



COURT MARTIAL

Citation: *R. v. Cheung*, 2014 CM 2020

Date: 20141016

Docket: 201355

General Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Ex-Lieutenant K. Cheung, Offender

Before: Colonel M.R. Gibson, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Ex-Lieutenant Cheung, having accepted and recorded your plea of guilty to the first, second, third and fourth charges on the charge sheet, the court now finds you guilty of these charges. It is now my duty to determine an appropriate, fair and just sentence.

[2] In doing so, the court has considered the principles of sentencing that apply in the military justice system, the facts of the case as disclosed in the evidence heard by the court and the documents introduced in evidence, as well as the submissions of counsel for the prosecution and by you on your own behalf.

[3] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[4] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[5] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[6] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[7] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[8] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force. One of the most important components of discipline in the military context is self-discipline. This includes, in large measure, the strength of character to resist engaging in conduct which is wrong or unethical. Your actions demonstrate that this is an area in which you have been deficient.

[9] The facts of this case are disclosed in the Statement of Circumstances entered into evidence:

"At all material times, Lieutenant Cheung was a member of the Canadian Forces, Regular Force. In July 2010, Lieutenant Cheung was posted to 11 Health Services, Canadian Forces Base Shilo, Manitoba, following his graduation from the University of Manitoba for Physiotherapy.

In order to become a trained physiotherapist, a graduate with a physiotherapy undergraduate degree must take a written exam. This written exam is administered and marked by the Canadian Alliance of Physiotherapy Regulators (the "written exam"). The Canadian Alliance of Physiotherapy Regulators is a national examining body for physiotherapists. Upon successful completion of the written exam, the person who took the written exam has exam candidate status ("exam candidate status").

Lieutenant Cheung took his written exam in May 2010 and passed. Lieutenant Cheung had exam candidate status and registered himself as an exam candidate with the College of Physiotherapists of Manitoba as he was required to do. The College of Physiotherapists of Manitoba regulates the licenses of physiotherapist for the province of Manitoba.

Exam candidate status means that a person can treat patients but only under mentorship. The next step to become a fully qualified physiotherapist is to take the Objective Structured Clinical Exam (the "OSCE"). The OSCE must be taken by the person with exam candidate status within two years of the successful completion of the written exam. The OSCE is also administered and marked by the Canadian Alliance of Physiotherapy Regulators.

Lieutenant Cheung was required to take his OSCE by May 2012 but he did not do so and requested an extension. An extension was provided and Lieutenant Cheung took his OSCE in June 2012 and failed.

In the Canadian Forces, in order to be qualified as physiotherapist, the member must take several performance objective tests in addition to passing the OSCE. These performance objective tests are part of a program called the Preceptorship. Lieutenant Cheung failed the charting performance objective test three times and so a training review board was ordered.

Lieutenant Cheung never submitted his receipt to be reimbursed for his license, which is usually how the physiotherapist chain of command monitors the status of their subordinates. Additionally, Lieutenant Cheung advised his mentor, Mr Leo Larocque, a physiotherapist at 11 Health Services, Canadian Forces Base Shilo, Manitoba, that he did pass his OSCE and was a fully qualified physiotherapist. Lieutenant Cheung's

chain of command at 11 Health Services was under the impression that Lieutenant Cheung was a fully qualified physiotherapist.

After Mr Cheung's training review board, his chain of command became suspicious of his qualifications. Lieutenant-Colonel Rowe, who was part of Lieutenant Cheung's chain of command, could not understand why Lieutenant Cheung failed the charting performance objective three times. Lieutenant-Colonel Rowe asked Major Snejdar who was the Commanding Officer for 11 Health Services to obtain Lieutenant Cheung's documents that could confirm his status as a physiotherapist.

Major Snejdar asked Lieutenant Cheung for original certificates required for a physiotherapist license. Lieutenant Cheung provided Ms Lorraine Lockhart, who also worked at 11 Health Services, with a Physiotherapy Competency Exam Certificate and a Canadian Alliance of Physiotherapy Regulators Candidate Score Report on 22 October 2012 at Canadian Forces Base Shilo, Manitoba.

A Physiotherapy Competency Exam Certificate would only be issued by the Canadian Alliance of Physiotherapy Regulators if the person passed the OSCE. Lieutenant Cheung never passed the OSCE and the Canadian Alliance of Physiotherapy Regulators never issued him a Physiotherapy Competency Exam Certificate. The signature on the Physiotherapy Competency Exam Certificate that was purported to belong to Ms Fidelma Serediuk, an employee with the Canadian Alliance of Physiotherapy Regulators in charge of issuing these certificates, was fake. Ms Fidelma Serediuk never signed a Physiotherapy Competency Exam Certificate in favour of Lieutenant Cheung.

The Canadian Alliance of Physiotherapy Regulators Candidate Score Report that Lieutenant Cheng submitted to Ms Lorraine Lockhart was also fake. Lieutenant Cheung had received his real Canadian Alliance of Physiotherapy Regulators Candidate Score Report from the Alliance along with a letter advising him that he failed the OSCE. The Canadian Alliance of Physiotherapy Regulators Candidate Score Report Lieutenant Cheung submitted to Ms Lorraine Lockhart falsely indicated that he passed the OSCE.

Lieutenant Cheung wanted Ms Lorraine Lockhart and his chain of command, including Major Snejdar and Lieutenant-Colonel Rowe to believe that he was a fully qualified physiotherapist and as such could see patients without mentorship.

On 23 October 2012, Lieutenant Cheung faxed a Physiotherapy Competency Exam Certificate and a Canadian Alliance of Physiotherapy Regulators Candidate Score Report to Ms Brenda McKechnie, the

registrar at the College of Physiotherapists of Manitoba. Lieutenant Cheung sent this fax from Canadian Forces Base Shilo, Manitoba.

The Physiotherapy Competency Exam Certificate and a Canadian Alliance of Physiotherapy Regulators Candidate Score Report that Lieutenant Cheung faxed to Ms Brenda McKechnie were the same documents Lieutenant Cheung submitted to Ms Lorraine Lockhart.

Lieutenant Cheung wanted Ms Brenda McKechnie to believe that he was a fully qualified physiotherapist so that she would issue him a license to practice as a physiotherapist without mentorship in Manitoba.

Lieutenant Cheung saw patients without mentorship at 11 Health Services at Canadian Forces Base Shilo, Manitoba. The College of Physiotherapists of Manitoba suspended Lieutenant Cheung from practicing physiotherapy."

- [10] The Court considers that the aggravating factors in this case are the following:
- (a) the objective gravity of the offences of which Lieutenant Cheung has been convicted. The offence of Using a Forged Document under s. 368(1) of the *Criminal Code*, if prosecuted as an indictable offence, is punishable by imprisonment for 10 years;
 - (b) that Lieutenant Cheung violated one of the most fundamental obligations of a commissioned officer in the Canadian Forces, that of integrity and honesty;
 - (c) that Lieutenant Cheung further violated the trust imposed in him as a professional health care provider, by misleading both his superiors, the Manitoba College of Physiotherapists and, implicitly, his patients, regarding his professional qualifications;
 - (d) that there were significant repercussions to his unit. These include damage to the clinical reputation of the unit, stress and anxiety caused to the patients themselves when they were informed that they had been treated by someone who did not, in fact, have the professional qualifications that he purported to have, the additional work and stress caused by the necessity for his mentor, Mr Larocque, and the Base Surgeon to review his cases, as well as damage to the reputation of the Canadian Forces generally;
 - (e) the degree of premeditation that Lieutenant Cheung demonstrated in committing the offence, and in repeating the offence on 23 October; and

- (f) that ex-Lieutenant Cheung did not voluntarily attend his trial, but rather ignored the efforts of the prosecutor and the Court Martial Administrator to constructively engage him, and wilfully failed to appear for his trial, necessitating the issuance of a judicial arrest warrant and the engagement of the Military Police to bring him to court.

[11] The mitigating factors in this case include the following:

- (a) first and foremost, that ex-Lieutenant Cheung has pleaded guilty to the offences on the charge sheet. This is always an important mitigating factor, reflecting that the offender has accepted some responsibility for his actions. That said, I do acknowledge the observation of the prosecutor that there were no financial savings or savings in inconvenience to witnesses, as the guilty plea was only proffered once he was in custody and his trial was set to commence. I also share the scepticism expressed by the prosecutor about Lieutenant Cheung's apology to his former chain of command and colleagues offered in court. This was only proffered by Lieutenant Cheung at the suggestion of the prosecutor on cross-examination, and appeared largely contrived and hollow; and
- (b) although it was not corroborated by other witnesses or documentary evidence, ex-Lieutenant Cheung gave evidence that he was suffering from depression at the time of commission of the offences, and had been prescribed anti-depressant medications, Effexor and Celexa, which may have had some effect on his judgment at the time of the commission of the offences.

[12] I will make one further observation. Lieutenant Cheung asserted in his submissions that his decision to commit these offences was a spur-of-the-moment one, and that he was motivated by a desire to continue to help members of the Canadian Forces by treating them. I do not believe his evidence on these points. It was contrived and hollow. His assertions in this regard are belied by the fact that he submitted his application for voluntary release during this very time period. Lieutenant Cheung's actions were clearly motivated by self-regard, and not by a selfless desire to continue to serve his fellow members of the Canadian Forces.

[13] The prosecutor submits that the court should award as punishment a fine of \$6,000. Lieutenant Cheung submits that a fine of no more than \$2,000 would be appropriate.

[14] The principles of sentencing that the court considers should be emphasized in the present case are denunciation, and both general and specific deterrence. Confidence in the honesty, integrity, discipline, maturity and good judgment of officers of the Canadian Forces, both by the general public and by other Canadian Forces members, is critical to the effectiveness of the Canadian Forces in the fulfilment of its vitality

important functions. Members of the Canadian Forces are rightly held to a very high standard. Professional health care providers, such as physiotherapists, also have very stringent professional obligations which they bear as part of the privilege of practicing their professions. The actions of Lieutenant Cheung constitute a significant derogation from those standards, and a betrayal of trust of his superiors, his professional governing body, and his patients. He must never repeat these actions, and other members of the Canadian Forces must also understand that such actions are simply not tolerable and be deterred from committing them.

[15] I have carefully reviewed the cases provided by the prosecution. Although they are helpful to some degree, and the court appreciates her diligence in research and in providing them to the court, as she observed, none of them are directly on all fours with the facts of the present case.

[16] Ex-Lieutenant Cheung, this case exemplifies the maxim, "what a tangled web we weave, when first we practise to deceive." As your former Commanding Officer Major Snejdar testified, had you been forthcoming with your chain of command about your difficulties in attaining the requisite professional standards, they would have provided you with assistance, remedial training and additional opportunities to achieve them. Instead, you chose to deceive them, your professional governing body, and your patients. This led to the end of your career in the Canadian Forces and your conviction today of four criminal offences. Your performance in court the past two days in making representations on your own behalf, demonstrate that you are clearly an intelligent person. It is the profound hope of the Court that you have learned the appropriate lessons from this, and will not repeat such actions. The Court hopes that your guilty plea does, in fact, represent a genuine recognition of your error, and an acceptance of responsibility, and a commitment to never repeat it. Your guilty plea is what has saved you from the imposition of a custodial sentence that the court would otherwise have imposed on these facts.

FOR THESE REASONS, THE COURT:

[17] **FINDS** you guilty of the first, second, third and fourth charges on the charge sheet.

[18] **SENTENCES** you to a fine of \$6,000, payable forthwith.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Ex-Lieutenant K. Cheung
On his own behalf