



Australian Government

Defence Honours and Awards Appeals Tribunal

Kjeldsen and the Department of Defence [2023] DHAAT 1 (23 January 2023)

File Number(s) 2022/015

Re **Mr Paul Kjeldsen**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Major General Mark Kelly AO DSC (Retd)

Hearing Date Thursday 12 January 2023

Attendances Mr Paul Kjeldsen, applicant

Mr Roderick Hilliker, witness

Ms Jo Callaghan
Assistant Director Service and Campaign Awards
Directorate of Honours and Awards
Department of Defence

Mr Wayne Parker
Manager Service & Campaign Awards Assessments
Directorate of Honours and Awards
Department of Defence

DECISION

On 23 January 2023, the Tribunal decided to affirm the decision that Mr Kjeldsen not be recommended for the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – eligibility criteria – initial enlistment conditions not met – reasons for cessation – limited exceptions to mandatory period of efficient service – no discretion.

LEGISLATION

Defence Act 1903 – Part VIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

Defence Regulation 2016, Regulation 36

Australian Defence Medal Regulations Letters Patent, Commonwealth of Australia Gazette S48, dated 30 March 2006

Australian Defence Medal Regulations Amendments of Letters Patent Commonwealth of Australian Gazette G00629, dated 5 August 2020

Australian Defence Medal Determination 2021 dated 16 March 2021

Introduction

1. The Applicant, Mr Paul Kjeldsen, seeks review of a decision dated 6 August 2021 by Mr Wayne Parker, Manager Service and Campaign Awards, Directorate of Honours and Awards of the Department of Defence (the Directorate), to refuse to recommend him for the Australian Defence Medal (ADM).¹

Decision under review

2. On 24 April 2021, Mr Kjeldsen applied to the Directorate for an assessment of his eligibility for the ADM. On 6 August 2021, Mr Parker wrote to Mr Kjeldsen stating that Mr Kjeldsen could not be recommended for the award. Mr Parker gave the following reasons:

'In accordance with the ADM Regulations 2006 (the Regulations), as amended, in order to be eligible for the ADM, a member or former member of the Defence Force after 3 September 1945 must have rendered the minimum annual qualifying service that is efficient service as determined by the Chief of the Defence Force by completing an initial enlistment or appointment period, or totalling not less than four years' service.

'There is no evidence to show that you completed your enlistment period of three years, or served for periods that totalled not less than four years.

'Additionally, there is no evidence to show that the reasons for your discharge was due to any of the exceptions at paragraph 4(1)(d) of the Regulations.'

Tribunal jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* 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 a defence award in response to an application. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the ADM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Mr Kjeldsen's service

4. Mr Kjeldsen enlisted in the Citizens Military Force (CMF) on 23 September 1978 for a period of three years and was discharged on 27 April 1981 under Australian Military Regulation (AMR) 176(1)(U) 'Discharged Non-Effective', having completed two years, seven months and five days service. (Defence has advised that the AMR reference in the Record of Service was originally interpreted as a 'V' but that 'U' is the actual sub-regulation for Mr Kjeldsen's discharge.)²

5. Mr Kjeldsen has not been issued with any award for his service with the CMF.³

¹ Letter to Mr Kjeldsen from Mr Parker dated 6 August 2021

² Letter to Tribunal from Defence dated 7 September 2022

³ Letter to Tribunal from Defence dated 9 September 2022.

The Australian Defence Medal

6. The eligibility criteria for awarding the ADM, contained in paragraph 4(1) of the *Australian Defence Medal Regulations 2006* (the Regulations) *Commonwealth of Australia Gazette No. S48*, dated 30 March 2006,⁴ incorporating *Commonwealth of Australia Gazette G00629 Australian Defence Medal Regulations 2006 Amendments 2020* dated 4 August 2020, provide:

4. Award of the Medal

(1) The Medal may be awarded to a member, or former member, of the Australian Defence Force who after 3 September 1945 has given qualifying service that is efficient service:

- a) by completing an initial enlistment or appointment period; or*
- b) for a period of not less than 4 years' service; or*
- c) for periods that total not less than 4 years; or*
- d) for a period or periods that total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:*

- (i) the death of the member during service;*
- (ii) the discharge or termination of the member as medically unfit;*
- (iii) the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force;*
- (iv) the member ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant factor.*

(2) For subregulation (1), the Chief of the Defence Force may determine the following:

- a) that a period of the member's qualifying service is efficient service; or*
- b) the minimum annual period of service to be completed by a member for each year of qualifying service.*

7. The *Australian Defence Medal Determination 2021* (the Determination), dated 16 March 2021,⁵ provides specific details of qualifying service and prevailing discriminatory policy for the purpose of subparagraphs 4(1) and 4(1)(d)(iii) of the Regulations.

8. For subparagraph 4(1)(d)(iii) of the Regulations, the Determination provides that policies relating to the following topics that were in effect before the specified dates are determined to be prevailing discriminatory Defence policies:

- a) Transgender - before 1 June 2010.*
- b) Homosexuality - before 24 November 1992.*
- c) Pregnancy (female) - before 7 January 1975.*
- d) Marriage (female) - before 1 January 1970.*
- e) Retention after marriage (female) - before 21 March 1984.*

⁴ *Australian Defence Medal Regulations Letters Patent, Commonwealth of Australia Gazette S48*, dated 30 March 2006

⁵ *Australian Defence Medal Determination 2021* dated 16 March 2021

9. Schedule 1 of the Determination provides that the “minimum annual periods of service to be completed by a member for a year of qualifying service” is, for service in the Army Reserve up to 30 June 1993, 26 days, including such periods of continuous training and home training as directed by the proper military authority.

Mr Kjeldsen’s application to the Tribunal

10. In his application to the Tribunal, Mr Kjeldsen stated that:

‘I enlisted 23 Sep 1978 and was discharged 27 April 1981. My records show I was discharged as "Non-Effective". I served with 1 Commando Company during my enlistment. I requested to leave at that time as I was going through a difficult time with my marriage and did not want to bring this up with my Commanding Officer.’⁶

‘I was notified that I did not qualify for the Australian Defence Medal due not serving the full 3 years of initial enlistment. I agree this was not the full 3 years of my Initial Enlistment, however, I request a review with reference to the "Australian Defence Medal Determination 2021" by General Angus Campbell. Referring to "Schedule 1- Minimum periods of annual qualifying service". For Australian Army Reserve Units; this states that to qualify, 26 days of service of continuous training and home training as directed by the proper military authority per year of service. This would equate to 78 days over 3 years of Initial Enlistment. ‘

11. Mr Kjeldsen further stated:

‘I completed a Recruit course over 14 days, Unarmed Combat course over 9 days and a Shallow Water Dive Course over 14 days during my enlistment. Totalling approximately 37 days continuous service. On top of these courses I paraded weekly of an evening which involved some form of training on each occasion (which even if taken as a half day per parade would equate to 40 to 60 days over the course of my enlistment.). I also attended some weekend training but I do not have records for those occasions.

‘This would equate to approximately 95 days service during my enlistment. This would then appear exceed the minimum requirements as listed in "Schedule 1- Minimum periods of annual qualifying service" Given that as a Special Forces Unit, we were expected to and did train more often and more intently than some other units, I feel that my days of service over my period of enlistment does qualify me for the Australian Defence Medal. With this in mind, I respectfully request a review of my application to be awarded the Australian Defence Medal.’

12. On 10 August 2022, Mr Kjeldsen provided further details of his service. He stated:

‘With reference to my application for review of an Australian Defence Medal, I offer this extra information on top of that already provided. I attended a bush camp over 14 days at a location south of Sydney (near Nowra) during March 1979. I cannot give the exact date but I was at the camp at the time of my birthday (25 March). During this camp we trained on day & night navigation exercises, weapons drills on a variety of weapons and infantry tactics. Post my Shallow Water Dive Course (08 - 23 March 1980) I attended at least one

⁶ Mr Kjeldsen’s application for review to the Tribunal dated 2 August 2022.

weekend acting as Assistant Dive Instructor for new recruits. This would add to my previous stated overall Training days as per my original application.'

Defence Report

13. Defence stated in its report to the Tribunal that it acknowledged that Mr Kjeldsen rendered the required amount of qualifying service in two of his completed enlistment years. However it also stated that completing the minimum periods of annual qualifying service is one aspect of eligibility for the ADM, with another being the requirement to complete an initial enlistment or appointment period.⁷

14. Defence stated that Mr Kjeldsen did not complete the final year of his three year enlistment period and therefore he did not complete his initial enlistment period, and consequently did not meet the criteria for the ADM.

15. Upon receiving Mr Kjeldsen's application to the Tribunal as part of the review process, Defence assessed his eligibility for the ADM afresh. This review confirmed Defence's view that he rendered two years, seven months and five days service with the Army Reserve and was discharged under AMR 176 (1) (U) 'Discharged Non-Effective'. As such, Defence's position is that Mr Kjeldsen did not complete the minimum requirement of his three year period of enlistment for the purpose of eligibility for the ADM. Defence contend that Mr Kjeldsen did not discharge under any of the provisions contained in subparagraphs 4(1)(d)(i-iii) of the ADM Regulations, as amended, and that there was no evidence or information that mistreatment by a member of the Defence Force or an employee of the Department of Defence was a significant contributing factor to Mr Kjeldsen ceasing service within subparagraph 4(1)(d)(iv).

16. In its report, Defence provided the following table to display its calculations of Mr Kjeldsen's service:

Start 12 Months	Service, Transfer, Discharge	End 12 Months	Service Type	Days Required	Days Served	Qualifying Year	Aggregate Year	Remarks
23/09/1978		22/09/1979	ARES	26	>26	Yes	1	
23/09/1979		22/09/1980	ARES	26	>26	Yes	2	
23/09/1980	27/04/1981		ARES	26	0	No	2	Incomplete year

Mr Kjeldsen's comments on the Defence report

17. On 13 September 2022, Mr Kjeldsen was provided with a copy of the Defence Report and asked to provide his comments on that report. On 1 November 2022, Mr Kjeldsen emailed the Tribunal providing comments on the Defence Report.⁸

⁷ Letter from Mr Ian Heldon to Tribunal dated 9 September 2022

⁸ Email from Mr Kjeldsen to the Tribunal dated 1 November 2022.

18. In his comments, Mr Kjeldsen stated that, since making his application, he had 'revisited his records and recollections of his service activities' and supplied the following as a summary of his service in support of his application:

'Courses and Training Camps attended from my Enlistment date of 23 Sep 1978; as per my Official Service Records.

Recruit Course; 04 – 18 Nov 1978; **15 days** duration.

Unarmed Combat Course; 10 – 18 Feb 1979; **9 days** duration

Annual Camp March-April 1979; **14 days** duration

Shallow Water Dive Course 08 – 23 Mar 1980; **16 days** duration

'During Enlistment 1 night per week was required for Parade at Georges Heights.

'Over the period from 23 Sep 1978 to 04 April 1980 this would have amounted to approximately 100 Parade nights. These would probably have equated to half days as calculated for Service, giving approximately 50 days service.

*Obviously, I would not have attended all these due to various reasons, however, even if I attended only 25 % of these Parades (which I doubt due to the more stringent requirements for Training with 1 Commando Company at the time) this should equate to at least **25 days Service**. At 50% attendance this would increase to about **50 days Service**. I estimate these figures as I do not have access to my full attendance records from the time in question.*

*'Also required was attendance for Training approximately 1 weekend per month. At a conservative estimate, again being unable to attend ALL weekends I estimate I would have attended 5 to 10 weekends during the time of my enlistment. This would equate to be at least **10 days Service**.*

*'With these comments and the conservative attendance recollections, my total days of service during my enlistment would be **at least 89 to 114 days Service**.*

*'As I quoted in my original letter of Application, I refer to the "**Australian Defence Medal Determination 2021**" by General Angus Campbell.*

'Referring to "Schedule 1- Minimum periods of annual qualifying service"

'This Schedule mentions a minimum requirement of 26 days per year which may consist of one or a combination of;

1; Days renumarated at Defence rates of salary or;

2; Days on which the member is eligible for a Reserve Service payment.

*'For a 3-year Enlistment period of **26 days per year, this would be 78 days Service**.*

'I consider I have served in excess of that minimum requirement and so respectfully apply for consideration by the Tribunal for the award of the Australian Defence Medal.'⁹

⁹ Email from Mr Kjeldsen to the Tribunal dated 1 November 2022

Tribunal Analysis

19. Mr Kjeldsen's argument is, in essence, that he completed more than 78 days of service during the period of his Reserve service and thus met the eligibility criteria for award of the ADM.

20. That argument cannot succeed as the Regulations and Determination require 26 days of service in each year of qualifying service, not an average of 26 days per year over the entire period of service.

21. When this was pointed out at hearing, Mr Kjeldsen and the witness he called, Mr Roderick Hilliker, asserted that they believed that he would have provided at least 26 days of service in his final (part) year of service. Mr Kjeldsen said that he continued to parade right up to the time of his discharge, notwithstanding the personal and work issues that eventually led to his discharge. Mr Hilliker referred to one particular three-day period at *HMAS Waterhen* but was unable to give details of any other periods that he could say definitely occurred during the third year. Neither was able to point to any contemporary evidence of actual service, such as Mr Kjeldsen's service record or a pay book or roll book.

22. The Tribunal questioned the Defence representatives on the records they had examined which led them to conclude that Mr Kjeldsen had met the 26 day criterion in his first and second year of service but not his third. It is apparent that those Defence records are not an accurate record of time actually spent – for the first and second years they could not say what exact periods of service he rendered but only that it was more than 26 days. For example, Mr Parker speculated that Defence pay systems at the relevant time only generated a record of Reserve pay where payments were made for a full enlistment year and thus Defence could neither confirm nor deny that Mr Kjeldsen had actually provided service in his third enlistment year beyond the small (and insufficient) amount actually recorded on his service file.

23. While the Tribunal accepts that Mr Kjeldsen and Mr Hilliker gave their evidence sincerely, candidly and to the best of their recollection, it was not sufficient to allow the Tribunal to be reasonably satisfied that, on the balance of probabilities, Mr Kjeldsen had in fact provided at least 26 days of service in his third year of enlistment.

24. And while it is unfortunate and perhaps even a matter for criticism that contemporaneous Defence records do not detail actual periods of service, that lack of evidence similarly does not allow the Tribunal to be reasonably satisfied that, on the balance of probabilities, Mr Kjeldsen had in fact provided 26 days of service in his third year of enlistment.

25. More fundamentally, even if the Tribunal had been satisfied that Mr Kjeldsen had completed 26 days of service in his third enlistment year, that would not have been sufficient to meet the ADM eligibility criteria which require not only that there be 26 days of efficient service in each year of service but also that the initial enlistment or appointment period be completed. In Mr Kjeldsen's case this was three years and he was discharged after two years, seven months and five days, nearly five months short of the required period.

26. The reasons for Mr Kjeldsen's discharge give cause for no criticism of him and the

Tribunal does not doubt that, but for those reasons, he would have continued to serve for at least the full period for which he enlisted. However, those reasons do not fall within any of the exceptions listed in the Regulations and Determination under which a lesser period can qualify for the ADM.

27. Section 110VC(6) of the *Defence Act 1903* very specifically provides that ‘In reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision’. Therefore, notwithstanding that it appreciates the service he actually provided and accepts that in other circumstances Mr Kjeldsen would have completed his three-year enlistment period and qualified for the ADM at that time, the Tribunal has no discretion to recommend that he be awarded the ADM.

Tribunal Decision

In these circumstances the Tribunal is bound to affirm the decision that Mr Kjeldsen should not be recommended for award of the ADM.