

2017 AUTUMN INTERNATIONALS

IN THE MATTER OF AN APPEAL BROUGHT BY SEKOPE KEPU AGAINST THE  
DECISION OF THE JUDICIAL COMMITTEE

**Appeal Committee:**

Christopher Quinlan QC, World Rugby Judicial Panel Chairman,  
Judge Lex Mpati, SANZAR Judicial Chairman  
Oliver Kohn, ex-Bristol RFC, Harlequins RFC and Wales

**Attendees:**

Sekope Kepu, Appellant  
Stephen Cottrell, Player's counsel  
Stephen Schmidhofer, Head of Integrity, Rugby Australia  
  
Jon Davis, Six Nations Disciplinary Officer  
Max Duthie, representing Six Nations Disciplinary Officer

---

**DECISION OF THE APPEAL COMMITTEE**

---

**A. INTRODUCTION**

1. Sekope Kepu ('the Appellant') is an experienced Australian International Rugby Union player. He is a tight-head prop. On 25 November 2017 he was sent from the field of play whilst playing for Australia in a test match against Scotland at BT Murrayfield Stadium, Edinburgh.
2. On 28 November 2017, he appeared at a disciplinary hearing, conducted by way of telephone conference call. The Appellant accepted he committed an act of foul play, which merited a red card. In consequence, he was suspended from Rugby Union for a period of three weeks.

3. The appeal was confined to the narrow but important issue as to the playing consequences of that suspension.
4. The substantive hearing of the appeal took place by telephone conference call on 9/10 January 2018<sup>1</sup>. At the conclusion, we reserved our decision. This document constitutes our final reasoned Decision, reached after due consideration of the evidence, the written submissions and 'decisions' placed before us. Each member of the Appeal Committee contributed to it and it represents our unanimous conclusions.
5. This is necessarily a summary. We considered all the material placed before us and the written and oral submissions made to us. The fact that specific reference is not made herein to any part or aspect thereof does not mean it was not considered and given the appropriate weight.

## **B. DECISION OF DISCIPLINARY COMMITTEE**

6. Given the confined scope of the appeal, it is unnecessary to set out at any length the facts or the findings of the Disciplinary Committee. In summary, the Appellant was ordered off for dangerous charging contrary to Law 10.4(h) of the Laws of the Game. The Referee's Report on Red Card stated:

*Shoulder charge into ruck with his shoulder, making straight contact with the blue players head with force*

7. The Player admitted committing that act of foul play and that it merited a red card. The Player has a clean disciplinary record and a good character. He is thirty-one years old and has ninety-one Australian caps. The Disciplinary Committee found the act of foul play merited a mid-range try points (six weeks). It found there were no aggravating factors and gave the Appellant full 'credit' for his mitigation, resulting in a reduction of three weeks. It therefore imposed a suspension of three weeks.

---

<sup>1</sup> 9 January in Northern Hemisphere, 10 in the Southern Hemisphere

8. At the conclusion of that hearing we were told, and Six Nations Rugby Limited ('SNRL') did not disagree, the Committee Chairman announced the three week suspension and said it would not include the Brisbane Tens Tournament ('BTT'). However, it would include a single pre-season match and two Super Rugby competition matches. No reasons were given.
9. On the effect of the suspension, the written Decision, dated 29 November 2017 ('the Decision'), states this:

*The Player is expected to play a meaningful pre-season fixture on 15th February 2018, then two Super Rugby matches on 24th February and 4th March 2018.*

*Consequently, the Player is suspended from taking part in the game of rugby up and to including Sunday 4th March 2018 midnight. The Player is free to resume playing rugby on 5th March 2018. This represents a 3 week suspension.*

### **C. GROUNDS OF APPEAL**

10. The Notice of Appeal is dated 1 December 2017 ('the Notice'). Therein the Appellant appealed on the grounds that the Disciplinary Committee was wrong "*in fact and law*" in deciding not to include the BTT matches when determining the duration of his three week suspension. He did not take issue with the fact or length of the suspension.
11. Following a Directions Hearing on 6/7 December 2017<sup>2</sup>, the Notice was supplemented by helpful written submissions filed on his behalf. If we may say so, Mr Cottrell's submissions, both in writing and before us were conspicuously measured, realistic and helpful. He confirmed that the only question for determination by the Appeal Committee was whether the Disciplinary Committee was wrong in finding the BTT matches should not 'count' towards his period of suspension. He submitted that (1) the

---

<sup>2</sup> 6 December in Northern Hemisphere, 7 in the Southern Hemisphere

BTT should be included as part of the suspension, but (2) the extent to which it should count was a matter for the Appeal Committee.

12. In summary, he submitted as follows:

- a. The Appellant's first pre-season match on 2 February 2018 was not a match that at the time of the hearing he could confirm he was scheduled to play in. No one suggested that match should count as part of the suspension.
- b. The Disciplinary Committee did not ask the Appellant any questions about the matches he was scheduled to play.
- c. The Decision does not provide any explanation or reasons as to why any of matches were or were not taken into consideration in determining the playing consequences of the Player's suspension.
- d. As to the approach on appeal he submitted
  - i. Given the absence of reasons for including or not including particular matches, it was simply not possible for the Appellant to establish that the Disciplinary Committee was wrong.
  - ii. Therefore, it cannot be in the interests of justice for a player to have the burden of establishing that the Disciplinary Committee was in error in circumstances where it is not possible for him to show that the Disciplinary Committee was wrong in not taking into account the BTT in circumstances where he does not know why it did not do so.
  - iii. Accordingly, it follows that the question of which matches should be taken into consideration in assessing the duration of a period of suspension is a matter which needs to be determined by us as if this was a first instance hearing.
  - iv. In that regard, he wished to rely upon new evidence (i.e. evidence not before the Disciplinary Committee) from three sources:
    1. Daryl Gibson, Head Coach NSW Waratahs letter dated 19 December 2017.
    2. Stephen Schmidhofer, Head of Integrity, Rugby Australia – letter dated 20 December.

3. Anthony French, head of Professional Rugby, Rugby Australia – letter dated 20 December 2017.
  4. The new evidence was essentially to the effect that the BTT is a serious event and that the Appellant would have been selected to play in it.
- e. He did not submit that each match in the BTT should be considered the equivalent of a week but that the BTT should form part of the suspension. He said there was a “*continuum*” from (1) the proposition that each match in the BTT is equivalent to one week of the suspension to (2) the BTT itself counts as one week (or match) of the three match suspension. We sensed from his submissions and the way they were advanced that he advanced the latter as a more realistic approach.
13. He also noted that the Decision records that the Appellant’s suspension expires at midnight on Sunday 4 March 2018 (rather than midnight on Saturday 3 March 2018). He observed, that may be due to time zones given the match is being played in South Africa but this was not explained in the Decision.

### **C. POSITON OF SNRL**

14. SNRL administers the disciplinary programme for the Autumn International played in the Northern Hemisphere. Jon Davis is the SNRL Disciplinary Officer. He instructed Mr Duthie to advance submissions SNRL’s behalf. Both emphasised that SNRL’s position on the appeal was neutral.
15. It is not necessary to repeat Mr Duthie’s submissions. In summary, he made the following points, in writing and orally before us:
- a. The general policy of SNRL is to participate in disciplinary proceedings in order to try to assist the relevant tribunal and at the same time represent more broadly the image of the sport.
  - b. On the topic of a *de novo* hearing he submitted:

- i. If we were to find that the Disciplinary Committee's failure to set out in the Decision why it was not taking into account any particular match or series of matches for the purposes of his suspension entitled him to a *de novo* appeal, that might have a significant effect on rugby discipline administration around the world, since tribunals would be at greater risk of appeal (which has a cost implication for the administrators), and would be inconsistent with the general move towards more streamlined decision-making (and short-form decisions).
- ii. *De novo* appeals are (or can be) expensive, time-consuming and inconvenient because detailed factual (and sometimes expert) evidence that was given before the disciplinary committee, as well as lengthy legal submissions that were put to the disciplinary committee, all need to be repeated to a new tribunal; and they can - if frequently allowed - encourage players to make half-hearted attempts to defend complaints at first instance in the belief that they will have another 'bite of the cherry' on appeal, which is why *de novo* appeals are the exception, and not the norm.
- iii. While accepting that the Decision does not disclose the Disciplinary Committee's reasons for not taking into account the BTT, the Appeal Committee might consider that the Appellant is perfectly capable of advancing his position by way of a "*conventional appeal*", either because he does not need to know the reason (i.e. he can say '*whatever the reason, the Disciplinary Committee was wrong to make the decision*'), or because in the relevant context the reason is obvious (i.e. the BTT did not meet the tests set out in World Rugby Regulation 17.19.10 and 17.19.11 ['Regulation 17']). By "*conventional appeal*" he meant a review rather than *de novo*.
- c. He reminded us of the margin of appreciation to be afforded to a disciplinary committee if this were to be conducted as a conventional appeal.
- d. He reminded us of a number of previous decisions on the scope of appeals and the application of Regulation 17 in the context of playing consequences of sanctions.
- e. He also cross-examined the witnesses called by the Appellant.

## D. NATURE OF THE APPEAL

### (a) The competing approaches

16. By virtue of the matter set out above and the stance of SNRL, there was a live issue as to the nature of this appeal. The consequences are not merely technical. Section 4.6 of Appendix 1 to World Rugby Regulation 18 ('Regulation 18') provides:

*Except where an appeal proceeds in whole or in part, and then only with respect to that part, as a de novo hearing, appeals shall be conducted on the basis that:*

*(a) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the relevant findings made by the Judicial Committee or Judicial Officer are manifestly wrong;*

*(b) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the Judicial Committee or Judicial Officer applied wrong principles in the exercise of its/his discretion which has resulted in an erroneous decision being made; and/or*

*(c) new or additional evidence not offered before the Judicial Committee or Judicial Officer shall only be considered by the Appeal Committee or Appeal Officer where the party offering such evidence establishes that it was not, on reasonable enquiry, available at the time of the proceedings before the Judicial Committee or Judicial Officer.*

17. Accordingly, the Disciplinary Committee's Decision should not be interfered with unless its findings were manifestly wrong or it applied the wrong principles in the exercise of its discretion which resulted in an erroneous decision being made.

18. Therefore, if the matter proceeded as a conventional appeal the onus was upon the Appellant to establish the error/s. Further in doing so, he would not be permitted to rely on the new evidence, unless he was able to satisfy Section 4.6(c) above. However, if the appeal proceeded as partial *de novo* appeal, he would be able to rely on the new evidence

and we would decide the issue afresh, reaching our own decision unfettered by the findings of the Disciplinary Committee.

19. We heard the evidence *de bene esse* and reserved our position as to whether to we would, in the event, actually admit it.

(b) **Decision**

20. Regulation 17.19.9 provides:

*Disciplinary Committees and Judicial Officers shall ordinarily in their written decisions set out the reasoning for their findings, including the finding on culpability, how they have categorised the seriousness of the offence by reference to the features set out in Regulation 17.19.2, how they identified and applied any aggravating and mitigating factors and conclude with the resultant sanction, if any, imposed.*

21. Regulation 17.19.11(c) provides:

*shall, in respect of meaningful off-season application of sanctions, set out the reasons why it or he considers those Matches to be meaningful;*

22. The Decision does not expressly set out why the pre-season fixture was considered meaningful. Plainly it decided that it was; and unsurprisingly the Appellant does not suggest that was an error. But, in that respect, it does not strictly comply with Regulation 17.19.11(c). That would not have been an issue, but for the fact that the Decision does not address at all the BTT. It is to be noted that Regulation 17 does not expressly require a written decision to explain why a match is not considered meaningful.

23. We saw real merit in the Appellant's argument that it was here impossible, or certainly difficult for him and those representing him to understand why the BTT had not been considered meaningful. Obviously (as Mr Duthie pointed out) it was not counted. Further, one can reasonably infer that the Disciplinary Committee considered it not to

be meaningful. However, one knows not why. A Disciplinary Committee speaks through its oral and written decisions. Absent explanation by way of reasoning in either, it is difficult to understand why it was not considered meaningful. That is important for two reasons: (1) for comprehension and (2) in evaluating the merits of any appeal.

24. Accordingly, having heard the evidence *de bene esse*, we decided to proceed as follows:
- a. We would consider afresh the issue as to whether the BTT should count, and if so to what extent, as part of the playing suspension.
  - b. Those being live issues we would admit and consider the new evidence before us.
25. In our view, written decisions dealing with sanction playing consequences should address each and every fixture that a player contends should count towards a playing suspension. They should state expressly (1) whether a match does or does not 'count' and (2) why it is or is not considered meaningful within the meaning of Regulation 17 (or the relevant regulation derived therefrom).
26. That approach is entirely consistent with what is required by Regulation 17.19.9. It is also not inconsistent with this passage from the decision of *Russell* (at paragraph 75)<sup>3</sup> which Mr Duthie quoted to us

*It is important to understand that a written decision is a summary of the evidence, arguments and reasons for the factual and 'legal' (i.e. rugby Law) conclusions reached. It does not have to deal with every point or argument raised, only sufficient for the reader to understand what was decided and why...*

27. It is important when citing from decisions to do so in context and to ensure the quotations are complete. That passage was said in the context of addressing a complaint by a player's representative where he had made many points, a number of which were not material to that committee's decision. In that context, of course a committee does not need to address every single point.

---

<sup>3</sup> Six Nations, 1 March 2015; an Appeal Committee chaired by this Chairman

28. Further, the passage as set out in paragraph 26 above was as cited to us. It is incomplete.

The paragraph continues to its end thus:

*DR 2.5.105 states that the DC must confirm its decision in a written judgment which “sets out the reasons for its findings”.*

29. Not to include a match, or here the BTT, as part of a playing suspension is a finding. It is a material finding in the context of a playing suspension. It is a finding arrived at by the following process: application of the relevant regulations to factual findings based on an assessment of evidence. That process involves reasoning. It is that reasoning which must also be explained.

## **E. DETERMINATION**

30. The match was played on 25 November 2017. On 1 January 2018, new Laws and versions of Regulations 17 and 18 came into force. That has no material effect on the outcome of this appeal. The relevant Laws are those which applied at the time of the act of foul play. In any event, the Appellant admits the act of foul play and accepts the length of the playing suspension. Further, there is no relevant difference between the 2017 and 2018 version of Regulations 17 and 18

### **(a) Discussion**

31. Appendix 1 to Regulation 17 expresses sanctions for foul play in Rugby Union in weeks, not matches. What a ‘week’ means is addressed in the first sentence of Regulation 17.34.1 which states:

*World Rugby’s Sanctions for Foul Play set out in Appendix 1 have been established on the basis that a one week period of suspension would normally result in a Player missing one Match of Fifteens.*

32. Therefore, in the ordinary course of events, a fifteens player suspended for three weeks, should miss three matches. Sometimes it will be appropriate that a playing suspension is both expressed as a period of time and takes effect in that way. For example, a serious act of foul play resulting in significant injury might result in a suspension measured in years. No one would reasonably expect that to be expressed in matches. Those cases are not the norm, but flexibility to cater for them is appropriate and necessary. This decision is not concerned with such situations.
33. However, sometimes expressing sanctions in terms of weeks gives rise to difficulties. They commonly arise where the foul play is committed at or towards the end of the season or a tour, as in this appeal, or where the player is injured. The issue is simply stated: a suspension of X weeks, taking immediate effect will have no consequence for the player who is not playing. Put another (more robust) way: three weeks during the summer when the player is on a beach is meaningless. This case is a good example. Following the match on 25 November, the Appellant returned home to Australia and does not play again for months.
34. Regulation 17.19.10 seeks to address this:

*Decisions on sanctions and suspensions imposed on Players under World Rugby Regulation 17 shall:*

- (a) be applied universally by Unions, Associations, Rugby Bodies and their constituent bodies such that the Player may not play the Game (or any form thereof) or be involved in any on-field Match day activities anywhere during the period of suspension;*
- (b) not allow Players to avoid the full consequences of their actions by, for example, playing in Matches prior to the commencement of their suspension, or playing in Matches during a break in the suspension and/or serving their suspension during a period of inconsequential pre-season and/or so-called friendly Matches;*
- (c) apply and be served when the Player is scheduled to play;*
- (d) be imposed until a stated date which should be fixed after taking into consideration all playing consequences of such suspension; and*
- (e) be effective immediately (subject to 17.19.11(b)).*

35. Regulation 17.19.10 has this effect: any period of suspension must, inter alia,
- a. Run to a stated date;
  - b. Apply when the player is scheduled to play; and
  - c. Must be fixed taking into account the playing consequences of such suspension; and
  - d. Must not allow a player to escape the full consequences of their actions.

36. That formulation is sometime expressed in this shorthand way: the sanction must be meaningful. The word meaningful derives from Regulation 17.19.11. When imposing sanctions judicial committees must do so in accordance with Regulation 17.19.10 and in so doing, must have regard to and apply Regulation 17.19.11. Regulation 17.19.11(d) states that the judicial committee/officer:

*...may at its/his discretion in assessing the playing consequences of a sanction apply the suspension to scheduled pre-season and/or so-called friendly Matches, provided such scheduled pre-season and/or so-called friendly Matches have, in the opinion of the Disciplinary Committee or Judicial Officer concerned, a meaningful playing consequence for the Player. In making their assessment Disciplinary Committees and Judicial Officers may, in their discretion, take account of such factors as they consider relevant including, for example, the proximity of the Match to the commencement of the season, the identity and stature of the opponents, likely quality of teams to be selected, and the general Match profile...*

37. There is no difficulty with matches scheduled within a regular playing season. The issue arises with pre-season or friendly matches. World Rugby could have excluded all training matches or pre-season friendlies as counting for sanctioning purposes. It has not done so. Instead, World Rugby has sought to find a fair balance between the 'regular' and pre-season matches. Regulation 17.19.11(d) provides assistance in ensuring that the stated aim of Regulation 17.19.10 (the player must not escape the proper and full consequences of their actions) is achieved.

38. However, it is impossible, in the context of not excluding pre-season matches entirely, to cater for every factual eventuality. Instead, judicial committees/officers must examine the

circumstances of individual cases in assessing the playing consequences of a sanction. In doing so judicial committees/officers must never lose sight of the touchstone, namely that the player must not avoid the full consequences of their actions.

39. When considering whether such pre-season or friendly matches count towards a playing suspension a judicial committee/officer should consider and determine:

- a. Is the game under consideration a “Match”?
- b. Is it one in respect of which the player is scheduled to play?
- c. Does the Match have a meaningful playing consequence for the player?

40. In relation to the task of considering meaningful playing consequence the judicial committee/officer should scrutinise with care the evidence and approach the question of a “meaningful playing consequence” thus:

- a. Is it a match within the meaning of the Laws of the Game and Regulations?
- b. Apply the factors in Regulation 17.19.11(d).
- c. Apply the guidance in the decision of the Appeal Officer in *Schalk Brits*, 30 June 2013, paras. 40-41<sup>4</sup>.
- d. The burden is upon the player to satisfy the judicial committee/officer on the balance of probabilities that the match in question has a meaningful playing consequence.

41. As for the guidance in *Brits* it is important to remember what was said in the case about those matters<sup>5</sup>:

*...I empathise they are not listed in any particular order of importance, and are not intended to be exhaustive. They supplement Regulation 17.19.11(d) and I hope assist others who have to grapple with an area not without its challenges.*

42. The term “Match” is defined in World Rugby Regulation 1 to mean “a Game in which two teams compete against each other”. A “Game” is further defined as “rugby football played in

---

<sup>4</sup> The Chairman of this Committee.

<sup>5</sup> Paragraph 39

accordance with the Laws of the Game”. That means what it says. When considering the meaning of “Match” the Appeal Committee in *Sonny Bill Williams* said this in paragraph 50 of its Decision (dated 3 August 2017):

*...But the committee fell into error by ascribing an overly-literal meaning to the word “Match” and thereby failing to consider the meaning – and application - of the word from a common-sense, rugby, perspective, having regard to the scheme of the Regulation and the Laws as a whole.*

43. With respect, we disagree and prefer the reasoning and approach of the Judicial Committee in that player’s case. In any event, we would venture to suggest that a common-sense rugby person would readily say that a match is played between two teams, not three; and over two halves, not in three thirds. That common-sense rugby person would, we think, more readily find such to be the more natural and ordinary meaning of the word ‘Match’.

44. The meaning of match leads us to variations of the fifteen-a-side Game. For example, under 19s, sevens and tens. Regulation 17 recognises this in the context of Sevens rugby. Regulation 17.34.1 continues thus:

*During a Sevens Tournament, Players may participate or participating Unions may be scheduled to participate in several Matches per day. When determining the appropriate periods of suspension, a Judicial Officer should take cognisance of the fact that during a Sevens Tournament or Series of Matches a Player may miss more than one Match as a result of being made subject to a week’s suspension and may impose a suspension based on a number of Tournament Matches. In this respect the Judicial Officer shall have regard to the overall impact of the suspension. This provision does not preclude the imposition of periods of suspension running beyond a Player’s participation in the Tournament. [emphasis added]*

45. In short, it is a matter for the judicial committee/ officer’s judgment, whether to express the suspension as matches or a period of time having regard to its overall impact.

46. There is no mention of tens in Regulation 17.

47. A further complication: Regulations 17.19.10, 17.19.11 and 17.19.12 do not provide any guidance as to how to treat sevens or tens tournaments for the purposes of suspensions imposed as a result of foul play committed in a fifteen-a-side match. Regulation 17.19.10(a) does say “*shall not play the Game (or any form thereof)*” but that is simply to make it clear (if it was not) that abbreviated forms of the Game are covered by such suspensions.
48. It seems to us that Regulation 17.34.1 is not intended to apply other than when a sanction is being imposed following an act of foul play committed in a sevens tournament. Mr Duthie helpfully provided us with copies of two decisions:
- a. *Tapper*, 9 January 2017 – the Appeal Committee hearing a case arising out of the Autumn Internationals of the preceding year dismissed the appeal from the disciplinary committee’s refusal to translate a three-week suspension from a fifteens game into three sevens matches in the Dubai Sevens Tournament in which the player was due to participate. That disciplinary committee treated the whole tournament as representing the three-week sanction.
  - b. *Recaman*, an RFU first instance decision in 2013 (but one chaired by an experienced World Rugby Chairman) – the player was banned for eleven weeks for biting an opponent in a fifteen-a-side match. The two sevens tournaments in which was due to play, were each counted as one match.
49. Rugby jurisprudence has grown. It was bound to as lawyers became involved, both representing players and chairing committees or acting as single judicial officers. Strictly speaking there is no doctrine of *stare decisis* in rugby. But, it is natural for common law lawyer to seek guidance. We hope the following helps others who might find themselves confronting this issue.
50. With respect, we agree with the general approach taken in each of those cases. Our analysis of the relevant regulations leads us to conclude that when a judicial body is imposing a suspension for foul play in a fifteen-a-side match and is considering whether a sevens or tens match or tournament should count as part of that suspension, it must

consider the playing consequence in accordance with Regulation 17.19.10(d). In doing so, it must exercise its judgment (based on the evidence) as to the extent, if at all, such matches should be included as part of the playing suspension. In that respect, it should consider (among other things)

- a. The matters set out in paragraph 39 hereof, including the player's previous history in the sevens/tens variation (*per* paragraph 40(d) in *Brits*)<sup>6</sup>.
- b. The nature and standard of the tournament – is it (for example) a ‘beach’ or ‘fun’ event as compared to the HSBC World Series Sevens events?
- c. How does the standard of the tournament or matches and the participants compare with the player’s usual standard?
- d. The extent of the player’s participation in the tournament.
- e. It will also have regard to the Game in which he committed the act of foul play and the usual format in which he/she plays. For example, if it was fifteen-a-side match, how does that compare with an upcoming tournament or match in a shorter variety of the Game. In that context it is difficult to see how a fifteens match would equate to a single sevens match?

51. Finally, it is important also not to overlook another effect of Regulation 17.19.10(a). During any period of suspension, the player cannot play the Game (or any form thereof) or be involved in any on-field match day activities. The effect is that an act of foul play which merits a suspension of three weeks may in fact be expressed (1) as a longer calendar period to capture the relevant matches, and accordingly may mean (2) the player cannot play in fixtures or events which are not counting as part of their suspension. It is analysing the ‘playing consequences’ that disciplinary committees/officer must be scrupulous to ensure a fair sanction is imposed. There is no panacea. It calls for an exercise of judgment, based on evidence.

---

<sup>6</sup> In that respect, the fact the Laws of the Game are varied for tens to provide for rolling substitutions would not (of itself) act as a bar to tens counting. That is a recognised Law variation of that format of the game. Paragraph 40(a) of *Brits* was concerned with rolling substitutions in fifteens.

52. It is the search for the sometimes elusive effect of ‘playing consequences’ which gives rise to this appeal. It is to that, that we now turn.

(b) The Appellant’s playing schedule

53. The schedule, as placed before the Disciplinary Committee and us is as follows:

Event 1

Pre-Season Fixture: NSW Waratahs v Highlanders  
Friday 2nd February 2018  
Queenstown, NZ

Event 2

BTT  
Friday 9th and Saturday 10th February 2018  
Day 1 9th - two matches  
Day 2 10th - Up to four matches

Event 3

Pre-Season Fixture: NSW Waratahs v Melbourne Rebels  
Thursday 15 February 2018  
Brookvale Oval, Sydney, NSW

Event 4

Super Rugby Round 1: NSW Waratahs v Stormers  
Saturday 24 February 2018  
Allianz Stadium, Sydney

Event 5

Super Rugby Round 2: NSW Waratahs v Sharks  
Saturday 3rd March  
Kings Park, Durban

54. There is and was no issue that events 4 and 5, if he were suspended at the time of either, should count as part of the playing suspension. There was also no issue about event 3 (which also counts) and event 1 which does not.

55. At the heart of the appeal lies event 2, the BTT. Two issues arise:

- a. Should it be counted as part of his suspension?
- b. If yes, to what extent?

(c) The nature of BTT

56. First, tens rugby. It is a recognised variation of the traditional fifteen-a-side Game. It is recognised by and in the Law Book, which caters expressly for it by providing a number of dedicated Law variations.

57. Second the nature of the BTT. We read, admitted and accepted the letter from Anthony French It was not challenged by SNRL. Therein he said, inter alia:

*The Brisbane Global Rugby Tens (Brisbane Tens), run by Duco Events Australia Pty Ltd, has been sanctioned by Rugby Australia and World Rugby and as such is played and administered in accordance with the Laws of the Game, World Rugby Regulations and all Rugby Australia policies, codes and regulations. This includes the appointment of senior citing and judicial personnel to regulate and sanction any on-field foul play.*

*The Brisbane Tens is a world class sporting event held in Brisbane, Queensland between 9-10 February 2018. The tournament is held at Suncorp Stadium, a state-of-the-art Test-Match Venue which has a capacity of over 50,000 spectators and is the home of various major sporting events including the Rugby Championship and Bledisloe Cup.*

*All matches will be broadcast live in high-definition by Fox Sports, the leading sports broadcaster in Australia. The broadcast feed will be taken up by New Zealand and broadcasters in other countries. The inaugural event in 2017 was attended by more than 50,000 spectators and attracting a large global broadcast audience. The tournament has attracted significant government support through Tourism and Major Events Queensland, forming part of the \$600 million It's Live! In Queensland initiative.*

*The Brisbane Tens is the premier professional ten-a-side rugby tournament in Australia and it holds an important place in the Australia domestic rugby calendar, especially for Super Rugby teams. The tournament is played less than a fortnight prior to the commencement of the season proper and is therefore an important part of the Super Rugby pre-season, allowing players the opportunity to gain crucial match fitness, sharpen their skills and form combinations in a form of the game similar to fifteens just prior to the 2018 Super Rugby competition commencing.*

*The Brisbane Tens is attended by a number of elite professional rugby teams including every professional Super Rugby side from both Australia and New Zealand as well as strong professional*

*provincial sides from Japan and France and international teams representing Fiji and Samoa. A substantial fee (circa \$100,000 AU) is provided to each team for participating with an additional financial incentive for the winning team.*

58. On this aspect, we also heard from Daryl Gibson, who told us that he intended to send a strong squad of twenty players to the BTT. That included first XV players, including seven or eight Wallaby internationals. He anticipated that other sides would take a similar approach.

59. We are quite satisfied that the BTT is a tournament which, subject to the Appellant's participation, would be of sufficient standing to 'count'. It is

- a. Played according to the Laws of the Game.
- b. It is open to the paying public.
- c. It is televised.
- d. It has players of suitable experience, standing and ability properly to be regarded as professional, and similar to the level at which the Appellant plays.

(d) Evidence of Appellant's participation in the BTT

60. Before the Disciplinary Committee, the Appellant was represented by a Mr Somerville. According to Stephen Schmidhofer's letter, the following was placed before the Disciplinary Committee:

*With regards to the Brisbane Global Rugby Tens, Mr Somerville submitted the following:*

- *Mr Kepu participated in the inaugural edition of the tournament in 2017 and his instructions were that Mr Kepu expected to be participating in the event again in 2018;*
- *the NSW Waratahs were scheduled to play two matches on day one and up to four matches on day two;*
- *Mr Kepu expected to play both matches on day one with his participation on day two dependent on the performance of the team and his individual fitness requirements; and*

- *Mr Kepu did not wish to argue that each match of the Brisbane Global Rugby Tens was equivalent to a Super Rugby match but that the tournament should be considered by the Judicial Committee in some capacity for the purposes of matches comprising any sanction to be imposed.*

61. On this topic, we heard first from Daryl Gibson and then the Appellant himself. They were questioned by both advocates and by members of the Appeal Committee. They were candid.

62. Mr Gibson said, in summary as follows:

- a. The Appellant did not play in the 2017 BTT.
- b. The Appellant has not played any tens rugby of “this magnitude”, a reference to the BTT.
- c. The Waratahs had three guaranteed fixtures and then up to six depending on how they progressed in the BTT.
- d. The matches are played over two halves each lasting ten minutes.
- e. The Appellant was not expected to play twenty minutes in any match. He was to play “short bursts” in each of the first three scheduled matches. Those bursts would last in the order of five minutes. This was part of a conditioning plan.
- f. The only other tight five forwards he was taking to the BTT were three hookers.

63. The player told us:

- a. He did not play in the 2017 BTT.
- b. He had not played tens rugby since 2005.
- c. He would play as part of a five-man scrum.
- d. He first asked about playing in the BTT after he was suspended by the Disciplinary Committee.

64. The BTT is a pre-season tournament. Our task is first to decide whether we are satisfied that he was always scheduled to participate in the BTT. In other words, that he is not seeking to avoid the full consequences of the suspensions by claiming falsely that he was and so offend Regulation 17.19.10(b). Mr Cottrell and Mr Schmidhofer were at pains to

emphasise that neither the Appellant nor Rugby Australia was seeking to avoid the *fair* playing consequences of the suspension.

65. Mr Duthie sought to pursue why the Disciplinary Committee was told that the Appellant had participated in the 2017 BTT. Neither Daryl Gibson nor the Appellant could help with that. Mr Schmidhofer described it as an error, for which he apologised. As we have made clear, the Appellant and his coach were frank and candid with us. We accepted it was a mistake.

66. Nonetheless, we have to say the evidence about this, as it unfolded before us, was unhappy for the Appellant. The Disciplinary Committee was misinformed about his participation in 2017. Further, he has not played that format of the Game for over twelve years. Mr Duthie pointed us to the paragraph 40(d) of the appeal decision in *Brits*:

*Where a Sevens Tournament is put forward for consideration as part of the meaningful pre-season matches the player wishes to perform in, the player must be able to demonstrate that he has recently played Sevens (or previously played in the equivalent Sevens window of preceding seasons, as applicable) and participated in Sevens' Tournaments for the Club/Union/Rugby Body he wishes to represent or did so for his immediately preceding Club/Rugby Body where the player is transferring from one Club/Rugby Body to another across the off-season period."*

67. That passage was part of what was expressly described as guidance. It does not replace the relevant regulations. It was said in the context of a fifteens player seeking to rely on a forthcoming sevens tournament. By parity of reasoning, the principle therein set out applies also to tens. It is not a definitive answer to any such situation, but merely guidance. Its purpose is obvious: to guard against a fifteens player seeking to extinguish in whole or in part their suspension by claiming falsely to be participating in a shorter version of the Game. It counsels a judicial committee/officer to scrutinise with care any such claim, tested against that player's playing history in that shorter format of the Game.

68. We appreciate that the BTT is growing in stature, from its inaugural year in 2017, and might well be drawing more high-profile players. However, it is some transformation for

the Appellant, who has not played that format of the Game for over ten years. Further, he is a tight-head prop. He might well be explosive (as he was described) but a tight-head prop is not a natural fit for this shortened format of the Game. No other prop or lock is going (as Mr Kohn drew out in evidence). Further, he appeared to say to us when questioned, that it was he who first asked to play in the BTT and only after he had been suspended by the Disciplinary Committee.

69. Even if we were satisfied that he was always going to participate in the BTT, and that it was not an *ex post facto* (i.e. after his sending off) idea to get his suspension running, we would still have to consider what were the meaningful playing consequences for him in doing so. In that regard, the evidence is that he would play a part in a minimum of three matches. But that part would be limited to “short bursts” and would fall a significant way short of the time we would expect him to play in a fifteen-a-side match. Even in modern times, one could reasonably expect a front row forward (all things being equal) to play at least fifty to sixty of an eighty-minute match. “Short bursts” of about five minutes in three matches, does not get close to matching that. We therefore concluded that his proposed level of participation as described by Mr Gibson would not amount to a meaningful playing consequence within the meaning of Regulation 17.19.11.

70. Accordingly, we concluded that the BTT should not and would not ‘count’ as part of the playing suspension of three weeks.

71. The matches which do ‘count’ for the purposes of the playing suspension are as follows:

- a. Pre-season Fixture: NSW Waratahs v Melbourne Rebels, Thursday 15 February 2018.
- b. Super Rugby Round 1, NSW Waratahs v Stormers, Saturday 24 February 2018.
- c. Super Rugby Round 2, NSW Waratahs v Sharks, Saturday 3 March.

72. The effect of Regulation 17.19.10 (d) is that the playing suspension must be expressed to a fixed date. There is presently a time difference of nine hours between Durban and Sydney. If the match starts at 15.00 Durban time on 3 March 2018, it will be 23.00 in Sydney. Sixty-one minutes later it will be 00.01 in 4 March in Sydney. In those

circumstances, we can well understand why the Disciplinary Committee extended the suspension to 4 March 2018. It avoids any issues arising out of the different time zones. To do so involves no unfairness to the Appellant. Therefore, he is suspended from playing Rugby Union up to and including 4 March 2018. He is free to play thereafter.

73. During that time, he is suspended from Rugby Union within the meaning of Regulation 17.19.10(a).

#### **F. COSTS**

74. In his written submissions Mr Duthie said this about costs:

*We respectfully remind the Appeal Committee that it has the power (under Regulations 18.8.1 and Regulation 18, Appendix 1, paragraph 4.14) to vary the Decision in such manner as it sees fit and also to make a relevant costs order. We respectfully suggest that the question of costs be held over, to be the subject of further submissions (if appropriate) following the Appeal Committee making an interim decision*

75. If SNRL wish to make any such an application, it must be made within seven days of receipt of this Decision. If such application is made, and we need trouble the Appellant for a response, we will do so.

76. We repeat our gratitude to the parties for their assistance.

A handwritten signature in black ink, appearing to read 'Chris Quinlan', written in a cursive style.

**Christopher Quinlan QC, Chairman,**

Bristol

17 January 2018

Signed on behalf of the Appeal Committee