

RUGBY FOOTBALL UNION

DISCIPLINARY HEARING

VENUE: Holiday Inn, Bloomsbury, London

DATE: 7 April 2010

Player: James TUBASEI

Club: Esher RFC

Match: London Scottish 2nd XV v Esher 2nd XV

Venue: London Scottish

Date of match: 30 January 2010

Panel: Jeremy Summers (Chairman), Michael Cordell and Dr Julian Morris (“the Panel”)

Secretary: Liam McTiernan

In Attendance:

Esher RFC

James Tubasei (“the Player”)

Mark Haslam – Solicitor

David Page – Team Manager

Mike Schmid – Director of Rugby

London Scottish RFC

Martin Goudie – Counsel

Paul McFarlane – Assistant Secretary LSRFC

Lee Rust - Player

DECISION

1. **The Panel convened to consider a charge brought by the Rugby Football Union following a citing by London Scottish RFC alleging that the Player had made contact with the face of an opponent in the regions of the eyes and/or mouth contrary to Law 10. 4 (m) of the Laws of the Game 2010.**
2. **On the evidence available to the Panel it was not satisfied, to the standard required, that the offence had been proved, and accordingly the citing was not upheld.**

PRELIMINARY ISSUES

3. The Player did not object the composition of the Panel and no other preliminary issue arose.
4. The Player pleaded not guilty to the charge as set out above.

EVIDENCE

5. The Panel considered: -

- a) The match recording (this was taken by Esher and did not record the entirety of the match).
- b) Oral evidence from Lee Rust ("LR").
- c) 6 photographs of LR's face (4 taken by Mr Kesley and 2 by LR)
- d) Oral evidence from the Player.
- e) Oral evidence from Mr Schmid.
- f) Written statements from LR
- g) A statement from Russell Kesley – London Scottish RFC Physiotherapist
- h) A statement from Chris Kibble – Esher RFC Coach
- i) A statement from Gordon Raybould – Team Manager of Esher Cardinals.
- j) Medical notes from Dr Stephen Chew – London Scottish RFC 1st XV Doctor
- k) Submissions on behalf of the Player.
- l) Submissions on behalf of London Scottish RFC

THE CITING

6. The London Scottish citing in summary was as follows:

From the attached statements and photos you will see that following a tackle Lee Rust found himself face down on the ground. Whilst he was on the ground he received injuries to the facial area as set out in the statements by someone placing their fingers in his eye and mouth and exerting extreme pressure.

7. LR gave evidence and was a compelling witness. He is 29 years old and previously worked for the RFU in the North East before joining London Scottish as a Community Development Manager some 2 years ago. He has no disciplinary record.
8. He stated that whilst playing 10 he took a flat ball following a lineout and attacked into the middle of the field. He was tackled by one or more Esher opponents, went to ground and implemented a "squeeze" move to lay the ball back through his legs to the upcoming support.
9. As he was going to ground he was conscious that the Player (who had very recently come on to the field as a replacement 7) was closing in on him. Once tackled his face had been on the ground. He then felt fingers and thumbs go into his mouth and around his eye on the left hand side of his face.
10. Although his evidence was that it was impossible to see who had been responsible, he was in no doubt that it was the Player.
11. He accepted that another Esher player, believed to be the fly half, was on top of him, and so between himself and the Player. However, in his view the position of the fly half was such that he could not have been the guilty party.

12. He described feeling a very quick “lawnmower” action that pulled his mouth up and out. He felt a sudden sharp pain and indicated there had been a lot of blood. Because of the adrenalin he had not realised the seriousness of his injury. He had not made any overt reaction immediately after the assault.
13. Although in evidence LR repeatedly referred to having been gouged, on questioning from the Panel he indicated that the contact had been to the exterior of the corner of his eye. He also accepted that the most evident injury on the photographs he had supplied was to the cheek bone (zygoma) and that this showed bruising and swelling consistent with having been struck with a blunt part of another body rather than having had a finger purposefully apply pressure to the eye or eye area.
14. He had then summoned the physio and reported to him (Mr Kesley) that he had been gouged and fish hooked. The physio treated him for over a minute and washed his mouth out before he continued playing and completed the game. No treatment was given to LR’s eye.
15. Mr Kesley had advised the Referee of the incident and the Referee had apparently stated that he had not seen any foul play.
16. LR accepted that he had been involved in a number of legitimate physical confrontations during the game. It was also put to him that he had something of an ongoing battle, which at one point had culminated in a scuffle, with the Esher fly half.
17. Following the game he had seen the club doctor, who had advised him to seek hospital treatment. He then returned to his home in the North East following the game and sought attention at an A&E department once there. He was referred to an ENT department the following day where stitches were applied inside his mouth and it was initially feared that he had suffered significant nerve damage.
18. Happily that prognosis was unduly pessimistic, and LR reported that 99% of the feeling in his cheek had now returned. There though remains a small area where he has no sensory feel. It is however hoped that the small nerve endings that are likely to have snapped as a result of being over stretched by the incident will regenerate within 18 months. LR played again on 20 February 2010.
19. The Panel then considered the match recording. This had been taken by Esher and had not recorded the entire match.
20. The incident where LR claimed the offending had occurred was available, and was recorded at 20.53. Mr Haslam made the point in cross examination that this was not entirely consistent with LR’s claim that the incident had occurred “early in the second half”. He also noted that this was the only piece of footage available that could in any way have been consistent with LR’s allegations.
21. The Panel was advised that only 1.76 seconds elapsed from the time LR was tackled to the point at which the Player was legitimately cleaned out by another London Scottish Player.
22. It was accepted that the Player had not made the tackle and so would have had to have joined the breakdown and committed any act of foul play within that timescale.
23. It was not in any event possible to detect any foul play from the footage. A number of other London Scottish players, most notably the support runner who cleared out the

Player appeared to have a clear view of the breakdown, but none reacted in any way.

24. The Referee was well positioned at the break down and similarly did not see any foul play.
25. The Panel then considered the written evidence from Mr Kesley and Dr Chew. Mr Kesley had not seen the incident and his evidence was not specific to the footage relied upon by LR or any other piece of play. Unhelpfully, the footage available did not include the treatment administered to LR on the pitch. The Panel was however assisted by Dr Morris who indicated that the injuries recorded by Dr Chew would have been caused by a pulling action as described by LR.

DEFENCE CASE

26. The Player gave evidence. He is 30 years old and married. He has been in England for 5 years and joined Esher in 2004. Prior to the incident he had no disciplinary record. He sustained a serious broken leg last season and had only resumed playing some 3 weeks before this match.
27. The Player had only just come on to the field when the lineout that preceded the alleged incident took place. His participation at the breakdown was accordingly in effect his first physical involvement in the game.
28. He stated that from the line out he was covering the 9/10 channel and when LR was tackled by the Esher fly half he had joined the break down in an attempt to win turnover ball.
29. Although his hands were free he had been unable to get to the ball because the Esher fly half was on top on LR and so between him (the Player) and the ball. He had then very quickly been cleared out by a London Scottish support player which resulted in him being pushed to the ground behind the ruck that had formed.
30. He stated that he could not see LR's face and denied having come into contact with it (LR's face) at any time. He had been made aware of the allegation by club Mr Kibble after the game and had similarly denied any wrong doing at that time.
31. Mr Schmid then gave evidence by way of an analysis of the match recording on behalf of the Player. He noted that as a "7" the Player was trying to win turnover ball at the break down and had properly joined the ruck "through the gate". LR had squeezed the ball through is legs so the Player would have been following the ball and thus moving away from LR's face. In any event he had been legitimately cleared out very quickly and so his time to make contact was extremely limited. In his view contact with the eyes tended to occur in slow ball instances, which was very much not the case here. He noted the lack of reaction from any other London Scottish player and the positioning of the Referee.
32. The Panel also considered written statements from Mr Kibble and Mr Raybould. Mr Kibble recorded his inquiries after the game and the Player's denial of any involvement. Mr Raybould referred to other incidents during the game when injury could have occurred.

SUBMISSIONS

33. Mr Goudie submitted that the Player was guilty of a deliberate act of foul play. He confirmed that the incident had not been seen by anyone else but the incident had nevertheless occurred. In his view the Player was the only person who could have committed the offence. He rejected the suggestion that any other Esher player, and in particular the fly half, could have been responsible. He referred the Panel again to the video which he considered showed the Players right hand to be at exactly the point where the contact would have occurred.
34. He stressed the medical evidence and the fact that although LR had not seen the actual assault, he had "identified" the Player immediately after the game and so before he had seen the match footage.
35. In his submissions Mr Haslam made it clear that there was no dispute that a regrettable injury had been sustained. He however noted the standard of proof prescribed by the RFU Disciplinary Regulation and submitted that on the evidence the Panel could not be satisfied of the Player's guilt to the standard required.
36. In his submission LR's "identification" had strengthened over time. He stressed that on LR's own case he had not seen who had made contact with him. Whilst he had subsequently identified the Player, the Player had come to some prominence having been sent off (together with a London Scottish player) for a separate incident later in the game.
37. He relied upon the Player's previous good character and the fact that in reality the passage of play relied upon from the footage was the Player's first direct involvement in the game.
38. The evidence suggested that LR's head was to the left of and away from the break down and yet no other player or match official had seen the alleged incident. He further noted that the evidence did not suggest that there had been any "gouging" i.e. actual contact in the eye itself as LR had initially claimed. If contact had occurred at this incident, in his view the possibility that the Esher fly half had been involved could not be ruled out. In this regard he noted that there had a number of incidents between the two fly halves during the game. London Scottish had however pinned its colours firmly to the mast in citing the Player.

DECISION

39. The Panel had no hesitation in finding that injury had been sustained in the manner described by LR. It also found that, on the balance of probabilities LR's injuries had been caused in consequence of an act of foul play that was serious in nature.
40. The difficulty faced by the Panel was in finding evidence with which to be satisfied as to the identity of the culprit.
41. The available footage did not show the offending. The Panel was similarly not assisted by a reaction from other players that might normally have been expected or by the evidence from the Referee that he had not seen any foul play.

42. If (which could not be determined from the footage) the incident occurred during that passage of play, the Panel found that the position of the Esher 10 was such that his involvement could not be excluded and remained a possibility.
43. The Panel was mindful of the fact that the sliding scale no longer applies when determining the balance of probabilities. However when determining matters such as this there remains the need to have strong evidence to establish that it is more likely than not that the offence is proved.
44. Whilst there was evidence of offending available to the Panel, that evidence was insufficient to enable the Panel to be satisfied to the required standard as to the identity of the offender.
45. In those circumstances the Panel was unable to uphold the citing.
46. As noted, the Panel was satisfied that an act of foul play had occurred and this was not ultimately disputed by Esher. Given that a serious injury resulted, the Panel would very much hope that Esher will remind its players, in appropriately robust terms, of their obligations to the game and the standards that are expected of them.

Jeremy Summers

Chairman

10 April 2010