



Australian Government

Defence Honours and Awards Appeals Tribunal

Low and the Department of Defence [2013] DHAAT (8 August 2013)

File Number(s) 2012/027
Re **Mr Barry Low**
APPLICANT

And **the Department of Defence**
RESPONDENT

DECISION

Tribunal **M. Lax (Presiding Member)**
A. Bodzioch

Date **8 August 2013**

The decision under review is affirmed.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the Australian Service Medal with Clasp ‘CT/SR’ – whether service rendered, in Australia, as part of a special group under the command of 2/4th Battalion, the Royal Australian Regiment between February 1978 and August 1978 was part of a prescribed operation as specified in the Regulations.

LEGISLATION

Defence Act 1903 – ss 110V(1), 110T
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Service Medal Regulations 1988
Australian Service Medal Regulations 2001
Australian Service Medal Regulations 2011

REASONS FOR DECISION

Introduction

1. The applicant, Mr Barry Low (Mr Low), seeks review of the commencement date for the award of the Australian Service Medal (ASM) with Clasp 'CT/SR'.
2. Mr Low lodged an application with the Chief of Army for the award ASM with Clasp 'SPECIAL OPS' on 30 March 2012. He based this on the time he served in 1978, as part of a special group under the command of the 2/4th Battalion, Royal Australian Regiment. The special group was formed after the Sydney Hilton Hotel bombing on 13 February 1978 and was intended for counter-terrorist operations.
3. After consideration by Special Operations Command and the Chief of Army, Mr Low was advised on 18 July 2012 that he was not eligible for the ASM with Clasp 'SPECIAL OPS' and was provided the reasons. As well as review his eligibility for the SPECIAL OPS Clasp, Special Operations Command also considered his eligibility for the ASM with Clasp 'CT/SR'. Mr Low was found not eligible for this award either as his service with 2/4th Bn was before the commencement date of the 'CT/SR' award. On 23 November 2012, Mr Low lodged his application for review with the Tribunal to *appeal the introduction date/year of this [ASM with Clasp CT/SR] award*. The Tribunal took this request to mean to seek an earlier commencement date of the award to enable him to qualify.
4. There is no dispute that the Tribunal has jurisdiction to review the Directorate's decision in regard to Mr Low's application for the award of the ASM with Clasp 'CT/SR': see subsection 110V(1) and 110T of the *Defence Act 1903* and regulation 93C and Schedule 3 of the *Defence Force Regulations 1952*.
5. However, the Tribunal cannot consider the case for a review of the commencement date of the award, as the Tribunal would require direction from Government to convene an Inquiry.

Steps taken in the conduct of the review

6. On 17 December 2012, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal, Mr Alan Rose wrote to the Secretary of the Department of Defence with a copy of Mr Low's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. A written submission was received from the Directorate of Honours and Awards of the Department of Defence (the Directorate) on 10 January 2013.
7. On the basis of the discussion above about the limits of the Tribunal's reviewable decision jurisdiction, Mr Low was provided with a copy of the Directorate's written submission and appropriate correspondence and he was invited to respond to these and submit any further material he may have in support of his request to amend the commencement date of the award of the ASM with Clasp 'CT/SR'. Mr Low was also invited to give oral evidence (by telephone) to the Tribunal on a date that was suitable to him and the Tribunal panel members.

8. The Tribunal met on 16 May 2013.
9. During its meeting the Tribunal considered the material provided by Mr Low and the Directorate. It also heard oral evidence from Mr Low who agreed to be available by telephone on 16 May 2013.

Defence records of Mr Low's service

10. Defence records of Mr Low's service state he enlisted in the Australian Army on 7 August 1973. He served continually until discharged on 6 August 1982.

11. In 1978, Mr Low was serving with 2/4th Battalion Royal Australian Regiment based in Townsville. After the Sydney Hilton Hotel bombing on 13 February 1978, Mr Low and a number of his Army colleagues were selected to form a special group to train for and if necessary, respond to a terrorist incident. Although membership of this special group is not recorded in his service documents, the Directorate and the Army have confirmed this was the case and thus, is not in contention.

Australian Service Medal Regulations

12. The ASM was established, on 13 September 1988, by Letters Patent. The medal was introduced to recognise members of the Australian Defence Force (ADF) and certain other persons who render service in certain 'non-warlike military operations' since 14 February 1975. The award of the ASM is governed by the *Australian Service Medal Regulations* 1988 (ASM Regulations).

13. Regulation 4 of the ASM Regulations sets out the conditions for the award of the ASM. That regulation is in the following terms:

Conditions for award of the Medal

4. (1) The Medal may be awarded for service in or in connection with a prescribed operation.

(2) The conditions for the award of the Medal are conditions determined by the Governor-General on the recommendation of the Minister.

(3) Any subsequent award of the Medal to the same person shall be made in the form of a further clasp to the Medal.

(4) The persons to whom the Medal may be awarded are –

(a) persons who served in a prescribed operation as members of the Defence Force; and

(b) persons included in a class of persons determined by the Minister, for the purposes of this regulation.

(5) The Medal may not be awarded except to a person who fulfils the conditions for the award of the Medal.

14. The term ‘*a prescribed operation*’ is defined in regulation 2 to mean ‘*an operation in respect of which a declaration has been made under regulation 3*’. Regulation 3 vests the Governor-General with the power to ‘*declare a non-warlike operation, in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation*’ for the purpose of the ASM Regulations. However, the exercise of that power is subject to a recommendation having been received from the Minister.

15. The Governor-General has made a number of declarations, under regulation 3, declaring specific operations as being a non-warlike operation for the purpose of the ASM Regulations. For the purpose of this application, there are two declarations relating to ADF activities with Special Operations. These are the declaration made on 29 June 2001 (which revoked the declaration of 31 October 1997) for the ASM Clasp ‘SPECIAL OPS’ and the declaration made on 30 March 2011 for the ASM Clasp ‘CT/SR’.

The ASM with clasp ‘CT/SR’

16. Under regulation 4 to the Regulations for the award of the ASM with clasp ‘CT/SR’, the applicable conditions are:

- (i) *the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member of the prescribed operation for a prescribed period;*
- (ii) ...
- (iii) *in this paragraph “prescribed period” means in relation to the activities described at subparagraph (a)(i) and (a)(ii) a period of not less than 60 days continuous*

17. Thus to be eligible for the ASM with Clasp ‘CT/SR’, the member has to satisfy both the ASM and the ASM with Clasp ‘CT/SR’ Regulations.

The arguments of Mr Low

18. In his written submissions Mr Low states that:

... our group was overlooked and that the contribution of the Brigade based CT group was significant in the form of specialist training, tactics, and specialist sections which were developed. It became the instrument to the formation of the Interim [Tactical Assault Group] TAG in 1979...

19. Mr Low further stated that security was very tight, the training was intense involving very long hours, they were under extremely high pressure and they were ready to move in an instant. Mr Low stated that they were formed up under command of Lieutenant Ric Moor. This special group comprised members of the 3rd Field Engineers (including Mr Low), about 30 infantry and a medic. The special group was established between February and August 1978, and all were on a two-hour call out.

In August, they were advised to return to their normal duties and the special group was disbanded.

20. The essence of Mr Low's written and oral submission was that he believes the commencement date for the award ASM with Clasp 'CT/SR' should be brought forward to 13 February 1978 to allow the special group of which he was a member to be eligible for the ASM with Clasp 'CT/SR' award.

21. In his oral evidence Mr Low reiterated what he had said in his application to the Army and the Tribunal. He added that the special group remained in Townsville for the duration, but were isolated from the rest of the Battalion and received no extra pay or allowances.

The arguments of the Directorate

22. In its written submission to the Tribunal, the Directorate responded to Mr Low's claim as if he had applied for the ASM with Clasps 'SPECIAL OPS' and 'CT/SR'. The Directorate did not comment on Mr Low's proposal to amend the commencement date of the ASM with Clasp 'CT/SR', but reiterated he was not eligible for either the ASM with Clasp 'SPECIAL OPS' or Clasp 'CT/SR' because he did not meet the eligibility criteria in either case.

Previous Consideration of the ASM with Clasp 'CT/SR'

23. In December 2009, the Defence Honours and Awards Tribunal (the old Tribunal) undertook an *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*. Among its Terms of Reference, the old Tribunal was tasked to consider the appropriateness of establishing other recognition for CT and SR military service. This inquiry led to the establishment of the ASM with Clasp 'CT/SR'.

24. In making its findings, the old Tribunal looked closely at the period of time and the commencement date for the proposed Clasp 'CT/SR'. The old Tribunal decided on a commencement date of 31 August 1979 for very specific reasons as discussed in the Report¹ and covered by the ASM Regulations (Annex A). In summary the reasons were:

- Under the Regulations, the ASM is not awarded for training even if such training was exceptionally hazardous;
- The unit had to be 'operational'. That is, it had to have completed its training, be on notice to move orders, and be ready to go;
- The element had to be under a Chief of the Defence Force (CDF) or CGS (the old term for the Chief of Army), Directive or Operational Order; and

¹ *Inquiry into Recognition of Australian Defence Force Service for Special Air Service Counter Terrorist and Special Recovery Duties*, Executive Summary paragraphs 7-10; and Report paragraphs 66-7 and 79.

- The time period had to be 60 days continuous.

25. The old Tribunal therefore recommended that the date of 31 August 1979 be the commencement date for the Award of the ASM with Clasp 'CT/SR' as this was the first time a TAG had completed its training and was placed under an operational order by the Chief of Army. The Government accepted the recommendations of the DHAT on 15 July 2010.

The Tribunal's Findings

26. There is no dispute about Mr Low's service record and his membership of a special group raised under 2/4th Bn in 1978 for possible counter-terrorist operations.

27. In our discussions with Mr Low we explained that we accepted his service as stated but that any decision to amend the commencement date for the ASM with Clasp 'CT/SR' was a matter for Government to decide. Mr Low was advised of this directly.

28. While the Tribunal accepted that Mr Low's time with the 2/4th Bn 'special group' between February and August 1978 was under high security, at times hazardous and involved long hours, the group was continually under training and was never formally declared operational nor deployed. In addition, Mr Low's service with the 'special group' concluded before the eligibility start date for the award of the ASM with clasp 'CT/SR' as defined by the Regulations. Mr Low therefore does not meet the criteria for the award of the ASM with clasp 'CT/SR'.

29. In conclusion, for the reasons set out above, the Tribunal finds that the Mr Low is not eligible for the ASM with Clasp 'CT/SR'.

30. In making its findings, the old Tribunal looked closely at the period of time and the commencement date for the proposed Clasp 'CT/SR'. The old Tribunal decided on a commencement date of 31 August 1979 for very specific reasons as discussed in its Report. In order for the Tribunal to re-consider the commencement date of ASM with Clasp 'CT/SR' as requested in Mr Low's application, Mr Low would need to obtain Government agreement for the Tribunal to conduct a further Inquiry.

DECISION

31. The decision of the Directorate not to award Mr Low the ASM with Clasp 'CT/SR' is affirmed.