2019 SUMMER INTERNATIONALS

IN THE MATTER OF AN APPEAL BROUGHT BY PAUL GABRILLAGUES AGAINST THE DECISION OF THE JUDICIAL COMMITTEE

Appeal Committee:

Christopher Quinlan QC, World Rugby Independent Judicial Panel Chairman

Adam Casselden SC, Chairman, SANZAAR Foul Play Review Committee

David Croft, Ex-Australia & Queensland Reds

Attendees:

Paul Gabrillagues, the Appellant

Louis Weston, Appellant's Counsel

Ben Rees, Appellant's Solicitor

Jenny Collier, Interpreter (French/English)

Sarah Nelson, Senior Administration Executive, Six Nations Rugby Limited

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DECISION OF THE APPEAL COMMITTEE

A. INTRODUCTION

1. Paul Gabrillagues ('the Appellant') is an International Rugby Union Player. He attended a hearing before the Disciplinary Committee ('DC') held on 20 August 2019 after being cited for an act of foul play committed while playing for France against Scotland in the match at Allianz Stadium, Nice, France on 17 August 2019 ('the Match'). He was represented by Counsel. He accepted committing an act of foul play contrary to Law 9.20, which he further accepted merited a red card. He was suspended from Rugby Union for a period of six weeks. It is that decision against which he appeals.

2. The substantive hearing of the appeal took place on 27 August 2019. The Appeal Committee Chairman was present together with the above-named attendees. The remaining members of the Appeal Committee attended by video conference call. At the conclusion, we announced our decision but reserved our reasons.

3. This document constitutes its final reasoned Decision. Each member of the Appeal Committee contributed to it and it represents our unanimous conclusions. It is necessarily a summary. It is reached after appropriate consideration of all the evidence, submissions and the other material placed before us. Nothing is to be read into the absence of specific reference to any aspect of the material or submissions before us. We considered and gave appropriate weight to it all. We apologise for its length, but the issues are important, not straightforward and require proper analysis.

4. For reasons explained below we allowed the appeal and imposed a suspension from Rugby Union for a period of three weeks, up to and including 21st September 2019.

B. <u>FOUL PLAY</u>

5. The Appellant committed the act of foul play in the 17th minute of the Match. He was cited contrary to law 9.20 namely dangerous play in a ruck or maul. Law 9.20.a. states that a "*player must not charge into a ruck or maul. Charging includes any contact made without binding onto another player in the ruck or maul*". John Barclay ('JB") was the Scotland player involved in the breakdown and was the victim of the Appellant's charge. Given the issues and our findings, it is unnecessary to set out the terms of the citing report.

6. Neither the referee nor the assistant referees witnessed the incident during live play and their written evidence was deemed by the DC to be "*of no relevance to the issues to be determined at the hearing*".

7. The DC's written decision ('the Decision') records that the Television Match Official ('TMO') had observed and examined the incident at the time via the Hawkeye system on two 'front on' camera angles. The TMO attempted to draw the incident to the referee's

attention as he believed the Player's actions merited a red card. A failure of the telecommunications system meant the referee could not hear him and so the TMO was unable to inform him in accordance with the Protocol.

8. The medical evidence was as follows. A statement from Dr James Robson SRU Team Doctor was before the DC:

"*I, and my colleague Stuart Paterson attended John, on field, at approximately 16 minutes after kick off. He reported that he had sustained a blow to the back of his neck and head. He reported that he had had very transient "pins and needles" (paraesthesia) down both arms. He was at all times alert and orientated. He expressed a desire and ability to continue after a few moments to recover.*

At half time he reported that his "neck was tight and sore". Our head coach was informed that in my opinion he was unlikely to be able to continue for the remainder of the match and may need (sic) replaced early in the second half.

After the game, John reported having a painful and stiff neck. On return to the team hotel he required analgesia (cocodamol 30/500) and muscle relaxants (Diazepam 5mg).

This morning (18/08/19), examination reveals global restriction of all cervical (neck) movements with most restriction in cervical rotation to the left. In addition, he has marked increase in tone of his trapezius muscles (neck muscle spasm) with no mid-line tenderness. He continues to report generalised neck pain.

He is currently continuing to take analgesia (cocodamol 30/500, 2 tablets up to 4 times in 24 hours)."

9. There was a statement from JB. Therein he stated:

"My memory of the event was going in for an attempted Jackal. As I arrived, I felt a heavy blow to the back of my neck and head. Took me a while to get over the knock which left me with constant pain and discomfort in my neck".

10. The other relevant evidence (as to the event) comes from the Appellant's oral evidence before the DC (and us) and the footage of the incident. We address both below.

11. The Appellant's Notice of Appeal dated 22 August 2019 ('the Notice'). Therein he accepts that his "*factual case, before his oral evidence, is accurately set out at page 4 of the Decision*" (emphasis added). Page 4 records:

> "*I am in the thick of the action, following the ball. In play and at high speed, I see my teammate has been tackled.*
> *I am the first support and I run towards the play, ready for an offload or to clear out. Then as I approach, I see that my teammate has been blocked and tackled to the ground. I try to move in as quickly as I can to help him by clearing out number 6, who is jackalling for the ball, using both of my arms to clear number 6.*
> *I see the number 13 is now getting up. I move my right arm down to avoid hitting the head of number 13 and I twist round my body to avoid a collision with him. In doing so, my footing is not secure because I am coming around to join the ruck and not moving in a straight line. In trying to clear out number 6 and trying to avoid number 13, as I go into contact my head has moved down and I do not see number 6 and then there is the collision. I did not realise that I had made contact with the head of number 6.*
> *It was not my intention to hurt number 6 in any way. When I heard about the injury to number 6, I wrote him a text to apologise.*"

12. The Decision records that his case was that his conduct was neither intentional nor deliberate but was reckless.

C. DECISION OF DISCIPLINARY COMMITTEE

13. The Decision is dated 20 August 2019 and is in the familiar 'template' format. It states:

> *"This written judgment is the unanimous decision of the Committee following consideration of all the evidence it had seen and heard and following oral submissions by the Player's legal representative at a hearing on 20 August 2019. It is not intended to be an exhaustive record of all the evidence presented at the hearing and the absence of a reference to some evidence or submission is not to suggest that such evidence or submission was not taken into account by the Committee at the hearing."*

14. The DC's central factual findings are recorded clearly and carefully at page 7 of the Decision. It is appropriate to repeat them in full:

"*1. Following a tackle by S13 upon F13 both players go to ground with F13 turning to his own side in an attempt to place the ball.*

2. S13 immediately begins to partially get up from the ground by raising his right leg and planting his right foot on the ground with his left knee remaining on the ground. At this time F13, who is partially held down by the weight of S13 remains on the ground.

3. John Barclay (S6) is the first player on either side to arrive at the tackle area and approaches F13 with a view to "jackal" for the ball.

4. At the same time, the Player can be seen running quickly towards the tackle area from behind his own player, F13.

5. As the Player approaches, he keeps his right hand near the level of his right hip with a bent arm.

6. He then moves forward by dipping and leading with his right shoulder and charges forcefully into S6 causing his shoulder to impact with considerable force upon S6's head.

7. S6 is knocked backwards from the impact to his head and then he falls to the floor.

8. During the passage of play, the Player makes no attempt to avoid contact with S6 and makes no attempt to slow his speed before impact.

9. The Player had also made no attempt to bind onto another player when entering the tackle area.

10. The Player's shoulder's impact upon S6's head was with considerable force and was very dangerous.

11. The Committee rejected the Player's explanation that whilst he had sufficient time to adjust his footwork and right arm to prevent a collision with S13, he had insufficient time to avoid contact with S6.

12. The Committee also rejected the Player's evidence that he partially lost his footing immediately before he charged into the tackle area which affected how he came into contact with S6.

13. Due to the Player's dangerous charge into a tackle area, S6 had suffered considerable pain and discomfort which had not subsided the following day when the Scotland team doctor had provided a written statement outlining the injury.

14. The Committee concluded that notwithstanding the speed of the incident, the Player had the opportunity to avoid contact with S6's head but did not do so."

15. Those factual findings are prefaced by the DC observing (correctly):

"The Committee also recognised that watching footage in slow motion can give the false impression that a person has more time to think, calculate and form intentions than is the case."

16. In light of those factual conclusions the DC concluded - contrary to the Appellant's case - that:

"Th [sic] *Committee found on the balance of probabilities that the Player had acted intentionally in charging into John Barclay rather than in a reckless manner. It rejected the Player's evidence that he had insufficient time to avoid contact with Barclay. In coming to this conclusion, the Committee took into account the match footage and fact that the Player had accepted he had time to lower his right arm and his angle of running to avoid contact with S13 who was closer to him. The Committee found that if the Player had time to avoid S13, he had sufficient time to avoid charging into S6 leading with his right shoulder. Further, the footage was not consistent with any attempt by the Player to slow down as he entered the tackle area which he could have done in light of his admitted* [sic] *ability to adjust other aspects of his movement."*[1]

17. The Appellant challenges this finding of fact (Ground 1) and complains about the procedure which led or contributed to it (Ground 2). In light of that, and other factual findings made when applying R17.19.2 (as it was required to), the DC concluded that the foul play merited a top end entry point. The Appellant challenges that conclusion (Ground 3).

D. REGULATORY FRAMEWORK

18. The applicable rules and regulations are the 2019 Summer Internationals ('the Rules') and World Rugby Regulations 17 and 18 ('R17' and 'R18' respectively) and Appendix 1 to R18 ('Appendix 1').

[1] Page 8

19. Clause 4.3 of Appendix 1 provides:

"The Appeal Committee or Appeal Officer shall have the power to order that a de novo hearing in whole or in part be adopted on appeal. A de novo hearing in whole or in part would ordinarily only be appropriate where it is established that it is in the interests of justice that a re-hearing of the case in whole or in part is necessary. In the case of an appeal which proceeds in whole as a de novo hearing the procedure to be adopted, the burden of proof and all evidential and other matters shall proceed as if the hearing was a first instance hearing before a Judicial Committee or Judicial Officer."

20. Clause 4.4 of Appendix 1 reads:

"Except where an appeal proceeds in whole or in part, and then only with respect to that part, as a de novo hearing and subject to clause 3.3 above, appeals and any question of fact arising on appeal will be heard and determined based on the record of the decision and the evidence received and considered by the Judicial Committee or Judicial Officer."

21. Clause 4.5 of Appendix 1 states:

"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."

22. Clause 4.6 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."

23. Accordingly, the DC'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. If the matter proceeds as a conventional appeal the onus is upon the Appellant to establish the error/s[2]. Further in doing so, he would not be permitted to rely on the new evidence, unless he was able to satisfy Clause 4.6(c) above. However, if the appeal proceeds as a partial *de novo* appeal, he would be able to give evidence before us (on intention) and we would decide that issue afresh.

E. APPELLATE PROCEEDINGS

(1) The Grounds of Appeal

24. The Notice pleads three specific Grounds of Appeal ('the Grounds'). The Appellant contends:
    a. Ground 1 - the Decision was in error as to a central factual finding, in finding that the Appellant intentionally committed dangerous play and factual findings that supported that finding; and/or

[2] Clause 4.13, Appendix 1

b. Ground 2 - the Decision was reached by error of law by failing to put, challenge, raise or confront the Appellant with the suggestion that he had intentionally committed dangerous play; and/or
c. Ground 3 - the sanction imposed was manifestly excessive or wrong in principle.

25. The Notice seeks a de novo hearing upon two bases:
    a. The absence of a recording of the proceedings before the DC means that the Appeal Committee cannot review the evidence considered by the DC as required by Clause 4.4 of Appendix 1; and
    b. Ground 2.

(2) <u>Six Nations Rugby Limited</u>

26. Six Nations Rugby Limited ('SNRL') administers the disciplinary programme for the Summer International played in the Northern Hemisphere. Mr Jon Davis is SNRL's Disciplinary Officer and was present at and during the hearing before the DC. He did not attend the hearing before us.

27. In advance of the hearing, the Appeal Committee Chair issued the following directions:
(1) By 14.00 (BST) on Monday 26 August 2019 I direct that the Appellant must indicate in writing if he has any objection to:
    - *any member of the Appeal Committee; or*
    - *to its composition; and/or*
    - *to the proposed procedure to be adopted at the appeal, namely the chair present in person and the other members attending remotely.*

(2) In order necessarily to expedite matters, I also direct as follows. By 17.00 (BST) on Monday 26 August 2019:
    - *Mr Davis, the 6 Nations Disciplinary Officer, confirms (if it be the case) that the proceedings before the Disciplinary Committee were not recorded.*
    - *Mr Davis provides any written submissions he has on the submitted Grounds of Appeal, including any factual assertions made therein, or confirmation that he has none.*

(3) There should also be an interpreter present to assist the Appellant, should such prove necessary.

28. Mr Davis replied to Direction (2) thus:

"The hearing on 20th August was not recorded as is Six Nations Rugby's normal practice. I have no submissions to make."

29. Mr Davis was not present for the hearing. Ms Nelson was present to assist us with administrative matters.

30. So far as Direction (1) is concerned, the Appellant's representative replied thus:

"Pursuant to point 1 of the pre-hearing directions, I confirm that the Appellant has no objection to any member of the Appeal Committee, to its composition or to the proposed procedure.

The Appellant would wish to make one additional factual point to those contained in his Notice of Appeal – namely that John Barclay was selected amongst the replacements for Scotland in the match between Scotland v France on Saturday 24 August and played in the second half of the match."

31. Insofar as that is 'new evidence' we admitted it as being relevant to sanction and not being available at the time of the last hearing.

F. DETERMINATION

(1) Application for a partial de novo hearing and Ground 2

32. It is appropriate to start first with this application. Ground 2 feeds into it. We did so in the hearing, inviting Mr Weston to make such oral submissions as he wished. Having heard from Mr Weston we ruled in the Appellant's favour and acceded to a partial de

novo to the extent that we heard evidence from him about the circumstances of the foul play. We now explain why.

(a) Clause 4.4

33. If the appeal hearing does not proceed in whole or part de novo then it must be adjudicated upon by reference to the Decision and the "*evidence received and considered*" by the DC.

34. The proceedings before the DC were not recorded. There is no regulatory stipulation that they must be. R17.21.4 provides:

"*The hearing by the Disciplinary Committee or Judicial Officer may be audio or audio-visually recorded or recorded by a stenographer…*"

35. Clause 1.12 of Appendix 1 states:

"*Hearings by Disciplinary Tribunals (save for private deliberations) may be fully audio or audio-visually recorded or by a stenographer…*"

36. Mr Weston told us he "*assumed*" the proceedings were being recorded and did not ask. As indicated in paragraph 28 above Mr Davis told us that not recording disciplinary hearings was "*six nations normal practice*". It appears that point was not discussed at all, by anyone.

37. In the modern age the necessary equipment is relatively inexpensive. We can conceive of no real disadvantage in recording such proceedings. There are obvious advantages. An audio recording should provide an accurate, contemporaneous, full record of such proceedings. It provides a record of, *inter alia*, the evidence given, question asked, answers given, and submissions made.

38. Mr Weston submitted that the "*lack of the recording of the evidence at the Hearing prevents the Appeal Committee from determining the appeal on 'the record of the decision and the evidence received and considered by the Judicial Committee'*"[3].

39. It is not, with respect, as straightforward as Mr Weston submitted. We do have a record of the evidence, especially the Appellant's evidence. It is to be found in (1) his written statement and the (2) Decision.

40. The relevant part of the Appellant's written statement is reproduced in the Decision[4]. His oral evidence is set out at length and in detail in the Decision[5]. Both are consistent with what he told us in his evidence. The summary of his evidence reveals matters upon which he was questioned (it is not clear by whom):

"He was asked what his head was doing as he approached the ruck. He said that at the last minute he dipped his head."[6]

"He was asked what his torso was doing. He said that his torso was crouching down "to get low."[7]

It is clear from the Decision that the DC certainly asked him about two matters:

"Upon questioning by the Committee, the Player did not accept that he had sufficient time to avoid charging into S6 in the manner that he had leading with his shoulder. He described how his actions were a "reflex" as a consequence of S13 beginning to stand up."[8]

41. We would not expect this or any such Decision to include a verbatim record of the evidence. There is no good reason to do so. Indeed R17.19.9 provides:

[3] Notice, §6a
[4] Page 4 and see paragraph 12 above
[5] Page 5
[6] Ibid.
[7] Ibid.
[8] Ibid.

"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 including, for the avoidance of doubt, the expiry date of the suspension setting out a list of the Matches (or Match weekends, rounds or dates where specific fixtures have not yet been scheduled) for which the Player is suspended provided that, in any event, the Player would, on the best information available at the time of the decision, be scheduled to play in a Match which would meet the criteria set out in Regulation 17.19.10 below on each of the weeks taken into account and that an expiry date is stipulated for the suspension."

42. In our judgment the absence of a full record of the proceedings before the DC does not, *of itself*, mean an Appeal Committee can never properly discharge its obligation pursuant to Clause 4.4. If that were the case, then one would expect the regulations (1) to say so, (2) to mandate recording of all first instance hearings and (3) it would mean an appellant would always be entitled to at least a partial de novo hearing on appeal where there was no such recording.

43. However, this point does not stand alone. It has to be assessed with Ground 2 and the complaint that the Appellant's account on a central issue, namely his intention, was not properly challenged or tested.

(b) <u>Ground 2</u>

44. On our analysis, Ground 2 breaks down to the following issues:
    a. In such circumstances, what onus, if any, is upon a Disciplinary Committee to challenge or to test a player's account?
    b. Does any failure by the DC to discharge that onus render the hearing unfair?

(i) Onus

45. These proceedings were inquisitorial. In adversarial proceedings, where there is dispute one can usually depend upon the parties to challenge and test the opposing case. SNRL played no adversarial role in the proceedings before the DC. It did not appear before us.

46. Therefore, the topic is this: where a Disciplinary Committee or Judicial Officer or any tribunal of fact in inquisitorial proceedings does or may take issue with a central aspect of a player's account, what is the onus, if any, to test their version?

47. Pursuant to R17, R18 and Appendix 1 disciplinary proceedings are not adversarial. They are inquisitorial. There is regulatory requirement or obligation upon a Disciplinary Committee or Judicial Officer (or any tribunal of fact) to challenge an assertion from or on behalf of a player before making a finding contrary to that assertion.

48. However, that is not an end to matters. Disciplinary Committees, Judicial Officers and any tribunal of fact in rugby disciplinary proceedings are bound by law to observe the principles of natural justice. Clause 1.13 expressly recognises that principle:

"*In respect of any matter not provided for in this Regulation 18, Appendix 1, the appropriate body or person shall make a decision according to general principles of natural justice and fairness.*"

49. A core principle of natural justice is the right to a fair hearing. In our judgment, in the context of such proceedings that requires or includes the following:
    a. The player must be given a fair opportunity to present their case, including giving such relevant evidence as they wish.
    b. In inquisitorial proceedings (such as these) the tribunal of fact is seeking to inquire as to the circumstances and to establish what happened. Therefore, it has no case to put.
    c. In inquisitorial proceedings no one is performing the prosecutorial role.
    d. Therefore, in inquisitorial proceedings, absent challenge from any other party, the tribunal of fact should test or challenge any aspect of core facts of a player's account in respect of which it may reach a conclusion adverse thereto.

50. We acknowledge that such an exercise may not be straightforward. The tribunal is an impartial factfinder. However, we are confident not only that it can be done in an appropriate way, but that it should be done. The nature and extent of any challenge or testing is a matter of fact and degree, depending upon the particular issues of the given case. The player must have an opportunity to address any potential finding adverse to their case which goes to the central issues. Such issues may include, by way of example, whether they acted intentionally, recklessly or, in a different context, dishonestly. It may not be either necessary or appropriate to challenge by way of direct confrontation[9] but the core factual matrix of the player's account should – where it may not be accepted - be explored and tested.

51. We would add the following:
    a. R17, R18 and Appendix 1 do not provide for a re-hearing of a case every time it is felt that an appellant was not challenged on evidence that was subsequently not accepted.
    b. Accordingly, while it is open to Appeal Committees to re-hear all or part of a matter where it is considered in the interests of justice to do so, the circumstances in which an Appeal Committee will re-hear all or part of a case must of necessity be exceptional.
    c. It is emphatically not the case that the tribunal of fact must always conduct an inquiry in relation to all contentious or potentially contentious issues. It is the core issues which are important. Much will depend on the circumstances.
    d. Further, the responsibility for ensuring that the tribunal of fact has the evidence it needs to determine a matter is one that is shared between the player any other party and, if applicable, their representatives. That is especially so where, as here, the parties are represented by lawyers, who will know the issues and can be expected to marshal the relevant evidence to assist the tribunal.

52. It is necessary to turn to the events before the DC.

(ii) Events before the DC

[9] For example, "you are lying" or "you did this deliberately"

53. Mr Weston, who represented the Appellant before the DC, told us that it was not "*put*" to him that he acted intentionally. He also said the issue was not "*explored*" with him. As is clear from his reply to our directions, Mr Davis indicated that he had no submissions to make, including the factual assertions in the Notice. Those assertions included:

"During the Hearing the Judicial Committee did not question or put to the Appellant the suggestion that he had acted intentionally. He was denied an opportunity to respond to the Disciplinary Committee on that issue..."[10]

54. The fact it was not put directly to the Appellant that he acted intentionally is not determinative. The real point is whether there (1) was a failure properly to explore or test that issue with him such that (2) the hearing was unfair in the sense it did not accord with natural justice.

55. The absence of a recording of the proceedings can prove a positive disadvantage for the parties, especially for an Appeal Committee. This is one such case. It would have helped us considerably, especially on this issue. There could have been no dispute as to what was said, by whom and what questions were asked of the Appellant. In the absence of such we have had to try to ascertain what evidence was given and what questions were asked of the Appellant on the issue of intention.

56. The obvious place to start is with the central issues in the case. Whether the foul play was committed intentionally or recklessly was a central issue, obvious to the DC and to the Appellant and Mr Weston. Secondly the evidence he gave – through his written statement and his Counsel - plainly addressed that question: he said it was reckless, which means he did not accept it was intentional. Thirdly, it is clear from the Decision he was asked questions from the Committee as follows:

[10] §6.b

"Upon questioning by the Committee, the Player did not accept that he had sufficient time to avoid charging into S6 in the manner that he had leading with his shoulder. He described how his actions were a "reflex" as a consequence of S13 beginning to stand up."[11]

57. Those questions were designed to test his account of the approach to the breakdown, what he did or did not do and why. They are relevant to the issue of his state of mind.

58. The Appellant was given ample opportunity to present his case. We are confident, with Mr Weston's help, he did so. We are also satisfied that this experienced and able DC questioned him, with the purpose of testing his account, especially as to his state of mind. The mere fact (if that is what it is) it was not "*put*" directly to him that he acted intentionally would not of itself have been sufficient to persuade us to conclude that it was appropriate to grant him a partial de novo hearing.

59. However, the difficulty for us is that we do not have a complete recording. We are deprived therefore of the detail of the questioning and the nuance of language and of the answers given. The absence of a recording left us unsure as to the extent and nature of the testing of the Appellant's account before the DC on this central issue of intention.

(c) Decision

60. We were left in the uncomfortable position of not being confident that we had a sufficiently complete account of the detail of the Appellant's account so as to be able properly to discharge our duty pursuant to Clause 4.4 of Appendix 1. That was especially acute for us as it created uncertainty as to the extent and nature of the testing of the Appellant's account before the DC on the central question of intention. Ultimately, we were persuaded that it was the interests of justice to grant a partial de novo, to the extent that we heard evidence from the Appellant as to the circumstances of his foul play.

(2) **Ground 1**

[11] Page 5

61. We heard from the Appellant. He gave us his account standing up, using the footage, words and actions to tell and to demonstrate to us what he did and why. We summarise part of it in the next two paragraphs (62 and 63) but also in our factual findings.

62. The Appellant was tracking France 13 ('F13') when he was tackled by Scotland 13 ('S13'). F13 could not off-load the ball. His intention was to clear out JB who was now bound onto S13. He showed us how he intended to do so, using both arms. S13 began to rise, outing out his left arm across his path. His view of JB was thereby obscured and immediately before contact, he twisted and dropped his head. His intention was to get low so as to drive JB up and away. He did not see JB's head nor intend to clear him out with his shoulder. His footing was such that he could not drive off his standing right leg or alter his course.

63. He was questioned by us. We took him, step-by-step, through his approach, asking him *inter alia*, where he was looking, what he could see, what he was intending to do, and why. He told us:
    a. He was intending to go low, bind onto JB with two arms and drive him up and out.
    b. He got his approach wrong and was too high.
    c. He said he was not looking at JB.
    d. He purported not to be able to see JB's head which we found (from the footage) improbable.
    e. He was asked directly whether he
        i. deliberately drove or dropped his shoulder into JB; and
        ii. took advantage of JB's position to deliver a 'cheap shot' on him.
    f. He denied both. We heard his responses but also had the benefit of seeing his reaction to those questions.

64. At the end of it, and when asked, Mr Weston agreed that the issues had been properly explored, his account tested and intention "*put*".

65. In light of that and the other evidence, including the footage[12], our factual findings are:

a. Following a tackle by S13 of F13 both players go to ground. F13 turns to his own side attempting to place the ball.

b. S13 immediately began to get up from the ground. He reached a position with his right foot on the ground, bent at the knee. His left knee remained on the ground. He was leaning over F13. At this time

   i. F13, who is partially held down by the weight of S13 remained on the ground; and

   ii. JB, the first player to arrive at the tackle area, bound (with his left arm) with S13 and put his right arm over F13, in the process of taking up the 'jackal' position, to compete for the ball.

c. At the same time, the Appellant ran towards the tackle area from his own side. He was intending to act within the laws of the Game, to use legitimate force to 'clean out' JB.

d. There is no clock on our footage. However, using the clock on the viewing software, it is plain events happened very quickly. Once JB had bound onto S13, the Appellant covered the final stages of his approach in three or four strides. It took just over a second of time. That was the time framework in which the Appellant was operating and in which we must assess his actions.

e. As the Appellant approached, S13 continued to rise, such that his torso was almost perpendicular to the ground. He turned toward the Appellant and put out his left arm across the Appellant's intended path to the tackle area.

f. We agree with the DC that:

   i. At the moment before contact the Appellant's right hand was near and level with his right hip with a bent arm. However, it had been moving consistent with his running action.

   ii. At the moment before contact, he twisted his body, dipped and leant forward. In our assessment that gave the appearance that he was leading with his right shoulder (but see paragraph 65.g(i) below).

   iii. He made forceful contact with his shoulder to JB's head, knocking JB backwards and away from the tackle area.

[12] From different angles, viewed at full speed and slow-motion

iv. He made no attempt to bind with JB.

g. However, and disagreeing with the DC, we conclude:

i. At the moment before contact, the twist, dipping and leaning forward was, in our assessment at least consistent with his account that he did so to avoid (by getting underneath) S13's outstretched arm.

ii. He probably was not – at that moment – able to adjust his footing or drive off his standing right ankle (which was supporting his body weight) because of its angle: his leg was leaning outwards, at about 45 degrees to the vertical. His left leg was in the air. His case was not that he lost his footing at this point (as rejected by the DC) but that he could not alter his course because of it. We cannot say on the balance of probabilities that it played no part in the resulting nature of impact with JB.

iii. At that point he was (recklessly) committed to contact and could not stop or control the point of impact with JB's head.

h. Crucially, we accept his account that he did not deliberately target and strike with his shoulder JB's head. We do so because it is not inconsistent with our analysis of the footage and because of what he said and the way he said it. On that point, we found him credible. If we may say so, that is why it is important to explore, test and give the player an opportunity to deal with such a point. Giving a person the opportunity to address an issue contrary to their case, is about more than simply the answer.

i. None of this detracts from the admitted foul play. The manner and nature of his approach was dangerous. It was reckless in that it created the obvious risk of foul play.

66. On our analysis therefore, we were not satisfied on the balance of probabilities the Appellant's conduct was intentional or deliberate. That being so we are enjoined to deal with the case on the basis of his account, namely that it was reckless.

(3) **Sanction (Ground 3)**

67. Having heard from the Appellant and reached our own factual conclusions, it is for us, in light of our factual findings to assess the appropriate sanction. Therefore, we need not deal expressly with Ground 3.

68. Applying our factual findings to R17.19.2 we find as follows:

    a. We are not satisfied on the balance of probabilities that the offending and the consequential contact with the head was intentional or deliberate (R17.19.2(a)). We note that DC did not expressly find that either. The Decision records that the DC was satisfied that the Appellant "*acted intentionally in charging into John Barclay*".
    b. We are satisfied that his conduct was reckless (R17.19.2(b)).
    c. The Appellant's actions were serious (R17.19.2(c)) involving the use of his shoulder which connected with force with an opposing player's head (R17.19.2(d)).
    d. There was no provocation ((R17.19.2(e)), the Appellant was not retaliating ((R17.19.2(f)) nor acting in self-defence (R17.19.2(g))
    e. The DC found – and we agree – that the Appellant caused JB considerable pain and discomfort, but he played on after treatment on the pitch. That pain had not subsided the following day. It is also clear that he was fit to play and did play the following weekend (R17.19.2(h)).
    f. There was no effect on the match (R17.19.2(i)).
    g. JB was vulnerable in that he was in no position to prepare for contact or to protect himself (R17.19.2(j)).
    h. The DC found his conduct was intentional but not premediated. Those may appear contradictory findings. If an action is intentional it is the product of some premeditation albeit it may be very short lived indeed. In the event, we are satisfied there was no premeditation to commit any act of foul play ((R17.19.2(k)).
    i. The foul play was completed (R17.19.2(l)).

69. Appendix 1 to R17 mandates that "*any act of foul play which results in contact with the head shall result in at least a mid-range sanction*". In light of our conclusions, principally this was an act of foul play committed recklessly, and the injury caused was not such as to prevent the 'victim' playing on or from playing the following week, that the appropriate starting point is mid-range, namely one of six weeks.

70. There are no aggravating factors within the meaning of R17.19.4.

71. The relevant mitigating features are as follows:
    a. He made an early admission both that he committed an act of foul play and that it merited a red card (R17.19.5(a)).
    b. His disciplinary record and/or good character:
        i. He has one matter recorded, contact with the eye or eye area, for which he received a suspension of eight weeks.
        ii. When questioned he told us it was in 2015/16 season (not 2014/15 as recorded in the Decision[13]) and he admitted it.
    c. He did apologise and show remorse, which we accept as genuine (R17.19.5(e)).

72. In answer to our questions, he said he is twenty-six years of age and has been a professional player since 2014/15 season. His relative youth and experience (R17.19.5(c)) is neutral. It is right to observe that before us he behaved as we would expect a player to and this would not *of itself* merit any discount (R17.19.5(d)).

73. He is entitled to credit for the mitigation we have identified. The extent is a matter for our judgment. There is no rule or regulation which entitles him to 50%. A reduction of 50% is the maximum[14] (absent the wholly disproportionate provisions which do not apply in this case[15]) and has become, through practice over many years, to be expected by a player where of the factors in R17.19.5 are present. Having found against the Appellant on an important factual issue, and his record, the DC was perfectly entitled to conclude,

[13] A fact volunteered by the Appellant to his potential disadvantage
[14] R17.19.6
[15] R17.19.7

(as it did) that he was not entitled to the maximum 50% credit. Indeed, had we made the same factual determination, we would have reached the same conclusion.

74. However, we have not found against the Appellant on the facts. Therefore, the remaining issue is his disciplinary record, which is not perfect. However, R17.19.5(b) does not refer to a perfect or clean disciplinary record. He has one serious matter recorded against him. But he was young and it was (effectively) four seasons ago. That fact is not such as to deprive him of some credit by way of mitigation for his disciplinary record. The question is how much? Anything less than 50% and he serves a suspension of four weeks, not three. There is no room for 40% discount in this case as the arithmetic does not work so as to leave a round number of weeks. On these facts it is either 33% or 50%.

75. Ultimately, it is not a matter of arithmetic. It is a matter of judgement, exercised to arrive at a just sanction for the 'offending' giving appropriate weight to the relevant factors. We conclude the appropriate discount is three weeks, resulting in a suspension of three weeks.

76. The next and final question is the effect of that suspension of three weeks. The starting point is the Core Principal in R17.1.1(b):

"In accordance with the applicable sanction table (that is, Appendix 1 or Appendix 3 as appropriate), suspensions shall ordinarily be imposed for a number of weeks in which the relevant Player would otherwise have been scheduled to play a Match which meets the criteria set out in Regulation 17.19.10. All Matches are equal, that is, regardless of the level of competition provided they meet the criteria in Regulation 17.19.10. A Player suspended from playing the Game shall be suspended from participating in any Match at any level during the period of his suspension."

77. R17.19.10(a) provides that the purposes of imposing a sanction Disciplinary Committees and Judicial Officers "*shall take into account weeks in which there is a Match(es) which comply with each of the following criteria:*

(a) until such time as he was suspended, the Player would otherwise have been scheduled to play in the Match, the burden resting with the Player to prove that he was scheduled to play. Where the Player was scheduled to play in more than one Match in a week (for example, a mid-week fixture) this week still only counts as one week of the suspension save where the rules of the particular tournament or tour from which the suspension arises and in which there is more than one Match per week allow for a suspension within that tournament or tour to be served in Matches.."

78. The complication in this case is the impending Rugby World Cup 2019 ('RWC 2019'). In relation to that Ms Nolan, Senior Counsel, World Rugby provided to the Appellant and to us the following information which was not disputed:

"RWC2019 Team Member inclusion

The RWC Terms of Participation requires Participating Unions to confirm final selection of the "Tournament Team" (i.e. 31 players plus team management, each a "Team Member") by September 2, 2019.

A Team Member can be replaced for any reason from the time the Tournament Team has been submitted to RWCL on September 2, 2019 up until the Team's Official Arrival Date (France's date is September 13, 2019) by giving prior notice to the RWC Tournament Director specifying the reason for the requested change.

From the start of the Team's Official Arrival Date replacements are only permitted if a player is certified by the Tournament Medical Director (or his designated representative) as being unfit to play a useful part in the remainder of the Tournament as a result of illness of injury."

79. The evidence and submissions before us in relation to the Appellant's position was as follows:
    a. He is presently in the France International Squad of thirty-one provisionally but publicly announced for the RWC 2019.
    b. He has not been released back to his club Stade Francais Paris.

c. It was not suggested or submitted and there was no evidence that if he remained in the France RWC 2019 squad he would be released back to Stade Francais Paris before the tournament starts.
d. Mr Weston told us that his instructions were that if the Appellant was (by virtue of this suspension) to "*miss more than one game* [in RWC 2019] *he will not go*".
e. France have one 'warm-up' international to play, namely against Italy on 30th August 2019.
f. Thereafter, France has a short two/three-day (he was unsure as to the precise length) camp before leaving for Japan.

80. The DC imposed the suspension of six weeks on the basis he would not be selected for RWC 2019. Therefore, the Decision records the 'qualifying matches' for the purposes of the suspension to be:

"24 August 2019 – LOU Rugby v Stade Francais Paris
31 August 2019 – Stade Rochelais v Stade Francais Paris
7 September 2019 – Stade Français Paris v Aviron Bayonnais
14 September 2019 – Bordeux Begles v Stade Francais Paris
28 September 2019 - Stade Francais Paris v ASM Clermont Auvergne
5 October 2019 – Castres Olympique v Stade Francais Paris"

Given the length of the suspension and the material before it, that was an entirely reasonable approach.

81. Mr Weston submitted that we should impose the sanction in matches. He invited us to do it on an alternative basis, catering for (1) his being named in the France RWC 2019 squad and (2) his not being named. In doing so, he (frankly) recognised the possibility that the Appellant could (theoretically since no one suggested this may or even would happen) not be named on 2 September, return to his club to serve the balance of his ban ('claiming' as the last match, the game against Aviron Bayonnais on 7th September). Thereafter, the theory went, he might return to the France RWC 2019 squad before 13th September.

82. As R17.19.9 makes clear the Decision may include:

> "*…for the avoidance of doubt, the expiry date of the suspension setting out a list of the Matches (or Match weekends, rounds or dates where specific fixtures have not yet been scheduled) for which the Player is suspended provided that, in any event, the Player would, on the best information available at the time of the decision, be scheduled to play in a Match which would meet the criteria set out in Regulation 17.19.10 below on each of the weeks taken into account and that an expiry date is stipulated for the suspension*".

83. The correct way to approach this question is by reference to the best information available at the time of our decision, namely 27th August. As at that time he was a member of the France International Squad of thirty-one provisionally announced for the RWC 2019. The recent history and pattern of his selection is that he will remain so and therefore be named on 2nd September unless, by virtue of our sanction, he were ineligible for more than one game in RWC 2019. He will not. He is, we are satisfied scheduled to play in the matches we identify hereafter.

84. Therefore, applying World Rugby Regulation 17.1.1.(b), 17.9.9, 17.9.10 and on the basis of the evidence before us, the suspension of three weeks will operate such that the Appellant is suspended up to and including 21st September 2019. The effect is that he cannot play in the following matches:
    a. Scotland v France on 24th August 2019 – for which he was suspended and did not play, when otherwise (he would have done, and therefore it counts as one match for the purposes of this suspension;
    b. France v Italy on 30th August 2019; and
    c. France v Argentina on 21st September 2019 (France's first RWC 2019 match).

85. We announced our decision orally at the conclusion of the hearing. We did so principally to assist the Appellant and France. We identified the three matches above as those which 'counted' for the purposes of the suspension. Having done so, Mr Weston asked us whether the written decision would address what would happen should the Appellant

were not named in the France RWC 2019 squad on 2nd September. We said it would. We now do so.

86. If the Appellant is not named in the France RWC 2019 squad on 2nd September that would be contrary to the evidence placed before us and upon which we have based our decision. If that were to be the case, the suspension up to and including 21st September 2019 remains in force. If permitted by the regulations (about which we would wish to hear argument) any application to vary the terms thereof is reserved to this Appeal Committee.

Christopher Quinlan QC, Chair
Adam Casselden SC
David Croft
29 August 2019