

**EUROPEAN RUGBY CUP (“ERC”)**

**DECISION OF APPEAL COMMITTEE IN APPEAL BY ALESANA TUILAGI**

**HELD AT THE OFFICES OF HARPER MACLEOD LLP, THE CA’D’ORO, 45 GORDON STREET, GLASGOW**

**30 APRIL 2009 (“the Hearing”)**

**IN RESPECT OF:-**

An Appeal by Alesana Tuilagi (“the Player”) against the decision of a Disciplinary Committee (“the Committee”) dated 23<sup>rd</sup> April 2009, finding that the Player had committed an act of illegal and/or foul play contrary to Law 10.4(f), namely playing an opponent without the ball and thereby upholding the Citing Complaint and suspending the Player from taking part in a game of rugby up to and including 12 midnight on the 21<sup>st</sup> May 2009. This suspension represented a four week suspension which commenced on the 23<sup>rd</sup> April 2009 (“the Decision”).

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

Professor Lorne D. Crerar (Chairman) (SRU)

Rod McKenzie (SRU)

John West (IRU)

**DECISION OF THE APPEAL COMMITTEE:**

- (1) The Player had failed to discharge the burden of proving that the Decision pursuant to Discipline Regulation 7.4.8 of Heineken Cup 2008/09 was in error;
- (2) That the Player’s Appeal against the Decision be refused; and
- (3) That the Player be responsible for 50% of the costs of the Disciplinary Officer and of the convening and holding of the Hearing in accordance with the terms of this Decision.

## 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 the Citing Complaint made by Douglas Hunter, Citing Commissioner dated 11<sup>th</sup> April 2009 against the Player relative to an incident of alleged illegal and/or foul play during the course of a match between Leicester Tigers and Bath Rugby played at the Walker’s Stadium on 11<sup>th</sup> April 2009. The Citing Complaint alleged that the Player had committed an act of illegal and foul play namely a contravention of Law 10.4(f) – “playing an opponent without the ball”.

The Citing Complaint was considered by the Committee at a Hearing on 23<sup>rd</sup> April 2009. The Committee issued the Decision on 24<sup>th</sup> April 2009.

The Player admitted that he had committed the act of illegal and/or foul play alleged in the Citing Complaint. The Committee determined to uphold the Citing Complaint, found that the Player had committed an act of illegal and/or foul play contrary to Law 10.4(k), categorised the offence as at the “mid” range with an entry point of 5 weeks, considered aggravation and mitigation factors and determined to impose a period of suspension of 4 weeks from the date of the Hearing until midnight on 21<sup>st</sup> May 2009. The Disciplinary Committee also made an award of costs against the Player in respect of the Hearing.

The Player appealed by Notice of Appeal dated 28 April 2009. In accordance with DR 7.2.1 (b), an Appellant is obliged to state in his Notice of Appeal, the specific aspect(s) of the Decision, which were being challenged on appeal. The Player in his Notice of Appeal stated that he was

challenging the Decision in respect of the level of sanction imposed, namely four weeks commencing from the date of the Hearing. The Player was not seeking to argue that the case should be heard *de novo*.

The Appeal Committee sat on 30 April 2009 to consider the appeal.

In addition to the members of the Appeal Committee there was present during the hearing on 30 April 2009:-

**The Player**

Richard Smith QC, appearing for the Player (“the Player’s Representative”)

Simon Cohen (Leicester Tigers)

Roger O’Connor, Disciplinary Officer, ERC (“the Disciplinary Officer”)

Max Duthie, Solicitor to the Disciplinary Officer (“the Disciplinary Officer’s Legal Representative”)

James Herbert, Bird & Bird Solicitors, assistant to Max Duthie

Jennifer Nicol, Trainee Solicitor, Clerk to the Appeal Committee

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

1. Citing Commissioner’s report and Charge Letter.
2. Hearing Notice and Directions.
3. The Decision.
4. Statement by Nick Abendanon (“the Opposition Player”).
5. Injury Report by Dr Julian Widdowson.
6. Match Official reports

7. A DVD with footage of the cited incident and surrounding circumstances.
8. The Notice of Appeal.
9. Directions statement by the ERC Disciplinary Officer.

## **2. SUBMISSIONS ON BEHALF OF THE APPELLANT**

The Player's Representative made submissions on behalf of the Player to the Appeal Committee as to why the Decision as regards the allegation in the Citing Complaint of illegal and/or foul play on the part of the Player should be overturned.

The essence of the Player's Representative's submissions was that the Committee erred in classifying the level of seriousness of the Player's conduct in respect of this alleged act of illegal and/or foul play at a mid range entry point.

The Player's Representative submitted that the Player's actions were in the context of a coached system of defence and consistent with a genuine attempt to anticipate the play of the ball. He reminded the Appeal Committee that Mr Burke (Coach, Leicester Tigers) had advised the Committee that the Player's defensive role was "to step inside and take the man running the inside line". The Player's Representative argued that the video footage highlights that the Player made a genuine attempt to play man and ball. The Player was committed to the tackle at the point at which he realised that the ball was going over his opponent's head.

The Player's Representative was of the view that the only factors which the Committee took into account in reaching their conclusions were the vulnerability of and injury to the Opposition Player. The Committee's Decision did not state that the Player's actions were intentional. The Player's Representative submitted that the Appeal Committee cannot therefore infer from this omission that the conduct of the Player was intentional. It followed that the Committee must

have deemed the offence to be either reckless or careless. The Player's Representative further submitted that the Committee must have accepted the evidence by Mr Burke in respect of coaching methodology. The Player's Representative was of the view that the case in hand was profoundly different to someone who tackles intentionally. He argued that the Player was so close both with regards to timing and location to the Opposition Player that the Appeal Committee should therefore hold that the Committee erred in defining the act of illegal and/or foul play as a mid-range entry point offence.

The Player's Representative made representations as to the vulnerability and injury of the Opposition Player. In terms of vulnerability, he noted that any player running into the line of play would be entering a vulnerable situation. The Player's Representative explained that the vulnerability of the Opposition Player requires to be seen in the context of the Player's genuine attempt to make a fair tackle and sought to show that this act must be distinguished from the actings of a player who deliberately targets an opponent who has no real opportunity of receiving the ball. The Player's Representative also stated that it would be impossible to consider the time in the match when the incident occurred as having a material bearing upon the entry point for categorising the act of illegal and/or foul play.

The Player's Representative noted that the Appeal Committee required to decide on the balance of probabilities as to whether there was an error in deciding that the alleged act of illegal and/or foul play was a "mid-range offence". The Player's Representative contended that there was an error on the part of the Committee and that the Decision erred in categorising the act of illegal and/or foul play as a mid-range offence as it should have categorised the offence as "low-range".

### **3. SUBMISSIONS ON BEHALF OF THE ERC**

The Disciplinary Officer's Legal Representative noted at the outset of his submissions that the

Appeal Committee are required to show that the Decision of the Committee was in error and thereby should be overturned or varied. He sought to remind the Appeal Committee that their function is not to review the evidence and substitute its own findings for those of the Committee. The Decision needs to be afforded in the view of the Disciplinary Officer's Legal Representative a margin of appreciation.

The Disciplinary Officer's Legal Representative argued that the Committee's decision regarding the sanction imposed was based upon the exercise of their discretion which involved them weighing up a series of factors as they are required to do under the Disciplinary Rules of the Tournament. He argued that a margin of appreciation must be afforded to the Committee where they have exercised their discretion. The Appeal Committee must consider whether the Committee exercised their discretion in a reasonable manner.

The Disciplinary Officer's Legal Representative argued that the Committee are not required to make a finding in their Decision on each of the considerations listed at DR 6.7.32 but accepted that it is unclear from the Decision whether or not the Committee made a finding with regards to intention of the Player in committing the act of illegal and/or foul play. The Appeal Committee took the opportunity to advise the Disciplinary Officer's Legal Representative that the Committee are obliged to include detail on how it categorised the seriousness of the offending in respect of DR 6.7.48. In response, the Disciplinary Officer's Legal Representative noted that the Decision did not state that the considerations taken into account were exclusive. In response the Appeal Committee advised that they were not suggesting that the Committee need to articulate each consideration in DR 6.7.32 but found it difficult to conceive of a case of foul play that a consideration of intention would not be relevant. The Disciplinary Officer's Legal Representative explained that it was clear that the Committee considered it to be sufficient on the grounds of injury and vulnerability to classify the alleged act of illegal and/or foul play as a mid-

range offence.

The Disciplinary Officer's Legal Representative also argued that just because Mr Burke's evidence was not contradicted in the Decision does not necessarily infer that the evidence must have been accepted by the Committee. He also noted that the Disciplinary Rules do not require the Committee to consider whether the Player's actions have been 'coached' when making a decision with regards to the entry point.

In conclusion the Disciplinary Officer's Legal Representative argued that in applying the appropriate margin of appreciation, the Committee's findings were justified based on the information that was before the Committee and were not inconsistent with that information. The Disciplinary Officer's Legal Representative reminded the Appeal Committee that they were not in a position to reduce the sanction further to a declared mid-range entry point as it is not the case that there are "no aggravating features".

#### **4. DECISION**

The Appeal Committee concluded from the Decision of the Committee that they deemed the conduct of the Player to be unintentional. It was within the reasonable discretion of the Committee to categorise the alleged act of illegal and/or foul play as a mid-range offence having regards to the two factors relied upon by the Committee, namely the injury to and vulnerability of the Opposition Player.

#### **5. COSTS**

The Appeal Committee considered that the Decision did lack clarity in the categorisation of the act of illegal and/or foul play and accordingly determined to require the Player to pay 50% of the

costs of proceedings as narrated at DR 7.4.20.



**Professor Lorne D. Crerar  
Chairman  
Appeal Committee  
14<sup>th</sup> July 2009**