

EUROPEAN RUGBY CUP
DECISION OF APPEALS COMMITTEE
HELD AT THE OFFICES OF ERC,
THIRD FLOOR, HUGUENOT HOUSE,
35-38 ST. STEPHENS GREEN DUBLIN 2
10th day of January 2006 at 5.00p.m.

IN RESPECT OF:-

GAVIN HENSON (“the player/appellant”)

AND

His Appeal against the decision and sanction of the Disciplinary Committee under the Chairmanship of Rod McKenzie and dated the 29th December 2005 wherein the player was found guilty of committing an act of illegal and/or foul play namely that he struck an opponent with his elbow and that the citing complaint of Bill Dunlop, Citing Commissioner in a match between Neath Swansea Ospreys and Leicester Tigers held at Liberty Stadium, Swansea on the 18th December 2005 be upheld insofar as concerning an infringement of Law 10.4(a) of the Laws of the Game Rugby Union 2005 (“the Laws”) and that he be suspended from taking part in the game of Rugby Union up to and including Sunday 5th March 2006 representing a 10 weeks and 2 days period of suspension commencing on the conclusion of the Disciplinary Committee meeting on the 23rd December 2005.

MEMBERS OF THE APPEAL COMMITTEE:- (“the Committee”)

Brian McLoughlin – Chairman, Ireland

Peter Brown - Scotland

Philip Orr - Ireland

DECISION OF THE APPEALS COMMITTEE:

- (i) The Committee decided, following submissions from the player’s legal representative, to hear the Appeal de novo pursuant to the powers granted to the Appeal Committee under Rule 7.4.7 of the Heineken Cup ERC

Disciplinary Rules 2005/06 (“the Rules”) for the reasons set out in this Judgment.

- (ii) During the course of the hearing of the Appeal de novo, the player, through his legal representative, and following a short adjournment, notified the Committee that he acknowledged that he had struck an opponent with his elbow contrary to Law 10.4(a) of the Laws and admitted the offence as set out in the Citing Complaint of the 19th December 2005.
 - (iii) The player was suspended from taking part in the game of Rugby Union up to and including Sunday 12th February 2006. This represents a 7 weeks and 2 days period of suspension commencing from the conclusion of the Disciplinary Committee meeting on the 23rd December 2005.
 - (iv) The player is required to pay the costs of both the Disciplinary Hearing and the Appeal Hearing including the legal costs incurred by the ERC.
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INTRODUCTION:

The Appeal Committee was convened by Professor Lorne D. Crerar, the Chairman of the ERC Discipline Panel pursuant to the Rules in respect of a citing complaint dated the 19th December 2005 by Bill Dunlop, Citing. The citing complaint concerned the conduct of the player during a Heineken Cup Match played between Neath Swansea Ospreys (Ospreys) and Leicester Tigers (Tigers) on the 19th December 2005 at Liberty Stadium, Swansea, home ground of Ospreys.

The citing complaint alleged that the player had been played “off the ball” by the Leicester No. 3 and that the player delivered a blow to the rear with his elbow catching the Leicester No. 3 in the face. There was a further incident alleged against the player but this had been dismissed by the Disciplinary Committee.

The incident was not detected by any of the match officials.

Present at the hearing on the 10th January 2006, in addition to the members of the Committee, were:-

Roger O’Connor – Disciplinary Officer for ERC

Jonathan Taylor – Solicitor for ERC

John Morris. – Solicitor for the player

The player/appellant

Derwyn Jones – Regional Rugby Manager of Ospreys

Mike Cuddy – Owner of Ospreys

HEARING:

Preliminaries:-

At the commencement of the hearing the Chairman confirmed the identities of all present and informed the parties that there had been certain evidence submitted prior to the Appeal which in the view of the Committee was available at the time of the proceedings below and so were exercising their discretion to exclude the following evidence pursuant to Rule 7.4.8, namely,

1. Letter dated the 4th January 2006 from Mike Ruddock, National Coach, WRU although the Committee did state that this letter could be used in mitigation in the event that liability rested with the player;
2. Letter dated 4th January 2006 from The Right Honourable Peter Hain MP, Secretary of State for Wales;
3. All newspaper articles;
4. Statement of Derwyn Jones dated 9th January 2006 relating to an incident in the first Heineken Cup Match between Ospreys and Leicester at Leicester's ground;
5. Evidence submitted by Ospreys relating to a Disciplinary Hearing concerning Luc Lafforgue which was dealt with without reference to the ERC Disciplinary Rules or IRB Regulation 17.

The Committee further expressed the view that if they had accepted the additional evidence in the form of the statements at 2 and 4 above the issue of pre-meditation by the player may have come into consideration which could have been prejudicial to the player and on a finding of liability against him may have resulted in a greater sanction than that already imposed by the Disciplinary Committee.

The Chairman then set out the procedural guidelines for the conduct of the Appeal as set out in 7.4 of the Rules and Mr. Morris confirmed the contents of his Notice of Appeal of the 30th December 2005 and further confirmed that the Appeal was both in respect of liability and sanction. Pursuant to the provisions of Rule 7.4.7 the Chairman advised the parties that the Appeal Committee would proceed with the Appeal on the basis that the Appellant has the burden of proving to the Committee's

satisfaction that the decision of the Disciplinary Committee was in error and should be varied.

The parties were then invited to make any submissions in relation to preliminary issues and Mr. Morris raised an issue in respect of a letter of the 6th January 2006 sent to the Chairman of the Disciplinary Appeals Committee by Rod McKenzie the Chairman of the Disciplinary Committee which letter had been copied to all parties in advance of the Hearing and opened to the Committee an extract from Halsburys Laws Volume 1(1) Administrative Law and Judicial Control at paragraph 100 and quoted "A person ought not to participate or to appear to participate in an Appeal against his own decision, or act or appear to act as both Prosecutor and Judge; the general rule is that in such circumstances the decision will be set aside". Mr. Morris submitted that this was contrary to the principles of fair procedures and natural justice and prejudiced the independence of the Appeal Committee. Mr. Morris further questioned the role of the Chairman in obtaining the letter and requested the Committee to disqualify itself and set aside the original decision.

The Chairman informed Mr. Morris that the letter from Mr. McKenzie was unsolicited and had been copied to all parties in advance of the Hearing and so there was complete transparency in relation thereto which was acknowledged by Mr. Morris. The Chairman further informed Mr. Morris that the Committee had no power or discretion to set aside the original decision and the only way any change could be made to the decision would be to hear formal evidence and arrive at a decision. The Chairman enquired of Mr. Morris if he was of the view that the Committee was so contaminated by this letter that they would not be in a position to arrive at a fair decision having heard all the evidence. In addition the Chairman informed Mr. Morris that the Appeal Hearing could proceed by excluding the letter from Mr. McKenzie from the evidence. Mr. Morris was of the view that as everybody had read the letter and was aware of its contents this would not be satisfactory or fair. Mr. Taylor replied on behalf of ERC that the ERC had not solicited the letter and also submitted that the Committee had a discretion to request the letter if clarification of matters arising in the Judgment were required.

The Committee then informed the parties that there were 2 options open to it;-

1. To disqualify itself and arrange for a new Appeal Committee to be appointed,
or,

2. To have the hearing de novo as provided for in Rule 7.4.7 in which event the same burdens as applied before the Disciplinary Committee shall apply with the onus on ERC to prove the citing complaint.

Mr. Morris requested an adjournment at this point in time to take instructions.

The parties returned to the hearing at 6.05p.m. and Mr. Morris informed the Committee that they wished the Appeal to be heard de novo and in those circumstances it was agreed that all documentation submitted for the Appeal would be set aside and the only documentation to be used in the course of the hearing would be the documentation that was available at the initial hearing, namely,

1. The Citing Complaint;
2. Letter dated 19th December 2005 Roger O'Connor, Disciplinary Officer to Professor Crerar requesting nomination of a Disciplinary Committee;
3. E.mail dated 19th December 2005 from Professor Crerar appointing a Disciplinary Committee;
4. E.mail dated 19th December 2005 from Alain Rolland, Match Referee;
5. Witness Statement of Alejandro Moreno;
6. Medical Report from Paul Stanton, Chartered Physiotherapist re injury to Alejandro Moreno.

Mr. Taylor, on behalf of ERC then notified the Committee that ERC were withdrawing that part of the citing complaint relating to the allegation that the player had kicked his opponent. The Chairman informed all parties that whilst this was an Appeal de novo there would be no Appeal from the decision of this particular Committee and that all parties would be bound by the decision of this Committee without any right of Appeal.

Both parties then informed the Committee that there were no further issues and the hearing proceeded.

EVIDENCE:

The Chairman narrated the terms of the citing complaint and Mr. Morris, on behalf of the player, denied striking an opponent with his elbow contrary to Law 10.4(a) of the Laws.

The Chairman outlined the procedures to be followed in citing cases as provided in Rule 6.6. of the Rules and particularly referred to Rule 6.6.5 noting that the burden of proof shall be on the Disciplinary Officer, on the balance of probabilities, to satisfy the Committee that the person cited committed the act of illegal and/or foul play specified in the complaint.

Mr. Taylor, on behalf of ERC, proceeded to present the evidence which included the documentation referred to above and in addition video tape evidence and a newspaper article whose source was unknown. Mr. Morris took objection to the said newspaper article and Mr. Taylor argued that he was tendering the evidence contained in the newspaper article as to the state of mind of the player going into the match.

The Committee disallowed the evidence relating to this newspaper article on the grounds that its source was unknown and it was not possible to verify its contents.

Mr. Taylor then opened the statements of evidence and then produced video evidence. Each party proceeded to give their own interpretation of the video including the player and in the course of his explanation he admitted striking his opponent with his elbow. In light of this admission the Chairman invited Mr. Morris to reconsider his decision to dispute liability following on which Mr. Morris requested a short adjournment to reconsider the player's position.

Following a short adjournment Mr. Morris confirmed to the Committee that the player now accepts that he did breach Law 10.4(a) of the Laws but that it was unintentional without malice and was at best careless and at worst reckless. He further stated that the reason they had gone into the detail they had was to ensure that all the facts were before the Committee.

The Chairman then confirmed with Mr. Morris that liability was no longer an issue. Mr. Taylor requested permission to cross examine the player in relation to the level of intent with a view to dealing with the matter of sanction.

The player responded by saying that he was reacting to a green arm and raised his elbow and said his actions were instinctive. He was not aware it was No. 3. He was not concerned about the previous weeks match or about illegal play at rucks in that match. He stated that his coach did mention to his players that Tigers were moving players out of the way and that they were holding back Ospreys forwards the previous week and that he, the coach, was going to make the referee aware of this. The coach did not say that Ospreys should do anything but that an approach would be made to the referee beforehand. The player stated that he did not go out to hurt people. He

saw his opponent going off the field from the video evidence which was subsequently presented but he noticed that he was on the pitch at the end of the game. After the incident he was not aware that his opponent was lying on the ground because he was talking to one of his players in the backline as he, the player, is the play maker. He did not speak to his opponent after the game nor before they left the ground and he made no effort to contact the player subsequently.

The player was then cross examined as to his previous record which related to a sending off offence on the 4th October 2002 for which he received a 3 match ban for a red card in a game between Swansea and Llanelli and it was put to him that he threw a player into the perimeter board which sparked a fight in reaction to his dangerous tackle. The player explained this by stating that his actions ended up with the whole Llanelli team chasing him. It was further put to him that his actions on this occasion were deliberate which was denied.

SANCTION:

In accordance with ERC Rule 6.6.21 the Committee invited Mr. Morris to make submissions to the Committee with regard to the sanction, if any, which should be imposed on the player. The Committee drew the attention of Mr. Morris to the terms of ERC Rules 6.6.24 to 6.6.27 (inclusive) and invited him to direct his submissions to these provisions and Mr. Morris responded as follows:-

- (a) He stated that the offending was not intentional but an instinctive reaction to being taken out off the ball;
- (b) The actions of the player were careless but he was raising his elbow initially to protect his back;
- (c) It was acknowledged that the player used his elbow and this is obvious from the video but he submitted that there was an intentional act by his opponent to take him out and reiterated that the actions were instinctive.
- (d) He stated that the player acted in retaliation and not in self defence and reacted to protect himself.
- (e) The player's opponent left the pitch but came back subsequently to participate fully in the game;
- (f) The player's actions had no effect on the game;
- (g) He submitted that the player's opponent was not standing upright and that the player is trying to get back into position for the next phase of play when be

becomes aware of his opponent endeavouring to take him out and raises his elbow as already described and could not possibly have delivered a calculated blow;

- (h) He submitted that there was no time for premeditation, that the incident happened in a split second;
- (i) The conduct of the player was completed and he submitted that the entry point should be at the lower end of the scale.

Mr. Taylor for ERC submitted as follows:

- (a) That the player saw a green arm coming in and reacted to that and in his defence he said he tensed himself for it but he only raised one elbow. His left arm is completely relaxed but his right arm is cocked which he moves back and up by way of a quick reaction and therefore it is a deliberate strike rather than reckless and the question to be answered, following the decision in the David Barrier case, is did he deliberately strike the head of his opponent or was he wholly indifferent as to what part of the his opponent's body he struck;
- (b) In view of the submission at (a) recklessness was not an issue;
- (c) It was a deliberate use of the elbow;
- (d) The Medical Report on the player discloses the injuries he received, namely, a fractured nose leading to bilateral blocked nasal passages;
- (e) The player's actions had no effect on the game;
- (f) The video clearly shows the vulnerability of the victim;
- (g) The level of participation in the offending and the level of premeditation is a matter for the Committee;
- (h) The conduct of the player was completed and in those circumstances the entry point was at the mid range of seriousness.

Pursuant to the terms of Rule 6.6.35 the Committee then assessed the seriousness of the player's conduct and were of the view that the offence should be categorised as being at the mid range of the scale of seriousness which is 3 months as set out at appendix 3 of the Rules in respect of IRB recommended sanctions for offences within the playing enclosure.

In mitigation Mr. Morris tendered a letter dated the 28th December 2005 to Leicester expressing their remorse for the player's actions which letter it transpired had not

been received by Leicester but confirmation was given at the hearing that it had been faxed to them today.

As evidence of the player's character Mr. Morris submitted that he was of good character, that he regularly participated in schools programmes in the locality and was a role model for young players and a good ambassador for Rugby Union. He is 23 years of age having commenced playing rugby at the age of 5. He has played in excess of 50 games professionally and played for 7 seasons at the highest level. He has played 16 times for Wales and participated in the recent Lions Tour to New Zealand where he started in the second Test.

DECISION:

The Committee were of the view that as the player saw his opponent approach he could have taken evasive action but braced himself for contact and his use of the elbow was an instinctive deliberate act without concern for the consequences of his actions.

The Committee were further of the view that there was an element of provocation in that the opponent did appear to change direction away from the direction of the ball for the purposes of making contact with the player.

The player's opponent was removed from the pitch but returned after medical treatment and the Committee has noted the injuries he received.

The actions of the player did not have any effect on the game and the Committee were of the view that the player's opponent was not vulnerable in that there was the element of provocation already referred to above.

The Committee was satisfied that there was no premeditation and that the conduct of the player was completed.

The player's remorse and plea of guilty have come very late in the day but the Committee are satisfied that he is not a persistent offender and have decided that in all

the circumstances the appropriate period of suspension should be 7 weeks and 2 complete days, the period of suspension to commence on the 23rd December 2005.

In addition the Committee direct that the player discharge all of the costs associated with the original hearing and the current hearing including ERC's legal costs.

The parties are reminded that there is no Appeal from this decision.

Dated this 10th day of January 2006

SIGNED:.....

BRIAN McLOUGHLIN - CHAIRMAN