

Citation: *R. v. Master Seaman R.J. Middlemiss*, 2009 CM 1003

Docket: 200857

**GENERAL COURT MARTIAL
CANADIAN FORCES SUPPORT UNIT COLORADO SPRINGS
COLORADO SPRINGS, COLORADO
UNITED STATES OF AMERICA**

Date: 16 January 2009

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**MASTER SEAMAN R.J. MIDDLEMISS
(Offender)**

SENTENCE

(Rendered orally)

[1] Master Seaman Middlemiss was found guilty on 14 January 2009 by a General Court Martial of two counts of Disobedience of a Lawful Command under s. 83 of the *National Defence Act* and one count of Absence without Leave under s. 90 of the *National Defence Act*. The evidence at trial was mostly composed of admissions from both Prosecution and Defence and the testimony of one witness, Petty Officer 2nd Class Starling.

[2] During the sentencing procedure, the only evidence provided was in the form of an agreed statement of facts that described the chronology of events since November 2007 with regard to the legal proceedings surrounding this case. In passing sentence, the General Court Martial shall accept as proven all facts, expressed or implied, that were essential to the court martial panel's findings of guilty. In addition, it may find any other relevant facts that were disclosed by the evidence to be proven. For sentencing purposes, the court considers that the relevant facts in this case indicate that the offender, Master Seaman Middlemiss, was a Regular Force member of Canadian Forces Support Unit (Colorado) (CFSU(C)) at Colorado Springs, Colorado, United States of America, during October and November 2007. On 11 October 2007, the Commanding Officer (CO) of CFSU(C), Lieutenant-Colonel Ouellet, sent an email to all CF personnel located in the Colorado Springs area announcing the CNOS Fall Mess Dinner.

In her email she wrote in particular, "CF personnel are strongly encouraged to attend." Attached to it was an invitation stating in particular, "Lieutenant-General J.J.C. Bouchard, Deputy Commander North American Aerospace Defense Command (NORAD) requests the pleasure of your company at the Canadian Fall Mess Dinner," and, "RSVP by 1 November 2007." The cost of the mess dinner, to be paid by the members, was set at \$35. Between 11 October and 17 October 2007, the CFSU(C) Chief Clerk asked Petty Officer 2nd Class Starling to inquire with members of the unit, including Master Seaman Middlemiss, whether they would attend at the dinner. He found that the majority of his section would not attend if the event was not mandatory. He then passed that information to his commanding officer. In reaction, Lieutenant-Colonel Ouellet held an O Group meeting in which she reminded personnel that CFSU(C) members are required to attend the mess dinner on 9 November 2007. Present at that meeting were Captain C.D. Whelan, Petty Officer 2nd Class Starling, and Petty Officer 1st Class Hilliard and others. On 17 October 2007, the minutes of the O Group expressly stated that the mess dinner was a mandatory event and that all members of the unit would attend. Prior to that date, other people within the unit did not want to attend at the mess dinner, but only Master Seaman Middlemiss clearly stated that he would not attend and requested to be excused from the mess dinner.

[3] Master Seaman Middlemiss exchanged a series of emails with his superiors in the following days where he openly challenged the lawfulness of the order from his commanding officer to make the CNOS Fall Mess Dinner a mandatory event for the personnel of CFSU(C) that had been convened by the CO of CNOS. In these emails he voiced his opposition to pay for a dinner that he did not intend to attend for personal reasons.

[4] In response, his superior and supervisor, Petty Officer 2nd Class Starling, advised him that mess dinners were intended to be *esprit de corps* events. He outlined his expectation that, as a junior leader, Master Seaman Middlemiss was expected to support mess dinners and act as a role model to his subordinates. On 2 November 2007, Petty Officer 2nd Class Starling forwarded Master Seaman R.J. Middlemiss' request to be excused from the mess dinner to the CO, Lieutenant-Colonel Ouellet, with copies to Captain C.D. Whelan, Petty Officer 1st Class Hilliard; both superior officers of Master Seaman Middlemiss and known to him. On 5 November 2007, Captain Whelan met with Master Seaman Middlemiss in the presence of Chief Clerk, Petty Officer 1st Class Hilliard. Captain Whelan told Master Seaman Middlemiss that, "the Mess Dinner was an official function and that as such it was a parade that he must attend." Master Seaman Middlemiss reiterated that the order was unlawful. Petty Officer 1st Class Hilliard advised Master Seaman Middlemiss to use another method to challenge the policy, although without specifying which method, rather than not attending the mess dinner. Again Master Seaman Middlemiss requested a copy of the relevant policy. The same day, Master Seaman Middlemiss sent another email to Captain Whelan asking to see such regulation that would say that a member must spend their money for attending

a mess dinner. Again, he expressed his views that the CO's order and the order of Captain Whelan to attend were unlawful.

[5] Master Seaman Middlemiss was not provided with any such regulation. However, on 5 November 2007, Petty Officer 2nd Class Starling showed Master Seaman Middlemiss Canadian Forces publication A-AD-262-000/AG-000, the Mess Administration Manual, Chapter 5, p. 5-3, para. 11, and sent him a copy in an email to him, Petty Officer 1st Class Hilliard, and Captain Whelan which stated:

"To All, I have shown Master Seaman Middlemiss the reference from the Mess Administration Manual Chap 5 which clearly states,

Mess Dinners

11. Mess dinners provide an opportunity for mess members to meet on a formal but friendly occasion, allowing the senior member or his guest(s) to address the members as a group. By custom and tradition, which in the service context is an extension of the common law, mess dinners are considered to be a parade and as such attendance is compulsory except for members excused by the B Comd, PMC or other convening authority."

[6] On 5 November 2007, Captain Whelan sent an email to the CO stating:

"After speaking with the DCO and after getting advise [sic] from her on this issue, I have told MS Middlemiss that he is to attend the Mess Dinner. I think that you and I, along with the DCO and CClk need to discuss this further as there seems to be some confusion on the members [sic] part on our authority to order him to attend.

I reiterated your standpoint on the issue, that we all must attend, and PO2 Starling has given him a quote from the Mess Administration Manual which states he must attend unless excused by BComd, PMC, or other convening authority."

Lieutenant-Colonel Ouellet replied to Captain Whelan on 8 November 2007 in an email which stated: "The mess dinner is a parade. Please ensure all understand this."

[7] On 8 November 2007, in the office of Petty Officer 1st Class Hilliard, Petty Officer 2nd Class Starling ordered Master Seaman Middlemiss, "to provide payment for a CNOS Mess Dinner being held on the 9th of November 2007." Master Seaman Middlemiss was presented with a quittance roll that would have the cost of mess dinner deducted from his pay. He refused to sign the quittance roll or provide cash or cheque payment and informed those present that he was not intending to attend the mess dinner.

[8] On 9 November 2007, the Canadian NORAD OUTCAN Staff (CNOS) Fall Mess Dinner was held at the Peterson Air Force Base Club, at Colorado Springs, Colorado, U.S.A. It was attended by members of CFSU(C), other members of CNOS and invited guests. Master Seaman Middlemiss was not present at the CNOS Mess Dinner and did not pay the \$35 cost for that dinner.

[9] The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. However, the punishment imposed by any tribunal, military or civil, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[10] In determining sentence, the court has considered the circumstances surrounding the commission of the offences as revealed by the evidence heard during the trial and the documentary evidence provided to the court during the sentencing procedure. This court has examined the evidence in light of the applicable principles of sentencing, including those set out in ss. 718, 718.1 and 718.2 of the *Criminal Code* when they are not incompatible with the sentencing regime provided under the *National Defence Act*. The court has also considered the representations made by counsel, including the case law provided to the court and any indirect consequence of the findings or of the sentence that will affect Master Seaman Middlemiss.

[11] When a court must sentence an offender for offences that he has committed, certain objectives must be pursued in light of the applicable sentencing principles. It is recognized that these principles and objectives will slightly vary from case to case, but they must always be adapted to the circumstances and to the offender. In order to contribute to one of the essential objective of military discipline, that is the maintenance of a professional and disciplined armed force that is operational, effective and efficient, within a free and democratic society, the sentencing principles and objectives could be listed as:

Firstly, the protection of the public, and this includes the Canadian Forces;

Secondly, the punishment and the denunciation of the unlawful conduct;

Thirdly, the deterrence of the offender and other persons from committing similar offences;

Fourthly, the separation of offenders from society, including from members of the Canadian Forces, where necessary;

Fifthly, the rehabilitation of offenders;

Sixthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender;

Seventhly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar situations;

Eighthly, an offender should not be deprived of liberty if less restrictive punishment or combination of punishments may be appropriate in the circumstances; and,

Finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or to the offender.

[12] In this case, the protection of the public must be achieved by a sentence that will emphasize general deterrence, punishment and denunciation, as well as specific deterrence. However, the sentence must also assist to rehabilitate the offender.

[13] The court reviewed the case law provided by counsel for the prosecution and agrees with the general principles contained therein. In the context of a military force, offences of disobedience are always objectively very serious as they go to the heart of military discipline. S. 83 of the *Act* provides that:

Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction liable to imprisonment for life or to less punishment.

However, the scope and the nature of offences of disobedience cover a large spectrum of situations. For example, disobedience may be of a minor nature in the performance of routine activities, whereas it could also include the extreme situation where a soldier refuses to engage in a combat operation on the battlefield when so ordered by his superior officer in the presence of enemy forces.

[14] Counsel for the prosecution recommends that the court impose to Master Seaman Middlemiss a sentence that would be composed of a reprimand and a fine in the amount of \$1,000. She argues that discipline is the foundation of the Canadian Forces or any armed force. Discipline implies the willingness and prompt obedience to commands from every member through self-discipline. She argues that the aggravating factors are the premeditation of Master Seaman Middlemiss to disobeying the orders received in light of the numerous attempts by his chain of command to convince him to comply with the orders. She concedes that Master Seaman Middlemess' absence of conduct sheet or criminal record and admissions at trial mitigate the sentence.

[15] Counsel for Master Seaman Middlemiss asked this court to impose a fine in the amount of \$200, considering the particular facts of this case, the absence of previous record, and the 18 years of service of the offender. He also submits that the proceedings

of this court martial have already achieved the necessary general and specific deterrent effects required in this case; therefore, he submits that the punishment should focus on the rehabilitation of Master Seaman Middlemiss. In addition, he submits that the disobedience of Master Seaman Middlemiss had limited effect, in that his absence simply created an empty seat and a meal being prepared unnecessarily at the CNOS Mess Dinner. Finally, counsel for the defence submits that the punishment should reflect that members of the Canadian Forces posted in Colorado Springs were treated differently with regard to their attendance at the dinner. CNOS personnel were only strongly encouraged to attend, whereas members of CFSU(C) were forced to attend by their commanding officer.

[16] I agree with counsel that this case is facts specific. This case is that of a very experienced Resource Management Services (RMS) Clerk who openly challenged, over a period of time, the authority of his chain of command to make, for the members of his unit, the attendance at a mess dinner compulsory, when the event had been convened by another unit. After having voiced his strong opinions several times with regard to the lawfulness of the orders and been expressly told by his superiors to use other methods to challenge the policy, he made it clear to his chain of command that he would not comply with the order to attend in an open debate with his superiors.

[17] This case is not about a trivial refusal to pay the sum of \$35 for a meal and attend at a mess dinner. It is about the blatant disregard and disrespect of an experienced junior leader towards his chain of command via the manner he chose to voice his strong views about the legitimacy of the order to attend at a mess dinner that the CO had made a mandatory event for reasons within her discretion. The court does not dispute that Master Seaman Middlemiss was extremely frustrated to be forced to attend at a mess dinner that was not a mandatory event for Canadian Forces personnel serving outside his unit. However, this is not the issue. Master Seaman Middlemiss' duties and responsibilities as an RMS Clerk with 18 years of experience—many of those as an Administration Clerk—have given him a fair knowledge of the rules and regulations applicable to members of the Canadian Forces, including the obligation to obey lawful commands and orders of a superior officer unless it is manifestly unlawful pursuant to QR&O article 19.015. Note C to the said article refers to an order that would appear to a person of ordinary sense and understanding to be clearly illegal. The facts before the court may support an argument that the lawfulness of the orders was questionable; however, the evidence cannot support an argument to the effect that the orders were manifestly unlawful. As an experienced and mature junior leader, he has learned throughout his career in the Canadian Forces of the importance of obedience and self-discipline, as well as the mechanisms in place within the institution to voice someone's concerns or grieve a matter up to the Chief of the Defence Staff under Chapter 7 of the QR&O. Petty Officer 2nd Class Starling was correct when he told Master Seaman Middlemiss that he expected him to support mess dinners and act as a

role model to his subordinates, in particular where people were all encouraged to invite American co-workers to introduce them to Canadian customs and traditions.

[18] Canadian Forces personnel chosen for postings outside Canada on foreign bases or embassies enjoy several privileges. One privilege consists of representing our country and acting as an ambassador with foreign colleagues, including when members participate in social functions. Another privilege is financial. In the case of Master Seaman Middlemiss, the evidence indicates that this financial benefit amounts to \$18,580.68 per year. Obviously, the refusal to pay was not based on financial reasons. The refusal to obey the order was self-centered on personal opinion. Master Seaman Middlemiss, as a junior leader, completely refused to conceive that his chain of command could have legitimate military reasons to make the attendance at the mess dinner a mandatory event. The fact that the members of CNOS were not forced to attend, unlike members of CFSU(C), is irrelevant to this case, although it could be in the context of a redress of grievance. Master Seaman Middlemiss totally abdicated his responsibilities to support his chain of command and his leadership role with his subordinates in openly challenging his chain of command. To accept the submission of counsel for the defence to the effect that the disobedience did not have any impact, other than causing an empty seat at the mess dinner, would ignore the inevitable disruptive effect caused by Master Seaman Middlemiss despite the numerous attempts of various levels of his chain of command to listen to his concerns and propose suitable and appropriate methods to deal with the issue.

[19] Counsel for the defence has pointed to the delay that occurred in this case as a mitigating factor. After a review of the events contained in the agreed statement of facts, I consider the delay to be neutral in this case. Other than his absence of conduct sheet, his record of service of 18 years in the Regular Force and, to a limited extent, the admissions made at trial that have shortened the proceedings, I do not see other significant factors that would mitigate the sentence in the circumstances of this case. His family and economic situation are stable and would have no effect in light of the sentence that the court finds fair and just. There is, however, serious aggravating factors. Premeditation and blatant disrespect to his chain of command are particularly serious in the context of this experienced and mature non-commissioned member. By his actions, he failed to support his superiors. As a junior leader, he failed and abdicated his responsibilities. He should have led by example. Nothing prevented him to express his views and use appropriate methods to seek reparation if he felt aggrieved by the situation. Disobedience was simply not an option in the circumstances. A sentence such as suggested by counsel for the defence would neither ensure general deterrence nor specific deterrence. To the contrary, it would condone the disobedience of an experienced junior leader who knew better. The court believes that these objectives can only be achieved with a combination of punishments that includes, as a minimum, a reprimand and a significant fine where the offender is mature, experienced, and in any leadership position. Rehabilitation will not be impaired by an appropriate

balance of these punishments. It may well be that a person of the rank and experience of Master Seaman Middlemiss, as a junior or senior leader, reaches a point in his career where he or she should sincerely and honestly reflect about whether basic military obedience and values such as respect and support of his chain of command still corresponds to his personal and professional values. If the answer is negative, it may be a sign that it may be time to move on and say farewell.

[20] For these reasons, the court imposes upon you a reprimand and a fine of \$500 dollars.

COLONEL M. DUTIL, C.M.J.

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