

# Decision of the Independent Judicial Officer

ERC Heineken Cup 2013-2014

Held at Huguenot House, 35-38 St Stephen's Green, Dublin

On 23 January 2014

In respect of

**Cornell Du Preez of Edinburgh ("the Player")**

And

A citing of the Player in respect of an offence contrary to Law 10.4 (a) of the Laws of the Game in the match Munster v Edinburgh played on 19 January 2014.

Judicial Officer appointed to hear the case:

**Jeremy Summers (England) ("the Judicial Officer")**

## **Decision of the Judicial Officer:**

- (i) The Judicial Officer directed that, pursuant to DR 8.8, the citing should proceed on the basis that the foul play alleged was an offence contrary to Law 10.4 (a) or in the alternative an offence contrary to Law 10.4 (h).
- (ii) The Judicial Officer found that an act of illegal and/or foul play had occurred contrary to Law 10.4(h) and therefore upheld the citing.
- (iii) The Judicial Officer was however not satisfied that the act of Illegal and/or Foul Play merited a "Red Card" and in application of DR 6.7.41 imposed no sanction upon the Player.
- (iv) No order for costs was made.

## Introduction

1. 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 2013-2014.
2. The Judicial Officer was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Munster and Edinburgh on 19 January 2014 ("the Match")
3. Yves Thieffine (France) was appointed as the Citing Commissioner to the Match and had cited the Player for an infringement of Law 10.4 (a) namely punching or striking an opponent.
4. Present at the hearing in addition to the Judicial Officer were the following persons:-
  - The Player
  - Mr David Kerr, solicitor for the Player
  - Mr Max Duthie, solicitor for the ERC Disciplinary Officer, ERC
  - Mr Liam McTiernan, ERC Regulations Executive.

## Preliminary matters & procedure

5. At the commencement of the hearing the Judicial Officer identified all parties present and confirmed that the hearing would proceed in accordance with The Disciplinary Rules ("DR") found in the Heineken Cup Participation Agreement 2013-2014.
6. The Judicial Officer read the Complaint and the Official Reports from the Match Officials.
7. Following a submission from the ERC Disciplinary Officer (see further paragraph 14 below) that the Judicial Officer might consider exercising his discretion under DR 8.8 to amend the offence for which the Player had been cited to an offence contrary to Law 10.4 (g), (h) or (k), submissions were invited from the parties.
8. Mr Duthie considered a strike with a shoulder contrary to Law 10.4 (a) as set out in the Complaint might be viewed being inconsistent with the legitimate use of a shoulder as part of the game and thus an offence of that nature as a matter of policy might create difficulty. He submitted that the Judicial Officer ought to most safely order that the three further offences be put to the Player as alternative offences. The Judicial Officer considered that to do so would not assist case management. He was however satisfied the offence could properly be characterised as one contrary to Law 10.4 (h) and accordingly directed that the Complaint should be considered as if alleging both offences in the alternative.
9. The Player formally denied the Complaint. In so doing he initially denied that he had committed an act of foul play and in the alternative that his conduct, if foul play, had not warranted a Red Card
10. The Judicial Officer indicated that his preliminary view was that he might take persuading that no act of foul play had been committed but that he could see some merit in the Player's position that such act had not met the Red Card threshold.
11. Mr Kerr asked for some time to consult with the Player in private. Upon their return Mr Kerr indicated that the Player in fact accepted that he had committed an act of foul play.
12. The Judicial Officer considered:
  - The Complaint dated 19 January 2014.

- The Match footage.
- Reports from the Match Officials.
- A medical report from Dr JP Donohoe, Munster team Doctor.
- An e-mail from a Mr O'Connell (M5).
- A letter from Mr Alan Solomons, Head Coach Edinburgh Rugby
- Oral evidence from the Player.

13. The Player responded to Standing Directions found at Appendix Six DR ("the Directions") as follows:-

*1 The Player confirms that he is the player named in the Citing Report.*

*2 There are no preliminary matters which the Player wishes to raise.*

*3 The Player accepts that the "Brief Report of Incident" set out in the Citing Report is a true and accurate account of the incident that resulted in the citing subject to the following exceptions:*

*3.1 The Player did not dive onto the maul without being bound to another player. A ruck had formed. The Player moved behind the hindmost foot of the ruck, bound with his left hand onto Edinburgh #1 and drove forward into the ruck. The Player stayed on his feet throughout the incident other than for approximately 1 second when he was on one foot and one knee.*

*4 The Player has no knowledge of the matters set out in the Citing Report under the heading "Brief Report of Discussion with Match Officials"*

*5 The Player does not accept that he committed the act of Foul Play set out in the Citing Report. The Player acknowledges that his shoulder did strike the head of his opponent (Munster's #5, Paul O'Connell). The Player did not do so intentionally or recklessly. The collision was accidental.*

*6 The Player does not accept that the act complained of warranted a red card:*

*7 Summary of reasons why the Player does not accept that the act was Foul Play or warranted a red card:*

*7.1 The Player did not intend to make contact with his opponent's head. Nor did the contact result from any reckless conduct by the Player. The Player's intention was to assist his team mate, Edinburgh #7, Roddy Grant, in clearing out Paul O'Connell from the ruck. The resulting contact with Paul O'Connell's head was accidental.*

*7.2 The video footage of the Match demonstrates that when the Player began his forward movement to join the ruck, Paul O'Connell's head was not in the position it was in when the Player made contact with the ruck. As the Citing Commissioner notes in his report "Edinburgh # 7 lifted the head of Paul O'Connell so that it emerged from the ruck". This is partially correct. Edinburgh # 7 attempted to remove Paul O'Connell from lying over an Edinburgh player, which Paul O'Connell was doing to slow down the ball. Paul O'Connell was not supporting his own body weight which he ought to have been doing. Paul O'Connell was not making any attempt to roll away. Edinburgh # 7 was attempting to move him in order that Edinburgh # 9 could get to the ball and play. O'Connell was attempting to slow down the ball because of the time in the match (it was close to half-time).*

*7.3 It was the action of Edinburgh # 7 lifting action that placed Paul O'Connell's head in the position it was in at the point at which the Player entered the ruck. Had it not been for the unfortunate co-incidence of the lifting action of Edinburgh #7 Paul O'Connell's head would not have been struck. The lifting action and the Player's forward movement all occurred in less than 1 second.*

7.4 The Player entered the ruck in a powerful but controlled manner and with the correct body position necessary to clear out. The Player remained on his feet throughout the clear out, briefly going down on one knee after the clear out had been effected. The Player can be seen to first make contact with one of his teammates. As he enters the ruck his head is bowed down, as he drops down and in to the ruck, driving forward and upward, which is the correct way to attempt to move bodies (his own team-mates and an opponent) from the position that they were in; he was not attempting to deliberately strike an opponent in the head. Had he intended to do so, his actions would have differed (and he would have been able to drop down on to the opponent).

7.5 In short, the Player did not intend to strike Paul O'Connell's head with his shoulder when he entered the ruck. The Player could not reasonably have anticipated that Paul O'Connell's head would be in the position it proved to be in at the point the Player entered the ruck. The incident was the result of an unfortunate coincidence of movements of three players, two of which were not within the control of the Player;

7.6 The very experienced Match referee had a clear view of the incident and did not consider it to be Foul Play when it occurred.

7.7 The matter was raised with the referee by the touch judge ("TJ"). The audio footage suggests that referee concluded (presumably either from the description provided by the TJ and / or from the stadium replays) that the Player had "recklessly led with the head", on any measure a more serious category of Foul Play than that complained of in the Citing Report. The referee considered that the Player's actions merited a yellow card.

7.8 The matter was referred to the television match official who reviewed the incident for 3.5 minutes from multiple angles before appearing to recommend that the incident warranted a yellow card.

7.9 The player was advised that he had recklessly led with the head and shown the yellow card. The player has been cited for a lesser offence, in how he has entered the ruck.

7.10 In the event that the Judicial Officer determines that the Player committed the act of Foul Play set out in the citing report, the Player asks that the decision reached by the experienced match officials (in respect of their view of what should be considered to be a more serious act of foul play warranted a yellow card) be observed by the Judicial Officer in determining whether or not the incident for which the Player has been cited warranted a red card.

7.11 Paul O'Connell was not injured in the incident. He played on.

8 Evidence to be relied upon by the Player in support of his contention that the incident did not amount to Foul Play and did not merit a red card: video footage

9 Player will be represented by Mr David Kerr, solicitor

14. In response to the above points the Judicial Officer received an e-mail from the ERC Disciplinary Officer in the following terms:

*In accordance with clause 6.5.5 of and section B.2 of Appendix 6 to the 2013/14 Heineken Cup Disciplinary Rules (Disciplinary Rules), please find below the Disciplinary Officer's directions statement in respect of the citing complaint made against Cornell du Preez (Player):*

(a) The Player has indicated that he will not argue any preliminary matters.

*(b) The Player does not accept that he committed the act of Foul Play set out in the citing complaint and it follows that he does not accept that his actions warranted a red card. Accordingly, I will have the burden of proving that the Player committed the relevant act of Foul Play (see clause 6.7.11 of the Disciplinary Rules). It will be for you, as Judicial Officer, to determine, on the balance of probabilities, whether the Player committed an act of Foul Play, and (if so) whether that warranted a red card. I will rely on the evidence already circulated (including the video footage of the incident). It might be that you see it as appropriate, in the circumstances, to amend the offence for which the Player was cited (for example, by adding, as alternative offences, infringements of laws 10.4(g), (h) and/or (k)). See clause 8.8 of the Disciplinary Rules. We will be happy to address you on that at the hearing.*

*(c) Other than that already circulated I do not currently intend to refer to any further evidence or authorities but if that changes for any reason (for example, if we receive any new evidence), I will communicate that to all relevant people as soon as reasonably practicable.*

*(d) Owing to other commitments, I will not be able to attend the hearing. However, I will be represented in my absence by Liam McTiernan (ERC's Regulations Executive) and Max Duthie (a solicitor, and partner of Bird & Bird LLP).*

### **Evidence supporting the Complaint**

15. Pursuant to DR 6.2.9 the Judicial Officer directed that the video footage of the incident should be shown. The parties watched the video footage with the sound off. The footage showed as follows:

- A maul was being contested on and around the half way line as the first half drew to a close. The score was 12- 6 to Munster at the time.
- Edinburgh are in possession and an unidentified player takes the ball to ground.
- M5 jackals over the ball carrier and is legitimately competing for possession.
- The Player, who had been engaged in the maul, separates himself from it and comes round to take up a position again to the right and a few feet behind the maul on the Edinburgh side.
- E7 is then seen to attempt to manoeuvre M5 off the ball and in so doing briefly raises M5's head.
- Shortly thereafter the Player is seen to propel himself into the maul with some force.
- His left hand is though clearly seen to bind onto the back/shorts of E1 (before the Player's body hits the maul).
- Shortly thereafter the Player's right shoulder makes contact with the side of M5's head.
- At the point of contact the Player's right arm is trailing behind his body, although after contact it comes round to try and bind onto the maul.
- It is possible that E7's right leg was slightly blocking the Player's right arm as it came through but the footage was not inconclusive on this aspect.
- The Player's actions agitate those Munster players who see it. The Referee comes in to separate the players, and after consultation with his AR asks that the incident is shown on the big screen.

- M5 receives treatment on the field following the incident.

16. The Complaint read as follows:

*"Touchline, on the median line, Edinburgh catch the ball and develop a maul. #5 Munster contests the action. #7 Edinburgh grasps him by the lower jaw with the left hand and raises his head so that it emerges from the maul. #6 Edinburgh, Cornell Du Preez, dives on the maul without being bound onto another player and hits with his shoulder the head of #5 Munster in a vulnerable position (40'08"). The Referee stops the action and asks for advice to his TJ and then to TMO. Result is yellow card to #6 Edinburgh and penalty. #5 Munster is treated on the ground. He resumes the game 4mn later. (44'20").*

17. An e-mail report from received the Referee stated:

*At the end of the first half, following a maul, I penalised Munster 9 for side entry. As I did so, I notice players shouting at my assistant referee, Tim Wigglesworth. After telling players to stop shouting at one of my team and asking them to step back, I spoke to Tim who asked me to refer potential foul play on Munster 5; this I did.*

*I then watched the big screen and saw Edinburgh 6 leading with his head into the maul without grasping. It was unclear to me whether the head or shoulder of the Edinburgh 6 made contact with the head of the Munster 5.*

*When the Tmo had shown me all available angles, I told him that I was yellow carding the Edinburgh 6 for recklessly leading with the head.*

*I then informed the Edinburgh captain and explained that no arms were used by his number 6.*

18. The Assistant Referees had not seen anything that added to the detail of the incident and the TMO simply recorded that having reviewed the incident at the time he was "in tune" with the Referee's view.
19. Mr O'Connell submitted a brief statement by e-mail indicating he had received a bang to the head from the shoulder of an Edinburgh player. This led to a "stinger" in his neck and shoulder. This subsided after about 90 seconds and was able to play on until later substituted in the normal course of the game. This assessment was confirmed by Dr Donohoe who indicated that Mr O'Connell had been able to resume training without restriction.

## **Player's case**

20. The Player gave evidence. He confirmed that he accepted he had committed an act of foul play but disputed that it warranted a Red Card.
21. Edinburgh had been trying to recycle possession to launch a further attack before the end of the first half, and he had felt that M5 was trying to slow down possession to thwart that objective.
22. He had therefore driven into M5 as he had been coached and was intending to firstly dislodge his forearms from around the ball. He felt there was nothing improper in his objective. However immediately before he made contact with the maul, E7 had lifted M5's head. He thought that, absent that intervention from E7, his shoulder would not have hit M5's head. He further asserted that at the time he had not seen M5's head.
23. In answer to questions from the Judicial Officer as to why his right arm had been trailing, and thus not capable of bidding on to the maul at the point contact had been made, the Player stated that he had been coached to approach a maul in that way so that his arm

could "punch" through later with additional force with a view to (legitimately) clearing out an opponent.

24. He accepted that his shoulder had hit M5's head before his right arm had come through, but suggested this may have occurred because his arm had been impeded by the leg of E7. E7 was positioned slightly in front of him. He had though not acted intentionally and had not set out to cause injury.
25. Mr Kerr expanded on his helpful written submissions set out at paragraph 13 above. He also gave further detail of the Player's career which had previously been without disciplinary issue and drew attention to the reference from Mr Solomons who had coached the Player for a number of years and spoke positively about his personality and discipline.
26. In response Mr Duthie questioned whether it was credible that the Player had not seen M5's head. He noted that there was no guidance available to the Judicial Officer as to what nature of conduct would warrant a Red Card. Even if the Judicial Officer accepted the Player's case that he had not seen M5's head, he questioned whether his conduct could in any event be viewed as reckless, and thus deserving of a Red Card.
27. He confirmed that the Match Officials had taken some 3 1/2 minutes in viewing the footage on the big screen at the stadium and had been able to view the same angles available to the Judicial Officer during the hearing.

### **Decision as to whether or not the Complaint should be upheld**

28. The Player admitted foul play but it nevertheless fell to the Judicial Officer to determine which of the alternative offences he should proceed under.
29. Whilst technically the offending consisted of a strike delivered to an opponent with his shoulder, the Judicial Officer considered that the gravamen of the offence was better reflected as an offence under Law 10.4 (h).

*A player must not charge into a ruck or maul. Charging includes any contact made without use of the arms, or without grasping a player.*

30. Although the Player's left hand had made some slight contact with the back of E1, his right arm was, on the Player's own evidence, intentionally trailing behind his body as his shoulder made contact with M5.
31. In the Judicial Officer's view this was sufficient to engage Law 10.4 (h) as set out above, and the citing was accordingly upheld on the basis that an act of foul play had occurred contrary to that Law.

### **Decision as to disposal**

32. The Judicial Officer then had to consider the Player's principal submission that his conduct had not warranted a Red Card. This was a difficult exercise. On the one hand an experienced Citing Commissioner had determined that this was a Red Card offence. Equally a leading international referee and an experienced TMO, who it was accepted had spent some minutes reviewing the incident at the time, had concluded that the appropriate sanction was a Yellow Card.
33. The Judicial Officer reminded himself that the views of the Match Officials were not determinative and that both he and the Citing Commissioner had a luxury of time not available to those officials. The Judicial Officer also had the benefit of being able to consider oral evidence and submissions.

34. The Judicial Officer carefully considered all the evidence and submissions before him and reminded himself of the standard of proof (balance of probabilities) to be applied. In so doing he paid close attention to the narrative in the Complaint and made the following findings:
- I. The Player had propelled himself into a ruck in that he had not used his arms and/or grasped a Player.
  - II. Contact had been with the right shoulder to the side of M5's head with some temporary injury resulting.
  - III. An act of foul play had occurred but this could not be viewed as an insidious act. The Judicial Officer was however not persuaded by the Player's claim that he had not seen M5's head.
  - IV. Although the conduct could be defined as a charge within the specific definition of Law 10.4(h), the Judicial Officer did not consider that the Player had "dived" into a ruck as set out in the Complaint. The use of that term suggests a degree of culpable behaviour that was not fully borne out by the footage.
  - V. The Citing Commissioner also recorded that the Player had not been bound on to the maul when contact was made. On reviewing the footage, the Judicial Officer found that the Player's left hand did make contact with the lower back and/or shorts of E1 before the Player's right shoulder had struck M5.
35. Whilst the differences between the conclusions of the Citing Commissioner and the Judicial Officer in their respective interpretations of the incident were not overly significant they were, on balance, just sufficient for the Judicial Officer to prefer the assessment made at the time by the Match Officials to the view subsequently taken by the Citing Commissioner.
36. It was however a decision taken on the finest of margins, and another tribunal might have reached a different conclusion. Certainly no criticism whatsoever should be inferred against the Citing Commissioner. To the extent that the Player considers that his technique (even if coached) is within the law he is mistaken. He should be in no doubt as to the potential for a significant sanction to be imposed in the event that illegal contact is made with an opponent's head.
37. However for the reasons set out, the Judicial Officer was on this occasion not satisfied that the offending warranted a Red Card. Pursuant to the provisions of DR 6.7.41 no sanction was therefore imposed upon the Player.
38. No order for costs was made or applied for.
39. The parties are advised of their right of appeal.

*Jeremy Summers*

**Jeremy Summers**

**Judicial Officer**

**30 January 2014**