

EUROPEAN RUGBY CUP
DECISION OF APPEAL COMMITTEE IN APPEAL BY SHANE JENNINGS
HELD AT THE OFFICES OF ERC, HUGUENOT HOUSE, St STEPHENS GREEN, DUBLIN

22 OCTOBER 2009 (“the Hearing”)

IN RESPECT OF:-

An appeal by Shane Jennings (“the Player/Appellant”) against the decision of the Judicial Officer, Roger Morris dated 19 October 2009, finding that the Player had committed an act of foul play, upholding a citing complaint and suspending the Player for a period of 12 weeks.

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

Christopher Quinlan, Chairman (England)

Rod McKenzie (Scotland)

Jean Noel Couraud (France)

DECISIONS OF THE APPEAL COMMITTEE:

- (1) That the Player’s appeal against the decision of the Judicial Officer that he had committed an act of foul play and that the citing was upheld be refused;
- (2) That the Player’s appeal against the sanction imposed by the Judicial Officer for the said act of foul play be refused;
- (3) That accordingly the appeal is dismissed; and
- (4) That he pay the costs of the hearing as particularised in the body of this Decision.

1. INTRODUCTION

The Appeal Committee was convened by Professor Lorne D. Crerar, Chairman of the ERC, Disciplinary Panel, pursuant to the Disciplinary Regulations of the Heineken Cup 2009/2010 (“DR”) in respect of a citing complaint made by Richard McGhee, Citing Commissioner against the Player relative to an incident of alleged foul play during the course of a match between

Leinster and London Irish played at Royal Dublin Showground on 9 October 2009. The citing complaint alleged that the Player had committed an act of illegal and/or foul play namely a contravention of Law 10.4(l), acts contrary to good sportsmanship, in that the Player made contact with an opponent's eye or eye area. The opponent was one Nick Kennedy.

The citing complaint was considered by a Judicial Officer, Roger Morris (WRU) at a hearing on 14 October 2009. The Judicial Officer issued his decision on 19 October 2009 ("the Decision"). The Player denied having committed the act of foul play alleged in the citing complaint. The Judicial Officer found it established that the Player had committed the act of foul play, and accordingly upheld the citing. He categorised the offence as meriting a "Low End" entry point, namely 12 weeks. He considered the offence aggravated by the absence of remorse or contrition and the need for there to be a deterrent against a pattern of offending of this type. In consequence he added two weeks to starting point of 12 weeks. Thereafter, he considered the following to be mitigation: the Player's previous "exemplary record and good character" and so deducted a period of 2 weeks. In light of that, he imposed a period of suspension of 12 weeks from 14 October 2009 until 6 January 2010 inclusive.

The Player appealed by Notice of Appeal dated 21 October 2009. In accordance with DR 7.2(b), third bullet point, an Appellant is obliged to state in his Notice of Appeal, the specific aspect of the decision, which was being challenged on appeal. In this case, the Player in his Notice of Appeal chose to challenge both the finding that he had committed the act of foul play alleged in the citing complaint (and the upholding of the citing complaint) and the level of sanction imposed by the Judicial Officer.

The Appeal Committee sat on 22 October 2009 to consider the appeal.

In addition to the members of the Appeal Committee, there was present during the hearing on 22 October 2009:-

The Player

Mr Donal Spring, Solicitor, appearing for the Player

Ms. Avalon Everett, assisting Mr Spring

Mr Christopher Whitaker, Leinster Team Manager

Roger O'Connor – Disciplinary Officer, ERC

Max Duthie (Solicitor), appearing for the Disciplinary Officer

The following documentation and other materials were considered by the Appeal Committee:-

1. Charge letter and Citing Commissioner's report.
2. Hearing notices and directions, both in respect of the hearing before the Judicial Officer and the hearing before the Appeal Committee.
3. Email referring to referee comments.
4. Mr Kennedy's statement.
5. Statement from Dr Rossiter.
6. Recorded footage of the cited incident
7. Judicial Officer's Decision dated 19 October 2009
8. Addendum to that Decision dated 19 October 2009
9. The Player's Directions Statement (DR, Appendix 6)
10. Directions Statement on behalf of the ERC Disciplinary Officer (DR, Appendix 6)

2. FUNCTION OF APPEAL COMMITTEES IN TERMS OF ERC DISCIPLINARY RULES

The Heineken Cup Disciplinary Rules are contained in schedule 4 to the Participation Agreement of the Heineken Cup 2009/2010 and are part of the Terms and Conditions of the Tournament. In accordance with clause 1.1.2. of the Participation Agreement, all clubs participating in the Heineken Cup 2009/2010 are obliged to have delivered to the ERC a validly executed copy of the Participation Agreement formally agreeing on its own behalf and on behalf of each of its Players and members of staff to be bound and abide by the terms and conditions of the Participation Agreement. There was no suggestion that the Player was other than bound, as a matter of contract, by the Disciplinary Rules.

In the usual course of events, the primary fact finding tribunal in the case of players ordered off or cited is a Disciplinary Committee or as it was in this case, a single Judicial Officer. In the case of a citing, the burden is on the Disciplinary Officer to prove, on the balance of probabilities, that the Player cited committed the act or acts of Foul Play specified in the citing complaint (DR 6.7.11). Formal rules of evidence do not apply to hearings before the Disciplinary Committee; it has discretion to receive such evidence as it thinks appropriate and to attach such weight to that evidence as it sees fit (DR 6.7.18).

In a citing, where the Disciplinary Officer meets the burden of establishing on the balance of probabilities that the act or acts of foul play specified in a citing complaint was/were committed, then the Disciplinary Committee shall uphold the citing complaint (DR 6.7.11). It is for the Disciplinary Committee to decide whether or not it has been proved that the cited act or acts of foul play happened. The burden of proof is on the Disciplinary Officer to prove to the satisfaction of the Disciplinary Committee on the balance of probabilities that the cited act or acts happened. Proof on the balance of probabilities is no more than the Disciplinary Committee being satisfied that it is more likely than not that the fact in question e.g. whether the cited act or acts of foul play happened, is established. As the ERC Appeal Committee made clear its decision in *Marius Tincu*, 25 November 2008, the standard of proof required does not change based on the seriousness of the act or acts of foul play cited. The seriousness of the foul play cited is one component within the whole range of circumstances, which have to be weighted in the scale when deciding as to whether the Disciplinary Officer has discharged the burden of proof.

Subject to the issue of whether the Appeal Committee should consider an appeal *de novo*, the Appellant in an appeal before an ERC Appeal Committee has the burden of proving that the decision being challenged was both in error and that it should be overturned or varied. As to the Appeal Committee's approach, the following assistance appears in the decision of *Tincu*: "*except in the case of a de novo appeal, the function of the Appeal Committee is not to review*

all of the evidence, which was before the Disciplinary Committee, and then to come to its own conclusions as to whether or not that evidence establishes on the balance of probabilities that the cited act or acts of foul play occurred” (p7 of the Decision). ERC Appeal Committees are only entitled to interfere with a factual determination of the Disciplinary Committee where it concludes that such determination was not consistent with the evidence before the Disciplinary Committee. As is to be derived from the decisions of previous ERC Appeal Committees in the cases of *Alan Quinlan, Gerry Flannery, Alexandre Audebert and Tincu* in making the assessment as to whether the evidence was consistent with such a determination by a Disciplinary Committee a margin of appreciation is to be accorded to the determination being challenged.

3. NOTICE OF APPEAL AND APPLICATION FOR A *DE NOVO* HEARING

DR 7.4.8 permits Appeal Committees to determine appeals as a *de novo* hearing only where it is shown that the circumstances in which the matter is brought before the Appeal Committee are exceptional and that there are compelling reasons why the Appeal Committee should hear the case *de novo*. It is not necessary to review the circumstances in which *de novo* hearings will be allowed by Appeal Committees. It is not necessary because Mr Spring, on behalf of the Appellant did not pursue the request which appeared in the Notice of Appeal for the hearing to be heard *de novo*. He told us that he was “not proceeding” with it and, as he put it, he accepted that the “burden has shifted”.

However, Mr Spring submitted that significant and important parts of the Judicial Officer’s Decision where he recorded the evidence either did not reflect accurately that evidence or in some respects was plain wrong. He further submitted that the Judicial Officer misinterpreted important aspects of the evidence. In consequence of those matters, he submitted we should “hear the evidence again”. As to which evidence, he said he wished to call Mr Kennedy and to play footage of the incident. When asked what Mr Kennedy would say, Mr Spring told us he anticipated he would say he did not believe the contact with his eye was intentional. It was Mr

Spring's recollection that he, Kennedy, said that before the Judicial Officer; that was not Mr Duthie's recollection.

Mr Kennedy gave evidence before the Judicial Officer. If he said what Mr Spring recalled there was no need for him to be called. The Decision (p6) records Mr Kennedy as having said he felt he overreacted by using (to the referee on the pitch) the word "gouge" because to him "that indicated a finger right in the eye". At p7 of the Decision, the Judicial Officer records that Mr Kennedy did not think the Appellant was the sort of player who would "indulge in gouging". Those passages seem to us to be consistent (at least) with Mr Spring's understanding of Mr Kennedy's evidence.

If Mr Kennedy did not say that below, three points arise. First, since he was a witness before the Judicial Officer he could (if he was not) have been asked that question. Accordingly the proposed evidence did not satisfy DR 7.4.11, namely it was available at the time of the proceedings below. Second, how could Mr Kennedy possibly know, still less speak as to the Appellant's state of mind. Third, it was irrelevant to any issue before us. It was irrelevant because the Judicial Officer did not find that the Player's act was an intentional act. On the contrary, he found that the contact with the eye was reckless.

For all of those reasons, we were against the application and declined to hear from Mr Kennedy. We pointed out that Mr Spring was free to comment on the evidence below, including the footage.

4. SUBSTANTIVE APPEAL

Act of Foul Play

Submissions

Having notified parties that the application to hear Mr Kennedy was refused we heard Mr Spring's submissions as to why he submitted the Decision to uphold the citing complaint was in error and should be overturned.

Mr Spring counselled us to exercise caution against being improperly influenced by the the letter from Monsieur B Lapasset, Chairman, International Rugby Board ('IRB') dated 1 July 2009 to Mr T Gresson, Chairman of the IRB Judicial Panel and His letter to IRB Judicial Personnel (which includes the Chairman of this Appeal Committee and Mr McKenzie) dated 10 July 2009. On 1 July 2009 the IRB also issued a press release. All three documents concerned what is sometimes described using the expression "eye-gouging". That has a specific meaning as well as being used in a more general and shorthand way to describe all incidents of foul play involving contact with the eye or eye area. Such include "gouging" (in the well-understood rugby sense) as well as reckless contact with the eye or eye area. As we read the documents it is plain that the IRB and Mr Gresson were intending to address all incidents of foul play involving contact with the eye or eye area.

Mr Spring criticised the Judicial Officer's Decision. I record here a *summary* of the criticisms. I emphasise that, conscious that I am reprising submissions about the alleged inadequate and inaccurate recording and interpretation of evidence by another. He said the Judicial Officer made a fundamental error in stating that the Appellant got into a wrestling match with Mr Kennedy (p11 Decision). He did not: Kennedy pulled him into the ruck, Mr Spring submitted. That error (as he categorised it) was compounded by his misinterpretation of the footage and the Player's evidence. He objected to the Judicial Officer categorising the Appellant's

movement of his left hand as “reaching out” when in fact he was putting out his hand to break his fall, as he tried to get to his feet (p11 Decision).

Dealing with Mr Kennedy’s reaction on the field, namely his immediately accusing the Appellant of having gouged him, Mr Spring reminded us that Mr Kennedy’s said that he overreacted to the contact. Mr Spring said we could not rule out such an overreaction following an accidental contact with the eye.

Turning to the footage, Mr Spring accepted it showed the Appellant’s left hand making contact with Kennedy’s face, but said it supported his contention that at that moment his line of sight was blocked and his face was “semi-turned”. He made a point that Kennedy never let go of the Appellant. He counselled against the danger of attributing actions to a player when watching in slow motion highly dynamic incidents.

Mr Spring summarised the Appellant’ case in this way. He was pulled into the ruck and in the course of being manhandled, put out his left hand to break his fall. The coming into contact of that hand with Kennedy’s face was an accident. He said there was nothing to support the finding that contact with Kennedy’s left eye was reckless.

In response, Mr Duthie submitted that there was sufficient evidence before the Judicial Officer for him to conclude, on the balance of probabilities, that the Player had committed the act of foul play specified in the citing complaint. Mr Duthie submitted it was not for the Appeal Committee to seek to review that evidence and come to its own conclusion as to whether or not the Disciplinary Officer had discharged the burden placed upon him by DR 6.7.11. The task of the Appeal Committee was to determine whether in light of the evidence relied upon by the Disciplinary Officer, the Judicial Officer was entitled to come to the conclusion that he had discharged the burden upon him. In Mr Duthie’s submission, there was sufficient evidence before the Disciplinary Committee to discharge that burden.

Decision

The issue for the Appeal Committee can be stated shortly. Was there a sufficient evidential basis for the Judicial Officer's decision that Mr Jennings committed the act of foul play alleged in the citing? In other words, that there was contact with Mr Kennedy's eye in circumstances which constituted an act contrary to good sportsmanship and therefore Foul Play.

In our judgment, there was ample evidence to support that conclusion. First, the contact with the left eye of Mr Kennedy by Mr Jennings left hand. This was proved by an abundance of evidence, including Mr Kennedy. On appeal that evidence was not challenged; Mr Spring said in terms that they accepted it. The high definition footage showed clearly the Appellant's left hand making contact with Kennedy's face. In addition, the medical evidence from Dr Rossiter proved a modest injury to that left eye, supported by a photograph of the same. None of that evidence was challenged or disputed on appeal.

Second, the nature of the contact. At page 11 of the Decision and under the heading "Decision as to whether or not the Complaint should be upheld" the Judicial Officer states that "on the balance of probabilities the fingers of the left hand of the Player made reckless contact with the eye of eye area of Kennedy causing a bruise to his eyelid". At page 13, when dealing with entry point, he states this: "the Player [Appellant] did not deliberately set out to put his fingers into Kennedy's eyes or the area of his eyes but he deliberately placed his hand on Kennedy's face in a manner that, in the Judicial Officer's assessment, was reckless as to whether or not such contact would be made". As we understand it, the Judicial Officer's factual conclusions on the act of foul play were thus

1. The Appellant put out his left hand
2. He deliberately put it onto Mr Kennedy's face
3. When he did that he did not intend to make contact with his eye or eyes or the area thereof

4. When he put his left hand onto Mr Kennedy's face, he was reckless as to whether contact was made with his eye or eyes or the area thereof
5. That was reckless in accordance with meaning at DR 6.7.32, namely that when he put his left hand onto Mr Kennedy's face he knew or should have known that there was a risk of his making contact with the eye or eye area.

In this case, the Judicial Officer accepted the Player's evidence that he did not intentionally make contact with Mr Kennedy's eye. However, he rejected his contention that his hand accidentally encountered Mr Kennedy's face. He found as a fact that he could see where that hand was going. As to that, the Judicial Officer had the advantage of hearing the evidence given by the Player. His evidence "in chief" was to the effect that he did not make contact with his face (pp8-9, Decision). When questioned by Mr Duthie he said he could not recall making contact with Mr Kennedy's eye. When re-examined by Mr Spring, he said he had not deliberately made contact with Kennedy's eye. In cases where credibility and reliability are in issue this advantage is significant and an Appeal Committee in such circumstances will be slow to interfere with decisions on matters of fact taken by a Disciplinary Committee. This recognises that where a Disciplinary Committee has observed the witnesses and considered their evidence, the decisions of the Disciplinary committee on issues of fact are much more likely to be correct than those of the Appeal Committee which has not had the advantage of hearing the same witnesses. This is part of the margin of appreciation to be accorded to the decisions of Disciplinary Committees.

There was ample evidence to support the conclusion that it was reckless in the sense explained above. The Judicial Officer, as he was entitled on the evidence before him, rejected the Player's contention that his line of sight was blocked or impaired such that he could not see Mr Kennedy's face. That conclusion is supported by the footage of the incident. Further, it is also of note that the act of foul play was the second of three contacts made in very quick succession by one or other of the Appellant's hands with Mr Kennedy's head or face. On the ground and immediately before his left hand made contact with the face, he grabbed his headgear with his

right hand. Immediately after they both stood up (following the second contact which gave rise to the citing) he pushed his left hand into Mr Kennedy's face. That combined with the finding that the Appellant knew where his hand was going, was a sound foundation for the Judicial Officer's conclusion that he committed an act of foul play.

For those reasons, and notwithstanding Mr Spring's forceful submissions and his analysis of the footage, we were comfortably satisfied that there was sufficient evidence to support the Judicial Officer's conclusion that the Appellant's contact with Mr Kennedy's eye which was reckless in the sense set out above. It follows that in all the circumstances, the Appeal Committee is satisfied that there was sufficient evidence before the Judicial Officer, which he accepted, to entitle him to find it established that the burden on the Disciplinary Officer to prove the allegation of foul play on the balance of probabilities had been discharged to the requisite standard (DR 6.7.11). In such circumstances, the Judicial Officer was bound to uphold the citing as it did. There was no error on the part of the Judicial Officer in the approach he took to determine this matter. Accordingly, the Appeal Committee refused this aspect of the Player's appeal.

Sanction

Mr Spring submitted that the Judicial Officer erred in finding the act of foul play was aggravated within the meaning of DR 6.7.34 by the absence of remorse or contrition and for the need for there to be a deterrent against a pattern of offending of this type. No criticism is made of his decision to categorise the offence as one meriting a "Low End" entry point.

The starting point is whether the Judicial Officer erred in his determination that the said aggravating factors were present. As for the need for a deterrent, DR 6.7.34(c) the Judicial Officer stated that "there is a need in the light of the number of recent cases of the breach of this Law for there to be a deterrent against a pattern of offending." Further, he said that "this is particularly so "to emphasise that breaches of this law do not only include 'gouging' in the

worst sense of the offence. Players need to be aware that the placing of a hand on another's face will inevitably lead to a danger of damage to that player's eyes. Such actions need to be removed from the game".

Although he did not refer expressly to the Monsieur B Lapasset letter dated 1 July 2009, the IRB press release or Mr T Gresson's (Chairman of the IRB Judicial Panel) memorandum to IRB Judicial Personnel, dated 10 July 2009 his sentiments echo the content of those. In his letter to Mr Gresson, Monsieur Lapasset expressed to him that "the prevalence of eye-gouging in the Game is a major worry". Thereafter he listed a range of sanctions handed down in named cases; it is plain he had in mind acts of foul play involving contact with the eye or eye area. He concluded by reminding the reader that it is the IRB's "strongly held view that such serious offences of this sort must be dealt with severely". In his memorandum Mr Gresson reminded to IRB Judicial Panel Personnel of HHJ Blackett's comments in *Hartley* and said "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".

None of that can properly be categorised as pressure. It is (if we may say so) no more than a reminder of (in our view) the legitimate sense of concern held by the IRB about (1) the prevalence and (2) gravity of such offences. This calendar year there have been a number of examples of this offending, some of which have attracted much publicity. It was perfectly open to the Judicial Officer conclude there is a pattern of such offending and that the time had arrived where a deterrent is needed to combat it. Indeed, we agreed that there is such a pattern and that a deterrent is appropriate. His assessment of two weeks cannot sensibly be said to be excessive.

In the proceedings below the Player expressed the view that he had "nothing to apologise for". That was consistent with this case that he was not guilty of an act of foul play. A player is entitled to defend himself against an allegation of foul play. His case before the Judicial Officer

is summarised above. He might have been robust in his defence, but we see force in the point that it is difficult for him to be contrite about or have remorse for something which he denies. For our part we would not have regarded that, of itself, as an aggravating factor. We would not have treated it as such, and in our judgment the Judicial Officer erred in so doing. However, in light of our conclusion in respect of the need for a deterrent, that is, for the purposes of this appeal, of no practical effect.

As is clear from the Addendum to his Decision the Judicial Officer considered the impact of DR 6.7.36. The presence of an aggravating factor and this being a Low End offence together triggered the operation of DR 6.7.36 such that he was not able to apply any reduction from the minimum (entry point) period of 12 weeks. It operates on the Appellant Committee in exactly the same way. That is so regardless of the mitigation advanced on the Player's behalf.

In such circumstances, we were driven to conclude that the Judicial Officer did not err in imposing the sanction of a suspension for a period of 12 weeks. Accordingly, the Appeal Committee refused this aspect of the Player's appeal.

5. COSTS

Mr Spring did not contest the ERC's application for costs. Accordingly and pursuant to DR 7.4.20 we ordered the Appellant to pay the following costs

1. The costs of the holding of the hearing
2. The travel costs of the members of the Appeal Committee, save for Mr McKenzie, in respect of whom he shall pay one-third of his costs
3. The legal, travel and accommodation costs of the ERC

In the event of disagreement as to the specific sums payable hereunder such dispute shall be dealt with as proved by DR 7.4.20.

A handwritten signature in black ink, appearing to read 'Chris Quinlan', written in a cursive style.

Christopher Quinlan

Chairman

Appeal Committee

22 October 2009