



## **Decision of the Independent Appeal Committee**

Hearing held at the offices of Clifford Chance, 10 Upper Bank Street, Canary Wharf, London.  
27 October 2015 commencing at 10:00 a.m.

In respect of an appeal by

**Mariano Galarza** of Unión Argentina de Rugby ("**the Player**")

And

A decision of the Judicial Officer, Christopher Quinlan QC, made on 23 September 2015  
(written reasons for decision dated 24 September 2015) which held that:

- (a) the Player committed an act of Foul Play namely Acts Contrary to Good Sportsmanship, Law 10.4(m); and
- (b) the Player should be suspended from taking part in the game of rugby union for a period of 9 weeks, up to and including 25 November 2015.

Appeal Committee appointed to hear the case:

**Prof. Lorne Crerar (Scotland) (Chairman)**

**Hon. Graeme Mew (Canada)**

**Mr. Robbie Deans (New Zealand)**

### **Decision of the Appeal Committee:**

- (i) The Player's Appeal is dismissed;
- (ii) The appeal deposit of £1,000 should be returned to the Unión Argentina de Rugby.

## REASONS FOR DECISION

### Introduction

- 1.1. The Player appeals from the decision of the Judicial Officer (“JO”) that he committed an act contrary to good sportsmanship in breach of Law 10.4(m) in the Match between New Zealand and Argentina on Sunday 20 September 2015 at Wembley Stadium and from the sanction imposed by the JO.
- 1.2. The Player was cited by Murray Whyte (Ireland), the Citing Commissioner for the Match.
- 1.3. The Player did not request a *de novo* hearing in whole or in part. Accordingly the appeal proceeded on the basis of the record before the JO, save that we exercised our authority under clause 4.6(c) of Appendix 5 of the Tournament Disciplinary Programme (“TDP”) to admit as evidence a clip from another game (France v Romania), which was tendered in support of the Player’s submissions and which had not been available at the time of the hearing before the JO.
- 1.4. The following persons were in attendance at the hearing:
  - **The Player**
  - **Victor Luaces** (UAR Board Member and Legal Representative for the Player)
  - **Nestor Galan** (UAR Vice-President and President of the Argentina Delegation)
  - **Jaime Barba** (UAR Board Member and President of UAR Legal Affairs Commission)
  - **Fernando Rizzi** (UAR Secretary)
  - **Ben Rutherford** (Designated Disciplinary Official, Rugby World Cup Limited (“RWCL”))
  - **Yvonne Nolan** (Assistant to the Designated Disciplinary Official, RWCL)
  - **Patricia Bianco** (English-Spanish Interpreter)

## 2. Decision Appealed From

- 2.1. The Player was cited for ‘acts contrary to good sportsmanship’. He was alleged to have “made contact with the eyes or eye area” of an opponent, contrary to Law 10.4(m). The incident occurred in the 24th minute of the first half of the match. In his report the Citing Commissioner states:

*“Following a Lineout with Argentina in possession, Number 4 New Zealand is attempting to contest for the ball and Number 19 Argentina is trying to prevent this action in a maul. In doing so Number 19 Argentina’s arm comes over the shoulder of Number 4 New Zealand and then his hand makes contact with the eye area of No 4 New Zealand as can be seen in the clips attached.*”

*Having reviewed the incident after the game I asked for a player statement which I received and confirms my understanding of the incident. I refer you to the statement and also draw to your attention in a post match interview there is a mark under the left eye of New Zealand 4”.*

- 2.2. The JO’s reasons for decision are fully set out and will not be repeated in these reasons except where necessary to explain our own decision. [[Link to JO’s decision](#)]
- 2.3. In summary, the JO found that during the course of a maul, the Player’s hand made contact with an opposing player’s eye and that such contact was not accidental but was reckless, and, accordingly, the Player committed an act of foul play (“TDP Clause 10.8.4).
- 2.4. In determining what the sanction should be, the JO concluded that the act of Foul Play merited a low-entry point, namely 12 weeks on the World Rugby Sanction Table, Appendix 3 to the TDP. After the application of aggravating and mitigating factors, the JO decided that the Player should be suspended for 9 weeks.

### **3. Standard of Review**

- 3.1. The Player has exercised his right to appeal from the JO’s decision.
- 3.2. Clause 4.5 of Appendix 5 of the TDP sets out what an appellant must do to succeed on appeal:

Except where an appeal proceeds in whole as a de novo hearing it is for the Appellant to establish that the decision being challenged on appeal:

- a) was in error (either as to central factual findings or in law);
  - b) in the interests of justice should be overturned;
  - c) the sanction imposed was manifestly excessive or wrong in principle; and/or
  - d) the sanction imposed was unduly lenient.
- 3.3. The Player does not, for the purposes of his appeal, challenge the JO’s findings of fact. Rather, it is the application of those facts and his conclusions on the issues of Foul Play and applicable sanction that the Player challenges.
- 3.4. Given this concession, the Player bears the burden of establishing that:
- a) the JO erred in law;
  - b) it is in the interests of justice the JO’s decision should be overturned; or
  - c) the sanction imposed was manifestly excessive or wrong in principle.

#### **4. Judicial Officer's Findings in Relation to Act of Foul Play**

4.1. After making his findings of fact with respect to the incident, the JO concluded that the Player had committed an act of Foul Play, stating (at paragraph 4.4 of his reasons):

- (a) *I am not satisfied on the balance of probabilities that the Player targeted the eye and eye area. The contact with the eye and eye area was not intentional or deliberate. He did not look for or seek out the eye deliberately.*
- (b) *However, in my judgement he intentionally reached out for and grabbed the Player's head and face. Further, I am satisfied he knowingly made contact with NZ4's face. With his hand placed on NZ4's face in the way I have described he then deliberately used force to pull his head backwards. In the act of grabbing his face and pulling back his head, he made contact with the Player's eye in the way I have described. I am satisfied that contact was not accidental but was reckless. It was reckless because he knew or ought to have known that in grabbing an opponent's head and face in the way described, there was a risk of committing an act of foul play; there was a risk he would make contact with the opponent's eye or eye area as in fact, he did.*

#### **5. Submissions on Issue of Foul Play**

5.1. The essence of the comprehensive written and oral submissions made by the Player on this issue is captured in the following paragraphs of the Notice of Appeal:

*This view [that the Player made contact with the eye area of the New Zealand player in a reckless manner because he ought to have known that in such contact there could be the risk of making contact with the opponent's eye or eye area] seems not to be consistent with the position sustained by the Judicial Officer himself which expressly acknowledges that the Argentine player, from his position in the maul, was not able to have the player from New Zealand in sight at the moment when the questioned action takes place (4.4.a of the judgement under appeal) and therefore by no means could the player Galarza imagine the potential risk attributed, risk which besides was not realized since the eventual touch did not cause any damage or injury on the player who was contesting a position in a maul formed by twelve players.*

*The appreciation of recklessness exposed by the Judicial Officer involves a divergence from the logical criteria used to determine a situation of such nature in the game and a lack of awareness in the distinctive features characteristic of a game of contact such as rugby and, more precisely, a set such as the maul in which, as the players expressly acknowledged at the hearing, it is habitual and normal to involve actions like struggling and sweeping with the hands with*

*no intention to harm or no lack of responsibility that may cause potential risk on a rival.*

5.2. During the course of oral submissions made on the Player's behalf the following additional points were emphasised:

- a) The fact there was eye contact does not automatically lead to the conclusion that the Player was reckless;
- b) The referee and assistant referees did not see "anything abnormal" in the maul situation;
- c) It was unreasonable to expect the Player to have foreseen the trajectory of his hand in "a situation of unstable balancing, fighting for position against other players, one of them being over two metres tall";
- d) The game was not stopped - the NZ player continued to play and went on to win the maul;
- e) The NZ player was not injured as a result of the incident; there was no reaction from the NZ player, other players, the match officials or the crowd.

5.3. The Player himself added that:

- a) He had no memory of the incident and recalled "no situation out of the ordinary";
- b) [He didn't] recall touching the eye, hence "I don't have a specific memory";
- c) He "was surprised and couldn't understand why that had been the case" when informed about the Citing Complaint;
- d) He now accepted that it could be interpreted that his finger had gone over the eye area without exerting any pressure.

5.4. Mr. Rutherford (the "DDO") noted the definition of "reckless" in TDP Clause 10.10.2(b) – whether "the Player knew (or should have known) that there was a risk of committing and act of Foul Play" – submitting that the JO's conclusion that the Player was reckless were consistent with his findings of fact.

## **6. Assessment (Foul Play)**

6.1. Because the JO's findings of fact have been accepted, the question to be determined is whether the JO erred in his conclusion that the conduct was reckless.

6.2. In our view the JO correctly concluded that the Player's actions were reckless, that is to say the Player knew (or should have known) there was a risk of committing an act of foul play.

6.3. The facts supported the JO's conclusion that the Player made a conscious effort to play the head area of NZ4. He had to reach up to achieve that. When one plays the

head area there is inevitably the consequent risk that an act of Foul Play as a result of contact with the eye or the eye area. The Player, by his actions, courted that risk with, for him, severe consequences.

- 6.4. It follows that the appeal against the JO's finding that the Player committed an act of Foul Play, namely Acts Contrary to Good Sportsmanship (Law 10.4(m)) should fail.

## **7. Submissions as to sanction**

- 7.1. The Player argues that the sanction was disproportionate to the level and type of offending of the Player. He relies on Clause 10.10.7 of the TDP, which provides:

*In cases involving offending that has been classified pursuant to Regulation 10.10.2 as lower end offending, where:*

- (a) there are off-field mitigating factors; and*
  - (b) where the Judicial Officer considers that the sanction would be wholly disproportionate to the level and type of offending involved;*
- the Judicial Officer may apply sanctions less than 50% of the lower end entry sanctions specified in Appendix 3 including in appropriate cases no sanction.*

- 7.2. The Player points in particular to the following:

- a) No injury was caused to the opposing player;
- b) The game was not interrupted;
- c) In the context of an incident occurring at a Rugby World Cup tournament:  
*“A top level rugby player like Galarza has trained all his life for these six competition weeks and it is an express arbitrariness not to contemplate the fact that each week means much more for the player than a simple calendar week.”*
- d) The opposing player was not in a vulnerable position;
- e) He could not (and did not have the possibility) to see that his arm movement would result in “grabbing his opponent’s head and/or face and not his shoulder”.

- 7.3. The Player has an exemplary disciplinary record. Although before the JO he did not accept that an act of Foul Play had occurred, he was ready to apologise in the event that it was found that he had.

- 7.4. The evident sense of injustice felt by the Player and his team was reflected in the following submission:

*“... in cases when we are facing an excellent player like this one, where there might be a situation of reckless action but nothing of this was observed by the authorities of the game, why is the norm there even when the World Rugby has admitted that this was the case?”*

*And in fact we want to mention that this sanction for nine weeks to Mr Galarza has affected the whole Argentine team where nobody could understand why a player who embraces fair play has been sanctioned without considering it an unfair decision.”*

- 7.5. The reference to World Rugby’s position arises from the response of the DDO to Pre-Hearing Directions which the Chairman of the Appeal Committee made prior to the hearing of the appeal, in which the DDO stated:

*“Issue II(b) in the Appellant’s Notice of Appeal: At first instance Rugby World Cup Ltd submitted that “ordinarily, effectively with consistency in mind, World Rugby would oppose [Clause 10.10.7] submissions. This is not a case where we are going to oppose that submission if you consider this to be an appropriate case [and] we would not object to the consideration of a lower sanction than 50 per cent.” [pages 92-93 of first instance transcript, section 13 of appeal folder and paragraph 5.4 of the Decision] Rugby World Cup Ltd similarly does not oppose the Appellant’s submission that the Judicial Officer was in error in not applying Clause 10.10.7 in the unique circumstances of this particular case.*

- 7.6. In not opposing the Player’s submission that the JO was in error by not applying his discretion further to 10.10.7(b), the DDO advised that ordinarily World Rugby/RWCL opposes applications to judicial committees to apply Clause 10.10.7 (or its equivalents) on the basis that circumstances need to be truly exceptional. In the present case that application was not being opposed on the basis that it would be open to the Appeal Committee to find that the sanction was manifestly unfair or wrong in principle on the basis that the JO had failed to apply the “wholly disproportionate” rule in 10.10.7(b).

- 7.7. In support of this submission the aspects of the level and type of offending considered to be important by the DDO were:

- a) The incident was a “rugby action” in a maul as opposed to a pushing or scuffle between players;
- b) There was no penetration of NZ4’s eye;
- c) There was “delicate contact only” resulting only in the dislodging of a contact lens.

## **8. Assessment (Sanction)**

- 8.1. Our task is to consider whether “the sanction imposed was manifestly excessive or wrong in principle” (TDP Appendix 5, Clause 4.5(c)).

- 8.2. The entry points for categories of foul play established by the TDP reflect a sanctioning regime which is of universal application in the Game and which were determined at the 2012 Morality of the Game conference, participated in by all stakeholders in the Game.
- 8.3. Judicial Officers and Appeal Committees do not have the luxury of choice not to apply the Laws and Regulations of the Game in circumstances that result in a harsh outcome for a player.
- 8.4. We should add that this would not, in our view, be the sort of case where Clause 4.5(b) of Appendix 5 of the TDP should be invoked (i.e. that it would be in the interests of justice that the JO's decision should be overturned). Neither the Player nor RWCL sought to rely on this provision.
- 8.5. The fact that this incident has arisen at the Rugby World Cup and that the effect of his suspension is that the Player will miss the rest of a tournament that represents the pinnacle of his rugby achievements to date is not a proper factor in considering the period of suspension to be imposed. Clause 10.10.14 of the TDP reflects the extent to which there are special considerations when dealing with sanctions at the Rugby World Cup. Further, Clause 10.10.15 makes it clear that "all Matches are equal and a Player suspended from playing the Game shall be suspended from participating in any Match at any level during the period of his suspension."
- 8.6. Having regard to the submissions of the DDO that the exceptional circumstances of this case warrant the application of Clause 10.10.7(a), we do not accept that the incident was an acceptable "rugby action" in a maul. No matter how dynamic a situation is during the course of play, it is never acceptable to target the head of an opposing player. We reject the suggestion of the Player that such contact is an acceptable and inevitable risk where arms are flailing as players attempt to grapple with each other.
- 8.7. As to the submission that there was no penetration of the opposing player's eye, the factual finding of the JO (paragraph 4.3(b)) was as follows:

*"The Player's left hand reaches round and onto the left side of NZ4's face. His left index finger entered NZ4's left eye socket. Contact is made between NZ4's eye and the distal and possibly the upper reaches of the middle phalange of the left index finger. The Player's left middle finger is alongside and touching his index finger, touching the area immediately below and close to NZ4's eye."*

- 8.8. To similar effect, the JO's finding, at paragraph 4.3(d) of his decision, is not consistent with the submission that there was "delicate contact only":

*"[NZ4] was clear that he felt digital pressure applied directly to his eyeball."*

- 8.9. The JO's decision makes reference to a memorandum issued by the International Rugby Board (as it then was) on the subject of "Contact with the Eyes or Eye Area" dated 10 July 2009 ("the 2009 Memorandum") and to a further supplementary Memorandum on the same subject dated 24 October 2014 issued by Tim Gresson, IRB Judicial Panel Chairman ("the 2014 Memorandum"). Paragraph 4 of the 2014 Memorandum provides:

*"There have been a number of decisions which have helpfully clarified what is referred to as "contact" and defined the 'eye area'. In Hartley (RFU Disciplinary Panel, 2007), a passage also included in the 2009 memorandum, the Disciplinary Panel clarified the extent of conduct required for there to be 'contact' with the eye(s) or eye area:*

*'Clearly 'contact' encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury. Offences which would properly be classified as at the Lower End of the scale of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area. Offences which would properly be classified as at the Top End of the scale of seriousness would include, but not be limited to, an intentional act designed to cause serious discomfort or injury to the eye or area around the eye of an opponent. The most serious offences in this category would be where permanent damage is caused.'*

- 8.10. The 2009 Memorandum was accompanied by a letter dated 1 July 2009 from Bernard Lapasset, Chairman of the International Rugby Board, and a Press Release to which the Chairman refers. In that letter M. Lapasset expressed the "strongly held view" that such "*serious offences must be dealt with severely to protect players, to deter others from such activity and to remove offenders from the game...*"
- 8.11. The present case involves reckless contact by a finger with the eye area of an opponent as envisaged by the *Hartley* decision. It has been properly categorised as a low-end entry point offence for which the entry point sanction is 12 weeks.
- 8.12. None of submissions persuade us that the circumstances of this case warranted a departure from the very clear guidance provided to judicial officers by the *Hartley* decision and the IRB memoranda.

- 8.13. Judicial Officers and Appeal Committees are constrained. IRB memoranda in respect of contact with the eye or eye area of 1 July 2009 and 24 October 2014 suggest that we deal with such incidents “severely”, with the principal underpinning purpose of protecting players and deterring others from such activity.
- 8.14. While the scale of seriousness of the offending in this case has properly been categorised as “low-end”, it nevertheless carries a significant entry point suspension period of 12 weeks. It accordingly follows that Judicial Officers and Appeal Committees will encounter acts of foul play at the low end of offending with off-field compelling mitigating circumstances that carry a significant entry point potential suspension of 12 weeks – as in this case. We agree with the JO’s analysis (paragraph 6.13 of his decision) of the term “wholly disproportionate” in the context of TDP 10.10.7. The *Hartley* decision envisages factual circumstances in line with the determination of the JO in this case. The JO was in our view wholly correct in not exercising the provisions of 10.10.7(b) – which could have resulted in a significantly reduced sanction on the Player.
- 8.15. We therefore reject the second aspect of this appeal.
- 8.16. We fully understand why this appeal was taken. The Player and his representatives presented their case in an exemplary manner. We are acutely aware of the degree of disappointment which they must feel. Accordingly, although, as we have endeavoured to explain, we must view this matter in the broader context of the interests of the Game, it was appropriate that the Player asked us to review the JO’s decision and to consider the important points of principle which it raised. We therefore direct that the Appeal Deposit of £1,000 should be returned to the Unión Argentina de Rugby

London, 30 September 2015



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**Lorne Crerar**



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**Graeme Mew**



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**Robbie Deans**