Appeal Decision

Parties: **Irish Canoe Union (I.C.U.)**

And

Michael Scanlon (Appellant)
(Represented by William Fawsitt B.L., instructed by Dillon Solicitors)

Subject: **Appeal against the findings of a Disciplinary Panel that he be dismissed for Gross Misconduct.**

Background:

The I.C.U. is recognised by the Irish Sports Council and the Olympic Council of Ireland as the governing body of the sport of canoeing in Ireland.

It is funded primarily from the Irish Sports Council, membership contributions and fees from training courses. It is a volunteer – run organisation at Board level.

The Appellant was originally employed by the I.C.U as National Administrator in or around 1990, having previously served in a voluntary capacity for a period as Honorary Secretary. His roles and responsibilities gradually evolved and in or around 2003, the title of the post changed to Chief Executive of the I.C.U.

In 2010, the recently-appointed Treasurer of the I.C.U. undertook a general assessment of the organisation's financial structure, controls and governance. This review highlighted a number of issues of concern in respect of the CEO's role in relation to the corporate and financial governance of the I.C.U.

The Board appointed an investigator into the issues raised, while suspending the appellant on full pay pending the outcome.

A total of 16 complaints against the appellant in his role as CEO were put before the investigator.

In his report dated 23rd November 2010, following a full investigation in which all parties participated, the investigator referred 7 of the 16 complaints back to the Board for disciplinary

proceedings. The Board in turn referred the issues raised to an external three-person Disciplinary Panel.
In February 2011, the Appellant (through his legal advisors) sought an injunction to restrain the I.C.U. from continuing with the disciplinary process. In May 2011, the High Court (Murphy J.) declined to grant such an injunction.

In June 2011, the disciplinary panel considered the investigator's report and also met with the appellant. It found that the appellant had committed a serious breaches of I.C.U. rules in respect of 6 of the 7 complaints referred to the panel. It also recommended that the Appellant be dismissed on grounds of gross misconduct.

The Board of the I.C.U. met on 29th June 2011 and endorsed the decision of the Disciplinary Panel. The Appellant was dismissed by letter dated 30th June 2011. The letter offered an opportunity to appeal the decision and informed the appellant that an external appeal mechanism had been put in place through the Irish Sports Council.

When that appeal was duly lodged, I was nominated in July 2011 by the Irish Sports Council to hear the appeal. My appointment was accepted by the parties and an appeal hearing took place on August 19th 2011 at which both sides made submissions, commented and answered questions on the matter. Subsequent to the hearing, both parties made additional submissions on 31st August and on 15th, 26th and 27th September 2011.

Methodology

I propose to deal with each of the appealed complaints in turn with a general summing up of arguments thereafter.

Complaint no.1

That the Appellant drew up a post-dated Contract of Employment for himself in November 2006 in order to satisfy a PWC Corporate Governance Audit undertaken on behalf of the Irish Sports Council.

The appellant argued as follows-

1. He agrees that he drew up draft employment contracts for all I.C.U. staff, including himself, in November 2006. There were no such contracts previously and this was a deficiency which required correction. He had also drawn up a HR policy document, the content of which encompassed contracts of employment.
2. The Contract of Employment did not bind the I.C.U. to any financial commitment to the appellant in excess of what it was already committed to in terms of an agreement reached in 1998. The contract, in fact, by benchmarking his salary to that of an Assistant Principal

Officer (APO) in the Public Service, actually kept his salary lower, on an ongoing basis, than was provided for in the 1998 agreement.

3. The Contract confirmed his acceptance of an annual payment to the VHI in lieu of part of the pension contributions due to be paid into his pension fund as per the 1998 agreement.
4. It also addressed a gap in corporate governance requirements and was in no way detrimental to the interests of the I.C.U.
5. The Disciplinary Panel acted unfairly in relying on the terms of Article 52 of the I.C.U. Articles of Association, not only in relation to this complaint, but also in relation to other complaints upheld by it. The Panel quoted selectively from the Article in support of its decision in regard to this complaint as follows

   "…The Chief Executive shall at all times be subject to the control and direction of the Executive and shall not without the express approval of the Executive, have power to bind the Union, Board and Executive."
   Yet the same article also states
   "…*The Executive should be empowered to place upon Chief Executive such additional duties and responsibilities as it may deem fit with the power to vary some from time to time"*

   It is a fact that the Executive failed to establish controls or to meet the CEO on any regular basis. There was no direction and the appellant made all decisions in good faith and acting on an authority which he had exercised for many years without objection and with no adverse consequences for the I.C.U. He made, de facto, all the day to day decisions.

The I.C.U. argued that-

1. The Appellant at no time consulted or informed the Directors or Board of the I.C.U. that he was drawing up his own contract of employment (and others) and backdating it by nearly 2 years. A matter like this, concerning the personal contract and job circumstances of a C.E.O. is one which all circumstances, would require Board approval.
2. Any Contract of Employment binds the parties to its terms and to draw one up without the approval of the Board or Executive is a clear breach of Article 52 in which the Chief Executive can not without Executive Approval, bind the Union, Board and Executive.
3. The appellant has admitted that he drew up and backdated the contract in order to satisfy the PWC Governance Review. As the contract was not in existence prior to the time of the review and was only produced and backdated for that purpose, the wrongdoing here is not just in failing to inform the Executive, but also in deceiving PWC. It should be noted that it is the severity of the sanction only which is being appealed. The offence is admitted.

<u>Complaint no.2</u>

The question of the appellant adjusting his own salary without the agreement of or ratification by the Board.

The appellant argued as follows-

51. In 1998, the following agreement was reached in regard to the appellant's conditions.

> *It was agreed by the Executive that a single retrospective payment of £3,000 be made to Michael Scanlon's pension fund in lieu of a salary payment for 1997. It was further agreed that from January 1st 1998, Michael Scanlon's salary be increased by £4.000 per annum and that payments to his pension fund be increased by £3,000 per annum, also from January 1st, 1998.*

The investigator drew up a table (Table B) in his report which clearly demonstrates that, following his assessment of the I.C.U.'s financial position in 2002, he chose not to take the increment allowed to him under the 1998 agreement and that between 2002 and 2004, his salary actually reduced by over €5,000. He then decided that, despite his entitlement, the increases due were no longer sustainable and instead decided to benchmark his salary against the APO grade in the Public Service which, by 2010, left his salary more than €24,000 short of what he would have been entitled to under the 1998 agreement. The cumulative shortfall between 2003-2010 is very considerable indeed. In these circumstances, it is outrageous to describe his behaviour as dishonest – in fact he made considerable financial sacrifices voluntarily to the benefit of the I.C.U.

The same arguments apply as in Complaint no 1 regarding Article 52 – i.e. he considers that he had authority within that article to act as he did.

The I.C.U. responded as follows-

The I.C.U. acknowledges the existence of the 1998 agreement. It was unaware that the Appellant had deviated either in his favour or otherwise from the terms of that agreement at any point, or that he had linked his salary to the APO grade in the Public Service. This act unilaterally varied these terms of a joint agreement and clearly benefited the appellant from 2005 onwards. The offence constituting gross misconduct in this case is that a CEO would vary the terms of his salary without consulting the Executive. It is a clear breach of the terms of Article 52 (as already outlined in Complaint no.1) in that the terms were changed, on occasion to his benefit, without the knowledge or authorisation of the Board. It has already been stated that there was a "light touch" approach in the Board's relationship with the CEO, but there was a very clear responsibility at all times for the CEO to inform the Board that he was proposing to make changes in the 1998 agreement, and for permission to be sought.

Complaint no.3

Signing and backdating of Contract of Employment by a Past President of the I.C.U.

The appellant, for his part argued that-

In getting the former president of the I.C.U. to sign a backdated contract of employment, the appellant was not attempting either to deliberately deceive the I.C.U. or to gain salary and/or benefits not due to him. He simply asked the past President to sign the contract on the basis that he was, de facto, the President at the commencement date of the contract. His action had no adverse consequences, financial or otherwise, on the I.C.U. and did not bind the Union to anything to which it was not already bound. He accepts that he could just as easily had the contract signed by Mr Devoy, the current I.C.U. President who was also in office in November 2006 when the contract was signed. None of this is, in his opinion, a breach of Article 52 of the I.C.U.

All other mitigating circumstances regarding the Board and the Articles as outlined in Complaint no.1 apply equally in this case.

In response, the I.C.U. Argued that-
The appellant created a document purporting to be a Contract of Employment, with all that such a document entails and confirming details of salary, pension and conditions, without the knowledge of the Board or Executive and in clear response to the PWC audit which was imminent. He then compounded this by getting a past president to retrospectively sign the document, still without the knowledge of the then – existing Executive and Board. He had the clear and only choice, if he wanted the document signed, to present it to the existing President but chose not to do so. He clearly intended to conceal the contract from the existing Executive and by so doing, to mislead the Board, Executive and President to his advantage. He also misled PWC, who assumed that the Contract and its date were genuine. It is again a failure to comply with his responsibilities under Article 52 and represents gross misconduct.

Complaint no.4
Appellant's admittance that he carried out the actions in complaints 1-3 without the knowledge or consent of the President, Executive or Board.

The appellant contended as follows-

There was a lax approach on both sides to matters such as outlined in complaints 1-3 above. The division between operational and governance issues and thus within the remit of the C.E.O. and/or that of the Board/Executive have become blurred over the years.

All of the decisions made by the Appellant were made in good faith and in the best interests of the I.C.U. and of management of staff. They accorded with and eventually improved (from the I.C.U. point of view) on the terms of the 1998 agreement. There are witnesses who have testified that responsibility for HR issues and work practices devolved to the C.E.O over time.

Article 52, as previously quoted, gave the C.E.O. full authority to act as he did. There were only 10 interactions with the Board over 6 years – a very "light touch" indeed.

As far as the Appellant is concerned, he always acted within the limits of his authority.

The I.C.U. Argued that-

The C.E.O., over the period in question, never sought to raise the question of the frequency (or lack of frequency) of meetings with the Board.

The Board had no need to seek extra meetings as it was completely unaware of the matters dealt with in complaints numbers 1 to 3 as they were never raised with the Board, the President or any individual Director. It is a basic duty of a Chief Executive (regardless of any "light touch" approach by the Board) to keep the Board and Executive informed on all matters of importance. These must include financial decisions and changes in the Employment Conditions of **all** staff. The creation of purported contracts, backdated and signed by a person not a member of the Executive is one more example of a gross breach of trust which the Executive had in the Appellant. He also significantly exceeded, as previously argued, his authority under Article 52 of the I.C.U. Articles.

Complaint no.6

The taking out by the Appellant of VHI Plan E fully funded by the I.C.U. without the prior knowledge, ratification or consent of the sitting Board or Executive.

Appellant's Case:
Over time, the Appellant's pension fell behind what was agreed under the 1998 Agreement. In order to mitigate this shortfall, he initiated a VHI Plan E package in 2004. The Appellant discussed this approach informally with the then President, but did not put the matter before the Executive or Board.

The Appellant's view is that he sought and obtained approval from the then President for his actions. As the cost of the package was covered by the amount of the annual incremented contribution not fully paid into his pension fund, he was not acting dishonestly or to his material gain. The Past President offered to confirm this to the disciplinary panel but it failed to avail of his offer to be interviewed.

It should be noted that contemporary Executive Committees and Boards are based on decisions made by past Senior Officers until and unless subsequently amended or voided.

Through the Appellant's actions, a cost saving was secured and no dishonesty occurred. He acted at all times within his authority under Article 52.

I.C.U. Case:
There is no record whatsoever of a discussion with the then President on this matter, nor did he discuss the matter with the Board or the Executive.

A package the size and cost of VHI Plan E represents a significant part of a remuneration package. The Appellant signally failed to disclose this to the Board or Executive at any time until it was itemised in an Operational Budget in 2010 and queried at a Board meeting. Even there, the Appellant's response that it was "in his contract" closed the discussion, having shed no further light on the matter. There was deception or, at least, concealment going on in regard to what was, after all, expenditure, in part, of public money. This was not uncovered until investigated by the Treasurer.

To fail to keep the Board and Executive informed is once more a breach the appellant's responsibilities under Article 52.

Complaint no.16
Recording of meeting with President and Treasurer in September 2010 without their knowledge and denying that he had done so.

Note: Transcripts of meeting provided to me.

Appellant's Case:

The Appellant strenuously denies that he intentionally set out to record the meeting with the President and Treasurer. There are no reasons why he would choose to do so.

The meeting was described initially as a "chat" by the President but later became an integral part of the I.C.U. case against the appellant

It was the appellant's intention to send a transcript of the recording to the President and Treasurer but, the following evening, the laptop was seized from him when he was suspended from duty.

The only reason that the Appellant failed to admit that the meeting was being (inadvertently) recorded was because of the stress he was under due to the confrontational nature of the meeting. This also applies to his failure to retract this when he realised that the meeting was, in fact, being recorded.

The contents of the transcript reflect the aggressive nature of the meeting and also the fact that the Appellant did not make the admissions of wrongdoing subsequently alleged.

I.C.U. Case
The Appellant has stated subsequently that he knowingly recorded the meeting and that he stopped when asked. He also denies (in the transcripts) that he was recording the meeting.

He also gave other versions of this at different times including that "(the President) asked him to do the minutes and to do a recording and I said I would". This is not as recorded in the transcript of the meeting. He also stated "I thought (that) I had closed down the audio recording programme on my laptop when asked to do so"…

The fact remains that recording the meeting, then twice denying that he was doing so, is an extremely serious disciplinary matter, justifying dismissal.

Findings and Decision

General:
This is, at this point, an appeal to me against the findings of the Disciplinary Panel on the complaints put before it following the investigator's report. I intend to deal with the individual complaints without reference to the remarks of the Disciplinary Panel and only to their findings on the 6 issues which, they considered, constituted gross misconduct justifying dismissal.

I am guided in my findings by the basic principles of good industrial relations norms and natural justice. I have taken account of the 1998 Agreement, (which is open to interpretation in more than one way, but I note, with no little surprise, that the parties appeared to be ad idem on its meaning), the relations between the C.E.O. and the Board/Executive, the Governance Policy and Articles of the I.C.U., in particular Articles 49 to 52, the UK case put forward by Mr Fawsitt as authority (**Brennan V Health Professions Council (UK) [2011] EWHC41)** and all the submissions, oral and written, put by both sides prior to, at and subsequent to the hearing.

There is no doubt, in my mind, that the "Light Touch" approach of successive Boards, Presidents and Executives in this matter was a contributory factor in this matter in that it allowed the Appellant to make assumptions about the level of his authority in the area of his own and others' pay and conditions. The parties clearly took two different interpretations of the relevant Articles of the I.C.U. and no attempt was made by either side to reconcile this problem. The Executive side were guilty of apathy, but there are definite obligations on a Chief Executive Officer also, particularly one remunerated in part from the public purse, which were clearly not honoured either, in some instances to his clear benefit.

I do not believe that the Appellant was guilty of out and out dishonesty as it is generally understood. He was, however, in my opinion, guilty of obfuscation, concealment, exceeding

the authority of a C.E.O., failure to keep the executive informed on matters of definite interest to them and serious breach of trust in office.

I will go through the appealed complaints individually:

Complaint no.1:
Drawing up of Contract of Employment in November 2006

Whether the Appellant drafted, signed and backdated his own Contract of Employment in November 2006 is not at issue. The Articles of Association referred to previously determine the total relationship between the C.E.O., in particular Articles 51 and 52 as follows

51. *"The Executive may from time to time delegate to (the) Chief Executive such of its powers, as it considers desirable to be exercised by such a Chief Executive. Any such delegation may be made subject to any conditions the Executive may impose and either collaterally with or to the exclusion of their own powers and may be revoked or altered.*
52. *A Chief Executive may be appointed only by the Executive for such time, at such remuneration, on such terms and upon such conditions as it may think fit. Any Chief Executive so appointed may (subject to the terms of any contract between him and the Union) be removed only by the Board. The Executive shall be empowered to place upon the Chief Executive such additional duties and responsibilities as it may deem git with power to vary same from time to time. The Chief Executive shall at all times be subject to the control and direction of the Executive and shall not, without the express approval of the Executive, have the power to bind the Union, Board, or Executive."*

This is a two-way relationship, both sides having rights and responsibilities. While the Board, by its "Light Touch" approach, did not, in my view, give sufficient or specific enough direction to the C.E.O., he was the Chief Operating Officer to a Board composed of volunteers. It was his job, in my view, to lead the Board and to keep them informed on all relevant matters.

The drawing up of new contracts of employment for any staff and, in particular, for himself, was an action which clearly and obviously had to be approved and signed by the Board.

Not doing so, backdating the contract (for whatever reason) and not bringing the matter at all to the attention of the Board are actions not only of concealment and in breach of the Articles but, more fundamentally, actions which fail the most basic tests of trust and confidence which a Board is entitled to place in its C.E.O. In my view, it constitutes gross misconduct. The appeal on this complaint is not upheld.

Complaint no 2
Appellant's adjustment of his own salary

I accept the Appellant's argument that he, while being entitled to apparently time-limitless pay increases under the most unusual terms of the 1998 Agreement, decided that the I.C.U. could at one point not afford these increases and subsequently linked his salary to the A.P.O. scale in the Public Service which, while only partly recovering his losses within the terms of the 1998 agreement, never again reached the levels set by that agreement.

In fact, I do not feel that the Appellant is guilty of dishonesty. By his own lights, he was being more than fair with the I.C.U.

However, from a Chief Executive to adjust his own salary and link it to Public Service Salaries and not to inform the Board is a modus operandi which borders on the unbelievable.
While my remarks regarding the I.C.U. Articles as set out under Complaint no.1 again apply, I cannot envisage any circumstances where a C.E.O. would not inform the Board to which he is responsible about changes in his own salary. Regardless of how lightly he was controlled, there was an obligation of honour on him to keep those to whom he reported informed. Not to do so was a serious breach of trust constituting gross misconduct.
The appeal on this complaint is not upheld.

Complaint no.3
The Appellant having his Contract of Employment signed by a Past President.

I have already dealt separately with the provenance of the Contract of Employment drawn up in November 2006.

I have no doubt that the Appellant discussed this matter with the Past President and that he agreed to sign it.

I accept that there was not necessarily any financial gain to the Appellant arising from this action.

I do not accept in any way the Appellant's argument that the purported start date of the Contract lay within the time of influence of the Past President. Either the Appellant was engaged in deceit or concealment, but in either case, there was no possible justification for not having the contract signed by the existing President or authorised Board members – theirs was the existing authority and the Past President no longer possessed that authority.

The question of why the Past President chose to sign the contract is one for consideration by the I.C.U. and not for me.

The actions of the Chief Executive Officer amount, in my view to a deception amounting to a breach of trust, and constitute gross misconduct.

The appeal on this complaint is not upheld

Complaint no.4
The actions of the Appellant under complaints 1, 2 & 3 without the knowledge or consent of the sitting President, Executive Committee or Board of the I.C.U.

I am not satisfied that, despite alleged history and within the terms of the Articles, the interpretation of his authority adopted by the Appellant has any validity in regard to matters such as these. Any person in the position of a C.E.O. has, and must be aware that he has, a duty and obligation of trust to reveal matters such as the above to those who ultimately employ him and pay his salary. To fail in that duty is an act of gross misconduct.
The appeal on this complaint is not upheld.

Complaint no.6
The Appellant taking out VHI Plan E for himself without the knowledge or authorisation of the Board of the I.C.U.

The Appellant maintained that this action was taken to “catch up” with the deficit in his pension and also that he discussed the matter with the Past President of the I.C.U.

The I.C.U. argued that to do so without informing the Board formally was an act of concealment which also bound the I.C.U. Financially, in breach of Article 52, amounting to gross misconduct

I again accept that this was not an act of dishonesty per se by the Appellant. I must also accept that he discussed the matter with the Past President of the I.C.U. (though there is no record of this).

It is still quite wrong that the matter was not put before the then Board and Executive by either of the parties who allegedly discussed it.

It is also a breach of the Articles of the I.C.U. Neither does it reflect well on the “light touch” of the then Board and Executive that at least one member of the Executive was aware of the matter, and he was the President, yet the matter was not put before the Board.

In my view this was an act of misconduct which was quite serious but which, in the circumstances, falls just short of the ultimate sanction but still worthy of disciplinary action. The alleged role of the Past President in this particular issue is not one for me but is a matter between that individual and the I.C.U.

The appeal on this complaint is conditionally upheld.

Complaint no.16
Recording of meeting of September 2010 by the Appellant

I have carefully read the transcripts and all the accounts of this meeting.

Whether the Appellant recorded the meeting intentionally is a moot point.
What is not at issue is that he denied on more than one occasion doing so.

His explanations for this are not, in my view, entirely credible and are quite inadequate as explanations or mitigation. They are also inconsistent from one version to another.

His actions, in my view, constituted deception and a serious breach of trust amounting to an act of gross misconduct.

The appeal on this complaint is not upheld

Overall:
I cannot say that the Appellant acted dishonestly. He did, however (remembering the number of complaints involved – not just one) engage in deception and concealment and act in breach of the duties of a C.E.O. towards his employing Board as instanced in the I.C.U. Articles.

The total picture amounts to a serious breach of trust, (regardless of the control shortcomings of the voluntary Board) which, in my view, fatally affects the possibility of a satisfactory future employment relationship between the parties.

Consequently, I cannot disagree with the overall conclusions of the Disciplinary Panel that dismissal is the appropriate sanction. The appellant should, or course, receive all statutory entitlements to which he is due in relation to his employment with the I.C.U.

Raymond McGee
4th October 2011