



Australian Government

Defence Honours and Awards Appeals Tribunal

Kevin Cecil CUTBUSH and the Department of Defence [2018] DHAAT 21 (27 September 2018)

File Number 2017/013

Re **Mr Kevin Cecil CUTBUSH**
Applicant

And **Department of Defence**
Respondent

Tribunal Rear Admiral James Goldrick AO CSC RAN (Retd)
(Presiding Member)
Ms Anne Trengove

Hearing Date **30 May 2018**

DECISION

On 27 September 2018 the Tribunal decided to affirm the decision of Chief of Staff Career Management, Army that Mr Kevin Cutbush is not eligible for the award of the Defence Long Service Medal.

CATCHWORDS

DEFENCE AWARDS – Defence Long Service Medal – avenues of enquiry – adequacy of Defence pay records – balance of probabilities

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)
Defence Force Regulations 1952, Reg 93C
Commonwealth of Australia Gazette No S352 dated 10 July 1998
Commonwealth of Australia Gazette No S160 dated 30 March 2000
Commonwealth of Australia Gazette No S2 dated 3 January 2002
Chief of the Defence Force Determination dated 6 February 2013

REASONS FOR DECISION

Introduction

1. Mr Kevin Cecil Cutbush seeks review of a decision that he is not eligible for the award of the Defence Long Service Medal (DLSM). Mr Cutbush asserts that his service in the Australian Regular Army and the Australian Army Reserve between 1989 and 2016 qualifies him for the award. The Department of Defence's contention is that Mr Cutbush satisfied the service requirements for only fourteen of the required fifteen years and that his service after 2003 did not achieve sufficient qualifying days in any of the other years involved. The key question for the Tribunal is whether Mr Cutbush did or did not achieve the required 20 days Reserve service in any year from 2003 onwards.

Tribunal Jurisdiction

2. 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 DLSM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Conduct of the Review

3. On 12 June 2017, Mr Cutbush wrote to the Tribunal making application for the review of a decision by the Department of Defence to refuse the award to him of the DLSM. In the absence of written evidence of the decision, the Tribunal asked that Mr Cutbush provide it before his application could be considered. Mr Cutbush then approached the Department of Defence for confirmation of his eligibility. After conducting its own reassessment, the Directorate of Honours and Awards replied to Mr Cutbush on 22 August 2017 to the effect that he had not accumulated sufficient qualifying years to be recommended for the award.¹ Mr Cutbush applied to the Tribunal on 28 September 2017 for a review of this decision.²

4. On 30 May 2018 the Tribunal heard oral evidence by telephone from Mr Cutbush, who was self-represented, and from Mr Mark Jordan and Ms Joy Callaghan, from the Directorate, who had undertaken calculations of the Applicant's service.

Mr Cutbush's Service Record

5. Mr Cutbush has served in the Australian Defence Force, as follows:

- Australian Regular Army – 13 June 1989 to 11 December 1994; and
- Australian Army Reserve – 14 December 1994 to 4 November 2016.

¹ DHA Letter 555848/8235410 dated 22 August 2017.

² Mr Kevin Cutbush Letter dated 28 September 2017.

6. For his service, Mr Cutbush has been awarded the following:
- Australian Active Service Medal with Clasp ‘CAMBODIA’;
 - Australian Service Medal with Clasp ‘CAMBODIA’;
 - Meritorious Unit Citation – Force Communications Unit (UNTAC) 15 March 1992 to 7 October 1993;
 - United Nations Medal with Ribbon UNTAC;
 - Australian Defence Medal; and
 - Returned from Active Service Badge.

The Defence Long Service Medal

7. The DLSM was introduced by Letters Patent on 26 May 1998³ for the purpose of:

... according recognition to persons who render long and efficient service as members of the Defence Force

8. The Defence Long Service Regulation (the Regulation) 3 dated 10 July 1998 provides:

3. The Medal may be awarded to a person who:

(a) has given qualifying service for a period of at least 15 years or periods that, in total, amount to at least 15 years; and

(b) has given at least 1 day’s qualifying service on or after 14 February 1975.

9. Regulation 5 defines “qualifying service”, relevantly, as follows:

(a) where the service was given as member of the Permanent Forces or the Reserve Forces - the member:

(i) fulfilled the requirements specified in directions given by the Chief of the Defence Force: and

(ii) gave efficient service; or

...

7. Subsequently, on 30 March 2000 the Regulation was amended⁴ to provide a definition of “efficient service”⁵:

Regulation 2

Efficient service means service determined to be efficient service by the Chief of the Defence Force.

8. On 3 January 2002 the Regulation was again amended, but the changes are not relevant to this review.

³ *Commonwealth of Australia Gazette No S352* dated 10 July 1998.

⁴ *Commonwealth of Australia Gazette No S160* dated 30 March 2000.

⁵ Regulation 3 was also amended, but the change is not relevant to this review.

9. On 6 February 2013 the Chief of the Defence Force (CDF) made a Determination⁶ in which he specified that the minimum periods of qualifying service for the Australian Army Reserve for the purposes of the Regulation were as follow:

- Until 30 June 1993 26 days
- 1 July 1993 – 20 April 2000 14 days
- From 20 April 2000 20 days

10. The Determination also recorded that the days were to be remunerated at Defence rates of salary, unless they are approved voluntary unpaid Reserve service.

11. No Determination has been made subsequent to the Regulation as to “efficient service”.

Agreed Evidence

12. The Tribunal sought confirmation from the Applicant and Defence at the start that the hearing that the only years in dispute were those after 12 June 2003 and that Mr Cutbush had completed at least fourteen years’ qualifying service. This was agreed.

Mr Cutbush’s evidence

13. Mr Cutbush asserted that, given the discrepancies between his 2003 bank statements which showed additional entries than his relevant Defence pay records, in all likelihood he had achieved the fifteen years’ qualifying service and he should be awarded the DLSM. Given the passage of time, Mr. Cutbush could not recall his parading attendance for the relevant years in question and he relied upon the three bank statements he provided for 2003.

Department of Defence evidence

14. Defence submitted that the 2003 bank statements provided by Mr Cutbush align with pay records for the relevant period and that he fell short of the fifteenth year in which to qualify for the DLSM.

Tribunal Consideration

15. The Tribunal carefully considered all the available evidence.

16. So far as is relevant, the Regulation provides that the DLSM may be awarded to a person has given qualifying service for a period of at least 15 years or periods that, in total, amount to at least 15 years. “Qualifying service” is defined to mean that the person has fulfilled the requirements specified in the directions given by the CDF and gave efficient service. The Determination made pursuant to the Regulation (as amended) specifies that annual minimum attendance to meet eligibility criteria for ‘qualifying service’ by an Army Reserve Member for the years in question is, relevantly, 20 days.

⁶ CDF Determination dated 6 February 2013.

17. “Efficient service” means service determined to be efficient service by the CDF. The CDF did not determine what amounted to “efficient service” for the purpose of the Regulation.

18. The Determination also recorded that the days were to be remunerated at Defence rates of salary, unless they are approved voluntary unpaid Reserve service. (There was no contention that Mr Cutbush’s service was voluntary unpaid Reserve service.)

19. There is no dispute that Mr Cutbush met the eligibility criteria in respect of his service years in each of the 14 years from 13 June 1989 to 12 June 2003. The key periods in dispute were service year 13 June 2003 to 12 June 2004 and service year 13 June 2007 to 12 June 2008. For those key periods Defence contended that Mr Cutbush had only 13 and 2 days service, respectively.

20. Defence’s position relies entirely on the pay records, which show in two years, 2003-2004 and 2007-2008, Mr Cutbush was paid for 13 and 2 days respectively, with no record of payments in the other years other than a half day in 2009.

21. At the Tribunal’s request Defence identified the dates for which payments were recorded:

- 13/06/2003 to 12/06/2004 – a total of 13 days as follow:
 - 24/06/2003 – 0.5 day
 - 30/06/2003 – 1 day
 - 01/07/2003-11/07/2003 – 11 days
 - 15/07/2003 – 0.5 day
- 13/06/2007 to 12/06/2008 – a total of 2 days as follow:
 - 04/09/2007 – 0.5 day
 - 12/02/2008 – 0.5 day
 - 16/02/2008 – 1 day
- 13/06/2008 to 12/06/2009 – a total of .5 of a day as follows:
 - 24/2/2009 - 0.5 day

22. Mr Cutbush provided three bank statements for 2003 which, when matched against his daily rate of pay and allowances, aligned with the Defence pay records. One other payment made on 18 May 2006 for \$1658.28 was identified by Defence as a Defence Veteran’s Affairs Payment and thus not related to any Reserve service by Mr Cutbush in that year. There was no evidence in either Defence records or in the bank statements of other payments for Reserve service.

23. The Tribunal noted, however, two anomalies in Mr Cutbush’s records of service and one in a bank statement. The first is that a Soldier Performance Appraisal Report on Mr Cutbush for the twelve months before 01 August 2003 specifically states that he ‘completed 39 days this reporting period’.⁷ This compares with the 34.5 days listed in the pay record for the same period. While the Report notes that Mr Cutbush’s service in the later part of the assessment period had been limited by his civilian employment,

⁷ LCPL Cutbush SPAR Form AC833-22 for period ending 1 August 2003, part 3A.

this raises the possibility that there are days within his service year 2003-2004 which may be unaccounted for. The second is a Personnel Occurrence Report dated 25 October 2005 which lists Mr Cutbush as being 'Non Efficient 2004/2005 paraded 12 days'.⁸ There is, however, no record of payment for any days in his service year from 2004-2005.

24. Finally, Mr Cutbush's bank statement for September 2003 includes a payment for Travel Allowance on 15 September 2003 for \$27.70. According to Defence, the amount suggests that this was a part-day travel allowance, but there is no service listed proximate to the pay record with which this could reasonably be associated. When asked by the Tribunal about travel prior to or around 15 September 2003, Mr. Cutbush could not recall when, where or why he travelled to incur the allowance and any associated service provided.

25. The Tribunal noted the anomalies between the Defence pay records, the Defence reporting records for the purposes of work appraisal and efficiency and the part day travel allowance. Following the hearing, the Tribunal put further questions to Defence about the reliability of the pay records for 2002 onwards, the Tribunal having been on notice in a recent case where the Department of Defence conceded that pay records in the late 1990s were potentially unreliable, when the transfer to the computerised (PMKEYS) system was under way. On 12 June 2018, the Manager of the Reserve Pay Administration Centre (RPAC) provided a summary of the 2003 records which confirmed that there is no discrepancy between Mr Cutbush's bank statements and the Defence records.⁹ More relevantly, on 25 July 2018, the Director Honours and Awards, after consultation with RPAC, confirmed that the Defence pay records for 2002-2008 are accurate and reliable.¹⁰

26. The Tribunal regarded Defence's assessment in relation to the reliability of the pay records for the period in question to be persuasive. Furthermore, although there are anomalies in other records, they are not sufficient to indicate that Mr Cutbush actually reached the necessary total of 20 days paid Reserve service in 2003 or any subsequent year. The Tribunal accepts that Mr Cutbush's total of qualifying service is 14 years and 13 days, some 7 days short of the required amount for award of the DLSM.

Finding

27. For the reasons set out above, the Tribunal finds that Mr Cutbush is not eligible for the DLSM as he did not complete a minimum of 15 years of qualifying service. The Tribunal has no discretion in this matter. The Regulations are clear and unequivocal in relation to the number of days of qualifying service. Accordingly, the Tribunal finds that the decision of the Directorate is correct and is therefore affirmed.

DECISION

28. The Tribunal decided to affirm the decision that Mr Cutbush is not eligible for the award of the Defence Long Service Medal.

⁸ LCPL Cutbush Personnel Occurrence Report Form PR 072 dated 25 October 2005.

⁹ Manager RPAC Statement 'Accuracy of Reserve Pay and Attendance Records' dated 12 June 2018.

¹⁰ DH&A/OUT/2018/0061 Letter dated 25 July 2018.