



Australian Government

Defence Honours and Awards Appeals Tribunal

Robertson and the Department of Defence [2015] DHAAT 31 (3 July 2015)

File Number(s) 2014/010

Re **Rodney Edward George Robertson**
Applicant

And **Department of Defence**
Respondent

Tribunal Professor David Horner AM (Presiding Member)
Dr Jane Harte

Hearing Dates 23 July and 13 August 2014 and 2 July 2015

DECISION

On 3 July 2015 the Tribunal decided to affirm the decision of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, not to determine that civilians serving in Iraq are eligible for the Australian Active Service Medal with Clasp 'IRAQ 2003' and the Iraq Medal and hence that Mr Robertson is ineligible for these medals.

CATCHWORDS

DEFENCE AWARDS – Australian Active Service Medal, and Iraq Medal

LEGISLATION

Defence Act 1903 – ss 110T, 110V, 110VA, 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Commonwealth of Australia Gazette, No S335 of 2 November 1988
Commonwealth of Australia Gazette, No S153 of 28 September 2009
Commonwealth of Australia Gazette, No S421 of 22 October 2004
Commonwealth of Australia Gazette, No S154 of 28 September 2009
Australian Operational Service Medal Regulations 2012

REASONS FOR DECISION

Introduction

1. The applicant, Mr Rodney Edward George Robertson (Mr Robertson), formerly a civilian member of the Department of Defence, seeks review of a decision of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, not to determine that civilians serving in Iraq are eligible for the Australian Active Service Medal (AASM) with Clasp 'IRAQ 2003' and the Iraq Medal, and hence that he (Mr Robertson) is ineligible for these medals.

2. Mr Robertson initially provided a submission to the Tribunal's *Inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence honours and awards* on 31 January 2014. On 24 February 2014 the Tribunal Chair advised Mr Robertson that he could submit an individual appeal in relation to his ineligibility for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal. On 25 February 2014 Mr Robertson agreed to this proposal.

3. Although Mr Robertson had not specifically applied to the Defence Honours and Awards Directorate for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal, he had been advised by the then Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, in 2007, the then Chief of the Defence Force (CDF), Air Chief Marshal Angus Houston AC AFC, in 2008, and the then Deputy Secretary Defence Support, Mr Martin Bowles, in 2009, that there had been no change to the policy of not issuing the Australian Service Medal (ASM), the AASM and other military campaign medals to civilians (other than to a class of persons determined by the Minister for the purposes of the Regulations).

Jurisdiction

4. Subsection 110V(1) of the *Defence Act 1903* gives the Tribunal jurisdiction to review a 'decision' of the Minister that is made in response to an application. A 'decision' is defined in paragraph 110V(1)(a)(ii) to mean a decision that 'is or was a refusal to recommend a person for . . . a defence award'. A 'defence award' is defined in section 110T of the *Defence Act 1903* to have the meaning that is given to this term in the *Defence Force Regulations 1952*. Regulation 93C of the *Defence Force Regulations 1952* provides that a 'defence award' is an award mentioned in Part 2 of Schedule 3 of the Regulation. The AASM and the Iraq Medal are mentioned in that part of Schedule 3.

5. The Minister's decision that Mr Robertson is not eligible for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal is a decision that the Tribunal has jurisdiction to review. The role of the Tribunal is to determine whether the decision of the Minister is the correct or preferred decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of the review

6. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 26 February 2014, the Tribunal wrote to the

Secretary of the Department of Defence informing him of the review of the decision concerning Mr Robertson and requesting that he provide a report. On 22 April 2014, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, Defence recommended that the decision not to recommend Mr Robertson for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal be affirmed. A copy of the report of the Directorate was forwarded to Mr Robertson on 6 May 2014 for comment and he responded on 11 May 2014.

7. The Tribunal met on 30 June 2014 to consider the material provided by Mr Robertson and the Directorate. The Tribunal decided to seek further information from Defence and to hear evidence from Mr Robertson on 23 July 2014. After hearing evidence from Mr Robertson the Tribunal decided to hear evidence from Admiral Chris Barrie, CDF from 1998 to 2002, and the Tribunal heard his evidence on 13 August 2014. The Tribunal made Admiral Barrie's evidence available to Mr Robertson and he provided a written response to it.

8. The Tribunal also decided to seek further documentary evidence from Defence, which was provided on 19 November 2014. On 12 December 2014 Defence asked the Tribunal to consider delaying a decision relating to Mr Robertson because the 'CDF would like the opportunity to further consider the matter to assure himself that the decision of ADM Barrie should continue to be upheld and whether there should be any retrospective changes'. The Tribunal agreed to the delay and advised Mr Robertson. The current CDF, Air Chief Marshal Mark Binskin AC, wrote to the Tribunal on 31 March 2015. He supplied several documents, which were the same as those provided to the Tribunal in November 2014, but did not comment on whether Admiral Barrie's decision should be upheld or whether there should be any retrospective changes. Mr Robertson was provided with the letter and he in turn gave the Tribunal further written comments after considering it.

9. The Tribunal met on 2 June 2015 to consider the material before it and conducted a further hearing on 2 July to hear evidence from the Department of Defence.

Eligibility Criteria for the Award of the AASM with Clasp 'IRAQ 2003'

10. The AASM was established in 1988 to recognise service rendered by members of the ADF in prescribed warlike operations since 14 February 1975.

11. The eligibility criteria for the AASM with Clasp 'IRAQ 2003' are contained in the *Commonwealth of Australian Gazette* No S335 of 2 November 1988 and *Commonwealth of Australia Gazette* No S153 of 28 September 2009. The Letters Patent state that the AASM is to be instituted 'for the purpose of according recognition to members of the Defence Force and certain other persons who render service in certain warlike service'. To qualify for the AASM with Clasp 'IRAQ 2003' in accordance with the eligibility criteria:

1. The Medal may be awarded for services 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 only be awarded except to a person who fulfils the conditions for the award of the Medal.

12. To qualify for the AASM with Clasp 'IRAQ 2003' in accordance with the eligibility criteria, a member must render not less than one day of service in a warlike operation as member of the Australian Defence Force. The starting dates for eligibility in the prescribed areas of operations were set down in a series of *Commonwealth of Australia Gazettes*.

Eligibility for the Iraq Medal

13. The eligibility criteria for the Iraq Medal are contained in the *Commonwealth of Australia Gazettes* No S421 of 22 October 2004 and No S154 of 28 September 2009. To qualify for the Iraq Medal in accordance with the eligibility criteria, the conditions of the award are:

1. The Medal may be awarded for service in the operational area of Iraq in connection with a prescribed operation.
2. 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.
3. The other conditions for the award of the Medal are the conditions determined by the Governor-General on the recommendation of the Minister.
4. The Medal may only be awarded except to a person who fulfils the conditions for the award of the Medal

14. To qualify for the Iraq Medal in accordance with the eligibility criteria, a member must render not less than 30 days service in a warlike operation as a member of the Australian Defence Force.

Eligibility for the Australian Operational Service Medal (Civilian) (AOSM)

15. The 2007 Review of Defence Honours, Awards and Commendations Policies (HACOM, also referred to as the Kehoe Review) through its recommendations, decided to:

Recognise approved civilian service on operations. That service by designated Defence employees as part of an ADF element on operations, is recognised by an OSM (Civilian) or clasp as appropriate, with a different ribbon to that awarded to uniformed personnel.

16. The introduction of the AOSM by Letters Patent and the *Australian Operational Service Medal Regulations 2012* on 22 May 2012 was to replace the AASM and the ASM for new ADF operations and provides recognition of Defence-related service which better reflects contemporary operations.

17. The AOSM may also be awarded to Defence civilians and other classes of civilians who are employed on ADF operations under the provisions of the *Defence Force Discipline Act 1982*. The AOSM (Civilian) has the same medal for all operations, but is awarded with a standard civilian ribbon and a clasp denoting the declared operation. The following Clasps for civilians who participate in operations have been approved by the Governor-General and issued to date:

East Timor (TANAGER, CITADEL AND SPIRE)
ICAT (SLIPPER)
Iraq 2003 (FALCONER and CATALYST)
Solomon Islands II (ANODE)
Timor-Leste (ASTUTE)
Greater Middle East Operations (GME (OPS))

18. While the Kehoe Review recommended that the AOSM (Civilian) not be applied retrospectively, it was made retrospective from early 2000 after civilian recognition for the ASM ceased (see below).

Background

19. Before 1999, in certain circumstances, civilian personnel deployed in support of the ADF were eligible for military operational service medals. In October 1999, soon after the INTERFET deployment, Major General Peter Dunn, Head of Defence Personnel Executive, advised Admiral Barrie that awarding operational medals to civilians had caused problems for two reasons.

- a. It has been suggested that civilian service is not equal to ADF service as civilians are not bound by discipline under the DFDA (Defence Force Discipline Act) nor are they bound to take up arms if threatened, eg in many cases they would be evacuated when a situation worsened; and
- b. Many civilians in receipt of Defence related awards are now claiming access to qualifying service under the *Veterans' Entitlements Act 1986* and retrospective payment of deployment allowances on the basis of a perceived link between medals and entitlements.

In response, Admiral Barrie agreed to the development of a civilian service medal. From that time, Defence took this as guidance that Defence civilians would no longer be eligible for military awards in general.

20. In recommending subsequent awards of the ASM and AASM the CDF did not advise the Minister that he should include civilians as persons he might determine to be eligible for the medals. The Tribunal has not been able to find any communication to the Minister stating that the CDF was not going to recommend civilians. Rather, the CDF simply made no recommendation.

21. On 13 July 2007 the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, advised Mr Robertson by letter that there had been no change to the policy of not issuing the ASM, the AASM and other military campaign medals to civilians (other than those determined by the relevant minister as a class of persons determined by the Minister for the purposes of the Regulations).

22. In response to a submission by Mr Robertson, on 17 July 2008 the then CDF, Air Chief Marshal Houston, wrote to Mr Robertson explaining that the Kehoe Review had been established to investigate current Defence honours and awards policies, including recognition of Defence civilians who served on ADF operations. The Review reported its findings in February 2008 and these were subsequently considered by the Chiefs of Service Committee (COSC) in March 2008. The findings were then subject to further considerations by the Interdepartmental Committee on Honours and Awards, which examined the recommendations from a whole-of-Government perspective.

23. In May 2009 the Deputy Secretary Defence Support, Mr Martin Bowles, advised Mr Robertson that there had been no change to the decisions which ceased the award of the ASM, AASM and other military campaign medals to civilians.

24. Subsequently, as explained in paragraph 16, the AOSM (Civilian) was introduced, which gave recognition to Defence civilians serving in operational areas. The Tribunal noted that a period of some 13 years had passed between the time when the CDF initiated a medal for civilians in 1999 and when it was finally approved in 2012, and during this time civilians who were deployed on operations were likely to feel that their contribution had been overlooked.

Mr Robertson's service and awards

25. Mr Robertson has served in the Regular Army and continues to serve in the Army Reserve; however, this review pertains only to his work as a civilian employee of the Department of Defence. Therefore, his military service is not overviewed here.

26. Mr Robertson, then a civilian employee of the Department of Defence, served in the Iraqi Ministry of Defense, Baghdad, formally assigned directly to deliver against the mission of Operation Catalyst to assist the Iraqis to develop a security capability from 23 August 2005 to 17 February 2006.

27. Mr Robertson signed a form on 4 August 2005 giving consent to his being subject to Defence Force Discipline while serving in Iraq.

28. On 19 April 2013 Mr Robertson applied for medallic recognition as a Defence civilian with Operation Catalyst. On 28 February 2014 the Directorate despatched the

AOSM (Civilian) with Clasp 'IRAQ 2003' and the Operational Service Badge to Mr Robertson.

Arguments of the Directorate

29. The Directorate argued (based on criteria specified in paras 11 and 13) that the persons to whom the medals might 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.

That is, the only members who are eligible for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal are members of the ADF and other persons who are in a class of persons determined by the Minister. The Minister has made no determination with regard to the two medals. Therefore, in the Directorate's view, Mr Robertson was not eligible.

Arguments of Mr Robertson

30. Mr Robertson has stated that through his service in Iraq in 2005-06 he met all the eligibility criteria for the award of the AASM with Clasp 'IRAQ 2003' and the Iraq Medal.

31. He challenged the claims made in Paragraph 19, arguing that civilians were 'force assigned' to Operation Catalyst, he was subject to Defence Force Discipline, the area where he worked was subject to mortar and rocket attacks, he was not evacuated, and although he was not armed, other medal recipients, such as ADF chaplains, were also not armed.

32. He claimed that the policy applied by the CDF was inequitable. He stated that the advice from Major General Dunn, accepted by Admiral Barrie, and the explanation in Air Chief Marshal Binskin's letter, 'provide an insight into the basis of the prejudicial positions adopted at the time that influenced the informal and unreasonable discretion exercised by Admiral Barrie in 1999 and applied in my case in 2005'.

33. Commenting on the fact that the AOSM had been awarded retrospectively, Mr Robertson argued that retrospectivity 'might reasonably be applied to enable a benefit to be generated . . . but not to deny a benefit that already existed within the system of honours and awards'.

34. Mr Robertson pointed out that the Letters Patent referred to the AASM being established 'for the purpose of according recognition to members of the Defence Force and certain other persons who render service in certain warlike service'. He was a person who had rendered service in warlike conditions.

35. Mr Robertson stated that Defence has been inconsistent in applying the informal policy of not awarding operational medals to civilians, noting that a Defence

civilian who served in Afghanistan in 2005 was awarded the AASM with Clasp 'ICAT' and Afghanistan Medal.

Tribunal Consideration

36 The Tribunal carefully considered all the material before it and considered the criteria for the AASM with Clasp 'IRAQ 2003' and the Iraq Medal.

37. The Tribunal needed to consider whether the Minister had made a decision. As discussed in paragraph 20, the Tribunal has not been able to find any communication to the Minister stating that the CDF was not going to recommend civilians; rather the CDF made no recommendation. The current CDF advised the Tribunal that: 'The decision by the then CDF in 1999 not to recommend civilians for Defence awards was not reflected in a formal instrument of determination'. In writing to Mr Robertson on 13 July 2007 (see paragraph 21) the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, in effect acknowledged that the CDF had not recommended including civilians in the award of the AASM, and hence he endorsed that position. That letter therefore indicates that he had made a decision, albeit retrospectively.

38. Since the Minister had made a decision not to include civilians, under the Regulations, Mr Robertson was not eligible for the relevant medals.

39. The Tribunal needed to consider the arguments from Mr Robertson. Mr Robertson has argued that in making his decision not to include civilians Admiral Barrie was guided by inaccurate or at least prejudiced advice from Major General Dunn. Whether or not this was so, there is no evidence that Admiral Barrie acted in a way that was contrary to any regulation or law. Further, Admiral Barrie agreed to the development of a civilian service medal.

40. The Tribunal accepted that the service rendered by Mr Robertson had characteristics that seemed at odds with the situation described by Major General Dunn in 1999, but noted that he served in 2005-6, by which time the employment of civilians in an operational area might have changed. Nonetheless, the policy of not recommending civilians was applicable in 2005-6, and Defence in applying that policy was acting in a legitimate manner, even if some observers might have considered the policy to be inequitable.

41. Mr Robertson argued that he was a person who had rendered service in warlike conditions, as described in the Letters Patent. However, he has overlooked the fact that the Regulations spelt out what conditions were to be applied in deciding which persons had served. He claimed that when the AOSM was awarded retrospectively it denied him a 'benefit that already existed'. As indicated above, according to the Regulations, that benefit did not exist unless he was in a class of person determined by the Minister.

42. Mr Robertson stated that Defence has been inconsistent in applying its 'informal policy' of not awarding operational medals to civilians because a Defence civilian who served in Afghanistan in 2005 was awarded the AASM with Clasp 'ICAT' and the Afghanistan Medal. Documents provided by Mr Robertson describe

the Defence civilian as an Army major. Mr Robertson has suggested that the civilian's status as an Army Reserve officer allowed 'operational commanders' to recommend the civilian for the AASM to 'manipulate public policy to enable selected civilians to be awarded the AASM and campaign medals'.

43. At the hearing on 2 July 2015, the Tribunal heard that Defence awarded the medals to a Defence civilian in error. When this error was detected in the Area of Operations, Defence rescinded its decision and withdrew the medals. The Defence civilian was subsequently awarded the AOSM (Civilian). By acknowledging its clerical error, Defence has therefore been consistent in applying the informal policy or practice of not awarding medals for ADF personnel to civilians in the relevant period.

44. The Tribunal noted that Defence has used Major General Dunn's letter with Admiral Barrie's notation as the basis for the policy that Defence civilians are not to be awarded military medals. The Tribunal considers that having received such a decision from the CDF, it would have been best practice to have developed a clear policy which could then have been disseminated widely.

45. The Tribunal could find no compelling evidence to suggest that the CDF or Defence had acted improperly in not recommending civilians be included for the award of the AASM with Clasp 'IRAQ 2003' or the Iraq Medal. Nor could it find that the Minister had acted improperly in accepting that 'non recommendation'.

46. In initiating the establishment of the AOSM (Civilian), Defence indicated that it wished to recognise the service of civilians in operational areas, and in applying it retrospectively, the Government has sought to recognise service by civilians before 2012.

DECISION

47. The Tribunal has decided to affirm the decision of the Minister Assisting the Minister for Defence, the Hon Bruce Billson MP, not to determine that civilians serving in Iraq are eligible for the Australian Active Service Medal with Clasp 'IRAQ 2003' and the Iraq Medal and hence that Mr Robertson is ineligible for these medals.