

EUROPEAN RUGBY CUP

DECISION OF APPEAL COMMITTEE IN APPEAL BY MARIUS TINCU

**HELD AT THE OFFICES OF BIRD & BIRD SOLICITORS, 15 FETTER LANE,
LONDON**

12 NOVEMBER 2008 (“the Hearing”)

IN RESPECT OF:-

An appeal by Marius Tincu (“the Player”) against the decision of a Disciplinary Committee dated 5 November 2008, finding that the Player had committed an act of foul play, upholding a citing complaint and suspending the Player for a period of 18 weeks.

MEMBERS OF THE APPEAL COMMITTEE (“the Appeal Committee”):-

Rod McKenzie (Chairman) (SRU)

Achille Reali (Italian RFU)

Christopher Quinlan (RFU)

DECISIONS OF THE APPEAL COMMITTEE:

- (1) that the Player’s application for a *de novo* hearing before the Appeal Committee be refused; and
- (2) that the Player’s appeal against the decision of the Disciplinary Committee that he had committed an act of foul play and that the citing was upheld be refused and that accordingly the appeal is dismissed.

1. INTRODUCTION

The Appeal Committee was convened by Professor Lorne D. Crerar, Chairman of the ERC Disciplinary Panel, pursuant to the Disciplinary Regulations of the Heineken Cup 2008/2009 (“DR”) in respect of a citing complaint made by Douglas Hunter, Citing Commissioner dated 20 October 2008 against the Player relative to an incident of alleged foul play during the course of a match between Ospreys and USA Perpignan played at Swansea on 18 October 2008. The citing complaint alleged that the Player had committed an act of illegal and foul play *viz* a contravention of Law 10.4(k), acts contrary to good sportsmanship, in that the Player made contact with an opponent’s eye.

The citing complaint was considered by a Disciplinary Committee at a hearing on 4 November 2008. The Disciplinary Committee issued its decision on 5 November 2008 (“the Decision”).

The Player denied having committed the act of foul play alleged in the citing complaint. The Disciplinary Committee upheld the citing, found it established that the Player had committed the act of foul play alleged, categorised the offence as at the “Top End” range with an entry point of 24 weeks, applied a degree of mitigation and imposed a period of suspension of 18 weeks from 4 November 2008 until 9 March 2009.

The Player appealed by Notice of Appeal dated 7 November 2008. In accordance with DR 7.2(b), third bullet point, an Appellant is obliged to state in his Notice of Appeal, amongst other things, the specific aspect of the decision which was being challenged on appeal. In this case the Player in his Notice of Appeal chose to challenge only the finding that he had committed the act of foul play alleged in the citing complaint and the upholding of the citing complaint by the Disciplinary Committee. No appeal was taken by the Player against the level of sanction that

had been imposed by the Disciplinary Committee. Monsieur Beque, representing the Player at the hearing of the appeal, confirmed that no appeal was taken against the level of sanction imposed.

The Appeal Committee sat on 12 November 2008 to consider the appeal.

On 14 November 2008 the Appeal Committee issued an advance notification of its decision. The decisions of the Appeal Committee in that advance notification are the same as the decisions set out above.

In addition to the members of the Appeal Committee there was present during the hearing on 12 November 2008:-

The Player

Pierre Beque (Avocaat), appearing for the Player

Roger O'Connor – Disciplinary Officer, ERC

Max Duthie (Solicitor), appearing for the Disciplinary Officer

James Herbert (Bird & Bird, solicitors), assisting Mr Duffy

The following documentation and other materials were considered by the Appeal Committee:-

1. Citing Commissioner's report.
2. Hearing notice and directions.
3. Email referring to referee comments.
4. Email from Wayne Burns.
5. Statement by Paul James.

6. Statement by Dr Crane.
- 7., Three photographs of injuries suffered by Paul James.
8. Statement of Ian Evans.
9. The decision.
10. A DVD with footage of the cited incident and surrounding circumstances.
11. Notice of Appeal.
12. Transcript of evidence of Paul James given at the hearing before the Disciplinary Committee.
13. Transcript of evidence of the Player given at the hearing before the Disciplinary Committee.
14. Directions statement by the ERC Disciplinary Officer.

2. FUNCTION OF APPEAL COMMITTEES IN TERMS OF ERC DISCIPLINARY RULES

The Heineken Cup Disciplinary Rules are comprised within schedule 4 to the Participation Agreement of the Heineken Cup 2008/2009 and are part of the Terms and Conditions of the tournament. Per clause 3.9 of the Participation Agreement it shall be governed by and construed in accordance with the laws of the Republic of Ireland.

No evidence was led before us of the Disciplinary Committee or any submissions made, that any part of the Participation Agreement, including the Disciplinary Rules, were not consistent with the law of Ireland. Accordingly, we proceeded on the basis that the Disciplinary Rules were in accordance with the laws of that country.

In accordance with clause 1.4.4. of the Participation Agreement, all of the players of a Club

participating in the Heineken Cup 2008/2009 were obliged to have procured that those players signed and returned an Acknowledgement and Agreement Form in accordance with appendix 6 to the 2008/2009 Anti-Doping Programme. That Anti-Doping Programme is itself schedule 5 to the Participation Agreement.

Paragraphs 1 and 2 of that Acknowledgement and Agreement Form constitutes an agreement by players taking part in the tournament to be bound by, amongst other things, the Disciplinary Rules at schedule 4 to the Participation Agreement.

Accordingly, the Player was bound, as a matter of contract, by the Disciplinary Rules and he agreed to participate in the 2008/2009 tournament on the basis of those Disciplinary Rules.

In the usual course of events the primary fact-finding tribunal in the case of players ordered off or cited is the Disciplinary Committee.

In the case of a citing the burden is on the Disciplinary Officer to prove, on the balance of probabilities, that the Player cited committed the act or acts of Foul Play specified in the citing complaint (DR 6.7.11).

Formal rules of evidence do not apply to hearings before the Disciplinary Committee. The Disciplinary Committee has discretion to receive such evidence as it thinks appropriate and to attach such weight to that evidence as it sees fit (DR 6.7.18). There is no requirement in the Disciplinary Rules that evidence must be corroborated in order to achieve proof on the balance of probabilities required by DR 6.7.11.

In a citing, where the Disciplinary Officer meets the burden of establishing that the act or acts of

foul play specified in the citing complaint was/were committed on the balance of probabilities, then the Disciplinary Committee shall uphold the citing complaint (DR 6.7.11). It is for the Disciplinary Committee to decide whether or not it has been proved that the cited act or acts of foul play happened. The burden of proof is on the Disciplinary Officer to prove to the satisfaction of the Disciplinary Committee on the balance of probabilities that the cited act or acts happened. If a Disciplinary Committee is in doubt to the extent that it is not satisfied that act of foul play alleged was committed by the player concerned then the doubt is resolved in favour of the cited player because the Disciplinary Officer has failed to discharge the burden of proof placed on him by DR 6.7.11.

Proof on the balance of probabilities is no more than the Disciplinary Committee being satisfied that the fact in question e.g. whether the cited act or acts of foul play were more likely than not to have happened.

The standard of proof required does not change based on the seriousness of the act or acts of foul play cited. The seriousness of the foul play cited is one component within the whole range of circumstances which have to be weighted in the scale when deciding as to whether the Disciplinary Officer has discharged the burden of proof on him on the balance of probabilities.

Subject to the issue of whether the Appeal Committee should consider an appeal *de novo*, see paragraph 3 below, the Appellant in an appeal before an ERC Appeal Committee has the burden of proving that the decision being challenged was both in error and that it should be overturned or varied. Except in the case of a *de novo* appeal, the function of the Appeal Committee is not to review all of the evidence which was before the Disciplinary Committee and then to come to its own conclusions as to whether or not that evidence establishes on the balance of probabilities that the cited act or acts of foul play occurred. ERC Appeal Committees are only entitled to interfere

with a determination on a matter of fact by the original Disciplinary Committee where the Appeal Committee concludes that such determination was not consistent with the evidence before them. In making the assessment as to whether the evidence was consistent with such a determination by a Disciplinary Committee a margin of appreciation is to be accorded to the determination being challenged. This is consistent with the decisions of previous ERC Appeal Committees in the cases of Alan Quinlan, Gerry Flannery and Alexandre Audebert.

3. DE NOVO HEARINGS BEFORE APPEAL COMMITTEES

DR 7.4.8 permits Appeal Committees to determine appeals as a *de novo* hearing only where it is shown that the circumstances in which the matter is brought before the Appeal Committee are exceptional and that there are compelling reasons why the Appeal Committee should hear the case *de novo*. The circumstances in which *de novo* hearings will be allowed by Appeal Committees were discussed in the Alan Quinlan decision referred to above. Since that decision the circumstances in which *de novo* hearings may take place have, if anything, narrowed by the introduction of the requirement in the Disciplinary Rules that the circumstances should be “exceptional” as well as there being compelling reasons why a *de novo* hearing should take place.

4. NOTICE OF APPEAL AND APPLICATION FOR DE NOVO HEARING

In his Notice of Appeal, the Player advanced an argument that the Appeal Committee should hear his case *de novo*. The arguments advanced in the Notice of Appeal for a *de novo* hearing were as follows:-

- “He [the Player] always denied having made any contact, by his finger, with the eye or eye area of Mr Paul James (Ospreys’ player number 1) playing as left during the game;
- The match referee, who was standing close to the scrum, did not see anything and whistled

penalty against Ospreys;

- In the same way the touch referee did not see anything;
- The citing commissioner did not see any Foul Play during the match and declares in deciding the complaint that from his examination of the available TV evidence he could not immediately detect the action referred;
- The Disciplinary Committee after watching several times the tape of the match, could not see any evidence of the offence;
- The latest witness, Mr Ian Evans, called by phone during the hearing could not give sufficient evidence;
- Neither Mr James, nor Mr Evans could remember that the supposed author of foul play was wearing gloves (mittens) during the game;
- There was no evidence of blood and there wasn't direct injury after the supposed facts;
- Mr Tincu has always been an honest professional player since 2002 when he started in France his professional career."

In addition, the Notice of Appeal asserted:-

"Thus, there is no evidence that Mr Marius Tincu is guilty of any facts and especially contravention of law 10.4(k)."

During the course of the appeal hearing Monsieur Beque reiterated each of these points as forming the basis as to why the Appeal Committee should hear the case *de novo*.

In addition, he drew the attention of the Appeal Committee to the following sentence in paragraph 22 of the decision:-

“Tincu was concussed and, although he said he could remember all of what had occurred before the punch but little or nothing after, we believe that he may not have remembered everything that led up to the blow to his head.”

Monsieur Beque submitted that this demonstrated that the Disciplinary Committee had reached a medical conclusion that the effect of the concussion that the Player had suffered after being struck by Mr James had affected his memory prior to the blow as well as his memory after the blow.

The background to this is that immediately after the cited incident Mr James had struck the Player using his fist or arm which had caused the Player to fall to the ground. Mr James’ position was that he had done this in retaliation for the eye contact initiated by the Player on him. There was evidence before the Disciplinary Committee that the Player had suffered concussion following this blow which had continued after the match.

Monsieur Beque argued that if, as he contended, the Disciplinary Committee had considered that Mr Tincu’s memory had been affected by this punch in relation to events prior to the punch then that was a matter which had not been part of the evidence before the Disciplinary Committee, and parties had not been allowed to make representations to the Disciplinary Committee in relation to a question that the blow to the Player’s head had affected his memory of events prior to the blow.

In response to the application for *de novo* hearing Mr Duthie, on behalf of the Disciplinary Officer, relied on the detailed written response to the arguments advanced in the Notice of Appeal as set out in the directions statement by the ERC Disciplinary Officer. In essence Mr Duthie argued that there was nothing which was either exceptional or compelling in the arguments advanced on behalf of the Player which would entitle the Appeal Committee to hold a *de novo* hearing. In relation to the sentence a paragraph 22 of the decision Mr Duthie argued that there

was nothing in the sentence which would indicate that the Disciplinary Committee were there reaching a conclusion in relation to the Player's memory of what happened based on the effects of the punch. He contended that in the sentence the Disciplinary Committee was doing no more than reflecting that they had reached the conclusion that notwithstanding that the Player claimed that he could remember everything which occurred before the punch that in fact his memory of what occurred before the punch was not as good as he claimed that it was. This was, Mr Duthie argued, part of the analysis which led the Disciplinary Committee to prefer as more reliable and credible the version of events spoken to by Mr James to the version of events given by the Player.

The Appeal Committee is constrained by the terms of DR 7.4.8. There are differences between appeal jurisdictions and procedures within the different countries which comprise the European Cup area. There are differences even between England and Scotland and no doubt there are even greater differences between Ireland and France and Ireland and Italy, but Appeal Committees must proceed on the basis of what we understand to be the law of Ireland since that is the law which governs the Participation Agreement under which the tournament is held.

DR 7.4.8. has a number of components. It starts off with a statement about the conduct and regulation of appeal proceedings. What that is concerned with is the proceedings under which the appeal takes place, the circumstances of the case and the basis on which the appeal will proceed but there is then a stated exception in relation to *de novo* hearings and then the direction as to the general basis of the appeal.

If an Appeal Committee allows a *de novo* hearing on appeal it would be as if there had been no disciplinary hearing, the clock would effectively be reset, it would be for the Disciplinary Officer to then bring before the Appeal Committee whatever evidence he chose to bring in support of the citing and it would be for the player to bring whatever evidence he chose to bring in defence of

the citing. The parties did not indicate in this case that there was any evidence which they would intend to bring to a *de novo* hearing which was not before the Disciplinary Committee. There was no suggestion of any fundamental unfairness in the way the Disciplinary Committee approached the disciplinary hearing and there was no suggestion of bias or serious procedural irregularity.

It is of the essence of the task of Disciplinary Committees that they will reach conclusions about the reliability and creditability of different elements of the evidence. It is apparent from the Decision that the Disciplinary Committee in this case accepted the evidence of the club doctor, which was not controversial. They accepted Mr James' evidence. They found Mr Evans' evidence should be accorded little weight, presumably because they did not find him a reliable or credible witness and they chose not to accept the Player's evidence.

The Appeal Committee considered carefully the submissions made by Monsieur Beque concerning the penultimate sentence in paragraph 22 of the decision. In particular we considered whether what the Disciplinary Committee was saying there was based upon some medical evidence or opinion not disclosed to parties, some expert opinion that the committee may have received externally or from a member of the committee or whether it was simply a way of the committee expressing itself as to why there were not accepting as reliable the Player's evidence. The Appeal Committee concluded that all that the Disciplinary Committee were saying in this sentence was that the Player's recollection of events prior to the punch was not as reliable as he claimed and that they found his evidence to be unreliable for this reason. They were not reaching this conclusion based on undisclosed medical evidence or opinion that this unreliability was as a consequence of the punch to the Player's head by Mr James. This was a conclusion the Disciplinary Committee was entitled to reach as part of its fact-finding task.

The Appeal Committee did not consider that any of the grounds advanced in the Notice of Appeal or the additional oral submissions made by Monsieur Beque led to a conclusion that there was anything exceptional about this case or that there was anything that compelled that the evidence in the case had to be reheard at a *de novo* hearing. All of the factors relied on in the Notice of Appeal are circumstances which are commonplace in citing cases before rugby disciplinary bodies. There is nothing exceptional about them and nothing which is peculiar to this case which compels a *de novo* hearing. For these reasons we declined the application for a *de novo* hearing.

5. SUBSTANTIVE APPEAL

Having notified parties at the appeal hearing that the application for a *de novo* hearing was refused Monsieur Beque then made submissions to the Appeal Committee as to why the Decision as regards the allegation in the citing complaint of foul play on the part of the Player was in error and should be overturned.

On reviewing the evidence Monsieur Beque pointed out that there was no video evidence which showed any contact between the hand of the Player and the eye of Mr James. Indeed, the video did not show Mr James and the Player being together on the ground at the same time or show the Player above Mr James with his hand stretched out towards Mr James. Monsieur Beque pointed out that the Disciplinary Committee had not found Mr Evans to be a reliable and credible witness and that they had accorded his evidence little weight. Furthermore, the Disciplinary Committee had found, as a matter of fact, that the injury to the eyelid of Mr James had not been occasioned during the incident for which the Player had been cited. Monsieur Beque contended that the only evidence against the Player was the evidence of Mr James and that this was not sufficient for the Disciplinary Committee to hold it established that the Player had committed the cited act of foul play.

In response Mr Duthie submitted that there was sufficient evidence before the Disciplinary Committee for it to conclude, on the balance of probabilities, that the Player had committed the act of Foul Play specified in the citing complaint. Mr Duthie submitted it was not for the Appeal Committee to seek to review that evidence and come to its own conclusion as to whether or not the Disciplinary Officer had discharged the burden placed upon him by DR 6.7.11. The task of the Appeal Committee was to determine whether in light of the evidence relied upon by the Disciplinary Committee the Disciplinary Committee was entitled to come to the conclusion that the burden on the Disciplinary Officer had been discharged. In Mr Duthie's submission there was sufficient evidence before the Disciplinary Committee to discharge that burden notwithstanding that the Disciplinary Committee had accorded little weight to the evidence of Mr Evans and had held that the injury to the eyelid of Mr James had not been occasioned during the cited incident.

At paragraph 19 of its decision the Disciplinary Committee under reference to DR6.7.11 stated:-

“The balance of probability is a sliding scale: the more serious the allegation, the less likely it is that the event occurred and hence the stronger the evidence needed to prove that it did occur. Allegations of contact with the eyes are serious and carry significant sanctions if proved. In such cases, therefore, Disciplinary Committees need stronger evidence than just sufficient to show that the events were more likely than not to have occurred.”

The Disciplinary Committee is here reflecting that the seriousness of the incident does not change the nature of the proof required in order to establish that the cited event occurred. The basis of proof remains the balance of probabilities. However, the more serious the incident the less likely

that the incident will have occurred. The gravity or seriousness of that which is alleged is a component of the circumstances which have to be weighed by the decision maker in deciding as to the balance of probabilities.

However, the seriousness of the allegation as a factor in judging where the balance of probabilities lies has to be accorded such weight as is appropriate in the circumstances of a match of professional rugby union. Rugby is a game which involves significant physical contact. Incidents of foul play are not uncommon. Incidents of serious foul play are regularly adjudicated on by disciplinary bodies. The seriousness of an allegation of contact with the eyes of an opponent needs to be placed in the context of a game of rugby at the level of the particular matter in question. A game of professional rugby is not to be regarded in the same context as, for instance, in the case of two strangers who happened on each other on the street and where one alleged that the other had come into contact with his eye. The respective probabilities of the alleged act having occurred, using his hand, are different as between the two contexts.

The Disciplinary Committee had the advantage of hearing the evidence given by the Player, Mr James and Mr Evans. The Disciplinary Committee was in a much better position than the Appeal Committee to judge the credibility and reliability of the evidence which they heard. In cases where credibility and reliability are in issue, as was the case here, this advantage is significant and an Appeal Committee in such circumstances will be slow to interfere with decisions on matters of fact taken by a Disciplinary Committee. This recognises that where a Disciplinary Committee has observed the witnesses and considered their evidence the decision of the Disciplinary Committee on issues of fact is much more likely to be correct than the decision of the Appeal Committee which has not had the advantage of hearing the same witnesses. This is part of the margin of appreciation to be accorded to the decision of a Disciplinary Committee.

In this case, the Disciplinary Committee found that the evidence of Mr James was reliable and credible. He identified the Player as the person who had used his fingers to come into contact with Mr James' eye and he gave evidence that he had a clear sight of the face of the Player at the time that the incident occurred. Mr James had, by his evidence, been in no doubt as to the commission of the act of foul play and who had committed same. His evidence that foul play had been committed was supported by the medical evidence which confirmed the injury to the surface of his eye. His immediate reaction after the incident was to strike out at the Player in an aggressive and directed fashion. This was consistent with a player retaliating after having suffered an act of serious foul play on his person. Furthermore, there was the complaint made by Mr James to the referee of his eye having been "gouged" by the Player, notwithstanding that no action was being taken by the referee against Mr James in relation to the punch to the Player by Mr James. Mr James was in effect drawing attention to himself when he was not himself being penalised and was complaining of the foul play that he had suffered.

Whilst not evidence, in itself, of the act of foul play alleged the video evidence is consistent with the version of events spoken to by Mr James, in that it shows Mr James and the Player rising next to each other from the ground immediately prior to Mr James throwing the punch which struck the Player.

In all the circumstances, the Appeal Committee is satisfied that there was sufficient evidence before the Disciplinary Committee, which the Disciplinary Committee accepted, to entitle the Disciplinary Committee to find it established that the burden on the Disciplinary Officer to prove the allegation of foul play on the balance of probabilities had been discharged per DR 6.7.11 . In such circumstances the Disciplinary Committee was bound to uphold the citing as it did. There was no error on the part of the Disciplinary Committee in the approach that it took to determine this matter and accordingly the Appeal Committee refused the Player's appeal.

6. COSTS

Parties are invited to make whatever application(s) they consider appropriate in relation to costs by email to the clerk to the Appeals Committee within 7 days of the date of this decision. If any application is made in relation to legal costs then the amount of legal costs should be stated together with a breakdown as to how the costs have been calculated. If any party wishes to argue that it would have difficulty in meeting any costs which may be awarded because of their financial circumstances then those should be disclosed to the clerk by the same means within the same period.

Rod McKenzie
Chairman
Appeal Committee
25 November 2008