

EUROPEAN RUGBY CUP

DECISION OF APPEAL COMMITTEE

**HELD AT THE OFFICES OF THE EUROPEAN RUGBY CUP
3RD FLOOR, HUGUENOT HOUSE, 35-38 ST STEPHENS GREEN, DUBLIN 2,
IRELAND**

6th February 2008 ("The Hearing")

IN RESPECT OF:-

An appeal by Alexandre Audebert ("the Appellant") against a decision of a Disciplinary Committee dated 25th January 2008, finding that the Player had committed an act of foul play, upholding a citing complaint and suspending the Player for a period of eight weeks ("the Decision").

MEMBERS OF THE APPEALS COMMITTEE ("the Appeals Committee"):-

His Honour Judge Jeff Blackett (Chairman) (RFU)

Professor Lorne D Crerar (SRU)

Russell Howell (WRU)

DECISIONS OF THE APPEALS COMMITTEE:

- (i) That the Player had failed to persuade the Appeals Committee that the original decision had erred in its determination of the citing complaint;
- (ii) That the appeal be dismissed in its entirety; and
- (iii) That the Player be responsible for 50% of the costs of the Disciplinary Officer and of the convening and holding of the Hearing in accordance with the terms of this Decision.

INTRODUCTION

The Appeal Committee was convened by Professor Lorne D Crerar, Chairman of the ERC Disciplinary Panel, pursuant to the Discipline Regulations (“DR”) of the Heineken Cup 2007/2008 in respect of a citing complaint made by Mr Achille Reali, FIR, Citing Commissioner, dated 15th January 2008 against the Player relative to an incident of foul play during the course of a match between Munster and ASM Clermont Auvergne in the Heineken Cup on 13th January 2008. The citing complaint alleged that the Player had committed an act of illegal and foul play viz a contravention of Law 10(4)b – stamping, on the head of the Munster player Ronan O’Gara (“the Injured Player”) in or around the 34th minute of the match.

The citing complaint was considered by a Discipline Committee and the Decision was issued on 26th January 2008. The Player denied having committed the act of foul play alleged in the citing complaint. The Discipline Committee determined that the Player should be sanctioned, categorised the offence as a top-end offence and imposed a period of suspension of eight weeks. It was against the Decision that the Player appealed.

The Appeal Committee sat on 6th February 2008 to consider the Player’s appeal.

In addition to the members of the Appeal Committee, present during the hearing on 6th February 2008 were:-

Jim O’Callaghan, Barrister, appearing for the Player

Roger O’Connor – Disciplinary Officer, ERC

Max Duthie, Solicitor, Bird & Bird Solicitors, appearing for the Disciplinary Officer.

The Player was not present as he was with his club at a training camp in Spain.

1. REGULATORY FRAMEWORK

The Appellant has not asked the Appeal Committee for a *de novo* hearing and so these proceedings are regulated by ERC Disciplinary Rule 7.4.8. That is, the Appellant shall have the burden of proving [on the balance of probabilities] that the decision being challenged (a) was in error and (b) should be overturned or varied. It is not the function of the Appeal Committee to review the evidence and substitute its own conclusions for those of the original Disciplinary Committee. Even if the Appeal Committee considers that the evidence supports a different conclusion from that of the original Disciplinary Committee, it should not interfere unless it concludes that the original decision was inconsistent with the evidence. In making that assessment the Appeal Committee must apply a margin of appreciation to the decision being challenged.

2. SUBMISSIONS ON BEHALF OF THE APPELLANT

Mr O'Callahan submitted on behalf of the Appellant that there were four areas where the original Disciplinary Committee had fallen into error:

- a. There was insufficient evidence to support the conclusion that the stamp was a deliberate act of foul play. He stated that the player gave evidence at the original hearing and his evidence (which was the only oral testimony) should have been given significant weight. The medical report and statement from Ronan O'Gara did not attribute any deliberate intention on the cause of the injury while the oral testimony from the player was that the contact was accidental.

- b. The case was decided virtually exclusively on the video evidence which itself was inconclusive. He stated that the original Disciplinary Panel ascribed significant weight to their conclusion that the Player shortened his stride before contact and they could see no legitimate reason for him so to do. Mr O'Callaghan submitted that it was debatable whether he did in fact shorten his stride, but even if he did there were legitimate reasons for that action. Mr O'Callaghan, later in response to ERC submissions, submitted that the Disciplinary Committee ascribed too much weight to an assessment that the Player moved his head slightly before contact. Thus, he said, the panel relied on unsubstantiated assumptions which they drew despite the direct evidence on the point from the Player who had said he did not know that O'Gara was on the ground or that he trod on him.
- c. There was other evidence which should have been given more weight. Mr O'Callaghan referred to a newspaper cutting in which O'Gara was quoted as saying (in reference to the incident): "I am not saying it was intentional." He submitted that this statement should have been given as much weight as the statement from O'Gara prepared for the hearing in which he referred to a stamp.
- d. The Disciplinary Committee failed to apply the appropriate standard of proof. Mr O'Callaghan submitted that in disciplinary proceedings where there was a serious allegation of foul play the standard of proof should be higher than the civil standard of simple balance of probabilities. He cited the Irish Supreme Court case of *Georgopoulos v Beaumont Hospital Board [1998] 3 Irish Reports 132*. At page 150 Hamilton CJ said that he agreed with the statement in the sixth edition of Wade on Administrative Law that: "the civil standard is flexible, so that the degree of probability required is proportionate to the nature of the gravity of the issue. Where personal liberty is at stake, for example, the court will require a

high degree of probability before it will be satisfied as to the facts justifying detention; and the requirement will not be much lower in matters affecting livelihood and professional reputation, or where there is a charge of fraud or moral turpitude.” Mr O’Callaghan submitted that in this case, which concerned an allegation of a deliberate stamp to the head (something abhorred by rugby players and therefore akin to moral turpitude) and a long suspension which affected the livelihood of the player, the Disciplinary Committee should have applied a higher standard of proof. In balancing the Player’s own evidence, his good character and the additional material against assumptions gleaned from the video evidence the Disciplinary Committee patently did not apply a higher standard.

Mr O’Callaghan further submitted that even if the Appeal Committee did not accept these submissions, the sanction was manifestly excessive and should be replaced with a lower sanction.

3. SUBMISSIONS ON BEHALF OF THE ERC

Mr Duthie on behalf of ERC had submitted skeleton arguments in advance of the hearing. In his oral submissions he concentrated on the four matters raised by the Appellant. He first reminded that Appeal Committee that they should only interfere with the decision of the Disciplinary Committee if we find that they went outside the possible range of conclusions which was supported by the evidence. Mr Duthie made the following observations on each of the appeal points:

- a. The evidence was sufficient to support the Disciplinary Committee’s conclusions. He agreed that the video evidence was critical and suggested that there were two indicators which assisted the Committee: the change in stride pattern just before

contact and a slight movement of the Player's head. This together with the O'Gara statement that he was stamped on and the medical evidence was consistent with a deliberate stamp.

- b. The video evidence spoke for itself and was sufficient.
- c. The press cutting from the Irish Examiner should properly attract little weight. Even if the quotation was correct it was not possible to ascertain the context of the statement. Clearly O'Gara was not reported as denying that there was any intentional stamp.
- d. The issue of standard of proof was not raised at the original hearing, but the Disciplinary Committee was entitled to apply the civil standard.

In relation to sanction, Mr Duthie submitted that the Appellant had advance no reasons why the sanction was manifestly excessive.

4. DECISION

The Appeal Committee has considered carefully the helpful submissions of both Counsel. We have addressed each of the Appellant's four criticisms of the original decision as follows:

- a. Insufficiency of evidence. The evidence considered by the Disciplinary Committee came from a video of the incident, the Player, a medical report, a written statement from the victim player Ronan O'Gara and a newspaper cutting quoting O'Gara. The function of a first instance Disciplinary Committee is to assess that evidence and it is not the function of an Appeal Committee to go behind that assessment unless the original decision was inconsistent with the

evidence. In this case the absence of the Appellant from the proceedings was not helpful because we were asked to take a view on his accuracy and truthfulness. That was impossible without having the opportunity to observe and listen to him and the Appeal Committee are bound by the assessment of his evidence by the original Disciplinary Committee. In those circumstances the Appeal Committee did not accept that the evidence was insufficient to support the original conclusions.

- b. The video evidence. The Appeal Panel watched the video several times. It show the Player running across O’Gara with his boot coming into contact with O’Gara’s head. It is perfectly proper to conclude that this action was deliberate. It was also perfectly proper for the Disciplinary Committee to use their rugby knowledge and experience to conclude that a player running in open space knows exactly where he places his feet and in these circumstances could have ensured that he did not make contact.
- c. Failure to give sufficient weight to the newspaper cutting. The Disciplinary Committee correctly gave this little weight. It was hearsay, did not provide any context and even if the quotation was accurate it did not assist. The written statement of O’Gara, on the other hand, was served in advance of the hearing on the Appellant, addressed the issue in the case and was cogent evidence of a stamp. The Appellant could have objected to its admission and insisted on O’Gara being called to give evidence, but he did not. The evidence was therefore agreed and given weight by the Disciplinary Committee accordingly.
- d. Standard of proof. The Appeal Committee accepts that the civil standard is a flexible one and that flexibility applies to rugby disciplinary hearings and the

quotation from Wade reflects the law. However, there is nothing in the judgment of the Disciplinary Committee to suggest that they did not know the law – indeed the Committee was chaired by experienced Counsel and unless the contrary can be shown the Appeal Committee may assume that the Committee properly directed itself on the law. In this case that assumption is made.

In all the circumstances, therefore, the Appellant has failed to prove that the Disciplinary Panel was in error and the appeal against finding is rejected.

The Appeal Committee considered the original Disciplinary Committee's reasons for applying a sanction of 8 weeks. The Appellant has provided no reason why the Top End entry point is erroneous and the Appeal Committee concluded that the Disciplinary Committee applied the Disciplinary Rule correctly and made a proper assessment. It assessed the entry point as being at the very bottom of the Top Entry Range and correctly applied their minds to aggravating features (there were none) and mitigating factors. The Appeal Committee could find no errors in this process or the conclusion. **The appeal against severity of sanction is also rejected.**

5. COSTS

As the appeal has failed on all counts the costs of this hearing are to be paid by the Appellant. As the Appeal Committee heard two cases then only 50% of the costs associated with their attendance are included.

His Honour Judge Jeff Blackett

7 February 2008

Chairman

Appeals Committee