

European Challenge Cup 2016/17

Decision of Discipline Committee

Held at The Sheraton Hotel, Charles de Gaulle Airport, Paris on 26 April 2017

In respect of the citing of Jone Quovo Nailiko (the player) by Alberto Recaldini, Citing Commissioner appointed to the match between La Rochelle and Gloucester played at Stade Marcel Deflandre La Rochelle on 22 April 2017 alleging that the player committed an act of foul play contrary to Law 10.4(a).

The Committee appointed to hear the case:-

Kathrine Mackie (Scotland) (Chair)

Jean-Noel Couraud (France)

Jeremy Summers (England)

The Decision

1. The player having accepted that he committed an act of foul play contrary to Law 10.4(a), as cited, and that said act of foul play warranted a red card the citing was upheld.
2. The committee having decided that a sanction should be imposed suspended the player from playing the game of rugby (or entering the playing enclosure in any capacity including as a water carrier or tee carrier at any time on the day of a match) for a period of two weeks. The player will be free to play from 8 May 2017.
3. No order was made for costs.

Parties at the hearing

In addition to the discipline committee the following were in attendance:-

The player

Christian Chevalier, the player's representative

Liam Mctiernan, Disciplinary Officer, EPCR

Danny Rumbles, EPCR Regulation & Compliance Executive

Introduction

The Discipline Committee was appointed by Professor Lorne D Crerar, Chairman of EPCR Disciplinary Panel, pursuant to the Disciplinary Rules of the participation agreement relating to the European Rugby 2016/17 Tournaments. The committee was appointed to consider the citing of the player for an alleged offence contrary to Law 10.4(a) in the match between La Rochelle and Gloucester on 22 April 2017 at Stade Marcel Deflandre La Rochelle.

Preliminary Matters

At the commencement of the hearing the Chair noted the identities of all those present. There was no objection to the composition of the committee. The Chair confirmed that the player had had an opportunity to consider all papers, namely:-

1. The Citing Commissioner's report
2. The reports from the referee, AR1, AR2 and TMO
3. The statement from Mr Hibbard (G2)
4. The statement from Brent Taylor, Gloucester Head Physiotherapist
5. Video clip

With his response to the standing directions the player produced the following documents:-

1. Letter from the player including 4 still photographs

2. Copy tweet from G2

3. Medical report with translation

The Chair confirmed that the player had no preliminary issue to raise.

Mr Mctiernan, as outlined in his response to the standing directions, submitted that in view of the serious allegation against G2 made for the first time in the player's response, namely that G2 had grasped his testicles, it may be difficult for this committee to proceed until an investigation was carried out and the facts determined and that it would be unsatisfactory if two different committees were to come to different conclusions. He advised that G2 had been contacted and was available should the committee wish to hear from him. M Chevalier in response explained that the Citing Commissioner had not been in touch with either of the two officials of La Rochelle, the President and the CEO, who were the only persons who had the authority to refer a matter to him. They were not aware that the Citing Commissioner had provided his contact details to a member of the Club. The Club had recognised that this was their last match in the tournament and they had decided not to make any complaint. Their intention was only to use the information to explain the player's actions.

The Committee considered that it would be open to the Disciplinary Officer to investigate the allegations now made and, if so advised, to bring a complaint against G2 of misconduct notwithstanding that the citing window was now closed. While it may be unfortunate if different committees reached different decisions it could not necessarily be said that the evidence presented to each would be identical. The committee recognised that the allegation was a serious one and may be prejudicial to G2's reputation. However, at this stage it could not be said with any certainty that a complaint would be brought against him. The committee also required to have regard to the prejudice to the player from an unspecified delay and the uncertainty as to when he may be free to play. In all the circumstances the committee were of the view that in balancing their respective interests the prejudice to the player outweighed any potential prejudice to G2 and it was not in the interests of the player for there to be any delay. In any event the committee were not referred to any authority or provision which permitted such a course to be adopted. While a Discipline Committee has power to regulate its own procedure (rule 7.1.8) the committee were mindful of the provisions of rule 7.5.6 which states that "*The Disciplinary Committee's hearing of the Citing complaint should commence as soon as reasonably practicable following the player's receipt of the written notice....*".

Accordingly the committee determined that the hearing should proceed forthwith. The committee were also of the opinion that in view of at least a potential complaint against G2 it would not be appropriate to hear from him and that the hearing should proceed only on the basis of the statement already provided in writing.

Procedure

The Chair read the Citing Commissioner's report which states:-

"After the maul the player number 4 of La Rochelle Jove Quovo Nailiko deliberately punched in the stomach with the right hand the player of Gloucester number 2 Richard Hibbard."

The player accepted that he was the player cited. He also accepted, as he had done in his response to the standing directions, that he had committed an act of foul play contrary to Law 10.4(a). With the exception of the word "deliberately" the player accepted as accurate the statement of facts in the report.

The Chair then sought to clarify whether the player also accepted that the offence warranted the issue of a red card. After explaining how the player's response would have a bearing on the procedure to be adopted the player requested, and was granted, an adjournment to discuss the issue with his representative. On his return the player stated that he accepted that the act of foul play committed would have warranted a red card.

In these circumstances the citing was upheld. The committee then proceeded to consider the seriousness of the offence.

Evidence in relation to seriousness

The video clip was played several times at varying speeds including frame by frame. The player also produced blown up copies of three of the still photographs incorporated into his letter. These were marked A, B and C to determine the sequence in which they should be considered.

The player explained by reference to the video and photographs that following a line out at about the 10 metre line in the Gloucester half La Rochelle secured the ball and formed a maul. The maul was disrupted by Gloucester and a group of players including him were separated from the ball carrier. Some off the ball grappling between L6 and an opponent was noted. Just prior to the splitting of the maul G2 ran in to assist in defending the maul. Both the player and G2 are on the far side from the camera. When the maul separated the player intended to join the ball carrier. He was unable to do so because he was being held by G2.

The player said that G2 was holding his testicles and "grinding" them. The player turned towards G2 and punched him once in the stomach whereupon G2 fell to the ground. The player was then able to rejoin play. From the time that G2 joined the maul until he was

punched by the player about 6 or 7 seconds had elapsed. The player was unable to say for how long his testicles were held but suggested it was for a short time within that overall time period.

He said he was feeling pain but he was required to play his part in the ruck that had formed. He thought he had told his captain about the incident during the game. He did not know if his captain had spoken to the referee. He was uncertain as to whether he had received any treatment on the field but thought that he had not. He had seen the team physiotherapist and doctor after the match.

The incident was not seen by any of the match officials. The referee's report states

"Regarding the incident involving Jone Qovu Nailiko and Richard Hibbard my focus was obviously on the maul going forward and didn't see any punch thrown. What I thought I saw in the corner of my eye was La Rochelle player Jone Qovu Nailiko pushing off the Gloucester No 2 who was holding him and the over reacted by throwing himself down on the floor hence my communication back to him."

The Committee inferred that the alleged grasping of the player's testicles was not reported to the referee at or about the time of the incident.

In his brief statement G2 states *"Whilst I was defending a driving maul I was punched in the stomach which caused me to drop to the floor as I was winded. I did not need any further treatment for this as the pain past within a few minutes."*

Brent Taylor, Gloucester Head Physiotherapist confirmed G2's statement and that no treatment was required after the match.

The copy tweet produced by the player states *"All sweet. Just need to do some med ball crunches this week. Worse part all the boys text from back home."* This appears as a response to comments *"Poor Richard Hubbard"* and *"Smacked in the spuds. Accused of simulation"*.

Submissions on sanction

M Chevalier submitted that the player had a very clean record, had never punched anyone on the field of play and that he had no reason to punch G2 except as a reaction to stop him. The incident had not caused any injury to G2, that from the copy tweet it appeared that he had been joking about the incident after the match and it was not a big deal. He invited the committee to consider the lowest possible entry point.

Contrary to the assertion about the absence of any previous offending by the player Mr Mctiernan advised that the player had received a one week suspension on 28 December 2016 for an accumulation of yellow cards and on 17 February 2016 he had received a one week suspension following a citing for a punch. Mr Mctiernan also invited the committee to consider a low end entry. While there may be a dispute about whether G2 grasped the player's testicles it was not disputed that the player had been restrained by G2 illegally and there was clear provocation. Such actions were acknowledged as a problem in the game which was being addressed. They were understood if not condoned. Mr Mctiernan provided for the assistance of the committee copies of the Decision of the Discipline Committee dated 27 March 2012 in relation to Dylan Hartley in which the committee had considered the question of self-defence.

The committee was also advised that the player held 9 caps for Fiji, had played in France for 10 years initially for Racing Metro and then La Rochelle. In that time he had accumulated 12 yellow cards.

Decision

The committee retired to consider its decision in private.

The committee reminded itself that the standard of proof in relation to matters of fact was balance of probabilities.

In considering the seriousness of the act of foul play the committee had regard to the provisions of rule 7.8.32 and determined as follows:-

1. The offending was intentional.
2. It was not a particularly grave act.
3. The offence involved one strike with the player's fist to G2's stomach.
4. The video and still photographs show that the player was being held, illegally, by G2 preventing him from engaging with the play. The player was thus provoked by the actions of G2.
5. The offending by the player was in retaliation for the action of G2.
6. The offending was not in self-defence.
7. G2 was momentarily winded. His falling to the ground was considered by the referee to be an overreaction although the referee had not seen the incident. He was able to

continue playing and required no treatment.

8. The offending had no effect on the match.

9. G2 was not vulnerable.

10. The act was completed.

The committee had regard to the observations about self-defence in the decision in respect of Hartley to which we were referred. In that decision the committee considered whether self-defence should afford a player a defence to an allegation of foul play and concluded “*firmly*” that it did not. In their decision the committee stated “*Reference to self defence in the Regulations is clearly placed in the principal Regulation that deals with the seriousness of an act of foul play. Further the laws of the game do not qualify acts of foul play for example by saying “except in order to defend himself a player shall not punch an opponent”.*

The notion of self defence and a player’s right to defend himself can in the context of rugby be properly and correctly applied in the assessment of seriousness of an offence. The committee could envisage circumstances in which an act of self defence might lead to no sanction at all being imposed even though an act of foul play had been committed.

In the committee’s clear view the correct approach to the application of the concept of self defence – within a rugby specific jurisdiction and set of regulations and law designed to be applied throughout the game worldwide – was to consider it as a factor dealing with the seriousness of an act.”

The committee respectfully agreed with that approach. In this case the committee were not satisfied on balance of probabilities that the player acted in self-defence. There did not appear to be any attempt to remove G2’s hand. The action of the player was not considered to be a proportionate response. Rather the player acted in retaliation.

The committee considered at length the player’s allegation that he was held by his testicles. The video footage is from one angle only. The player and G2 are initially seen on the opposite side of the maul to the position of the camera. When the maul separates the player has his back to the camera. While it is clear that he is being restrained by G2 it is not clear and obvious from either the video footage or the still photographs produced what G2 is holding. G2’s arm is extended backwards and appears to be at or around the player’s midriff or lower abdomen. There is a significant difference in size between the players. The committee noted the apparently remarkable fortitude of the player in being able to continue to engage in play following the alleged grasping and grinding of his testicles. The committee also noted, with surprise, the absence of any report to the referee or the Citing Commissioner of the alleged actions by G2, particularly if the player was examined by the team doctor immediately after the match and it was found as stated in the report dated 22 April 2017 that “*He presented a painful palpation with right testicle oedematized*”. Such actions are generally regarded by the rugby community as abhorrent. The committee further noted that the player was somewhat vague in his responses to questions about the nature and timing of the alleged incident, the reporting of it and treatment received.

The committee took the view that, having determined that the player’s offending was in retaliation to provocation by G2, it was not necessary to make any finding in relation to the allegation of grasping of the testicles.

The committee were satisfied that the correct categorisation of this offending was at the lower end of seriousness. In terms of the recommended sanctions as amended in January 2017 this meant a period of suspension of 2 weeks. The committee considered whether the player’s offending history was such as to require any aggravation of the entry point but determined that it did not do so.

Finally the committee turned to the mitigating factors to be considered in terms of rule 7.8.35. The committee considered that there were off field mitigating factors which might be taken into account, such as the presence and timing of the player’s acknowledgement of culpability and his conduct at the hearing. It was not clear if or when the player had expressed remorse. In his response to the standing directions he stated that he regretted his act and “*naturally apologised to him after the game.*” However at the hearing he said he had had no communication with G2 after the match or since. In any event, the player’s record of offending at least meant that the committee could not apply a reduction of 50%. That being the case, and any reduction amounting to less than one week which would then be rounded up to one week, the period of suspension would remain at 2 weeks. Having been advised of the player’s anticipated playing schedule the player will be able to play from Monday 8 May 2017.

No application was made for costs.

The player was reminded of his right to appeal.

