



Australian Government

Defence Honours and Awards Appeals Tribunal

Biscoe and the Department of Defence [2015] DHAAT 26 (24 April 2015)

File Number(s) 2014/046

Re **Paul Thomas Biscoe**
 APPLICANT

And **Department of Defence**
 RESPONDENT

Tribunal Mr Mark Sullivan AO (Presiding Member)
 Mr Kevin Woods CSC, OAM

Hearing Date 1 April 2015

DECISION

On 24 April 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Paul Thomas Biscoe is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the Australian Defence Medal to Mr Paul Thomas Biscoe.

LEGISLATION

*Defence Act 1903 – ss 110T, 110V(1) 110VB(2),
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Defence Medal Regulations 2006*

REASONS FOR DECISION

Introduction

1. The applicant, Mr Paul Thomas Biscoe (Mr Biscoe), seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Australian Defence Medal (ADM). Mr Biscoe had lodged an application for the award of the ADM on 11 September 2009. His application was based on his service in the Citizen Military Forces (CMF) from 19 August 1975 to 1 June 1976 and service in the Australian Army Reserve (ARES) from 9 March 2007 to 31 July 2009. The Directorate advised Mr Biscoe that he was not eligible.

2. On 15 July 2010, Mr Biscoe wrote to the Member for Mitchell, Mr Alex Hawke MP, seeking his assistance to obtain the ADM. On 25 November 2010, Mr Hawke made representation on behalf of Mr Biscoe to the then Parliamentary Secretary for Defence concerning Mr Biscoe's eligibility for the ADM. On 2 February 2011, the Parliamentary Secretary advised that in order to determine if Mr Biscoe was discharged medically unfit his service medical file would need to be examined. On 16 February 2011 Mr Biscoe consented to the release of his service medical file. The medical advice that was returned to the Directorate stated that Mr Biscoe's medical file gave no indication as to the reason that he was discharged.

3. On 28 July 2011, the Directorate advised Mr Biscoe by letter that he was not eligible for the ADM as the additional examination of his service and medical records could not provide evidence that he had been discharged from the ARES as 'Medically Unfit'.

4. Being dissatisfied with the decision of the Directorate, Mr Biscoe lodged his application for review with the Tribunal on 22 April 2014. Included in that application was a submission written, on behalf of Mr Biscoe, by Mr Timothy McCombe OAM, President, Vietnam Veterans' Federation of Australia Inc.

Tribunal Jurisdiction

5. There is no dispute that the Tribunal has jurisdiction to review the Directorate's decision in regard to Mr Biscoe's application for the award of the ADM see subsection 110V(1) and 110T of the *Defence Act 1903* and regulation 93C and Schedule 3 of the *Defence Force Regulations 1952*.

Steps taken in the conduct of the review

6. On 14 May 2014, in accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*, as amended, the Tribunal wrote to the Secretary of the Department of Defence advising him of Mr Biscoe's application for review and invited Defence to make a submission and provide the Tribunal with any material on which it sought to rely. A written submission was received from the Directorate on 18 July 2014.

7. On 6 August 2014, Mr McCombe was provided with a copy of the Directorate's written submission and he was invited to respond to this and submit any further material he may have in support of Mr Biscoe's claim for the award of the ADM. Mr McCombe provided a written response to the Directorate's submission on 26 August 2014. On 9 October 2014, Mr Biscoe was provided with a copy of the Directorate's written submission and was also invited to respond to this and submit any further material he may have in support of his claim for the award of the ADM. Mr Biscoe provided a written response to the Directorate's submission on 20 October 2014. Mr Biscoe was also invited to give oral evidence (by telephone) to the Tribunal on a date that was suitable to him and the Tribunal.

8. The Tribunal met on 1 April 2015. During its meeting the Tribunal considered the material provided by Mr Biscoe, Mr McCombe and the Directorate. It also heard oral evidence from Mr Biscoe who agreed to be available, by telephone, that day. An additional submission from Mr Biscoe dated 17 March 2015, was received by the Tribunal on 20 April 2015.

The Australian Defence Medal

9. The ADM was instituted by Her Majesty, Queen Elizabeth the Second by Letters Patent on 8 September 2005, *for the purpose of according recognition to Australian Defence Force personnel who have served for a minimum of six years since the end of World War II*. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006¹ when they came into force as the *Australian Defence Medal Regulations 2006*. As a result of that amendment the minimum period of service became four years. Regulation 4 of the amended Regulations states:

- (1) *The Medal may be awarded to a member, or former member, of the Defence Force who after 3 September 1945 has given qualifying service that is efficient service:*
 - (a) *by completing an initial enlistment 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 of the member as medically unfit due to a compensable impairment;*
 - (iii) *the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force or his or her delegate;*

¹ *Commonwealth of Australia Gazette* No. S48, 30 March 2006.

- (2) *For subregulation (1), the Chief of the Defence Force or his delegate may determine that a period of the member's qualifying service is efficient service ...*

10. Following an Inquiry by the Defence Honours and Awards Tribunal in 2009² the Chief of the Defence Force (CDF) made a determination on 8 November 2009 pursuant to reg 4(2). The Determination stated that:

where a member or former member was discharged as medically unfit to serve due to a non-compensable injury or disease, and the period of service of that member or former member is less than that prescribed under regulations 4(1)(a) to (c), that lesser period may, subject to the individual circumstances, be considered as being efficient service for the award of a medal to members or former members of the Defence Force who qualify for the award of the medal under section 4 of the regulations.

11. On 31 October 2013 the Acting Chief of the Defence Force, Air Marshal Binskin, authorised an additional determination to the ADM Regulations.

The Determination stated that:

'exercise my authority under sub-regulation 4(2) of the Australian Defence Medal Regulations to determine that where a member or former member was discharged and the period of service of the member is less than the prescribed under Regulations 4(1)(a) to (c), that lesser period may be considered as being efficient service for the award if it is found that, during a formal investigation or hearing, the discharge was a result of mistreatment, and that a Service Chief, or his or her representative, makes a recommendation that the Australian Defence Medal be awarded'.

12. The Tribunal notes that the eligibility criteria in clause 4(1) of the ADM Regulations contain a commitment component (i.e. completing the prescribed period of service, namely serving the shorter of four years or the initial enlistment period) and a productivity component (i.e. the service that was rendered was efficient service). Both components must be satisfied.

Defence records of Mr Biscoe's service

13. Defence records of Mr Biscoe's service state he enlisted in the CMF on 19 August 1975 for a two year enlistment period. On his enlistment in the CMF, Mr Biscoe served as a Trooper at 1/15 Royal New South Wales Lancers. On 16 January 1976 he transferred to the Officer Cadet Training Unit 2nd Training Group, as an Officer Cadet until his discharge. On 1 June 1976 having served a total of 9 months and 13 days Mr Biscoe discharged from the CMF. His service record states that he discharged at his own request.

² Defence Honours and Awards Tribunal's Inquiry into eligibility criteria for the award of the Australian Defence Medal, 11 February 2009.

14. On 9 March 2007 Mr Biscoe enlisted in the ARES for an initial enlistment period of four years. According to Mr Biscoe's service record he was 55 years of age. On his enlistment, Mr Biscoe served as an administration clerk in 1/15 Royal New South Wales Lancers. Defence records note that the order discharging Mr Biscoe is dated 29 July 2009 with an effective discharge date as 31 July 2009. The order states the reason for discharge as being 'D(P)R 98(1) own request'.

Summary of the Claims of Mr Biscoe

15. In his written submission, Mr Biscoe said:

'At a weekend training exercise on 9 May 2009, I was part of a group from RHQ consisting of medics, pay clerks and orderly personnel who were tasked with setting-up a field command post... It was during the construction of a very heavy telescopic Radio Mast that I sustained an injury. While we were extending the sections, my peers were not taking their share of the load as required. I alone out of necessity bore the whole weight of it and in doing so suffered injury to my upper back/neck. I did not report this injury as I thought it would naturally repair in time and besides, the discomfort was bearable. Members over 50 years old are required to undergo a 'Comprehensive Preventative Health Examination' (CPHE) medical examination every 5 years. I attended the Holsworthy Base Hospital (IHSB) for this mandatory medical and was attended to by a military doctor, Dr Valabjee. During my speaking with him and in response to his general health questions, I regrettable [sic] mentioned the very recent back/neck injury... I further confided that this recent accident had exacerbated a prior back/spinal injury which I had sustained some years ago but which had become dormant, To my great surprise, he without hesitation, issued me with a written directive which stated, 'This member has significant Medical Issues that warrant a Rapid Exit from the ADF. Kindly expedite this matter'.

16. Further in his submission, Mr Biscoe said:

'...I had been an enthusiastic and productive part-time soldier with prospects of continuing to contribute dedicated army service for at least a further 7 years. I did not want to resign, I loved this new-found 'career' and I was extremely happy. The Army doctor's intervention with perhaps mine and the Army's best interests in mind brought about my premature departure. I was reluctant to sign the 'AC853-Application for Discharge' form which had been prepared for me. On that same form, my commanding officer Lt/Col E L Stevenson's comment was: 'I have spoken to Pte Biscoe and reluctant [sic] support his medical discharge. If his medical circumstances change, happy to have him back'.

17. In his oral evidence Mr Biscoe reiterated that which he had said in his written submission. Mr Biscoe also said that he very much enjoyed his time in the unit and was extremely disappointed that he was forced to leave the ARES.

18. The essence of Mr Biscoe's written and oral submission is that he believes his discharge was due to medical reasons and was not at his own request. Mr Biscoe

provided to the Tribunal a number of Defence documents as evidence in support of his claim that he was medically discharged. The following is a list of those documents:

- 1st Health Support Battalion letter signed by Dr Chetan Valabjee dated 25 May 2009.
- Form AC 853 *Application for Resignation, Separation, Discharge or Transfer to the Reserves*, completed by Mr Biscoe's supervisor, SGT C. Hayden, and his Commanding Officer LTCOL E. Stevenson on 2 June 2009.
- Covering Staff-In-Confidence Minute dated 3 June 2009 signed by SGT Hayden.

Summary of the Claims of Defence

19. In its written submissions, the Directorate reiterated that which it had said in its decision, namely Mr Biscoe did not complete his initial enlistment period, (which in Mr Biscoe's case was a period of four years). He was not discharged as medically unfit and Mr Biscoe was not discharged due to a prevailing discriminatory Defence policy. As a result of Mr Biscoe's appeal to the Tribunal, his eligibility for the ADM was re-assessed by the Directorate. This re-assessment confirmed that Mr Biscoe is not eligible for the ADM because his service does not meet the eligibility criteria specified under Regulation 4(1) of the *Australian Defence Medal Regulations 2006*.

The Tribunal's Findings

20. In conducting this review, the Tribunal is bound by the eligibility criteria that govern the award of the ADM. These criteria are found in regulation 4(1) of the ADM Regulations. Accordingly, in order for Mr Biscoe to be eligible for the award of the ADM it must be established that his period of service met the prescribed minimum period of service (in the case of Mr Biscoe this is four years), or the reason for his discharge fell within one of the prescribed exceptions. In Mr Biscoe's submission and during his oral evidence he stated that he was forced to resign due to a medical condition.

21. There is no dispute that Mr Biscoe's period of service failed to meet the prescribed minimum period of service. He enlisted on 9 March 2007 and was discharged on 31 July 2009 – a total of 2 years, 4 months and 22 days service.

22. Although the Army Personnel Agency-Sydney 'Record of Termination' document states that Mr Biscoe was discharged at own request it is the Tribunal's view that a case of maladministration has occurred in the discharge process of Mr Biscoe. Defence documentation as mentioned in paragraph [18] above clearly indicates that Mr Biscoe's application for discharge was a result of his medical issues.

23. Although it is not within the Tribunal's jurisdiction to change Mr Biscoe's service records the Tribunal strongly recommends that Mr Biscoe make representation to the Commander Career Management - Army, at the address below, seeking to have his service records changed to reflect the reason for discharge as medical reasons.

Commander Career Management – Army
Department of Defence
PO Box 7980
Canberra BC ACT 2610

24. If this option fails the Tribunal strongly recommends that Mr Biscoe make representation to the Chief of Army at:

Chief of Army
Department of Defence
PO Box 7901
Canberra ACT 2610

25. Should Mr Biscoe succeed in having his service record changed to reflect medical reasons he is encouraged to re-apply to Defence for the award of the ADM.

DECISION

26. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Paul Thomas Biscoe is not eligible for the award of the Australian Defence Medal.