

EUROPEAN RUGBY CUP (ERC)
DECISION OF APPEAL COMMITTEE IN APPEAL BY JULIEN DUPUY
HELD AT THE PARK INN HOTEL, HEATHROW, ENGLAND
13 JANUARY 2010 (“the Hearing”)

IN RESPECT OF:-

An appeal by Julien Dupuy (“the Player”) against the decision of the Judicial Officer, HHJ Jeff Beckett dated 18 December 2009, finding that the Player had committed acts of foul play, upholding a Citing Complaint and suspending the Player for a period of 24 weeks.

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

Professor Lorne D Crerar, Chairman (Scotland)

Rod McKenzie (Scotland) – (In attendance by way of telephone conference call)

Pat Barriscale (Ireland)

DECISIONS OF THE APPEAL COMMITTEE:

- (1) That the Players application for a for a *de novo* hearing be refused;
- (2) That the Judicial Officer did err in his decision and that the decision be varied.
- (3) That the Player’s period of suspension be varied. The Player is suspended from taking part in the game of rugby up to and including 27th May 2010. This represents a 23 week suspension commencing on 18 December 2009.
- (4) That each party to the proceedings provides written submissions to the Chairman of the Appeal Committee in relation to costs within 7 days of the issuing of this decision.

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 2009/2010 ("DR") in respect of a Citing Complaint made by Tony Lanaway, RFU, Citing Commissioner against the Player relative to incidents of alleged foul play during the course of a match between Stade Francais and Ulster played at Ravenhill, Ulster on 12 December 2009. The Citing Complaint alleged that the Player had committed an act or acts of illegal and/or foul play namely a contravention of Law 10.4(l), acts contrary to good sportsmanship, in that the Player made contact with an opponent's eye or eye area. The opponent was Ulster No.6, Stephen Ferris.

The Citing Complaint was considered by a Judicial Officer, HHJ Jeff Blackett (England) at a hearing on 18 December 2009. The Judicial Officer issued his decision on 18 December 2009 ("the Decision"). The Player accepted that the Citing Complaint was a true and accurate account of the incidents and the facts surrounding the incidents and that the complaint should thereby be upheld. However later in the Hearing the Player's representative (Madame Moyersoen) submitted that the alleged acts of foul play did not pass the red card threshold and that they should only have merited the award of a yellow card. The Judicial Officer established that the Player had committed the acts of foul play and accordingly upheld the citing. He categorised the offence as meriting a "Top End" classification on the scale of seriousness and determined the appropriate entry point being 40 weeks. In paragraph 33 of the Decision, last sub paragraph, the Judicial Officer included in his determination of the entry point the factor of the need for a deterrence namely "Despite a number of high profile cases involving contact with the eye or eye area over the past two years, the sanctions imposed do not seem to have deterred this insidious offence and higher sanctions are necessary to change the behaviour of some Players and indicate that this conduct will not be tolerated"

In listing those other factors relative to the potential suspension of the Player, the Judicial Officer determined that there was one aggravating feature, namely that there was a need for a deterrent to combat a pattern of offending but that had already been considered in assessing the appropriate entry point within the top end range (namely 40 weeks). The Judicial Officer listed the potential mitigating factors which could reduce the suspension upon the Player, stating these factors as being significant although not sufficient for the Player to be entitled to a “full 50% reduction” as specified in DR 6.7.36. The Judicial Officer thereby determined that the appropriate sanction would be 24 weeks and that from 18 December 2009 to 3 June 2010.

The Player’s Representative appealed by Notice of Appeal, dated 21 December 2009 in accordance with DR 7.2.1(b) as supplemented by a Player’s Notice of Appeal dated the same date of 21 December 2009. The Player’s Representative and Player’s letters of appeal are contained in Appendix (1) and included on application for a hearing further to DR 7.4.8.

The Appeal Committee sat on 13 January 2010 to consider the appeal.

In addition to the members of the Appeal Committee, there was present during the Appeal Hearing :-

The Player

Madame Patricia Moyersoan, Advocate (“the Player’s Representative”)

Oliver Terryn, Administrative Director, Stade Francais

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

Max Duthie (Solicitor), appearing for the Disciplinary Officer (“the Disciplinary Officers’ Representative”)

Jamie Herbert (Solicitor), Assistant to for the Disciplinary Officer

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

1. Charge letter and Citing Commissioner’s report.
2. Hearing notices and directions, both in respect of the hearing before the Judicial Officer and the hearing before the Appeal Committee.

3. All papers available to the Judicial Officer and listed in the Decision
4. Recorded DVD footage of the cited incidents
5. The Decision dated 18 December 2009
6. The said Appeal Notices by the Player's representative together with that of the Player both dated 21 December 2009
7. Additional Direction dated 6 January 2010 by the Chairman of the Appeal Committee requesting written submissions in respect of the application of the Player's Representative and Player for a de novo hearing.
8. Letter from the Player's Representative responding to the Chairman's additional direction regarding the application for a de novo hearing and containing additional grounds of appeal (Appendix II)
9. Direction statement by the ERC Disciplinary Officer and responding to the Player's grounds of Appeal and dated 11 January 2010 (Appendix III)

2. FUNCTION OF APPEAL COMMITTEES IN TERMS OF ERC DISCIPLINARY RULES

The decision of the Appeal Committee in the Appeal of a player, Shane Jennings, dated 22 October 2009, cogently and properly declares the functions of Appeal Committees in terms of the DR's and are *ad longum* narrated for the purpose of clarity and explanation as follows: (pages 3, 4 and 5 of the decision of Shane Jennings)

"In a citing, where the Disciplinary Officer meets the burden of establishing on the balance of probabilities that the act or acts of foul play specified in a Citing Complaint was/were committed, then the Disciplinary Committee shall uphold the Citing Complaint (DR 6.7.11). It is for the Disciplinary Committee to decide whether or not it has been proved that the cited act or acts of foul play happened. The burden of proof is on the Disciplinary Officer to prove to the satisfaction of the Disciplinary Committee on the balance of probabilities that the cited act or acts happened. Proof on the balance of probabilities is no more than the Disciplinary Committee being satisfied that it is more likely than not that the fact in question e.g. whether

the cited act or acts of foul play happened, is established. As the ERC Appeal Committee made clear its decision in *Marius Tincu*, 25 November 2008, the standard of proof required does not change based on the seriousness of the act or acts of foul play cited. The seriousness of the foul play cited is one component within the whole range of circumstances, which have to be weighted in the scale when deciding as to whether the Disciplinary Officer has discharged the burden of proof.

Subject to the issue of whether the Appeal Committee should consider an appeal *de novo*, the Appellant in an appeal before an ERC Appeal Committee has the burden of proving that the decision being challenged was both in error and that it should be overturned or varied. As to the Appeal Committee's approach, the following assistance appears in the decision of *Tincu*: "*except in the case of a de novo appeal, the function of the Appeal Committee is not to review all of the evidence, which was before the Disciplinary Committee, and then to come to its own conclusions as to whether or not that evidence establishes on the balance of probabilities that the cited act or acts of foul play occurred*" (p7 of the Decision). ERC Appeal Committees are only entitled to interfere with a factual determination of the Disciplinary Committee where it concludes that such determination was not consistent with the evidence before the Disciplinary Committee. As is to be derived from the decisions of previous ERC Appeal Committees in the cases of *Alan Quinlan*, *Gerry Flannery*, *Alexandre Audebert* and *Tincu* in making the assessment as to whether the evidence was consistent with such a determination by a Disciplinary Committee a margin of appreciation is to be accorded to the determination being challenged".

3. NOTICE OF APPEAL AND APPLICATION FOR A *DE NOVO* HEARING

DR 7.4.8 permits Appeal Committees of ERC to determine appeals as a *de novo* hearing only in circumstances where it is shown that the circumstances are exceptional and that there are compelling reasons why the Appeal Committee should hear the case *de novo*. The Player's Representative in her address to the Appeal Committee acknowledged that the factors relied upon by her as justifying a *de novo* hearing did not fulfil the criterion of exceptional

circumstances but in any event was of the view that the Judicial Officer had not taken sufficient weight of the evidence contained within the DVD clips together with the testimony of the Opposition Player, namely Stephen Ferris. Reference was made by the Player's Representative to her letter to the Appeal Committee Chairman dated 8 January 2010, namely that the grounds of Application for a *de novo* hearing were that the contact with opposition player Stephen Ferris's face was not eye gouging nor a deliberate attack on the opponents eyes or eye area and that "it is very important for the Panel to see the video and hear Mr Ferris's testimony". The Disciplinary Officer's Representative, expressed the contrary view that there were neither exceptional nor compelling reasons why the Appeal Committee should hear the case *de novo* and referred to his written submissions on the matter at paragraph (b) pages 1, 2 and 3, (Appendix III).

The Appeal Committee having considered the submissions of the Player's Representative and the Disciplinary Officers Representative together with the consideration of their written submissions in the matter refused the application of the Player for a *de novo* hearing because the Appeal Committee were wholly satisfied that the Appellant had failed to demonstrate any exceptional circumstances as to why the Appeal Committee should hear the case *de novo*. Further the Appellant had failed to show any compelling reasons why the Appeal Committee should hear the case *de novo*. The evidence before the Judicial Officer, as laid out clearly and at length by him in the Decision, was wholly consistent with his determination. There were no exceptional circumstances to hear the case *de novo* and there were no compelling reasons so to do.

4. SUBSTANTIVE APPEAL

Act of Foul Play

Introduction

The Direction Statement of the ERC Disciplinary Officer (Appendix III) para (1), page 11 stated that the submissions by the Player's Representative to the Chairman's Additional Direction dated 6 January 2010, contained additional late grounds of appeal and should not be allowed.

The Appeal Committee explained their position and that they wished to hear from the Player's Representative on all of the heads of appeal contained in her letters of 21 December and 8 January 2010, unless the Disciplinary Officer could show prejudice as to why submissions in respect of every aspect of the appeal should not be considered. The Disciplinary Officer agreed that he could not show prejudice and in the circumstances the Appeal Committee gave the Player's Representative the fullest of opportunities to address the Appeal Committee on all of the individual aspects of appeal as listed in the letters of 23 December 2009 and 8 January 2010.

Submissions

The Appeal Committee invited the Player's Representative to provide submissions as to why she considered the Judicial Officer's decision was in error and should be overturned or varied (DR 7.4.8).

The Player's Representative explained that the Judicial Officer had not taken into account that the Player declared that he had no intention of causing injury or harm to the eye area of the opposition Player, Mr Ferris's face. Further the Player's Representative referred to the grounds of Appeal in the letters of 21 December 2009 and 8 January 2010 but in particular the Player's Representative considered that the Judicial Officer had erred in stating that the Player had an intention to target the eye area of the opposition Player, Mr Ferris, particularly in relation to the second contact with the face area of Mr Ferris, had given evidence that he had not considered the contact with this eye or eye area to have been intentional on the part of the Player and the Judicial Officer had erred in categorising the seriousness of the offences at the top end of seriousness.

Additionally, the Player's Representative contended that the Judicial Officer had failed to take into account the details of the "very similar decision" of an ERC Appeal Committee in respect of a Player Shane Jennings, which was very similar in facts and had been issued after the IRB letter to Judicial Personnel dated 10 July 2004 and the letter from Bernard Lapasset, Chairman, IRB, dated 1 July 2009, both in relation to offences involving contact with the eye area.

The Player's Representative submitted further that the Judicial Officer had not acted in a "proportionate" fashion in imposing the sanction upon the Player. It was not proportionate she argued to levy a significant sanction upon the Player because of leniency of previous decisions or as a means to deter future acts of similar foul play alike to those perpetrated by the Player.

Finally the Player's Representative repeated her representations to the Judicial Officer and asked the Appeal Committee to reflect upon the unblemished playing record of the Player and that it was wholly inappropriate that he be so penalised "for the good of rugby". When addressed to the question "why was the Judicial Officer not entitled to reach the conclusion he did relative to the acts of foul play based upon the evidence narrated in his decision", the Player's Representative referred to her previous submissions. No attempt was made on behalf of the Player to examine all of the evidence before the Judicial Officer in an effort to demonstrate that there had been an error in his analysis of that evidence which had resulted in him incorrectly categorising the offending as being at the top end of the scale of seriousness.

The Disciplinary Officer's Representative submitted that there was more than sufficient evidence before the Judicial Officer enabling him to reach the conclusions he did in relation to the entry point and the sanction imposed upon the Player. The Disciplinary Officers Representative referred the Appeal Committee to his detailed written submissions contained in his Direction Statement (Appendix III).

After a short adjournment the Appeal Committee explained that there was nothing in the submissions which had been made to the committee which had led the committee to conclude that the Judicial Officer had not been entitled on the evidence to conclude that the admitted acts of foul play should be properly classified at the top end of the range of seriousness. Indeed, in light of the decisions in cases such as *Hartley* and *Bergamasco* a top end sanction for an offence involving intentional contact with the eye or eye area in the circumstances which were apparent from the video coverage of the incidents in this case made a categorisation at the top end entirely appropriate if not inevitable. The video evidence clearly shows to incidents of contact with the eye or eye area of Mr Ferris by the Player in circumstances which are wholly consistent with the finding of intentional contact made by the Judicial Officer.

The Appeal Committee records its disappointment that despite the very clear guidance on the extent of the role of the Appeal Committees in cases where there is not a *de novo* given in decisions such as *Quinlan*, *Flannery*, *Audebert*, *Tincu* and *Jennings* appellants continue to bring and argue appeals on a basis that effectively invites the Appeal Committee to take a different view of the evidence taken by a Judicial Officer and to effectively substitute its assessment of the evidence for that of the Judicial Officer. That is not the role or function of Appeal Committees within the ERC Disciplinary Rules, except where a *de novo* hearing is allowed or in circumstances where new evidence is admitted on appeal which was not before the Judicial Officer. In that latter circumstance the other evidence in the case may need to be re-evaluated in the light of new evidence admitted at the appeal stage. However, in this case a *de novo* hearing was refused for the reasons given above and there was no application to admit new evidence at the appeal stage.

Additional matters at the direction of the Appeal Committee

The Appeal Committee then asked the ERC Disciplinary Officer and the Player's Representative to address the Appeal Committee on two questions:-

- (a) was the Judicial Officer in error in taking into account the IRB letter to Judicial Personnel dated 10 July 2009, regarding “eye gouging” together with Bernard Lapasset, Chairman IRB’s letter dated 1 July 2009, regarding matters of deterrent in determining where in the top end range the entry point should be in this case and
- (b) was the Judicial Officer in error in paragraphs 35 and 36 of his determination by not taking account of the need for deterrence as an aggravating factor?

DETERMINATION OF THE APPEAL COMMITTEE

(1) That the Appellants application for a *de novo* hearing be rejected.

(2) That the Judicial Officer had not erred in categorising the offending as being at the top end of the range of seriousness.

(3) That the Judicial Officer erred in including in his assessment of the seriousness of offence the need for a deterrent of such acts of foul play as described in the IRB letter to Judicial Personnel dated 10 July 2009, and the letter from Mr Bernard Lapasset, Chairman IRB dated 1 July 2009.

The Appeal Committee determined that it was the assessment of the seriousness of the on field offending as provided for in DR 6.7. 32 that determined the level of entry point and in the case of top end offending where in the range a particular incident or incidents of offending should be placed. The seriousness of the offending in any particular case was not affected by any general need to deter a pattern of offending. Rather, the need for a deterrent to combat a pattern of offending should be considered under DR 6.7. 34, as a potential aggravating factor. In effect the issue of deterrence is an off field circumstance to be taken account of at the stage of considering DR 6.7.34.

The Appeal Committee determined that upon the basis of an assessment of the seriousness of the offending, the entry point should be 30 weeks. In reaching this assessment the Appeal Committee took account of all of the Judicial Officer's comments in reaching the entry point with the exception of the deterrent factor (para 33 sub paragraph 4, p12 of the Decision). The Appeal Committee noted in particular that there were two separate established acts of intentional targeting of the eye area of the opposition Player by the Player.

(3) Further to DR 6.7.34, it had been established that there was a need for a deterrent to combat a pattern of offending as outlined in the said IRB and Bernard Lapasset letters which was as appropriate aggravating factor. The Appeal Committee considered that an aggravating factor of 25% was appropriate (thereby increasing the potential sanction, prior to taking account of any mitigation, to a suspension of 37.5 weeks).

(4) The Appeal Committee agreed with the Judicial Officer that there were mitigating factors which “deserved significant recognition in reducing the sanction” and also agreed that 50% mitigation was inappropriate in light of the Player’s limited admission in respect of his perpetration of the acts of foul play (Judicial Officer decision para 35 sub para (1). The Appeal Committee agreed with the Judicial Officer that mitigation of 40% was appropriate in this case. In applying a mitigation factor of 40% to the aggravated period of suspension of 37.5 weeks the Appeal Committee varied the decision of the Judicial Officer but only to the extent of reducing the period of suspension of the Player from 24 to 23 weeks. The Player is suspended from taking part in the game of Rugby up to and including 27 May 2010.

(5) Both Parties are directed to provide the Chairman of the Appeal Committee their submissions in respect of costs, in writing within seven days of this decision.



Professor Lorne D Crerar

Chairman

Appeal Committee

13 January 2010

Appendix I

RECEIVED TIME 21 DEC 14:35
PRINT TIME 22 DEC 10:47

APPENDIX I

CABINET MOYERSON

Patricia MOYERSON
D.E.A DE DROIT INTERNATIONAL
PRIVE

Christine RUAULT
MAITRISE CARRIERES
JUDICIAIRES

Natacha MOYERSON
DIPLOMEE DE DROIT EUROPEEN
A L'I.E.E DE BRUXELLES

Olivier LEDRU
MAITRISE CARRIERES
JUDICIAIRES
MAITRISE DE DROIT PRIVE
EUROPEEN

Nicolas BONE
D.E.A. DE DROIT PRIVE
MASTER DE DROIT DU SPORT

AVOCATS A LA COUR

European Rugby Club
3rd Floor Huguenot House
35-38 St Stephen's Green
DUBLIN 2
IRLANDE

Attention: to Mr Chairman of the
Disciplinary Panel of ERC
By fax : 00.353.1.676.9287

Cc : Roger O' Connor
By fax : 00.353.1.676.9287
And by email :
roger.oconnor@ercrugby.com

Paris, 21 décembre 2009

Notice of Appeal against a decision of Independent Judicial Officer of Disciplinary
Panel of ERC
Held at Huguenot House, Dublin, on 18 december 2009

Mr Chairman of the Disciplinary Panel of ERC,
Dear Mr O'CONNOR,

I am writing to you as Julien DUPUY's legal advisor.

Julien DUPUY has decided to lodge an appeal against the decision of Independent
Judicial Officer of Disciplinary Panel of ERC, date 18 december 2009, which has
been notified to me the same day, and which imposes to me a period of suspension
from playing rugby union of 24 weeks commencing on 18.12.2009 up to and
including the 3 June 2010, in respect of a citing complaint made by Tony Lanaway
after the match played between Ulster and Stade Français Paris on 12 december
2009 in the Heineken Cup 2009/2010.

Please find enclosed the letter signed by himself in order to lodge this appeal.

I would like to precise that Julien DUPUY would like also to complaint about the fact
that he has been condemned to pay all ERC's reasonable costs as he warned the
Citing Commissionner that he is going to plead guilty by an email send on Sunday 13
december and I have send a letter ERC on 16 december saying that the player will
attend the hearing.

197 boulevard Saint Germain - 75007 PARIS - Palais B 0609
Tél : 01 45 48 97 97 - FAX : 01 45 48 07 27 - e-mail : cabinet@moyerson.fr
SIRET : 379.758.543.00035 - APE 6910 Z - TVA Intra communautaire : FR 68.379.758.543

21-12-09 14:34 Pg: 1/4

MOYERSON

x emts par : 0145480727



APPENDIX I

Could you please send all notice regarding this appeal to my office by fax or by email (see direction below).

Best regards.

Patricia MOYERSON



APPENDIX I

Julien DUPUY
3 place des Ecoles
92100 Boulogne Billancourt
France

Attention to Mr Chairman of the
Disciplinary Panel of ERC
By fax : 00.353.1.676.9287

Cc : Roger O' Connor
By fax : 00.353.1.676.9287
And by email :
roger.oconnor@ercrugby.com

Paris, 21 december 2009

**Notice of Appeal against a decision of Independent Judicial Officer of
Disciplinary Panel of ERC
Held at Huguenot House, Dublin, on 18 december 2009**

Mr Chairman of Disciplinary Panel,

By the present letter, and further to ERC Disciplinary Rules 2009/2010 article 7.2.

I would like to lodge an appeal against the decision of Independent Judicial Officer of Disciplinary Panel of ERC, date 18 december 2009, which has been notified to me the same day, and which imposes to me a period of suspension from playing rugby union of 24 weeks commencing on 18.12.2009 up to and including the 3 June 2010, in respect of a clting complaint made by Tony Lanaway after the match played between Ulster and Stade Français Paris on 12 december 2009 in the Heineken Cup 2009/2010.

The Independent Judicial Officer, Mr Jeff Blackett, found me committed an act of full play contrary to Law 4 (l) and has decided there was a contact with Stephen PERRIS (Ulster player n°6) 's eyes and that this contact was deliberate.

I would like to convince the Appeal Committee that this contact was not a "eye gouging", neither a deliberate attack on a opponent's eyes or eye area.

Also I would like to complain with the Entry point (Top End of the scale) and the sanction (24 weeks) which have been decided by the Independent Judicial Officer.

Fax emts par : 8145480727
MOYERSOEN
21-12-09 14:35 Pg : 3/4
0145480727
21-12-09 13:45 Pg : 1

APPENDIX I

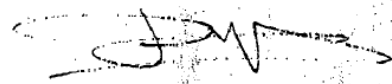
As specific grounds, I would like to complain about the fact that the Independent Judicial Officer has decided I am *"being made an example of the wider benefit of the Game"* and that the sanction imposed to me is *"being one heavily influenced by the need for deterrence and the fact that too many previous sanctions for this sort of offending have been unduly lenient"* (point 37 of the decision).

As I would like to show evidence of it was a reckless contact with eye area, I would like to ask the Appeal Committee to conduct a de novo hearing or, at least, a combination of a de novo hearing and appeal on the records as it is provided within ERC Regulation 7.4.8.

Please note that I have appointed as my Counsel, Mrs Patricia MOYERSOEN, Avocate au Barreau de Paris, 197 bd st Germain 75007 Paris (Tel : 00.33.1.45.48.97.97 Fax : 00.33.1.45.48.07.27).

Sincerely

Julien DUPUY.



Appendix II

APPENDIX II
CABINET MOYERSON

Patricia MOYERSON
D.E.A. DE DROIT INTERNATIONAL
PRIVE

Christine RUAULT
MAITRISE CARRIERES
JUDICIAIRES

Natacha MOYERSON
DIPLOMEE DE DROIT EUROPEEN
A L' I.E.E. DE BRUXELLES

Olivier LEDRU
MAITRISE CARRIERES
JUDICIAIRES
MAITRISE DE DROIT PRIVE
EUROPEEN

Nicolas BONE
D.E.A. DE DROIT PRIVE
MASTER DE DROIT DU SPORT

AVOCATS A LA COUR

European Rugby Club
3rd Floor Huguenot House
35-38 St Stephen's Green
DUBLIN 2
IRLANDE

(4)

Attention to Mr Chairman of the
Disciplinary Panel of ERC
By fax : 00.353.1.676.9287

Cc : Roger O' Connor
By fax : 00.353.1.676.9287
And by email :
roger.oconnor@ercrugby.com

Paris, 8 janvier 2010

Grounds of Appeal

**Appeal against a decision of Independent Judicial Officer of Disciplinary Panel of ERC
Held at Huguenot House, Dublin, on 18 december 2009**

Mr Chairman of the Disciplinary Panel of ERC,
Dear Mr O'CONNOR,

I am writing to you as Julien DUPUY's legal advisor.

Julien DUPUY is pleading guilty of a Foul Play against Ulster n°6, Stephen FERRIS
as he had a contact with his right hand on FERRIS's face twice.

He recognises that he carried out stupid and foolish and had apologised to FERRIS
many times.

But he would like to convince the Appeal Committee that the contact with FERRIS 's
face was not a "eye gouging", neither a deliberate attack on a opponent's eyes or eye
area.

He is asking for a *de novo* hearing as he thinks it is very important for the Panel to
see the video and to hear Mr FERRIS testimony.

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Tél : 01 45 48 97 97 - FAX : 01 45 48 07 27 - e-mail : cabinet@moyerson.fr
SIRET : 379.758.543.00035 - APE 6910 Z - TVA Intra communautaire : FR 68.379.758.543

APPENDIX II

On the assumption that the Appeal Committee will not hear the case de novo, Julien DUPUY wants to demonstrate that the decision of the Independent Judicial Officer was in error and why it should be overturned.

The grounds upon which Julien DUPUY wish to appeal the decision are as follows : *(7.4.3) was in error + should be overturned.*

- There was insufficient evidence to support the conclusion that the contact with FERRIS's eyes or eye area was a deliberate "eye gouging".
- Mr FERRIS's testimony saying that DUPUY's was not involved in his injury is an evidence which should have been given more weight.
- The Independent Judicial Officer failed to apply the appropriate Entry point regarding the features listed in article 6.7.32
- The Independent Judicial Officer failed to apply the appropriate sanction regarding the features listed in 6.7.34 and 6.7.35.
- The Independent Judicial Officer Roger Morris had fallen in error when he reused to take in consideration the Decision taken by the Judicial Officer in Shane Jennings of Leinster's case date 14 October 2009, as the facts and the features are pretty similar with DUPUY's case.
- The Independent Judicial Officer had fallen in error when he decided that DUPUY should be "*made an example of the wider benefit of the Game*" and that the sanction imposed to him is "*being one heavily influenced by the need for deterrence and the fact that too many previous sanctions for this sort of offending have been unduly lenient*" (point 37 of the decision).

I would like to precise that Julien DUPUY also complaint about the fact that he has been condemned to pay all ERC's reasonable costs as he warned the Citing Commissioner that he is going to plead guilty by an email send on Sunday 13 December and I have send a letter ERC on 16 December saying that the player will attend the hearing.

Yours sincerely,

Patricia MOYERSON

APPENDIX III

5

IN THE MATTER OF
THE APPEAL BY JULIEN DUPUY
AGAINST THE DECISION
OF AN ERC DISCIPLINARY COMMITTEE (JUDICIAL OFFICER)
DATED 18 DECEMBER 2009

DIRECTIONS STATEMENT BY THE ERC DISCIPLINARY OFFICER

Further to the hearing notice dated 5 January 2010, I set out below my directions statement (which follows the format of a directions statement pursuant to Disciplinary Rule 7.4.3 and Section D of Appendix Six to the Disciplinary Rules).

- (a) whether he/it will argue any preliminary matters, and if so what they are (in summary)

I will not argue any preliminary matters.

- (b) his/its response (in summary) to the Appellant's position regarding a *de novo* hearing

In the letter dated 21 December 2009 that was sent by email from Mme Moyersoen to me at 11.28am on that date (Notice of Appeal, copy attached marked A), Mr Dupuy tells us that he 'would like to ask the Appeal Committee to conduct a *de novo* hearing or at least a combination of a *de novo* hearing and [an] appeal on the record [...]'.

Pursuant to Disciplinary Rule 7.4.8, unless it is shown by M Dupuy that the circumstances are exceptional and that there are compelling reasons for a *de novo* hearing, the Appeal Committee may not proceed with a *de novo* hearing. M Dupuy has not sought to articulate why he thinks the circumstances are exceptional and that there are compelling reasons for a *de novo* hearing. All he has done is say in Mme Moyersoen's letter of 8 January 2010 (copy attached marked B) that he 'thinks it is very important for the Panel to see the video and to hear Mr Ferris's testimony' but he does not tell us why he thinks that makes the circumstances exceptional and the reasons compelling. As a consequence I am not able to respond properly to his request. Nevertheless, I can say that there appears to be nothing in the circumstances of this case that is exceptional and there appear to be no compelling reasons as to why the appeal should be heard *de novo*.

M Dupuy's grounds of appeal essentially amount to an argument that the Judicial Officer misinterpreted the evidence that was before him (by concluding that the contact had been with Mr Ferris's eyes and had been intentional) and thereafter erred in determining the appropriate sanction. That is not exceptional and it is not a compelling reason to order a *de novo* appeal. There is no allegation of procedural unfairness, bias or anything of that

APPENDIX III

nature that might conceivably give rise to a finding that there are exceptional circumstances and compelling reasons. See the decision of the Appeal Committee in *Tincu*, copy attached marked C at pages 7 and 11.

We can see no reason whatsoever (compelling or otherwise) to support reversing the burden of proof and making the appeal *de novo*. We respectfully oppose the application and suggest that the appeal proceed on the basis that M Dupuy has to show that the Judicial Officer's decision in this case (Decision) was in error and should be overturned or varied.

M Dupuy's alternative application is for '... a combination of a *de novo* hearing and [an] appeal on the record [...]'. The Disciplinary Rules do not expressly provide that a hearing can proceed on such a basis. But, assuming for the sake of argument that the Appeal Committee was entitled to proceed with a hearing on such a basis (and I note that, by analogy, this is envisaged in IRB Regulation 17.17.7), I respectfully submit that M Dupuy would first have to show that the circumstances are exceptional and that there are compelling reasons for such a hearing, otherwise the Appeal Committee ought not proceed with such a hearing. I say this because the policy reasons behind the limited rights to *de novo* appeal hearings (such as avoiding the costly reconsideration of evidence and presentation of the prosecution, and the inconvenience of recalling witnesses to be re-examined) would be defeated if partial *de novo* hearings could be held without the need to comply with the requirements of exceptional circumstances and compelling reasons. And, continuing the above analogy, I note that in order to have a partial *de novo* hearing under IRB Regulation 17, the appellant must demonstrate exceptional circumstances in the same way as he must in order to have a full *de novo* hearing.

There is one practical point concerning the applications for a *de novo* or partial *de novo* hearing and that concerns the inconvenience to Mr Ferris if he is required to give evidence again. Mr Ferris travelled to Dublin on 17 December 2009 in order to attend the previous hearing and waited around for most of the day but was unable to give evidence because M Dupuy's legal adviser missed her flight (twice) and so the hearing had to be adjourned. Mr Ferris then travelled back to Belfast and agreed to attend the rescheduled hearing and give evidence by telephone the next day (notwithstanding that very shortly thereafter he was due to be participating in Ulster's 'Captain's Run' ahead of the next day's Heineken Cup match). He gave evidence and was cross-examined by M Dupuy's legal adviser. He is also due to give evidence in the hearing of the citing complaint against M Attoub (the only reason that he was not able to do that at the same time as giving evidence against M Dupuy was that M Attoub sought an adjournment of this hearing so that his expert witness could examine certain pieces of evidence). In the circumstances, it would be quite unfair on Mr Ferris (an innocent victim in all of this) if he were required to attend and give his evidence against M Dupuy again (a third time of asking) in order that M Dupuy can have a *de novo* hearing.

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(c) his/its response (in summary) to any other matters raised in the Appellant's written statement

As a general comment, pursuant to Disciplinary Rule 7.4.3, if the Appeal Committee proceeds with the appeal on the basis that it is not *de novo*, M Dupuy will have to show that the Decision was in error and should be overturned or varied. The function of an ERC Appeal Committee in such an appeal is not to review the evidence and substitute its own conclusions for those of the Disciplinary Committee/Judicial Officer below. Rather, the Decision needs to be afforded a margin of appreciation and the Judicial Officer's determinations ought not be interfered with unless they are inconsistent with the evidence. See the decision of the Appeal Committee in *Tincu*, copy attached marked C at pages 7 and 15.

My specific response to the other matters raised in M Dupuy's Notice of Appeal and Mme Moyersoën's letter of 8 January is as follows:

- (i) The first ground of M Dupuy's challenge to the Decision (as it appears in the Notice of Appeal) is that the Judicial Officer concluded that this was 'eye gouging' and that it constituted a 'deliberate attack on an opponent's eyes or eye area' (M Dupuy claims that his contact was reckless and with the eye area and in Mme Moyersoën's letter of 8 January he says that there was insufficient evidence to support the Judicial Officer's conclusions).

In response, I say the following:

- (A) It does not appear from the Decision that the Judicial Officer concluded that M Dupuy's actions had been an example of 'eye gouging', certainly the Judicial Officer does not expressly state that this was a finding of his.
- (B) Even if the Judicial Officer had concluded that M Dupuy's actions had been an example of 'eye gouging', given the video evidence (which shows, among other things, the movement of M Dupuy's hands, the (double) contact with Mr Ferris's face, and Mr Ferris's immediate reaction), there was a sufficient basis on which the Judicial Officer would have been able to make such a finding and there would be no basis for disturbing that finding (certainly not once it has been afforded the required margin of appreciation).
- (C) In any event, whether or not M Dupuy's actions could be characterised as 'eye gouging' would, of itself, not be particularly relevant when determining sanction, since the phrase 'eye gouging' is not used in the recommended sanctions table nor in the relevant section of the decision in the case of RFU case of *Hartley*, copy attached marked D at paragraph 20 (which was relied on by the Judicial Officer here, and which has been endorsed by the IRB and relied on by many tribunals as an appropriate guide when determining sanction in cases involving

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contact with the eye/eye area). So, even if the Judicial Officer had concluded that M Dupuy's actions had been an example of 'eye gouging', and that could be said to have been an error, there would be no basis on which it could be said that as a consequence the Decision should be overturned or varied.

- (D) In the Decision, the Judicial Officer does conclude that M Dupuy's actions constitute a 'deliberate attack on an opponent's eyes or eye area' (see, for example, paragraphs 29(a), 30 and 33 of the Decision). Given the video evidence (as described above), there was a sufficient basis on which the Judicial Officer was able to make such a finding and there would be no basis for disturbing that finding (certainly not once it has been afforded the required margin of appreciation). Accordingly, this was not an error.
 - (E) It is true that Mr Ferris gave evidence that in his opinion the contact with the eyes had not been deliberate (see paragraph 18 of the Decision). The Judicial Officer was perfectly entitled to afford relatively little weight to that aspect of Mr Ferris's evidence and/or conclude differently from Mr Ferris since Mr Ferris could not know what M Dupuy's mental state had been when he made the contact (only M Dupuy could know that, but the Judicial Officer is obviously entitled to disagree with M Dupuy's evidence on this). If the Judicial Officer was going to give *any* weight to Mr Ferris's assessment of M Dupuy's mental state when he made the contact, the Judicial Officer was entitled to give greater weight to evidence that showed Mr Ferris's immediate reaction (including his angry remonstrance and appeal to the referee, which is more consistent with him believing the contact had been intentional) rather than Mr Ferris's re-assessment of that reaction some days later. And the Judicial Officer was entitled, in any event, to afford weight to other evidence when assessing M Dupuy's mental state when he made the contact, eg the force used and the fact that M Dupuy contacted Mr Ferris's eye/eye area on two separate occasions during the same passage of play.
 - (F) As for whether to contact was with the eye or was with the eye area, the video evidence and Mr Ferris's evidence were clear that there had been contact with the eye (see paragraph 18 of the Decision in which Mr Ferris is recorded as saying '*there was definitely contact with my eyes but it didn't feel like intent of going into eye sockets ... he definitely scraped me in the eye*').
- (ii) The second ground of M Dupuy's challenge to the Decision (as it appears in the Notice of Appeal) is that the Judicial Officer erred in determining that the appropriate entry point should be 40 weeks (top end+) and that the suspension itself should be 24 weeks (in Mme Moyersoen's letter of 8 January he says that the Judicial Officer failed to apply 'the appropriate entry point regarding the

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features listed in [Disciplinary Rule] 6.7.32' and 'the appropriate sanction regarding the features listed in [Disciplinary Rules] 6.7.34 and 6.7.35').

In response, I say the following:

- (A) As a general matter, the Judicial Officer's conclusions as to sanction (which includes his conclusion as to entry point and his conclusion as to how much the entry point should be varied based on aggravating and mitigating factors) were based on him exercising a discretion, weighing up a series of factors as he is required to do under the Disciplinary Rules. Just as determinations of fact ought not be interfered with unless they are inconsistent with the evidence (see the decision of the Appeal Committee in *Tincu*, copy attached marked C at pages 7 and 15, referred to above), a similar margin of appreciation should be applied to situations where a discretion is exercised. The Appeal Committee should not substitute its own conclusions for those of the Judicial Officer; instead (so long as the Judicial Officer did not misapply the relevant rules or take irrelevant considerations into account) the Appeal Committee should consider whether the Judicial Officer's exercise of his discretion was one that he was entitled to make in light of the information that was before him (or in other words whether it was one that he was reasonably able to come to). And if the Appeal Committee concludes that the Judicial Officer's exercise of his discretion *was* one that he was entitled to make (or reasonably able to come to), it should not find that he was in error (even if the Appeal Committee would have exercised its discretion differently). See the decision of the Appeal Committee in *Tuilagi*, copy attached marked E at pages 6 and 7.
- (B) M Dupuy claims specifically that the Judicial Officer erred in categorising his offending as being at the top end of the scale of seriousness (and determining that that should be the entry point pursuant to Disciplinary Rule 6.7.33). While M Dupuy does not state this expressly, it is assumed that he believes the Judicial Officer should have categorised his act of foul play as being either at the lower end of seriousness or at the mid range.
- (C) The Disciplinary Rules do not prescribe a certain entry point for a given set of factors – the entry point is at the discretion of the Judicial Officer, weighing up all relevant factors in accordance with the Disciplinary Rules. The factors that the Judicial Officer took into account in determining entry point were:
- M Dupuy's intention (see paragraph 29(a) of the Decision and Disciplinary Rule 6.7.32(a)), as to which, see the comments above;

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- the serious nature of M Dupuy's actions (see paragraphs 29(b) and 30 of the Decision and Disciplinary Rule 6.7.32(c)(i)), as to which it is clear that the evidence supports the Judicial Officer's assessment in terms of the amount of force, the fact that there were two contacts (which was clearly – and understandably - a significant factor for the Judicial Officer), the pulling of the head back in the second contact, the fact that there was contact with the eye itself (not just the eye area) and the causing of pain;
 - the relative insignificance of the provocation (see paragraph 29(c) of the Decision and Disciplinary Rule 6.7.32(c)(ii)), as to which again it is clear that the evidence supports the Judicial Officer's assessment;
 - the fact that M Ferris suffered (at least) pain as a result of M Dupuy's actions (see paragraph 29(d) of the Decision and Disciplinary Rule 6.7.32(d)), as to which again it is clear that the evidence supports the Judicial Officer's assessment;
 - the effect of Mr Dupuy's actions on the game (see paragraph 29(e) of the Decision and Disciplinary Rule 6.7.32(e)), as to which again it is clear that the evidence supports the Judicial Officer's assessment;
 - the vulnerability of Mr Ferris (see paragraph 29(f) of the Decision and Disciplinary Rule 6.7.32(f)), as to which again it is clear that the evidence supports the Judicial Officer's assessment;
 - the level of premeditation (see paragraph 29(g) of the Decision and Disciplinary Rule 6.7.32(g)), as to which again it is clear that the evidence supports the Judicial Officer's assessment; and
 - the fact that the act was completed (see paragraph 29(h) of the Decision and Disciplinary Rule 6.7.32(h)), as to which again it is clear that the evidence supports the Judicial Officer's assessment.
- (D) So, almost every one of the factors that the Judicial Officer was required to take into account in determining entry point under Disciplinary Rule 6.7.32 were present and featured against M Dupuy (ie pointed toward a higher assessment of seriousness and entry point).
- (E) In addition, the Judicial Officer found that M Dupuy had intended to cause (at least) discomfort to Mr Ferris (see paragraph 30 of the

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Decision), and so it was entirely consistent with the IRB-endorsed analysis of contact with the eyes cases that was set out in *Hartley* (copy attached marked D at paragraph 20), which was referred to at paragraph 27 of the Decision, for the Judicial Officer to conclude that this act deserved a top end entry point. The *Hartley* analysis provides that top end cases will include those where the act was intentional and was designed to cause serious discomfort or injury. The Appeal Committee in *Bergamasco* (copy attached marked F at page 23) in fact preferred a slight variation to that analysis, saying that in order to be a top end offence, the act need not be *designed to* cause discomfort or injury, rather it need only be an act that *could* cause injury. And it is clear that the Judicial Officer here found that M Dupuy could have caused Mr Ferris serious injury (see paragraph 30 of the Decision) and it is equally clear that the evidence supports the Judicial Officer's assessment.

- (F) The Judicial Officer concluded that the entry point should be 40 weeks, which is greater than the minimum top-end entry point for this type of offending (24 weeks). This is perfectly justifiable under Disciplinary Rule 6.7.33, and the evidence (as well as the IRB's guidance, see below) supports the assessment that the Disciplinary Officer made when exercising his discretion, see paragraph 33 of the Decision. Certainly, the Judicial Officer's exercise of his discretion *was* one that he was entitled to make (or reasonably able to come to) and so when afforded the appropriate margin of appreciation, the decision should not be disturbed.
 - (G) The Judicial Officer then reduced the sanction from the 40-week entry point to 24 weeks (a reduction of 40%), which appears to have been a fair and reasonable reduction having taken into account the relevant mitigating and aggravating factors. Disciplinary Rule 6.7.37 provides that the maximum reduction available was 50%. As with the assessment of entry point, the assessment of aggravating and mitigating factors is at the Judicial Officer's discretion – there are no prescribed formulae or calculations, and the exercise of the discretion has to be afforded the appropriate margin of appreciation.
- (iii) The third ground of M Dupuy's challenge to the Decision (as it appears in the Notice of Appeal) is that the Judicial Officer erred in seeking to make an example of M Dupuy and being influenced by the need for deterrence and the fact that there have been unduly lenient sanctions imposed for similar cases in the recent past (see paragraph 37 of the Decision).

In response, I say the following:

- (A) The Disciplinary Rules provide that the Judicial Officer must apply the IRB's recommended sanctions in a case of foul play (see Disciplinary Rule 6.7.31). On 10 July 2009, the Judicial Panel Chairman from the

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IRB (ie the body whose recommended sanctions the Judicial Officer is required to apply) circulated to all IRB Judicial Personnel (including the Judicial Officer) a memorandum containing guidance about the sanctions to be imposed in cases involving contact with the eye or eye area (copy attached marked G). That memorandum attached a letter from the Chairman of the IRB to the Judicial Panel Chairman (dated 1 July 2009) and an IRB press release of the same date on the same subject.

- (B) In summary, the memorandum noted the IRB's concern that there has been an increasing number of cases involving contact with the eye or eye area in recent years, that the sanctions being imposed in such cases were becoming more lenient and that the approach to sanctioning in the *Hartley* case (see above) was appropriate. The memorandum called on judicial personnel to note the IRB's concerns and impose sanctions that were consistent with the seriousness of the offending. The letter from the Chairman of the IRB criticised the leniency of the sanctions imposed in the *Burger* and *Parisse* cases and made clear that 'serious penalties' and 'strong sanctions' should be imposed in cases of contact with the eye or eye area by way of a deterrent in order to arrest the prevalence of this type of offending. It made clear that this directive was to be passed down to (and applied by) judicial personnel throughout the game.
- (C) The Judicial Officer appears to have considered the IRB documents (including the IRB's call for strong sanctions with a deterrent effect) when considering generally the sanction to be imposed (see paragraphs 27, 28 and 37 of the Decision), when considering the appropriate entry point (see paragraphs 30, 33 and 34 of the Decision), and when considering aggravating factors (see paragraphs 35 and 36 of the Decision).
- (D) Of course, there can be no criticism of the Judicial Officer for taking into account the need for deterrence as an aggravating factor, since that is expressly provided for in Disciplinary Rule 6.7.34(c).
- (E) As for the entry point, while the Disciplinary Rules do not expressly require the Disciplinary Officer to take into account the need for deterrence when assessing the seriousness of the offending, it is perfectly reasonable that the need for deterrence (as specifically identified by the IRB) as well as the IRB's call for strong sanctions should have been considered by the Judicial Officer when considering the appropriate entry point. It is the determination of the entry point that is the fundamental driver in any imposition of a suspension in rugby union: it is that which governs the range in which the sanction will fall (the aggravating and mitigating factors effectively then finesse that). If the Judicial Officer was going to take heed of the IRB's directions, then he was entitled to do so (indeed he had to do so) when determining entry point. That was essential context for him.

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- (F) Further, there can have been no real risk of the Judicial Officer prejudicing M Dupuy by 'double-counting', ie taking into account deterrence when assessing entry point and then again when assessing aggravating factors. The Judicial Officer expressly acknowledges that the need for deterrence has already been taken into account by the time he comes to assessing aggravating factors (see paragraph 35 of the Decision). And it is quite clear from the drastic *reduction* in the sanction when aggravating and mitigating factors are taken into account (from 40 weeks to 24 weeks) that little or no account was taken of the need for deterrence as an aggravating factor. (It seems that the Judicial Officer did consider that the presence of the need for deterrence meant that he could not reduce the suspension by 50%, see paragraph 36 of the Decision: this appears to have been a mistake on the Judicial Officer's part as he was considering Disciplinary Rule 6.7.36 (or a variation thereof) – which applies to lower end entry point cases – instead of Disciplinary Rule 6.7.37. But even if it is a mistake, it does not require the Decision to be varied or overturned, and it is not a ground of appeal being pursued by M Dupuy in any event).
- (G) Ultimately, given the way that the appeal is made, the Appeal Committee should consider the suspension as a whole and consider whether the Judicial Officer erred in taking into account the IRB's directions in the way that he did. ERC's strong view is that there was no error and that even had there been, it cannot be said that the Decision should be varied or overturned. Put another way, if the Judicial Officer had been wrong to take into account the need for deterrence when determining entry point, there were sufficient other factors that would have allowed him to arrive at an entry point of around 40 weeks in any event. And what is more, he almost certainly would have treated the need for deterrence as a serious aggravating factor, increasing the suspension from the entry point identified (subject, of course, to any mitigation). So, if there had been any error, the Decision should not be overturned as the sanction would have been the same or greater had the error not been made.
- (iv) The fourth ground of M Dupuy's challenge to the Decision (as it appears in the Notice of Appeal) is that the Judicial Officer erred in awarding ERC its costs in this case (he says this was an error because on 13 December 2009 M Dupuy sent the Citing Commissioner an email saying that he was going to plead guilty and on 16 December 2009 his legal representative sent ERC a letter saying that M Dupuy would attend the hearing). This ground is not referred to in the Notice of Appeal. Rather, it is referred to in a covering letter sent by Mme Moyersoen to me by fax on 21 December 2009 (copy attached marked H).

In response, I say the following:

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- (A) The Judicial Officer has a wide discretion when it comes to costs (see Disciplinary Rule 6.7.45). As with the exercise of discretion in other contexts, see above, an appropriate margin of appreciation should be applied if the exercise of that discretion is being reviewed, so that it should not be disturbed if the exercise of the discretion was one that the Judicial Officer was entitled to make in light of the information that was before him (or was one that he was reasonably able to come to).
- (B) The Judicial Officer was perfectly entitled to make a costs order against M Dupuy in this case (certainly it was not a decision that he could not reasonably have come to), given the relevant facts, namely that:
- M Dupuy 'lost' the case and ERC will ordinarily try to recover its costs in such cases where it is reasonable to do so (see Disciplinary Rule 6.7.47);
 - it was a case involving contact with the eye or eye area, one of the most serious acts of foul play (and one that carries strong sanctions) and in the circumstances it was the type of case at which ERC would reasonably want to have legal representation (just as M Dupuy did);
 - M Dupuy argued various points unsuccessfully during the hearing that required ERC's lawyer to respond (for example, that the offending did not merit a red card) and gave evidence that merited close cross-examination by a lawyer (in particular with regard to whether M Dupuy's acts had been intentional); and
 - M Dupuy had failed to comply with the Judicial Officer's pre-hearing directions and had therefore given no indication to us that, for example, he would be pleading guilty, or that he would be arguing that the acts did not warrant a red card (it was therefore inevitable that we would have to have a lawyer present to deal with any arguments that might have arisen).
- (C) The email sent on 13 December 2009 to which M Dupuy refers (copy attached marked I) does not do anything remotely like tell us that he would be pleading guilty. Leaving aside the fact that it was sent not by M Dupuy but by Alain Elias (a team manager at Stade Francais) and the fact that it was sent not to me (or the Judicial Officer) but to the Citing Commissioner (I did not see it until the very end of the hearing), nowhere does it say that M Dupuy will be pleading guilty (in fact the Citing Commissioner did not make his citing complaint until the next day - 14 December 2009 - and so there was no citing complaint to which M Dupuy could have pleaded guilty at that stage). The email from M Elias says that M Dupuy had called the Citing Commissioner to

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apologise for his gesture, but that is not a guilty plea (and is not necessarily indicative that a guilty plea will follow). For example, Messrs Dupuy and Attoub together were quoted on the Stade Francais website on 15 December 2009 as apologising for their respective 'gestures' (copy attached marked J) and yet M Attoub went on to plead not guilty a few days later. The email from M Elias also asks the Citing Commissioner to consider that the act was not typical of Mr Dupuy and that he had pushed his hand onto Mr Ferris's face to protect himself: this – if anything – might be said to indicate that he would be pleading not guilty. It is not clear what the purpose of this email was, but since it was sent to the Citing Commissioner and was sent before the Citing Commissioner made his formal citing complaint (on 14 December 2009), it might have been an attempt to persuade the Citing Commissioner not to make a citing complaint. Whatever was the purpose, it cannot realistically be said to be a demonstration that M Dupuy was pleading guilty.

- (D) The letter sent on 16 December 2009 (copy attached marked K) told us nothing more revealing than the fact that M Dupuy would be attending the hearing.
- (E) Accordingly, the two pieces of correspondence that are referred to are wholly irrelevant here. Certainly, they do not excuse or otherwise make up for the failure to comply with the Judicial Officer's pre-hearing directions, and ERC had to go into the hearing entirely ignorant as to whether, for example, M Dupuy would be arguing any preliminary issues, whether he accepted the Citing Commissioner's report as true and accurate, whether he would argue that the acts did not warrant a red card, and whether he would rely on other evidence or authorities. That failure to comply alone justifies the costs order (see paragraph 38 of the Decision and Disciplinary Rule 6.7.10).
- (v) In Mme Moyersoens's letter of 8 January, M Dupuy has introduced two new grounds of appeal, which did not appear in his Notice of Appeal, namely that 'Mr Ferris's testimony saying that Dupuy was not involved in his injury is evidence which should have been given more weight' (the first new ground of appeal) and that the Judicial Officer [mistakenly referred to as Roger Morris] erred in failing to take into consideration the decision in the Jennings case 'as the facts and the features are pretty similar with Dupuy's case' (the second new ground of appeal).

In response, I say the following:

- (A) Neither the first nor the second new ground of appeal was set out in the Notice of Appeal – they both appeared for the very first time in Mme Moyersoens's letter of 8 January 2010, 18 days after the deadline for filing the Notice of Appeal and just three working days before the appeal

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hearing. This represents a failure to comply with Disciplinary Rule 7.2.1(b), and Disciplinary Rule 7.4.10 precludes M Dupuy from advancing these new grounds (unless the Appeal Committee grants its express consent). The Appeal Committee has a wide discretion in this regard, but ERC urges the Appeal Committee to grant such consent only if M Dupuy can show (and the Appeal Committee is satisfied) that there was a sufficient reason for the failure to comply and for the extraordinary delay in notifying ERC of the new grounds. If the Appeal Committee does grant its consent, I make the following additional comments.

The first new ground of appeal

- (B) The Judicial Officer does record (and we must assume took into account) that Mr Ferris believed that the injuries he sustained (ie the blurred vision, watering eyes, scratches and inflammation that Dr Irwin reported) were probably caused by M Attoub in the second incident rather than M Dupuy in the first (paragraphs 20, 29(d) and 30 of the Decision).
- (C) However, Mr Ferris was evidently unsure about this, and in light of the other evidence (including the DVD evidence of the contact and the reaction), it would have been perfectly reasonable of the Judicial officer to have concluded that M Dupuy probably did cause some injury. Tellingly, Mr Ferris gave clear evidence that Mr Dupuy's second contact caused him pain (paragraph 18 of the Decision), itself an injury of sorts.
- (D) But, from the face of the Decision, it seems that the Judicial Officer did not attribute a great deal of significance to the injuries that might have been sustained as a result of M Dupuy's contacts, and in light of the other relevant factors and the application of the *Hartley* analysis and the IRB's guidance, he was entitled to arrive at the entry point he did in any event.

The second new ground of appeal

- (E) At the hearing, Mme Moyersoem made reference on M Dupuy's behalf to the case of *Jennings* and said (in essence) that the two cases should be treated similarly because the facts are similar (she said that the entry point in *Jennings* had been lower end and that therefore it should be the same in the case of M Dupuy). In the Decision, the Judicial Officer says that he did not consider the decision in *Jennings* (paragraph 31 of the Decision). This was not an error on his part.
- (F) For one thing, as the Judicial Officer observes, Mme Moyersoem did not circulate a copy of the decision in *Jennings* and did not address the Judicial Officer on the facts of that case. Accordingly, it is hard to see

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what he was supposed to make of the submission. (It is also true that Mme Moyersoer had not indicated prior to the hearing that she would be intending to rely on the *Jennings* case: that failure to comply with the pre-hearing directions alone would have entitled the Judicial Officer to refuse to hear the submission, see Disciplinary Rule 6.7.10 and Appendix Six, section B1(e) of the Disciplinary Rules).

- (G) For another thing, the Judicial Officer was quite right to exercise caution when being asked to consider previous cases with purportedly 'similar' facts. While it is important that all involved in the disciplinary process strive to achieve a degree of consistency in decision-making, it is very difficult (if not impossible) to look at previous decisions and compare the facts of one case with those of another when determining sanction. See the case of *Moody* at pages 9-13 (copy attached marked L).
- (H) In any event, even if it was relevant to compare the facts of one case with the facts of another to assist in the determination of sanction, the facts of the case in *Jennings* were very different from the facts before the Judicial Officer in M Dupuy's case. For example, the Judicial Officer in *Jennings* found that the contact had been reckless (not intentional), he found that there had been no effect on the game (unlike the brawl that occurred after M Dupuy's actions), and he found that Mr Kennedy (the victim in *Jennings*) had been able to defend himself and therefore had not been in a particularly vulnerable position (unlike the Judicial Officer's finding in respect of Mr Ferris's vulnerability, particularly when M Dupuy made his second contact). See the decision in *Jennings*, copy attached marked M. And so the Judicial Officer would have been able to distinguish the case of *Jennings* from that of M Dupuy.

In summary, and applying the appropriate margin of appreciation, the Judicial Officer's conclusions were justified based on the evidence and information that was before the Judicial Officer, and were certainly not inconsistent with that evidence and information. Accordingly, ERC's position will be that, based on the points set out in the Notice of Appeal and elsewhere, M Dupuy will not be able to show that the Judicial Officer's decision was in error and should be overturned or varied; the appeal should fail.

- (d) **if there is any evidence that he/it will rely on to support his/its position, what that evidence is (any written evidence must be attached to the written statement made by the other party to the appeal, and the names of any witnesses to be called must be set out in the statement**

On the assumption that the appeal is not to be heard *de novo*, I will be relying on no further evidence (other than the documents attached). I have already circulated to members of the Appeal Committee a copy of the evidence that was copied to all parties ahead of the hearing before the Judicial Officer.

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- (e) **whether any evidence that he/it will rely on is evidence that was not offered below, and if so what the evidence is, why he/it says it was not on reasonable enquiry available at the time of the proceedings below, and why he/it says the Appeal Committee should exercise its discretion to consider such evidence**

The only new evidence is the correspondence referred to in the Notice of Appeal and the print outs and translations of the 'apologies' on the Stade Francais website. These were not relied on at the hearing as they were not relevant to any issues and so were essentially not available on reasonable enquiry (no reasonable enquiry would have sought the use of such documents).

- (f) **who will be attending the hearing and in what capacity**

I will be attending the hearing, along with Max Duthic (who will present the response to the appeal) and his assistant, Jamie Herbert. Where appropriate, at the hearing Mr Duthic will expand on the points made above.

* * *

Roger O'Connor
ERC Disciplinary Officer
11 January 2010

Attachments:

- A. Notice of Appeal, dated 21 December 2009 (pages 1 and 2);
- B. Letter from Mme Moyersoer to ERC Disciplinary Officer, 8 January 2010 (pages 3 and 4);
- C. *ERC v Tincu*, 25 November 2008 (pages 5 to 20);
- D. *RFU v Hartley*, 24 April 2007 (pages 21 to 27);
- E. *ERC v Tuilagi*, 14 July 2009 (pages 28 to 35);
- F. *Six Nations v Bergamasco*, 14 May 2008 (pages 36 to 61);
- G. IRB memorandum on sanctions to be imposed in cases involving contact with the eye or eye area (and attachments), 10 July 2009 (pages 62 to 65);
- H. Cover letter from Mme Moyersoer to ERC Disciplinary Officer, 21 December 2009 (pages 66 and 67);
- I. Email from Alain Elias to the Citing Commissioner, 13 December 2009 (page 68);
- J. Print-out and translation of pages from Stade Francais website, 15 December 2009 (pages 69 and 70);
- K. Letter from Mme Moyersoer to ERC Disciplinary Officer, 16 December 2009 (pages 71 to 75);
- L. *Six Nations v Moody*, 28 November 2005 (pages 76 to 95); and
- M. *ERC v Jennings*, 19 October 2009 (pages 96 to 111).

