



NOTTINGHAMSHIRE, LINCOLNSHIRE & DERBYSHIRE
RUGBY FOOTBALL UNION

DISCIPLINARY DECISION

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JUDGMENT OF THE PANEL

Venue: Newark RUFC

Date: Thursday 14th February, 2019

Player: Ashley Piccaver ('the Player')

Club: Spalding RFC

Match: Mansfield 1st XV v Spalding 1st XV

Match Date: Saturday 9th February, 2019

Panel: Matthew O'Grady, Chairman
Timothy Bembridge
Michael Hilton

Secretary: Andrew Statham, NLD Disciplinary Secretary

Attending: The Player
Andrew Branton (Disciplinary Officer, Spalding RFC)

Preliminary Issues

1. There were no objections to the composition of the Panel.

Charge and Plea

2. On Saturday 9th February, 2019 the Player was sent off for allegedly kicking an opponent in the head.
3. On Monday 11th February, 2019 the NLD RFU settled a hearing notice particularising the following alleged offences:

“On February 9th Ashley Piccaver kicked an opposing player 38 minutes into the 2nd half of the league game between Spalding 1st XV and Mansfield 1st XV.”

4. The Player denied the citing that he had kicked an opponent

The Approach

5. At the outset of the hearing the Panel reminded itself, the Player and Mr. Branton of the contents of Reg 19.11.1, that the burden was on the Player to prove that the Referee’s decision to send off the Player was wrong. The standard of proof is the simple balance of probabilities. That is to say, it is more likely than not that the Referee was wrong. If the Panel considers that neither event is as likely as the other (essentially a 50-50 position), then the standard is not met, the burden is not discharged and the Referee’s decision is treated as not being wrong. We reminded those present of the express terms of Reg 19.11.1: “*In any such case, the Disciplinary Panel shall not make a finding contrary to the Referee’s decision unless it is satisfied, on the balance of probabilities, that the Referee’s decision was wrong.*” The Panel reminded itself, the Player and Mr. Branton of the general approach to hearsay evidence (Reg 10.10.6) and to the manner in which written evidence may be treated differently to oral evidence (Reg 10.10.5).
6. The Panel enquired of the Player whether it would hear oral evidence from those who had provided written accounts. It was clear no steps had been taken by the Player nor his club to ensure those who provided written accounts give evidence orally (by telephone or otherwise). The Player told us that Mr. Pogmore had messaged him earlier in the day to wish him well.
7. It was apparent to the Panel that the Player and Mr. Branton were naïve to the approach the RFU Regulations bound the Panel to take. We ensured they were provided a copy of the key Regulations and had time to consider them before we continued.
8. The Panel was anxious to ensure the Player be afforded every reasonable opportunity to present his case in its best light. We therefore urged the Player and Mr. Branton to take all the time they needed to make enquiries as to whether any witnesses that might be relied upon could give evidence by telephone, particularly bearing in mind that Mr. Pogmore was said to have been in contact with the Player earlier in the day. The Panel left the Player and Mr. Branton to make their enquiries and they were disturbed only for the Disciplinary Secretary to provide them with a copy of the Regulations to assist them in framing how the Player presented his case. When they were ready (about 20 minutes

later), the Player and Mr. Branton returned to the Panel. We were informed that, despite their efforts, they were not successful in contacting anyone the Player might rely upon.

9. We invited the Player and Mr. Branton to address us on how we should proceed in the circumstances. We were told they did not want to have to drive up and come back before the Panel on another date. Both the Player and Mr. Branton urged us to continue with the hearing despite their witnesses not being available to provide oral evidence. The Panel did not want to casually take that course so suggested they take some time to reflect on what they wanted to do. We were told in terms that the Player wanted to go ahead. The Player was informed that a postponement of this hearing to another date was an option so that he could ensure his witnesses were available and that, again, if he wanted time to reflect before expressing a definitive view we would happily give him that time. We were told in terms by Mr. Branton that if the Panel went on to make a decision adverse to the Player's interests that they would simply appeal the decision. The Panel informed the Player and Mr. Branton that the approach suggested by them was unsatisfactory and an Appeal Panel may not find a 'second bite of the cherry' approach attractive.
10. Neither the Player nor Mr. Branton made any request that the hearing be adjourned, despite this option being presented to them and with full knowledge of the approach within the Regulations. We asked, again, whether they would like to take further time to consider this before coming to a concluded view, but they did not. They were both clear and resolute that they wished the Panel to proceed. We were again told before continuing that the decision would simply be appealed if the Player found the outcome unsatisfactory.

The Evidence

11. The Panel heard oral evidence from the Player and the Referee, Mr. Wayne Franks. Additionally, we read written accounts from Mr. Peter Julian (Spalding RFC Treasurer and Touch Judge) and Mr. Phil Pogmore (the alleged victim of the kick). We say at the outset that we considered all the written and oral evidence with care. This judgment is not intended to be a transcript of the evidence given. We have considered all the evidence and its omission from this judgment does not mean that it has not been considered.

The Player

12. The Player informed us that the alleged incident occurred shortly after he had returned to the game after previously leaving the field of play for an injury. He told us that he saw Mr. Pogmore being tackled. The Player did not say that he saw anything illegal about the tackle. The Player said that he ran over to the ruck and "rucked over" Mr. Pogmore. The Player told us that he was trying to win the ball. We were able to infer, and the Player later confirmed, that Mr. Pogmore was lying on the ground when the Player arrived at the breakdown. The Player said that Mr. Pogmore turned to him whilst he was on the floor so that he was looking towards the Player's goal line. He said he saw Mr. Pogmore with an injury to his head. The Player heard a challenge from a Mansfield player that he had kicked Mr. Pogmore in the head. The Referee blew his whistle and told the Player that he had kicked Mr. Pogmore in the head. The Referee pulled out a red card, the Player asked what that was about and then left the field.

13. The Panel heard that when Mr. Pogmore was tackled he was lying in a diagonal position. The Player described Mr. Pogmore's head as being quite far from him and reiterated that Mr. Pogmore was facing him. We were told that there were about five Players in the ruck, a couple of other Players from his team and a couple of opponents. The Player informed us that the ball was slightly behind where Mr. Pogmore was. The Player reiterated, "I seem to remember [Mr. Pogmore] was facing towards me," with the inference being that the back of Mr. Pogmore's head was facing the Mansfield goal line.
14. The Player rejected the possibility that he was trying to get to the ball and as a result his foot recklessly made contact with Mr. Pogmore's head. He denied the possibility he had swung his leg through or around the ruck to try to get to the ball or kick the ball at any point.
15. The Player said that he saw Mr. Pogmore did receive treatment to his head immediately after he was sent off, which confirmed the accuracy of that part of the Referee's report. Mr. Pogmore, we were told, remained in the diagonal position that the Player described, throughout the time of being treated. It was therefore common ground between the Referee and the Player that Mr. Pogmore suffered an injury to his head of some kind.
16. After the game had finished the Player found Mr. Pogmore. The Player told us that Mr. Pogmore said he had been kneed in the back of the head. It was not clear how Mr. Pogmore knew he had been kneed, as opposed to kicked or any other type of physical contact, when it was to the back of head and presumably he would not have seen it. Mr. Pogmore is said to have told the Player that it was not the Player who was responsible (although we were not told who Mr. Pogmore thought had kneed him, if he could say). The Player told Mr. Pogmore that he would have to appeal the red card as he felt it was unjust and Mr. Pogmore told the Player that he would be happy to assist.
17. Finally, the Player told us that the Referee was very controlling and the game did not flow too well because of that.

Peter Julian

18. We were informed by Mr. Branton that Mr. Julian is the Club Treasurer and was acting as the Touch Judge for the match. He was on the touchline closest to where the foul play is alleged to have occurred. In advance of this hearing Mr. Branton emailed the Disciplinary Secretary a short typed account from Mr. Julian, which provided background information in relation to the Player and another player from his team, Mr. Jordan Templar, who had been sent off for two yellow cards. The email read as follows:

"Jordan's red card was due to receiving two yellow's. (sic).

First yellow was a first offence by Spalding in the red zone as Mansfield established several rucks / pick and drives on Spalding's try line. The referee I believe indicated that Jordan was half a step offside I think on the blind side of a ruck as they pick and drove forward on the openside so Jordan did not have a direct influence on play. Spalding's try line defence on the open side stopped a score but ref awarded a penalty try and yellow carded Jordan. From my point of view not a very logical decision as Jordan was not interfering with play and was a first offence, unlike Mansfield who had had a number of penalties awarded against them earlier and the ref constantly warning on verbal dissent (one time he

marched Mansfield back 30 metres for constant dissent) but no sign of a yellow card

Second yellow was probably correct as Jordan got involved in a bit of a fracas. Not sure of underlying cause. Second yellow therefore became a red

Ash Piccaver

Ash came of (sic) the bench to replace Kev Hudson in the dying minutes as Mansfield were pressing in our twenty two. Typically Mansfield were using their forwards. Ash within seconds of coming on, got involved and believe Ref red carded Ash for a kick to head/body of player on ground. Ash did not kick the Mansfield player and after the game the Mansfield player confirmed Ash did not kick him and is willing to provide a statement to that effect.”

Phil Pogmore

19. The Player’s club sent the Panel a word document within which was a short typed message, which read as follows:

“To whom this may concern,

My Name is Philip Pogmore and I play for Mansfield Rugby Club. I’m writing this letter to support Ashley Piccaver’s appeal. On Saturday the 9th we played Spalding RUFC to which Ashley received a red card. I am the player Ashley had allegedly kicked in the head. I can assure you that I received no such injury or harm. I’m hoping my letter will help in Ashley’s appeal as I would hate for a player to be banned for any length, especially in the circumstances that he didn’t do it.

If you need to clarify the validity of this letter, then please feel free to contact me via email philpogmore23@hotmail.co.uk

*Kind regards
Phil Pogmore”*

Andrew Branton

20. We asked whether Mr. Branton was in a position to provide evidence in support of the Player’s case. He told us he was not there. It follows that he could not say whether the alleged incident happened or not.

Wayne Franks – The Referee

21. The Panel considered the Referee’s report, which stated:

“Mansfield were attacking up hill when a ruck was formed and as the ball came out from the ruck into touch Spalding No.5 kicked Mansfield hooker in the head with force whilst he was on the floor.”

22. The Referee described himself being 1m from the incident and having a clear view. Under the question, ‘Did the incident require medical attention either on or off field?’ the Referee entered, “*Was checked out by Mansfield Physio.*”
23. The Referee was available by telephone and was called to provide oral evidence. The Referee said that he could not be sure whether anything had happened prior to the alleged incident. He checked the offside line and in doing so looked away from the ruck. He looked back to the ruck and then he saw the Player kick the head of the Mansfield player who was on the floor. The Referee added that he then heard the touch judge on that side of the pitch (Mr. Julian) say to the Player, “What do you think you’re doing? That’s your own player.”
24. The Referee was properly and courteously cross-examined by the Player and Mr. Branton. He was asked specific details about what happened in the ruck. The Referee could not be sure how many players were involved in the ruck. The Referee could not say which way Mr. Pogmore’s head was facing, but that he was lying in a 1 o’clock to 7 o’clock position. The Player thought that was a fair recollection. It was not suggested to the Referee, nor did the Referee say, that there had been foul play to Mr. Pogmore’s head in the process of Mr. Pogmore being tackled.
25. Mr. Branton invited the Referee to comment on why he thought Mr. Pogmore would say he was not kicked. Mr. Branton was advised by the Panel that the question, nor the answer the Referee provided to the question, would assist the Panel because the Referee could not be expected to know what Mr. Branton was thinking and the Referee’s speculation as to what he thought Mr. Pogmore was thinking would not help us resolve the issue. We urged him to focus on any factual issues, which he went on to do. It was suggested to the Referee that Mr. Pogmore might have been kned in the head. The Referee was clear and unambiguous in his answer that what he had seen was a kick to the head. The Referee could not be sure in his recollections as to where on the head the kick connected, but on whether there was a kick to the head or not, there was no doubt in his mind. He thought, but could not be sure, that it was the side of the boot that connected rather than being the heel or toe.
26. The Referee recalled Mr. Pogmore being treated for a number of minutes. Mr. Pogmore was able to resume playing the game after being treated.

Discussion

27. At the conclusion of the evidence we explained to the Player and Mr. Branton that we would welcome hearing any other representations they wished to present as to the decision we should make on the factual issue. We reminded them of the burden and standard of proof. The Panel suggested to the Player and Mr. Branton that they take some time to prepare their remarks and they accepted that invitation.
28. The Player and Mr. Branton returned to the Panel when they felt they had sufficient time to prepare their representations. The Panel is grateful to the Player and Mr. Branton for the measured, focussed and careful way in which they presented their remarks. We were urged to find the Referee had been wrong in the conclusion he reached. It was argued that the Referee was grasping at straws in his evidence and he had come up with the wrong decision. It was submitted to us that we should give significant weight to the written account from Mr. Pogmore, which was argued was exceptional in the

circumstances. Fairly, Mr. Branton offered that the Referee should not be expected to remember every single detail of the ruck.

29. There is no video footage of this alleged incident and therefore our decision turns on the assessment we make of the evidence we have read and which we have had the particular advantage of hearing. We have listened to the evidence and the representations on behalf of the Player with care. We have carefully read the evidence we had in writing. We have considered all the evidence in the round. As we set out at the conclusion of the hearing, when we gave brief reasons for our decision, this written judgment is to stand as the reasons of the Panel and stand in place any ex tempore reasons.
30. After considered deliberation we find that the Player has not proved on the balance of probabilities that the Referee was wrong.
31. First, we accept the evidence of the Referee. He was a neutral and independent observer, who clearly saw the contact of boot with head. He had a clear and unobstructed view. The Panel found the Referee to be measured in his evidence. He did not try to embellish his account and, where he could not recall a matter, said so. We accept the submission made to us that there were some areas upon which the Referee was not clear. However, we consider Mr. Branton's submission that the Referee should not be expected to remember every single detail was insightful. Whilst the Referee might not have precisely recalled every single part of what happened in a dynamic situation, he was adamant that he saw the kick. We reject the argument that the Referee was "clutching at straws" in the evidence he gave.
32. Secondly, the Player was a participant in a dynamic and physical situation. His focus was on winning possession of the ball. In the circumstances his evidence was less reliable than the observer Match Official who was not participating and was stood back looking at the unfolding situation.
33. Thirdly, although we were only able to consider the accounts of Mr. Pogmore and Mr. Julian in writing, we were prepared to approach their evidence with full weight as if it had been given orally. Even taking it at its highest there were limitations to the evidence both provided.
34. Mr. Pogmore was part of a dynamic situation. He was at the bottom of the ruck. There were players over him. We do not accept as being reliable the (hearsay) account provided through the Player that Mr. Pogmore was kneed in the head. Not because it is a hearsay account, but because of the position Mr. Pogmore was in and where he was looking. We were not persuaded to the appropriate standard that Player 'X', as opposed to *the* Player, had connected with the back of Mr. Pogmore's head (let alone that it was a knee). Mr. Pogmore's evidence that, "*I am the player Ashley had allegedly kicked in the head. I can assure you that I received no such injury or harm,*" does not sit comfortably with the fact that Mr. Pogmore was in fact injured by a blow to his head, for which he had to receive treatment.
35. Mr. Julian was acting as the club Touch Judge for Spalding. We accept the submission that we should not give weight to the evidence given by the Referee of the comments alleged to have been said by Mr. Julian. Mr. Branton was correct in his submission that the Referee could not be sure what Mr. Julian was speaking about. It follows we have disregarded that aspect of the evidence in coming to our conclusions. The evidence of

the Referee, that he saw the kick, and of Mr. Julian that there was no kick sits starkly against each other. We preferred the evidence of the Referee, being the independent Match Official, who was charged with officiating all the game (including foul play) as against Mr. Julian whose attention at the time was presumably more focussed on judging touch and who had no responsibilities of officiating foul play.

36. Fourthly, there is the absence of reliable or credible evidence of injury being caused by a means other than the means seen by the Referee. Mr. Pogmore, as we now know, was indeed injured to his head. He had to be treated for some minutes. The Player did not see any injury caused in the process of Mr. Pogmore being tackled. There is no evidence at all *from any source* of any injury being caused to Mr. Pogmore's head by the way in which Mr. Pogmore was tackled. The Referee did not penalise foul play in the tackle and the Player did not suggest to the Referee that there was foul play in the tackle. Mr. Pogmore does not suggest in his written account that he was injured as he was tackled. In considering the evidence in round we do not find, that the injury to Mr. Pogmore's head was caused in the act of being tackled. Furthermore, the Player did not see any players injure Mr. Pogmore in the ruck. In sum, the only act to have caused injury which was reliably witnessed, was that seen by the Referee.

37. The Panel therefore makes the following findings:

- a) The Player failed to prove the Referee was wrong.
- b) The Player was a part of a dynamic situation and, in attempting to win the ball in the ruck, he caught the head of his opponent, who was on the floor, with some force.
- c) The Player did not deliberately, intentionally or with any malice cause the foul play to take place. He was reckless.
- d) There was a light injury to the victim from the foul play, but not so serious as to prevent him playing after treatment was provided.
- e) In a dynamic and physical situation, the Player may have been unaware he made contact with the opponent's head whilst competing for the ball.

Sanction

38. The Panel then undertook an assessment of the Player's conduct under Regulation 19.11.8 as follows:

- a) *Intentional / deliberate.*

N/A

- b) *Whether the offending was reckless, that is the Player knew (or should have known) there was a risk of committing an act of Foul Play.*

The Player's actions were reckless. In trying to win the ball in the ruck he kicked the opponent in the head.

- c) *The gravity of the Player's actions in relation to the offending.*

Foul play to the head is always serious. There was some force as the Player was trying to win the ball in a contested breakdown, but no significant injury was caused.

- d) *The nature of the actions, manner in which the offence was committed including part of the body used (for example, fist, elbow, knee or boot).*

The Player recklessly caused his boot to come into contact with the head of his opponent.

- e) *The existence of provocation.*

None.

- f) *Whether the Player acted in retaliation and the timing of such.*

N/A

- g) *Whether the Player acted in self-defence (that is whether he used a reasonable degree of force in defending himself).*

N/A

- h) *The effect of the Player's actions on the victim (for example, extent of injury, removal of victim Player from game);*

The Player had to be treated on the pitch for the blow to the head. He was treated for a couple of minutes and then was able to resume playing. We assume there have been no lasting effects.

- i) *The effect of the Player's actions on the match.*

It was very close to the end of the game. The game had to be stopped whilst the injured player was treated.

- j) *The vulnerability of the victim Player including part of the victim's body involved/affected, position of the victim Player, and the ability to defend himself.*

The Player was in a vulnerable position on the floor and the connection was to a vulnerable part of his body.

- k) *The level of participation in the offending and the level of premeditation.*

N/A

- l) *Whether the conduct of the offending Player was completed or amounted to an attempt.*

Completed.

- m) *Any other features of the Player's conduct in relation to or connected with the offending.*

N/A

Aggravating Features

39. We considered the aggravating factors under Regulation 19.11.10, namely:

- a) *The Player's status as an offender of the laws of the game.*

The Player told us he has received at least two red cards in the past, over two seasons ago, which were for "fighting". He was also sent off as recently as Saturday 26th January, 2019. This Panel made the judgment in that case that the Referee was wrong to send the Player off and the red card was dismissed (reducing it to a yellow card). None of this history was in any way relevant to determining the factual issues before us nor in aggravating this offence.

- b) *The need for a deterrent to combat a pattern of offending.*

N/A

- c) *Any other off-field aggravating factor that the Disciplinary Panel considers relevant and appropriate.*

N/A

Mitigating Features

40. We considered the mitigating factors under Regulation 19.11.11, namely:

- a) *The presence and timing of an acknowledgment of culpability/guilt by the offending Player.*

The Player denied the offence. He refused to accept any culpability for the foul play.

- b) *The Player's disciplinary record and/or good character.*

Not a clean record, but the record was not treated as relevant in sanctioning the Player.

- c) *The youth and inexperience of the Player.*

Relatively experienced grassroots player.

- d) *The Player's conduct prior to and at the hearing.*

The Player conducted himself courteously and respectfully, despite disagreeing with the Panel's decision.

- e) *The Player having demonstrated remorse for the Player's conduct to the victim including the timing of such remorse.*

The Player denied committing any foul play. There was no remorse shown, but he may not have been aware he caught the opponent with his boot.

- f) *Any other off-field mitigating factor(s) that the Disciplinary Panel considers relevant and appropriate.*

The Player is involved in occasional coaching of his club's U7s side.

Decision

41. Word Rugby mandates that the Panel must not enter lower than Mid-Range (8 weeks) because the foul play was to the head. Although there was some force in the incident, Top End entry is not appropriate. The Player could not receive full credit, given his Not Guilty plea. The entry point was reduced by 25% (2 weeks) in light of the mitigating features. There were no aggravating features.
42. **Accordingly, the total period of suspension is 6 weeks.**

Return to Play

43. The period of suspension must be meaningful. The Player informed the Panel that he has Cup or League matches every week for the next 6 weeks. If that changes, he must advise the Disciplinary Secretary. The Player is suspended from Saturday 9th February, 2019 to Saturday 23rd March, 2019. **The Player is free to resume playing from Sunday 24th March, 2019.**

Costs

44. The Club shall pay costs to NLD RFU of £30.

Appeal

45. There is a right to appeal against this decision. Any such appeal must be made within 14 days of this judgment being received.

Matthew O'Grady
Chairman, for and on behalf of the Panel

Friday 15th February, 2019