EPCR DECISION OF APPEAL COMMITTEE
IN RESPECT OF CHRIS ASHTON

HELD AT THE SOFITEL HOTEL, LONDON HEATHROW, LONDON
ON WEDNESDAY 3RD FEBRUARY 2016

IN RESPECT OF:-

An appeal by Chris Ashton ("the Player") against the Decision of a Judicial Office ("the JO") dated 22 January 2016 ("the Decision"), finding that the Player had committed an act of Foul Play contrary to Law 10.4(m) of the Laws of the Game, namely an act contrary to good sportsmanship, thereby upholding the Citing Complaint and suspending the Player from taking part in the game of rugby up to and including Sunday 27th March 2016. This represented a ten week suspension.

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

Professor Lorne D Crerar (Chairman) (SRU)

Rod McKenzie (SRU)

Roger Morris (WRU)

DECISION OF THE APPEAL COMMITTEE:-

The Appeal Committee determined in relation to each of the grounds of appeal:-

Ground of Appeal 1:

"The JO incorrectly stated in his written decision that the Disciplinary Officer ("DO") suggested that the 2009 and 2014 IRB Memoranda have an aggravating effect on the sanction (see Para 23 of the Decision)."

The Appeal Committee determined that the JO was not in error in the application of the said Memoranda in relation to EPCR Disciplinary Regulation DR 7.8.34(b) and thereby increasing the sanction imposed on the Player by a period of 1 week. This ground of appeal is refused.

Ground of Appeal 2:

"The JO failed to take into account, or state in his written decision, the submissions made by the DO and the Player's legal representative, that the Player's denial of committing an act of Foul Play should not be held against him for the purposes of mitigation (see Para 29 of the Decision). Further that the JO made an error in the finding of a 3 week reduction in sanction (when it was open to the JO to be reduced by up to 6 weeks in accordance with DR 7.8.36) given the submissions by the DO and the Player's legal representative, and the other mitigating facts identified (see Para 29/30 of the written decision)"

The Appeal Committee determined that the JO was not in error in the exercise of his discretion to apply a 3 week mitigation period based upon the circumstances made available to the JO at the Hearing. In determining the appropriate period of mitigation of suspension the JO was entitled to take into account that the Player had denied committing the alleged act of Foul Play for which he had been cited and, in effect, to limit the period of mitigation of sanction from the maximum of 6 weeks in part because there was no timely admission of culpability by the Player. This ground of appeal is refused.

Ground of Appeal 3:

"The JO failed to take into account, or state in his written decision, the submissions made by

the DO that EPCR did not oppose the submission made by the Player's legal representative that DR 7.8.37 was appropriate in the circumstances of this case. Further the JO wrongly applied the concept of "wholly disproportionate" by reference to the Galarza decision. At paragraph 32 of the Decision it stated "the JO referred to the Galarza decision (JO and Appeal Committee) where it was determined that the sanction of 10 weeks for this type and level of offending is not "wholly disproportionate".

The Decision of the JO to equate the facts of the Player's case to those of Galarza was in error."

The Appeal Committee determined that the JO had erred in having regard to the purported period of suspension imposed and the consideration of whether the purported period of suspension was wholly disproportionate in the Galarza case in determining whether the period of suspension identified by the JO in relation to this Player was wholly disproportionate in this case. The JO should instead have considered whether the level and type of offending of the Player as determined in the circumstances of this case was such that the period of suspension otherwise determined by the JO would be wholly disproportionate for the purposes of DR 7.8.37. Further, the JO erred in considering that the period of suspension imposed by the JO in the Galarza case was 10 weeks when in fact it had been 9 weeks. The Appeal Committee proceeded to consider whether, for the purposes of DR 7.8.37, the level and type of offending of the Player as determined by the JO, was such that the period of suspension otherwise determined by the JO would be wholly disproportionate having regard to the circumstances of this case, it is decided that it would not be wholly disproportionate and determined that the JO's decision should not be overturned or varied further to DR 8.4.8 . This ground of appeal is therefore also refused.

1. INTRODUCTION

The Appeal Committee was convened by Professor Lorne D Crerar, Chairman of EPCR Disciplinary Panel, pursuant to the Disciplinary Regulations of the EPCR 2015/16 (DR) in respect of the Citing Complaint made by Yves Thieffine (France) dated 17 January 2016. The Citing Complaint was in relation to an incident of alleged Foul Play during the course of a match between Saracens and Ulster Rugby at Allianz Park, London on 16 January 2016 ("the Match"). The Citing Complaint alleged that the Player had committed an act of Foul Play contrary to Law 10.4(m), Acts Contrary to Good Sportsmanship.

The Citing Complaint was considered by the JO at a Hearing on 20 January 2016. The JO issued his decision on 22 January 2016 (the Decision is at Appendix 1 to this decision).

The Player denied having committed the act of Foul Play alleged in the Citing Complaint. The JO determined that the Player had committed the act of Foul Play, upheld the Citing Complaint, categorised the offence as at the "low end" range with an entry point of 12 weeks.

The Player appealed by Notice of Appeal dated 25 January 2016. A copy of the Notice of Appeal is included in Appendix 2 of this Decision. The Appeal Committee sat on Wednesday 3rd February to consider the Appeal.

In addition to the members of the Appeal Committee there was present during the Hearing on Wednesday 3rd February:-

The Player

Chris Smith, Associate, Lewis Silkin LLP, appearing for the Player ("the Player's

Representative)

Mark McColl, Director of Rugby, Saracens

Liam McTiernan, Disciplinary Officer EPCR (the "DO")

Max Duthie, Solicitors, Messrs Bird and Bird, appearing for the Disciplinary Officer (the "DO's" legal representative)

Jennifer Rae, Solicitor, Clerk to the Appeal Committee

In addition to the documentation and other materials which were considered by the JO, the additional materials considered by the Appeal Committee were:-

1. The Notice of Appeal (Appendix 2) and cases referred to therein

2. The Player's response to the Standing Directions (Appendix 3) and cases referred to therein.

3. The DO's legal representative's response to the Standing Directions (Appendix 4), together with the cases referred to therein.

2. PRELIMINARY MATTERS

The Player's legal representative stated that the Player was not seeking a *de novo* hearing and accepted the factual determinations of the JO. The Appeal was in relation to the level of sanction only.

The Appeal Committee determined that they wished to deal with a preliminary matter. In the response by the Player's legal representative to the standing directions he had replied to the question "what evidence he/she would rely on to support his/her position (any written evidence must be attached to the written statement when sent by the appellant, and the names of any witnesses to be call must be set out in the statement) by stating "that evidence would

be sought from the DO, Liam McTiernan, regarding submissions made to the JO at the Disciplinary Hearing". At paragraph 16 of Appendix 4 the DO's legal representative makes it clear that " the DO will be present at the Appeal Hearing and will be happy to let the Player/Appeal Committee know what he recollects about the submissions he made to the JO." The Appeal Committee considered what value, if any, evidence from the DO would provide to a consideration of each of the appeal grounds and determined as follows:-

Ground of Appeal 1:

It was not part of the reasoning of the JO for aggravating the sanction to be imposed upon the Player as to what the DO had or had not submitted in respect of this matter. In any event, whatever was said by the DO, the JO was required to consider the Memoranda in considering whether or not he should aggravate any proposed sanction on the Player. Further there was no challenge in the Grounds of Appeal by the Player as to the reasoning of the JO at Para 28 of the Decision.

Ground of Appeal 2:

There was no record of the DO having made any submission with regard to what was or was not relevant in the context of mitigating factors. There is no suggestion at Paras 29 or 30 of the Decision that the JO took into account anything the DO had said in relation to this matter.

Ground of Appeal 3:

There was no indication in Para 32 of the Decision that what the DO said relative to DR 7.8.37 (the wholly disproportionate rule) was taken into account by the JO and in any event whatever evidence the DO might now give, as to the submissions made by him at the hearing, the position of the Player and of the DO in this issue in the Player's response to the Standing

Directions and the DO's legal representative's response to the Standing Directions are the same. Both parties contend that the DO did not state in his submissions at the hearing that he opposed the Player's submissions in relation to reduction of the sanction by application of DR 7.8.37, nor did he advise the JO that he supported those submissions. The Appeal Committee agreed that it would proceed to determine the appeal on the basis that such was the position of the DO at the hearing before the JO.

The Appeal Committee accordingly determined that there was no need, nor would any purpose be served, in hearing evidence from the DO as to what submissions were made by him to the JO at the original hearing as regards the matters to which the 3 grounds of appeal relate.

3. THE SUBSTANTIVE APPEAL:

Ground of Appeal 1:

The JO incorrectly stated in his written decision that the Disciplinary Officer ("DO") suggested that the 2009 and 2014 IRB Memoranda have an aggravating effect on the sanction (see Para 23 of the Decision).

"The DO stated that it was for the JO to decide whether this was a case which warranted aggravation, but did not submit that EPCR considered that this was a case which warranted aggravation. As a result of this misclassification of the DO's submission, it was an error for the JO to add a period of one week to the entry point of 12 weeks."

The Player appealed against the JO's finding that "the offence is of the type referred to in the 10 July 2009 and 24 October 2014 Memoranda and there is a need for a deterrent to combat

the offending that occurred in this case (see Para 28 of the Decision).

The Player's legal representative supplemented his written submissions on this ground of appeal which are contained in Para 1 of the Notice of Appeal (Appendix 2) and argued that the factual circumstances of this case and, in particular, the supervening event of other players becoming involved in the contact between the Player and the Victim Player at the time of the alleged Foul Play was such that the specified Memoranda should not apply.

The DO's legal representative also supplemented his written responses to this ground of appeal which are contained in the response to the Standing Directions (Para B of Appendix 4).

The Appeal Committee determined as follows:-

The JO found in his decision at paragraph 21:

> *"In the act of grabbing the Victim Player's face and pulling back his head, he [the Player] made contact with the Victim Player's eyes or eyes area. This contact was not accidental but was reckless because the Player took inevitably the consequent risk to commit an act of Foul Play, which resulted in contact with the eyes or eyes area, when the Player made contact with the Victim Player".*

The Appeal Committee considered that this one of the types of offence described in the said Memoranda and the JO was required to consider these Memoranda when determining whether the sanctions to be imposed should include an element of aggravation to deter the

future commission of the sort of offending that occurred in this case. The memoranda allow for contact with the eye area using the flat part of a hand without any specific gouging movement. In this case the Player intended to have his hand on the face of the Victim Player and in so doing there resulted in a high risk of contact with the eye area, which the Victim Player would have considered placed the safety of his eyes in danger. Any player who places his hand in the fact of an opponent exposes himself to the high risk of commission of an offence of coming into contact with the eye area of his opponent, and his opponent at risk of damage to his eyes. It was therefore open to the JO to aggravate the sanction, albeit it only modestly by one week, consistent with the memoranda, so as to deter this type of offending. This ground of appeal is accordingly refused.

Ground of Appeal 2:

"The JO failed to take into account, or state in his written decision, the submissions made by the DO and the Player's legal representative, that the Player's denial of committing an act of Foul Play should not be held against him for the purposes of mitigation (see Para 29 of the Decision) and the Player appeals against the JO's finding of a 3 week reduction in sanction (when it was open to the JO to be reduced by up to 6 weeks in accordance with DR 7.8.36) given the submissions made by the DO and the Player's legal representative, and the other mitigating factors identified (see Para 29/30 of the written decision)."

The Player's legal representative made brief submissions in addition to the written submissions which are contained in paragraph 2 of the Notice of Appeal (Appendix 2).

In respect of the oral submissions, the Player's legal representatives key focus was that the

Player genuinely believed that he had not committed the act of Foul Play. It was argued that it was unfair to the Player that mitigation should be constrained because he had not made an acknowledgement of his culpability/wrong doing further to DR 7.8.35 as the Player devoutly believed his innocence.

The DO's legal representative made brief oral submissions further to the more detailed responses to this ground of appeal as contained in paragraph C of Appendix 4.

The Appeal Committee determined:-

The JO correctly considered all of the potential mitigating factors in respect of the potential sanction upon the Player by reference to DR 7.8.35. The Appeal Committee do not dispute the genuineness of the Player's position namely that he believed that the alleged act of Foul Play was committed accidently. However the JO found that the contact "was not accidental but was reckless because the Player took the risk of committing an act of Foul Play, *viz* contact with the eyes or eyes area, when the Player made contact with the face of the Victim Player" (paragraph 21 of the Decision).

The JO was entitled to determine mitigation up to a maximum of 50% potential reduction of the low end sanction. A JO when considering mitigation up to the maximum potential reduction will work upwards from a 0% potential reduction of sanction, rather than starting at a 50% potential reduction of sanction and working downwards. In this case the low end sanction is 6 weeks and the JO mitigated by 3 weeks, i.e. half of the maximum available. The Appeal Committee were referred to the case of *Manon Andre*, which is a 6Nations decision dated 18 February 2015, in respect of an allegation of contact with the eye(s) or eye area contrary to Law 10.4(m), namely Acts Contrary to Good Sportsmanship. The Appeal

Committee were not persuaded by the terms of that decision and its analysis of the application of the sanctioning regime for such incidents. The approach taken by the Committee in that case should not be followed in future cases.

In the present case the Player denied having committed an act of Foul Play, which was established and not challenged on appeal, and the Player does not have a wholly 'clean' disciplinary record. According, on two of the possible mitigating factors the Player in this case does not qualify. One cannot logically mitigate sanction in cases where Players do accept liability and in other cases mitigate where they do not accept responsibility. The acceptance of responsibility for one's actions before a disciplinary system is an important component in the sanctioning regime.

It was well within the discretion of the JO in this case to select a level of mitigation of 50% of the maximum i.e. 3 weeks form a possible 6. Appeal Committees do not interfere with such legitimate exercise of discretion by the JO who heard the case.

The Appeal Committee accordingly refused this ground of appeal.

Ground of Appeal 3

"The JO failed to take into account, or state in his written decision, the submissions made by the DO that EPCR did not oppose the submission made by the Player's legal representative that DR 7.8.37 was appropriate in the circumstances of the case. The Player appealed against the JO's finding that the sanction of 10 weeks was not "wholly disproportionate" to the level and type of offending in this case, and submitted that in accordance with DR 7.8.37 a

reduction greater than 50% from the 12 week entry point suspension was justified."

The Player's legal representative made oral submissions further to paragraph 3 of the Notice of Appeal (Appendix 2). The Player's legal representative argued that the equating of the facts of the Galarza decision to those of this case, in determining that a sanction of 10 weeks suspension in this case was not wholly disproportionate to the level and type of offending, was an error by the JO and accordingly the Decision should be varied. The Player's legal representative argued that the varying of the Decision should be to provide the Player with the benefits of the application of the "wholly disproportionate" rule and that the suspension to be imposed upon the Player significantly reduced to a level greater than 50% of the 12 week entry point suspension. The Player's legal representative argued that the facts of this case as laid out in the JO's decision should lead to a view that the proposed suspension was "wholly disproportionate to the level and type of offending" of the Player further to DR 7.8.37(b).

The DO's legal representative made brief oral submissions further to his written submissions contained in paragraph D of Appendix 4. The DO's legal representative made submissions as to why the "wholly disproportionate" rule as incorporated in DR 7.8.37(b) has a high level threshold and that in consideration of this very high threshold. The JO was entitled to consider that the facts of this case were such that the JO should not consider that the level and type of offending was "wholly disproportionate" to the proposed sanction to be imposed upon the Player.

The Appeal Committee determined that the JO had erred in paragraph 32 of the Decision where he stated "The JO did not consider that the sanction of 10 weeks was "wholly disproportionate". The JO referred to the Galarza decisions (JO and Appeal Committee)

where it was determined that a sanction of 9 [mistakenly stated by the JO in this case to have been 10] weeks for this type and level of offending is not "wholly disproportionate".

The drafting of said clause 32 of the Decision could be construed to the effect that there was a comparison between the facts of the Galarza decision and those of this case. The role and function of the JO, in a consideration of DR 7.8.37(b), is to consider whether or not there should be a reduction in the proposed sanction by greater than the otherwise maximum of 50% of the low end entry point, in circumstances that the sanction which would be imposed would be such as to be "wholly disproportionate" to the level and type of offending of this case. The Appeal Committee determined that the JO had erred in seeking to make a comparison with the facts of the Galarza decision on the same issue, rather than focussing on the level and type of offending in this case and whether that analysis led to the conclusion that it would be wholly disproportionate to sanction at a suspension of 10 weeks.

The Appeal Committee then proceeded to consider whether, further to DR 8.4.8(b), the Decision should be overturned or varied. The Appeal Committee considered the established facts of this case noting that the JO had determined in Paragraph 20 of the Decision:

> *"In this case, the Player made a conscious effort to play the head area and face of the Victim Player. He intentionally reached and grabbed with his right hand the Victim Player's head and face. The Player knew (or should have known) that there is a risk of committing an act of Foul Play."*

Further, Paragraph 21 of the Decision states:

"In the act of grabbing the Victim Player's face and pulling back his head, he made contact with the Victim Player's eyes or eyes area. The contact was not accidental but was reckless because the Player took inevitably the consequent risk to commit an act of Foul Play, which resulted in contact with the eyes or eyes area, when the Player made contact with the Victim Player".

The Appeal Committee were also referred to the Decision of *Manon Andre* dated 18th February 2015, which has already been referred to in this decision, and involved a Citing in respect of an allegation of contact with the eye(s) or eye area contrary to Law 10.4(m) Acts Contrary to Good Sportsmanship. The Appeal Committee were not persuaded by the terms of that decision and its analysis of the application of the sanctioning regime for such incidents. In that case part of the reasoning applied for a reduction of greater that 50% is that it was not a case of eye gouging. However, that it was not such a case had already been taken account of at the stage of determining the entry point. It was already categorised as bottom of the range in terms of the seriousness of the case. That decision should not be used as a basis to determine the application of the 'wholly disproportionate rule' in cases where the issue arises. This Committee respectfully adopts and restates the approach to the interpretation of the 'wholly disproportionate' rule as set out both at first instance (6.13 and 6.14) and on appeal (8.13 and 8.14) in *Galaraza*.

The Appeal Committee determined that in the context of the facts of this case that the level and type of offending of the Player as narrated in the JO's decision was not such that the sanction proposed by the JO "would be wholly disproportionate to the level and type of offending." In this case there are factual findings unchallenged on appeal, that the Player intentionally grabbed for and made contact with the head and face of the Victim Player. As

such it was the Player's actions which exposed the Victim Player to the risk that contact would be made with his eye or eye area, and the Player took the risk that he would make contact with the Victim Player's eyes, or at least that area of the Victim Player's face where the Victim Player would fear for contact with his eyes. That risk, in this case, became the reality, as such the JO was not only entitled to reject the application of DR 7.8.37(b) but would have been in error had he decided it applied.

The Appeal Committee having determined that the JO had made an error further to DR 8.4.8, further determined that the Decision should not be overturned or varied And this ground of appeal was also refused.

4. COSTS

Parties are invited to make whatever application they consider appropriate in relation to costs by email to the Chairman of the Appeal Committee within 7 days of the date of this decision. Submissions in relation to costs should be within the context of DR 8.4.20.

Professor Lorne D Crerar, Chairman 16th February 2016