



Decision of the Independent Judicial Officer

Hearing held at the offices of Clifford Chance, 10 Upper Bank Street, Canary Wharf, London.
Monday 28 September, 2015 – 10.00

In respect of

Nemani Nadolo of Fiji Rugby Union (“**the Player**”)

And

A citing by **Freek Burger (South Africa)** Citing Commissioner, **contrary to Law 10.4(j)** in the Match between **Australia v Fiji** on Wednesday 23 September 2015 at the Millennium Stadium (“**the Citing Complaint**”)

Judicial Officer appointed to hear the case:

Christopher Quinlan QC (England) (“**the Judicial Officer**”)

Decision of the Judicial Officer:

- (i) The Judicial Officer found that the Player committed an act of Foul Play namely a ‘dangerous tackle’, contrary to Law 10.4(e).
- (ii) The Player is suspended from taking part in the game of rugby union for a period of 1 week, up to and including 5 October 2015. The Player is free to resume playing on 6 October 2015.

1. Introduction

1.1 I was appointed to consider the Citing Complaint against the Player in the match played between **Australia** and **Fiji** on Wednesday 23 September 2015 at the Millennium Stadium (“the Match”) in the Rugby World Cup 2015 (“the Tournament”).

1.2 **Frek Burger (South Africa)** was appointed as Citing Commissioner to this Match and cited the Player contrary to Law 10.4(j).

1.3 Pursuant to Section 2 of Appendix 5 to the Tournament Disciplinary Programme (“TDP”) I issued pre-hearing directions.

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

- **The Player**
- **John McKee**, (Fiji Head Coach)
- **Chris Smith**, Lewis Silkin, player’s representative
- **Yvonne Nolan**, Designated Disciplinary Official, Rugby World Cup Limited (“RWCL”)
- **Ben Rutherford**, Designated Disciplinary Official, RWCL

Witness (present only when giving evidence)

- **David Pocock** (Australia)

2. Summary of the Citing Complaint and Player’s account

2.1 The Player was cited for an act of Foul Play contrary to Law 10.4(j). Exercising my power under TDP Clause 10.14.2 I indicated to the parties that should I not be satisfied as to the alleged breach of Law 10.4(j), I would also be considering (per TDP Clause 10.8.4) whether the Player committed an act of Foul Play contrary to Law 10.4(e). Neither party objected to that course.

2.2 The incident occurred in the 31st minute of the second half of the match. In his report the Citing Commissioner states

*“After a tackle a ruck was formed and there was cleaning out by both teams.# 11 Fiji cleaned out # 7 Aus and then latched onto # 8 Aus picking him up from the ground ,drove him forward and dropped # 8 Aus flipping him over on ground while his feet was off the ground.
11 Fiji gripped #8 Aus with his left arm between his legs and right arm on shoulder.# 11 Fiji pulled #8 Aus back over his body {on ground} that resulted in #8 Aus upper body and head coming in contact with ground.
19 Fiji also assisted in cleaning out # 8 Aus but no relation to Foul Play incident.
After incident # 8 Aus stayed down on knees but resumed playing.
No action by Match officials and in my opinion a RED CARD THRESHOLD for DANGEROUS PLAY”*

2.3 In support of the Citing Complaint I received the recorded match footage of the incident. The footage was played and viewed (with no sound) at full speed and in slow motion (at 75%, 50% and 25% full speed). In addition to the broadcast feed, the Citing Commissioner

submitted footage from the following cameras: numbers 1, 2, 4 and 24. The remaining available footage was disclosed (to the parties) but not relied upon by the Citing Commissioner in support of his Citing. A careful analysis of the footage is needed and my findings in relation thereto are set out below (see paragraphs 4.2).

2.4 In separate emails the referee (Glen Jackson) and both assistant referees (Nigel Owens and Leighton Hodges) said they did not see the incident.

2.5 In an email the Australia team manager stated that David Pocock (“A8”), the Australia number 8 was not injured in the incident.

2.6 In compliance with my pre-hearing directions the Player supplied (in advance of the hearing) a written summary of his case:

“The Player and the Player’s legal representative will argue that the Player was in the process of removing #8Aus from being a nuisance on the Fijian side of the ruck, when #19 Fiji also decided to remove #8 Aus from the Fijian side of the ruck. The Player and the Player’s legal representative will argue that it was #19 Fiji’s momentum which caused both the Player and #8 Aus to lose their feet.”

2.7 The Player expanded upon that before me. In summary he said his intention was to lift and push A8 back. He gripped him with his left hand between his legs and right arm over his left shoulder. He made two attempts to lift him. As he lifted him for the second time, another player, Fiji number 19 (“F19”) came in and, in effect, cleared them both out. Both were propelled backwards, the Player still holding A8 with his right arm. He said he was concerned about falling onto A8’s right knee, as he knew he had a history of injuries thereto. He said this:

“There, in that moment, I have done -- I have had a few knee injuries myself. I had a split decision to make. As I was landing, if I had have just gone in and landed in, I would have landed directly on his knee and I had to make that decision to pull back that way, but my arm was still connected.”

2.8 Therefore he said he “rolled away”. As he did so his right arm was still “locked” over A8’s left shoulder, with the effect that he flipped backwards over the Player’s right side.

2.9 I also had the benefit of a very careful analysis of the footage by Chris Smith, the Player’s representative. I also heard from Mr McKee on the technique used by the Player. He said that all his players had been made aware that any grasping round the neck or head are would be penalised.

2.10 Before the hearing I received an email from David Pocock, dated 27 September 2015. Therein he stated:

“At the ruck as I got cleaned out my knee was caught at an awkward angle as I jumped backwards to free it and kicked out. I felt at the time that this contributed to the momentum that meant I flipped over. Watching the video it definitely looks like my actions contributed to the end result”.

2.11 He gave evidence by telephone. In summary he said

“...I remember feeling like my leg got a bit stuck and my knee was in an awkward position, so I kind of pushed off backwards and kind of jumped to free my leg and then sort of flipped backwards and one hand was on the ground. I would say that I have definitely contributed to that, but yeah, got up and got back into it.”

2.12 He added, *“I think me flicking backwards and pushing backwards definitely added momentum to it”*.

3. Submissions

3.1 In response to a specific direction from me, the DDO submitted in writing that *“the footage it is clear that notwithstanding that the Player had the opportunity to bring Australia #8 to ground safely, the Player took a subsequent grasping and/or grabbing and/or twisting and/or throwing action which resulted in Australia #8 landing on his head/neck/upper spine area”*. She submitted that such amounted *“to an act of Foul Play and accordingly the citing should be upheld”*. She further submitted that F19’s involvement appeared to have concluded before the act of Foul Play occurred.

3.2 As to the correct law reference, she submitted that it was for me to *“determine on a factual basis whether the components of 10.4(j) are met”*. She submitted that if I was not so satisfied then the act of Foul Play could in the alternative be characterised one contrary to Law 10.4(e)”. She pointed to the Memorandum issued by Joel Jutge, World Rugby High Performance Match Officials Manager and Tim Gresson, World Rugby Judicial Panel Chairman, dated 22 May 2015 (“the 2015 Memorandum”) which sets out the following

“A further pattern of offending was identified in the Game (Memoranda 4 August 2011) whereby players not in possession of the ball were being grasped and/or grabbed by an opponent in and around the neck and/or head area, principally in an effort to clear out players from the breakdown. While such behaviour does not come under the definition of a tackle, as no ball carrier is involved, nevertheless it is dangerous play and Foul Play under Law 10.4(e) and/or Law 10.4(f) (playing an opponent without the ball) which must be sanctioned.”

3.3 She submitted that the Player’s actions involved the dangerous grasping and grabbing of A8 with a degree of force. Bearing in mind the vulnerability of the victim player, the Foul Play had the potential for harm/injury in light of A8 landing on his head/neck/upper spine area.

3.4 The Player’s representative submitted that there was no act of Foul Play, under Law 10.4(e) or (j). In summary he submitted that the Player was entitled to clean out A8 in the way he attempted. He said the ingredients of Law 10.4(j) were not satisfied. After he lifted him, A8’s feet returned to the ground. Further, he did not drop or drive him into the ground. As for Law 10.4(e), F19 intervention caused the Player to lose control. The events that followed were the result of a dynamic ruck situation, including A8’s own contribution, rather than Foul Play.

4. Judicial Officer's findings in relation to act of Foul Play

4.1 I considered with care the evidence and all the submissions advanced before me. By TDP Clause 10.8.4 my function was to determine whether or not I was satisfied on the balance of probabilities that the Player committed an act of Foul Play. If so satisfied, I must uphold the citing complaint.

4.2 My findings of fact:

- (a) A8 was over the breakdown in a strong position, legs set, one hand down and body almost parallel to the ground. The Player grabbed him, his left arm through his legs and right arm over his left shoulder. At that point the Player was bent forward at the waist, both knees bent. He lifts A8 a little from the breakdown.
- (b) A8 resisted and forced himself downwards. In response, the Player again lifted him, forcing A8 up and backwards away from the breakdown. He lifted him such that A8's left foot was off the ground and his right foot almost so.
- (c) As A8 right foot came off the ground, F19 drove in, his left shoulder making contact with the Player and A8. In so doing he propelled the Player and A8 backwards. A8's feet returned to ground. The Player's legs buckled as he fell over the Fiji number 13, lying on the ground ("F13"). As he landed on F13 the Player released his left hand from A8 and used it to brace his fall. His right arm remained over A8 left shoulder.
- (d) With his right arm he then pulled A8 backwards, such that A8 'flipped' backwards, head and upper body first over the Player's right shoulder and upper body and chest. He landed heavily on his left arm, upper back and head/neck. The momentum was such that he was propelled into a "backwards roll". He eventually settled on his hands and knees and appeared momentarily stunned (in that position) before re-joining play.

4.3 It is necessary to apply the relevant laws to those facts to decide whether the Player committed an act of Foul Play. I deal first with Law 10.4(j):

- (a) The word "tackle" does not appear in the Law.
- (b) There are four component parts to Law 10.4(j). If each element is present the player commits an act of Foul Play. They are as follows (i) The tackled player is lifted off the ground (ii) whilst his feet are still off the ground, (iii) he is dropped or driven into the ground such that (iv) his head and/or upper body come into contact with the ground.
- (c) I am satisfied that the Player lifted A8 such that his feet were off the ground.
- (d) Law 10.4(j) is breached if the offending player drops or drives his opponent into the ground while his feet are still off the ground (my emphasis). That did not happen here, for I am also satisfied that having been lifted, the Player's feet then returned to ground.
- (e) Whatever the Player did thereafter to bring A8's feet off the ground again, is not accurately described, in my view, as a lift. It is more accurately described as a pulling, twisting and/or rolling action by which he flipped A8 off his feet and onto his back.
- (f) Accordingly I am not satisfied on the balance of probabilities that the Player committed an act of Foul Play contrary to Law 10.4(j).

4.4 I turn to Law 10.4(e):

- (a) Law 10.4(e) provides that a player must not tackle an opponent early, late, or dangerously.
- (b) Law 15 defines a tackle thus: “ball carrier brought to the ground”. A8 was not in possession of the ball.
- (c) However, 10.4(e) is not restricted to contact with the ball carrier. Law 10.4(e) itself provides that “*playing a player without the ball is dangerous play*”.
- (d) Further, in Clarification 4-2014 the International Rugby Board’s (as it then was) Rugby Committee stated:
“In terms of ruck clearouts using ‘head rolls’ and ‘body rolls’, this is not specifically referenced in Law. However, Law 10.4 (e) regarding dangerous play and misconduct should be applied to both the tackle and clear out.
Dangerous tackling. A player must not tackle an opponent early, late or dangerously. A player must not tackle an opponent above the line of the shoulders even if the tackle starts below the line of the shoulders. A tackle around the neck or head is dangerous play. Sanction: Penalty kick”
Therefore body rolls are permissible but head rolls should be penalised.”
- (e) Still further, the 2015 Memorandum, under the heading “Dangerous Grasping” provides:
“A further pattern of offending was identified in the Game (Memoranda 4 August 2011) whereby players not in possession of the ball were being grasped and/or grabbed by an opponent in and around the neck and/or head area, principally in an effort to clear out players from the breakdown. While such behaviour does not come under the definition of a tackle, as no ball carrier is involved, nevertheless it is dangerous play and Foul Play under Law 10.4(e) and/or Law 10.4(f) (playing an opponent without the ball) which must be sanctioned.” [my emphasis]
- (f) The Player’s intention from start to finish was to clear out A8. In order to do so, he grabbed A8, *inter alia*, over his left shoulder. Having been propelled backwards (by F19), he was still holding A8. He elected not to release him or simply to maintain his grip, but to pull him backwards. If A8 contributed to his being flipped over it was a very modest contribution indeed. I am quite satisfied that the overwhelming cause of A8 backwards movement was the Player pulling him. That conduct was reckless in that it exposed A8 to a risk of serious injury. On that basis I am satisfied on the balance of probabilities that the Player’s conduct was dangerous and contrary to Law 10.4(e). Therefore I am satisfied on the balance of probabilities that he committed an act of Foul Play (TDP Clause 10.8.4)

4.5 Accordingly in light of my findings, I uphold the citing on that basis (TDP Clause 10.8.4).

5. Submissions as to sanction

5.1 In writing the DDO submitted that if I was satisfied that Player committed an act of Foul Play contrary to Law 10.4(e), then the 2015 Memorandum “*has an aggravating effect on any sanction imposed*”. Before me, in her oral submissions, she finessed that by submitting that the 2015 Memorandum only had that effect if I was satisfied that the act of Foul Play involved conduct covered by the said Memorandum, namely grasping and/or grabbing in and around the neck and/or head area.

5.2 On behalf of the Player it was submitted that this act of Foul Play merited a lower end entry point. It was submitted that there were no aggravating factors and although the Player's conduct "got close" to that covered by the 2015 Memorandum, I was urged not to apply it. As for mitigation I was told he has a very good record: he received yellow cards in 2013 and 2015 but none was for Foul Play.

5.3 I was invited to apply TDP Clause 10.10.7 and conclude that by application of Appendix 3 to the TDP, the sanction imposed would be wholly disproportionate to the type and level of this offending. Therefore I should impose a sanction less than 50% of the lower end entry point specified therein.

5.4 I repeat the thanks I expressed in the hearing to Ms Nolan for her assistance and submissions, and also to Mr Smith for his careful and able analysis of the footage.

6. Assessment of sanction

6.1 In assessing the seriousness of the Foul Play and by reference to TDP Clause 10.10.2 I find as follows:

- (a) The Player's conduct in pulling A8 over such that he landed on his upper back and head/neck was reckless in that it exposed him to a risk of serious injury (TDP Clause 10.10.2(b), (c),(d)).
- (b) There was no provocation, the Player did not retaliate, nor did he act in self-defence (TDP Clauses 10.10.2(e)(f)(g)).
- (c) The Player's actions appear to have "stunned" A8 momentarily but there was no injury and he played on (TDP Clause 10.10.2(h)).
- (d) The conduct had no effect on the match (TDP Clause 10.10.2(i)).
- (e) A8 was vulnerable to the extent that he was not able to break his fall as he landed backwards as described (TDP Clause 10.10.2(j)).
- (f) The offending was complete and was not premeditated (TDP Clause 10.10.2(k)(l))
- (g) There are no other relevant features of the offending (TDP Clause 10.10.2(m)).

6.2 Accordingly I concluded that the act of Foul Play merited a lower end entry point, namely 2 weeks on the World Rugby Sanction Table, Appendix 3 to the TDP.

6.3 Turning to aggravating factors, the Player is not an offender of the Laws of the Game within the meaning TDP Clause 10.10.4(a). As for the need for a deterrent to combat a pattern of offending (TDP Clause 10.10.4(b)), I gave anxious consideration to the applicability of the 2015 Memorandum. The material part of thereof provides:

"A further pattern of offending was identified in the Game (Memoranda 4 August 2011) whereby players not in possession of the ball were being grasped and/or grabbed by an opponent in and around the neck and/or head area, principally in an effort to clear out players from the breakdown. While such behaviour does not come under the definition of a tackle, as no ball carrier is involved, nevertheless it is dangerous play and Foul Play under Law 10.4(e) and/or Law 10.4(f) (playing an opponent without the ball) which must be sanctioned...

The grasping and twisting of the neck and/or head area of a player to effect [my emphasis]

- 6.4 On my factual findings, the grasping was of A8's upper chest. His arm was very close to A8's neck. However, the Player did not grasp or grab A8 in and around his neck or his head area. He did not grasp or twist his neck or his head area. Therefore I concluded that this act of Foul Play was not one to which the Memorandum applies. There were no other off-field aggravating factors and so no additional period of suspension is appropriate (TDP Clause 10.10.4(c)).
- 6.5 Turning to Mitigating factors and with reference to TDP Clause 10.10.5 I found as follows:
- (a) The Player denied committing an act of Foul Play, but did not dispute the essential facts (TDP Clause 10.10.5(a)).
 - (b) The Player has a very good disciplinary record and is of good character. None of his yellow cards was for Foul Play and he has never been ordered off or cited (TDP Clause 10.10.5(b)).
 - (c) The Player's conduct before and at the hearing was exemplary (TDP Clause 10.10.5(d)).
 - (d) I note also Mr Smith's submission that there was no absence of remorse on the Player's part (TDP Clause 10.10.5(e)).
- 6.6 The mitigating factors identified above merit a reduction of the suspension by a period of 1 week.
- 6.7 In respect of the submission made that I should apply TDP Clause 10.10.7, I concluded as follows. There are mitigating factors here as I identified in paragraph 6.5 (TDP Clause 10.10.7(a)). However I did not consider that the sanction (absent application of TDP Clause 10.10.7) of 1 week was "*wholly disproportionate for the level and type of the offending*". The adverb "wholly" means completely, totally or entirely and modifies by addition "*disproportionate*". It connotes a sanction which is really exceptional for that level and type of offending. It is worth noting that the sanctions are of universal application and were determined at the 2012 Morality of the Game conference, with contributions from all stakeholders. Further, it is to be remembered that the 2009 and 2014 Memoranda addressing this type of offending remain in force.
- 6.8 On my factual findings, the Player's conduct was dangerous. It exposed A8 to the risk of serious injury. In those circumstances, a sanction of one week notwithstanding the off-field mitigating factors is not wholly disproportionate.
- 6.9 Accordingly, the period of suspension from playing rugby union is one of 1 week.

7. Finding as to Sanction

- 7.1 The Player is suspended from playing rugby union for 1 week. The suspension will take effect immediately and run up to and include 5 October 2015. He is free to play on 6 October 2015. The effect is that he is suspended for Fiji's Pool match A against Wales on 1 October 2015.

8. Right of Appeal

8.1 The Player has a right of appeal from the decision in accordance with the TDP Clause 10.13.



Christopher Quinlan QC
Judicial Officer

29 September 2015