

**DECISION OF THE INDEPENDENT DISCIPLINARY COMMITTEE
EPCR Champions Cup, Season 2016/2017**

**Held at Sofitel, Terminal 5, London Heathrow Airport,
on Wednesday, 21st December 2016, at 6 p.m.**

In respect of:

Etienne Falgoux ("the Player") of ASM Clermont Auvergne

and

The citing of the Player for a breach of Law 10.4(m) of the Laws of the Game (acts contrary to good sportsmanship – contact with the eye(s)/eye area) in the European Rugby Champions Cup match between ASM Clermont Auvergne and Ulster Rugby played at Stade Marcel Michelin on 18th December 2016 ("the Match").

Disciplinary Committee ("the Disciplinary Committee") appointed to hear the case:

Jeremy Summers (England) (Chairman)
Jean-Philippe Lachaume (France)
John Carroll (Ireland)

Decision of the Disciplinary Committee:

1. **The Player's challenge to the citing was dismissed, the Disciplinary Committee being satisfied, to the standard required, that an act of foul play had occurred which had warranted a red card.**
2. **The Player is suspended for 7 weeks. This will cover the period from 19 December 2016 until 29 January 2017 inclusive and the period 13-19 February 2017 inclusive. He may play again on 20 February 2017.**
3. **There was no order for costs.**

Introduction

1. The Disciplinary Committee was appointed by Professor Lorne D Crerar, Chairman of EPCR's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Champions Cup 2016/2017.
2. The Disciplinary Committee was required to consider the citing of the Player for an offence of contact with the eye/eye area contrary to Law 10.4(m) in the 30th minute of the Match when the score was ASM Clermont Auvergne 21 Ulster Rugby 0.
3. Present at the hearing in addition to the Disciplinary Committee were the following persons:
 - The Player
 - Maître Charles Fribourg – representing the Player
 - Jennifer Rae – Solicitor, Secretary to the Disciplinary Committee
 - Lionel Fintoni - Interpreter
 - Liam McTiernan - EPCR Disciplinary Officer
 - Danny Rumble - EPCR Disciplinary Manager

Preliminary Matters and Procedures

4. At the commencement of the hearing, the Chairman noted the identities of all present and

narrated the contents of the citing commissioner's report.

5. The Chairman reminded all parties that the EPCR Disciplinary Rules found in the Participation Agreement of the Champions Cup 2016/2017 ("the Disciplinary Rules" and "DR" in the singular) would apply.
6. The Chairman outlined the procedure to be followed to determine the matter, and indicated that the purpose of the hearing was to review the citing report and determine what action (if any) should be taken. The EPCR Disciplinary Officer was required to satisfy the Disciplinary Committee, to the standard required, that an act of foul play had been committed and that it had warranted a red card. The Player and all present agreed to proceeding on that basis.
7. The Chairman confirmed what evidence had been placed before the Disciplinary Committee prior to the hearing, and that all present had received this in good time.
8. The evidence for consideration comprised of the following:
 - The citing commissioner's Report from Jeff Mark (Wales).
 - Match footage of the incident.
 - Letter from Liam McTiernan to Professor Crerar, dated 20th December 2016;
 - Statement of the match referee, Marius Mitrea;
 - Statement of the assistant referee, Matteo Liperini;
 - Statement of the assistant referee, Simone Boaretto;
 - Statement of the television match official, Stefano Penne;
 - Written Statement of Luke Marshall, Ulster Rugby No.13;
 - Audio Statement of Luke Marshall, Ulster Rugby No.13;
 - Medical Statement of Dr. Michael Webb, Ulster Rugby Medical Director.
 - Letter from Neil McIlroy, Rugby Manager, ASM Clermont Auvergne
9. In advance of the hearing the Chairman had requested that Mr Marshall was available to give oral evidence by way of a telephone conference call, and the Disciplinary Committee was grateful to Mr Marshall for his assistance in this regard. The Chairman confirmed that the parties did not wish to produce any further evidence.
10. The Disciplinary Committee noted the term of the Player's response to the Standing Directions set out at Appendix 6 DR:
 - a. Yes he is the Player named in the Citing Commissioner's Report.
 - b. Regarding Preliminary Matters. We would like it noted that in the Citing Commissioner's Report – Part 2 The Incident, he refers to two contacts with the eye, one of which is a separate report. We have not received this report but it is our understanding that it refers to a separate incident concerning another Player and has no relevance to Etienne Falgoux and this alleged incident.
 - c. No
 - d. No
 - e. No
 - f. Concerning the Citing Complaint. Having reviewed the videos clips (both our own and those forwarded by EPCR) we see U13 hold his hand to his face, not his eye. Secondly, from the same EPCR clip, we see a finger, apparently from Etienne Falgoux, on the cheekbone of U13, not 'apparently in the eye/eye area'

It is not evident that in clearing out U13 Mr. Falgoux made any contact with the eyes of U13. The action of removing him from the ruck was quick and fluid and without premeditation to make contact with the facial area. Any contact of this nature was purely accidental and not clearly to the eye area.

We would like to refer to a similar incident from the previous week which was

referred to the Citing Commissioner but was deemed not to merit a citation because of its accidental nature following contact to the face of one of our Players.

- g. *The Player will attend in Person and will be accompanied by the Club Lawyer Mr. Charles Fribourg*

11. The Disciplinary Committee similarly noted the EPCR Disciplinary Officer's position in response:

- a. *Mr McIlroy, on behalf of the Player, has confirmed that Mr Falgoux is the Player named in the citing complaint and the subject of said complaint. Mr McIlroy raises a preliminary matter, in the form of an objection to a statement in the Citing report making reference to a separate incident that he was also reviewing.*

I would like to endorse Mr McIlroy's view that this is an unrelated matter with no relevance to the present case. This reference is included only to differentiate between two cases that Mr Mark was reviewing at the end of the match, which appeared on the same clip provided by the host broadcaster, and which have now been 'separated' digitally so as not to confuse the Disciplinary Committee as to what evidence is being adduced in this present case.

I do not seek to persuade you that you should take any pejorative inference by reference to this second incident, such as might cause you to conclude that players of ASM Clermont Auvergne are especially predisposed to committing acts of foul play of this nature (or any other nature), or that foul play was being advanced as a valid tactic by the Club's coaching team (or any other negative impression one might conceivably form as a result of being informed of an unrelated second incident that was being reviewed by the Citing Commissioner post-match). In fact, I seek to persuade you (if such persuasion should be necessary) that you should specifically set that other matter aside.

- b. *The Player does not accept that he committed the act of Foul Play described in the Citing Complaint and does not accept that it warranted a red card. Accordingly, and pursuant to clause 7.8.11 of the Disciplinary Rules, I will have the burden of proving that the Player committed the act of Foul Play described in the Citing Complaint. I will present the relevant evidence and it will be for you to determine.*

- c. *Other than that which has already been circulated, I do not intend to refer to any further evidence. As for authorities, I attach the cases of Quinlan, Flannery and Leo, which might be of some assistance to you:*

- in Quinlan, page 6, the Appeal Committee indicated how it believed the phrase 'eye area' should be interpreted;
- in Flannery, paragraph 13, the Appeal Committee indicated how it believed actions should be characterised (as either intentional, reckless or accidental), see also clause 7.8.32(b) of the Disciplinary Rules; and
- in Leo, paragraphs 21 and 27, the Judicial Officer indicated how he believed 'accidental' should be interpreted.

In the event that you find the Player committed the act of Foul Play described in the Citing Complaint and that it warranted a red card, you will then need to consider the appropriate sanction. I also attach:

- the case of Hartley, in which the Disciplinary Panel (paragraph 20) indicated how it believed the seriousness of offending and appropriate entry points should be assessed in cases involving contact with the eyes; and
- a table showing details of a number of cases involving contact with the eyes (this is not intended to be an exhaustive list, and the purpose is to highlight cases in which the World Rugby memoranda of 2009 and 2014 - found at 4-81 and 4-86 of the Disciplinary Rules - were applied and for which the need for a deterrence was considered an aggravating factor).

Naturally, in the event that you find the Player did not commit the act of Foul Play described in the Citing Complaint or that it did not warrant a red card, then there will be no need for you to consider Hartley or the attached table.

d. I will attend the hearing with Danny Rumble, EPCR's Regulations & Compliance Executive. I have arranged for a translator (Lionel Fintoni) to be present to assist Mr Lachaume, but I am sure Mr Fintoni will be happy to assist Mr Falgoux, and indeed Mr Fribourg, if the need arises.

12. The Chairman confirmed that the Disciplinary Committee would disregard entirely the reference to the second matter referred to at 10 b and 11 a above, and noted that no further evidence had been received in relation to it.
13. M. Fribourg advised the Disciplinary Committee that the Player would not in fact seek to rely on the incident understood to have arisen in a previous match as referred to at 11 f above.

Evidence Supporting the Citing

Match Official Reports

14. The Citing Commissioner's report read:

"Re-start gathered by CA4. U13 and U8 challenge for the ball. CA1 holds U13 with right arm over top of U13's head when U13 immediately holds his hand to his eye. He goes to ground still holding his face. Additional angles show CA1's hand around top of U13's face with fingers apparently in eye/eye area immediately before U13's puts his own hands to his face. Given the directives on contact with the eye, I have cited this incident as one which merited a red card.

Referee had already left the stadium by the time I finished reviewing other incidents and it is only 24+ hours after the match that I have been able to speak to the victim player and team medic.

I have received a written account from Ulster team medic confirming a complaint of fingers in the eye and noting reddening and watering which resolved fairly quickly. There is reference to two contacts with the eye, one of which is the subject of a separate report. I was not able to detect any another, so believe these are the two incidents referred to."

15. The evidence from the match officials, including the TMO, confirmed that the incident had not been observed by any of them at the time.

Match Footage

16. The match footage was viewed and it showed the following sequence of events:

- From a restart CA4 catches the ball whilst running backwards toward his 22m line.
- CA4 is tackled by U13 as the first chaser and shortly thereafter U8.
- U13's tackle takes him and CA4 to ground. U13 then immediately seeks to get back to his feet to contest possession, and is pushed slightly forward and upwards by U8 as he does so.
- The Player joins the breakdown lawfully and is attempting to seal off possession by clearing out U13.
- His left hand goes through to grip onto U13's shirt (below the armpit) and his right arm comes over and makes contact with U13's head.
- At 0:03 on the tape counter the Player's right arm can be seen crooked in a right angle with his lower arm pointing down and apparently locking on to U13's head.
- At 0:04 the right arm rises slightly bringing U13's head up with it and a finger is visible in the region of U13's left eye.

- At 0:05 of the counter it appears that a second and possibly a third finger is in the region U13's left eye.
- U13's brings his left hand up towards his eye and it is possible that he is squinting. He starts to move his body away from the contact (by the Player) and his left hand is seen flat on his face.
- At 0.06 the Player pulls U13 away from the breakdown sending him to ground about 2m away. In doing so, he rotates U13 away from the breakdown with his left arm in contact with U13's body and his right arm/hand still in contact with U13's head.
- Play then continues.

Other Evidence

17. Medical evidence, in the form of an email from the Ulster Team Doctor to the citing commissioner, dated 19 December 2016 read:

This is to confirm that around 30 minutes into yesterday's game in Clermont, I noticed Luke Marshall come out of a contact situation holding his r eye. At the next break in play - ?approx 30 seconds later I ran to him and he told me that at the last 2 rucks fingers had gone into his eyes although he intimated that he didn't believe this had been deliberate.

On examination his r eye was red and watering slightly. He told me his vision was ok and he didn't feel he needed any more treatment.

He did not require any further treatment either at half time or post match for this issue. I hope this is the information you require but please let me know if you require any further clarification.

18. An email from U13 dated 20 December 2016 read:

In relation to the incident in Sunday's game at about 30 minutes into the match, I was involved in a ruck and contact was made with one of my eyes. As my head was down I have no recollection of who the player was. The team doctor came on to attend to me but I did not need any treatment. My eye was sore for 2 or 3 minutes but after I fully recovered and had no ill effects.

19. An audio recording obtained by the citing commissioner in which U13 detailed his recollection of the incident was played. Whilst this largely reflected the email report above, U13 also stated that the contact was accidental and not intentional.
20. Mr Marshall (U13) also gave evidence by telephone. He stated that his head had been looking down in the ruck, when he had felt something go into his eye. He did not at the time know what it was or who was around him. There had been no prolonged contact and, although his eye had watered for two or three minutes, he had thereafter fully recovered. He could not recall which eye had been involved. He recalled a discussion, whilst being treated by the Team Doctor, to the effect that there had been contact with his eyes at the last two rucks. He confirmed his view that contact had been accidental and stated that there had been nothing to it.

The Player's position

21. The Player stated that his intention had been to clear out U13 from the ruck, and he had no intent to injure U13. He knew that his right arm had been around U13's neck/shoulder but had been very surprised by the citing. If he had known he had done anything wrong he would have apologised. He had initially tried to push U13 down with his shoulder but U13 had moved up towards him, which meant he could only pull him out of the ruck to the side.
22. Although his arm had been around U13's head he did not accept that he had held the head. He had not been aware that his hand had been on U13's face and did not accept that any of his fingers had gone into U13's eye, although he accepted from the footage

that they were close to the eye.

23. He had used his body to rotate U13 out of the ruck and no one had complained about his actions at the time.
24. By reference to the footage, he contended that his fingers had been on U13's cheek bone and not in his eye.
25. His fingers had not caused U13's eye to water. He did not agree that his fingers had bent.
26. In support of the Player, M. Fribourg submitted that three or four other players contesting the ruck could have made contact with U13's and caused it to water. To the extent that the footage showed U13 moving his hand towards his face, this could simply been out of fear in that, because the Player's hand was on his face, this could have led to fingers then perhaps going to into his eye. He did not believe that U13 was reacting to fingers that had already gone into his eye.
27. In M. Fribourg's view, it was highly significant that the Ulster Team Doctor had referred to injury to the right eye and yet the footage showed U13 reacting to contact with his left eye. U13 could not recall which eye had been affected.
28. The Player accepted foul play in that he had grasped U13 around the neck, but disputed the foul play as alleged.
29. The Player had not acted with any intention to injure U13 and had wanted only to pull him out of the ruck. His hand had at all times been open and not bent into U13's eye. M.Fribourg also wanted it to be made known to the Disciplinary Committee that, if it was found that the player had injured U13, the player wished to apologise for same.
30. The Chairman reviewed with M. Fribourg the concept of recklessness for the purposes of the DR. In M. Fribourg's submission, if there had been any contact with U13's eye, this had been accidental and no foul play had therefore occurred.
31. In response, Mr McTiernan noted that the concept of accidental conduct had not been defined in the DR but pointed to the possibility of reckless conduct as provided for in the DR, which would constitute foul play. He also referred to the EPCR decision in *Leo* (2012) which had attempted to address what might constitute accidental behaviour. This in turn had been applied in *Ashton* (2015) being a case that had also been concerned with contact with the eye/eye area.

Decision on Foul Play

32. The Disciplinary Committee retired to consider the evidence and submissions in private. It made the following findings:
 - The Player's right hand had been on U13's face as his arm went around the head in an attempt to pull U13 out of the ruck.
 - On the Player's own evidence, he had used his grip on U13 neck to rotate him away from the ruck, and in doing so, his hand was on U13's face.
 - The footage showed at least one crooked/bent finger in or around U13's left eye.
 - U13's evidence confirmed that contact had been made with his eye
 - U13's had reacted by bringing his hand up to his eye.
 - The Ulster Team Doctor had observed that U13 was in distress immediately after the ruck and rendered immediate attention at the next breakdown.
 - U13's eye was watering on being examined by the Doctor.
33. The Disciplinary Committee did not find the Doctor's reference to the right, as opposed to the left, eye to be significant, noting that his statement had not been given until over 24 hours after the Match, when he was contacted by the Citing Commissioner. The Disciplinary Committee having regard to the video footage concluded that the Doctor, in

his statement, had got the right eye mixed up with left eye.

34. The Disciplinary Committee rejected the submission that contact had been made by another player contesting the ruck.
35. In light of the above, the Disciplinary Committee found that there had been contact with U13's eye. Whilst the Disciplinary Committee did not consider that the Player had acted intentionally, the submission that the contact should be viewed as accidental was rejected.
36. The Disciplinary Committee disregarded the opinion of U13 in this regard, and came to an objective view based on all the available admissible evidence.
37. The hearing was reconvened and the parties advised accordingly.

Submissions as to whether the offending merited a red card

38. M. Fribourg accepted that conduct that would be colloquially be termed as "gouging" was completely unacceptable and noted that this case was readily distinguishable from such conduct.
39. He contended that the Player had not acted intentionally and questioned whether, in those circumstances, the offending should be viewed as meeting the red card test.
40. Mr McTiernan drew the Disciplinary Committee's attention to IRB (as then was) Memoranda issued in 2009 and 2014, ("the Memoranda") both of which remain in force and emphasise the inherent danger that contact with the eyes give rise to the risk of serious and long term injury arising.
41. In his view, the Memoranda establish that contact with the eye/eye area was viewed as an offence of sufficient seriousness to require an offender to be issued with a red card.

Decision on the red card test

42. The Disciplinary Committee again retired to consider the position in private and gave careful consideration to all the evidence and submissions.
43. The Disciplinary Panel had found that the Player's finger(s) had penetrated U13's eye and had no hesitation of finding that the offending had therefore merited the issue of a red card.

Submissions as to sanction

44. The Chairman reviewed with the parties the entry point criteria prescribed by DR 7.8.32. M. Fribourg submitted that the Disciplinary Panel should find the matter to be a low end offence and Mr McTiernan did not urge otherwise on behalf of EPCR.
45. The Player is a young man of 23, with a clear disciplinary record. Although in his third year of professional rugby, the Match had been his first game in the Champions Cup. The Disciplinary Committee also considered the reference letter from Mr Neil McIlroy, Rugby Manager at ASM Clermont Auvergne in support of the Player.
46. M. Fribourg submitted that the Disciplinary Committee should apply DR 7.8.37 and find that even a 6 week suspension (being 50% of the entry point) would be wholly disproportionate to the level and type of the Player's offending. Accordingly, the sanction to be imposed could, and should, be less than 50% of the low end entry point. In his view a suspension of 2 weeks would be correct.
47. In relation to the application of the wholly disproportionate provision, Mr McTiernan

submitted that the Disciplinary Committee would need to find that a sanction of above 6 weeks would be entirely disproportionate and having regard to the seriousness of the offence committed he argued that to do so would be wrong.

Decision as to Disposal

48. The Disciplinary Committee noted that the offence of acts contrary to good sportsmanship contrary to Law 10.4(m) is listed within World Rugby recommended sanctions for offences within the playing enclosure – *Contact with Eye(s) or the Eye Area* – (found at Appendix 3 of the European Rugby Disciplinary Rules) as follows:

- Low end, 12 weeks
- Mid range, 18 weeks
- Top end, 24 + weeks
- Maximum sanction 208 weeks

Factual Findings

49. The Disciplinary Committee considered DR 7.8.32 and made the following findings:

- a) The offending was not intentional or deliberate;
 - b) The offending was reckless;
 - c) The gravity of the offending lay in the risk of serious and/or long term injury to an opponent;
 - d) As set out above, the offending consisted of a brief penetration into U13's left eye by at least one finger from the Player's right hand;
 - e) There was no provocation;
 - f) The conduct was not retaliatory;
 - g) There was no element of self-defence;
 - h) Transitory injury had been sustained and, although watering and some redness had been noted, this had fully resolved within 2 to 3 minutes;
 - i) There was no effect on the Match;
 - j) U13 was vulnerable in that he was facing away from the Player's incoming hand;
 - k) There was no premeditation;
 - l) The conduct was complete;
 - m) There were no other relevant features of the Player's conduct connected with the offending.
50. In light of the above findings, the Disciplinary Committee determined that the seriousness of the offending should be assessed as being at the LOW END of the scale of seriousness.
51. In so doing the Disciplinary Committee had regard to the following extract from paragraph 20 of the RFU decision in *Hartley* (2011), which is cited in the Memoranda:

Clearly “contact” encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury.

Offences which would properly be classified as at the Lower End of the scale of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area.

52. The entry point for the offending was accordingly 12 weeks.

Aggravating Features

53. By a majority decision the Disciplinary Committee¹ determined not to increase the entry point to reflect the issues addressed in the Memoranda. No other aggravating factors as set out in DR 7.8.34 were found to be present.

Mitigating Factors

54. The Disciplinary Committee noted the Player's clear record, his youth and his conduct at the hearing.
55. The Player's had, however, opted to contest the red card and, in all the circumstances, the Disciplinary Committee concluded that the entry point should be reduced by 5 weeks from the entry point.
56. The Disciplinary Committee, declined to apply the wholly disproportionate provision of DR 7.8.37 as had been requested. In so doing, it adopted the findings on this point made in Galarza (RWC2015). This decision similarly concerned contact with the eye/eye area and was upheld by an RWC Appeal Committee:

The adverb "wholly" means completely, totally or entirely and modifies by addition "disproportionate". It connotes a sanction which is really exceptional for that level and type of offending. It is worth noting that the sanctions are of universal application and were determined at the 2012 Morality of the Game conference, with contributions from all stakeholders. Further, it is to be remembered that the 2009 and 2014 Memoranda addressing this type of offending remain in force.

57. The Disciplinary Committee found that the Player had purposefully held on to U13's head to pull him out of the ruck and in doing so had made reckless contact with the eye, which had included direct penetration. In those circumstances, the Disciplinary Committee was not able to conclude, that the sanction, (already reduced from the entry point) fell to be viewed as completely, totally or entirely disproportionate.

Sanction

58. Accordingly, the Player is suspended for a total of 7 weeks from 19 December 2016 until 29 January 2017 inclusive and the period 13-19 February 2017 inclusive.
59. The Disciplinary Committee was satisfied that this period covered 7 games due be played by ASM Clermont Auvergne and that this accordingly constituted a meaningful period of suspension.
60. No order for costs was made.

Appeal

61. The Chairman advised the parties of the right of appeal.

¹ The Chairman dissenting.

.....[Jeremy Summers](#).....

Date: 24 December 2016

Jeremy Summers, Chairman
Jean-Philippe Lachaume
John Carroll