Disputes Resolution Authority

An Córas Eadrána

IN THE MATTER OF THE ARBITRATION ACTS 1954 and 1980

Record No. DRA/ 06/2010

Between:

Padraic O'Sullivan and Colin O'Sullivan

Claimants

-and-

Peter Twiss

(mar Runaí agus ar son Choiste Chontae Ciarraí)

Respondent

DECISION AND AWARD

Background and Facts

1. The claimants herein are 13 and 7 year old brothers from Ballytrasna, Faha, Killarney in the County of Kerry. Their home lies within the parish of Ballyhar/Firies.

2. In or about April 2008, the Claimants' father, Michael O'Sullivan, wrote to both the secretary of the Firies GAA Club and to Eamon O'Sullivan, then secretary of the Respondent (hereinafter "the County Board") seeking permission to play for the Listry GAA Club.

3. The necessity for the request arose as a consequence of Rule 20 of the Byelaws of the Kerry County Board (2008 edition), known as the Parish Rule, which in broad terms requires any person wishing to play in Kerry to play for a club in the parish in which he/she resides where there is such a club. The only club in the parish of

Ballyhar/Firies is the Firies GAA club and in the absence of a derogation from this Rule the Claimants would be required to play for that club if they wish to play under the auspices of the GAA.

4. The Claimants contend that they have a connection with the Listry club and parish, whereas they have no connection with the Firies Club and parish. They live 1.4 miles from the Listry club whereas they live 7.2 miles from Firies. They both attend or attended the Faha National School in the Listry parish where they played gaelic football. Their parents are involved in a number of community activities in the Listry parish.

5. In reply to the Claimants' request, Eamon O'Sullivan replied by letter dated 25 April 2008 stating that "the above matter is now with both clubs with a final decision due at County Committee meeting on May 12th." Michael O'Sullivan replied to this letter on 2 May 2008 expressing his concern that the County Committee might decide the application by reference to a geographical landmark and in which he cited the examples of previous cases involving other families where a derogation from the Parish Rule had been permitted which allowed children living in the Ballyhar/Firies parish to play for the Listry GAA club.

6. It should be noted that the application on behalf of the Claimants was one of 13 similar applications made at that time and which fell for consideration by the County Committee at that time. However, only the Claimants' application is the subject matter of this arbitration.

7. The minutes of the County Committee meeting record (under the heading 'Transfers') the decision of the Committee that "*It was agreed that the Parish Rule boundaries would remain for Listry families seeking transfer from Firies*." The Claimants were informed of this ruling by letter dated 19 May 2008 which stated that "*Following the failure to agree on a County Board proposal by both Firies and Listry, Coiste Chiarraí, at its monthly meeting on 12th May, reaffirmed*

the Parish Rule under Bye-Law 20 of Coiste Chiarraí. Therefore those involved must continue to play with Firies." It should be noted that the Claimants had not sought a transfer and have never played for Firies. However, the Claimants interpreted the letter (together with a subsequent letter from Firies to similar effect) as being a refusal of their request for a derogation from the Parish Rule.

8. By Plenary Summons issued in the High Court on 26 November 2009, the Claimants issued proceedings challenging the decision of the County Board. By Notice of Motion issued on 2 March 2010 the Claimants sought an interlocutory injunction restraining the Respondent from preventing the Claimants from playing for Listry GAA Club.

9. The necessity for High Court proceedings arose because the Claimants are not members of the Association and therefore not subject to the Rules of the Association. However, the parties agreed that for the purposes of resolving the dispute between them, they would refer the dispute to the Dispute Resolution Authority (DRA) to be decided according to its Rules and agreed to be bound by the decision of the DRA subject to the DRA accepting jurisdiction. The parties therefore adjourned the High Court proceedings pending a proposed DRA hearing. The terms upon which the parties agreed to adjourn the High Court pleadings are set out in an appendix to this award.

10. The Claimants therefore submitted a request for arbitration dated 18 May 2010. By letter dated 20 May 2010, the secretary of the DRA, Mr Matt Shaw, confirmed that the DRA would accept jurisdiction in the matter and extended the time necessary for submitting a request for arbitration. A response to the Request for Arbitration was submitted dated 27 May 2010 and a hearing of the reference was set for 8 June 2010.

11. At the outset of the hearing, the parties were asked to confirm their position in relation to the jurisdiction of the DRA to hear the dispute. The parties confirmed

that they agreed to the DRA reaching a binding determination on the issues agreed to be referred to it, and to that binding determination being published (as with other decisions of the DRA) if appropriate.

The Claim

12. Two questions were referred to the DRA for its determination. (1) Whether Rule 20 of the Bye-Laws is unenforceable as being inconsistent with the Claimants' constitutional guarantee of freedom of association as enumerated in Article 40.6.1(iii) of the Constitution; and (2) whether Rule 20 was applied by the County Board in respect of the Claimants in a manner which was unfair and/or was reached in a manner inconsistent with the guarantee of fair procedures. After some discussion, it was agreed between the parties that the decision under challenge was that of the County Board taken on 12 May 2008 and communicated to the Claimants by letter of 19 May 2008.

13. Rule 20 of the Kerry County Board Bye-Laws provides as follows:

"A Player may play only with a club in the parish

(a) Where he resides

(b) Where he works

(c) A player who resides or works in a town of more than one club may play for any club in that town.

(d) A player may play for a club in his native parish.

(e) A player may play for his Home Club

If no such club exists he may with permission play with the nearest club to his place of residence or as directed by the County Committee.

Club membership alone per se does not confer automatic playing eligibility: the player must qualify under one or more of the conditions outlined above or as directed by decision of the County Committee.

No deviation or derogation from the above stated conditions are allowed without the prior application to and sanction of the County Committee whose decisions are final and binding on all parties concerned."

Evidence

14. The Claimants called evidence from Michael O'Sullivan, father of the Claimants. He set out the basis of his sons' connection to the Listry parish and the reasons for wishing to play for the Listry Club. He explained the circumstances in which they had applied to play for the Listry Club and how they learned of the decision that their application had been refused.

15. He made particular complaint that he had never been given an adequate reason for the decision, nor had it ever been explained to him why a derogation had been granted to their neighbours which enabled them to play for the Listry Club whereas no derogation had been granted to the Claimants. He gave evidence that at a meeting in Killorglin Golf Club July 2009 to discuss the issue, he had been informed by Mr Jerome Conway, Chairman of the County Board that there existed what Mr O'Sullivan characterized as a "gentleman's agreement" between the County Board and the Firies GAA club that after they agreed to a derogation from the Parish Rule in relation to a number of families at the County Board's request, they would not be asked to agree to any further derogations.

16. In cross-examination, he fairly acknowledged that he understood and accepted the purpose behind the Parish Rule – to prevent players being coaxed from smaller to larger clubs – but could not see how that justified the decision in this case having regard to the relative sizes of the clubs nor the decision to allow a derogation to his neighbours. He acknowledged that the Respondent had followed the correct procedure in arriving at its decision to refuse the application.

17. On behalf of the Respondents, Mr Eamon O’Sullivan and Mr Jerome Conway gave evidence. Mr O’Sullivan was at the time of the impugned decision the Secretary of the County Board. Mr Conway is its chairman.

18. Mr O’Sullivan gave evidence that he had received similar requests for derogation from the Parish Rule from 12 or 13 families in the Ballyhar/Firies parish looking to play for the Listry club. He replied to all in similar terms the applicants. He acknowledged receiving a further letter from the Claimants’ and a number of telephone calls regarding the status of the applications. He stated that he would have told all persons that the applications would be considered at the main meeting of the County Committee. He stated that at the meeting of the County Committee when the applications came up for consideration both the Listry and Firies GAA clubs voted in favour of upholding the Parish Rule, *i.e.* not granting an exemption.

19. In cross-examination, he was asked whether the consent of the clubs involved to a derogation from the Parish Rule was a pre-condition to that derogation being granted. He stated that in 99% of the cases it would be. He stated that if there were no agreement than it would be “very difficult” to grant a derogation. He stated that at the meeting of the County Committee no specific consideration had been given of the previous derogations which had been granted in relation to these clubs, nor was any individual consideration given to the 13 applications before the Committee – they were considered together and decided together. The contents of the letters sent by each applicant and of the letter of 2 May 2008 from the Claimants were not considered at the meeting.

20. Mr Conway gave evidence of what was expressly considered at the meeting on 12 May 2008. He stated that reference was made to the fact that many children who attended Faha National School were already playing for Firies. There was reference to the fact that the Community Games successfully employed a similar rule which did not allow for derogation. The Committee considered that the Firies

Club was a well-organised club where the children were well looked after, well coached and got games.

21. Mr Conway said that he was aware that letters had been sent in making the applications for derogation and that all were in similar terms. He could not recall whether they had been considered by the Committee but stated that if Eamon O'Sullivan said that they had not, then he would accept that. He stated that the delegates were aware of the history.

22. Mr Conway had had an involvement in earlier cases in which a derogation had been allowed. He said that in the case of two families, their application had been "hot on the heels" of the so-called Ahern case in which a derogation had been allowed following the institution of High Court proceedings. He said that as a consequence County Officers approached the Firies club to seek to persuade them to agree the derogation. After much discussion they did so, but only on the basis that they would never be asked again. Mr Conway stated in his evidence that in his experience, if there was not agreement from the clubs involved, then they would never be forced to accept a derogation.

23. He stated that he wouldn't characterize the agreement with the Firies club as a "gentleman's agreement" and could not recall whether it had been specifically referenced at the meeting on 12 May 2008.

Submissions

24. In light of the evidence, the Claimants narrowed the basis upon which they sought to challenge the decision of the Respondent and confirmed that they were no longer pursuing any claim in relation to the alleged unenforceability of Rule 20 in light of the constitutional guarantee of freedom of association.

25. The Claimants contend that the manner in which the County Committee arrived at its decision was unlawful because they had fettered or unduly restricted their discretion. They pointed to the cursory attention given to each individual application and the fact that they had been considered and decided together. They contended that because no agreement had been given to the derogation by Firies and/or because of the prior agreement with the Firies Club described by Mr Conway, the applicants were refused on a uniform basis.

26. In effect, the Claimants contend that the 'real' reason for the decision was the absence of agreement from Firies and the Claimants could never have achieved a derogation because of the manner in which the County Committee fettered its discretion. The Claimants submit that where a sporting organization exercises a discretion it must do so fairly and relied on *McInnes v Onslow-Fane* [1978] WLR 1520 in this regard. The Claimants contend that the duty to act fairly must be considered in light of the Claimants' constitutional rights of freedom of association.

27. The Respondent accepted that it had a duty to act fairly in the application of its rules but that duty to not extend to a duty to act judicially and rejected the contention that considerations of the rights of association should have any bearing on determining the extent of the duty. Counsel relied on the decision of McCracken J *O'Donohoe v O'Baroid and Quirke*, unreported, 23 April 1999.

28. It was submitted that the Claimants had placed an overly restrictive interpretation on the evidence in seeking to assert that the only basis for the decision to refuse the Claimants' application was the absence of agreement from Firies/the prior agreement with Firies. It was submitted that the evidence established that other matters had been considered.

29. The Respondent accepted that there was a procedural difficulty in the manner in which it arrived at its determination but contended that this was not necessarily

fatal to its decision. It submitted that the correct question for this Tribunal to ask itself was whether the Kerry County Board had fettered its discretion to such an extent that couldn't make a fair decision. It was contended that it was open to this Tribunal to determine that it had not.

Decision

30. The Tribunal is satisfied that in arriving at its decision, the Respondent had an unfettered discretion as to whether to allow a derogation from Rule 20 or not, and that it was under a duty to act fairly in exercising that discretion. We do not accept that the Respondent was under a duty to act judicially in exercising its discretion and in light and the extent of the duty to act fairly was an entirely different level than that being considered by the Court in *Pudliszewski v District Judge Coughlan* [2006] IEHC 304 a case on which the Claimants relied.

31. We are also satisfied that in having regard to the opinions of the two clubs in question, the Respondent was having regard to a factor relevant to the exercise of its discretion.

32. However, it appears to the Tribunal that the evidence establishes that the Respondent went further than was permissible in having regard to the objection of the Firies club to the derogation. It appears to us that the Respondent adopted what was, in effect, a fixed policy of allowing derogations only where the clubs involved agreed. In the circumstances, the Respondent, while nominally maintaining a discretion to allow a derogation even in the absence of agreement, had *de facto* fettered its discretion to such an extent that it could not fairly consider the Claimants' application. In effect, the Respondent by adopting such a policy has delegated to the clubs involved a decision-making power which is given to the Respondents under the bye-laws.

33. Furthermore, it appears to us that the Respondent had regard to an irrelevant consideration (or at the very least failed to disregard an irrelevant consideration) insofar as the existence of a prior agreement with Firies (whether a gentleman's agreement or otherwise) was known to the members of the County Committee familiar, as Mr Conway out it, with the "history" of the case. Whether this is characterized as a fettering of discretion, breach of fair procedures, or as giving rise to a reasonable apprehension of objective bias, it is clear that there is no room within Rule 20 for such an agreement, or for a veto as described above.

34. In the circumstances, we are satisfied that although a number of matters were identified which were relevant to the Respondent's consideration, the County Board in arriving at its decision had fettered its discretion to such an extent that it could not arrive at a fair decision. While the Respondent argues that if that were the case, what then was the point of considering any issue other than the consent of the clubs involved, it seems to us that the corollary is equally true: if it is not the case that the Respondent had unduly fettered its discretion, how could it have failed to give any individual consideration to the various applications before it and in particular to the application of the Claimants.

35. While the Tribunal accepts that the rationale for the Parish Rule and the opinions of the clubs involved are relevant factors for the County Board's consideration in any application for a derogation from Rule 20, those factors, and more particularly the refusal of consent by one of the clubs involved, cannot be treated as determinative of the matter as appears to have occurred in this case.

36. For the foregoing reasons, the Claimants' claim that Rule 20 was applied by the County Board in respect of the Claimants in a manner which was unfair and/or was reached in a manner inconsistent with the guarantee of fair procedures is accepted.

37. We therefore direct that their application for a derogation from Rule 20 be remitted to the Kerry County Board for its further consideration in accordance with the above findings. We recommend that the County Board adopt the following minimum steps in processing that application:

- Invite a further written submission from the Claimants.
- All interested parties (e.g. the clubs) be invited to make written submission.
- All written submissions to be considered by delegates at the County Committee meeting next following from the receipt of submissions.
- A detailed record of the deliberations of the County Committee and decision be kept and made available to Claimants.

38. In the absence of agreement on costs, the parties are invited to submit written submissions within three weeks of the date of this decision as to what Order the Tribunal should make in respect of costs.

Dated 11 June 2010.

_________________________ Declan Hallissey

_________________________ Jim Murphy

_________________________ Rory Mulcahy (Chairman)