

EUROPEAN PROFESSIONAL CLUB RUGBY (EPCR)

DECISION OF THE APPEAL COMMITTEE

IN RESPECT OF THE APPEAL BY GEORGE EARLE

HELD via Conference Call

ON 6 January 2017

IN RESPECT OF:-

An appeal by George Earle ("the Player") against the decision ("the Decision") of the Disciplinary Committee on 21 December 2016 (written decision dated 22 December 2016), which held that the Player:

- (a) committed an act of Foul Play namely Acts Contrary to Good Sportsmanship, further to Law 10.4(m); and
- (b) should be suspended from taking part in the game of Rugby Union for a period of 8 weeks, up to and including 13 February 2017

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

Professor Lorne D Crerar (Chairman) (SRU)

Rod McKenzie (SRU)

Sir James Dingemans (RFU)

DECISIONS OF THE APPEAL COMMITTEE:

The Decision of the Appeal Committee is that the Player's Appeal is dismissed;

GROUND OF APPEAL

1. The Disciplinary Committee should not have added an extra week to the Low entry point pursuant to the World Rugby Memoranda (the Decision, paragraph 45);
2. The Panel acted in error by failing to reduce the length of the player's suspension pursuant to European Professional Rugby Disciplinary Rules (DR) 7.8.37 (the Decision paragraph 48), and

3. The sanction imposed was accordingly wholly disproportionate to the level of offending. The sanction should be varied to provide for a significantly reduced suspension from playing, proportionate to the level of Foul Play.

APPEAL HEARING

The Appeal Committee was convened by Professor Lorne D Crerar, Chairman of the EPCR Disciplinary Panel, further to DR 8.3.1 and DR 8.4.3 on 6 January 2017 to hear the Players appeal. ("the Hearing")

Pursuant to Clause 8.4.7, the Appellant requested that the Appeal Committee review the sanction without the need for a personal hearing. All parties confirmed that they were content for the hearing of the Appeal to take place based on the papers alone. The Chairman allowed the Hearing to proceed upon that basis by way of a telephone conference call amongst the Appeal Committee.

- a. In addition to the members of the Appeal Committee, there was present during the Hearing Ms Jennifer Rae, Solicitor, Harper Macleod, Clerk to the Appeal Committee

The documentation and other materials which were available and considered by the Appeal Committee included inter alia:-

1. The Written Decision of the Disciplinary Committee dated 22 December 2016
2. The Notice of Appeal (Appendix I)
3. The Player's response to the Standing Directions of the Appeal Committee and Note of Argument on behalf of the Player (Appendix II)
4. A response from the Legal Representation of the Disciplinary Officer to the standing direction and note of argument for the EPCR (Appendix III)
5. A response from the Legal Representation of the Disciplinary Officer regarding the legal authorities of *R v Docherty* 2016 UKSC 62 and *Scoppola v Italy* (10249/03)
6. The decision of ERC Appeal Committee in respect of Marius Tincu (November 2008)
7. The decision of ERC Appeal Committee in respect of Alan Quinlan (January 2007)
8. Rugby World Cup 2015 the decision of the Judicial Officer in respect of Mariano Galarza (September 2015)
9. Six Nations Rugby Limited decision of the Appeal Committee in respect of Mauro Bergamasco (March 2008)
10. Pro12 decision of the Disciplinary Committee in respect of Giulio Bisegni (December 2016)
11. National Anti-Doping Panel Appeal Case no 120036 between Matthew Duckworth and UK Anti-doping (October 2012)
12. RFU short form judgment in respect of Rupert Cooper (November 2016)
13. RFU short form judgment in respect of Ryan Mills (November 2016)

14. Letter from David Carrigy regarding Regulation 17 dated 23 December 2016
15. Letter from David Carrigy regarding Regulation 17 dated 5 January 2017

In reaching its decision on the appeal by the Player the Appeal Committee carefully considered all of the documentation and submissions before it. Only such documentation and submissions relevant to its decision on the appeal are referred to in this decision.

THE APPEAL SUBMISSIONS

The submissions for the Player are as contained in Appendices I and II attached to this decision.

REPRESENTATIONS FOR EPCR

The representations for the Disciplinary Officer are as contained in Appendix III to this judgement

CONSIDERATION OF GROUNDS OF APPEAL

In relation to ground 1 – *" The Disciplinary Committee should not have added an extra week to the Low entry point pursuant to the World Rugby Memoranda (Written Judgement paragraph 45)"*

The Player contended - As of 3rd January 2017, it is understood that all existing World Rugby Memoranda issued by the World Rugby Head of Judiciary will be revoked and will no longer be applicable. The memoranda were designed to be a deterrent or at least to promote disciplinary decisions which would act as deterrents. It was unjust of the Disciplinary Committee to impose a deterrent sanction on the Appellant Player when the current context of World Rugby thinking (as should properly be reflected in this competition) is that it is now unnecessary to impose such an additional sanction. There can be no deterrent effect in a sanction imposed days before a completely new set of standards are employed on the 3rd January 2017.

World Rugby advised its Member Unions on 23rd December 2016 that the World Rugby Memoranda dated July 2009 and October 2014 were to be withdrawn from 3rd January 2017 at the same time as the new and revised World Rugby Sanctioning Table came into force. Said Memoranda referred to acts of Foul Play which related to the "eye" or "eye area" which is the act of Foul Play for which the Player has been sanctioned in this case (a breach of Law 10.4.(m)).

World Rugby Council at their meeting on 16th November 2016 determined that the said Memoranda would be rescinded from 3rd January 2017. World Rugby Council did not immediately rescind the Memoranda which was open to them to do and they remained in force in relation to acts of Foul Play committed prior to 3 January 2017. The Disciplinary Committee had not been in error further to DR 8.4.8 in determining that the sanction entry point be increased by one week to "reflect the issues

addressed in the Memoranda" (para 45 of the Decision). This is because it was a memorandum which remained in force and needed to be taken into account by the Disciplinary Committee.

In relation to ground 2 – *"The Panel acted in error by failing to reduce the length of the player's suspension pursuant to DR 7.8.37 (Written Judgement paragraph 48)"*

and

In relation to ground 3 – *"The sanction imposed was accordingly wholly disproportionate to the level of offending. The sanction should be varied to provide for a significantly reduced suspension from playing, proportionate to the level of Foul Play"*.

The entry points for breach of Law 10.4 (m) have been altered in the new Sanctioning Table of World Rugby which took effect from 3rd January 2017. The arguments of the Player are cogently laid out in paragraphs 17 and 18 of the Notice of Appeal. The Player argues that the principle of *Lex Mitior* be applied and thereby "the more lenient law has to be applied if the laws relevant to the offence have been mended.", although it is appropriate to note that the player placed emphasis on this change mainly in support of the ground of appeal relating to a "wholly disproportionate" sanction.

DR 7.8.31 provides, subject to clause 7.8.41, below, in exercising its sanctioning authority against a Player in a case of Foul Play (in particular a citing complaint and/or a red card case), the Disciplinary Committee shall apply World Rugby's sanctions for Foul Play (as set out in Appendix One to World Rugby Regulation 17, available at www.worldrugby.org, and as amended by World Rugby from time to time), in accordance with clauses 7.8.32 to 7.8.44, below. Set out at Appendix Three to these Disciplinary Rules is the version of World Rugby's sanctions for Foul Play in force as at September 2016, but any amendments made by World Rugby to its sanctions will take immediate effect in the Tournaments. However, and for the avoidance of doubt, the version of World Rugby's sanctions for Foul Play to be applied will be the version that is in force at the time that the act of Foul Play is committed. Accordingly, if, for example, World Rugby amends its sanctions after an act of Foul Play is committed, but before disciplinary proceedings in respect of that act of Foul Play are concluded, the version of World Rugby's sanctions to be applied will be the version in force before the amendments were made. Notwithstanding clause 7.8.29, above, a Player suspension imposed solely as a result of Misconduct proceedings can, where appropriate, be suspended.

In a consideration of the potential for the application of the principle of *Lex Mitior* reference is made to paragraph 54 of the UK supreme Court Decision *R v Docherty* [2016] UKSC62 which states "*whilst a court will faithfully give effect to a change in a sentencing regime from the time that it is introduced, it is not permissible for it to anticipate its commencement. That way lies chaos. Sometimes, indeed, changes which are legislated for in statute are never brought into force. That was the case with a raft of new provisions for intermittent custody enacted by the Criminal Justice Act 2003. The present appeal amounts to a claim by Docherty to anticipate the commencement of the change of regime, to*

the extent that he wishes the disappearance of IPP to be effective for him before the Commencement Order (by article 6(a)) abolishes it. He can no more do that than it would be possible or him to contend that IPP should be treated as unavailable for every court from the day that LASPO received the Royal Assent on 1 May 2012. Anticipation of a change which is yet to take effect is no part of Lex Mitior." Lex Mitior, as explained in Scoppola at para 108, prevents the imposition of a sentence which the system has now adjusted, by a change of law, to be excessive. But if the change has yet to be made, that judgement has not yet been given effect; it is in prospect only. The fixing of the date for the change is part of the change itself. If a conscious decision has been made not yet to commence the new law/practice, it cannot yet be said that "society now considers excessive" the old. And it may well consider, rationally, that a penalty shall be regarded as excessive for the future but not for the past."

The Disciplinary Committee were not in error in applying the Sanctions Table of World Rugby in force at the date of the act of Foul Play and were not obliged to consider the amended World Rugby Sanctions Table which came into force on 3rd January 2017.

We did not require to consider whether, on the application of the principle of *Lex Mitior*, the position would have been different if the disciplinary hearing had taken place on or after 3rd January 2017 and this decision is not to be understood as making any determination of what would be the appropriate approach in an equivalent future circumstance.

The Player contends at Paragraph 19 and 20 *et seq* the essence of the argument that the suspension of the Player is "wholly disproportionate" within the context of DR 7.8.37, (b) namely that the "sanction would be wholly disproportionate to the level and type of offending". We do not consider the sanction was wholly disproportionate in this case. Contact with the eye area has the potential to cause very serious harm, and is rightly treated as a serious offence. The change in sanctioning from 3rd January 2017 was to enable sanctioning differentiation in cases involved contact with the eye and other cases which concerned contact with the eye area.

However, just because after 3rd January 2017 the entry points for low entry offending was reduced does not mean that the entry point for low entry offending was "wholly disproportionate" before 3rd January 2017. In that respect we note that Disciplinary Committees had been applying the sanctions for low entry offending for contact with the eye area for a number of years and in a variety of competitions, including the Rugby World Cup, in, for example, the *Galarza* case both at first instance and on appeal,, without making findings that the sanction resulting from an incident of such offending was "wholly disproportionate", including where the sanctioning included for an element of 'aggravation' as a deterrent. This had not been the case, for example, with reckless contact with a match official in a dynamic game situation.

World rugby has made a policy decision to change the structure of its Table of Sanctions so as to differentiate between different types of offending both involving contact associated with the ocular area. It has decided as a matter of policy that as from a specific date the whole of the Rugby World at all levels of the sport will use the new arrangements as from a specific date, i.e. 3 January 2017. The disciplinary committee in its decision correctly declined to in effect anticipate the date of the change in approach in this particular case. It was not for the disciplinary committee and it is not for us to, in effect, make the change in this case on an earlier date than that determined by World rugby when the change will happen universally.

For the reasons discussed in Galarza the imposition of a sanction for this type of offence, based on low end offending in the table which applied before 3 January 2017, is not "wholly disproportionate"

The Disciplinary Committee were therefore correct in applying the Sanctions Table of World Rugby at the time of commission of the act of Foul Play, namely 15 December 2016 contained in Appendix 3 of the DR's. The Disciplinary Committee was accordingly not in error in applying a Low Entry point of 8 weeks further to DR 8.4.8.

The Disciplinary Committee were not in error in failing to reduce the length of the Players suspension pursuant to DR 7.8.37.

The Disciplinary Committee in declining to determine that the sanction imposed would be wholly disproportionate to the level and type of offending were not in error further to DR 8.4.8. The Disciplinary Committee was applying a long standing and well understood approach discussed and adopted in previous cases and there was no error in its Decision.

DECISION OF THE APPEAL COMMITTEE

1. The Appeal is dismissed
2. No award or costs is made to or by either party



Professor Lorne D Crerar
Chairman
Appeal Committee

9 February 2017