

**IN THE MATTER OF THE DECISION OF THE JUDICIAL OFFICER HHJ
BLACKETT OF 19 OCTOBER 2011**

Brought by: RWCL
Against: Eliota Fuimaono-Sapolu (the Player)
Event: RWC 2011, New Zealand

Background

1. On 19 October 2011, when sitting as an independent Judicial Officer at RWC 2011, I found the Player guilty of misconduct relating to abusive and offensive comments, which he posted on his “Twitter” account, about the referee who officiated in the match between South Africa and Samoa. I imposed a sanction in the following terms (the Decision):

“The Player is suspended from playing for six months, but that suspension is suspended for two years from 15 October 2011 subject to the following conditions that the Player:

- issues a full and unconditional public apology to Nigel Owens and an unconditional retraction of any criticism of him and the RWC.
- undertakes rugby Community Service in Samoa in support of the IRB high performance programme. That will comprise of a minimum of 100 hours work at the Player’s own expense as directed by the IRB, and he must complete the work within 12 months.
- must attend and pass a recognised referees course at his own expense within three months and report when he has completed the course to the IRB.

If the Player fails to comply with any of these conditions, or if he makes any public criticism of a match official, the IRB or the disciplinary process which is proved at a subsequent misconduct hearing, the suspension will be activated immediately in addition to any other sanction imposed for further misconduct.

I make an order for costs against the Player in the sum of NZ\$1000 because of the way he has conducted this case and huge inconvenience to all parties”

2. The Player issued an apology and paid the costs of the hearing. He subsequently appealed against the decision and an independent Appeal Committee rejected his appeal on 20 November 2011 in relation to the suspended period of suspension. However it varied the conditions attached to that sanction by deleting the requirement to undertake rugby Community Service in Samoa and extended the time in which he must undertake a referee’s course from 3 to 6 months.

3. At the end of Samoa's involvement in RWC, the Player rejoined his club, Gloucester RFC. On 7 November 2011 he was found guilty of two charges of misconduct by an RFU disciplinary panel relating to comments posted on his "Twitter" account. He was suspended for three weeks from 8 to 29 November 2011 and he has subsequently served that suspension. One charge related to comments that the RFU panel concluded were "critical of both the IRB and the Rugby World Cup." The comments were:

- 25 October 06.15. "Fining the French, the final act of the RWC11, is the perfect way to end the RWC. Eternally it will be remembered for 3 letters I R B.
- 26 October 19.10. "rugby players should cite the IRB for bringing the game into disrepute".
- 27 October 06.53 "The IRB have appointed an independent...." What does 'appointed' mean? Does it include 'have paid'?

Referral by RWCL

4. On 1 December 2011 RWCL referred the case back to me, asking me to consider what implications the RFU decision may have on the continuing suspension or otherwise of the sanction imposed on 19 October. I asked both parties to provide any representations they wished to make before I considered the matter further, indicating that if I was minded to activate the whole or part of the suspended sanction I would first give the player an opportunity to address me at a hearing.

Submissions on behalf of RWCL

5. RWCL submitted that the Player breached the term of the Decision by making public criticism of the IRB and that fact was proved at an RFU misconduct hearing. In those circumstances RWCL submitted that it is essential that the integrity of the RWC judicial process is upheld. To take no action against the Player for this breach could be seen to undermine the integrity of RWC judicial process and the IRB disciplinary regime.

Submissions on behalf of the Player

6. The Player has made extensive written submissions. Importantly he asks me to recuse myself because I would have a conflict of interest as a result of the fact, he says, that he successfully appealed the Decision. At the oral hearing he withdrew his application for recusal. As to substantive matters, the Player first submitted that:

- The RFU definition of what amounts to "criticism" is different from the IRB may decide, there is no objective IRB definition of "criticism" and a hearing as to whether the tweets are "criticism" should be heard by the IRB.
- If a subsequent hearing determines that "criticism has been made by the Player" then activation of the suspended period of suspension would be double jeopardy because he has already been punished by the RFU for the most recent "tweets".

7. In terms of mitigation the Player submitted:

- He lost match payments from the three matches missed for Gloucester RFC and that the club also fined him.
- Others who depend on him for financial support have also been punished.
- Gloucester has suffered from his absence, the Club having lost all three matches while he was suspended.
- He is suffering extraordinarily from the RFU and RWCL decisions because it is difficult to persuade another club to sign him when his contract runs out at the end of this current season with Gloucester.
- His good name has been tarnished extensively by the media coverage surrounding the RFU decision.
- If the sanction is suspended the Player's rugby career will be over, he will not be able to make mortgage payments and may lose his house.
- He has not made any further offensive tweets since those relevant to the RFU case and he is now "over the entire twitter saga".
- He has come from a poor background but was fortunate enough to be given a good education and become a lawyer who practices in two jurisdictions, but he is caught between his two professions. He asks for understanding as to what he goes through mentally but wishes no offence and harm to anyone. He wishes to be able to be given the chance to show he can learn to work and balance his tweets with the IRB and not against them for the greater good of the game.

8. Finally the Player submitted that it would bring integrity to the IRB if I did not activate the suspended period of suspension, as it would reflect leniency when dealing with the diversity of opinions, especially opinion from players of ethnic diversity. In oral submissions at the hearing the Player repeated his concerns about Tier 1 nations being treated more favourably than Tier 2, but he stressed that he would make no further public criticism of the IRB or RWC. He asked that he be given one last chance and that the breach be marked by a warning as to his future conduct.

Decision

9. Although the Player has withdrawn his application that I should recuse myself, I will address the matter for the sake of the record. There is no doubt that as a serving judge I am perfectly capable of dealing impartially with this case. Whether or not the appeal committee upheld his appeal or simply varied some of the conditions of the sentence – the matter before me is whether or not to activate the suspensions as I warned him I would do if the Player took the action that he subsequently did. A fair minded and informed observer would agree that the person best placed to determine whether or not a suspended sanction should be activated is the person who imposed the suspension and conditions in the first place. I am, therefore, satisfied that I can deal with this matter impartially and that there is no bias or appearance of bias.

10. There is no doubt that the Player's tweets between 25 and 27 October were critical of the IRB. Criticism in this context has its normal dictionary definition of "disapproval, condemnation or denigration". There is no distinction between the RFU and the IRB in that respect and arguments suggesting that there is or that an IRB tribunal should determine whether the tweets amount to criticism are specious. The

comments did amount to criticism on any objective assessment and the Player must have accepted that when he decided not to appeal against the RFU decision.

11. Further, there is no doubt that by making this remarks the Player breached the terms of the Decision in that he made “public criticism of the IRB or the disciplinary process which [was] proved at a subsequent misconduct hearing....”.

12. The suggestion that activating the suspended period of suspension would be double jeopardy is also specious and without merit. It was clear from the Decision that any breach would lead to a sanction in addition to the activation. Activation would not be a second punishment for the tweets of 25/26/27 October but the enforcement of the original sanction because the Player failed to behave appropriately despite receiving a clear warning. This is how any suspended sanction operates.

13. Therefore the sole issue for me to determine is whether the suspended period of suspension should be activated in whole or in part, or whether the breach of the Decision can be dealt with in some other way.

14. I have taken account of the Player’s conduct throughout the RWC 2011 and subsequently. Near the beginning of RWC 2011 he made offensive tweets comparing the treatment of his National side with the Holocaust. Samoa RFU took internal action, which included a warning as to his future conduct, and RWCL decided not bring misconduct proceedings. That decision itself displayed admirable sensitivity by RWCL. After Samoa lost to South Africa, the Player again published offensive tweets which were the subject of misconduct proceedings which led to the Decision. Again RWCL made submissions on sanction which demonstrated a wish to help the Player rather than simply punish him. That Decision included a warning by way of conditions attached to the suspended period of suspension. Despite these two warnings, and the sensitive approach by RWCL, the Player subsequently made further critical tweets which were the subject of the RFU misconduct proceedings.

15. The Player is misguided in his belief that tweeting unmerited criticism is not offensive or damaging to the image and interests of the game. He is also misguided is suggesting, as he did at the original hearing, that any fetter on what he says in his “tweets” would be an interference in his right of free speech. Given that the Player has ignored two warnings, it would not be wrong in principle, nor disproportionate, to activate the suspended suspension and direct that he be suspended for 6 months. Indeed, RWCL made a very good point that if some action is not taken the integrity of the judicial programme will be undermined. Thus in my view, some action must be taken against the Player.

16. However, I accept what the Player has said about his background and that he feels aggrieved because of his perception that he and his countrymen are treated less fairly than those players from Tier One nations. I also take account of the fact that the RWC Appeal Committee could have activated the suspended period of suspension when dealing with the Player’s appeal but did not to do so and that the Player has made no further critical comments since the end of October. It is important that the integrity of the disciplinary process is upheld, but it is also important that it is not seen to be oppressive. Therefore, and given his apparently genuine submission that he is “over the entire Twitter saga”, I am prepared to deal with this breach of condition in

such a way as to give the Player one last chance. In so doing I make it clear that this really is his last chance and if he posts another tweet which is offensive or critical, or if he makes any public criticism of a match official, the IRB or the disciplinary process which is proved at a subsequent misconduct hearing, the suspension will be activated immediately in addition to any other sanction imposed.

17. Having said that I must demonstrate the gravity of what the Player has done. I intend to do this by varying the terms of the original suspension by extending both the length of the suspended suspension and period of suspension. The length of the suspended suspension is increased from 6 to 9 months and the period during which it will be suspended is extended from 2 to 3 years (commencing from the date of the original suspension).

18. If there is any future breach of the terms of the Decision (as amended herein) such that the Player is found by another disciplinary body to have made any public criticism of a match official, the IRB (including RWC) or the disciplinary process RWCL will advise me immediately. In those circumstances I reserve to myself the ability to activate the suspended sentence immediately without the need for a further hearing.

19. The Player must realise that he has been treated exceptionally leniently. This really is his last chance and I give him a warning in the strongest possible terms that he must comply with the terms of the Decision or this suspension will be activated in addition to any other sanction applied for any further offence.



HHJ J Blackett
RWC Judicial Officer

9 January 2012