



Australian Government

Defence Honours and Awards Appeals Tribunal

Gurney and the Department of Defence [2015] DHAAT 033 (6 July 2015)

File Number(s) 2014/012

Re **Midshipman Izaak Gurney**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr Kevin Woods CSC, OAM (Presiding Member)
Brigadier Kevin O'Brien CSC (Retd)

Hearing Date 16 April 2015

DECISION

On 6 July 2015 the Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Midshipman Izaak Gurney is not eligible for the award of the Australian Active Service Medal with Clasp 'ICAT' and substitute its decision that Midshipman Izaak Gurney is eligible for the award of the Australian Active Service Medal with Clasp 'ICAT', and that medal be issued.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the Australian Active Service Medal with Clasp 'ICAT'.

LEGISLATION

Defence Act 1903 – ss110T, 110V(1)(a)(ii), 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Active Service Medal Regulations 1988
Instrument of Declaration and Determination for the Australian Active Service Medal with Clasp 'ICAT' 2011
Instrument of Declaration and Determination for the Australian Active Service Medal with Clasp 'ICAT' 2014

REASONS FOR DECISION

Introduction

1. The applicant, Midshipman Izaak Gurney (MIDN Gurney), seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Australian Active Service Medal (AASM) with Clasp 'ICAT'. MIDN Gurney applied for the award of the AASM with Clasp 'ICAT' on 23 October 2013. His application was based on his service as a member of the ship's company on board HMAS *Newcastle* in the Gulf of Oman during Operation 'Slipper' from 18 to 24 September 2013.

2. On 20 December 2013 the Directorate informed MIDN Gurney that his 'operation log reflects you did not render assigned service but deployed as a Visitor, Non Force Assigned. As you deployed as a visitor you are not entitled to associated conditions of service, including awards.'

3. Being dissatisfied with the decision of the Directorate, MIDN Gurney lodged his application for review with the Tribunal on 27 January 2014. In his application for review, MIDN Gurney submitted that he and 31 other sailors were actually assigned for temporary duty as a relief crew as some of the ship's company had left the theatre early to return to Australia. He indicated that the relief crew had participated in the ship's final patrol before the ship departed for Australia and they had performed normal operational duties whilst on that final patrol. He also stated that '...the main reason we are applying is a consequence of the encouragement we have received from existing members of the RAN (some who have been part of longer campaigns) which in turn has prompted us to seek recognition for our service'.

4. MIDN Gurney's application is also on behalf of Sub Lieutenant Johnson, Midshipman Mellross and Midshipman Watson who all served on HMAS *Newcastle* during the same period and under the same conditions. The Tribunal will deal with each member's claim separately.

Jurisdiction

5. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an award in response to an application. Regulation 93C of the *Defence Force Regulations 1952* defines a defence award as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 is the Australian Active Service Medal. Therefore the Tribunal has jurisdiction to review decisions in relation to this award.

Conduct of the review

6. In accordance with its *Procedural Rules 2011*, on 20 February 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of MIDN Gurney's application for review and requested that he provide a report referring to evidence under the Department's control that was relevant to the application. A written submission was received from the Directorate on behalf of the Department of Defence on 13 June 2014. MIDN Gurney was provided with a copy of the Directorate's submission on 4 July 2014. MIDN Gurney, acting on behalf of all four applicants provided a written response to the Directorate's submission on 7 July 2014. On 30 January 2015 the Tribunal wrote to Mellross, Watson and Johnson seeking confirmation that the submission written by MIDN Gurney for the award of the AASM with Clasp 'ICAT' was also written on their behalf. Confirmation was received from all three applicants. MIDN Gurney was also invited to give oral evidence to the Tribunal on a date that was suitable to him and the Tribunal.

7. The Tribunal met on 16 April 2015. During this meeting the Tribunal considered the material provided by MIDN Gurney and the Directorate. It also heard oral evidence from MIDN Gurney who agreed to be available that day.

8. The Tribunal sought evidence relating to force assignment from Headquarters Joint Operations Command (HQJOC) which was provided on 17 February and 7 April 2015 and an information briefing was also conducted with HQJOC to seek clarity on assignment processes on 2 June 2015.

The Australian Active Service Medal with Clasp 'ICAT'

9. The Australian Active Service Medal was established by Letters Patent on 13 September 1988 for the purpose of according recognition to members of the Australian Defence Force (ADF) and certain other persons who render service in certain warlike military operations¹. The award of the medal is governed by Regulations set out in the Schedule. Regulation 3 states that:

...
The Governor-General, on the recommendation of the Minister, may declare a 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 purposes of these Regulations.
...

10. Furthermore, Regulation 4 states:

- ...
(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 the conditions determined by the Governor-General on the recommendation of the Minister.*

¹ *Commonwealth of Australia Gazette*, No.S.335, 2 November 1988.

...

11. The eligibility criteria for the AASM with Clasp 'ICAT' is contained in the *Commonwealth of Australia Gazette No S29, Commonwealth of Australia, Declaration and Determination Under the Australian Active Service Medal Regulations* which was executed by the Governor General on 21 February 2011². The Determination states:

...

(b) **declare**, under regulation 3 of the Regulations, the following warlike operations in which members of the Australian Defence Force are or were engaged, to be a 'prescribed operation' for the purposes of the Regulation:

(i) Operation "Slipper" – the Australian Defence Force contribution to the International Coalition Against Terrorism, that:

...

(B) (2) commenced on 31 July 2009;

within the area bounded by:

39 00N Latitude, 78 00E Longitude

39 00N Latitude, 32 00E Longitude

05 00S Latitude, 32 00E Longitude

05 00S Latitude, 78 00E Longitude

(c) **determine**, under regulation 4 of the Regulations, that the conditions for the award of the Australian Active Service Medal with Clasp 'ICAT' ('the Medal') for that 'prescribed operation' are:

(i) the Medal may be awarded to a member of the Australian Defence Force who rendered assigned service as such a member while posted as a member of the Australian element for duty to the 'prescribed operation' for a 'prescribed period';

...

(v) the Medal may be awarded to a person who rendered service as part of the Australian element of the 'prescribed operation' for a 'prescribed period' and who, in accordance with a determination made by the Minister under paragraph 4(4)(b) of the Regulations is in a class of persons who may be awarded the Medal;

...

(B) in this paragraph 'prescribed period' for the 'prescribed operation' at subparagraph ... b(i)(B)(2) ... means:

² *Commonwealth of Australia Gazette No S29, Commonwealth of Australia, Declaration and Determination Under the Australian Active Service Medal Regulations*- dated 3 March 2011

(1) *In relation to subparagraph c(i) ... a period of not less than one day.*

12. In summary, to qualify for the AASM with Clasp 'ICAT' for service during Operation 'Slipper' (the prescribed operation), a member of the ADF must render one day (the prescribed period) of assigned service whilst posted to the Australian element for duty and that duty must have been performed within the specified area for the operation.

Operational Context and Deployment and Redeployment Background

13. Operation 'Slipper' was the Australian Defence Force contribution to the war in Afghanistan. The operation commenced in late 2001 and ended on 31 December 2014. Australia's involvement included two major activities centred on Afghanistan and the Persian Gulf. Since October 2001 the Royal Australian Navy has maintained a continuous presence in and around the Gulf as part of Operation 'Slipper'. From 2009 Australian warships have been involved in counter-piracy operations and maritime interdiction off the Horn of Africa as part of Combined Task Force 151 (CTF151). CTF151 is a multinational naval task force whose mission is to disrupt piracy and armed robbery at sea and to engage with regional and other partners to build capacity and improve relevant capabilities in order to protect global maritime commerce and secure freedom of navigation. In 2013 the task force consisted of six ships from Australia, Pakistan, South Korea, Turkey, the UK, and the USA. Australia's contribution included the Adelaide Class Guided Missile frigate HMAS *Newcastle* from March to September 2013.

14. As part of the planning for the return to Australia of HMAS *Newcastle*, HQJOC issued Deployment Order 1490/13 – Taskord 0245 on 13 September 2013³. This order authorised the force preparation and deployment of an 'Early Relief Crew' of 31 sailors to depart Australia on 17 September 2013 by air and arrive in the United Arab Emirates on 18 September 2013 where they would join HMAS *Newcastle*. The order indicated 'the expected departure from the Middle East Area of Operations and Outchop⁴ in HMAS *Newcastle*', would occur on 24 September 2013. Administratively the order included the statement that individuals would be provided with the status of 'Visitor – ADF Force Assigned for Temporary Duty and not entitled to Op 'Slipper' Conditions of Service'.

15. The relief crew boarded HMAS *Newcastle* on 19 September 2013 and those they replaced returned to Australia. The ship commenced its final operational patrol under the operational command of CTF151 from the port of Fujairah on the eastern side of the United Arab Emirates into the Gulf of Oman on 20 September 2013 bound for Diego Garcia⁵. On 24 September 2013, HMAS *Newcastle* rendezvoused with its replacement, HMAS *Melbourne* in the Indian Ocean and an official handover of

³ Op 'Slipper' – Deployment order 1490-13 – Taskord 0245 (HMAS NEC ERC) dated 130352Z Sep 13

⁴ 'Chop' is a Naval term which refers to the change of operational command, spoken as 'inchop' (entering a command region or zone) or 'outchop' (leaving a command region); e.g. 'We will inchop MIDEASTFOR at 0830 tomorrow.'

⁵ Ship's Log 20 September 2013

responsibility was conducted. HMAS *Newcastle*'s Report of Proceedings states that HMAS *Newcastle* outchopped from Operation 'Slipper' on 24 September 2013.⁶

MIDN Gurney's Service Record

16. MIDN Gurney's service record indicates that he enlisted in the Royal Australian Navy on 4 February 2013. He is still serving. His records indicate that he emplaned in Sydney on 17 September 2013 and arrived in the Middle East at Al Minhad Air Base on 18 September 2013. He was allocated to HMAS *Newcastle* for Operation 'Slipper' from 18 September 2013 to 24 September 2013. The record indicates his status as a Visitor (Non Force Assigned).

Summary of Claims by MIDN Gurney

17. In his written submissions MIDN Gurney stated:

'Over the period of 6 days following embarkation onboard NEWCASTLE along with approximately 40 other RAN personnel in the port of Fujairah (United Arab Emirates, having bused there following being flown into Al Minhad Airbase from Australia), we joined NEWCASTLE in preparation for the ships final patrol in the MEAO before handing over to the oncoming ship (HMAS MELBOURNE), and eventual trip back to Australia. During this final patrol as individuals we performed duties primarily as the Assistant Officer of the Watch (A/OOW), as well as other duties in several departments before formally leaving the area of operations and proceeding back to Australia.

As the A/OOW we undertook training as per our training task book as well as assisting the Officer of the Watch, performing duties, including watches, as evidenced in the attached copies of each of our PH408s (Record of Bridge Watch Keeping) and ships log. This included variable watches throughout the day (see PH408 for official hours) as well as assisting the OOW in whatever they required.

Furthermore, prior to embarking onboard NEWCASTLE we completed the Force Preparation Course at Randwick Barracks where we first learned that we would be entitled to the AASM as part of the conditions of service brief, prior to deploying. Only later did we find on our Deployment Order that this was not the case, contrary to what was briefed. Whether this was due to the nature of the course, we are unsure. Additionally, having spoken to members of both NEWCASTLE's ships company, as well as other members of the Royal Australian Navy (RAN), we have been encouraged by them to pursue the issue, as they like us see that our case is genuine and well founded'.

18. In his oral evidence MIDN Gurney reiterated what he had said in his written submission, emphasising that he also carried out other duties in several departments as directed whilst on board HMAS *Newcastle* during its time in the operational area.

⁶ HMAS *Newcastle* Report of Proceedings – September 2013.

19. The essence of MIDN Gurney's written and oral submission is that he believes that during his time on HMAS *Newcastle* he contributed to the ship's operation whilst in the operational area.

Defence's Submission

20. The Defence Submission of 13 June 2014 confirmed the earlier decision that MIDN Gurney was not eligible for the AASM with Clasp 'ICAT' as his records 'reflect that he did not render assigned service as he deployed as a Visitor and was therefore not entitled to awards'. The submission indicated that the Directorate had sought advice from HQJOC and the Defence People Group (DPG). The advice provided included the following:

- a. **The Assistant Director Overseas Policy, Military Conditions and Housing Policy DPG.** This advice focusses on conditions of service policy and concludes that a deliberate executive decision was taken to exclude the relief crew from operational benefits as they were undergoing training and 'it just so happens they were on a ship inside an operational area'. The advice also compares other members attending staff training at the Kuwaiti Staff College who do not receive warlike benefits.
- b. **Ministerial Liaison Officer HQJOC.** This advice essentially concludes that the issue is one for the Navy chain of command and opines that the Deployment Order was clear regarding conditions of service. The opinion also indicates a presumption that '...Navy sent them to the MEAO ... in order to effect outchop of the vessel at the end of its tour, not to achieve or maintain, or deliver operational capability'.
- c. **Staff Officer Grade One Honours and Awards HQJOC.** This advice includes the caveat that the officer providing the advice has a 'lack of honours and awards knowledge'. The advice concludes that 'it all comes down to whether or not a person has been assigned for duty to the operation ... if they are not assigned, then NO benefits are provided'.
- d. **J1 HQJOC.** '...It has been the practice of the MEAO ships to conduct an "early crew change-out" at their last port ...this maximises training opportunities, allows an early leave party ... and facilitates some postings ... While the relief crews ...join the ship at the last port, and will participate in the last out-going patrol, they are identified as visitors as the primary intent is based on a raise, train, sustain effect'.

21. Based on an analysis of this advice, the Regulations and the various submissions, the Directorate confirmed its position that MIDN Gurney was not eligible for the AASM with Clasp 'ICAT' as his records reflect that he did not render assigned service.

Headquarters Joint Operations Command Evidence - Regarding Force Assignment Policy

22. In order to clarify the policy used to determine force assignment, on 30 January 2015 the Tribunal asked HQJOC for information relating to force assignment doctrine and processes in order to determine what may constitute 'rendering assigned service'. On 17 February HQJOC responded pointing to the Australian Defence Doctrine Publication Series 1 and 1.0 and the definitions contained therein in support of force assignment. The response indicated that essentially assignment relies on either an individual being allocated to an Operational Manning Document (OMD) created for the operation or, where the deployment is of a short or temporary nature, the person must give service that involves the 'performance of Operational Duties'.

23. In a further submission dated 7 April 2015, HQJOC clarified that temporary assignment is determined on a case by case basis and those who are 'temporarily force assigned for operational duties' will be entitled to conditions of service whereas those who are assigned as visitors will not. The submission concluded that current and future orders are more specific and clearly specify temporary assignment status (be it operational or visitor).

Tribunal Consideration

24. There is no dispute that MIDN Gurney was a member of the ADF and served aboard HMAS *Newcastle* in the Middle East Area of Operations as a part of Operation 'Slipper' from 18 September to 24 September 2013. There is also no dispute that Operation 'Slipper' was a prescribed operation for the purposes of the AASM with Clasp 'ICAT' and that HMAS *Newcastle* was allocated to the operation until 24 September 2013.

25. The Tribunal examined MIDN Gurney's eligibility for the AASM with Clasp 'ICAT'. As the decision was made in response to his application on 23 October 2013, the Tribunal found that the award of the AASM is governed by Regulations set out in the Schedule to the *Commonwealth of Australia Gazette*, No.S.335 dated 2 November 1988. The Regulations were current at the time of the application.

26. The Tribunal was satisfied that pursuant to the Regulations, the Governor-General on 21 February 2011 through *Commonwealth of Australia Gazette No S29* did declare Operation 'Slipper' to be a prescribed operation for the purpose of awarding the AASM with Clasp 'ICAT'. Pertinent to MIDN Gurney's claim, the Tribunal noted that the conditions which must be met to be eligible for the award included service of a period of 'not less than one day'. The Tribunal noted from HMAS *Newcastle*'s report of proceedings that the ship did not outchop from Operation 'Slipper' until 24 September 2014. The Tribunal also noted that the ship's log for the period 19 September 2013 to 24 September 2013 includes daily comments, endorsed by the Commanding Officer that the ship was 'conducting patrols in the Gulf of Oman in support of CTF151'.⁷ The Tribunal relying on the ship's Report of

⁷ Ship's Log 20-24 September 2013 as tendered by MIDN Gurney

Proceedings, log and MIDN Gurney's service record therefore found that he did meet the prescribed period requirement by being aboard HMAS *Newcastle* for 'not less than one day' in the period 18 September 2013 to 24 September 2013 and that the ship was deployed conducting operations during this time.

27. The Tribunal considered that the definition of 'rendered assigned service' was the fundamental issue. Specifically the condition that:

(c)(i) the Medal may be awarded to a member of the Australian Defence Force who rendered assigned service...

28. The Tribunal considered that to render assigned service, an individual or group must be assigned and it was necessary therefore to look to the endorsed and current doctrine relating to force assignment⁸. This doctrine states:

Service Chiefs assign respective forces to Commander, Joint Operations (CJOPS) when directed by CDF. Personnel deploying overseas are force assigned from their parent-Service or peacetime organisation to a position appropriate to their rank, skill set or specialisation contained in a CDF endorsed Operational Manning Document (OMD) created for that operation.

29. The Tribunal, relying on the responses received from HQJOC, considered that not being on the OMD did not necessarily preclude the entitlement to the award. The Tribunal noted that in these circumstances, requests were made for visits or temporary duty to an appropriate delegate at HQJOC who determined the status of the temporary duty or visit, whether it was a deployment to perform operational duties or not, and then approved deployment by issuing formal orders.

30. The Tribunal noted that HQJOC had confirmed during the information brief on 2 June 2015 that there was an authorised OMD for HMAS *Newcastle* and those personnel who were replaced by the 'Early Relief Crew' occupied positions on that OMD. HQJOC staff agreed that the relief crew would therefore have replaced these positions on the OMD albeit it in a 'temporary duty' capacity. The HQJOC staff agreed that without the relief crew, the ship was unlikely to have been able to operate safely or complete its operational mission. The Tribunal agreed with this view.

31. The Tribunal noted that the Deployment Order specifically assigned the relief crew as 'force assigned for temporary duty' and that other similar orders for short term deployments to other operations used the terminology 'force assigned as approved visitors'⁹. The Tribunal was therefore satisfied that MIDN Gurney was correctly assigned for duty as a part of the relief crew and was allocated to a position on the OMD on a temporary basis to replace an individual who left the ship on 19 September 2013. The Tribunal considered that the translation of this assignment statement from the Order to the PMKeys Operations Log which reflected 'Visitor (Non Force Assigned)' did not accurately reflect the fact that the assignment was 'force assigned for temporary duty'.

⁸ *Australian Defence Doctrine Publication 1.1 - Personnel Support to Operations*, Chapter 2, Para 2.7 – Generation of Forces to conduct and sustain operations.

⁹ CJOPS Deployment Order 236/09 dated 1 September 2009

32. Turning to the advice provided to the Directorate by DPG and HQJOC; the Tribunal considered that the majority of the advice was more applicable to conditions of service policy or provided without a full understanding of the issues relevant to MIDN Gurney's claims. The Tribunal considered that the advice 'that Navy sent them to the MEAO ... in order to effect outchop of the vessel at the end of its tour, not to achieve or maintain, or deliver operational capability'; was indicative of this lack of understanding. HMAS *Newcastle* continued to deliver operational capability until it outchopped and the relief crew were on board in the five days prior to this occurring. Had the outchop occurred in the Port of Fujariah and had HMAS *Melbourne* assumed station on 19 September 2013 as a component of CTF151, the circumstances would be different.

33. The Tribunal noted the advice provided by the J1 at JOC to the Directorate that:

'...It has been the practice of the MEAO ships to conduct an "early crew change-out" at their last port ...this maximises training opportunities, allows an early leave party ... and facilitates some postings ... While the relief crews ...join the ship at the last port, and will participate in the last out-going patrol, they are identified as visitors as the primary intent is based on a raise, train, sustain effect'.

34. The Tribunal did not agree with this advice as it relates to awards and trainees. Entitlement is determined by the eligibility criteria as declared in the Instruments, Regulations and Determinations for the particular award. Whilst the Tribunal accepts that an individual trainee may be allocated for training purposes, to understudy or complete competency logs whilst deployed; if that trainee actually meets the conditions, in particular the performance of duties which contribute to the mission, then that individual must be considered to have rendered assigned service. In MIDN Gurney's case he was part of a 31 person relief crew, without them the ship would not have been able to operate safely or conduct its mission.

35. The Tribunal noted that for more recent operational deployments, the question of assignment, temporary duty and visitors is now being more clearly defined in relevant Regulations for the AASM with Clasp 'ICAT' as evidenced by the 2014 instrument amending the eligibility criteria for the AASM with Clasp 'ICAT' which states members are eligible to receive the award under the following conditions¹⁰:

... (1) (c) ...a person must have given the service while assigned for duty ...
... (f) except as provided in paragraph 2(a) of the following sub-section, a person must have given service that involves the performance of Operational Duties...
...2(a) ... effect is to exclude service involving non-operational duties such as: participation in training activities, exercises and conferences ...; liaison visits; lessons learnt/fact finding activities; and command/staff visits...
...

¹⁰ *The Australian Active Service Medal (International Coalition Against Terrorism) Instrument 2014* dated 4 September 2014

36. The Tribunal noted that HQJOC during the information brief on 2 June 2015 indicated that they are working to overcome the problems of assignment policy implementation and that there remain many areas of inconsistency which they are addressing.

Finding

37. The Tribunal found that MIDN Gurney meets the eligibility criteria for the award of the AASM with Clasp 'ICAT' as he was a member of the ADF in the period from 18 September to 24 September 2013, rendered assigned service as a member of the relief crew on the OMD of HMAS *Newcastle* during Operation 'Slipper' and was in the prescribed area for the prescribed period during HMAS *Newcastle's* final operational patrol on Operation 'Slipper' when under the command of CTF151.

DECISION

38. The Tribunal decided to set aside the decision of the Directorate of Honours and Awards of the Department of Defence that Midshipman Izaak Gurney is not eligible for the award of the Australian Active Service Medal with Clasp 'ICAT' and substitute its decision that Midshipman Izaak Gurney is eligible for the award of the Australian Active Service Medal with Clasp 'ICAT', and that the medal be issued.