

## **Decision of the Disciplinary Committee**

### **EPCR**

Held at the Sofitel Hotel, London Heathrow Airport

On Wednesday 4<sup>th</sup> July 2018.

In respect of Mourad Boudjellal (“MB”) and RC Toulon (“the Club”)

### **Disciplinary Committee appointed to hear the case (“The Committee”)**

Philip Evans QC – Chairman (England)

Jean-Noel Courad - (France)

Dan White – (England)

### **Those present at the hearing**

The following were present at the hearing;

Mr Max Duthie – Bird & Bird - advocate appearing on behalf of EPCR

Mr Richard Bush – Bird & Bird – assisting Mr Duthie

Mr Max Latchmore – Bird & Bird – Trainee (observing only)

Mr Anthony Lepage – EPCR

Ms Charlotte Godber – pupil barrister (observing only)

### **Introduction**

1. This document should be read in conjunction with an earlier judgment of this Disciplinary Committee which set out our ruling as to a number of preliminary points raised by MB. That previous judgment is dated the 17<sup>th</sup> May 2018.
2. The final version of the complaints, which are now advanced by the EPCR, are contained in the re-amended version of the letter of complaint dated the 14<sup>th</sup> March 2018. There had been earlier versions of the letter and this Committee has permitted

amendments to the version dated the 14<sup>th</sup> March. In essence the amendments withdrew an earlier allegation made by the EPCR in relation to a text message and added allegations in relation to subsequent but linked behavior of MB and consequently the Club. The EPCR made it clear to the Committee that they do not allege that MB sent the text message in question.

## The Complaints

3. The complaints advanced against MB and the Club arise following a review by the EPCR of a media article in which MB was reported to have made various comments which, in short, the EPCR allege (i) condone the use of foul and abusive (and homophobic) language by himself and others, (ii) are discriminatory by reason of sexual orientation and/or religion and/or nationality and/or ethnic origin, and/or (iii) attack, disparage or criticise the EPCR.
4. The article in question was headed '*Boudjellal: "Je crains le côté mormon des instances européennes"*'. It was published after the match on 14 January 2018 on the Rugbyrama.fr website and was written by a journalist called M. Vincent Bissonnet. The bulk of the article is said to be an interview with M. Boudjellal, conducted in French and apparently prompted by comments made in the match on the 14<sup>th</sup> January 2018 by the RC Toulon Player, Mathieu Bastareaud. In that match M. Bastareaud called a Benetton player a "fucking faggot" (this incident was subsequently the subject of a citing complaint and M. Bastareaud was suspended for three weeks, having admitted verbally abusing his opponent).
5. The Committee has been provided with an English translation of the article. The panel consists of French speakers and we were able to confirm that the translation provided is an accurate one. The article records MB as saying (among other things):
  - (a) *"In my view, we are talking about an insult that has entered the common language. Mathieu Bastareaud has at no time judged the sexual orientation of the player in question ... I'm not homophobic either but I have previously insulted someone by calling them faggot/queer. It's like the use of this term has become common, it's what comes to mind first in case of altercation. But we are in an era where morality has become very important. As people are not able to*

*understand that and to balance things ... the only thing that humour does not belong to is paedophilia. What Mathieu said is in the order of verbal blunder in the heat of the action"; and*

(b) *"I am concerned [about EPCR's action against M. Bastareaud]. What I'm afraid of is the Mormon side of the ECPR with the Welsh and the Irish. They are people who sell morality when they do not have it. The same ones who have ministers who are being whipped in private but who present themselves as clean guys in public."*

6. Following the publication of this article the EPCR wrote to MB by letter, dated the 16<sup>th</sup> February, in which they set out details of their initial complaints. Following that, on or around 22 February 2018, an article appeared on the Rugbyrama.fr website entitled '*Mourad Boudjellal annonce qu'il ne se rendra pas à la convocation de l'EPCR.*' An English translation was provided to the Committee and again we have satisfied ourselves that it is accurate. In that article MB is reported to have said, in French, the following (among other things) at a press conference:

*"I received a summons from EPCR, two-three days ago. I will not attend the hearing because it doesn't exist. For the simple reason that it doesn't respect the French and European law. It isn't based on anything, except the citing commissioner's conviction, which has no value, no importance for me. ... Some people do not like me at EPCR and I'm going to defend myself. ... At EPCR, someone has it in for me. A guy cannot stand me. But it will be him or me. It will be EPCR or me";*

7. Then on or around 23 February 2018 a further article appeared on the blog-rct.com website entitled '*Furieux, Boudjellal recadre sévèrement les anglais qui << chient >> sur les Français depuis des années.*' It appears based on the same press conference. In this article this M.Boudjellal is reported to have said, in French, among other things:

*"The English live from our dough! We share with them while they don't create a lot [of money] and we create a lot. But we share everything! Moreover, they don't write in French, but they write everything in English (his summons to the disciplinary hearing). They shit on us! They don't even respect our language. They don't take into account that they are dealing with a French person and that, therefore, they will translate into French. They*

*don't even respect the language of those who give them money. No, everything in English! In their logic, everything is written in English with very approximate French translations. The translations for which I was cited have nothing to do with what I said. They didn't even take an official sworn and recognised translator who can translate exactly what I said. They took a guy in the street, they offered a shower to him, they gave him clothes and invited him to the restaurant in exchange of a translation. They like French language when it comes to having headquarters in Switzerland, but for the rest, they don't. Law doesn't work like that. We wonder why we fund the European Cup and why we count the finals that are played in France while there are a lot of finals played in English-speaking countries. We are getting scammed on everything! For me it's over. They should strike me off if they want and they will need guts to strike me off!*

*"Besides, these are people who are unable to sign a sponsor for the European Cup. Today, all the TV rights of the European Cup are shared in a common pot. The French TV rights have doubled and the British TV rights have been divided by two. In the end, we will earn the same amount because it is a common pot. But it's funny because, this year, we have seen adverts for "BT" on many British jerseys. BT is the TV that broadcasts the European Cup. I find it surprising because it might be a part of the TV rights that we do not share because they are on the jersey of English clubs. This is how we have been getting scammed for many years but we share everything";*

8. In relation to the Club, the EPCR points to the Participation Agreement, the Media Rules and the Disciplinary Rules of the EPCR tournament to support the allegations they bring. This Committee has earlier ruled in relation to some of these regulations when considering whether MB was bound by them.
9. In particular the EPCR rely on Clause 1.4.1 of the 2017/18 EPCR Participation Agreement ("Participation Agreement") which states:

*"The Club undertakes to procure that each of its relevant players, as well as each of its officials, directors, officers, members, employees, members of staff, contractors, agents and other representatives involved in any way in the Club's participation in any of the Tournaments, is made aware of, has the opportunity to take professional advice regarding, and agrees to be bound by, to observe and to comply with, the Terms and Conditions."*

10. They point out that under clause 1.1 of the Participation Agreement, the “Terms and Conditions” are defined as “*the terms and conditions of participation in the Tournament*” as set out in the Participation Agreement and the schedules thereto.

11. Clause 1.4.2 of the Participation Agreement states:

*“The Club undertakes to advise each such person that...his...involvement in the Club’s participation in any of the Tournaments shall be deemed to be definitive proof of his...acknowledgement and acceptance of the Terms and Conditions.”*

12. Clause 2.2 of the 2017/18 EPCR Media Rules (“Media Rules”) states:

*“In all dealings with the public and the media, each Club shall, and shall procure that each of its Persons shall, use best endeavours to enhance the reputation of the Tournaments, EPCR and the Commercial Partners. Further, and without prejudice to the generality of clause 2.3 of the Disciplinary Rules, each Club shall ensure that each of its Persons (a) is fully aware of the Club’s and his/her own obligations as set out in these Media Rules (and the Participation Agreement generally), and (b) when interacting with representatives of the media and/or appearing in the media (including when providing interviews, press releases, statements, comments, newspaper columns...and/or similar), acts at all times in accordance with these Media Rules (and the Participation Agreement generally) and does not do, say or write anything that criticises, damages or would bring into disrepute the sport of rugby union, any of the Tournaments, other Clubs or Persons, match officials, EPCR and/or any sponsor or other commercial partner of any of the Tournaments or EPCR. Any Club or Person who fails and/or refuses to comply with these Media Rules may be liable to Misconduct proceedings pursuant to the Disciplinary Rules.”*

13. Clause 1.2 of the Disciplinary Rules states:

*“These Disciplinary Rules shall apply to and bind each Club and each of its Players and other Persons throughout the Tournaments. By participating in any of the Tournaments, each Club and Person shall be deemed to have accepted these Disciplinary Rules and agreed to be bound and to abide by their provisions (in the case of a Club, on its own behalf and on behalf of each of its Persons). Each Club shall ensure that each of its Players and other Persons are aware of these Disciplinary Rules and understands and agrees to be bound by them. The participation of such Players and other Persons in any of the Tournaments shall be deemed to constitute their acceptance of these Disciplinary Rules and their agreement to be bound and to abide by these Disciplinary Rules and all decisions made hereunder.”*

14. Clause 2.1 of the Disciplinary Rules states:

*“Each Person is responsible and accountable for his own conduct...in connection with the Tournaments. He must conduct himself...at all times in accordance with the highest standards of disciplined and sporting behaviour. He must not commit...any act(s) of...Misconduct.”*

15. Clause 2.2 of the Disciplinary Rules states:

*“Without prejudice to the personal responsibility of each Person for his own conduct..., each Club is responsible and accountable for its own conduct and for the conduct of each of its Players and other Persons in connection with the Tournaments...”*

16. Clause 2.3 of the Disciplinary Rules states:

*“Each Club must ensure that:*

*“2.3.1. the Club and each of its Players, other Persons and supporters conducts it/him/herself at all times in accordance with the highest standards of disciplined and sporting behaviour;*

*“2.3.2. neither the Club nor any of its Players, other Persons or supporters commits an act or acts of Misconduct...”*

17. The definition of 'Person' in Appendix One to the Disciplinary Rules is 'a Player, or a member, director, official, officer, member of Staff, employee, contractor, agent or representative of a Club and any other person involved in any of the Tournaments in any way on behalf of a Club'.

18. It is the view of this Committee, for the reasons already set out in our earlier judgment, that MB is a 'Person' bound by the EPCR rules. As a consequence, the Club is responsible for MB as set out in the rules above.

19. The EPCR's case is that M. Boudjellal and the Club have committed acts of Misconduct in breach of the rules set out in section 3 of the Disciplinary Rules and accordingly they bring the Misconduct complaints specified below against them. They do so pursuant to clauses 4.1.3 and 7.6 of the Disciplinary Rules.

20. The first Misconduct complaint against M. Boudjellal is *“that after the Match he made comments to a media representative concerning M. Bastareaud's abuse of an opposition player and how he would be disciplined for that abuse by EPCR (as set out above) in a way that (among other things) condoned M. Bastareaud's conduct, discriminated against various groups and criticised EPCR and others. That constitutes Misconduct because:*

*(a) it was conduct, behaviour and/or statements that were unsporting and/or insulting and/or brought or had the potential to bring the sport of rugby union, the tournament and/or EPCR into disrepute (which constitutes Misconduct under clause 3.2 of the Disciplinary Rules);*

- (b) *it was a breach of clause 2.2 of the Media Rules (which constitutes Misconduct under clauses 3.2 and 3.3.4 of the Disciplinary Rules);*
- (c) *it was a failure by M Boudjellal to conduct himself in accordance with the highest standards of disciplined and sporting behaviour and therefore a breach of clause 2.1 of the Disciplinary Rules (which constitutes Misconduct under clauses 3.2 and 3.3.4 of the Disciplinary Rules);*
- (d) *it involved making comments in connection with current and/or anticipated disciplinary proceedings (being those against M. Bastareaud) in such a way that may be prejudicial to and/or have an impact on current and/or anticipated disciplinary proceedings and/or that is prejudicial to the sport of rugby union and/or EPCR (which constitutes Misconduct under clause 3.3.9 of the Disciplinary Rules);*
- (e) *it involved making statements that are discriminatory by reason of sexual orientation, nationality, ethnic origin and/or religion (which constitutes Misconduct under clause 3.3.10 of the Disciplinary Rules); and/or*
- (f) *it involved making comments to representatives of the media that attacked, disparaged or criticised EPCR (which constitutes Misconduct under clause 3.3.15 of the Disciplinary Rules).*

21. The second Misconduct complaint against M. Boudjellal *“is that in the comments reported in the 22 February Article and the comments reported in the 23 February Article he discriminated against various groups, he criticised EPCR, he claimed that someone within EPCR is unlawfully victimising M. Boudjellal and he suggested that EPCR and others are operating some sort of unlawful or corrupt scheme to deprive the French clubs of their rightful proceeds from the exploitation of media rights. That constitutes Misconduct for the same reasons as set out above in respect of the first Misconduct complaint against M. Boudjellal.”*

22. The Misconduct complaint against the Club *is that in respect of the relevant conduct of M. Boudjellal, who is one of the Club's 'Persons' for the purposes of the Disciplinary Rules, the Club:*

- (a) *failed or refused to procure that M. Boudjellal used his best endeavours to enhance the reputation of the Tournaments and EPCR (which constitutes Misconduct under clause 2.2 of the Media Rules and 3.3.4 of the Disciplinary Rules);*

*(b) failed or refused to ensure that M. Boudjellal conducted himself at all times in accordance with the highest standards of disciplined and sporting behaviour (which constitutes Misconduct under clause 2.3.1 and 3.3.4 of the Disciplinary Rules);*

*(c) failed or refused to ensure that M. Boudjellal did not commit any acts of Misconduct (which constitutes Misconduct under clause 2.3.2 and 3.3.4 of the Disciplinary Rules);*

*(d) failed or refused to exercise reasonable and proper control over M. Boudjellal on or off the Playing Enclosure (which constitutes Misconduct under clause 3.3.5 of the Disciplinary Rules);*

*(e) failed or refused to observe and/or instil among M. Boudjellal a sufficient degree of respect for the Laws of the Game, the disciplinary authority of EPCR and/or the Participation Agreement (which constitutes Misconduct under clause 3.3.6 of the Disciplinary Rules); and*

*(f) is directly responsible and accountable for that conduct as if it had committed it itself (see clause 2.2 of the Disciplinary Rules).*

23. Originally the EPCR further alleged that:- *“in light of M. Boudjellal's contention that he is not bound by the terms of the Participation Agreement, in the event that the Disciplinary Committee were to find that M. Boudjellal is not bound by the Participation Agreement, then, on an alternative basis, a (second) Misconduct complaint against the Club is that it will have failed in its obligation to procure that M. Boudjellal was so bound. That constitutes Misconduct because it would be a breach of clause 1.4.1 of the Participation Agreement and clause 1.2 of the Disciplinary Rules (which constitutes Misconduct under clause 3.3.4 of the Disciplinary Rules).”* Given the ruling of this Committee that MB is bound by the terms of the Participation agreement, it is unnecessary to consider this matter any further.

## Decision

24. Neither M. Boudjellal or the Club attended the hearing on the 4<sup>th</sup> July. The Committee first had to determine whether to proceed in their absence. All papers, evidence and authorities had been provided to MB and to the Club in advance. The EPCR compiled a detailed chronology which is at our tab 14 of the bundle of documents relating to sanction and costs. We have set out below a summary of that chronology, as it is important to this aspect of our decision and to other areas of this judgment. For example, it was important in our assessment of the manner in which both MB and the Club have behaved during these proceedings and it is central to the question of costs.
25. On the 27<sup>th</sup> February 2018, an email was sent by Jennifer Rae on behalf of the Chairman of the EPCR disciplinary panel Mr Mike Hamlin. It was sent to a number of people including, EPCR, MB, the Club and to a lawyer, M Chevalier, who was at that stage instructed on behalf of MB. It notified the parties of the constitution of the panel, set a deadline of the 5<sup>th</sup> March for any objections to that panel. The email further notified the parties of the original date, place and time of the proposed hearing; the 7<sup>th</sup> March at 11:45hrs at the Sofitel, London Heathrow.
26. The same day M. Chevalier replied on behalf of MB. He described himself as furious. He said Ms Rae was perfectly aware that he had not yet had an opportunity to meet with his client and claimed he was not able to prepare the case. He “required” an immediate postponement of the hearing which he said had been unilaterally decided to take place on the 7<sup>th</sup> March without taking care to preserve the rights of the defence.
27. Shortly after M Chevalier’s email the hearing was adjourned.
28. The EPCR served an amended misconduct complaint on the 5<sup>th</sup> March.
29. On the 7<sup>th</sup> March M. Chevalier wrote to the Chairman of this Committee. He wrote in English and described himself as “legal Counsel to Mr Mourad Boudjellal.” He identified a number of preliminary points that he wished to argue on behalf of MB. As a consequence, the Committee issued directions on the 12<sup>th</sup> March to facilitate argument of these matters. Shortly thereafter, on the 14<sup>th</sup> March, the EPCR served its final re-

amended misconduct complaint via an email from Mr Duthie. MB replied to that email the same day with the words “Merci de m’ecrire en Francais je ne parle pas votre belle langue Bien a vous.” He did so despite his now having “legal Counsel” acting on his behalf who was communicating with the EPCR and the Committee in English. Thereafter MB continued to reply to emails with similar words in French which most often read “Bonjour Je ne parle pas Anglais merci de m’ecrire en Francais, Bien a vous Mourad B.”

30. On the 29<sup>th</sup> March 2018 M. Chevalier filed his submissions in relation to the preliminary matters. The submissions were in French, despite his original submissions being in English and all communications having been sent to him in English. This document had to be translated at a cost to EPCR.
31. EPCR provided their response on the 23<sup>rd</sup> April and in turn M. Chevalier filed his final reply on behalf of MB on the 4<sup>th</sup> May 2018. Again, no doubt on instruction, he did so in French. At that stage it became appropriate for this Committee to issue part of its preliminary ruling; the part in relation to the use of English in these proceedings. That ruling was accompanied by a further direction that all future documents in these proceedings were to be provided in English and that MB’s final document of the 4<sup>th</sup> May be translated to English. On the 11<sup>th</sup> May M. Chevalier provided his final submissions in English.
32. Despite that ruling and directions which were sent to both MB and to his lawyer, MB once again replied the same day saying he does not speak English and that he wishes to be written to in French.
33. There were further exchanges of a similar nature. These are detailed in the EPCR chronology. The ruling of the Committee in relation to the preliminary points was sent out to all parties on the 17 May. Again MB replied stating he does not speak English and stating he wished to be written to in French.
34. On the 17<sup>th</sup> May the Committee issued further directions to the parties, with a view to managing the preparation and timing of the hearing at a time convenient to all. The directions were not complied with. In the absence of any communication from MB,

the Club or M. Chevalier an amended hearing notice was sent to the parties stating the hearing was to commence on the 4<sup>th</sup> July. This prompted a similar reply from MB.

35. On the 8<sup>th</sup> June the evidence and authorities relied on by EPCR were sent to the other parties and M. Chevalier.
  
36. On the 15<sup>th</sup> June a letter in French was emailed direct to the Chairman of this Committee and only to him. It came from a M. Goldnadel who purported to be “defending the interests of MB.” The letter advanced objection to the decisions already taken by the Committee and made it clear that he, M. Goldnadel, had received the relevant paperwork from M. Chevalier. The letter mentioned (wrongly) that the hearing was fixed for 5<sup>th</sup> July. M. Goldnadel said, “Further, it is my professional duty as a lawyer to draw the attention of my client to the fact that your insistent pressure and repeated attempts to intimidate could legally constitute tortious moral/psychological harassment, in those circumstances it would be the French criminal courts that would have the power to confirm it.” M. Goldnadel advised the Chairman of the panel to seek legal advice in France. The letter had to be translated at a cost to EPCR.
  
37. Further directions were issued on the 20<sup>th</sup> June in French and English, to avoid any possibility of confusion or doubt) clarifying the hearing was in fact fixed for three days from the 4-6 July. The directions sought to confirm whether MB or the Club would be attending and what their position as to the allegations was. Six days later on the 26 June M. Goldnadel wrote again, again in French and again directly and only to the Chairman of this Committee. He did not copy either letter to any other party. The letter was addressed to the Chairman’s correct email address but wrongly had his postal address at the EPCR Neuchatel in Switzerland. M. Goldnadel appears wrongly to believe the Chairman is connected to EPCR. This letter confirmed that M. Goldnadel was now MB’s lawyer. It said the Chairman had used (presumably in the directions) an offended tone which caused them to understand that he considers it a crime of less-majesty to challenge his jurisdiction over a natural person who does not belong to his organisation. It also said the Chairman had violated MB’s right to a fair defence. The letter had to be translated at a cost to EPCR.

38. To quote that letter read, *“given your obstinacy, I am obliged to officially notify you: Firstly: that my client confirms that he shall not comply with your summons. The lawyer representing him informs you out of sheer courtesy to spare unnecessary organisational costs – Secondly: your last email can only be construed as one last attempt to pressurize and intimidate my client through the might of personality and position of your organisation. Consequently, he has instructed me to inform you officially that such repeated moral harassment leaves him no choice but to ask me to immediately bring before French courts proceedings against such harmful conduct. The Court will incidentally be asked to investigate the strange circumstances under which your complaint was brought. My code of ethics requires that I ask you the name of the lawyer who will defend your interests before the French criminal court. I would like to add that this lawyer may get in touch with me if he/she so wishes and deems it necessary.”*
39. On the 29<sup>th</sup> June M Chevalier officially notified the EPCR for the first time that he no longer acted for MB in these proceedings.
40. On the 4<sup>th</sup> July the hearing was convened. At the beginning of the hearing the Committee made it clear that we have put threats of Court proceedings, made by M. Goldnadel entirely out of our minds when reaching our decision in relation to the allegations faced by MB and the Club in these proceedings. We take the view that it is not for us, as part of these proceedings, to adjudicate over those letters or their propriety. Our role is to impartially adjudicate over whether the allegations are proved and if so what the appropriate sanction should be. We therefore specifically exclude those letters from our deliberations.
41. As a result of the events set out in that chronology and the totality of the correspondence available to us, we have no doubt that MB, after receiving the ruling in relation to his preliminary points had no intention of engaging with the process any further. We have no doubt that he and his lawyer(s) were well aware of the time, date and venue of the hearing and that he had no intention of attending on the 4<sup>th</sup> July or on any day thereafter. No application was made to move the hearings date or location. The Club has not engaged in any meaningful way in these proceedings. Both MB and the Club have failed to comply with a number of directions, the Club has not notified any legal representative and has provided no meaningful correspondence throughout.

This has, without doubt, been a willful failure to attend and amounts to a positive refusal to recognise the EPCR's disciplinary process or engage in it.

42. Rule 7.8.15 says, that the absence of a party at a hearing shall not, in itself, prevent the Committee from proceeding to a decision in the matter, provided the Committee is satisfied that the party received notice of the hearing. We are sure that both MB and the Club did receive notice of the hearing, indeed they acknowledge as much. The same rule goes on to set out how, when proceeding in absence, the Committee is entitled to consider written submissions on behalf of the absentees and or to adjourn the allow attendance. We were not asked to adjourn and we saw no reason whatsoever to do so. However, when considering whether the allegations were proved or not we did consider all of the material available to us including any written submissions made by MB himself or by his lawyers on his behalf.

43. In addition to considering MB's written submissions we felt it important, in the interest of fairness, to re-visit some of our own preliminary rulings. We were keen to make sure that our understanding regarding the text message and its potential relevance to these proceedings was clear and up to date. We acknowledge that if there were evidence to suggest that the text had been written by someone connected with the EPCR in order to incriminate MB then that may (we stress may) have some relevance to the other allegations, dependent on the precise factual nexus. We therefore sought any disclosure from the EPCR to that effect. We were informed by the EPCR there was nothing to disclose or, for that matter, in existence of that nature. We understand the EPCR has had the phone in question analysed and enquiries continue in relation to the origin of the text message. We are therefore content that our original ruling regarding the text message should stand.

44. Another area we revisited and which we considered in detail when considering our decision, was the evidence of M. Bissonnet, the reporter who interviewed MB over the telephone to produce the first article. We asked the EPCR to confirm whether there was anything in their possession or knowledge which could be considered to undermine or cast doubt over the evidence of M. Bissonnet. They confirmed there was not. We also confirmed the following matters in regard to M. Bissonnet: Following the relevant match on the 14 January 2018, MB was interviewed by M. Bissonnet and the

article was created; In response to that article the EPCR sent their 'request for further information' (letter on the 16 January 2018); The following day M. Bissonnet provided a signed formal Attestation that we have been provided a translation of. We understand he provided this at the behest of MB. In summary, he said the interview had been a response to a Tweet from Andy Goode regarding the Bastareaud incident. At the time of the interview M Bastareaud had not been cited nor had the inquiry been opened. He explained the term 'Mormon' had already been utilised in reaction to a series of earlier Tweets. Following this Attestation EPCR took a further statement from M. Bissonnet. That statement is dated 28<sup>th</sup> February 2018, it is signed by M. Bissonnet and contains a declaration of truth. We have received no evidence of any law which would prevent the EPCR from seeking such a statement. We conclude it is obviously in the interests of all parties to these proceedings and in the interests of rugby that any available evidence is obtained and placed before the Disciplinary Committee. We have seen no evidence at all of any improper conduct having been used to influence the witness or obtain the statement. We have also been assured that Mr McTiernan (against whom MB makes separate allegations) has had no part in the process of obtaining the statement from M. Bissonnet.

45. M. Bissonnet was not called to give evidence. Neither MB or the Club had provided the detail of any challenge they make to his evidence. Nonetheless we considered all of the points advanced in MB's letter of the 18<sup>th</sup> January and subsequent points advanced in written submissions for the preliminary points. In particular MB questioned some of the translation in relation to the 'Mormon' section of the article. He made the point that he was only reacting to Mr Goode's views and that his remarks pre-dated any citing of M. Bastareaud. We also considered with care MB's remarks towards the end of his 18 January letter where he sets out his explanation for his comments. We note that MB says M. Bissonnet had not indicated that their exchange was going to be published in any medium. He says that if that had been the case he would have required, as he does every time he speaks as President of Rugby Club Toulonnais, to re-read any interview before publication. MB also argues he cannot be responsible for any onward transmission of the article to other media or social networks.

46. M. Bissonnet has been working as a journalist since 2011. He sets out how the incident in the match on the 14 January 2018 caused much reaction and commentary and

explains why he contacted MB by telephone on the 14 January. He said he was seeking MB's "official" reaction to Andy Goode's remarks. MB's remarks he says are detailed in the relevant article which he wrote, shortly after finishing the call. He confirms the comments attributed to MB are recorded accurately and that he took notes of the conversation by hand during the call. M. Bissonnet says it was clear throughout the telephone interview that comments made to him by MB were "on the record," "for publication" and that no element of the conversation was at any stage to be "off the record." M. Bissonnet confirm that he spoke to MB after the article was published and no complaint was made to him regarding it.

47. Having considered the evidence carefully this Committee is satisfied of the following matters from the evidence before us: that M. Boudjellal gave the interview; that he did say the things attributed to him in the article; that the English translations accurately reflect what he said, and; that the interview was in no way said to be a private "off the record" conversation. We also conclude that MB knew, or ought to have known, that his remarks were to be made public and would be published, and that in doing so it was overwhelmingly likely that his remarks once published, would be distributed further around other media or social networking sites and read by the general public.
48. In relation to the two later articles we conclude they were written following a press conference given by MB on the 22<sup>nd</sup> February 2018 and at that press conference MB did say what he is reported to have said in both of the articles. We have received nothing to deny the content of either article, nothing to put either into a different context or to provide an alternative, or challenge to the translation. We have nothing to undermine them and we take the view that the articles speak for themselves, and given the circumstances, they can be relied on as an accurate recitation of the press conference.
49. The next question for the Committee was whether those remarks amount to misconduct. Do they as the EPCR allege (i) condone the use of foul and abusive (and homophobic) language by himself and others, are they (ii) discriminatory by reason of sexual orientation and/or religion and/or nationality and/or ethnic origin, and/or do they (iii) attack, disparage or criticise EPC

50. As part of these proceedings a number of previous cases heard in various rugby jurisdictions were provided to all parties including MB and to the Club in advance of the 4<sup>th</sup> July hearing. These cases related to similar or analogous misconduct cases. We have considered those judgments and generally rely on them in support of our ruling. In particular we refer to the case that gave rise to this case involving M Bastareaud. That case recognises that which is surely trite, namely that discriminatory comments are prejudicial to the game. The Committee in that case made the following comment;

*“Being gay has no negative implications and words which are negatively associated with homosexuality, particularly words such as “faggot” which in this context have an abusive connotation related to homosexuality, have no place in rugby; whether on or off the field of play.”*

51. We wholly endorse that finding and, in our opinion, to seek to justify the actions (or possible actions as it was then) of a player, who plays for the Club at which you hold a position of responsibility by saying “we are talking about an insult (faggot) that has entered the common language” is absolutely an attempt to approve of his behaviour or establish it as acceptable and thereby condone it. There was here no sense or prospect that the word “faggot” was used positively and to call any person a “fucking faggot” in a demeaning act and undoubtedly an insult.

52. By going on to say, “I’m not homophobic either but I have previously insulted someone by calling them faggot/queer (Pede was the French word used)” is exactly as the allegation suggests. MB is seeking to justify the behaviour by saying it is ok, despite the fact that he recognises, in his own words, that his own behavior was insulting. These words are a clear example of MB seeking to condone this homophobic language.

53. By going on to say “It’s like the use of this term has become common, its what comes first to mind first in case of altercation.....the only thing that humour does not belong to is paedophilia”. This is a further attempt to justify the behaviour by claiming it has become common place. We repeat the word “faggot” is not in any way a positive word. It only has negative connotations and is directed by the user as an insult relating to homosexuality. Such behaviour should be entirely rejected and marked as entirely

unacceptable. It has no place whatsoever within rugby and its use or the condoning of its use is discriminatory and brings the game of rugby into disrepute.

54. In the second part of the article MB said he is afraid of the “Mormon side of the EPCR with the Welsh and Irish.” This makes it clear he is directing his comments at two specific nationalities within the EPCR. He has therefore deliberately chosen to insult a group based upon their nationality having singled out those two groups to insult. He said of those groups, “*they are people who sell morality when they do not have it,*” and goes on, “*The same ones who have ministers who are being whipped in private but who present themselves as clean guys in public.*” These comments are, we find self-evidently, discriminatory and insulting. They are also disparaging and critical of the EPCR or parts of it and were made to a representative of the media.
55. In relation to the articles published on the 22 February and 23 February, we find that MB deliberately used that press conference in order to discuss the possible disciplinary proceedings he might face as a result of his earlier comments. He did so knowing it would result in, and positively encouraging, the onward publication of his views to as wide an audience as he could manage was inevitable. He said the hearing does not exist and said, before there had been any hearing or adjudication, that “it doesn’t respect French or European law.” He went on to deliberately and publicly undermine the disciplinary process of the Tournament. His suggestion that some people at the EPCR don’t like him, that a guy (at the EPCR) can’t stand him and that someone has it in for him, obviously amount to the making of comments to (many) representatives of the media which attack, disparage and criticise EPCR.
56. The second article reported MB’s comments, at the press conference, about the English. We find he sought to insult, by making various remarks about their use of money and their purported attitude toward the French language, culminate in the remark “they (the English) shit on us (the French).” This we conclude is discriminatory behavior, is insulting behaviour and is not in accordance with the Participation Agreement. .

57. MB goes on to discuss the translations, obtained by the EPCR, in disparaging terms, thereby once again discussing his disciplinary proceedings with representatives of the media.
58. MB went on to suggest that the French were funding the European Cup and that there was an unfairness to the French from the EPCR as to the distribution of the venues for the final matches. He said, “we are getting scammed on everything.” He continued his suggestion that the EPCR were scamming the French when he discussed some unfairness about the distribution of the pot created from TV rights. Such statements clearly constitute Misconduct as they breach clause 3.3.15 of the Disciplinary Rules.
59. We do not seek in any way to restrict what complaints MB is legitimately entitled to make about the EPCR. Naturally if he has such complaints he is perfectly entitled to address those privately to the EPCR. What he is not entitled to do (clause 3.3.15), given the Participation Agreement binds him, is to attack, disparage or criticise EPCR to representatives of the media.
60. For the reasons set out above we find that MB has committed the acts of Misconduct as alleged.
61. In relation to the Club we refer to and rely on the findings and reasons set out above in relation to MB. We are satisfied that the Club entirely failed to procure that MB use his best endeavours to enhance the reputation of the Tournaments and EPCR. This constitutes misconduct under the Media Rules 2.2 and 3.3.4 of the Disciplinary Rules. We are satisfied that the Club failed to ensure MB conducted himself in relation to his dealings with the media in accordance with the highest standards of disciplined and sporting behavior which amounts to Misconduct under clause 2.3.2 and 3.3.4 of the Disciplinary Rules. We have seen no evidence at all of anything which the Club did or tried to do to prevent MB committing these acts of Misconduct and they entirely failed to ensure that he did not commit them. We cannot see any evidence at all that the Club tried to exercise any control over MB. Consequently, we find they did not exercise reasonable or proper control over him. This amounts to misconduct under rule 3.3.5 of the Disciplinary Rules. We have taken into account the fact that MB is close to the Club and they should have the ability to control his actions. He is certainly sufficiently

proximate to the Club for them to try to do so and to have proper media policies and behaviour policies in place to prevent senior 'Persons' behaving in the manner which MB has. The Club are, in the circumstances which exist here, directly responsible and accountable for that conduct as if they had committed it.

62. In summary therefore, having considered all of the evidence provided and for the reasons set out above, the Committee concluded as follows in relation to the complaints.

- (i) The case was found proved against Mourad Boudjellal in relation to the first complaint of Misconduct which arose as a result of interview with M Bissonnet. We find that he did seek to condone M. Bastareaud's behavior, and he was discriminatory and insulting against various groups. We find what he said did amount to him making comments in connection with anticipated disciplinary proceedings and that he did make comments to a representative of the media which criticised EPCR and others. We conclude that this behavior did have the potential to and did bring the game of rugby into disrepute.
- (ii) The case was found proved in relation to the second complaint of Misconduct which arose as a result of press conference and the subsequent publication of two articles on the 22 February and the 23 February. We find that MB did say the things reported in these article and that the comments were made to representatives of the press and that they criticised EPCR. The comments were discriminatory and insulting and against various groups. We conclude that this behavior did have the potential to and did bring the game of rugby into disrepute.
- (iii) The case was also found proven against the Club. We find the Club did fail to procure that MB use his best endeavours to enhance the reputation of the Tournaments and EPCR. The Club failed to ensure MB conducted himself in accordance with the highest standards of disciplined and sporting behavior; failed to ensure he did not commit acts of Misconduct, failed to exercise reasonable or proper control over MB and that they are directly responsible and accountable for that conduct as if they had committed it itself.

## Sanction

63. We made an assessment as to the appropriate sanction based on a number of factors which included submissions advanced by the EPCR as to the type of sanction appropriate and the level of sanction appropriate. We are guided in passing these sanctions by clause 7.8.29 of the Disciplinary Rules which sets out a wide range of possible types of sanction between (a) – (h) the permissible sanctions. We have also had some regard to clauses 7.8.32 – 7.8.35 which set out various factors that assist in assessing starting points in other rugby disciplinary offences. Although providing some guidance, it is limited in these circumstances. We have been very much alive to the desirability of maintaining consistency within rugby sanctions for similar offences but we also recognise that all cases are unique to their own facts, this one offence in particular. In the interests of consistency we have reviewed all of the cases, which EPCR provided in the “sanctions and costs” bundle, and have assessed the sanction we pass with those cases in mind. We have concluded that the actions of MB, as the evidence demonstrates are in a more serious category than the previous cases we have been taken to.
64. We have identified a number of factors relevant to our assessment of the gravamen of MB’s actions.
65. MB’s remarks are off-field statements and are not, for example, directed discretely to another player or match official. They were made quite deliberately made to representatives of the media with the obvious consequence of wider distribution. We do not agree with the assertion that MB cannot be held responsible for, onward, additional publication. M. Boudjellal is someone in a position of responsibility at one of the top rugby clubs in the world. His actions are observed, and no doubt followed, by members of the public of all ages and backgrounds from within and from outside the rugby community. There is an obvious likelihood that his comments, views and opinions will generate interest amongst the media and social networking sites. It is obvious we conclude that his saying something to one or to a group of journalists will

inevitably result in wider publication. His comments will also have an influence on people's perception of whether and to what extent rugby upholds its core values.

66. We have a responsibility to pass a sanction which properly marks rugby's disapproval of the use, or condoning of the use, of any remark which is discriminatory or insulting. Such remarks only undermine the confidence and the desire of the majority of those involved in rugby to promote an entirely inclusive and diverse game.
67. MB's remarks are made worse because, (for the reasons set out above), they amount to misconduct under a number of areas of the Rules and the examples they provide.
68. Having considered all the alternatives open to us in relation to an individual, we have decided it would be appropriate to pass one total sanction that reflects the totality of the behaviour in both charges. We have also concluded that it would be most appropriate to pass a financial penalty against MB. It is important to point out that the EPCR provided MB with the opportunity to provide details of his means so that this Committee could take his representations into account. EPCR wrote to MB and copied in his lawyer setting out, as best they were able, what they understood MB's financial position to be. MB declined to provide any information. In fact he and/or his lawyer appeared to take offence at being given this opportunity. MB did not however dispute the position which had been set out by the EPCR. We have arrived at this sanction we have on the basis that MB is a man of significant means who will not have any real difficulty paying the financial penalty and costs which we have imposed.
69. We consider this case to be a very serious example of offending of this type. Having used the words he did to M. Bissonnet, MB went on to continue the offending and to make it worse at the subsequent press conference. Over the course of this offending he discriminated against and/or insulted a number of different groups with no regard to the effect on them, to rugby in general or to the Tournament.
70. The EPCR submits the sanction should be aggravated as a consequence of MB's record of previous offending and also as a consequence of the way in which he and in the case of the Club they have conducted themselves. We agree. The previous offending is of a

type, which shows repeated behavior and it is of a similar type. One of those similar matters occurred in very close proximity to these.

71. We have taken little account of two matters in 2008 but in January 2012 MB was disciplined by Ligue Nationale de Rugby for making public statements during a press interview. His comments were published and included matters relating to a referee's integrity

*"I experienced my first refereeing sodomy in the 2009 semi-final against Clermont. I've just had my second tonight. I'm told the first time is painful but it is just as painful the second time...."*

*Clermont is a terrific team. They did not need that. They are stronger than us, we know that. But tonight, here we are, we need a bit of fairness so that, from time to time, we are able to do amazing things.*

*We can watch the footage again – not on YouTube but on You Porn."*

72. We found it was significant that on the 4<sup>th</sup> January 2018 (just 10 days prior to the incident we are dealing with) MB was again disciplined by Ligue Nationale de Rugby for making comments in public relating to a referee's integrity.

73. We understand these included; *"Either there is a plot against us, either I don't know what's happening. Clearly they are biased against us. And in this case, it is obvious. Quite in your face... The first try we had to concede to Clermont, was a knock-on. In Bordeaux, knock on 4 metres out, on the first try. In Agen, 10 minutes before the end, we lost the referee. We could not find him. He wasn't there any more to blow the whistle for us. On Sunday, Mr Charabas was true to self ... When it comes to referee, when they're refereeing for our matches we're scared."*

*"[...] I feel we're back in the old days in `Saint Etienne, when I was talking about Mickey Mouse refereeing. They're biased against us, they're plotting against us or I don't know what else it could be. Before that, referees were crafty, acting discreetly. Now they do it openly. Are they not ashamed to be ok with this? At the end of the day, we've missed out on points that would have given us confidence ... But it's the same for all matches! The problem is that referees are the poor*

*relatives of professional rugby. They're still amateurs. Take Charabas: he's a doctor! You can't be a medical doctor and a referee at the same time! ...*

74. For this offence MB was banned for 8 weeks. It follows therefore that the comments to the media made in the instant case were each made at a time when MB was serving a ban imposed for making public comments about the integrity of referees. This is a further reason why another ban, which appears to have little effect, would not be an appropriate sanction here. The fact that these offences took place during a period of suspension is, we conclude, a further reason why the instant sanction should be aggravated.

75. We repeat that when considering the question of aggravation as a result of his conduct in these proceedings we have put out of our mind the communications of M. Goldnadel to the Chairman of this Committee. We do however find that the remainder of MB's conduct in these proceedings has been so exceptional that it warrants an increase in sanction to reflect that aggravation. His behaviour has gone well outside the behaviour that could reasonably be expected. It has not simply been a case of an individual who has robustly challenged all aspects of the allegation, as of course would be his right. He has ignored directions, refused to accept rulings of the panel, failed to attend at the hearing, he has apparently instructed his lawyers to send documents in French despite rulings and M. Chevalier's ability to communicate in English. MB has persistently replied to any communication with a short, often derisive reply in French, advising that he does not speak English and, despite the rulings and directions of this panel, repeatedly asked for communications to be in French. He has failed to attend at the hearing despite all reasonable attempts having been made to accommodate him and his lawyers.

76. As for mitigation we have been provided with no evidence which can amount to any mitigation on behalf of MB.

77. Having regard to previous less serious cases and the factors set out above, the total sanction we pass in relation to MB and charges 1 and 2 is an immediate fine of €75,000 and with a further fine of €25,000 suspended for a period of 3 years. That suspension will be effective from the time of sending this judgment (09:00hrs (UK) on the 17<sup>th</sup>

July 2018) until a day exactly 3 years later. The suspension will be lifted, and the sanction will become effective in the event of any similar offending or misconduct by MB in any rugby jurisdiction.

78. In relation to the Club we have also considered a number of factors when arriving at the appropriate sanction. For example, it is relevant that MB is the President of the Club and consequently the Club should easily be able to exercise control over him if they chose to do so or had any or proper procedures and governance in place to do so. We take the view that the Club ought to have prevented MB giving the type of interview he did with M. Bissonnet. We believe they could have done so. Once he had given that interview, and the article had been published however, it was obvious to the Club that MB was intent on engaging with the situation concerning M. Bastareud and it was incumbent on them to prevent what happened in the subsequent press conference. In any event, by the regulations, the Club is liable for MB's actions as if they were their own.
79. In this case liability cannot be mitigated because we have not been provided with any evidence from either the Club or MB. There is, for example, no evidence before us of attempts which the Club made to prevent or persuade MB from doing what he did.
80. We have, however, been provided with a schedule (tab 9 sanctions and costs bundle) setting out the Club's record, both relating to the Club itself and for individuals at the Club for off-field offences. Those offences spanned the 2011/12 season – 2017/18 season. They included in 2017 an altercation between the Clubs coach and an opposition coach on the pitch side, in 2015/16 the improper behavior of M. Delmas in relation to a match official, in 2013/14 when the General Manager of the Club made improper remarks in a radio show in January 2014 about a referee and in 2011/12 when the same individual again made improper remarks against the referee during two separate matches.
81. The evidence of this previous offending demonstrates that the Club has persistently failed in its responsibility to control its personnel. That has happened with sufficient frequency to warrant this sanction being aggravated.

82. Taking into account all of the circumstances, as we find them to be, the sanction we have considered appropriate is a 5-points deduction from the EPCR Tournament. This deduction will be suspended for a period of three seasons. In real terms this sanction means that if there is any repeated similar offending by the Club or any 'person' within it (as defined by the EPCR regulations), in any rugby jurisdiction, the Club will be deducted 5pts (or the equivalent maximum number of points for a one match victory) in any of the 2018/19, 2019/20 or 2020/21 seasons.

### **Costs**

83. The EPCR applies for a costs order in the sum of €145,000 pursuant to rule 7.8.45 which gives this Committee, in Misconduct cases, a discretion in exceptional circumstances to order any party or parties to pay some or all of the costs of proceedings. Those costs can include costs of holding the hearing and legal/or travel/accommodation cost. This is, we conclude, an example of truly exceptional circumstances. Neither MB nor the Club have done anything to expedite, or to assist with the efficiency of these proceedings or to mitigate the costs incurred. We also recognise that the costs asked represent a large sum of money, but this case has involved complex issues of law, cross-jurisdictional law as well as complex matters of fact, all of which the EPCR will have needed and are entitled to take specialist advice in relation to. We make it clear we do not award costs against MB or the Club as a consequence their seeking to defend themselves. As we have already said that is their right. Here however they have almost entirely failed to engage with the process. They have failed to comply with directions, ignored directions and rulings and by their behaviour have caused these proceedings to become protracted and very expensive. We do not feel it would be right to for the EPCR and ultimately the game of rugby to bear those costs.

84. That said we do recognise part of the costs claimed relate to the issue arising from the original allegation (now withdrawn) about the text message. We do not think it right to award any costs in relation to that aspect of the case. We also recognise that some of the costs claimed arise from dealing with the preliminary issues. We do not feel we should award costs as a consequence of MB taking those points, even though we ruled against him in relation to all. During and after that ruling however there has been little

or no productive engagement in the proceedings by either MB or the Club. We therefore order that both MB and the Club each pay the sum of €50,000 in costs. It follows that doing our best to make a fair assessment we have felt it proportionate to deduct the figure applied for by €45,000.

85. Both MB and the Club have the right to appeal this decision pursuant to rule 8.2.1, any appeal must be lodged by 16:00hrs (UK) on Friday the 20<sup>th</sup> July 2018. The notice of appeal must comply with rule 8.2.1(b).

The Committee

Dated 17<sup>th</sup> July 2018.