

**RUGBY FOOTBALL UNION**

**RE: NEIL BEST**

**APPEAL PANEL HEARING**

**Panel:** Ian Mill QC (chairman), Robert Horner and John Doubleday

**At:** London Bloomsbury Holiday Inn

**On:** Monday 6 October 2008

**Representation:** For Neil Best (“the Player”), Paul Tully of Counsel  
For the Rugby Football Union (“the RFU”), Gerard McEvelly of Counsel

**Decision under appeal:** Decision of an RFU Disciplinary Panel (Jeff Blackett (chairman), Jeff Probyn and Peter Budge) (“the Panel”) dated Tuesday 30 September 2008 (“the Decision”)

**JUDGMENT**

**The Decision**

1. On 30 September 2008, the Panel met to consider a charge against the Player brought in the light of a citing report following the Player’s participation as a member of the Northampton Saints team in its match against London Wasps at Franklin’s Gardens on 20 September 2008.
2. The charge alleged an offence of making contact with the eye or eye area of an opponent (the London Wasps number 7, James Haskell (“Mr Haskell”)) contrary to RFU Law 10.4(k) (acts contrary to good sportsmanship).

3. The Player admitted the offence “*on the basis that he was reckless when seeking to lawfully remove James Haskell from a ruck. He denies that he deliberately sought to make contact with the eye or eyes of James Haskell. He nonetheless admits being reckless in the manner in which he sought to remove James Haskell from the ruck and thereby causing injury to his eye*”.
4. The Panel, in order to determine the appropriate level of sanction, had to decide whether to accept the basis of this plea, or whether the Player had in fact been shown to the requisite standard of proof to have acted with deliberate intent rather than with mere recklessness (“the preliminary issue”).
5. Having received oral testimony from (among others) the Player and Mr Haskell, having viewed the video recording of the incident in question and having received submissions from Counsel for the Player, the Panel concluded on the preliminary issue as follows:

*“..The Panel noted that the whole incident from the time the Player’s hand was in the vicinity of Haskell’s head to the time the hand moved away from his head was about 1 second. It accepted that the Player had not intentionally searched for Haskell’s eye but had tried to grab somewhere on his head to pull him up and backwards. Initial contact with his eye was, therefore, reckless. However, the Panel does not accept the Player’s account that contact with the eye was “fleeting”. Haskell’s evidence was very clear and compelling that the fingers had been in his eye for more than fleeting contact. His explanation that he felt the fingers in his eyes pulling him upward was consistent with observations of the video, and the injuries described were not consistent with fleeting contact for a millisecond. The Panel, therefore, determined that after the Player’s finger went into Haskell’s eye he must have known where it was because the feel of an eye is unique. **He then deliberately maintained contact with the eye area to force Haskell to release the ball and move backwards and he pulled Haskell’s head upwards by the eye socket.** The Panel also accepted that the incident occurred very quickly and although the Player deliberately maintained contact with the eye area to pull Haskell there was no intention to cause serious injury...”* (Emphasis in original)

6. Having so found and having set out a number of matters prayed in aid on behalf of the Player by way of mitigation, the Panel proceeded to consider the appropriate sanction. It reminded itself of the statement of principle established by an RFU Disciplinary Panel in the case of *Hartley* in April 2007:

*“Contact with an opponent’s eye or eye area is a serious offence because of the vulnerability of an eye and the risk of permanent injury. It is often the result of an insidious act and is one of the offences most abhorred by rugby players. Serious offences of this sort – and particularly those known colloquially as “eye gouging” must be dealt with severely to protect players, to deter others from such activity and to remove offenders from the game to ensure that they learn the appropriate lesson. Clearly “contact” encompasses a wide range of activity from applying pressure with an open hand to a finger intentionally inserted into the eye socket intending to cause injury. Offences which would properly be classified as at the Lower End of the scale of seriousness would include, but not be limited to, wiping with an open palm or fist without any real force or intent and causing no injury. In certain circumstances it might also include reckless contact with a finger into the eye area. Offences which would properly be classified as at the Top End of the scale of seriousness would include, but not be limited to, an intentional act designed to cause serious discomfort or injury to the eye or area around the eye of an opponent. The most serious offences in this category would be where permanent damage is caused.”*

7. The Panel then sought to apply this statement of principle to the facts of the Player’s case. It made the following findings:

*“a. The Panel had already determined that, although initial contact with the eye was reckless, the continuing contact was deliberate. We accept, however, that the Player did not intend to inflict serious injury to Haskell although he intended to apply sufficient discomfort to move Haskell out of the way and release the ball.*

- b. *The nature of the Player's actions was grave. Placing fingers in and around opponent's eyes constitutes one of the most serious offences in the Game because of the risk of permanent career-ending damage.*
  - c. *Contact was clearly painful and caused significant injury, continuing distress and some mental anguish to Haskell who initially feared first for his sight and subsequently that he may not be able to play again. The Panel concluded that, given the dynamic situation at the ruck and the force applied, the Player was fortunate that the injuries were not even more serious.*
  - d. *Haskell was vulnerable in that he had been participating in a contest for the ball on the ground and would neither have expected this sort of contact nor been able to protect himself from it.*
  - e. *The offence was not premeditated but it was completed and Haskell was rendered unfit to play."*
8. The Panel then proceeded to conclude, in the light of its findings as set out above:
- a. that the Player's offence was at the Top End of the scale of seriousness; and
  - b. that the entry point was 36 weeks.
9. In so concluding, the Panel made the following observations:
- a. In relation to the conclusion that the Player's offence was at the Top End of the scale of seriousness, that:  
  
*"This was a serious case because the Player, having realised that he had contact with the eye area, clearly intended to apply leverage to Haskell to pull him upwards. Although we accept he did not intend to cause this*

*injury it was the inevitable result of his actions...this sort of offending must be marked with a substantial sanction not only to punish the Player but to mark the Game's abhorrence for this type of offending and to deter others from similar offences".*

b. In relation to the entry point of 36 weeks, that:

*"This is higher than the entry point in the case of Hartley who was found guilty of two offences of contact with the eye or eye area in the same match: in that case one of the incidents involved deliberate insertion of fingers into an opponent's eyes, but there was only superficial injury".*

10. Finally, having taken into account the various matters which operated by way of mitigation in the Player's case, the Panel applied the maximum 50% credit from the entry point. It therefore determined that the appropriate sanction for the Player was a suspension of 18 weeks, which was to run from 24 September 2008 to 27 January 2009.

### **The Basis of Appeal**

11. The Player does not seek on appeal to disturb any of the relevant factual findings made by the Panel (as set out above). His appeal (by a Notice dated 2 October 2008) is therefore a limited one. It is expressed to be "*confined to the length of the sanction imposed*".

12. In his helpful written and oral submissions, Mr Tully on behalf of the Player explained the points being advanced on the Player's appeal against the 18 week suspension which the Panel had imposed. These may be summarised as follows:

a. The Panel was wrong in finding that the seriousness of the Player's offence merited a Top End entry point.

- b. In the particular circumstances of the case the correct entry point was Mid Range.
  - c. Even if the correct entry point was Top End, the correct starting point within the Top End range for a breach of Law 10.4(k) (24 weeks to 3 years) was not more than 24 weeks.
13. On behalf of the RFU, Mr McEvilly did not seek to argue for any increase in the sanction imposed upon the Player by the Panel. The RFU, in short, supported the Decision for the reasons given by the Panel.

### **The Appeal Panel's Findings**

#### **(1) Top End/Mid Range**

14. On behalf of the Player, Mr Tully started by drawing our attention to a number of aspects of the Panel's findings on the preliminary issue, as set out in paragraph 5 above. In particular, he pointed to the Panel's findings that:
- a. The Player's contact with Mr Haskell's eye area was only for about one second.
  - b. The initial part of that contact had not been deliberate.
  - c. Such contact as did take place lacked an intention on the part of the Player to cause serious harm.
15. Mr Tully accepted as correct the statement of principle in the *Hartley* case which is set out in paragraph 6 above and, specifically, that part of the statement which related to offences which would properly be classified as being at the Top End. His contention was that an application of that statement of principle to the facts of the Player's case supported the conclusion that the Panel had been wrong to find that his offence was at the Top End of the scale of seriousness. He pointed to the Panel's findings that the Player had not

committed an intentional act throughout and that the Player had not intended to cause serious injury to Mr Haskell.

16. Mr Tully also sought to derive support from the Six Nations Rugby Appeal Committee Decision dated 7 March 2008 in the case of Mauro Bergamasco, following that player's infringement of Law 10.4(k) at the end of the Six Nations match between Wales and Italy played on 23 February 2008 at the Millenium Stadium in Cardiff. In that case, the decision of a Disciplinary Committee had been that the player's offence of making contact with the area of the right eye of the Welsh player, Lee Byrne, was within the Mid Range of seriousness. That conclusion was overturned on appeal. The Appeal Committee decided that the "*only reasonable conclusion open to the Committee was that the appropriate entry point was top end*". However, as Mr Tully pointed out (and as the video of the incident which we were shown at the hearing clearly demonstrated) in that case the offending player's actions throughout had been deliberate and premeditated. This, said Mr Tully, made the case a more serious one than the one facing the Panel in the present case.
  
17. In addressing this first ground of appeal, we reminded ourselves of the provisions of the RFU Disciplinary Regulations ("the Regulations") which have to be applied in assessing the seriousness of the player's conduct and for the purposes of determining where in the scale of seriousness an offence lies. The provisions concerned are to be found in Regulation 8.2.5, which sets out a number of "*features of offending*" which are to be taken into account. These are as follows:
  - a) The offending was deliberate, that is, committed intentionally or deliberately;*
  
  - b) The offending was reckless, that is the Player know (or should have known) there was a risk of committed an act of illegal and/or foul play;*
  
  - c) The gravity of the Player's actions in relation to the offence:*

- i. *Nature of actions, manner in which offence committed including parts of body used i.e. fist, elbow, knee or boot; and*
  - ii. *The existence of provocation and whether the Player acted in retaliation;*
- d) *The effect of the offending Player's actions on the victim (i.e. extent of injury, removal of player from the game);*
  - e) *The effect of the offending Player's actions on the game;*
  - f) *The vulnerability of the victim player including part of the victim's body involved/affected, position of player, and the ability to defend himself;*
  - g) *The level of participation in the offending and the level of premeditation;*
  - h) *Whether the conduct of the offending player was completed or amounted to an attempt; and*
  - i) *Any other feature of the Player's conduct which constitutes the offending."*

18. It is clear from the passage from the Decision set out in paragraph 7 above that the Panel had attempted to give proper consideration to these features in the context of the Player's offence, before concluding that his offence was at the Top End of the scale of seriousness. As stated above, the Player does not challenge the factual findings made by the Panel. Further, the burden on an appellant in a case such as the present is (as stated in Regulation 11.5.1) to "*prove on the balance of probabilities that the decision appealed against was wrong*". Accordingly, as it seems to us, for this first ground of appeal to succeed the Player would have to be able to show on the balance of probabilities:

- a. that the Panel failed to take one or more material features of the offence into account and that, had it taken it/them into account, it would or should

have concluded that the offence was in the Mid Range of the scale of seriousness; and/or

b. that the Panel, although it correctly identified the material features in the Decision, nonetheless reached a conclusion as to the seriousness of the offence, based on those features, that was inconsistent with relevant previous decisions and/or with the statement of principle as set out in the *Hartley* case.

19. In our view, the Player has failed to establish either of these possible bases for success under this ground of appeal. He did not, as we understood the submissions made on his behalf, seek to identify a material feature which the Panel had failed to take into account. Rather, his case was that, having identified the relevant features, the Panel misapplied the *Hartley* statement of principle and/or reached a conclusion which could be shown to be wrong in the light of the conclusion on the facts of the *Hartley* case itself and in the light of the decision in *Bergamasco*.

20. As to the Player's case on the application of the *Hartley* statement of principle, we have reached the following conclusions:

a. The panel which decided that case was only giving (in the passage quoted) an example of the type of conduct which would fall within the Top End of the scale of seriousness. It was not intended to be a comprehensive description of the only type of conduct which might fall within that classification.

b. Irrespective of that fact, it seems to us that the conduct of the Player, as found and described by the Panel, clearly falls within the type of conduct given by the panel in the *Hartley* case as an example of a Top End offence. The Panel found in terms that there had been "*an intentional act designed to cause serious discomfort...to the eye or area around the eye of an opponent*" (see finding "a." quoted in paragraph 7 above). For the avoidance of doubt, we entirely agree with the panel in that case that the

conduct described in its example would warrant a finding that a Top End offence had been committed.

- c. In any event, the findings of the Panel set out in paragraph 7 above, taken together, would in our view clearly justify a conclusion (having regard to the features listed in Regulation 8.2.5) that the Player's offence was at the Top End of the scale of seriousness, unless it were clear from relevant comparable cases in the past that such a conclusion was inconsistent with an established approach in RFU disciplinary proceedings.

21. We would have been unwilling to displace the Decision of the Panel in the present case on the basis of decisions made on other sets of facts in other cases unless it was palpably clear from such decisions that the Panel in the present case had trespassed outside the range of possible decisions reasonably available to it. As it is, however, we have been unable to find any inconsistency between the Panel's conclusions in the present case and the decisions made on the facts of the *Hartley* and *Bergamasco* cases – which are the only comparables which we have been invited to consider:

- a. As to the facts of *Hartley*, there were two offences established against the player, but only one which warranted any form of sanction. That offence, which again coincidentally involved contact with the eye area of Mr Haskell, was one in which there was intent on the part of Mr Hartley from the outset, but the injury caused was far less serious than that caused by the Player in the present case. Moreover, the incident involving Mr Hartley had not adversely affected Mr Haskell's ability to participate in the game. In the present case, as found by the Panel, Mr Haskell was rendered unfit to play by the actions of the Player.
- b. Mr Tully engaged us in an interesting philosophical debate as to the extent to which the outcome of offending conduct, as opposed to the intent (or lack of it) with which it was committed, should be relevant in assessing the appropriate sanction. Interesting as the argument was, we

found it ultimately unhelpful, as the Panel was constrained (as are we) by Regulation 8.2.5 to take into account as material features of an offence the effect of the offending player's actions (a) on the victim and (b) on the game. In those circumstances, and having regard to the fact that the Player in the present case has been found to have intended to cause serious discomfort to Mr Haskell, we see no inconsistency between the finding in the present case, as in *Hartley*, that the offending player's offence was at the Top End of the scale of seriousness. Indeed, we would regard the material facts of the present case as more serious than those that applied in *Hartley*. We expand upon that conclusion further below in the context of the Player's second ground of appeal.

- c. In the case of *Bergamasco*, the offending player was guilty of both intent and premeditation. However, he had been subject to provocation (which is not a feature of the present case), the effect on the victim was far less serious than the effect on Mr Haskell in the present case and the offence occurred at the end of the game so that the incident had no effect on its outcome. Again, therefore, we can find no inconsistency between the decision of the Appeal Board in that case and the Decision in the present case that the offence concerned was at the Top End of the scale of seriousness. As with the case of *Hartley*, we in fact regard the relevant circumstances of the present case as more serious than those that pertained in *Bergamasco*. Again, we expand upon that conclusion further below in the context of the Player's second ground of appeal.
- d. In summary, there were features of both the *Hartley* and *Bergamasco* cases which were, having regard to the contents of Regulation 8.2.5, in some respects more serious and in others less serious than the features of the present case. In those circumstances, there can be no valid criticism of the Decision of the Panel, who reached the same conclusion as the panels in those other cases as to whether the offence was sufficiently serious to be classified as Top End.

**(2) Top End Starting Point**

22. As stated above, the Panel decided that the appropriate starting point within the Top End range (24 weeks to 3 years) was 36 weeks. By his second ground of appeal, the Player asserts that the Panel was wrong to have reached this conclusion; instead the minimum starting point of 24 weeks should have been adopted.
23. In addition to a general assertion that, if the Player's actions justified a Top End entry point, then this was such a marginal decision that the lowest possible starting point was appropriate, specific reliance was placed on behalf of the Player upon the starting points adopted in the cases of *Hartley* (30 weeks) and *Bergamasco* (24 weeks). The thrust of the argument advanced on behalf of the Player was that the facts of the present case were either less serious or, at worst, no more serious than those which were found in these other two cases. Thus, the adoption of a higher starting point in the present case than in either of these other cases demonstrates that the Panel was wrong in that respect.
24. We are unable to agree. As indicated by us in paragraph 21 above, we consider that the facts of the present case are (by reference to the features in Regulation 8.2.5) overall more serious than those which were found in either of these other two cases:
- a. In relation to *Hartley*, the panel in the case observed that, had the injuries been worse or the effect on the victim or the game significant, it would have classified this offence as being "*well into*" the 24 week to 3 year range. The panel in that case also observed that the starting point should be "*towards the bottom of that range, but not right at the bottom, because there might be offences meriting a Top End entry point where, for example, no injury occurred*". It is thus apparent that the very experienced panel in that case regarded the extent and significance of the injuries caused in the context both of the victim and of the game as being highly important when assessing the appropriate starting point. We can

see nothing unreasonable in such an approach. On that basis, we would regard a materially higher starting point for the Player in the present case than the 30 weeks applied to Mr Hartley as being almost inevitable (since, by the time that he inflicted injury upon Mr Haskell, the Player intended to cause him serious discomfort by pulling Mr Haskell's head upwards using his right eye socket). On any view, a decision to adopt a materially higher starting point for the Player was an entirely reasonable one and in no sense wrong.

- b. As to the adoption of the minimum 24 week starting point in *Bergamasco*, the Appeal Board in that case made it clear that this was “*only because the injury to Mr Byrne had fortunately been of a minor and temporary nature and taking account of the modest provocation to which the player had been subject*”. The Board might also have referred to the fact that the incident occurred right at the end of the game (in fact, after the final whistle had blown), so that it had no effect upon the game whatsoever. Again, it seems to us that the facts of the present case are more serious overall, having regard to the severity and impact of the injuries sustained by Mr Haskell and the absence of any provocation on his part, and despite taking into account the premeditated nature of Mr Bergamasco's actions. We would regard a starting point of 36 weeks in the present case as being entirely consistent with the 24 week starting point applied to Mr Bergamasco.
- c. Finally on this second ground of appeal, we consider that (irrespective of the decisions in the other cases to which we have referred) a starting point of 36 weeks – i.e one that is above, but not very substantially above, the lowest end of the Top End range - was and is entirely appropriate in the present case, having regard to the features identified by the Panel in the Decision. It is possible to envisage a range of factual situations (such as those which applied in those other cases) which are less serious than the present facts but which would justify nonetheless a finding that a Top End offence had been committed. Equally, far more serious conduct involving a breach of Law 10.4(k) can be envisaged. In

summary, we are of the firm view that the conclusion reached by the Panel in the present case as to the starting point was sensible, reasonable and, indeed, right.

**(3) Other Matters**

25. In deference to Mr Tully's arguments, we should mention two other points which were raised on behalf of the Player at the hearing:

- a. Mr Tully invited us to have regard to Regulation 6.4.1, which provides that the "*overriding consideration in the conduct of disciplinary procedures are that they should be fair and just*". He submitted that this "overriding" consideration required the Panel to reach a decision which, irrespective of the terms of Regulation 8.2.5 and the range of entry points set out in the Regulations, resulted in a sanction which was in all the circumstances fair and just. He suggested that a suspension of 18 weeks entailed non-compliance with that Regulation. We disagree. In the first place, that Regulation is concerned with the procedures adopted at disciplinary hearings, not with the substance of the decision made. Secondly and in any event, we would (had it been relevant) have held that the substances of the Decision in the present case was in all respects fair and just.
- b. Mr Tully pointed out that, as the first two weekends after the end of the Player's suspension contain international games, the period of suspension of the Player is in effect 20 weeks, not 18. The relevance of this was said to be that this was a point which goes to mitigation and should have dictated a shorter ban. We regret that we really do not understand this point. It cannot sensibly be asserted that such a factor could properly influence a decision as to the appropriate entry point or the starting point. In relation to mitigation itself, the Player has already had the benefit of the maximum 50 % reduction.

## **Conclusion**

26. For all the reasons set out above, the Player's appeal is dismissed and his £500 deposit is forfeited.

22 October 2008