

Decision of the Independent Judicial Officer

ERC Heineken Cup 2011- 2012
Held at Huguenot House, 35-38 St Stephen's Green, Dublin
22 December 2011 at 12.30 pm.

In respect of

Ian Gough of Ospreys (“the Player”)

And

A citing of the Player in respect of an offence contrary to law 10.4 (j) of the Laws of the Game in the match played between Ospreys and Saracens on 16 December 2011.

Judicial Officer appointed to hear the case:

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

Decision of the Judicial Officer:

- (i) The Player contested the Citing Complaint brought against him. The Judicial Officer however found that the Player had committed an act of Illegal and/or Foul Play as alleged in the citing complaint
- (ii) The Player did not agree that the act of Illegal and/or Foul Play merited a “red card.” The Judicial Officer was however satisfied that the act of Illegal and/or Foul Play merited a “red card” and that the Player should have been Ordered Off for the offence.
- (iii) The Player is suspended from taking part in the game of rugby up to and including 8 January 2011. This represents a 3 match suspension commencing on 22 December 2011.
- (iv) The Judicial Officer ordered that the Player should pay the Disciplinary Officer’s reasonable costs incurred in connection with this hearing.

Introduction

1. The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2011/2012.
2. The Judicial Officer was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Ospreys and Saracens on 16 December 2011 in the Heineken Cup 2011/2012.
3. Peter Brown was appointed as citing commissioner to this match and had cited the Player for an infringement of Law 10.4 (j) namely dangerous play by lifting a player from the ground and dropping or driving that player into the ground whilst the player's feet are still off the ground such that the player's head and/or upper body come into contact with the ground.
4. Present at the hearing in addition to the Judicial Officer were the following persons:-
 - The Player.
 - Mr Andrew Hore, COO, Ospreys.
 - Mr Andy Lloyd, Team Manager, Ospreys.
 - Mr Roger O'Connor, ERC Disciplinary Officer ("the Disciplinary Officer").
 - Mr Max Duthie, Solicitor representing the Disciplinary Officer.
 - Mr Liam McTiernan, ERC Regulations Executive.

Preliminary matters & procedure

5. 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(j).
6. The Judicial Officer reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement for the Heineken Cup 2011/2012 (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 proceed on that basis.
7. 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: -
 - The Citing Complaint dated 18 December 2011.

- An e-mail dated 19 December from Mr Gordon Black (as gatekeeper pursuant to DR 6.4.7) to the Disciplinary Officer.
- E-mails from the match officials dated 20 December 2011.
- Medical report from Saracens dated 19 December 2011.
- Undated statement from Mr Schalk Britz.
- The match footage.
- Player's statement in compliance with the Standard Directions received by e-mail dated 21 December 2011.
- The Disciplinary Officer's response to the Player's statement in response to the Standard Directions received by e-mail dated 21 December 2011.
- A written statement dated 21 December 2011 from Mr Ryan Jones, Ospreys (submitted at the hearing).

8. The Judicial Officer noted the terms of the parties' responses to the Standing Directions found at Appendix Six of the Disciplinary Rules ("the Directions") as follows:-

The Player:

- (a) *I am [the Player]*
- (b) *No*
- (c) *No I do not*
- (d) *As discussed with Roger O'Connor I would like to discuss this further. I do not accept that I committed an act or acts of foul play as set out in the citing complaint*
- (e) *I do not accept it is a red card offence.*
- (f) *I am working against the force of Ryan tackling the player concerned around the leg and dragging him back in the position I am pulling ,hence when that release happens from Ryan I spin quickly and the momentum is rapid*

My feet are very close together hence I am in an unstable unbalanced position. As a consequence when I rotated I am off balance.

Due to my feet position I pivot and he comes up and across my legs, it is physically impossible not to lift the player

I am falling backwards as well as my feet being in an unbalanced position

I do not drive him I fall on the player with my chest. It is not a driving action

I do not lift my elbow or knee in a driving action

On entry into the ruck I go from a down to up position this generates a lot of force with is compounded further with Ryan (Ospreys No 6) working against the direction I am moving as a consequence there is a lot of speed and momentum generated.

We are taught in every defensive session and break down drill to use 'hooks and handles' to move and shift players that is all I have done here.

We are happy to shear these views as it will help in Andrew Hore s discussion with the panel before the hearing.

The Disciplinary Officer:

(a) The Player has stated that he will not argue any preliminary matters.

(b) The Player does not accept that he committed an act of foul play and (it follows) that he does not accept that his actions warranted a red card. Accordingly, and pursuant to Disciplinary Rule 6.7.11, it will be for you as Judicial Officer to determine whether or not the Player committed an act of foul play, and (if so), pursuant to Disciplinary Rules 6.7.28, 6.7.29, 6.7.31 and 6.7.41, it will be for you as Judicial Officer to determine the appropriate sanction (if any) in this case.

On 8 June 2009, the IRB Referee Manager and Judicial Panel Chairman circulated a memo on the subject of 'tackles involving a player being lifted off the ground and tipped horizontally and ... then either forced or dropped to the ground' (so-called 'tip tackles'). The memo gives guidance on the circumstances in which a 'tip tackle' will warrant a red card. (While the June 2009 memo is concerned with tackles, we respectfully submit that it should be applied equally to cases in which the player being tipped and dropped or speared into the ground happens not to have the ball. In Candelon the player was not lifted (he was already in the air) but the Judicial Officer took account of the June 2009 memo in any event).

In the event that you get to consider sanction, pursuant to Disciplinary Rule 6.7.34, when determining sanction, the Judicial Officer is required (among other things) to identify all relevant aggravating factors. One such aggravating factor listed in the Disciplinary Rules is the need for a deterrent to combat a pattern of offending (see Disciplinary Rule 6.7.34(c)). The following information might assist you when making your determination under Disciplinary Rule 6.7.34(c):

(i) The June 2009 memo also states that despite the IRB previously issuing a ruling and advice to referees about the danger of such tackles, 'these tackles are still being made ... [and] they must be dealt with severely by referees and all those involved in the off-field disciplinary process'.

(ii) Accordingly, the June 2009 memo might be treated by disciplinary tribunals as evidence, in effect, that according to the IRB there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending.

(iii) Indeed, we are aware of a number of cases involving 'tip tackles' decided since the circulation of the June 2009 memo in which the respective disciplinary tribunals have referred to that memo and gone on to determine that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending (resulting in a finding that there is an aggravating factor under Disciplinary Rule 6.7.34(c) or its equivalent). Those cases include a number from Six Nations, Celtic Rugby and ERC competitions, such as Bales, Tuitupou, Fritz, Taofifenua, Filipucci, Candelon and Shingler. In fact, we are aware of a total of eleven cases, decided since June 2009, in which the tribunal has determined that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending.

(iv) I should also point out that in that same period (ie since June 2009), there have been a number of cases involving 'tip tackles' in which the tribunal has not determined that there is a pattern of offending or that there is the need for a deterrent to combat that pattern of offending.

(v) It is unfortunate that there is a degree of inconsistency on this issue and we hope that the recent Appeal Committee decision in Shingler will serve as guidance on this issue in the future, but that decision has not yet been circulated. In Shingler (which concerned a 'tip tackle'), the Judicial Officer found that there was a pattern of offending with respect to 'tip tackles' and that there is a need for a deterrent to combat that pattern of offending (resulting

in a finding that there is an aggravating factor under Disciplinary Rule 6.7.34(c)). The player appealed against that decision on the ground that the Judicial Officer in the circumstances had not been entitled to make those findings, and the appeal was dismissed entirely. But in any event, in ERC's respectful submission the first instance case of Shingler, and those involving Bales, Tuitupou, Fritz, Taofifenua, Filipucci and Candelon were correctly decided. And in contrast, we respectfully submit that other cases (such as Marty and Brits, and the others in which it has been decided that there is no need for a deterrent to combat a pattern of offending with respect to 'tip tackles', or in the case of Brits that the June 2009 memo should be taken into account when determining entry point) were wrongly decided. ERC considers that there is a pattern of offending and that there is the need for a deterrent to combat that pattern of offending.

(vi) Regardless of whether the June 2009 memo itself should be treated as evidence that there is a pattern of offending (such that there is the need for a deterrent to combat it), disciplinary tribunals might conclude in any event that given the significant number of cases involving 'tip tackles' that have been heard in recent months and years, there is indeed such a pattern of offending and the need for a deterrent to combat it. For the avoidance of doubt, since June 2009, we are aware of 31 such cases in which the relevant player has been found guilty of such a tackle, either under law 10.4(j) or (occasionally) under law 10.4(e). That figure is effectively a minimum: we know of that many but that is not based on a comprehensive or systematic search and there might well be more.

(vii) I have not attached to this statement a copy of all the cases referred to, although I would be happy to circulate a copy if you and/or the Player would like. Instead I attach simply a copy of the June 2009 memo and a table that we have compiled which lists certain details of those cases (those cases in which the comments section is shaded green are those in which the tribunal determined that there is a pattern of offending with respect to 'tip tackles' and that there is the need for a deterrent to combat that pattern of offending).

(viii) On a separate but related matter, it might also be of assistance if I respectfully draw to your attention Disciplinary Rule 6.7.36 which, among other things, provides that for acts of foul play categorised at the lower end of the scale of seriousness, there can be no reduction from the entry point suspension unless there are no aggravating factors and compelling mitigating factors. Accordingly, if you were to find in this case that there was an act of foul play that warranted a low end entry point and considered that there was the need for a deterrent under Disciplinary Rule 6.7.34(c), you would then not be entitled to reduce the sanction below the low end entry point due to the presence of an aggravating factor.

I hope you understand the purpose in my bringing these points to your attention. It is most certainly not to make an example of the Player or to encourage you to treat him differently from other players. In fact, it is entirely the opposite: it is with a view to maintaining a consistent approach to the treatment of 'tip tackles' in rugby union's disciplinary regime since it seems to us to be unfair that in some situations a tribunal will find that there is the need for a deterrent and in other situations it won't, notwithstanding the offending being of the same or similar nature.

(c) Other than that which has already been exchanged, I do not intend to refer to any further evidence.

9. Neither party had any preliminary issue that they wished to raise.¹

¹ The Judicial Officer was however sent an e-mail by Mr Hore timed at 23.18 on 21 December requesting a meeting with the Judicial Officer. With the agreement of the Disciplinary Officer an informal discussion was held with all parties in advance of the hearing commencing. Mr Hore indicated his belief that, if the Player entered a guilty plea, the offending would be assessed at the low end. The Judicial Officer corrected that misapprehension and outlined the process to be followed and explained the elements of Law 10.4 (j) and the potential impact of the iRB Memorandum of 8 June 2009. Thereafter the parties withdrew and after a short period the hearing commenced and proceeded as recorded in this judgment.

10. The Judicial Officer reviewed the Complaint in full and asked the Player whether he accepted that:

- the Complaint was a true and accurate account of the incident and the facts surrounding the incident;
- the Complaint should be upheld (namely whether he had committed the alleged act(s) of Illegal and/or Foul Play); and
- the alleged act(s) of Illegal and/or Foul Play warranted a red card.

11. The Player confirmed that his position remained as set out in the e-mail of 21 December 2011 providing his response to the Standard Directions.

Evidence supporting the Complaint

12. In terms of the Disciplinary Rules it is for the Disciplinary Officer to demonstrate to the Judicial Officer's satisfaction that the Complaint should be upheld. To do this he must demonstrate on the balance of probabilities that the Player committed the act or acts of Illegal and/or Foul Play complained of in the Complaint.

13. Mr Duthie referred the Judicial Officer to the Citing Complaint and the gatekeeper's confirmation that the Player had a case to answer. He confirmed that the match officials had not seen the alleged incident and then referred to the evidence from Saracens. Mr Britz had provided a statement indicating that he had been picked up and driven into the ground by the Player. The medical evidence provided noted that Mr Britz had been taken off following the incident and that subsequent examination had revealed a grade 2 injury to the right AC joint and cortical rim fracture of the clavicle. The Judicial Officer was advised that there was a chance Mr Britz would be able to play on 27 December but that further assessment was awaited in that regard.

14. The Judicial Officer was then referred to the match footage which showed the incident from four angles at full and reduced speed. In advance of the hearing the Judicial Officer had prepared the following narrative describing what he considered the video showed. This was read to the parties during the hearing who both confirmed that they considered it to be a broadly accurate summary of the incident as shown on the match footage:-

O8 attacks Saracens 22m line. S2 comes in to assist making a legitimate tackle on O8.

The Player joins the breakdown and attempts to clear out S2 who is on his feet in a breach and attempting to win possession of the ball that has been placed on the ground by O8 following the tackle.

The Player's left arm can be seen to have gone round and under the front of S2's shoulder and may have been grabbing onto the front of S2's shirt. At this point S2's legs are being held by O6.

The Player then continues to pull S2 away from the breakdown towards the Saracens goal line. At this point the ball can be seen to have been retained by Ospreys and O21 (acting scrum half) is shaping to pass the ball away to the left for the next phase of the attack.

As the ball is passed the Player can be seen looking down at S2 whose upper body is bent across the front of the player.

His left arm is still in contact with the front of S2's shirt and his right arm is then seen between S2's legs and to lift S2's left leg up into a vertical position.

The Player's body then goes backwards and to the left which causes S2, who he is still holding, to be lifted off the ground with his legs in the air and his head/shoulders pointing towards the ground.

S2 puts out his right arm to break the fall. The Player still has hold of him and is following S2 down towards the ground.

S2's right shoulder then hits the ground and the Player's right hand can still be seen in contact with the upper thigh/lower shorts of S2's left leg.

The Player comes down on top of S2 before getting up. S2 immediately remonstrates with him. The Player moves away and S2 who is obvious pain turns to protest to the Assistant Referee.

15. Mr Duthie confirmed that the burden lay with him to satisfy the Judicial Officer that an act of foul play had occurred and referred in this respect to the provisions of Law 10.4 (j). In his submission the Player had lifted Mr Britz off the ground. Having done so, and whilst Mr Britz's feet were still off the ground, Mr Britz's head and or upper body and had then come into contact with the ground. The Player had not simply dropped Mr Britz; whether he had driven him into the ground was a question of fact to be determined by the Judicial Officer. Mr Duthie referred to the definition of recklessness as set out in DR 6.7.32 and the judgment in *Flannery* which gave further guidance on that issue. In so far as the Player was asserting that any foul play was an accident, in Mr Duthie's view an accident would arise in the context of rugby discipline where a player acted in way which gave rise to an acceptable risk that foul play would arise as opposed to an unacceptable risk as is the case with recklessness. In determining what is an acceptable risk, Mr Duthie suggested that this would entail a situation

where a Player did not know that there was a risk of foul play arising and that it could not be said that he should have known that there was that risk.

Player's defence

16. The Judicial Officer asked the Player to explain his actions by reference to the video evidence. The Player indicated that he and O6 had been attempting to clear out Mr Britz. His sole purpose had been to remove Mr Britz from the breakdown using a *hook and handle* technique that is practiced at training every week. O6 then fell to the floor but continued to hold on to Mr Britz's legs and so was in effect countering the Player who then had to fight against the force of O6 to pull Mr Britz away. His legs were positioned in a narrow base and he therefore lost stability and had fallen backwards. At that point Mr Britz had come across his left leg and pivoted on it from the momentum of the Player pulling him away from the breakdown. He had simply acted instinctively as he had been trained, had not been aware that Mr Britz had come off the ground and could not at that stage see that the ball was some distance away. He had not intended to lift Mr Britz off the ground and to the extent that he had done so this had been an accident.
17. In support of the Player Mr Hore noted his own background in Sports Science and submitted that the bio-mechanics of what had happened could not be under-estimated. The Player's narrow base, the force he had exerted and the counter force being applied by O6 had led to the Player becoming unstable which had in turn caused an accidental *corkscrew* effect that had taken Mr Britz off the ground.
18. Mr Hore thought the position would have been very hard for the Player to have controlled and that he had certainly not been trying to hurt Mr Britz. The Player is about 12 kg heavier than Mr Britz and that, had he wanted to have done so, he could have deliberately forced him into the ground. He had not done so.
19. He further noted the lack of player reaction or crowd reaction that he believed would have accompanied anything other than an accidental incident. In support of the Player's position he pointed to the positioning of the match officials who he submitted were in a good position to have detected any improper conduct had it occurred.
20. It was not accepted that the Player had driven Mr Britz to the floor, and he regretted the Citing Commissioner's use of language in this regard. Mr Hore did not believe that Mr Britz had landed on his head or even upper body, suggesting that Mr Britz's right lateral muscles had made contact with the ground.
21. In summary Mr Hore submitted that any foul play had been accidental and had arisen out of the dynamics of the situation that had caused the Player to spin backwards. His elbow could not be seen to have lifted Mr Britz and he had not driven him into the ground as alleged.

22. The Judicial enquired of Mr Duthie whether he wished to respond to the points raised. In questioning of the Player he established that the Player did not believe he could either have simply let go of Mr Britz or continued to fall backward so that Mr Britz landed safely.
23. The Judicial Officer retired to deliberate in private in respect of whether the Complaint should be upheld.

Decision as to whether or not the Complaint should be upheld

24. The Judicial Officer's made the following findings:

- That Mr Britz was lifted off the ground by the Player. In this respect the Judicial Officer did not agree with Mr Hore that the Player's elbow could not be seen to have lifted Mr Britz.
- Mr Britz was then not simply dropped to the ground. He was though, at a minimum through the application of the Player's body weight, driven, even if only in the broadest sense of the word, into the ground.
- Mr Britz's upper body, being his right shoulder, made contact with the ground.
- An act contrary to Law 10.4 (j) therefore occurred.
- That act was not simply an accident and the Player's case in this regard was accordingly not accepted.

25. Pursuant to DR 6.7.11 the citing was accordingly upheld. The Judicial Officer further found that the offending warranted the issue of a red card and in this respect had regard to the IRB Memorandum of 8 June 2009. He did not find that the offending came within the third of the three categories of offending specified in that guidance (whilst noting that it related to tackles as opposed to a lift as was the case in this instance).

26. As the Complaint was upheld, the Judicial Officer reconvened the hearing and advised the parties of his findings. He thereafter heard representations from the Disciplinary Officer and Player as to sanction.

Decision as to disposal

27. Mr Duthie indicated that this was a case where, unusually, the Disciplinary Officer would make submissions as to sanction and that in his view this was offending should be assessed as a low end offence. The Judicial Officer invited Mr Duthie to explain the reasons for that belief and Mr Duthie confirmed that the Disciplinary Officer did not consider this to a classic tip tackle where an opponent had been taken up very steeply into a vertical position, and therefore the standard dangers that arose in other cases were not present here.

28. Mr Duthie then further submitted that there was however a pattern of offending that, in the opinion of the Disciplinary Officer, needed to be deterred by way of an aggravated sanction. In this regard he referred the Judicial Officer to the matters set out in the Disciplinary Officer's e-mail of 21 December 2011 recorded at paragraph 8 above.
29. In the event that the Judicial Officer did determine that the sentence needed to be aggravated by way of a deterrent, he was reminded that it would not then be open to him to reduce the sentence below the low end entry point (if the offending was assessed as being low end).
30. Mr Duthie made an application for costs.
31. The Player is 35 has been playing professional rugby for 16 years and in that time has amassed 68 caps for Wales and over 400 first class club performances. Of note, and to his credit, he has only received one red card during his entire career. Mr Hore suggested that the IRB Memorandum of 8 June 2009 did not operate to require that the Player's sanction should be aggravated. He also submitted forcefully that there was a lack of consistency in the decisions reached in regard to such offending to date. He regretted the fact that the Disciplinary Officer had sought to rely on the appeal decision in *Shingler* when the appeal judgment had not yet been published. In his view the Player's record spoke for itself and strongly suggested that the incident was indeed an accident.
32. The Judicial Officer retired to deliberate in private in respect of what, if any, sanction would be appropriate in the circumstances. In this regard the Judicial Officer considered the terms of the Disciplinary Rules including DR 6.7.29 through to DR 6.7.44. The Judicial Officer considered that this was an offence for which a suspension ought to be imposed.
33. The Judicial Officer noted that the offence in contravention of Law 10.4 (j) was listed within the IRB Recommended Sanctions for Offences Within the Playing Enclosure (found at Appendix Three of the Disciplinary Rules) as follows:-
- Lower End – 3 weeks.
 - Mid Range – 6 weeks.
 - Top End – 10+ weeks.
 - Maximum Sanction – 52 weeks.
34. To decide upon the appropriate entry point the Judicial Officer assessed the seriousness of the Player's conduct by reference to the following "on-field" issues:-
- The Player had deliberately lifted an opponent off the ground.

- He had failed thereafter to do all reasonably required of him to bring that opponent down safely. In so doing he had neither dropped nor forcibly driven an opponent into the ground but had nevertheless acted in a dangerous way.
- He had not intended to cause injury but had clearly been reckless as to that risk.
- The offending entailed a dangerous tip as described above. The offending must be viewed as grave in consequence of the risk that catastrophic injury can result from lifting an opponent in the way described. There was no provocation.
- The offending led to injury as set out at paragraph 13 above.
- There had been no effect on the game (although Saracens were deprived of a vital player in the final stages of a close game).
- A player lifted in such manner is plainly vulnerable.
- There was no premeditation.
- The offending was complete.
- There were no other features that constituted the offending.

35. In light of his findings the Judicial Officer determined that the appropriate entry point for this matter was three weeks being the Low End.

36. The Judicial Officer then considered the “off-field” issues and in doing so looked at whether there were any “aggravating” or “mitigating” factors.

37. The Judicial Officer considered that there was a pattern of offending that required a deterrent and that this should be viewed as an off-field aggravating factor to be taken into account when determining the appropriate period of suspension.

38. A period of one week was accordingly added to the entry point. In so doing the Judicial Officer had regard to the Disciplinary Officer’s e-mail of 21 December 2011 and noted in particular that at paragraph (v) thereof the Disciplinary Officer had made the following statement:

ERC considers that there is a pattern of offending and that there is the need for a deterrent to combat that pattern of offending.

39. In the view of the Judicial Officer, that statement now having been made, it would assist in ensuring consistency going forward if similar offending is viewed as part of a pattern that requires deterrent until such time as further guidance might be given by ERC.

40. The Judicial Officer considered that the following were off-field mitigating factors to take into account in determining the appropriate period of suspension:-

- The Player’s excellent record to date.
- His conduct at the hearing.

- Although the Player had not acknowledged guilt, the Disciplinary Officer considered that he should not be overly criticised for raising the points that he had.

41. A period of one week was accordingly deducted by way of mitigation.

42. In all of the circumstances the Judicial Officer determined that the appropriate sanction was the imposition of a period of suspension of three weeks commencing on 22 December 2011.

43. At the request of the Disciplinary Officer, and reflecting the fact that the Player was due to play games for Ospreys on 6 December, 1 January and 8 January, this suspension was expressed in terms of three matches and will accordingly end at midnight on 8 January 2012.

44. The Player and the Disciplinary Officer are reminded that DR 7.1.1 provides for a right of appeal against this decision.

Costs

45. The Judicial Officer ordered that the Player and/or his club should bear the Disciplinary Officer's reasonable costs of being represented at the hearing. In so doing he noted that the Player had responded to the Standard Directions after the time prescribed by the DR.

Jeremy Summers

Jeremy Summers
Judicial Officer

27 December 2011