



Decision of the Independent Judicial Officer

Hearing held at the offices of Clifford Chance, 10 Upper Bank Street, Canary Wharf, London on 2 October 2015 starting at 1.00pm.

In respect of

Tevita Mailau of Tonga (“the Player”)

And

A citing by **Freek Burger (South Africa) Citing Commissioner**, in respect of an alleged offence under Law 10.4(e) namely, a player must not tackle an opponent early, late or dangerously in a match played between Tonga and Namibia on 29 September 2015 at Sandy Park Stadium, Exeter (“the Citing Complaint”).

Judicial Officer appointed to hear the case:

Sheriff Kathrine Mackie (Scotland) (“the Judicial Officer”)

Decision of the Judicial Officer:

- (i) The Judicial Officer found that the player committed an act of Foul Play contrary to Law 10.4(e).
- (ii) The player is suspended from taking part in the game of rugby union for a period of 2 weeks, as equated to matches in the Tournament, up to and including 9th October 2015. The player is free to resume playing on 10th October 2015.

1. Introduction

- 1.1. I was appointed to consider the Citing Complaint against the Player in a match played between Tonga and Namibia on 29 September 2015 at Sandy Park Stadium, Exeter in the Rugby World Cup 2015 (“The Tournament”). The alleged incident occurred in the 75th minute of the match.
- 1.2. A hearing was initially arranged to take place on the morning of Thursday 1st October 2015. A postponement until Friday 2nd October 2015 at 1pm was requested by Tonga Rugby on behalf of the player. Having regard to possible prejudice to the player as a result of any delay, and the terms of clause 10.7.10 of the Tournament Disciplinary Programme (TDP), I directed Tonga Rugby to provide an explanation for their request. In their response it was stated that they required further time for preparation of their case. I was also advised that the player’s legal representative would not be available until about 12 noon on Friday 2nd October 2015. In these circumstances I agreed to their request.
- 1.3. The following persons were present at the hearing:
 - **The Player**
 - **Chris Smith, Lewis Silkin** (the Player’s representative)
 - **Mana Otai** (Tonga Head Coach)
 - **Peter Harding** (General Manager, High Performance Tonga Rugby)
 - **Alfie Atcheson** (Tonga Union)
 - **Yvonne Nolan**, Designated Disciplinary Official (“DDO”), Rugby World Cup Ltd
 - **Susan Ahern**, Disciplinary Officer, Rugby World Cup Ltd
- 1.4. Before the hearing commenced I confirmed that the player was present and that he and his representative had had an opportunity to consider all the documents and match footage.
- 1.5. As a preliminary issue I referred to the terms of the responses to the Standing Directions issued by me and in particular to the Player’s intention to present evidence from Mana Otai, Tonga Head Coach, “about the technicalities of the ruck/clean out area and the Player’s technique.” and to refer to video clips from World Rugby. In their response RWC referred to section 3.5 of Appendix 3 of the TDP. Mr Smith confirmed that Mr Otai would be speaking to how he coached the players to deal with the dynamics of the breakdown and to only the video clip provided by World Rugby as part of the preparations for the Tournament. No opinion evidence would be presented. Mr Smith also confirmed that although he had produced a number of video clips of the incident only those produced by the Citing Commissioner would be used for the purpose of the hearing.

2. Summary of Citing Complaint and Player’s Account

- 2.1. Freek Burger (South Africa) was appointed as Citing Commissioner to this match.

2.2. The Player was cited for an alleged offence contrary to Law 10.4(e), namely, a player must not tackle an opponent early, late or dangerously.

2.3. The incident occurred at 74.40 minutes of the match. In his report the Citing Commissioner stated:

"#8 Tonga on ground and presenting ball when # 16 Namibia fell on # 8 Tonga got back on his feet contesting for ball. #17 Tonga joining the 2 players goes straight for the head of # 16 Namibia in a CLEAN OUT ACTION Started off with the left arm around the neck and the right arm on the chin of # 16 Namibia. The left arm around the neck of # 16 Namibia resulted in a lot of pressure on the throat of # 16 Namibia. # 17 Tonga in this grabbling /grasping action also pulled # 16 Namibia backwards "BACKWARDS ROLL" flipped him over and this action resulted in both players landed on ground. After reviewing the clips the following was also noted. --# 17 Tonga was way off the ball when he cleaned out. --- When both players were on their feet # 16 Namibia got his left leg trapped in the action going to ground and this could have resulted in a serious injury. ---# 16 Namibia was placed in very vulnerable position with ; grip around neck; and pulled backwards that could have resulted in a serious injury to neck .T.M.O. call and after review penalty given against # 17 Tonga In my opinion this Dangerous tackle, playing the player without the ball has met the RED CARD THRESHOLD."

2.4. In support of the citing the recorded match footage of the incident was produced. In addition to the broadcast feed, the Citing Commissioner submitted footage from camera numbers 2, 9 and 10. The remaining available footage was disclosed to parties but not relied upon by the Citing Commissioner in support of his citing. The footage was played without sound. In particular footage from camera 9 was played at 25% of full speed.

2.5. By email the Referee, Glen Jackson, stated, *"In terms of the game Tonga versus Namibia 29 September 2015 I was the referee and I didn't see the incident involving the Tongan Tevita Mailau live. The TMO refer (sic) it to me and after looking at it and discussing with Ben (TMO) I gave a Penalty Kick for his actions."*

2.6. In separate emails the Assistant Referees, Chris Pollock and Federico Anselmi, stated that they had not seen the incident.

2.7. By email Wessel Kotze, Namibia Team Manager, confirmed that 16 Namibia (16 N) was not injured during the incident. 16 N agreed with the statements in the Citing Report, namely, that the Player *"goes straight for the head of 16 Namibia in a Clean Out Action. Started off with the left arm around the neck and the right arm on the chin of 16 Namibia. The left arm around the neck of 16 Namibia resulted in a lot of pressure on the throat of 16 Namibia. 17 Tonga in this grabbing/grasping action also pulled 16 Namibia backwards "Backwards Roll" flipped him over and this action resulted in both players landed on ground."* 16N emphasised that there was a lot of pressure on his throat during the incident.

2.8. 16N was available by telephone. He said he was contesting for the ball. He agreed that his feet were on either side of 8T. The Player came straight into his neck with both arms, one straight round his neck and the other on his lower face or chin. Then the player did a backwards roll or flip in which his neck and back were twisted. He said there was a lot of pressure on his neck and back in the roll. There was no strain on or injury to his legs. He also confirmed that he was able to get up and resume playing. In answer to questions from Mr Smith 16N said that the first contact with the Player was around his neck. In answer to questions from Ms. Nolan he denied standing up and said the upwards movement was because he was being pulled backwards. He also explained that Namibia did not practice the backwards roll because they know that *“it is illegal and most of the refs are very strict on penalising you whenever there’s strain on the neck just to prevent injuries.”*

2.9. In compliance with my pre-hearing directions the Player supplied the following summary of his position:

“The Player and the Player’s legal representative will say that his initial point of contact with Namibia 16 was with his right shoulder. The Player and the Player’s representative will say that Namibia 16 had his hands on/near the ball when he made the decision to remove him from the Tongan side of the ruck. The Player and the Player’s representative will say that at no point did he intentionally or otherwise make contact with Namibia 16’s neck/throat area, but rather his right arm is under Namibia 16’s left armpit and his left arm/hand is on the upper shoulder of Namibia 16. The Player and the Player’s representative will say that Namibia 16 stood up during the clean out which resulted in the backwards motion.”

2.10. Mr Smith provided a detailed analysis of the respective positions of the Player and 16N as shown on the video clip particularly from camera 9. In the course of that analysis he said that the Player’s left hand made initial contact with the right upper shoulder of 16N. However, he also said that because the Player was in a pulling motion his left hand altered position and agreed that the Player’s left hand was seen to be curled round the neck area of 16N. He also agreed that the Player’s weight came down over the left leg of 16N.

2.11. The Player expanded his account of what occurred. Initially he thought that 8T would pop the ball up but he did not do so. He confirmed that his intention then was to take out 16N, or as he put it, get rid of the threat to the ball. He is coached to get his shoulder under an opponent’s shoulder but 16N’s position was too low so he decided to effect a body roll. He tried to grab 16N with a view to spinning him out.

2.12. The Player appeared to be confused about what to call the area of 16N’s body that he had grabbed hold of. At times the Player appeared to concede that his left hand was around 16N’s neck area but at other times he denied grabbing hold of him by the neck and said it was his upper shoulder or his “traps”. He was aware that to put an arm or hand around a Player’s neck might be dangerous. He described a “neck roll” as being where both arms would be round an opponent’s neck. He accepted that the fingers of his left hand were pointing towards 16N’s throat.

- 2.13. Mr Otai demonstrated with the assistance of the Player and explained how he has coached defence at the breakdown. He also referred to a training video issued prior to the start of the Tournament.

3. Submissions

- 3.1. Mr Smith submitted that the Player did not consider that what occurred was an act of Foul Play because the Player did not intentionally put his hand, arm or upper arm bicep area around 16N's throat or neck area. The Player's right arm was around 16N's left bicep and his left arm and hand was on his upper trapezius. The Player performed a body roll effectively.
- 3.2 Ms Nolan referred to the Citing Commissioner's report as being clear in relation to the facts set out by him. It appeared that there might be some acceptance that there had been some contact in or around the head and neck area.

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

- 4.1. In terms of TDP Clause 10.8.4 the Judicial Officer is to determine whether, on balance of probabilities, the Player committed an act of Foul Play. If so satisfied, the citing shall be upheld and the Judicial Officer shall determine the sanction, if any, to be imposed on the Player. In determining the appropriate sanction the Judicial Officer may take account of any action taken in respect of the Foul Play by the referee.
- 4.2. I considered carefully all the evidence and the submissions advanced on behalf of the Player. I found the following facts:
- a. 8T fell to the ground with the ball. 16N fell on top of him. He immediately got to his feet and leaned over 8T to contest for the ball. His feet were on either side of 8T's body and he was supporting his own body weight in a strong and stable position.
 - b. The Player arrived at the breakdown. He did not attempt to play the ball. His intention was to clear 16N out of the breakdown area.
 - c. The Player leaned round and across the back of 16N, grabbed him with his left arm, over 16N's right shoulder, round the neck area and with his right arm, under 16N's left arm, around his chin or lower face. The Player pulled 16N upwards and then backwards with his left hand still in the same position. The Player's right arm is round 16N's left shoulder holding his bicep. The Player's body is at approximately a 45 degree angle from the ground with his momentum pulling 16N upwards and backwards. The Player's right hand loses its grip on 16N's bicep and appears in front of 16N's face. It does not appear to make contact. The Player's left hand is still in the same position that is round the neck area with his fingers pointing towards 16N's throat. The Player's feet leave the ground as he falls to the ground. As he is pulled backwards 16N's feet are, initially, on the ground and as he falls back his left

knee and ankle are twisted to the left and back. He landed on his left side and lower back. His feet are in the air at the point of impact on the ground. The manoeuvre placed strain on 16N's neck and back. The Player released his hold on N16's neck area when both players land on the ground. 16N then rolled to his right, got to his feet and resumed playing.

- d. Following consultation with the TMO the referee, who had not seen the incident live, awarded a penalty kick.
- 4.3. Law 10.4(e) provides that “A *player must not tackle an opponent early, late or dangerously.*” Law 15 defines a tackle as occurring “*when the ball carrier is held by one or more opponents and is brought to ground.*” 16N was not a ball carrier. However Law 10.4(e) also provides that “*Playing a player without the ball is dangerous play*” and accordingly the Law is not restricted to contact with the ball carrier.
- 4.4. In the Further Amended Memorandum dated 22nd May 2015 in relation to, inter alia, Dangerous Grasping of Neck and/or Head Area of Player Not in Possession of the Ball it is stated, “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 10.4(f) (playing an opponent without the ball) which must be sanctioned.”
- 4.5. There was much discussion about where was a person's neck. The position of the Player's left hand was described variously as in the neck area, on the upper shoulder or on the “traps” or trapezius muscle. In my opinion, the reasonable person looking at the position of the Player's left hand as it appears on the video clips, particularly angle 2 from camera 9, would describe it as being around the neck area, with the fingers pointed towards the throat of 16N. The trapezius muscle, of course, extends from the occipital bone to the thoracic vertebrae and laterally to the scapula and accordingly covers both shoulder and neck areas. In any event the Memorandum describes the offending as being grasped or grabbed in and around the neck and/head area (my emphasis). It is also noted in the Memorandum that any tackle above the line of the shoulders is dangerous.
- 4.6. I attached no weight to the evidence of Mr Otai about his coaching techniques or what examples of what not to do he, along with others, had been shown before the start of the Tournament.
- 4.7. The Player's intention was to clear out 16N from the breakdown. He was unable to get his shoulders below 16N's shoulders, as in the technique demonstrated by Mr Otai Head Coach. To remove 16N, whom he regarded as a threat to their retention of the ball, the Player, over 16N's right shoulder, from behind, grabbed 16N round the neck area with his left hand and with his right hand under 16N's left arm around his lower face. His right hand then transferred to 16N's left bicep. The Player then pulled him backwards retaining his grip on 16N's neck area until both players fell to the ground.

As he fell to the ground 16N's left knee and ankle were twisted to the left and backwards until his feet left the ground. The Player's conduct exposed 16N to a risk of serious injury. On balance of probabilities I am satisfied that the Player's conduct was dangerous and contrary to Law 10.4(e) and that he committed an act of Foul Play.

- 4.8. Accordingly, being satisfied on balance of probabilities that the Player committed an act of Foul Play, I upheld the citing complaint.

5. Submissions as to sanction

- 5.1. Mr Smith submitted that the incident merited a low end entry point. He suggested that the Player's actions were careless rather than reckless. He did not intend to grip 16N in a way that had not been coached and specifically did not grasp the front of his throat. Tonga had been forced back and a penalty had been awarded at a vital stage in the game.

- 5.2. I was advised that the Player had a clean disciplinary record. It was submitted that the Memorandum did not apply in the circumstances. The Player had not used a headlock technique as envisaged in the Memorandum. The Player is 30 years of age having played professional rugby for 10 years in Auckland, with the Blues in New Zealand and now at Perpignan. He showed remorse to the referee. Mr Otai also spoke to the Player's good character.

- 5.3. Ms. Nolan pointed out that there is no reference to "carelessness" in TDP clause 10.10.2. She submitted that if it was found that there had been a dangerous grasping of the neck and/or head area the Memorandum should be applied and any sanction aggravated.

6. Assessment of sanction

- 6.1. In assessing the seriousness of the act of Foul Play, by reference to TDP clause 10.10.2, I found that:

- a. The Player's conduct in grabbing 16N round the neck area and pulling him backwards was intentional.
- b. The act of Foul Play exposed 16N to the risk of serious injury.
- c. There was no provocation and the Player did not act in retaliation or self-defence.
- d. No injury was caused.
- e. The conduct had no effect on the match.
- f. 16N was in a vulnerable position. He was unable to protect himself and was pulled backwards principally by a hand around the neck area placing considerable strain upon his neck and back. His left knee and ankle were also twisted with the potential for serious injury.
- g. There were no other relevant features.

- 6.2. I concluded that the act of Foul Play was at the lower end of the scale of seriousness of offending. The applicable entry point in terms of TDP Appendix 3 is 2 weeks.

- 6.3. With regard to off-field aggravating factors I found that:
- a. The Player is not an offender of the Laws of the Game.
 - b. There is a need for a deterrent to combat acts of Foul Play by grasping or grabbing an opponent in and around the neck and/or head area as identified in the Memorandum dated 22nd May 2015.
 - c. There were no other relevant off-field aggravating factors.
- 6.4. In these circumstances I concluded that the sanction should be aggravated by 1 week.
- 6.5. With regard to mitigating factors I found that:
- a. The Player denied committing an act of Foul Play.
 - b. The Player has a clean disciplinary record.
 - c. The Player's conduct before the hearing was courteous and respectful.
 - d. The Player showed no remorse to 16N.
- 6.6. Taking into account the mitigating factors identified I considered that the sanction should be reduced by 1 week. I was not addressed on whether TDP clause 10.10.7 should be applied.
- 6.7. Accordingly the period of suspension from rugby is 2 weeks. In terms of TDP clause 10.10.14 the period of suspension equates to matches. I was advised that the Player was scheduled to play against Argentina on 4th October 2015 and New Zealand on 9th October 2015. Those matches were meaningful.

7. Finding as to Sanction

- 7.1. The Player is suspended from playing rugby for 2 weeks or matches. The suspension will take effect immediately and will run up to and include 9th October 2015. He is free to play on 10th October 2015.
- 7.2. Accordingly the Player is suspended for Tonga's matches against Argentina on Sunday, 4 October 2015 and against New Zealand on Friday 9 October 2015. He is free to resume playing on 10 October 2015.

8. Right of Appeal

- 8.1. The Player was advised of his right of appeal in terms of TDP clause 10.13.

Sheriff Kathrine Mackie
Judicial Officer

Dated: 3 October 2015