

**EUROPEAN PROFESSIONAL CLUB RUGBY (“EPCR”)
HEINEKEN CHAMPIONS CUP
SEASON 2021-2022**

**IN THE MATTER OF AN APPEAL BROUGHT BY WILLIAM MUIR (BATH RUGBY)
AGAINST THE DECISION OF THE DISCIPLINARY COMMITTEE**

Match:	Leinster v Bath Rugby
Match date:	Saturday 11 December 2021
Match venue:	Aviva Stadium, Dublin
Hearing venue:	Held remotely by Zoom conference call
Appeal Committee:	Pamela Woodman (Scotland), Chair Donal Courtney (Ireland) Jamie Corsi (Wales)
Clerk to Appeal Committee:	Maria Gyolcsos
Attending:	
The Player (and Appellant):	William Muir (who played number 11 for Bath Rugby in the Match)
On behalf of the Player (and Appellant):	Sam Jones (counsel) Alex Cohen (chief operating officer for Bath Rugby)
On behalf of EPCR:	Liam McTiernan (EPCR Disciplinary Officer)
Date of the appeal hearing:	Thursday 23 December 2021 (4pm GMT)

Decision of the Appeal Committee: The Appeal Committee heard and dismissed an appeal by the Player (William Muir) against the decision of the Disciplinary Committee and upheld the decision of the Disciplinary Committee (which imposed a sanction of four weeks on the Player).

Background

1. The citing complaint arose out of an incident in the Match on Saturday 11 December 2021 between Leinster and Bath Rugby, which took place at the Aviva Stadium, Dublin.
2. The Player was cited by the citing commissioner appointed in respect of the Match (Jeff Mark) in relation to a breach of World Rugby law 9.12. Law 9.12 is in the following terms:

“A player must not physically... abuse anyone. Physical abuse includes...contact with the eye...”
3. The citing complaint was in the following terms:

“After a converted try, Bath restart the game with a kick from B10 which was aimed to land just beyond the Leinster 10m line. L7 (in red scrum cap) lifted L13 to receive the kick off, which B11 was also chasing. Having run beyond both Leinster players, B11

made to jump for the ball and using his right hand, jumps while pushing down on L7's head to gain leverage and height to challenge for the ball. (Law 9:15 "a player not in possession of the ball, must not hold, push, charge, or obstruct an opponent not in possession of the ball") As B11 pushes down on L7's head, he pushes L7's scrum cap down towards L7's eyes and as B11 falls away, maintains contact with the scrum cap, pulling away across L7's face and in so doing, there was contact with L7's eye. L7 can be seen immediately holding his face and in the resultant break in play, gestured towards his eye and can be heard on the ref mic saying "he put his finger in my eye" Additional angles of the incident are on Sony Ci, including attempts to zoom in to show the point of contact. In a recorded statement made to me this morning, L7 confirmed to me that there had been contact with his eye, which initially frightened him as he didn't know what had happened and describes how his eyelid had been turned inside out or folded such that he could not see properly and which necessitated medical attention. He also confirmed that there was no visible injury and no impairment of his vision after receiving appropriate attention. I have accordingly cited Bath 11, Will Muir, for breach of Law 9:12 given the evidence of contact with the eye of L7, Josh Van Der Flier."

4. A disciplinary hearing took place by Zoom conference call (remotely) on Wednesday 15 December 2021 before the Disciplinary Committee convened under the EPCR Disciplinary Rules ("**Rules**"), which Disciplinary Committee comprised Philippe Cavalieros (France) as chair, Val Toma (Romania) and Chris Watts (Wales).
5. The Player did not accept that he should have been the subject of a citing complaint and submitted that it should not be upheld. The crux of the Player's case was that the incident was an accident, albeit that the Player had accepted that he had made contact with the eye of Leinster number 7.
6. The Disciplinary Committee upheld the citing complaint and imposed a sanction of four weeks' suspension.
7. The appeal against the decision of the Disciplinary Committee was brought by way of a notice (and grounds) of appeal ("**Appeal Notice**") dated 21 December 2021. The Appeal Committee was satisfied that the Appeal Notice met the requirements for such a notice as set out in, and had been filed in time in accordance with, clause 8.2.1(a) of the Rules.
8. At the outset of the appeal hearing, Mr Jones confirmed that the Player was not seeking a *de novo* hearing.
9. This document sets out the written judgment of the Appeal Committee in which the Appeal Committee confirms its decision. It is necessarily a summary and is reached after appropriate consideration of all the evidence (including video clips) and submissions made to the Appeal Committee (both in writing in advance of, and orally at, the appeal hearing).
10. For simplicity, references to submissions (or similar) by the Player include those made on his behalf by Mr Jones.

Grounds of appeal

11. The grounds of appeal (as set out in paragraphs 8, 9 and 10 of the Appeal Notice) were as follows:

"It is submitted that [the written decision of the Disciplinary Committee] fails to properly identify the basis upon which the [Disciplinary] Committee concluded that the Player had committed an act of foul play and failed to identify the correct test for recklessness and apply it properly to the facts.

As a consequence, the [Disciplinary] Committee has fallen into error.

They were not assisted by the submissions of the Disciplinary Officer (as reflected at the bottom of page 2 under the heading 'Essential Elements and Other Evidence') who in effect invited the judicial committee to combined the questions of foul play and recklessness more generally rather than specifically to apply the test for recklessness to the act of making contact with the eye(s)."

Video footage

12. The Appeal Committee viewed the relevant video footage which it found shows (in summary) the following:
- a. Bath Rugby number 10 kicking off after a restart;
 - b. Leinster number 13 ("**L13**"), with his eyes on the ball, jumping for the ball with Leinster number 7 ("**L7**"), Joshua van der Flier, holding L13's shorts/waistband in order to lift and assist the jump;
 - c. The Player, also with his eyes on the ball, but not in a realistic position to catch the ball, jumping for the ball;
 - d. At a low point in the Player's jump during the upward motion of the jump, the Player placing his right hand on the head of L7 to the middle to left hand side of the front of L7's red scrum cap and forehead, with his right forearm over the top of L7's head – see stills #1 and #2;
 - e. The Player adjusting the position of his right hand after making the initial contact such that his fingers protrude beyond the forehead and into the eye and eye area – see still #3;
 - f. The Player's hand and fingers being cupped, rather than flat, and fingers of the Player's right hand being cupped into the left eye of the Player – see stills #3 and #4;
 - g. The Player appearing to use L7 to leverage himself and give himself more height in the jump;
 - h. The Player losing balance and not being in control of his own body throughout the jump;

- i. The Player's left arm fully extending to reach for the ball but his right arm remaining bent (at different degrees) with his right hand in contact with the head/face of L7 throughout most of the upward motion and during the downward motion until his body is approximately in line with the middle of L7's back;
- j. The Player having a firm grip on L7's head as he in the downward motion of the jump/fall and continuing to hold on, with his right arm in an almost straight position;
- k. L7's head being pulled backwards and sharply (albeit not a significant distance) to his left hand side as the Player falls and eventually releases L7's head; and
- l. L7 grabbing his face across his left hand eye area during the ensuing breakdown and then gesturing towards the referee immediately upon the referee blowing his whistle.

Approach of Appeal Committee

13. The approach which the Appeal Committee is required to take is as set out in clause 8.4.8 of the Rules (emphasis added):

"The Appeal Committee shall be entitled to conduct and regulate the appeal proceedings as it sees fit in the circumstances of the case and shall determine the basis on which the appeal will proceed. Except where an appeal proceeds as a de novo hearing pursuant to this clause 8.4.8, **the basis of the appeal will be that the Appellant shall have the burden of proving that the decision being challenged (a) was in error and (b) should be overturned or varied...**"

14. However, the Appeal Committee agreed with the following observations made by the appeal committee in the Rugby World Cup 2019 case of Matu'u (28 September 2019):

"... appellate panels have to be very cautious in overturning findings of fact, including evaluative findings of fact to the effect that a red card test has been met, made by committees sitting at first instance. This is because such committees have seen the players and taken into account the whole of the sea of the evidence as opposed to indulging in impermissible hopping on to islands or parts only of the evidence in an appeal. For those reasons appellate panels will only interfere with findings of fact if committee was plainly wrong. This means making a finding of fact which had no basis in the evidence, or showing a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence so that the decision cannot reasonably be explained or justified..."

15. The Player submitted that the Disciplinary Committee's decision to uphold the citing complaint "was in error such that it should be overturned".

16. Accordingly, it is worth noting the approach which the Disciplinary Committee was required to take, which is as set out in clause 7.8.11(a) of the Rules and is in the following terms (emphasis added):

"If the Player does not accept that he should have been the subject of a citing complaint, **the burden shall be on the Player to prove, on the balance of probabilities, that he should not have been the subject of a citing complaint (because he did not commit the act(s) of Foul Play specified in the complaint and/or those act(s) would not have warranted a red card).** If the Player does not meet this burden, the citing complaint shall be upheld. If, however, the Player proves that he did not commit the act(s) of Foul Play specified in the complaint and/or that

those act(s) would not have warranted a red card, the citing complaint shall not be upheld, and the proceedings will ordinarily be discontinued.”

17. By upholding the citing complaint, the Disciplinary Committee had implicitly, even if not explicitly, found that the Player had not proved, on the balance of probabilities, that the Player should not have been the subject of a citing complaint.

Decision (including discussion around submissions made)

18. The Disciplinary Committee, in its written decision, recorded that the Player had accepted that he had made “contact with the eye” of L7 and this was not disputed in the Appeal Notice.
19. In his recorded interview, L7 confirmed that someone had tried to grab his head, that fingers had gone into his eye and that he had got a “fright” and, whilst he described the incident as an accident, he didn’t really know what had happened at the time and was confused - he could be seen on the video clips gesturing to the referee immediately after the incident, which he accepted.
20. Submissions were sought from the parties as to whether or not “the decision challenged” (as referred to in clause 8.4.8 of the Rules) was the decision (as set out in the “DECISION” section of the written decision which confirmed that the citing was upheld) or the wider terms of the written decision, including the findings of fact section to which many of the submissions included within the Appeal Notice referred.
21. No determination was made on this point in the circumstances of the current case because it was unnecessary to do so in light of the evidence and information available. However, in any event, the Appeal Committee was mindful of the observations of the appeal committee in the Matu’u case as set out above.
22. In the Appeal Notice, the Player submitted that the “key issues” for the Disciplinary Committee to determine were:
 - a. “Was this accident or foul play by making contact with the eye(s)?; and
 - b. If foul play, was the Player reckless regarding contact with the eye(s)?”
23. It is clear from the written decision of the Disciplinary Committee that this categorisation was put to it by or on behalf of the Player – 2nd paragraph on page 3 of 9.
24. However, in accordance with clause 7.8.11(a) of the Rules, the Appeal Committee considered that, more accurately, the correct question for the Disciplinary Committee to ask itself was:

has the Player proven, on the balance of probabilities, that the Player should not have been the subject of a citing complaint, either:

 - a. because the Player did not commit the act of foul play specified in the citing complaint (“first limb”); or
 - b. if it found that the Player had committed the act of foul play specified in the citing complaint, that such act of foul play did not warrant a red card (“second limb”).

25. Whilst the first “key issue” set out by the Player in the Appeal Notice could be reframed so as to align with the first limb of the correct question for consideration by the Disciplinary Committee (as to whether or not the Player had proven that “the Player did not commit the act of foul play specified in the citing complaint” which, where relevant, would include proving that there was no foul play at all if the incident was an accident), the second “key issue” set out by the Player in the Appeal Notice was not correct in terms of the test to be applied by the Disciplinary Committee. The second limb of the correct question would not be engaged at all if the incident in question was found to be merely accidental (and so not foul play).
26. As noted above (based on clause 7.8.11(a) of the Rules), the second limb relates to the red card test, which does not require a consideration as to whether an act of foul play is reckless or intentional.
27. On-field, a referee does not require to make a determination as to whether or not an act of foul play is reckless or intentional. Their determination is as to whether or not the conduct in question warrants a red card (and, where relevant, if there is any mitigation which might require consideration of a lesser outcome).
28. It must be remembered that there is a distinction between upholding a citing complaint, on the one hand, and imposing a sanction (if any) should the citing complaint be upheld, on the other. The concept of reckless conduct appears in clause 7.8.32(b) of the Rules in the context of assessing the seriousness of offending for the purposes of determining the entry point for a sanction: “whether the offending was reckless, that is the Player knew (or should have known) that there was a risk of committing an act of Foul Play”. This assessment takes place after a determination as to whether or not the citing complaint is to be upheld.

First limb – consideration of act of foul play specified in the citing complaint

29. There appeared to be conflicting submissions in the Appeal Notice with regard to the relevance of the wider context and circumstances surrounding an incident, including whether or not the Player had pushed down on L7’s head.
30. The Appeal Committee was satisfied that the Disciplinary Committee’s consideration of the wider context and circumstances leading up to and following the contact by the Player with the eye of L7 (including the breach of law 9.15 referenced in, but not the subject of, the citing complaint) was not (as submitted by the Applicant) a “fundamental error” by the Disciplinary Committee by virtue of it “[considering] the whole of the incident/the Player’s actions *in toto* against a test of recklessness”.
31. First of all, the assessment by the Disciplinary Committee did not (correctly) appear to be “against a test of recklessness”. Rather, the test was whether or not an act of foul play had been committed, in this case contact with the eye of L7.
32. However, more importantly and as a point of general relevance, the Appeal Committee considered that it was entirely appropriate for the context and circumstances leading up to and following the commission of an alleged act of foul play to be considered by a disciplinary or appeal committee in order to help to understand how the alleged act of foul play may have been committed or arisen and, indeed, whether or not it was an act of foul play at all. To use the example of the head contact process (which was referenced by the Player, albeit in a different context, during the appeal hearing), such a consideration is essential in determining whether or not there is to be any mitigation in relation to the act of foul play itself.

33. The Disciplinary Committee had narrated that it turned specifically to the act of foul play specified in the citing complaint (“More specifically when it comes to Rule 9.12, having carefully reviewed the footage...”) and then went on to state that the “contact with the eye” (i.e. the act of foul play specified in the citing complaint) was “a direct consequence” (i.e. an outcome of actions/events, rather than the act itself) of the “overall careless actions of the Player during the entirety of the events, that cannot be separated” and had “established that the act constituted foul play” (i.e. the act of making contact with the eye, rather than the wider actions/events).
34. The Appeal Committee noted that there was a distinction to be drawn between considering the wider context and circumstances around an act of foul play, on the one hand, and making a decision as to whether or not an act of foul play as specified in a citing complaint had been committed, on the other. The Appeal Committee was satisfied (on the balance of probabilities) that the Disciplinary Committee had addressed the matter of the act of foul play specified in the citing complaint and reached a conclusion on that specifically.

First limb - foul play or accident (including knowledge of Player)?

35. It is relevant to consider if the Disciplinary Committee was in error in concluding that the act of foul play specified in the citing complaint was foul play rather than merely accidental, as submitted by the Player.
36. The term “accidental” is not defined in the Rules but was described in the Leo decision (2 May 2013 – paragraphs 21 and 28) as “essentially doing an act where a player does not know and it cannot be said that he should have known (i.e. it was reasonable for him not to have known) that there was a risk of foul play occurring” and as “including circumstances which would have happened in any event and where no other outcome could have ensued”. The Appeal Committee endorsed this description.
37. The Player submitted in the Appeal Notice that the Disciplinary “Committee’s written decision also appears to inadequately deal with findings of fact in respect of...whether the Player knew that he had put his hand onto the head of the other player” and makes various submissions that the Player did not “knowingly put his hand on the head of the other player”.
38. This, as with other submissions, appears to relate to the terms of the written decision as opposed to the underlying substance of the matter.
39. It is not made clear in the Appeal Notice the specific relevance of these submissions and whether they relate to the question of accident or not, or rather the assessment of reckless versus intentional for the purposes of sanction. It is presumed to be the former.
40. The Appeal Committee was not persuaded that it was relevant whether or not the Player actually “knew” that he had made contact with the eye of L7, for the purposes of determining whether or not to uphold the citing complaint. The Appeal Committee noted that, if the Player did not indeed “know” that he had done this, he should have known that there was a risk of doing so – it was not “reasonable for him not to have known”. The Disciplinary Committee was not required to make a finding as to whether or not the Player made contact with the eye of L7 “knowingly”.
41. The Disciplinary Committee clearly recorded that the “first issue” which it needed to decide was “whether the incident amounted to foul play at all”. It was for the Player to prove to the Disciplinary Committee, on the balance of probabilities, that the act of foul

play specified in the citing complaint had not been committed by him (or that it did not amount to foul play at all).

42. As noted above, the Disciplinary Committee made a finding that an act of foul play had been committed by the Player. It was entitled to do so. Whilst the Disciplinary Committee does not appear to be specific on this point, the Disciplinary Committee (by making the finding it did) did not accept that the Player had proven that the contact with the eye was merely accidental.
43. By way of observation and based on the video footage available to it, the Appeal Committee was not satisfied (on the balance of probabilities) that the incident was accidental, nor (using the description in Leo) that the contact with the eye “would have happened in any event” nor that it was reasonable for the Player not to have known that there was a risk of foul play occurring.
44. In this context and again by way of observation only, the Appeal Committee noted that the video footage clearly showed the Player holding or pushing L7 (contrary to law 9.15), and that the Player was not in a legitimate or legal position during the incident in question either immediately before, during or after the contact with the eye occurred. Had the Player not jumped in the air to contest for a ball which he was not in a realistic position to gather, there would have been no contact with the eye of L7. This was not simply accidental. The Appeal Committee concurred with the Disciplinary Committee in that the Player did not appear to be in control and had disregarded the duty of care which he was required to show to the players around him.
45. Accordingly, the Appeal Committee did not consider that the Player had proved, on the balance of probabilities, that the decision of the Disciplinary Committee was in error in that respect.

Second limb – red card test met?

46. The Disciplinary Committee addressed the second limb of the (correct) test which it required to consider and stated that “Because of the mere fact that there was contact with the eyes, and having determined foul play, the Panel finds that the act in itself is sufficiently dangerous to warrant a red card.” It was entitled to make such a finding.
47. The Appeal Committee was not satisfied that the Disciplinary Committee was wrong in reaching this decision on the second limb and, accordingly, is not willing to interfere with the Disciplinary Committee’s finding in this respect.

Conclusion

48. The Appeal Committee was not satisfied that the Player had proved that the Disciplinary Committee’s decision was in error, neither in respect of the binary question as to whether or not the citing complaint should be upheld, nor more broadly that the written decision of the Disciplinary Committee failed to identify the basis on which it was upholding the citing complaint.

Observations

49. The Appeal Committee observed that the use of the words “careless” and “carelessness” in the written decision was unfortunate in that that is not a recognised concept in rugby disciplinary cases - see the finding of the appeal committee in the Flannery appeal decision (3 March 2020 - paragraph 13). In addition, the concept of “careless” or “carelessness” does not appear in the Rules, nor in World Rugby

regulation 17. However, the Appeal Committee was satisfied, on the balance of probabilities, that this did not give rise to any error in the Disciplinary Committee's decision to uphold the citing complaint.

50. With all due respect to the match officials, the Appeal Committee did not consider that the opinions expressed by the match officials (including the TMO) and L7 in relation to this case were persuasive in determining whether or not an act of foul play had been committed (or if it was merely an accident). The Appeal Committee noted that the Disciplinary Committee was aware that this was opinion evidence only and that it had more evidence available to it and more time to consider that in making its decision. It was entitled to take a different view.

P S Woodman

**Pamela Woodman
Donal Courtney
Jamie Corsi
24 December 2021**

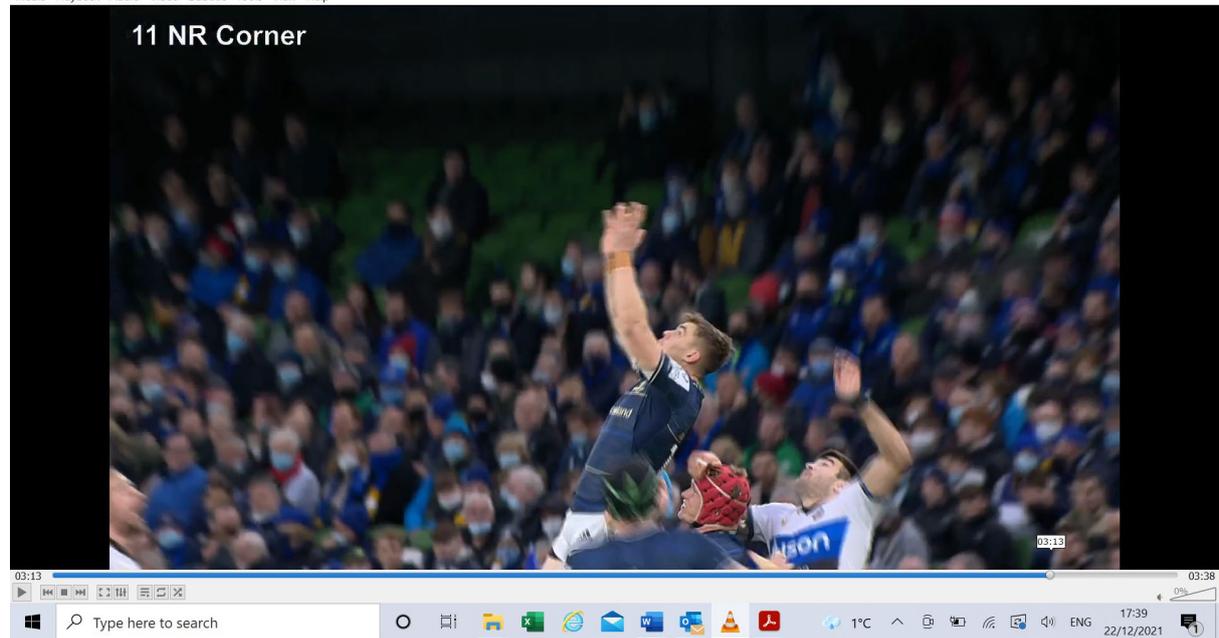
Still #1

Will Muir (Bath Rugby) citing.mp4 - VLC media player
Media Playback Audio Video Subtitle Tools View Help



Still #2

Will Muir (Bath Rugby) citing.mp4 - VLC media player
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Still #3



Still #4

