

European Champions Cup

Decision of Appeal Committee in appeal by Augustin Creevy

Hearing Held Remotely on 20 December 2022

IN RESPECT OF:

An appeal by Augustin Creevy (“the Player”) against the decision of a Disciplinary Committee finding that the Player had committed an act of foul play, upholding his ordering off the field of play (Red Card) and suspending the Player for a period of four weeks.

Members of the Appeal Committee:

Roger Morris, Chair (Wales)
Donal Courtney (Ireland)
Marcello d’Orey (Portugal)

Also present at the Hearing:

The Player;
Tomas McGarvey (Counsel representing the Player);
Alex James (London Irish Management);
Declan Kidney (London Irish Management);
Liam McTiernan (Disciplinary Officer) (representing EPCR); and
Maria Gyolcsos (EPCR).

Decision of the Appeal Committee

1. That the Player failed to establish that the decision challenged was in error and that it should be overturned or varied.
2. That the appeal lodged by the Player was accordingly refused.

Introduction

The Appeal Committee was convened by Mike Hamlin, chairman of the EPCR disciplinary panel, pursuant to the tournament’s Disciplinary Rules in respect of the Red Card issued to the Player in the match between London Irish and Montpellier played on 9th December 2022. The referee, Andrea Piradi, alleged that the Player had committed an offence contrary to Law 9.13 of the Laws of the Game. The Disciplinary Committee was duly convened and considered matters at a hearing on 9th December

2022. At that hearing, the Player accepted he had committed a foul but asserted that it was not of sufficient seriousness to warrant the issue of a Red Card. The Disciplinary Committee disagreed with that assertion and for the reasons set out in their written judgment (attached at Appendix 1) upheld the Red Card and suspended the Player from playing for a period of four weeks.

The Player lodged (within the requisite time frame) a Notice of Appeal (attached at Appendix 2).

The specific aspects of the Disciplinary Committee's decision being challenged, as set out in the Notice of Appeal were as follows:

- a. "The finding of facts in relation to the change in height or change in direction by M15. The committee had found that "there was no significant drop in height or change of direction by M15".**
- b. The committee's decision not to allow/apply mitigation when considering the HCP (head contact protocol) and off-field mitigating factors:**
 - i. HCP: Sudden/significant drop of height or change in direction from ball carrier, and**
 - ii. Off-field mitigating factors: Remorse.**
- c. The committee's application of the HCP in relation to the degree of danger and level of harm.**
- d. The committee decision that on the balance of probabilities, the referee's decision to award a red card was correct."**

In addition to the decision of the Disciplinary Committee and the Player's Notice of Appeal, the Hearing was able to consider the following materials (all available to the parties in advance of the Hearing): Written submissions on behalf of the Player (Appendix 3); written submissions on behalf of EPCR (Appendix 4) ; World Rugby's Head Contact Process (HCP); and the same video footage viewed by the Disciplinary Committee of the incident that gave rise to the original Red Card.

Subject to the issue of whether the Appeal Committee should consider an appeal de novo, the appellant in an appeal before an EPCR Appeal Committee has the burden of proving that the decision being challenged was both in error and that it should be overturned or varied. The approach a rugby appeal committee should adopt is well established by decisions of appeal committees (including those cited by the Disciplinary Officer) over many years. It is still best expressed in the appeal decision in the case of the player *Tincu* in which that appeal committee said "except in the case of a de novo appeal, the function of the Appeal Committee is not to review all of the evidence which was before the disciplinary committee and then to come to its own conclusions as to whether or not that evidence establishes on the balance of probabilities that the act of foul play occurred".

It is well established by successive an appeal committee is only entitled to interfere with factual determinations of a disciplinary committee where it concludes that such

determination was not consistent with the evidence before the disciplinary committee and, in making the assessment as to whether the evidence was consistent with such a determination, a margin of appreciation is to be afforded to the determination being challenged.

It is also well established that the margin of appreciation that should be afforded to a disciplinary committee's findings of fact should also be extended to their exercise of judgment.

Submissions for the Player

Mr McGarvey had helpfully supplied written submissions in advance of the hearing.

He was invited to develop those submissions by reference to the video footage. The essence of his oral submissions was as follows:

- Applying the HCP to any given dynamic situation leads inevitably to issues and differences of opinion when evaluating the facts of that situation.
- In situations where dynamic contact between players was likely, those players are required to make quick, almost instantaneous decisions. That is the situation the Player found himself in.
- The principal ground of appeal was based on what was the Disciplinary Committee's principal error – its finding that there was no significant drop in height or change of direction by the opponent (referred to as "M15" in the Disciplinary Committee's written decision) before contact was made with the Player.
- By reference to the video footage (viewed at the Hearing), Mr McGarvey suggested that there was indeed a clear and obvious change of direction by M15 as well as a less obvious but still clear change in height.
- These movements by M15 should have been noted and taken into account as a mitigating factor in the application of the HCP.
- The mitigation available in the HCP for changes in height and direction was such that had M15's movements properly been taken into account, the Player's foul should not have been regarded as sufficiently serious so as to attract the issue of a Red Card.
- Mr McGarvey said he did not wish to pursue the point made in Paragraph 3B(ii) of his written submissions on behalf of the Player.
- Mr McGarvey further submitted that the Disciplinary Committee had erred in applying the HCP in relation to the degree of danger present in this particular collision. On a scale from high to low, the Disciplinary Committee had said that the level of danger in this case was "*medium to high*". If the level of danger was

to be placed on a sliding scale, then the mitigation to be applied to reduce the severity of an act should also be on such a sliding scale so that a lower level of mitigation was required than would be the case if the Disciplinary Committee found the level of danger to be high.

- He accepted that a margin of appreciation should be afforded the Disciplinary Committee, but any margin of appreciation had just that – a margin. In this case, he suggested, the committee had crossed that margin and had done so to the point where its assessments of the facts surrounding the foul in question were in error.
- A correct analysis of the facts should have led the Disciplinary Committee to conclude that a Yellow Card (a temporary ordering off the field of play) was the appropriate sanction in this case

Submissions for EPCR

The Disciplinary Officer had supplied written submissions in advance of the Hearing and did not wish to expand on those submissions other than to suggest that the video showed the Player had a clear line of sight towards M15 and therefore any change in direction and/or height was not so significant as to have a mitigating bearing on the Player's actions.

There were no further points either party wished to make and therefore the Appeal Committee retired to consider matters in private.

Appeal Committee decision

The principal factual basis of the Player's appeal related to his assertion that M15 had suddenly and significantly changed his line of running so that the Player's culpability should have properly been sanctioned by the issue of a Yellow Card.

The Appeal Committee considered the video footage, taking account of the submissions made on behalf of the Player. They concluded that the Disciplinary Committee, in determining that the movements of M15 were not, in this tackle, so significant or sudden as to warrant mitigation of the foul in question, was well within any margin of appreciation that might be applied to that determination.

Mr McGarvey suggested that a lower level of danger should, in applying the HCP, lead to a less rigorous assessment of what amounts to mitigation. Therefore, in labelling the danger in this tackle as "medium", the Disciplinary Committee should have been more ready to recognise M15's movements as a mitigating factor.

The Appeal Committee disagreed. It is not sufficient to show merely that a tackled player changed height or direction. His movement must be so sudden and significant as to remove from the tackler, in the tackle in question, some, at least, of the responsibility for the consequential collision. That is an assessment that needs always to be made in applying the HCP. It does not rely upon the danger of the tackle but the

particular mechanical facts and dynamics of the tackle being considered. And every tackle is different.

That the Disciplinary Committee adjudged the danger in this tackle as “medium to high” was a judgement that, in the view of the Appeal Committee, it was entitled to make. Just as it was entitled to assess the level of force in the tackle differently, as “medium”.

The HCP lists potential “High Danger” indicators and “Low Danger” indicators. Those are the two extremes. The “High Danger” indicators are helpful pointers to what might deserve a Red Card and the “Low Danger” indicators are helpful pointers towards a Yellow Card. These indicators or pointers, as with the rest of the HCP, create a set of guidelines that must always be applied with judgement to the particular facts being considered. Clearly there is a gradation or scale of danger in every action that takes place on a rugby pitch. It is not a binary choice between high and low. The level of danger is but one important factor in the HCP. Whatever a disciplinary committee’s determination in this regard, it should not, as Mr McGarvey argued, create an equivalent scale applicable to mitigation or, for that matter, to any of the other factors highlighted in the HCP.

In applying judgement to the application of the HCP, it is also always important not to be diverted into concentrating on one or other aspect of the process to the exclusion of the whole but to consider the HCP in the round. This, it seemed to the Appeal Committee is exactly what, correctly, the Disciplinary Committee did in this case.

In the Notice of Appeal and the written submissions on behalf of the Player, the Disciplinary Committee was criticised for not recognising the Player’s remorse as an off-field mitigating factor. Although this ground of appeal was not pursued, it seemed to the Appeal Committee appropriate to remind disciplinary committees to be aware of the potential confusion between the use of “mitigation” in applying the HCP, where it is applied to consider reducing the seriousness of the on-field foul and the use of “mitigation”, under the Disciplinary Rules, to highlight off-field factors in a particular player’s CV that might be applied to reduce the severity of the sanction applied to the on-field foul.

For all the above reasons the Player’s appeal is dismissed

Roger Morris (Chair)

28 December 2022



EPCR SHORT JUDGMENT FORM

Match	London Irish	Vs	Montpelier
Club's Country		Competition	Champions Cup
Date of match	9 December 2022	Match venue	GTEC Stadium
Rules to apply	EPCR Disciplinary Rules 2022/23		

PARTICULARS OF OFFENCE

Player's surname	Creevy	Date of birth	
Forename(s)	Agustin	Plea	Admitted <input type="checkbox"/> Not Admitted <input checked="" type="checkbox"/>
Club name	London Irish		
SELECT: Red card <input checked="" type="checkbox"/> Citing <input type="checkbox"/> Other (specify) <input type="checkbox"/>			
Offence	Law 9.13		
Summary of Sanction			

HEARING DETAILS

Hearing date	13 December 2022	Hearing venue	Via Zoom
Chairman/JO	Sheriff Kathrine EC Mackie (Scotland)	Panel member 1	Bogdan Zebega (Romania)
Panel member 2	Thembelani Mayosi (South Africa)	Disciplinary Officer	Liam McTiernan, EPCR Maria Glyocsos, EPCR
Appearance Player	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>	Appearance Club	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>

Player's Representative(s):

Other attendees:

Tomas McGarvey, Barrister	Alex James, Team Manager, London Irish Declan Kidney, Director of Rugby, London Irish Danny Rumble, EPCR, Observer Trainee Barrister with Tomas McGarvey
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List of documents/materials provided to player in advance of hearing:

<p>Video footage Referee Report TMO Report ARs Report Statement from Montpelier 15 (M15) Statement from Montpelier Club Doctor Player's response to Standing Directions/Submissions Link to report in decision in Cian Healy v Ulster 3 December 2022 Decision in Andrew Porter v New Zealand 16 July 2022 Additional video footage Link to footage of Cian Healy Red Card incident Link to footage of player's tackle technique</p>
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SUMMARY OF ESSENTIAL ELEMENTS OF CITING/REFEREE'S REPORT/FOOTAGE

The referee provided a brief report stating that “number 2 London Irish hits the head of number 15 Montpellier with a shoulder charge. He never tries to wrap the opponent and makes direct contact with the head with the shoulder”. The other match officials’ reports did not add to the description of the incident.

Video Footage

The video footage, at various speeds, shows M15 gather the ball following a box kick. He initially holds the ball in two hands and then transfers it and carries it under his left arm. He runs at speed through a number of his own and opposition players. He runs directly towards the player who has braced himself for a tackle. He is upright with both legs slightly bent. LI5 is to the right and slightly in front of the player. As M15 approaches the player LI5 effects a tackle by wrapping his arms around the chest of M15. At the same time the player stands up keeping his arms down by each side. He turns his body so that his right shoulder is leading in towards M15. His shoulder strikes the face of M15. At the time of contact there is no significant change in height or direction of M15. His forward movement and speed has been reduced by being held in the tackle by LI5. After contact M15’s head jerks backwards. He falls to the ground still held in the tackle by LI5. The player takes two steps back and moves forward to jackal over M15 and contest for the ball. Play is then stopped.

ESSENTIAL ELEMENTS OF OTHER EVIDENCE (e.g. medical reports)

A very brief report was provided by the Montpellier Club Doctor in which he stated that M15 “has followed the HIA protocol. All the HIA are perfectly normal thus far. He has not had any concussion symptoms from the game up to this morning”. It was confirmed that the statement was provided on the morning of the hearing namely 13 December 2022. It was also confirmed that M15 left the field of play after the incident to undergo an HIA. He was able to return to play the remainder of the match.

SUMMARY OF PLAYER’S EVIDENCE

In his response to the Standing Directions and written submissions and at the hearing the player accepted that he had committed an act of foul play contrary to Law 9.13. He did not accept that his conduct warranted the issue of a red card. Accordingly, the issue for the Disciplinary Committee (the Committee) was whether, on balance of probabilities, the referee’s decision to show a red card was wrong. In terms of Rule 7.2.10 the burden was on the player to prove that.

In his written submissions the player stated as follows:-

“The player recalls a box kick recovered by the Montpellier no 15. The player was part of the first line of defence with London Irish No 5 (Adam Coleman) to his right. London Irish No 5 tackled Montpellier no 15 altering his direction, speed and height. Montpellier No 15 was moving at speed and the player ha very limited time to react.

The player was not attempting a dominant tackler (sic) at the time contact was made with Montpellier No 15. The player attempts to pull out, due to the change in height and direction, turning his head away from the contact.”

The player’s oral evidence was largely consistent with his written account. He said that he was in the first line of defence following a box kick. He saw M15 recover the ball. He made eye contact with him. He intended to make the tackle. He saw his fellow player Adam Coleman (LI5) next to

him on his right. LI5 anticipated and tackled M15 before he was able to. He changed his body position because of the change of direction of M15 to avoid a hit to his (the player) face. This resulted in his shoulder touching the face of M15. He said it was an accident. It all happened really fast. Play was stopped. He signalled to the camera intending to convey that he was not responsible for the tackle.

FINDINGS OF FACT

In order to determine whether the admitted act of foul play passed the red card test the Committee required to consider the Head Contact Process (HCP). The process poses four questions. Firstly, whether head contact has occurred. Secondly, whether there was any foul play. Thirdly, what was the degree of danger. Fourthly, whether there was any mitigation.

As was said in the Porter decision *“The answers to some of these questions require a subjective evaluation based on the objective evidence before the decision maker. Rugby is a dynamic contact sport where players are routinely called upon to make split second decisions in order to adjust or react to the events unfolding before them. Against that background it is to be expected that, from time to time, reasonable minds may differ on the correct outcome when applying a particular question from the HCP to the objective evidence.”*

The background to the HCP is player welfare with a zero tolerance of foul play especially where head contact occurs. The development of safe tackling techniques is encouraged. As Mr Mctiernan reminded the Committee in the context of the HCP it is emphasised that the “power of choice” for tacklers is crucial.

Mr McGarvey provided the Committee with a copy of the decision in Porter and a copy of the press report of the decision in Cian Healy. He accepted however that each case turns on its own facts and circumstances and neither decision was binding on the Committee. His principal submission was that mitigation existed which had not been considered by the match officials. The exchange between the referee and TMO was in Italian and therefore it was not clear what consideration had been given to the question of mitigation. In delivering his decision in English the referee stated that there was no mitigation and in an exchange with the London Irish Captain he stated that M15 never changed height. Mr McGarvey relied primarily on the submission that there had been a sudden and significant change to M15’s position by reason of the tackle by LI5 and that the player was trying to pull out of the tackle. Mr McGarvey also referred the Committee to three clips of the player’s tackling technique in other matches. The Committee did not find evidence of how the player acted in other matches to be directly relevant to the issue before them. However, the Committee considered that the player’s upright tackle technique opened up a real risk of committing an act of foul play involving contact with the head, a risk which the player appeared to be willing to take, at least to date.

In applying the HCP the Committee found, on balance of probabilities, as follows:-

- [1] There was direct contact between the player’s right shoulder and the head of M15.
- [2] There was an act of foul play committed by the player. He admitted, in our view correctly, that he was in breach of Law 9.13. As M15 approached the player and was tackled by LI5

the player changed his body position by standing up, turning his body to the left and leaning forward so that he led with his right shoulder into contact with M15's head.

[3] The degree of danger was medium to high. By adopting an upright position and then standing up and turning his body in towards the advancing M15 there was a high probability of contact with the head of M15. M15 was approaching at speed which was reduced by the tackle by LI5. The player did not move forward except with his upper body and the extension of his legs. The level of force was medium.

[4] The player's actions were not intentional or highly reckless.

[5] There were no mitigating factors present to reduce sanction down to a point below a red card. The player had a clear line of sight of the approaching M15 and the presence and actions of LI5. The player was braced to absorb contact with M15 in an upright position with legs slightly bent. He had time to decide to pull out of the tackle of M15 and make adjustments to his body position. He had time to react to what was unfolding in front of him and accordingly he had time to adjust his body position to make a legal tackle. In fact he reacted by standing up and turning his body so that he led in towards M15 with his right shoulder resulting in direct contact with the head of M15. There was no significant drop in height or change of direction by M15.

Therefore, the Committee determined, on balance of probabilities, that the player failed to prove that the referee's decision to show a red card was wrong.

DECISION

Breach admitted

Proven Not proven Other disposal (please state below)

The player failed to prove that the referee's decision to show a red card was wrong. The red card test was met.

SANCTIONING PROCESS

ASSESSMENT OF SERIOUSNESS

Assessment of Intent – R 7.8.32 (a)-(b)

PLEASE TICK APPROPRIATE BOX

Intentional/deliberate

Reckless

State reasons

The player knew or ought to have known that there was a risk of committing an act of foul play.

Gravity of player's actions – R 7.8.32 (c)

Potentially serious

Nature of actions – R 7.8.32 (d)

Strike with shoulder to head

Existence of provocation – R 7.8.32 (e)

N/A
Whether player retaliated – R 7.8.32 (f)
N/A
Self-defence – R 7.8.32 (g)
N/A
Effect on victim – R 7.8.32 (h)
Victim was removed from field of play to undergo HIA. Passed and returned to play remainder of match. No symptoms of concussion evident at date of hearing.
Effect on match – R 7.8.32 (i)
None
Vulnerability of victim – R 7.8.32 (j)
Victim was vulnerable. He had been tackled by another player and would not have expected a strike to the head. He was not in a position to defend himself.
Level of participation/premeditation – R 7.8.32 (k)
Not premeditated. Player only one involved in act of foul play.
Conduct completed/attempted – R 7.8.32 (l)
Completed
Other features of player's conduct – R 7.8.32 (m)
None relevant

ASSESSMENT OF SERIOUSNESS CONTINUED

Entry point					
<u>Top end*</u>	<u>Weeks</u>	<u>Mid-range</u>	<u>Weeks 6</u>	<u>Low-end</u>	<u>Weeks</u>
<input type="checkbox"/>		<input checked="" type="checkbox"/>		<input type="checkbox"/>	

*If Top End, the JO or Panel should identify, if appropriate, an entry point between the Top End and the maximum sanction and provide the reasons for selecting this entry point, below.

In making this assessment, the JO/Committee should consider World Rugby Regulations 17.19.2(a), 17.19.2(h), and 17.19.2(i) or the equivalent provisions within the Tournament Rules referred to above.

Reasons for selecting Entry Point above Top End

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RELEVANT OFF-FIELD MITIGATING FACTORS

<p>Acknowledgement of guilt and timing – R 7.8.35(a)</p> <p>The player acknowledged immediately that he had committed an act of foul play. He challenged the decision of the referee to show a red card. He did not act improperly in doing so.</p>	<p>Player’s disciplinary record/good character – R7.8.35 (b)</p> <p>The player does have a disciplinary record. Ignoring a red card issued in 2010 it was noted that the player has received a red card on 15/1/2022 for striking with the head (3 weeks) and a citing was upheld on 8/5/2022 for unsportsmanlike conduct (hair pulling – 1 week).</p>
<p>Youth and inexperience of player – R 7.8.35 (c)</p> <p>The player is very experienced. He has accumulated 89 caps for his country and played 218 senior matches in various professional competitions.</p>	<p>Conduct prior to and at hearing – R 7.8.35 (d)</p> <p>The player’s conduct before the hearing was exemplary.</p>
<p>Remorse and timing of remorse – R 7.8.35 (e)</p> <p>There was no evidence that the player had demonstrated any remorse to the victim. Indeed, on his behalf it was said that he would have done so had there been injury suffered.</p>	<p>Other off-field mitigation – R 7.8.35 (f)</p> <p>None known</p>

Number of weeks deducted: **2 weeks**

Summary of reason for number of weeks deducted:
<p>The Committee were unable to afford the player full mitigation having record to the existence of a disciplinary record where the relevant entries had both occurred in this Tournament in this calendar year. The Committee also had regard to the lack of remorse and the suggestion that contact would have been made with M15 only if he had suffered injury. The player was noted to be very experienced and conducted himself well before the Committee however they considered that only 2 weeks could be deducted in mitigation.</p>

ADDITIONAL RELEVANT OFF-FIELD AGGRAVATING FACTORS

Player’s status as an offender of the Laws of the Game – R 7.8.34 (a)
N/A
Need for deterrence – R 7.8.34 (b)

While it is recognised that there is in general a need for deterrence of acts of foul play involving contact with the head no specific deterrence was identified in this Tournament.

Any other off-field aggravating factors – R 7.8.34 (c)

N/A

Number of additional weeks: 0

SANCTION

NOTE: PLAYERS ORDERED OFF ARE PROVISIONALLY SUSPENDED PENDING THE HEARING OF THEIR CASE, SUCH SUSPENSION SHOULD BE TAKEN INTO CONSIDERATION WHEN SANCTIONING – R 7.2.5

Total sanction (weeks)	4 weeks	Sending off sufficient <input type="checkbox"/>	
Sanction commences	From issue of red card on 9 December 2022	Costs	N/A
Sanction concludes	Midnight on 4 January 2023		
Free to play	From 5 January 2023 The Committee agreed that if approved by World Rugby the player could undertake the Coaching Intervention Programme with a view to reducing the period of suspension.		

Signature (JO or Chairman)	<i>Kathrine EC Mackie</i>	Date	14 December 2022
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NOTE: YOU HAVE THE RIGHT OF APPEAL AGAINST THIS DECISION AS SET OUT IN REGULATION 8.1 AND 8.2 OF THE EPCR DISCIPLINARY REGULATIONS. YOUR ATTENTION IS SPECIFICALLY DRAWN TO THE TIME LIMIT AND DIRECTIONS/REQUIREMENTS RELATING TO AN APPEAL SET OUT IN REGULATION 8.2.1 TO 8.2.4 OF THE REGULATIONS

BEFORE THE EPCR APPEAL COMMITTEE

BETWEEN:-

AGUSTIN CREEVY ('The Appellant')

-and-

EPCR ('The Respondent')

NOTICE OF APPEAL

Pursuant to Rule 8.2

1. This document is provided as a Notice of Appeal against the decision of the Disciplinary Committee on 13th December 2022.
2. The written notice of the decision was received by The Appellant on 14th December at 20:11hrs, via email.
3. The specific aspects of the decision being challenged are as follows:
 - a. The finding of fact in relation to the change in height or change in direction by M15. The Committee found that, "there was no significant drop in height or change of direction by M15".
 - b. The Committee's decision not to allow/apply mitigation when considering the HCP and off-field mitigating factors:

- i. HCP: Sudden / significant drop in height or change in direction from ball carrier, and
 - ii. Off field mitigating factors: Remorse.
 - c. The Committee's application of the HCP in relation to the degree of danger and level of harm.
 - d. The Committee's decision that, on the balance of probabilities, the referee's decision to award a red card was correct.
- 4. The specific grounds of the challenge(s) are:
 - a. The Committee erred in finding that there was no significant drop in height or change in direction by M15. It is submitted that there was a significant change in direction, and a less significant change in height. It is respectfully submitted that this is clearly demonstrated in the available footage, and in particular, the "Brentford 3" camera footage, played to the Committee during the hearing.
 - b. The Committee erred in concluding that there were no applicable/available mitigation. It is submitted that a) mitigation should have been applied arising from the significant change in direction and change in height of M15. It is further submitted that the committee erred in equating a lack of direct communication between the Appellant and M15, in advance of the hearing, as evidence of a lack of remorse. To the contrary, it is respectfully submitted that the account given by the player, when questioned by the Committee, provided sufficient material for the Committee to conclude that the Appellant was remorseful. The Appellant's representative also confirmed to the Committee that the Appellant had indicated his remorse in advance of the hearing.

- c. The Committee, in finding that the degree of danger was “medium to high”, and in finding that the degree of force was “medium”, misapplied the HCP. It is respectfully submitted that the level of mitigation required in the Appellants case, to reduce the sanction to a point below a red card, considering the findings of the Committee, was less than would be required if the Committee had found the level of danger to be ‘high’.

- d. As a result of the ground(s) of challenge, the Committee erred in its decision to uphold the red card.

Signed: _____

Dated: _____

BEFORE THE EPCR APPEAL COMMITTEE

BETWEEN:-

AGUSTIN CREEVY ('The Appellant')

-and-

EPCR ('The Respondent')

**WRITTEN SUBMISSIONS
ON BEHALF OF THE APPELLANT**

1. The Appellant's Notice of Appeal was served on EPCR, by email, on Monday 19th December 2022.
2. The Appeal Committee is invited to consider the following as part of the Appeal Hearing:
 - a. The EPCR short written judgement dated 14 December 2022;
 - b. These written submissions; and
 - c. The available footage, as shown at the hearing on 13 December 2022.
3. The Notice of Appeal set out the specific aspects of the decision being challenged as follows:
 - a. The finding of fact in relation to the change in height or change in direction by M15. The Committee found that, "there was no significant drop in height or change of direction by M15".

is respectfully submitted that the level of mitigation required in the Appellants case, to reduce the sanction to a point below a red card, considering the findings of the Committee, was less than would be required if the Committee had found the level of danger to be 'high'.

- c. As a result of the ground(s) of challenge, the Committee erred in its decision to uphold the red card.
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7. It is respectfully submitted that the ground of challenge set out at paragraph 6(a) is, on its own, sufficient to allow a finding that the referee's decision to show a red card was wrong.
 8. The available footage, and in particular, the 'Brentford 3.mov' footage at 17 seconds, clearly demonstrates a sudden / significant change in direction, and a change in height of M15.
 9. It is further submitted that the second ground of challenge set out at paragraph 6(b) further supports the suggestion that the Committee erred in their decision to uphold the red card. Where the level of danger falls below the top end of the scale (*question 3 in the HCP*), as the Committee found, the level of mitigation required to reduce the sanction down to a point below a red card, must also decrease.

Tomas McGarvey
On behalf of the Appellant

20 December 2022

Appendix 4

Appeal by Agustin Creevy from a Decision of an EPCR Disciplinary Committee dated 14 December 2022 ('Decision')

1. Please find below the Disciplinary Officer's written submission in response to Mr Creevy's appeal. This is circulated pursuant to the directions of the Appeal Committee dated 19 December 2022, and to clause 8.4.3 of (and Appendix Six, section E2, to) the 2022/23 EPCR Disciplinary Rules (**Disciplinary Rules**).
2. Before addressing each of the elements set out in section E2 of Appendix Six to the Disciplinary Rules, we make some comments on Mr Creevy's appeal.

The Basis of the Appeal

3. It appears clear from the notice of appeal submitted by email on 19 December 2022 by Mr Creevy (**Notice**) that Mr Creevy does not seek a *de novo* hearing (and we can think of no justification for holding such a hearing, i.e. the circumstances are not exceptional and there are no compelling reasons, see clause 8.4.8 of the Disciplinary Rules). Accordingly, the appeal should proceed as a conventional appeal.
4. Clause 8.4.8 of the Disciplinary Rules states: '*... Except where an appeal proceeds as a de novo hearing ..., 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.*' So, Mr Creevy will have to prove that the Decision was in error and that it should be overturned or varied.
5. According to the Notice, it appears that Mr Creevy says that the relevant errors in the Decision were:
 - a) The Committee's finding that there was no significant drop in height or change in direction by Montpellier's No.15, Anthony Bouthier (**First Ground of Appeal**);
 - b) The Committee's decision not to allow/apply mitigation when considering the Head Contact Process guidance and off-field mitigating factors set out at paragraph 7.8.34 of the Disciplinary Rules (**Second Ground of Appeal**);
 - c) The Committee's application of the Head Contact Process guidance in relation to the degree of danger and level of harm (**Third Ground of Appeal**);
 - d) The Committee's decision to uphold the red card (**Fourth Ground of Appeal**).

The Margin of Appreciation

6. It seems to EPCR that Mr Creevy's challenge to the Decision is based at least in part on the argument that the Disciplinary Committee erred when making findings of fact and/or exercising its judgment or discretion (that seems to be the case in respect of all Grounds of Appeal). In such conventional (i.e. non-*de novo*) appeals, where Appeal Committees are faced with challenges to findings of fact and/or exercises of judgement or discretion made by a Disciplinary Committee, rather than simply revisiting all of the evidence put before the first instance decision-maker and substituting its own conclusions, the accepted practice has been for the Appeal Committee to afford such findings of fact and/or exercises of judgement or discretion a margin of appreciation.
7. In the words of the Appeal Committee in the ERC (as was) case of *Tincu* (attached): *'Except in the case of a de novo appeal, the function of the Appeal Committee is not to review all of the evidence, which was before the Disciplinary Committee, and then to come to its own conclusions as to whether or not that evidence establishes on the balance of probabilities that the cited act or acts of foul play occurred. ERC Appeal Committees are only entitled to interfere with a determination on a matter of fact by the original Disciplinary Committee where the Appeal Committee concludes that such determination was not consistent with the evidence before them. In making the assessment as to whether the evidence was consistent with such a determination by a Disciplinary Committee a margin of appreciation is to be accorded to the determination being challenged. This is consistent with the decisions of previous ERC Appeal Committees in the cases of Alan Quinlan, Gerry Flannery and Alexandre Audebert'* (page 7, emphasis added).
8. The decision in *Tincu* concerned a finding of fact. But it was made clear in the Six Nations case of *Bergamasco* (attached) that such a margin of appreciation applies not just to findings of fact but also to exercises of judgement or discretion (although the test on appeal was slightly different, we submit that it was not materially so): *'This [the regulation in which the relevant test is set out] implies a test somewhat less than 'Wednesbury unreasonable' and something more than that the Appeal Committee would have come to a different evidential assessment than the body at the first instance on the set of facts. The first instance body is entitled to a margin of appreciation and its decisions in relation to the assessment of evidence and exercises of discretionary judgement are not to be overturned by Appeal Committees except where the first instance body has gone outwith that margin of appreciation ... This is a significant margin of appreciation'* (page 15, emphasis added).
9. The requirement that Appeal Committees should afford findings of fact and exercises of judgement or discretion by Disciplinary Committees acting as first instance tribunals a margin of appreciation has been applied time and time again by Appeal Committees in various competitions (in an effort to limit the amount of paperwork being circulated the relevant decisions are not attached, but they can be supplied on request).
10. What this means in Mr Creevy's case, if the Appeal Committee adopts a similar practice to the tribunals in those previous cases, is that where there is a challenge to the Disciplinary Committee's findings of fact and/or exercise of judgement or

discretion (i.e. their conclusion that there was no significant drop in height or change of direction by Montpellier No.15, their determinations on the degree of danger and level of harm, and their conclusion that Mr Creevy had committed an act of foul play which would have warranted a red card), the Appeal Committee should not interfere with such findings of fact and/or exercises of judgement or discretion unless they are outside the appropriate (and significant) margin of appreciation. The Appeal Committee members should not simply ask themselves whether they would have made the same findings of fact and/or exercised their judgement or discretion in the same way. Instead they must ask themselves whether it had been open to the Disciplinary Committee to do what they did based on the material that was before them. (We recognise that Mr Creevy might contend that his challenge is at least in part based not on the Disciplinary Committee's findings of fact and/or exercise of judgement or discretion, but rather on the basis that it had been wrong in law, for example because the Disciplinary Committee applied the Head Contact Process guidance incorrectly.)

The First Ground of Appeal

11. Mr Creevy says that the Disciplinary Committee's finding that there was no significant drop in height or change in direction by Mr Bouthier was in error. More particularly, he says (at paragraph 6(a) of the Notice) that *"...there was a significant change in direction, and a less significant change in height."* He also says (at paragraph 6(a) of the Notice) that *"It is respectfully submitted that this is clearly demonstrated in the available footage, in particular the 'Brentford 3' camera footage played to the Committee during the hearing"*.
12. In response, EPCR says as follows:
 - a) The Disciplinary Committee does indeed appear to have made a finding that there was no significant drop in height or change of direction by Mr Bouthier (Montpellier No.15).
 - b) This finding of fact is one that the Disciplinary Committee was entitled to make on the evidence before it. It is a reasonable finding. The guidance requires there to be a significant drop in height or change of direction by the ball-carrier, and the Disciplinary Committee must make a subjective evaluation of the video footage, based on the wording of the Head Contact Process guidance. The guidance does not require Disciplinary Committees to mitigate down from a red card based on any drop in height or change in direction, there must be a *significant* drop in height or change in direction. The assessment of the video footage requires the Disciplinary Committee to carry out an exercise of discretion to determine whether any drop in height or change in direction was significant, and on their assessment they have determined that it was not.
 - c) There is no suggestion in this Ground of Appeal that the Disciplinary Committee simply forgot or omitted to make that assessment for some reason, and therefore fell into error. Their decision specifically records that it was Mr Creevy's primary submission, and therefore it must follow that the assessment was carried out.

- d) Mr Creevy invites you to reconsider the video footage, and determine that Mr Bouthier did in fact drop his height or change direction significantly.
- e) But the test for the Appeal Committee is not whether or not Mr Bouthier did in fact drop his height or change direction significantly, it is whether (based on the material before it and applying the margin of appreciation) the Disciplinary Committee was entitled to find that Mr Bouthier had not done so.

The Second Ground of Appeal

13. Mr Creevy says that the Disciplinary Committee's decision not to apply/allow mitigation when considering the Head Contact Process guidance and off-field mitigating factors was wrong. More particularly, he says (at paragraph 3(b)(i) and (ii) of the Notice) that no on-field mitigation was awarded on account of the significant drop in height or change in direction from the ball-carrier; and that no off-field mitigation was applied for Mr Creevy's remorse.

14. In response, EPCR says as follows:

- a) The point listed at 4(b)(i) appears to be a duplication of the First Ground of Appeal, set out at paragraph 3(a). EPCR simply adopts the same submission set out previously with regard to the First Ground of Appeal.
- b) The point listed at 4(b)(ii), references Mr Creevy's remorse over the incident. However, as the Decision being appealed against faithfully records, there was no evidence before the Disciplinary Committee that the player had demonstrated any remorse to Mr Bouthier, nor apologised to him. On Mr Creevy's own evidence, he had not done so. The Disciplinary Committee had no evidential basis to conclude that any off-field mitigation whatsoever should be awarded in that specific regard.
- c) The Appeal Committee does not appear to have been provided with any evidence that Mr Creevy has expressed any remorse, nor apologised to, Mr Bouthier; as if to persuade you that you should give Mr Creevy a discount on the sanction imposed by the Disciplinary Committee.
- d) In any event, the test for the Appeal Committee to apply here is whether or not (based on the material before it and applying the margin of appreciation) the Disciplinary Committee was entitled not to award any deduction from the number of weeks suspension to be served by Mr Creevy.

The Third Ground of Appeal

15. Mr Creevy says that the Disciplinary Committee's application of the Head Contact Process guidance was in error. More particularly, he says (at paragraph 3(c) of the Notice) that there was an erroneous assessment of the degree of danger and level of harm. He also says (at paragraph 6(b) of the Notice) that "...in finding that the

degree of danger was 'medium to high' and in finding that the degree of force was medium...", the Disciplinary Committee misapplied the HCP. Paragraph 6(b) goes on to say that "It is respectfully submitted that the level of mitigation required in the Appellants case, to reduce the sanction to a point below a red card, considering the findings of the Committee, was less than would be required if the Committee had found the level of danger to be 'high'."

16. In response, EPCR says as follows:

- a) The document entitled Head Contact Process (updated December 2021) is a Law Application Guideline. It sets out a list of considerations that disciplinary bodies might undertake when determining the seriousness of foul play. It is not a set of regulations, purporting to provide an absolute process for reaching factual determinations. Disciplinary bodies are effectively invited to consider the guidelines, weigh the considerations and use their discretion to arrive at the correct outcome. It does not depend upon a slavish, literal and rigorous application of the words used and intended only as guidance.
- b) The Head Contact Process guidance is not engineered to create binary outcomes and box-ticking exercises. It is a tool to be used to ensure that disciplinary bodies take into account all of the relevant factors when making their decisions, and to create a framework by which consistency of application might be achieved.
- c) For this reason, technical departures from the guidance are not grounds for invalidating the decisions reached therefrom. Disciplinary bodies have wide discretion to interpret the guidance in whatever way is necessary to give effect to the stated policy objective of protecting players and promoting player welfare.
- d) For the record, EPCR does not accept that the Disciplinary Committees use of the words 'medium to high' when describing the level of danger they have assessed, or the use of the word 'medium' to describe the force involved, is in any way determinative. It is their assessment, and their objective is to work out how that assessment impacts their view on the appropriate sanction.
- e) Nor is the Disciplinary Committee required to make their finding on solely that basis, and nor does their assessment preclude them from concluding that the red card test is met in this case. There are other factors they must consider, before taking everything in the round. It would be absurd if a guideline that purported to cover a range of offences was reduced to a box-ticking exercise in which every box must be ticked before a disciplinary body could make a determination that the red card test was satisfied in a specific case involving a specific offence. If we take the example of a dangerous clear-out; it would be absurd if an assessment of a case involving that offence required the exact same assessment as in the present case.

- f) The Disciplinary Committee in this case considered each of the factors in turn, attributed such weight to them as it could taking into account the specific mechanics of the incident before them and formed a view that the red card test was satisfied. It is entirely foreseeable that the Appeal Committee, if considering the evidence for itself, might reach a different view. But that is not the test it must apply. The Appeal Committee must only ask itself if the decision reached was not one that the Disciplinary Committee could reasonably have come to.

The Fourth Ground of Appeal

- 17. Mr Creevy says that the Disciplinary Committee's conclusion that the act of foul play warranted a red card was in error.
- 18. In response, EPCR says that Mr Creevy has provided no basis for that assessment (further to what has been advanced in his first three Grounds of Appeal). The Fourth Ground of Appeal should therefore be summarily dismissed.

Section E2 of Appendix 6 to the Disciplinary Rules

- 19. The Disciplinary Officer's response to the relevant directions is:
 - (a) The Disciplinary Officer will not argue any preliminary matters.
 - (b) As we say above, Mr Creevy does not seek a *de novo* hearing.
 - (c) Other than what is said in this email, the Disciplinary Officer does not currently wish to make any further points by way of a response.
 - (d) There will be no additional evidence to be relied on or witnesses to be called by the Disciplinary Officer.
 - (e) All of the documents that were before the Disciplinary Committee in this case are attached above. If you believe that something is missing, please let us know immediately.
 - (f) Other than the attached cases, we do not envisage having to rely on any authorities.
 - (g) I will be attending the hearing on behalf of EPCR.

We hope that this submission has been of some assistance to the Appeal Committee and we would be happy to expand on this, ahead of or at the hearing, if further information is required.