



NOTTINGHAMSHIRE, LINCOLNSHIRE & DERBYSHIRE
RUGBY FOOTBALL UNION

DISCIPLINARY DECISION

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IN THE MATTER OF A CITING BROUGHT BY CHESTERFIELD PANTHERS RUFC

JUDGMENT OF THE PANEL

Venue: Newark RUFC

Date: Tuesday 30th April, 2019

Player: Baden Kerr ('the Player')

Club: Grimsby RUFC

Match: Chesterfield Panthers RUFC 1st XV v Grimsby RUFC 1st XV

Match Date: Saturday 2nd March, 2019

Panel: Matthew O'Grady, Chairman
Andrew Stout
Michael Hilton

Secretary: Andy Statham, NLD Disciplinary Secretary

Attending: Darren Burton (Disciplinary Secretary of Chesterfield Panthers RUFC)
Kim MacDermid (Grimsby RUFC)

Decision of the Panel

- (i) **The Player was guilty of striking Jack Burton to his temple with an elbow on one occasion using very significant force.**
- (ii) **The Player be suspended for a period of 20 weeks.**
- (iii) **Chesterfield Panthers RUFC costs of £125 be returned.**
- (iv) **Grimsby RUFC pay £30 costs.**

Preliminary Issues

1. The Chairman directed that the hearing be recorded. All witnesses were advised prior to their evidence that the recording was taking place. There were no objections to the composition of the Panel. The Panel case managed this citing after it was filed and the delay in the citing being heard was due to adjournments with the consent of both clubs to ensure the best evidence was available.
2. The Player attended by telephone and the Panel ensured it was mindful of the potential disadvantage the Player was at in how he explained his actions, as opposed to appearing in person. No criticism was attached to the Player or Grimsby RUFC for the Player not personally being in attendance. It should be noted that the Player attended (along with Mr. MacDermid) on an earlier hearing date, which was cancelled and the cancellation of which was not appropriately communicated to the Player. The Panel ensured that the Player was able to speak with Mr. MacDermid on the telephone in private at the conclusion of each witness' initial evidence and before any cross-examination on his behalf as well as before we were addressed on the appropriate period of suspension.

Citing and Plea

3. On 12th March 2019 Mr. Mike Curley (the Hon. Secretary of Chesterfield Panthers RUFC) filed a citing complaint against the Player.
4. On 21st April 2019 the NLD RFU settled a revised hearing notice particularising the following alleged offences contrary to Law 9.12:

“On Saturday 2nd March 2019 Baden Kerr struck with his elbow the Chesterfield player Jack Burton on the head whilst the player lay prone at the bottom of a ruck 15 mins into the first half of the league game between Grimsby 1st XV and Chesterfield Panthers 1st XV.”

5. The Player's formal position was that he admitted the citing. For the reasons that will be set out, the Panel found that the Player did not genuinely accept the description of his behaviour or meaningfully accept responsibility for his actions.
6. There was a single issue of fact for the Panel to determine, namely whether the Player had struck Mr. Burton three times or once.

The Approach

7. The Panel reminded itself and those present that as Chesterfield Panthers RUFC brought this citing, it must prove the allegations it makes are true. The Player had to prove nothing. The standard of proof is the simple balance of probabilities. That is to say, is it more likely than not that the alleged fact happened. If the Panel considers that neither event is as likely as the other, then the standard is not met, the burden is not discharged and the alleged fact is treated as having not happened.

The Evidence

8. The Panel heard oral evidence from two witnesses called by Chesterfield Panthers RUFC, both of whom also provided written statements, Mr. James Fisher and Mr. Burton. Additionally, we read written statements prepared by Ms. Carolyn Pike and Mr. Tom Heath.
9. The Player prepared a brief written statement and we heard his representations by telephone.
10. This judgment cannot hope to reproduce (and is not intended to reproduce) all the evidence given, but the Panel took account of all the evidence heard and read in reaching the conclusions it has. The actions alleged of the Player were very serious. There is no video or audio evidence of the alleged events. This case turns on the assessment we made of the relative reliability and credibility of the witnesses whose evidence we have had the advantage of considering.

Chesterfield Panthers RUFC's Case

James Fisher

11. Mr. Fisher described himself as being a 'referee developer'. He is not associated with either club, but was present to observe the referee. Mr. Fisher described the Player as being at a ruck. As the ball moved away from the ruck he saw Grimsby 7, who he now knows to be the Player, strike Chesterfield Panthers 7, who he now knows to be Mr Burton, to the head. He wrote that Mr. Burton was laying on the floor and was unable to defend himself because his arms were underneath a player above him. Mr. Fisher added that the contact was with the Player's elbow to the temple area of Mr. Burton's head. The force was so considerable that Mr. Fisher described being able to hear a loud noise at the time elbow connected with the temple. Mr. Fisher wrote that he saw Chesterfield Panthers 9, who we now know to be Mr. Heath, tackle the Player to the ground after seeing his foul play.
12. In his oral evidence Mr. Fisher told us that he saw only a single blow and no repetitive action. Mr. Fisher said that both players continued playing after the event, although he accepted he immediately walked up the touch line to identify Mr. Kerr and his attention was not on Mr. Burton.

Tom Heath

13. Mr. Heath played scrum half for Chesterfield Panthers during the match. He wrote that he saw Grimsby RUFC 7 punching Mr. Burton in the face. Seeing this he described that he removed the Player away from Mr. Burton.

Jack Burton

14. Mr. Burton is 18 years old. He became an adult in September 2018 and has been playing rugby since he was 17 years old. Mr Burton recalled being at the bottom of a ruck, having made a tackle. He said he was trapped with one arm free. With that free arm he grabbed the Player's shirt just below the collar. Very shortly afterwards he received, what he said, was the first blow to his head. Mr. Burton said he could clearly recall experiencing a second blow and believes, from what others have said to him, that it may have been as many as four separate blows. In his written statement, Mr. Burton said that the Player put his hand on Mr. Burton's chest to support his weight and then he, Mr. Burton, responded by grabbing the Player's shirt. Mr. Burton added that after the Player deliberately fell on him with his elbow the Player then struck him to the head three more times.
15. Mr. Burton told us that he recalls immediately being "very, very delirious" and the referee made him leave the field. Mr. Burton added that the club's physiotherapist, Ms. Pike, refused to allow him to walk to the changing room, that he had to be monitored for the remainder of the game and that Ms. Burton required him to sit next to her on the bus so that she could continue monitoring him.
16. We were told by Mr. Burton that he experienced notable symptoms after the match. They included; anger, emotional instability, headaches, migraines and loss of short term memory. Mr. Burton added that he experienced trouble balancing in the days immediately after the match and fell over. On Ms. Pike's advice, Mr. Burton went to his GP. So concerned was Mr. Burton's GP that he was referred for immediate attention at hospital, there being a concern that Mr. Burton had intercranial bleeding. Mr. Burton went to the Chesterfield Royal that day where he underwent a CT scan. The scan showed a serious concussion, but no bleeding.
17. We were told, powerfully, about the symptoms Mr. Burton went on to experience in the weeks after the game and how they affected him. Mr. Burton said he experienced mood swings and, in one example, had a breakdown at work. He told us he would get angry and irritated about very small things, which would send him into a rage. Mr. Burton said it was suggested to him by Ms. Pike that his symptoms were consistent with her experience of post-concussive syndrome.
18. Mr. Burton's persistent symptoms ended about three weeks before the hearing, but he continued to experience headaches until more recently. He has been symptom free for about one week. He was on no-contact training until Tuesday 16th April 2019. Mr. Burton was therefore symptomatic for over six weeks.

Carolyne Pike

19. Ms. Pike is a chartered physiotherapist, registered with the HCPC. In two written documents (a written statement and GP referral), Ms. Pike informed the Panel that Mr. Burton was removed from the game complaining of dizziness and fatigue. In addition to concussive symptoms, Ms. Pike observed notable tenderness in the left upper fibres of the trapezius (it is not clear these are causally linked to the strike). At a formal concussion assessment on Tuesday 5th March 2019 Ms. Pike observed ongoing cognitive and psychological symptoms with impaired balance and visual disturbances. Ms. Pike confirmed that Mr. Burton had short term memory loss and very little recollection of the incident. Ms. Pike noted in her referral letter that Mr. Burton is currently studying for A Levels and the sustained cognitive effort required by those studies were causing pain and discomfort, which was detrimental to his recovery.
20. Understandably, Mr. Burton was keen to return to play, but Ms. Pike refused to approve that at a clinic on Tuesday 26th March and during a telephone consultation on Sunday 7th April because she continued to observe emotional and cognitive symptoms consistent with a concussion. Mr Burton is to be commended for his honesty with the medical professionals and for his mature approach to accepting their advice, rather than rushing to return to play.

The Player's Case

The Player

21. The Player is a young man, also aged 18 years. He has played rugby from a young age and is in his second season of senior rugby. In a written statement submitted in advance of the hearing the Player said this:

“15 minutes into the game I was involved in a ruck. As other players joined in the ruck I was forced down and felt someone grab me round the throat. I lashed out with my elbow which I now know was a stupid thing to do. I admit the offence and I am deeply sorry for my conduct. I would like to apologise to the club and to the Chesterfield player and accept the citing and the clubs initial suspension.” (sic)
22. The Player did not accept striking Mr. Burton more than once. At the conclusion of Mr. Burton's evidence the Player was asked whether there was anything he wanted to say to Mr. Burton. The Player had nothing to add and did not offer an apology to Mr. Burton. Later, the Player said that there was nothing he could really say other than that he apologised and he should not have done what he did. When asked what he felt about the symptoms Mr. Burton said he experienced, the Player said that he thought they were “a bit exaggerated”. The Player accepted he had not reached out to Mr. Burton personally to apologise, whether by email, through his club or through any other route. When asked to describe his own actions, the Player said “all he had done” was try to “brush” Mr. Burton off him and that what his actions amounted to was a “nudge”.

Discussion

23. The Panel was not persuaded that the Player struck Mr. Burton more than once. We preferred the evidence of Mr. Fisher who was observing and not participating in the game over that of Mr. Burton, who's recollection of events was affected by the serious nature of the foul play. Mr. Burton was not lying when he said he was struck more than once. He was giving an honest account of what he thought happened whilst dazed in the immediate aftermath of being struck to the temple.

Sanction

24. The Player having admitted an offence under Law 9.12 the Panel undertook an assessment of the Player's conduct under Regulation 19.11.8 as follows:

- a) *Intentional / deliberate.*

The Player deliberately connected a single strike with his elbow to Mr. Burton's temple. Serious injury was an easily foreseeable consequence. The Player himself should have known the risk of concussion given he missed a week from work after being punched to the head in December 2018.

- 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.*

N/A

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

A very serious act of foul play which risked grave consequences.

- 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).*

This was a gratuitous and wholly unacceptable act of violence. The consequences could have been grave. The strike connected with an especially vulnerable part of the body, namely the temple. The force used was considerable, so considerable it was heard from where Mr. Fisher was stood.

- e) *The existence of provocation.*

Mr. Burton was holding the Player, but it was not proved that he was to the throat. What was described was not provocation and there was nothing which could have in any way justified the Player's actions.

- 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 consequences for Mr. Burton were very significant. We accepted Mr. Burton's and Ms. Pike's evidence as to the consequences for Mr. Burton. He suffered serious emotional, cognitive, psychological and physical difficulties over an extended period, all whilst he was studying for his A Levels and when he had work commitments. Medical professionals were so worried for Mr. Burton's welfare that he was required to urgently attend Accident & Emergency to undergo a CT scan. Mr. Burton's symptoms persisted for an extended period of at least six weeks and the Player's actions denied Mr. Burton the ability to play with his team mates in the final weeks of the season.

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

N/A

- 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 very vulnerable. He was on the floor with other players on top of him. Mr. Burton's movement was restricted and, although he had one arm free, he had no meaningful ability to defend himself from the violence inflicted on him. The head is a vulnerable part of the body, but the Player chose to strike an especially vulnerable part of the head, namely the temple.

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

Not premeditated.

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

The blow was completed.

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

The Player remained a part of the game and continued playing.

Aggravating Features

25. 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 has a poor record. He was sent off on Saturday 15th December 2018 for punching a player to the head for which he received a 3 week suspension. As a youth an RFU Disciplinary Panel upheld a citing of racial abuse by the Player.

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

The Player has committed two acts of striking to the head this season. In a matter of months from returning to the game after his last suspension he has committed a considerably more serious offence. The Player did not demonstrate any insight into the seriousness of his offending, preferring instead to suggest that Mr. Burton was exaggerating. Clearly, the Player's first period of suspension was inadequate in communicating the unacceptable nature of his conduct. We have no confidence, given the Player's lack of insight, that he yet appreciates the seriousness of his actions or that there will be any immediate change in his behaviour. This is all the more disappointing in light of the fact that the Player knows how serious head injury is, he having to miss a week of work after he was punched to the head in December 2018.

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

N/A

Mitigating Features

26. 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 pleaded guilty to the citing early.

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

Poor, as set out above.

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

The Player is a young man of just 18 years and is in his second season of senior rugby. He has been playing the game since being a junior and should know the Game's values.

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

Very good. He attended at an earlier hearing, which had been cancelled.

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

We accept that within his written statement the Player said he was deeply sorry and that he would like to apologise. However, his representations to the Panel were unsatisfactory and revealed his plea to be tokenistic. Rather than demonstrating any true acceptance of the factual position he minimised his actions, describing his own conduct as being merely to “brush” or “nudge” Mr. Burton with his elbow. This perception was reinforced by the Player’s belief that Mr. Burton had exaggerated his symptoms. Although the Player wrote that he was sorry, he did not even *try* to apologise to the Player after the game nor at any point since through an email between clubs or through any other means, except his written representations to the Panel, which were made almost a week before the hearing. It was only in the weeks after the Player was cited that he was prompted he put an apology to this Panel in writing. The Panel does not accept the Player is genuinely remorseful for his actions.

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

N/A

Decision

27. The Player was well represented by Mr. MacDermid, who presented the Player’s case effectively, courteously and made every point that could reasonably be made on the Player’s behalf. We invited representations from the Player and Mr. MacDermid on the appropriate Entry Point for this offending. Both were of the view that the Entry Point applied by the club in disciplining the Player (Mid Range – 6 weeks) was appropriate. The Panel informed the Player that the seriousness of his actions could warrant nothing other than a Top End Entry Point and that we should be addressed on the gravity of the offending in particular.
28. This was a serious act of violence, which can have no place in the game of rugby union. Put simply, the consequences could have been grave for Mr. Burton and this was completely lost on the Player. Whilst the Player may not have wanted to cause such serious injury to Mr. Burton, the way in which he brought his elbow so forcefully to such a vulnerable part of Mr. Burton’s head mean he can have expected nothing other than serious injury to result.
29. The persistent nature of Mr. Burton’s symptoms, along with their impact on Mr. Burton, weighed very heavily in the balance. The Player took Mr. Burton out of the game for the final weeks of the season and he has only just been able to return to training. The Panel took account of recent RFU cases with similar features and their Entry Points, namely:
- Jason Mills (2013): fracture and surgery under general anaesthetic. Entry point of 26 weeks.
- Courtney Roberts (2016): post-concussion headaches, dropped eyeball, surgery to correct eyeball and titanium plates. Entry point of 24 weeks.
- Shaun Thorpe (2016): 9 stitches, permanent 2 inch scar on side of face, severe jawline swelling. Entry point of 52 weeks.

Daniel Harris (2017): Concussion causing severe headaches, amnesia, fluid to leak from ears. Entry point of 20 weeks.

30. We noted that the initial Top End Entry Point for those offences was lower than the current 10 weeks. Taking all the features of the offending and its impacts on Mr. Burton into consideration we were driven to the conclusion that the appropriate Entry Point was Top End 24 weeks.
31. The Player's minimisation of his conduct, his lack of genuine remorse and poor record meant little mitigation could be applied. For the features that were present 4 weeks were discounted. The Panel was anxious to ensure the period of suspension was not crushing on this young player's aspiration to return to the game, but proportionate in deterring further foul play by him. With that in mind, and given the Player's poor history limited his mitigation, the discounted period of suspension was not aggravated. The Player's offence of racial abuse was not found to be relevant in our decision making due to the Player being a child at the time.
32. **Accordingly, the total period of suspension is 20 weeks.**

Return to Play

33. Grimsby RUFC suspended the Player with effect Saturday 6th April. He did not feature in any of the remaining fixtures for the season from that date (two league matches and one cup final). The Player has 17 weeks of his suspension outstanding. Grimsby RUFC should contact the Panel when the Player's 2019-20 fixture list is known and a return to play date will be set for him. He must not play until the date has been set.

Costs

34. Chesterfield Panthers RUFC was successful in its citing and the costs of £125 shall be returned. Grimsby RUFC shall pay £30 costs.

Appeal

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

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

Saturday 5th May, 2019