

Decision of Appeal Committee

ERC

Held by telephone conference call

23 December 2010

In respect of an appeal by

Paul O'Connell ("the Appellant")

And

The decision of HHJ Jeff Blackett ("the Judicial Officer") dated 16 December 2010 ("the Decision")

Members of the Appeal Committee ("the Appeal Committee"):-

Professor Lorne Crerar (Scotland) (Chairman)

Mr Rod McKenzie (Scotland)

Mr Simon Thomas (Wales)

Decision of the Appeal Committee:

- (i) that the Appellant failed to establish that the decision challenged was in error;
- (ii) the Appeal Committee accordingly determined that the decision should not be overturned or varied and the Appeal was refused; and
- (iii) that both parties are to provide written submissions as to costs within the timescales provided by the Appeal Committee.

Introduction

The Appeal Committee was convened by Professor Lorne Crerar, Chairman of the ERC, Disciplinary Panel, pursuant to the Disciplinary Regulations in the Participation Agreement of the Heineken Cup 2010/2011 ("DR") in respect of the Ordering Off of the Appellant in the match between Munster and Ospreys on 12 December 2010 by the appointed referee, Mr Christophe Berdos ("the Referee"). The Referee's report on the red card stated that the Appellant struck the face of Osprey's Number 8 with his elbow.

The Ordering Off was considered by His Honour Judge Jeff Blackett ("the Judicial Officer") at a hearing on 16 of December 2010 in Dublin. The Judicial Officer issued his decision on 17 December 2010 ("the Decision"). The Judicial Officer determined that the Appellant's challenge to the Referee's decision to order him off should not be upheld. The Appellant was therefore suspended from taking part in the game of rugby up to and including 9 January 2011. This represented a four week suspension commencing on 12 December 2010. Finally, the Judicial Officer made an award of all reasonable costs incurred by ERC against the Appellant in a sum to be determined within 14 days.

The Appellant appealed by Notice of Appeal, dated 22 December 2010 in accordance with DR 7.2.1(b). The Notice of Appeal included nine specific Grounds of Appeal, the first of which being that "the Judicial Officer erred in not finding that the reason for the Referee's decision was wrong when by the Referee's own admission and the evidence presented it clearly was." It was thereafter stated in the Notice of Appeal that "the Judicial Officer erred in not deciding to take no further action".

The Appeal Committee heard the Appellant's Appeal by telephone conference call on Thursday the 23rd of December 2010.

In addition to the members of the Appeal Committee, the following individuals joined the Hearing by conference call:

The Appellant

Mr Donal Spring, Solicitor of Daniel Spring & Co, representing the Appellant ("the Appellant's representative")

Mr Roger O'Connor, Disciplinary Officer, ERC ("the Disciplinary Officer")

Mr Max Duthie, solicitor of Bird & Bird LLP, representing the ERC Disciplinary Officer ("the Disciplinary Officer's representative")

Ms Jennifer Nicol, solicitor of Harper Macleod LLP, Clerk to Appeal Committee

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

1. Charge letter and red card 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 mentioned in the Decision
 4. Recorded DVD video evidence which was before the Judicial Officer
 5. The Decision dated 16 December 2010
 6. The Notice of Appeal by the Appellant (contained at Appendix I)
 7. ERC's response to the Appellant's specific Grounds of Appeal

Preliminary matters

At the commencement of the hearing the Chairman of the Appeal Committee noted the identities of all present and reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement for the Heineken Cup 2010/2011 (the "Disciplinary Rules" and "DR" in the singular) would apply. The Chairman outlined the procedure to be followed to determine the Appeal. The Appellant and all present agreed to proceeding on that basis.

The Chairman of the Appeal Committee invited the Appellant and Disciplinary Officer to confirm whether or not they had any preliminary issues that they wished to raise. Both parties to the Appeal confirmed that they did not wish to raise any preliminary matters.

Substantive Appeal

The crux of Mr Spring's submission, as it concerned whether any sanction should be imposed, was that "the Judicial Officer had erred in not finding that the reason for the referee's decision was wrong when, by the referee's own admission and the evidence presented, it clearly was." It was the Appellant's position that the primary reason the Referee issued a red card was because the referee believed the Appellant struck his opponent with his elbow when in actual fact he struck him with his lower arm. It was further submitted that as a result of this fundamental error by the Referee as to the part of the arm which was used by the Appellant in committing the alleged act of foul play the Judicial Officer should have taken no further action. The Appellant's representative sought to rely upon the specific wording of IRB Regulation 17.11.1 and 17.11.2.

The Appellant's representative explained to the Appeal Committee that the intention of the Appellant was to strike the opposing player with his arm in order to "break his bind" and escape from Osprey's Number 8 (Jonathan Thomas). The Disciplinary Officer's representative commented that if there was an intention to strike then this would automatically amount to an act of foul play.

Mr Rod McKenzie of the Appeal Committee referred the Appellant's representative to page 4 of the Decision and in particular the section headed "Player's Challenge" where it is stated:

"He said he did not expect to make contact when he did – he thought Thomas was to his left or behind him and the impact was a lot earlier and more forceful than he thought."

Mr McKenzie suggested to Mr. Spring that the specific Grounds of Appeal do not appear to question

the manner in which the Judicial Officer recorded the Appellant's evidence and noted that it is manifestly clear from the words "when he did" that the Appellant deliberately intended to strike his opponent whatever might have been his reason for so doing.

Mr Duthie argued that by incorrectly identifying the specific point of contact of the Appellant's arm is not a sufficiently distinguishing feature of the Referee's decision to issue a red card that would permit the Judicial Officer to treat the Referee's decision as wrong. It was also submitted on behalf of the Disciplinary Officer that even if there was an error in the Referee's reasoning the Judicial Officer or Appeal Committee could have amended the offence for which the Appellant was shown a red card under DR 8.8.

Determination of the Appeal Committee

The Appeal Committee referred to the procedure to be followed in cases arising out of a player being shown a red card which is clearly stated at DR 6.2.2 in the following terms:

"In cases arising out of a Player being shown a red card, the function of the Disciplinary Committee shall be to review the showing of the red card, including the referee's reasons for showing the red card to the Player and the circumstances surrounding the red card, in order to determine what further action (if any) should be taken..."

Mr McKenzie noted that the task for the Judicial Officer was not to determine whether or not the decision of the Referee should or should not be upheld. The issue was whether or not any further action should be taken and, if so, what the action should be.

The Appeal Committee were of the view that there were several elements to the reasons for the Referee's decision and only one of the elements was factually incorrect. The reasons for the Referee's decision are not necessarily "wrong" on the basis of an erroneous factual understanding in one part of his reasoning. The substance of the act of foul play for which the referee ordered the player from the playing enclosure was the same as that disclosed by the evidence admitted and held established by the Judicial Officer. The Judicial Officer was entitled on the evidence to find that the Player had deliberately struck Mr Thomas in the way described by the Judicial Officer and the fact that slow motion and multi angle camera views established that hit was the Player's lower arm which impacted with his opponent's face rather than his elbow did not mean that the referee's reasons were wrong. The nature, character and consequences of the Player's act as determined by the referee on the field of play were not in substance different from that held established by the Judicial Officer.

The members of the Appeal Committee were of no doubt that the Appellant had committed an act of foul play and were mindful of the fact that this had resulted in a significant injury being inflicted upon Mr Thomas. The Appellant admitted that his intention was to strike his opponent with his arm.

The Appeal Committee considered that the Judicial Officer had exercised appropriate discretion in

concluding that the Appellant's actions were intentional and that a mid range entry point was appropriate.

In respect of the Appellant's representative's assertion that the Judicial Officer erred in his mitigation in not giving sufficient credit for the Appellant's "excellent record", the Appeal Committee were of the view that the Judicial Officer had given appropriate weight to mitigation from the entry point. The minimum sanction that could have been imposed from the mid range entry point was three weeks and full mitigation was clearly not appropriate in circumstances where the Player had contested whether any sanction should be imposed and where he had previously been suspended following a disciplinary process.

Finally, the Appeal Committee were not made aware of any satisfactory reason why the Appellant had not apologised to the victim player immediately following the incident and agreed with the Judicial Officer that the Appellant had not shown "real remorse".

Conclusion

The Appellant failed to establish that the Decision was in error and the Appeal Committee therefore determined that the Decision and should not be overturned or varied. The Appeal was accordingly refused.

Costs

A decision will be made by the Appeal Committee in respect of costs once it has received the written submissions from both parties.



Professor Lorne D. Crerar
Chairman
Appeal Committee
29 December 2010