

Citation: *R. v. Corporal M.J. Kemp*, 2004CM06

Docket: F200406

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA**

Date: 8 April 2004

PRESIDING: COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN

v.

CORPORAL M.J. KEMP

(Accused)

FINDING

(Rendered orally)

[1] Corporal Kemp, you have been charged with four charges arising out of incidents that occurred in March 2003.

[2] The court finds you not guilty of the first charge of conduct to the prejudice of good order and discipline. The court finds you guilty of the second charge of disobeying a lawful command. As the second charge is an alternative to the third charge, the court stays proceedings on the third charge of absence without leave, and the court finds you guilty of the fourth charge of conduct to the prejudice of good order and discipline.

[3] The court will now explain its reasons for this, and as the explanation will be comprehensive, the court will permit you to break off and sit with your defence counsel while it does so. So, please, break off and sit with your defence counsel now.

[4] The court would begin by thanking counsel for their submissions which the court has found helpful. The court also thinks it would be useful to begin with an explanation of some of the fundamental principles which are applicable to every civilian criminal trial and every court martial in Canada. These are well known to counsel but perhaps less so to other participants and to other people in the courtroom.

[5] The two fundamental principles are the presumption of innocence and proof beyond a reasonable doubt. These two principles have been described by Mr Justice Cory in the Supreme Court of Canada decision of *R. v. Lifchus*, which can be found at (1997), 118 C.C.C. (3d) 1. In that decision, at page 10, Mr Justice Cory, for the majority states:

.... If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable is the silver and these two threads are forever intertwined in the fabric of criminal law.

[6] An accused person is presumed innocent throughout his or her trial. The presumption remains with the accused person from the beginning of the trial until after all the evidence has been heard and considered and the finder of fact, whether that be a military panel, a civilian jury, or a judge, has been satisfied beyond a reasonable doubt of the guilt of the accused.

[7] The fact that a person have been charged is in no way indicative of his or her guilt. The burden of proving guilt beyond a reasonable doubt rests with the prosecution. There is no burden on the accused person to prove his or her innocence. If the court has a reasonable doubt that the accused committed an offence with which he or she is charged the benefit of that doubt must be given to the accused and he or she must be found not guilty of that charge. And what I would stress here is that the only charges faced by an accused person are those on the charge sheet.

[8] The Supreme Court of Canada has explained in *R. v. Lifchus* what a reasonable doubt is, and here I will summarize what Mr Justice Cory wrote at page 13 of that decision.

[9] A reasonable doubt is a doubt based upon reason and common sense, not upon sympathy and prejudice. It is one logically connected to the evidence, or absence of evidence, not an imaginary or frivolous doubt. One that does not involve proof to absolute certainty, it requires more than proof that an accused is probably guilty. It must be a doubt that is held after a fair, thorough, and impartial consideration of all the evidence before the court. The standard of proof at a criminal trial, and that includes a court martial, is a higher one than used in every day decisions or decisions in civil cases where people are suing each other, or in decisions made about administrative matters. It has a significance unique in the legal process. It is an exacting standard of proof rarely encountered in everyday life.

[10] While the court considers the evidence as a whole to determine whether the guilt of the accused has been proven beyond a reasonable doubt, the burden is on the prosecution to prove each essential element of the offence beyond a reasonable doubt. If there is a reasonable doubt concerning only one essential element of the charge, the accused must be given the benefit of the doubt, however, the standard of proof beyond a reasonable doubt does not apply to individual items of evidence which make up the

prosecution's case, but rather to the total body of evidence which the prosecution relies upon to prove each and every essential element.

[11] Now, evidence can come in many forms, documents, photographs, maps, et cetera. Most often, however, evidence is in the form of sworn or affirmed oral testimony of witnesses before the court. It is not unusual that some evidence before the court is contradictory. Often witnesses have different recollections of events. The court must determine what testimony it finds credible. Credible is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Simply put, a sincere witness, honestly endeavouring to tell the truth, may still give unreliable evidence.

[12] Many factors influence the court's assessment of the credibility of a witness. These include a witness's opportunity to observe; a witness's reasons to remember, for example, were the events noteworthy, unusual, striking, or relatively unimportant, and therefore more difficult to recollect. Does the witness have any interest in the outcome of the trial? That is, a reason to favour the prosecution or the defence, or is the witness impartial. This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume the accused is interested in securing his or her acquittal, the presumption of innocence which I mentioned earlier, does not permit a conclusion that the accused would lie if he or she chooses to testify.

[13] Another factor determining credibility is the apparent capacity of the witness to remember. Emotional restrictions may also affect a witness's credibility; that is, a witness may be so scared, angry or elated, that this affects their ability to observe. Or a witness may be under the influence of alcohol or prescription or non-prescription drugs.

[14] A witness's demeanor is also a factor that can be used to assess credibility; that is, was he or she responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative.

[15] Finally, and quite importantly in this case, was the witness's testimony consistent within itself and with any uncontradicted facts. Minor discrepancies can and do innocently occur but these do not necessarily mean that testimony should be disregarded, however, a deliberate falsehood is an entirely different matter, it is always serious and may taint a witness's entire testimony.

[16] A court is not required to accept the testimony of any witness except to the extent it has impressed the court as credible, however, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[17] Now, this is a case where the accused person; that is, Corporal Kemp, chose to testify, and the Supreme Court of Canada has established in those

circumstances what this court must do. In a case called *R. v. W.(D.)*, a copy of which was provided to the court by defence counsel and which is found at (1991), 63 C.C.C. (3d) 397, the Supreme Court of Canada has set out a process for this court to follow. First the court must analyse whether or not the accused is believed, and there is by implication an assumption that the accused's testimony would exculpate the accused if believed, which is certainly the situation in this case. If the accused is believed, then the court must acquit the accused. If, however, the accused is not believed, but nevertheless the testimony of the accused raises a reasonable doubt, then again, the court must give the benefit of that reasonable doubt to the accused person and find the accused not guilty. Finally, if the testimony of the accused is not believed and does not raise a reasonable doubt, but still a reasonable doubt exists on the basis of the evidence that the court accepts, then again the court must find the accused person not guilty. It is only if the court does not have a reasonable doubt about any of the essential elements of the charge that the court will find the accused guilty.

[18] In the case of *R. v. Avetyan, A-v-e-t-y-s-a-n*, a 2000 decision of the Supreme Court of Canada found at 149 C.C.C. (3d) 77, that court explained that the *R. v. W.(D.)* process applied in situations such as exist in this case, where, in essence, it is not only the accused but another person or persons who testified and there are two irreconcilable versions of events. Madame Justice Arbour at page 87 of the decision makes it clear the same rules apply. The trier of facts should not fall into the trap of trying to resolve the factual question of what happened by trying to figure out which of the competing versions to believe. She states:

[22] The jury should have been told that it could acquit even if it did not believe the testimony of the two accused men provided it was left with reasonable doubt about the guilt of the accused on the evidence that it accepted.

[19] Now, I will finish this general summary of the principles by speaking a little bit about *mens rea* because that is clearly an issue that is before the court. *Mens rea* is a legal term which means a guilty mind and it refers to the mental fault of an accused that is necessary—and that mental fault is necessary to prevent the conviction of morally innocent people. *Mens rea* requires an intention to commit a prohibited act, combined with the knowledge of relevant circumstances which are the essential elements of the crime charged. The prosecution must establish beyond a reasonable doubt that the accused committed both the physical element; that is called the *actus reus* and had the mental element; that is, the *mens rea*, to commit an offence. *Mens rea* does not require an accused to have a morally blameworthy or unethical mental state, nor does it require that the accused must intend to contravene the applicable law. It does, however, require that the prosecution establish beyond a reasonable doubt that the accused's actions were done knowingly and voluntarily, and the *mens rea* for a section 129 offence is something that is related to the act; that is, it is not necessary to establish that the accused intended to prejudice good order and discipline by the act that was committed.

[20] Now, this relates to an issue that was raised by the defence which is an honest but mistaken belief in a set of circumstances and what that really refers to is a situation where although an accused may commit a prohibited act, he is generally not guilty of a criminal offence when he is honestly ignorant of or mistaken as to a factual element of the offence, and to give an example of this, somebody who is accused of stealing a hat, if that person honestly but mistakenly believed it was their own hat, then that would be a defence to that charge.

[21] In determining the honesty of an accused's ignorance or belief a court may consider the reasonableness of the accused's state of mind. So, very simply, an honest but mistaken belief in a factual state, and this is a subjective honest but mistaken belief—but a subjective belief to which reasonableness may be applied to to establish its honesty. An honest but mistaken belief which if true would negate the accused's *mens rea*; that is, if the state of the facts were as the accused honestly but mistakenly believed, then he would be not guilty of the offence charged.

[22] Now, the court has heard the testimony of a number of witnesses. The prosecution called six members or former members of the Royal Canadian Dragoons, the accused's unit, Second Lieutenant Mathey, Master Corporal Hotte, Corporal Crossman, Warrant Officer Bush, Warrant Officer Martin and Master Warrant Officer Slack. The defence called Corporal Kemp and two social work officers, Captain Grondin and Captain Brockington.

[23] I'll now summarize the prosecution's submission on the evidence and the law. The prosecution argued that all the essential elements of all the offences have been established beyond a reasonable doubt.

[24] In relation to charge number one, the prosecution argued that Corporal Kemp sent the two emails, Exhibits 4 and 5, to Second Lieutenant Mathey who was not in his chain of command. The prosecution submitted that actual prejudice to good order and discipline resulted from this action, because it resulted in Second Lieutenant Mathey being placed in an awkward position, created a bad precedent, demonstrated contempt for the chain of command, left Corporal Kemp's chain of command out of the loop, and suggested that Corporal Kemp's chain of command was unable or unwilling to do its job.

[25] In regard to charge number four, the prosecution submitted that Corporal Kemp was not a credible witness and his testimony should not be believed, but the testimony of Warrant Officer Bush should be believed and that testimony established that Corporal Kemp told Warrant Officer Bush that he was going to an appointment related to his occupational transfer request organized for him by Second Lieutenant Mathey. The prosecution argued that the testimony of Second Lieutenant Mathey established that statement was a lie. The prosecution argued that actual prejudice resulted from this lie because an individual was lost from assigned work duties; it

showed disregard and disrespect for the chain of command; it resulted in a loss of trust in, respect for, and a loss of belief in the integrity of Corporal Kemp on the part of Warrant Officer Bush and Master Warrant Officer Slack; and it again put Second Lieutenant Mathey in an awkward position.

[26] The prosecution argued that the evidence showed, in relation to charges number two and three, that Corporal Kemp was twice denied permission to leave by Master Corporal Hotte, and ordered to report to the squadron quartermaster for work; that Corporal Kemp did not comply with this order but rather attempted to leave the RCD compound and when questioned by Warrant Officer Bush as to where and why he was leaving, provided the account of a meeting that had been arranged by Second Lieutenant Mathey for him. The prosecution submitted it was only as a result of that information that Warrant Officer Bush permitted Corporal Kemp to leave.

[27] The prosecution provided two cases to the court, the first is Standing Court Martial of Sapper Wallace of 10 November 1998, where the learned trial judge held that lying to justify an illegal absence was, in the circumstances of that case, an act which had the effect of prejudicing good order and discipline. The second case is the standing court martial of Lieutenant-Commander Bowes dated 17 and 18 October 2000, where the learned trial judge in explaining the elements of a section 129 offence to Lieutenant-Commander Bowes during a plea of guilty stated that the court would not have any difficulty recognizing that lying to a superior in relation to a military matter affects good order and discipline.

[28] The defence began its submissions by arguing that the prosecution had not proven the essential elements of any of the four charges faced by Corporal Kemp beyond a reasonable doubt.

[29] In relation to charge number one, defence counsel argued that the applicable definition of the term circumvent was to be found in the Concise Oxford Dictionary and that it meant evading, particularly by trickery or guile. The defence submitted that this was not disclosed on the facts which counsel submitted were the following: Corporal Kemp was open about his occupational transfer request; that it was only by a narrow definition of chain of command that Second Lieutenant Mathey was not in Corporal Kemp's chain of command; that it was reasonable for Corporal Kemp to think Second Lieutenant Mathey was an appropriate person to contact for assistance after 14 days had passed and his request had not been responded to and that if Corporal Kemp was wrong, this was an honest but mistaken belief on his part; that it was understandable that Corporal Kemp might not want to go to Master Warrant Officer Slack who was a senior and somewhat intimidating figure; that at no time did Corporal Kemp go outside his squadron; that the term "back door" used in Exhibit 4 was simply a description of an authorized activity; that is, making certain medical appointments directly then informing the chain of command, which simply demonstrated initiative;

and, in the final analysis, the chain of command jumped to erroneous conclusions about the addressee on the emails who was identified as a person in ADM(HR Mil).

[30] The defence argued that there was no prejudice to good order and discipline resulting from Corporal Kemp's actions. If, however, the court found otherwise, the defence argued that the legal doctrine of *de minimis non curat lex* applies in this case, and that legal doctrine, in essence, means that some matters are so minor that although they are a breach of the law, it is inappropriate to use the full weight of the law to deal with them.

[31] The defence provided the court with the case of *R. v. Perivolaris* an Ontario Court of Justice provincial decision dated the 10th of December 1998, identified as Ontario Judgement number 5820. In regard to charges number two and three, the defence argued legal doctrines of agency, waiver and honest but mistaken belief applied and that since the order that Corporal Kemp could not leave came from Warrant Officer Bush and was only passed on by Master Corporal Hotte, the subsequent action of Warrant Officer Bush in authorizing Corporal Kemp to attend an interview, even if this was a result of a misunderstanding or miscommunication, meant that Corporal Kemp did not disobey a lawful command nor was he absent without authority. It might be, the defence suggested, grounds for a different charge but not these charges.

[32] The defence stressed it was necessary for the prosecution to establish beyond a reasonable doubt not only Corporal Kemp's actions but also his blameworthy state of mind, and the defence also mentioned that the encounter between Corporal Kemp and Warrant Officer Bush, as far as Corporal Kemp was concerned, occurred on the 21st of March 2003.

[33] In relation to charge number four, the defence submission was that there was no lie told by Corporal Kemp. Essentially, the defence submitted that Warrant Officer Bush, as a result of his agitated emotional state, misheard what Corporal Kemp told him. The defence suggested that Warrant Officer Bush heard what he wanted to hear, not what was said. The defence also submitted that there was no reason for Corporal Kemp to want to go and see the BPSO, and that if the conclusion of the unit was that he had lied to them about this why was he not arrested that very afternoon for absence without authority. The defence suggested that the unit probably knew that Corporal Kemp was going to see the social worker. The defence also argued that the prejudice to good order and discipline had not been established if Corporal Kemp left for an emergency mental health appointment as this was an inevitable and accepted consequence of having a policy which permitted individuals to go to seek help in such matters.

[34] On the issue of credibility, the defence counsel suggested that Corporal Kemp was a credible witness whose testimony was consistent on both direct and cross-

examination, and also one whose previous conduct demonstrated truthfulness when being questioned by persons in authority, specifically Master Warrant Officer Slack. The defence counsel submitted the applicable law in this case, as the accused had testified, was *R. v. W.(D.)* a Supreme Court of Canada case I've mentioned earlier.

[35] Defence counsel also suggested there was a history of animosity between Corporal Kemp and his unit, and the court should consider that when assessing the credibility of other witnesses. Specifically, the defence counsel suggested that what he characterized as an eerie similarity existed between the opening words on a series of statement forms and that this could be attributed to the witnesses discussing the incident and being influenced, possibly inadvertently, by one another to the extent that their testimony before this court was not reliable. In addition, the defence suggested that Second Lieutenant Mathey's testimony was, to some degree, unreliable because of her lack of experience; Warrant Officer Bush's testimony was to some degree unreliable because of his emotional state; and Master Corporal Hotte's testimony was to some degree unreliable because of questions about the reliability of his memory.

[36] Now, the court has before it a large amount of evidence which is essentially uncontradicted and upon which all the witnesses agree and from which it can make findings of fact, and before moving to consider the more controversial aspects of this case, the court will set out those findings of fact which it has made that are not controversial, and they are as follows: Corporal Kemp has been a member of the Royal Canadian Dragoons for a number of years. In the time frame February-March 2003, he was in B Squadron. That on the 17th of February 2003, he submitted a request for an occupational transfer to one of two occupations—and this is set out in Exhibit 3—his primary choice as set out in that Exhibit is Intelligence Operator, and his alternative choice is Geomatics Technician. That this request was submitted through his direct chain of command in accordance with normal procedures, and; that is, through Master Corporal Hotte, to Warrant Officer Bush, and then to Lieutenant Goela. That during the period 17th of February to the 5th of March 2003, Corporal Kemp made regular inquiries within his troop about the progress of this memo. He did this to Corporal Crossman, to Master Corporal Hotte, and the response came back to him from Warrant Officer Bush that, in essence, this would be dealt with later and that he would have to wait. It is clear from the evidence that Lieutenant Goela was absent for some portion of this time frame, in essence, Corporal Kemp was told there was no news on his application. There is no evidence before the court that this particular submission went any higher during this time frame and, in that regard, the court would refer to the statement that is found at Exhibit 4; that is, unfortunately this request stayed at the troop level until today. It would refer to the fact that there is evidence before it that the action that was taken at the squadron level by Captain Graham was done on the 6th of March and also that Master Warrant Officer Slack, who operated at the squadron level, was not aware of this application until the emails were forwarded to him.

[37] Concurrently during this 17 of February to 5 March 2003 time frame, Corporal Kemp was taking action to arrange, as he explained, in accordance with authorized procedures, his own medical appointment, and indeed the testimony of all the witnesses is that individuals could arrange their own medical appointments and then obtain the permission from the chain of command to attend them.

[38] Corporal Kemp was apparently getting more concerned about the lack of progress or lack of response from his chain of command. After the expiration of a 14-day time frame, it is clear that there was an ability for an individual to go higher in the chain of command to find out what was happening. The exact details of this ability varied from witness to witness, but it was clear that an individual could ask or move the matter up one level in the chain of command after 14 days if no response had been received or if the response was unsatisfactory. Equally, it was clear that the chain of command went from Lieutenant, or as he's also identified Second Lieutenant Goela, to the squadron level.

[39] Corporal Kemp was going on leave from the 5th to the 17th of March 2003. On his last day at work, it appears that the request was finally sent out from the troop level, and the evidence of that is as the court already indicated. The evidence is also that the direct chain of command above the troop level within the squadron; that is, above Lieutenant or Second Lieutenant Goela was to the squadron chain of command and then ultimately to the Commanding Officer. No specific names were provided for the chain of command other than the reference to Master Warrant Officer Slack.

[40] As indicated, Second Lieutenant or Lieutenant Goela was absent for some of the time frame and it would appear that Warrant Officer Bush was the senior person within the troop. The evidence before the court is also that Warrant Officer Bush reported to the Squadron Sergeant Major in many matters; that is, Master Warrant Officer Slack.

[41] The squadron level administration was handled by Captain Graham and he had an organization which included Second Lieutenant Mathey who was assigned on a temporary basis to provide administrative support from August 2002 until March 2003.

[42] It is evident from the evidence before the court that the request that was forwarded by Corporal Kemp on the 17th of February ultimately got to the right administrative person to handle it; that was, Captain Graham, by the 6th of March 2003.

[43] Corporal Kemp, on the 5th of March, sent two emails to Second Lieutenant Mathey. Second Lieutenant Mathey appears to be a more approachable, less intimidating individual than Master Warrant Officer Slack. She certainly had a role in dealing with administrative matters, she was described as a liaison officer, but it was

clear that her role in administrative matters and that included occupational transfers, was activated by a request from troop leaders or from her superiors.

[44] On the 5th of March, she receives two emails from Corporal Kemp and her testimony is as follows: that she was surprised because this was not the usual route and that this generated some concern for reasons related to the contents of the emails. Firstly a reference to speaking with the Canadian Forces Recruiting Group, CFRG, and the Base Personnel Selection Officer, BPSO; secondly, that there was an indication there was a carbon copy sent to someone in the Assistant Deputy Minister Human Resources (Mil) organization, that is, the human resources organization in Ottawa; thirdly, that it was perceived that there was some implied criticism of inaction at the troop level; and finally, there was some reference to a back door being used for some parts of a request.

[45] Second Lieutenant Mathey passes this email; that is, the first email which is sent at 11:25, directly to Second Lieutenant Goela and Warrant Officer Bush who are in Corporal Kemp's direct chain of command. In the second email that is sent that same day at 1656 hours, Corporal Kemp specifically asks Second Lieutenant Mathey, "... can you book me in with Maj. Overton....", and the evidence before the court is that Major Overton was the BPSO. As the court has indicated, the time on this email is 16:56 hours on the 5th of March; that is, the end of the working day on the last day before Corporal Kemp goes on a period of leave. It is forwarded the next day by Second Lieutenant Mathey to her superior; that is, Captain Graham, and then by him to Master Warrant Officer Slack on the 17th of March. It appears that nothing happens between the 6th and the 17th of March, there is no further contact between Corporal Kemp and Second Lieutenant Mathey.

[46] The next incident that occurs is on the 19th of March, Corporal Kemp is marched in by Warrant Officer Bush to see Master Warrant Officer Slack, and this interview perhaps indicates that the evaluation of the occasions on which an individual sees a Sergeant-Major is reasonably accurate; that is, it is not necessarily a pleasant experience. Master Warrant Officer Slack cautions Corporal Kemp and offers him the right to counsel and interviews him in regard to the emails that he has sent to Second Lieutenant Mathey and in particular issues such as who he spoke to at the Canadian Forces Recruiting Group and who the person who's identified as being at ADM(HR Mil) Ottawa/Hull would be. During that same interview, Corporal Kemp receives the information that his application was not supported from the unit. As the court has indicated, all of the testimony before it is that this was not a particularly pleasant experience for Corporal Kemp, nor was it intended to be. This was an investigation, he was under caution and he also received what could only be considered news that he didn't want to hear and that is that his application was not supported. It is not before the court exactly how long this interview took place.

[47] The following morning, Corporal Kemp meets with Captain Grondin, a social worker, who is providing counselling assistance to him regarding his divorce; that is, on the morning of the 20th of March he sees Captain Grondin, but not about divorce issues but job related issues. Captain Grondin, as a result of the information that Corporal Kemp provides and in accordance with new policies, introduces Corporal Kemp to Major Lloyd who is a workplace conflict resolution specialist who works down the hall in the same building as Captain Grondin.

[48] I would now move to the next matter about which there's no dispute, and before doing so, I would indicate that there is a difference between the witnesses as to whether this next incident occurred on the 19th, 20th, or 21st of March, depending on the testimony of different witnesses. The court will resolve that matter later. But what is not in dispute is that in the early afternoon, at approximately 1330, Second Lieutenant Mathey, on the instructions of Captain Graham, meets with Corporal Kemp and Master Corporal Hotte. Master Corporal Hotte accompanies Corporal Kemp primarily as a witness and the purpose of the meeting is to explain why Corporal Kemp's occupational transfer is not proceeding onwards, and the reason for this is apparently in relation to certain policy interpretations. This interview occurs in the squadron building C-53. At the end of the meeting, Master Corporal Hotte and Corporal Kemp return to their normal place of duty. Corporal Kemp says that he has to go and see somebody and he is told, No. He's told, No, by Master Corporal Hotte, but Master Corporal Hotte also checks with Warrant Officer Bush who says, No, and the information that's provided to Corporal Kemp is that everyone is too busy, there's too much to do. This matter is also discussed with Master Warrant Officer Slack who also says, No, that people are too busy and he indicates that part of the troop are working until 7 p.m. and that maybe this is something that can be facilitated the next afternoon which is the clean-up afternoon.

[49] Master Corporal Hotte goes back to Corporal Kemp and explains that the answer is no, and that it is not simply him who is saying this, and Corporal Kemp is visibly upset. Master Corporal Hotte indicates that he tells Corporal Kemp to meet him in the squadron QM and he sees Corporal Kemp taking off his jacket. Master Corporal Hotte leaves the quartermaster location, which is apparently in or closely located to building C-53. As Corporal Kemp does not appear in the squadron quartermaster location very shortly afterwards, Master Corporal Hotte returns and sees Corporal Kemp talking to Warrant Officer Bush outside building C-53. Master Corporal Hotte then leaves the matter there as, in essence, Corporal Kemp is talking to a higher individual in his chain of command. Corporal Kemp is never seen by Master Corporal Hotte in the quartermaster area that afternoon, nor is he seen there by Corporal Crossman who is also working there.

[50] Shortly after Master Corporal Hotte leaves Corporal Kemp in building C-53, Corporal Kemp heads out towards the gate of the compound. This is noticed by Warrant Officer Bush who yells at him and calls him over to speak with Warrant Officer Bush; that is, Warrant Officer Bush calls Corporal Kemp over to a smoking area

where Warrant Officer Bush and Warrant Officer Martin are having a cigarette. A brief but heated conversation ensues. Corporal Kemp then departs building C-53 and Warrant Officer Bush goes to Second Lieutenant Mathey's office to confront her about making appointments for his soldiers without consulting him, specifically, about making an appointment for Corporal Kemp with a major. Second Lieutenant Mathey denies doing this and Warrant Officer Bush and Second Lieutenant Mathey go to Master Warrant Officer Slack's office and Master Warrant Officer Slack initiates an investigation into the matter. A number of people, including Second Lieutenant Mathey, Warrant Officer Bush, and Master Corporal Hotte write written statements about what happened the same day the incident occurs. The day following the incident Warrant Officer Martin makes a written statement about what happened.

[51] So these matters are all uncontradicted. There are certainly differences about certain aspects such as the contents of the brief but heated conversation between Corporal Kemp and Warrant Officer Bush but this general pattern is not something that any of the witnesses disagree with.

[52] At this point it is therefore appropriate to indicate the findings made by the court on the credibility of the witnesses who testified before it including the accused. The court has applied the considerations it mentioned earlier, including the witness's opportunity to observe; his or her ability or reason to recollect; any apparent bias; their demeanor while testifying; and the logic and consistency of their testimony, not only internally but with uncontradicted facts.

[53] The court has applied the same standards to every witness. The court considers that Corporal Crossman, Captain Grondin, and Captain Brockington, who were all relatively brief witnesses whose testimony was limited to quite specific points, as disinterested, non-partisan witnesses with a reasonable recollection of events which were apparently not particularly noteworthy from their point of view. Their testimony was internally consistent and they responded clearly and concisely. In short, the court found them credible.

[54] The court found Second Lieutenant Mathey to be a credible witness, although involved more deeply in this matter, her evidence was logical, consistent internally and with the testimony of others, and presented in low-key and dispassionate matter. Any lack of experience, and the court would indicate it accepts that as a graduate of RMC she had had several years of prior service and administrative experience before her August 2002 service began with the RCDs, but any lack of experience did not adversely impact on her ability to observe or to analyse.

[55] Warrant Officer Martin was another relatively focussed witness who testified in a logical and straightforward manner and who, although a smoking colleague of Warrant Officer Bush, did not display any partiality in his testimony.

[56] Master Corporal Hotte was a member of Corporal Kemp's direct chain of command, however, his testimony was not only clear and straightforward, but also disclosed no bias one way or the other. When he was sure he said so, and when he was less sure he said so.

[57] Master Warrant Officer Slack was also in Corporal Kemp's direct chain of command. His testimony was clear, direct, logical and dispassionate. Although evidently a powerful and somewhat intimidating figure to non-commissioned members in B Squadron, the court finds nothing surprising or improper in that. Indeed, likely the contrary would be surprising and perhaps somewhat worrying. Master Warrant Officer Slack certainly played a disciplinarian's role and acted with vigour and dispatch, but there is no indication that he was anything but reasonable and fair in his actions.

[58] The court found that Warrant Officer Bush was a more emotional witness than others. This was evident not only in his actions but also in his demeanor while testifying, however, the court has found that this did not adversely influence his ability to remember. He was straightforward, but the court would indicate, to some degree, defensive or uncomfortable, but not noticeably more so with the defence than with the prosecution. The court would also say that his testimony was corroborated to a large extent by Warrant Officer Martin who the court has indicated was a dispassionate witness. It is clear that Warrant Officer Bush had little time or respect for Corporal Kemp, but equally it is clear that he is not reticent, hesitant or evasive in saying so. Although some of his actions and words could be regarded as less than temperate when sitting in the formal confines of a disciplinary proceeding, he was very open about what he did and said. The court has found him to be a credible witness except to the extent of his own evaluation of when and what degree he is upset. In that area, as with many people, his own subjective evaluation is less reliable than the evaluation of more objective observers such as Warrant Officer Martin.

[59] Now, the court here will discuss the issue raised by defence counsel which defence counsel described as an eerie similarity between the beginning of various written statements that were apparently made by witnesses. The court would indicate that it does not find that there is any eeriness to this similarity or any concern. The court finds any matter here is really a concern of a non-existent issue. In essence, what is before the court is the indication that a document was identified as a statement at the top and then it began with references to who the person was who was making the statement and then moved to talking about in two of the cases the time that a certain matter occurred. The court would indicate that it is clear from the documents in front of it, any of the more formal documents including Exhibits 1, 2 and particularly Exhibit 3, that starting a document with an identification of what it is, and the court would refer to, for example, Exhibit 3 begins with an identification that it's a memorandum and shortly thereafter it's followed by service number and the rank of the person who is making or providing the memorandum. So the court is satisfied that, indeed, there is no eeriness in

this matter but, in fact, the individuals were simply, as they indicated, following a standard process.

[60] The court also would indicate that it does not see anything on the evidence before it that would indicate either some kind of conspiracy, as was indirectly suggested, against Corporal Kemp or the application of some form of group thinking that misled all the other witnesses. There's a suggestion that there was hostility between Corporal Kemp and his unit. It is clear from the testimony that there was a conflict between Corporal Kemp and Warrant Officer Bush. There is no indication before the court that there was hostility, generally, between Corporal Kemp and his unit, although there is evidence that Corporal Kemp was upset with lack of action.

[61] There is no indication before the court for any support to a statement that Corporal Kemp's squadron or unit probably knew he was going to see the social worker, and as the court has indicated there is nothing before it that would indicate that somehow all the witnesses who made statements were influenced by each other and the general atmosphere, and that their statements were not really accurate and that now all they were doing was saying what was in their statements rather than what they recalled. The court would indicate there is no evidence of that and, indeed, the evidence before the court in terms of the testimony of the witnesses is to the contrary.

[62] The court now turns to its assessment of the testimony of Corporal Kemp. The court finds that in a number of areas it is credible, but there are equally a number of areas where the court does not find Corporal Kemp's testimony credible, and principally because of a lack of logical consistency. Those areas relate to testimony about specifics of the two incidents which underlie the charges which he faced, and the first area is in relation to his testimony that his two emails on the 5th of March 2003 to Second Lieutenant Mathey were simply a continuation of his occupational transfer request which, since he had not received what he considered an appropriate response within 14 days, he, in accordance with what he understood to be the applicable squadron policy, sent up to the next level to seek action. This testimony is inconsistent with the tone and content of the emails, with Corporal Kemp's own knowledge of the process to be followed, with his actions between the 17th of February and the 5th of March, and the 6th and 17th of March, and his knowledge of who was properly in his chain of command at that time and what they could do.

[63] The court has compared Exhibits 3, 4, and 5. Exhibit 3 is Corporal Kemp's formal application dated the 17th of March '03, which he forwarded through his chain of command to the BPSO. He gave it, as was indicated, to Master Corporal Hotte, it passed to Warrant Officer Bush, and it's addressed through Lieutenant Goela. It is formal and it starts and ends with, "Sir", it has appropriate classifications on it, it has references listed.

[64] Exhibit 4, which was sent at 11:28 on the 5th of March is different in tone and content. In comparison to the formality of Exhibit 3 it has a number of very informal comments and it is clearly directed towards a certain and particular interest of Corporal Kemp's. Corporal Kemp says in that:

... I need to get this pushed along ...

And later:

... I need to push this alot faster ...

And then:

... I have back-doored some parts of the request and need to reach the board.

... Can you give me a time estimate ...

[65] Exhibit 6 which is sent—sorry, Exhibit 5, which is sent at 1656 hours on the last day that Corporal Kemp is working, is even more informal and demanding. The title is spelled O-p-p-s, which the court understands to read something along the lines of:

Opps forgot one last thing.

And it says:

I start leave today, and I am not back till 17march...my deadline is 17 march to BPSO ...

...

... any help you can provide would be greatly appreciated. If you can work your magic ... can you book me in with Maj. Overton ...

It goes on to say:

... he is familiar with the situation ...

And finishes:

... Thanks for the help!!

[66] The tone and content is not consistent with taking a formal application to the next level of the chain of command to seek appropriate action. It is consistent with someone approaching a person on an individual basis looking to see if they can do something to help.

[67] Exhibit 3 and Corporal Kemp's own testimony is that he knows the process requires that his application be approved through the squadron who is involved in the onward transmission of his request. He gives it to Master Corporal Hotte, his direct supervisor. It is addressed to Lieutenant Goela, his troop commander. His inquiries as to a response are made to Corporal Crossman, the onsite supervisor while Master Corporal Hotte is not around; Master Corporal Hotte; and through them to Warrant Officer Bush. The responses, even if unsatisfactory, come back to him through that same route. The next level is the squadron chain of command. It is clear that Corporal Kemp is reluctant to go there and he makes it very clear that he does not want to go up to that level and complain to Master Warrant Officer Slack about an admin problem because, to use Corporal Kemp's own words, "He would tear my head off".

[68] So the court finds as the court has indicated, the tone of this correspondence and the direction of the correspondence makes it clear it is not a formal next step. That is, in essence, after the 14 days, there is no formal next step to push it up to a higher level.

[69] The court has also considered the actions of Corporal Kemp in February and March 2003, regarding his OT request. The first thing, as the court has indicated, is that the Geomatics Technician, which is the trade which has been indicated a deadline applied to, appeared to be the second choice, not the primary choice. Corporal Kemp puts in a request on the 17th of February '03, and as he describes it, and as others agree, he starts to regularly question or pester his proper chain of command for a response. He's dissatisfied. He's so dissatisfied that two days after the 14-day response time, he kicks it up to a level that can get something done; that is, to use Corporal Kemp's words, he kicks it up a level. But he does not do this to someone who's directly in the chain of command and perceived as powerful, but rather to an acting admin officer who he sees as a lesser authority. Now, he does this on the last day before 12 days' leave and he does it in a very informal fashion.

[70] The evidence before the court is that there is no pursuit of an issue of response to this; that is, there is no contact between Corporal Kemp and Second Lieutenant Mathey between the 6th and the 19th of March. The 19th of March, the court would point out, is two days after Corporal Kemp apparently perceives the deadline for at least one of his trade application, has expired, and the first time he finds out his OT request is not supported by the unit.

[71] Corporal Kemp, having submitted the formal request, having pestered—to use terminology that was mentioned by a number of witnesses—to get a response, fires off two emails and goes on leave, and there's no indication he makes any check of what the next level that he has sent this up to because he's dissatisfied with the actions of the chain of command, there's no indication that he checks. There is no contact, let alone any pestering, of Second Lieutenant Mathey.

[72] This is not consistent with treating these two emails as a passing on of the OT request to the next level. It is consistent with a quick, last minute attempt to get some extra help before going on leave.

[73] The court would also point out there is inconsistency between the testimony of Corporal Kemp before the court in that on one occasion he indicates that his expectation was Second Lieutenant Mathey would book the appointment and tell him when the appointment was going to be, and another time that she would book the appointment and info his chain of command about when the appointment would then be. And as indicated, the court has it clear that Corporal Kemp, in his own mind, is saying that Second Lieutenant Mathey's position, and it's not entirely understandable why but, is perceived by him as lower in the chain of command than Master Warrant Officer Slack. Again, this is another contradiction, it is not consistent that you would pass up to a higher level when that higher level is someone who you regard as not being somebody who has very much power or authority.

[74] The court would also comment on the issue of the explanation of "back door" as it is set out in the memos. The explanation provided to it is that, in essence, back door was used to described an action in booking Corporal Kemp's own medical appointment in support of his occupational transfer request, however, it is clear in Exhibit 4 that he already covers that, he says, I passed my medical test today. In addition, it appears clear that there were two equally valid ways of booking medical appointments. One was to do it yourself and let the chain of command know of the time and the reason for the appointment, or the other one was to ask the chain of command to do it. In essence, as presented to the court, neither of these were back door in any way, they were both equally legitimate and therefore the court cannot accept that the reference to back door is a reference to the booking of a medical test by Corporal Kemp.

[75] The second area where the court finds significant logical inconsistencies in Corporal Kemp's testimony is in relation to what he said and did on the afternoon of the meeting with Second Lieutenant Mathey and Master Corporal Hotte. In essence, after the meeting he goes back to the floor and says he tells Master Corporal Hotte, he wants to go to base side to sort things out and mentions Captain Grondin and perhaps Major Lloyd. Master Corporal Hotte tells Corporal Kemp that he cannot do this and he also passes on very clearly that this order comes from higher; that is, Warrant Officer Bush. It is very clear that this is also Warrant Officer Bush's direction, and that direction is that he cannot go and see the people he's indicated he wants to see and that he has to go to the QM.

[76] Corporal Kemp ignores this order and after Master Corporal Hotte leaves heads off to try and see, he indicates, Captain Grondin and Major Lloyd. His explanation is that this is an emergency mental health issue where an individual serviceman, in Corporal Kemp's view, has a clear right to go provided he explains the

reasons for his absence and the necessity for departing to his unit; that is, the unit cannot deny this request. However, he does not present the request in that fashion, he simply, from his testimony, mentions Captain Grondin, who apparently is known as dealing with him for a divorce issue, and Major Lloyd, who is someone who he apparently met for the first time that day or a previous day. That is, Corporal Kemp's testimony is, that he felt so upset and stressed, that this was an emergency mental health issue and he had an entitlement to go, but that he does not explain that situation clearly to the Master Corporal. He uses ambiguous words and, by Corporal Kemp's testimony, a name and expects Master Corporal Hotte to put it all together.

[77] When he's told no, he does not take the opportunity to explain further but simply waits for Master Corporal Hotte to leave and then heads off without notifying anyone about where he's going. He's unexpectedly stopped, as he's exiting the gate, by Warrant Officer Bush who happens to be outside smoking. What is his approach in this situation? Does he provide a fuller explanation to Warrant Officer Bush who's already refused permission for him to leave on the information he provided to Master Corporal Hotte? Does he elaborate on the situation and its urgency? No, in essence, he says it's a personal matter and he is reluctant to provide any information. He antagonizes the Warrant Officer by telling the Warrant Officer, amongst other things, as far as he, Corporal Kemp, is concerned their conversation is over.

[78] Then, according to Corporal Kemp's testimony, he provides the name, Captain Grondin, to the Warrant Officer and Warrant Officer Bush, the same person who refused to let him go only minutes earlier on what Corporal Kemp believes is the same information; that is, the information provided to Master Corporal Hotte by him, who has subsequently clearly been antagonized by seeing Corporal Kemp leave contrary to that refusal, who has been confronted by Corporal Kemp and further antagonized by being challenged by Corporal Kemp, suddenly says, Yes, go. After receiving exactly the same information that he'd received before.

[79] Corporal Kemp's actions, attitude, and the information provided are not consistent with someone who is acting in accordance with what he describes as a generally recognized policy and an emergency mental health situation.

[80] These are examples of critical internal inconsistencies in Corporal Kemp's testimony as it relates to the charges which lead the court to find him not to be a credible witness on those matters.

[81] These kinds of inconsistencies are almost always evident when looking a course of conduct because they highlight themselves as being anomalous and inconsistent with the rest of the individual's actions or explanations, or the consequences that the individual indicates are desired from such actions and explanations.

[82] So applying the *R. v. W.(D.)* approach the court does not find Corporal Kemp a credible witness on the critical parts of the testimony which relate to the sending of the emails and the reason for that, nor of his conversations with Warrant Officer Bush, nor does his account, even if not believed, raise a reasonable doubt.

[83] Specifically, the court would deal with the issue of honest but mistaken belief, which was raised by the defence as to the 14-day response time and what could be done afterward, the right to go to emergency medical appointment and whether or not Corporal Kemp was authorized by Warrant Officer Bush to go and see Captain Grondin.

[84] As the court has indicated, it does not believe the testimony of Corporal Kemp in that regard for the reasons set out above and therefore does not find that he had an honest but mistaken belief.

[85] Now, let me return briefly to the issue of facts and elaborate how the court has dealt with some of the more controversial issues, and the first thing that the court would indicate is that it makes a finding that the incident with Warrant Officer Bush occurred on the 20th of March 2003, not the 19th as was suggested was possible by Corporal Crossman, nor the 21st as was the testimony of Corporal Kemp, and the court has done this for a number of reasons and, in fact, one of the simplest of those reasons is the testimony of Warrant Officer Martin. Warrant Officer Martin testified that he made his statement the following day after the incident, that it was made in the office, he was using his computer, that other people were around; that is, it is something that is consistent with a normal working day. The 21st is a Friday, if his statement was made the day following the incident, and the incident occurred on a Friday, it would have to be made on a Saturday. It is clear from his testimony that was not the case, it was done in a normal working day and so that is one reason that the court has found that this occurred on the 20th. Another reason is the testimony of almost all the witnesses to that effect, and that is the witnesses that the court has found credible.

[86] The court has found that, in essence, on the 20th that Corporal Kemp, who had indicated he had an appointment with Captain Grondin, in fact, because the court prefers the testimony of Captain Grondin, turned up on the morning of the 20th in an agitated state, and that is, indeed, consistent with the fact that he had an interview that was not a pleasant interview with Master Warrant Officer Slack on the 19th as is indicated by Exhibit 6, and that he had found out that his occupational transfer had not been supported. So the court makes that finding; that he was a walk-in and dealt with by Captain Grondin on the 20th. It's also clear from that, that Captain Grondin was in the office on the 20th; that is, he was not on leave on anything similar on the 20th. The court finds that the meeting with Second Lieutenant Mathey and Master Corporal Hotte was that same day, and again, as the court has indicated this is the testimony of the bulk of the witnesses, certainly the witnesses who made the statements at the time, with the exception of Warrant Officer Martin who explained how he could be in error in that

regard. It is also consistent with the fact that having dealt with Corporal Kemp on the day before that there was a desire to deal quickly with his issue.

[87] Also, as indicated in the testimony of Master Warrant Officer Slack, if this had been the Friday, then that afternoon would have been a clean-up afternoon rather than a work afternoon, and it is clear from the testimony of the witnesses that this was a regular work afternoon.

[88] The court has also found that, based on the testimony of Master Corporal Hotte which it finds credible, that Corporal Kemp did not provide the name of the major nor the name of Captain Grondin to him, but simply the fact that he had to go to an appointment with a major.

[89] The court also finds based on the testimony of Warrant Bush, as corroborated by the testimony of Warrant Officer Martin, that Corporal Kemp told Warrant Officer Bush that he was going to an appointment with a major and that this had been arranged by Second Lieutenant Mathey.

[90] The court also finds that Corporal Kemp met with Captain Brockington on the 21st of March, not that day, the 20th of March.

[91] So the court finds in regard to the 5th of March emails that they were sent by Corporal Kemp not as a request to push matters along through the chain of command, but rather to try and get Second Lieutenant Mathey to do something personally for him, to book an appointment with the BPSO, and, in doing this, he was going around the chain of command process.

[92] As the court has indicated in regard to the meeting with Second Lieutenant Mathey and Master Corporal Hotte, the court finds it took place on the 20th of March and it also finds that the subsequent encounter between Warrant Officer Bush and Corporal Kemp occurred that same afternoon. In regard to the conversation between Corporal Kemp and Master Corporal Hotte, the court accepts that Master Corporal Hotte twice denies a request by Corporal Kemp to leave, and on the second occasion, makes it clear that it is not just him, that he has checked and the order has come from higher than him. The court finds that Master Corporal Hotte ordered Corporal Kemp to go to the squadron quartermaster area to work, and that Corporal Kemp disobeyed that order.

[93] The court finds that Corporal Kemp when called over to speak with Warrant Officer Bush told him he had to go to an appointment and it was personal, that it was major, that it related in part to the fact that Warrant Officer Bush was responsible for the failure of Corporal Kemp's occupational transfer to go through, and that the appointment had been made by Ms, meaning, Second Lieutenant Mathey, and that on the basis of that information Warrant Officer Bush told Corporal Kemp he could go to

his appointment and then went to confront Second Lieutenant Mathey about making the appointment without consulting him. The court finds that Second Lieutenant Mathey made no appointment and when advised of this both Warrant Officer Bush and she, went to Master Warrant Officer Slack's office to bring this to his attention.

[94] So those are the factual findings of the court. The court would now apply those to the charges. In relation to charge number one, the issue is, was Corporal Kemp's action in sending emails to Second Lieutenant Mathey, which includes the statement:

... Can you book me in with Maj. Overton ...

Who, the evidence is, was BPSO. Was that a circumvention of the chain of command to obtain an interview with the BPSO? Now, the defence has indicated a certain definition of "circumvent". The court would indicate that pursuant to QR&Os and particularly QR&O 1.04 where there's an indication of how to interpret words that is referred to the current edition of the Concise Oxford Dictionary; that is, the Tenth Edition completely revised, there the definition is somewhat different than that that was presented by the defence. Circumvent is defined as:

Find a way around (an obstacle).

And that is the definition that the court would adopt. So the court finds that the actions of Corporal Kemp were a circumvention of the chain of command to obtain an interview with the BPSO; that is, that Second Lieutenant Mathey was not part of the chain of command of Corporal Kemp and that this was dealt with as clearly a personal request from Corporal Kemp.

[95] The issue, however, before the court is, was that conduct prejudicial to good order and discipline? The actual prejudice as presented by the prosecution is that it set a bad example to others, it could leave the chain of command out of the loop, it led to a loss of confidence in and respect for Kemp, and also that it put Second Lieutenant Mathey in an awkward position. With regard to the issue of the loss of confidence in and respect for Corporal Kemp among his own chain of command, in essence, it is somewhat difficult to use that as establishing an element of the offence. In essence, what we have is a situation where the offence has to stand or fall other than simply on the question of the chain of command losing confidence in you because it believes that you've committed an offence.

[96] The court would indicate that it has a reasonable doubt as to whether prejudice to good order and discipline has been established in this offence. If this matter had proceeded further; that is, if Second Lieutenant Mathey had not acted in a prompt and appropriate fashion and, indeed, an appointment had been made, then the court may well have been satisfied that prejudice to good order and discipline had

occurred, however, that was thwarted by the timely and proper action of Second Lieutenant Mathey, who referred this matter immediately back to the chain of command.

[97] The court finds that it is not satisfied beyond a reasonable doubt that conduct prejudicial to good order and discipline has been established in the first charge and for that reason finds Corporal Kemp not guilty of that charge.

[98] With regard to charge number 4, the court has found that Corporal Kemp did make an untrue statement to Warrant Officer Bush saying that Second Lieutenant Mathey had made an appointment for him on the 20th of March 2003. The effect of that was that Corporal Kemp did not do assigned work that afternoon. Other people had to fill in and do the work. This imposed a greater burden on his workmates. In addition, the chain of command did not know where he was. Both of these matters are ones that have serious consequences in an armed force. An individual cannot put personal issues first and do whatever they want to facilitate the resolution of those issues. Truthfulness is an essential aspect of mutual respect, which is integral to effective functioning of the unit. So the court finds that in relation to charge number 4, that the actions of Corporal Kemp were prejudicial to good order and discipline.

[99] In relation to charge number 2; that is, disobedience of a lawful command, the court finds that Master Corporal Hotte gave a command, a command that Corporal Kemp could not go to the appointment or meeting or emergency situation, and also Master Corporal Hotte made it clear that this was not only him, but this command also had the weight of the chain of command, Warrant Officer Bush and Master Warrant Officer Slack, behind it. That is, Master Corporal Hotte gave an order, and then came back and backed up his order with a further order, a confirmation of his original order. The court finds that he was not simply an agent. The court finds that Corporal Kemp disobeyed, he did not go to the squadron QM to work.

[100] On the issue of waiver which was raised by the defence, Warrant Officer Bush as a more senior NCO in Corporal Kemp's direct chain of command could rescind his own orders and could, indeed, rescind the order of Master Corporal Hotte who was one of his subordinates, however, he did not do so. It is true that Warrant Officer Bush said that Corporal Kemp could go to an appointment arranged by Second Lieutenant Mathey, however, no such appointment existed, and an order is not rescinded if it is induced by fraudulent misrepresentation by the accused, and for a more straightforward example, if somebody comes back and reports, I've finished loading the ammunition, can I leave? And then they are authorized to leave, and it turns out later that they were lying and had not finished loading the ammunition, then, indeed, they could be convicted of disobeying the lawful command to load the ammunition.

[101] The court finds that Corporal Kemp could not have and did not have an honest but mistaken belief that Warrant Officer Bush had rescinded his order and let him go, because this was based on the untruthful statement that was made by Corporal

Kemp and Corporal Kemp knew the statement was untrue. So the court finds that Corporal Kemp had an initially blameworthy state of mind when he left the building to depart the compound and that this blameworthy state of mind continued during his conversation with Warrant Officer Bush and afterwards.

[102] With regard to charge number 3, this is an alternative to charge number 2, and the court has therefore stayed this. If the court had not found Corporal Kemp guilty of charge number 2, then the court is satisfied there was sufficient evidence before it, that the court could find he was absent without leave, because, as indicated, the authorization given by Warrant Officer Bush was founded on the misleading situation presented to him by Corporal Kemp.

COLONEL K.S. CARTER, M.J.

Counsel:

Captain S. Raleigh, Director Military Prosecutions Ottawa

Counsel for Her Majesty the Queen

Captain K. Maynard, Canadian Forces Legal Advisory Services

Assistant counsel for Her Majesty the Queen

Major A.E. Appolloni, Directorate of Defence Counsel Services

Counsel for Corporal Kemp