



Australian Government

Defence Honours and Awards Appeals Tribunal

Klimeck and the Department of Defence [2018] DHAAT 08 (5 July 2018)

File Number 2018/006

Re **Mr Bruce Klimeck**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt, AM (Retd) (Presiding Member)
Ms J. Lumb

Hearing Date 21 June 2018

DECISION

On 5 July 2018 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Bruce Klimeck is not eligible for the award of the Australian Service Medal with Clasp 'MIDDLE EAST'.

CATCHWORDS

DEFENCE AWARDS – Australian Service Medal with Clasp 'MIDDLE EAST'.

LEGISLATION

Defence Act 1903 – ss 110T, 110VB(2)

Defence Force Regulations 1952 – Reg 93C

Commonwealth of Australia Gazette No S336 dated 2 November 1988

Commonwealth of Australia Gazette No S424 dated 8 October 2001

Commonwealth of Australia Gazette No S80 dated 19 May 2011

REASONS FOR DECISION

Introduction

1. The applicant, Mr Bruce Klimeck, seeks review of a decision by the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Australian Service Medal with Clasp 'MIDDLE EAST' (the ASM with Clasp 'MIDDLE EAST').

2. On 22 October 2001, Mr Klimeck made an application to the ADF Medals Section of the Department of Defence for the ASM with Clasp 'MIDDLE EAST'. On 25 September 2002, Mr Mark Jordan of the ADF Medals Section advised Mr Klimeck that he was not eligible for the award.¹ Mr Klimeck made a further application for the same award on 22 May 2014, this application was refused by the Directorate on 15 August 2014.²

3. On 16 January 2018 Mr Klimeck applied to the Tribunal for review of the 2002 decision by Defence to deny him the award of the ASM with Clasp 'MIDDLE EAST'.³ Mr Klimeck stated that he believed that he and the ship's company of HMAS *Perth* who deployed to the North-West Indian Ocean (NWIO) during the period 5 September to 3 December 1980 'should have been awarded the ASM for service in this area'.⁴

Tribunal Jurisdiction

4. 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 3.⁵ Included in the defence awards set out in Part 2 is the Australian Service Medal.

5. The Tribunal was satisfied that Mr Klimeck's letter to the ADF Medals Section on 22 October 2001 constituted an application as defined in s110V(1)(c) of the Defence Act. The Tribunal considered that the response by Mr Jordan on 25 September 2002 constituted a refusal to recommend Mr Klimeck for the ASM with

¹ ADF Medals Section HA(ADF)3151/02 Letter to Mr Klimeck dated 25 September 2002 – Folio #75

² DHA-0117148 Letter to Mr Klimeck dated 15 August 2014 – Folio #76

³ Application for Review of Decision by Mr Klimeck dated 16 January 2018 – Folio #2

⁴ Letter attached to Application for Review by Mr Klimeck dated 16 January 2017 (sic) – Folio #6

⁵ Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016. As Mr Klimeck's application was made on 22 October 2001, *Defence Force Regulations 1952* apply.

Clasp ‘MIDDLE EAST’, satisfying the requirements of s110V(1)(a) and (b) of the Defence Act. Therefore, the Tribunal has jurisdiction to review the decision to refuse to recommend Mr Klimeck for the ASM with Clasp ‘MIDDLE EAST’. The role of the Tribunal is to determine whether the decision by the Department of Defence is the correct or preferred decision having regard to the applicable law and the relevant facts.

Conduct of the review

6. In accordance with its *Procedural Rules 2011*, on 1 February 2018, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Klimeck’s application for review and requested that he provide a report.⁶ On 16 March 2018 the Directorate, on behalf of the Secretary, provided the Tribunal with a report.⁷ In that report the Directorate concluded that the decision not to recommend Mr Klimeck for the ASM with Clasp ‘MIDDLE EAST’ should be affirmed. On 21 March 2018 the Defence report was sent to Mr Klimeck for comment.⁸ On 4 April 2018 Mr Klimeck provided his comments, continuing to press his eligibility.⁹

7. The Tribunal met on 24 May 2018 and considered the material provided by Defence and Mr Klimeck. The Tribunal confirmed the scope of the review, the decision under review, jurisdiction and drafted questions for the subsequent hearing.

8. The Tribunal heard oral evidence from Mr Klimeck in a telephone hearing on 21 June 2018. The Respondent was represented at the hearing by Ms Jo Callaghan, Assistant Director Honours and Awards; Mr Jordan, now Manager Service Assessments; and Mr Brett Mitchell, Research Officer.

Australian Service Medal with Clasp ‘MIDDLE EAST’

9. The Australian Service Medal was established by Letters Patent in 1988 for the purpose of according recognition to members of the Australian Defence Force and certain other persons who render service in certain non-warlike military operations.¹⁰ The award of the medal is governed by Regulations set out in the Schedule:

...

Declaration of prescribed operations

3. *The Governor-General, on the recommendation of the Minister, may declare a non-warlike operation, in which members or the Defence Force*

⁶ DHAAT/OUT/2018/042 Letter to the Secretary dated 1 February 2018 – Folio #1

⁷ DH&A/OUT/2018/0010 Letter to the Tribunal and Submission dated 16 March 2018 – Folio #19

⁸ DHAAT/OUT/2018/049 Letter to Mr Klimeck dated 21 March 2018 – Folio #17

⁹ Letter from Mr Klimeck to the Tribunal dated 4 April 2018 – Folio #77

¹⁰ *Commonwealth of Australia Gazette No S336* dated 2 November 1988 - Folio #41

are, or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purposes of these Regulations.

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 the 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.*

...

10. On 21 May 1990, the Governor-General made a Declaration and Determination under the Australian Service Medal Regulations establishing the ASM with Clasp ‘MIDDLE EAST’.¹¹ This instrument provided recognition of Australian Defence Force service with the United Nations Truce Supervision Organisation, the United Nations Disengagement Observer Force, the Second United Nations Emergency Force and the United Nations Interim Force in Lebanon.

11. On 26 September 2001, the Governor-General approved amendments to the conditions for the award of the ASM with Clasp ‘MIDDLE EAST’ to include Royal Australian Navy service during deployments in the NWIO.¹² This is the Declaration and Determination that was current at the time Mr Klimeck made his original application – 22 October 2001. The Instrument states:

...

(b) declare, under regulation 3 of the Regulations that the following non-warlike operations in which members of the Australian Defence Force were engaged in during the following periods to be a declared operation for the purpose of the Regulations:

...

¹¹ *Australian Service Medal Regulations* Declaration and Determination dated 21 May 1990 – Folio #78

¹² *Commonwealth of Australia Gazette No S424* dated 8 October 2001 – Folio #33

(v) participation by ships of the Royal Australian Navy in the North West Indian Ocean deployments in the area north of 10 degrees north and west 75 degrees east, that is, that is, the Arabian Sea including the Gulf of Aden, Gulf of Oman and Persian Gulf during the period that commenced 1 September 1980 and ended on 31 July 1986; and

...

*(c) **determine**, under subregulation 4(2) of the Regulations, that the conditions for award of the Australian Service Medal with Clasp ‘MIDDLE EAST’ (“the Medal”) for the declared operation are:*

(i) the Medal may be awarded to a member of the Australian Defence Force who rendered service as such a member while posted to or serving as a member of the Australian element of the declared operation for a period of 30 days, or for periods amounting in the aggregate to 30 days;

...

12. On 16 May 2011, the Governor-General approved further amendments to the conditions for the award of the ASM with Clasp ‘MIDDLE EAST’.¹³ This is the current Declaration and Determination. The Instrument states:

...

*(b) **declare**, under regulation 3 of the Regulations that the following non-warlike operations in which members of the Australian Defence Force were engaged in during the following periods to be a prescribed operation for the purpose of the Regulations:*

...

(v) participation in naval operations in the North West Indian Ocean deployments in the area north of 10° North and west of 75° East, that is, the Arabian Sea including the Gulf of Aden, Gulf of Oman and Persian Gulf during the period that commenced 1 September 1980 and ended on 31 July 1986; and

...

*(c) **determine**, under regulation 4 of the Regulations, that the conditions for award of the Australian Service Medal with Clasp ‘MIDDLE EAST’ (“the Medal”) for that prescribed operation are:*

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

¹³ Commonwealth of Australia Gazette No S80 dated 19 May 2011 – Folio #37

...

(v) *the Medal may be awarded to a person who ...*

(1) in relation to subparagraph (c)(i) ... a period of 30 days, or for periods amounting in aggregate to 30 days; and

...

Mr Klimeck's Service Record

13. Mr Klimeck's service record states that he enlisted in the Royal Australian Navy on 15 July 1974.¹⁴ He was commissioned on 29 June 1987 and served until 31 October 1998 when he transferred to the Reserves. Of relevance to his application, he was posted to the guided missile destroyer HMAS *Perth* from 15 August 1980 to 14 December 1980 as a Leading Seaman Writer.¹⁵

14. For his service Mr Klimeck has received the following defence awards:

- Defence Force Service Medal with 1st Clasp, and
- Australian Defence Medal

Mr Klimeck's Submissions and Evidence

15. Mr Klimeck stated in his application for review that he had served on HMAS *Perth* during the period 15 August 1980 to 29 December 1980.¹⁶ He stated:

...I joined HMAS Perth a couple of days prior to deployment to the NWIO due to the fact that my predecessor deserted the ship as he did not wish to deploy to a potential war zone. When we arrived in Western Australia we completely re-ammunitioned the ship with live ordinance (sic) and missiles. The impression the ships company had was that we were sailing into harms way and there was a good chance that we might need to defend ourselves. It was a tense and very taxing deployment for all members of the ships company.

We deployed to the NWIO during the period 5 September to 3 December 1980. However the decision was made that the ship was only in the NWIO area for 7 days on this deployment. Whilst this was not long enough for award of the ASM it was a very taxing deployment and there were many times we encountered Russian warships and Russian 'spy ships'.

¹⁴ Record of Service C117148 LCDR B.S. Klimeck dated 12 February 2013 – Folio #44

¹⁵ Ibid. 'Postings' – Folio #48

¹⁶ Letter from Mr Klimeck to the Tribunal dated 16 January 2018 – Folio #4

I realise that this deployment occurred over 37 years ago, but I still have vivid memories of this deployment and believe that all members of the ships company should have been awarded the ASM for service in this area.

16. In his comments of 4 April 2018 Mr Klimeck continued to press his original contention.¹⁷ He stated:

...the first deployment by HMA Ships Perth, Melbourne and Derwent in late 1980 did not allow any member of these ships companies to accrue 30 days in the operational area. Subsequent deployments by HMAS Perth and other ships allowed their ships companies to accrue the necessary 30 days.

I still believe that this is not right as all members of the initial deployment were sent into a war zone and did not know what to expect. Obviously, after the fact nothing happened but we did not know this at the time.

17. During the hearing Mr Klimeck reiterated that his basic contention was that because he was in the initial deployment he should be recognised despite not meeting the criteria of thirty days service. He acknowledged that HMAS *Perth* had only been within the declared area for seven days however he stated that prior to deployment:

*...we fully rearmed and removed our practice ammunition and replaced it with live ammunition ...*¹⁸

18. Mr Klimeck said that as far as he and his shipmates were concerned, what they were doing was warlike and there was a direct threat to them. He said that he thought the Tribunal should exercise discretion and make the award for seven days service. He also asked that if the Tribunal could not do that, would it be able to make a formal recommendation to amend the eligibility criteria for the award to alter it from thirty to seven days.

The Defence Submission

19. The Defence Submission identified that the decision-maker held an appropriate delegation for the purpose of deciding not to recommend the award sought by Mr Klimeck.¹⁹ The Submission confirmed the legal bases for the decision and identified the eligibility criteria for the award as stated previously in this report. One of the key material findings in the Submission was:

¹⁷ Letter from Mr Klimeck to the Tribunal dated 4 April 2018 – Folio #77

¹⁸ Mr Klimeck, Oral submission, Hearing, Canberra, 21 June 2018

¹⁹ Defence Submission – Review of Recognition Mr B.S. Klimeck dated 16 March 2018 – Folio #19

*HMAS Perth entered the qualifying area for the ASM 'MIDDLE EAST' for duration of seven days.*²⁰

20. In the preparation of the Submission, Defence conducted a re-assessment of Mr Klimeck's application. The re-assessment 'confirmed that Mr Klimeck is not eligible for the ASM 'MIDDLE EAST' as he did not complete 30 days, or periods amounting in the aggregate to 30 days, in the declared operation'.²¹

Tribunal Consideration

21. **General.** The Tribunal is required to review decisions 'on the merits' and this requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.²² The merits review necessitates consideration of the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the original decision-maker. In making its decision, the Tribunal considers afresh the relevant facts, law and policy.²³ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the decision was correct.²⁴ The Tribunal is bound to make what it regards as the 'correct and preferable' decision.

22. **The Reviewable Decision.** The Tribunal noted that Mr Klimeck made two applications for the ASM with Clasp 'MIDDLE EAST'; the first in 2001 and the second in 2014. His application for review clearly seeks review of the decision made in response to his first application:

... I received a negative response from the ADF Medals Section on 25 September 2002 ...'.²⁵

23. The Tribunal is therefore satisfied that the *reviewable decision* is the decision by the ADF Medals Section not to recommend Mr Klimeck for the ASM with Clasp 'MIDDLE EAST' on 25 September 2002.²⁶

24. **The Relevant Legislation.** The Tribunal is satisfied that the Regulation applicable to the matter is *Commonwealth of Australia Gazette (CAG) No S424* dated

²⁰ Ibid. Para 23

²¹ Ibid. Para 24

²² *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

²³ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

²⁴ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

²⁵ Application for Review of Decision by Mr Klimeck dated 16 January 2018 – Folio #4

²⁶ The ADF Medals Section has since been incorporated into the Directorate.

8 October 2001 as this was the Instrument in place at the time of Mr Klimeck's application and the basis of the subsequent *reviewable decision*.²⁷

25. **Eligibility Criteria.** To be eligible for the ASM with Clasp 'MIDDLE EAST', Mr Klimeck must therefore have been engaged on the declared operation as part of the ship's company deployed in the North West Indian Ocean in the area north of 10 degrees north and west of 75 degrees east during the period that commenced 1 September 1980 and ended on 31 July 1986 (*CAG S424(b)(v)*). Mr Klimeck must also have rendered service while posted to or serving as a member of the Australian element for the declared operation for a period of 30 days, or for periods amounting in the aggregate to 30 days (*CAG S424(c)(i)*).

26. **Mr Klimeck's Relevant Service.** There is no dispute regarding Mr Klimeck's service record or the fact that he was posted to HMAS *Perth* during the period 15 August 1980 to 14 December 1980.

27. **HMAS *Perth*'s Deployment from 5 September 1980 to 12 December 1980.** The Tribunal notes that research conducted by the Sea Power Centre – Australia and confirmed by the Directorate's Research Officer provides undisputed records of HMAS *Perth*'s deployment in the period September to December 1980.²⁸ There is no dispute that Mr Klimeck was part of the ship's company during this deployment.

28. The ship's Report of Proceedings and log book both record that *Perth* departed the port of Fremantle on 5 September 1980 and visited Singapore (12-22 September), Penang (26-29 September), Madras (6-8 October) and Colombo (13-20 October). On 20 October *Perth* sailed from Colombo to an exercise area south of Sri Lanka and on 26 October was in the vicinity of the Maldives. At 2345 on 28 October *Perth* was in position 9°44.2' North, 67°22.8' East.

29. At 0157 on 29 October 1980 *Perth* is recorded as being in position 10°04.9' North, 66°58.9' East. This position is north of latitude 10° North and west of longitude 75° East thus being inside the declared area for the ASM with Clasp 'MIDDLE EAST' from and including 29 October 1980.

30. At 0114 on 1 November 1980 *Perth* is recorded as being in position 10°17.5' North, 61°50.4' East. By 0400 she had proceeded to position 9°38.3' North, 61°50.8' East thus having left the declared area on 1 November as she was in a position south of latitude 10° North.

31. By 0004 on 3 November 1980, *Perth* had proceeded to position 10°21.1' North, 62°15' East being a position once again north of latitude 10° North and west of

²⁷ *Commonwealth of Australia Gazette No S424* dated 8 October 2001 – Folio #33

²⁸ Background Information for Defence Submission by Mr B. Mitchell dated 1 March 2018 – Folio #51

longitude 75° East thus having re-entered the declared area before 2359 on 2 November 1980. The ship's Report of Proceedings states that she commenced the return passage to Singapore at 0001 on 4 November and that at 1853 she is recorded as being at position 9°57.2' North, 66°59.7' East, thus having left the declared area on 4 November 1980.

32. HMAS *Perth* anchored off Colombo harbour on 7 November 1980 before continuing to Singapore. She returned to the ship's home port of Sydney on 12 December 1980 having visited Singapore (14-18 November) and Surabaya (20-22 and 26-27 November).

33. **Finding in Relation to HMAS *Perth*'s Participation within the Declared Area for the Operation.** The Tribunal finds that for the purposes of the Regulation, HMAS *Perth* was within the declared area for the award of the ASM with Clasp 'MIDDLE EAST' from 29 October to 4 November 1980 inclusive, a total of seven days.

34. **Mr Klimeck's Other Claims.** Mr Klimeck's submission portrays the expectations of junior sailors during the deployment to the NWIO. It is understandable that the ship's company may have concluded that due to the provisioning of live ammunition and the occasions when they 'encountered Russian warships' that they were 'sent into a war zone and did not know what to expect'.

35. The Tribunal notes that the detailed information contained in the HMAS *Perth* Report of Proceedings for the months of the deployment points to a series of very realistic exercises including representative 'enemy' ships, surveillance activities, covert manoeuvres and several live firing activities. The Tribunal was therefore of the view that it would not be unreasonable for the ship's junior sailors to have thought that they may well have been involved in 'warlike' operations for the duration of the deployment. This however was simply not the case. HMAS *Perth* participated in a series of exercises during the deployment and for a short period of time (seven days) was within the declared area of a 'non-warlike' operation.

36. In relation to Mr Klimeck's request that the Tribunal consider making a recommendation to amend the eligibility criteria for the award to alter it from thirty to seven days, the Tribunal noted that no evidence was provided which would lead it to conclude that the period of 30 days was inappropriate. In reaching this conclusion the Tribunal was conscious of the fact that the award was created to recognise service in non-warlike military operations and in the absence of an actual enemy threat, it was therefore appropriate that 30 days be the prescribed period.²⁹

²⁹ Commonwealth of Australia Gazette No S336 dated 2 November 1988 - Folio #41

Finding

37. The Tribunal finds that Mr Klimeck rendered service in HMAS *Perth* in the NWIO between 29 October and 4 November 1980, a total of seven days. The Tribunal finds that this service does not meet the eligibility criteria for the award of the ASM with Clasp 'MIDDLE EAST' as the service rendered must be for a period of 30 days, or for periods amounting in the aggregate to 30 days within the declared area. Accordingly, the Tribunal finds that Mr Klimeck is not eligible for the award of the Australian Service Medal with Clasp 'MIDDLE EAST'.

DECISION

38. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Bruce Klimeck is not eligible for the award of the Australian Service Medal with Clasp 'MIDDLE EAST'.