



IN RE APPEAL OF GERHARD VAN DER MERWE

APPEAL DECISION

February 11, 2021

JURISDICTION and AUTHORITY

This matter involves allegations of Foul Play by a Player within the Cayman Rugby Football Union (“CRFU”). World Rugby Regulations (“WR Regs”) 17, 18, 19, and 20, as amended effective January 1, 2021¹, cover all disciplinary actions for all players, WR Reg Preamble B; WR Reg 17 specifically addresses Foul Play as alleged here, and **“all Unions, Associations and Tournament Organisers shall adopt the World Rugby Sanctions for Offences within the Playing Enclosure”**, WR Reg 17.3.1(a). This matter involves CRFU players, clubs, match official, and judicial officials, and therefore the WR Regulations apply to this matter at the Disciplinary Committee (“DC”) and Appeal levels. Since this was an incident in a CRFU completion match, I am a WR and RAN certified Disciplinary Officer, I was appointed by CRFU to be the Appeal Officer (“AO”), and since during the Appellate Hearing no one objected to my serving as AO in this matter, I find that I have the authority and jurisdiction to hear this appeal.

¹ For a number of years, Rugby Discipline has been governed by WR Regs 17, 18, and 20. Effective January 1, 2021 (2 weeks prior to the match, incident, and hearing underlying this Appeal) World Rugby substantially revised the form of the Disciplinary Regulations, now including them in WR Regs 17, 18, 19, and 20; most of the revisions, which included renumbering many provisions, were made for greater clarity and better organization while for the most part not making substantial changes to the existing WR Disciplinary requirements and procedures. These revised WR Regulations apply to this matter, and to the best of my ability I will be referencing herein to these 2021 Regulations.

PROCEEDINGS BELOW

Based on the information supplied to me as set forth herein, and the information supplied during the Appeal Hearing, I find that the following occurred in this matter.

The CRFU has recently experienced a great deal of referee abuse of differing types during and in conjunction with matches. There are few referees available in general, they have often complained of abuse, and recently one referee quit rather than face further mistreatment; CRFU and its Referee Society had to talk him back into providing his services, lest they be left in even worse shape. Referee abuse is universally condemned in Rugby, and to address the current unacceptable situation, before this season began in January 2021 the CRFU Vice President of Rugby met with each of the member clubs, putting them on notice that the Union was not going to tolerate this pattern of referee abuse further and effectively immediately anyone engaging in such misbehavior would be disciplined strongly.

On January 16, 2021, during a regular CRFU season match between the Advance Fire Buccaneers (“the Buccaneers”) and the John Doak Tradeview Markets Iguanas (“the Iguanas”), Buccaneers Player Gerhard Van Der Merwe (“the Player”) was sent off by a CRFU appointed referee for swearing and other negative actions directed at the referee. Disciplinary matters are handled at the first level by a CRFU-appointed DC; any appeal goes then to a CRFU-appointed Appeal Officer. At the request of CRFU, on January 19 the Player provided a Statement regarding the incident and his explanation, and several hours later CRFU provided the Player with the Referee’s Red Card Report and the Charging Sheet. The CRFU DC held a hearing on January 21, 2021, at the conclusion of which it found that the Player had committed Foul Play-Referee Abuse with a Mid-Range Entry Point meriting a suspension of 6 weeks, commencing January 30 and concluding on April 11, 2021. The Player timely appealed and posted the required (WR Reg 17.24.5) Appeal Deposit of KYD 250. Since the regular CRFU AO was conflicted as he had been an Assistant Referee during the match, CRFU asked Rugby Americas North (“RAN”) to

suggest another AO, and RAN suggested that I serve as AO for this matter. I was pleased to be so appointed by CRFU to be the AO in this matter, and with the assistance of CRFU and the Player's counsel collected, and disseminated to all involved, the materials relevant to this matter. I held a Zoom telephone Appeal Hearing on Thursday February 4, 2021, at the end of which I indicated I would consider all materials submitted and issue a written Appeal Decision as soon as I could.

This Appeal Decision follows and this document constitutes the reasoned Appeal Decision. It is necessarily a summary, reached after appropriate consideration of all the evidence, submissions, and the other material placed before me. Nothing is to be read into the absence of specific reference to any aspect of the material or submissions before me. I considered and gave proper weight to it all. I apologize for its length, but the issues are not straightforward and require proper analysis, especially in light of the much appreciated, thorough, and thought-provoking Submissions and arguments of the Player's Appeal Counsel. For the same reasons, I determine that any timing errors in holding the Judicial and Appeal Hearings herein and issuing the DC Decision and this Appeal Decision have been caused by the nature of the proceedings, are reasonable, are technical only in nature, and are not grounds for reversal, amendment, modification, or quashing of these decisions. See WR Regs 17.30.2, 20.1.2.

SUMMARY OF APPELLATE DECISION

For the reasons stated herein, the Player's Appeal is granted in part and denied in part, and the DC's Judicial Decision is modified in part to allow the Player to play again beginning March 14, 2021. The Player having partially prevailed on appeal, he shall forfeit to CRFU KYD 150 of the Appeal Deposit and CRFU shall promptly return to the Player KVD 100.

EVENTS BELOW

The Game. Because, as with most Judicial Decisions, the outcome of this matter depends on the facts of what happened on the pitch, a somewhat explicit description of the underlying events is necessary.

Overall, when the referee here disallowed a try by the Player's team because it had thrown a ball into a lineout ("LO") too short, the Player proceeded to swear at the referee at least twice, gestured angrily at the referee at least thrice, and when the referee issued him a Red Card the Player aggressively took a couple of steps toward the referee, only to be shoved back twice by his own captain.

As the Referee's Red Card Report stated,

At approximate 30 mins into the 2nd half, after a decision to disallow a try for an incomplete lineout (not travelling 5m) against Buccaneers, the Number 3 [the Player] verbally abused me. He looked directly at me and told me to "fuck off" whilst pointing at me, this was repeated. I heard this very clearly and have no doubt it was pointed towards me. I asked the A/R (Nick Fox) if he could confirm the language used, he was unable to confirm. I stopped the match and spoke to the captain and the Number 3, I explained his behaviour towards a match official was unacceptable and had no place on a rugby field and deserved a red card. Just before leaving the field #3 took a few aggressive steps towards [me] and needed to be restrained by the team captain, I was walking away at time and decided [not] to react. However, the incident was intimidating.

There is a 1 minute 44 second video clip of most of these events, although the Player's statements at the referee are not audible. The video shows an attacking Buccaneers LO forming approximately 5m from the Iguanas' goal line and the Player, wearing Buccaneers jersey #3, is about to throw in the ball; the referee cannot be seen as he is apparently at the back of the LO, to the left of the camera view. The Player throws the ball in short; the first Buccaneer player grabs it and dives into in-goal for an apparent try approximately 6m from touch-in-goal (0:42). The Player follows his ball-carrying teammate into the in goal and is right next to the apparent try; the Player raises his right arm with his fist enclosed in celebration (0:43). As the Player is walking back up field, out of the in-goal, the referee, still off camera to the left, apparently disallows the try, and the Player is seen (0:45) yelling to the left (where the referee is) and jabbing his right arm and hand to the

left of the screen. The Player keeps walking back up field and the referee comes into view from the left at 0:50, walking along what had been the line of touch, facing and approaching the touch line while the Player appears to be about 5m away from the referee. The referee, still facing touch, has his right arm out toward the Player and his Buccaneers teammates, and appears to be talking to the assistant referee. The Player continues to walk up field, appears to say something to the referee, and shakes his head (0:54). The referee turns toward the Player and with both hands beckons for the Player and his captain (# 9) to approach the referee (0:55). The Player fails to go to the referee, instead apparently saying something else to the referee, and again jabbingly points at the referee with his right hand and arm. The referee then walks out about 4 or 5m toward the Player and his captain (1:03). The Player retreats and disappears briefly to the left of the screen and then, after talking to the Player's captain, the referee shows the Player a Red Card while gesturing to indicate the Player must leave the pitch (1:14). At this point the Player then reappears on the left side of the screen, takes a step or two toward the referee and from perhaps 5m from the referee the Player again animatedly points at the referee with his left arm and hand. The Player's captain is positioned between the Player and the referee and twice pushes the Player back away from the referee; at that point the Player turns away from the referee and walks back and off the pitch.

CRFU DC Proceedings. At some point in time the CRFU DC set a hearing on the matter for 5:30 pm January 21. On January 19, 2021, 2 days before the hearing, at the request of CRFU, at approximately 4:00 pm the Player provided his Report, confessing what that he had done and expressing remorse, in part as follows:

In the second half we had an important lineout near the Iguanas try line. I threw the ball low and straight to the front lifter (Joe Brown). Joe caught it and scored a try. The try was disallowed for the ball not travelling 5m. I saw the call was correct but in my frustration I reacted badly. I used profane language which was disrespectful to the referee. It was in the heat of the moment. I walked away to try to calm down. I expected to be told off so did not go far. I was called back and was surprised to receive a

red card, and I reacted again. I do not remember exactly what I said, but I do remember that I was not calm or respectful, and was moved away by my captain (David Stringer). I am extremely regretful of my actions, which let down myself and my team. It was not acceptable and I knew this straightaway. Once I had time to calm down, I offered my apologies to the referee and other people who I knew I had let down.

By way of explanation but not excuse the Player went on to describe his mental framework resulting for his experiences earlier this season and earlier in this game, explaining his general frustrations, about himself, this match, and this season, but not as an excuse; he repeated his apology several more times.

The materials sent to me regarding the exchange of documents immediately thereafter are a bit confusing. At 10:09 pm that January 19 evening by email the Player's Coach Chris Carroll indicated to CRFU official Mr. Jovan Bowles that he already had the CRFU Charging Sheet in this matter, and asked for copies of the DC Powers; Mr. Bowles was apparently acting as the Disciplinary Liaison Officer or Disciplinary Facilitator, see WR Regs 17.12.1, 18.6.1, 20.8.12(a). There is some evidence that the Charging Sheet and Referee's Red Card Report had been sent to the Player or his representatives at approximately 5:30 pm that Tuesday January 19. The Referee's Report is set forth above, and the Charge Sheet specified the charges against the Player and their possible penalties, to wit:

The Player is charged with breaching the following Laws:

- 1. "9.27 A player must not do anything that is against the spirit of good sportsmanship."**
- 2. "9.28 Players must respect the authority of the referee. They must not dispute the referee's decisions."**

The following Regulation 17 Appendix 1 sanctions are potentially applicable:

- 1. "9.27 A player must not do anything that is against the spirit of good sportsmanship including but not limited to:
...Other"**

Low end: 4 weeks Mid range: 8 weeks Top end: 12+ weeks Max: 52 weeks

2. "9.28 A player must not disrespect the authority of a Match Official."

Low end: 2 weeks Mid range: 4 weeks Top end: 6+ weeks Max: 52 weeks

3. "9.28 A player must not verbally abuse a Match Official. Verbal abuse includes, but is not limited to, abuse based on: religion, colour, national or ethnic origin, sexual orientation."

Low end: 6 weeks Mid range: 12 weeks Top end: 18+ weeks Max: 52 weeks

4. "9.28 A player must not use threatening actions or words towards Match Officials."

Low end: 12 weeks Mid range: 24 weeks Top end: 48+ weeks Max: 260 weeks.

Several hours later, at 1:17 am January 20, Mr. Bowles sent the Player's team the Referee's Red Card Report, the CRFU Charge Sheet (again), and links to WR Reg 17, and asked if the Player would be available for the January 21 hearing. Mid-afternoon on January 20 the Player's Coach Carroll inquired of Mr. Bowles regarding the charges, the possible duplication of charges, and definition of Abuse; Coach Carroll also supplied some Judicial Decisions from overseas regarding Abuse (I was not provided with these Decisions, but I believe they are included in the Appeal's subsequent Table of Cases). Mr. Bowles forwarded the Coach's email to DC Chairman Mr. James Austin-Smith, who at approximately 8:00 pm that evening replied to Mr. Bowles, indicating in part:

The short answer to Chris' question is that he needs to prepare to deal with abuse and threatening behaviour. The charges are set out under the section headed "The Player is charged with breaching the following Laws:"...

Under Law 9.28 there are different ways in which that Law may be contravened. In this case, the Referee's report suggests that the Law was breached in three ways: his authority was disrespected; he was verbally abused; he felt threatened (he used the word "intimidated") by the Player's actions. The relevant sanctions guidelines were therefore attached for each of these allegations. The Disciplinary Committee will consider the evidence and submissions (as explained above) and make a

decision about whether Law 9.28 (or 9.27) was breached and, if so in what manner, and whether that warranted a red card. If appropriate it will then consider the relevant sanction in accordance with the guidelines.

If Gerhard wishes to submit that he should not have been ordered of he should do so. If he wishes to submit that his actions do not constitute something that is against the spirit of good sportsmanship he should do so. Similarly, if he wishes to assert that his actions did not constitute verbal abuse and/or were not threatening to the Referee, then he should do so.

We regard “verbal abuse” as ordinary English words. If Gerhard wishes to defend himself against that aspect of the allegation on the basis that “Fuck you” is not verbal abuse then he should do so and the Disciplinary Committee will consider his submissions before making any decision as outlined above.

Mr. Bowles forwarded Mr. Austin-Smith’s email to Coach Carroll at some time thereafter, perhaps on the morning of January 21. Sometime before the DC Hearing the Player and his counsel submitted to the DC several letters of support from the Player’s teammates and coach.

The January 21, 2021 Disciplinary Committee Hearing

The DC held the Disciplinary Hearing on this matter on January 21, 2021. In attendance were DC Chairman Mr. James Austin-Smith, 2 other members of the DC, the Player, and his attorney Mr. Peter Sherwood; if there were others present I was not informed and no other people were identified. The hearing was audio recorded, which recording was subsequently provided to me and everyone else involved in this Appeal, including the Player and his Appellate Counsel Mallory Carroll.

During the DC Hearing the Player and his counsel fully admitted what the Player had done as described above, apologized again, and argued under Law 9.28 and the RFU Judicial Decisions that his behavior should constitute at most Disrespect of the Referee, but not Abuse or Threats. The Player and his counsel raised no other arguments at the DC Hearing.

At the conclusion of the Disciplinary hearing the JO issued a verbal Judicial Decision on the WR Judicial Decision Template, which was followed by a written Judicial Decision on January 25, 2021. In that written Decision the DC described the video as:

- 1. Video footage of the incident has been provided to the Committee. The video footage is from a single camera positioned in line with the halfway line approximately 50 metres from the incident. The footage is of good quality but only fully shows the incident up to the point that the red card was issued. It is however, possible to see the Player walking back towards the Referee after the red card was issued, gesticulating towards him before being intercepted by his captain and walking off. There is no audio of the exchange between the Player and the Referee.**
- 2. The Committee watched the video footage multiple times. The Committee considers that the following can be observed:**
 - i. the player walking away whilst the Referee is explaining his decision before issuing the red card;**
 - ii. the Player advancing back towards the Referee from out of camera shot after the red card had been issued;**
 - iii. the Player gesticulating towards the Referee;**
 - iv. the Buccaneers' Captain physically interposing himself between the Player and the Referee and pushing the Player away twice;**
 - v. the Player subsequently walking away shaking his head and gesticulating.**

Under Findings of Fact, regarding the Player's argument that his words and actions constituted only Disrespect but not Abuse, the DC ruled:

Based on the Player's own admissions in his written and verbal evidence the Committee finds that the charge of disrespecting the authority of the Referee is proved.

The Player's counsel addressed the allegation of verbally abusing the Referee. It was submitted that repeatedly telling the Referee "Fuck off" did not amount to verbally abusing *him* and was merely disrespecting *his authority*. Counsel drew the Committee's attention to a number of decisions of the RFU. Most reliance was placed on the RFU disciplinary panel judgment in Sinckler, dated 12 January 2021. It was argued that the

words used by the Player amounted to no more than disrespect of the Referee's authority. In Sinckler the allegation was that the Player had shouted "Are you fucking serious?". Whilst the expletive used in the instant case was the same the similarities end there. Sinckler was disputing a Referee's *decision* using foul language – the expletive served to emphasise the strength of feeling. In this case the Player made no reference to the Referee's decision – the expletive was deliberately aimed directly *at the Referee personally*. It was repeated and accompanied by gesticulating. After he had been ordered off the Player gesticulated further at the Referee, and by his own admission: "I reacted again. I do not remember exactly what I said, but I do remember that I was not calm or respectful".

Notwithstanding the articulate and comprehensive submissions made on his behalf by the Player's counsel the Committee is unable to accept counsel's submissions that this did not amount to verbal abuse. The Committee has little difficulty in concluding that the Player's actions amounted to verbally abusing the Referee.

These actions were, by definition, also contrary to the spirit of good sportsmanship, and accordingly the Committee also found this charge proved.

On the allegation that the Player had threatened the referee, the DC ruled:

The most serious charge the Player faced was that of using threatening actions or words to the Referee. This charge was based upon his actions after having been ordered off. The video shows the Player advancing back towards the Referee, gesticulating again and, by his own admission, not acting calmly. The Player's captain interposed himself between the Player and the Referee and twice shoved him backwards before the Player turned to walk away. The Referee stated in his report that the event was "intimidating".

The Player did not address this allegation specifically in his written evidence but it was clear that he did not accept it. His counsel, at the invitation of the Committee, did address the point. Counsel quite rightly did not seek to dispute the Referee's statement that he was intimidated by what took place, but this left him with the challenging problem of how

this intimidation had been caused, unless by the threatening words or actions of the Player.

In submissions counsel pointed out that the Player only took two steps towards the Referee and remained some distance from him at all times during the actions which gave rise to this allegation. He noted the statement of the Player's captain, that he only pushed the Player out of his own frustration and to ensure there was no further verbal argument, and by implication, not because he was having to restrain the Player. Counsel noted that had the Player chosen to continue towards the Referee the captain's actions would have been unlikely to have prevented that.

This allegation gave the Committee the greatest difficulty, however, in the end, and after very careful consideration of the evidence and counsel's submissions, the Committee found that it was not proved.

In summary, the DC found that the Player had acted contrary to the spirit of good sportsmanship (Law 9.27), and under Law 9.28 had committed acts of Abuse, not "just" disrespect toward the referee; the DC found that the Player had not threatened the referee.

As required, the DC then considered the factors set forth in WR Reg 17.17 and 17.18.1 to determine an Entry Point for a sanction, and concluded thereunder that these events required a Mid-Range Entry Point. For violation of Law 9.28 Abuse of a Referee, as stated in the Charging Sheet pursuant to WR Reg 17 Appx 1 the Mid-Range Entry Point is a suspension of 12 weeks. The DC then determined that there were Aggravating Factors Pursuant to WR Reg 17.19, as

The Committee considers that there is a need to deter players from engaging in Foul Play, particularly Foul Play that is the result of a loss of control or discipline on the part of the players and demonstrates a lack of respect for the Laws of the game and the authority of the Referee. That a further incident occurred after the Referee had ordered the Player off was an aggravating feature.

and

The Player is an experienced and senior player. As such, he should ensure that his conduct is sets an appropriate example.

However, in spite of finding these Aggravating Factors the DC imposed no additional sanction. The DC then considered possible Mitigating Factors under WR Reg 17.20.1, including

the Player's exemplary previous record, the excellent character references received (including in particular his involvement in assisting youth players), his early acceptance of his actions and his obvious and genuine remorse.

The DC therefore deducted 50% or 6 weeks from the suspension, the maximum deduction allowed, WR Reg 17.20.2, for a final suspension of 6 weeks, with the Decision specifying the upcoming matches affected by the suspension.²

The Player promptly filed a Notice of Appeal, on January 27, which I accepted as complying with WR Reg 17.24.4.

THIS APPEAL

Prior to the Appeal Hearing, the Player's appeal counsel Mallory Carroll sent to me her very thorough and detailed Appeal Hearing Submissions; during the Appeal Hearing Mrs. Carroll indicated that I should consider these Submissions as the applicable Notice of Appeal, which I agreed to do.

In anticipation of the Appeal Hearing, with the assistance of CRFU and the Player's counsel I collected, and disseminated to all involved, the materials relevant to this matter, including but not limited to the Referee's Red Card Report, video clip of the underlying incident, the Player's Statement, the Player's supporters' statements, statements from CRFU officials, DC Decision, the one hour audio clip of the DC hearing, the Player's Notice of Appeal, the RFU Disciplinary Decisions

² After finding that the Player's actions were also Contrary to the Spirit of Good Sportsmanship, Law 9.27, the DC made no further reference to this allegation and finding and imposed no separate sanction for this finding. Because the WR Reg 17 Appx 1 sanctions for Law 9.27 are less than for Law 9.28 Abuse, because the DC and the Player focused mainly on Abuse, and because all the allegations arose from the same series of events, I presume that any sanctions the DC would have assessed separately for Law 9.27/Sportsmanship were subsumed in and would run concurrently with the sanctions imposed for Law 9.28 Abuse, and thus any 9.27 sanction need not be addressed here.

submitted by the Player, and the Player's appellate counsel's pre-appeal hearing Submissions/Notice of Appeal.

Standard on appeal:

To prevail on appeal, pursuant to WR Regulation 20 Sections 4.5-4.6 the Player as the appellant must demonstrate:

4.5 Except where an appeal proceeds in whole as a de novo hearing it is for the Appellant to establish that the decision being challenged on appeal:

- (a) was in error (either as to central factual findings or in law);**
- (b) in the interests of justice should be overturned;**
- (c) the sanction imposed was manifestly excessive or wrong in principle...**

4.6 Except where an appeal proceeds in whole or in part, and then only with respect to that part, as a de novo hearing, appeals shall be conducted on the basis that:

- (a) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the relevant findings made by the Judicial Committee or Judicial Officer are manifestly wrong; and/or**
- (b) the evidential assessment or decision involving an exercise of discretion or judgment of or by a Judicial Committee or Judicial Officer shall not be overturned save in circumstances where the Judicial Committee or Judicial Officer applied wrong principles in the exercise of its/his discretion which has resulted in an erroneous decision being made;**

The Appeal Hearing:

I held the Zoom telephone Appeal Hearing on February 4, 2021. In attendance were:

James S. Russell-CRFU AO

Gerhard Van Der Merwe-the Player

Mallory Carroll-the Player's appeal counsel

Rhian Minty -CRFU Vice President of Operations

Ben McDonald-CRFU Vice President of Rugby

James Austin-Smith-CRFU DC Chairman

Mathew Dorrs-CRFU Disciplinary Officer

No one had any objection to my serving as AO in this matter. I reminded everyone that any false statements could be grounds for a separate action for Misconduct. See: WR Reg 20.4(e & i).

Allegations of Procedural Improprieties

1. Having to submit the Player's statement before seeing the Referee's Report. On appeal the Player first argues that he was improperly required to submit his Report to the DC before he had seen the Referee's Red Card Report and the Charging Sheet; the Player here did not specify which provisions of WR Regs 20.8.5 and 8.6 were the basis for this complaint, but just generally alleged that "**this directly contravenes the Core Principle of natural justice that 'players shall have the right to know the evidence against them' before responding.**"

I note first that the Player misquotes the Core Principle as found in WR Reg 17.1.1(d), as the actual Core Principle contains no reference to, and does not require that, players know the evidence "before responding"- there is no such specific temporal requirement in the Regulations or Principles. Indeed, with a Red Card situation such as found here, WR Reg 17.12.5 requires that the Player be provided with the Referee's Report and other evidence "as soon as reasonably practicable", and WR Reg 17.8.4 merely requires that the Player be supplied with the relevant

materials at any unspecified time “prior to the hearing”, which, as demonstrated herein, occurred in this matter.

Secondly, between receiving the Charging Sheet 2 days before the DC hearing and receiving the Referee’s Red Card Report a day or two before the hearing, and the time of the DC hearing, neither the Player nor his counsel ever raised this objection, they requested no more time to file an amended Report specifically addressing the Red Card Report or the Charging Sheet, they never requested a continuance of the DC Hearing to prepare further or gather more evidence or witnesses, and they never raised this issue at the DC hearing. (I see also that Mr. Jovan Bowles’ January 20 email to the Player’s Coach Carroll asked if the Player “**can be available for the hearing on Thursday at 5:30pm, at the Rugby Club Grounds?**”; I interpret this question to mean that had the Player and counsel needed more time to prepare for the hearing then the DC proceeding would have been continued.) The Player’s failure to raise to the DC any complaint about not receiving the materials before he submitted his Report may explain why the Player now does not even argue that this alleged error caused the DC to make a “manifestly wrong” finding in this or any area, WR Reg 20.8.6(a), or that this alleged error caused the DC to make an “erroneous decision”, WR Reg 20.8.6(b): the DC cannot be faulted for not addressing matters the Player never brought before it. The failure to raise these issues then could be considered a waiver of any such objection subsequently, including in this Appeal.

Further in this area, when he submitted his Report the Player may not have had before him the specifics of Referee Red Card Report or the Charging Sheet, but, as his Report confesses, he knew what he had done and that it was wrong; in fact, immediately after the match and 5 days before his submitted Report he apologized to the referee for his actions, and his Report to the DC states that he knew “straightaway” that his actions were “unacceptable”. As for any implication that perhaps he did not know the allegations against him and the possible sanctions he

faced, those allegations and possible sanctions were explicitly laid out in the Charging Sheet, which Coach Carroll had 2 days before the hearing. In addition the sanctions for all violations of Laws 9.27 and 9.28 are found in WR Reg 17 Appx 1, and pursuant to WR Reg 17 Preamble D as a participant in the Game the Player is deemed to recognize and be bound by the provisions of WR Reg 17, including the possible sanctions found in WR Reg 17 Appx 1.

It indeed would of course offend and violate the Fundamental Principles of Natural Justice [WR Regulation 17 Preamble B; WR Reg 17.3.1(d)] if the Player had been required to go into the DC hearing without being fully informed of the charges and evidence against him. However, as demonstrated above, all of the facts indicate, and I find, that well before going into the hearing the Player and his counsel felt they were fully informed: regardless of which came first on January 19 (Player's submission of his Report or Player's receipt of Red Card Report and Charging Sheet), the Player was in fact fully informed nearly 48 hours before the DC Hearing. Therefore, in compliance with the actual requirements of WR Core Principle 17.1.1(d) the Player was indeed "afforded the right to know the evidence against" him well before the DC Hearing.

Finally, even if there were some requirement that the Player receive the subject documents before he responded, which requirement I find does not exist, and even if the Player had raised this objection to the DC, which he did not do, I find that since the Player was fully informed of everything relevant well before the DC hearing, any alleged violation of this non-existent temporal requirement would have been and is harmless and further would have been and would have been and is only a "defect, irregularity, omission, or other technicality" which does not raise "a material doubt as to the reliability of the findings of a Disciplinary Committee" nor did it "result...in a miscarriage of justice." WR Regs 17.30.2, 20.1.12.

For the reasons stated above, the Player has failed to substantiate that this allegation establishes any errors pursuant to WR Reg 17.8.5, he has failed to establish any of the requirements of WR Reg 17.8.6, he has failed to establish any violations of any of the WR Reg 17 Core Principles, and this ground for the Player's appeal must be rejected.

2. A "72 Hour Rule" for Evidence. WR Reg 17.12.7 requires a hearing "where reasonably practicable" be held within 48 hours, or "in exceptional circumstances, no later than 72 hours of the conclusion of the Match". (There is apparently a similar provision under "the CRFU Hearings Procedures", but I have never been provided with that document.) Since in this instance the Player was provided with the Referee's Report and Charging Sheet on January 19 perhaps a couple of hours after that "72 hour window", on Appeal the Player argues again that such a process also violates "the core principles of natural justice" because it somehow made "gathering contemporaneous and fulsome witness evidence against the unexpected allegations impossible". Again, the Player and his DC Hearing counsel failed to ask the DC for a continuance to find this evidence or witnesses, and again failed to raise this issue before the DC before or during the DC Hearing, which failures could again be deemed a waiver of this argument. In addition, at the Appeal Hearing the Player could not substantiate just what evidence or witnesses he was somehow unable to gather once this "72 hour window" had passed on January 19, or why he was unable to gather evidence or witnesses in the 48 hours between the end of the 72 hour window on January 19 and the actual DC Hearing on January 21. I find once more that providing the Referee's Report and Charging Sheet after the 72 hour window was again at most harmless, technical error or a "defect, irregularity, omission, or other technicality" which did not prejudice the Player and does not raise "a material doubt as to the reliability of the findings of a Disciplinary Committee" nor did it "result...in a miscarriage of justice." WR Regs 17.30.2, 20.1.12.

Again, for these reasons stated above, the Player has failed to substantiate that this allegation establishes any errors pursuant to WR Reg 17.8.5, he has failed to establish any of the requirements of WR Reg 17.8.6, he has failed to establish any violations of any of the WR Reg 17 Core Principles, and this ground for the Player's appeal must also be rejected.

3. Inability to Recollect. Next, the Player alleges that the DC "clarifie[d] its approach to sanctions only on the day of the [DC] hearing", which timing somehow again interfered with the Player's ability to gather witnesses because, whoever they were, their recollections and his of the match events were "reduced due to the passage of time." I have already found that the Player had been informed or "clarified" as to the charges and sanctions not on the day of the DC Hearing but a day or two beforehand. To the extent that the Player is again alleging an inability to gather evidence and witnesses merely due to the timing, such an argument has already been rejected, *supra*. To the extent that the Player is alleging that some timing issue caused memories to fade and thus interfered with his presentation, such an argument is rejected as ridiculous. Not only could the Player not substantiate this claim, but I also note that while memories may indeed fade and witnesses disappear or become unavailable due to the passage of a period of time which is significant, such as months, in this case a total of only 5 days had elapsed between the match, the Red Card, and the DC hearing. It is literally unbelievable that in such a short time span the Player, any potential witnesses, and anyone else at the match or involved in this matter would have forgotten anything significant. I must add that during the Appeal Hearing, 14 full days after the DC hearing and 19 days after the match, the Player spoke clearly and coherently and had no problems whatsoever recounting events of the match, his interaction with the Referee, his remorse, and explaining the causes of his frustrations.

The Player has failed to substantiate that this allegation establishes any errors pursuant to WR Reg 17.8.5, he has failed to establish any of the

requirements of WR Reg 17.8.6, he has failed to establish any violations of any the WR Reg 17 Core Principles, and this ground for the Player's appeal must also be rejected.

4. General Procedural Claims. After setting forth the 3 Procedural claims above, as evidence that the Player was denied Natural Justice due to all these alleged procedural errors in general, the Player's Appeal Counsel quotes the DC Decision that, "*The Player did not address this allegation [threatening the referee] specifically in his written evidence but it was clear that he did not accept it.*"; Appeal Counsel argues that "**The player did not address the allegation because he did not know the allegation, or any specific allegation or potential sanction (including the critical abuse allegation), at the time he was made to produce his own witness evidence; a clear breach of natural justice.**" It is clear that counsel is once again arguing, now with reference to all the Procedural allegations collectively, that the Player was somehow injured because he didn't know the details of Referee's Red Card Report and the Charging Sheet when he submitted his own Report. I have already rejected this argument, as I have found that, as a result of the other events in this matter, even if the Player had not earlier seen the Referee's Red Card Report and Charging Sheet, with all the information contained therein when he submitted his Report, such was an immaterial technicality, that as a result of the Player's receiving all the information but a few hours after submitting his Report, and since the DC hearing did not occur until a day or two hours later the Player was fully and sufficiently informed of the evidence and allegations in plenty of time to prepare for his Hearing. I also note that, as the quoted DC Decision specifically stated, the "allegation" that the Player did not address related to allegations he had threatened the Referee. Since the DC ultimately found that the Player had not threatened the Referee, any reference to the Player's alleged failure to address that accusation, and any potential negative impact such an alleged failure that may have allegedly flowed to the Player, is immaterial. This allegation on Appeal is also rejected.

Allegations of Errors in Law

Turning from the allegations of procedural errors as discussed above, the Player and his Appeal Counsel raised substantive allegations that in violation of WR Reg 20.8.5(a) the DC had made 2 error in Law or in WR Disciplinary Regulations which should be overturned under the provisions of WR Regs 20.8.6(a & b).

1. Mischaracterizing the Player's actions as Abuse rather than Disrespect
Law 9.28 in part requires: **Players must respect the authority of the referee. They must not dispute the referee's decisions.** The WR Reg 17 Appx 1 Sanctions table distinguishes 5 different circumstances which violate this Law, each with its own set of sanctions; the sanctions for Verbal Abuse of a Referee are generally three times as high as the sanctions for Disrespect of a Referee. In this matter, based on the facts set forth above the DC found that, while the Player had not threatened the referee(which would have led to a sanction range double that of Verbal Abuse and 6 times that for Disrespect), the Player had committed Abuse.

On Appeal, the Player disagrees with this DC finding, alleging it is an error in Law (or WR Reg), as the Player admitted to and should only have been found to have committed, Disrespect, but not Abuse. The Player's DC Hearing counsel, Mr. Peter Sherwood, had already submitted to the DC several RFU Disciplinary Decisions in support of this Disrespect v Abuse argument; the Player's counsel's argument before the DC was that the distinction between Abuse and Disrespect hinged on whether the Player had attacked the referee personally, which would be Abuse, or had only attacked the referee's authority, which would be Disrespect, and that the Player had not attacked the referee personally. The DC disagreed, finding that the Player had attacked the referee personally.

Appeal Counsel Mallory Carroll adopted these same RFU Decisions with a detailed and a very clear Table of Cases showing the facts, the Abuse v Disrespect findings of each, and the sanctions imposed; however she changed the focus, now relying on the Table of Cases to argue that these

Decisions establish that, **“The gravamen of abuse is that the nature of the attack is based on characteristics personal to the victim.”** The argument is based on the WR Reg 17 Appx 1 description of Abuse as **“includes, but is not limited to, abuse based on: religion, colour, national or ethnic origin, sexual orientation.”** These categories are sometimes referred to as “protected characteristics”, “suspect criteria”, or “hate speech”. The Player’s appeal argument is that if the criticized language or actions do not consist of these specific characteristics, criteria, or speech, then, “Any other attack coming within the orbit of abuse MUST be hateful enough to deserve categorisation alongside a racist or homophobic attack. ‘Fuck off’ is not in this orbit - it is a statement that could be directed at anyone, irrespective of individual characteristics.” Counsel’s Table of Cases is offered ostensibly to show that Abuse has only been found where it has been directed at the referee personally and involved the characteristics set forth above, while more general statements, even though profane, were deemed Disrespect only.

Disregarding this change of approach by the Player’s counsel (which flexibility, after all, is what successful attorneys exhibit), while the Table of Cases is well done and very interesting, and one of the objectives of WR Reg 17 is to achieve consistency and uniformity in the administration of Rugby Discipline, WR Reg 17 Preamble B, as I noted during the Appeal Hearing in a rugby Disciplinary matter such previous Judicial Decisions are not controlling. **“Strictly speaking there is no doctrine of *stare decisis* in rugby.”** (*In re Appeal of Kepu*, Autumn Internationals 2017, Jan 17, 2018 at p. 15), and matters should be considered from the viewpoint of **“a common-sense rugby person”** (*In re Appeal of Kepu, supra*, at p. 14). Further, **“Each case is different. The individual circumstances of each player coming before a JO [Judicial Officer] needs to be examined having regard to the factors that are required to be taken into consideration...”** *In re Appeal of Vaiomanu* (IRB Pacific Rugby Cup, March 21, 2014, at p. 15). In other words, while

the Appeal's Table of Cases is revealing as to what other Disciplinary Officials have determined in various other situations, and may be used as guidance only, I must determine the issues here based on the common sense of a rugby person and considering the particularities of this specific incident. The underlying rationale for requiring such an individualized analysis is clear: over the 80+ minutes of a match there are so many different ways matters can occur among the 30-46 players, the referee, 2 assistant referees, 2 touchline assistants (Numbers 4 and 5), and innumerable coaches, physios, and even spectators, that the facts constituting any one event and underlying any specific Judicial Decision will easily be differentiated from any other event and decision. Opening the door to such dissections in such a variety of situations would be to "cavil on the ninth part of a hair". W. Shakespeare, *Henry IV, Part I*, Act 3, Scene 1. For instance, the Player's Appeal Table of Cases presents 8 other incidents, some involving referees but most involving only players, some involving profanity but some not, some referencing sexual contest but some not, some involving words only while 2 also included some kind of physical motions. Trying to determine absolute pathways and mandatory rulings from such a diverse caboodle of circumstance would be nigh onto impossible. For all these reasons, I must decide this matter based on all the facts in front of me and the DC under the framework of WR Regs 17-20 without being strait-jacketed by previous Decisions with potentially distinguishable circumstances.

Player's counsel, at the DC and on appeal, argue that the Player's actions should "only" be deemed Disrespect but not Abuse, because the Player "only" yelled "Fuck off", not "Fuck you" at the referee. On the contrary I find that in this instance to distinguish between "off" and "you" is to make a distinction without a difference. The clear import of both versions is that the Player was very demeaning the referee, which is not permitted, and in this instance the Player was so attacking the referee personally, directly, very publicly and in front of all the other players and

whoever may have been on the touchline. Further, in this instance, the Player issued this profanity at the referee not once but at least twice. In addition, while so yelling at the referee, the Player thrice angrily and threateningly gestured at the referee with his hands and arms. And at one point during this disgraceful episode the Player actually advanced a few steps toward the referee until his captain pushed him back, twice. I find that all of these actions by the Player constitute Abuse, not “just” Disrespect. Based thereon, I cannot disagree with the DC’ Finding of Facts that, **“In this case the Player made no reference to the Referee’s decision – the expletive was deliberately aimed directly at the Referee personally. It was repeated and accompanied by gesticulating.”** I find that this Abuse Finding of the DC was not **“in error (either as to central factual findings or in law)”**, WR Reg 20.8.5(a), should not be overturned **“in the interests of justice”** be overturned, WR Reg 20.8.5(b), was not **“manifestly wrong”**, WR Reg 20.8.6(a), and was not **“an erroneous decision”**, WR Reg 20.8.6(b).

The Appeal’s allegation that the DC’s finding of Abuse was an error in Law or Disciplinary Regulation is rejected.

2. Mischaracterizing the Player’s Abuse as Mid-Range

The DC assessed the Player’s Abuse as Mid-Range, WR Reg 17.18.1. Without agreeing that the Player’s conduct should be characterized as Abuse, relying again on his Table of Cases on Appeal the Player argues that if his conduct is Abuse, it should be assessed as Low End, not the Mid-Range assessed by the DC. Though not specified, I presume the Player is arguing pursuant to WR Reg 20.8.6(a) that the DC’s exercise of discretion in so assessing a Mid-Range level of seriousness was manifestly wrong, and under WR Reg 20.8.5(c) resulted in a sanction which was manifestly excessive.

For the possible sanction for this Red Card, as already demonstrated, I once more must determine this and all issues “as a common-sense

rugby person”, *In re Appeal of Kepu, supra*, based on the individual circumstances of each matter, *In re Appeal of Vaiomanu, supra*. And there is no *stare decision* in rugby, *In re Appeal of Kepu, supra*, so that the Decisions the Player relies on in this Appeal are again not controlling. However, I may look to such decisions for general guidance, *In re Appeal of Kepu, supra*, at 15. In other words, the Judicial Decisions the Player cited in the DC hearing and on appeal are not mandatory but may be considered as guidance, coupled with my view as a common-sense and experienced rugby person. In this light, I agree with the Player on appeal that the entry point for his Abuse should be Low End, not Mid-Range.

As a common-sense rugby person I find that a Mid-Range assessment for Abuse would normally (but not exclusively) be applied to those situations described above involving, as Appeal Counsel argued, “protected characteristics”, “suspect criteria”, or “hate speech”, which characteristics, criteria, or speech were not present here. What the Player did here was to swear at the referee, gesture at him, and take a couple of steps toward him, but he did not hurl vile epithets or take other heinous actions. I must make my Entry Point determination in this Disciplinary Appeal Officer as an independent Judicial WR Regs 17 Preamble, 17.3.1(e), 17.7.8(b). As such, while not in the slightest minimizing the concerns about what the Player did and said, and taking into considerations all of the factors set forth in WR Reg 17.8.1 as determined by the DC, the guidance (but not requirements) of other Judicial Decisions, and the common-sense of a rugby person, I find that the Player’s Abuse is Low End.

Accordingly, and respectfully, I find that the DC assessment of the Player’s conduct as Mid-Range, WR Reg 20.8.6(a), was manifestly wrong, in the interest of Justice must be overturned, WR Reg 20.8.5(b), and that the Player’s conduct must assessed as Low End. Therefore, the initial imposition of a Mid-Range sanction of 12 weeks was manifestly

excessive. WR Reg 20.8.5(c). The WR Reg 17 Appx 1 initial Low End sanction for Referee Abuse is 6 weeks.

3. Determining the Sanction-Aggravating and Mitigating Factors

My duty as Appeal Officer is to ensure the integrity, image, and reputation of The Game generally. WR Reg 17 Preamble A. Therefore finding that the Player's conduct must be assessed as Low End pursuant to WR Reg 17.18 does not end this matter, as I must now determine what the resulting sanction now should be and thus whether the DC erred in determining Aggravating and Mitigating Factors, regardless of to which Entry Point they are to be applied, WR Regs 17.19 and 20. As also set forth above, the DC found that there were 2 Aggravating Factors:

The Committee considers that there is a need to deter players from engaging in Foul Play, particularly Foul Play that is the result of a loss of control or discipline on the part of the players and demonstrates a lack of respect for the Laws of the game and the authority of the Referee. That a further incident occurred after the Referee had ordered the Player off was an aggravating feature.

and

The Player is an experienced and senior player. As such, he should ensure that his conduct is sets an appropriate example.

Yet the DC inexplicable failed to apply any further sanction for these Aggravating Factors, or explain why they did so. The DC's failure here was serious in that, as noted above, the CRFU has faced a significant problem with referee Abuse and shortly before this match and the events underlying this Appeal the CRFU Vice President of Rugby was forced specifically to warn all the teams, including the Player's Buccaneers, that

there had been a pattern of referee Abuse, and to put the teams and players on notice that referee Abuse would no longer be tolerated but would be met with strong disciplinary action. The DC recognized this warning, as in a post-Decision Note it stated:

The Committee is aware that there has been a marked increase in incidents of Foul Play involving abuse and disrespect directed at Referees and Match Officials in Cayman. The Committee understands that the situation was sufficiently serious to necessitate a meeting to address the issue with teams' management and coaches at the start of the season.

The DC even quoted the current language of WR Reg 17.19.1(b) listing as the Aggravating Factor of

the need for a deterrent to combat a pattern of offending in the Game where the teams participating in the Match or Tournament have been put on notice that such a need exists...

However the DC then stated:

If a Player (or anyone else) comes before the Disciplinary Committee in the future for an act of Foul Play involving or directed at a Referee or Match Official, they should expect to receive an additional period of suspension, above the applicable entry point, to reflect this aggravating feature and the need for deterrence.

In choosing to apply this Aggravating Factor to the CRFU teams and players only "in the future, the DC erred, as World Regulations 17-20 became effective on January 1, 2020, and CRFU and its DC were bound to enforce and apply the Aggravating Factors as of that date, not "in the future." In addition, the DC thereby effectively gave this CRFU Player a free bite but would not be treating other CRFU players the same, which

approach is inconsistent and does not comply with the fundamental principles of Natural Justice. WR Reg 17 Preamble B.

As Appeal Officer and a common-sense rugby person, I find that the announced Aggravating Factors require an increase in the sanction by 2 weeks, to 8 weeks.

Turning to the Mitigating Factors, the DC found and immediately (not “in the future”) credited the Player with several, including that the Player’s admission that he had acted improperly, clean disciplinary record, and expression of “clear and genuine remorse”; based on all these matters, the DC reduced his Mid-Range sanction by 50%, to 6 weeks. I have seen nothing to contradict this DC finding. As Appeal Officer and as a common-sense rugby person I accept that the Player’s sanction should be reduced 50% by these Mitigating Factors. Normally, such mitigation cannot exceed 50% of the 6 week Entry Point, not 50% of the 8 week calculated Entry Point plus Aggravating Factors, WR Reg 17.20.2. On Appeal the Entry Point has now been set at the Low End of 6 weeks, and thus normally the Mitigating Factors would only reduce the final sanction by 3 weeks (50% of 6 weeks, not 50% of 8 weeks), to a sanction of 5 weeks. However, I further find that such a sanction of 5 weeks would be “wholly disproportionate to the level and type of offending involved”, WR Reg 17.20.3(b), and I therefore lower the sanction by 4 weeks from the Entry Point plus Aggravating Factors, to 4 weeks, as I am authorized to do since I have set the Player’s offending as Low End. WR Reg 17.20.3.

As the result of all these findings, Regulations, calculations, and gyrations, the Player’s sanction shall be 4 weeks.

Timing of the Player’s Revised Sanction

The DC Decision suspended the Player as follows:

The Player will be suspended for the following matches:

Advance Fire Buccaneers v Queensgate Pigs Trotters, 30 January 2021

Advance Fire Buccaneers v Fidelity Cayman Storm, 13 February 2021

Advance Fire Buccaneers v Queensgate Pigs Trotters, 27 February 2021

Advance Fire Buccaneers Advance v John Doak Tradeview Markets

Iguanas 13 March 2021

plus 2 more subsequent matches which were not yet determined but which I am informed are the CRFU playoffs. In light of the findings herein, this list of suspended games is affirmed in part, to wit: since I have determined that the Player should be suspended for 4 weeks, he will therefore be suspended for those 4 matches specified in the DC Decision and set forth above. The Player has already sat out the January 30 match. The Player may resume play as of March 14, 2021, and will be eligible to play the final 2 matches, on March 27 and April 10.

If any of these matches are cancelled, postponed or altered for any reason, such as due to weather or Covid or anything else, I am to be informed immediately so this suspension schedule may be amended as necessary.

CONCLUSION

The DC's determination that the Player committed Foul Play-Referee Abuse is **AFFIRMED**, the DC's assessment of an Entry Point for that Abuse at Mid-Range is **REVERSED** and the Player's Appeal on this issue is **GRANTED** as the Entry Point is set at Low End, 6 weeks. The DC's failure to apply an increased sanction in spite of its finding of Aggravating Factors is **REVERSED**, and the Entry Point plus Aggravation Sanction is set at 8 weeks. The Mitigating Factors initially **REDUCE** the Sanction by 3 weeks, to 5 weeks. Such a 5 week sentence is wholly disproportionate to level of the Player's offending, and thus the Player's suspension is further **REDUCED** by another week. Overall, the Player is suspended for 4 weeks, from January 30 through March 13, 2021, and the Player may return

to play on March 14, 2021. With those modifications the remainder of Player's appeal is DENIED.

DEPOSIT AND COSTS

The Player has partially prevailed on Appeal, in that his prayer to be found to have committed Disrespect "only" was rejected, but the Entry Point for his Abuse of the Referee was reduced to Low End, and his overall suspension was reduced from 6 weeks to 4 weeks. Accordingly, of the Appeal Deposit of KVD 250, CRFU shall promptly return to the Player KVD 100, and the remaining KVD 150 is forfeited to CRFU.

No other costs have been sought or established, no further costs are assessed.
WR Reg 20.1. 7.

James S. Russell

CRFU Appeal Officer

February 11, 2021