

Decision of the Independent Judicial Officer

ERC Heineken Cup 2011/2012

Held at the offices of ERC, Huguenot House, St Stephens Green, Dublin

17th November 2011 at 10:00 am

In respect of

Sean Cox ("the Player")

And

In respect of a citing complaint arising out of the London Irish –v– Edinburgh match at the Madejski Stadium, Reading on the 12th November 2011 that he did punch or strike an opponent in contravention of Law 10.4(a) of the laws of the game ("the Laws") wherein a player must not strike an opponent with hand, arm or fist

Judicial officer appointed to hear the case:

Robert H P Williams (Wales) ("the Judicial Officer")

The Decision of the Judicial Officer:

- (i) The Player did not contest the citing complaint brought against him. The Judicial Officer found the Player had committed the act of illegal and/or foul play alleged in the citing complaint
- (ii) The Player did not agree that the act of illegal and/or Foul play merited a "red card". The Judicial Officer was however satisfied that act of illegal and/or Foul play merited a "red card" and that the Player should have been ordered off for the offence.
- (iii) The Player is suspended from taking part in the game of rugby up to and including the 24th November 2011. This represents a one-week suspension commencing the 17th November 2011.
- (iv) The Judicial Officer made an award of costs against the Player, such costs to be limited to 50% of the Judicial Officer's costs (travel and accommodation only).

Introduction

The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of ERC's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup, 2011/2012.

The Judicial Officer was appointed to consider the citing complaint against the Player in the match between London Irish and Edinburgh on the 12th November 2011 in the Heineken Cup 2011/2012.

The Citing Complaint

Mr Yves Thieffine was appointed as Citing Commissioner to this match and the citing complaint read that he had cited the Player for that he did

"Law 10.4(a) Punching or striking. A player must not strike an opponent with fist or arm, including elbow, shoulder, head or knees"

The Parties at the Hearing

Present at the hearing in addition to the Judicial Officer were the following persons:-

- Mr Roger O'Connor ("the Disciplinary Officer, ERC")
- Liam McTiernan ("Regulations Executive, ERC")
- Michael Brady ("Edinburgh Head Coach")
- The Player

Preliminary Matters & Procedures

At the commencement of the hearing, the Judicial Officer noted the identities of all present and in particular that the Player acknowledged that he was the player referred to in the Citing Commissioner's report.

The Judicial Officer narrated the complaint reminding the Player that the complaint was in respect of an allegation that he had committed an act of illegal and/or Foul play by punching or striking an opponent contrary to Law 10.4(a) of the Laws.

The Judicial Officer reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement of the Heineken Cup, 2011/2012 ("the Disciplinary Rules") ("DR" in the singular)

would apply. The Judicial Officer outlined the procedures to be followed to determine the matter. The Player and all present agreed to proceed on that basis.

The Judicial Officer established 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. The Judicial Officer then enquired as to whether any additional evidence was to be presented before him and was advised that there was none. The evidence for consideration was therefore as follows:-

- (i) The notice of the hearing and appointment of the Judicial Officer etc., from Professor Lorne D Crerar.
- (ii) The letter from the Disciplinary Officer to Professor Lorne D Crerar of the 14th November 2011 confirming that the citing complaint had been made and for a disciplinary committee to be convened.
- (iii) The citing complaint from the Citing Commissioner.
- (iv) The request from the Disciplinary Officer to vary the standing directions so that Player and/or his representatives would file their responses to standing directions found in Section B-1. of Appendix 6 of the Disciplinary Rules by 6:00 pm on Tuesday, 15th November 2011.
- (v) The Judicial Officer's direction varying the standing directions for the Player and/or his representatives to comply with the standing directions by 6:00 pm on Tuesday, 15th November 2011.
- (vi) The email/note from Shontayne Hape ("the Opponent") dated the 15th November 2011 with his description of what had occurred.
- (vii) The email/note dated 15th November 2011 from Kieran McCarthy confirming that the injured player had no medical treatment following the incident.
- (viii) The response dated the 15th November 2011 of the Player to the standing directions.
- (ix) The email dated the 15th November 2011 from Romain Poite, the referee at the match.
- (x) The email from Cyril Lafom, the assistant referee at the match.
- (xi) The response of the Disciplinary Officer dated the 16th November 2011 to the Player's direction statement.
- (xii) Video footage.

The Judicial Officer summarised the Player's response to the standing directions as follows:-

- He accepted that he was the Player.
- He will not be arguing any preliminary matters.

- He accepted the citing complaint was a true and accurate account of the incident.
- He accepted he committed an act of Foul play as set out in the citing complaint.
- He did not accept that those acts warranted a "red card".
- He would be submitting that there was:
 - No intention to injure.
 - No malice.
 - A glancing blow with forearm; not with fist or elbow.
 - No injury to the player.
 - No impact on the game.
 - The move and flow to the next phase.
 - Touch judge was right beside the incident but did not see anything untoward.
 - If referee had seen the incident it would have warranted a yellow card

As there were no preliminary issues being raised, the Judicial Officer reviewed the complaint in full and narrated the Citing Commissioner's report from the match. Although the Player had already responded in the standard directions to the complaint, the Judicial Officer asked, for the sake of the record, the Player whether he accepted that:

- The complaint was a true and accurate account of the incident and the facts surrounding the incident
- The complaint should be upheld, namely whether he admitted or denied that he had committed an act of illegal and/or foul play contrary to Law 10.4(a) by punching or striking his opponent in the London Irish –v– Edinburgh game on the 12th November 2011.
- The alleged act of illegal/and or foul play warranted a red card.

The Player said that he was admitting the act of illegal and/or foul play as set out in the citing complaint, but that it did not warrant a "red card" and intended to argue that there should therefore be no sanction.

As the Player had therefore accepted that the complaint should be upheld, the Judicial Officer advised the parties that he did not have to be persuaded that the Player had committed an act of illegal and/or Foul play. It was noted however that the Player was not admitting that such act would have merited a "red card" and therefore a sending off. The Judicial Officer advised the parties however that he would immediately proceed to deal with the issue of sanction and in order to do so and to dispose of the matter, he would be requiring the Disciplinary Officer to present his evidence regarding the incident to which the Player would then be entitled to respond.

Evidence Supporting the Complaint

The Disciplinary Officer informed the Judicial Officer that he would be referring to:

- The documents which had been disclosed prior to the hearing
- The video footage of the incident

The video clippage showed the Opponent attempting a quick dropout from the London Irish 22 metre line and as he does so, the ball is knocked forward. He is seen re-gathering the ball and being tackled in the process by the Player. He goes to ground and is rolled onto his back. The Player is seen grasping the front of the Opponent's jersey with his left hand. The Opponent is prone on his back, his head is raised and he is grasping for the ball and is looking at it and is turned away from the Player. The Player leans across and strikes him with his right forearm across his chin.

The Disciplinary Officer referred to the statement from the Opponent in which he states that while lying on the ground, he receives a strike to his face from an Edinburgh player who he knows to be the Player. He assumes that the match officials did not see the incident as play continued, albeit that play was brought back to the place of the incident for a scrum due to his having knocked the ball on.

The Disciplinary Officer also drew the Judicial Officer's attention to the note from Kieran McCarthy the London Irish Rugby Manager confirming that the Opponent was not treated by the medical team after the face strike and no subsequent treatment was needed.

The Disciplinary Officer also referred to the e-mail of Romaine Poite the referee in which he stated that he did not see the foul play because he had paid attention to the ball when he was playing advantage. He had subsequently reviewed the incident on the video game and expressed an opinion about it. The Judicial Officer indicated that he would not be taking note of the referee's opinion.

The assistant referee, Cyril Lafon, stated that in his e-mail that he had not seen the incident as it was on the opposite touch line.

There was no further evidence being adduced by the Disciplinary Officer.

The Player was then asked to explain his position.

The Player's Position

The Player's evidence is summarised as follows:

"I have little recollection of the incident. I remember tackling the London Irish player but it was not until I saw the incident on the big screen that I realised what I had done.

I realised it was wrong and stupid.

I sought out Shontayne Hape and apologised and he accepted my apology.

I was embarrassed by what I had done.

There was no intention to injure him.

I was intent on tackling him and seeking the ball.

It was totally out of character.

It was a cheap shot and it was reckless."

The Judicial Officer asked the Player what he had been trying to achieve and his response was:

"On reflection from watching the video, I see I had caused him (the Opponent) to make his error (the knock on) and I was reminding him that I had done this. It was one-upmanship. It was childish."

Although the Player could not recollect the incident at the time and it was not until he saw it on the big screen that he saw what he had done, he asked the Judicial Officer to consider that it was a stroke with the arm not a strike.

The Player informed the Judicial Officer that he had been a professional rugby player since 2004. He had played 115 Premiership and European games with Sale Sharks and had now played 7 games with Edinburgh. He had not previously had a yellow nor a red card for foul play but had had a yellow card for a technical offence.

The Player maintained that had the referee seen the incident, he would not have been awarded a red card.

The Judicial Officer invited the parties to address him on sanction.

Submissions on sanction

As the evidence had been heard on what had happened, the Judicial Officer invited firstly the Disciplinary Officer to make submissions as to sanction.

The Disciplinary Officer referred to the on-field factors, taking into account D.R. 6.7.32 and submitted that:

- a) It was clearly intentional as the video clippage clearly show the Player striking the Opponent across his chin with his forearm
- b) As it was intentional, there was no reason to address the Judicial Officer on recklessness
- c) As to gravity, the Player was using his forearm and the elbow might also have come into contact with the Opponent.

This is not a case of self defence and one cannot see any evidence of provocation immediately prior to the incident.

- d) The note from London Irish was that the incident did not affect the Opponent
- e) There is no evidence that the incident affected the match
- f) The Player was vulnerable in that he was lying on his back when the incident occurred and although it might not be a strong blow, the Opponent is clearly in a vulnerable position
- g) The Player was the only one involved in the incident and it was he who therefore fully participated in it. Although he knew or should have known what he was doing, it happened very quickly and there was therefore very little premeditation.
- h) It was fully completed.
- i) There were no other features of the Player's conduct that constituted the offending.

The Judicial Officer invited the Disciplinary Officer to address him on whether there were any aggravating or mitigating factors as per DR 6.7.34 and DR 6.7.35.

The Disciplinary Officer advised the Judicial Officer that he was not making any further submissions in that he was not submitting there were any aggravating factors and it was for the Player to address the Judicial Officers on any mitigating factors, save that he reminded the Judicial Officer that the Player had responded to the standing directions accepting the citing complaint, although not accepting that the incident would have warranted a red card.

On behalf of the Player, it was submitted that:

a)b) Although the video clippage makes it fairly clear that the Player intended to clip the Opponent, it was a glancing blow from the forearm and not the elbow. There was no intention to injure and it was not done out of malice.

c) As to gravity, it was a glancing blow with the forearm not the elbow.

It was accepted there was no provocation and no self defence.

d) The incident had no effect on the Opponent.

The Player checked with the Opponent immediately after the incident once he saw on the big screen what he had done and he also checked with him later on and the incident itself had not stopped the Opponent from continuing with his game.

e) It had no effect on the match itself.

f) The Player accepted that the Opponent was in a vulnerable position, lying on his back when the incident occurred

g)h) The Player accepted that it was only he was involved in the incident. He fully participated in it. It was completed. It was done on the spur of the moment and was not premeditated. The Player again reiterated that he could only think that he had done it out of one-upmanship and that was not very appropriate behaviour.

i) There were no other features which, in the Player's view, constituted the offending.

Dealing with the criteria in DR 6.7.34, the Player submitted:

a) He was very embarrassed about the whole incident. It was a bad image of him. He was remorseful and very contrite about it.

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- b) He had a clean record during his professional career
- c) He did not think that this was the type of matter where the Judicial Officer had to demonstrate in his sentence a need for a deterrent to combat a pattern of offending

As to DR 6.7.35 (the mitigating factors), the Judicial Officer was asked to take note that:

- a) The Player had acknowledged his culpability very quickly and this is borne out by the response to the standing directions.
- b) He was of good record and of good character.
- c) He is an experienced player and accepts that he should have known better,
- d) He hoped he conducted himself well at the hearing
- e) He was relieved that the Opponent had not been injured.

The Player and his representative were invited to make closing submissions and they reiterated that, although it was quite clear that the Player struck the Opponent, it was more of a stroke than a strike. There was no intention to harm. Taking everything into account, the sanction should, in their opinion, be lower than a red card.

Decision as to disposal

The Judicial Officer deliberated in private in respect of what if any sanction would be appropriate in the circumstances. The Judicial Officer concluded that:

- The Opponent was lying prone on his back when the incident occurred and was in a vulnerable position
- The Player grasps the front of the Opponent's jersey with his left hand and at the same time
- The Player struck the Opponent across his chin with his forearm
- The Opponent was not affected by the incident
- The incident had no effect on the game itself.

In terms of the question of sanctions, the Judicial Officer considered the terms of the Disciplinary Rules, including DR 6.7.29 through to DR 6.7.44. The Judicial Officer considered as to whether or not this was an offence for which a suspension ought to be imposed but having regard to the fact that the act was clearly intentional and there was the use of a forearm across a chin, came to the conclusion that the incident merited a suspension.

The Judicial Officer noted that the offence of striking another player with a hand, arm or fist, in contravention of law 10.4(a) was listed within the IRB recommended sanctions for offences within the playing enclosure (found at Appendix 3 of the Disciplinary Rules) as follows:

- Low end is – 2 weeks
- Mid range – 5 weeks
- Top end - 8 plus weeks
- Maximum sanction 52 weeks.

To decide upon the appropriate entry point, the Judicial Officer assessed the seriousness of the Player's conduct by reference to the following on-field issues (following the criteria in DR 6.7.32):

- a) The Player intended the act i.e. he intended to strike the Opponent
- b) As it was intentional there was no need to consider recklessness
- c) As for gravity:
 - (i) The Player clearly used his forearm and the elbow might also have come into contact with the Opponent
 - (ii) There was no provocation, retaliation nor could it be in self evidence
- d) The incident had no effect on the Opponent
- e) There was no evidence there was any effect on the match
- f) The Opponent was vulnerable in that he was lying prone on his back and was being grasped by the Player's left hand as he was being struck by the right forearm (and maybe the elbow)

- g) Only the Player was involved in the incident and he therefore fully participated in it. Although he should have known what he was doing and he intended it, one would not class it as pre-meditated.
- h) The action was completed.
- i) There were no other features of the Player's conduct which would constitute the offending

Although, therefore, it was an intentional not a reckless act, all of the features were such that this incident could be quite properly categorised as having a low entry point – 2 weeks.

The Judicial Officer then considered the off-field aggravating factors (having regard to DR 6.7.34 criteria) and whether there were any off-field mitigating factors (DR 6.7.35 criteria).

With regard to the aggravating factors, the Disciplinary Officer had not advanced any aggravating factors and the Judicial Officer, took note of the following:

- a) The Player was remorseful and contrite. He described that he was embarrassed and in the circumstances, it is probably a very apt description.
- b) The Player has a clean record
- c) This incident was not the type where there was a need for the Judicial Officer to demonstrate in the sanction a deterrent to combat a pattern of offending

And in the circumstances concluded that there were no aggravating factors.

With regard to the off-field mitigating factors, the Judicial Officer noted that:

- a) The Player had acknowledged his culpability at an early stage as was evidenced by the responses to the standing directions
- b) It was accepted he had a good record and was of good character
- c) He is an experienced player with a good record
- d) The Player had conducted himself very well at the hearing. He was quite open and candid and the words "embarrassing" and "one-upmanship" had a ring of truth and it was more of an immature act.

- e) The Opponent had not been injured but he had sought him out immediately after the incident to apologise for his actions.

The Judicial Officer therefore concluded that there were compelling mitigating factors to reduce the sentence below the 2 weeks which he had imposed as a result of the offending being low range and reduced the sentence by 1 week.

In the circumstances, therefore, the Player would be suspended for 1 week from the date of the hearing being 17 November 2011 up to and including 24 November 2011.

Insofar as the costs are concerned, the costs would be confined to those of the attendance at the hearing of the Judicial Officer and as there had been another case earlier in the day, it would be 50% of such costs.

Announce the decision

The Judicial Officer announced that, having reviewed the evidence and considered the submissions and reminding himself of the criteria and DR 6.7. 32 and the Player having admitted the Citing Complaint in that he struck his opponent with his arm across his chin, the entry point (for the reasons set out above) would be low range and for this offence, such sanction is 2 weeks.

The Judicial Officer said he had looked at the aggravating factors as per DR6.7.34 and concluded that there were none.

The Judicial Officer said he had considered the mitigating factors under DR 6.7.35 and concluded there were compelling mitigating factors which would enable him to reduce the sanction and he did so by reducing it by 1 week so that the suspension would therefore be for 1 week.

The Judicial Officer announced that the Player would therefore be suspended for 1 week to take effect from the day of the hearing 17 November 2011 and would be up to and including 24 November 2011.

The Judicial Officer announced that a written judgment would follow by close of business Wednesday 23 November 2011.

Costs

There would be an order for the costs which would be limited to 50% of the Judicial Officer's costs for attending the hearing.

Appeal

The Player and his representative were reminded of their right to appeal under DR 7.

Robert H P Williams
Judicial Officer

Date