

EPRC CHALLENGE CUP

Decision of Disciplinary Committee

Hearing held at Hilton Hotel, Heathrow, London.

27 April 2016

In respect of:

Joe Marler ("the Player")

and

A citing complaint ("the Complaint") brought by Iain Goodall, the citing commissioner ("CC") appointed to the match played between Harlequins and Grenoble at The Stoop, Twickenham on 22 April 2016 ("the Match") alleging that during the Match the Player committed an act of foul play contrary to Law 10.4(c) of the Laws of the Game.

Disciplinary committee ("the Committee"):

Roger Morris (Chair)

Sheriff Kathrine Mackie

Simon Thomas

Decisions:

- (i) That the Player – as he had admitted - committed an act of foul play contrary to Law 10.4(c)
- (ii) That the act of foul play was serious enough to warrant the issue of a "Red Card".
- (iii) That the Player be suspended from playing the game up to and including 8 May 2016 - a period of suspension representing two weeks.

Introduction:

The Committee was appointed by Professor Lorne D. Crerar, Chairman of the EPCR Disciplinary Panel, to consider the Complaint made against the Player for his alleged offending in the Match played in the EPRC Challenge Cup ("the Tournament"). A hearing was necessary because the CC had cited the Player for an alleged breach of Law 10.4 (c) of the Laws of the Game and specifically that he had kicked an opponent, the Grenoble player Arnaud Heguy ("G2").

Hearing:

In addition to the Committee, the following persons were present at the hearing:

- The Player
- Richard Smith QC representing the Player
- Mr Liam McTiernan (Tournament's Disciplinary Officer) on behalf of EPCR

The parties agreed that the hearing would be conducted in accordance with the provisions of the Tournament's Disciplinary Rules applicable to Season 2015-2016 ("the Disciplinary Rules" in the plural and "DR" in the singular).

The evidential and other materials that had been distributed to the parties and the Committee in advance of the hearing were:

- The CC's report
- Letter from Mr McTiernan to Prof Crerar informing him of the Complaint.
- Email from Prof Crerar containing notice of the hearing.
- E mails from the referee, the television match official and the two assistant referees.
- Letter from G2
- The Player's responses to the standing directions set by the Rules ("Standing Directions")
- Email from Mr McTiernan with the Tournament's response to the Player's position as set out in the Standing Directions.
- Video footage of the alleged foul play as referred to in the Complaint.

There were no preliminary issues that either party wished to raise.

The Committee sought to establish the Player's position in light of his responses to the Standing Directions and confirmed that whilst the Player accepted he had committed an act of foul play he did not regard his offending so serious that it would have merited him being ordered off the field of play (" a Red Card").

The Committee agreed to proceed as suggested by Mr Smith and the hearing would therefore examine the evidence and consider the parties' representations with the purpose of deciding if the act of foul play described in the Complaint deserved a Red Card.

Consideration of the evidence

Before watching the video clips, Mr Smith suggested it was important for the Committee to understand both the wider context and the on field context in which the Player's offending had occurred.

The Player, questioned by Mr Smith, explained that the Match was his first game after serving a period of suspension imposed for his misconduct in a case that had received extremely wide and, from his point of view, adverse publicity. In the heat of a moment he had entirely inappropriately addressed an opponent by derogatory reference to his ethnicity. He accepted unreservedly that he had been in the wrong and did not demur from the need for the game of rugby to address that inappropriateness but the pressure on the Player of the extended process that had been applied by the different authorities in the game, the extensive press and television coverage and the personal vilification he had been subjected to in social media had at times been difficult to bear.

All of this was said not with self pity or self justification but with a mature acceptance that the game of rugby deserved, required, to be protected from the critical attention the Player's reprehensible, heat of the moment, remark had generated.

The consequence of all of this in the case now being considered was that it gave the opposition in the Match and particularly the opposition front row more than ample ammunition to use against the Player in an attempt to "wind him up" and that is what they had done. The Player explained that it was common in the game for teams to use any means available to gain marginal advantage over their opponents and that included verbal as well as physical means. From the start of the Match and consequent upon his recent misconduct case, he had been subjected to the foulest of verbal abuse and references of a personal nature.

He and Mr Smith emphasised that the Player was not trying to excuse his behaviour in the instant case but to place the incident in its correct context.

The Player explained that matters in the Match culminated in the tackle by G2 on the Player that had been executed off the ball (as described by the CC in his report), following which the Player had committed the foul the subject of the Complaint.

The video recording was then played.

It showed the Player rising from the ground and helping himself to do so by pressing for leverage on the upper back of the prone G2. When he rose to his feet the Player's right foot was alongside the left shoulder of G2. As the Player started to move away his right leg, in the Player's words, "flicked out" towards the head of G2 and made contact with the left side of G2's head.

The essence of the Player's and Mr Smith's explanation of what could be seen from the video was as follows:

- The confrontations both physical and verbal that the Player had been subjected to by the opposition front row had caused him to become frustrated.
- The Player bitterly regretted that he had allowed that frustration to cause him to act in the way he did
- The Player's frustration was exacerbated and came to a head when G2 tackled him off the ball in what the Player felt was part of the opposition's attempt to get at him personally.
- As the Player rose to his feet he found he had the opportunity to give G2 a forceful message in response to the "crap" he had endured before this incident.
- He had "flicked" G2 with his right leg, not intending to hurt or damage him but "to make a point"- to send a message to G2 that he would not be intimidated. Urged by Mr Smith to be specific about that message, the Player said that what he did was intended as the physical equivalent of telling G2 to "fuck off".
- He knew and regretted that that he had let himself and his teammates down.
- He accepted he had committed the cited foul and that his act was both petulant and stupid.
- Nevertheless, the actual contact with G2 was light and not with the Player's booted foot but with his shin. It was of a relatively minor nature causing no hurt and no injury.

In terms of the written evidence before the Committee it was noted that none of the match officials had observed anything of the incident and it was not dealt with on the pitch.

The letter received from G2 confirmed that he had not been injured. Mr Smith also noted that G2 had initially been reluctant to make any statement at all, indicative, said Mr Smith, of G2 not considering the incident to be serious.

In final summary, Mr Smith urged the Committee to use what he described as "their rugby sense" to scrutinise the incident. He again suggested that the foul being considered did not deserve a Red Card and therefore did not pass the so called "red card test". It was clearly a foul, it was petulant, it was wrong, it was stupid but was it enough to have removed a player from the field of play for the rest of the game?

Mr McTiernan on behalf of the Tournament referred the Committee to the appeal decision in the case of Thomson and suggested that, although a stamping case, it was analogous to the present case and might provide useful guidance.

The hearing was then adjourned to allow the Committee to consider matters in private.

Adjudication as to the “red card test”

The Committee reminded themselves that under the Rules the applicable standard of proof in all factual determinations is the balance of probabilities.

The Committee reviewed the evidence, particularly the video evidence, and looked carefully at what the Player had done and the action he and Mr Smith had characterised as a petulant flick, designed not to hurt but to “send a message”.

The Committee accepted the Player’s motive was not to injure or harm G2 and had a certain sympathy for the Player in considering the wider context Mr Smith had asked them to consider. They could not, however, escape from the fact that the Player had deliberately aimed a kick (albeit with the instep and albeit that contact may have been relatively light and with the shin) at an opponent’s head.

Mr Smith had pointed to the gradation of seriousness that applies to all acts of foul play, starting with merely a penalty and rising through a number of stages to the most serious “Top End” offence. In placing this foul in the appropriate place on that graduated scale he had asked the Committee to apply their rugby sense in assessing the seriousness of this particular act of foul play.

In doing just that, the Committee concluded that if a referee observed a foul such as this it would be appreciably more surprising if he did not issue a Red Card than if he did. In the Committee’s view, the “red card test” was met and the Complaint would be upheld on that basis.

Sanction

The hearing was reconvened and the Committee’s decision given to the parties.

In the circumstances the remaining task of the Committee was to consider the appropriate sanction, if any, that should be imposed. Mr Smith addressed the issue by reference to Rules 7.8.32, 7.8.34 and 7.8.35.

In analysing the case by reference to DR 7.8.32, Mr Smith suggested that the Lower End entry point in World Rugby’s schedule of sanctions for foul play was appropriate.

He also suggested there was nothing aggravating of the offence in terms of Rule 7.8.34.

The Committee might also conclude, he said, that there were ample mitigating factors available to them so as to allow them to reduce the period of suspension to a minimum. He also referred the Committee to DR 7.8.37 and their power to reduce the period of suspension even further.

Mr McTiernan referred the Committee to the appeal decision in the case of Flannery and considered it might give useful guidance as to the determination of the appropriate entry point.

The Committee again retired to consider matters in private and did so first by reference to the matters set out in DR 7.8.32. Their assessment was as follows:

- (a) & (b) As the Player had accepted, the act was a deliberate act.
- (c) The gravity in the Player's actions was heightened by the fact that contact was made with G2's head.
- (d) The Committee accepted the Player had flicked out his leg and that what was aimed with the instep actually made relatively minor contact with the shin.
- (e) The Committee accepted the Player had been provoked as he had described.
- (f) There was no retaliation involved.
- (g) There was no self-defence involved.
- (h) There was no effect on G2
- (i) There was no effect on the match.
- (j) G2 was vulnerable to the extent that his head was exposed to the Player's kick as described.
- (k) The Player's participation was full.
- (l) The act was completed and not an attempt.
- (m) There were no other features that needed to be considered.

On the above assessment and despite the obvious characterisation of the offence as a "kick to the head" the Committee considered that the relative lightness of the contact, administered with the

motive ascribed to it by the Player, i.e. that he had no intention of hurting far less injuring G2, drove them to determine the Lower End entry point was appropriate in this case.

This represented an entry point suspension from playing the game of four weeks.

The Committee next considered if there was anything aggravating of the offence in terms of DR 7.8.34.

The only matter of possible relevance in this case was the Player's status "generally as an offender against the Laws of the Game". The Committee gave earnest and protracted thought to the Player's record and whether it should lead them to increase his period of suspension.

They noted that DR 7.8.34 requires Disciplinary Committees "to determine what period of suspension, **if any** (emphasis added), above the applicable entry point for the offence should be applied...." The addition or not of an increased period of suspension was, under the Rules, clearly a matter for the Committee's discretion.

In exercising that discretion, the Committee first had regard to the Player's recent misconduct case and the period of suspension imposed. As reprehensible as the Player's conduct may have been, it was not foul play of a physical nature and very different from the matter now before the Committee. It was also manifestly clear from what the Committee had heard that the Player was wracked with remorse and contrition and that he himself had suffered the consequences of his penalty far beyond the fact that he had been fined and suspended from playing the game for two weeks.

There was no lesson the Player needed to learn that required the emphasis of an additional period of suspension in this case consequent upon his recent case.

As to his previous record, the Player's transgressions were again different from the case before the Committee. They occurred a long time ago when the Player was young and when, as he alluded to, he was youthfully hot-headed and impetuous. He had worked hard in subsequent years to direct his energies in the right way and felt he had been successful in doing that. This view was supported by the references given by Messrs Borthwick and O'Shea.

There was nothing in the present case to indicate to the Committee that the present offending had anything at all to do with the Player having forgotten the lessons of his early transgressions such that he deserved additional sanction now.

In all the circumstances of this player in this case at this time, the Committee were comfortably satisfied that the correct thing for them to do in exercise of their discretionary powers was to add nothing to the Player's period of suspension to account for aggravating features.

The Committee recognised too that in exercising their discretion they had been in the privileged position of having heard and been able rigorously to question everything said by and on behalf of the Player. They noted too that Mr McTiernan, who had addressed all the issues in the case in an exemplary, fair and even handed way, had not on behalf of the Tournament sought to influence the Committee's discretion in either direction.

Turning then to mitigating features in the case, which were to be considered by reference to DR 7.8.35, the Committee noted that the application of this rule is also a matter for the discretion of the Committee and concluded as follows.

The Player should receive full credit for his early acceptance of culpability. He had unreservedly accepted the accuracy of the facts set out in the Complaint and was perfectly entitled to question where in the scale of seriousness his actions lay. His honest acceptance of the wrongness of what he had done was refreshing and indicated to the Committee an understanding that the rugby disciplinary process is about the integrity of the game and not about "getting off" come what may.

In respect to that disciplinary process, to benefit from the maximum discount under the head referenced to his conduct at the hearing, a player needs not only to engage efficiently and promptly in the process itself but also needs to demonstrate an understanding of why, in the wider interests of the game, that process is necessary and why the disciplinary process is fundamental to the integrity of the game. The Committee was amply satisfied that the Player had demonstrated just that understanding.

And what is more – and to his huge credit – he had done it, although ably represented by sympathetic and experienced counsel, on his own. He was not, at the hearing, supported or prompted, as would usually be the case, by representatives of either his club or country.

Under DR 7.8.35(b) the Committee is led to consider the Player's disciplinary record and/or good character. Good character is therefore something more than just a reflection of an absence of a disciplinary record. From the Committee's own observations and from the comments of Messrs Borthwick and O'Shea there was nothing to suggest that the Player was other than of good character and should not therefore have that good character taken into favourable account.

In addition to all of this the Player's remorse for what he had done was palpable. Perhaps perversely, the fact that the Player attended the hearing without a support network to coach his responses or interject their own responses to the Committee's close scrutiny made that remorse all the more real.

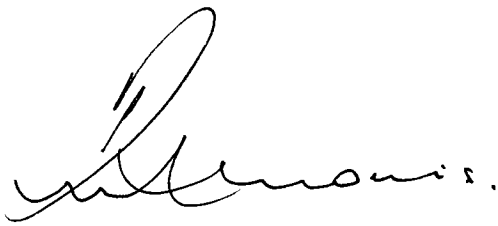
It is undoubtedly unusual for a Disciplinary Committee to allow the full permissible mitigation to a player who has a previous record. The other mitigating features, however, were, when taken together,

sufficiently compelling to lead the Committee to conclude that again in the circumstances of this player in this case at this time, to grant the maximum permissible mitigation was the just thing they should do.

The Committee would allow 50% mitigation which reduced the period of suspension in the final tally to a period of suspension representing two weeks.

Having regard to the Player's playing schedule, he would be suspended up to and including 8 May 2016 so that he would be free to play again on 9 May 2016.

The parties have the right to appeal the Committee's decision.

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

Roger Morris

29 April 2016