

# EUROPEAN RUGBY CUP

## DECISION OF APPEAL COMMITTEE

### HELD BY WAY OF WRITTEN SUBMISSIONS AND TELEPHONE CONFERENCE DISCUSSION

2<sup>nd</sup> FEBRUARY 2005

#### IN RESPECT OF:-

An appeal by the European Rugby Cup (“ERC”) against a decision of a Disciplinary Committee dated 21<sup>st</sup> January 2005, dismissing a citing complaint brought by Roger O’Connor, Disciplinary Officer, ERC against Patrick Furet (“the Player”) (“the Decision”).

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

Rod McKenzie (Chairman) (*SRU*)

Professor Lorne D. Crerar (Chairman, Discipline Panel ERC) (*SRU*)

Dr Barry O’Driscoll (*IRFU*)

#### DECISION OF THE COMMITTEE:

- (i) In accordance with ERC Rule 7.4.16(b) the Appeal Committee set aside the Decision;

- (ii) In accordance with ERC Rule 7.4.16(e) the Appeal Committee vacated the award of costs made in the Decision;
  - (iii) In accordance with ERC Rule 7.4.16(f) the Appeal Committee remitted the matter back to the same Disciplinary Committee for reconsideration of the citing complaint at a full hearing in accordance with and for the reasons set out below.
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## **INTRODUCTION**

This Appeal Committee was convened by Professor Lorne D Crerar, Chairman of the ERC Disciplinary Panel, pursuant to the Discipline Regulations of ERC in respect of a citing complaint made by ASM Clermont Auvergne (“ASM”) and brought forward by the ERC Disciplinary Officer. The citing complaint concerned the alleged conduct of the Player during an ERC match played between Section Paloise and ASM on Saturday 8<sup>th</sup> January 2005 at the Stad Du Hameau, France. The citing complaint alleged that the Player had committed an act of illegal and foul play *viz* a contravention of law 10.4(c) in that the Player had in the fortieth minute of the second half of the match stamped on the face of the ASM number 7.

The citing complaint made by ASM, using ERC form 4, was dated 10<sup>th</sup> January 2005 and was signed by Jacques Pineau, Directeur General Delege of ASM.

The relevant procedures to be followed in cases of citing are set out in ERC Rule 6.2. ERC Rule 6.1.7 describes *inter alia* ERC Rule 6.2 as setting out “procedural guidelines to be followed in citing cases.”

ERC Rule 6.2.2 provides as follows:-

“To be valid, a citing complaint must be in the form of Form Four set out in Appendix Two to these Disciplinary Rules and must: ...

(b) contain at least the following information: ...

- the names of the Match officials officiated at the Match; ...”

The citing complaint dated 10<sup>th</sup> January 2005 did not contain the name of one of the two touch judges. That citing complaint did not therefore contain all of the information required by ERC Rule 6.2.2.

The issue of the omission of the name of one of the two touch judges was taken as a preliminary issue on behalf of the Player before the Disciplinary Committee. The Disciplinary Committee determined that there was no valid citing complaint and that it had no power to exercise a discretion under and in terms of ERC Rule 8.8 to allow the citing complaint to be considered on its merits. The Decision stated *inter alia*:-

“The Committee found that the citing was invalid to the extent that the citing form (form four) was incomplete and therefore there was no case to answer.”

Roger O’Connor, Disciplinary Officer of the ERC, on behalf of the ERC, appealed against the Decision.

Detailed written submissions were received by the Appeal Committee on behalf of both the ERC and the Player. The Player required that there be a full hearing before the Appeal Committee. The hearing took place by way of telephone conference call on 2<sup>nd</sup> February 2005.

In addition to the members of the Appeal Committee, present during the teleconference hearing were:-

Roger O’Connor, Disciplinary Officer, ERC;

Jonathan Taylor, Solicitor, Hammonds, Legal Representative of the ERC Disciplinary Officer;

Sian Lewis, Hammonds, Assistant to Mr Taylor;

John O’Donnell S.C., Legal Representative of the Player;

Bruce A Caldwell, Clerk to the Appeal Committee.

The ERC's primary written submissions in the appeal were dated 24<sup>th</sup> January 2005. The primary written submissions for the Player were dated 31<sup>st</sup> January 2005. In addition the Committee was referred to legal authorities and to supplementary submissions. The Chairman of the Appeal Committee addressed certain questions to the legal representatives of the parties in writing prior to the hearing. Parties' written submissions were supplemented by oral submissions during the teleconference hearing.

## **REASONS**

It was argued, on behalf of the ERC:-

- (a) that the citing complaint considered by the Disciplinary Committee was not the citing complaint submitted by ASM dated 10<sup>th</sup> January 2005 but that, properly construed, ERC Rule 6.2.5 had the effect that the citing complaint considered by the Disciplinary Committee was the citing complaint made by the ERC Disciplinary Officer, following a determination by a Citing Officer and that the citing complaint made by the Disciplinary Officer was fully compliant with ERC Rules. It was argued that notwithstanding any omission in the original citing complaint of 10<sup>th</sup> January 2005 the citing complaint of the Disciplinary Officer was valid and ought to have been considered by the Disciplinary Committee on its merits; further and in any event,
- (b) properly construed the terms of ERC Rule 8.8 were such that in the circumstances of this case any error (to use a neutral term) in the original citing complaint of 10<sup>th</sup> January 2005 was such as not to invalidate the procedure of the citing.

On behalf of the Player it was argued:-

- (a) that the terms of ERC Rule 6.2.2 were such as to make the requirements for inclusion in the citing complaint mandatory and that the omission of the name of one of the touch judges rendered the original citing complaint invalid and that accordingly the Disciplinary Officer had no jurisdiction to make the citing complaint purportedly brought by him in terms of ERC Rule 6.2.5; and,
- (b) that ERC Rule 8.8 did not operate so as to cure any deficiency in the original citing complaint because the terms of ERC Rule 6.2.2 were mandatory in effect and that even if the ERC Rule 8.8 gave discretion to a Disciplinary Committee to waive an error, such as the error that occurred in this matter, there is no material before the Disciplinary Committee which would have entitled them to exercise that discretion.

The ERC Disciplinary Rules are a contract between the ERC and the clubs participating in the tournament. Players agree, in writing, to be bound by the ERC Disciplinary Rules. Descriptions such as “mandatory” and “directory” when referring to particular provisions of the ERC Disciplinary Rules are useful as labels but care should be taken that the labels are not used in the same manner as would be appropriate when construing a statutory provision.

The description of ERC Rule 6.2 as setting out “procedural guidelines” per ERC Rule 6.1.7 is, we think, misleading. Properly construed ERC Rules 6.2, 6.3 and 6.4 are not guidelines but are ERC Rules which require, subject to the other provisions of the ERC Rules, to be fully complied with.

In this case it is not in dispute that one of the ERC Rules *viz* the third bullet point in 6.2.2(b) was not complied with. Nowhere in the ERC Rules is it provided what the consequence of failing to comply with ERC Rule 6.2.2 is to be. We consider that in making a citing complaint ASM, in this case, were obligated to comply with the provisions of 6.2.2. They did not do so.

We consider that a “complaint” made by the Disciplinary Officer pursuant to ERC Rule 6.2.5 is not the same thing as the “citing complaint” made by the citing club in terms of ERC Rule 6.2.2. Apart from this being a necessary consequence of the structure of the ERC Rules the point is made clear by the last sentence of ERC Rule 6.2.6 which makes reference to a “Club’s original citing complaint”. This original citing complaint is a component of the supporting material accompanying the Disciplinary Officer’s complaint.

However, in this case, the distinction between the original citing complaint by the Club and the complaint by the Disciplinary Officer is of little significance. There can only be a complaint by the Disciplinary Officer if there has been a valid original citing complaint by a club in terms of ERC Rule 6.2.2. ERC Rule 6.2 contains no provision entitling a Disciplinary Officer to instigate a citing without a prior determination by a Citing Officer.

However, in this case, for the reasons set out below, we do not consider that, at this stage, the original citing complaint brought by the club is invalid.

We reach this conclusion by reason of the terms and application of ERC Rule 8.8.

ERC Rule 8.8 provides as follows:-

**“Deviations from these Disciplinary Rules**

Any deviation from any provision of these Disciplinary Rules and/or any irregularity, omission, technicality or any defect in the procedures followed shall not invalidate any finding, procedure or decision unless it is shown to render the proceedings unreliable or to have caused a miscarriage of justice.”

The failure of ASM to include the name of one of the touch judges in the original citing complaint was a deviation from a provision of the ERC Disciplinary Rules. Further, it was an omission in the procedures followed. It might, depending on the circumstances, also be categorised as an irregularity, technicality and/or defect in the procedures followed. A deviation and/or omission etc, by application of ERC Rule 8.8, does not invalidate the citing procedure unless and until it is determined that the proceedings have been rendered unreliable by reason of such deviation and/or omission etc or that such has caused a miscarriage of justice. There has been no determination by any person or body having jurisdiction so to do, that the proceedings of the citing complaint have been rendered unreliable; in this context we include both the original citing complaint brought by ASM and the complaint brought by the Disciplinary Officer, and/or that any miscarriage of justice has been thereby caused.

Within an ERC context, in relation to a citing, the persons/bodies with discretionary functions in relation to a citing are the Citing Officer in terms of ERC Rule 6.2.3 and, where a complaint is brought by the Disciplinary Officer, a Disciplinary Committee and, where an appeal is taken, an Appeal Committee.

The Citing Officer has a discretion as to whether or not a complaint should be brought against a cited player in terms of ERC Rule 6.2.3. A Disciplinary Committee has discretion to review all of the procedures leading up to a hearing before the Disciplinary Committee. An Appeal Committee has discretion to review all of the procedures leading up to the hearing of the Appeal Committee.

The Disciplinary Officer has no discretion as to whether a citing complaint is brought where a Citing Officer has determined that there shall be a complaint in accordance with ERC Rule 6.2.3. That the Disciplinary Officer has no such discretion is made clear by the first sentence of ERC Rule 6.2.5.

It is not clear whether the Citing Officer in this case did or did not consider the application of ERC Rule 8.8 in the context of the omission on the part of ASM from the original citing complaint. It is not even clear that the Citing Officer was aware of the omission.

However, even if the Citing Officer were to have been aware of the deviation and/or omission etc and to have determined that no unreliability or miscarriage of justice had occurred that would not prevent a Disciplinary Committee, or indeed an Appeal Committee on appeal, taking a contrary view.

Unless and until a competent person or body determines that a deviation and/or omission etc has rendered the proceedings unreliable and/or caused a miscarriage of justice, the proceedings continue. ERC Rule 8.8 does not operate such as to give a relevant person and/or body discretion to decide that proceedings continue where a deviation and/or omission etc has occurred. It does not operate such that an application requires to be made to such

person and/or body to allow proceedings to continue. The proceedings continue unless and until a person and/or body, having jurisdiction so to do, determines that the proceedings have been rendered unreliable and/or a miscarriage of justice has occurred. No such determination having taken place in the case of the citing proceedings against the Player the Disciplinary Committee erred in holding that the citing was invalid and that the Player had no case to answer.

The Disciplinary Committee were, strictly speaking, correct to hold that it did not have the discretion which the Disciplinary Officer invited it to exercise when the matter was considered at the hearing on 18<sup>th</sup> January 2005. The discretion which the Disciplinary Committee was invited to exercise proceeded on the basis that it was open to the Committee to excuse the deviation and/or omission and thereby allow the citing proceedings to continue. For the reasons set out above we consider this approach to be incorrect. The application for the exercise of a discretion ought to have come on behalf of the Player. The Disciplinary Committee has a discretion to determine whether or not the proceedings of the citing have been rendered unreliable and/or a miscarriage of justice has occurred by reason of the deviation and/or omission etc. If they determine that such has occurred then the citing falls to be dismissed. It does not appear from the Decision that such application was made on behalf of the Player.

We are not here intending to hold that it is always necessary that such application be made by one of the parties. It would be open to a Citing Officer, Disciplinary Committee or Appeal Committee to decide *ex proprio motu* to consider the application of ERC Rule 8.8 where such a person or body ascertained that such a deviation and/or omission etc had occurred.

It would not be appropriate for the Appeal Committee, in this case, to decide whether or not the proceedings had been rendered unreliable and/or a miscarriage of justice had occurred. No such application has been made to the Appeal Committee and in any event were the Appeal Committee to make that determination at this stage, it would afford the party against whom the decision was made no right of appeal from that decision, there having been no decision on the same matter at first instance.

In the circumstances we direct that the matter be remitted back to the same Disciplinary Committee in order that it should hold a full hearing on the citing complaint. It should not consider the ERC Rule 8.8. point at a separate preliminary hearing. However, it would be open to the Player at any such hearing to argue that the proceedings of the citing had been rendered unreliable and/or that a miscarriage of justice had occurred by reason of the deviation and/or omission etc. Alternatively it would be open to the Disciplinary Committee to itself raise the issue, seek representations and then determine the matter. The Disciplinary Committee will need to know the full facts before determining whether the deviation and/or omission etc has or has not rendered the proceedings unreliable and/or caused a miscarriage of justice to occur.

It is desirable that the full hearing of this matter takes place as soon as possible before the Disciplinary Committee. In the event that a member or members of the original Disciplinary Committee is/are unable, for any reason, to take part in the consideration of this citing complaint then the Chairman of the Disciplinary Panel is authorised to appoint substitute member or members as may be required.

The parties are invited to make written submissions as to costs in relation to this appeal and the costs of the proceedings before the Disciplinary Committee on 18<sup>th</sup> January 2005. Such written submissions should be received by me within seven days of the date of receipt of a copy of this decision.

This decision may be publicised.

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**Rod McKenzie**

**Chairman**

**Appeal Committee**

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**Date**