Decision of the Independent Judicial Officer

European Rugby Commission

Held at The ERC Headquarters, Hugenot House, St. Stephen's Green, Dublin 2

on 27th January 2012

In respect of

of Micky Young ("the Player")

And

A citing in respect of the Player by the Citing Commissioner John Kirk (Scotland) for an offence contrary to 10.4.m Acts Contrary to Good Sportsmanship; Contact with the Eyes or Eye Area contrary to the laws of the game in a match between Leicester Tigers and Aironi Rugby on the 21st January 2012 which took place at Welford Road in Leicester;

Judicial Officer appointed to hear the case:

H. Pat Barriscale, Ireland ("the Judicial Officer")

Decision of the Judicial Officer:

1. That the citing complaint was upheld;
2. That the Player be suspended from all rugby for a period of 8 weeks to end at midnight on Sunday 18th March 2012;
3. That the Player be responsible for the costs of the ERC in respect of this hearing.

Introduction

The Judicial Officer 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 2011/2012 (DR). The Judicial Officer was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Leicester Tigers and Aironi Rugby at Welford Road in Leicester on the 21st January 2012 in the Heineken Cup 2011/2012.

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

- Mr Roger O'Connor, Disciplinary Officer, ERC;
- Max Duthie, Solicitor representing the ERC;
- Liam McTiernan, ERC;
- The Player;
- Ray Tully, Counsel instructed on behalf of the Player;
- Simon Cohen, Acting Chief Operations Officer Leicester Tigers;
- Peter Wheeler, Executive Director, Leicester Tigers.

The Judicial Officer outlined the procedures that he proposed adopting as far as the hearing was concerned and this was accepted by everyone present. He asked the Player if he understood the citing complaint, which he did, and the Player stated that he was not guilty of the Complaint which had been made by the Citing Officer and that he wished to contest the Complaint in its entirety. As there were no preliminary issues arising thereafter, the Judicial Officer requested Mr Duthie to present the case on behalf of the ERC.

It was accepted by all that the standard of proof which was applicable was the balance of probability.

Mr Duthie read through specifically the Citing Report which had been completed by Mr Kirk together with the statements which had been made available to all parties. He explained that it was proposed to call the injured player, Giiulio Toniolatti, but that the other Aironi Rugby

player, Fabio Staibilio, was unavailable to give evidence as he was on a cruise ship somewhere near Sharm el Sheikh in Egypt.

Mr Duthie then went through in some detail the video clip which was available in relation to the incident in question and played it through numerous times, stopping it and emphasising various aspects of it at different stages. He said that the highlights which could clearly be seen from the video clip were as follows:-

a) The Referee's whistle had gone before any incident took place and the players continued anyway;
b) The Player pulls the Aironi No. 14 over the top of the ruck and can clearly be seen to be standing over him;
c) The Player's right hand is in the face area of Aironi No. 14; and
d) When the injured player emerges from the ruck he consistently points suggesting an injury to his eye or eye area;
e) The Aironi No. 3 Player pulls the Player away from the incident and clearly remonstrates with him.

Mr Duthie then arranged to contact Mr Toniolatti on the telephone and he was available to give evidence with the benefit of an interpreter present with him on the telephone. Under examination by Mr Duthie, he said that he had a copy of the statement which was before the hearing which he said was correct but was a little too specific and was not actually what he had said to the Citing Commissioner after the match. He said that it was too detailed. Mr Duthie then took him through his evidence to say exactly what had happened on the day in question. The Player said that a hand had come in contact with his right eye and that a hand had grabbed his face and touched him in the eye area. He said that the hand touched him in the right eye area but that it did not go into his eyeball. He was sure that it was a finger and he pulled away from the contact because it hurt him. He believed that it was the scrum half (the Player) and confirmed that he had identified him specifically following the viewing of the video footage after the match in the presence of the Citing Commissioner. He said that he was not sure what Player had done this to him immediately he got up from the ruck but was satisfied that it was a scrum half having viewing the video after the match. He immediately said it to the Assistant Referee that someone had pushed their finger in his eye and asked him if he had seen it. He received treatment from the physiotherapist from his own team immediately and after the match noticed that there was a red mark in the area of his right eye and a swelling. He said that there was no serious or significant injury to his eye arising out of the incident. He was certain that the mark and the swelling occurred in this incident and not at any other time in the game. He confirmed that he had no chat with the Player at any stage during or after the match.

Under cross examination by Mr Tully, the Player agreed that it was a tough but fair match up to the time the incident occurred. He confirmed that there had been no issues between himself and the Player prior to the incident taking place. Mr Tully suggested the issue for the Judicial Officer was that who had touched the Player and how they had done it. The Player, Mr Toniolatti, agreed with this. He suggested that it was probably the scrum half that had carried out the incident and that this view was established after he had seen the video a number of times after the match had finished. He agreed that he had viewed the video with the Citing Commissioner and a number of others and that the consensus was that it was the Player who had carried out the incident. Mr Tully suggested that there were many other players in the area in and around the time the incident happened and there were lots of hands and arms around the injured player. He agreed with this and said that he did not specifically know whose hand had come in contact with his eye area. He said that he was sure that it was one of the Leicester players and that he was not certain who it was but that he was sure that it was the Player after he had seen in the video a number of times. He agreed that it was possible that one of the other Leicester players came in contact with his eye area but said that he would like to know who else it could have been.

Mr Tully then put to the injured player the evidence that the Player would be giving. He said his case was that the Player had never went near his eye or his eye area and that the video does not show the Player making any contact with his eye area and, therefore, could not be relied upon.

Upon further examination, the Player was asked whether he thought it could have been anyone else. He said he was not sure who did it but was satisfied that it was the scrum half after viewing the video evidence. This ended the case on behalf of the ERC.

At this stage, Mr Tully made a half time application i.e. an application for a direction. He suggested that the prosecution had failed to prove the case and that the Complaint should be dismissed. He said they were not able to identify the Player as having committed the offence and that the video was unclear and unsatisfactory from a prosecution perspective.

The Judicial Officer said that one thing which was certain was that the injury occurred in this incident and that Mr Tully's client, the Player, was "all over" the incident. He was the most proximate to the injured player at all times during the incident and the Judicial Officer's view was that he certainly had a case to answer. In those circumstances, he refused the application.

Mr Tully then called the Player and gave details of his former rugby playing history up to date. The Player said it was a tough hard game but that he believed that Leicester were dominant at the time the incident occurred despite the fact that the scores were equal. The video was played again and the Player was asked to commentate on it as it went along. He agreed that the whistle had gone by the time that he came in contact with the injured player but that his objective was to retrieve the ball to take a penalty which the Referee had clearly awarded to them. He caught the Aironi No. 14 with both hands on his collar and pulled him over the ruck. As he landed on the ground, he released his grip of the injured player and grabbed him by the neck/shoulder to keep him down. He suggested from the video evidence that it was clear that his hand never came in contact with his eye or eye area. He said he was surprised when the Aironi No. 3 grabbed him and pulled him out of the ruck and suggested that he did not hear the injured player shouting anything to him. He went on to say that he did not become aware of the citing against him until Monday evening and when he did he was absolutely shocked at the allegation. He said that initially he did not even remember the incident happening and only did so when he saw the video clip eventually. He was emphatic that he did not touch the injured player's eyes or eye area at any stage during the course of the incident.

Under cross examination by Mr Duthie, he agreed that there was no need for him to pull the injured player through the ruck at all. Mr Duthie suggested that he could be seen keeling on or next to the injured player in the video clip and he accepted that his knee may have been in contact with the injured player's back. He did not accept that he made contact with the eye area of the injured player at any stage during the incident. Mr Duthie put it to him that he had suggested that it could have been another player and asked him to specifically identify which other player involved in the incident could have come in contact with the eye or eye area of the injured player. The player suggested that he did not see anyone else touch the injured player and was of very little assistance in identifying any other player who could possibly have done it. The Player suggested that the injury could have been caused by a player's stray boot but Mr Duthie emphasised that the injured player had already given evidence that he was certain the injury was caused by a finger.

The next witness was Mr Wheeler who gave character reference on behalf of the Player and gave specific details in relation to the checks which were carried out by Leicester before any player was signed by them. They had to be satisfied that they were of the highest character and not liable to be involved in any type of foul play as this cost matches. These checks would have been done with people that they could rely upon and they were absolutely satisfied as to the Player's character prior to signing him in June 2011.

The next witness was Mr Jack Fletcher, the current England Under-18 Head Coach who gave evidence again in relation to the Player's character. He said that he had known him since he was 12 years old and had coached him until he was 18. He said that he had never known the Player to be involved in any act of violence and/or retaliation and his credibility was unquestioned.

This ended the formal evidence and, at this stage, the Judicial Officer said that he had a number of issues that he wished both sides to address him on before he made any decision in relation to the Complaint. He pointed out from the video clip where he suggested it could be seen that the Player's wrist/hand was in contact with the injured player's eye and eye area. He said the injured player immediately reacts when he emerges from the ruck pointing to an assault on his eye area and also that the reaction of the Aironi No. 3 player was immediate to the incident. He suggests that it could not possibly have been set up in those circumstances. He asked Mr Duthie to specifically address him in relation to the fact that whereas the contact by the Player with the injured player was on the left side of the Player's head that the injury resulted to his right eye.

Mr Duthie commenced by saying that it could be clearly seen from the video clip that the Player's hand and arm were in the area of the injured player's eyes and eye area. There was an immediate reaction from the injured player and also by the Aironi No. 3. He suggested that there was no other player who could possibly have done the injury to the Player and, when asked, the Player was unable to point out anyone else for consideration. He introduced the decision which had been given previously in Tincu and emphasised from that judgment that the lack of clear video evidence was not fatal to any prosecution. He said that there was no reason for the Player to be there at the time and certainly no need to pull the injured player over the ruck and hold him down in the fashion which he did. He suggested that on the balance of probabilities, as he had more than adequately proven, that the Player was the one who carried out the incident causing the injury.

Mr Tully then suggested that Mr Toniolatti could not say in his evidence which player had touched him in the eye or eye area. He suggested that he was fair in his evidence in this regard and placed considerable emphasis on the fact that the injured player conceded that his statement was not accurate and that the events which he had given was somewhat at variance to the statement which had been provided to the Citing Commissioner. He asked the Judicial Officer to specifically consider the following matters which he said were fatal to the prosecution and the citing should be dismissed. They are as follows:-

1. The absent witnesses. Why did the Referee who was in a reasonable proximity to the incident and particularly the Assistant Referee who was in close proximity to the incident not see anything specifically that warranted them giving evidence before this hearing. He suggested that it was because the Player had done nothing wrong.

2. There was no motive for the Player to carry out the incident. Why would he commit such an offence in front of the Assistant Referee who was within a metre of him at the time?

3. He suggested that to convict the Player you would have to completely disregard not only the word of Mr Young, the Player, but also the two character witnesses who had given evidence on his behalf. He suggested that the Player had given his best account of what had happened on the evening in question. He emphasised that the character witnesses went to his credibility and his propensity to commit such a crime;

4. He suggested that because of the number of other players who were in the area that any of those could have been responsible for the injury which had occurred to Mr Toniolatti and that on the balance of probability he suggested that Mr Young could not have been responsible for the incident.

DECISION ON LIABILITY

The Judicial Officer deliberated in private and took some time to consider his decision as to whether the Complaint was upheld or not. He reconvened after a period of deliberation and stated that he was satisfied of the following:-

1. It was a fact that the injured player Mr Toniolatti was subjected to contact in the eye or eye area in this specific incident;

2. The Player was the most proximate to Mr Toniolatti at all times during the course of the incident;

3. The whistle had gone and there was no need whatsoever for any contact between any of the players at the time this incident occurred.

4. The injured player reacts immediately to the incident which occurred being contact with his eye/eye area;

5. There was an immediate reaction from the Aironi No. 3 Player whose written statement said *that he saw face scratching and that the Player took his hand across our player's face, our player screams out and grab the player and take him away and then the Touch Judge is there*;

6. The Player when asked could not point to another player who could possibly have done the incident at the time in question.

In those circumstances, the Judicial Officer said that he was satisfied that on the balance of probabilities that the Player was responsible for the incident and that in those circumstances he was upholding the citing. He did say that he was also satisfied that it was not an intentional contact but that the Player was reckless and knew or ought to have known that his conduct would have given rise to the incident and/or injuries.

SANCTION

In those circumstances, the Judicial Officer said that he was moving on to determine what the appropriate sanction was in the circumstances. Mr Duthie pointed out that the entry levels for this type of offence was as follows:-

- Lower End - twelve weeks
- Mid Range - eighteen weeks
- High End - twenty four plus weeks

He pointed to Paragraph 20 of the Decision which was previously given in Dylan Hartley's case as setting out the considerations which should be taken into account as far as the entry level was concerned. He said that there was only one potential aggravating factor and that was the need for a deterrent in respect of this specific type of offence. He referred particularly to the IRB Memorandum of the 10th July 2009 which he suggested was particularly clear in this regard. Mr Duthie provided the Judicial Officer with a particularly helpful schedule of numerous decisions which had been made dating back to early 2008 and emphasised the ones which had taken account of the need for a deterrent. He did agree that because the finding had been one of reckless that it was possible that the aggravating factor could be avoided in those limited circumstances.

In mitigation on behalf of the Player, Mr Tully accepted the finding of the Judicial Officer in relation to liability and said that any contact with the injured player was fleeting. This was

confirmed by the minimal injury which had occurred and this had been confirmed by the injured player. He suggested strongly that the low end entry point should be considered and that there should not be any consideration of an aggravating factor in respect of the 2009 memorandum in the particular circumstances of this case. He said that he was happy that the Judicial Officer accepted that the contesting of the charge was not frivolous in the circumstances and that there was a clear basis for the same. He suggested that the Player's conduct at the hearing was exemplary and that if sanctioned that this had very serious consequences indeed for the Player from a playing perspective and also in respect of his reputation.

Mr Duthie stated that he would be looking for an order in respect of the costs of the ERC as far as the hearing was concerned.

The Judicial Officer took some time then to consider the appropriate sanction to impose on the Player and reverted to the hearing after some time.

He stated that he was satisfied having regard to the fact that his finding was that incident was reckless on the part of the Player that the low end entry point was appropriate at 12 weeks. In the particular circumstances of this case, he did not feel that it was appropriate to impose an increased sanction by way of aggravation in respect of the need for a deterrent in respect of this type of offence. He said that there was a minimal injury and clearly some remorse on the part of the Player and that obviously he was of exemplary character. In addition, he had conducted himself very well at the hearing and the contest of the charges was not frivolous. In those circumstances, he concluded that a deduction of four weeks was appropriate and, therefore, suspended the Player from all rugby for a period of eight weeks to end at midnight on Sunday 18th March 2012.

He made an order in respect of the costs of the ERC in respect of the hearing also.

The Player was reminded of his right to appeal the decision according to the disciplinary rules.

H. PAT BARRISCALE **31st January 2012**
Judicial Officer