DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL

Hodge v Chief of Navy [2015] ADFDAT 4

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| Citation: | Hodge v Chief of Navy [2015] ADFDAT 4 |
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| Appeal from: | Defence Force Magistrate |
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| Parties: | **JOSHUA JOEL HODGE v CHIEF OF NAVY** |
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| File number: | DFDAT 2 of 2014 |
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| Judges: | **TRACEY j (PRESIDENT), BRERETON and Hiley JJ (Members)** |
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| Date of judgment: | 4 September 2015 |
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| Catchwords: | **DEFENCE FORCE** – discipline – appeals against conviction – conviction arising out of receipt of rental allowance – obtaining financial advantage by deception – whether Defence Force Magistrate failed to consider appellant’s intention in concluding that selection of “not sharing” option in online application for rental allowance was “false and hence deceptive” – duty of Defence Force Magistrate to give reasons – whether Defence Force Magistrate failed to give adequate reasons for finding appellant’s conduct deceptive and dishonest – whether conviction unreasonable, unsupportable, and/or unsafe and unsatisfactory – role of Tribunal on “unsafe and unsatisfactory” appeal – whether rational hypotheses consistent with honesty excluded – whether established that appellant knew or believed that he would not be entitled to full rental allowance at time of completing online application – held, hypotheses that appellant believed his entitlement would not be affected not excluded – conviction unsafe and unsatisfactory  **CRIMINAL LAW –** offences of dishonesty – dishonestly obtaining financial advantage by deception – separate elements of deception and dishonesty – necessity to prove that accused knew he was not entitled to the advantage – necessity to exclude rational hypotheses consistent with accused believing that he was entitled to the advantage |
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| Legislation: | *Defence Force Discipline Act 1982* (Cth)*,* s 61(3)  *Criminal Code 1995* (Cth)*,* ss 5.4(2), 133.1, 134.2  *Defence Force Discipline Appeals Act 1955* (Cth), s 20(1), s 23(1)(a), s 23(1)(d) |
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| Cases cited: | *R v Ghosh* [1982] QB 1053 – cited  *Yewsang v Chief of Army* [2013] ADFDAT 1 – cited  *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250 – cited  *Pettitt v Dunkley* [1971] 1 NSWLR 376 – cited  *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 – cited  *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 – cited  *SKA v R* [2011] HCA 13; (2011) 243 CLR 400 – cited  *Low v Chief of Navy* [2011] ADFDAT 3 – cited |
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| Date of hearing: | 10 April 2015 |
|  |  |
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|  |  |
| Place: | Melbourne (heard in Darwin) |
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| Category: | Catchwords |
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| DEFENCE FORCE DISCIPLINE APPEAL TRIBUNAL |  |
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| ON APPEAL FROM A dEFENCE FORCE MAGISTRATE | DFDAT 2 OF 2014 |

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| BETWEEN: | JOSHUA JOEL HODGE  Appellant |
| AND: | CHIEF OF NAVY  Respondent |

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| JUDGES: | TRACEY j (PRESIDENT), BRERETON and Hiley JJ (Members) |
| DATE OF ORDER: | 4 september 2015 |
| WHERE MADE: | MELBOURNE (heard in darwin) |

THE TRIBUNAL ORDERS THAT:

1. Leave be granted to the appellant to appeal to the Tribunal on the grounds referred to in s 23(1)(a) and (d) of the *Defence Force Discipline Appeals Act 1955* (Cth), insofar as those grounds do not involve questions of law.
2. The appeal be allowed.
3. The conviction of the appellant by the Defence Force Magistrate be quashed and judgment of acquittal be substituted.

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| BETWEEN: | JOSHUA JOEL HODGE  Appellant |
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| JUDGES: | TRACEY j (president), BRERETON and hiley JJ (members) |
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**REASONS FOR JUDGMENT**

1. This appeal was heard in Darwin before a Bench comprising Justices Tracey, Byrne and Brereton. Before judgment could be delivered Byrne J’s commission as Deputy President of the Tribunal expired. The *Defence Force Discipline Appeals Act 1955* (Cth) requires that appeals should be heard and determined by at least three members. In these circumstances the Tribunal sought submissions from the parties as to the course which should be followed in determining the appeal. In joint submissions the parties agreed that the Bench should be reconstituted by including an additional member. That member would have access to all the material which was before the Tribunal at the time of the hearing and to the transcript of argument. This course was followed.
2. Hiley J replaced Byrne J for the purposes of the appeal. His Honour read all of the relevant material and the transcript of argument. The reasons for decision which follow are the reasons of the reconstituted Tribunal.
3. The appellant Able Seaman Electronics Technician Hodge was on 25 September 2014 convicted by a Defence Force Magistrate (DFM) of one charge of engaging in conduct outside the Jervis Bay Territory that is a Territory offence, being the offence of obtaining a financial advantage by deception, in that being a Defence member, at Darwin in the Northern Territory between 6 March 2014 and 12 May 2014, he did, by a deception, dishonestly obtain a financial advantage of $1,912.08 from the Commonwealth, contrary to s 61(3) of the *Defence Force Discipline Act 1982* (Cth) and s 134.2(1) of the *Criminal Code 1995* (Cth) (the Code). In the light of that conviction, the DFM did not proceed with an alternative charge under s 135.2 of the Code (engaging in conduct as a result of which he obtained a financial advantage, knowing or believing that he was not eligible to receive that financial advantage). The appellant was sentenced to be dismissed from the Defence Force. On 11 December 2014, the appellant applied for an extension of time within which to appeal from the conviction, which extension was granted by the President on 16 December 2014.
4. The primary facts were not in dispute at the trial before the DFM. On 10 February 2014, immediately upon the breakdown of a previously recognised inter-dependent partnership, the appellant promptly completed and lodged a number of service documents informing Defence of the change in his relationship status, and the consequent changes in his entitlements and allowances, including the surrender of the married quarter he had occupied with his former partner. One of those documents was a Defence Housing Australia (DHA) form entitled “Notification of Housing Change”, in which he applied for rent allowance with effect from 10 March 2014 (when he would vacate his existing accommodation). In it, he ticked the answer “yes” to the following question:

**34. Are you the sole occupant of the property for which you are applying for Rent Allowance?** Note: MWD – do not include dependants. All other occupants of the premises, including civilians, children, ADF members or house sitters will normally be regarded as sharing the premises unless they have a more permanent residence in another locality and are no more than visitors or temporary co-residents (refer to PACMAN Chapter 7).

1. PACMAN, Chapter 7, Part 6, “sets out the principles for giving rent allowance, who can get it and how to apply for it. It also explains how to work out the member’s contribution toward the cost of the rented home” [clause 7.6.1]. In clause 7.6.3, for the purposes of Part 6, “Number of residents” is defined as “The number of people living in the home”, and “Sub‑lease rent” is defined as “The amount of income the member gets as rent for any part of the rental property that is sub-let”, of which is given as an example “Money made by sub‑letting a downstairs flat or a spare bedroom to a boarder”. Clause 7.6.20, entitled “Shared home”, provides as follows:

1. This clause applies to a member who meets both these conditions.

1. They are a member without dependants or a member with dependants (unaccompanied).
2. They share a house that they get rent allowance for.

2. The rate of rent allowance is the fortnightly rate worked out using the following formula.

**(twice the weekly rent ÷ the number of residents) – contribution**

3. A visitor to the house may affect the amount of rent allowance a member is entitled to. If the visit is for less than four weeks, rent allowance will not be affected. If the visit is for four weeks or more, this table shows the effect on the member’s rent allowance.

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| **Item** | **If the visitor has…** | **then they are…** |
| 1 | a permanent home at another location | **Not** taken to be a resident  The visit will not affect the member’s rent allowance |
| 2 | No permanent home | Taken to be a resident.  The visit will reduce the member’s rent allowance from the first day of their stay |

**Example:** A member shares a house with two other members. They pay $330 a week rent in total and $70 each contribution. The member’s rent allowance is $150 a fortnight (that is, (660 ÷ 3) – 70). The member’s itinerant adult cousin visits and stays for four weeks. The member’s rent allowance is $85 a fortnight (that is, (660 ÷ 4) – 70).

4. The member must inform the Housing Management Centre Manager in writing if a person will be living in their home for longer than four weeks. The CDF will then decide if the member is subletting their home. The CDF must consider all the circumstances in which the person is living in the home.

1. When the appellant completed the “Notification of Housing Change” form, the rental property to which he would move had not yet been identified. On or about 13 February, he identified a suitable rental property at 20 Antoninus Street, Bellamack, and applied to the letting agent “My Agent” for a lease. His “Residential Tenancy Application” form stated:

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| --- | --- | --- | --- |
| Adults | Children | Vehicles | Pets |
| 1 | 0 | 2 | 2 |

1. At that time, he asked the agent about the possibility of his sister and brother-in-law staying at the property, and was told by the agent that they would need to complete a form.
2. On 18 February, the appellant completed an on-line application to DHA for rent allowance in relation to the Antoninus Street premises. Under the drop-down box “Share Type”, he selected the “Not Sharing” option. The on-line application form included, via a drop-down box, the same information as provided in connection with Question 34 in the “Notification of Housing Change” form referred to above. It was this selection of the “Not Sharing” option that was the deception alleged in the charge.
3. On 19 February, the appellant supplied to the letting agent two forms, together with the requisite identification documents, to obtain approval for his sister and her family to reside in the premises. No period for which they might do so was specified, but the forms neither required nor invited identification of any such period.
4. On 20 February, the appellant (as tenant) executed a Residential Tenancy Agreement in respect of the premises, with a commencement date of 27 February 2014. He was the only tenant named on the agreement. The lease contained a covenant by the tenant (clause 22) “not to assign the Tenant’s interest in the tenancy or to sublet the Property without the written consent of the Owner”. A copy of the lease and other requisite documents were submitted to DHA on 13 March, and rental allowance was subsequently approved, at the rate applicable if the appellant were “not sharing”, with effect from 27 February 2014.
5. Meanwhile, on 6 or 7 March, the appellant's sister, brother-in-law and niece (the Innes family) moved into the premises. Although they contributed to housekeeping, they paid no rent.
6. On or about 28 March, a DHA representative, while at a social gathering, became aware of the appellant’s residential circumstances. She reported it to her regional manager on 31 March. The appellant was aware that he was under investigation from not later than 15 April.
7. On 8 May, the appellant sent an email to DHA in the following terms:

I have attached a letter informing you of people living with me but not paying rent.

1. The attached letter was as follows (sic):

I am writing this letter in accordance with PACMAN 7.6.20.4 to inform you that my Sister (Samantha Innes), Brother in Law (Andrew Innes) and Niece (Isla Innes) will be staying at my residence of 20 Antoninus Street for longer than 4 weeks and they are not paying rent. As they aren’t paying rent I’m not be subletting my home to them.

1. On 9 May DHA requested further particulars, which the appellant provided on 12 May. That same day, DHA informed the appellant that as the Innes family were residing with him for more than four weeks and had no permanent home elsewhere, they were counted as residents and that his rental allowance would be adjusted. The difference between the rent allowance that he received during the relevant period, and that which he would have received on the basis that he was “sharing” with the Innes family, was $1,912.08, which was the “financial advantage” the subject of the charge, and which he subsequently repaid in full.
2. The appellant, as was his right, did not give evidence at the trial. However, in evidence was his record of interview with service police, in which he had given the following answers (sic):

Q33. … As I have already informed you we are making inquiries into the allegations that between the 27th of February 2014 and the 12th of May 2014 you were in receipt of full rental assistance for 20 Antoninus Street, Bellamack, Northern Territory, as a single occupant whilst other people were living with you, causing you to receive Commonwealth allowances that you were not entitled to. Josh, what can you tell me about this matter?

1. I couldn’t tell you what date they came in, it was my sister, her partner and their child.

Q34. Yep.

1. They were in the process of moving out of their house and I said, look, you can either come and live with me, it’s 28 days with DHA, umm they’re allowed to stay there, as far as I’m aware anyway. Umm, and then I wrote an email to HMC manager the other day stating that, look, they could be there for longer, they’re not paying any rent, and and they emailed me back just asking particulars. And I’ve sent another email off recently saying these are the questions, or answers to the questions you’ve asked and I haven’t received anything back from them from there. Umm, yes, that’s about all I’ve got.
2. And later:

Q49. What is your understanding then of DHA?

A. Ah, how do you mean?

Q50. Well, you’ve said that about the 28 day rule, so what is your understanding of rental assistance, rental allowance and DHA rules and regulations regarding that?

A. Well, from what I’ve read, I might be taking it the wrong way, um, is you’re allowed to have someone stay with you for 28 days, you must inform DHA if it’s going to be longer than that um and whether you’re sub-letting or sharing a house with them, which I’ve advised them. So, they’re not paying rent so I’m not sub-letting, and um, I’ve advised them that, look, they could possibly be staying longer, looking for a house and all the rest of it.

Q51. And do you know the conditions of full RA?

A. Sort of, as if someone is - - -

Q52. Can you explain for me what you do know?

A. Someone is – okay, someone – you can’t be living with someone else while they’re paying rent as well, and getting full RA. So, if I’m getting full RA I can’t have someone living there paying me rent without going down to partial RA of whatever it’s called now.

1. And subsequently:

Q64. And you say Samantha and Andrew moved in with you, just came to visit for 28 days?

A. Yeah, well, because they were moving out of their house, looking for another one, I said, “You might as well come in with me. I’ve got spare rooms sitting out the back there”.

1. The offence of which the appellant was convicted is that provided for in s 134.2 of the Code, namely:

**134.2**  Obtaining a financial advantage by deception

(1)  A person is guilty of an offence if:

(a)  the person, by a deception, dishonestly obtains a financial advantage from another person; and

(b)  the other person is a Commonwealth entity.

Penalty:  Imprisonment for 10 years.

(2)  Absolute liability applies to the paragraph (1)(b) element of the offence.

1. Deception is defined in s 133.1 to mean, relevantly, an intentional or reckless deception, whether by words or conduct, and whether as to fact or as to law, and includes a deception as to the intentions of the person using the deception, or any other person.
2. The learned DFM stated the elements of the charge (in addition to being a defence member) to the following effect:
3. That at Darwin between 6 March and 12 May 2014;
4. He practised a deception (being an intentional or reckless deception as defined in s 133.1) by completing an online application for rent allowance on 18 February 2014 in which he represented that he was to be the sole occupant of 20 Antoninus Street, Bellamack, when from 6 March 2014, Samantha, Andrew and Isla Innes resided at that property;
5. By reason of that deception he obtained a financial advantage, namely overpayment of rent allowance totalling $1,912.88;
6. That he was reckless as to (3) (which could be established by knowledge, intention or recklessness);
7. That he was dishonest; and
8. That the financial advantage was obtained from a Commonwealth entity.
9. At the trial, the elements in contest were whether the appellant practised an intentional or reckless deception, and whether he was dishonest.
10. The learned DFM concluded that it was clear, from item 2 in the table in PACMAN clause 7.6.20, that the Innes family were to be taken to be residents and that the appellant’s entitlement to rent allowance should have been reduced accordingly, and thus that the assertion “Not Sharing” in the application form “was false and hence deceptive”. As to whether it was intentionally or recklessly so, the DFM referred to the circumstance that the appellant had asked the agent on 13 February about the possibility of his sister’s family staying in the premises, and on 19 February submitted a document seeking to have them approved for that purpose, and concluded:

I am satisfied that it was his intention from the outset to share the premises with the Innes family for some time.

1. The DFM referred to a number of the appellant’s answers in the record of interview and, rightly in our view, regarded them as a consistent assertion on his part that he did not think he had done anything wrong; but having regard to the instructions on the forms the appellant had completed, to which we have referred above, he concluded that the appellant was at least reckless as to the falsity of the representation.
2. On the question of dishonesty, correctly directing himself in accordance with the definition in the Code, and with reference to *R v Ghosh* [1982] QB 1053, the DFM again referred to the appellant’s consistent assertions in his record of interview that he had done nothing wrong, but said that they had to be considered against a number of matters, namely:

(a) The fact that the answer given to the question about whether he would be sharing was plainly false at the time it was made, and ABET Hodge must have known it to be so. The question was not a technical one, such as, “Are you sub-letting” or, “Are you sharing for the purposes of the PACMAN instructions”. It was, as agreed, that he was not sharing.

(b) The steps taken to inform the agent and to have the Innes family approved by the lessor as co-occupants.

(c) The note to question 34 of exhibit 12 [the ‘Notification of Housing Change’ form referred to above] completed by ABET Hodge on 10 February 2014 and replicated in the drop-down box available on the online application.

(d) The fact that notwithstanding ABET Hodge’s asserted understanding at question 34 of the record of interview, that the Innes family could stay for 28 days, nothing was done to subsequently inform DHA of their presence until some 70 days had elapsed, and only then after ABET Hodge was aware that he was under investigation. Inherent in this finding is my satisfaction to the requisite standard that ABET Hodge did not simply lose track of the time the Innes family was in residence, or otherwise mistake the period of their occupancy such as to think it was of the order of 28 days when in fact some 70 days had elapsed. They had been in residence almost from the start of ABET Hodge’s own occupation of the house, and following formal arrangements with the agent to recognise them as part of the leasing process. It was not the case that they arrived unexpectedly and simply overstayed. Rather, their arrival was planned and formally accommodated for an indefinite time.

(e) That the Innes family were living openly at the Antoninus Street premises. I do not consider this to be of great significance because ABET Hodge had no reason to believe that DHA would look behind his application and the copy of the lease showing him as the sole tenant, and unless he volunteered the information, his friends and associates would not know the basis of his rental allowance support.

(f) The declaration that formed part of the online application, exhibit 17, which provided:

*By clicking I agree I will undertake to advise DHA of any changes to the details provided in this application within 10 days of the change. I acknowledge that as part of my rent allowance entitlement I may be audited one or more times in a posting cycle and that I will respond by the advised due date or my rent allowance will be suspended. I understand that DHA will collect, store and use or disclose information contained in this application. I certify that the information I have provided is true and correct and I understand that a person who intentionally makes a false or misleading statement is committing a serious offence under the Commonwealth Criminal Code 1995 and the Defence Force Discipline Act 1982, and that this imposes substantial penalties, including imprisonment. Any entitlement provided to me as a result of such conduct may be recovered.*

This reinforced the significance of accurately and honestly completing the form and warned of the fact that the provision of incorrect or untrue information constituted an offence.

In my view, the only inference that can be drawn from the facts is that there was never any intention to inform DHA of the Innes occupancy after 28 days or at all, until such [time] as ABET Hodge knew himself to be under suspicion. Having regard to these findings and the declaration to which I have referred, I am satisfied that ABET Hodge knew that what he was doing in completing the application as he did was dishonest according to the standards of ordinary people, notwithstanding the denials in the record of interview.

1. At the hearing of the appeal, the appellant, without objection, sought to rely on the grounds (a) that the conviction is unreasonable, or cannot be supported, having regard to the evidence; (b) that as a result of a wrong decision on a question of law, or of mixed law and fact, the conviction was wrong in law and that a substantial miscarriage of justice has occurred; and (c) that in all the circumstances of the case, the conviction is unsafe or unsatisfactory.
2. It is convenient to deal first with the complaint of error of law, which was advanced on two bases.
3. The first was that the DFM erred in concluding that the selection of the “Not Sharing” option “was false, and hence deceptive”, the alleged error being that the DFM failed to address the fault element, and in particular whether the appellant meant to be deceptive. The appellant argued that “deception” was a physical element of conduct, the fault element for which was intention, and that the DFM failed to address the question of intention. However, the DFM expressly referred to the definition of deception in s 133.1 to mean an intentional or reckless deception, and expressly found that the appellant “was at least reckless [as] to the falsity of the representation within the meaning of the Criminal Code, section … 5.4(2)”. Given that the definition in s 133.1 includes a “reckless” deception, and the DFM found that the appellant was “at least reckless” as to the falsity of his selection, there was no error of law. Insofar as there is a complaint about the conclusion that the appellant “was at least reckless”, that is not a matter of law but falls for consideration under the “factual” grounds of appeal.
4. The second was that the DFM did not give adequate reasons for concluding that the conduct of the appellant was deceptive, and that he acted dishonestly. It was submitted that no process of reasoning was exposed as to why:
5. selection of the “not sharing” option was not merely incorrect but deceptive;
6. the appellant was at least reckless as to the falsity of the representation;
7. why the DFM “rejected the evidence of the appellant in favour of inferences that he drew in his 6 findings”, including how he treated the evidence that the appellant was of good character.
8. In our view, this ground is without substance. The summary in paragraphs [23]-[24] above is but a distillation of the DFM’s reasoning as to why selection of the “not sharing” option was a deception within the definition, including why the appellant was at least reckless. While the DFM accepted that the appellant was otherwise of good character, he explained – in the passage extracted above – why he concluded that, notwithstanding the appellant’s assertions in the record of interview, he acted dishonestly. The DFM’s reasons amply satisfy the requirement that they identify the principles of law applied, the main factual findings and the reasons for making them, and the reasoning process that links them and leads to the ultimate decision, and enable appellate scrutiny [*Yewsang v Chief of Army* [2013] ADFDAT 1, [11]‑[12]; *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250, 262-3 [28] (Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ); *Pettitt v Dunkley* [1971] 1 NSWLR 376, 387-8 (Moffitt JA)]. In reality, the complaint was that the reasoning was incorrect, not inadequate, which falls for consideration under the “factual” grounds.
9. We turn, then, to those “factual” grounds, namely that the conviction is unreasonable, or cannot be supported, having regard to the evidence; and that in all the circumstances of the case, the conviction is unsafe or unsatisfactory. While these are separate grounds, under ss 23(1)(a) and 23(1)(d) respectively of the *Defence Force Discipline Appeals Act 1955* (Cth), they are legally indistinguishable: the terms “unreasonable”, “cannot be supported, having regard to the evidence” and “unsafe and unsatisfactory” are different ways of stating the same legal concept [*M v The Queen* [1994] HCA 63; (1994) 181 CLR 487, 492 (Mason CJ, Deane, Dawson and Toohey JJ); *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606, 623-4 (McHugh, Gummow and Kirby JJ); *Yewsang v Chief of Army* [2013] ADFDAT 1, [56]].
10. The scope of these grounds is now well-established, and was explained by this Tribunal in *Yewsang v Chief of Army*, with reference to *M v The Queen*, *MFA v The Queen,* and *SKA v R* [2011] HCA 13;(2011) 243 CLR 400. For present purposes, the essential propositions, stated in the context of this Tribunal, are as follows.
11. First, the question for the Tribunal is whether it thinks that, upon the whole of the evidence, it was open to the DFM to be satisfied beyond reasonable doubt that the appellant was guilty [*M* v *The Queen*, 493].
12. Secondly, to address that question, the Tribunal must make an independent assessment of the sufficiency and quality of the evidence [*SKA v The Queen*, 406 [14] (French CJ, Gummow and Kiefel JJ); *Yewsang v Chief of Army*, [57]-[59]].
13. Thirdly, the conviction must be set aside if the Tribunal decides that the DFM should have had a reasonable doubt about the appellant’s guilt, even if there was sufficient evidence in law to support it [*M v The Queen*, 493-5; *Low v Chief of Navy* [2011] ADFDAT 3, [70]‑[74]].
14. Fourthly, a doubt experienced by the Tribunal will be a doubt which the DFM ought also to have experienced, except where the DFM’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by the Tribunal [*M v The Queen,* 494].
15. These grounds are factual and require leave [*Defence Force Discipline Appeals Act 1955* (Cth), s 20(1)], which was not opposed. It will be granted.
16. Before us, the issue was whether it was open on the whole of the evidence to find, beyond reasonable doubt, two elements of the offence, namely deception and dishonesty. The prosecution had the burden of proving both, beyond reasonable doubt. To do so, any rational hypothesis consistent with innocence had to be excluded.
17. As the appellant completed the online application on which he selected the “Not Sharing” option (the alleged deception) before he moved into the premises, it was not a statement of present fact but a statement of intention, and it was false only if when he completed the application he intended to “share”, in the relevant sense and for the relevant purposes – an aspect which the charge, as particularised, tends to overlook, as it treats the statement of intention as falsified merely by the subsequent co-residence of the Innes family.
18. Accordingly, what is “sharing” for relevant purposes, is important. The context in which the statement was made being an application for rent allowance, the relevant purposes are the purposes of eligibility for rent allowance. That context is informed by the “drop-down” box available on the online application, and PACMAN Chapter 7 to which it refers. To that extent, we respectfully disagree with item (a) in the DFM’s list of six considerations; a reasonable person completing the application would think that the question asked whether the applicant was “sharing” *for the purposes of eligibility for rent allowance*, which in turn imports the instruments that define “sharing” for that purpose, and in particular the PACMAN.
19. The appellant accepted before us that his arrangements with the Innes family amounted to sharing and that the selection of the response “Not Sharing” was, objectively, false; the issue was whether it was intentionally or recklessly so. If, when the appellant completed the application, he knew that he would be “sharing” for the purposes of eligibility for rental allowance, then his selection of the answer “Not Sharing” was a deception. But if he thought that the arrangements with the Innes family would not constitute “sharing” for the purposes of eligibility, there was no intentional deception; and if he was not aware of a substantial risk that it would constitute sharing, there was no reckless deception.
20. Fundamental to the concept of *dishonestly* obtaining the advantage is knowledge that he was not entitled to it: the dishonesty lies in the intent to obtain something to which he knew he was not entitled. He obtained the advantage dishonestly if he knew or believed that he was not entitled to it. But if he believed that the arrangements with the Innes family did not affect his entitlement to full rent allowance, he was not dishonest. In order to establish dishonesty, the prosecution had to prove that the appellant knew or believed that he was not entitled to full rent allowance in the circumstances
21. Accordingly, although “deception” and “dishonestly obtains” are distinct elements of the offence, in this case they are factually inter-related. Both would be negated by a belief that what he was proposing to do was not sharing, for the purposes of eligibility for rent allowance.
22. Under PACMAN, clause 7.6.20, a visitor to the premises for not more than 28 days is not counted as a resident and does not reduce the member’s rent allowance. However, a visitor for more than 28 days is counted as a resident and reduces the member’s rent allowance from the first day of the visit – although only if the visitor has no permanent home elsewhere. The function of sub-clause 4 is unclear. The consequence of a decision by the Chief of Defence Force (CDF) that the member is – or is not – subletting, is not readily apparent. On at least one view, which might appeal to an Able Seaman or equivalent consulting the PACMAN, it suggests that the CDF has an over-riding discretion to decide whether or not a member is subletting having regard to all the circumstances (not limited to those in the table) and, if not, that rental allowance is unaffected.
23. There are hypotheses consistent with innocence that when he completed the application form, the appellant (1) did not know that the Innes family would be living with him for more than 28 days (and thus would not be counted as sharing); or (2) believed that his entitlement to rent allowance was unaffected, unless they were paying rent and he was thereby regarded as sub-letting. These are not mere speculative hypotheses, but are founded on the appellant’s answers in his record of interview, and his email of 8 May. And given the terms of PACMAN clause 7.6.20.4, the second is a view that could not unreasonably be entertained by a sailor who read that part of PACMAN.
24. In our view, the prosecution did not exclude, beyond reasonable doubt, those hypotheses, and did not establish that the appellant knew or believed when he completed the online application that he would not be entitled to full rent allowance. The evidence relevant to the appellant’s state of mind went no further than his answers in the record of interview, his email of 8 May, and the instructions in Q34 on the Notification of Housing Change and the drop-down box in the online application. The answers in the record of interview and the email, so far as they go, tend to support the hypotheses, although the better view is that they relate to the appellant’s understanding at the time of the interview, not when he competed the application. The change in tense in the answer to Q34 suggests that the reference to the 28-day rule was something he now understood, rather than understood at the time of the application, while the terms of Q50 and Q52 are expressly addressed to his current knowledge at the time of the interview - by which time he appears to have researched the matter and read PACMAN. But if Q34 speaks as at the time of the application, it would indicate knowledge at that time that they could stay for 28 days coupled with a belief that they would stay only for that time, a position somewhat confirmed by Q64. And if they speak only at the later time, then that leaves a void of evidence as to his knowledge of the conditions of eligibility when he made the application: he was not asked in the interview for his understanding of the conditions *when he made the application,* and there was no other evidence adduced to enable a finding as to his state of knowledge at that time (such as of any briefing or instruction that he might have received). The only other relevant evidence is the information in Q34 in the Notification of Housing Change, replicated in the drop-down box in the on-line application, which is inconclusive, and directs the reader to the difficult passage in PACMAN clause 7.6.20 to which we have referred. He was asked no questions about it in the record of interview. It is far from self-evident that an Able Seaman or equivalent would have any detailed understanding of the eligibility criteria applicable in respect of sharing, and not unreasonable that he might suppose that his eligibility would not be affected if the Innes family were not paying rent.
25. Thus it was not established, at all, that the appellant knew that his entitlement would be affected although the Innes family were not paying rent. And while it was established that the appellant knew, at least to some extent and at some stage, of the “28-day rule”, it was not established that he knew, when he completed the application form, that the Innes family would remain in the premises for more than 28 days. Indeed, although the learned DFM found that it was the appellant’s intention from the outset to share the premises with the Innes family “for some time”, there was no finding that it was then his intention that it would be for more than 28 days.
26. Thus, the evidence did not establish that the appellant knew or believed, when he completed the application, that he would not be entitled to full rent allowance. Rational hypotheses consistent with the appellant not knowing that his arrangements with the Innes family would constitute “sharing” in the relevant sense and thus affect his entitlement to rental allowance have not been excluded.
27. While that conclusion is of itself sufficient, at least to raise a reasonable doubt as to the elements of “deception” and “dishonesty”, there are additional considerations which bear on the dishonesty element.
28. First, as to the DFM’s reasons for concluding that the appellant was dishonest, we have already indicated that we are unable to agree with consideration (a), because the question viewed in its context did import the notion, not of sharing *simpliciter,* but of sharing in a way that would affect eligibility; so viewed, the answer was not “plainly false”; it was false only if the appellant then believed that he would be sharing in a way that affected his entitlement. The information in the drop-down box supports that view. As to (b), the steps taken to inform the agent and to have the Innes family approved by the lessor as co-occupants only establish that he knew that they would be in the premises for some time – not for 28 days; nor that their presence was relevant for rent allowance purposes if they were not paying rent. As to (c), while the note to Q34 of the Notification of Housing Change form, and replicated in the drop-down box on the online application, indicates that all other occupants will *normally* be regarded as sharing the premises unless they have a more permanent residence in another locality and are no more than visitors or temporary co-residents, it also contains the reference to PACMAN Chapter 7 (with its ambiguity about sub-letting), and it does not state that they will be so regarded even if they do not contribute to the rent; in other words, it does not clearly contradict a belief that a temporary co-resident who does not pay rent would not be counted. As to (d), the fact that nothing was done to inform DHA of the presence of the Innes family after 28 days, until some 70 days had elapsed and the appellant was aware that he was under investigation, while not entirely irrelevant to an assessment of his state of mind when he completed the application, must be treated with considerable caution, because it does not follow from the length of their stay, nor from failure promptly to advise when it exceeded 28 days, that he knew at the outset that they would be staying for so long – let alone that their presence, rent-free, would affect his rent allowance. As to (f), while, as the DFM observed, the declaration that formed part of the online application reinforced the significance of accurately and honestly completing the form, that says nothing as to whether the appellant believed that he was accurately and honestly completing it. Thus we do not think that the considerations relied on by the DFM make a strong case of dishonesty.
29. Moreover, there are the circumstances that, so far as appears from the evidence, the appellant acted with propriety in immediately notifying his change in status following the breakdown of his relationship and surrendering his married quarter; the Innes family were living openly in the premises and the appellant had told other service personnel that they were, within days of their moving in on 7 March; the appellant derived no financial benefit from the presence of the Innes family; and – as the DFM accepted – he was shown to be otherwise of good character.
30. Accordingly, in our view, there is a reasonable doubt whether the appellant practised a deception (as there is a reasonable possibility that he did not know that the Innes family would be “sharing” in the relevant sense), and whether he obtained the advantage dishonestly (as there is a reasonable possibility that he did not know that the Innes family would remain longer than 28 days, and/or believed that their presence would not affect his entitlement so long as they did not pay rent). Those doubts are not capable of resolution by the DFM’s advantage in seeing and hearing the evidence. It follows that the conviction was unsafe and unsatisfactory. The appeal should therefore be allowed, and the conviction quashed. As knowledge that he was not entitled to the advantage is also an element of the alternative charge under s 134.2(1), a reasonable doubt would necessarily also have attended whether he was guilty of that charge, so there is no occasion for the alternative charge to proceed. Judgment of acquittal should be substituted.

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| I certify that the preceding fifty-two (52) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Tracey, Brereton and Hiley. |

Associate:

Dated: 4 September 2015