

# Rugby discipline in the time of coronavirus – a note on *RFU v Barbarian FC players*

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**Paul Harris QC and Michael Armitage, of Monckton Chambers, acted for the 8 Saracens players who faced charges, as well as former England international Richard Wigglesworth.**

An Independent Disciplinary Panel appointed by the Rugby Football Union (RFU) has today given judgment in a high-profile case concerning breaches of COVID-19 protocols by 13 professional rugby players which led to the recent cancellation of the Quilter cup match between Barbarian FC and England. The Panel's lengthy and detailed reasons address a number of matters of principle, and are therefore required reading for all those with a professional interest in sporting disciplinary matters.

Given the nature of the events in issue, it is unsurprising that the basic facts of the case were already in the public domain. In short, during the week preceding the proposed Barbarians-England fixture, which was intended to be a warm-up fixture for the England team prior to the resumption of the 2020 Six Nations tournament, a large number of players who had been selected for the Barbarians squad broke the agreed COVID-19 protocols. For instance, a group of players visited a bar, pub and restaurant in central London without permission. Further, that same group of players initially provided a false account of their actions to the RFU, although this was swiftly corrected.

A total of 13 players were charged with various breaches of RFU rule 5.12, on the basis that their conduct was prejudicial to the interests of the Union / the game. Each of the players admitted each of the charges brought against them, and the Panel's judgment was therefore entirely concerned with the question of the appropriate sanction. Ultimately, the Panel decided that immediate playing suspensions, as well as financial penalties, were appropriate for the serious conduct to which the players had admitted. However, the Panel recognised the very substantial mitigation that had been advanced by the players, and, on that basis, significantly reduced the sanctions that it imposed (see the Appendix to

the Panel's decision).

There are a number of points of broader practical significance arising from the judgment.

### **Conduct of the hearing**

This case was almost certainly unprecedented, at least in English professional rugby, both in terms of the conduct at issue (which the Panel described as "*particularly unusual*" – para 83) and the number of different players involved. At the players' request the Panel adopted a highly expedited procedure. The COVID-19 pandemic presented additional challenges, but the Panel adopted a flexible approach, holding a number of case management hearings as well as final substantive hearings via remote technology.

The involvement of multiple players, a number of whom had raised sensitive, personal matters by way of individual mitigation, also gave rise to concerns over the precise conduct of the final hearing, particularly as it was necessary to resolve certain contested factual issues that were relevant to questions of sanction. The Panel proceeded via a 'hybrid' approach, whereby sensitive, personal matters were heard in individual private hearings, but other factual evidence from certain players, where such evidence was potentially capable of affecting the Panel's consideration of the case against other players, was given in the presence of all players and their representatives, who were given the opportunity to cross-examine the players concerned (see paras 6-7 of the Decision).

Despite the substantial logistical challenges involved, the cooperative and flexible approach taken by all concerned meant that the Panel was able to hand down its final judgment just over six weeks after the date on which the cancelled Barbarians-England fixture would have taken place. It is no doubt because of the challenges involved in the proceedings that the Panel took the opportunity (at para 15) to remind all clubs and players of the provisions of regulation RFU 19.1.6, which emphasises that Disciplinary Panels are not Courts of Law, and that, in the rugby disciplinary context, procedural and technical considerations take second place to "*...the overriding objective of being just and fair to the parties thus being consistent with a duty to the Game*".

### **The Panel's overall approach to sanctions**

While there have been several high-profile COVID-related incidents in other professional sports, this was only the second disciplinary decision taken by an independent panel in the context of COVID-19 protocols and rugby union, and the first to involve a large group of players. It is nevertheless clear that whereas other sports governing bodies have not always taken formal disciplinary action

in relation to COVID-19 breaches (for instance, The Football Association did not do so in relation to the widely-publicised breaches of COVID-19 protocols by Phil Foden and Mason Greenwood during the England football team's international fixture with Iceland in September this year), the RFU will not hesitate to take formal disciplinary action in relation to such breaches. The Panel itself – entirely properly - emphasised that it did not intend to “...*make an example of these Players...*” but that it would instead adopt sanctions that were “...*fair and proportionate to what each Player did and their individual circumstances...*” (para 74). The Panel did however emphasise the seriousness of the charged players' conduct, not only in relation to the so-called “COVID-19” breaches, but also a number of the players' acts of “lying to the regulator” (see para 75).

There are several further points of wider significance arising from the Panel's approach to sanctions that are worth emphasising:

- The Return to Play Disciplinary Framework. The Panel emphasised that it had a “...*broad discretion...*” as to the type and range of sanction available in relation to breaches of RFU rule 5.12: see para 77. In relation to the “COVID-19” breaches, the RFU invited the Panel to have regard to the Return to Play Disciplinary Framework (“the Framework”) that has been agreed upon by representatives from the Premiership, the Championship, the Rugby Players Association and the RFU, as providing the appropriate starting point for the relevant breaches. The Panel accepted that the Framework provided “...*indicative guidance...*” to which it could properly have regard, despite the fact that the Framework did not strictly speaking apply to the match in question: para 81. While it emphasised that it did not regard either the Framework or its own judgment in the present case as binding in relation to other COVID-19 cases in the future (para 84), it is plainly essential for all clubs and players to be familiar with the provisions of the Framework, since future Panels may well take the same view as to its relevance.
- Application of Appendix 2 of RFU Regulation to 'off-field' conduct. The Panel also took the view that paragraph 9.27 of Appendix 2 to RFU Regulation 19, which sets out the appropriate 'starting points' for sanctions in relation to “unsportsmanlike” conduct, was applicable to cases involving 'off-field' contraventions of rule 5.12: see paras 88-89. This is a somewhat surprising aspect of the judgment, given that Appendix 2 is – on its face - concerned with acts of “Foul Play” occurring on the field. Nevertheless, players and clubs should bear in mind that future Panels may well take the same approach in relation to off-field conduct.
- Concurrent or consecutive sentences? With one exception, all of the players were faced with multiple charges for breaches of rule 5.12. The

Panel emphasised (para 91) that there is “...*no inflexible rule governing whether sanctions should be structured as concurrent or consecutive components...*”. The Panel considered that it was appropriate for sanctions for the “false account” breaches to run consecutively to sanctions for the COVID-19 breaches. However, it considered that where Players had been charged with multiple “COVID-19” breaches, the sanctions for those breaches should be concurrent, with the overall sanction for those breaches reflecting the totality of the relevant players’ conduct: see para 91.

- Suspended sanctions. The RFU submitted that no element of the players’ sanctions should be suspended in this case. The Panel rejected that submission, deciding that a suspension of an element of each Player’s sanction was appropriate “...*because we decided to impose other types of sanction alongside a playing suspension, and because, in each of the 13 individual Player’s cases, they have been able to provide mitigation about the offence itself or about themselves and their personal circumstances...*”: para 94. Practitioners in the field of rugby discipline should bear in mind that it is always open to a disciplinary panel to suspend an element of the sanction for contraventions of rule 5.12: see regulation 19.11.20. This is in contrast to sanctions for Foul Play, where sanctions must not be suspended: see regulation 19.11.17(a).
- Importance of proactive steps taken by the Players to ‘right their wrongs’ by the Players. Perhaps the most significant feature of the judgment, in terms of its relevance to future disciplinary cases, which clubs and players will do well to bear in mind in the context of any future disciplinary cases, is the substantial weight attached by the Panel to the steps taken by the Players in advance of the hearing to atone for their conduct. The 8 Saracens players, along with Mr Wigglesworth, had proactively made formal apologies to a range of stakeholder affected by their conduct, agreed to make donations and engage in substantial fund-raising efforts for the charity that stood to benefit from the cancelled fixture, and offered to compensate the casual workers at Twickenham Stadium who lost out as a result of the cancellation of the match. In addition, the Saracens players had accepted a range of internal sanctions imposed by their Club, including both playing bans and undertakings to carry out ‘rugby community service’. The Panel regarded these as matters of “...*particular significance...*” to this case and, notably, required all of the players concerned to engage in the kind of rugby community service that the Saracens players had already volunteered to undertake in the context of the internal sanctions process engaged in by their club: see paras 108-109. Ultimately these factors, along with other mitigation, resulted in the charged players receiving a full 50% reduction as against the starting points that the Panel considered it appropriate to adopt. As noted above, these factors were also relevant

to the Panel's decision to suspend an element of each Player's sanction.

- **Staggered sanctions?** A final point of note is the Panel's conclusion that it did not have the power to 'stagger' the match bans imposed on the 8 Saracens players so as to avoid a disproportionate effect on Saracens itself. The Panel regarded those players' submissions on this point as "...*superficially attractive*...", given that Saracens was essentially an innocent third party to the proceedings, but ultimately decided that the terms of regulation 19.11.16(e), under which match bans must generally be "...*effective immediately*...", did not permit any staggering of the match bans which it considered it appropriate to impose. It is not clear that this conclusion is correct as a matter of law, at least in relation to contraventions of rule 5.12 (and other acts of misconduct) which are subject to a broad discretion as to the appropriate sanction in regulation 19.11.18, and where there is a specific power to suspend the effect of any ban (which might be taken to permit a suspension of the sentence until a specific point in the future so as to enable staggered match bans to be imposed). The point is certainly ripe for consideration in future cases involving multiple players from the same club.

Links to the Panel's judgment, and to the appendix summarising the sanctions imposed in each case, can be found [here](#) and [here](#).

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