



## COURT MARTIAL

**Citation:** *R. v. Fedoryshyn*, 2014 CM 4011

**Date:** 20141029

**Docket:** 201423

Standing Court Martial

Canadian Forces Base Esquimalt  
Victoria, British Columbia, Canada

**Between:**

**Master Seaman D. Fedoryshyn, Accused**

- and -

**Her Majesty the Queen**

**Before:** Commander J.B.M. Pelletier, M.J.

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### REASONS FOR FINDING

(Orally)

#### INTRODUCTION

[1] Following the decision of the prosecution to withdraw the first charge on the charge sheet under section 129 of the *National Defence Act* in the initial stages of the proceedings, Master Seaman Fedoryshyn was tried under one count under section 90 of the *National Defence Act* for Absence without Leave. The particulars of the charge are as follows: "In that he, at approximately 0800 hours, 15 January 2014, without authority was absent from Canadian Forces Health Services Centre (Pacific) and remained absent until approximately 1241 hours, 15 January 2014."

#### THE EVIDENCE

[2] The prosecution called three witnesses who introduced a number of exhibits. The first witness was Master Corporal Dureau, a medical technician employed at the Canadian Forces Health Services Centre (Pacific) (CFHSC(P)). She testified about the general procedures adopted for sick parade in the period covered by the charge.

[3] Master Corporal Dureau explained that sick parade was then located at the Urgent Care Department in building 97, Canadian Forces Base (CFB) Esquimalt, Naden site, where most of the CFHSC(P) is housed. Sick parade hours were from 0730 hours to 1530 hours. A patient arriving at sick parade would first have to manually fill in an Urgent Care form and hand it over to a clerk at the reception desk. That form allows the patient to enter his or her particulars, the symptoms justifying the visit, and it has a section for the person to enter the time at which they come in. The patient would then normally wait for triage by a medical technician. Following that step, the patient would come back to the waiting room to be eventually called in to be seen by a doctor or physician assistant. After having been seen, the person would then be directed to other medical services at the centre or sent away based on the direction received by medical personnel. The Urgent Care form would then be recovered and filed for approximately 30 days, after which it would be destroyed.

[4] Master Corporal Dureau also explained how health information is inputted in the Canadian Forces Health Services Information System (CFHIS) in relation to a typical sick parade visit. She explained that the patient's visit was first recorded in the system by use of a scheduler, which included arrival information inputted in one of two ways: either manually by the clerk using the time provided by the patient on the Urgent Care form or automatically by the computer using the time the information is inputted in the system. She also explained that persons providing care were required to make an entry in the system with time of encounter, also entered manually or automatically. She does not know which inputting method was used in the case of Master Seaman Fedoryshyn as she did not input that information. In fact, she gained knowledge of that information contained in the CFHIS months after the events after having been tasked by her boss to obtain data about the visits to sick parade at the urgent care department on 15 January 2014 for the purpose of this court martial.

[5] On consent of the defence, Master Corporal Dureau produced, as Exhibit 3, a spreadsheet she made with 46 patients identified by number, their arrival time, the time they were seen by, and by whom they were seen. After some hesitation, she testified that Master Seaman Fedoryshyn would have been patient No. 40, arriving at 1251 hours, and seen at 1330 hours by Dr Campbell. She also produced Exhibit 4, a Canadian Forces Health Services Chit (CFHS Chit), pertaining to Master Seaman Fedoryshyn, obtained from the CFHIS, also showing arrival time of 1251 hours on 15 January 2014, and a mention by Dr Campbell to the effect that Master Seaman Fedoryshyn was excused from duty beginning Wednesday, 15 January 2014, for duration of one day. She added that a copy of the chit is normally printed and given to the patient and an electronic copy is subsequently sent to the patient's boss.

[6] On cross-examination, Master Corporal Dureau said that she had no personal knowledge of the events at the CFHSC(P) on 15 January 2014 as she was in Cyprus at the time. She admitted that the arrival time shown on Exhibits 3 and 4 pertains only to the sick parade at the urgent care department and is subject to a number of variations in addition to, and depending on, the method of inputting time chosen by the clerk. For instance, if many patients arrive at the same time or if time entered by patients on the Urgent Care form is inaccurate. She admitted that the urgent care department is only one of several departments within the CFHSC(P) and that a patient such as Master Seaman Fedoryshyn could have been attending other locations within the centre prior to being logged in as having arrived at sick parade. She said she had access to, but did not look for or see information on the CFHIS pertaining to Master Seaman Fedoryshyn to the effect that he would have been receiving care in another department at the CFHSC(P) on 15 January 2014.

[7] The second witness heard was Sergeant Gow, the immediate supervisor of the accused on 15 January 2014. He testified that on that day, the normal place of duty of Master Seaman Fedoryshyn was at building 1020 at the Work Point site of CFB Esquimalt and that his duties included going through schedule and lesson plans for upcoming courses. He said that Master Seaman Fedoryshyn's normal work hours are from 0745 hours to 1545 hours each workday, a variation from normal base hours to allow personnel to get ahead of traffic at the end of the day. He would, therefore, have expected to see Master Seaman Fedoryshyn at work no later than 0745 hours on the morning of 15 January 2014 if it was not for a text message he received from Master Seaman Fedoryshyn at 0728 hours that morning, stating "Going to MIR. Will keep you posted." Sergeant Gow stated that as a result of this information from Master Seaman Fedoryshyn and his acknowledgement of it, he would have expected Master Seaman Fedoryshyn to report to sick parade at 0745 hours or shortly after, depending on his circumstances and how ill he was. He added that if Master Seaman Fedoryshyn was too sick to make it in, it would have been nice to be told as he expected personnel to tell the chain of command where they were. When asked if Master Seaman Fedoryshyn was aware of that expectation, Sergeant Gow responded that he believed so.

[8] Sergeant Gow introduced as an exhibit a record that he produced of the text messages allegedly exchanged with Master Seaman Fedoryshyn on 15 January 2014. However, on cross-examination, he admitted that a printout of the exchange of text messages provided by defence counsel and taken from the phone of the accused was a more accurate record of the time and content of the messages exchanged. That printout, introduced as Exhibit 10, showed that, from 1150 hours, Sergeant Gow requested and was provided with regular updates of Master Seaman Fedoryshyn's progression through the medical process.

[9] Sergeant Gow also mentioned that he called the front desk for sick parade around 1515 hours on 15 January 2014, as indicated in an email he produced, at Exhibit 6, to inquire as to when Master Seaman Fedoryshyn had arrived there. He had previously held a divisional interview with Master Seaman Fedoryshyn on 26 September 2013, and had advised him of the importance of keeping the chain of

command informed at all times of where he was, in relation to visits to the Medical Inspection Room (MIR). However, he could not specifically recall changes made at that time to the timing requirements in reporting to the MIR.

[10] As far as his actions following the events of 15 January 2014, Sergeant Gow said that he received a CFHS Chit by email, which he entered as Exhibit 7. It is the same document as previously entered by Master Corporal Dureau as Exhibit 4. He said that the arrival time of 1251 hours shown on the document confirmed the concerns he had on 15 January to the effect that Master Seaman Fedoryshyn had not headed to sick parade first thing in the morning. He had reported his concerns to his chain of command and provided information to his superiors about the exchange of text messages. He said that he also had a divisional interview with Master Seaman Fedoryshyn on 17 January 2014, during which Master Seaman Fedoryshyn had an opportunity to, but did not provide any information about the text messages exchanged on 15 January.

[11] On cross-examination, Sergeant Gow admitted that he did not speak to Master Seaman Fedoryshyn on 15 January 2014. He said he did not respond when receiving a text message from Master Seaman Fedoryshyn at 0737 hours, to the effect that he was in pain. He thought that Master Seaman Fedoryshyn was going directly to the MIR, but did not send a text message to direct Master Seaman Fedoryshyn to leave immediately to the MIR or to indicate that he needed to arrive at the MIR by a specific time. As for the counselling session of 26 September 2014, he said that he counselled Master Seaman Fedoryshyn that if he was unable to make it in or there were any changes in his plans, he was to inform him.

[12] The third and last witness for the prosecution was Chief Petty Officer 2nd Class Cotey, the acting Divisional Chief Petty Officer of the Recruit Section at Canadian Forces Fleet School Esquimalt and supervisor of Warrant Officer Corfield, the supervisor of Sergeant Gow. He stated that he was informed at about 0830 hours on 15 January 2014 by Sergeant Gow that Master Seaman Fedoryshyn had reported to be sick and would be attending the MIR. He received an update in the afternoon to the effect that Master Seaman Fedoryshyn was still being followed up at the MIR. At the end of the day he was informed that Master Seaman Fedoryshyn had been excused from duty for one day by a doctor.

[13] Chief Petty Officer 2nd Class Cotey stated that when he was provided with a copy of the CFHS Chit by email, at Exhibit 7, by Sergeant Gow, he noticed the 1251 arrival time on the chit and started the investigation as he was concerned that on 15 January 2014, Master Seaman Fedoryshyn was not where he had said he was going to be. He then contacted the urgent care department by phone and subsequently visited in person. He was shown by Warrant Officer Begley a document which he identified as the standard intake form with the particulars of Master Seaman Fedoryshyn showing a time of arrival of 1241 hours. He said that Master Seaman Fedoryshyn's work hours on that day started at 0800 hours and that he, therefore, expected Master Seaman Fedoryshyn to go directly to the sick parade at or before that time, and that if it was not

possible for him to do so, he would advise his chain of command. He said he expected Master Seaman Fedoryshyn to arrive at the sick parade at or about 0800 hours. Both on direct and on cross-examination, Chief Petty Officer 2nd Class Cotey admitted that he did not provide specific direction to Master Seaman Fedoryshyn about the requirement, if sick, to report immediately to sick parade. He added that he was not Master Seaman Fedoryshyn's direct supervisor and it was the responsibility of the direct supervisor to provide this specific direction.

[14] Those three witnesses constituted the prosecution's case and the defence elected not to call any evidence.

### **THE FACTS AND THE LAW**

[15] The court finds that the three prosecution witnesses were credible. They narrated sincerely a number of factual elements as they remembered them. As sincere as the prosecution witnesses were, however, the court needs to assess the sufficiency of their evidence as it pertains to proving the essential elements of the charge. Indeed, testimony of witnesses may be credible yet provide only circumstantial evidence resting entirely on hearsay. That kind of evidence may be insufficient to sustain a conviction.

[16] The evidence heard at trial reveals that both Sergeant Gow and Chief Petty Officer 2nd Class Cotey are of the view that the accused, Master Seaman Fedoryshyn, failed to meet their expectations as it pertains to when he was expected to attend sick parade on 15 January 2014. However, this trial is not about that. Master Seaman Fedoryshyn is not charged with failing to meet his bosses' expectations. This trial is about whether the prosecution has proven beyond a reasonable doubt all of the elements of the offence of absence without leave on the basis of the particulars as they appear on the charge sheet.

[17] Indeed, the Court Martial Appeal Court decision of *R. v. Tomczyk*, 2012 CMAC 4 illustrates the importance for the prosecution not to simply rely on evidence revealing the commission of the offence generally, but to present evidence which corresponds to the specific offence as particularized in the charge sheet.

[18] The prosecution invites this court to accept the theory of the case to the effect that the initial communication from the accused to his chain of command at 0728 hours, on 15 January 2014, "Going to MIR" and his failure to explain why the CFHS Chit shows an arrival time of 1251 hours reveals a wrongdoing which makes up the offence of absence without leave for that morning. In supporting this theory, the prosecution mentioned the absence of evidence to the contrary, inviting me to presume wrongdoing. This presumptive view may be adequate from a military personnel management point of view where a superior can require explanations from a subordinate. It is, however, wholly inadequate as a basis to seek a conviction for a criminal infraction in Canadian law.

[19] Indeed, in this country, one of the principal safeguards to ensure fair trials, where no innocent persons are convicted, is the onus resting upon the prosecution to prove the guilt of the accused beyond a reasonable doubt. The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that before an accused can be convicted of an offence, the judge of facts must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence. As Dickson C.J. wrote for the majority of the Supreme Court of Canada in *R. v. Oakes*, at pages 132 and 133:

If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt.

[20] As for the meaning of the expression "beyond a reasonable doubt," the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 SCR 320 tells us that a reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me as judge of facts to believe the accused is probably guilty or likely guilty. In those circumstances, the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so.

***The essential elements that the prosecution must prove beyond a reasonable doubt***

[21] The elements of identity of the accused as the person who committed the offence and the date of the offence, 15 January 2014, have been admitted by the defence. Consequently, the prosecution had the burden of proving each of the following essential elements of the offence beyond a reasonable doubt:

- (a) the place and time when Master Seaman Fedoryshyn was required for duty on 15 January 2014;
- (b) that Master Seaman Fedoryshyn knew or ought to have known where and when he was required for duty;
- (c) that Master Seaman Fedoryshyn was absent and the length of the absence; and
- (d) finally, that Master Seaman Fedoryshyn's absence was not authorized.

## ANALYSIS

### *As to the place and time when the accused was required for duty*

[22] As to the place of duty, the court concludes based on the evidence, that Master Seaman Fedoryshyn, from the moment he received tacit approval from his superior to go to the MIR, as he had announced by text message at 0728 hours, on 15 January 2014, had a duty to proceed to the CFHSC(P) to be medically assessed. As it turned out, he did that. The real issue in the context of the charge of absence without leave in this case is whether prior communications from the chain of command were sufficiently clear to impose the obligation to be present at the CFHSC(P) at a specific time.

[23] In his submissions on the issue of time, the prosecution suggests that the testimony of Sergeant Gow and Chief Petty Officer 2nd Class Cotey should not leave me with any doubt as to the fact that Master Seaman Fedoryshyn was required for duty at 0800 hours at the CFHSC(P) on 15 January 2014. Yet it is acknowledged that the evidence of these two witnesses is contradictory on the specific time for duty. Although both witnesses testified that their expectation was that Master Seaman Fedoryshyn was required to be at the CFHSC(P) on the Naden site at the same time as he was normally required to be at his normal place of work at Work Point, Sergeant Gow was adamant that the hours of work of Master Seaman Fedoryshyn were from 0745 hours until 1545 hours, while Chief Petty Officer 2nd Class Cotey testified that the normal hours of work were from 0800 hours to 1600 hours.

[24] Faced with this situation, the prosecution invites the court to find that Master Seaman Fedoryshyn was required for duty at 0800 hours as "it was the latest timing on which moral culpability would attach" and that it made the offence less severe as the period of absence is 15 minutes shorter. In the alternative, the prosecution invites the court to make a special finding under section 138 of the *National Defence Act* to find that the absence commenced at 0745 hours or, again in the alternative, the prosecution submits that the words "approximately" in the particulars of the charge would allow the court to conclude that 0745 hours is "approximately" 0800 hours.

[25] Although the court could be receptive to such an argument in its determination of the length of the absence in relation to that essential element of the offence, the argument cannot be used to facilitate the burden on the prosecution to prove the element of the existence of an order or other satisfactory direction as to the specific time and place of duty, the essential element subject to analysis here. In determining the time of duty, the court cannot pick 0800 hours over 0745 hours simply because the former is less severe or because 0745 is approximately 0800 hours. The suggestion of making a special finding with a time of duty different than as specified in the charge sheet could be accepted only if the facts proven showed that different timing. That is not the case here: the facts reveal two different timings.

[26] A choice must, therefore, be made on the weight to be given to the respective testimony of witnesses. The prosecution offered no reasons why the court should give

more weight to the testimony of one of its witnesses over another on the issue of time of duty. Both Sergeant Gow and Chief Petty Officer 2nd Class Cotey admitted not providing specific direction to Master Seaman Fedoryshyn about the requirement, if sick, to report immediately to sick parade. Chief Petty Officer 2nd Class Cotey added on cross-examination that he was not Master Seaman Fedoryshyn's direct supervisor and it was the responsibility of the direct supervisor to provide that specific direction. If that is the case, the testimony of Sergeant Gow is to the effect that if Master Seaman Fedoryshyn was too sick to make it in, it would have been nice to be told as he expected personnel to tell the chain of command where they were. Although he stated that he believed that Master Seaman Fedoryshyn was aware of that expectation, he confirmed that he did not provide specific direction to that effect.

[27] The court cannot accept the proposition that in the absence of order to the contrary, the usual hours of work applicable to Master Seaman Fedoryshyn would remain the same despite the change in the place of duty implicitly authorized by the chain of command. Both Sergeant Gow and Chief Petty Officer 2nd Class Cotey testified that their expectation was that Master Seaman Fedoryshyn would report at 0745 hours or shortly after or on or about 0800 hours.

[28] I take it from this aspect of their testimony that they both understood that the statement by the accused to the effect that he was sick and going to get medical care, the implied permission from his superior to do so, the fact that he did obtain medical care, which confirmed a medical incapacity to perform duty on 15 January 2014 are all factors indicating a change from normal work circumstances. The court is of the view that this significant change required specific direction from the chain of command on its expectations as to timing of reporting to sick parade, a location entirely different from the accused's normal place of work. Despite opportunity to transmit such direction, no orders came from the accused's superiors, either before, for instance during a divisional interview on 26 September 2013, or on 15 January 2014.

[29] Once again, the accused is not charged with failing to meet expectations that he would report to sick parade first thing in the morning. He is charged with absence without leave, an offence which requires to be grounded in clear order or direction to be present for duty at a specific place on a specific time. On the basis of the evidence presented as discussed above, the court is left with a reasonable doubt as to the essential element of the time of duty. Consequently, the prosecution has failed to prove beyond a reasonable doubt that Master Seaman Fedoryshyn was required for duty at the CFHSC(P) at 0800 hours on 15 January 2014.

### ***The other elements of the offence***

[30] The conclusion reached by the court on the elements of place and time of duty have an obvious impact on the second element of actual or deemed knowledge of the place and time of duty by the accused. In the circumstances of this case, the insufficiency of evidence as to the existence of a specific order or direction requiring Master Seaman Fedoryshyn to be at CFHSC(P) for duty at approximately 0800 hours



on 15 January 2014, makes it impossible for the court to conclude that Master Seaman Fedoryshyn knew or ought to have known that he should be there at that time. The evidence on that essential element is also insufficient to sustain a conviction for absence without leave. Similarly, the lack of evidence on the element of place and time of duty make the fourth element of authority to be absent irrelevant in the circumstances.

[31] On the third element pertaining to the absence from CFHSC(P) and the duration of that absence, the court has heard circumstantial hearsay evidence to the effect that Master Seaman Fedoryshyn arrived at sick parade at the urgent care department of the CFHSC(P) at approximately 1251 hours according to Exhibits 3, 4 and 7 or approximately 1241 hours according to the evidence of Chief Petty Officer 2nd Class Cotey, who stated that he was shown the Urgent Care form and that it indicated a time of 1241 hours. However, this evidence does not relate to the particulars of the charge as laid, which alleges arrival at CFHSC(P), of which the urgent care is only one of the departments.

[32] The prosecution was unable to lead evidence showing when Master Seaman Fedoryshyn arrived at the CFHSC(P). This fact remains unknown. In essence, the prosecution is asking this court to deduce from the circumstantial evidence of approximate arrival time at sick parade, as shown on documents not made by any of the witnesses, that Master Seaman Fedoryshyn proceeded directly to sick parade upon arriving at CFHSC(P). Even if that conclusion is possible, there is no proof that it did occur. To base a verdict on such evidence, the court would need to be satisfied beyond a reasonable doubt that it is the only reasonable inference to be drawn from the time of arrival at sick parade. Yet it is not so. It is possible and not unreasonable that Master Seaman Fedoryshyn visited other departments, used the bathroom or the cafeteria. There is no evidence of that, but as explained before, there is no burden on the accused to establish any of those facts to benefit from a reasonable doubt. Once again, the evidence on that third essential element of absence was also insufficient to sustain a conviction for absence without leave.

**FOR THESE REASONS, THE COURT:**

[33] **FINDS** the accused, Master Seaman Fedoryshyn, not guilty of the second and only charge remaining on the charge sheet for absence without leave.

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**Counsel:**

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Counsel for Her Majesty the Queen

Major S.L. Collins, Directorate of Defence Counsel Services  
Counsel for Master Seaman D. Fedoryshyn