COURT MARTIAL

Citation: *R. v. O'Malley*, 2021 CM 5014

Date: 20210817
Docket: 202052

Standing Court Martial

Canadian Forces Leadership and Recruit School
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Sailor 1st Class T.C. O'Malley, Offender

Before: Commander C.J. Deschênes, M.J.

SENTENCE

(Orally)

Introduction

[1] Sailor 1st Class O'Malley pled guilty to a charge under section 129 of the *National Defence Act* (*NDA*) for conducting himself towards Canadian Forces Leadership and Recruit School (CFLRS) candidates in a manner that amounted to a contravention of the Commandant Standing Orders – Chapter 2 – Conduct. The conduct took place between 1 February and 7 March 2020, at or near St-Jean-sur-Richelieu, Quebec. The second charge of ill-treated a person who by reason of rank was subordinate to him was withdrawn by the prosecution with leave of the Court. Therefore, this Court is left with only the one charge in this proceeding. Having accepted and recorded his guilty plea on this charge, the Court must now determine and impose a fair and fit sentence, which requires that the punishment be proportional to the circumstances surrounding the commission of the offence, and that takes into consideration his situation. In order to assist the Court in determining the appropriate

punishment, both counsel are jointly recommending that this Court impose a punishment of a reprimand combined with a fine in the amount of $4,000.

Summary of circumstances

[2] The circumstances surrounding the commission of the offence contained in the Statement of Circumstances were read in court and the document was introduced as an exhibit. The offender admitted that the account of the events was true. The Statement of Circumstances reads as follows:

"AGREED STATEMENT OF CIRCUMSTANCES

1. At all material times, between 1 February 2020 and 7 March 2020, LS O'Malley was a member of the Regular Force of the Canadian Armed Forces. At all material times, he was a member of the staff at CFLRS, Saint-Jean-sur-Richelieu, Qc.

2. During that period of time, LS O'Malley inappropriately obtained cellphone numbers of 4 candidates at the CFLRS and communicated with them by text messages, flirting with them and repeatedly inviting two of them to spend time with him outside of the Mega. During the same period, LS O'Malley repeatedly addressed S3 Sleigh, Avr(R) DeChamplain and Avr Robinson (then Ferrier) in an inappropriately familiar manner, using their first names or nicknames. LS O'Malley also made daily use of tobacco products (cigarettes) in view of candidates at the staff's and the candidate's smoke pits.

3. At times, LS O'Malley made inappropriate comments to S3 Sleigh about her body and how she looked in her uniforms, such as: 'I didn't think anybody could make those things look good.'

4. On or about 13 February 2020, LS O'Malley convinced S3 Sleigh to spend the evening of 15 February 2020 off base with him in order to 'de-stress'. At the time, S3 Sleigh was working on an OJT in the CFLRS orderly room with LS O'Malley. On 15 February 2020, he asked S3 Sleigh to text him to let him know when the recruits had left and then proceeded to pick her up around 1630 hrs at the North door. The plan to going off base to de-stress quickly turned out to be a private dinner at a restaurant which included the consumption of alcohol.

5. After picking up S3 Sleigh and leaving the base by a back gate, LS O'Malley drove to his house where he invited S3 Sleigh inside. Once in his house, he offered her coffee, water and different kinds of alcohol. She said no to everything. From there, he then brought her to the SAQ where he bought himself and her each a bottle of wine.

6. Once at the restaurant, from S3 Sleigh's perspective, LS O'Malley was behaving as if he and her were a couple, for example by taking her hand on the table for several minutes. This made her very uncomfortable. He was drinking his wine and questioned her as to why she did not seem to be enjoying her wine, that comment made her feel pressured to drink. At some point during the dinner he said to her: 'I had no expectations for tonight but would you ever date a guy like me.' He did not end up kissing her that night or at any other time. However, after he made that comment, S3 Sleigh was on 'high alert.'

7. Later that evening, LS O'Malley took S3 Sleigh back to his house and offered her some more alcohol, which she again refused, and he encouraged her to stay for the night in his guest room. S3 Sleigh refused. She then had to take an UBER to get back to CFLRS because LS O'Malley could not drive her back all the way to the base. The UBER trip cost her 56.32 $.

8. Two days later, at CFLRS, LS O'Malley invited S3 Sleigh into his office after hours in order for her to use a computer to book flights and access her online banking. He had told her to bring Avr(r) DeChamplain with her, which she did. S3 Sleigh needed to book flights to go home to visit her family on a compassionate leave that had been approved. Once in the office, LS O'Malley rubbed and massaged her shoulders and rubbed her back without her consent in the presence of Avr(R) DeChamplain, making the two uncomfortable. On this same occasion, LS O'Malley insisted on loaning 800$ to S3 Sleigh in order for her to pay for her flights. LS O'Malley said in the presence of both S3 Sleigh and Avr(R) DeChamplain that he could and wanted to pay for her flights because he had no kids or pets, was quite happy financially, and that he 'spends all his money on hookers and blow', which he intended as a joke but not made it clear to S3 Sleigh that he was joking. LS O'Malley ended up transferring 865$ to her, 800$ in loan for the flights and 65$ to repay her for the UBER ride two days earlier. She returned 800$ to LS O'Malley a few days later.

9. During the relevant period of time, LS O'Malley also regularly hugged S3 Sleigh at the CFLRS staff's and candidate's smoke pits, which each time made her feel uncomfortable. She felt that she had to accept these hugs or he would become angry. She did not want him to become angry because she was required to work with him for her OJT.

10. During the same relevant period of time, LS O'Malley said, in the workplace and in the presence of S3 Sleigh and one other staff, that 'Operation Honour sounded like - Hop On Her – and that the people who created it must have wanted it to be taken as a joke'. LS O'Malley intended this comment to criticize the name of the operation, not its validity.

11. On 3 March 2020, LS O'Malley, after hearing that Avr Robinson might have been interested in him, convinced S3 Sleigh to give his personal cellphone number to Avr(R) Robinson (then Ferrier) because he said, among other things, that he thought she had beautiful eyes and he liked her attitude. Avr(R) Robinson contacted him by text message the same day and LS O'Malley then texted her over a period of 5 days. The last two of those days, Avr(R) Robinson did not respond. She made it clear to him that her priority was CFLRS training. During these text message exchanges, LS O'Malley made flirtatious comments and tried without success to convince her to call him. He proposed a date out in Montreal, inviting her to stay over at his house, cuddle or stay in a guest room. Although the text messages were never explicitly sexual in nature, Avr(R) Robinson felt that they were clearly inappropriate and made her feel awkward. On 6 March 2020, Avr(R) Robinson decided to report the situation to the CFLRS chain of command.

12. On 4 March 2020, LS O'Malley made an inappropriate joke related to Avr(R) Robinson in front of a group of candidates at their smoke pit, saying how he wanted to see her in pigtails and gesturing to the group the action of grabbing pigtails and making insinuating comments suggesting the desire to grab her pigtails 'from behind'.

13. On 21 February 2020, S3 MacDonald traveled home to visit her family on a compassionate leave. LS O'Malley was asked to drive her to the airport from the CFLRS. After leaving CFLRS, LS O'Malley stopped at his private residence and invited S3 MacDonald inside. LS O'Malley mentioned to her that he had to stop to get changed. S3 MacDonald refused to go inside and waited in the car. On the way to the airport, in the course of discussing relationships they had been in, LS O'Malley told S3 MacDonald about his sex life and a 'threesome' he had with his ex-girlfriend and a friend. S3 MacDonald was very uncomfortable and stopped talking. LS O'Malley ended up apologizing for his comments. Just before leaving her at the airport, LS O'Malley gave S3 MacDonald his cellphone number, telling her that she could let him know that everything was OK after the flight. She texted him to tell him she was OK and he texted her twice during her leave to ask her how she was doing and if everything was OK.

14. LS O'Malley's conduct between 1 February 2020 and 7 March 2020 amounted to several violations of the Commandant Standing Orders – Chapter 2 – Conduct, in particular paragraphs 2.4.1, 2.4.2, 2.4.5, 2.4.6, 2.6.3.1, 2.7.1 and 2.8.1."

The issue

[3] The Court must now determine whether the joint submission, a reprimand combined with a fine in the amount of $4,000, is contrary to the public interest test.

<u>Position of the parties</u>

Prosecution

[4] In her submissions, the prosecutor explained that the fundamental purposes of sentencing were considered when deciding on the joint submission. She affirmed that these fundamental purposes shall be achieved by imposing a sanction that has for objectives for this specific case to denounce unlawful conduct; to deter others from adopting the same conduct; and to assist in the rehabilitation of the offender. The prosecution explains that before agreeing on the joint submission, consultation with the chain of command and the victims took place.

[5] The prosecution considered as aggravating that the conduct caused harm to the recruit system. She contends that recruit training transforms civilians by transitioning them into military members, and that it sets the bedrock of military discipline to be followed throughout one's military career. She further considered the number of victims subjected to the conduct, their rank, that they were all young recruits aged between eighteen and twenty-eight years old, as well as the impact that the conduct had on them. The conduct was also composed of repeated acts towards the victims, which took place during a thirty-five-day period in the workplace, with one involving the violation of a victim's physical integrity. Also aggravating was that the offender acted knowing that his actions were against the Commandant's Standing Orders. In support of this argument, the prosecution contended that the offender's use of the back gate when leaving the base with Sailor 3rd Class Sleigh demonstrates that he knew what he was doing was wrong, as the use of the back gate is uncommon for the staff and the recruits. She further considered aggravating that the offender has served several years in the Canadian Armed Forces (CAF) and therefore, as an experienced CAF member, he should have known not to conduct himself contrary to the Commandant Standing Orders. Lastly, the position of authority of the offender during the material time and the position of vulnerability of the victims as recruits were considered aggravating circumstances. The prosecution did consider as mitigating factors that the offender has no conduct sheet and pled guilty to the charge.

[6] The prosecution contends that the joint submission is higher but within the range of punishment, explaining that the joint submission is the least severe punishment that will maintain discipline and morale within the CAF and the unit. In applying the principles of the Supreme Court of Canada decision, *R. v. Anthony-Cook*, 2016 SCC 43, the prosecution explains that the joint submission meets the public interest test.

Defence

[7] The defence first contended that there was no evidence supporting the prosecution submission that using the back gate was something nefarious, as there is no evidence regarding what the practice was in regards to departing the base for recruits and staff. He contended that the offender saw himself as a colleague. He also contended

that age matters less than rank, and that the offender's bubbly and social nature contributed to a friendly atmosphere at work. He argues that there is no evidence of predation, that the offender's sociality is the driving force behind his conduct, and that he had no malicious intent. He finally claims that none of the complainants conveyed their discomfort in relation to his conduct toward them.

Evidence

[8] The Court examined and considered the Statement of Circumstances, the content of which was agreed to by the defence, as well as the documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and provided by the prosecution, in accordance with article 112.51 of the QR&O. The Commandant's Standing Orders, issued on 29 May 2019, along with the offender's declaration attesting that he has read the Commandant's Standing Orders, signed on 12 August 2019, were entered as exhibits. The defence introduced a letter of reference, a Personnel Development Review (PDR) dated 21 Jan 2019, and an undated Agreed Statement of Facts, which includes additional information pertaining to the offender's situation.

Victim impact statements

[9] The prosecution consulted with and advised the victims of their right to provide a victim impact statement. The statements of Sailor 3rd Class Sleigh and Sailor 3rd Class McDonald were read in court by the prosecutors, while Aviator Robinson read hers in court, via video link. Aviator DeChamplain declined to provide a statement.

Apology

[10] The offender offered an apology, where he indicated having learned from this experience.

The analysis

[11] When determining a sentence, the Court must be guided by the sentencing principles contained in the *NDA*. Subsection 203.1(1) enunciates the fundamental purposes of sentencing, which are:

(a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and

(b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[12] The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2), such as to promote a habit of obedience to lawful commands and orders, to maintain public trust in the

Canadian Forces as a disciplined armed force, or to assist in rehabilitating offenders. The objectives of the sentence are dictated by the particularity of the case and of the offender.

[13] Finally, section 203.2 of the *NDA* provides for the fundamental principle of sentencing:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[14] Consideration of a joint submission by the Court is done with the legitimate assumption that counsel were mindful of these statutory sentencing principles during plea negotiations and when agreeing on the joint submission. Further, counsel have in-depth knowledge of the circumstances surrounding the commission of the offence, while defence counsel is aware of the offender's personal situation. Joint submissions provide many benefits to the accused, the participants, the unit, and the military justice system. They assist in limiting the resources normally required to support a trial by court martial. A guilty plea offers accused persons an opportunity to take responsibility for their actions and tends to show that they are indeed remorseful. The Supreme Court of Canada in *Anthony-Cook*, in recognizing these many benefits, has established the public interest test for trial judges dealing with a joint submission. It dictates that joint submissions should not be departed from by trial judges. However, if the joint submission would cause an informed and reasonable public to lose confidence in the institution of the courts or would be contrary to the public interest, only then should the sentencing judge follow certain steps before considering rejecting the recommendation. This means that I have limited sentencing discretion in this case.

[15] This Court must therefore examine the joint submission and determine if it is contrary to the public interest or whether it would cause an informed and reasonable person or public to lose confidence in the institution of the courts. If it is not contrary to the public interest, or if it would not bring the military justice system into disrepute, this Court is required to accept it even though it may have arrived at a different sentence in the absence of a joint recommendation.

[16] When considering a joint submission, trial judges rely heavily on the work of the prosecution as representing the community's interests, and the defence counsel acting in the accused's best interest. Trial judges can rightfully assume that counsel took all relevant facts into consideration when mutually agreeing upon an appropriate sentence. The Statement of Circumstances that was read in court and filed as an exhibit provides the Court with the facts that guided counsel in coming to a joint submission, as it generally provides a fulsome description of the circumstances surrounding the commission of the offence, including the existence of aggravating factors. Additionally, when adduced as evidence as part of the sentencing hearing, an Agreed Statement of Facts provides additional information that may present mitigating factors that were also considered during the plea negotiations, which would further support the joint submission.

The offence

[17] The offence to which the offender pled guilty does not specifically allege sexual harassment conduct. Nevertheless, the Agreed Statement of Circumstances does provide the details demonstrating that the conduct was mainly composed of sexual advances, sexual comments, and unwanted touching of one of the complainants, which constitutes sexual harassment. Therefore, as established by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at page 1284 of the decision:

> When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[18] In the military context, harassment in the workplace has a greater impact because in addition to causing harm to the victims subjected to the conduct, it erodes the trust and esprit de corps within the unit, and has the potential of detrimentally affecting operational effectiveness of the unit, and of the CAF as a whole. It also brings discredit to the institution and to its members, particularly because the public legitimately expects a higher standard of conduct from its military organization.

Aggravating factors

[19] Additionally, in the case at bar, in determining whether the proposed punishment of a reprimand combined with a fine in the amount of $4,000 meets the public interest test, the Court has considered the aggravating factors specific to this case:

(a) the level-entry rank of the victims, their age and the fact that they were recruits. Although no evidence was adduced to prove their age, the Court could see that two of the victims present in court were visibly young women. Further, as a member of the staff at CFLRS, Sailor 1st Class O'Malley was in a position of authority vis-a-vis the victims. Therefore, there was an inherent power imbalance between the offender and the victims based on their positions, rank and age difference;

(b) there were not one but four victims subjected to the harassing conduct;

(c) the impact of the conduct on the victims. It takes courage for a victim to come forward to their chain of command to report conduct that makes one feel uncomfortable, particularly for young recruits reporting on a superior. That said, the Court was very careful only to consider what the law authorized the sentencing judge to consider in the victim impact statements. The conduct had a significant and long-lasting effect on the victims subjected to it. The victims who provided a statement did suffer emotionally as a result of the offender's actions, and continue to do so;

their trust in the system, in the organization, has been shaken to its core. I commend their courage in coming forward, denouncing the conduct and telling their story to the Court themselves or through the prosecution. Hopefully, time will help them heal;

(d) the conduct was composed of repeated acts toward the victims, which took place during a thirty-five-day period in the workplace;

(e) the conduct involved the violation of one victim's physical integrity; and

(f) although no evidence was adduced to prove beyond a reasonable doubt that the offender did use his position as a clerk in being entrusted with full access to personal records of recruits in order to obtain their personal and contact information, he did inappropriately obtain cellphone numbers of four candidates at the CFLRS.

Mitigating factors

[20] The Court also accepted counsel's submissions regarding mitigating circumstances and took the following factors into consideration:

(a) Sailor 1st Class O'Malley is a first offender;

(b) he pled guilty before this Court, dispensing with the need for the victims to have to testify, and where more resources would be required to sustain a longer, costlier trial, effectively saving the Court, counsel and the unit supporting the Court considerable time;

(c) the prosecution confirmed that the offender's chain of command supports him; and

(d) he apologized to the victims, in court. His apology seems sincere.

<u>The offender's situation</u>

[21] Sailor 1st Class O'Malley is 47 years old. He enrolled in the CAF on 16 September 2009. After basic training in Saint-Jean-sur-Richelieu in 2009 he served on the west coast in various positions as a Naval Combat Information Operator, including on board Her Majesty's Canadian Ship *Winnipeg* from June 2011 to January 2015, where he participated in multiple short sails, as well as Exercise Rim of the Pacific (RIMPAC) 2012, and spent 184 days at sea. From January 2015 to November 2018, he was posted to the Regional Joint Operation Centre Pacific (RJOC(P)) at Maritime Forces Pacific Headquarters, and thereafter he occupationally transferred to become a clerk. He was promoted to his current rank in 2013. He was posted to CFLRS on 28 June 2019. He was sent home due to the COVID-19 pandemic and when he returned to work in May of 2020 he was assigned to assist with health-related force protection

measures before being assigned to work in the staff orderly room. Thereafter, he was posted to the CAF Language School in May 2021. Sailor 1st Class O'Malley was not placed on any type of administrative action following the incident at bar. The only administrative action he received in his twelve-year career in the CAF was initial counselling for being late while posted to RJOC(P).

[22] As for Sailor 1st Class O'Malley's performance, the Court notes that his superior's observations of his performance are extremely limited, beginning 1 May 2021, with summer leave and working-from-home conditions since then. The Court was also only provided with a PDR, and counsel could not explain why a Personnel Evaluation Report could not be provided. In the circumstances, the Court gives little weight to these exhibits and is therefore not in a position to conclude that his performance has been or is continually outstanding.

[23] Sailor 1st Class O'Malley is single and has no dependants.

Parity

[24] Having considered the circumstances surrounding the commission of the offence and the personal situation of the offender, the Court examined precedents for similar offences to determine whether the joint submission is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate in his case.

[25] In *R. v. Malone,* 2019 CM 5004, the offender, a warrant officer, pled guilty to a charge pursuant to section 129 of the *NDA* for sending images of a sexual nature to his subordinate's cell phone. Counsel had divergent views on sentencing. There was no touching involved and the conduct took place over a short period of time. Warrant Officer Malone was sentenced to a reprimand and a fine in the amount of $1,500. The Court also considered *R. v. McCabe and Gibson*, 2010 CM 2008, where a punishment of a severe reprimand with a fine in the amount of $4,000 was imposed on Leading Seaman McCabe, who had engaged in repeated touching of one of the complainants. A severe reprimand and a fine in the amount of $4,000 was imposed on Corporal Gibson.

[26] Finally, the Court considered *R. v. Duhart*, 2015 CM 4023, where a severe reprimand and a fine of $4,000 was imposed. In *R. v. Havas*, 2020 CM 2001, a reserve force sub-lieutenant who pled guilty to one charge contrary to section 129 of the *NDA* for violating the Cadet Training Centre Adult Staff Code of Conduct by texting an eighteen-year-old cadet and making advances, was sentenced to a severe reprimand and a fine in the amount of $2,000. After a brief review of these precedents, the Court concludes that the proposed sentence corresponds to punishments imposed in the past for similar offences. That is sufficient to allow the Court to conclude that the proposed sentence is not unfit. Consequently, the joint recommendation meets the parity principle.

Conclusion

[27] The Court reviewed the documentary evidence introduced as exhibits and considered counsel's submissions. It is apparent that they carefully assessed the specific circumstances of the offender when they arrived at their joint submission. Counsel overall identified and considered the most relevant aggravating and mitigating factors surrounding the commission of the offence. Counsel properly addressed the applicable principles and objectives of sentencing in this case. I am therefore satisfied that the documents introduced as exhibits provided this Court with a complete picture of both the offence and Sailor 1st Class O'Malley's personal situation and I accept counsel's position that the need for general and specific deterrence as well as reintegration of the offender into military life are met with the proposed sentence. Consequently, the Court finds that the joint recommendation is not contrary to the public interest and would not bring the military justice system into disrepute.

FOR THESE REASONS, THE COURT:

[28] **FINDS** Sailor 1st Class O'Malley guilty of one charge under section 129 of the *NDA*.

[29] **SENTENCES** Sailor 1st Class O'Malley to a reprimand combined with a fine in the amount of $4,000, payable in twelve monthly instalments over a period of one year, starting 1 October 2021.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez and Captain C.M.L Isabelle

Captain D.P. Sommers, Defence Counsel Services, Counsel for Sailor 1st Class T.C. O'Malley