

Disputes Resolution Authority

An Córas Eadrána

DRA 08 of 2018: In the matter of an arbitration under the Disputes Resolution Code and the Arbitration Act 2010

Between:

DONAL MOLONEY

Claimant

v.

AN LAR CHOISTE EISTEACHTA (CHC)

First Named Respondent

and

AN LAR CHOISTE ACHOMHAIRC (CAC)

Second Named Respondent

Hearing: Green Isle Hotel, St John's Drive, Newlands Cross, Dublin at 8.00pm on 13 July 2018

Tribunal: Mr. Colm Ó hOisín SC, Mr. Eamonn Denieffe, Mr Peter Quinn

Secretary to the DRA, Rory Hanniffy BL

VERDICT:

The appeal is allowed. The decisions of the CHC and the CAC are quashed.

KEYWORDS: R.7.2 (c) *Cat II(a) TO – Infraction – Physical interference with an opposing team player.*
R.7.11 (o) *TO – Scope of appeal – introduction of new evidence.*
R.7.3 (aa) *TO – Rules of Evidence – Referee’s report presumed to be correct – rebuttal evidence - unedited video evidence – whether Claimant given sufficient opportunity to rebut referee’s report.*
R.7.3 (aa)(viii) *TO – post hearing clarification of referee’s report – only for purposes of exoneration or mitigation – whether post hearing clarification used for a purpose other than to exonerate.*
R.7.13 *TO – Jurisdiction of DRA to review grounds of irrationality – DRA15/2015 Diarmuid Connolly v. CHC & CAC. Whether decision of CHC was manifestly incorrect and irrational – DRA13/2017 Ryan Burns v. CAC & CHC.*

LIST OF ATTENDEES:

Claimant - Donal Moloney:

Donal Moloney
Lorcan Connolly BL
James Nash

CCCC:

Louise Reilly BL (Representing all Respondents)
Laura Graham (Solicitor) (Representing all Respondents)
Maria Quigley, trainee solicitor, of Reddy Charlton, Solicitors (Representing all Respondents)
Joe Shaughnessy
Bernard Smith

CHC

George Cartwright
Darerca O’Sullivan

CAC

Declan Hallissey
Niamh McCoy

FACTUAL BACKGROUND

1. The Claimant is the joint manager of the Clare senior hurling team.
2. On the 10 June 2018, Clare played Tipperary in a Munster GAA Hurling Senior Championship match. The Claimant was listed on the Team Officials' list as Maor Fóirne of the Clare team. According to the Referee's Official Report Form:

"As highlighted in Sideline Officials report, it was brought to my attention at end of game that the Clare Maor Fóirne physically interfered with Tipperary Bainisteoir. Then on 74th minute Clare Maor Fóirne again tried to make physical contact with Tipperary Bainisteoir but instead bumbed [sic] into stand by referee Johnny Murphy knocking him to the ground, with no apologies made to Johnny at the time or subsequently after the game finished. Páid Ó Duibhir"

3. According to the Sideline Official Report:

"On numerous times the Claire Maor Fóirne would not leave the Tipperary designated area on one occasion had physical interuence [sic] with the Bainisteoir in their designated area in which the Tipperary (Bainisteoir) didn't get involved. At the end of normal time while trying to make physical contact with the Tipperary Bainisteoir, he made physical contact with the stand by referee Johnny Murphy who fell on to the ground ."

4. On 12 June 2018, Bernard Smith, Fixtures & Discipline Administrator, sent an email to the referee, Paid O'Duibhir, with the subject line: "Clarification of Referee Report". Mr. Smith asked the referee the following question with regard to the second possible infraction.

"Paud a chara,

In your referee report for the Munster GAA hurling Senior Championship between Tiobraid Árann & An Clár on the 10th June you have reported the "An Clár Maor Foirne bumbed into the stand by referee Johnny Murphy, knocking him to the ground"

In according with Rules 7.3(e)(1) T.O. 2018, can you please provide further information on the incident involving the An Clár Maor Foirne & the stand by referee?"

5. On the same day, the referee responded as follows:

"To clarify, on 75th minute Johnny Murphy, standby ref, was running down the sideline. As the final whistle went, the Clare Maor Foirne, who was inside the Tipperary box, turned to the Tipperary management team and made an attempt to interfere with them by trying to shoulder them, he missed them and

as a result unintentionally bumped into Johnny Murphy, knocking him to the ground.

6. On 13 June 2018, the CCCC sent the Claimant a Notice of Disciplinary Action, that he was reported to have committed a Rule 7.2(c) Category IIa infraction, namely. "Any type of physical interference with an Opposing Team Official".
7. On 16 June 2018, the Claimant replied to the Notification of Disciplinary Action, indicated that he requested a hearing, and requested clarification of the Referee's Report in the following terms:

"Please let me have clarification of the Referees Report on the following;

1. *By whom was it brought to the Referees attention at the end of the game "that the Clare Maor Foirne physically interfered with Tipperary Bainisteoir?"*
 2. *When is it alleged that the Clare Maor Foirne physically interfered with Tipperary Bainisteoir prior to the 74th minute?*
 3. *Was these alleged interferences brought to the Referees attention before the end of the game"*
8. On 18 June 2018, Bernard Smith wrote to the referee setting out the Claimant's request for clarification. On the same day, the referee replied as follows:

"For clarification to questions, answers are as follows,

1. *Stand by Referee Johnny Murphy*
 2. *On approximately 65th minute*
 3. *No"*
9. On 23rd June 2018, the CHC held a hearing. Video evidence was presented at the hearing on behalf of the Claimant for the period between the 60th and 68th minute. It was common case that the Claimant could be seen on the video for this period of time and that nothing untoward had happened. There was also evidence from the Tipperary manager, Michael Ryan, denying that there had been any interference.

10. According to the Respondents the CHC made a preliminary decision that the alleged infraction was proven. However, having regard to the evidence including the video present and the clarification from the referee that the incident had occurred at approximately the 65th minute, the CHC agreed to seek clarification from the referee, which could only be used to exonerate the Claimant.
11. The Secretary of the CHC emailed the referee on the 23rd of June 2018 in the following terms:

"In exercise of our right under 7(aa)(1)(viii) we are seeking the following Clarification.

1. *Please speak to your linesman and confirm the time when it is alleged that Donal Moloney physically interfered with Michael Ryan.*
2. *Please ask your linesman to specify the nature of the alleged physical interference. Is the linesman adamant that it occurred?*

Please note that this clarification does not relate to the incident in the 74th/75th minute."

12. The referee replied later that day by email in the following terms:

"In response to your questions for clarification,

1. *I spoke with Stand by Referee Johnny Murphy, and whilst he is not 100% certain he says it was between 65th and 70th minute.*
2. *Johnny says that the Clare Maor Faoirne made a frontal charge to the chest of the Tipperary Bainisteoir."*

13. The CHC formed the view that the clarification did not exonerate the Claimant and then made its preliminary decision final. Its decision was to impose a sanction of eight weeks suspension in all codes and all levels from the date of the CHC hearing on the 23rd June 2018.

14. That decision was notified to the Claimant on the 26th June 2018.
15. On 29th June 2018 the Claimant filed an appeal.
16. That appeal was heard on the 3rd of July 2018. In its decision of the 6th July 2018 the CAC decided that only arguments which were made before the CHC could properly be part of the appeal. It stated, *inter alia*, as follows:

"The scope of an Appeal is governed by Rule 7.11(o) TO 2018. An Appeal does not provide an opportunity for the Appellant to introduce new evidence; it is not a re-assessment of the evidence adduced at the Hearing but rather is an examination of the procedural correctness of the original decision-making process. Where manifest incorrectness is a stated ground of Appeal (as it is in this case) then evidence may be reassessed. If the Appellate function is to examine the procedural correctness of the decision-making process then it follows, and it is well established principle, that the Appellate Committee must only consider arguments that were canvassed before the Decision Maker."

17. On that basis, the CAC ruled that all but two of the grounds of appeal would not be considered as they had not been made to CHC. The two remaining grounds were alleged (i) manifest incorrectness, and (ii) breach of fair procedures and natural justice. The CAC concluded that the CHC decision was neither manifestly incorrect nor irrational. It further decided that the Claimant's right to a fair hearing had not been compromised to such an extent as to cause him an injustice. Accordingly, the CAC did not allow the appeal.
18. On the 10th July 2018, the Claimant filed a Request for Arbitration to the Dispute Resolution Authority ("DRA").

DISCUSSION

19. The essential grounds to be considered are, firstly, a lack of fair procedures (breaches of procedural and natural justice) and, secondly, manifest incorrectness in the decision.

20. The key rule in the Treoir Oifigiúil (TO) which is at issue in this appeal is as follows:

TO Rule 7.3 (aa) states, *inter alia*, as follows, in relation to the evidence at a hearings committee.

“The following Rules of evidence shall apply:

....

(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 it;

....

(viii) After the Hearing, the Hearings Committee may, in its sole discretion, seek Clarification in writing of any matters in the Referee’s Report. Any written Clarification or comment by the Referee shall have the same status as the Referee’s Report itself, but may only be used for the purposes of exoneration of the Defending Party or mitigation of any allegations made against him. Such Clarification may not be challenged in any way or made the subject matter of any further Hearing.

21. In the present case, following a decision of the first-named Respondent, disciplinary proceedings were commenced against the Claimant in respect of events described in the Referee’s Report and Sideline Officials Report in a game between Tipperary and Clare on the 10th of June 2018. The allegation made against the Claimant was that he had committed the following infraction:

“Any type of physical interference with an Opposing Team Official”

This is classified as *“category IIa misconduct at games by team officials”* under Rule 7.2(c) of the TO 2018.

22. The Referee’s Report referred to two incidents but the disciplinary proceedings related only to the first of these which involved alleged physical interference by the Claimant with the Tipperary Bainisteoir.

23. The Sideline Official Report is also referred to in the Referee's Report. It simply stated that the Claimant would not leave the designated Tipperary area and on one occasion had physical interference with the Tipperary Manager.
24. At the Claimant's request, clarification was obtained by the CCC of the allegation of interference. This indicated that the incident happened on approximately the 65th minute.
25. The case therefore that the Claimant had to meet at the disciplinary hearing was that he interfered with the Tipperary Manager on approximately the 65th minute. As can be seen from TO Rule 7.3(aa) quoted above, the Referee's Report is presumed to be correct in all factual matters. Accordingly, there was a heavy burden on the Claimant to rebut the evidence of infraction contained in the Referee's Report. That report could only be rebutted if it was contradicted by unedited video or 'other compelling evidence'.
26. In this case, the Claimant did adduce rebutting evidence at the hearing of the CHC. It was accepted by the Respondents at this DRA hearing that the video evidence presented at the CHC hearing demonstrated that there was no interference by the Claimant with the Tipperary Manager in that period.
27. On its face, it seems there was compelling evidence to contradict the Referee's Report (as subsequently clarified) at the CHC hearing. However, the minutes of the meeting indicate that the CHC "*were agreed that the evidence presented by the defending party was not sufficient to contradict the Referee's Report and the clarifications thereto*". This was a most surprising conclusion given that the CHC clearly had evidence contradicting the Referee's Report for a period of five minutes before the 65th minute and three minutes after that point. This Tribunal can only conclude that the CHC decided that "*approximately 65th minute*" must be taken to cover a period in excess of the period shown in the video. If the CHC were contemplating such an approach, one would have expected that, at the very least, the Claimant would have been offered an opportunity to provide further video evidence. Where a burden is placed upon a claimant to rebut the contents

of the Referee's Report, it is incumbent upon the relevant hearings committee to ensure that the claimant has sufficient opportunity to so rebut. As set out in the Treoir Oifigiúil, the CHC has a responsibility to ensure that the hearing is fair.

28. It seems that the CHC had some doubts about the matter as it proceeded after the hearing to seek clarification or comment by the referee under Rule 7.3(aa)(viii). It is important to note that the power to seek clarification under Rule 7.3(aa)(viii) can only be used *"for the purposes of exonerating of the defending party"*. This restriction is necessary as such a request by the CHC is made after the hearing has concluded and, in circumstances, the defending party is given no opportunity to see the response to the request for clarification or to make submissions thereon.
29. Far from exonerating the Claimant in this case, the clarification in effect 'changed the goalposts'. The request to the referee was as follows:

"Please speak to your linesman and confirm the time when it is alleged that Donal Moloney physically interfered with Michael Ryan."

The response from the referee to that request was as follows:

"I spoke with Stand by referee Johnny Murphy, and whilst he is not 100 percent certain he says it was between 65th & 70th minute."

30. This explanation left open the possibility that the incident had happened some time between the 68th and 70th minute and, therefore, that the video evidence had no longer entirely contradicted the Referee's Report. However, Rule 7.3(aa)(viii) cannot be used for that purpose. Any clarification which did not exculpate the Claimant should be treated as a nullity.
31. Accordingly, the decision of the CHC is to be reviewed by reference to the evidence available at the hearing. Any finding against the Claimant had to be on the basis of an offence having occurred at approximately the 65th minute.

32. This DRA tribunal of course accepts that it is not its role to trespass into the fact-finding jurisdiction of the CHC or of the supervisory appellate jurisdiction of the CAC. Its jurisdiction in accordance with TO Rule 7.13 relates to the legality of decisions made or the procedures used. However, its jurisdiction does include a review on grounds of irrationality, although it is of course accepted that proving irrationality on the part of the CHC is a high threshold for a claimant to cross.
33. The Committee agrees with the statements regarding the irrationality ground made by a number of other DRA Tribunals including DRA 15/2015, *Diarmuid Connolly v. CHC & CAC*.
34. On this occasion, however, the tribunal is satisfied that it has been established that the decision of the CHC was manifestly incorrect and irrational.
35. In DRA 13/2017, *Ryan Burns v. CAC/CHC*, a DRA Tribunal stated, *inter alia*:

“Having regard to the context of the Rule, its purpose and the reference to “compelling evidence” the reference to “contradicting” the Referee’s Report such as to upset the presumption that it is factually correct must be taken as more than providing a reasonable alternative interpretation. Otherwise the presumption would be robbed of all effect. Rather it must be something considerably more, contradicting the Referee’s Report to the point of compelling a conclusion that the Referee’s Report was not factually accurate.

When presented with a Referee’s Report (whether clarified or not) which sets out that there has been an infraction of the Rules, the CHC sole task therefore is to consider whether the evidence available, be it unedited video evidence or some other form of evidence, is compelling evidence that the Referee’s Report is wrong. If it is not so compelling, the CHC is bound to accept the Referee’s Report as factually correct and to conclude that the offence is made out.”

36. In the present case it is not merely that the video evidence provided a reasonable alternative interpretation. Far more than that, it clearly and unambiguously contradicted the case against the Claimant that the infraction had taken place at approximately the 65th minute. There is no explanation in the minutes for the decision by the CHC not to accept the video evidence as contradicting the

Referee's Report as clarified. Having regard to the acceptance by the Respondents at the DRA hearing, the conclusion by the CHC must be deemed irrational.

37. Furthermore, if for some reason the CHC's interpretation of "*approximately 65th minute*" was to include periods outside the 60th-68th minute, this would be a very surprising interpretation, but if that were the interpretation it should at least have alerted the Claimant that such an interpretation might be taken and given him an opportunity to provide further video evidence.

CONCLUSION AND DETERMINATION

38. As set out above, the Tribunal has concluded that the decision of the CHC was manifestly incorrect and irrational and should be quashed. The decision of the CAC to dismiss the Claimant's appeal should also be quashed on this basis.
39. The Tribunal awards in final and binding determination of this dispute, and in accordance with its power under Section 11.4 of the Disputes Resolution Authority Code, that the decision of the CHC made on the 26th June 2018 and the decision (on appeal) of the CAC made on the 6th July 2018 be quashed.

This is the unanimous decision of the Tribunal

COSTS AND EXPENSES

40. The Tribunal directs that the deposit be reimbursed to the Claimant and that the expenses be discharged by the Respondents.
41. The Tribunal notes the Claimant's application for costs and directs that the parties make written submissions and that the Claimant files such written

submissions within one week of the date of notification of this Decision and the Respondents respond within a further week.

Date of Oral Hearing: 13 July 2018

Date of Agreed Award: 4 March 2019

By email agreement on agreed date above.

Mr. Colm Ó hOisín SC

Mr. Eamonn Denieffe

Mr Peter Quinn