COURT MARTIAL

Citation: *R. v. Williams*, 2017 CM 4017

Date: 20171130
Docket: 201654

Standing Court Martial

Canadian Forces Station St. John's
St. John's, Newfoundland and Labrador, Canada

Between:

Her Majesty the Queen

- and -

Sergeant M.B. Williams, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Sergeant Williams is facing three charges under the Code of Service Discipline relating to alleged incidents of ill-treatment and harassment involving three students under his supervision in the summer of 2015 while he was the course warrant officer for Basic Military Qualification (BMQ) courses held at Canadian Forces Station St. John's (CFS St. John's), Newfoundland and Labrador. Each charge concerns a different candidate on the courses. The first two charges allege that he ill-treated subordinates contrary to section 95 of the *National Defence Act* (*NDA*), while the third charge alleges conduct to the prejudice of good order and discipline, specifically harassment, contrary to section 129 of the *NDA*.

[2] The particulars of the first and second charges under section 95 of the *NDA* allege that, between 30 June and 18 August 2015, Sergeant Williams ill-treated Private Theriault (first charge) and Officer-Cadet White (second charge) by ordering her and him to consume water until they did vomit. As specified by the prosecution during

preliminary proceedings and at trial, the ill-treatment alleges an order to consume water and, as a consequence of that order, vomiting. Both combine to constitute the ill-treatment alleged. Those two charges concern an alleged incident when all members of the BMQ Common Course were formed up and ordered to consume water from their individual water canteen, then fall out of the ranks to quickly go over to a sink to refill their water canteen again, re-muster in ranks to repeat the drill. In the course of that evolution, two members of the course vomited.

[3] As for the third charge under section 129 of the *NDA*, it is alleged that Sergeant Williams did harass Private Renouf between 14 July and 7 August 2015. Although it is not part of the particulars of the charge, the prosecution concedes that the harassment alleged is to be understood as harassment contrary to Defence Administrative Orders and Directives (DAOD) 5012-0, *Harassment Prevention and Resolution*. The defence agrees. That charge is the result of alleged harassment of Private Renouf, which manifested at the beginning of the BMQ (Land) Course when it is alleged that Private Renouf, who had just been retired from the course, was made to watch as his former course mates were performing one push-up for every day that he was under medical restrictions during the course, with him saying "thank you" at the completion of each of the push-ups.

[4] I am aware that two prosecution witnesses testified about another incident when Private Renouf was asked to cheer on his course mates performing a physical challenge he could not be involved with due to medical restrictions. The inference appeared to be that this could constitute harassment. However, there were significant discrepancies in the facts related by these witnesses as well as with the testimony of Private Renouf himself who didn't know which instructor had asked him to cheer. Also, there was no evidence to the effect that he was in any way offended by the conduct of anyone in the course of that event. Therefore, I conclude that this event cannot be considered as harassment and is therefore irrelevant to my analysis of the third charge.

Evidence and admissions

[5] The prosecution called ten witnesses to prove its case. Some were candidates on the BMQ Common Course only, which ran mainly in July 2015. Others were also candidates on the BMQ (Land) Course that immediately followed in early August. The former category testified about the water drinking event while the latter category testified about both the water drinking event and the treatment of Private Renouf by Sergeant Williams in the course of the push-ups event. In addition, the prosecution introduced, on consent, the version of DAOD 5012-0, *Harassment Prevention and Resolution* which was in force at the time of the events in the summer of 2015.

[6] The defence called one witness, the accused. Sergeant Williams essentially confirmed that the events testified about by prosecution witnesses had occurred. However, he also provided his version of these events which brought a different perspective and, at times, differed on aspects of the versions of prosecution witnesses.

[7] The Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence* (*MRE*).

[8] The defence made admissions at the outset of the trial on the elements of identity, time and place of all of the alleged offences.

The facts

[9] On the basis of the whole of the evidence, it would appear that there are two events that are relevant to this case. The first is the water consumption incident which forms the basis of charges 1 and 2, then there is what I will describe as the push-up incident forming the basis for charge three. There is no contention that these two incidents occurred. What is contested is some of the details of what occurred as it pertains to the essential elements of the offences.

[10] The ten prosecution witnesses all testified about the water consumption incident. The testimony heard from all witnesses differed significantly as to the details of what had occurred. This is not surprising given the time that had elapsed since the events in July 2015. I heard and re-listened to most of the testimony and noted the numerous discrepancies. Yet, I do not see the point in describing each witness's testimony in detail. I will narrate the events on the basis of the facts that I do accept, as they flow logically from the narrative offered by the majority of prosecution witnesses. I will complement with the testimony of Sergeant Williams as required. Indeed, he is the only witness who could offer some elements of background and context as to how the incident developed.

[11] In relation with this event, Sergeant Williams testified that he had been told by Lieutenant Desjardins, the course officer-in-charge, that complaints had been received to the effect that students did not have time to fill up their canteen with water and as a consequence may not have enough water to drink throughout the day. He was told to resolve this.

[12] From there the narrative about how the water consumption incident commenced from the perspective of prosecution witnesses was very similar: members of the course were ordered by the accused Sergeant Williams to form up in three ranks outside the building, near the door leading to the multi-purpose room where they slept, ate, exercised and essentially spent most of their time on course. They were told to take their issued canteen in hand. From there, the testimony of prosecution witnesses varies greatly as to what was said and what exactly occurred. Importantly, no witness was able to recall exactly the words spoken by Sergeant Williams, although they all believed that direction was given to drink from their canteen to empty the contents. At that point, the amount of water in each canteen varied. Once they were done emptying their canteen a first time, they were told to hold the canteen upside down over their head, opened, to show it was empty.

[13] Not one witness was able to describe the rest of the events in exactly the same way but everyone said that once the canteens were emptied a first time, members of the course were told to dismiss and to go fill their canteen with water quickly and form up again in a given period of time, varying from two to five minutes, depending on what version one hears or accepts. Once formed up, they were expected to empty their canteen a second time. There was no common agreement as to what precise direction was given, but essentially, as a result of what was said by Sergeant Williams, the expectation was that the canteens would be emptied mostly by the consumption of water contained therein, although some of the witnesses said that part of the contents of the canteen could be, and were, poured on the ground or over one's head. Once all canteens were emptied a second time, the group was told to go fill up their canteen again, that is for a second time. Once that was done and they formed up, they were expected to empty their canteen a third time. Some drank the entire contents, while others were unable to, and poured some or all of the contents to the ground or on their head. At that point some had difficulty drinking the entire contents of their canteen. Gagging noises were heard. Someone broke ranks. Private Theriault testified that after drinking the equivalent of two full canteens of water, or two liters, she felt sick and had to break rank in an attempt to make it to the washroom. She was unsuccessful and vomited on the floor of the multi-purpose room. She was then assisted by others and attended to by Sergeant Williams, who allowed her to leave the group to go to the bathroom, assisted by another candidate. She was told to clean herself up as required and was granted permission to brush her teeth as she had asked.

[14] The group had been told to go fill up their canteen a third time. Officer Cadet White, who by the time of trial had become Corporal Holland, testified that he made it to the bathroom to fill up his canteen but felt sick and vomited in one of the toilets. He then got back in ranks with the others within the timing given by Sergeant Williams. By most accounts, the group was dismissed at that time. Sergeant Williams said that he dismissed the group once they had shown they were able to fill their canteen completely within the time allowed. This is consistent with the testimony of Corporal Holland. Sergeant Williams said he was not aware that Officer Cadet White had been sick in the bathroom. From his recollection, there was one sequence of fill and empty in the absence of Private Theriault after she had been sick. Others testified that once it was known that Private Theriault had vomited, there was no more demand made to consume water.

[15] Sergeant Williams did testify that once he realized Private Theriault had been sick, he specified to the group they did not have to drink all of the water, they could empty their canteen on the ground or over their head. Five prosecution witnesses said they were told they could pour water over their heads instead of drinking it. A sixth said he thought he had to drink it all but at one point he poured water over his head after having seen a colleague do it. Three prosecution witnesses said they were convinced they had to drink the entire amount of water. Of those three, one also said he could dump water over his head if there was some left, another conceded on cross-examination that he could have misunderstood the instructions as he could not recall the exact words but remembered people pouring water over their head without being

reprimanded for doing so. For her part, Private Theriault insisted she understood the order to mean she had to drink the entire contents of her canteen despite the fact that she had made notes, shortly after the events, to the effect that she had to chug the water and pour the rest on the ground. A tenth witness said that some people took the order literally and drank too much water, however he preferred pouring some of the contents of his canteen on the ground.

[16] Despite all of the differences in the testimony, two facts appear not contradicted. First, many students dumped water over their heads or on the ground instead of drinking it, yet none were reprimanded for not drinking the entire contents of their canteen. Secondly, it appears that the group was dismissed shortly after it was known that a candidate had vomited and as soon as the timing for refilling the canteens had been met.

[17] As it pertains to the push-ups incident, subject of charge 3, the evidence is much more consistent, on the part of prosecution witnesses. At the beginning of August 2015, Sergeant Williams was going through the building with his family in civilian clothes, having attended Regatta Day activities nearby. He was informed by Lieutenant Desjardins that Private Renouf was taken off the course. He then attended the multi-purpose room, spoke to Private Renouf and said that he could speak to the course before departing. The course was formed up and Private Renouf said a few words. Following that, prosecution witnesses present all testified that they were ordered to do one push-up for every day that Private Renouf was granted medical restrictions, qualified as being "on medical chit", during the BMQ Course and since. While push-ups were performed, Private Renouf was ordered to say "thank you" for every push-up performed by his former colleagues. Private Renouf said he felt degraded and worthless as a result. Every prosecution witness who attended stated that they felt doing push-ups like this was inappropriate in some way, most qualifying the event as unfair and undeserved.

[18] For his part, Sergeant Williams explained that he had simply asked the course if they agreed to send Private Renouf off with push-ups. He did not deny the link between push-ups and the number of days Private Renouf was on medical restrictions, stating that he was disappointed Private Renouf had at times shut down, using medical chits to get out of difficulties he had experienced with the course. He said it was common on course to put people in the spotlight and that he had no ill intentions, he wanted to demonstrate that when one fails, the entire group fails. Sergeant Williams also admitted that with hindsight about how this made Private Renouf feel, he should have done otherwise. He admits having shown poor judgement.

The assessment of the evidence

The proper frame of analysis

[19] In light of the number of references made to the effect that the conduct of Sergeant Williams was odd and showed a level of performance below what could be expected by a course warrant officer, I feel the need to specify that the role of this Court is not to make a general judgement on the performance or character of Sergeant

Williams or to provide statements as to the training value of what he did or did not do. My role in presiding this court martial and coming to findings on the charges is to analyze the actions of the accused in light of the three charges before me, no less and no more.

Presumption of innocence and proof beyond a reasonable doubt

[20] It is also important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal offences.

[21] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent.

[22] What does the expression "beyond a reasonable doubt" mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[23] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The court must not find Sergeant Williams guilty unless it is sure he is guilty. Even if I believe that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Sergeant Williams and find him not guilty because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[24] The requirement of proof beyond a reasonable doubt applies to each and every essential element of the offence. It does not apply to individual items of evidence. The court must decide, looking at the evidence as a whole, whether the prosecution has proved Sergeant Williams' guilt beyond a reasonable doubt.

[25] Reasonable doubt also applies to the issue of credibility. On any given point, the court may believe a witness, disbelieve a witness, or not be able to decide. The court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Sergeant Williams' guilt arising from the credibility of the witnesses, then I must find him not guilty.

The assessment of credibility

[26] The court may accept or reject, some, none or all of the evidence of any witness who testified in these proceedings. Neither credibility nor reliability is an all-or-nothing

proposition. A witness can be deemed reliable on some aspects and unreliable on others. It is a given, however, that to support a conviction, testimony must be reliable and capable of sustaining the burden of proof on a specific issue or as a whole. The court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except the presumption of innocence.

[27] Rendering a verdict is not a question of deciding whether the court believes the defence's evidence or the prosecution's evidence. In those areas where the evidence of the accused contradicts the evidence of prosecution witnesses, the method that I must follow in order to respect the fundamental principle obliging the Crown to prove the guilt of the accused beyond a reasonable doubt is as provided by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at page 758 as follows:

> First, if I believe the evidence of the accused, I must acquit.
>
> Second, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.
>
> Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[28] I must add that if, after careful consideration of all of the evidence, I am unable to decide whom to believe, I must acquit. (see *R. v. H. (C.W.)*, 1991 68 CCC (3d) 146 (BC CA).

The credibility of the accused

[29] Following the close of the prosecution's case, the accused took the stand in his defence. In relation to charges 1and 2, Sergeant Williams admitted ordering students to drink water from their canteen but provided context and a rationale for his actions. I find that his narrative generally made sense as it was internally consistent. This is not an approval of what Sergeant Williams has done to fix the perceived problem of the lack of time to fill canteens as requested by Lieutenant Desjardins. It remains that his actions were logically linked with making students realize the importance of filling their canteens and that it was possible to fill them in a short period of time; all of that in the context of a recruit course that is aimed at transforming young civilians into soldiers within a limited period of time and with limited means. Having heard the testimony of prosecution witnesses, Sergeant Williams did not try to take advantage of obvious discrepancies or occasions to make himself look better. To illustrate, he could have stated that upon learning of the unintended and unfortunate fact that Private Theriault vomited, he stopped the evolution. Instead, he explained the help provided to Private Theriault and said that the evolution continued until students demonstrated their capacity to fill their canteen within what he considered to be a reasonable time.

[30] Yet, Sergeant Williams' explanations in relation to the push-up incident, subject of charge 3, is not as convincing. He did not deny in any way the testimony of prosecution witnesses to the effect that they had to do one push-up for every day that

Private Renouf had been on medical chit during the course. In fact, he confirmed that he was disappointed with Private Renouf's tendency to shut down and use medical chits to avoid addressing his difficulties. How then can I believe that he asked the group if they wanted to do push-ups as a farewell to send Private Renouf off in a spirit of solidarity as he explained? That is so especially since he had described push-ups as the default punishment for minor failures in the course. I am very skeptical of his assertions that he was simply asking if Private Renouf wished to appear before the group and if the group wanted to do push-ups. In the context of a basic training course, it is clear that a request from the Course Warrant Officer, the instructor's boss, would be seen at least as a demand, if not an order. It was even more so for Private Renouf who, although leaving the course that day, was and still is a member of the Royal Newfoundland Regiment, the same Reserve unit to which Sergeant Williams belongs. As a junior member who was in the precarious position of having failed to complete an essential component of basic training, he could hardly afford to upset a senior non-commissioned officer from his unit. Finally, Sergeant Williams' explanation as to why he did not feel his actions could hurt Private Renouf was also not credible: If it is common during a course to place a candidate under the spotlight as Sergeant Williams said, it does not explain why he felt it was appropriate to place someone who had just been removed from the course in the spotlight just before his dad comes to pick him up to bring him home in what is bound to be an overall day of failure for him. I don't believe his testimony as it pertains to the incident subject of charge 3.

The credibility and reliability of prosecution witnesses

[31] I find that prosecution's witnesses were generally credible. They were nervous and challenged by the task of testifying, but I find that they did not exaggerate the facts, admitted when their memory would not allow reaching firm conclusions and testified without demonstrating animosity towards the accused. One exception to this assessment would be in relation to Private Theriault who insisted that even if she could not recall the exact words spoken by Sergeant Williams, she was certainly ordered to drink the entire contents of her canteen multiple times as she did. Confronted with notes she had made shortly after the events, she did not address adequately the fact that she had written that the water could also be poured out. By contrast, Corporal Holland, previously Officer Cadet White, testified that he could have been mistaken in his belief that he had been ordered to drink his entire canteen, given that he could not recall the order being given. This is a much more balanced approach in my view.

[32] The problem with the testimony of the prosecution witnesses is that there was a significant amount of inconsistency in their testimony, which renders some of it unreliable. This is not their fault. They were very young at the time of the offences, typically 16 or 17, and at that age, almost two and a half years is a long time to recall events. I must, therefore, be careful in assessing their testimony and seek corroboration when necessary.

Analysis of Charges 1 and 2 for ill-treatment of subordinates

[33] As stated earlier, the accused is facing two charges under section 95 of the *NDA*, which reads as follows:

> *Abuse of subordinates*
>
> 95. Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

Essential elements of the offence

[34] In addition to identity, the date and place of the offence, and the fact that by reason of rank, the alleged victims were subordinate to the accused by rank or appointment were all admitted by defence or are beyond contention. The remaining elements that the prosecution had to prove beyond a reasonable doubt are:

(a) proof of the conduct particularized in the charges;

(b) proof that the particularized conduct constitutes ill-treatment; and

(c) the accused had a blameworthy state of mind.

The particulars

[35] The two charges under section 95 of the *NDA* are similarly worded. They both allege that Sergeant Williams ill-treated a person who by reason of rank (first charge) or appointment (second charge) was subordinate to him. Specifically, the particulars read as follows:

> "In that he, between 30 June 2015 and 18 August 2015, at or near Canadian Forces Station St. John's, St John's, Newfoundland and Labrador, did ill-treat Private Theriault [first charge] and Officer-Cadet White, N.C. [second charge] by ordering [them] to consume water until she/he did vomit."

Position of the parties

[36] The prosecution submits that in relation to charges 1 and 2 under section 95, every element was proven beyond reasonable doubt by the testimony of its witnesses, sufficient for me to find guilt. The defence submits that I should be left with a reasonable doubt on whether the conduct as stated in the particulars of the charge has been proven and if so, whether, in the circumstances of a recruit course, that conduct reaches the level required to constitute ill-treatment under section 95 of the *NDA.*

First Issue: Whether the prosecution has proven the charges as particularized

[37] After having assessed the evidence, the credibility of the witnesses and reviewing the law, the first issue for this Court is whether the particulars as detailed are proven beyond a reasonable doubt. The onus is on the prosecution to prove beyond a reasonable doubt the particulars as alleged, namely that Sergeant Williams ill-treated his two subordinates by ordering them to consume water until they did vomit.

[38] This wording is peculiar. A charge similarly worded has generated some debate a few months ago in the case of *R. v. Young*, 2017 CM 2006 which involved charges against a subordinate of Sergeant Williams serving as an instructor in the same BMQ Land Course in question here. The presiding military judge had expressed concern with the particulars and requested clarification on what they meant, as indeed, it is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proven beyond a reasonable doubt. Indeed, the allegations as particularized here and in *Young*, "did ill-treat by ordering her/him to consume water until she/he did vomit", upon a strict reading, suggests that the order given was to consume water until they vomited, the act of "vomiting" being the intended end state of the order given.

[39] During preliminary discussions in this case, as explained at the start of the trial, defence counsel asked which of the two different interpretations discussed in *Young* applied here: the first one being that the act of "vomiting" as the intended end state of the order; and the second one being that they were ordered to consume water and as a consequence ended up vomiting. The prosecution confirmed that it was the latter and the trial proceeded on that basis. Therefore, with the particulars interpreted with this meaning, there is a requirement that vomiting did occur for both Private Theriault and Officer Cadet White. On the basis of the evidence that I heard, especially from these two witnesses, I am convinced beyond a reasonable doubt that vomiting occurred.

[40] Yet, vomiting is not the only requirement that must be met in order to conclude that the charge as particularized has been proven. By virtue of the way the charge was drafted, there has to be a cause to effect link between the order and its alleged consequence, that is, vomiting. Indeed, Sergeant Williams is charged with ordering consumption of water until vomiting. The word "until" has to mean something. I believe that the prosecution has obliged itself to prove that the order to consume water caused both Private Theriault and Officer Cadet White to vomit. In addition, given the requirement for wrongful intent on the part of the accused generally on the ill-treatment particularized as it has been, I need to find sufficient evidence to allow me to draw an inference that vomiting was either anticipated or intended by the order.

[41] On both fronts, the prosecution has failed to meet the stringent requirement of proof beyond a reasonable doubt. Even if it is reasonable to conclude that Private Theriault and Officer Cadet White got sick as a result of consuming too much water and it is admitted that they were given an order to drink water, it remains that the consequence, vomiting, must be linked with the order itself. Here, no one was able to

testify as to the exact words spoken to give this order. It cannot be said that an order to drink water constitutes in itself ill-treatment. As discussed at paragraphs 88 and 98 of *Young*, it would be different if the order was to "consume water until you vomit" or if the order was to consume an inherently toxic substance that was reasonably certain to cause vomiting. In the circumstances of this case, with the ill-treatment particularized as it has been, I cannot find sufficient evidence to allow me to draw an inference beyond a reasonable doubt that vomiting was either anticipated or intended by the order. In fact, there is some evidence to the effect that vomiting appeared very much to be an unintended consequence: Sergeant Williams did testify that once he realized Private Theriault had been sick, he told the group they did not have to drink all of the water. Five prosecution witnesses recalled having been told by Sergeant Williams that they could pour water over their heads instead of drinking it.

[42] Of course, this clarification occurred after at least Private Theriault and possibly Officer Cadet White had already vomited. It is difficult to assess precisely what occurred before as no one remembers the exact words spoken by Sergeant Williams in giving the order. However, the evidence to the effect that many students dumped water over their heads or on the ground instead of drinking it and were not reprimanded for not drinking the entire content of their canteen, combined with the fact that that the group was dismissed shortly after it was known that a candidate had vomited and as soon as the timing for refilling the canteens had been met, is sufficient to create in my mind a reasonable doubt as to whether the order was intended to oblige students to consume all of the contents of their canteens on several occasions, as Private Theriault and Officer Cadet White had done. On the basis of that evidence and in line with the assessment of credibility I made previously, I cannot ignore the possibility that they both misinterpreted the order given by Sergeant Williams.

Conclusion

[43] In the circumstances, I have a doubt as to whether the overconsumption of water by Private Theriault and Officer Cadet White, which led them to vomit, is a direct result of the order given by Sergeant Williams. This is not to say that I approve of the conduct of Sergeant Williams nor do I fail to recognize the duty to give clear orders. What I am saying in fulfilling my role as military judge is that it is not enough for me to conclude that Sergeant Williams may have done something wrong in the course of the water consumption incident or could have done something better. I must assess his conduct in relation to the charges that are the source of the jurisdiction of this court martial. It is not enough for me to conclude that he is probably guilty of the charges or of something else. To find him guilty as charged, the prosecution must have satisfied me of his guilt beyond a reasonable doubt. Here, the evidence introduced by the prosecution falls short of proving the conduct as particularized. There is therefore no need to continue the analysis and assess whether that conduct constitutes ill-treatment under section 95 of the *NDA* as this term has been interpreted by courts martial in the past. Sergeant Williams will be found not guilty of charges 1 and 2.

Analysis of Charge 3 for conduct to the prejudice of good order and discipline

Elements of the offence

[44] The defence admitted at the outset the elements of identity, time and place for all offences. The elements that are left to be proven beyond a reasonable doubt by the prosecution in relation to charge 3 are:

(a) the conduct alleged in the charge, namely that Sergeant Williams did harass Private Renouf;

(b) the fact that the conduct is conduct to the prejudice of good order and discipline; and

(c) the required wrongful intent on the part of Sergeant Williams.

Position of the parties

[45] The prosecution alleges that the improper comments attributed to Sergeant Williams in relation to Private Renouf are sufficient in themselves to conclude that harassment occurred and, therefore, all four elements of the definition of "harassment" at DAOD 5012-0 are proven. For its part, the defence submits that the accused's conduct was not improper and, alternatively, that he did not know his remarks would cause offence or harm. The defence also argues that the evidence is insufficient to demonstrate beyond a reasonable doubt that the conduct of Sgt Williams is conduct to the prejudice of good order and discipline under section 129 of the *NDA*.

First issue: did Sergeant Williams harass Private Renouf?

[46] The parties agreed in submissions that the question of whether Sergeant Williams harassed Private Renouf is to be answered on the basis of the definition of "harassment" found in DAOD 5012-0, a well-known order that applies to all members of the Canadian Armed Forces (CAF) as well as to civilian employees of the Department of National Defence. That definition requires four things to be proven in order to find harassment on the part of Sergeant Williams:

(a) Sergeant Williams must have manifested an improper conduct;

(b) that conduct was directed at another person in the workplace;

(c) that the conduct was offensive to another person in the workplace; and

(d) that Sergeant Williams knew or ought reasonably to have known the conduct would cause offence or harm.

[47] I have no hesitation in finding that the facts related earlier, as it pertains to the push-ups event, were proven beyond a reasonable doubt. All present who testified said that they were mustered by Sergeant Williams and ordered to do one push-up for every day that Private Renouf was on medical chit during the BMQ Course. While these push-ups were performed, Private Renouf was ordered to say "thank you" for every push-up performed by those who, by then, were his former colleagues, as he had been removed from the course previously the same day. I accept Private Renouf's testimony to the fact that he felt degraded and worthless as a result as well as the testimony of prosecution's witnesses who said they found the event was unfair and/or undeserved in relation to Private Renouf.

[48] I do not accept as credible Sergeant Williams' explanations to the effect that he had simply asked the course if they agreed to send Private Renouf off with push-ups nor his other attempts at justifying his actions as explained earlier in my findings relating to his credibility.

[49] As it pertains to the first element of the definition of "harassment", I conclude beyond a reasonable doubt that, by his actions, Sergeant Williams ensured that Private Renouf's last duty as a departing candidate in the BMQ Land Course was to be brought in front of his former colleagues of the course to witness them make one push-up for every day that he was on medical restrictions during that and the previous BMQ Course. In addition, he was ordered to say "thank you" after each push-up. I have no difficulty concluding that Sergeant Williams' conduct in ordering, directing or even tolerating that Private Renouf be treated that way is improper. That first element has been proven beyond a reasonable doubt.

[50] In relation to the second and third elements, I have no difficulties in concluding that the conduct was directed at another person in the workplace, here the location where the BMQ Course was held, and that it was offensive to another person in the workplace, as clearly laid out in the evidence of Private Renouf.

[51] As to the fourth element, on whether Sergeant Williams knew or ought reasonably to have known his conduct would cause offence or harm, I do accept the invitation of defence counsel to look at this element in the context of the basic training course that Sergeant Williams was tasked to deliver at the time of the alleged harassment. For sure, it is the job of course staff to provide challenging training and situations during the course in order to test candidates and allow them to change some of their civilian ways to become soldiers. Yet, I do not agree with the suggestion made in passing that the job of course staff is to an extent to harass candidates. Indeed, DAOD 5012-0, the order prohibiting harassment in the CAF, specifically provides that conduct involving the proper exercise of responsibilities *does not constitute harassment*. In the training context, the challenges imposed on candidates by staff, whether specifically provided for on course plans or imposed as a result of the fluid dynamic of any course, must provide training value. I do accept that doing push-ups has a training value given the objective of improving the physical fitness of candidates. However, the way push-ups were imposed by Sergeant Williams, especially the link between the

number imposed and medical restrictions to Private Renouf, in his presence, with the obligation to say thank you, had no training value. Its only value was humiliation or revenge directed to a candidate who, according to Sergeant Williams himself, had used medical restrictions to get out of difficult situations.

[52] In my opinion, this conduct is not even close to the line of impropriety; it leans heavily on the side of conduct that is entirely improper, especially on the part of a senior instructor occupying the functions of course warrant officer. He was so far over the line that he ought reasonably to have known the conduct would cause offence or harm.

[53] In addition, on the basis of what I observed of the demeanor of Private Renouf, and the fact that he was 17 or 18 years of age at the time he was subjected to the conduct of the accused, as well as his testimony and the testimony of the prosecution witnesses about Private Renouf's observable reaction during the event, I am left with no doubt that Sergeant Williams ought reasonably to have known his conduct would cause offence or harm. I conclude the fourth element of the definition of "harassment" has been met in this case.

[54] In summary, I find that Sergeant Williams manifested an improper conduct in making the class do push-ups in the manner I just described. This conduct was directed at Private Renouf, in the workplace and was offensive to him. Sergeant Williams knew or ought reasonably to have known his conduct would cause offence or harm. I find Sergeant Williams has harassed Private Renouf.

Second issue: Is the conduct of Sgt Williams conduct to the prejudice to good order and discipline under section 129 of the *NDA?*

[55] Having just found that the conduct of Sergeant Williams contravened the prescription of DAOD 5012-0, an order applicable to the entire CAF, I can conclude that the act done in contravention of that order is a conduct to the prejudice of good order and discipline by application of subsection 129(2) of the *NDA.*

[56] I am aware that a practice has been followed for some time in the drafting of charges to specify in the particulars of the charge the specific order that was alleged to have been contravened in order to highlight that the prosecution was relying on what has at times been described as a presumption of or a deemed prejudice found in subsection 129(2). Given the constraints I am operating under in preparing this decision, I have not had the time to research in depth the reason as to why such practice developed and whether it was deemed legally necessary or whether it was rather done to ensure that the accused knew the case to meet. I do not believe such practice is necessary in the case of a conduct such as harassment, which is governed by a well-known order – DAOD 5012-0 – and is the subject of regular reminders and training as described by the accused himself in his testimony. This is even more so since the recent decision of the Court Martial Appeal Court (CMAC) in *R. v. Golzari*, CMAC-587 of 23 June 2017, which clarified the essential element of whether the neglect or conduct

particularized in a charge laid under section 129 of the *NDA* is neglect or conduct to the prejudice of good order and discipline, evacuating the previously adopted view that a standard of conduct had to be proven.

[57] *Golzari* was not a case where an order had been breached, contrary to the situation here. That CMAC decision stands for the proposition that prejudice will be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would tend to or be likely to result in prejudice to good order and discipline, which the CMAC distinguishes from a physical manifestation of injury to good order and discipline. Furthermore, the CMAC stated that in most instances, the trier of fact in a court martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge.

[58] The prosecution has submitted that even without applying the presumption of subsection 129(2) the court could find that prejudice to good order and discipline has been proven in this case. This is not a case where an accused can risk being convicted by the subjective applications of norms known only by the trier of facts. I concluded here that the prosecution has established beyond a reasonable doubt that the accused has violated objectively defined norms in the field of harassment. In doing so, the service knowledge I applied is educated by the version of DAOD 5012-0 in force at the time of the alleged offence. The analysis is not so different than what would have occurred pre-*Golzari*. Having found that a breach of the non-harassment obligation found in DAOD 5012-0 has occurred, I could infer prejudice to good order and discipline, as stated in *Golzari*. It is exactly what Parliament decades ago stated a trier of fact could do under subsection 129(2) of the *NDA*.

[59] I do not think it is necessary to refer to the evidence of witnesses here to infer prejudice. Should I be wrong on that, I wish to state that the evidence of every prosecution witness present at the time, to the effect that they felt doing push-ups like this was unfair and undeserved both to them and Private Renouf or who felt used as tools to shame a colleague, is sufficient to allow me to conclude that Sergeant Williams's conduct tended or was likely to result in prejudice to discipline. It is trite to say that young recruits who believe they have been treated unfairly are less likely to respect their superiors and their superiors' orders in the future. Conduct that drives such sentiments carries a real risk of injury to good order and discipline.

[60] I wish to add that the implication of the conduct of Sergeant Williams in this case as to the system of medical limitations applied in the CAF is troubling. Non-observance of medical restrictions in military duties is something that is likely to prolong injuries and make soldiers unavailable for normal duties for longer periods of time. By his conduct, Sergeant Williams promoted a culture of disregard for *bona fide* medical limitations, an integral part of the duty of injured soldiers to get better and get back to full duties as soon as possible. Any suggestion that one should eschew medical limitations may compel soldiers, especially given the pressures inherent in military service, including the pressure to succeed in training, to disregard their duty to get better

when injured or ill. That is not only inherently detrimental to discipline but also has the potential to threaten a person's long-term health, including long after they have left the military.

[61] I conclude, therefore, that the conduct displayed by Sergeant Williams in the course of the push-ups incident did prejudice good order and discipline as the notion is now understood following the CMAC decision in *Golzari*, especially at paragraphs 76 to 78 of that decision.

Final issue: Did Sergeant Williams have the required wrongful intent

[62] The CMAC decision of *R. v. Latouche*, CMAC 431 of 2 Aug 2000, addresses the *mens rea* requirement in this case. In that decision, the court held that section 129 of the *NDA* does not require the prosecution to prove that an accused had any intent whatsoever to adopt a conduct to the prejudice of good order and discipline. It is the underlying violation that is relevant in determining what *mens rea* is required for a finding of guilt pursuant to section 129.

[63] The Court rejects Sergeant Willams' assertion that he did not intend to cause any harm by his conduct and finds that he knew or ought reasonably to have known the conduct would cause offence or harm in its analysis of the final step required in determining that he did harass Private Renouf, and in doing so violated the non-harassment obligation found in DAOD 5012-0. This is the extent of the analysis required for *mens rea* according to *Latouche*. The Court, therefore, finds that Sergeant Williams had the required wrongful intent.

Conclusion

[64] I find that the conduct of Sergeant Williams did harass Private Renouf and that the third charge of conduct to the prejudice of good order and discipline under section 129 of the *NDA* has been proven beyond reasonable doubt.

FOR THESE REASONS, THE COURT:

[65] **FINDS** the accused, Sergeant Williams, not guilty of charges 1 and 2 for ill-treatment of subordinates.

[66] **FINDS** Sergeant Williams guilty of charge 3 for conduct to the prejudice of good order and discipline.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Captain B.E. Jalonen

Major J.L.P.L. Boutin, Defence Counsel Services, Counsel for Sergeant M.B. Williams