

Decision of the Independent Judicial Officer

ERC

Held at IRB Conference Room, Huguenot House, Dublin

On 16th December 2010

In respect of

Paul O’Connell, Munster (“the Player”)

And

The award of a red card for striking an opponent in the match between Munster –v- Ospreys at Thomond Park on 12 December 2010

Judicial Officer appointed to hear the case:

His Honour Judge Jeff Blackett (England) (the Judicial Officer)

Decision of the Judicial Officer:

- (i) The Judicial Officer determined that the Player’s challenge to the referee’s decision to order him off should not be upheld;
- (ii) As the Player’s challenge was dismissed, the Player was suspended from taking part in the game of rugby up to and including 9 January 2011. This represents a 4-week suspension commencing on 12 December 2010. The Player is free to play again on or after 10 January 2011;
- (iii) The Judicial Officer made an award of all reasonable costs incurred by ERC against the Player in a sum to be determined within 14 days.

Introduction

The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2010/2011. The Judicial Officer was appointed to consider the Ordering Off of the Player in the match played between Munster and Ospreys on 12 December 2010 in the Heineken Cup 2010/2011. Christophe Berdos was appointed as referee to this match and had ordered the Player off for striking an opponent with the elbow contrary to Law 10.4(a).

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

- Mr Roger O'Connor, Disciplinary Officer, ERC
- Mr Max Duthie, Counsel for IRB
- The Player
- Mr Donal Spring, Counsel for the Player
- Miss Avalon Everett, Solicitor
- Mr Shaun Payne, Team Manager Munster
- Mr Christophe Berdos, Referee giving evidence by telephone conference

The Player complied with the standard pre hearing directions and did not raise any preliminary matters.

The Judicial Officer reviewed the Ordering Off, including the referee's reasons, in accordance with Disciplinary Rule 6.2.2. The Player indicated before the hearing that he did not accept the Referee's report as a true and accurate account of the incident and he did not accept that he should have been Ordered Off. The Player stated that he wished to contest the Referee's decision because the Referee stated clearly on three separate occasions and in his report that the Player struck an opponent (Ospreys No 8 Jonathan Thomas) with his elbow. The DVD footage showed that contact was made with the arm and not with the elbow. The Player submitted that the Referee's reasons for issuing the Red Card were, therefore, wrong. Had he known the true facts he would not have ordered the Player off, rather he would have awarded a penalty kick or, at most, a Yellow Card.

Evidence supporting Ordering Off

The ordering off report stated:

At the 29th minute I was on a penalty advantage against Munster after offside at the line out, Ospreys was playing it by No 8 of Ospreys, at the following breakdown, joined it by the wrong side. I blew my whistle for coming back to the initial advantage, and in the same time, this Ospreys player (No 8) was holding the No 19 of Munster (Paul O'Connell), and then, this player of Munster struck with his elbow on the face of No 8 Ospreys; this player leaving the pitch because bleeding after that.+

The Referee gave evidence by way of telephone conference. He said that he has reviewed the incident on DVD and seen that the Player did not hit Thomas with his elbow but with his arm around the wrist area. He said that at the time he perceived that the Player used an elbow and that he now knows he got that wrong. However that fact made no difference to his assessment of the seriousness of the offence because whether the Player used his arm or elbow, it was the fact that he struck Thomas in the face which made this a dangerous act. He also stated that he believed that the Player's action was a reactive gesture probably to try to free himself from Thomas who was holding his shirt. He did not believe that he intended to injure or harm Thomas. He was pressed by Mr Spring about the difference between using the arm and using the elbow. However Mr Berdos said that although when he ordered the Player off he thought he had used the elbow he repeated that if he had known then that he had used the arm he would still have ordered him off.

The DVD footage indicated that the incident occurred in the 69th minute. Ospreys were attacking from a breakdown on the right side of the pitch with the ball being passed through the hands of their backs. An Ospreys player running in the centre took the ball into contact, was tackled and went to ground as a ruck began to form. The Player approached the breakdown from the side and then went to the back so that he could move into the pillar position legally. As he was moving towards the breakdown Ospreys No 8 (Jonathan Thomas), who was at the side of the breakdown, continued to move forward and grabbed the Player's midriff with his left hand holding his shirt. Both players moved to behind the breakdown on the Munster side with Thomas behind the Player with his left hand holding the Player's shirt and with his right arm held upwards.

The referee blew his whistle and almost simultaneously the Player pushed back with his left hand making contact with Thomas's left shoulder, and then he swung his right arm backwards. It was a full swing delivered with some force and he struck Thomas in the face, hitting him with his arm around the wrist or just above it. As he made contact the Player's head swivelled to the right so that at the time of impact he was looking sideways towards Thomas who immediately fell to the ground. The Player walked away, spreading his arms outwards as if to protest his innocence and then glanced back. Shortly after he was called over to the referee and before a red card was issued he said: "He's pulling me back, I swung my arm. I barely touched him"

Statements written by Jonathan Thomas and Doctor Gareth Jones were presented within the ERC bundle. Thomas stated that he had let the Player go and was jogging back to get back into play when an arm was flung round. He described it as a decent strike to his lip. He did not see it coming and wondered what had happened as it was so fast. He said it was a powerful blow which knocked him to the ground and it took a period of time for him to compose himself and get up as there was a lot of blood. He said that the Player apologised to him after the game and he accepted that. Doctor Jones stated that Thomas sustained a mid-line full thickness laceration to his upper lip which required careful cleaning before the insertion of six fine sutures. The ERC bundle also contained photographs

showing the injury after it had been sutured. It appears from press releases that Thomas will be fit to play in the next match scheduled for the following weekend.

Player's challenge

The Player said that as he approached the ruck he decided to move into the pillar position and Thomas took him out. As he was being pulled back he threw his left arm back to try to get away and re-enter the game. He did not hear the referee's whistle and remained anxious to take up position so, as his first attempt had been unsuccessful, he threw his right arm back. He said he did not expect to make contact when he did. He thought Thomas was to his left or behind him and the impact was a lot earlier and more forceful than he thought. He did not lose his temper or feel aggravated and he was shocked when he did hit him. He did not think the blow was as hard or as bad as it was. He did not think Thomas saw his arm swinging around and he certainly did not mean any harm. He said that contact was with his forearm area just above the wrist. He suffered bruising which appeared there afterwards. He stressed that he did not intend to hit Thomas in the head, rather he wanted to break his bind so that he could get away. He accepted that some contact was inevitable if Thomas had not moved away but thought that would be at the end of the swing not in the middle. If that had occurred his arm would have been lower and would not have hit Thomas's head. He accepted that he did cause Thomas's injury but he did not realise he had hit him in the face until he looked back as he walked away.

Submission on whether referee had erred

Mr Spring, on behalf of the Player, said that there were two reasons why the red card should be dismissed and the Player cleared of any wrongdoing.

First, it was clear that the Player did not strike Thomas with his elbow. In rugby terms striking with the elbow is particularly heinous - the recommended sanctions table in the Disciplinary Rules provides a higher Top End entry point for striking with the elbow - and deserves an immediate red card. However the Player did not set out to strike but simply meant to make Thomas let go so he could rejoin the game. It was very unfortunate that Thomas moved to the Player's right hand side without him knowing. In effect Thomas ran into the impact. The Player's swing was long and any impact should have been at the end of the swing from rather than in the middle. In reality the injury was not intentional but accidental. Mr Spring said that if one player pulls another player's jersey to impede him in some way then he should expect the held player to swing his arms to try to get free. This is what occurred here, and Thomas was right when he described the action as an arm being flung round. There was no intention to punch an opponent and the evident surprise shown on the Player's face in a photograph taken immediately after the contact corroborates his assertion that the contact was accidental. If the act was accidental then there was no foul play and there should have been no red card.

Second, the sole reason for the referee's decision to order the Player off was that he used his elbow to strike the opponent. This reason was clearly wrong because the evidence now shows that the

contact was made with the Player's forearm just above his wrist. The referee accepts that he was wrong on this point. There is such a fundamental difference in scale of seriousness between the heinous act of deliberately striking an opponent with the elbow and this striking with the arm that the Judicial Officer may safely find that the referee's reasons for the red card were wrong.

Mr Duthie on behalf of ERC said that this is a case where the Judicial Officer should examine the evidence to establish whether the referee was wrong to send the Player off. Unfortunately the Disciplinary Rules are muddled with the IRB Regulation 17 reference to reasons for that decision but that is a matter of terminology which should not detract from the real issue. In this case the referee saw what he thought was an infringement of Law 10.4(a) which merited an ordering off. The fact that he thought contact was with the Player's elbow when in fact it was with his arm was not so significant that it would allow the Judicial Officer to find that the reasons for the red card were wrong. The important issue for the Judicial Officer was to look at what the referee's report actually says and decide what were the distinguishing features of the conduct. Mr Duthie suggested that those were a strike with a fast swinging arm making contact with the victim's face.

Decision as to whether or not Ordering Off should be overturned

I must first determine whether an act of foul play took place. All parties agreed that the Player swung his right arm backwards and that he struck Thomas in the face with such force that Thomas fell to the floor. The strike caused a nasty injury . a split lip which subsequently required suturing. Law 10.4(a) states that a player must not strike an opponent with the fist or arm, including the elbow, shoulder, head or knees. The Player did strike an opponent with his arm and had therefore committed an act of foul play unless the strike was lawful or accidental. The Player accepted that by swinging his arm back he was likely to make contact with an opponent, even if that contact was only to move his arm away, so he cannot say that the strike was accidental. Nor is there any suggestion that the act was within the laws. In those circumstances an act of foul play did take place. Indeed that was been acknowledged by Mr Spring, on behalf of the Player, who suggested that a penalty or yellow card may have been appropriate.

Having seen an act of foul play the referee determined that it was serious enough to merit a red card. Under Disciplinary Rule 6.2.2 I cannot make a finding contrary to the referee's decision unless I am satisfied on the balance of probabilities that the reasons for the referee's decision were wrong. Mr Spring submitted with some force that the only reason the referee sent the Player off was because he struck Thomas with his elbow. It is clear that he did not strike him with the elbow but with the arm, just above the wrist. Mr Spring said that since the referee made such a fundamental error as to the part of the body which was used, and particularly as striking with the elbow is more serious than striking with the arm, then I could be satisfied that his reasons were wrong and I should dismiss the red card. Mr Duthie says this is not the case and that the reason for the ordering off was that the Player struck Thomas and the fact that he identified the wrong part of the body is not so significant as to persuade me to dismiss the red card. He is supported in this submission by the referee who said that although he did get that element wrong, he would still have sent off the Player had he seen that

the strike was with the arm rather than the elbow because the dangerous part of the act was the strike to the face.

The purpose behind the Disciplinary Rule permitting a Judicial Officer to, in effect, dismiss or quash a red card only if he determines that the Referee's reasons are wrong is to uphold the principle that the referee is the sole judge of fact and law during a match and that his decisions should not be interfered with subsequently. The meaning of the phrase, however, is that a red card should only be overturned if the referee made the wrong decision . perhaps where he mistook the identity of the player committing the act of foul play, or there was no foul play. The latter might be where he thought he saw a player stamp on an opponent's head but later on review it was clear that the player stamped on the ball and there was no contact with an opponent. Where a referee determines that there was an act of foul play which merited an ordering off it is not fatal that all of the detail in his report is not completely accurate provided it sufficiently describes an incident which is serious enough to merit ordering off.

In my view it would fly in the face of common sense for me to accept Mr Spring's submission in relation to the referee's reasons. There is a clear act of foul play which caused a significant injury to an opponent. Whether the Player used his elbow or arm to strike Thomas may make a difference to sanction, but it certainly made no difference to the referee's decision to send the player off. Not only is that a matter of common sense, but it is also the view of the referee himself in this case. In those circumstances I am not satisfied that the referee's reasons for ordering the Player off were wrong and I am satisfied that the Player was properly shown a red card.

Mitigation

Mr Spring submitted that this action was not deliberate because there was no intention to strike Thomas in face with force. His intention was to force the player to release the bind on the jersey. He submitted that this was not even reckless . more in the accidental zone. He said that in relation to the part of body used, an open arm was about as low as one could go and the action caused simply because he was trying to free himself. He accepted that the Player caused the injuries reported, although he suggested that 6 micro stitches perhaps made the injury sound worse than it was, but the Player had no intention to smack Thomas in the face. He also opined that Thomas was not vulnerable because he was in control of the situation, and there was no premeditation.

Mr Spring said that the Player could not have a better record . he has played 6 Lions tests, 150 games for Munster 71 games for Ireland. He has never had a red card before this one and his only disciplinary offence in a long and illustrious career was a 2 week suspension when he was cited for a punch in the 6 Nations in 2005. Mr Spring opined that this is an exceptionally good record for someone who has played for so long in the second row at such a high level. He said that he is one of the most respected players in the game with a reputation as being hard and fair. He apologised to Thomas after the match and he was genuinely shocked by what occurred. Mr Spring submitted that the Player has already suffered enough through the embarrassment of being sent off in his first match

back after a 9-month injury enforced absence.

Decision as to Sanction

I first made an assessment of the seriousness of the offending by reference to Disciplinary Rule 6.7.32. I determined that:

- a) The offending was deliberate . the Player himself said that he flung his arm back to make Thomas release him. Although I accept there was no intention to injure Thomas, and the Player said he did not intend to hit him in the face, there was an intention to strike him somewhere. I do not accept that this was just a swinging arm which happened to strike earlier than intended. It is apparent from the DVD footage that there was a full and deliberate swing and it is safe to conclude that the Player intended forceful contact. This cannot, therefore, be classified as reckless.
- b) The action was grave because the strike was delivered with real force with his arm coming into contact with Thomas's face.
- c) There was, however, some provocation in that Thomas pushed the Player back illegally and continued to hold him by the jersey thereby preventing him from rejoining the game.
- d) The effect of the action was that the victim was hurt and injured. He immediately fell to the floor with a split lip which required suturing and he took no further part in the game
- e) There was no significant effect on the game
- f) The victim, Thomas, was vulnerable in that he did not see the strike coming and it took him completely off guard
- g) There was no premeditation . rather the strike was reactive . but it was completed.

This is too serious an offence to merit an assessment that this was at the low end of the scale of seriousness because of the force of the strike, and the injury caused. Had it not been for the facts that there was an element of provocation, the Player did not intend to injure Thomas and he reacted to being held illegally, this might well have been classified as at the Top End of the scale of seriousness. **However, those factors persuaded me that in all the circumstances the appropriate classification for this offence is Mid Range.**

The Mid Range entry point for strike with the arm is 5 weeks. There are no aggravating features in this case which would justify an increase from the entry point. There is, however, some mitigation. Although the Player has not acknowledged culpability nor has he displayed any real remorse and therefore deserves no credit for those factors, he does have a reasonably good record and his

conduct at the hearing was satisfactory. In those circumstances I reduced the sanction from the entry point by 1 week.

The Player is suspended for 4 weeks from 12 December (the date of the match) to 9 January 2011. He may play again on or after 10 January.

In sanctioning the Player I informed him that this was nasty and entirely unnecessary incident. It is no good for the image of the game nor indeed for his own reputation . and someone of his iconic stature should have exercised much better self control.

Right of Appeal

The Player and the Disciplinary Officer are reminded that DR 7.1.1 provides for a right of appeal against this decision.

Costs

All reasonable costs of this hearing are awarded in favour of ERC. Quantum is to be assessed and served on the defence within 14 days. If there is any dispute to the quantum that should be referred back to me within 7 days thereafter.

**His Honour Judge Jeff Blackett
Judicial Officer**

16 December 2010