COURT MARTIAL

Citation: *R. v. Bluemke,* 2022 CM 4015

Date: 20221027
Docket: 202155

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

His Majesty the King

- and -

Sergeant K.E. Bluemke, Offender

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

REASONS FOR SENTENCE

Introduction

[1] Sergeant (Sgt) Bluemke was brought before this Standing Court Martial facing two charges following derogatory comments he is alleged to have made while an instructor on an Infantry Section Commander (ISC) course at Canadian Forces Base Petawawa in early 2021. The first charge for disgraceful conduct contrary to section 93 of the *National Defence Act* (*NDA*) alleged that he had made hateful, anti-Jewish comments. The second charge, under section 129 of the *NDA*, for conduct to the prejudice of good order and discipline, alleged that, as an instructor, he had uttered comments adverse to the Jewish community, persons, or faith in front of course candidates.

[2] At the beginning of the proceedings, Sgt Bluemke pleaded guilty to the second charge on the charge sheet, under section 129 of the *NDA*. The Court accepted and recorded his guilty plea. Subsequently, the prosecution elected not to call any evidence on the first charge and Sgt Bluemke was consequently found not guilty of the first charge under section 93 for disgraceful conduct.

[3] I now find Sgt Bluemke guilty of the second charge for conduct to the prejudice of good order and discipline. The parties disagree on the sentence to be imposed. It is now my duty to determine an appropriate and fair sentence, based on the evidence, precedents and arguments submitted by counsel for both parties in the course of a two-day sentencing hearing.

Position of the parties

Prosecution

[4] The prosecution submits that Sgt Bluemke should be sentenced to a reduction in rank by one rank, which is to the rank of corporal. Indeed, master corporal is, in law, an appointment and not a rank, something that is not well-known or understood in today's Canadian Armed Forces (CAF) as it is an historical anomaly which would gain to be rectified. The proposed reduction in rank will therefore be significant, by what most perceived to be in effect two ranks, implying consequent loss of prestige, responsibilities and pay. Regardless, the prosecution considers that a reduction in rank is the sentence most likely to contribute to the maintenance of discipline, efficiency, and morale in the CAF, in the circumstances of the offence and of the offender.

Defence

[5] The defence submits that Sgt Bluemke should be sentenced to a reprimand and a fine of $1,000. It is, in the view of defence counsel, the outcome that is in the offender's and the CAF's best interest given that Sgt Bluemke has, in defence counsel's view, been almost entirely rehabilitated since the offence came to light in April 2021.

Evidence

[6] The facts revealing the circumstances of the offence were introduced first by the prosecution through the Statement of Circumstances read by the prosecutor and accepted as accurate by the offender, as well as by the documents mandated at *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.51(2). These included a conduct sheet which encompasses two previous convictions by summary trial for absences without leave, dating from 2004 and 2005 respectively, when Sgt Bluemke was a private. Considering the length of time that has elapsed, the obvious lapses in the data entered in the conduct sheet and the absence of connection between these previous convictions and the misconduct for which the offender is sentenced

today, I have decided to treat Sgt Bluemke as a first-time offender with no previous record.

[7] Other documents were produced by the prosecution with the consent of the defense as follows:

(a) a two-page document detailing the remedial measure, specifically counselling and probation (C&P), applied to Sgt Bluemke by his commanding officer, Lieutenant-Colonel (LCol) Sheppard, on 20 August 2021 in relation to the same occurrence subject of the charge he pleaded guilty to, with a monitoring period of six months, until 20 February 2022;

(b) a letter by LCol Sheppard, dated 9 September 2022, aimed at recognizing the expiry of Sgt Bluemke's monitoring period for the C&P, by virtue of the fact that he had completed the prescribed courses and had elevated his conduct to meet the expected standard, acknowledging that the planned monitoring period, which should have ended in February 2022, had elapsed due to administrative oversight;

(c) two personnel evaluations reports (PER) on Sgt Bluemke for fiscal years 2020-21 and 2021-22, the second PER making specific reference to the issue of the C&P, including comments by the immediate supervisor and commanding officer to the effect that Sgt Bluemke has met the conditions in conducting himself professionally; and

(d) the victim impact statement of MCpl Mahar, who was a candidate of Jewish heritage on the ISC course instructed by Sgt Bluemke in early 2021, describing the emotional impact that the statements made by Sgt Bluemke had on him at the time.

[8] The prosecution called two witnesses: LCol Sheppard, the commanding officer of the offender, and MCpl Christian, who was a candidate on the ISC course instructed by Sgt Bluemke from January to April 2021.

[9] For its part, the defence called four witnesses: Captain (Capt) Stewart; Warrant Officer (WO) Martin; WO Mustard; and MCpl Doggett. The first three of these witnesses are or were, at some point, supervisors of Sgt Bluemke. For his part, MCpl Doggett is currently one of seven subordinates of Sgt Bluemke and was also a candidate on the ISC Course in early 2021, during which the offence was committed.

[10] An additional document was introduced as an exhibit by Capt Stewart, namely a letter serving as a note to file recording the fact that Sgt Bluemke has been working to meet the conditions to overcome his deficiencies recognized in the C&P and noting that

he was acting above his rank by fulfilling much of the administrative duties of a Platoon warrant officer.

Facts

The circumstances of the offence

[11] The Statement of Circumstances includes the following facts which I find are relevant to the immediate circumstances of the offence:

(a) towards the end of an ISC Course in April 2021, as candidates provided their end-of-course review, a number of them reported that one of their instructors, Sgt Bluemke, had made frequent inappropriate jokes and comments referring to Jewish people and to the events of the Holocaust;

(b) a unit investigation was conducted, which eventually led to this court martial. Twelve candidates stated that they had witnessed this behaviour by Sgt Bluemke on multiple occasions throughout the course. Many candidates described this conduct as offensive, demeaning, and unprofessional; and

(c) the series of incidents the candidates described occurred during the period between 16 February and 9 April 2021. The comments Sgt Bluemke made included the following:

i. "Is anyone here Jewish?" This was one of the very first questions Sgt Bluemke asked the group of candidates at the beginning of the course;

ii. "Move with the sense of urgency as a certain group did leaving Germany in 1939." Sgt Bluemke made this remark during candidates' participation in the remediation of a firing range;

iii. "Germans are really good at packing things in tight." Sgt Bluemke made this comment at a moment when it was necessary to find additional space for transport inside of course vehicles; and

iv. "Why do Jews have big noses...? Because the air is free."

[12] Sgt Bluemke has formally admitted making these comments, part of the Statement of Circumstances, during the acceptance of his guilty plea.

[13] These comments had consequences. MCpl Christian testified that he recalled the comment about Germans being good at packing things tight, which was presented as a

joke by Sgt Bluemke. As a candidate, he was angered that a Sgt would make such comments in a professional environment. He felt embarrassed, both because the comments made him think of the ordeal Jewish people have gone through while packed in train cars and in gas chambers and because the casual way in which it was said made him fear that Sgt Bluemke could be making such comments in the presence of civilians while in uniform, bringing disrepute to the military generally and the Royal Canadian Regiment specifically. He said that although he did not verbalize his feelings at the time to Sgt Bluemke or another person in authority, he lost some respect and trust for Sgt Bluemke at the time and felt others on the course did as well, from the discussions they had between candidates. He also believes Sgt Bluemke's conduct may have had a detrimental effect on learning during the course, given that some candidates may have felt that they could not approach Sgt Bluemke or doubted his expertise.

[14] The victim impact statement filed on behalf of MCpl Mahar reveals that, being of Jewish heritage, the comments made by Sgt Bluemke were extremely disturbing for him, regardless of whether Sgt Bluemke was joking or not when he made them. The comments he heard eroded his confidence and respect for the CAF and affected his learning experience, as he was often so angered by Sgt Bluemke's comments that he could not retain knowledge that was being taught. MCpl Mahar stated that it was decided between candidates not to bring the matter up to other staff members to avoid potential reprisals in the form of increased intensity that could be injected in the course by the staff. The subsequent cross-examination of WO Martin confirmed the validity of these concerns in the sense that even if candidates are told they can bring any concerns to the directing staff of the course, it remains that in such high intensity environment, the course staff is often seen by candidates as an opposing force who have control over the degree of challenge that is brought to them and that they will need to overcome to succeed.

[15] The perspective of MCpl Doggett on the circumstances of the events was slightly different. Although he witnessed Sgt Bluemke make remarks about the Holocaust during the ISC course, his perception was that no one appeared to be affected negatively by what, for him, was intended as jokes. From what he experienced and perceived, Sgt Bluemke was clearly intent in ensuring that no one would be offended, asking repeatedly if it was the case, showing genuine concern in that regard. He stated that as far as he could tell, members of the class laughed at the jokes and were not negatively affected. He stated that MCpl Mahar did not appear affected and did very well on the course. He was not affected either and did not lose trust in Sgt Bluemke, his supervisor to this day. For him, no harm was intended by that conduct, although he conceded in cross-examination that the comments were inappropriate, could make some

people feel singled out and could be perceived differently, especially by a Jewish course mate such as MCpl Mahar.

[16] For his part, LCol Sheppard was not involved in the course and has no direct knowledge of the circumstances of the offence. Yet he provided useful explanations as to how far from expectations the comments that were admittedly made by Sgt Bluemke were, from his unique perspective as commanding officer of an infantry battalion.

The circumstances of the offender

[17] Sgt Bluemke was born in Potsdam, Germany in 1984 and is thirty-eight years of age. He immigrated to Canada in 1995 and identifies as a person of German heritage. He has joined the Canadian Armed Forces, regular force, in 2002, following completion of high school. Upon completion of basic and infantry training, he was posted to infantry regiments, where he is still serving today, specifically with the 3rd Battalion, Royal Canadian Regiment (3 RCR). He was promoted to the rank of Sgt in 2017. He has deployed twice overseas: for seven months to Afghanistan in 2010 and for four months in Ukraine in 2017-2018. He is separated and has two dependent children.

[18] At the time the complaints were made involving him, Sgt Bluemke was completing an assignment to the 4th Canadian Division Training Centre Detachment (4 CDTC) Petawawa from his home unit. As explained by LCol Sheppard, this is not unusual: the training centre requires instruction personnel from units in the division, especially from infantry battalions, to be able to run infantry courses. Units such as 3 RCR must provide a certain number of instructors. LCol Sheppard arrived in his position as commanding officer in the summer of 2021. He was briefed about the results of the investigation regarding the remarks allegedly made by Sgt Bluemke and on options to deal with the situation administratively, in parallel with disciplinary actions that were being pursued, noting that the charge sheet in this case was signed on 14 October 2021.

[19] In the remedial measure form he signed on 20 August 2021, LCol Sheppard concludes that written representations from Sgt Bluemke do not alter his decision to proceed with C&P, a decision that was likely in line with a previously issued notice of intent. The next formal documentation in evidence bearing LCol Sheppard's signature is Section 6, additional review, in Sgt Bluemke's 2021-2022 PER, signed on 6 May 2022, which states that Sgt Bluemke has conducted himself and managed his tasks professionally. The "cessation of C&P" letter of 9 September 2022 confirms that in more specificity, making express references to the four requirements listed in the remedial measures form of 20 August 2021 and confirming that in effect, Sgt Bluemke

had been subjected to a monitoring period for twelve and a half months instead of the six months initially foreseen.

[20] In his testimony, LCol Sheppard stated that his confidence in Sgt Bluemke is damaged because of the unacceptable conduct the offender admittedly engaged in. Indeed, what Sgt Bluemke has said repeatedly is likely to damage the morale and discipline of subordinates as he was expected as instructor to show, "what right looks like". The conduct was also of the kind to damage the teacher/mentor relationship that must be fostered by instructors to ensure that candidates feel free to engage with them and learn to succeed in their training. Finally, LCol Sheppard mentioned the risk that the conduct of Sgt Bluemke entails for the morale of the candidates and the reputation of his unit given that the conduct is in direct opposition both of his expectations and of the CAF ethos. That said, when engaged by the Court as to whether the damaged trust could be repaired, LCol Sheppard stated that he believes in rehabilitation and that indeed, trust could be regained over time.

[21] Without venturing in stating an opinion as to what sentence the Court should impose, LCol Sheppard stressed that he needs to trust Sgt Bluemke's leadership if he is to remain in that rank. Indeed, he cannot afford to have a sergeant who cannot be in a leadership position, given current shortages of senior non-commissioned officers within his unit. He stated that despite the possibility of managing the risk that Sgt Bluemke's past conduct generates through layers of supervision so that he can use and share his technical expertise and knowledge, the situation becomes more problematic when dealing with expectation relating to leadership courses or training that someone in the rank of sergeant is expected to contribute to. In that vein, he mentioned that a planned posting of Sgt Bluemke to the Petawawa-based Leadership Company of the 4 CDTC last summer had been cancelled due to his past conduct and the ensuing administrative and disciplinary measures. As a result, he had to identify a replacement. Mention was also made of potential problematic situations for international relations should Sgt Bluemke be deployed in places where he needs to deal with people of the Jewish faith, although this could be managed through assignments.

[22] In cross-examination, LCol Sheppard confirmed that he, as a commanding officer of the battalion, had limited exposure to Sgt Bluemke in his daily work, adding that on the rare occasions that he had dealt with him, Sgt Bluemke had conducted himself appropriately and professionally. Commenting on the PERs in evidence, LCol Sheppard confirmed that the marks on both the 2020-2021 (pre-incident) and 2021-2022 (post-incident) PERs were high and exactly equivalent, in that the sums of the performance and potential assessment "bubbles" were the same. He explained, without further elaboration, that the high marks were the result of the PER process and that the fact that the marks were not lowered post-offence was to allow for recovery in the case

of a not guilty verdict by the Court. LCol Sheppard confirmed that the promotion recommendation for both fiscal years, before and post-offence, remained as "Ready" and that he had signed, hence approved, the additional comments in Section 6 of the 2021-2022 PER referring to the conduct deficiency that had resulted in the C&P and the appropriate conduct since.

[23] The witnesses subsequently called by the defence, namely Capt Stewart, WO Martin and WO Mustard, did offer perspectives on the circumstances of the offender, which they all have known more extensively than LCol Sheppard, in one case for over twenty years. They explained the context of their involvement with Sgt Bluemke, especially their experiences in supervising him. WO Martin discussed what he observed while he was the Course Warrant Officer on the ISC course during which the offence was committed by Sgt Bluemke. For his part, Capt Stewart described Sgt Bluemke's role as A/Company Sergeant Major of the Para Company, a nominal role as the Company was by then largely stood down. Nevertheless, Sgt Bluemke had about four subordinates to supervise and was exposed to a number of tasks and meetings normally reserved for someone in the rank of warrant officer. Finally, WO Mustard described his experience supervising Sgt Bluemke since January 2022 at 3 RCR.

[24] These witnesses described Sgt Blumeke as a dedicated soldier who is always on time and exceeds expectations in the accomplishment of his tasks. Acknowledging the gravity of what Sgt Blumeke admits having said to subordinates while instructing the ISC course in early 2021, they nevertheless shared their trust in his leadership on the basis what they have observed in the past and, for WO Mustard, based on what he is observing currently, as Sgt Bluemke has seven subordinates under his supervision. They qualified Sgt Bluemke's conduct of 2021 as a serious mistake, from which he should be allowed to recover, especially after having admitted his failings by pleading guilty. That said, they did acknowledge that Sgt Bluemke had a peculiar dark sense of humour and tended to speak without thinking matters through, a weakness which explains the unacceptable jokes that he has made and got him in trouble.

[25] For his part, MCpl Doggett provided the perspective of a current subordinate of Sgt Bluemke. He said he would trust his leadership in every situation, including combat.

Analysis

The purpose and objectives of sentencing

[26] The purpose, objectives and principles applicable to sentencing by courts martial are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

> **203.1 (1)** The fundamental purpose of sentencing is to maintain the discipline, efficiency and morale of the Canadian Forces.
>
> **(2)** The fundamental purpose of sentencing is to be achieved by imposing just punishments that have one or more of the following objectives:
>
> **(a)** to promote a habit of obedience to lawful commands and orders;
>
> **(b)** to maintain public trust in the Canadian Forces as a disciplined armed force;
>
> **(c)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(d)** to deter offenders and other persons from committing offences;
>
> **(e)** to assist in rehabilitating offenders;
>
> **(f)** to assist in reintegrating offenders into military service;
>
> **(g)** to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
>
> **(h)** to provide reparations for harm done to victims or to the community; and
>
> **(i)** to promote a sense of responsibility in offenders and an acknowledgment of the harm done to victims and to the community.

[27] The objectives that a just sanction must try to achieve are mainly associated with the CAF, but also include considerations reaching outside the bounds of the military, for instance, the maintenance of public trust and acknowledgement of the harm done to victims who may belong to the larger civilian community.

Objectives to be applied in this case

[28] In my opinion, the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and deterrence, both general and specific, in sentencing the offender.

[29] Indeed, the conduct which Sgt Bluemke engaged in is extremely troubling, in several ways. First is the fact that as a member of the CAF, he uttered comments adverse to a religious community in the presence of other members. I am having difficulties finding the right word to qualify the use of stereotypes and the reference to the unspeakable horrors suffered by the Jewish community before and during the Second World War to make adverse comments intended as jokes. The word "distasteful" does not suffice. It is in my opinion utterly disgusting. Regardless of who in the CAF engages in such conduct, it should make a reasonable member cringe and worry about belonging to the same organization as the perpetrator. That said, Sgt

Bluemke was not any CAF member when he made these adverse comments, he was an instructor on a formal course required for progression of infantry soldiers. This makes his conduct particularly problematic as it risks sending entirely inappropriate potential messages to the effect that such comments are acceptable if they are made to lighten up the mood, that anyone who is uneasy is simply too sensitive, that it is okay if no one present is member of the community adversely targeted, etc.

[30] I must add that the evidence heard to the effect that Sgt Bluemke did not intent to harm anyone is not determinative as it pertains to the subjective gravity of the offence. Even if steps were allegedly taken to ensure and verify that no one would be offended by the conduct, the use of this evidence is limited to concluding that the moral blameworthiness accompanying the conduct would have been more significant if someone had been targeted specifically based on their personal characteristic. However, this is not mitigating in the context of the charge as laid and particularized in this case. At most, it is the absence of a factor which would have justified another charge under either a different section of the *NDA* or even the *Criminal Code* or would have constituted a conduct to the prejudice of good order and discipline on a different basis, such as harassment.

[31] I am specifically worried of appearing to condone any notion to the effect that by inquiring if anyone was Jewish at the outset, Sgt Bluemke was taking a step to diminish the harm he could cause. This implies that if anyone had come forward, he would cease and desist in making further comments adverse to the Jewish community. This goes hand in hand with a view to the effect that Sgt Bluemke was somehow justified in assuming that his comments would not hurt anyone given that no one had come forward to state they were Jewish or of Jewish heritage.

[32] Both are untenable. First, as stated by LCol Sheppard in his testimony, it is wrong for an instructor to ask members of a group of candidates to self-identify in the presence of others as belonging to a given religion or faith. Second, the charge as particularized in this case is made up in its entire scope and gravity regardless of whether someone of the targeted community is present or if someone is offended. It is not the harm to persons but rather the harm to discipline that is targeted by the charge under section 129 in this case.

[33] Of course, then, the objective of denunciation of the conduct must be at the forefront of what the sentence must accomplish in this case.

[34] Deterrence is also important, as it is primordial not only that the sentence denounces the conduct, but also is of sufficient severity to deter others from engaging in the same type of behaviour. The deterrent aspect the sentence must meet also includes

the specific deterrence of Sgt Bluemke despite the steps he has already taken to rehabilitate himself during the monitoring period of the C&P. Indeed, I have not heard or seen any evidence to the effect that Sgt Bluemke has been in front of a group of candidates as an instructor on a formal course since the commission of the offence. In fact, the evidence leads me to imply that it is not the case. I have also heard from the witnesses called by the defence who know Sgt Bluemke that he can "shoot from the hip" at times and not consider the full significance of what it is that he is saying. This reveals that I must impose a sentence sufficiently severe to ensure that Sgt Bluemke will think hard about what he can, should and should not say in the presence of course candidates when he may be called to instruct other CAF members.

[35] From what I have just referred to, it would not be unreasonable to conclude that I am particularly shocked by the circumstances of the offence in this case. The conduct of Sgt Bluemke disappoints me as a CAF member and I am, to an extent, angered by it. Yet, I am cognisant of my duty to always act judicially under all circumstances, in accordance with the oath I have made. It is particularly important that I consider the circumstances of the offender with an open mind, based on the evidence before me.

[36] First, I have to take Sgt Bluemke as he is, namely as a CAF member who has already been deemed to have committed misconduct by his commanding officer who has, with input from people who know Sgt Bluemke, decided to retain him in the CAF following the successful completion of an extended period of C&P. I am mentioning this because the concern, when dealing with circumstances of such gravity, is that the conduct Sgt Bluemke engaged in is the product of a person who holds adverse beliefs in relation to the Jewish community, individuals or faith and has taken advantage of a privileged position as an instructor to spread these beliefs to a captive audience who is dependent in part on his evaluation for professional success and career progression.

[37] Such a concern is not supported by the evidence I heard during the sentencing hearing. In fact, the evidence from the prosecution and the implication of the documents signed by Sgt Bluemke's commanding officer, who testified for the prosecution, is to the effect that Sgt Bluemke committed a grave error but is otherwise able to rehabilitate himself to become a productive member of his unit and indeed the CAF over time.

[38] Consequently, I cannot lose track of the objective of rehabilitation. The offender has admitted guilt, another important step on the road to rehabilitation which Sgt Bluemke has travelled for well over a year now, through the monitoring period associated with the C&P, the most severe administrative sanction, just below compulsory release from the service. I must apply the outmost care to avoid imposing a sentence which would have the effect of creating an excessive additional barrier to an

offender who appears willing to invest the efforts to make a positive contribution to the CAF and society.

[39] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence.

Main principle of sentencing: proportionality

[40] The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring proportionality such a privileged position in the sentencing scheme, Parliament acknowledges the jurisprudence of the Supreme Court of Canada, which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of this case, LeBel J. explains the importance of proportionality in these words:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. (…) Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [Citation omitted.]

[41] The principle of proportionality thus obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender. Respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

Other principles

[42] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of section 203.3 of the *NDA* as follows:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender…

A number of aggravating circumstances are listed in this section, none of them being applicable here.

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

That is known as the principle of parity.

> (c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
>
> (c.1) all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
>
> (d) a sentence should be the least severe sentence required to maintain the discipline, efficiency and morale of the Canadian Forces;

Those paragraphs embody the principle of restraint, especially for Aboriginal offenders; and, finally,

> (e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[43] I will now go over these factors in consideration for the circumstances of this case.

Aggravating and mitigating factors

[44] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender. That being so, one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be an adequate sentence.

[45] In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The offender pleaded guilty to a charge of conduct to the prejudice of good order and discipline under section 129 of the *NDA*, punishable by dismissal with disgrace from Her Majesty's service or less punishment. It is an objectively very serious offence.

[46] The circumstances of the offence and the offender in this case reveals in my view a number of aggravating factors as follows:

(a) Sgt Bluemke's ranks and position when committing the offence – as an instructor;

(b) the rank and relative subordinate position of those exposed to the conduct as candidates on a course;

(c) the training environment in which the offence was committed which required particular care in ensuring that any conduct which can be detrimental to the learning environment be avoided;

(d) the repetition of the conduct over some time; and

(e) the harm that the conduct caused to MCpl Mahar, as detailed in the victim impact statement introduced in evidence, regardless of the fact that the suffering experienced may not have been externalized and visible to others such as MCpl Doggett.

[47] The Court also considered the following as mitigating factors arising either from the circumstances of the offence or the offender:

(a) first, the guilty plea of the offender which avoids the expense and energy of running a trial and demonstrates that he is taking full responsibility for his actions in this public trial in the presence of members of his unit and of the military community;

(b) the fact that Sgt Bluemke must be treated as a first offender with no criminal record;

(c) the administrative consequences of the offence, especially the counselling and probation and the significantly lengthy monitoring period imposed on Sgt Bluemke for almost thirteen months due to an administrative oversight, which may have contributed to the cancellation of a posting to a training position;

(d) the satisfactory conduct and rehabilitative efforts made by Sgt Bluemke since the offence, in achieving the training required by the counselling and probation and performing in an entirely satisfactory manner as recognized by his commanding officer and supervisors alike; and

(e) the contribution made by Sgt Bluemke to the CAF over the years, including on deployments overseas and the contribution he still has the capability to make, as evidenced by the decision by the commanding officer to retain Sgt Bluemke following successful completion of counselling and probation and by the positive PER obtained post-offence.

[48] In line with the remarks made previously when discussing the objectives of sentencing to be privileged in this case, I have made a conscious decision to limit the list of mitigating factors that I accept, in relation to suggestions made to me by counsel. I am expressly rejecting any potential inference, based on the evidence elicited from witnesses, that Sgt Bluemke did not appear to be intending to harm and that he did not

know MCpl Mahar was Jewish, to the effect that these facts could potentially be mitigating in the circumstances, especially given the way the offence is particularized. I also have not been convinced by the submission to the effect that the characterization of the conduct was misguided comments and inappropriate jokes by an otherwise outstanding performer. On the evidence, Sgt Bluemke continues to manifest character traits which make him vulnerable to making inappropriate comments at times and it would therefore, in my view, be inappropriate to consider him as entirely rehabilitated, hence, not requiring the sentence to meet specific deterrence objectives.

Parity and sentencing range

[49] The next principle to be considered is the principle of parity. The prosecution has not shown any case law reflecting circumstances similar to those applicable here to support its submission for a reduction in rank. My attention was brought to last year's Court Martial Appeal Court (CMAC) decision in *R. v. Duquette*, 2021 CMAC 10, leave to appeal dismissed 29 September 2022 (40074), where the Court decided not to interfere with the reduction in rank imposed at trial for three charges, including sexual assault, despite reversing the conviction for two of the three charges, leaving, in effect, a sentence of reduction in rank to stand to punish the offender's conduct, namely highly reprehensible sexual harassment by a major of a subordinate in the rank of master corporal during a social event. However, this case is not about targeted sexual harassment by a senior officer, and I fail to see how the *Duquette* precedent can be of any assistance in determining an appropriate sentence.

[50] The defence has brought three cases to my attention in attempting to demonstrate that its submission for a reprimand coupled with a fine of $1,000 is in an appropriate range of sentences imposed in the past for similar offences. Specifically, the cases of *R. v. Cribbie*, 2018 CM 3008; *R. v. Scott*, 2018 CM 2034, and *R. v. Dryngiewicz*, 2012 CM 1016 deal with adverse comments pertaining to race or religion made by non-commissioned members from the ranks of corporal to sergeant directly to or accessible by other members of the CAF. The case of Sgt Scott bears the most similarity to this case as he pleaded guilty to three counts of harassing candidates on a leadership course he was instructing. The harassing comments referred to personal characteristics of individuals, including their appearance, associating one to the "son of Hitler", and describing another as an unworthy clerk with "cunt hair" and a third as a "homo". The sentence was contested, prosecution requesting the imposition of a severe reprimand and a $3,000 fine while the defence submitting that a fine of $750 was sufficient. Ultimately, the military judge imposed a severe reprimand alone, finding that in the circumstances of the offender a fine was not necessary to meet the objectives of sentencing.

[51] Although these precedents are of limited use given the discrepancies in circumstances of the offence and of the offender, they show a range of sentence from fine alone to a fine combined with a reprimand and a severe reprimand alone, in the case of *Scott*. This range tends to show that the submission of the prosecution is above the range of sentence usually imposed, while the defence's submission sits more comfortably within it.

[52] In any event, even if the sentences proposed were outside the range, it would not constitute an absolute limit on my discretion as sentencing judge given that, as explained earlier, proportionality is the cardinal principle that must guide judges in imposing a fit sentence. There will always be situations that call for a sentence outside a particular range. Although ensuring parity in sentencing is a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded.

The principle of restraint

[53] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale. In this case, I must consider all available punishments, paying particular attention to the circumstances of Sgt Bluemke.

[54] That is where I am running into difficulties with the submission of the prosecution. With respect, I am unable to conclude, based on the evidence before me, that a reduction in rank is the minimum sentence required to maintain discipline, efficiency and morale in the circumstances.

[55] Indeed, although the circumstances of the offence are of significant gravity, which could justify reaching beyond the range of sentence handed out in the past in similar circumstances, the submission for a reduction in rank in this case does not, in my view, sufficiently consider the circumstances of Sgt Bluemke, notably the rehabilitation he has undertaken and his employability in his current rank. Consequently, imposing such a sentence would in my view be disproportionate for several reasons.

[56] First, it is important to consider that the prosecution has been unable to show a precedent in the jurisprudence where a reduction in rank had been imposed for a similar offence on a similar offender. The submission of the prosecution is therefore not based on the application of one or several precedents. It is based uniquely on the gravity of the offence with a bare mention to the effect that the rehabilitation of Sgt Bluemke would be better achieved through a reduction in rank. The only evidentiary source for this

assertion could be the testimony of Sgt Bluemke's commanding officer, to the effect that his trust in Sgt Bluemke is damaged, that he cannot afford to have a sergeant who is not in a leadership position and that regaining his trust would take time.

[57] Yet, Sgt Bluemke is and has been employed in a leadership position. He currently has seven subordinates and is performing his supervisory functions appropriately based on the evidence I have heard. I acknowledge that Sgt Bluemke still has to be employed as an instructor and that putting him in a position where he would be instructing leadership may be difficult at this point. However, there is no indication in the evidence that it is not doable with efforts, supervision, and some time. It is impossible for me to understand how reducing Sgt Bluemke in rank to corporal would place him and his unit in a better position to affect his rehabilitation in a manner which maximizes the benefits not only to him but also and especially for his unit.

[58] I am also unable, in light of the evidence, to agree with any suggestion that Sgt Bluemke is unemployable as a sergeant in light of the PER that has been made concerning him at the end of fiscal year 2021-22, post-offence, reflecting essentially the same overall score for performance and potential as the PER completed the previous year, with a promotion recommendation of "Ready" as opposed to "No". In addition, Sgt Bluemke's commanding officer has signed a letter just over a month ago, stating that Sgt Bluemke has overcome his deficiencies and has met the standard of an infantry sergeant.

[59] I conclude therefore on the evidence that the principle of restraint can be applied in the circumstances of this case to exclude the possibility of imposing the punishment of reduction in rank recommended by the prosecution.

Choosing a fit sentence

[60] Having rejected the submission of the prosecution for a punishment of reduction in rank, I must now turn to the determination of an appropriate sentence. In choosing a fit sentence, I believe it is appropriate to consider whether the suggestion of the defence to impose a reprimand combined with a fine of $1,000 would be sufficient to maintain discipline. Even considering the principle of restraint, I must nevertheless ask myself whether the objectives of denunciation and deterrence, both general and specific, that I have identified as important in this case can still be met if I was to give priority to the objective of rehabilitation as requested by the defence. In arriving at that conclusion, I must consider the circumstances of the offence and of Sgt Bluemke, including the aggravating and the mitigating factors identified previously.

[61] Having considered these factors and the objectives that the sentence must meet, I have to conclude that despite Sgt Bluemke's significant efforts at rehabilitating himself, evidenced by his successful completion of a lengthy period of C&P, sentencing him to a reprimand, combined with a relatively modest fine, would be insufficient to send the required signal of denunciation that the gravity of the circumstances of the offence in this case calls for.

[62] Indeed, the conduct of Sgt Bluemke is extremely serious, as highlighted previously. The offence in this case is of a different nature than in the case of Sgt Scott and, in my opinion, it is more severe. Sgt Bluemke has not targeted individuals based on their appearance with references to Hitler, homos or cunts. He has made comments adverse and indeed demeaning to an entire community who has suffered unspeakable harm in history. This conduct needs to be sanctioned with punishments that have a strong enough symbolic impact as well as a strong personal impact on the offender.

[63] In my efforts to find the appropriate sentence, I must move beyond the reprimand in the scale of punishments available at section 139 of the *NDA* and ask myself whether the punishment higher in the scale, namely a severe reprimand would be an adequate minimum punishment to maintain discipline. Recognizing the remarks made by the Honorable Justice Fish in his *Report of the Third Independent Review Authority to the Minister of National Defence* pertaining to the misunderstood difference between reprimand and severe reprimand, it remains that a severe reprimand has a stronger symbolic impact than a reprimand.

[64] The punishment of severe reprimand in this case must also be accompanied by a fine so there can be a concrete impact on the offender, an impact that can be understood by the public, including in the military community. That way, the sentence can globally reach the objectives of denunciation and deterrence. For that effect to be met, the fine must reach a level much higher than the $1,000 proposed by defence counsel in submissions. I believe a fine of $3,000 is a minimum to achieve the necessary objectives of sentencing in this case. Although it is three times what was requested by defence, it is not even half of the monthly basic pay of a sergeant. It is also significantly less than the financial impact of the reduction in rank to corporal proposed by the prosecution, which amounted to almost $9,000 reduction in pay over a year. In recognition of the financial responsibilities of Sgt Bluemke for the support of two children, I will provide for terms of payments which would spread the impact of the fine over several months.

Conclusion and disposition

[65] I have concluded that a sentence composed of the punishments of a severe reprimand combined with a fine of $3,000 would be sufficient to meet the interest of discipline in this case. As recognized by the Supreme Court of Canada, the imposition of a sentence by a judge is not an entirely precise process. Guided by the principle of proportionality, I have done my very best to exercise judgment and arrive at a sentence that constitutes the absolute minimum to meet the requirement of discipline in this case, while impeding as little as possible the rehabilitation of Sgt Bluemke. I am confident I have been able to strike the appropriate balance.

[66] Sgt Bluemke, I cannot understate how concerned I am with the conduct you displayed in front of course candidates in 2021 and I want you to understand that I did seriously consider reducing you to corporal. I hope this sentencing hearing has offered an opportunity to reflect on what you have done wrong and convinced you to do better in the future. I have decided to give you a chance to continue your efforts to rehabilitate yourself, based on what I have heard from those who have testified on your behalf. You may not see me again, but you will see them. I hope you will not let them down by re-offending.

FOR THESE REASONS, THE COURT:

[67] **SENTENCES** Sgt Bluemke to a severe reprimand and a fine in the amount of $3,000 payable in six monthly instalments of $500, the first payable no later than 15 November 2022 and subsequent payments being due no later than the 15th day of the months of December 2022 to April 2023. Should Sgt Bluemke be released from the CAF before the fine has been paid in full, any remaining unpaid sum will be payable on the day of his release.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner

Major Gélinas-Proulx, Defence Counsel Services for the Offender, Sgt K.E. Bluemke