

Decision of the Independent Judicial Officer

ERC Heineken Cup 2011/2012

Hearing held by telephone conference call on Wednesday, 16th November 2011 at 7pm

In respect of

Schalk Brits of Saracens (“the Player”)

and

A citing by Mr Jean-Etienne Bernard (FFR) Citing Commissioner in respect of an alleged act of Foul Play contrary to Law 10(4)(j) of the IRB Laws of the Game in the match between Saracens and Benetton Treviso on 13 November 2011 at Vicarage Road (“the Complaint”)

Judicial Officer appointed to hear the case:

Rod McKenzie (Scotland) (“the Judicial Officer”)

Decision of the Judicial Officer:

- (i) the Player having accepted that he had committed the act of Illegal and/or Foul Play for which he had been cited the Citing Complaint was upheld;
- (ii) the act of Illegal and/or Foul Play for which he had been cited having warranted a “red card” the Player should be sanctioned for the offending;
- (iii) the Player is suspended from taking part in the game of Rugby for a period of 3 weeks from 17 November 2011 until midnight on 7 December 2011 (inclusive); and
- (iv) no application for costs was made and none were awarded.

Introduction

I was appointed by Professor Lorne D. Crerar, Chairman of the ERC's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2011/12. I was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Saracens and Benetton Treviso on 13 November 2011 in the Heineken Cup ("the Match").

Mr Jean-Etienne Bernard was appointed as the Citing Commissioner to the Match and cited the Player for an infringement of Law 10(4)(j), namely "lifting a player from the ground and dropping or driving that player into the ground such that the player's head and/or upper body come into contact with the ground is dangerous play".

In addition to myself, the following persons joined the hearing via conference call:

- Mr Schalk Brits ("the Player")
- Mr Edward Griffiths, Chief Executive of Saracens
- Mr Roger O'Connor, ERC Disciplinary Officer ("the Disciplinary Officer")
- Mr Liam McTiernan, ERC Regulations Executive
- Miss Jennifer Nicol, clerk to the ERC Discipline Panel (present pursuant to Disciplinary Rule 6.7.6 of the Heineken Cup, Participation Agreement 2011/12)

This is a case in which the Player accepted the facts as set out in the Citing Commissioner's report, accepted that he had committed the act of Foul Play for which he had been cited, I found that the act of Foul Play would have warranted a red card; that act of Foul Play being contravention of Law 10.4(j) and that, for the reasons set out below a 3 week period of suspension should be imposed.

Preliminary matters and procedure

At the commencement of the hearing the I noted the identities of all present and narrated the Complaint, reminding the Player that the Complaint was in respect of an allegation that he had committed an act of Foul Play contrary to Law 10(4)(j) of the Laws of the Game.

I reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement for the Heineken Cup 2011/12 (the "Disciplinary Rules" and "DR" in the singular) would apply. I outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.

I confirmed what evidence had been placed before him prior to the hearing and enquired as to whether all present had received the same in good time. I then enquired as to whether any additional evidence was to be presented before him. There was no additional written material.

The written and video evidence for considered was as follows:

- Letter dated 15 November 2011 from the Disciplinary Officer to Professor Lorne D. Crerar notifying him of the Complaint in respect of the Player;
- The Complaint in French and an English translation (no objection was raised as to the accuracy of the translated version);
- Email from Alice Bado to the Disciplinary Officer at 11:13 on 15 November 2011 confirming that Mr Benjamin De Jager (“Mr De Jager”) continued playing after the incident and was not suffering “any consequence” post Match;
- Email from Miss Nicol at 14:54 on 15 November 2011 on behalf of the Judicial Officer seeking clarification from Benetton Treviso;
- Email from the Disciplinary Officer at 15:10 on 15 November 2011 to all parties confirming that Mr De Jager was replaced on the 74th minute of the Match;
- Email from Mr Griffiths to the Disciplinary Officer at 15:29 on 15 November 2011 advising that Mr De Jager left the field of play as a sin bin replacement on the 38th minute of the Match;
- Email from the Disciplinary Officer to all parties at 11:02 on 16 November 2011 attaching the Match Official’s report;
- Email from Mr Griffiths to the Judicial Officer at 12:02 on 16 November 2011 containing response to the Standing Directions contained within the Disciplinary Rules of Participation Agreement for the Heineken Cup 2011/12;
- Email from the Disciplinary Officer at 13:40 on 16 November 2011 containing response to the Player’s response to the afore mentioned Standing Directions;
- Various tip tackle case law provided by the Disciplinary Officer together with a table narrating the same;
- Memorandum from Mr Paddy O’Brien, IRB Referee Manager, dated 8 June 2009 headed “Dangerous Tackles”;
- Memorandum from the IRB Judicial Panel Chairman, Mr Tim Gresson, to all IRB Judicial Personnel regarding contact with the eyes or eye area dated 10 July 2009;

- Letter from Mr Bernard Lapasset, Chairman of the International Rugby Board, to Mr Tim Gresson dated 1 July 2009 regarding contact with the eyes or eye area;
- Amended memorandum from Mr Paddy O'Brien dated 4 August 2011 regarding (i) dangerous tackles (high tackles) and (ii) dangerous grasping of neck and/or head area of player not in possession of the ball;
- The written decision of His Honour Judge Jeff Blackett dated 18 December 2009 in respect of Julien Dupuy;
- The decision of the Appeal Committee in respect of Julien Dupuy dated 13 January 2010;
- The decision of the Appeal Committee in respect of David Attoub dated 19 March 2010; and
- Various video clips of the incident.

I noted the terms of the parties' responses to the Standing Directions found at Appendix Six of the Disciplinary Rules ("the Directions") as follows:

The Players response to the Directions was that:

- He would not argue any preliminary matters at the hearing;
- He accepted the Complaint that he was involved in a dangerous tackle but stated that his actions were unintentional;
- He accepted the act, although unintentional, could have been construed as Foul Play;
- He accepted the act, although unintentional, could have warranted a red card; and
- The Player also provided a summary of his recollection of the incident which was expanded upon at the hearing and is noted below.

The Disciplinary Officer's response:

The Disciplinary Officer's response to the Directions included a helpful reminder of the Judicial Officer's role under DR 6.7.34, when determining sanction. In particular, the Disciplinary Officer outlined the requirement of a Judicial Officer to identify all relevant aggravating factors including a consideration of whether there is a need for a deterrent to combat a pattern of offending (DR 6.7.34(c)). The Disciplinary Officer provided the following information in this regard:

"(i) On 8 June 2009, the IRB Referee Manager and Judicial Panel Chairman circulated a memo on the subject of 'tackles involving a player being lifted off the ground and tipped horizontally and ... then either forced or dropped to the ground' (so-called 'tip tackles'). The memo gives guidance on the circumstances in which a 'tip tackle' will warrant a red card. The

memo also states that despite the IRB previously issuing a ruling and advice to referees about the danger of such tackles, 'these tackles are still being made ... [and] they must be dealt with severely by referees all those involved in the off-field disciplinary process'.

(ii) Accordingly, the June 2009 memo might be treated by disciplinary tribunals as evidence, in effect, that according to the IRB there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending.

(iii) Indeed, we are aware of a number of cases involving 'tip tackles' decided since the circulation of the June 2009 memo in which the respective disciplinary tribunals have referred to that memo and gone on to determine that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending (resulting in a finding that there is an aggravating factor under Disciplinary Rule 6.7.34(c) or its equivalent). Those cases include a number from Six Nations, Celtic Rugby and ERC competitions, such as Bales, Tuitupou, Fritz, Taofifenua, Filipucci and Candelon. In fact, we are aware of a total of nine cases, decided since June 2009, in which the tribunal has determined that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending.

(iv) I should also point out that in that same period (i.e. since June 2009), there have been a number of cases involving 'tip tackles' in which the tribunal has not determined that there is a pattern of offending or that there is the need for a deterrent to combat that pattern of offending. We are aware of a total of ten such cases, including four rather high-profile cases decided in the recent Rugby World Cup: Estebanez, Hufanga, Waqaniburoto and Warbuton (all of which were determined by Chris Quinlan QC sitting as a single Judicial Officer).

(v) Regardless of whether the June 2009 memo itself should be treated as evidence that there is a pattern of offending (such that there is the need for a deterrent to combat it), disciplinary tribunals might conclude in any event that given the significant number of cases involving 'tip tackles' that have been heard in recent months and years, there is indeed such a pattern of offending and the need for a deterrent to combat it. For the avoidance of doubt, since June 2009, we are aware of 19 such cases in which the relevant player has been found guilty of such a tackle, either under law 10.4(j) or (occasionally) under law 10.4(e). That figure is effectively a minimum: we know of that many but that is not based on a comprehensive or systematic search and there might well be more.

(vi) I have not attached to this statement a copy of all the cases referred to, although I would be happy to circulate a copy if you and/or the Player would like. Instead I attach simply a copy of the June 2009 memo and a table that we have compiled which lists certain details of those cases (those cases in which the comments section is shaded green are those in which the

tribunal determined that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending).

(vii) On a separate but related matter, it might also be of assistance if I respectfully draw to your attention Disciplinary Rule 6.7.36 which, among other things, provides that for acts of foul play categorised at the lower end of the scale of seriousness, there can be no reduction from the entry point suspension unless there are no aggravating factors and compelling mitigating factors. Accordingly, if you were to find in this case that there was an act of foul play that warranted a low end entry point and considered that there was the need for a deterrent under Disciplinary Rule 6.7.34(c), you would then not be entitled to reduce the sanction below the low end entry point due to the presence of an aggravating factor.”

In light of the above response from the Disciplinary Officer I re-familiarised myself with the cases involving *Dupuy* and *Attoub* together with the memorandum from Mr Gresson and the letter from Mr Lapasset which suggested that there was a need to combat a pattern of offending in respect of contact with eyes or the eye area.

Mr Griffiths apologised on behalf of the Player for their combined lack of knowledge in respect of the procedure to be followed and advised that they would try their best to adhere to the correct procedure. I advised Mr Griffiths that the Player had rather commendably complied with the procedure to date and reassured him that the Player would not be at a disadvantage as a result of any lack of familiarity in this regard.

I invited the Player and the Disciplinary Officer to confirm whether or not they had any preliminary issues that they wished to raise. Both parties confirmed that there were no such issues.

I confirmed that DR 6.7.8 had been complied with insofar as the Player confirmed that he was the person named in the Complaint. The Player was informed that ordinarily the burden would be on the Disciplinary Officer under DR 6.7.11 to prove that, on the balance of probabilities, the Player committed the act of Foul Play specified in the Complaint. However, I acknowledged the Player's response to the Directions and asked the Player and Mr Griffiths to look at DR 6.7.23. The Player confirmed once more that he admitted the Complaint.

Evidence supporting the Complaint

As the Player had accepted that the Complaint should be upheld, the Disciplinary Officer did not need to persuade me that the Player had committed the act of Foul Play that would have warranted a red card and Ordering Off. Nevertheless in order to deal with the issue of sanction I required the Disciplinary Officer to present his evidence regarding the Complaint in the form of the video footage of the incident.

It is evident from the video footage that Mr De Jager had possession of the ball and was running towards the try line of the opposition with approximately 10 yards short of the Saracens 22m line. The Player was standing directly between Mr De Jager and the try line. The Player planted his feet fairly wide apart, bent his knees and dropped his head almost in line with his waist by bending over at the waist. Contact is made between the Player and Mr De Jager just as Mr De Jager parts with the ball. There was, however, no question of this being a late tackle. The Player's arms are outstretched in front of him but the Player does not take hold of Mr De Jager. It would appear that the Player's shoulder made contact with the upper groin area of Mr De Jager and Mr De Jager's forward momentum causes him to pass over the Player's head and shoulders.

It is at this point that the Foul Play arises. Rather than maintaining his posture, the Player stretches upwards by flexing his knees, unbending from the waist and stretching his arms and hands above his head. In one complete motion the Player in effect stands up straight. This causes Mr De Jager, who is still in contact with the upper part of the Player's body to be lifted up and rotate. By the time the Player is standing straight up with his arms above his head the Player's movement has caused Mr De Jager to be in the air parallel to the Player but falling to the ground "up side down" with his head towards the ground and his feet in the air. Fortunately he had been lifted to such an extent by the Player's actions that Mr De Jager eventually rotated in total through 270 degrees and fell heavily to the ground on his back and shoulders as opposed to his head.

The Disciplinary Officer and the Player confirmed that they agreed with my interpretation of the video footage.

The Player emphasised that the incident was accidental but that he knew immediately that he had done something wrong.

Submissions on sanction

Once all the evidence had been heard and reviewed I invited the Player and the Disciplinary Officer to make submissions as to sanction.

The Disciplinary Officer's submissions were:-

The Disciplinary Officer advised me in line with DR 6.7.32 that it was his belief that the offending was both intentional and reckless and that it could not be argued that there was any provocation by Mr De Jager. The Disciplinary Officer agreed that Mr De Jager sustained no long term injury and that the Player's actions had no real effect on the Match. It was the Disciplinary Officer's submission that Mr De Jager was vulnerable insofar as he was entering a tackle and could have sustained a serious injury.

Except for the debate around DR 6.7.34 (c) in respect of whether there was a need for a deterrent to combat a pattern of offending which is discussed below, the Disciplinary Officer made no other submission regarding the presence of any aggravating factors but acknowledged the good character of the Player in the few days leading to the disciplinary hearing and at the hearing itself. It was agreed by the Disciplinary Officer that the Player has a clean record.

The Disciplinary Officer advised that he would be making no application for costs.

The Player's evidence and submissions were:-

Mr Griffiths advised me that the Player was someone who plays rugby with a smile on his face and is the type of person who would be horrified to cause injury to an opponent. This was demonstrated by the fact the Player immediately conceded that he was guilty of the alleged Foul Play contained in the Complaint. His behaviour throughout the disciplinary process was also impeccable.

The Player is South African and is 30 years old. He has been playing rugby since the age of 6 and has been playing at a professional level since the age of 17 or 18. He has been playing professionally in the UK for the past 3 years at Saracens. Initially, he played all over the pitch but now he mainly plays in the position of hooker.

The Player explained to me that the Match was one of the better games that Saracens have played recently but that it was a hard game, as anticipated.

It was the Player's position that he was the only man at the back of the field and that he was faced with a 2 on 1 situation. The Player saw Mr De Jager running at him and due to the size of Mr De Jager, the Player decided to "go low" and put his head down. He advised that having "gone low" his subsequent actions in standing up whilst Mr De Jager was in contact with him was his acting as he was trained to in the tackle by driving upwards and forward.

The Player argued that it felt like Mr De Jager had jumped into the tackle and that his (Mr De Jager's) momentum had taken him (the Player) backwards. The Player acknowledged that neither of these features was obviously apparent from the video footage.

The Player emphasised that he understood the incident "looked terrible" and that "it felt terrible" but that he had apologised immediately to Mr De Jager.

Mr Griffiths informed me that although the incident looked like a tackle it genuinely could not be described, in his view, as a tip tackle. It was his position that the act of Foul Play should be viewed as an unfortunate and unintentional accident and that it would not have warranted a red card.

Discussion and Decision

Whilst it was suggested on behalf of the Player that for the purposes of DR 6.7.41 the Foul Play committed by the Player would not have warranted a red card I concluded based on the reckless nature of the Player's conduct, the danger to the tackled player, the degree of culpability on the part of the Player and relevant IRB guidance, all of which are discussed below, that a red card would clearly have been warranted and that a sanction comprising a suspension should be imposed in this case.

It is not in issue in this case that there was an act of Illegal and/or Foul Play ("offending") committed by the Player. This is a case in which the Player accepted the facts as set out in the Citing Commissioner's report, accepted that he had committed the act of Foul Play for which he had been cited and I found that the act of Foul Play would have warranted a red card; that act of Foul Play being contravention of Law 10.4(j).

For the purposes of determining the appropriate entry point for sanction, the conduct of the Player which constituted the offending requires to be characterised according to its "seriousness". It is that which determines the relevant entry point for sanctioning purposes, DR 6.7.32 and DR 6.7.33(Regulation 17.14.2).

The focus must always be on the conduct of the offending Player which constitutes the relevant offending for the purposes of Law 10.4. In this case the relevant conduct of the Player which constitutes the offending for the purposes of Law 10.4(j) was lifting Mr De Jager and dropping him such that Mr De Jager fell and his upper body struck the ground whilst his feet were off the ground. That is the offending cited and which the Player has accepted he committed.

DR 6.7.32(a) (Regulation 17.14.2(a)) relates to offending which is "intentional, that is committed intentionally or deliberately". Placing both intentional and deliberate within the general heading "intentional" obscures the distinction that not all intentional offending is deliberate. "Deliberate" is taken to mean carried out following deliberation, however brief, which suggests a level of premeditation which is in any event provided for in DR 6.7.32(g) (Regulation 17.14.2(g)).

DR 6.7.32(b) (Regulation 17.14.2(b)) relates to offending which is "reckless". The Rule goes on to define reckless offending as follows "that is the Player knew or should have known that there was a risk of committing an act of Illegal and/or Foul Play". However, this definition of reckless in DR 6.7.32(b) (Regulation 17.14.2(b)) using as it does the language of risk and knowledge is more consistent with offending which results from a careless act rather than an act which is carried out recklessly.

Offending, for the purposes of Law 10.4, comprehends offending which occurs in circumstances where the offending is (i) intended, that is where the Player intended to commit the actions which constitute the offence; (ii) reckless, that is carried out in circumstances which fall significantly below

the standard of conduct expected of a player and which demonstrates a culpable disregard for the consequences which might result from the player's conduct; and (iii) careless, that is carried out in circumstances where the player has failed to exercise reasonable care that he did not commit an act in circumstances where he knew or ought to have known that there was a risk of him offending.

DR 6.7.32(c) (Regulation 17.14.2(c)) requires Judicial Officers to consider, when fixing the entry point, "the gravity of the Player's actions in relation to the offence". The same Regulation goes on to refer to the "nature of actions, manner in which offence committed including part of body used".

There is no doubt that in this case the actions of the Player were intentional in the sense that the Player intended to rise up by unbending his knees, straightening up from his waist and raising his arms above his head, all of which resulted in Mr De Jager being lifted and in his forward momentum being converted, in part, into an upwards and rotational movement. However that is not the same as the Player having intended to commit the offending.

For the purposes of DR 6.7.32(a) (Regulation 17.14.2(a)) I required to consider and determine whether in acting as he did, was the Player intentionally lifting Mr De Jager from the ground and dropping him (there being in this case no suggestion of driving) such that Mr De Jager's head and upper body, as a consequence of the 270° rotation, struck the ground whilst his feet were off the ground i.e. did the Player intend the components of Law 10.4(j) to result from his actions; or had the Player conducted himself in the circumstances in a manner which was reckless in the sense that it disregarded the danger of Mr De Jager being placed in a position of considerable danger by the components of Law 10.4(j) arising from the Player's actions; or was it a situation in which the Player was being careless, in the sense that he was not taking reasonable care to ensure that the components of Law 10.4(j) did not arise from his actions where there was a risk that they might thus compromising for the safety of Mr De Jager.

It is essential for me to make this determination because the character of the conduct which constituted the offending determines in part the seriousness of the offending and as a consequence the relevant entry point for the purposes of DR 6.7.33 (Regulation 17.14.2).

I concluded that the lifting, rotation and dropping of Mr De Jager were not the intended result of the Player's actions but given the momentum of his opponent and the mechanics of the tackle there was an obvious danger the components of Law 10.4(j) arising and Mr De Jager being placed in a position of danger if the Player were to act in the way which he did.

The actions by the Player were reckless. However, reckless in this context does not mean reckless as provided by DR 6.7.32(b) (Regulation 17.14.2(b)). In this case the conduct of the Player was undertaken without thought to its consequences and without regard to the risk to Mr De Jager. In acting in the way he did. The Player's conduct fell significantly below the standard of conduct

expected of a player and demonstrated a culpable disregard for the consequences of his actions. The degree of culpability on the part of the Player was moderate. In my judgement the Player used a tackling technique driving forward and upward from a low level which was inappropriate in the circumstances because of the danger in which it was likely to place the tackled player.

The Player's actions in tackling Mr De Jager were, he explained at the hearing, in accordance with how he was trained to tackle by driving forward and rising up. I understand that that is one tackling technique which players are trained to utilise. However, the technique used must be appropriate for the circumstances. In a situation in which the tackling player deliberately sets himself up so that his head is at the level of his waist and a player travelling at speed hits the tackling player straight on, there is an obvious danger that the momentum of the tackled player will cause him to pass over the top of the tackling player unless the tackling player is able to take a firm hold of the tackled player.

In this case, there was little effort on the part of the Player to take hold of Mr De Jager. If the Player had remained low, then it is likely Mr De Jager's momentum would have caused him to continue forward over the top of the Player, no doubt with the possibility that Mr De Jager might have been able to immediately regain his feet and continue to take part in the play. By rising up as he did, including flexing from the knees, straightening up from the waist and raising his hands above his head, a technique which he had been trained to use, the Player caused Mr De Jager to be placed in a position of considerable danger. The possibility of a playing advantage being derived by using this tackling technique in these circumstances was no justification for having placed his opponent in such a dangerous position.

Reckless conduct comprehends a range of culpability and the degree of culpability is a factor to be taken into account in determining the seriousness of the offending for the purposes of fixing the entry point. I concluded that in this case there was a moderate degree of culpability on the part of the Player. The risk of Mr De Jager being placed in a dangerous position by his actions should have been anticipated by the Player but this was not a case where there was a high degree of culpability such as might result in a top end entry point.

As a consequence of the Player's reckless conduct, a serious injury could have been sustained by Mr De Jager. Fortunately, he was able to continue to play after brief on-field medical attention.

Before completing the analysis of the identification of the appropriate entry point in this case, it is necessary to consider a submission made by the Disciplinary Officer concerning the application of DR 6.7.34(c) Regulation 17.14.3(c)). The Disciplinary Officer argued that there was a need for a deterrent to combat a pattern of offending i.e. "tip tackles", and that once I had established the entry point, I should apply an aggravating factor to the entry point to take account of the need, he argued for a deterrent component to be added to the suspension to address such a pattern so that others might be deterred by the potential sanctioning consequences from such conduct in future.

The Disciplinary Officer produced a table of previous rugby disciplinary decisions relating to “tip tackles” since the publication of the memorandum offered by Mr Paddy O’Brien, IRB Referee Manager, and Mr Tim Gresson, IRB Judicial Panel Chairman, dated 8 June 2009 headed “Dangerous Tackles”. The table, which is set out below, comprises twenty cases, all of which related to allegations of contravention of Law 10.4(e) (three cases) or Law 10.4(j) (seventeen cases).

Tip tackle case law

Date	Player	Tournament	Law	Comments	Sanction
17.12.09	Tommy Bowe	Heineken Cup, Viadana v Ospreys	10.4 (e)	Referred to IRB Memo of June 2009 in determining foul play (paras 12 to 14).	Dismissed
31.03.10	Alexi Bales	U20 Six Nations, France v England	10.4 (j)	Referred to IRB Memo of June 2009 in determining the low end entry point (paras 20 and 21) and in applying need for a deterrent as an aggravating factor, adding one week to the low end entry point of three weeks (para 30).	2 weeks
08.04.10	Cummins			Applied need for a deterrent, adding one week.	
16.06.10	Matt Banahan	England v Australian Barbarians	10.4 (j)	No reference to IRB Memo of June 2009 and found no aggravating factors.	2 weeks
21.07.10	Jean de Villiers	Tri-Nations, New Zealand v South Africa	10.4 (j)	Referred to IRB Memo of June 2009 in relation to a need for deterrence but found that, due to the particular circumstances of the tackle, there was no need for a general deterrent on the facts (paras 9.4 and 9.5).	2 weeks
27.07.10	Quade Cooper	Tri-Nations, Australia v South Africa	10.4 (j)	Found no need for a deterrent on the facts (para 3.3(b)(i)). Decision upheld on appeal.	2 weeks
02.08.10	Jaque Fourie	Tri-Nations, Australia v South Africa	10.4 (j)	Referred to IRB Memo of June 2009 in considering whether the referee’s reasons were wrong (para 3.3 and 4.2) and in applying need for a deterrent as an aggravating factor (in addition to the player’s previous suspension for the same offence, which specifically factored in a further week as a deterrent), adding one week to the low end entry point (para 4.4).	3 weeks
18.10.10	Sam Tuitupou	Heineken Cup, London Irish v Munster	10.4 (j)	Referred to IRB Memo of June 2009 and various cases (para 6). Referred to IRB Memo of June 2009 in determining foul play (paras 33 to 35) and in applying need for a deterrent as an aggravating factor, adding one week to the low end entry point (para 46).	3 weeks
14.02.11	Florian Fritz	Heineken Cup, Wasps v	10.4 (j)	Referred to IRB Memo of June 2009 and various cases (page 4). Referred to IRB Memo of June 2009 in considering whether	3 weeks

		Toulouse		the referee's reasons were wrong (pages 13 to 17 and 19 to 20) and applied need for a deterrent as an aggravating factor, adding one week to the low end entry point by applying the <i>Atoub</i> principles of a 25% increase (page 25).	
21.02.11	Sebastien Taofifenua	U20 Six Nations, Ireland v France	10.4 (j)	Referred to IRB Memo of June 2009 in applying need for a deterrent as an aggravating factor, adding two weeks to the mid range entry point (pages 7 to 9).	4 weeks
23.03.11	Marco Filipucci	Magners League, Glasgow v Treviso	10.4 (j)	Referred to IRB Memo of June 2009 in applying need for a deterrent as an aggravating factor, adding 1/3 of the entry point (pages 1 and 2).	5 weeks
25.03.11	Gonzale Canale	Six Nations, Scotland v Italy	10.4 (e)	Referred to IRB Memo of June 2009 in determining foul play (page 3).	2 weeks
19.05.11	Julien Candelon	Heineken Cup, Northampton v USAP	10.4 (e)	Referred to IRB Memo of June 2009 in applying need for a deterrent as an aggravating factor (in addition to a belated acknowledgement of wrongdoing and absence of apology), adding two weeks to the mid range entry point (pages 6 and 7).	6 weeks
01.08.11	Sean McCarthy	Premiership Rugby 7s Series, Newcastle v Worcester	10.4 (j)	No reference to IRB Memo of June 2009 and found no aggravating factors.	2 weeks
20.09.11	Dominiko Waqaniburotu	RWC, South Africa v Fiji	10.4 (j)	Referred to IRB Memo of June 2009 in considering whether the referee's reasons were wrong and determining the entry point (mid range) but found no aggravating factors (paras 27, 32, 36 to 38).	3 weeks
03.10.11	Sukanaialu Hufanga	RWC, Tonga v France	10.4 (j)	Referred to IRB Memo of June 2009 in considering whether the referee's reasons were wrong and determining the entry point (mid range) but found no aggravating factors despite a previous yellow card for a dangerous tackle in 2005 and a 4 week suspension for a dangerous tackle in 2009 (paras 28, 39 to 41).	5 weeks
03.10.11	Lekso Gugava	RWC, Argentina v Georgia	10.4 (j)	Applied need for a deterrent as an aggravating factor (in addition to the player's disciplinary record), adding one week to the mid range entry point (paras 14, 18 to 21).	5 weeks
03.10.11	Fabrice Estebanez	RWC, Tonga v France	10.4 (j)	Referred to IRB Memo of June 2009 in considering whether the referee's reasons were wrong and determining the entry point (mid range) but found no aggravating factors (paras 23 to 25 and 28 to 30).	3 weeks

17.10.11	Sam Warburton	RWC, Wales v France	10.4 (j)	Referred to IRB Memo of June 2009 in determining the entry point (mid range) but found no need for deterrence (distinguishing Gugava on the basis that one week was added due to a need for deterrence <u>and</u> the player's disciplinary record).	3 weeks
18.10.11	Justin Tipuric	RaboDirect PRO12, Munster v Ospreys	10.4 (j)	Referred to IRB Memo of June 2009. Low end entry point but found no need for deterrence on the facts.	3 weeks

In all but one of those cases, *Cummins 8 April 2010*, the Disciplinary Officer also provided a copy of the Judicial Officer, Disciplinary Committee and Appeal Committee written decisions. The cases highlighted are those where an aggravated sanction was imposed.

The relevant parts of the memorandum of 8 June 2009 provides as follows:

"In 2007, the IRB Council approved a Laws Designated Members Ruling which essential made it clear that tackles involving a player be lifted off the ground and tipped horizontally and were then either forced or dropped to the ground are illegal and constitute dangerous play.

Unfortunately these types of tackles are still being made and the purpose of this memorandum is to emphasise that they must be dealt with severely by referees and all those involved in the off-field disciplinary process.

... the lifting of players in a tackle and then either forcing or dropping them to the ground is dangerous and must be dealt with severely.

To summarise, the possible scenarios when a tackler horizontally lifts a player off the ground:

- The player is lifted and then forced or "speared" into the ground. A red card should be issued for this type of tackle.*
- The lifted player is dropped to the ground from a height with no regard to the player's safety. A red card should be issued for this type of tackle.*
- For all other types of dangerous lifting tackles, it may be considered a penalty or yellow card is sufficient."*

The memorandum was addressed to Referees, Citing Commissioners, Judicial Officers and Non-legal Judicial Committee Members.

On 4 April 2011, Mr O'Brien and Mr Gresson, in the same capacities as in 2009, issued a further

memorandum to the same categories of rugby official. Whilst this memorandum is not directly concerned with tip tackles, the memorandum of 8 June 2009 is mentioned in the following terms:

“The purpose of this revised Memorandum is to emphasise that as with tip tackles, (see memorandum of 8 June 2009) this type of dangerous play must be dealt with severely by referees and all those involved in the off-field disciplinary process.”

Accordingly, in June 2009 and by reminder in August 2011, the IRB has directed, amongst others, Judicial Officers to deal with instances of tip tackles “severely”.

On 10 July 2009 Mr Gresson issued a memorandum to all IRB Judicial Personnel concerning “Contact with the Eyes or Eye Area”. Attached to that memorandum was a copy of a communication to Mr Gresson from Monsieur Lapasset, the Chairman of the IRB. In his communication to Mr Gresson, Monsieur Lapasset said:

“We felt it necessary to write to you to express our strongly held view that such serious offences of this sort [contact with the eyes including “eye gouging”] must be dealt with severely to protect players, to deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson.”

In his memorandum Mr Gresson said:

“There is ample scope within the existing tariff structure to impose sanctions which accord with the gravity of the offence. However judicial personnel should note the IRB’s concerns with regard to the increasing number of incidents of this insidious form of foul play and in all proven cases where appropriate impose a condign sanction which clearly denounces the player’s conduct.”

Accordingly, in the case of contact with the eyes, there is an express direction from the IRB that this particular form of offending may, in appropriate cases, merit the sanction imposed on a player found guilty being aggravated so as to deter others from the commission of the same type of offence and an enjoinder for a condign sanction.

The Disciplinary Officer in this case submitted that the June 2009 memorandum could be regarded as evidence, that in the view of the IRB, there was a pattern of offending by “tip tackles” and that there was a need for deterrent to combat that pattern of offending. The Disciplinary Officer observed that in nine of the twenty cases listed in the table, the sanction had been aggravated under reference to the June 2009 memorandum (*Bales, Cummings, Fourie, Tuitupou, Fritz, Taoffenua, Filipucci, Candelon, and Gugava*). However, it must be observed that in eleven of the cases (*Bowe, Banahan, de Villiers, Cooper, Canale, McCarthy, Waqaniburotu, Hufanga, Estebanez, Warburton and Tipuric*) the period

of suspension had not been aggravated on the basis that there was a pattern of offending for which deterrent sanction was required.

In RWC 2011 there were five disciplinary cases involving what might be described as “tip tackles”. In four of those cases the suspension was not aggravated on the basis that a deterrent was required to prevent future offending in circumstances where there was an existing pattern of offending, although in one case a period of suspension was aggravated by one week for a combination of what was regarded as a poor disciplinary record and the need for a deterrent sanction. This fifth case was the case of *Gugava*.

In the cases of *Fourie* and *Cummins*, SANZAR Appeal Committees added an extra week in each case to recognise the need for a deterrent. However, in the cases of *de Villiers* and *Cooper*, Judicial Officers had not added an additional sanction as a deterrent and this was not criticised by the SANZAR Appeals Committee in the *Cooper* appeal.

In the case of *Tuitupou*, the Judicial Officer at paragraph 46 of the decision, decided it was appropriate to add an additional one week suspension on the basis that a deterrent was required to combat a pattern of offending in the game *viz* tip tackles. The same approach was followed by the Judicial Officer in the case of *Fritz* at page 25 of the Decision. In the case of *Candelon*, the Judicial Officer at page 7 again took the same approach.

However, in none of the five RWC 2011 cases did the IRB, acting through its counsel, make any submission that any suspension imposed should be aggravated in order to deter a pattern of tip tackles, either in the game generally, or in the tournament.

The Judicial Officer in *Waqaniburotu* noticed the June 2009 at paragraph 27 and again at paragraph 36. He takes into account the content of the 2009 memorandum in deciding that the case did not merit a low end entry point and rather decided that the offending in that case should properly be categorised as mid range. He applies the same reasoning at paragraph 39 of the Decision in *Hufanga*, at paragraph 28 in *Estebanez* and again at paragraphs 20 and 21 in *Warburton*.

In light of the different approaches that have been taken by Judicial Officers and Committees in the different jurisdictions, the clear difference in language between the “tackling” memoranda of June 2009 and August 2011, which say nothing about a need to deter others by imposing condign sanctions and the Contact with the Eyes memorandum of 10 July 2009 which expressly directs Judicial Officers to have regard to the need for deterrence together with the apparent absence of any submissions made by or on behalf of the IRB during the RWC 2011 cases that a period of suspension should be aggravated in order to deter a pattern of offending and I am unable to conclude that there is any clear direction on this subject either from previous cases or from the IRB whether directly or indirectly.

After I issued my initial notification of my decision in this case to parties my attention was drawn by Ms Nicol to the decision of an ERC Judicial Officer in the case of *Marty*, 18 November 2011. Because I was not aware of that decision when I was deciding the appropriate length of suspension in this case it follows that it played no part in my reasoning in this case. However I notice that in the *Marty* case the Judicial Officer took account of the June 2009 memorandum in determining a mid range entry point but declined to aggravate the sanction in order to deter a claimed pattern of offending.

As an individual ERC Judicial Officer I doubt, in the absence of any explicit direction from the IRB or an ERC Appeal Committee, whether it is appropriate for me to decide in an individual case that a deterrent sanction is required in order to discourage others from committing the same type of offending. Indeed I am far from convinced that unless there was a consistent application of aggravation of sanction in all law 10.4(j) cases that the application of an aggravation to sanction in this case would have any general deterrent effect. Rather it would result in unfairness to the Player who was unaware and could not reasonably have been expected to be aware of there having been deterrent sanctions imposed in around 50% of similar cases in the last 2 years.

I notice from the ERC website that in seasons 2009/2010 and 2010/2011 combined there were in aggregate 7 cases where the sanctioned offence was contravention of Law 10.4(a) and 6 where it was for contravention of Law 10.4(b). There were in the same period 3 cases sanctioned in the ERC jurisdiction for contravention of Law 10.4(j).

I have not heard it argued that sanctions should be aggravated to combat a pattern of offending in the case of contravention of Laws 10.4(a) and/or (b). I acknowledge of course that the a relatively lower number of cases involving contravention of a Law in comparison with other Laws is not the only consideration when deciding to reject a submission that there is a need for deterrent sanctions to combat a pattern of offending but by parity of reasoning the fact that there have over a period been a number of cases should not be the only criteria in determining the existence of such a pattern and the need for deterrent sanctions.

I have further concern that if the 2009 memorandum is taken account of at the stage in determining the appropriate entry point, that it should not also be taken account of to aggravate the period of suspension at the second stage, unless there is clear direction from the IRB or an ERC Appeals Committee that such should be the approach.

In the case of *Dupuy* (13 January 2010), an ERC Appeal Committee varied the period of suspension of the player on the basis that the Judicial Officer had erred in taking account of the deterrence effect of sanctioning encouraged in the July 2009 Contact with the Eye memorandum both at the stage of fixing the top end entry point and in aggravating the sanction. I acknowledge that the context in that case was somewhat different to the present in that the issue was at what stage should the deterrent factor be taken account of in the determination of the length of suspension. However, the decision of

the Appeal Committee in that case makes clear that care must be taken to ensure that a player is not receiving two aggravations of sanction for the same sanctioning consideration.

I would I acknowledge be open to the IRB to direct that Judicial Officers both sanction severely at the entry point stage and impose deterrent sanctions at the aggravation stage but I do not consider that either of the two "tackle" memoranda give such a direction.

For these reasons, and being mindful of the IRB guidance that the form of tackling utilised in this case should be dealt with "severely", I found, based on the seriousness of the offending, that this was a mid range offence.

I so concluded based on the seriousness of the offending having particular regard to i) the reckless character of the conduct; ii) the gravity of the Player's actions; iii) the moderate degree of culpability on the part of the Player; iv) the absence of injury to Mr De Jager; and v) the vulnerability of Mr De Jager; (vi) the absence of any affect of the Player's actions on the Match; and (vii) the absence of premeditation or provocation.

For the reasons set out above there were no off-field aggravating factors to be taken into account for the purposes of DR 6.7.34 (Regulation 17.14.3).

In relation to mitigation, I gave due credit for the early acknowledgement of culpability, the expressions of remorse, the obvious concern shown by the Player for the condition of Mr De Jager after the incident, the timely compliance with directions, and the absence of any previous relevant disciplinary record. As a consequence of all of those factors, I mitigated the 6 weeks' entry point by 50% bringing the period of suspension down to 3 weeks, commencing on 17 November 2011 (the date of initial notification to the Player of my decision) and continuing until midnight on 7 December 2011 (inclusive).

Costs

No application for costs was made and none were awarded.

Appeal

Parties were notified of their appeal rights in the initial notification of my decision on 19 November 2011.


Rod McKenzie
Judicial Officer

23 November 2011
Date