

# **DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL**

## **Mocicka v Chief of Army [2003] ADFDAT 1**

**DEFENCE AND WAR** – Defence Force – service offences – conduct likely to bring discredit on the Defence Force – whether likelihood of conduct coming to attention of public essential

**WORDS AND PHRASES** – “conduct likely to bring discredit on the Defence Force”; “likely”

*Defence Force Discipline Act 1982 (Cth) s 60*  
*Defence Force Discipline Appeals Act 1955 (Cth) ss 21, 37(1)*

*Chief of General Staff v Stuart* (1995) 58 FCR 299 applied  
*Wyong Shire Council v Shirt* (1980) 146 CLR 40 cited  
*Bouhey v The Queen* (1986) 161 CLR 10 at 22 cited

**MARK JAN MOCICKA v CHIEF OF ARMY**  
**DFDAT NO. 2 OF 2002**

**HEEREY J (President), UNDERWOOD J (Deputy President) and**  
**MILDREN J (Member)**  
**1 AUGUST 2003**  
**MELBOURNE**

**DEFENCE FORCE DISCIPLINE APPEALS TRIBUNAL**

**DFDAT NO. 2 OF 2002**

**BETWEEN:            MARK JAN MOCICKA  
                             APPELLANT**

**AND:                   CHIEF OF ARMY  
                             RESPONDENT**

**TRIBUNAL:           HEEREY J (President), UNDERWOOD J (Deputy President)  
                             and MILDREN J (Member)**

**DATE OF ORDER:    1 AUGUST 2003**

**WHERE MADE:        MELBOURNE**

**THE TRIBUNAL ORDERS THAT:**

1. The appeal is allowed.
2. The convictions imposed on the appellant on 14 March 2002 are quashed and the penalties set aside.
3. The parties have leave to make written submissions as to reimbursement of costs under s 37 of the *Defence Force Discipline Appeals Act 1955* (Cth) within 14 days.

**DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL**

**DFDAT NO. 2 OF 2002**

**BETWEEN:            MARK JAN MOCICKA  
                             APPELLANT**

**AND:                    CHIEF OF ARMY  
                             RESPONDENT**

**TRIBUNAL:           HEEREY J (President), UNDERWOOD J (Deputy President)  
                             and MILDREN J (Member)**

**DATE:                  1 AUGUST 2003**

**PLACE:                 MELBOURNE**

**REASONS FOR JUDGMENT**

1     The appellant was originally charged with 121 breaches of the *Defence Force Discipline Act 1982* (Cth) (DFDA), s 60. The charges were all of a similar nature and were alleged to have been committed between July 2000 and March 2001. Each count alleged that the appellant, “being a Defence member, did at Victoria Barracks, Melbourne, behave in a manner likely to bring discredit upon the Defence Force by storing in his Defence computer home directory a file [designation given, eg al.jpg] being a still image of...”. Each count meticulously described the image that was the subject of the charge, e.g., “being a still image of a woman without knickers”. For what was described as “administrative convenience” the charge sheet was reduced to ten “representative charges”. These charges spanned the period covered by the original charge sheet and were representative of the type of pornography stored in the appellant's home directory. The material in the appeal book does not disclose the circumstances that led to this alteration of the charge sheet, but it is clear that evidence was led of the 121 images alleged to have been stored as such evidence was relevant to the issue of whether the appellant knew of the content of the material before he stored it.

2     The appellant was convicted by a Defence Force Magistrate (DFM) on 14 March 2002 of all but the first “representative charge” and penalties were imposed. This appeal is brought against the nine convictions upon the grounds that the convictions were unreasonable and cannot be supported having regard to the evidence, and that the DFM misdirected himself in law with respect to s 60(1) DFA which provides:

*"A defence member is guilty of an offence if the member engages in conduct that is likely to prejudice the discipline of, or bring discredit on, the Defence Force."*

### **Extension of time**

3 The appellant did not lodge an appeal within the time prescribed by s 21 of the *Defence Force Discipline Appeals Act 1955* (Cth). On 9 October 2002 he lodged an application for extension of time. In an affidavit in support of that application the appellant deposed that he misunderstood his position as to the time in which he could appeal. Without going into further detail it is sufficient to say that the respondent does not oppose an extension and we think it should be granted, particularly having regard to the substantive merits.

### **The facts**

4 The material facts were not in dispute. The appellant was a sergeant working in AEMA at Victoria Barracks. As part of his work he had access to the Defence Restricted Computer Network. He was provided with a Defence Force computer and was issued with a password to enable him to log onto the network. According to the evidence of the system manager for Defence Systems at Victoria Barracks, one of the drives in the server was assigned as a home drive. Home drive was a section of the server that was accessible by the appellant (and presumably others). The appellant's password gave him access to a folder in, or section of home drive. The system manager said that, so far as concerned the appellant, the folder was created as a space "where he can store his own personal documents". Mr Tracey QC, who appeared as senior counsel for the respondent, submitted that this was a reference to documents created, received and/or modified by the appellant in the course of his duties with the Defence Force, and was not a reference to personal documents that are not work related. Accepting that interpretation as correct, it is none the less commonly accepted in the work force generally, and the Defence Force is no exception in this respect, that work computers may be used to store strictly personal documents in the absence of a direction to the contrary by the employer, and provided that the use is reasonable and not to the detriment of the employer.

5 The systems manager said that the only persons who could gain access to the appellant's folder in home drive without knowing the password were himself and three other Defence members who worked in the computer administration area. The appellant told the military police that he had given his password to a captain because he was going to be away for a

period of time and he thought that another officer knew what it was.

6 The uncontradicted evidence given by the appellant in his interview with the military police was to the effect that from time to time, friends and acquaintances sent him e-mails to which were attached pornographic picture files or .jpeg's. The appellant did not always open the .jpeg. Sometimes he placed it in a subfolder labelled "humour" that he created in his folder in home drive. At a later date he opened these files and then decided whether to keep them or delete them. Sometimes he opened the .jpeg upon its receipt and immediately decided whether to store it in the home directory or delete it.

7 The pictures were pornographic, but none of them contained anything of a violent nature or depicted children or showed acts of bestiality. Mr Clark, senior counsel for the appellant, contended that they were the kind of pictures that were easily obtainable at any newsagent in Australia. Whether that is so or not, counsel for the respondent did not suggest that, apart from s 60(1), possession of these images by the appellant was unlawful.

8 The storage of these pictures on the Defence Force computer came to light when the appellant asked one of the three persons who, in addition to the system manager, had access to the file, to burn a CD of his home drive. This person looked at the folder to see how big it was and noticed that some of the files stored in it had names such as "my arse.jpeg image". We should interpolate that the folder also contained a lot of material that plainly was not pornographic such as "Monday joke.doc" and "Organic vegetables". The officer who discovered the existence of the pornographic material reported the matter to his senior and there ensued an investigation that lead to the charges being laid.

### **The Law**

9 Although *Chief of General Staff v Stuart* (1995) 58 FCR 299 concerned the other limb of s 60(1) – conduct likely to prejudice the discipline of the Defence Force – the following observations by Lockhart J (at 323 – 324) are apposite to that part of s 60(1) that deals with conduct likely to bring discredit on the Defence Force:

*"The words of the section are clear. It is for the courts and military disciplinary tribunals when hearing charges under s. 60 or appeals from convictions under that section to determine the application of the section in particular contexts. In my view it is unnecessary and unwise to substitute other words for those that appear in the section itself in an attempt to guide*

*military personnel and Appeals Tribunals in construing and applying the section.*

*It was said in argument that, if interpreted literally, the terms of the section would make punishable all conduct which had a prejudicial effect on discipline however slight that effect and however indirect. I doubt the correctness of this proposition. For behaviour to be of such a kind as to be likely to prejudice the discipline of the Defence Force or likely to bring discredit upon it, would not embrace trivial behaviour, nor behaviour that could only remotely be said to be prejudicial to that discipline.”*

With respect to the issue of causation, his Honour went on to say:

*“... in my opinion it is correct to construe s. 60 as relating only to such acts as have a reasonably direct or proximate and clearly perceived effect upon the discipline and credit of the Defence Force.”*

10 Mr Tracey conceded that if the stored material had been private but not pornographic he would not contend that the appellant had breached s 60(1). The use of the computer to store private material was not the issue; there was no question of cost, or the taking up of computer memory capacity. The issue was, as the charge sheet pleaded, the storage of pornographic material. It was that aspect that the respondent’s counsel contended was likely to bring discredit on the Defence Force, notwithstanding that the possession of such material was not, *per se*, unlawful.

11 The DFM said in his reasons for decision:

*“I am satisfied that if it became known that such material was stored on equipment provided with public moneys for Defence purposes, that fact would be likely to bring discredit upon the Defence Force.”*

12 He then held that there was plainly a likelihood, “in the sense of a reasonable probability” of this becoming known because the four systems administrators could access the file and the person(s) who sent the material to the appellant were likely to become aware that pornographic material was stored on equipment provided with public money for Defence purposes by virtue of having sent the material in the first place and by way of “subsequent discussion to which the accused admits”.

13 In the course of argument it was suggested that the discredit on the Defence Force referred to in s 60(1) may be discredit in the eyes of members of the Force as well as outsiders.

However, upon reflection, it seems that this construction of s 60(1) was not the intention of Parliament. The provision manifests an intention to maintain the credit of the whole of the Defence Force in the eyes of the general public or a section of it. The intention of Parliament was to create an offence designed to ensure that every member of the Defence Force would act in such a manner that its good standing in the eyes of those outside the Force would not be tarnished, in the same way as students at a school or members of a team are expected not to bring discredit on the school or team. The first limb of s 60(1) has, as explained in *Stuart* (at 323), a long history in military law. It is concerned with the internal organisation of military forces and the maintenance of discipline therein. The second limb, with which the present case is concerned, is comparatively recent. By contrast, it looks to the protection of the reputation of the Defence Force. In a democratic society governed by the rule of law the authority of the armed forces should be based on community respect rather than fear.

14 With respect to the meaning of “likely” Mr Tracey submitted that the offence was complete even if the likelihood of the general public being aware of the relevant conduct was, to borrow and corrupt an expression from the *Wyong Shire Council v Shirt* (1980) 146 CLR 40, “far fetched or fanciful”. However, it seems to us that to so construe s 60(1) is to fail to give the words of the section their plain meaning. “Likely” means a good chance, or a substantial, or real chance, as opposed to a remote possibility; see *Bouhey v The Queen* (1986) 161 CLR 10 at 22. In their ordinary meaning, the words of s 60(1) do not create an offence unless the conduct is such that, in all the circumstances of the case, there is a good chance that it will bring discredit upon the Defence Force. It follows from what we have earlier said that this cannot occur unless there is a good chance, not a remote possibility, that some person(s) other than a member of the Force will become aware of the impugned conduct. Accordingly, we reject Mr Tracey’s submission on this point.

#### **Application of the law to the facts**

15 Further, it follows that the DFM fell into error when he concluded that discovery of the stored material by the systems manager and his three staff was one way in which the storage was likely to bring discredit on the Defence Force. With respect to those who sent the appellant the material, the DFM said that it was likely that they knew that the material was stored on “equipment provided with public moneys for Defence purposes”. He said that it was likely that such persons would become aware of such storage by virtue of “having sent the material in the first place and, in the case of some of them, by way of subsequent

discussions to which the accused admits”. It is not clear to which evidence the DFM was referring when he said “subsequent discussions to which the accused admits”. It is obvious that such persons would know that the material went onto the Defence server because they sent the material to that address. However, the offence charged is not storing material on “equipment provided with public moneys for Defence purposes”, but storing material on the appellant’s “Defence computer home directory”.

16 With reference to the four systems management staff and the senders of the e-mails the DFM concluded:

*“It is a matter of speculation as to whether such persons thought that public money was being well spent to provide computer facilities for the accused to receive and store their material. But I am satisfied that this was a further class whose knowledge had the potential to discredit the Defence Force. It is likely that they would be led to believe that the standards set by the accused in these matters reflect those of the Defence Force. If so, we have all been demeaned and discredit brought upon us. It remains only for me to say that I believe the likelihood of discredit being brought to be a direct and proximate effect of the behaviour concerned.”*

17 There are several aspects to that paragraph. The first is that it seems to us to be drawing a long bow to be satisfied beyond reasonable doubt that the storage of material in a computer, not accessible to any member of the public without the appellant’s “key” to unlock the relevant section, is conduct that is likely to become known outside the Defence Force. The second is that it seems to us unreasonable to conclude that because one soldier keeps pornography in his electronic locker, the whole of the Defence Force somehow also keeps, or approves of the keeping of, such material in electronic custody. The third is the importation of a moral judgment in the sentence, “If so, we have all been demeaned and discredit brought upon us”. As we have said, the keeping of the material is not an offence *per se* but it appears that the DFM took the view that the appellant’s standards or conduct in keeping the pictures were immoral and demeaning in some undefined way. Not everybody in society approves of, or even tolerates, pictures of the kind that the appellant kept. They would offend some people. If the appellant’s conduct had been to brandish them to the general public in some way then, perhaps, it might be said that such conduct was likely to bring discredit on the Defence Force. In our view, on being told that a thirty-seven year old male army sergeant stored pornographic pictorial material that depicted what might be described as ordinary sexual activity, in a section of the Defence Force computer that was accessible only by him

and four system managers, the ordinary citizen would not raise an eyebrow. Even if he or she did not approve of such material, it is not likely on learning that that was the case, the Defence Force would be lowered in the esteem of that hypothetical person.

### **Conclusion**

18 For those reasons we are of the view that the appeal should be allowed, the convictions quashed and the penalties set aside. The parties will have leave to make written submissions as to reimbursement of costs under s 37 of the *Defence Force Discipline Appeals Act 1955* (Cth) within 14 days.

I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Heerey (President) Justice Underwood (Deputy President) and Justice Mildren (Member)

Associate:

Dated: 31 July 2003

Counsel for the Appellant: R W Clark

Solicitors for the Appellant: Cahills

Counsel for the Respondent: R R Tracey QC and P Kerr

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 21 July 2003

Date of Judgment: 1 August 2003