

EUROPEAN RUGBY CUP

DECISION OF APPEAL COMMITTEE IN APPEAL BY ALAN QUINLAN

HELD AT THE OFFICES OF HARPER MACLEOD LLP, THE CA'D'ORO, 45 GORDON STREET, GLASGOW

20 MAY 2009

IN RESPECT OF:-

An appeal by Alan Quinlan (“the Player”) against the decision of a Disciplinary Committee (“the Committee”) dated 13 May 2009 (“the Decision”), finding that the Player had committed an act of illegal and/or foul play contrary to Law 10.4(k) of the Laws of the Game, namely an act contrary to good sportsmanship, upholding the Citing Complaint and thereby suspending the Player from taking part in the game of rugby up to and including 9th September 2009. This represented a twelve week suspension which commenced on 13th May 2009. The Committee further ordered the Player to pay the costs of the Disciplinary Officer in relation to the Hearing (including legal costs) together with the costs of convening the Committee.

MEMBERS OF THE APPEAL COMMITTEE (“the Appeal Committee”):-

Professor Lorne D. Crerar (Chairman) (SRU)

Rod McKenzie (SRU)

Judge Jeff Blackett (RFU)

DECISION OF THE APPEAL COMMITTEE:

- (1) That the evidence before the Committee was consistent with the Committee’s factual findings;
- (2) that the conclusion reached by the Committee namely that “the Player had made contact

with the eye area of the Opposition Player, Leo Cullen's eye and that the contact was not accidental" was a conclusion on the facts established by the Committee which the Committee was entitled to reach; and

- (3) that the Player failed to prove that the Committee's decision being challenged was in error. It accordingly followed that the Player had not discharged the burden of proof contained in Disciplinary Regulation 7.4.8 and the Appeal was accordingly refused.

1. INTRODUCTION

The Appeal Committee was convened by Professor Lorne D. Crerar, Chairman of the ERC Disciplinary Panel, pursuant to the Disciplinary Regulations of the Heineken Cup 2008/2009 ("DR") in respect of the Citing Complaint made by John Byett (RFU), Citing Commissioner dated 2nd May 2009 against the Player. This Citing Complaint was in relation to an incident of alleged foul play during the course of a match between Munster and Leinster played at Croke Park, Dublin on 2 May 2009. The Citing Complaint alleged that the Player had committed an act of illegal and/or foul play namely a contravention of Law 10.4(k), acts contrary to good sportsmanship, in that the Player "brought his left arm across his body and with his fingers bent he scraped his hand across the Opposition Player (Cullen's) face, making contact in the area of Cullen's right eye".

The Citing Complaint was considered by the Committee at a Hearing on 13 May 2009. The Committee issued the Decision on 15th May 2009.

The Player denied having committed the act of illegal and/or foul play alleged in the Citing Complaint. The Committee determined that the Player had committed the act of illegal and/or foul play alleged, upheld the Citing Complaint, categorised the offence as at the "low" range with

an entry point of 12 weeks, considered the aggravating and mitigating features which had a neutral effect and imposed a period of suspension of 12 weeks from 13 May 2009 until 9 September 2009.

The Player appealed by Notice of Appeal dated 18 May 2009. In accordance with DR 7.2.1 (b), the Player is obliged to state in his Notice of Appeal the specific aspect(s) of the Decision, which are being challenged on appeal. In this case, the Player in his Notice of Appeal stated that there were three specific aspects of the Decision which he wished to appeal. Firstly, the decision and finding that the Player committed an act of foul play which merited a red card together with the decision of the Committee that the alleged act of foul play was contact with the eyes or the eye area. Secondly, that the Committee erred in its interpretation of the standard of proof which was required to be discharged by the Disciplinary Officer and finally that the Committee erred in holding that the citing complaint complied with the requirements of the Disciplinary Regulations and the principles of natural justice.

The Appeal Committee sat on 20 May 2009 to consider the appeal.

In addition to the members of the Appeal Committee there was present during the hearing on 20 May 2009:-

The Player

Michael McGraw S.C., appearing for the Player (“the Player’s Representative”)

Donal Spring, Solicitor assisting Mr McGraw

Sean Payne, Team Manager for Munster Rugby

Roger O’Connor, Disciplinary Officer, ERC (“the Disciplining Officer”)

Max Duthie (Solicitor), appearing for the Disciplinary Officer (“the Disciplining Officer’s

Representative”)

Jennifer Nicol, Trainee Solicitor, Clerk to the Chairman of Appeal Committee

The following documentation and other materials were considered by the Appeal Committee:-

1. Charge Letter and Citing Commissioner’s report.
2. Hearing Notice and Directions.
3. Match Officials reports.
4. The Decision.
5. Statement by the Opposition Player, Leo Cullen, dated 11th May 2009.
6. Character reference of the Player from Declan Kidney, Ireland Head Coach dated 12th May 2009.
7. Character reference of the Player from Simon Easterby (undated).
8. Player’s disciplinary record as of 11th May 2009.
9. Additional papers from the European Rugby Cup website.
10. Directions Statement by the ERC Disciplinary Officer dated 15th May 2009 (Appendix I).
11. Notice of Appeal on behalf of the Player dated 18th May 2009 (Appendix II).

2. PRELIMINARY MATTER

The Player’s Representative indicated that the Player was not seeking a *de novo* hearing. It accordingly follows that the burden falls to the Player further to DR 7.4.8 to prove that the Decision (a) was in error and (b) should be overturned or varied.

3. THE SUBSTANTIVE APPEAL

The Committee erred in concluding that the contact was in the area of the eye:

The Player's Representative sought to prove that the Committee had erred in concluding that the Player had made contact with the 'eye area' of Leo Cullen ("the Opposition Player") and relied upon the statement given by the Opposition Player namely that as it did not mention that contact had been made with his eye. The Player's Representative was of the view that the Opposition Player's statement "was as important for what it did state as for what it did not state". The Disciplinary Officer's Representative submitted, however, that the Appeal Committee could not reasonably infer from the Opposition Player's statement that no contact had been made with his eye area or the area of his eye. The Disciplinary Officer's Representative drew the attention of the Appeal Committee to page 15 of the Decision, which states the Committee "was unanimously of the view that the Player had made contact with the area of Cullen's eye".

The Player's Representative contended that if there was any ambiguity as to what constitutes the 'eye area' then the words should be interpreted in the Player's favour under the *contra proferentum* rule. The Disciplinary Officer's Representative stated that the words 'eye area' are not ambiguous and therefore there is no place for the application of the *contra proferentum* rule.

The Player's Representative further submitted on behalf of the Player that the Committee had erred by failing to define the words 'eye area'. He argued that the words 'eye area' should have been afforded the confining meaning given to them by expert witness Professor O'Keefe and if the Committee had applied that definition they would have necessarily concluded that there had not been contact made with the 'eye area'.

The Disciplinary Officer's Representative argued that Professor O'Keefe was in no position to offer expert evidence on the meaning of the words 'eye area' in a rugby discipline context and

that there was no requirement on the Committee to define these words, so long as the Committee was satisfied that the contact was at a point that is generally considered to be within the 'eye area' as those words were ordinarily interpreted. The words are used in the context of rugby and consequent offence categorisation in their "plain and ordinary sense" and should not be construed in a "narrow, special, technical or medical sense".

"Determination of the Appeal Committee"

The Appeal Committee considered that the Committee had made a determination, namely that the Player had made contact with the eye area of the Opposition Player based upon the evidence before them which was wholly consistent with their factual findings. Further, the Appeal Committee considered that it would be helpful for future cases involving player contact with an opposition player's "eye area" to provide a view as to the scope and import of the words "eye area". The Appeal Committee were of the view that contact by a player with an opposition player's eye area would occur in respect of "Any area of the face in close proximity to the eye, where contact would cause a victim to fear for the safety of his eye or where there is substantial risk that there could be contact with the eye".

Burden of Proof:

The Player's Representative submitted that the Committee had erred in its interpretation of the standard of proof that the Disciplinary Officer is required to satisfy in relation to alleged acts of illegal and/or foul play. The Player's Representative stated that he was an advocate of the sliding scale standard whereby stronger evidence was required when the nature of the allegation was more serious.

The Disciplinary Officer's Representative stated that it was clear from the Decision that the Committee had satisfactorily considered the evidence. He argued that the Committee had considered the evidence based on a 'straightforward assessment of the balance of probabilities' and referred to the case of *Re B [2008] 4 All ER 1* and had alternatively considered an assessment of the balance of probabilities that takes into account the seriousness of the allegation, with more serious allegations requiring stronger evidence, as demonstrated in the *Tincu* decision. The Disciplinary Officer's Representative suggested that both standards had been satisfied in the present case. The Appeal Committee concluded that the correct standard for defining the burden of proof was as laid out in *Re B*.

Natural justice:

The Player's Representative contested that the Committee had erred in holding that the Citing Complaint complied with the requirements of the Disciplinary Regulations of ERC and the rules of natural justice. In particular, it was important that the Citing Commissioner and the Disciplinary Officer had failed to specifically identify the particular act of the Player that gave rise to a breach of Law 10.4(k).

In response, the Disciplinary Officer's Representative submitted that the Committee had correctly identified that there is no prescribed form for citing complaints made by Citing Commissioners and that DR 6.4.6 had been fully and properly complied with. It was further submitted by the Disciplinary Officer's Representative that the Committee had correctly identified that there was sufficient clarity in the Citing Complaint for the Player to know the exact nature of the allegation against him. The Player it was contended could not argue that his position had been prejudiced as he had the opportunity to defend the complaint properly fully and fairly. The Appeal Committee agreed with the conclusions of the Disciplinary Officer's Representative in this regard.

4. DETERMINATION OF APPEAL COMMITTEE

The Appeal Committee determined:

- (i) That there was sufficient evidence before the Committee entitling them to conclude and establish that the burden upon the Disciplining Officer to prove the allegation of illegal and/or foul play had been discharged (DR 6.7.11).
- (ii) That the conclusion of the Committee namely that “the Player had made contact with the area of Mr Cullen’s eye and that contact was not accidental” was a conclusion on the facts established before the Committee that the Committee was entitled to reach, and
- (iii) That the Player (the Appellant) had not discharged the burden of proving that the Committee’s decision was in error. The Player’s Appeal is accordingly refused.

5. COSTS

Parties are invited to make whatever application(s) they consider appropriate in relation to costs by email to the Chairman of the Appeals Committee within 7 days of the date of this decision. If any application is made in relation to legal costs then the amount of legal costs should be stated together with a breakdown as to how the costs have been calculated. If any party wishes to argue that it would have difficulty in meeting any costs which may be awarded because of their financial circumstances then those should be disclosed to the clerk by the same means within the same period.



Professor Lorne D. Crerar
Chairman
Appeal Committee
14th July 2009