

DECISION OF THE INDEPENDENT JUDICIAL OFFICER

ERC Amlin Challenge Cup 2011/2012

Held at ERC Huguenot House, 35/38 St. Stephen's Green, Dublin, Ireland on 25th
May 2012, 08.00

In respect of

Carl Hayman of Rugby Club Toulonnais ("**the Player**")

And

A citing by Denis Templeton (IRFU) Citing Commissioner in respect of an alleged act of foul play under Law 10.4(j), namely a 'dangerous tip tackle' in the ERC Amlin Challenge Cup Final match between Biarritz Olympique Pays Basque ('BOPB') v Rugby Club Toulonnais ('Toulon') 18th May 2011 at Twickenham Stoop, England ("**the Citing Complaint**").

Judicial Officer appointed to hear the case:

Christopher Quinlan QC ("**the Judicial Officer**")

Decision of the Judicial Officer:

- (i) The Player admitted the act of foul play contrary to law 10.4(j). Accordingly the Judicial officer upheld the Citing Complaint.
- (ii) The Judicial Officer was satisfied that the act of 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 Union for a period of four weeks from 21 May 2012 to 10 June 2012 inclusive and then from 26 July to 1 August 2012 inclusive. The Player is free to resume playing on 2 August 2012.
- (iv) The Judicial Officer made an award of costs against the Player limited to the Judicial Officer's expenses.

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 Amlin Challenge Cup 2011/2012. The Judicial Officer was appointed to consider the Citing Complaint against the player arising from the ERC Amlin Challenge Cup Final match between Biarritz Olympique Pays Basque ('BOPB') v Rugby Club Toulonnais ('Toulon') 18th May 2012 at Twickenham Stoop, England
2. Denis Templeton (IRFU) was appointed as Citing Commissioner to the said match and cited the Player for an act of foul play contrary to Law 10.4(j), namely dangerous play by lifting a player from the ground and dropping or driving that player into the ground whilst that player's feet are still off the ground, such that the player's head and/or upper body come into contact with the ground (for ease of reference described herein as a 'dangerous tip tackle').
3. In addition to the Judicial Officer, the following persons were present at the hearing:
 - Carl Hayman ('the Player')
 - John O'Donnell, Senior Counsel representing the Player
 - Tom Whitford, Toulon Team Manager
 - Roger O'Connor, ERC Disciplinary Officer
 - Liam McTiernan, ERC Regulations Executive
4. The Player and his representatives confirmed that they had received the relevant papers and the footage of the incident which gave rise to the Citing Complaint. They understood the procedure would be in line with that provided by the Disciplinary Regulations¹ ('DR') and took no issue in respect thereof.
5. The Player responded to the Standing Directions², in time and as part of his written statement circulated in advance of the hearing. So far as the Standing Directions are concerned he replied:

"Following my citing after the Toulon / Biarritz game on 18 May 2012, and in accordance with disciplinary rules of the Amlin Challenge Cup 2011/2012, I wish to

¹ Schedule 4, Participation Agreement

² Appendix 6, DR

inform you of the following matters in accordance with Appendix 6 of the Disciplinary Rules:

(a) I confirm I am the Player named in the Citing Complaint.

(b) I will not be arguing any preliminary matters.

(c) I accept that the complaint is a true and accurate account of what occurred.

(d) I accept that I committed (although unintentionally and without any intent whatsoever to injure) the act of Foul Play referred to in the Citing Complaint.

(e) I accept (having regard in particular to the strict interpretation required in relation to the observation of this Law, and as ruled upon by the referee) that the act in question warranted a Yellow Card, but not in all the circumstances a Red Card; I accept the referee's decision in this regard.

(f) I will be attending the hearing accompanied by John O'Donnell Senior Counsel. I understand he will be relying on such authorities as may appear appropriate. I will also have a letter from Jonny Wilkinson, the distinguished England international. I understand these will be forwarded to the ERC and to the Judicial Officer."

6. In addition to his statement, I was (helpfully) provided (attached to the same email) with the following:
- a. His playing record.
 - b. A testimonial from his Toulon teammate and recently retired England International, Jonny Wilkinson.
 - c. *David Marty*, 18 November 2011.
 - d. *Ian Gough*, 27 December 2011.
 - e. IRB Memorandum on Dangerous Tackles dated 8 June 2009 issued to Referees, Citing Commissioners, Judicial Officers and Non-Legal Judicial Committee Members ('IRB Memorandum').

7. The Disciplinary Officer replied thus:

"In accordance with clause 6.5.5 of and section B.2 of Appendix 6 to the 2011/12
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*Amlin Challenge Cup Disciplinary Rules (**Disciplinary Rules**), please find below the Disciplinary Officer's directions statement in respect of the citing made against Carl Hayman (**Player**) in the 2012 Amlin Challenge Cup Final:*

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

(b) The Player accepts that he committed the act of Foul Play described in the Citing Complaint and, therefore, in accordance with Disciplinary Rule 6.7.23, it will be for you as Judicial Officer at the hearing to review any relevant evidence that remains unheard/unseen and then proceed to determine the appropriate sanction to be imposed (including whether or not the act of Foul Play described in the Citing Complaint warranted a red card). I note that the Player submits that the act of Foul Play described in the Citing Complaint did not warrant a red card. If you accept that submission, then pursuant to Disciplinary Rule 6.7.41, you will be entitled to impose no sanction on the Player. I also note that the Player has attached the memorandum circulated by the IRB Referee Manager and Judicial Panel Chairman on 8 June 2009, concerning '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'), to his directions statement, submitted on 23 May 2012. That memorandum gives guidance as to the circumstances in which a 'tip tackle' will warrant a red card, which guidance will, I submit, assist your determination in that regard in the present case. In the event that you reject the Player's submission that the act of Foul Play described in the Citing Complaint did not warrant a red card, and determine that a sanction should be imposed, pursuant to Disciplinary Rule 6.7.34, you will be required (among other things) to identify all relevant aggravating factors. Some comments in that regard:

(i) 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 memorandum referred to above 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'. 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.

(ii) Regardless of whether the June 2009 memorandum 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 example, ERC is aware of a total of **48** tip tackle cases that have been heard since the memo was circulated in June 2009. And since the start of this year's ERC competitions, ERC has itself had **six** cases (in addition to this case) in which the relevant player has been found guilty of such a tackle under IRB Law 10.4(j).

(iii) 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 attach a copy of the decision of the Appeal Committee in the case of Shingler (which might be of assistance when determining whether there is evidence of a pattern of offending in this case). I also attach a table that sets out detail of the 48 'tip tackle' cases we are aware of since June 2009.

I hope that 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. Quite the opposite: it is with a view to maintaining a consistent approach to the treatment of 'tip tackles' in rugby union's disciplinary regime.

(c) Other than that referred to above (and/or already in the record) I do not intend to refer to any further evidence.

(d) I will be attending the hearing, along with Liam McTiernan (ERC's Regulations Executive)."

8. The response was accompanied by the documents identified therein; he provided me with an updated schedule at the start of the hearing.

9. The only preliminary issue raised by the Player raised was his that the Disciplinary Officer had the burden of establishing the referee was wrong. The Disciplinary Officer resisted that submission and did not raise any preliminary issues. I deal with my resolution of that issue herein (see paragraphs 25-26).
10. The Player confirmed that he accepted:
 - a. Committing the act of foul play alleged therein contrary to Law 10.4(j); and therefore
 - b. That the Citing Complaint should be upheld (DR 6.7.11). His Counsel made it clear that he was doing so upon the basis that there was no concession thereby that the act of foul play warranted a red card; indeed his submission was that it did not.

Citing Complaint

11. The Disciplinary Officer invited me to the written citing report and then took me through the recorded footage of the incident ('the clip'), both of which I considered.
12. The written citing complaint form completed by Denis Templeton disclosed that the incident took place approximately seven minutes into the second half. The complaint form states:

"Foul play. Law 10.4(j) lifting a player from the ground and dropping or driving that player into the ground whilst that player's feet are still off the ground such that the player's head and/or upper body come into contact with the ground is dangerous play"

13. It is, in effect, a statement of Law 10.4(j) rather than a detailed description or narrative of the incident. The form discloses that he discussed the matter with the referee after the game. The referee, Wayne Barnes (a highly experienced international referee) told Mr Templeton: *"he reiterated his decision that the offence warranted a yellow card, in his opinion"*. The closest assistant referee, Dave Pearson, informed Mr Templeton that his view was obscured by players and so he did not see it.
14. I was provided with (and considered) emails from both of those match officials. They record:

- a. Wayne Barnes: *"I saw the Toulon 3 take the Biarritz player beyond the horizontal and failed to bring him to ground safely. I did not deem it to*

be a red card at the time, as I did not deem the player was driven into ground or that he was dropped to the ground from a height.”

- b. Dave Pearson: *“My view of the alleged incident was obscured by other players.”*

15. The clip:

- a. It records the incident from different angles and at full speed and in slow motion. I considered all.
- b. The BOPB winger Takudzwa Ngwenya ('TN') received the ball from the scrum half, following a lineout and advanced towards the Player. The Player bent forward at the waist such that his head and upper body were (essentially) parallel to the ground. He was in that position, right arm out as contact was made with TN. TN's lower body contacted with the Player's right shoulder/arm; at that moment TN's right foot was off the ground and his left foot might have been so, marginally. At the same time the Toulon No. 8 ('T8') took hold of TN around his back, TN's right arm stretched across TN's back, with his right hand grasping TN below his right shoulder. T8's left hand was on or holding the lower part of TN's right forearm. TN was clutching the ball to his chest with his right arm.
- c. The Player gripped TN in the following way: his right arm across TN's lower body, with his right hand holding him at the top of his left leg, just below the buttock. His left arm reached behind TN's right leg, holding him on the rear of TN's upper right leg.
- d. The Player then lifted TN. As he stood up, the effect was to lift TN to his (the Player's) right side. At no time did the Player move or attempt to move or drive TN backwards. He stood such that his back was perpendicular to the ground. In my judgment, he then twisted or tipped him 'through the horizontal'. That is clear from the movement of the Player's left elbow. TN was pivoted at the waist and hips, his head moving down as his legs and feet moved up through the line of his waist. TN was moved such that his head and shoulders were pointing to the ground, his feet above the line of his waist and he was at an angle of approximately 45 degrees to the vertical.
- e. TN then went to ground. He sought to break his descent first with his left hand and arm. He landed on his left arm and shoulder, the left side of his body and the left side of his head and neck. The ball came loose in the process. The Player landed on top of him, the right side of his body landed on top of the Player's right side and back.
- f. T8 was in contact with TN during his descent. T8 might well have added a little to the dynamics of the tackle and for the purposes of this decision I accept that he did. However, the Player was responsible (by his own

actions) for dangerous elements of the tackle (including lift and twist or tip).

- g. It is right to observe, as did Mr O'Donnell, that the referee's was close to the tackle and in a perfect position to observe it, unobstructed. He blew his whistle immediately and issued a yellow card.

16. I also read and considered an email from Pierre Bousquier, Biarritz Directeur Administratif, the relevant part of which read

"Takudzwa NGWENYA has not been injured after the action. Our player is actually on holiday but I have spoken with him by phone. For him, Toulon's player have not done intentionally this gesture ans [sic] it was more impressive than dangerous. In no case, he thinks he wanted to intend to undermine my physical integrity. After the action, Toulon's player came to apologize. Takudzwa NGWENYA have followed the game normally after this action."

The Player's Case

17. The Player spoke in terms materially consistent with his written statement. The material part of that statement reads:

"Circumstances of the incident

I hope it is helpful if I set out briefly my memory of the circumstances of the incident:

After a line out from which the ball ran loose, the winger from Biarritz Takudzwa Ngwenya gathered the ball and ran towards me into my "zone". I then attempted to tackle him as quickly as I could. Mr Ngwenya is a smaller lighter man than me and was travelling very quickly; I am a tighthead prop. I believe his momentum to some extent carried him on.

As I was attempting to make the tackle another player (Toulon Number 8) assisted me. In my view his assistance changed the dynamic and momentum of the tackle, since he pulled Mr Ngwenya forward and downward. Although my intention was simply to drive him back the intervention of the Toulon Number 8 meant that Mr Ngwenya instead came down on his front/side.

I did not "spear" or "force" Mr Ngwenya into to the ground, nor did I "drop" him to the ground, from a height or otherwise. At all times my

arms were wrapped around Mr Ngwenya's legs/thighs. I attempted to guide him as best I could to the ground, and I landed awkwardly beside him.

I accepted then – and do now – that the tackle I made was awkward and dangerous, though this was utterly accidental and without any intent to injure. I did speak to Mr Ngwenya immediately afterwards to apologise. He confirmed to me he was not injured. I received a Yellow Card from Mr Barnes the referee who was very close to me and saw the incident clearly.

I have since seen the video, and I would agree with the observation of Mr Ngwenya that it was “more impressive than dangerous”, by which I understand him to mean “it looks worse than it was”. Mr Ngwenya was not injured, received no treatment, and continued to play.

Summary

Having regard to the matters which I understand require to be taken into account, I hope it is of assistance to inform the Judicial Officer and the ERC as follows:

(a) Although I did lift the player, I did not “spear”, “dump” or “drop from a height” the player; I did lift the player, but brought him instead to the ground.

(b) The incident was awkward and dangerous

(c) The act in question was contributed to significantly by the actions of another player although this is not an attempt to evade responsibility on my part.

(d) No injury was sustained by the player; no treatment was required.

(e) I do not believe the incident affected the game or the outcome in any way, save that from the ensuing penalty Biarritz went ahead by 3 points, the margin by which they ultimately won the Amlin Cup Final.

(f) I accept the player was (in hindsight) unable to prevent/defend himself against the incident though no injury occurred, and as stated before the actions of another player contributed to this situation.

(g) *As already stated there was absolutely no premeditation or deliberation on my part to injure. I understand Biarritz and Mr Ngwenya accept this.*

(g) *[sic] I accept the act of Foul Play occurred.*

I have played rugby since I was 20 in New Zealand, England, and France. I have represented my country more than 50 times; I have also been selected for the Barbarians. In all my time playing rugby I have never received a Red Card; indeed I have only had 3 Yellow Cards since my career began. Nor have I been cited in any international match or in a Heineken or Amlin Challenge Cup game. I am 32 years old. Although my team Toulon lost the Amlin Final (something for which I blame myself to some extent) Toulon are now in the playoffs of the Top 14 competition in France, which begin on Saturday May 26th. This is a chance to win a major championship (I have never won a tournament); given my age, I am unsure how many more chances I will have or how many seasons I have left playing professional rugby.”

18. The Player asserted that the event happened very quickly and his intention was to drive TN backwards. T8 *“changed the dynamics of the tackle”*. Once he realised that TN was in a *“dangerous position”* he tried to *“[his] best not to put [his] weight through him and tried to bring him down as safely as [I] could”*. He said that TN was rotated by T8 pulling him round. He said he did not *“spear, drop or dump”* him. He did not intend to injure TN and apologised on the pitch.

19. Mr O’Donnell made a number of points on the clip and what it showed. He submitted that there was no burden upon the Player to establish that the referee’s decision was correct. It was, he submitted for the ERC to establish that it was not. He invited me to consider the IRB Memorandum. It was issued by Paddy O’Brien, IRB Referee Manager and Tim Gresson, IRB Judicial Panel Chairman and, *inter alia*, refers to three *“possible scenarios when a tackler horizontally lifts a player off the ground”*. Mr O’Donnell submitted that this tackle fell into the third, and least serious of those scenarios:
 - a. *“The player is lifted and then forced or ‘speared’ into the ground. A red card should be issued for this type of tackle”*
 - b. *The lifted player is dropped to the ground from a height with no regard to the player’s safety. A red card should be issued for this type of tackle.*

c. *For all other types of dangerous lifting tackle it may be considered a penalty or yellow card of sufficient.*"

20. He submitted that in the instant case the Player did not drive TN into the ground; nor, he submitted, did he 'spear' him. He said he did not drop him, since he had hold of him throughout his descent. On that basis he submitted this was a case where the referee's decision, taken on the pitch was correct (which, in any event, he submitted the Player did not have to establish). He invited me therefore to invoke DR 6.7.41 and conclude that the (admitted) act of foul play "*would not have warranted a red card*" and so to impose no suspension on the Player.
21. If, and only if, I was against that submission, then he invited me to conclude the tackle was properly assessed as meriting a lower end entry point pursuant to Appendix 3 to the DR (three weeks). He submitted it was not intentional or deliberate, had no effect on the game, did not cause injury and was not premeditated. He counselled against 'defaulting' (my word) to mid-range entry point. Naturally, he invited me to have regard to all I had heard about the Player's record and character.
22. An issue arose as to the Player's record. Initially, I was told the Player had not been sent off or cited. The ERC received and disclosed an email from the Ligue Nationale de Rugby which read: "*...I confirm that Mr. Carl Hayman (Rugby Club Toulonnais) has committed act of misconduct on 2010/2011 season:...he was given a 10 days suspended for lack of discipline.*" The Player's recollection was that he was cited for "nevosity". I asked for assistance as to what that meant. The Player put it in a way I understood: "*fighting*". Mr Whitford clarified that it was a scuffle. The Player's further recollection was that he was not suspended. A story on the Toulon website brought clarification (with the assistance of French translation): it appears he received a 'suspended sentence'. I proceeded on that basis.
23. I read and considered the testimonial from J Wilkinson. I also had regard to the oral reference as to his character from Mr Whitford.

Decision

24. The test the Citing Commissioner had to apply is that provided in DR 6.4.2, namely he shall "*be entitled to cite a Player for any act or acts of Foul Play that in [his] opinion warranted the Player being shown a red card, even where such act(s) may have been detected by the Match Referee and/or assistant referee(s)...*". The power to cite includes an act of foul play in respect of which the cited player was (as here) temporarily suspended.

25. My role as Judicial Officer is to make an assessment of the seriousness of the (admitted) act of foul play. I do so by applying the familiar regulatory framework, namely DR 6.7.29 *et seq.* The fact the referee deemed the foul play merited, on his single view at full speed, a yellow card does not bind me. Further, the ERC DRs do not contain a provision identical or similar to IRB Regulation 17.11.4(a). Therefore when, as here, the Judicial Officer is considering a citing complaint which arises out of an act of foul play in respect of which the referee has made a decision on the field of play, he/she is not constrained from making a finding contrary to the referee's decision unless satisfied on the balance of probabilities that the referee's reasons for his decision are wrong.
26. Further, I am against Mr O'Donnell's submission that there is a burden upon the ERC to prove the referee's decision was wrong. As Mr O'Donnell accepted, there is no such provision in the DR. I reject his submission that one exists by party of reasoning; with DR 6.2.10, which places a burden on a player who disputes a red card to show that the referee's reasons were wrong. With respect, that is a different point. Even if I were permitted so to do, I do not infer any such burden from any one or more of the DR.
27. The IRB Memorandum followed Law Ruling No5 of 2005 and an IRB Council Laws Designated Members Ruling in 2007. Each made clear that tackles involving a player being lifted off the ground, tipped horizontally and then forced or dropped to the ground are illegal and constitute dangerous play. They are inherently dangerous and can (and have) resulted in very serious injury.
28. The status and relevance of the IRB Memorandum was considered in the ERC Appeal Committee's decision of *Shingler*, 17 January 2012. Therein, an extremely experienced and venerable Appeal Committee sought guidance from the IRB on the said Memorandum by way of three questions. Question 2 and the answer thereto are as follows:

Q2 Is the correct methodology in applying the Memoranda to sanction to consider the issue as an aggravating factor (DR 17.14.3) namely "the need for a deterrent to combat a pattern of offending"? If that is the case it would accordingly follow that it is not a matter for consideration of the "seriousness of the offence" at the juncture of setting the "entry point" (DR 17.14.2).

A. Yes. Where there is a need to combat a pattern of offending it should be treated by the Judicial Officer / Judicial Personnel as an aggravating factor in accordance with DR 17.14.3 and should not be taken into account at the earlier stage of the process namely at the assessment of the seriousness of the offending (DR 17.14.2).

29. I understand the answer to mean the *fact* of the IRB Memorandum is not relevant when assessing the seriousness of a particular tackle, in the sense of determining entry point. The IRB Memorandum *itself* addresses the seriousness (or "*dangerousness*") of such tackles, both as a species (or "*type*") of tackle and by reference to three "*scenarios*" (as set out in paragraph 19 hereof). It specifically asserts what "*should*" be a red card tackle. So, the IRB Memorandum must be relevant to the question of assessing seriousness in the context of my considering whether the instant tackle merited a red card.

30. Mr O'Donnell invited me to apply the IRB Memorandum, to find the tackle fell within the third and least serious category and therefore to conclude it did not merit a red card. I do not read the Memorandum as he submitted it read, namely as mandating a yellow card for all tackles which are within that third category. As I understand it, the Memorandum purports to provide guidance to those to whom it is addressed (referees, Citing Commissioners, Judicial Officers) as to what "*may*" be the appropriate penalty and not what *should* or *must* be.

31. I have to assess this tackle on its 'merits'; namely make an assessment of the seriousness of the instant tackle. That is what I have done. For the reasons articulated in paragraphs 15 and 32 hereof, I conclude that the tackle did merit a red card. I agree with the Citing Commissioner's assessment of its seriousness.

32. Turning to an assessment of the seriousness of the offending and by reference to DR 6.7.32 I find as follows:

a. The offence

- i. The Player admitted the act of foul play contrary to Law 10.4(j). Thereby he accepted committing a tackle whereby he lifted a player off the ground and then dropped or drove him into the ground whilst that player's feet were still off the ground. He accepted therefore that he dropped or drove TN.
- ii. It was committed by the Player deliberately lifting TN off the ground and then twisting or tipping him deliberately in the manner described in paragraph 15 hereof. Thereafter TN descended to ground. He was not dropped in the conventional sense of the tackler letting go. The Player remained in contact with TN as he descended. By his contact with and his weight upon TN, he accelerated his descent³. That is to drive for the purposes of Law 10.4(j). It is of some note that the Player also went off his feet, ultimately landing on top of TN.
- iii. I accept the intent was not to execute a dangerous tackle. I accept also that he did not intend to injure TN. However, no sufficient attempt was made to bring TN safely to ground and the tackle was dangerous (DR 6.7.32(a) (b))
- b. There was no provocation (DR 6.7.32(c)(ii)).
- c. The Player's actions did not cause TN injury and he played on (DR 6.7.32 (d)).
- d. The act led to an immediate and very short-lived reaction from some BPOP players (DR 6.7.32 (e)).
- e. TN landed heavily on his left arm, shoulder, side and neck and head. Mr O'Donnell conceded that the tackled player was vulnerable. I agree (DR 6.7.32(f)).
- f. The act of foul play was not premeditated (DR 6.7.32(g)) but it was complete (DR 6.7.32(h)).

33. I have had regard to all of the 'dangerous tip tackles' decided in this season's ERC competitions. I have also considered other similar cases, both from the RWC 2011 and other competitions. In arriving at my conclusion I have counselled myself against adopting a 'default' conclusion based on other decisions. I have approached this case afresh. On the facts of this case I conclude the act of foul play is properly categorised as mid-range. Pursuant to Appendix 3, that is a starting point of six weeks.

34. Turning to DR 6.7.34 and aggravating factors, the Disciplinary Officer invited me to consider whether there was a pattern of offending in respect of 'dangerous tip

³ as the Disciplinary Officer submitted

tackles' such that there is the need for a deterrent to combat that pattern of offending. His very helpful schedule summarises forty-eight between 31 March 2010 and 6 May 2012.

35. The starting point, now, is the *Shingler*, 17 January 2012 and the question and answer set out in paragraph 28 hereof. Mr O'Donnell, relying on the schedule, submitted that there are cases of 'dangerous tip tackles', even since the *Shingler* appeal decision was promulgated, where the tribunal has not aggravated the sanction. I agree that is so (see decision in IRB 7s Tournaments and RFU decision of *Camacho* 26 April 2012).
36. This is the seventh case of a 'dangerous tip tackle' in this season's ERC Competitions. I agree with the finding of the Judicial Officer on *Shingler* (upheld on appeal): there is a well-established pattern of offending, in this season's ERC competitions and beyond. Further there is a need for deterrent. Accordingly pursuant to DR 6.7.34(c) I impose a further week to reflect that aggravating factor.
37. Turning to the mitigating factors as provided for in DR 6.7.35. I find the following present in this case:
 - a. He acknowledged culpability early and accepted he committed an act of foul play before the hearing (DR 6.7.35(a)).
 - b. He has a good (not perfect) disciplinary record (DR 6.7.35(b)) and he is of good character. I have regard to the testimonials I received (DR 6.7.35(b)).
 - c. He is a seasoned international and has in excess of fifty caps for New Zealand (DR 6.7.35 (c)).
 - d. He behaved well before me and during the disciplinary process (DR 6.7.35(d)).
 - e. He expressed remorse and contrition and apologised to TN on the pitch. I accept such as genuine. (DR 6.7.35(e)).
38. In my judgment, those mitigating factors merit a reduction of the suspension by a period of three weeks.
39. Accordingly, the period of suspension is one of four weeks. I had regard to DR 6.7.44. In light of the forthcoming off-season, the suspension will run for the remainder of the Top 14 (French) Season, namely from 21 May up to and including 10 June, namely 3 weeks. That was the fair (as it is to the Player's advantage) way Mr O'Connor invited me to approach DR 6.7.44. The balance, one week, will commence at the start of Toulon's 2012/2013 season. On the basis that I was told

Toulon's first pre-season fixture is scheduled for 27 July, the balance will run from 26 July to 1 August inclusive. He is free to play on 2 August.

Costs

40. I order the Player to reimburse the cost to ERC of the Judicial Officer's out of pocket expenses.

Right of Appeal

41. The Player is reminded of his right of appeal as set out in DR 7.1.



Christopher Quinlan QC
Judicial Officer

Date: 26 May 2012