Disputes Resolution Authority

An Córas Eadrána

DRA 18 of 2015

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

Parnell's of London v London CCC and Provincial Council of Britain Hearings Committee

Hearing: Wellington Park Hotel, Belfast at 8pm on 28 October 2015

Tribunal: Donard King, Fionnuala McGrady, Jarlath Burns

Secretary to the DRA, Jack Anderson, was also in attendance

Verdict: Claim fails

Keywords: Incorrect score recorded by the referee; meaning of the status of the Referee's Report and compelling evidence in R 7.3(aa)(1)(vi) of the Official Guide (2015); procedural unfairness; de novo appeal curing a procedural defect at first instance; the irrationality test in judicial review and the jurisdiction of the DRA.

List of Attendees:

Claimant:
Conor Sally, Logan & Corry Solicitors
Joe Reagen, Chairman
Dennis Diggins, Secretary

Respondent 1,
Mark Gottsche, Secretary London GAA

Respondent 2,
Paul Foley, Secretary, by phone

Factual Background

1. This claim arose out of a London senior football championship match between the claimants and Kingdom Kerry Gaels (KKG) held on 13 September 2015. The match was in the group stages of the championship. If the claimant club avoided defeat by 3 points, they would have proceeded to

the semi-final. The referee reported that the game ended in a 14 points to 10 defeat of the claimant club. The claimant club contended that the referee submitted the incorrect score which should have read 13 points to 10.

2. The claimants objected to the result of the KKG match to the London CCC (first respondent, decision dated 24 September) and thereafter appealed, again unsuccessfully, to the Hearings Committee of the Provincial Council of Britain (second respondent, decision dated 3 October 2015). The claimants then made a request for arbitration to the DRA and did so in line with the DRA Code and with a commencement date 10 October 2015. A DRA Tribunal was then appointed by the DRA Secretary pursuant to the usual procedure outlined in the DRA Code.

Preliminary Matters

3. As a preliminary matter, the first respondent objected to the fact that immediately prior to the hearing, the claimants supplied a 70-page document to the respondents and to the Tribunal containing reference to 7 previous DRA awards on which the claimant sought to rely in argument. Both respondents argued that insufficient time had been granted to them in which to review the case law and that they were now at a disadvantage. The claimant countered that DRA awards are freely available on line on the DRA's website and that the case law would be relied upon for illustrative purpose only. The Tribunal considered the matter and agreed to admit the case law bundle but did reassure the respondents that they would, if necessary, be given every reasonable opportunity (in the form of an adjournment etc) if deeper consideration of any case law contained in the supplementary bundle was required. The respondents agreed to proceed on this basis.

Claimant's Case

4. The claimant's case was based on a number of grounds. The first ground was substantive in nature; the remainder largely procedural in nature. What follows is a summary (only) of the arguments.

Substantive ground

5. The claimant's principal submission was that the referee reported the wrong score of the game. Additional to it being a breach of Rule 1.2 (v) of the Official Guide 2015 Part 2, the claimant reminded the Tribunal that, if not remedied, the consequences would be that the claimant club would be eliminated from the London SFC, as opposed to moving to the semi-final, had the correct score been recorded and reported by the referee.

6. The claimant informed the Tribunal that it had numerous independent witnesses (up to 11 in total) to support the assertion that the score was 13-10.

This evidence, the claimant informed the Panel, had previously been given at both the objection and appeal hearing and submitted that such evidence was compelling (within the meaning of Rule 7.3 R 7.3(aa)(1)(vi) of the Official Guide 2015) and of such quality from persons in such good standing in London GAA, that the decisions to dismiss the objection, and the subsequent appeal, were so unreasonable and irrational that they flew in the face of common sense and thus should be quashed by the DRA. In support of this point the claimant relied on DRA15/2007 *St Patrick's, Wicklow v Leinster Council* in which a DRA Tribunal remitted a matter to the Wicklow County Board for consideration of the evidence of an independent journalist as a first hand witness to a match in which there was a debate as to the (in)correct score recorded by the referee.

Procedural grounds, London CCC objection

7. First, the claimant argued that on its face the game was awarded to KKG on a score of 13-10 at a London CCC meeting on 14 September 2015, prior to a County Committee meeting later that evening. The claimant submitted that only the County Committee being the "council or committee-in-charge" had the power to award a game as per Rule 6.42 of the Official Guide 2015. The claimant further noted that the CCC, after awarding the game to KKG, was also the same body who then heard the objection on 23rd September 2015. The claimant submitted that the same individuals who sat at hearing in awarding the game at the first meeting had a conflict of interest when being asked to reverse that decision following the submission of the objection and that this caused injustice and was a breach of natural justice.

8. Second, the claimant argued that prior to the hearing of the objection, the claimant club had requested a copy of the Referee's Report in an e-mail from the CCC Secretary and a one page Referee's Report was received. The claimant sought the further parts of the report on 16th September 2015 and in reply was told the "incident had no bearing on the result of the game". The claimant argued that by not providing the full report this caused unfairness on the Claimant, particularly when the withheld pages of the report were read in context. As well as causing procedural unfairness, the withholding was, the claimant argued, a breach of Rule 7.10(h) of the Official Guide 2015 and disadvantaged the claimant in the preparation of their case in line with the principles discussed in DRA15/2015 *Diarmuid Connolly v CHC & CAC*.

9. Third, the claimant argued that prior to the hearing the London CCC were also in Breach of Rule 7.10(g) in that it appeared that a copy of the objection was not sent to the defending party, KKG. Although this did not invalidate the Objection per se, the claimant argued that it caused prejudice to them in that to date KKG had not been invited to partake in the process, although they were clearly a notice party to the current proceedings. It might have been the case, for instance, that had KKG been notified they may have accepted the

referee's error and there would have been no need even for an objection hearing had the CCC received a written admission from KKG.

10. Fourth, the claimant argued that at the London CCC hearing it was clear from the minutes that the CCC Chairman Mr O'Halloran excused himself from the meeting to avoid a potential or perceived conflict of interest, given that he was a potential witness in the objection hearing. What remained unclear however is how a temporary Chair was selected. It was noted ambiguously in the minutes that Mr Connelly "took the chair". The claimant informed the Tribunal that they were aware that Mr Connelly was neither elected, as would be normal procedure, nor appointed (there is no position of vice-chair). This was, they argued, a lack of proper procedure or transparency and in effect ensured that the objection was lost as the four members of the CCC voted 2:2 and the "chair" had the casting vote. Ironically, the claimant reminded the Panel, the CCC Chairman was absent only as he was a witness in support of the claimant. The claimant further submitted, aside from the conflict of interest of CCC members as outlined above that Mr Connelly sat in circumstances where there was a further conflict of interest in that he was present at the game and was therefore aware of the correct score. Finally, on this point, the claimant raised a number of issues relating to the accuracy of the CCC minutes at its various meetings in September 2015.

Procedural Grounds, Provincial Council hearing

11. First, the claimant argued that at 15:51 on the date of the appeal hearing, the Secretary of the Provincial Hearing Committee, Mr Foley, sent some 32 pages of material to all the parties. Unfortunately, the claimant Secretary had left his office and therefore the material was not received until the hearing commenced. Among this was the further two pages of the Referee's Report very relevant to the case. The claimant acknowledged that at the appeal they had been given the opportunity to make submissions and on foot of being given the additional pages of the report, asked for and received clarification on aspects of the referee's decision making process in the immediate aftermath of the game (such as did the referee attempt to confirm the score with anyone else etc). The claimant's argued that, despite the good practice at the appeal hearing, the failure of the CCC, at first instance, to provide such documentation in advance of the CCC hearing, or even in advance of the appeal hearing, severely hindered the claimant's ability properly to prepare their objection in line with the principles discussed in DRA15/2015 *Diarmuid Connolly v CHC & CAC*.

12. The above notwithstanding, the claimant argued that the second respondents, in seeking clarification from the referee, asked narrow limited questions and failed in its duty to determine the appeal, but rather left that to the referee, by asking the final score. This meant, according to the claimants, that the second respondent's decision was to accept the score of the referee without taking

into account the compelling witness evidence that had unambiguously confirmed that the referee had made a mistake. This, the claimant argued, was clearly outlined in the decision recorded in the second respondent's minutes. The claimant also highlighted that the referee also changed his report in making a case that had never been made previously. By not giving the claimant an opportunity to rebut same this denied the claimant the right a fair appeal hearing and effectively accepted new evidence in the absence of the Claimant, being a breach of Rule 7.3 (aa) (3). In short, if the referee as he subsequently claimed in his clarification was so sure of the score, why did he check it with his linesman who obviously had a different score? It followed, according to the claimant that, on respect of the clarification sought, the second respondent breached Rule 7.3 1 (aa)(viii) in that "such clarification can only be used for the purposed of exonerating the defending party" (in this case the Claimant). It therefore followed that the decision taken by the second respondent was fundamentally flawed as running contrary to the spirit of the particular rule and in light of the contra proferentem principle of construction of a rule.

Respondent 1, London CCC

13. The Respondent was represented by the Secretary of London GAA, who currently acts as Secretary of the London CCC. The Secretary of the London CCC at the time in dispute, Mr John Molloy, resigned from his post just prior to the submission of the proceedings to the DRA.

14. London CCC as first respondent disagreed that the referee submitted an incorrect score line. London CCC argued that in accordance with Rules of Control Rule l 1.1 Part 2 of the Official Guide of 2015 on "Powers of the Referee", it considered the referee's decision on any questions of fact as final and therefore the score submitted in the referee's report was accurate.

15. London CCC disagreed that the evidence provided was compelling enough to rebut the referee's report. The first respondent noted that member Tony O'Halloran stood down from London CCC in accordance with Rule 7.10 (j) and attended the meeting as a witness for the claimant. London CCC then took witnesses evidence into consideration when reaching a decision on the claimant's objection however the London CCC did not consider the evidence provided to be sufficiently compelling to contradict the Referee's Report.

16. London CCC further disagreed that there had been a number of rule breaches and a lack of fair procedures which resulted in severe prejudice being caused to the claimant club and the claimant. In this the first respondent argued that in strict compliance with the Official Guide, due process was followed at all times and in the following manner: proper and due notification granted to the claimant as to when their objection would be heard; natural justice at all times

during the objection hearing itself; and thereafter in informing the claimant of the CCC's decision.

17. The first respondent further informed that Tribunal that it considered the minutes provided by the then Secretary of the London CCC to be a true and accurate account of the relevant meeting(s) and that the minutes were provided to the second respondent even though Parnell's appeal thereto did not include any written application for these documents in accordance with Rule 7.11 (m).

Respondent 2, Provincial Council

18. The second respondent argued that in so far as it was concerned, it acted at all times in good faith and in accordance with the Official Guide in reaching its decision on October 3rd following the initial hearing on October 1st. The second respondent denied vigorously the claim that it breached the Rules listed by the claimant and further noting that the absence of any detail in the claimant's initial written submissions rendered it difficult to furnish a more detailed response.

19. Specifically, the second respondent denied that it failed to take proper account of the witness evidence. The second respondent informed the Tribunal that it gave each witness a fair opportunity to present their evidence in accordance with the guidance given in the Official Guide of 2015 and the Disciplinary Handbook. The second respondent was adamant that it asked every single person in the room at the conclusion of the appeal if they felt they had been given a fair. Everyone accepted that a fair opportunity was afforded to them before they left.

20. The second respondent strongly denied the claim that the referee's clarification substantially changed the referee's report – the score in the original report remained the same as the score in the clarified statement made by the referee. Neither did the clarification cause further severe prejudice – in line with Rule 7.3(aa)(viii) of the Official Guide 2015.

Reasoned Decision

Substantive ground

21. The key to this matter lies in the application of Rule 7.3(aa) (1)(vi): "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 is." In this instance, and according to the claimant, the other compelling evidence could be found in the form of "independent" witness evidence provided by a number of persons at the match. At first, 11 "independent" witnesses were put forward by the claimant

as being in a position to provide the necessary compelling evidence. On review it was found that the majority of said witnesses had a close connection to or were in fact members of the claimant club. That being said, the Chair of the London CCC was no doubt a witness of some standing and authority and his evidence was taken into account by both respondents, particularly the second respondent, in the matrix of compelling factors that needed to be considered. In the end, both respondents decided that the evidence as a whole put forward by the claimant club was not sufficiently compelling as per the requirement in Rule 7.3(aa)(1)(vi).

22. In reviewing this decision making process by the respondents, and in line with a number of previous DRA awards, the applicable test for this Tribunal is analogous to that used in judicial review when a court seeks to ascertain whether the decision maker acted rationally and/or reasonably in arriving at their decision. A summary of that test can be found recently in the Irish High Court in *Brady v Board of Management of Castleblayney Infant National School & Anor* [2015] IEHC 554 at para 53.

> "The court has no jurisdiction on judicial review to determine the merits of the decision: this application is not an appeal from the decision-maker. The court under this heading must consider whether the impugned decision "plainly and unambiguously flies in the face of fundamental reason and common sense" (per Henchy J, in *The State (Keegan) -v- Stardust Compensation Tribunal* [1986] I. 642 at p658: see also *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39 and *Meadows v Minister for Justice* [2010] 2 IR 701). The occasions upon which the court will be justified in intervening to quash a decision on this basis are limited and rare. There is a heavy burden on an applicant in such a case. It is not sufficient to demonstrate that this court might have reached a different decision or that a different result might, on a review of the materials, have been reached.

23. Applying the above to the situation at hand, the Tribunal finds that the respondents were not irrational or unreasonable in their interpretation of the what might or might not be considered compelling evidence in the context of Rule 7.3(aa)(1)(vi).

Procedural grounds

24. The claimant forwarded a number of grounds of procedural impropriety, the most salient being the manner in which the first respondent failed to furnish them with the full copy of the referee's report. That specific matter will be returned to shortly. In making their procedural points – see typically the points argued a paragraph 12 above – the claimant club took an approach similar to that which was successful in DRA15/2015 *Diarmuid Connolly v CHC & CAC*. The tactic seems to be to pepper officials, hearings and appeals committees with requests for clarification and further "discovery" of

documentation and, on not receiving what the claimant considers to be full or timely clarification, to then argue that the preparation of the claimant's case has been prejudiced by such procedural impropriety such that a substantial unfairness arises i.e., the claimant identifies a technical error which is then used to undermine the substance of the case against them.

25. It must be remembered here that GAA hearings and appeals committees are not courts of law bound by strict laws of evidence and procedure but are private tribunals manned by volunteers who are obliged as best they can to reach a fair and reasonable decision on the substance of the matter before them in line with the Official Guide's rules on evidence and procedure. The courts of law have acknowledged that this process of decision-making can, at times, be slightly more "robust" that might take place in an ordinary court but that is the margin of appreciation granted to a private organisation doing its best to resolve differences under its governing codes (*Barry and Rogers v Ginnity & Others*, Unreported, Naas Circuit Court, McMahon J, 13 April 2005:

> "The people, who wash jerseys, line the pitches and man the turnstiles, do so on a voluntary basis. The same is true, in general, of the officers of the clubs and of the County Boards. There are a few exceptions, but the general picture is one where the local administration is done by unpaid volunteers who do so for the love of the games and out of a sense of social duty. This means, of course, that they are not normally lawyers or persons of legal training. Rather are they characterised as persons who are committed to the games and the ideals of the Association, and as persons who in their decision-making roles display large measures of pragmatism and common sense. For the most part, they are not trained professional administrators, but enthusiastic amateurs. It would appear to me that provided the basic rules are not inherently unfair on their face, the process is not flawed because it relies on commonsense and a layman's pragmatism, even if, on occasion, it is a somewhat robust process. In such a situation one cannot demand a level of sophistication in the administration that one might expect of a lawyer or of a professional administrator. Further, to demand such a level of professionalism in the administration might well undermine the very success of the organisation to the detriment not only of the Association itself, but to the detriment of society in general…As a final word in this matter I should say that one must expect that laymen applying the disciplinary rules will occasionally do so in a somewhat robust manner. Provided those administering the rules, however, do so in a bona fide manner, giving each side a fair opportunity of participating, the onus on members who wish to challenge the findings and decisions is a heavy one. One must be careful that the heavy hand of the law does not weaken the operation of such voluntary bodies or undermine the considerable benefits they bring to society."

26. Moreover, the Irish courts have acknowledged that, although issues of natural justice are important, the substance of matters rather than their form are of greater importance in seeking to resolve internal disputes in sporting organisations (*Gould v McSweeney & Ors* [2007] IEHC 5, unsuccessful claim based on alleged breaches of natural justice and seeking to overturn a disciplinary ban imposed by a sports organisation). In sum, the key principles of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens on decision makers and neither should minor procedural errors by decision makers be conflated into an argument of substantial unfairness against claimants. Where the procedural impropriety is of such a grave nature that a genuine prejudice has been suffered by a claimant, then, of course, a DRA Tribunal should take that into account but proof of such prejudice is a burden on the claimant and, where proven, the usual remedy will be to remit the matter to the decision maker to give them an opportunity to rectify the procedural error.

27. The above notwithstanding, it must be stated forcefully that the decision of the London CCC to furnish the claimant club with only a partial version of the Referee's Report is to be regretted and of itself might be considered of substantial prejudice and detriment to the claimant in preparation of their case at first instance. The London CCC's rationale behind the withholding of pages 2 and 3 of the report – that they referred to a disciplinary matter relating to a Parnell's player – is difficult to understand. Moreover, and somewhat bizarrely, a fourth page to the referee's report appeared at the DRA hearing. The contents of that page, referring mainly to the lack of flags for linesmen and umpires, were deemed of little relevance to the issue at hand but again the failure by the London CCC to supply the page in a timely fashion was unsatisfactory.

28. More generally, the Tribunal observes there were elements of the conduct and operation of the London CCC during the period in question that cannot be considered good practice e.g., the failure to adopt the minutes of previous meetings. In addition, although due recognition must be given to those who volunteer to serve on the London CCC in what must be a difficult logistical exercise in a city the size of London, the Tribunal directs that some consideration must be given to ensuring that the London CCC is sufficiently resourced to enable it to delegate the investigation of an objection (such as this) to certain panel members and any subsequent hearing of such an investigation's findings to the remaining members (and a point raised by the claimant at paragraph 7 above).

29. The Tribunal hold however that the procedural defects at the London CCC hearing were "cured" by the comprehensive and, in effect, *de novo* hearing carried out by the second respondent. Mr Foley, the secretary, struck the

Tribunal as a highly conscientious official. The Tribunal was left in no doubt that the second respondent made every effort to embed its hearing with substantial and procedural fairness. For instance, at the second respondent's hearing, the claimant was given an opportunity to consider the second and third pages of the referee's report. If Mr Foley and the second respondents had not been so thorough, then the errors at London CCC would have left the process/decision as a whole highly vulnerable to (successful) challenge on grounds of lack of fair procedure. Nevertheless, the general principle of sports, administrative and even human rights law applies: a violation of the principles of natural justice at a first instance hearing may be cured on de novo appeal.

Award and Costs

30. The Tribunal awards in final and binding determination of this dispute that the application is dismissed and the reliefs sought refused.

31. The Tribunal directs that all parties bear their own legal costs and expenses and that the claimant's deposit be returned less the balance of the costs associated with the arbitral hearing, as calculated by the Secretary of the DRA.

Dated of Oral Hearing: 28 October 2015

Date of Agreed Award: 1 Dec 2015

Signed:

Donard King

Fionnuala McGrady

Jarlath Burns