

**DECISION OF THE INDEPENDENT JUDICIAL OFFICER  
EPRC /Champions Cup, Season 2016/2017**

**Held at Sofitel, London Heathrow, on 21 December 2016 at 9.30am**

In respect of:

**Maks VAN DYK (“the Player”)**

and

The citing of the Player, for a breach of Law 10.4 (a) of the Laws of the Game in the Champions Cup match between Toulouse and Zebre Rugby played at Stade Ernest Wallon on 17 December 2016 (“the Match”).

Disciplinary committee (“the Disciplinary Committee”) appointed to hear the case:

Jeremy Summers (England) (“the Judicial Chairman”)

John Doubleday (England)

Jean–Rene Hegoburu (France)

**Decision of the Disciplinary Committee:**

- i. The Player had committed an act of foul play as alleged.**
- ii. The act of foul play had not warranted the issue of a red card.**
- iii. The Player is free to play again with immediate effect.**
- iv. There was no order for costs.**

**Introduction**

1. The Disciplinary Committee was appointed by Professor Lorne D Crerar, Chairman of the 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 in the Match for an offence of striking an opponent contrary to Law 10. 4 9a) of the Laws of the Game.
3. On 20 December 2016 (the day prior to the hearing) a request was submitted on behalf of the Player for the hearing and to be convened by way of a Skype video conference. The Player had previously given notice that he intended to challenge the citing Chairman was therefore reluctant to accede to that request wanting to ensure that the Player had every opportunity to receive a full and fair hearing. The Player maintained his position, indicating that he did not have a visa permitting him to travel to the hearing.
4. The Chairman requested and received the following written declaration signed by the Player:

*I, undersigned Maks VAN DICK, have taken note of the e-mail of the Solicitor of the EPCR Jennifer RAE and agree that the citing hearing procedure should be carried out via Skype*
5. On the basis of the claimed position with regard to visa/travel difficulties and having received the signed declaration, the Chairman was, in this instance, willing to permit the hearing to proceed without a personal attendance.

**The Parties at the Hearing**

6. In addition to the Disciplinary Committee, present at the video conference were the following persons:
  - The Player

- M, Fabian Pelous – Director of Rugby Toulouse
- M. Jean-Luc Brumont – Administrative Director, Toulouse
- Ms Jennifer Rae – Solicitor, Secretary to the Disciplinary Committee
- M. Lionel Fintoni - Interpreter
- Mr Liam McTiernan – EPCR Disciplinary Officer
- Mr Danny Rumble – EPCR Disciplinary Manager

### **Preliminary Matters and Procedures**

7. At the commencement of the hearing, the Chairman noted the identities of all present and narrated the contents of Citing Commissioner's Report reminding the Player that he had been cited in the contravention of Law 10.4 (a).
8. 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.
9. The Chairman outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.
10. The Judicial Officer established what evidence was placed before the Disciplinary Committee 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.
11. The evidence for consideration comprised of the following:
  - The Citing Commissioner's Report.
  - The match footage.
  - Letter from Liam McTiernan to Professor Crerar, dated 18<sup>th</sup> December 2016.
  - Statement of the match referee, Ian Tempest.
  - Statement of the assistant referee, Greg Garner.
  - Statement of the television match official, Graham Hughes.
  - Statement of Gideon Koegelenberg, Zebre No.4.
  - Medical Statement of Dr. Paolo Ferrari, Zebre Doctor (and translation thereof).
12. The Disciplinary Committee noted the position of the parties in relation to the Standing Directions<sup>1</sup>:

*In accordance with clause 7.5.5 of, and section B.2 of Appendix 6 to, the 2016/17 European Professional Club Rugby Disciplinary Rules (**Disciplinary Rules**), please find below the Disciplinary Officer's directions statement in respect of the citing complaint made against Maks Van Dyk (**Player**):*

- a. Mr Brumont, on behalf of the Player, has confirmed that Mr Van Dyk is the Player named in the citing complaint and the subject of said complaint. Mr Brumont does not raise any preliminary matters.*
- 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.*

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<sup>1</sup> Responses on behalf of the Player were submitted in French and therefore not set out in this decision.

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 Flannery and Leo, which might be of some assistance to you:*

- *in Flannery, paragraph 13, the Appeal Committee indicated how it believed action 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.*

d. *I will attend the hearing with Danny Rumble, EPCR's Regulations & Compliance Executive.*

## **Evidence Supporting the Citing Complaint**

### The Citing Commissioner's Report

13. The Citing Commissioner's Report read as follows:

*"After the match the Zebre manager asked me to review an incident in the 2nd half, at 65-20mins, involving Toulouse 18 and Zebre 4. He alleged that his player (Z4) had been struck in the neck/face area at a breakdown clear out by T18 (Maks Van Dyk). Play was situated approximately 15 metres in from the left touchline, and 10 metres out from the Zebre goal line. Toulouse 16, running forward and in possession of the ball, was tackled by Z17 around the legs and Z4 around the body. All 3 players went to ground. Almost immediately T18, Maks Van Dyk, arrived at speed at the tackle area, and dived off his feet onto the bodies on the ground. T18 had clear vision on entering the tackle zone and there was little movement from the players on the ground. The main force of the impact by T18 was on Z4 who was lying sideways, with his head raised off the ground, but not looking at the arriving T18. As Mr. Van Dyk dives into the tackle area (his feet clearly in air) he knocks Z4 some 2 metres backwards with some force from the breakdown area. However as T18, (Mr. Van Dyk) dives onto Z4, he clenches his right fist and swings his right arm up and under the Zebre 4s face/neck. There is contact between the neck/face area of Z4 and Mr Van Dyk's forearm. (see extra footage angles). T18 then briefly holds Z4 with one hand, looks down at him, and continues playing. I considered this to be in breach of law 10.4.a, striking an opponent with the arm, and therefore issue a full citing against MAKS VAN DYK, TOULOUSE 18. (name spelling taken from the signed Toulouse match day team sheet.)"*

*After the match, I spoke with the team of 3 and TMO and they confirmed they had not seen the incident.*

*After the strike to his face/neck area, Zebre 4 regained his feet and continued playing. At the next stoppage he received brief treatment from the Zebre physio. I confirmed with the Zebre medical team after the game that there was no lasting/serious injury as a result of this alleged incident of Foul Play by Toulouse 18.*

14. The incident had occurred in the 65th minute of the match. Conditions were good. At the time Toulouse were ahead 54- 15.

### Video Evidence

15. The Disciplinary Committee considered the match footage which was available from 2 angles at full and reduced speed. This showed the following sequence of events:

- T16 takes the ball into contact and is tackled by Z17 bringing both players to ground. Z4 attempts to assist with the tackle of T16 but make only limited initial contact.
- Z4 however falls on top of T16 is in effect lying on his side. T18 joins the breakdown in an attempt to clear out Z4.
- T18 propels himself at speed towards Z4 leading with his right arm that swings up and into Z4, making contact with Z4's head and/or neck area.
- At the point of contact T16 appears to largely off his feet and in effect horizontal to the ground. Z4's head then makes contact with the ground.
- Z4 appears slightly dazed and does not immediately get up.
- T16 looks down at Z4 before getting up to re-join play. In so doing he has his hand on Z4 at or around the upper chest/neck area and pushes up.

### **Further Evidence**

16. Written evidence was received from the Match Officials, including the TMO, which indicated that incident had not been seen at the time.

17. A short statement by email from Z4 read as follows:

*I cannot remember fully what happened when I got hurt. I do not feel that further steps needs to be taken. I do not believe that bad intensions or foul play was shown in the match. (Typographical errors corrected)*

18. Translated medical evidence in the form of a hand written note from the Zebre Rugby Team Doctor advised:

*I certify that during the match played in Toulouse on December 17th 2016 against the local team, at around the 65th minute, I had to come to the help of the player Gideon Koegelemborg who, during a phase of play, was hit on the side of the neck - trachea. This caused a temporary ?hispnea?, which sorted itself out spontaneously within a few seconds.*

19. Mr McTiernan confirmed that he had clarified with Toulouse that the condition noted above was dyspnea, which is defined as a shortness of breath.

### **The Player's Position**

20. The Player disputed that he had dived off his feet into Z4. He accepted it had been an aggressive clear out but denied that he had struck Z4 as alleged.

21. He asserted that the initial point contact had been between his chest/shoulder and top of the shoulder/upper back of Z4. He had not thereafter come through with a swinging arm and had tried to grab Z4's shirt. His hand had been open and the Citing Commissioner was incorrect in reporting a clenched fist.

22. The Player took the Disciplinary Committee to the footage and pointed to what he asserted was a clear gap between his arm and Z4's head/neck which, in his view, established that he had not struck Z4's head/neck as alleged.

23. Contact had been forceful, but across Z4's chest and not with his head and or neck. To the extent that it was suggested that Z4 had been winded, this could have been caused by the force of the contact to the chest in what the Player likened to whiplash. He had also pushed down in Z4's neck when getting up and this could have caused the winding.

### **Submissions**

24. In response Mr McTiernan accepted that the Player might not have ultimately come off his feet, but he still considered that the Player had played Z4 unlawfully as Z4 had been off his feet and a ruck had been formed.

25. Mr McTierenan also accepted that a possible interpretation of the footage was that there had

been no contact with the neck/head as the Player was claiming. However, the Player's case, that contact had been across the chest, was inconsistent with the medical evidence, which he submitted showed that the Player had been winded.

26. Mr McTiernan suggested that the Disciplinary Committee could amend the offence to one of dangerous tackling or charging, although he did not urge the Disciplinary Committee to do so.
27. In his view the Player had struck Z4 unlawfully making contact with the head/neck as alleged. Whilst accepting that these related to dangerous tackles, he referred the Disciplinary Committee to IRB (as then was) Memoranda issued in 2009 and 2011, which remain in force. In his view, these reflected the concern for player safety and that the nature of the offending in this matter was of sufficient seriousness to warrant a red card.

#### **Decision as to Disposal**

28. The Disciplinary Committee retired to consider the evidence and submissions in private.
29. It found that The Player had struck Z4 across the chest rather than the head/neck as had been alleged. The medical evidence indicated no more than that Z4 had been suffering from a shortness of breath. There was no evidence that Z4 had been winded and if so, how that had happened. To the extent that the Doctor's report referred Z4 having been hit on the side of the neck, it was not clear what the basis of that statement was and there was no evidence that this was what Z4 had reported.
30. In the view of the Disciplinary Committee, the footage did not conclusively show that there had been contact with the head/neck (as conceded by Mr McTiernan) and in fact suggested that there had been no such contact. The medical evidence was not sufficiently clear to displace that interpretation of the match footage.
31. The Player had not properly grasped Z4 with his right hand, which was partially clenched at the point of impact, and the Disciplinary Committee therefore rejected the Player's contention that he had not struck Z4 and that no act foul play had occurred.
32. However, whilst finding that foul play had occurred in that the Player had struck an opponent, having found that the point of contact had not been with the head/neck as alleged, the Disciplinary Committee was not satisfied that the offending had warranted the issue of a red card.
33. The hearing was reconvened and the parties accordingly advised that the citing had not been upheld.
34. There was no order for costs.
35. The parties were reminded of the right of appeal.

*Jeremy Summers*

Dated: 27 December 2016

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Jeremy Summers – Chairman

John Doubleday  
Jean-Rene Hegoburu