

Decision of the Independent Judicial Officer

EPRC

Held via Skype at Hutchinson Thomas Solicitors, Pendrill Court, Neath

On 9th April 2015

In respect of:

Jacques Burger of Saracens (“the Player”); and

The Citing Complaint relating to the Player in the match played between Racing Metro –v- Saracens on 5th April 2015 at Stade Yves Du Manoir, Colombes, Paris for an offence of punching or striking contrary to Law 10.4(a) of the Laws of Rugby Union.

Judicial Officer appointed to hear the case:

Simon Thomas (Wales) (“the Judicial Officer”)

Decision of the Judicial Officer

- I. The Player admitted that he had committed the act of foul play alleged in the Citing Complaint. Accordingly the Judicial Officer upheld the Citing Complaint.
- II. The Player is suspended from taking part in the game of Rugby up to and including 12th April 2015. This represents a one week suspension commencing 5th April 2014.
- III. The Judicial Officer made no award for costs.

Introduction

1. The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of EPRC's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the European Rugby Champions Cup 2014/2015. The Judicial Officer was appointed to consider the Citing Complaint ("the Complaint") against the Player in the match played between Racing Metro and Saracens on 5th April 2014 in the Champions Cup 2014/2015.
2. Mr Eugene Ryan (Ireland) was appointed as the Independent Citing Commissioner to this match and had cited the Player for an offence contrary to Law 10.4(a) of the Laws of Rugby Union namely punching or striking. It was alleged that Racing Metro number 9, Maxime Machenaud had been struck to the left side of his head/face area with the left hand/wrist area of the Player when Machenaud was kneeling and had just passed the ball from the tackle area.
3. Present at the hearing in addition to the Judicial Officer were the following persons:-
 - a. Mr Liam Mc'Tiernan, Regulations Executive EPRC.
 - b. Mr Roger O'Connor, Disciplinary Officer EPRC.
 - c. Mr Jacques Burger ("the Player").
 - d. Mr J. P. O'Reilly, Saracens Team Manager.
 - e. Mr Mark McCall, Saracens Director of Rugby.

Preliminary Matters and Procedure

4. At the commencement of the hearing the Judicial Officer noted the identities of all present and narrated the Complaint reminding the Player that the Complaint was in respect of an allegation that the Player had struck Mr Machenaud.
5. The Judicial Officer reminded all parties that the EPRC Disciplinary Rules found in the Participation Agreement for the European Professional Rugby Champions Cup 2014/2015 (the "Disciplinary Rules" and "DR" in the singular) would apply. The Judicial Officer outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.
6. 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. The evidence for consideration was as follows:-

- a. The Citing Complaint.
- b. A translated statement from Maxime Machenaud.
- c. An emailed report from Mr Nigel Owens the Match Referee.
- d. An emailed report from Mr Ian Davies, one of the Assistant Referees.
- e. The Player's replies to the Rules' Standing Directions.
- f. An exchange of emails between the Judicial Officer and Mr J. P. O'Reilly clarifying the basis of the Player's original replies.
- g. The Disciplinary Officer's response to the Standing Directions.
- h. The written decision of the Judicial Officer in the Celtic Rugby Guinness Pro 12 appeal case relating to Leone Nakawara of Glasgow Warriors (2015).

The Citing Complaint

7. The Judicial Officer narrated the Citing Complaint which confirmed that the incident had occurred after the elapse of 47 minutes 46 seconds on his AMS (timing) system very shortly before the end of the first half.

8. The Citing Complaint contained the following:

"RM number 9 Maxime Machenaud is tackled by Saracens number 1 Mako Vunipola approx 3 metres outside his 22 metre line. As he passes the ball out of the tackle, number 7 Saracens, Jacques Burger is seen to run from behind Machenaud and to dive on top of him as he passes the ball. As Burger dives on top of Machenaud, who is on his knees passing the ball, he strikes him on the left side of the head/face area with his left hand/wrist area. After the striking incident, Machenaud is seen kneeling, holding his head as the RM Captain, Dimitri Szarzewski is seen attempting to draw the referee Owen's attention to the incident".

9. It also added the Machenaud was attended to on the field but was able to continue quickly.

10. The Judicial Officer then reminded the Player of his replies to the Standing Directions in which he had stated the following:

"I am the Player named in the Citing Complaint.

I will not argue any preliminary matters.

I accept that the Citing Complaint is a true and accurate account of the incident that resulted in the citing.

I immediately realised that I had mistimed a tackle. I had no intention to strike Machenaud, make contact with his head/face or commit an act of foul play and apologised to Machenaud at half time.

I accept that my act could have warranted a red card".

11. The Judicial Officer also reminded the Player that in response to a pre-hearing question asked by the Judicial Officer to Mr JP O'Reilly for clarification of his position, Mr Burger had confirmed that his conduct was reckless and he had committed the act of foul play alleged in the Citing Complaint.

The Plea

12. The Judicial Officer asked the Player whether he admitted or denied the allegation.
13. It was confirmed that Mr Burger's position was as that set out in the pre-hearing responses, namely that he admitted striking Machenaud but that his actions had not been intentional but had been reckless.
14. On that basis the Judicial Officer explained that he would uphold the Citing Complaint and would then proceed to hear the case and thereafter decide what sanction (if any) should be imposed.

Evidence supporting the Complaint

15. The Judicial Officer therefore invited Mr McTiernan, to present the evidence which was as follows:-

- a. **Match Footage:**

The match footage showed the incident from a number of angles both in real time and in slow motion. It gave a very clear depiction of what had occurred. The Disciplinary Officer confirmed that it corresponded very closely to the description set out in the Citing Complaint and, for that reason, it is not necessary to repeat it in this part of the written Judgement.

The Disciplinary Officer highlighted a number of relevant features which included the fact that Machenaud had been tackled by Sarcens number 1 and the Player had approached Machenaud from behind. Machenaud "pops the ball up" (i.e. passes it to his team mate) just as the Player launches himself towards Machenaud. As he dives

the Player can be seen using a swinging left arm in the direction of Machenaud. It appears that the contact with the left side of Machenaud's face or neck area is made with the midpoint of the forearm of the Player. Mr McTiernan further commented that it was of significance that Machenaud would have not have been able to have seen the Player's approach behind him and would have not been in any position to defend himself from the strike.

16. The Judicial Officer then narrated the remainder of the evidence which was as follows:-

b. Maxime Macheaud:

This statement confirmed that there was no physical consequence of the strike. Mr Machenaud confirmed that the Player had apologised for his gesture at half time and the apology had been accepted. He went on to add that he had told the Player that his conduct could have had serious consequences.

c. Match Official Reports:

The Referee, Mr Nigel Owens, had provided an emailed statement confirming that he had not observed the incident. He recalled the Racing Metro Captain asking him to check for foul play just after the incident had occurred but Mr Owens had explained that he could not check anything at his request if it had not been referred to him also by an Assistant Referee or the TMO. He said that he had asked all of the match officials if there was anything that needed to be checked and no- one had reported to him that there was

The Assistant Referee Ian Davies had not seen anything.

17. The Judicial Officer enquired whether there were any statements from the other Assistant Referee and the TMO but Mr McTiernan confirmed that there had been nothing provided by them but that he was satisfied from the information provided by the Citing Commissioner in the Citing Complaint that they had not observed the foul alleged foul play.

18. This concluded the evidence supporting the Citing Complaint.

Player's Case

19. The Judicial Officer then invited Mr Burger to provide his evidence in relation to the incident by reference to the match footage.

20. Mr Burger explained that the incident had occurred only a minute or so before half time. He explained that the passage of play leading up to the incident had involved Saracens being in possession of the ball but having lost it in the Racing Metro in-goal area. At that point Racing Metro had begun a counter attack. Mr Burger explained that at the time of the incident the first half was almost completed and he was feeling quite tired. He had observed Maxime Macheaud being "half tackled" by Saracens number 1. He said that as he approached the tackle area he could see Macheaud getting to his knees. Macheaud's back was towards him and he could not see the ball from his position because Macheaud's body was shielding it from his view. He said that his intention was to try and complete the tackle. He said that as soon as he came close to Macheaud who was on his knees he committed to the tackle. He intended to engage Macheaud with his left shoulder to Macheaud's left shoulder and at the same time wrap his left arm around Macheaud in an attempt to prevent Macheaud passing the ball. He said that as he committed to the tackle he dropped his head so that he was no longer looking directly at Macheaud. He had since seen from the video evidence that after he had committed to the tackle and dived towards Macheaud, Macheaud's body angle dropped down and he felt his left forearm hit Macheaud to Macheaud's neck. He described that there had been no call for foul play by the Referee and so he had played on.
21. However, a few moments later the Referee blew the whistle for half time and without anybody telling him to do so, he approached Macheaud who was about to give an interview to French TV and said that he was very sorry for what had happened. The Player stated that Macheaud had accepted his apology and had said that it was no problem and that he had appreciated it was an accident. He had said that Macheaud had accepted his apology unreservedly.
22. The Player was adamant under questioning that he had never intended to strike Macheaud to the head area. He repeated that he had committed to the tackle very early.
23. The Judicial Officer questioned the Player in conjunction with the video evidence about the precise mechanics of his approach to Macheaud and the Player confirmed that when he had dived towards Macheaud he had extended his right arm with a view to that breaking his fall when he landed but that it was the left arm that was being used in a swinging motion in an attempt to prevent the offload by Macheaud.
24. The Judicial Officer asked the Player and his representatives whether they wanted to call any further evidence in relation to the incident itself but they did not.
25. This therefore concluded the evidence on the part of the Player.

Sanction

26. The Judicial Officer explained that his function under the Rules was firstly to consider the entry point criteria under DR 7.8.32 so that a determination could be made as to whether the entry point was low end, mid range, or top end. Thereafter he would consider the existence of any aggravating factors in which case a further period of suspension may be added before considering the existence of any mitigating factors which may reduce any period of suspension.

Disciplinary Officers Submissions on Sanctions

27. The Judicial Officer invited the Disciplinary Officer to make any submissions on entry point.
28. Mr McTiernan confirmed that it was not the practice of the EPRC Disciplinary Officer to make suggestions or recommendations as to entry point but wished to make a number of comments which he felt might assist the Judicial Officer in his determination.
29. He commented that it was a matter for the Judicial Officer to determine whether the strike had been intentional or reckless. Insofar as the gravity of the matter was concerned and the part of the body with which the offence was committed, Mr McTiernan reminded the Judicial Officer that it had been the Player's left mid forearm which had struck Mr Macheaud. He also confirmed that there had been no injury to Mr Macheaud and, indeed, Macheaud was later awarded the "man of the match". He did say, however, that Macheaud had been vulnerable because as the strike had come from behind him he could not have anticipated it and was in no position to defend himself.
30. Mr McTiernan confirmed that there were no aggravating factors to be taken in to account and it was obviously a matter for the Player to advance mitigating factors on his behalf.
31. The Judicial Officer then invited the Player's representative to make submissions on entry point by reference to DR 7.8.32.

Player's Submissions on Sanction

32. Mr O'Reilly submitted that the evidence spoke for itself and there was little further to add. Mr McCall added that it should be taken in to account that the passage of play leading up to the incident had lasted for 45 seconds which had therefore been quite long and that the players would have been fatigued by this stage. He also stated that the execution of the tackle had not been in accordance with the Saracens coaching methods in that the Player's eyes had dropped from the tackle area too early after he had committed to the tackle. He also drew attention to the fact that at the point the Player had committed to the tackle, Macheaud had

been on his knees but that his body was rising in an upwards direction but that after the Player had committed to the tackle Machenaud had dropped from that height which had contributed to his neck being struck by the Player's left forearm.

33. Insofar as mitigating factors were concerned, it was confirmed by the Disciplinary Officer that the Player had an unblemished disciplinary record.
34. The Player confirmed that he had been playing professional rugby since the age of 20. During his career he had played in South Africa for three years, in Nantes for one year, thereafter returning to South Africa for two years to play with the Blue Bulls and had been with Saracens for five or six years. He was now 31 years of age and was the Captain of the Namibia national side.
35. It was advanced on his behalf that during his career he would have made many hundreds of tackles and had never committed a similar act before which had resulted in a sending off or citing complaint.

Decision as to Sanction

36. The Judicial Officer retired in private to consider his decision as to sanction.
37. In this regard the Judicial Officer considered the terms of the Disciplinary Rules including DR 7.8.32 to DR 7.8.35.
38. The Judicial Officer noted that an offence of punching or striking an opponent contrary to Law 10.4(a) was listed within the World Rugby Recommended Sanctions for offences within the playing enclosure (found in Appendix 3 of the Disciplinary Rules).
39. The Judicial Officer noted that the prescribed sanctions for actions contrary to Law 10.4(a) were as follows:-
 - a. Entry point – 2 weeks.
 - b. Mid range – 5 weeks.
 - c. Top end – 8 weeks + (maximum 52 weeks).
40. The Judicial Officer's determinations as to entry point were as follows:-
 - a. The offending had not been intentional or deliberate.

- b. The offending had been reckless, that is the Player knew (or should have known) that there was a risk of committing an act of foul play.

The Judicial Officer was satisfied having heard from the Player that his evidence that he had not intended to strike Machenaud was truthful. It was consistent with what was depicted on the match footage whereby his line of vision had dropped as he had committed to the tackle and that Machenaud's own body angle had altered in a downward direction which contributed in a strike to his neck area. When considering the state of mind of the Player, the Judicial Officer also concluded that the fact the Player had made an unprompted apology for his conduct to Machenaud during half time when the matter had not been picked up by any match official was consistent with him being genuinely remorseful for what had happened which was less likely to have occurred if he had intended to have struck Machenaud in the first place.

- c. As to the gravity of the Player's actions in relation to the offending, the Judicial Officer did not consider that his conduct was particularly grave. Whilst he should have exercised considerable more care in how he had attempted to tackle Machenaud, it was not a strike in the manner which one might normally expect to find in a ordering off or citing complaint.

- d. The Judicial Officer noted the manner in which the offence was committed in that it had been the mid inside part of the Player's left forearm which had connected with Mr Machenaud as opposed to any bony area of the Player such as his fist or elbow.

e.f.& g. Provocation, retaliation or self defence were not relevant to this particular case.

- h. The Judicial Officer noted that the effect of the Player's actions on the victim appeared to be no more than transitory in that whilst he required some on field treatment immediately after the incident he was fit to play on and was fit to be selected for the next match. He went on to be man of the match.

- i. There was no effect on the match.

- j. The Judicial Officer noted that Machenaud had been vulnerable for the reasons given above, namely that as the Player had approached him from behind, he had no means of anticipating or defending himself from it.

- k. There was no question of premeditation in the strike.

- i. The strike had been completed.

- m. There were no other features in relation to the Player's conduct relevant to the offending.
41. Based upon the Judicial Officer's assessment of the entry point criteria, the Judicial Officer was comfortably satisfied that this was a low entry point case which therefore resulted in a starting point of a two week suspension.
 42. As to aggravating factors, it was quite clear that there were none present.
 43. Turning to mitigating factors under DR 7.8.35, the Judicial Officer noted that there were several.
 44. Firstly the Player had made an acknowledgement of culpability/wrong doing to the Judicial Officer in his replies to the standing directions and this had assisted the administration of the hearing and had resulted in it being dealt with by technological means.
 45. The Player had an exemplary disciplinary record over a long period of time and that weighed heavily in his favour.
 46. Whilst it could not be said that the Player was either youthful or inexperienced, notwithstanding that these questions are specific considerations under the heading of mitigating factors under DR 7.8.35, the Player himself should not suffer any prejudice as a consequence particularly in circumstances where he had a long and unblemished record.
 47. The Player's conduct at the hearing had, in the view of the Judicial Officer, been open and honest, he had been apologetic for his actions and had had accepted responsibility for his conduct without trying to minimise it in any way.
 48. Very importantly, the Judicial Officer noted that the Player had made an unprompted apology to Mr Machenaud during half time which was only a few minutes after the incident had occurred. The Judicial Officer was satisfied that this was a genuine apology. The timing of the personal apology whilst the match was still going on evidenced positive character on the part of the Player. Mr Machenaud had confirmed that this apology had occurred during half time and he had also confirmed that it had been accepted by him.
 49. There were no other off-field mitigating factors the Judicial Officer considered relevant.
 50. Pursuant to DR 7.8.36, the Judicial Officer is able to give a reduction of no more than 50% from the entry point but the methodology is that one should start from 0% and work towards 50%. In this instance, however, the Player was entitled to full mitigation for the reasons given

above and accordingly 50% from the entry point of two weeks equated to a one week discount.

51. The Judicial Officer reconvened the hearing to announce his decision and explained how he had reached it. In the context of the Player's playing pattern, Saracens were due to play Leicester Tigers on Saturday 11th April 2015. That is a game which the Player would have in all probability been selected for and accordingly the Judicial Officer concluded that the one week suspension would take effect from 5th April 2015 up to and including Sunday 12th April 2015 which means the Player is free to resume playing on Monday 13th April 2015.
52. The Disciplinary Officer confirmed that there was no application for costs. Accordingly no order for costs was made.

Appeal

53. The Judicial Officer reminded the parties of their right to appeal against his decision under DR 8.1.

Dated: 10th April 2015

Simon Thomas
Judicial Officer