

# Decision of the Independent Judicial Officer

EPRC

Held at Huguenot House, 35-38, St Stephen's Green, Dublin 2

Thursday 29<sup>th</sup> January 2015

In respect of

**Ashley Johnson of Wasps (“the Player”)**

And

**A citing of the Player in the match played between Wasps –v- Leinster on 24<sup>th</sup> January 2015 at the Richo Arena, Coventry for an offence of tackling the jumper in the air contrary to Law 10.4(i) 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 having admitted the allegation of a breach of Law 10.4(i) the Judicial Officer found that the Player had committed an act of illegal and/or foul play contrary to Law 10.4(i) and suspended the Player from taking part in the game of rugby up to and including 15<sup>th</sup> February 2015. This represents a three week suspension commencing 24<sup>th</sup> January 2015.
- (ii) The Judicial Officer made an award of costs against the Player limited to the Judicial Officer's travel and accommodation expenses for the hearing.

## **Introduction:**

1. The Judicial Officer was appointed by Professor Lorne D. Crerar, Chairman of the 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 Wasps and Leinster on 24<sup>th</sup> January 2015 in the European Champions Cup 2014/2015.
2. Mr Alberto Recaldini, the Independent Citing Commissioner appointed to the match, had cited the Player for tackling a jumper in the air. It was alleged that Leinster 11 (David Kearney) had jumped to catch a high the ball from the kick off and had been tackled by the Player whilst he was in the air.
3. Present at the hearing addition to the Judicial Officer were the following persons:-
  - (a) Mr Roger O'Connor – Disciplinary Officer, EPRC.
  - (b) Mr Liam McTiernan – Regulations Executive, EPRC.
  - (c) Mr Ashley Johnson ("the Player").
  - (d) Mr Kevin Harman – Wasps Team Manager.
  - (e) Mr Shane Sibbel – Counsel for the Player.

## **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 committed an act of foul play contrary to Law 10.4(i) (tackling the jumper in the air) upon Mr Kearney.
5. The Judicial Officer reminded all parties that the EPRC Disciplinary Rules found in the participation agreement for the European 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 Report.
  - (b) The Statement if Mr David Kearney.

- (c) A medical report from Professor John Ryan, Consultant in Emergency Medicine and the Leinster Team Doctor.
- (d) Emails from Mr Guy Easterby, Leinster Team Manager.
- (e) The Referee's report on the Player's temporary suspension.
- (f) An email from the Match Referee M Jerome Garces.
- (g) An email from the Assistant Referee, Salem Attalah.
- (h) The Player's statement in response to the standing directors to the Disciplinary Rules.
- (i) An email from Mr Sibbel clarifying the Player's position in response to the allegation.
- (j) The Disciplinary Officer's response to the Player's statement.
- (k) An email dated 16<sup>th</sup> April 2014 from Joel Judge to referees with guidance in relation to tackles and collisions in the air.
- (l) The decision of the Disciplinary Committee in the Rabo Direct Pro 12 matter of Liam Williams (24<sup>th</sup> April 2014).
- (m) A copy of the decision of the Judicial Officer in the case of Jared Payne of Ulster (9<sup>th</sup> April 2014).
- (n) A copy an exchange of messages on Twitter between the Player and Mr Kearney.
- (o) A statement relating to the Player's playing and disciplinary record from Mr Harman.
- (p) A schedule of the forthcoming matches for Wasps.
- (q) Match footage from various angles.

#### **Preliminary Issues:**

7. The Judicial Officer invited the Player and the Disciplinary Officer to confirm whether they had any preliminary issues that they wanted to raise.
8. It was confirmed that there were none.

#### **The Citing Complaint:**

9. The Judicial Officer explained the procedure to be followed in the hearing in that he would shortly put the allegation contained in the Complaint to the Player and ask him to whether he admitted or denied it. If he admitted that he had committed the alleged act of foul play then the case would be heard and the Judicial Officer would consider what sanction, if any, should be imposed. If the Player denied the allegation then the case would be heard and the Judicial Officer would determine, on the balance of probabilities, whether the act of foul had in fact been committed. If the Judicial Officer was not satisfied on the balance of probabilities that the act had been committed then that would be an end to the matter. If the matter was proven then the Judicial Officer would proceed to sanction.
10. The Judicial Officer therefore narrated the Citing Complaint which was as follows:

*“At the kickoff, Wasps Player tackled Leinster’s Player 11 (Dave Kearney) who was jumping for the ball. Irish Player grounded with head and right shoulder”.*

11. The Citing Complaint went on to record the following:

*“Referee and TMO told me the Irish player grounded on his right shoulder and on his right side that is why the Referee only used the yellow card”.*

12. The Judicial Officer put the allegation to the Player who confirmed that he admitted that he had committed an act contrary to Law 10.4(i) and that the facts contained within the Citing Complaint were true

13. The Judicial Officer stated that he would now hear the case and proceed to determine what sanction (if any) should be imposed.

**Evidence Supporting the Complaint:**

14. The Disciplinary Officer presented the evidence which was as follows:

- (a) Statement of David Kearney:

*“From the first kick off of the match I jumped into the air to catch the ball. Just as I caught it I was hit from underneath and this caused me to be unbalanced in the air. I then landed heavily on my right shoulder. I was obviously pretty shaken and I felt some immediate pain in my right shoulder. The medics were out to me very quickly and whilst the pain didn’t really dissipate I wanted to try and carry on as it was so early in the game and I wanted to remain part of it. It became clear to me very quickly that my right shoulder wasn’t functioning properly and therefore I was substituted shortly afterwards”.*

- (b) Statement of Professor John Ryan

This contained the following:

*“I was in the dugout side of the pitch close to Leinster’s ten metre line at the start of the game. I witnessed Mr Kearney jump to catch a ball from the kick off. I saw him tackled in the air and land heavily on his right shoulder. I ran straight to his assistance and he called out that his shoulder “was gone”. I was joined by the duty physiotherapist Mr Karl Denvir. I cleared his cervical spine of any injury and then assessed his right shoulder. There was a good range of movement but he was very tender over his acromio-clavicular joint. He wanted to try playing on so after a short time recovering, he rejoined the game for a brief period. However his shoulder was too painful to*

*continue. I gave him some oral analgesia, ice and a broad arm sling.*

*Later that night on returning to Dublin I arranged x-rays of his clavical and acromio-clavicular joint. These were normal. A MRI scan performed the following morning revealed grade 1A-C joint injury and heavy bruising over the right shoulder. Physiotherapy and continuing care has been planned for him”.*

(c) Mr Guy Easterby

The Leinster Team Manager had confirmed that Mr Kearney was certainly going to miss the next match and would be likely to miss the following week’s match.

(d) The Referee’s Evidence

The Referee’s report on a temporary suspension read as follows:

*“At the kick off, the Player number 6 from Wasps tackled the jumper in the air (the Player number 11 from Leinster).*

*After my review on the big screen, the player number 11 lands on his back It’s the reason why I gave a yellow card against the number 6 from Wasps”.*

My Garces supplemented his official report with an email which read as follows:

*“In live I was sure about the yellow card and Salem (AR1) confirmed immediately that the right decision was a yellow card.*

*I preferred to use the big screen to show a different angle before taking my decision, it’s the reason why I ask Herve (TMO) to check on the video if the Player lands on his back.*

*After my review on the big screen I keep my analysis and decision to award the yellow card, Salem and Herve confirmed my decision”.*

(e) Assistant Referee – Salem Attalah

*“I have exactly the same analysis as Jerome. I see the player number 11 white (Leinster) crashed while in the air by the player number 6 (Wasps). The player number 11 white falls on his side. In consultation with Jerome we decide that it deserved a yellow card”.*

15. The Disciplinary Officer then played the video evidence and submitted that it depicted the following:

*“As the ball is descending and Mr Kearney jumps to catch it, the Player makes contact with Mr Kearney’s left ankle and right knee. At the point of contact Mr Kearney is at the apex/top of his jump.*

*The Player runs through him and doesn’t appear to stop.*

*Mr Kearney falls from a significant height.*

*Mr Kearney places his hand out to protect himself.*

*Mr Kearney’s impact with the ground is with his shoulder, neck and head in that order. Certainly his neck and head impact the ground before his feet or hips.*

*The Player appears to be looking at Mr Kearney at the time the impact is made”.*

16. The video evidence was shown from a number of angles on several occasions.

#### **The Player’s Evidence:**

17. The Player was asked by the Judicial Officer to explain what had occurred.
18. The Player stated that because it was such an important match (the final pool game) his adrenaline was high. He recalled looking at the ball when it was in flight. He explained that he normally is the player who chases the ball from the kick off. He was expecting the ball to be caught by one of three Leinster players forming a “pod”. He explained that the pod consisted of one Leicester player who would jump for the ball being supported by two players. As he ran towards the pod with the expectation of attacking the pod once the ball had been caught, he realised that the ball had travelled deeper than the players within the pod and was going to land behind it. Upon realising this, whilst he was running at speed and very close to the pod, he made an instant decision to run around the back of the pod to tackle whichever player received the ball. He anticipated that there would be a “sweeper” approaching the area behind the pod. He explained that as he was very close to the point where the ball was due to land Leinster 11 (Kearney) leapt into the air by which time it was too late for him to pull out of his run. He said that he had not anticipated that Mr Kearney would have jumped for the ball and that his previous analysis of the Leinster team tactics from the kick off had not shown that occurring. He said that he did not appreciate that Kearney had jumped for the ball until it was too late and he felt the impact of Kearney’s leg or foot on his left shoulder. By this time he had raised his arms and realised only then that Kearney was going to be in trouble due to the fact that he had leapt and that he (the Player) was running through him.

19. The player said that he put an arm out but then withdrew it. All of it had occurred in a split second and at no stage had he intended to de-stabilise Kearney or interfere with him while he was in the air. As soon as Kearney landed his immediate reaction was to look at him to check that he was alright. He said the video showed one of Kearney's team mates did likewise and when it was apparent that Kearney was conscious, Kearney's team mate approached the Player in an aggressive manner and pushed him away. The Player did not react to this push. The Referee blew the whistle and consulted his fellow match officials before showing him a yellow card and ordering him from the field.
20. The Player explained that he immediately felt very sorry for what had occurred, principally for Mr Kearney but also for how his actions were likely to impact upon the match. He explained it was the worst possible start and his teams were likely to be disadvantaged by losing him for a period. He described that even after he had served his ten minute suspension it took a considerable period longer than that before he had regained his concentration to be fully effective, in the match.
21. He confirmed that he was sincerely sorry for the incident. He had in no way had intended to tackle the player in the air. It was a clumsy mistake and the last thing that he wanted to happen.
22. Mr Harman also supplemented the Player's evidence by inviting the Judicial Officer to look carefully at the match footage from one of the additional angles which showed that the Player had been looking up at the ball for much of the time when he had been running and that he had looked and seen that the jumper in the pod was unlikely to catch the ball. It could also be seen that the Player had checked his run at that point and then carried on to the side of the pod. At the time that Mr Kearney was in front of him and about to jump there were only two strides before impact.
23. The Judicial Officer put to the Player that it appeared he had been looking towards Mr Kearney before the impact and had raised his arms. The Player stated in response that it had occurred in a split second and although he accepted responsibility for what had happened his actions had been clumsy and unintentional.

#### **Sanction**

24. The Judicial Officer explained that he was now required to firstly consider DR78.32 which contains the prescribed checklist to assess the seriousness of the incident itself and thereby the relevant entry point (i.e. "low end, mid range or top end"). The Judicial Officer therefore invited submissions from the parties.
25. The Disciplinary Officer stated that it was a matter for the Judicial Officer to assess as to whether the Player's offending was intentional/deliberate or whether it was reckless. He did not positively advocate that there was intent although he wanted to draw to the Judicial Officer's attention the fact

that the Player appeared to be looking forward and towards Mr Kearney immediately before the impact.

26. The Disciplinary Officer invited the Judicial Officer to conclude that when considering the gravity of the Player's actions that the incident had occurred at significant pace.
27. The Disciplinary Officer also invited the Judicial Officer to acknowledge that there had been a significant impact of the Player's actions on the victim in that he had, in effect, missed the whole of the match on 24<sup>th</sup> January, was certain to miss the match this forthcoming weekend and was likely to miss the following match. This therefore amounted to a period of three weeks incapacity. Thankfully, it appeared, that there was no structural damage to the shoulder but merely a ligament strain.
28. The Disciplinary Officer also commented that Mr Kearney had been particularly vulnerable in the incident.

**Player's Submission on Sanction:**

29. Mr Sidell submitted that the appropriate entry point was low end. He submitted that the case could be compared with the decision in the ERC case of Jared Payne which had also found low entry point. He explained that it was within roughly the same band of seriousness and that in the Player's case there was no basis for believing that his conduct had been deliberate or intentional. The Player had given a coherent account which had made sense. There was no positive suggestion from any match official, from the Citing Commissioner or from the Disciplinary Officer that there had been any intention to commit the act of foul play. He said that insofar as recklessness was concerned, in order to find recklessness there would need to be a sense of culpable disregard. He said the Player had been clumsy and to some extent his culpability in this matter was lower than that of Jared Payne. In the Payne case, he had an unobstructed view of where the ball was landing whereas in the Player's case, his view had been obstructed by the pod and that he had had to change his position.
30. As far as gravity was concerned, on page 7 of the Panel Judgment it was submitted that Mr Payne had acknowledged his focus had been solely on catching the ball with an apparent disregard for the safety of anybody else. That was not the case with the Player. He also felt it was of significance that the match referee had had no hesitation in issuing a red card to Payne whereas in this instance the Referee had felt (and maintained in his communications to the Disciplinary Officer since) that a yellow card was appropriate.
31. Continuing through the entry point criteria, whilst it was accepted that the effect of the Player's

actions on Mr Kearney were not insignificant, the effect of the victim on the Payne case was arguably greater. The victim player there had lost consciousness as a consequence of the incident and had been removed from field of play.

32. In terms of the Player's action's and their effect on the match, Mr Sibbel commented that even though one of Mr Kearney's team mates had acted in an aggressive manner immediately after the incident the Player had not responded in any way and had shown no upset or inappropriate reaction at the decision to show him the yellow card. Also the ultimate result was a draw in which Leinster have a home draw in the championships quarter finals whereas Wasps are drawn away to Toulon.
33. He also commented that Mr Kearney was necessarily vulnerable, like all victims of offences of 10.4(i) because it is an essential ingredient that the victim player be in the air when he is tackled.
34. Finally he submitted that the effect on Mr Kearney was not as significant as was feared at the time of the citing report when investigations still had to be made as to whether Mr Kearney had fractured his shoulder.
35. In summary, Mr Sibbel submitted that most of the entry point criteria applied to this particular case pointed towards low end.

**Aggravating Factors:**

36. The Disciplinary Officer and the Player agreed that there were no aggravating factors in this case.

**Mitigating Factors:**

37. The Disciplinary Officer accepted that the Player was entitled to considerable mitigation.
38. Mr Sibbell confirmed that the Player had indicated a guilty plea at the earliest opportunity. He had a clean disciplinary record in the sense that he had never been ordered off or cited in his career previously. He was 28 years of age and had been playing rugby at the top level for a considerable period. His conduct prior to and at the hearing had been very good and he had demonstrated remorse for his conduct to Mr Kearney at the match by speaking to him personally and apologising and subsequently making a public apology on Twitter which had been responded to in a sportsmanlike manner by Mr Kearney.

Mr Sibbel therefore summed up the Player's position that this was a case where the Judicial Officer should find that the offence warranted a low entry point of three weeks and that he should be entitled to maximum mitigation which, in the context of the Rules, would allow the Judicial Officer to

impose a suspension of two weeks. Mr Sibbel acknowledged that this was not a case where DR7.8.37 applied (where there were off field mitigating factors and without a further reduction from 50% of the entry point the remaining sanction would be wholly disproportionate to the level and type of offending).

**Decision as to disposal:**

39. The Judicial Officer carefully reviewed all of the evidence, none of which was seriously in dispute and also paid particular regard to the various video clips which showed the actions of the Player, and Mr Kearney immediately before the impact and afterwards.
40. The Judicial Officer considered that although significant relevance had been placed by the Player in the case of Jared Payne, no two cases are identical and each case must be carefully considered on its own merits.
41. The Judicial Officer was satisfied that the Player had been correct in that his initial approach was towards the pod but then checked his running momentarily and changed to move away from and around the pod. At the critical moment, Mr Kearney had come from across field to jump for the ball. The Player had looked and seen to Kearney immediately before Kearney left for the ball had not taken any steps to withdraw from the contact. He had, in effect, run through Mr Kearney which had destabilised him in the air and which had resulted in Mr Kearney hitting the ground with the shoulder and upper part of the body, including his neck and head, immediately afterwards. The Judicial Officer was satisfied that Mr Kearney had suffered a significant injury which had incapacitated him for the rest of the match and that he was likely to miss three matches (including the game on 24<sup>th</sup> January). In applying the entry point criteria the Judicial Officer was satisfied of the following:
  - (a) The offending had not been intentional or deliberate.
  - (b) The offending had been reckless in that the Player knew or should have known there was a risk of committing an act of foul play.

The Judicial Officer reminded himself that the Player had explained that it was his normal role to chase for the ball. When a high ball is kicked and, and the kicking team's players are chasing it is perfectly foreseeable and that a receiving player may leap for the ball, as in this case. Having made the decision to run to the side of the pod the Player should have taken more care. Whilst it was accepted that Mr Kearney had leapt at the very last moment when the Player was very close to him the Player's actions were nevertheless reckless.

- (c) The gravity of the Player's actions in relation to the offending.

Even though Mr Sibbel had agreed that the Player's actions were less grave than that in the case of Jared Payne, Payne had anticipated being able to catch the ball on the run. In this case, the Player's evidence had been different. He had not expected to be able to catch the ball and was intending tackling the recipient of the ball. . His focus should have been on the Leinster catcher.

- (d) The nature of the actions, the manner in which the offence was committed including the part of the body used (for example, fist, elbow, knee or boot).

The incident had happened at pace and the Player was large and had built up considerable momentum at the point of impact with Mr Kearney.

- (e)(f) & (g)

This was not a case where there was any provocation, retaliation or self defence.

- (h) The effect of the Player's actions on the victim (for example the extent of the victim's injury and whether he was removed from the match).

The Judicial Officer concluded that Mr Kearney had suffered a painful injury to his right shoulder, namely a grade 1 AC joint injury which was likely to incapacitate him for three full matches.

- (i) The effect of the Player's actions on the match

In this case the Player had received a temporary suspension whereas Mr Kearney had been incapacitated for the whole of the match, albeit he was able to be replaced. When comparing the effect of the match with that of Payne the Judicial Officer noted that Payne had been ordered off from the field permanently.

- (j) The vulnerability of the victim, including the part of the victim's body involved/affected, the position of the victim and his ability to defend himself.

The Judicial Officer noted that whilst tackling a jumper in the air necessarily involves vulnerability, in this case the impact by the Player had occurred when Mr Kearney was at the height of his jump which made him particularly vulnerable.

- (k) The Judicial Officer did not conclude that there had been any premeditation to the incident.

- (l) The Judicial Officer concluded that the conduct of the Player had been completed and was not attempted.
  - (m) There were no other features of the Player's conduct in relation to or connected with the offending.
42. Based upon the Judicial Officer's assessment of the Player's conduct in the incident he categorised the offence as being at the mid range of the scale of seriousness in the IRB recommended sanctions for offences within the playing enclosure (found at appendix 3 of the Disciplinary Rules).
  43. Sanctions for mid range 10.4(i) offences equates to a starting point of 6 weeks.
  44. The Judicial Officer was satisfied that there were no aggravating factors to increase the sanction.
  45. The Judicial Officer concluded, however, that there was considerable mitigation available to the Player. He had demonstrated immediate concern for Mr Kearney as soon as the incident had occurred until he was pushed away by one of the Leinster players. He had not reacted improperly to being shown a yellow card. He had immediately apologized to Mr Kearney in person, as soon as the match was over and had publicly sent a message on Twitter to Mr Kearney. The Player had been playing Rugby Union since leaving school in South Africa in 2004 and had played for Western Province Stormers and the Free State Cheetahs with whom he had made over 100 appearances. He had played with Wasps since 2012 with 65 appearances and 3 caps for the Springboks. He had never been cited or received a red card before.
  46. His conduct at the hearing had been very good and he had made a good and honest impression on the Judicial Officer.
  47. Taking all factors into account the Judicial Officer concluded that the Player was entitled to maximum credit (i.e. 50%) from the entry point of 6 weeks which meant that the final sanction would be one of 3 weeks.
  48. The Judicial Officer was satisfied on the evidence that the Player would be selected, if available, for Wasps next three matches and therefore those three weeks would constitute relevant weeks for the purposes of the suspension.
  49. Accordingly the Judicial Officer suspended the Player from the game of Rugby Union up to and including 15<sup>th</sup> February 2015 which means he is free to play on Monday 16<sup>th</sup> February 2015.
  50. The Judicial Officer made an award for costs against the Player limited to the Judicial Officer's travel and accommodation costs.

**Right of Appeal:**

The Judicial Officer reminded the parties of their right to appeal under DR8.1.1.

Dated: 4 February 2015

---

Simon Thomas  
Judicial Officer.