

Decision of the Independent Judicial Officer

ERC
Held at Huguenot House, Dublin
On 18 December 2009

In respect of

Julien Dupuy and David Attoub both of Stade Francais Paris (“the Players”)

And

A citing in respect of **allegations of contact with an opponent’s eyes or eye area**

Judicial Officer appointed to hear the case:

HHJ Jeff Blackett (England) (“The Judicial Officer”)

Decision of the Judicial Officer in relation to Julien Dupuy:

- (i) The Judicial Officer found that the Player had committed an act of Illegal and/or Foul Play as alleged in the citing complaint
- (ii) The Judicial Officer was satisfied that the act of Illegal and/or Foul Play merited a “red card” and that the Player should have been Ordered Off for the offence.
- (iii) The Player is suspended from taking part in the game of rugby up to and including 3 June 2010. This represents a 24 week suspension commencing on 18 December 2009.
- (iv) ERC’s reasonable costs are to be paid by the Player.

Decision of the Judicial Officer in relation to David Attoub:

- (v) The Judicial Officer adjourned the case until the week commencing 11 January 2010 while further expert reports are prepared. Attoub is suspended pending the outcome of that hearing.

Introduction

1. The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the ERC's independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Heineken Cup 2009/2010. The Judicial Officer was appointed to consider the citing complaints ("the Complaint") against the Players in the match played between Ulster and Stade Francais on 12 December 2009 in the Heineken Cup 2009/2010.

2. Mr Tony Lanaway was appointed as citing commissioner to this match and had cited both Players for contact with the eye or eye area contrary to Law 10.4(1).

3. 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 ERC
- The Players
- Madame Patricia Moyersoan, Counsel for the Players
- Mr Olivier Theriyn, Administrative Director Stade Francais

Preliminary matters & procedure

4. At the commencement of the hearing the Judicial Officer noted the identities of all present and narrated the Complaints reminding the Player that the Complaints were in respect of allegation that the Players had separately made contact with the eye or eye area of Stephen Ferris contrary to Law 10.4(1).

5. The Judicial Officer reminded all parties that the ERC Disciplinary Rules found in the Participation Agreement for the Heineken Cup 2009/2010 would apply. The Judicial Officer outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.

- **Dupuy formally admitted the citing against him (pleaded guilty)**
- **Attoub formally denied the citing against him (pleaded not guilty)**

6. Mdme Moyersoer made two preliminary submissions in relation to the case against Attoub:

a. First she submitted that the cases should be heard separately because the case against each and the pleas were different. Mr Duthie submitted that the alleged incidents occurred within a few seconds of each other at the same position on the field and much of the evidence is the same (DVD, medical report). Crucially he submitted that Mr Ferris had been in Dublin waiting for the hearing the day before and was now back into a training regime for the next round of matches. He was available to give evidence by telephone, but it would be unfair to ask him to give evidence twice throughout the day. I ruled that there was no prejudice to either Player by hearing their cases together even though they were separate and would receive separate consideration. Nevertheless I indicated to Mdme Moyersoer that if she felt anything changed during the hearing she should make further submissions.

b. Second she submitted that the citing was invalid. She said that it was not regular or normal and it was incomplete. The Citing commissioner could not say at what time the foul play happened and nor can he say what was the score at the particular time and he says that the photo was made available by Ulster management coming from independent media source with whom he was not able to communicate directly. Furthermore the citing commissioner could not find any DVD evidence to support the citing, and nor did ERC send a copy of the citing sent by Ulster. Mr Duthie complained that he had no notice of this preliminary point and submitted that the Disciplinary Rules had been fully complied with in this citing. I ruled that if there was any prejudice or unfairness to Attoub then the citing would be dismissed at this stage. However, I had no doubt that Mr Attoub understood the allegation against him, the time when it is said the alleged offences occurred from the combination of Mr Ferris's evidence and the photographs. The citing hearing could proceed.

Application to adjourn the case in relation to David Attoub

7. Mdme Moyersoer then submitted that the photographs which formed the basis of the complaint against Attoub had been digitally tampered with and could not be relied

upon. She said she had evidence from an expert witness which she received a few minutes before the hearing started to confirm that submission. Mr Duthie had been alerted to this evidence in advance and had invited the photographer and his own expert to attend the hearing to rebut the defence expert. I adjourned the matter to allow both counsel to consider all the evidence, including a view of the original photographs, before proceeding.

8. After an adjournment Mdme Moyersoen submitted that it was not possible for her to establish whether the photographs described as originals were original or not. She accepted that those photographs and the copies presented with the citing report showed a finger or fingers in Ferris's eye, but she sought an adjournment for her expert to examine the originals. She said that she did not impugn ERC's integrity in this matter, but Attoub had said that he had not put his fingers in Ferris's eye, or if he had it was unknowing, and therefore it was important that the original evidence was properly examined.

9. I therefore adjourned the case in relation to Attoub and made the following directions:

- Mdme Moyersoen is to provide ERC with e mail address of her expert so that the 4 relevant original photographs can be transmitted for investigation;
- ERC are to transmit those four photographs within 24 hours;
- Mdme Moyersoen is to obtain and serve a further expert report by 7 January;
- The adjourned hearing is to be reconvened in the week commencing 11 January.

10. I heard submissions from both parties as to whether Attoub should be subject to an interim suspension until the next hearing with reference to ERC Disciplinary Rule 6.7.5. I am satisfied that the circumstances warrant such a suspension because the evidence before me currently provides a prima facie case of serious foul play. However, if the expert evidence shows that the original photographs have been tampered with, and it transpires that this interim suspension was unjustified, then I will consider whether to recommend that ERC pay compensation to Attoub. **Mr Attoub is, therefore, suspended from playing rugby until the next hearing in his case.**

The case against Julien Dupuy

11. The Judicial Officer reviewed the Complaint in full and narrated the Official Reports from the Citing Commissioner and Match Official (who saw nothing but noted that Ferris had complained to him about contact with his eye). The Player accepted that:

- the Complaint was a true and accurate account of the incident and the facts surrounding the incident; and that
- the Complaint should be upheld.

12. However, later during the hearing Mdme Moyersoen submitted that the alleged acts of Foul play did not pass the red card threshold and that they should only have merited the award of a yellow card. I rejected that submission – there is no doubt that these cases pass the red card threshold.

Evidence supporting the Complaint against Dupuy

13. The citing complaint against the Player reads:

“At a static ruck situation Ulster No 6, Stephen Ferris is at the front of the body of players with head up, looking at incoming player, Stade Francais No 9, Julien Dupuy.

Dupuy’s left hand moves and holds back the headguard and consequently the head of Ferris. Dupuy’s right hand then makes contact with Ferris’s face, covering the upper face and eye region, thumb to the right of the head and index finger and rest of digits to the left of Ferris’s face, Dupuy’s hand closes and then travels down the face.

Dupuy continues to hold onto headguard and Ferris’s head continues to be pulled down and forwards towards the front of the players on the ground and to the side of Dupuy, who then reaches for the face region again and makes a second contact with the face/eye area on Ferris who falls to the ground.

Subsequent action on the DVD shows Ferris in an agitated state and then receiving treatment to his eye region.

I interviewed Ferris shortly after the game to confirm abrasion to the eye region which I understand a medical report will further clarify.”

14. The DVD footage, presented in three clips, corroborates the citing report. It showed a breakdown in the middle of the pitch on the Ulster 10m line. The ball emerged on the Ulster side and was passed away to the right. Dupuy arrived on the Stade side of the breakdown just before the ball emerged and was pushed backwards by Ferris. He then put his left hand on Ferris’s head, while Ferris still held on to him, and it appeared that he used his right hand to touch both of Ferris’s eyes. He used his thumb and forefinger (and possibly his middle finger) to wipe across both eyes in a very quick and deliberate action. By that stage the ball had moved from the back of the ruck and play had moved to the right.

15. Immediately after contact Ferris looked behind him, as though appealing to the referee, and appeared to shout. At the same time he put his left hand up to his own eyes. Dupuy then pulled Ferris’s head backwards with his left hand grabbing hold of the top of Ferris’s scrum cap while standing over him. As he did so he placed the fingers of his right hand into the area of Ferris’s right eye, with his thumb near his left eye, and dragged his fingers across the eyes in a forceful and deliberate downward motion. As he did so Ferris’s face was forced to turn. Dupuy was then pulled into the melee and a struggle developed.

16. Mr Ferris gave evidence by way of a written statement augmented by oral testimony given over the telephone. He had attended in person the day before when the hearing was originally scheduled but was unable to stay for the adjourned hearing. His evidence was also consistent with the citing report and the DVD footage. As to the first instance of contact with the eyes his statement said that after he had pushed Dupuy away he, in response, swiped his hand across the eye area of his face. Ferris said he was surprised and looked round for the referee. He said that Dupuy then pulled his head back by his scrum cap, pulling it off, and then hit him in the eye area of the face. He said that Dupuy’s fingers did not feel like they went into the sockets of his eyes but struck him in the eye area and felt more like a scrape. He said this was painful and a bit of a shock. He immediately shouted at Dupuy and wrestled him to the ground.

17. Ferris stated that his eyes were attacked again by another player (not Dupuy) during the subsequent melee.

18. When he gave evidence on the telephone Ferris seemed reluctant to make too much of these incidents and said that the later act (not involving Dupuy) when he was on the ground was worse. He said that in the first incident Dupuy definitely scraped across his face and he turned round to referee. He did not think Dupuy intended to make contact with his eyes and did not feel he had “stuffed his fingers into his eye”. When pressed Ferris said that the swipe was of the hand to the eye area from nose to eye brows. “It was fingers and thumbs scraping across that region and I was surprised by what happened.” He said that the second incident was that Dupuy struck him in the eye. He said: “That contact was more forceful than the first contact. It took me by surprise because I was a bit defenceless and a lot more force used. It was more like an open hand slap in the face using force downwards almost. That was in the eye area of the face. There was definitely contact with my eyes but it didn’t feel like intent of going into eye sockets – felt like a brief moment of slap in the face using force going downwards.” Again when pressed he said: “His fingers were in my eye area – again in between nose and eyebrows – but this time more force used and a lot more painful. I felt pain around the eye area – not 100% sure if he got right into my eyeballs, but it was a scrape across my eyes and I felt pain. He definitely scraped me in the eye.”

Medical evidence

19. The Ulster Team Doctor (David Irwin) provided a statement in relation to the injuries suffered by Ferris. He said that he attended Ferris during the 73rd minute of the game. He was complaining of blurred vision and pain in and around his eyes, especially his right eye. In examination on the pitch Doctor Irwin said it was evident that Ferris had several fresh scratch marks around his right eye and both eyes looked slight injected and watery. After the match Doctor Irwin examined him again. He said that further assessment revealed some redness/inflammation in the outer (lateral) recess of the right eye. There did not appear to be any internal eye damage (anterior/posterior chambers, iris, lens or retina). He made a third assessment the following day and recorded that Ferris was complaining of a bruised feeling especially around the right eye, worse on eye movements. Ferris said that

his eyes remained bruised and sensitive two days after the match although he was told by his doctor that there would be no permanent damage.

20. At the hearing Ferris said that he could not ascribe injuries to either these two occasions or the later one not involving Dupuy, but he thought injuries were caused in that further incident. He said: "I am not 100% sure, but because of the other incident that felt a lot worse and both incidents happened so quickly. However, I put my injuries down to the second gouge.

21. Three photographs of Ferris, taken shortly after the match, showed reddening and swelling around the right eye (below the eyebrow) and abrasions below the right eye just above the cheek bone.

Dupuy's position

22. The Player said that he carried out stupid and foolish act and had apologised to the player. He was angry because of the match and Stade were having a bad game. He apologised to the player. He recognise that he put his hand twice in his face but he did not have any intention to put his fingers in his eyes. He said the first contact was a reaction because he was angry that Ferris had pushed him away and the second contact was similar. That did not justify what he did, but he stressed that he did not intend to touch Ferris's eyes. He said he heard Ferris scream later when he was on the ground, and afterwards he told him that it had not been him who had attacked him on that occasion. He said he is not a nasty player on the pitch and has an unblemished record in 7 years as a professional.

23. Mr Theriyn also said that the club was under a lot of pressure and relied on the Player and they took some of the blame for putting him under so much pressure to win before the game.

Submissions on sanction and mitigation

24. Mr Duthie referred the Judicial Officer to the IRB's directions about the need for strong deterrent sanctions in relation to contact with the eye or eye area.

25. Mdm Moyensoen referred the Judicial Officer to the case of Shane Jennings, of 14 October where his offending was judged as being Low Entry. She described the Player's actions as "an imprudent gesture" but there was no intention to target Ferris's eyes. She also submitted that Ferris supported that view and agreed that the Player had not caused any injury. He has pleaded guilty at the earliest opportunity – unlike Jennings. She submitted that the suspension should be as short as possible and that an appropriate sanction would include participation in education projects.

26. She also submitted that the Player's actions had no effect on either the player or the game – it was the second, unrelated attack on his eyes which affected the game. She said that Dupuy is a man of good character who represents the French national team and has never been subject to any disciplinary sanction since he was 18. He also spent one year playing for Leicester and had a good reputation there.

Decision as to disposal

Sanctioning regime – general comments

27. The Judicial Officer first made an assessment of the seriousness of the conduct of the Player and in so doing referred to the judgment in the RFU case of Dylan Hartley 24 April 2007 (imposing a sanction of 26 weeks suspension) in which this Judicial Officer sat as Chairman of that Disciplinary Panel. The following statement of principle, written in that judgment, has been adopted by the IRB in a letter to all Judicial Personnel dated 10 July 2009:

Contact with an opponent's eye or eye area is a serious offence because of the vulnerability of an eye and the risk of permanent injury. It is often the result of an insidious act and is one of the offences most abhorred by rugby players. Serious offences of this sort – and particularly those known colloquially as "eye gouging" must be dealt with severely to protect players, to deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson. Clearly "contact" encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury. Offences which would properly be classified as at the Lower End of the scale

of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area. Offences which would properly be classified as at the Top End of the scale of seriousness would include, but not be limited to, an intentional act designed to cause serious discomfort or injury to the eye or area around the eye of an opponent. The most serious offences in this category would be where permanent damage is caused.

28. The IRB directive referred to a letter from Mr Bernard Lapasset, Chairman IRB, dated 1 July 2009 which expressed concern about lenient sanctions imposed on Schalk Burger (South Africa v British and Irish Lions) and Sergio Parisse (Italy v New Zealand) in June 2009 for offences in relation to what he described as eye gouging. Mr Lapasset said that in both cases the IRB believed that 8 weeks was insufficient. He also said:

“The prevalence of eye-gouging in the Game is a major worry for the IRB with cases ranging from reckless to intentional. In order to arrest recourse to this heinous act it is necessary that strong sanctions are disbursed as a deterrent..... We felt it necessary... to express our strongly held view that such serious offences of this sort must be dealt with severely to protect players, deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson.”

Entry Point

29. In assessing the seriousness of the Player’s conduct I took account of the following features of his offending as listed in ERC Disciplinary Rule 6.7.32:

- a. The offending was deliberate. Notwithstanding what the Player says, and Ferris’s subsequent apparent reluctance in giving evidence which impugned the Player, he clearly targeted Ferris’s eye area with his first attack. That can be seen from the DVD footage and Ferris’s reaction on screen. On the second occasion the Player pulled back Ferris’s head so that he could attack his eyes again. The manner in which he pulled his hand across Ferris’s eyes on the second occasion indicated his clear intention to inflict some pain or discomfort

on Ferris, and I reject his assertion that he was simply pushing or slapping Ferris away.

- b. The actions were serious. He used considerable force in the first contact and a seriously aggravating factor was that he executed a second attack on Ferris's eyes by standing above him, pulling his head back and attacking his eye area. There is no doubt from the DVD footage and Ferris's own testimony that the Player's fingers did make contact with his eye and caused him significant pain.
- c. There may have been some small element of provocation - the Player said he was angry at the state of the match and that Ferris pushed him as he joined the ruck, but if there was any provocation the Player's conduct was unjustified and a serious over-reaction.
- d. Ferris suffered some injury as a result of this incident and the subsequent one not involving the Player. The injuries sustained as a result of both of these attacks were not apparently permanent but they were obviously painful and left him in some discomfort for a day or so after the match. It is not possible to attribute individual injuries to either the Player or the other player in the second attack although what can be said with certainty is that they both contributed to those injuries. I take account of Ferris's own opinion which was that he thought the injuries occurred as a result of the second unrelated incident, although he indicated that the Player's second attack caused him pain and the bruising around his eye may well have been contributed to by this attack.
- e. As a direct result of the Player's actions there was a melee between players from both sides on the pitch during which Ferris suffered further interference with his eyes. I reject Mdme Moyersoen's submission that the Player's actions did not affect the game. They clearly caused the brawl which led to the further attack on his eye.
- f. Ferris was not in a particularly vulnerable position during the first contact, but he was off balance and completely at the Player's mercy on the second occasion.
- g. It cannot be said that there was any premeditation in relation to the first contact with the eyes, but the second contact was clearly deliberate and premeditated as can be seen by the manner in which the second contact was committed.
- h. The conduct was completed.

30. In my opinion the Player deliberately targeted Ferris's eye or eye area intending to cause serious discomfort to his victim. The first contact was very quick, although Ferris clearly felt some discomfort. However, the second contact was much more forceful, and the Player's action of pulling his right hand down forcibly across the eyes, scraping them as he went, indicated an intention to cause serious discomfort. That second contact was very clear on the DVD and would have been seen by many spectators thereby having a significantly detrimental effect on the image of the game. The Player may not have meant to cause serious injury, although I have no doubt he intended to cause discomfort, but serious injury could have been the result. To some extent he was fortunate that the injuries were not more serious and that it is not possible to determine precisely what injury he did cause. **Nevertheless, given the factors above, and particularly the fact that there were two separate and deliberate attacks on Ferris's eyes or eye area, I determine that this offending is at the Top End of the scale of seriousness. Even if he did not cause any of the injuries reported, the totality of the offending, the damage this sort of offending does to the image of the game and the terms of the IRB directive on this sort of offending, was such as to merit a Top End assessment.**

31. I did not consider the case of Jennings which was cited by Mdme Moyersoem. She did not address me on the facts of the case and did not present the written judgment. While cases at first instance may establish some principles in the way in which Judicial Officers approach offending, they must be judged individually on their own merits when determining the factual basis for any sanction. Mdme Moyersoem's submission that these offences should be assessed at the Low End of the scale of seriousness are unsustainable. The Low End entry point can never be justified where the eye or eye area is deliberately targeted even where there is no injury.

Sanction

32. In cases where the offending is classified as being at the Top End of the scale of seriousness, a Judicial Officer must assess the appropriate entry point within a given range. The Top End range for offences of contact with the eye or eye area is 24 – 156 weeks (3years).

33. In assessing the entry point within that range the Judicial Officer took account of:

- The offending player's intent. In this case there was clear intent not only to carry out an insidious act of foul play, but also to inflict a degree of discomfort and pain on the victim – and to do it twice in quick succession. It is the fact that the Player attacked his victim's eyes or eye area twice that makes it so serious even if the injuries were neither permanent nor severe, or indeed if the injuries were caused subsequently. I reject the Player's assertion that he did not intend to make contact with the eye or eye area – the DVD footage shows very deliberate actions;
- The effect on the victim – he was shocked by the first contact and in some pain after the second contact; and
- The IRB's directive that this sort of offending should be dealt with severely.
- The fact that, despite a number of previous high profile cases involving contact with the eye or eye area over the past two years, the sanctions imposed do not seem to have deterred this insidious offence and higher sanctions are necessary to change the behaviour of some players and indicate that this conduct will not be tolerated.

34. In those circumstances the appropriate entry point is a suspension of 40 weeks. Had the evidence indicated that the Player caused all of the reported injuries or a more serious injury the entry point would have been considerably higher. This entry point reflects the factors already mentioned, the Games abhorrence for this sort of offending and the need for a strong message to the Game. It reinforces the point already made by the IRB that there needs to be a deterrent to combat a pattern of offending.

35. With reference to ERC Disciplinary Rule 6.7.34 there is one aggravating feature in this case and that is the need for a deterrent to combat a pattern of offending. That has already been considered in assessing the appropriate entry point within the Top End range. There are also some mitigating factors (ERC Disciplinary Rule 6.7.35);

- The Player has admitted publicly that he made contact with Ferris's eye area, albeit he limited his admission to describing them as foolish acts concerned with wiping the palm of his hand over the eyes. He therefore merited significant credit for his plea of guilty made at an early stage.

- He has an excellent record in that he has played professional rugby and has never received any disciplinary sanction.
- His conduct at the hearing has been very good.
- He expressed remorse immediately after the game, made contact with Ferris on more than one occasion to apologise by telephone and text message. He also apologised at the hearing and stated that he would not commit similar acts in future.
- He has yet to face internal disciplinary action at his club but he would have to pay the costs of the hearing and undertake educational duties during any suspension.

36. Those factors deserve significant recognition in reducing the sanction, although the Player is not entitled to the full 50% reduction specified in ERC Disciplinary Rule 6.7.36 because of the presence of one aggravating factor already described (need for a deterrent). **In all the circumstances the appropriate sanction is a suspension for 24 weeks. The Player is therefore suspended from playing all rugby worldwide, including any domestic rugby in France, from 18 December 2009 – 3 June 2010. He may play again on 4 June 2010.**

37. This suspension will effectively remove the Player from rugby for the rest of this season and the beginning of any tour undertaken by France next summer. In my view, any lesser sanction would fail to address Mr Lapasset and the IRB's legitimate concerns about the increased incidence of offences relating to contact with the eye or eye area. To a certain extent Mr Dupuy is being made an example of for the wider benefit of the Game, this sanction being one heavily influenced by the need for deterrence and the fact that too many previous sanctions for this sort of offending have been unduly lenient. If these offences continue then players must expect to receive sanctions of increasing severity until deterrence drives this sort of offending out of the Game.

Costs

38. Before I adjourned to consider sanction Mr Duthie asked for an order that the Player pay ERC's reasonable costs for the hearing. Mdme Moyersoen submitted that this was not a case which brought the game into disrepute and the Player should not be penalised by the award of costs for just a short period of stupid conduct. Mdme Moyersoen did not comply

fully with the standard directions in Appendix 6 of the ERC Disciplinary Rules and she did not raise the issue of the offending failing to meet the red card test until the day of the adjourned hearing. I reject her submission that the Player's actions did not bring the game into disrepute. This type of offending always attracts significant negative publicity, and the DVD footage of his actions certainly adversely affect the image of the Game.

39. In those circumstances I order that the Player is to pay all ERC's reasonable costs which are to be calculated and served on the Player by 7 January. If there is a dispute as to quantum the matter should be brought to my attention for resolution.

Right of Appeal

40. The Player was reminded of his right of appeal in accordance with the ERC Disciplinary Rules.

HHJ Jeff Blackett
Judicial Officer

18 December 2009
Date