

HEINEKEN CUP (2009/2010)

CITING OF BRIAN MUJATI

DECISION OF JUDICIAL OFFICER

**Held at offices of the European Rugby Cup, Huguenot House, 35-38 St Stephen's
Green, Dublin 2, Ireland**

Thursday 22 October 2009

and

**At the offices of Harper Macleod LLP, the Ca'd'oro, 45 Gordon Street, Glasgow G1
3PE**

Monday 2 November 2009

IN RESPECT OF:

Brian Mujati ("the Player") and the citing complaint that the Player's actions breached Law 10.4(l) of the Laws of the Game.

JUDICIAL OFFICER:

Rod McKenzie (SRU)

DECISION OF THE JUDICIAL OFFICER:

- (i) The Player having accepted that he committed the act of foul play (law 10.4(l)) (Acts contrary to good sportsmanship) for which he had been cited, the Judicial Officer upheld the citing complaint against the Player.
- (ii) The Player be suspended for a period of six weeks from Thursday 22 October 2009 until Wednesday 2 December 2009 (inclusive).
- (iii) The Player shall bear the costs of the Hearing and of the Disciplinary Officer, including the legal costs of the Disciplinary Officer. However, by reason of their having been three Hearings on 22 October 2009 in which the Judicial Officer was involved, the Player should bear only 1/3 of the costs incurred by the Disciplinary Officer in relation to 22 October 2009.

INTRODUCTION

A Disciplinary Committee comprising of the Judicial Officer sitting alone was convened by Professor Lorne D Crerar, the Chairman of the ERC Discipline Panel, pursuant to the Disciplinary Rules of the Heineken Cup 2009/2010 in respect of a citing complaint made by Mr Murray Whyte, who was appointed by the European Rugby Cup Limited (“ERC”) to act as Citing Commissioner for a match between USAP and Northampton Saints (“Northampton”) in the 2009/2010 Heineken Cup on 16 October 2009 at Stade Aime Girali (“the Match”).

The citing complaint alleged that the Player had pushed the referee in the back during the second half of the game when 22 minutes and 27 seconds had elapsed in that half.

Present at the Hearing on 22 October 2009 were :-

Ray Tully (Barrister at Law, representing the Player)

James Mallinder (Director of Rugby, Northampton Saints)

Roger O’Connor (Disciplinary Officer, ERC)

Max Duthie (Solicitor, representing the Disciplinary Officer)

Present at the Hearing on 2 November 2009 were the same four persons who had been present on 22 October and, in addition, there were present:-

The Player

Dr David Cleal MB.BS. MRCP. MRCPGP. BSc. DipSEM (Northampton Team Doctor)

PROCEDURAL HISTORY

The Player did not respond fully to the standard directions, however his Counsel submitted a note for the Citing Hearing on 22 October 2009 which included details of a preliminary matter which was intended to be raised on behalf of the Player. It was intended that the Player should be personally present at the Hearing on 22 October but due to unforeseen circumstances that proved to be impossible. As a consequence, the evidence of the Player required to be taken by telephone

conference call. In the circumstances of this case the telephone conference call was not wholly satisfactory and for that reason, and because of the lateness of the hour, the Hearing was adjourned on 22 October to be reconvened on 2 November 2009.

During the intervening period the Judicial Officer circulated a note of the evidence of the Player taken during the conference call by the Judicial Officer. Parties were invited to make comments and suggest any revisions that were considered appropriate to that note of evidence. Certain revisions were proposed on behalf of the Disciplinary Officer. These were all accepted. Mr Tully, on behalf of the Player, expressed himself content with the note of evidence together with the suggested revisions advanced on behalf of the Disciplinary Officer. The narrative of the Player's evidence on 22 October as set out below may therefore be regarded as an agreed narrative.

A response was submitted by email dated 21 October 2009 by the Disciplinary Officer to the preliminary matter referred to in Mr Tully's note for the Citing Hearing on 22 October 2009.

At the commencement of the Hearing on 22 October Mr Tully sought to advance the preliminary matter which he had notified.

The preliminary matter concerned the second entry in appendix three of the Tournament Disciplinary Rules. That entry, referenced "6.A.5 10.4(l)", is in the following terms:

Appendix Three

IRB recommended sanctions for offences within the playing enclosure

| Law No. | Description | Entry point based on scale of Seriousness of the Player's conduct that constitutes the offending Lower End (LE), Mid Range (MR), Top End (TE). | Maximum Sanction |
|------------------|--|---|------------------|
| 6.A.5 10.4(l) | Physical Abuse of Match Officials | LE – 24 weeks MR – 48 weeks TE – 96+ weeks | Life |
| 10.4(l) | Any other acts (not previously referred to) which are contrary to good sportsmanship | LE – 4 weeks MR – 7 weeks TE – 11+ weeks | 52 weeks |

For ease of reference there is also noted above the terms of the final entry in appendix three. Both entries are relevant to the preliminary matter.

On behalf of the Player it was submitted that the video evidence submitted to the Judicial Officer showed the Player pushing the referee in the back and that this description was consistent with the citing complaint. It was contended for the Player that the offence fell within the second of the categories set out above i.e. the final entry in the table in appendix three. It was further submitted that the offence did not fall within the separate entry where the description is “Physical Abuse of Match Officials”. The argument advanced was that since the law references in the first column in relation to the entry for “Physical Abuse of Match Officials” were to both laws 6.A.5 and 10.4(l) that the provision and sanction relevant provisions necessarily envisaged a cumulative breach of both laws before the description “Physical Abuse of Match Officials” could apply. It was contended that since there was nothing in the factual narrative of events or the video which described or demonstrated any actions which could amount to a contravention of law 6.A.5 that the entry in appendix three for Physical Abuse of Match Officials could not apply in this case and that accordingly the only relevant entry which could apply was the final entry, i.e. that related to “Any other acts (not previously referred to) which are contrary to good sportsmanship”.

It was argued on behalf of the Disciplinary Officer that the issue sought to be advanced on behalf of the Player was not a preliminary matter which required to be dealt with in advance of the Player stating whether or not he admitted the act of foul play described in the citing complaint and thereby accepted the citing but rather was a matter related to what sanction ought to be imposed on the Player, if a sanction was to be imposed, following a determination that the citing complaint should be upheld or following an acceptance by the Player of the citing complaint.

In any event, it was argued on behalf of the Disciplinary Officer that the construction of the relevant entry in appendix three advanced on behalf of the Player was misconceived and that there was no reason why the reference to laws 6.A.5 and 10.4(l) should be read conjunctively. It was observed on behalf of the Disciplinary Officer that physical abuse of a match official could result in a contravention of either or both of laws 6.A.5 and 10.4(l).

The Judicial Officer determined that this was not a preliminary matter which required to be resolved prior to the Player being required to state whether he did or did not accept the citing complaint but rather it was a matter relevant to sanction. The Player did not need to know into which category in Schedule 3 his alleged offending would be categorised if established or

admitted in order for him to decide how he would respond to the citing complaint.

After a brief adjournment during which Mr Tully took instructions from the Player the meeting reconvened and the Player then stated that he admitted that he had committed the act of foul play alleged against him in the citing complaint and that he accepted that the citing complaint should be upheld.

The Judicial Officer therefore upheld the citing complaint and proceeded to determine what sanction, if any, should be imposed on the Player.

In determining the sanction, if any, to be imposed on the Player the Judicial Officer had regard to two video clips showing the incident, one of which was extended to show a conversation between the Player and the referee shortly after the incident. The Judicial Officer also had available a copy of the whole broadcast footage of the Match, and he viewed the whole of the second half; the Player having come on as a replacement at half time.

In addition the following documentary material was provided and considered:-

- Letter from the Disciplinary Officer to Professor Crerar dated 19 October 2009 enclosing copy citing complaint.
- Completed citing complaint form compiled by the Citing Commissioner.
- Notification of citing complaint and Hearing date sent to the Player by Professor Crerar.
- Referee's statement (undated), TMO statement dated 19 October 2009 and touch judges statement given by Jon Mason (undated).

Insofar as the referee in his statement expressed an opinion as to what he would have done had he been able to see at the time what he later saw on the video that part of the referee's statement was disregarded as inadmissible.

- Note for Citing Hearing 22/10/09 prepared by Mr Tully
- Undated statement from Dr David Cleal on Northampton Saints headed paper

- Email from Disciplinary Officer to Judicial Officer dated 21 October 2009 responding to the Note for Citing Hearing.

At the time of the reconvened Hearing on 2 November 2009 the following additional items of documentation were available and considered:-

- Email with hyperlinks to items of documentation from the Disciplinary Officer to Mr Tully dated 26 October 2009
- Email from Mr Tully to the Judicial Officer responding to the Disciplinary Officer's email of 26 October dated 27 October 2009
- Email from the Judicial Officer dated 28 October 2009 responding to emails of 26 and 27 October 2009
- Note for Citing Hearing on 2 November 2009 compiled by Mr Tully
- Statement of Dr David Cleal dated 26 October 2009
- Copy clinical notes prepared by Dr Cleal dated 17 and 19 October 2009
- Copy RFU/Guinness Premiership, Concussion Management Programme 2007/08
- Statement of Matthew Lee, physiotherapist, Northampton Saints dated 27 October 2009
- Copy letter of apology from the Player to the referee dated 26 October 2009
- Copy letter from South Africa Rugby dated 21 October 2009 stating that the Player had no disciplinary record while playing rugby in South Africa
- Undated note from Rassie Erasmus relating to Player giving character reference on his behalf
- Copy IRB Regulation 10

- Copy RFU Concussion Guidance taken from RFU website
- Copy webpage from MERCK website relating to concussion
- Copy webpage from CNNhealth.com relating to concussion
- Email from Mr Duthie to Mr Tully dated 1 November 2009
- Extracts from Collins dictionary giving dictionary definitions of physical and abuse
- Decision of a Discipline Committee in the case of Alesana Tuilagi dated 25 January 2007
- Copy letter from HHJ Jeff Blackett to Mr Lee Thomas Sail Sharks RFC dated 22 September 2009
- Exchange of emails (redacted) passing between Mr Duthie and Ms Susan Ahern (legal counsel to the IRB) dated 23 and 28 October 2009

In addition, video clips were provided showing two incidents in which a player Lee Thomas is seen to apparently push referees. The two matches are referred to in the letter from HHJ Jeff Blackett to Mr Thomas to 22 September 2009.

EVIDENCE OF THE PLAYER

At the start of his evidence the Player confirmed that he understood the charge against him, that he accepted that he had committed an act contrary to good sportsmanship by pushing the referee in the back, that he recollected doing so and that he accepted that it was a valid citing.

The Player came on as a replacement prop at half time in the Match.

The Player's recollection of the events of the Match are somewhat hazy and confused. He explained this by the concussion described below.

He recollected that at about 20 minutes into the second half there were a series of physical contacts of a particularly strong nature between the forwards on both sides. This was associated with a series of scrummages.

He had since the Match seen the DVD of the incident which led to the citing.

At the break up of the final one of these scrummages an opposition player, the Perpignan tight head prop (number three) pushed the Player. The Player has no specific recollection of this incident and does not now know of any reason why this Perpignan player should have pushed him in the way that he did. The Player did not respond in any way to this push.

The Player recollected making his way towards the next sequence of play which took him across the pitch from left to right from the perspective of the direction in which his team was playing.

The referee is between the ruck which has formed and the Player; looking towards the ruck i.e. with his back to the Player.

The Player acknowledged that as he approached the ruck he draws his arms back and pushes the referee firmly in the back so that the referee stumbles forward.

There is a suggestion that the Player said “move” to the referee as he pushed him but the Player does not recollect doing so. During cross-examination the Player acknowledged that whilst he does not recall shouting anything at the time that he pushed the referee it could have been him that shouted “move” and if so it would have been because he thought that it was someone from the opposition and that he wanted him to move.

The Player’s only recollection of the incident is of someone being in the way between him and

the ruck and that this causes him to push this individual so that he can make his way to the ruck.

The Player recollected looking towards the individual but not being conscious at the time that the individual concerned was the referee. During cross-examination the Player initially said that he did not know that it was the referee that he had pushed and that at the time he did not know who it was that he had pushed. He said "I did not know who it was, I was trying to get to the ball". Subsequently, still during cross-examination, the Player said that he thought the person he pushed was someone from the opposition and that he wanted that player to move. During questioning from the Judicial Officer he said that he thought the person he pushed was "a lazy runner in an offside position".

The Player is not colour blind and acknowledged that there was a clear difference in the colour of top between the referee, who was wearing a green top, and the opposition players who were wearing maroon tops.

The Player acknowledged that it is clear from the DVD that there was adequate room either side of the referee for the Player to have gone round this individual whether he was the referee or one of the opposition players.

The Player recollected realising after he pushed the person that it was the referee and states that he apologised for having pushed the person.

The Player confirmed that at the next breakdown in play the referee said to him words to the effect that there was plenty of room for 31 persons on the pitch and that if the Player pushed him in the back again then the Player would be sent off. During cross-examination the Player stated that he had again said sorry to the referee at this point.

The Player's recollection of this incident, together with all other incidents relevant to this matter is hazy and confused.

The Player denied that he intended to push, assault, manhandle or in any way physically interfere with the referee. The Player had no specific explanation as to why he did what he did other than that he was in a confused state because he was concussed.

The Player advised that he had not had any form of confrontation with the referee, was not aware of the members of his team being unhappy in any way with the referee's performance or that there had been any prior incident involving himself and the referee or any of the players in his team which might have caused him to push the referee because of some negative feelings towards the referee.

The Player asserted that about 10 minutes after the incident involving the referee that the Player can be seen on the DVD footage being ill on the pitch. He is seen to vomit and then to receive treatment from his team physiotherapist and doctor.

The Player advised that he was extremely dizzy and had a severe headache during the whole of this period and that he felt nauseous. He advised that by the end of the match he could barely stand and that after the game he had to lie down on the floor. He said that he was made to lie down by the Club doctor because of his condition.

The Player cannot now recollect the incident which led to him being concussed. However, during the Match the Player asserted that he developed a bruise on his right temple and that this was pointed out to him by the Club doctor when he was treated on the pitch.

The Player advised that the bruise was there at the end of the Match but that it had subsided by

the time of the Disciplinary Hearing.

The Player claimed that he told the doctor when he was being treated on the pitch that he was feeling sick. He recollected being asked questions about where he was, who he was playing against, what half he was playing in etc and answering the questions although he cannot now recollect the answers that he gave.

The Player explained the incident with the referee by the concussion which he asserted he was suffering from at the time and which was a consequence of a blow to the head prior to the incident when he pushed the referee. He claimed that the blow to the head and resulting concussion caused him to be confused, disorientated and unwell.

The Player was very sorry for what he had done as regards pushing the referee and stated that if he had the option to do so he would apologise to the referee once again for what he had done. The Player asserted that he was not responsible for his actions at the time that he pushed the referee.

During the course of cross-examination by Mr Duthie for the Disciplinary Officer the Player asserted:-

- That at the end of the scrummage where he was pushed by the Perpignan number three he was not sure where the ball was and was only partially conscious of where the play had moved over to.
- He could not see where the ball was in the ruck he was moving to but he recollects that he could see where the player who had the ball was.

- His impression now was that the referee was just in the space where the player wanted to go. He was not conscious at the time of their being space either side of this person who was in his way and there was no premeditation in what he did. His impression is that he just pushed this person, without knowing who the person was, in order to get the person out of the line of travel that he wanted to take.
- His feeling now is that he was fixed on the idea that it was his job to get to where the ball was and that the quickest way to get there was to push this person out of the way so that he could make his way to that point.
- He had never behaved in this way previously, has never had any form of physical interaction with a referee, it was totally out of character for him to behave in this way, he has never been sent off or cited previously.
- He recollected having a severe headache at the time. This was both before and after he made contact with the referee.
- Since the Match he had not engaged in full training. He had not been allowed to have physical contact training because of his concussion. He does not know when he will have a full medical or when he will be fit to recommence full training.
- At the conclusion of the Match he claimed to have been given anti-inflammatory medication and painkillers by the Club doctor. He did not go to hospital or have any form of investigations such as x-rays after the Match.

Under questioning from the Judicial Officer the Player contended:-

- That at the time he was being treated on the pitch by the doctor he did not feel able to carry on and he told the doctor that that was the case. He recalls feeling extremely unwell at the time. He claims that the doctor replied that his team already had a prop off the field and that there was no one else to play prop amongst their replacements.
- He recollects that the Club doctor drew his attention to the bruise on his right temple at that time.

VIDEO CLIPS

The longer video clip starts with showing a scrum at which Northampton Saints have the put in and with Northampton attacking from the right to the left of the screen. The Player was at this time playing tight head prop and he is at the other side of the scrum from the perspective of the viewer.

Northampton won the scrum and the ball was channelled back to the Northampton number eight from where the Northampton scrum half goes to collect the ball. The exact detail of events is not clear from the video because it takes place at the other side of the scrum but the scrum begins to break up and the video shows the Player being released from the scrum.

It appears that there follows some interaction (which cannot be clearly seen) between the Player and the Perpignan flanker which results in the Player stumbling to the ground. The Player then returns to his feet but is facing and remains facing towards his own team's Goal Line. This is not consistent with what one would normally expect since by this time the play had moved off to the right of the pitch from the Northampton perspective and all other persons, apart from one, that can be seen in the video are following the play with their eyes and are making towards the play. The exceptions are the Player and the Perpignan tight head prop. The Perpignan tight head prop is facing towards the Player. He makes his way over to the Player and pushes the Player on the shoulder. There is no reaction from the Player who commences to walk slowly in what is almost the opposite direction from where the play now is, and where a ruck is developing he is seen to walk towards his own Goal line. The Player then moves out of shot to the right.

After a few seconds the Player is seen to re-enter the shot from the right jogging towards the play.

The referee's attention is directed towards the ruck and he has his back to the approaching Player. There is ample room to either side of the referee for the Player to pass by the referee so as to take part in the ruck.

However, the Player appears to make his way directly towards the referee and he pushes the referee firmly on the back with both hands causing the referee to stumble forward a few steps. Whilst the referee loses his balance he remains upright.

It should be noted that when the Player pushes the referee a sound can be heard at that instant. It is a sound picked up over the referee's microphone and it may be the word "move" being said by the Player.

The play then moves away, across the pitch to the left from the Northampton perspective, and shortly thereafter the referee blows for an infringement when a Northampton pass goes forward.

The referee then speaks to the Player and says words to the effect that there is plenty of room on the pitch for 31 people and that if the Player pushes the referee in the back again then the referee will send him off. There is no identifiable oral response from the Player although it is possible that he may have said something briefly to the referee at this point.

FULL MATCH VIDEO

The full Match video indicates no incidents, other than the push, between the Player and the referee which might indicate any negative feelings by the Player towards the referee. The same applies to the Northampton Saints team in general. There is no identifiable incident in which the Player is in any way treated unjustly by the referee. It is not possible from the video to identify any specific incident where it could be said that the Player sustained a head injury.

However, there are a series of "physical" scrummages immediately prior to the pushing incident. The Player is involved in these scrummages and it is possible that at some point during these scrummages the Player sustained a head injury which resulted in a concussion.

The first piece of unusual behaviour on the part of the Player that can be identified on the Match video is the Player looking away from the play and walking towards his own Goal line immediately prior to the pushing incident.

The Match video also confirms that the Player was treated by Dr Cleal in approximately the 72nd minute of the Match after he had become unwell.

The general impression of the Player's involvement in the Match following the pushing incident is that he does not appear to be fully engaged. The Judicial Officer considered that the observations of Dr Cleal that the Player was "slow" during the relevant period is a reasonably accurate description of the Player's demeanour.

DR CLEAL'S EVIDENCE

Dr Cleal in his two reports and oral evidence describes having first become aware that there may have been a physical issue with the condition of the Player in about the 72nd incident of the Match.

Dr Cleal is a general practitioner with 23 years of experience and with 10 years experience in sports medicine. He has a Diploma in Sports Medicine. He was pitch side on medical duty at the Match. He has dealt with, diagnosed and treated numerous incidents involving players being concussed. A diagnosis of concussion by Dr Cleal is likely to be reliable.

In about the 72nd minute he was required to enter the field of play to attend to another player. He witnessed the Player on his hands and knees at this stage retching. A Northampton physiotherapist, Matt Lee, had initially attended to the Player and had witnessed him vomiting.

The Player complained of nausea but no pain. Dr Cleal asked if the Player had taken a knock to the head or abdomen and the Player replied "I don't think so".

A brief assessment revealed no evident external haemorrhaging, the Player was orientated in time and place and he responded appropriately to abbreviated Maddocks questions. No bruising to the face or head of the Player was evident at this time but the examination was brief and identification of bruising is more difficult in the case of persons with darker skin pigments.

Dr Cleal suspected concussion but was unable to confirm the diagnosis at that point. He was satisfied that the Player was able to continue subject to his condition being monitored. Dr Cleal radioed the coaches and physiotherapists advising that the Player had vomited with no apparent explanation other than that he should be monitored.

The Player's condition was not, at this time, such as would have warranted the Player be removed from the field of play.

Immediately after the Match the Player experienced an incident of partial collapse in the dressing room. He complained of feeling dizzy with a right-sided headache. He had no clear recall of any specific head injury however his recall of match events was patchy and poor. There was evidence of bruising and rawness to his right temple and eyebrow. The area was tender and coincided with the location of his headache. There were no other significant signs and the Player's dizziness improved in the next 10 to 15 minutes. The Player was given paracetamol for headache. He was not given anti-inflammatories. Anti-inflammatories are contraindicated for concussion.

The Player's condition was reviewed on five separate occasions after the Match by Dr Cleal and into the following day. Dr Cleal was satisfied that the Player's condition had improved and the Player was able to travel home with the team on the following day and then to go to his home on the evening of the following day.

Much evidence at the Hearing was taken up with details of the treatment given to the Player after the Match but it is not necessary that these details should be narrated in full.

Dr Cleal was satisfied that the Player had sustained a head injury which had resulted in a concussive episode beginning at some point during the second half of the Match.

Dr Cleal was not able to pinpoint from the Match video precisely when the head injury had occurred and the concussion had commenced but he was suspicious that the head injury had occurred during the scrummages immediately prior to the incident where the Player pushes the referee.

Dr Cleal considered that the Player's actions at the break up of the scrum immediately prior to the pushing incident and during and following being pushed by the Perpignan player were unusual and were inconsistent with the normal reaction that one would expect from a professional rugby player in such circumstances. Dr Cleal would have expected to see the Player fully involved in the play, focused on where the ball was moving and he would have expected him to react adversely to being pushed by the Perpignan player.

Dr Cleal explained that during a concussive episode the symptoms exhibited by the person with

concussion may rapidly change over a relatively short period. There was nothing inconsistent with a diagnosis of concussion where a player was confused and disorientated at one point and then only a few minutes later was vomiting but was orientated and then 10 minutes later the same person might go into a partial collapse. Dr Cleal explained that concussive episodes often show changing symptoms over a relatively brief period of time. He also explained that whilst there is an association between the severity of the symptoms of concussion and the severity of the blow to the head which causes the concussion the two are not necessarily co-relative. One person might sustain a very severe head injury with little in the way of symptoms of concussion whereas another person might sustain a relatively minor blow to the head but nonetheless exhibit very severe symptoms of concussion.

Dr Cleal's clinical opinion was that at the time that the Player pushed the referee the Player's reactions and judgement may have been impaired as a consequence of the concussive episode which was subsequently diagnosed.

Dr Cleal advised that he did not see the bruise to the Player's temple until after the Match was completed. Further he asserts he said nothing to the Player about having to carry on in the 72nd minute. Dr Cleal states that the Player did not tell Dr Cleal he wanted to go off in the 72nd minute.

Where the evidence of the Player and that of Dr Cleal conflicted the evidence of Dr Cleal was preferred. Dr Cleal explained that it was not unusual in cases of concussion for there to be transference of understanding on the part of the concussed person between that which the person thinks and that which he thinks he hears and/or says. The confusion can be profound. It may well be the case that the Player believes he said to Dr Cleal that he had to go off but in fact he may simply have had the thought that he required to go off. The Player may have had the thought that there were no replacements for him as prop and therefore he could not go off. Equally the Player may be confusing the identification of the bruising on the field in the 72nd minute with the identification of the bruising in the changing room during the period of partial collapse. It was not considered that the Player was being deliberately untruthful but rather that the Player's concussive episode makes him a witness whose reliability as regards events at the time must be treated with caution.

STATEMENT OF MR LEE

In his statement Mr Lee advised that he had some 10 years working experience within rugby

medical care and that he was providing pitch side medical care for Northampton Saints during the course of the Match. During the second half he noted that the Player was on his knees and that on attending to him Mr Lee identified that the Player was retching and had just vomited. Mr Lee asked the Player whether he had received a blow to the head and the Player replied that he did not think so but that something was making him sick. The Player responded appropriately to questioning and displayed no evidence or external signs of a head injury at that time. Mr Lee thought the Player's condition warranted an assessment from Dr Cleal and Mr Lee alerted Dr Cleal to the circumstances. Dr Cleal then attended to the Player as described in Dr Cleal's evidence.

After the end of the Match Mr Lee returned to the changing room and noticed that the Player was lying on his back on the floor at the corner of the changing room. Mr Lee immediately drew the condition of the Player to the attention of Dr Cleal so that his assessment could continue. Following that assessment Dr Cleal confirmed a diagnosis of concussion.

Following consideration of all of the evidence in the case including video evidence, medical reports and statements from the physiotherapist, the evidence of the Player and the evidence of Dr Cleal the Judicial Officer was satisfied on the balance of probabilities that at the time that the Player pushed the referee the Player was undergoing a concussive episode by reason of a head injury which had occurred earlier during the second half of the Match. The Judicial Officer was also satisfied on the balance of probabilities that the Player's judgement had been impaired at the time that the Player had pushed the referee in the back.

CONCUSSION

Having considered the evidence of the Player and that of Dr Cleal together with the statement of Mr Lee and the video evidence of the Match, the Judicial Officer was satisfied that at the time that the Player pushed the referee the Player was suffering from a concussive episode. The Judicial Officer was so satisfied on the balance of probabilities.

The conduct of the Player in pushing the referee was bizarre, out of character and out of keeping with the spirit of the Match. It is considered inherently unlikely that in circumstances such as applied in this case that a player would intentionally push a referee without cause or necessity. There was ample room for the Player to make his way to the ruck without pushing the referee. This was not a case in which the referee was in such close proximity to a ruck as to impede players. The Player's other conduct at that time is out of keeping with what one would usually

expect of a professional rugby player engaged in a match of such importance. The Player's partial detachment from events is apparent.

One of the aspects that led the Judicial Officer to the conclusion that there had been concussion was the evidence of rawness and bruising at the end of the Match on the Player's right temple and eyebrow.

The Judicial Officer had no reason to doubt the diagnosis of Dr Cleal that the Player suffered from a concussive episode particularly given the evidence of vomiting and nausea in the 72nd minute and the partial collapse following the Match.

The Player's description of events and his symptoms during the Match was credible. He gave his evidence without apparent exaggeration or embellishment. Where his recollection was impaired he acknowledges that such was the case.

However, the extent of the concussion was not such as to wholly exclude the responsibility of the Player for his actions. It was apparent that the Player had determined on a course of action in making his way to the ruck and that he had decided to push aside whomsoever was in his way. It happened that the person was the referee but it might just have easily have been one of his opponents. The Player was not so disorientated in time and space that he was unable to answer the Maddocks abbreviated questions put to him in the 72nd minute.

In the circumstances the Player was correct to accept the citing complaint and acknowledge that he had committed an act of foul play.

The effect of the concussive episode on the Player's judgement and responsibility are reflected in the mitigation applied to sanction which is discussed below.

SANCTION

Disciplinary Rule 6.7.31 requires the Judicial Officer to determine the section of appendix three which properly characterises the established or admitted offending on the part of a player.

Mr Tully submitted that the references to laws 6.A.5 and 10.4(1) in the same column in relation to the second row of appendix 3 meant that the law references should be read conjunctively and that since the Player had not been charged with a contravention of law 6.A.5 and that there was

nothing in the facts before the Judicial Officer which could amount to a contravention of section 6.A.5 that therefore the Player's offending ought not be placed in that category.

Mr Duthie on behalf of the Disciplinary Officer argued that there was no reason why the references to laws 6.A.5 and 10.4(l) should be read conjunctively. The word "and" or an equivalent did not appear between the two law references.

He observed that there are three entries with the same structure appearing at the beginning of appendix three. The first entry relates to verbal abuse, the second physical abuse and the third threatening actions. All three are referenced to match officials. The description column he asserted is not intended to be indicative of the particular law offended against; rather it objectively describes a particular form of conduct which might occur on the field of play. The particular conduct described in each of the first three entries could give rise to a contravention of laws 6.A.5 and/or 10.4(l). The purpose in referencing the two laws was, he said, to clearly identify within appendix three that the particular conduct concerned could give rise to a contravention of either or both of the laws specified.

Mr Duthie also drew attention to the entry in appendix three for "Dangerous charging or obstructing or grabbing of Opponent without the ball, including shouldering". In the case of that entry the referenced laws are 10.4(f) and 10.4(j). The word "and" does not appear before the two law references. Law 10.4(f) is concerned with "Playing an opponent without the ball". Law 10.4(j) is concerned with "Dangerous play in a scrum, ruck or maul".

The reference to law 10.4(j) in this section must be a reference to the components of that law which concern prohibited physical interactions by players with opponents who do not have the ball. It was, Mr Duthie contended, apparent that the drafter of the entry could not have been intending that these two law references were conjunctive since conduct which might result in a contravention of 10.4(f) would take place on a wholly different context from conduct resulting in a contravention to 10.4(j).

The Judicial Officer agreed with the submissions on this matter made by Mr Duthie on behalf of the Disciplinary Officer. The references to the two laws in the first three entries in appendix 3 are not intended to be conjunctive.

A player can commit physical abuse of a match official without that in any way involving the player contesting a decision of the referee. It cannot have been in the intention of the drafters

that in a case of physical abuse of a match official involving contesting a decision that the low entry point would be 24 weeks whereas the same physical abuse of a match official which did not involve a contravention of law 6.A.5 would attract no more than a low end entry of 4 weeks.

A player may be sent off for any infringement of the Foul Play Law under reference to law 10.5(a). There is a definition of foul play at the beginning of law 10. The definition is widely drawn. By law 6.A.5 a penalty kick is given for a contravention of that law. A player may be sent off for contravention of law 6.A.5. It is therefore necessary to make provision in appendix three for entry points in relation to players who come before judicial bodies on the basis of a contravention or alleged contravention of law 6.A.5. The inclusion of a reference to that law in each of the first three entries in appendix 3 is no more than a reflection that those laws appear earlier in the laws of the game than the Foul Play Laws at 10.4. It would have been pointless for the drafters of appendix 3 to have gone to the trouble of repeating the references to verbal abuse, physical abuse and threatening actions in relation to contraventions of law 10.4(1) at the end of appendix three when there would have been identical references to the same described events, entry points and maximum sanctions in the first three entries in appendix three. The submission made on behalf of the Player in relation to this matter was therefore rejected.

DISCIPLINARY RULES 6.7.31 TO 6.7.36 (INCLUSIVE)

For the purpose of assessing the seriousness of the Player's conduct the Player's actions in pushing the referee were intentional, although his judgement was affected by his concussion. Recklessness did not arise. The Player used his hands and there was no provocation nor was the Player acting in retaliation or in self-defence. The referee reported that he suffered some injury from the push which affected his ability to work for a number of days. There was no effect of the Player's actions on the game. The referee was somewhat vulnerable at the time because he had no reason to expect the push and was therefore thrown completely off balance when he was pushed. The Player fully participated in the offending but there was no premeditation. The conduct of the Player was completed.

Having regard to the seriousness of the Player's conduct the Judicial Officer categorised the Player's offence as being at the lower end.

Mr Tully argued that the Player's offending should not be regarded as amounting to physical abuse of a match official. Mr Tully contended that in order for the offending to amount to physical abuse there had to be some element of hostile *animus* in the mind of Player towards the

referee. There was, he said, therefore a subjective component within the word “abuse” which required the Judicial Officer to consider the nature of the act and the state of mind of the Player when the physical act was committed.

Mr Duthie for the Judicial Officer contended that there was no element of subjectivity within the term physical abuse. It was an objective description of a wide range of possible physical interactions which could take place between a player and a referee which went beyond near accident. Mr Duthie referred to the dictionary definitions of each of “physical” and “abuse” in Collins dictionary and asserted that in order to fall within those definitions was there no need for any subjective element to be included when deciding whether a particular act did or did not amount to physical abuse.

Mr Duthie made reference to his exchange of emails with Ms Ahern (legal Counsel for the IRB) where she expressed her opinion that a push to a referee would amount to physical abuse and she reported what was said to be the view of the Judicial Chairman of the IRB Mr Gresson that in drafting appendix 3 it had been intended that acts such as pushing a referee would amount to physical abuse.

It was apparent that Ms Ahern and Mr Gresson had not been provided with any detail of the incident and it was not therefore possible to determine from the email exchange whether or not they had regarded a push as necessarily involving some form of aggressive intent, perhaps with malice on the part of the Player concerned.

The Judicial Officer was satisfied that the term “physical abuse” was not intended to have any form of subjective component. It was simply a description of a broad range of potential actions involving physical contact between a player and a referee which went beyond mere accidental contact. The question is, was the referee physically abused? If the answer to that question is “yes” then the offending is properly characterised as falling within the second entry in appendix 3. In this case the referee was physically abused. He was deliberately pushed in the back causing him to stumble forward and sustain an injury. Such actions on the part of the Player constitute Physical Abuse whatever may have been the Player’s intention or responsibility.

It follows that the relevant low end entry point for the offending admitted by the Player was 24 weeks.

There were no aggravating factors for the purpose of Disciplinary Rule 6.7.34 and none were

suggested on behalf of the Disciplinary Officer.

Mr Tully sought to make a comparison with the incidents involving Lee Thomas. However, for the reasons given by the Judicial Officer as chairman in the case of *Moodie* such comparisons are not valid.

With reference to Disciplinary Rule 6.7.35 there were substantial and compelling mitigating factors. The Player acknowledged his culpability and guilt. It was noted the Player had not fully responded to the standard directions but this was explained by the preliminary matter taken by the Player's Counsel which was wholly appropriate to take although it was rejected by the Judicial Officer. The Player is of a good character and has no previous disciplinary record. The Player conducted himself impeccably both during the conference call at the first hearing and in person at the second hearing. The impression given was that he was genuinely attempting to answer all questions put to him fully and honestly even where his recollection was impaired by his concussion during the Match. The Player expressed remorse for his actions towards the referee. He apologised at least once on the day of the incident, perhaps twice, and he has subsequently written to the referee apologising.

The list of potential mitigating factors in Disciplinary Rule 6.7.35 is not exclusive. Further, under reference to Disciplinary Rule 6.7.36(b), compelling mitigating factors may be on field and/or off field. In this case, for the purposes of Disciplinary Rule 6.7.36, the Judicial Officer was satisfied that there were no (on field and/or off field) aggravating factors and there are compelling (on field and/or off field) mitigating factors. Such mitigating factors include the concussion from which the Player was suffering and which impaired his judgement and responsibility at the time of commission of the contravention of law 10.4(1). The existence of the concussion constitutes an exceptional circumstance. In terms of Disciplinary Rule 6.7.36 it was, in the circumstances, open to the Judicial Officer to reduce the period of suspension below the low entry point and further, having regard to the exceptional circumstances, it was, the Judicial Officer determined, necessary to apply a greater reduction than 50% from the entry point in order to avoid clear injustice/unfairness to the Player. In the circumstances the Judicial Officer determined that the appropriate reduction from the entry point was 75%, which results in a period of suspension of 6 weeks.

At the first hearing on 22 October 2009 the Judicial Officer imposed an interim suspension from that date until the reconvened hearing on 2 November 2009 in accordance with Disciplinary Rule 6.7.5. A separate note has been previously issued in relation to this interim suspension.

The period of interim suspension requires to be taken into account in determining the final period of suspension. Accordingly, the Player was suspended from 22 October 2009 until midnight on 2 December 2009.

COSTS

The Disciplinary Officer sought an award of costs in his favour pursuant to Disciplinary Rule 6.7.45. This included the costs of holding the hearings, the expenses and charges in relation to the Judicial Officer and the legal costs of the Disciplinary Officer.

Mr Tully on behalf of the Player resisted an award of costs on the basis that at the time of the offence the Player had been suffering from concussion and his responsibility was diminished.

The Judicial Officer determined to award the costs sought to the Disciplinary Officer on the basis that it was determined that the Player had borne a degree of responsibility for the pushing of the referee, that the period of suspension was not insignificant and that in all the circumstances an award of costs against the Player was appropriate. The Disciplinary Officer is invited to submit details of the costs sought for approval (or otherwise) by the Judicial Officer.

The parties were reminded at the hearing of their right to appeal.



Rod McKenzie
Judicial Officer (Chairman of Disciplinary Committee)
06 November 2009