained in detail, and with reference to the minutes of said meeting, what happened at the CAC hearing of 8 March. Mr Moroney again stressed as he had done so on the 8 March and does so consistently for all parties who appear before the CAC, that the appeal process under Rule 7.11 is limited in scope. In this, Mr Moroney rejected the case made by the appellant (outlined in paragraphs 16 and 17 above) and stated straightforwardly that the appellant's appeal to the CAC had been rejected for failing to satisfy any of the criteria outlined in Rule 7.11(n). Moreover, and with reference to paragraph 15 above, Mr Keane intervened to note that the general law does not require sporting bodies to provide a right of appeal. The GAA, however, provides *a limited form* of appeal, as acknowledged in DRA 02/2012 *Monaghan* at paragraph 10.

27. Finally, Mr Keane reminded the DRA Tribunal that it has, in effect, a judicial review remit only and that save on the grounds of irrationality or in accordance with Section 11.4 of the Disputes Resolution Code; it was not open to the DRA Tribunal to rehear the case. It would, Mr Keane, argued be impossible for a DRA Tribunal to place itself in the position of the CHC as of the night of 1 March 2012 when it heard the evidence and made the determinations of fact. This approach i.e., it is not the function of the DRA to provide a rehearing but rather to determine if there has been an illegality in relation to any decision made or procedure used, was, Mr Keane said, consistent with previous DRA authority such as DRA/16/2008 *Paul Finlay*.

Award with reasoning: general principles

28. The Tribunal awards and determines that the appellant's claim should be rejected because there was no clear infringement or misapplication of the applicable rules by the CHC or the CAC and the appellant's right to fair procedure was respected at all times on hearing and in the limited form of appeal.

29. The Tribunal is very cognizance of the fact that its jurisdiction is of a judicial review nature and (guided by Henchy J in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642 at p.658 but also by Finlay CJ in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 at p.70) in dealing with the circumstances under which a DRA Tribunal might intervene to quash a CHC or CAC decision on grounds of illegality (unreasonableness or irrationality), the standard of irrationality, as it were, is only made out in the following, complimentary circumstances: the decision in dispute is fundamentally at variance with reason

and common sense; it is indefensible for being in the teeth of plain reason and common sense and because the DRA Tribunal is satisfied that the decision-maker breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision. To reiterate, such "irrationality" was not found in this instance.

30. The above authority (*Keegan* and *O'Keeffe*) was recently approved by the Supreme Court in *Meadow v Minister for Justice* [2011] 2 ILRM 157 in which the Supreme Court also reiterated that interventions on the basis of irrationality are limited and rare. The Supreme Court further stated that a court on judicial review, and, by analogy, the DRA, cannot interfere with a decision-making authority merely on the grounds that it is satisfied on the facts that it would have raised different inferences and conclusions, or that it is satisfied that the case against the decision was stronger than the case for it. Moreover, Denham J as she then was, also noted in *Meadow* that a court (and, by analogy, the DRA) should be slow to intervene in a decision made with special competence in an area of special knowledge (such as the CHC has with regard to GAA disciplinary matters).

31. It is suggested that consistent with the above principles a DRA Tribunal hearing will, in instances similar to this dispute, be concerned, not with the decision, but with the decision-making process. In fact, unless that restriction on the power of the DRA is observed, the DRA might, under the guise of preventing the abuse of power, be itself guilty of usurping power. In sum, DRA review, as the words imply, is not an appeal from a decision but a review of the manner in which the decision was made.

Costs

32. 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. Both respondents however quickly put on record that neither the CHC nor the CAC would be pursuing their party legal expenses. The appellants bear the costs associated specifically with the holding of the arbitration hearing.

Dated: 15 March 2012

Signed:

Pat Purcell

Jack Anderson

Sean McCague