

**DECISION OF THE INDEPENDENT JUDICIAL OFFICER
EPCR**

**Held at Huguenot House, St Stephens' Green, Dublin
On 23rd October 2014**

In respect of:

Julien Bardy of ASM Clermont Auvergne ("the Player")

And

The citing of the Player in relation to an allegation of striking another player with his knee contrary to Law 10.4(a) of the Laws of Rugby Union in the match between Saracens and ASM Clermont Auvergne on 18th October 2014 at Barnet, London.

Judicial Officer appointed to hear the case:

Simon Thomas (Wales) ("the Judicial Officer")

Decision of the Judicial Officer:

- (i) The Player admitted that he had committed an act of striking another player with his knee contrary to Law 10.4(a) of the Laws of Rugby Union and that this merited a red card. The Judicial Officer found that the Player had committed the said act and that a suspension from taking part in the game of rugby was appropriate.
- (ii) The Player is suspended from taking part in the game of rugby up to and including 30th November 2014. This represents a 5-week suspension.
- (iii) The Judicial Officer made an award of costs against the Player limited to the Judicial Officer's travel and accommodation expenses for the hearing.

Introduction

The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the EPCR Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the European Rugby Champions Cup 2014/2015. The Judicial Officer was appointed to consider the citing complaint ("the Complaint") against the Player in the match played between Saracens and ASM Clermont Auvergne ("Clermont") on 18th October 2014 in the European Rugby Champions Cup 2014/2015 ("the Match").

Mr John Charles (Wales) was appointed as the Citing Commissioner to the Match and had cited the Player for striking an opponent with his knee whilst the Saracens player was on the floor at a ruck. At the time, the ball was nowhere near either player. The Saracens player (No. 8) had subsequently complained to the Referee. The law cited by the Citing Commissioner in his complaint was Law 10.4(a) of the Laws of the Game.

Present at the hearing in addition to the Judicial Officer were the following persons:-

- Mr Roger O'Connor, Disciplinary Officer, EPCR
- Mr Liam McTiernan, Regulations Executive, EPCR
- Mr Julien Bardy ("the Player")
- Mr Charles Fribourg, the Player's legal representative
- Ms Sylvie Kleinman, interpreter for the Player

Preliminary Matters and Procedures

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 striking another player with his knee.

The Judicial Officer reminded all parties that the EPCR Disciplinary Rules found in the Participation Agreement for the European Rugby Champions Cup 2014/2015 (the "Disciplinary Rules" in the plural 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 proceeding on that basis.

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 and supplemental email from the Citing Commissioner.
- The statement of the Saracens No 8 Billy Vunipola ("Mr Vunipola").
- The match official reports of the Referee, the Assistant Referees, and the TMO.
- The response prepared by the Player's team manager Mr Neil McLroy to the Standing Directions.
- The letter of apology from the Player to Mr Vunipola.
- A statement from Benjamin Kayser (Clermont No. 2).
- A character reference from Mr McLroy on behalf of the Player.
- Mr O'Connor's response to the Player's reply to the Standing Directions.
- Video footage of the incident from one angle.

The Judicial Officer noted the terms of the Player's response to the Standing Directions found at Appendix 6 of the disciplinary rules ("the Directions") as follows:-

The Player accepts that he committed an act of foul play. The Player does not accept that he committed an act that warranted a red card. The Player accepts that he made a deliberate gesture towards the Saracens player (Mr Vunipola) with his knee. Whilst he is not sure as to what area of the aforementioned player's body he struck, he has no reason to contest the declarations of Mr Vunipola, stating that he made contact with his face. The Player believes that he had reason to react in this way to help a teammate that was suffering (see attached declaration from Mr Kayser). The gesture was unacceptable, but ultimately had no bearing on the game and Mr Vunipola suffered no injury resulting from the incident.

Preliminary Matters

The Judicial Officer invited the player and the Disciplinary Officer to confirm whether or not they had any preliminary issues that they wished to raise.

Mr Fribourg stated that the Player fully accepted that his actions were contrary to Law 10.4(a) and that he had no hesitation in doing so but he, Mr Fribourg, had difficulty in advising the player as to whether his actions justified an ordering off because he had been unable to find any particular reference to the test which indicates what does and does not constitute this.

Mr Fribourg made it clear that the Player was not positively advancing a case that his actions did not constitute a red card, but would leave it to the Judicial Officer to consider that matter in light of the evidence.

The Judicial Officer noted the Player's position at that stage and reminded the Player and Mr Fribourg that it was entirely a decision for the Player as to how he presented his case, but when considering sanction, more credit may be received by a player who had admitted that his actions constituted a red card than a player who makes no admission but where the Judicial Officer ultimately finds an ordering off was merited.

The Player confirmed that his responses to the Standing Directions were still accurate and that he admitted an act of foul play contrary to Law 10.4(a) by striking Mr Vunipola with his knee.

The Judicial Officer explained that he would hear the case and decide, what sanction (if any) should be imposed. The Judicial Officer reminded the Player and indicated that decisions as to fact would be determined on the balance of probabilities.

Evidence

The Judicial Officer invited the Disciplinary Officer to present his evidence, which was as follows:-

Citing Complaint

The Citing Complaint confirmed that the incident had occurred after the elapse of 78 minutes of the Match when the score was Saracens 30 points Clermont 23 points. The citing report provided as follows:

"A Saracens player was struck whilst on the floor at a ruck with the knee of the Clermont Auvergne No. 20. At the time, the ball was nowhere near either player, it was in fact virtually in the hands of the Clermont No. 9. A Saracens player was last to leave the ruck and was

seen to hold his head with one hand. The Saracens No. 8 subsequently complained to the Referee."

The Citing Commissioner's report went on to confirm that the Referee did not see the incident, but he confirmed that there was a complaint made by the Saracens No. 8.

In a supplemental email, the Citing Commissioner confirmed to the Disciplinary Officer that the matter first came to his attention following a brief discussion with the Referee at the end of the Match. He obtained video footage of the incident and after the game spoke to Mr J P O'Reilly, Team Manager of Saracens, who gave more information. He spoke to Mr O'Reilly on 19th October 2014 and was forwarded further footage of the incident.

The Citing Commissioner pointed out that if one listened to the audio of the game, one could hear Mr Vunipola complaining at some length to the Referee.

Mr Vunipola

Mr Vunipola had provided a statement in relation to the incident which comprised the following:

"Near the end of the game v Clermont on Saturday I made a tackle on the Clermont hooker, Kayser. We both went to ground. The Referee shouted "release". I was at the bottom of the ruck looking up and one of the Clermont players knee'd me straight in the face. I felt the full force of his knee hitting me right in the face. I then tried to tell the Referee about what had happened. Back in the changing room, I was still worked up about what had happened and I spoke with my brother and Team Manager as they were asking me about the incident".

Other evidence

The other evidence in support of the Complaint was from Mr O'Reilly who confirmed to the Disciplinary Officer in an email that Mr Vunipola had a bruised face with no fractures. He stated that Mr Vunipola knew the Clermont player concerned was the replacement player who he confronted at the next play.

The match officials had not observed the incident and their reports did not contain anything of relevance save that the Referee confirmed that Mr Vunipola complained to him that he had received a knee to the face. The Referee further explained that he had not been alerted to any foul play by his assistants or TMO and so therefore decided to play on.

Video footage

At this point, the video of the incident was shown and Mr O'Connor commented as to what was depicted.

Mr O'Connor reported that Clermont were in possession of the ball at an attacking ruck within the Saracens 22 and the Player could be seen joining the back of the ruck.

The Player who is on the ground can be seen using his feet in an attempt to release the ball which is in the hands of Mr Kayser and as he does so, he (the Player) loses balance and stumbles slightly to his right. He re-gathers his balance and re-enters the ruck from the right side. He can then be seen lifting his right foot from the floor and brings his knee in a downwards movement on a player or players within the ruck. The ball is recycled and passed by the Clermont No. 9 to his outside half and the players formerly participating in the ruck disperse. The last player to emerge from the floor is Mr

Vunipola who is seen holding the right side of his head/face near the temple area. The audio of the footage demonstrates that Mr Vunipola repeatedly called out to the Referee "Sir, Sir" and "That guy knee'd me in the face". "Please, sir" "I promise you". The Referee tells him to speak to his captain. The Referee does not stop play for a detailed analysis of the footage by the TMO, but signals to his assistants and the TMO whether they "had anything" for him. The Disciplinary Officer confirmed that the correct referee protocol was not to require his assistants to look for specific aspects of foul play, but to ask the general question which, in this instance, he had done.

The footage was played on and when the next phase of play is over and a scrum breaks up, Mr Vunipola can be seen approaching the Player in a highly charged manner which results in pushing and shoving involving numerous players before everyone is separated. Shortly after this, the Referee blows the final whistle and the game is over.

At this point, the Judicial Officer stated he would adjourn for a short period so the Player and Mr Fribourg could re-consider his position in relation to whether he accepted in light of the admissions already made, that a red card was appropriate for his act of striking Mr Vunipola with his knee to the head or face.

After the short adjournment, Mr Fribourg confirmed on behalf of the Player that he now accepted that his actions warranted a red card. Mr Fribourg commented that the Player had said "If I had been the Referee, I would have issued a red card".

Player's Evidence

The Judicial Officer invited the player to explain what had occurred.

The Player confirmed that when he arrived at the ruck he hesitated to engage immediately because there were already a lot of Clermont players involved. He saw one of his teammates, Kayser, on the ground trying to get the ball out of the ruck. His teammate could not free up the ball because he was being prevented by a Saracens player. He decided therefore to play the ball with his foot in order to release it. By doing so, he lost balance. He then managed to regain balance and on that point he said he was focusing visually on Clermont No. 2 (Benjamin Kayser) as Kayser was being pinned down on the ground by a Saracens player. He was immediately concerned for Kayser because the Saracens player had his arm around Kayser's neck. He saw what he thought was a black jersey and "reacted with my knee". He said that his knee went down on the Saracens player with his sole intention to cause the Saracens player to free the arm from around Kayser's neck. In hindsight and in retrospect, he acknowledged that he should not have done this, but instead should have used his arm or his shoulder to secure Kayser's release. However, things moved very quickly. He admitted that he was not sure where he was putting his knee.

The Player was asked by Mr Fribourg whether he had seen the face of the Saracens player. He replied that he had not. He said that he saw what he thought was a bit of black jersey and thought it might have been the Saracens player's shoulder. He said that if he had seen a face, eyes or nose he would not have put his knee on the Saracens player and would not have targeted those areas. He explained that he had reacted quite quickly because he was frightened for Kayser on the ground as Kayser's face was being held back and was in the grasp of someone's arm. He accepted that the use of the knee was an inappropriate gesture.

Under questioning from the Disciplinary Officer, the Player confirmed that he believed Kayser was suffering at the time from the grip of the other player. However, he acknowledged that Kayser did not scream or shout out or say anything, but the Player said he could see a strain on Kayser's face due to the grip. He said that immediately after the incident, he did not know whether Kayser had

complained to any match official about the grip around his throat. In the post-match discussion between the Player and Kayser, Kayser mentioned it, but as far as the Player was concerned, did not report it formally.

The Player was asked whether he could have done anything else to have secured Kayser's release. His response was "Yes, of course. I could have done other things. I could have used my arms to have secured Kayser's release". He denied that he had seen Mr Vunipola's face before he struck with a knee and he thought that the impact would have been on the Saracens player's back or shoulder. He had only intended to push him away from Kayser and secure the release of the grip. He said that having dropped the knee, he did not know what he had hit.

He also said that when the later fracas occurred and Mr Vunipola came towards him, Mr Vunipola was "worked up". However, he had not realised what Mr Vunipola had been worked up about and had not realised it was he who had been struck by his knee.

Upon questioning from the Judicial Officer, the Player was reminded of the footage which had occurred after the subsequent fracas between Mr Vunipola and he had broken up, when Mr Vunipola looks towards him in a disapproving manner shaking his head and wagging his finger, obviously drawing attention to something objectionable which the Player had done. The Player accepted that he had seen Mr Vunipola do this towards him, but was uncertain what statement Mr Vunipola was making.

After the Match, the Player confirmed that he had not spoken with Mr Vunipola and had not apologised to him because he did not know who he had struck with his knee and did not know that he had struck a Saracens player to the head.

The Player confirmed that he had come on to the field at around the 65th or 68th minute of the Match. He was 1m 88cm tall and weighed 99 kilos. There had been no previous confrontations with Mr Vunipola in the 10 or so minutes that he had been on the field.

The Player had also produced a statement from Kayser which confirmed that when he was on the floor at the ruck his breathing had become restricted by the actions of Mr Vunipola and that after the Player had struck him, Mr Vunipola released his grip (Kayser also volunteered that he did not think Mr Vunipola's tackle had been dangerous or high in the first instance).

This therefore concluded the evidence.

Submissions as to Sanction

The Judicial Officer heard representations from the Disciplinary Officer and the Player's representative as to sanction.

The Disciplinary Officer confirmed that he did not advocate any particular sanction in this case, but would draw to the Judicial Officer's attention the provisions of DR 7.8.32 which deals with the entry point for such offences. The Disciplinary Officer considered that the following factors were relevant:

- That the offending had been intentional. The Player had admitted intending to strike another Player with his knee.
- The actions of the Player in relation to this offending were quite grave and that the manner in which the offence was committed was of significance because it involved the knee.

- Mr O'Connor accepted that there was the possibility that the Player could have been provoked by the actions of Mr Vunipola in holding Kayser in the manner in which he did.
- The Disciplinary Officer acknowledged that the Player's actions on Mr Vunipola involved only a minor injury.
- The Player's actions had an effect upon the Match because the fracas which subsequently occurred had been unsightly and had been replayed on television a number of times.
- There was no impact upon Mr Vunipola in the sense that the incident did not keep him out of any further rugby matches.
- The Disciplinary Officer also commented that Mr Vunipola was vulnerable.

As far as the entry point was concerned, the Disciplinary Officer wanted to rely upon the 2012 Autumn International Appeal Judgment in the case of Adam Thomson (New Zealand) in which guidance was given by the appeal panel in relation to offences of striking a Player with the boot to the head. This, in essence, confirmed that when assessing the level of seriousness, and entry point, where a player has intentionally stamped or trampled on an opponent's head, the starting point for determining the sanction should normally be at least mid range. Where injury occurs, it is likely that the starting point would be top end. It would only be in very exceptional cases where the starting point would be low end. A number of such examples were mentioned in the judgment.

The Disciplinary Officer accepted that there were no aggravating factors present in the case.

The Disciplinary Officer acknowledged that there were mitigating factors available to the Player including his conduct at the hearing and his guilty plea.

Player's Submissions as to Sanction

Mr Fribourg stated that he agreed largely with the analysis and representations of Mr O'Connor, but invited the Disciplinary Officer to conclude that this was a case which could properly be determined at the low entry point because he hoped the Judicial Officer could accept the Player had not intended to strike the head or face of Mr Vunipola with his knee. If, so, this would make it a significantly less serious matter which could justify a low entry point.

Mr Fribourg agreed there were no aggravating factors present. He indicated that there was significant mitigation available to the Player in terms of his guilty plea, generally good disciplinary record, and his conduct prior to, and at, the hearing. He also relied upon his remorse to Mr Vunipola which could reduce the sanction to two weeks. He stated, in terms, that the Player would be satisfied with a decision of two weeks.

Decision of the Judicial Officer

The Judicial Officer retired to deliberate in private in respect of what, if any, sanction would be appropriate. In this regard, the Judicial Officer considered the terms of the Disciplinary Rules including DR 7.8.32 to DR 7.8.35.

The Judicial Officer noted that the sanctions of striking an opponent with a knee in contravention of Law 10.4(a) were listed within the IRB Recommended Sanctions for Offences Within the Playing Enclosure (found in Appendix 3 of the Disciplinary Rules).

Striking another player with the knee attracts the following entry points

1. Low entry- 3 weeks
2. Mid range- 8 weeks
3. Top end- 12 weeks (maximum of 52 weeks)

The Judicial Officer determined that the following factors were relevant to entry point:

- a. *The offending had been intentional.* The Judicial Officer concluded that on the Player's own admission he had intended to strike another player with his knee. Based upon the lack of evidence supporting the issue, the Judicial Officer did not find on the balance of probabilities that the Player had intended to strike Mr Vunipola to the face or head. However, notwithstanding this, the Judicial Officer concluded that the Player knew or should have known that there was a very high degree of risk that this would have occurred.
- b. Having found that the strike with the knee had been intentional, the Judicial Officer did not find that the offending was reckless.
- c. The Judicial Officer concluded that the Player's actions were quite grave due to the nature of the strike with Mr Vunipola lying on the ground.
- d. As to the "*nature of the actions the manner in which the offence was committed including the part of the body used*" ("*for example, fist, elbow, knee or boot*"), it is obviously inherent in a strike with the knee that a knee must be involved. However, the Judicial Officer concluded that the Player had struck with some force onto the head/face of Mr Vunipola.
- e. As to "*provocation*" the Judicial Officer accepted that the Player was entitled minimally to rely upon provocation if he genuinely felt that Mr Vunipola was causing discomfort to Kayser and had his arm around Kayser's neck. However, the Judicial Officer considered that this was nowhere near sufficient to justify the Player's actions. The Judicial Officer noted that the Player had accepted that this was the case.
- f. *Retaliation* was not relevant.
- g. The Player had not acted in self-defence although his evidence was that he had acted in the defence of a fellow player, albeit he accepted other more appropriate actions were available to him.
- h. *The effect of the Player's actions on the match.* The incident did spark unsavoury scenes at the end of what had obviously been a close Match and to some extent had tarnished the image of the Match.
- i. *The Player's actions on the victim (for example, the extent of the victim's injury and whether he was removed from the match).* Mr Vunipola obviously suffered a significant blow to the face or head which caused immediate discomfort. The Player had accepted that he had also suffered bruising to his face or head as a consequence. Fortunately, the injuries were no more serious than that.
- j. *The vulnerability, of the victim, including the part of the victim's body involved/affected,* The position of the victim and his ability to defend himself – Mr Vunipola was obviously very vulnerable with no means of defending himself.

- k. *The level of participation in the offending and the level of premeditation* – the Judicial Officer considered that there had been no premeditation in his actions and they had occurred on the spur of the moment
- l. *Whether the conduct of the Player was completed or amounted to an attempt* – the Judicial Officer accepted the conduct was obviously completed.
- m. There were no other features of the Player's conduct in relation to or connected with the offending.

Based upon his assessment of the above factors, the Judicial Officer concluded that the appropriate entry point was comfortably mid range. This attracts a starting point of 8 weeks. The Judicial Officer was of the view that had he been satisfied the Player had intended to target Mr Vunipola's head or face and had there been anything more than a minor injury, he would have had no hesitation in starting at the top end. Entry point of between 12 and 52 weeks.

Aggravating factors

The Judicial Officer was satisfied that there were no relevant aggravating factors to take into account under DR 7.8.34.

Mitigating factors

The Judicial Officer was satisfied that the Player was entitled to a number of mitigating factors which included the following:-

- a. *The presence and timing of an acknowledgement of culpability/ wrongdoing by the Player.* The Player had admitted committing the act at the outset and had never sought to question any part of the evidence of Mr Vunipola. The Judicial Officer accepted that the decision at the commencement of the hearing not to fully accept that a red card had been appropriate was as a consequence of advice given by Mr Fribourg, but that when the Player had had the opportunity of reconsidering his position at an early stage during the hearing he had fully accepted an ordering off had been appropriate. He was therefore entitled to substantial credit for his acknowledgement of culpability.
- b. *The Player's disciplinary record and/or good character.* The Player was 28 years of age and had been playing rugby since the age of 14. He was a back-row player, with only one previous disciplinary matter for "nervsite" which Mr Fribourg confirmed was an act akin to retaliation for which he received a 9-day ban. In a fairly lengthy career at the highest level with in excess of 20 caps for Portugal, the Judicial Officer considered that this would not be held against him to any significant extent, albeit he could not claim to have an unblemished record.
- c. The Player's representative also drew the Judicial Officer's attention to the statement from Mr McIlroy which spoke about him in very complementary terms as being an outstanding player who, off the field, is a quiet family man.
- d. The Player was not able to avail himself of either youth or inexperience.
- e. The Player's conduct prior to and at the hearing had been very good.

- f. As far as remorse was concerned, the Judicial Officer concluded that whilst the Player had demonstrated remorse towards Mr Vunipola in a letter sent on 21st October 2014 apologising for the incident and for any discomfort which may have been caused, the Judicial Officer found, based upon the evidence, that the Player had, in fact, known very shortly after the incident how his actions had affected Mr Vunipola and had the opportunity to apologise to Mr Vunipola before he became aware of the citing report against him. To that extent, the Player could have done more in expressing remorse in a timely manner.

There were no other off-field mitigating factors that the Judicial Officer considered relevant. Taking account of the above, the Judicial Officer considered that the Player's suspension should be reduced by three weeks.

Announcing the Decision

The hearing was reconvened and the Judicial Officer announced the decision as follows:-

1. The mid range entry point of eight weeks would be reduced by three weeks to take into account the mitigation available to the Player, thus resulting in a five-week suspension from playing rugby.
2. In light of the Player's playing pattern both with Clermont and Portugal , a 5-week suspension would (as a consequences of fallow weeks) take him up to, and including, 30th November 2014 which means he would be free to play Rugby Union on Monday, 1st December 2014.
3. The Judicial Officer ordered the Player to pay to EPCR the Judicial Officer's costs, limited to travel and accommodation expenses, which would be assessed by the Judicial Officer if not agreed.

Right of Appeal

The Judicial Officer reminded the Player of his right to appeal against his decision under DR 8.1

Simon Thomas
Judicial Officer
27TH October 2014