Disputes Resolution Authority

An Córas Eadrána

DRA 08/2016:

Deaglán O'Mathuna (Declan O'Mahony) v & An Lár Choiste Éisteachta (CHC) & An Lár Choiste Achomhairc (CAC)

Hearing: Maldron Hotel, Dublin Airport at 8pm on 15 March 2016

Interim Relief Application in front of Secretary to the DRA, Jack Anderson

Verdict:
Application denied

Keywords:
Presumption in favour of the Referee's Report; rebuttal by way of compelling evidence; unedited video; Rule 7.3(aa)(1)(vi) of the Official Guide 2015; Clarification of the Referee's Report; Furnishing of Documents to the Defending Party; Fair Procedure; Rule 7.3(s) of the Official Guide 2015; Hearings Committee's Sole Discretion to Seek Clarification of Referee's Report Post-Hearing; Rule 7.3(aa)(1)(viii) of the Official Guide 2015; scope and hearing of an Appeal; manifestly incorrect; Rule 7.11(o) of the Official Guide 2015; scope and hearing of a DRA Tribunal; irrationality; Rule 7.13(a) of the Official Guide 2015.

Abbreviations:

An Lár Choiste Achomhairc	Central Appeals Committee	CAC
An Lár Choiste Éisteachta	Central Hearings Committee	CHC
Deaglán O'Mathuna	Declan O'Mahony	Applicant
Treoir Oifigiúil	GAA Official Guide 2015	TO

List of Attendees:
Applicant: Declan O'Mahony (player); Paddy Walshe (club member, Ballyboden); John Galvin (video analyst); Donough McDonough BL

Respondents: Louise Reilly BL, Barrister; Laura Graham Solicitor, Reddy Charlton; Niamh Gibney Trainee Solicitor, Reddy Charlton; Mel Clarke, Acting Chairman of CAC; Bernard Smith, Secretary of CAC; Joe Flynn, Acting Chairman of CHC; Emmet Haughian, Secretary of CHC. Also in attendance, Patrick Doherty, Secretary of CCCC.

Factual Background

1. On 13 February 2016, Ballyboden St Enda's of Dublin played Clonmel Commercials of Tipperary in the semi-final of the All-Ireland Senior Club Football Championship. The applicant was shown a straight red card on 53 minutes after tackling Clonmel forward Jason Lonergan. The accompanying Referee's Report reported that the applicant had "behaved in a dangerous way towards an opponent", which echoes the language used in the Category III of Rule 7.2(b) TO. Under Rule 7.2(b), Category III (1) TO, a minimum penalty of a one-match suspension in the same Code at the same Level, applicable to the next game in the same Competition, even if that game occurs in the following year's competition, is set down for the infraction alleged.

2. In a notice of disciplinary action, dated 17 February 2016, and pursuant to its powers under Rule 7.3 TO, the CCCC notified the applicant of a proposed penalty and informed him that he was entitled either to accept the proposed penalty or request a hearing before the CHC.

3. In a reply, dated 19 February 2016, the applicant requested a hearing at CHC. On 23 February the CHC secretary sent notification of a hearing to the Ballyboden St Enda's secretary confirming a hearing date of Thursday 25 February at 8pm in Croke Park. On the same date, and in accordance with Rule 7.3(s) TO, the applicant lodged a request for clarification of the referee's report and specifically clarification of what was alleged by the referee in his report as "behaving in a dangerous way to an opponent". On 24 February, the Secretary of the CCCC sent the request for clarification to the referee who replied on the same date. The referee clarified that he considered the tackle by the applicant to be dangerous because the applicant "made contact with the opponent's head/face with his arm as the Clonmel player was going past while in possession of the ball." That clarification was then forwarded, again on the 24th of February, to both the CHC secretary and the Ballyboden St Enda's secretary.

4. The requested CHC hearing took place on 25 February 2016. As with hearings generally within the GAA, the CHC's role as the primary decision maker was directed principally by Rule 7.3(bb) TO. Rule 7.3(bb) has two elements. First the CHC has the "final power to determine all matters of fact and all sources of evidence submitted [the CHC] shall be considered" and second, the infraction "shall be treated as proved if, in the opinion of the [CHC], the alleged infraction is "more likely to have occurred than not to have occurred."

5. In this instance, the CHC decided that the Category III of Rule 7.2(b) TO infraction as alleged was proven and that the appropriate penalty, per Rule 7.2(b), Category III (1) TO, was the minimum of a one-match suspension in the same Code at the same Level, applicable to the next game in the same Competition i.e. the All-Ireland Senior Football Club final on St Patrick's Day.

An oral verdict was given on the night of the hearing (25 Feb) and formal written notification on 2 March 2016.

6. The applicant appealed the CHC's decision to the CAC. The CAC appeal took place on 9 March 2016. As with appeals generally within the GAA, and as discussed in DRA09/2015, the CAC's role is directed principally by Rule 7.11(o), which has four elements. The first element holds that "An Appeal shall be limited to the matters raised in the Appellant's Appeal as originally lodged". The second element is that an appeal "shall be upheld only where there has been a clear infringement or misapplication of Rule" by the CHC or (and this is the third element) the appeal shall only be upheld where the "Appellant's right to a fair hearing has otherwise been compromised to such extent that a clear injustice has occurred." The fourth and final element is that "No determination of fact by (the CHC) shall be set aside (by the CAC)" unless shown to be "manifestly incorrect."

7. The CAC dismissed the appeal, finding that, contrary to the applicant's submission, it was satisfied that the determination of fact by the CHC (and principally that there was no compelling evidence to contradict the Referee's Report, including clarification thereto per Rule 7.3(aa)(1)(vi)) was a decision open to the CHC and was not shown to be manifestly incorrect; that there was no clear infringement or misapplication of Rule by the CHC; and that the applicant's right to a fair hearing had not otherwise been compromised by the CHC.

8. An application was then made to the DRA for an urgent hearing based on the interim relief provisions in section 8 of the Disputes Resolutions Code. This request was lodged by the applicant to the DRA on Saturday evening 12 March. To reiterate, the request sought interim relief to lift the one match suspension imposed on the claimant by the respondents on foot of an infraction by him during the All-Ireland senior club football semi-final v Clonmel Commercials and thus seeking to permit him to play in the final of that competition on St Patrick's Day.

9. The DRA secretary served notice on the CHC and CAC on Monday 14 March 2016 and they replied by lunchtime on Tuesday 15 March. A hearing was then arranged by the DRA Secretary for the Maldron Airport Hotel, Dublin at 8pm on Tuesday 15 March. In light of the approaching St Patrick's Day club football final, both sides were given the option by the DRA Secretary that he would either hear the matter on an interim relief basis (as per section 8 of the Disputes Resolution Code and the applicant's preferred option) or hear the matter fully as a sole arbitrator (as per section 5.4 of the Code and the respondents' preferred option). The parties were also given the option of adjourning in order for a full 3 person DRA panel to be appointed on the Wednesday 16 March (all parties were anxious to avoid same, it being so close to club finals day).

10. On taking submissions from both parties on the above options and taking account of the fact that there was less than 48 hours before the All-Ireland club final throw-in, the DRA Secretary agreed to the applicant's wish to have the matter heard on an interim relief basis (see further paragraphs 12-14 below).

11. Please note that I considered all the written submissions, evidence, oral submissions and legal arguments made by the parties in the present proceedings. This award refers only to the submissions and evidence the Tribunal consider necessary to explain its reasoning. The sub-headings used below are for ease of description only. Two preliminary points of concern were raised and discussed (on interim relief and the scope of review of the DRA) and three substantive points were made (compelling evidence contradicting the referee's report; clarification of the referee's report; and minor procedural defects in the processing of the disciplinary proceedings against the applicant).

Preliminary points

Interim relief

12. The applicant sought and was granted a hearing on an interim relief basis pursuant to section 8 of the Disputes Resolution Code and in line with previous hearings on interim relief under the DRA Code e.g., DRA 03/2016, *QUB v CHC and CAC* and DRA11/2011 *Ballyboden v Dublin County Board*. In hearing the matter on this basis, it must be noted that I was acutely aware of the fact that if mandatory, interim relief was granted in the manner sought by the applicant, the matter would, in effect, have been finally disposed of i.e., the applicant would have played in the All-Ireland club final, rendering a full hearing effectively moot because the applicant would have obtained the only real remedy which he sought.

13. In this regard, I was guided generally by the principles of Irish sports law identified by the High Court in *Jacob v Irish Amateur Rowing Union Ltd* [2008] IEHC 196 (10 June 2008) i.e., in the usual view of interim relief the test is whether the balance of convenience (including the impact on other, affected parties; possible delay in lodging the claim for relief etc) favours the award of relief in light of the applicant's demonstration of a fair case or serious issue for subsequent, full hearing. Nevertheless, because of the nature and effect, if granted, of the relief sought by the applicant in these particular circumstances, the test is a higher one, as per *Jacob*, of whether the balance of the risk of serious injustice favours the award of relief in light of the applicant's demonstration of a strong, clear case likely to succeed at a full hearing.

14. For the reasons outlined below, the applicant failed to demonstrate that a serious risk of injustice attached to his disciplinary circumstances and thus adopting the course of action that carried the lower risk of injustice if it turned out that I made the wrong decision, I refused interim relief pending a full

hearing of the matter. It remained open to the applicant to request a full hearing of the matter after the All-Ireland club final but this was not pursued by the applicant.

Scope of Review of the DRA

15. The respondents raised a preliminary point on jurisdiction or the scope of the DRA's review, which in summary was that in lodging his appeal form with the CAC, the applicant was directed to "List the Rules of the Association of which it is claimed the respondent(s) [CHC] is/are in breach." In his grounds for appeal, the applicant listed "Rule 7.2(b)" as the only rule which had been breached by the CHC. In his subsequent request for arbitration to the DRA, the applicant lodged a number of additional Rule infractions and including allegations in respect of breach of fair procedure not originally lodged at CAC.

16. The respondents argued that in light of Rule 7.13 TO which provides for arbitration "...as to the legality of any decision made or procedure used by any unit of the Association..." the DRA should only consider grounds of claim brought to the CAC and that the DRA should, on pain of acting *ultra vires* Rule 7.13, not entertain any additional grounds of claim or alleged breach of Rule not brought to or argued before the CAC. In essence, the respondents wanted to narrow the scope of review of the DRA to matters raised at the CAC, arguing that if this were not the case then the DRA would in effect be acting in all cases as a first instance tribunal and that the GAA's own internal disciplinary considerations on the disputed matter (at hearing and on appeal) would be reset to zero.

17. The applicant countered by noting the independence of the DRA from the GAA's internal disciplinary mechanics (see section 1.1. of the Dispute Resolution Code) and that the DRA was in analogy a judicial review type body and thus should be permitted to consider all that was necessary in evidence and potential Rule breach to allow it determine whether a decision reached by a hearings/appeals committee was rational and reasonable in nature. In this the applicant did however acknowledge that, as per DRA15/2015 *Diarmuid Connolly v CHC & CAC* (at para 15), the rationality test was a high threshold for an applicant to cross because it means that an applicant must convince a DRA Panel that the decision in dispute plainly and unambiguously flies in the face of fundamental reason and common sense. Moreover, the applicant acknowledged that a DRA Panel should never interfere with the factual determination of the CHC on the grounds that it (the DRA) might subjectively have arrived at a different conclusion based on the conflicting facts. A DRA Panel ought to intervene only if it is satisfied by the applicant's arguments that no reasonable, rational decision-making body, which properly instructed itself on the facts, would have reached the impugned decision.

18. In this specific instance, agreement was reached between the parties on the night as to what points of claim were ripe for consideration by the DRA. This was facilitated by the respondents agreeing to "fresh" grounds of claim, not raised at the CAC, being argued by the applicant to the DRA under the respondents' caution that they reserved the right to object given that such points had not been raised previously at the CAC. Whether in the future a DRA Tribunal limits itself narrowly, as to the respondents requested here, or more broadly, as the applicant suggested, is a matter for individual DRA Tribunals in the context of the issues before them. As general guidance, if there is new evidence presented by an applicant on a disputed question of fact and which is the basis for a new ground of appeal and that evidence could not, because of its freshness, have been presented to the CHC/CAC, a DRA Tribunal ought to consider the new evidence/ground of appeal. In contrast, if the applicant had ample opportunity to present the evidence/argue the rule breach before the CHC/CAC but, for whatever reason chose not to, a DRA Tribunal ought to have the discretion to decide what, if any, weight it should afford to that evidence/rule breach.

Substantive points

Compelling video evidence which contradicted the referee's report

19. The applicant's argument here was that the decision by the CHC that the applicant behaved in a way which was dangerous to his opponent was wrong in law and fact and was unsupported by the evidence and thus there was a misapplication by the CHC of Rule 7.2 and Rule 7.3(bb). In addition, the applicant argued that the CHC misapplied Rule 7.3(aa)(1)(vi) in deciding that the applicant had not provided compelling (video) evidence to contradict the Referee's Report. Similarly, by not upholding this part of the applicant's appeal, the CAC had misapplied Rule 7.11(o) and ought to have deemed the CHC's decision "manifestly incorrect".

20. The applicant argued that they did in fact adduce unedited video and other compelling evidence to rebut the "factual matters" contained in the referee's report and clarification. The applicant stated that the evidence came from the applicant, the player against whom the alleged infraction was committed and unedited video footage of the incident. The applicant asked the DRA to hear afresh from him on all three evidential points - from the applicant, the immediate opposing player and unedited video footage - in order to demonstrate that the decision, primarily by the CHC, not to consider such evidence as compelling under Rule 7.3(aa)(1)(vi) an irrational and unreasonable one that it should be quashed as per the test outlined in paragraph 17 above.

21. The respondents argument was that a DRA Panel must be extremely careful not to trespass on the fact-finding jurisdiction of the CHC and must also take

account of the supervisory appellate jurisdiction of the CAC and that if a DRA Tribunal does decide to review a video of an incident, it should be reminded that its role is to decide, applying the test of irrationality, whether the video showed compelling evidence to contradict the account of the incident in Referee's Report – again, a high threshold to cross.

22. The respondents' arguments on the "irrationality review" echo with that of previous DRA Panels e.g. DRA 15 of 2008 *Paul Galvin* at paragraph 9, DRA 16 of 2008 *Paul Finlay* at paragraph 19 and DRA 3 of 2012 *Stephen McKernan* at paragraphs 29-31 and generally DRA Panels (e.g., DRA18/2010) have been highly reluctant to consider video evidence in circumstances where such video evidence has been fully considered by a CHC and CAC. On rare occasions, DRA Panels have decided that the circumstances lend themselves to permitting a review of video evidence said to be relevant to the guilty or innocence of a player e.g., DRA 13-15/2007 *Cusack, O'Sullivan and O'hAilpin* and in DRA 05/2015 *McKinless*.

23. In the circumstances at hand it was decided that in order to properly instruct and inform myself as to whether the CHC's decision was irrational, I ought to view the video evidence offered by the applicant and including the applicant's own version or commentary on that video. On viewing same and listening to the applicant's own explanation of the event, I held, nevertheless, that the decision reached by the CHC was neither irrational nor unreasonable.

24. The applicant also pointed to the evidence (written and by video clip) given the by immediate opponent suggesting that the referee erred in his account of the incident. An opposing player's account or interpretation of a referee's decision to send off another player may be of some weight in the mitigation of a sanction but it has no evidential weight as regards the imposition of sanction, which in this instance was the minimum for the alleged infraction.

Clarification of the referee's report

25. In this, the applicant argued that the CHC had acted in breach of and misapplied Rule 7.3(aa)(1(viii) and had acted in breach of fair procedures and constitutional justice in failing to seek clarification of matters within the referee's report in light of the detailed evidence supplied by the applicant, the video evidence and the evidence given by the opposing player which the applicant argued contradicted or at least cast some doubt on the referee's version of the incident. The CHC argued that the exercise of Rule 7.3(aa) 1(viii) is at their sole discretion and that in exercising their discretion in this instance they took into account the fact that, as described in paragraph 3 above, clarification had already been sought by the applicant from the referee on the incident and that that request for clarification had been passed on by the CCCC to the referee in exactly the manner sought and required by the applicant (thus distinguishing this case from the arguments in DRA15/2015 *Connolly* where

the clarification request by the applicant had been unfairly condensed to the detriment of that applicant).

26. It is again the view of this Tribunal that the respondents' approach on this matter was reasonable and rational. The fact that, when received, the response to the clarification sought by the applicant did not tally with the applicant's version of the incident should not be equated to one which suggests that the clarification process was in some way unfair to the applicant. This is in line with DRA authority such as DRA 18/2015 *Parnell's* at paragraphs 24-26.

Procedural errors

27. The applicant argued that a number of procedural errors were made in the processing of this matter by the CHC and CAC e.g., that the CHC breached Rule 7.3(ff) in failing to record the Rule under which their decision had been taken and further that in its Notice of Decision, the CHC referred to a Rule 7.2(bb) TO 2015 which does not exist. It followed, according to the applicant, that the CAC's decision to ignore the breach of Rule 7.3(ff) and further to amend the CHC's Notice of Decision such that it referred more properly to Rule 7.3(bb) was collectively inconsistent and even *ultra vires* the CAC's role under Rule 7.11(o). The respondents contested that Rule 7.3(ff) had in fact been broken and argued that the CAC's decision to amend the typo in the CHC Notice of Decision was *intra vires*.

28. The Tribunal's view here is that minor procedural errors by decision makers should not be conflated into an argument of substantial unfairness to the opportunistic benefit of applicants. Where a procedural impropriety is of such a grave nature that a genuine prejudice has been suffered by an applicant, then, of course, a DRA Tribunal should take that into account but proof of such prejudice is a burden on the applicant 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. No prejudice to the applicant can be seen in the matters argued at paragraph 27 above.

Award

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

Costs

30. The applicant was given 7 days to indicate whether he might avail of the opportunity to pursue a full hearing on this matter. The applicant did not choose to do so. The Tribunal then sought and received detailed written submissions on costs from the parties.

31. In Ireland, the jurisdiction to award costs in an arbitration case is governed by section 21 of the Arbitration Act 2010. Section 21(1) states that the parties to an arbitration agreement may make such provision as to the costs of the arbitration as they see fit. Section 21(2) states that an agreement of the parties to arbitrate subject to the rules of an arbitral institution shall be deemed to be an agreement to abide by the rules of that institution as to the costs of the arbitration. Rule 11.2 of the DRA Code (Official Guide 2015) must be read in light of section 21 and it states that: "...Save in exceptional circumstances, to be set out in writing by the Tribunal, the Party deemed by the Tribunal to have been successful in the disputes resolution proceedings shall, on application, be entitled to its reasonable costs. If requested by either party, the Tribunal shall measure costs."

32. The outcome of this matter is clear: the applicant sought to arbitrate it at the DRA and, despite the respondents' objection, sought to do so by way of an interim ruling and a request to which the Tribunal acceded. The application for such interim relief failed and the substantive and procedural grounds made in its support were rejected in full.

33. In line with section 11.2 of the DRA Code above, and in the absence of exceptional circumstances, the Tribunal awards and determines that the "costs follow the event" principle applies and the respondents are entitled, in equal shares, to their party costs and expenses.

34. It must be noted however that section 11.2 of the DRA Code refers to "reasonable" costs and in line with the *ad misericordiam* argument made by the applicant in his submission on costs and in the voluntary, sporting context of this matter as a whole, it is sincerely hoped that such "reasonableness" is taken into account by the respondents.

35. Finally, as regards the costs and expenses associated with the arbitral hearing. It is determined that the applicant's deposit be returned less the balance of the costs associated with the arbitral hearing, as calculated by the Secretary of the DRA.

Date of Oral Hearing: 15 March 2016.

Date of Majority Award: 20 May 2016.

20/5/16