

EUROPEAN RUGBY CUP

DECISION OF DISCIPLINARY COMMITTEE

HELD AT THE OFFICES OF HARPER MACLEOD,
THE CA'D'ORO, 45 GORDON STREET, GLASGOW

Friday 23rd December 2005

IN RESPECT OF:-

Gavin Henson ("the Player")

AND

The Player was cited by Bill Dunlop, Citing Commissioner, asserting contraventions of Law 10.4(a), *viz* striking a player with his elbow and 10.4(c), *viz* kicking an opponent, in a match between Neath Swansea Ospreys and Leicester Tigers held at Liberty Stadium, Swansea on 18th December 2005.

MEMBERS OF THE DISCIPLINARY COMMITTEE:- ("the Committee")

Rod McKenzie, Chairman (SRU)

Dr Barry O'Driscoll (IRFU)

Professor Lorne Crerar (SRU) (Chairman: European Rugby Cup Disciplinary Panel)

DECISION OF THE COMMITTEE:

- (i) The Committee found that the Player had committed an act of Illegal and/or Foul Play *namely* that he had struck an opponent with his elbow and that the Citing Complaint be upheld so far as concerns an infringement of Law 10.4(a);
- (ii) That the Citing Complaint in so far as asserting an infringement of Law 10.4(c) be dismissed;
- (iii) That the Player is suspended from taking part in the game of rugby up to and including Sunday 5th March 2006. This represents a 10 weeks and 2 day period of suspension, commencing from the conclusion of the Committee meeting on 23rd December 2005; and

- (iv) That the Player is required to pay one half of the costs of the holding of the hearing of the Committee together with one half of the travel and accommodation costs of the members of the Committee.
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INTRODUCTION

This Committee was convened by Professor Lorne D Crerar, the Chairman of the European Rugby Cup Disciplinary Panel pursuant to the Disciplinary Rules of the Heineken Cup 2005/2006 in respect of a Citing Complaint made by Bill Dunlop, the Citing Commissioner. The Citing Complaint concerned the conduct of the Player during a match played between Neath Swansea Ospreys and Leicester Tigers in the Heineken Cup 2005/2006 on 18th December 2005 at Liberty Stadium, Swansea.

The Citing Complaint alleged that the Player had committed infringements of Laws 10.4(a) and separately 10.4(c) during the course of a single incident that took place at the 16th minute and 45th second into the game. It was further alleged that the Player had been played “off the ball” by the Leicester number 3 and that the Player had delivered a blow to the rear with his elbow catching the Leicester number 3 in the face. It was then alleged that the Leicester number 3 had subsequently gone to ground whereupon the Player had kicked the Leicester number 3 in the face.

The incident was not detected by any of the Match Officials.

Present at the hearing on 23rd December 2005, in addition to the Player and the members of the Committee, were:-

John Morris – Solicitor (representing the Player)

Derwyn Jones – Rugby Manager, Neath Swansea Ospreys

Jonathan Taylor – Solicitor (representing the Disciplinary Officer)

Roger O'Connor – European Rugby Cup, Disciplinary Officer

Bruce Caldow – Solicitor, Clerk to the Committee

HEARING

Preliminaries

At the commencement of the hearing the Chairman confirmed the identities of all present and established that the Player was before the Committee to answer a Citing Complaint. The Chairman outlined the procedure to be adopted by the Committee for the hearing and that the provisions of the Heineken Cup Disciplinary Rules 2005/2006 applied together with the relevant provisions of IRB Regulation 17.

There was no objection to the constitution of the Committee.

A question arose concerning a witness statement by a Mr Alejandro Moreno of Leicester Tigers and what appeared to be an off print from a press article commenting on certain matters leading up to the match. Mr Morris confirmed that he had not received this documentation more than 24 hours in advance of the hearing (in non compliance of ERCRule 6.4.5.}. The statement from Mr Moreno had been sought by the Disciplinary Officer but had been sent direct to the Clerk to the Committee. In respect that Mr Morris took objection to the statement and the press off print and in respect that it had not been received by him more than 24 hours in advance of the hearing the Committee ruled that the statement and off print should not be considered.

There was in addition an email from Paul Stanton, Chartered Physiotherapist, of Leicester Tigers dated 22nd December 2005 addressed to the Clerk to the Committee which, inter alia, describes

the injuries sustained by Mr Moreno, the Leicester number 3, as a result of the incident in question. This information had been sought in advance of the hearing by the Chairman of the Committee. There was no objection to this email being admitted into evidence. So far as is relevant and with reference to Mr Moreno, the email states:-

“He has difficulty breathing through his nostrils since the game on Sunday. He has a fractured nose leading to bi-lateral blocked nasal passages. He is being reviewed by an ear, nose and throat surgeon tomorrow (23/12/05) with a view to assessing if he requires elevation of his nasal bridge. If this is the case then he will have to refrain from contact rugby for 3 weeks.”

There were no other preliminary issues.

The Incident

The Chairman narrated the terms of the Citing Complaint.

The Chairman asked Mr Morris whether the Player accepted that he had, during the incident, struck Mr Moreno with his elbow. Mr Morris advised that the Player accepted that he had done so.

The Chairman asked Mr Morris if the Player accepted that he had committed an infringement of Law 10.4(a). Mr Morris advised that the Player did not accept that he had infringed Law 10.4(a).

The Chairman asked Mr Morris whether the Player accepted that he had kicked Mr Moreno during the incident. Mr Morris advised that the Player did not accept that he had so kicked Mr Moreno.

In these circumstances, per ERC Rule 6.6.5, the burden fell on the Disciplinary Officer to prove on the balance of probabilities that the Player had committed the acts of illegal or foul play specified in the Citing Complaint. The Committee noted that per ERC Rule 6.6.5 it was not relevant for the Committee to consider whether, if they held that an offence or offences libelled had occurred, one or both would have warranted a red card. The Committee noted that the Citing Complaint should be upheld if one or both of the offences libelled were established, on the balance of probabilities, to have been committed. In this context the Committee noted that the approach adopted by the same Committee in the decision in a case concerning *Serge Betson* following a hearing on 9th February 2005, so far as concerns this issue, should no longer be followed, having regard to the amendments made to the ERC Disciplinary Rules since that time.

The evidence before the Committee consisted of a number of pieces of "video" footage, taken from 4 different angles and the oral evidence of the Player given at the hearing.

The incident occurred during a period of attacking play by Leicester Tigers. At the material time the score was 3-0 in favour of Neath Swansea Ospreys. An unidentified Leicester player was running with the ball, in open play, in the Neath Swansea Ospreys half between the halfway line and the Neath Swansea Ospreys 22 metre line, heading towards the Neath Swansea Ospreys left (from their perspective) corner flag. His way was blocked by the Player. The Leicester player checked and moved in field and was half tackled by the Player. The Leicester player went to ground and the Player remained on his feet. As a consequence of the half tackle the Player had turned around 180 degrees and was facing towards his own try line. He looked to the left, which

was his “open side” and moved, not particularly quickly, towards his own three quarter line. He was, in an off side position and explained his actions by contending that he was making his way to his appointed position in the Neath Swansea Ospreys three quarters, since it was not part of his task to become involved in the developing ruck or to take up defensive duties around the ruck. Other players, both Neath Swansea Ospreys and Leicester Tigers were, at the same time, making their way towards and/or becoming involved in the ruck.

After taking one sideway step away from the ruck the Player detected a Leicester Tigers player (Mr Moreno) change direction and make towards the Player, from his back and slightly to his left. The Player considered, as was confirmed by the video footage, that Mr Moreno was intent on “taking out” the Player, notwithstanding that the Player was not part of the ruck. Such action by Mr Moreno would have, in itself, have been an infringement.

The Player contended that in anticipation of the blow from his rear by Mr Moreno, he (the Player) commenced taking a second step and tensed his shoulders causing his right elbow to be pulled back towards Mr Moreno and that it was this natural reaction to the impending blow from his rear which caused the Player’s right elbow to connect with the nose of Mr Moreno resulting in the injury already described.

In fact, as the video evidence clearly demonstrates, the Player remained relaxed throughout this part of the incident leading up to and including the blow with his elbow. He remained on his toes at all times and appeared, as he confirmed at the hearing, to be conscious of Mr Moreno making towards him. The Player’s left elbow remained at his side and the Player pushed his right arm forward. He then pulled his right arm back in a quick movement, bending it at the elbow and directed a blow with his elbow onto the nose of Mr Moreno, who was by that time behind and very slightly to the right of the Player. The action of the Player pushing forward his right arm

and then pulling back his elbow towards the face of Mr Moreno was prior to Mr Moreno colliding with the back of the Player. From the second piece of video footage, which is taken from the camera behind the Neath Swansea Ospreys' try line, it can be seen that the blow from the Player's elbow to the nose of Mr Moreno takes place immediately prior to Mr Moreno colliding with the back of the Player. At all times the Player's left arm remains at his side in a relaxed position and the Player is balanced and fully in control of his actions.

The Committee were in no doubt that it was a wholly intentional blow struck by the Player with his elbow and that the blow was intended to and did impact with the face of Mr Moreno.

On balance the Committee considered that the striking of the blow was consequent to the apprehended infringement which the Player considered was about to be perpetrated on his person by Mr Moreno. This was, in the view of the Committee, an example of a player "getting his retaliation in first".

The Player was thrown forward by the blow to his back by Mr Moreno. Mr Moreno fell forward and rotated around the Player such that he fell to the ground at the feet of the Player who was still facing towards his own try line.

As Mr Moreno was falling to the ground the Player put his hand on the back of Mr Moreno and pushed him to the ground. At the same time Mr Moreno had hold of the lower part of the Player's shirt or the top of the Player's shorts with his left hand.

The Player remained balanced and "light on his feet". He made two skipping movements to his left and his right foot moved slightly forward but generally to the left in a swinging movement. From the first and third video clips it appears to be primarily a forwards movement which looks

very much like a kick to the face of Mr Moreno. It would appear that it was only the first, second and third video clips which were available to the Citing Commissioner.

The Committee were provided with a fourth video clip, again from the match broadcaster, showing a camera angle from behind the Leicester Tigers try line. From this clip it is apparent that the Player's movement with his right foot is primarily a movement from right to left and that no blow was struck to Mr Moreno by the Player with his right boot.

The Committee determined that the Player had not kicked Mr Moreno and, so far as relevant, (as discussed below), had not attempted to kick Mr Moreno. Had the Player wanted to kick Mr Moreno the Player would have been, physically, well capable of doing so from the position in which he was in. However, the Player's movement with his right foot was exaggerated and unnecessary. The demonstration of athletic agility had given the impression of a kick having been aimed and landed. In this context the Player is fortunate that there were four different camera angles available. Had the fourth camera angle not been available the Committee might have been persuaded, on the basis of the remainder of the video evidence that a kick had been aimed and had landed. This fourth camera angle was not amongst the video clips passed on by the Citing Commissioner and it is likely therefore that Mr Dunlop did not have this fourth clip available to him at the time that the citing was made.

Whilst not acknowledging that a blow had not been landed by the right boot of the Player, Mr Taylor, for the Disciplinary Officer, suggested that the movement would be consistent with an attempted kick and that the Committee ought to regard an attempted kick as being an infringement of Law 10.4(c). In the opinion of the Committee there is nothing in the Laws to suggest that attempts at acts of illegal and/or foul play are, in themselves, to be regarded as infringements and in the absence of any such provision in the Laws of the Game the Committee,

even had it thought that the Player was attempting to land a kick on Mr Moreno, would not have held that the Laws of the Game had been infringed. In an appropriate case an attempt to kick an opponent might be regarded as an act contrary to good sportsmanship and an infringement of Law 10.4(k). However, since no submission was made to the Committee that it should regard such an infringement as having occurred and since, in any event, the Committee did not consider that the Player was attempting a kick, it being the essence of an attempt that there be actual intention to commit the act, the Committee did not have to consider whether it would be appropriate to exercise a discretion to amend the offence for which the Player was cited in terms of ERC Rule 8.7.

Findings

The Committee unanimously concluded that the Disciplinary Officer had discharged the burden on him to prove that the Player had committed an infringement of Law 10.4(a), *namely* that the Player intentionally struck the player Moreno on his face using his elbow and accordingly, in accordance with ERC Rule 6.6.5 the Committee upheld the Citing Complaint.

The Committee unanimously concluded that the Disciplinary Officer had failed to discharge the burden on him to prove on the balance of probabilities that the Player had infringed Law 10.4(c) and that part of the Citing Complaint was accordingly dismissed.

Sanction

In accordance with ERC Rule 6.6.21 the Committee invited Mr Morris to make submissions to the Committee as regards the sanction, if any, which should be imposed on the Player.

Under reference to ERC Rule 6.6.29 Mr Morris attempted to persuade the Committee that no suspension should be imposed on the Player notwithstanding that the Citing Complaint had been upheld, in part. Given the nature of the defence offered by the Player to the charge of infringement of Law 10.4(a), it was difficult for Mr Morris to make submissions under ERC Rule 6.6.29 other than to submit that no sanction was appropriate because the Player had been acting in circumstances where he was either the subject of an infringement by Mr Moreno or was about to be the subject of an infringement by Mr Moreno.

The Committee unanimously concluded that this was not a case in which it was appropriate to impose no suspension on the Player. The Committee was satisfied that the infringement in this case warranted a red card. This was a deliberate blow, struck with considerable force and directed high, towards the face, where there was a danger of significant injury to Mr Moreno.

Mr Morris then made submissions in mitigation of sanction on behalf of the Player. The Committee drew the attention of Mr Morris to the terms of ERC Rules 6.6.24 to 6.6.27 (inclusive) and invited him to direct his submissions to those provisions.

No submission was made on behalf of the Player in terms of Rule 6.6.28 but in any event this was not offending of the least serious kind and there were not present compelling mitigating features. Accordingly ERC Rule 6.6.28 would not have applied even if a submission had been made in terms of that rule.

Further, there was no submission made to the Committee in terms of ERC Rule 6.6.30 and in those circumstances the Committee did not have to invite Mr Taylor to make a submission to the Committee as to the inter-relationship between ERC Rules 6.6.29 and 6.6.30. However, notwithstanding that no submission was made to the Committee in terms of Rule 6.6.30 the

Committee would have considered that this was a case in which a sanction should be considered given the nature of the illegal or foul play found to have been established.

The Committee noted that the Player was 23 years of age and had been playing professional rugby for 5 years. He had 16 caps for Wales, had played once for the British Lions and had played some 50 professional matches for Neath Swansea Ospreys. He had been played rugby since the age of 5 years. He had been sent off on only one occasion, that being some 3 years previously, for a dangerous tackle.

Under reference to ERC Rule 6.6.24 it was noted:

- (a) That the Player's offending was intentional;
- (b) That recklessness was not an issue in this case;
- (c) That the offence had been committed using the Player's elbow and that the Player had been provoked to the extent that the Player anticipated that an infringement was about to be committed to him by Mr Moreno;
- (d) Mr Moreno sustained a broken nose which resulted in him being removed from the game although he had played for a period following the injury being sustained;
- (e) Other than the substitution of Mr Moreno there were no direct effects on the game;
- (f) Mr Moreno was, at the time of the incident, vulnerable to the blow which was struck in that he would not have seen the elbow of the Player being directed to him until it was too late for Mr Moreno to have defended himself from the blow;
- (g) The Player directly participated in the offending although the timescales were such that there was little in the way of premeditation;
- (h) The conduct of the Player was completed; and
- (i) There was no other feature relevant to the offending.

In terms of ERC Rule 6.6.25 the Committee then assessed the seriousness of the Player's conduct and whether the offence should be categorised as being at the lower end, mid range or top end of the scale of seriousness in order to identify the appropriate entry point for consideration in terms of Appendix 3 to the disciplinary rules.

Had it not been for the intended infringement by Mr Moreno, the Committee might have regarded the conduct as being at the top end of the scale of seriousness. It was a carefully directed blow, intentionally struck and placed where significant damage and effect would result. The Player either intended that injury be suffered or was wholly indifferent to whether injury would be suffered by Mr Moreno. If the Committee had considered that the Player had deliberately positioned himself where he was in order to strike a premeditated blow using his elbow to the nose of Mr Moreno it is likely that the Committee would have placed the offence at the top end of the scale of seriousness. However, the Committee was persuaded that at the material time the Player was returning to his allotted position in the three quarter line and that the incident was initially triggered by the Player's anticipation of the apprehended infringement by Mr Moreno.

However, there was time for the Player to take evasive action. The Player displayed during the course of the incident his exceptionally quick thinking and athletic ability. He could either have attempted to avoid the contact or at least have substantially mitigated its potential for injury to him. Instead, the Player dealt with the situation by remaining balanced and by a carefully directed blow to the face of Mr Moreno which had, as no doubt was its intended effect, the consequence of causing Mr Moreno to fall to the ground. Such conduct has no place in the game of rugby and is to be deplored. In the circumstances, and with some hesitation, the top end having been considered, the Committee decided to categorise the offending as mid range and the appropriate entry point is accordingly 3 months.

During this part of the hearing the Player was invited to express his view on the injury sustained by Mr Moreno. The members of the Committee each have many years experience of membership of rugby disciplinary bodies. In the experience of the members of the Committee the response of the Player was unique. He expressed no remorse or contrition whatsoever for the injury sustained by Mr Moreno. He stated that the injury was entirely the responsibility of Mr Moreno and that if he, Mr Moreno, had not been intent on playing the Player "off the ball" then Mr Moreno's nose would not have been where it was and would not have been struck by the Player's elbow. The Player's response had the advantage of honesty and candour although it did little to assist in the way of mitigation. The Committee might have considered the response of the Player to be an aggravating factor for the purposes of ERC Rule 6.6.26 but after some consideration the Committee decided that in the particular circumstances there were no factors which should be regarded as aggravating in this particular case. To some extent the Player's lack of remorse was balanced by his candour. The Committee did not regard the Player's one previous non analogous sending off as amounting to a sufficient basis to consider that the Player had the status of being a persistent offender, there was no identified pattern of offending and there were no other aggravating factors.

The Committee then proceeded to consider ERC Rule 6.6.27.

It was submitted by Mr Morris, in this context, that the Committee should regard the conduct of Mr Moreno as being such as having provoked the incident and that this conduct should be taken account of in the context of ERC Rule 6.6.27. Whilst not expressly stating that it is the case, ERC Rule 6.6.27 does not state that the mitigating factors which may be considered must all be "off field" factors. ERC Rule 6.6.27 is taken directly from IRB Regulation 17.14.4(a). The potential factors identified A to E (inclusive) in ERC Rule 6.6.27 are all off field factors. Factor

F makes specific reference to "any other off field mitigating factor". Having regard to its context and to its overall drafting the Committee concluded that ERC Rule 6.6.27 was intended to apply only to off field mitigating factors, any relevant on field factors being considered in the context of ERC Rule 6.6.24 when deciding which entry point should be adopted.

In this case there was no acknowledgement of culpability by the Player. Whilst it could not be said that the Player had a good record he was of good character. He could not be considered a young player and was an experienced professional. Although he conducted himself entirely properly at the hearing that is no more than one would expect. There was no remorse shown by the Player either for his actions or the effect of those actions on Mr Moreno. In all the circumstances only modest mitigation had been demonstrated *namely* the good character of the Player and his conduct at the hearing. In the circumstances the Committee decided to impose a period of suspension of 10 weeks and 2 complete days, the period of suspension to commence with immediate effect.

In fixing the terminal date for the conclusion of the period of suspension the Committee had regard to the follow up note to the ERC and 6Nations conference dated 24th October 2005 where committees are invited to impose terminal dates for periods of suspension as being on a Sunday. The Player is therefore suspended from all rugby up to and including Sunday 5th March 2006.

On the application of Mr Taylor the Committee found the Player liable in one half of the costs of the holding of the hearing and the travel and accommodation costs of the members of the Committee.

The Player is reminded of his right of appeal in terms of ERC Rule 7.2.1(a), any Notice of Appeal requiring to be lodged with the Chairman of the ERC Disciplinary Panel not more than 72 hours after the receipt by the Player or his representative of a copy of this written decision.

Date 29th December 2005

Rod McKenzie
Chairman
Disciplinary Committee