

EPRC CHAMPIONS CUP

Decision Judicial Officer
Hearing held at the Sheraton Hotel, CDG Airport, Paris

Thursday, 17 December 2015

In respect of:

Cian Healy ("the Player")

and

A citing complaint ("the Complaint") brought by John Byett, the citing commissioner appointed to the match played between RC Toulon and Leinster Rugby at Stade Mayol, Toulon on 13 December 2015 ("the Match") alleging that during the Match the Player committed an act of foul play contrary to Law 10.4(a) of the Laws of the Game.

Judicial Officer ("the Judicial Officer"): Roger Morris

Decisions:

- i. That the Player committed an act of foul play
- ii. That the classification of the act of foul play be changed to an offence contrary to Law 10.4(f)
- iii. That the act of foul play was serious enough to warrant a "Red Card"
- iv. That the Player be suspended from playing the game up to and including 27 December 2015 – a period of suspension representing two weeks.

Introduction:

The Judicial Officer was appointed by Professor Lorne D. Crerar, Chairman of the EPCR Disciplinary Panel, to consider the Complaint brought against the Player for his alleged offending in the Match played in the EPRC Champions Cup ("the Tournament"). The parties agreed that the hearing would be conducted in accordance with the provisions of the Tournament's disciplinary rules for season 2015/16 ("Rules" in the plural and "DR" in the singular).

John Byett was appointed as citing commissioner to the Match and cited the Player for an alleged breach of Law 10.4(a) of the Laws of the Game and specifically for striking an opponent, the Toulon hooker, Guiardo Guilhem ("T2") with his "knee/lower thigh".

In addition to the Judicial Officer the following persons were present at the hearing:

- The Player
- Donal Spring, Solicitor, representing the Player
- Guy Easterby, Leinster Team Manager
- Liam McTiernan (Tournament Disciplinary Officer) on behalf of EPCR

The materials that had been distributed to the parties and the Judicial Officer in advance of the hearing were:

- The citing commissioner's report
- Letter dated 14 December 2015 sent by the Tournament Disciplinary Officer to Professor Crerar

- E mail dated 15 December 2015 from Professor Crerar convening the hearing
- E mail dated 15 December 2015 from T2
- Match Official Yellow Card Report from the Match referee, Nigel Owens
- Letter dated 16 December 2015 from Mr Spring to the Judicial Officer setting out the Player's responses to the Tournament's standing directions
- E mail from Mr McTiernan with EPCR responses.
- Video footage of the alleged foul play as referred to in the Complaint.

There were no preliminary matters to be considered.

The Judicial Officer referred to the terms of the Complaint set out by Mr Byett, noted the Player's responses to the standing directions as set out by Mr Spring and clarified that there were two parts to the Player's position. First, he denied that he had committed an act of foul play at all and second, but without prejudice to the first, if it was found that he had committed an act of foul play then the seriousness was such that the Yellow Card issued by the referee was sufficient punishment and it did not warrant a Red Card. The first task of the hearing, therefore, was to consider the evidence with a view to determining whether or not foul play was committed. Only if foul play was established would it be necessary to consider its seriousness.

Evidence

Mr McTiernan first referred to the written items that he wished to present as evidence. These comprised: the Complaint itself, the e mail from the gatekeeper; the referee's yellow card report and the e mail from T2.

Each was taken as read, Mr McTiernan having no points to make in relation to them but subject to Mr Spring having the opportunity to comment at appropriate points in the hearing as he required.

The Judicial Officer said that the gatekeeper's report was a matter of procedure and that any opinion expressed in it would be ignored and disregarded when the Judicial Officer came to make his determinations.

Mr McTiernan then introduced the video evidence which comprised views of the alleged incident from a variety of angles. He pointed to the melee from which T2 had emerged. From Mr McTiernan's perspective the video established the cited act of foul play in that it showed:

- T2 rolling away from a tackle situation and attempting to stand up
- As he was rising to his feet he was met by the advancing player
- The advancing player ran into T2 raising his right leg so that his knee struck T2 on his head
- T2 was then left on the ground holding his head in pain

Mr Spring then set out his and the Player's view of the video evidence and the written evidence. The essence of the points he made was as follows:

- There was no strike to the head of T2 by the Player with his knee
- If there was contact it was with the Player's thigh and accidental
- Nothing should be implied into the Player's knees being flexed. If they were not flexed he would have fallen over
- The pitch was slippery as was clear from the evidence of the referee who was the person most likely to give accurate evidence about that aspect
- The Player approached the incident melee of players at a flat angle aiming to turn through the gate (the imaginary gateway through which players joining a ruck must pass) to enter the ruck legitimately
- T2 was in that gateway and where he should not have been had he properly rolled away from the tackle he had made
- If there was contact between the Player and T2 it was the accidental consequence of the Player's legitimate actions which were obstructed by the illegitimate actions of T2
- If there was contact it was not a strike but part of the process of the Player running

- The Player's focus was on getting at the Toulon player who was preventing Leinster win the ball
- If he had tried to run around T2 the Player would have been penalised for entering a ruck illegally
- The citing commissioner had described T2 as rolling away. That was not the case. He was standing up and coming straight backwards through the Player's gateway.
- The citing commissioner's description of a strike was incorrect
- The Player was no more than clumsy in his actions which had been carried out on a very slippery surface (attested to by the referee) and should be seen in that context
- T2 himself had said nothing about being struck with a knee but only that he had felt a blow from a tackle
- In summary there was no offence as cited but if there was an offence it was not worthy of more than the yellow card issued by the referee

The Player, asked to comment on the video and in answer to questions from Mr McTiernan and the Judicial Officer, added the following points:

- His focus as he approached the ruck was to get at T15
- He could see the ball and was intent at getting possession for his team
- As he approached the ruck he anticipated that T2 would have rolled away
- In the event he was still in the way and the Player pointed to the video showing his arms outstretched to push T2 out of the way
- He did not realise he had made contact with T2's head because he had felt nothing
- As he watched the scene being replayed on the stadium screen he thought the incident "didn't look right" but he knew what his intentions were and stood by them
- His intention as always when entering a ruck was to free up the ball
- As he approached the ruck T2 was getting up and towards him so he tried to push him down
- He could not have hurdled T2 or otherwise avoided him and achieved his objective of entering the ruck legitimately
- His knees were flexed because he wanted to be in the strongest possible body position
- He accepted he has a duty of care to other players but the total focus was win the ball, win possession, win the game.
- He was "gutted" when he was awarded the yellow card because he had not had one for a long time and prided himself on playing within the laws

There were no other items of evidence to be considered.

Deliberations:

The Judicial Officer retired to consider matters in private and reminded himself that the standard of proof to be applied is the balance of probabilities.

Having reviewed all the evidence that had been presented, in particular having watched the video clips again and again and having taken account of all the points made by Mr McTiernan on behalf of EPCR and by Mr Spring and the Player on behalf of the Player, the Judicial Officer's determinations were as follows:

- The Player approached the melee where the cited occurrence happened from the left (from his perspective) of that melee.
- The Player's approach was from infield of the melee and at a shallow angle.
- The Player considered the melee to be a ruck and was approaching it with the intention of clearing the ball for his team and with that intention in mind, focusing upon T15 who was in the so-called "jackal" position over the ball.

- The Player was intent on entering what he considered a ruck through the imaginary gateway on his team's side of it so as not to risk being penalised for entering a ruck from the side. T2, who had been involved in the melee, had detached himself from it and in the Player's "gateway" starting to get to his feet.
- The Player's intention to enter the ruck was obstructed by the presence of T2 but this did not stop the Player trying to run through the gateway and get to the ruck in question.
- In his attempt to perform his intended task, the Player's right leg made contact with T2's head with sufficient force that T2 was left on the ground holding his head and needing treatment
- Whether or not T2 was in an illegal position or whether or not he was cynically trying to obstruct the path of the Player, the fact is he was there and the Player, having a duty of care to his fellow players, was required to take account of that presence. The Player had a decision to make and he could have decided to avoid making contact with T2.
- That a decision to avoid T2 may have caused the Player to enter a ruck from an illegal angle or that it might have diminished his ability to perform his intended task was irrelevant to his obligation to avoid dangerous contact with another player.
- The decision the Player made was to try to enter the ruck regardless of T2's presence and in making that decision, the Player recklessly created the situation in which there was a heavy collision between him and his opponent. That collision included the Player's right leg hitting T2's head and in the Judicial Officer's view constituted foul play.
- The Judicial Officer accepted that the Player had not used his knee as a weapon in any manner targeted to strike T2 and that the main point of offensive contact by the Player was with his thigh and not his knee even if both parts of the leg may have made some sort of contact.

It was, however, well beyond the balance of probability that the Player's thigh had made offensive contact with T2's head and this conclusion, taken together with the Player's version of events (that his focus and intention was to join a ruck) and the angle and manner of his running towards that ruck, led the Judicial Officer to conclude that the offence committed was not correctly classified as a strike with a knee.

Mr Spring on behalf of the Player had not disputed that there had been contact (albeit he claimed the contact to have been accidental) between the Player and T2's head but had asserted that the contact was with the Player's thigh and not knee. The Judicial Officer agreed with Mr Spring's view that contact was with the thigh rather than the knee. The Citing Commissioner too had said contact included the thigh. These observations coupled with the Judicial Officer's acceptance of the Player's explanation that his focus was on joining a ruck led the Judicial Officer to consider if a more appropriate classification of the foul would be as an offence contrary to Law 10.4(f) – playing a player without the ball.

Appendix 3 to the Rules categorises together a number of offences contrary to both Laws 10.4(f) and 10.4(k) describing them as "Dangerous charging or obstructing or grabbing of Opponent without the ball including shouldering".

The Judicial Officer noted too that the sanctions applicable to Law 10.4(f) were less than to Law 10.4(a).

The Judicial Officer decided that he should give to the Player the benefit of such doubt as he had and deal with his offending as an offence in breach of Law 10.4(f). It could not be unjust in the circumstances to exercise his power under DR 9.8 and to amend the charge to one with lower entry point sanctions than the original. Such a change was compatible with all the evidence that was presented and, particularly, consistent with the Judicial Officer's finding that Mr Spring's assertion that contact was by way of the thigh was correct.

The Judicial Officer concluded that there had been an act of foul play and to that extent would uphold the Complaint but change the Category of offence to one contrary to Law 10.4(f).

The hearing was reconvened and the parties informed of the Judicial Officer's decisions.

Assessment of foul play

The Judicial Officer said that the hearing would deal with the remainder of the issues to be determined on the basis of a breach of Law 10.4(f).

The Judicial Officer noted that there remained to be decided the second part of Mr Spring's initial submission – that even if foul play was found, the foul play did not warrant the issue of a Red Card. Although that issue remained to be determined, and as the Judicial Officer noted it was within his powers at any time in the proceedings to make such a determination, he nevertheless suggested it would be helpful if Mr Spring addressed all the issues by reference to the Rules and in particular Rule 7.8.32 and those following on from it.

By reference to Rule 7.8.32, Mr Spring made the following submissions:-

- The offending was not intentional or deliberate.
- If the offending was reckless, the consequence of the offending was accidental and that in all respects the level offending was at the lowest end of the scale.
- In terms of the gravity of the Player's actions, he emphasised again that the contact was the accidental consequence of the Player's actions and the nature of the actions did not involve a deliberate use of aggression.
- He considered there was no provocation, retaliation or self-defence involved.
- The effect on T2 was that he needed some treatment with an icepack, but otherwise there was no effect and he carried on playing.
- There was no effect on the Match.
- T2 was vulnerable only to the extent that he was on the ground.

In relation to off-field factors, it was acknowledged by EPCR that there would be nothing to aggravate the offending and, in terms of mitigation, they would not expect a player to lose that element of mitigation usually granted for an acknowledgement of guilt in circumstances where the original cited offence had not been upheld.

By way of further information the Judicial Officer was told that the Player had served one previous period of suspension, in Season 2012/13, when he had been suspended from playing for a period of 3 weeks for stamping. The Player is now 28 years old and has played over 200 professional rugby matches

There were no other matters that either party wished the Judicial Officer to consider.

Disposal.

The Judicial Officer retired to consider matters in private and to determine what sanction, if any, should be imposed.

The Judicial Officer first considered whether or not the offending was such that the Yellow Card issued by the referee was sufficient punishment so that the offending did not warrant a Red Card. He undertook his assessment of that question by reference to Rule 7.8.32 and did so as follows:-

7.8.32

- (a) The Judicial Officer accepted that the Player's intention was to enter a ruck and to do so legitimately.
- (b) The offending was the reckless consequence of undertaking an otherwise legitimate course of action. Although T2 was in his path the Player could have chosen to avoid him. He had a choice of actions and recklessly disregarded the presence and therefore the safety of T2.
- (c) There was a reckless disregard for T2's safety.
- (d) The offence was committed as a consequence of the Player running towards a ruck and making heavy contact with his thigh to the head of T2.
- (e), (f) & (g) There was no provocation, retaliation or self-defence.
- (h) T2 appeared momentarily to have been stunned and was required to have treatment to his head immediately after the incident but carried on playing with apparently no adverse effect.
- (i) There was no effect of the Player's action on the match.
- (j) T2 was in a vulnerable position to the extent that there was little or nothing he could do to avoid the Player's contact.
- (k) The Player participated fully in the offending.
- (l) The Player's conduct was completed and was not merely an attempt.
- (m) There was no other feature to be taken into account.

In considering the totality of these assessments the Judicial Officer concluded that a foul that displayed a reckless disregard for the safety of another player culminating in a heavy blow to the head was comfortably deserving of a red card.

This left the Judicial Officer with the task of assessing at which entry level he should start his deliberations as to the sanction to be levied. He noted that the recommended sanctions for this category of foul in the table of applicable sanctions is : Lower End – two weeks; Mid Range – five weeks; Top End – ten+ weeks.

The Judicial Officer had accepted the Player had not targeted T2 and that foul play was not in the Player's original contemplation. It was also the case that apart from obviously initial pain, T2 suffered no more than transitory, short lived injury. In these circumstances the Judicial Officer concluded that the Lower End entry point was the appropriate starting point to properly reflect the level of offending in this case. This meant a period of suspension of two weeks.

The Judicial Officer agreed with Mr McTiernan and Mr Spring that there was nothing in terms of DR 7.8.34 aggravating of the offending.

In terms of mitigating features to be taken into account by reference to DR 7.8.35, Mr McTiernan had fairly conceded that the Player should not lose the benefit of a "guilty" plea for not admitting culpability in the circumstances of a finding that the originally cited Law was found not applicable. The Player and Leinster had also been cooperative with and respectful of the disciplinary process.

On the other hand the Player had served a previous suspension for foul play and in the Judicial Officer's assessment had shown little understanding or acknowledgement that what he had done was wrong. His duty to perform the tasks expected by his team appeared to override his duty of care to

other players. Nor had he apologised to T2. He would have been well aware that T2 was hurt and the incident led to the Player receiving a Yellow Card.

The Judicial Officer assessed 30% to be the correct discount to reflect the mitigating factors in the particular circumstances of this case and this player.

In the final reckoning the Player would serve a period of suspension of two weeks, and the Judicial Officer did not consider in terms of DR 7.8.37 that this was wholly disproportionate to the level of offending in this case.

The hearing was reconvened and the Judicial Officer's decision announced to the parties.

The Judicial Officer then confirmed the Player's playing schedule to conclude that the period of suspension would continue up to and including Sunday December 27. The Player would be free to play again on Monday 28 December.

The Parties were reminded that the Rules afford them the right to appeal against the Judicial Officer's decisions.

A handwritten signature in black ink, appearing to read 'Roger Morris', with a large, stylized initial 'R'.

Roger Morris

18 December 2015

EUROPEAN PROFESSIONAL CLUB RUGBY (EPCR)

DECISION OF THE APPEAL COMMITTEE

IN RESPECT OF THE APPEAL BY CIAN HEALY

HELD via Conference Calls

ON 18 December 2015 and 23 December 2015

IN RESPECT OF:-

An appeal by Cian Healy (“the Player”) against the decision of the Judicial Officer on 17 December 2015, finding that the Player had committed an act of Foul Play; that the classification of the act of Foul Play be changed to an offence contrary to Law 10.4(f); that the act of Foul Play warranted a “Red Card” and that the Player be suspended from playing Rugby up to and including 27 December 2015, a period of suspension representing two weeks (“the Decision”) and an application by the Player in terms of DR 8.2.4(b) to suspend that suspension pending determination of the appeal.

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

Professor Lorne D Crerar (Chairman) (SRU)

Rod McKenzie (SRU)

Roddy Dunlop QC (SRU)

DECISIONS OF THE APPEAL COMMITTEE:

1) In respect of the application to suspend the suspension of the Player pending determination of the appeal in terms of DR 8.2.4(b), was delegated by the Chairman of the Disciplinary Panel, in terms of Disciplinary Rules of the European Rugby Champions Cup 2015/16 (“DR”) further to DR 8.2.4(b) and DR 8.3.1, for consideration and determination by the Appeal Committee:-

- i) the Appeal Committee unanimously decided that the Application should be granted and that the suspension imposed by the Judicial Officer on 17 December 2015 was suspended pending determination of the grounds of appeal;

2) In respect of the appeal the Appeal Committee unanimously decided that:-

- ii) in terms of DR 8.4.8, the Judicial Officer was in error in reaching his decision and his decision should be overturned;
- iii) in terms of the DR 8.4.19(b) the decision appealed against is set aside and the sanction quashed;

- iv) in terms of the DR 8.4.19(e) the citing complaint of 14 December 2015 is remitted for re-hearing de novo and determination of new by a different Judicial Officer to be appointed in terms of the DRs; and
- v) in terms of DR 8.4.19(e) in order to deal justly with the appeal, the Player is no longer suspended further to DR 7.5.4(e) pending the de novo determination of the citing complaint by the different Judicial Officer further to (iv) above.

1. GROUNDS OF APPEAL

The Player appealed the Decision by Notice of Appeal dated 17 December 2015. The Grounds of Appeal were that:-

- i) the charge that the Player had committed an offence under 10.4(a) was found to be unproven by the Judicial Officer,
- ii) the Judicial Officer's finding that the Player had committed an act of Foul Play under law 10.4.(f) was not put to the Player at the hearing and that this was contrary to fair procedure and natural justice, and
- iii) the Decision should accordingly be overturned

2. INTRODUCTION AS REGARDS THE APPLICATION FOR SUSPENSION OF THE SUSPENSION ("the Application")

The Decision of the Judicial Officer was not available for consideration by the Appeal Committee on 18 December 2015. In the circumstances, and in terms of DR 8.2.4(b), the Chairman advised that in respect of the Suspension Hearing referred to below that he had appointed the Appeal Committee to determine the appeal when the Decision of the Judicial Officer became available and meantime intended to delegate to that Appeal Committee the determination of the Application.

The Appeal Committee was convened by Professor Lorne D Crerar, Chairman of the EPCR Disciplinary Panel, further to DR 8.3.1 on 18 December 2015 to consider and determine the appeal and there was delegated to it the determination, at the hearing, of the Application.

In addition to the members of the Appeal Committee, there was present during the Suspension Hearing on 18 December 2015:-

- a. The Player;
- b. Donal Spring, Solicitor of the Player, Messrs Daniel Spring and Co;

- c. Guy Easterby, Leinster Manager;
- d. Liam McTiernan, Disciplinary Officer, EPCR;
- e. Max Duthie, Messrs Bird & Bird, Legal Representative of the Disciplinary Officer; and
- f. Jennifer Rae, Solicitor, Harper Macleod, Clerk to the Appeal Committee.

Documentation and other materials were available and considered by the Appeal Committee which included:-

1. The documents before the Judicial Officer;
2. The Notice of Appeal; and
3. A response from the Legal Representative of the Disciplinary Officer regarding the Players application to suspend the suspension.

In reaching its decision on the Application the Appeal Committee carefully considered all of the documentation and submissions (written and oral) before it. Only such documentation and submissions relevant to its decision on the Application are referred to in this part decision.

3. PROCEDURE FOLLOWED AT THE SUSPENSION HEARING

The Chairman advised that the Decision of the Judicial Officer was not yet available. In the circumstances and in pursuant to DR 8.2.4(b) the Appeal Committee had been convened to hear matters in terms of DR 8.2.4(b) and the Application. The Chairman outlined the procedure to be followed at the Suspension Hearing. The Chairman enquired as to whether or not there were objections to the procedure which had been adopted to deal with the Application to suspend the suspension or any other preliminary matters. There were none.

The Chairman explained that he would ask the Player's Legal Representative to make oral submissions, regarding the Application, and during the course of submissions he may be questioned by members of the Appeal Committee. Following submissions by the Player's Legal Representative the Chairman explained that he would ask EPCR's Legal Representative as to whether he wished to supplement the written submissions regarding the Application. Thereafter the Player's Legal Representative would be afforded the opportunity to reply to the EPCR submissions. Final concluding remarks would be sought from EPCR's Legal Representative followed by the Player's Legal Representative. Thereafter the Appeal Committee would adjourn and deliberate in private to consider whether to grant the Application.

4. THE PLAYER'S SUBMISSIONS – APPLICATION TO SUSPEND THE SUSPENSION

The Player, by the way of his Legal Representative, made submissions as to why the Application should be granted.

In support of this contention, the Player's representative submitted:-

- i) that the Judicial Officer had not formally amended the charge and not allowed the Player to respond to the amended charge of an act of alleged Foul Play under Law 10.4(f) or (k), rather than Law 10.4(a) as narrated in the citing complaint;
- ii) the Judicial Officer had failed to follow due process in amending the charge; and
- iii) in all of the circumstances it would be contrary to natural justice for the Player to remain suspended while the appeal remained outstanding.

The Legal Representative for the Player ("DS") began his submission by setting out what had happened at the first instance hearing. He explained that he, on behalf of the Player, was given the opportunity to lead evidence and make submissions as to whether the Player had committed an act of Foul Play under Law 10.4(a) in response to evidence and submissions on the same subject by the Disciplinary Officer. The Judicial Officer then retired to consider whether the Player had committed an act of Foul Play under Law 4.10.4(a). When the Judicial Officer returned to the hearing he advised the Player that an act of Foul Play in terms of 10.4(a), in this case a strike with the knee, had not been established but he was making a finding that the Player had committed an act of Foul Play under Law 10.4(f) or 10.4(k).

DS explained to the Appeal Committee that DS had then asked the Judicial Officer, "are you making a finding?" He explained that the Judicial Officer replied and said, "Yes, I am making a finding". DS advised that the Judicial Officer then asked DS to address him regarding sanction. DS advised that he was not afforded the opportunity to address a proposed amended charge, namely that the Player had committed an act of Foul Play under Law 10.4(f) or (k), nor discuss the matter with the Player as to how the Player may plead to an allegation of the Player having committed an act of Foul Play under Law 10.4(f) or (k) it is was out to him.

DS advised the Appeal Committee that the hearing had been very lengthy and at no point were Laws 10.4(f) or (k) mentioned or in any way referred to prior to the Judicial Officer returning from his period of retirement. He submitted that the Player had not been given fair notice of the amended charge, to accept or reject that Foul Play had been committed by him in terms of either or both of those Laws or to lead evidence or respond to an allegation that he had committed a act of Foul Play in terms of Laws 10(4)(f) or (k). There had, he submitted been a failure to follow the procedures in terms of the disciplinary procedures because the Player had never been invited to state whether he accepted or rejected the allegation that he had committed an act of Foul Play in terms of Laws 10(4)(f) or (k). He further submitted that in terms of natural justice the Player should have had the amended charges put to him and have had an opportunity to respond to the new charge(s). DS submitted that there was a

clear injustice in what had happened and the Player should not be prevented from playing whilst the appeal was pending. Accordingly, the suspension should be suspended until such time as the Player's appeal was heard.

DS submitted that in terms of DR 9.8 at no point prior to or during the hearing had the Judicial Officer amended the charge. He stated that the word "amendment" was not used when the Judicial Officer stated that he was making a finding that the Player had committed Foul Play under Law 10.4(f) or (k). It was contended that the Judicial Officer had not stated that he was amending the charge in the citing complaint to a Law 10.4(f) or (k) charge. DS then submitted that this could therefore not be an amendment of the charge in terms of DR 9.8. It therefore followed that, the suspension should be suspended until such time as the Player's appeal was heard.

DS submitted that it would be prejudicial to the Player to serve the suspension in the event that the charge, amended or otherwise, was later found to be unproven, and that if this did transpire the serving of the suspension could not be undone. He advised the Appeal Committee that he may have proceeded differently had the charge originally been Law 10.4(f) or (k). Because acts constituting a contravention of Law 10.4(f) or (k) and those which would be a contravention of Law 10.4(a) are different in terms of what constitutes an offence. He further submitted that it was not for the Player or DS to explain at this hearing what the Player, or DS, would have said or done had the charge originally been presented to the Player as 10.4(f) or (k). Accordingly, the suspension should be suspended until the Player's appeal was heard.

5. REPRESENTATIONS FOR EPCR - APPLICATION TO SUSPEND THE SUSPENSION

The Legal Representative of EPCR supplemented his written argument orally under explanation that the Disciplinary Officer of EPCR's position was that they were opposing the application to suspend the suspension.

The following is a relevant part of the written submission made by the Legal Representative of the EPCR:

"Clause 8.2.4(b) does allow a suspension to be lifted but only in very exceptional circumstances. That clause provides that the appellant (here Mr Healy) will have to produce new evidence that was not available on reasonable enquiry at the hearing before the Judicial Officer and that casts a material doubt on the reliability of the decision of the Judicial Officer, for example because it is evidence of a miscarriage of justice because of mistaken identity or similarly truly exceptional circumstances. We don't yet know what this new evidence will be but given the way in which the notice of appeal was articulated, we imagine that it will be evidence not from the match but from the hearing itself, to the effect that the Judicial Officer did not 'put to Mr Healy before or during the hearing [the amended citing

complaint, under law 10.4(f)] and he [Mr Healy] was therefore not given the opportunity to defend himself.”

If that is the new evidence, then it will be for the Appeal Committee to determine whether or not that meets the high test set out in clause 8.2.4(b). The Disciplinary Officer does not recollect the Judicial Officer formally 'putting' the amended citing complaint to Mr Healy. Nevertheless, it might be of some assistance for the Appeal Committee to learn (based on the recollections of the Disciplinary Officer) that following the Judicial Officer's disclosure that he was minded to consider the citing complaint as an infringement of law 10.4(f) instead of law 10.4(a) (under the very wide powers set out in clause 9.8 of the Disciplinary Rules), Mr Healy seemingly had ample opportunity to (among other things) object to the amendment, clarify that he did not accept that he was guilty of Foul Play under law 10.4(f), clarify that he did not accept that his actions were worthy of a red card under law 10.4(f), ask to introduce new evidence or re-hear the same evidence in light of the new citing complaint, or ask for an adjournment. He did in fact do some of these things, and where he didn't do them that was not because he was not afforded the opportunity to do so: he was afforded that opportunity. And he was legally represented at the hearing before the Judicial Officer.

If we assume for a moment that Mr Healy is right that he should have been but was not properly afforded an opportunity to deny the amended citing complaint, in assessing whether the new evidence casts a material doubt of the reliability of the decision, the Appeal Committee might wish to consider what (if he had been properly afforded an opportunity to deny the amended citing complaint) Mr Healy would have said and why that would have made any difference to the decision.”

The Legal Representative of the Disciplinary Officer submitted that the Appeal Committee should consider whether the Application should succeed in terms of DR 8.2.4(b) only. He advised that the DR 8.2.4(b) should be interpreted narrowly in this regard. He advised that the Application should not succeed unless the Player produces new evidence that was not available at first instance that casts material doubt on the reliability of the Decision. The Legal Representative for EPCR acknowledged that neither of Laws 10.4(f) or (k) were referred to prior to the Judicial Officer returning from his private consideration of the matter during the hearing. However, the Disciplinary Officer did recall the Judicial Officer asking if anybody had any questions, or words to that effect, when the Judicial Officer stated that he was making a finding that Foul Play had been committed in terms of Law 10.4.(f) or (k). The Disciplinary Officer advised that he had understood the Judicial Officer's words when he said, "I am making a finding" to be a question rather than a statement. Although, how those words could be constituted as a question was not explained. The Disciplinary Officer was asked if he recalled the Legal Representative for the Player asking the Judicial Officer whether the Judicial Officer was making a finding, the Judicial Officer replying yes, and asking the Legal Representative for the Player to move on. The Disciplinary Officer advised that he did not recall the events being precisely described by DS but he could not say that they did not happen in that way as his attention was diverted to something else at that moment in time.

The Legal Representative for EPCR submitted that the Judicial Officer can amend the citing complaint at any stage prior to or during the hearing. The Legal Representative for EPCR submitted that it was EPCR's position that the citing complaint had been amended and that the amendment of the citing complaint at that stage of the proceedings, after he had considered whether there had been Foul Play in terms of Law 10.4(a), was permissible. The Legal Representative for EPCR submitted that an amendment at that stage in proceedings did not cast unreliability on the Decision. The Legal Representative accepted that the Judicial Officer may have been able to go about the amendment process in a better way; however, it was and would have been open to the Legal Representative of the Player to make submissions on any point regarding whether the Player had committed an offence which warranted a Red Card and that the Player and/or the Player's Legal representative chose not to make those submissions. The Legal Representative of EPCR advised that the hearing was not a short hearing and the Legal Representative for the Player could have requested an adjournment. He did not ask for an adjournment recognising that, it is important that the Player was afforded every opportunity to make any submissions. Accordingly, the Appeal Committee should not allow the application to suspend the suspension as a valid amendment had been made by the Judicial Officer.

The Legal Representative of EPCR advised the Appeal Committee that the outcome sought by the Player, to suspend the suspension, is exceptional. The Legal Representative of EPCR advised that DR 8.4.19(e) is intended to cover exceptional cases, for example when evidence is not available and/or there had been a miscarriage of justice or a witness who was not available for the first instance hearing later becoming available for an appeal hearing. The Legal Representative for EPCR advised that the circumstances of the Application would not be captured by DR 8.4.19(e) or DR 8.2.4(b) The Legal Representative for EPCR advised that the Appeal Committee should consider whether there is any new evidence. It was the Legal Representative's for EPCR's submission that new evidence in this regard could not be evidence of what the Judicial Officer has said.

The Legal Representative of EPCR advised that the test as to whether the application to suspend the suspension should be upheld is whether material doubt had been cast on the Decision. It was the Legal Representative of the EPCR's submission that it is not enough to say there has been an error, as this was an experienced Judicial Officer who had heard evidence, watched the video evidence, and formed a view and the Judicial Officer was entitled to form the view that he did. The Legal Representative for EPCR's provided that the Player required to present to the Appeal Committee what would have been different, following the alleged error of the Judicial Officer, in order for material doubt to be cast on the reliability of the Decision. The Legal Representative's for EPCR's contended that the requirements of DR 8.2.4(b) had not been satisfied by the Player. Accordingly, the Appeal Committee should not grant the application to suspend the suspension.

6. DECISION OF THE APPEAL COMMITTEE IN RESPECT OF THE APPLICATION TO SUSPEND THE SUSPENSION

The Appeal Committee convened in private to determine the Player's application to suspend the suspension following submissions by both parties.

The Appeal Committee unanimously determined as follows:-

The Player's Legal Representative had produced material evidence of what the Judicial Officer had said at the hearing, as regards the amended charge and the manner in which the issue of the amendment had been dealt with by the Judicial Officer. This was new evidence and accordingly, the Player had satisfied the requirement to produce new evidence in terms of DR 8.2.4(b). In the context of DR 8.2.4(b), there is no limitation that new evidence is required to be evidence regarding the on-field incident. In any event, where fundamental matters of fairness are in issue it is appropriate that the appeal system should allow for the possibility of the effect of sanctions being suspended pending appeal and DR 8.2.4(b) should be construed in this context.

The Disciplinary Officer could not recall whether the Legal Representative of the Player had questioned the Judicial Officer when the Judicial Officer had confirmed his finding as regards amending the citing complaint to a breach of Laws 10(4)(f) or (k) without affording an opportunity to the Player's Legal Representative to lead evidence and make representations as to the amended of the charge of Foul Play. The Appeal Committee proceeded on the description of events given by the Legal Representative of the Player, which was not disputed by the Disciplinary Officer. In so doing the Appeal Committee was not making any final finding on these matters, which is for the full appeal hearing, but was proceeding only on an interim basis pending receiving the written decision of the Judicial Officer with his description of the events. In these circumstances the Appeal Committee was satisfied that the grounds of appeal disclosed substantial issues of procedure and fairness for consideration and that in the circumstances the Application was granted and the suspension was suspended in terms of DR 8.2.4(b) pending the determination of the appeal. In these exceptional circumstances it would be unfair if the Player were not able to play whilst his appeal was pending. Had there been a substantial dispute between the Legal Representative of the Player and the Disciplinary Officer as regards what had occurred at the disciplinary hearing and the grounds of appeal not disclosed substantial issues of procedure and fairness then different considerations would have applied in consideration of the Application.

7. APPEAL HEARING

The Written Decision of the Judicial Officer was circulated to all parties on 20 December 2015. The Appeal Committee was reconvened by Professor Lorne D Crerar, Chairman of the EPCR Disciplinary Panel, further to DR 8.3.1 and DR 8.4.3 on 23 December 2015 to hear the Players appeal. ("the

Hearing")

In addition to the members of the Appeal Committee, there was present during the Hearing:-

- a. Donal Spring, Solicitor of the Player, Messrs Daniel Spring and Co
- b. Rose Alice Murphy, Solicitor, Messrs Daniel Spring and Co, assistant to Mr Spring
- c. Guy Easterby, Leinster Manager
- d. Liam McTiernan, Disciplinary Officer, EPCR
- e. Max Duthie, Messrs Bird & Bird, Legal Representative of the EPCR
- f. Jennifer Rae, Solicitor, Harper Macleod, Clerk to the Appeal Committee

The Player was absent from the Hearing as he was unwell. The Player's Legal Representative confirmed to the Appeal Committee that the Player was content for the Hearing to proceed without him being present. In the circumstances, the Chairman allowed the Hearing to proceed.

Documentation and other materials were available and considered by the Appeal Committee which included:-

1. The documents before the Judicial Officer;
2. The Notice of Appeal;
3. A response from the Legal Representation of the Disciplinary Officer regarding the Player's application to suspend the suspension;
4. The decision of ERC Appeal Committee in respect of Marius Tincu (November 2008) and Rugby World Cup 2015 decision of Judicial Officer in respect of Dominiko Waqaniburotu (September 2015)

In reaching its decision on the appeal by the Player the Appeal Committee carefully considered all of the documentation and submissions (written and oral) before it. Only such documentation and submissions relevant to its decision on the appeal are referred to in this part of the decision.

8. PROCEDURE AT THE APPEAL HEARING

The Chairman outlined the procedure to be followed at the Hearing. The Chairman enquired as to whether or not there were any preliminary matters. There were none. The Chairman explained that he would ask the Player's Legal Representative to make oral submissions and during the course of submissions he may be questioned by members of the Appeal Committee. Following submissions by the Player's Legal Representative the Chairman explained that he would ask EPCR's Legal Representative as to whether he wished to supplement the written submissions that had been made with oral submissions. Thereafter the Player's Legal Representative would be afforded the opportunity to reply to the EPCR submissions. Final concluding remarks would be sought from

EPCR's Legal Representative followed by the Player's Legal Representative. Thereafter the Appeal Committee would adjourn and deliberate in private to make its decision.

9. THE PLAYER'S APPEAL SUBMISSIONS

The Player by way of his Legal Representative made submissions as to why the appeal should succeed and the Judicial Officer's decision overturned. Further, he argued that the process embarked upon by the Judicial Officer in reaching his decision was in error. In support of this he submitted that there was no notice given to the Player that he was being considered for citing under Law 10.4(f) prior or during the hearing and he was not given an opportunity to defend himself in this regard. He referred the Committee to DR 9.8 and advised that there was no amendment prior to or during the hearing. He noted that in the written decision of the Judicial Officer there was no finding of breach of Law 10(4)(k), and that otherwise the events narrated to have occurred after the Judicial Officer returned to give his finding on whether Foul Play had been established were consistent with the description of events given by DS at the Suspension Hearing.

He also submitted that the decisions that the Legal Representative of the EPCR had provided as authority for an amendment being made without extensive consultation (*Waqaniburotu*), was not a comparable case, as in that case the player had accepted that he had committed Foul Play and both the offences were of a similar character as they related to tackling. In the Player's case the Appeal Committee was to consider two separate offences which he submitted were of a different character which was not the case in *Waqaniburotu*. He advised that he disagreed with the Legal Representative of the EPCR's previous submissions at the Suspension Hearing, namely that it was open to him as the Player's Legal Representative to object or ask for an adjournment or for the case to be dealt with under a different process. The Judicial Officer on returning from retirement had simply announced his findings on Law 10.4(a) and then on 10.4(f) without invitation for comment, representation or objection, The written decision of the Judicial Officer, DS submitted, consistent with his, DS's, description.

DS submitted that the Judicial Officer had not amended the charge in the citing complaint by following a fair process, allowing the Player to respond to the suggested amended acts of alleged Foul Play rather than an alleged act of Foul Play under Law 10.4(f) when he retired to consider whether he was making a finding under 10.4(a). He submitted that the Judicial Officer had not attempted to amend or suggested that the charge should be amended during the first part of the hearing. He submitted that the Judicial Officer should expressly state that he is considering making an amendment, ask for submissions as to whether an amendment should be made and then seek from the Player his amended submission in relation to the substituted alleged act(s) of Foul Play. He had advised that he would have contested the amendment had he been given the opportunity so to do as he had prepared for the charge in the citing report and that he would have required time to consider his position and submissions regarding a separate charge. He stated that he should have been given the opportunity

to discuss with the Player whether the Player accepted or denied that he had committed Foul Play under Law 10.4(f). He suggested that a new charge would have required a different discussion and that evidence would have been required to be led if the Player had contested a breach of Law 10.4(f). He also submitted that if the Appeal Committee agreed that there was a breach of natural justice, he did not need to establish what the Player's position would have been had the Player originally been cited for an act of Foul Play under Law 10.4(f). In the circumstances, he invited the Appeal Committee to find that the act of Foul Play in the citing complaint had not been validly amended in terms of the DR.

Further, the Legal Representative for the Player invited the Appeal Committee to dismiss the citing complaint in its entirety. He suggested that it would be against natural justice for the Player to be put through another hearing that would in effect be a new citing complaint against the Player. He advised that the Player had answered the charge put before him and the charge under 10.4(a) was found by the Judicial Officer not to have been established. It would be manifestly unfair for the Player to be put through further procedure.

10. REPRESENTATIONS FOR EPCR - APPEAL

The EPCR's Legal Representative supplemented his written argument under explanation that even if the Player was able to satisfy the Appeal Committee that the Judicial Officer had not formally and properly put the amended charge of Foul Play to the Player and thereby there had been an error, the Player must prove the Decision should be overturned or varied. The following is a relevant part of the written submission made by the Legal Representative of EPCR:

"EPCR's position is that even if Mr Healy is able to meet his burden and prove (i) that the Judicial Officer did what Mr Healy says he did (ie find that Mr Healy had committed an infringement of law 10.4(f) when the Judicial Officer had not formally put that infringement to Mr Healy), and (ii) that that was an error (as to which, see clause 9.8 of the Disciplinary Rules), Mr Healy must then go on to prove (iii) that the decision should be overturned or varied. And, EPCR says, that will require something more. For example, and assuming that there was an error as set out above, if Mr Healy is to prove that the decision should be overturned or varied, he will need to show what effect the error had on the substance of the decision. Here, that will mean showing that, if the Judicial Officer had done what Mr Healy says he should have done (presumably, formally putting to Mr Healy the allegation that he had infringed law 10.4(f)), then that would have resulted in a different decision. If the Appeal Committee agrees with this analysis, that will require it to consider, among other things, what Mr Healy would have said when faced with such a complaint (see, for example, Mr Healy's original directions statement in which he denies committing any act of Foul Play), what evidence he would have adduced, what submissions he would have made, and what findings the Judicial Officer would have made. EPCR takes the view that it is simply not sufficient for Mr Healy (if he is to have his appeal upheld) to point to an error by the Disciplinary Officer, even what he might regard as a serious

error. He has to do more. Even errors of a very profound nature by first instance tribunals, such as procedural irregularity or bias, would not of themselves allow the appellant to do nothing more than show the error and have the original decision overturned on appeal: rather, they might allow for a de novo hearing so that the substance of the case is properly considered (see the discussion of this in the ERC Tincu appeal, attached at page 11).

Mr Healy says that he will rely on 'if necessary any further evidence to be adduced at the hearing'. While that might be necessary if the Appeal Committee agrees with our analysis above, as a general proposition we respectfully remind Mr Healy of the provision in clause 8.4.11 of the Disciplinary Rules, which limits the introduction of new evidence on appeal."

The Legal Representative of EPCR advised that the circumstances of the citing complaint provided that contact was made with the opposition player's head such that the opponent required to be treated. Whilst, the Legal Representative of EPCR accepted that it could be argued what law this Foul Play should have been cited under, it was Foul Play nonetheless and it was Foul Play that warranted a Red Card. The Legal Representative for EPCR advised that EPCR rejected the Player's position that the amendment procedure had been defective in some manner or, alternatively, had not occurred at all. The Legal Representative for EPCR stated that EPCR did agree that an argument could be made on behalf of the Player that there was an error in the way the amendment was made; however, the Legal Representative for EPCR submitted that DR 9.8 does not impose formality regarding the amendment of citing complaints. He made reference to the decision in *Waqaniburotu* and advised that in that decision it appeared that the citing complaint was simply amended by the Judicial Officer. The EPCR's position was that the citing complaint was clearly amended and that the entire latter stage of the hearing was whether the act of Foul Play should be sanctioned.

The Legal Representative of EPCR submitted that that it cannot be said that the Player is now immune from answering a citing complaint in the event that there has been a defect in the hearing process. The Legal Representative of EPCR reminded the Appeal Committee that hearings that take place further to the EPCR tournament are rugby tribunals and are not court hearings, and that they are hearings that are aimed at sanctioning Foul Play which is admitted or established. He submitted that the Player should be able to advise the Appeal Committee what he would say in response to any citing for Foul Play, and if the Player established that the Player did not commit the act of Foul Play alleged, EPCR would have no difficulty in stating that the Player is free to play. However, if the Player did commit an act of Foul Play, the Legal Representative of EPCR submitted that the Player should be sanctioned like any other player in the tournament.

It was submitted that there were a number of elements of the Judicial Officer's decision where the Judicial Officer makes factual findings, which are not the subject of the Player's appeal. The Legal Representative of EPCR advised the Appeal Committee that the Player's appeal appears to be limited to the suggestion that the Judicial Officer has "made a finding" under Law 10.4(f). Accordingly, any

decision of the Appeal Committee should be limited to this aspect alone. The Player would require to demonstrate that the Judicial Officer had made an error and he also would then have to demonstrate that the Decision should be overturned or varied.

The Legal Representative for EPCR stated that the Appeal Committee have been given a clear background of what happened at the hearing when the Judicial Officer came back from the period of retiring, when he said I found Foul Play under 10.4(f) By this point the representative of the Player did not raise any objection as to whether there should be a finding of culpability and the Player's Representative then proceeded to make submissions regarding 10.4(f). Although, EPCR acknowledged that an argument could be made that more could have been done to identify that amendment had been made, in EPCR's view this was not a breach of natural justice and could not constitute an error. In order for there to be a breach of natural justice the Player would be required to demonstrate what would have been different, if the breach the Player said had occurred had not occurred. It was submitted that it should not be the case that all Player should be required to do is point to a breach of natural justice and then not answer the citing complaint. In the circumstances more needed to be done to demonstrate, pursuant to DR 8.4.8, an error, as the DRs are generally predicated on players having to answer the complaint or allegation put before them rather than technicalities allowing players to avoid the complaints or allegations put before them. For example, even a very profound error may lead to a new hearing, if a player was able to show bias then that may lead to a *de novo* hearing. Reference was made to *Tincu* in this regard and advised that this decision explored some of the circumstances where a *de novo* hearing may be ordered.

It was submitted that the Player should have to demonstrate why the decision should be overturned and varied and why the decision would be different. The Player had not led evidence as to what he would have done differently; in his submission the Player had not suggested how he has met that test in that he had not stated to the Appeal Committee what he would have said. Accordingly, the decision should not be overturned or varied.

10. DECISION OF THE APPEAL COMMITTEE IN RESPECT OF THE SUSPENSION

The Appeal Committee retired to consider their decision. Thereafter they issued a short form decision to be followed by a full written decision

The Appeal Committee found that there was an error in the manner in which the Judicial Officer had approached the question of whether the charge should be amended. There are no specific requirements in the DR as to how this should be approached at a hearing and the detail of the procedure is a matter for the Judicial Officer. What is appropriate will depend on the context in which the amendment arises. However, a fundamental requirement is that in all citing cases the Player must be given an opportunity to respond to the charge of Foul Play under the Laws of the Game which the Judicial Officer is ultimately required to determine. A citing complaint should not be upheld without

that opportunity first being given to the Player, and if the Player does not accept that he committed the act of Foul Play alleged then he must be given the opportunity of leading evidence and making submissions in response to the evidence and submissions of the tournament Disciplinary Officer who bears the evidential burden of establishing that Foul Play was committed by the Player.

In some cases, including this case, where substantial evidence has been advanced by both parties it is likely that the interests' of justice will require that parties are given an opportunity of making representations as to whether there should be an amendment to the charge of Foul Play in the citing complaint . That is not to say that there is such a requirement in every circumstance in which an amendment is being considered by a Judicial Officer. It is for the Judicial Officer to determine the circumstances but always subject to the general considerations of fairness referred to above.

In the circumstances of this case where the Player had denied having committed the Foul Play charged in the citing complaint and the Disciplinary Officer and the Player had presented evidence and made submissions in relation to the Foul Play with no reference having been made to any other Foul Play Law being in issues. The Judicial Officer should, before he made a finding on Foul Play and upholding the citing complaint, have advised the parties that he was considering amending the Foul Play cited from 10(4)(a) to 10(4)(f), or any other Law of the Game which was under consideration, and thereafter allowed the parties an opportunity to make representations on that possible amendment and then decided whether to amend in light of those representations. Amendment is only permitted where to do so would not result in substantial injustice to a player. If an amendment was then made by the Judicial Officer, the Player should then be asked to respond to whether he accepted that he had committed the Foul Play now alleged and, if he did not, the parties should be given an opportunity of leading such further evidence as was considered appropriate by them and be allowed to make representations on the amended charge before the Judicial Officer.

What should have happened in this case on this issue of amendment should not be considered as prescriptive of the procedure which must be adopted in every case where a Judicial Officer is considering an amendment to the Foul Play presented to him. When the question of possible amendment arises during the course of a hearing and whether the same evidence is relevant in all material respects to the Foul Play charged and the possible amended charge, may make it unnecessary in the interests of fairness to follow the sort of procedure which was appropriate in this case. For example where the issue is whether a tackle was a "tip tackle", under Law 10.4(j), or "dangerous", under Law 10.4(e), in such a case the hearing may have, in effect, been a consideration as to whether it was Foul Play under the former or the latter Law with any potential effects on sanction. In other cases the question of possible amendment will arise and be determined by the Judicial Officer at the beginning of proceedings where it is apparent on the papers that there has been a mis-classification or the possibility of amendment will be canvassed at an early stage and the hearing will take place on the basis that the Judicial Officer will decide on any possible amendment at the conclusion of the part of the hearing during which the issue of whether the citing is to be upheld is

determined. These are only some examples of circumstances in which a procedure for dealing with possible amendment, which is different from that which was appropriate in this case, could fairly be adopted by a Judicial Officer.

In the circumstances of this case the elements necessary for the Disciplinary Officer to establish Foul Play in terms of 10(4)(a) were at least potentially, if not actually, different from those requiring to be established in terms of 10(4)(f). In the interests of justice in this case, it is our view that the Player should have had the opportunity to make representations as to whether or not the alleged act of Foul Play, as amended had occurred. If the Player did not accept he had committed the alleged amended act of Foul Play he was entitled to lead evidence in relation to and making submissions on such alleged conduct on his part before it was held established that he had committed such an act of Foul Play.

In the circumstances the appeal is allowed and the decision of the Judicial Officer is set aside. The original citing for an act of Foul Play under Law 10.4(a) remains to be determined since the Judicial Officer's decision to amend has, in effect, been set aside. It would have been open to the Appeal Committee to itself proceed to determine the citing complaint but that would have required a *de novo* hearing and would have deprived the Player from having any right of appeal against that Appeal Committee determination. In the circumstances the citing complaint, as originally made, is remitted to be considered of new by a different Judicial Officer to be appointed by the Chairman of the Disciplinary Panel in accordance with DR 8.4.19(e). The Player is not suspended in terms of DR 7.5.4(e) pending the determination of the citing complaint by the different Judicial Officer.



Professor Lorne D Crerar
Chairman
Appeal Committee

2 February 2016

**DECISION OF THE INDEPENDENT JUDICIAL OFFICER
EPCR Champions Cup, Season 2015-2016**

Hearing held at the Sofitel, London Heathrow on 31 December 2015 at 10am.

In respect of:

Cian Healy (“the Player”)

and

The citing of the Player, for a breach of Law 10.4 (a) of the Laws of the Game in the Champions Cup match between RC Toulon and Leinster Rugby played at Stade Mayol on 13 December 2015.

Judicial Officer appointed to hear the case:

Jeremy Summers, England (“the Judicial Officer”)

Decision of the Judicial Officer:

- i. The Player's application, by way of a preliminary issue, that the citing should not be allowed to proceed in that it offended against the principle of double jeopardy and thus was a denial of due process was rejected.**
- ii. The Player had committed an act of foul play as alleged.**
- iii. The act of foul play warranted the issue of a red card.**
- iv. The Player was suspended from taking part in the game of rugby until midnight on 10 January 2016. This represents a 2 week suspension commencing on 31 December 2015.**

Introduction

- a) The Judicial Officer was appointed by Professor Lorne D Crerar, Chairman of the EPCR's Independent Disciplinary Panel pursuant to the Disciplinary Rules found in the Participation Agreement of the Champions Cup 2015/2016.
- b) The Judicial Officer was appointed to consider the citing of the Player in the match between RC Toulon and Leinster Rugby played at Stade Mayol on 13 December 2015.
- c) The Player had been cited for striking an opponent with his knee in breach of Law 10.4(a) of the Laws of the Game.
- d) The matter came before the Judicial Officer following a previous hearing at first instance held on 17 December 2015 and Appeal Committee hearings on 18 and 23 December 2015. On 23 December 2015 the Appeal Committee quashed the decision made at first instance and directed that the citing brought against the Player was to be remitted for determination by a new judicial officer.

The Parties at the Hearing

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

The Player
Mr Derek Hegarty, solicitor for the Player
Mr Guy Easterby, Team Manager, Leinster Rugby
Mr Liam McTiernan, EPCR Disciplinary Officer
Mr Max Duthie, solicitor to the Disciplinary Officer

Preliminary Matters

2. At the commencement of the hearing, the Judicial Officer noted the identities of all present and narrated the contents of the Citing Report reminding the Player that he had been cited in contravention of Law 10.4(a).
3. The Judicial Officer reminded all parties that the EPCR Disciplinary Rules found in the Participation Agreement of the Champions Cup 2015/2016 ("the Disciplinary Rules" and "DR" in the singular) would apply.
4. The Judicial Officer outlined the procedure to be followed to determine the matter. The Player and all present agreed to proceeding on that basis.
5. As foreshadowed in an email sent to the Judicial Officer on 30 December 2015, Mr Hegarty indicated that he wished to advance a preliminary issue as to the jurisdiction of the Judicial Officer to hear the case.

Preliminary Issue and Ruling

6. Mr Hegarty noted that the Player had appeared before another Judicial Officer on 17 December 2015 when the Player had been "acquitted" of the same offence which he was now required to answer again.
7. In Mr Hegarty's submission this was a breach of a fundamental legal right and a denial of due process. In support of that submission he referred to the UK Criminal Justice Act 2003 which he considered made it plain that the principle of double jeopardy would only be abrogated in the most extreme of circumstances.
8. In his view requiring the Player to answer again a compliant in respect of which he had already been cleared was so fundamental as to be analogous to reversing the burden of proof or denying the right to legal representation.
9. He noted that the hearing had been directed by an EPCR independent Appeal Committee purportedly pursuant to a power conferred by DR 8.4.19 (e). In his submission however that power could not circumvent the Player's basic legal right to due process, and the citing compliant should accordingly be struck out as an abuse of process.
10. Mr Hegarty further noted that the appeal had been against the finding that the Player had committed an act of foul play in contravention of Law 10.4 (e) and yet the Player was now required to attend a rehearing in relation to Law 10.4 (a) which had not been the subject of the appeal.
11. Mr Duthie opposed the application. He was not in a position to deal in detail with the legal point raised given the short notice he had received of the application. However in his view a principle of English (and other) state criminal law was unlikely to be applicable to a private sports regulatory process, which as he noted was in any event governed by Swiss law.
12. The Judicial Officer carefully considered the submissions before him in private and made the

following ruling:

- 1) DR 8.4.19 (e) confers a wide power¹ that had properly enabled the Appeal Committee to remit the matter for a rehearing before a different Judicial Officer in relation to a breach of Law 10.4 (a);
- 2) Such rehearing did not offend against the rule as to double jeopardy. No authority was advanced before the Judicial Officer to enable him to find that this principle applied in any context other than in relation the criminal law;
- 3) There was no denial of due process. DR 8.4.19 (d) would have permitted the Appeal Committee to have substituted in its own decision on liability which could have found the Player culpable of the offence for which he was now before the Judicial Officer in circumstances where no right of appeal would have flowed from that decision. By directing a rehearing the Player had been afforded the opportunity to have all points in his defence fully aired once again with a further right of appeal still being available to him.

13. In those circumstances that the Judicial Officer considered that matter ought properly to proceed and he ruled accordingly.

Procedure

14. The Judicial Officer established what evidence was placed before him prior to the hearing and enquired as to whether all present had received the same in good time. The Judicial Officer then enquired as to whether any additional evidence was to be presented.

15. The evidence and other material for consideration comprised of the following:

- The Citing Commissioner Report dated 14 December 2015.
- Email from the EPCR appointed "gatekeeper" dated 14 December 2015.
- Notice of Hearing dated 14 December 2015.
- Match Official Report Yellow Card dated 15 December 2015.
- Email from Toulon No. 2 dated 15 December 2015.
- Written responses to the Standing Directions submitted on behalf the Player dated 16 December 2015.
- Written responses from the Disciplinary Officer dated 17 December 2015.
- Summary decision of the Appeal Committee given on 23 December 2015.
- Email from Professor Lorne D Crerar dated 29 December 2015 convening the rehearing.
- An email from Mr Hegarty dated 30 December 2015.
- Video footage of the incident.

16. The Judicial Officer noted the terms of the Player's responses to the Standard Directions which were as follows:

- (a) *The player confirms that he is the player cited in the citing complaint.*
- (b) *The player will not argue any preliminary matters².*
- (c) *He does not accept that the citing of the Plaintiff is a true and accurate account of the incident.*
- (d) *He doesn't accept that he committed an act of foul play.*
- (e) *He does not accept that it warranted a red card.*
- (f) *The player does not accept the propositions on paragraphs (c), (d) and (e) and will rely on his own evidence and the video evidence in support of his position.*

17. The Judicial Officer similarly noted the terms of the Disciplinary Officer's responses to the Standing Directions in which he advised that, in light of the Player's position and pursuant DR 7.8.11, he would have the burden of proving that the Player had committed the act of Foul Play as

¹ The power allows an Appeal Committee to "take any other step that it considers necessary to deal with the appeal"

² The Player as was entitled gave notice of a change on this position by email dated 30 December 2015.

described in the citing complaint.

18. The Judicial Officer indicated that, as the matter would be heard afresh, he would require Mr Duthie to present such evidence as he wished to rely upon and would similarly call upon Mr Hegarty to present the Player's defence. The Judicial Officer would rule sequentially on whether there had been an act of foul play, if so, whether that act had warranted a red card and, if so, what sanction if any ought properly to be imposed. The Judicial Officer further noted that if he were to find in favour of the Player on either of the first two of those issues, that would be the end of the matter and the proceedings would conclude at that point.
19. Mr Duthie then adduced evidence in support of the citing

Evidence Supporting the Citing

The Citing Commissioner's Report

20. The Citing Report³ (John Byett, England) read as follows:

A Toulon player was tackled and the ball went loose which was then gathered by a Leinster player who was then in turn tackled by the Toulon No 2 Guirado Guilhem. The Hooker was rolling away from the tackle when the Leinster No 1 Cian Healy came to area. Healy did not attempt to go round the Toulon hooker but drove in and made contact with the front of Guilhem's head with his right knee/lower thigh, causing the Toulon player to fall to the ground. A strike to the head.

21. The incident had occurred in the 25th minute of the match (play clock) at which juncture Toulon were leading 10-9. The report noted that the ground conditions were good with the match having been played in cloudy conditions but without rain. The report further recorded that the Referee had consulted with the TMO who having reviewed the incident had recommended that the Player should be issued with a Yellow Card.
22. The Toulon player concerned (T2) received some on field treatment following the incident, but was thereafter able to resume playing.

Video evidence

23. The Judicial Officer then considered the available match footage, which was presented from five angles and was viewed in full and reduced speed.
24. The Judicial Officer reviewed with the parties the narrative as set out at paragraphs 23 to 28 below as to what he considered the footage showed. All concerned agreed that the narrative accurately described the incident, with the addition of the words in paragraph 27, requested on behalf of the Player, noting that T2 had been knocked backwards by a combination of forces.
25. The incident occurs in broken play in or around the Toulon 10 metre line towards the right hand touch. The ball bounces loose off a Leinster player following a kick and is gathered by T6. T6 goes forward and makes ground before attempting an inside pass as his run moves towards touch.
26. That pass is partially intercepted by L14 who goes to ground as he attempts the catch. As he does so L14 is immediately tackled by T2. L14 and T2 compete on the ground for possession and players from both sides join the breakdown in an attempt to secure the ball.

³ As is provided for under DR 7.4.6 the EPCR Disciplinary Officer had referred the citing to a further Citing Officer as a so called "gatekeeper" to determine if the evidence presented a case for the Player to answer as to whether he had committed an act of foul play that warranted a red card, and therefore that the citing should proceed.

27. T15 arrives first and jackals over the ball, and is immediately followed by L7 who goes over the top of T2 (who is still on the ground on the Leinster side of the breakdown) in an attempt to clear out T15.
28. T2 then attempts to get up and as he does so the Player arrives at the breakdown.
29. The Player's right leg makes contact with the left hand side of T2's head. That contact, in addition to a push from the Player's arms/hands, knocks T2 backwards. The back of T2's head then hits the thigh of another Leinster player before T2 slips to the ground holding his head.
30. There is an intervention from the Assistant Referee who comes slightly onto the pitch. T2 receives treatment whilst the Referee consults with the TMO. As a result of that consultation the Player is issued with a Yellow Card.

Other Evidence

31. A short statement was received from the T2 which translated read:

This is an isolated shot when I got out of the ruck area. Indeed, I'm not expecting it because I was not committing a foul. The blow was strong as it was a big tackle but no injuries to report. The player did not apologize.

32. Although the Referee's Yellow Card report was included in the papers provided to the Player the Judicial Officer did not admit the report in evidence and as such it was not considered. In so doing the Judicial Office noted the rulings as to the opinion evidence of match officials set out in *Macovei* (RWC 2015) at first instance and approved on appeal. The Judicial Officer similarly did not admit as evidence and had no regard to the "gatekeeper" report.

The Player's Position

33. Mr Hegarty stressed that the Player's primary position was that no act of foul play had occurred. The Player had not intentionally targeted T2 and the incident should be viewed as nothing more than an accident. In that respect he argued that the incident had only occurred because T2 had got up into the Player's path and had not rolled away from the breakdown as he should have done. He further contended that there had been no strike in the sense that there had been no intentional targeting of T2.
34. Mr Hegarty further submitted that, given contact had been with the thigh, there has been no offence as Law 10.4 (a) specifically referred to the knee and not any other part of the leg.
35. The Player had been entirely focussed on legally contesting the ruck and in particular clearing out T15. There had been no question of the Player retaliating against some perceived earlier action by T2. There had been no injury sustained. The Player has been put in a difficult position by T2 coming up and had needed to react instantaneously whilst at full speed. He had tried to push T2 out of the way and continue onwards to T15 and any collision had therefore been accidental.
36. The Player gave evidence and confirmed that he had only been focussing on lawfully joining the ruck through the gate to clear out T15. He had expected T2 to roll away to the side rather than come straight up and into his channel. At that point there had been nothing that he could have done to avoid the collision. To the extent that his legs were flexed this was simply the result of his having turned at full pace to come round through the gate. He had not realised he had made contact with T2's head until he saw the replay on the big screen after play had stopped. He could not recall the precise point of contact now, but believed that his mid-thigh had come into contact with T2's head.
37. Mr Duthie submitted that to assert that a strike with the knee could only be committed through the use of the patella (kneecap) bordered on the absurd. In his view the Judicial Officer should take a

purposive approach to the interpretation of the law, that being that it was designed to combat foul play and therefore should not be viewed in an overly prescriptive manner. For the purposes of Law 10.4 (a), the knee should be regarded as not simply confined to the kneecap.

38. The Judicial Officer reviewed with Mr Hegarty the rugby definition of recklessness as set out in DR 7.8.32 (b) and confirmed with him that his submission was that the Player's conduct should be found as having been accidental.
39. In Mr Hegarty's view the Player's attempt to push T2 out of the way was all that he could have done in the circumstances and that, having taken that action, the contact with the knee (if it could be found to be a strike) should be viewed as accidental.
40. Mr Duthie drew the Judicial Officer's attention the decisions in *Flannery* (2010) and *Leo* (2013) which he considered accurately set out the position that should be taken when determining whether conduct was accidental or reckless. EPCR was not suggesting that the Judicial Officer ought to find that the offending was intentional.

Decision on Foul Play

41. The Judicial Officer again retired to deliberate in private, and made the following findings:
 - i. The Player's lower/middle front of his right thigh had made contact the left side of T2's head/neck.
 - ii. That contact could properly be characterised as a strike with the knee in contravention of Law 10.4 (a). The submission that a strike with the knee could only involve the patella was rejected.
 - iii. Contact between the Player's knee and T2's head occurred before the Player started actively to also push T2 away with his hands/arms.
 - iv. Whilst, given the actions of T2, on balance the Player's actions could not be found as intentional, at the very least he should have known that there was a risk of committing foul play (if indeed he had not actually been aware of that risk).
42. As such the Judicial Officer determined that the Player's actions could not be categorised as accidental and that accordingly an act of foul play had occurred.
43. The Judicial Officer then reconvened the hearing and advised the parties of his determination, indicating that in the light thereof he would uphold the citing and proceed to consider whether the offending had warranted a red card as the DR required him to do. Only if he did so would he then continue to determine what sanction, if any, ought to be imposed.

Decision on Red Card

44. Mr Hegarty noted that the Judicial Officer had found against him on foul play, and therefore urged that the Judicial Officer should find, as had the Referee, that the offending warranted a Yellow Card. In this respect he considered that the lack of intention on the part of the Player was an important consideration. The Yellow Card issued at the time ought to be viewed as sufficient penalty, and in his view no further sanction should be imposed.
45. Mr Duthie noted that there was no guidance either in the DR or in case precedent as to when a red card should be issued. In his view the Judicial Officer in determining this issue was required to consider the seriousness of the Player's actions and in so doing he might have regard to the entry point criteria set out at DR 7.8.32.
46. The Judicial Officer retired and gave careful consideration to the evidence and submissions. He noted that the strike had involved forceful contact to the head of an opponent and that some, if only transient, injury had resulted. In his view the presence of those features were such as to have warranted the issue of a red card.

47. The hearing then reconvened and the Judicial Officer announced his ruling as above, before inviting submissions as to sanction.
48. Mr Hegarty urged that the offending should be assessed as low end and that the Player ought to be allowed the maximum possible discount by way of mitigation. Mr Duthie advised that EPCR would not agitate for an assessment beyond low end.
49. The Player is 28 and has been playing professional rugby for 9 years. He has amassed over 200 first class games and achieved considerable international honours. In that time he has only one previous disciplinary matter recorded against him.

Decision as to Disposal

50. The Judicial Officer noted that the offence of striking with the knee was listed within World Rugby recommended sanctions for offences within the playing enclosure (found at Appendix 3 of the Disciplinary Rules) as follows:

- Low end, 3 weeks.
- Mid-range, 8 weeks.
- Top end, 12+ weeks.
- Maximum sanction 52 weeks.

51. In applying DR 7.8.32 the Judicial Officer made the following findings:

- (a) The offending was not intentional;
- (b) The offending was reckless;
- (c) The gravity of the offending lay in the fact that forceful contact with a knee had been made with T2's head;
- (d) The nature of the actions were as set out above (paragraphs 28 and 29);
- (e) There was no provocation;
- (f) The conduct was not retaliatory;
- (g) There was no element of self-defence;
- (h) The Player received on field treatment after the incident but was otherwise not injured;
- (i) There was no effect on the game;
- (j) If T2 was vulnerable the fact that he had not simply rolled away had contributed to that fact;
- (k) There was no premeditation;
- (l) The conduct was complete;
- (m) There were no other relevant features of the Player's conduct connected with the offending.

52. In light of the above findings, the Judicial Officer determined that the seriousness of the Player's offending, should be assessed as being at the LOW END of the scale of seriousness.

53. The entry point for the offending was accordingly a suspension from playing of 3 weeks.
54. The Judicial Officer found that none of the aggravating factors prescribed by DR 7.8.34 were present and thus the entry point was not required to be increased.
55. Having considered the totality of the mitigating features prescribed under DR 7.8.35, the Judicial Officer determined that it was appropriate to allow a 33% discount from the entry point which resulted in the imposition of an overall period of suspension of 2 weeks.
56. The Judicial Officer considered but was not minded to conclude that such sanction could be viewed as wholly disproportionate to the level and type of offending such as would engage DR 7.8.37.
57. The hearing was reconvened and the Judicial Officer's decisions were relayed to the parties.
58. The Player was suspended for playing for a period of 2 weeks up to and including midnight on 10 January 2016. The Player will be free to play again from 11 January 2016. The suspension will take effect during the Pro 12 games scheduled to be played over the first two weekends of January 2016 and as such represent a meaningful period of suspension.
59. The Judicial Officer reminded the parties that the Disciplinary Rules provide the right of appeal against his decision.
60. There being no further matters to consider the proceedings were closed.

Jeremy Summers
Judicial Officer
1 January 2016