



## Australian Government

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### Defence Honours and Awards Appeals Tribunal

#### **Kavanagh and the Department of Defence [2015] DHAAT 41 (01 October 2015)**

File Number(s)      2015/003

Re                      **Mr Kevin Kavanagh**  
Applicant

And                     **Department of Defence**  
Respondent

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

Hearing Date         24 September 2015

#### **DECISION**

On 01 October 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Kevin Kavanagh is not eligible for the award of the Australian Defence Medal.

#### **CATCHWORDS**

*DEFENCE AWARD – refusal to recommend the award of the Australian Defence Medal*

#### **LEGISLATION**

*Defence Act 1903 – ss 110T, 110V(1) 110VB(2),  
Defence Force Regulations 1952 - reg 93C and Schd 3  
Commonwealth of Australia Gazette No S48 dated 30 March 2006 – Australian  
Defence Medal*

## REASONS FOR DECISION

### Introduction

1. On 2 April 2009 Mr Kevin Kavanagh (Mr Kavanagh) made application to the Directorate of Honours and Awards of the Department of Defence (the Directorate) seeking reassessment of an earlier decision made in respect of his eligibility for the Australian Defence Medal (ADM). On 19 June 2009 the Directorate advised Mr Kavanagh that the previous advice that he did not qualify for the ADM was extant.

2. On 22 November 2014 Mr Kavanagh made application to the Tribunal seeking a review of the decision by the Directorate to deny his entitlement to the award. Mr Kavanagh enlisted in the Australian Regular Army Supplement – National Service (ARAS-NS) on 27 January 1972 and was discharged on 11 January 1973. His basic contention is that he was previously awarded the Anniversary of National Service 1971-1972 Medal (ANSM) and should also be entitled to the ADM as he was ‘asked to do a job and did the job’.<sup>1</sup>

### Tribunal Jurisdiction

3. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an award in response to an application. Regulation 93C of the *Defence Force Regulations 1952* defines a defence award as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 is the ADM. Therefore the Tribunal has jurisdiction to review decisions in relation to this award. The role of the Tribunal is to determine whether the decision of the Directorate is the correct or preferred decision having regard to the applicable law and the relevant facts.

### Conduct of the Review

4. On 22 January 2015, 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 of the review of Mr Kavanagh’s eligibility for the ADM and inviting submissions and an explanation of how Defence had reached its decision to refuse the award. A written submission was received from the Directorate on 20 February 2015; this submission included a formal reassessment as documentation relating to the original decision was unable to be located.

5. The submission was provided to Mr Kavanagh by the Tribunal on 12 March 2015 and he responded on 23 July 2015. The Tribunal heard oral evidence from Mr Kavanagh on 24 September 2015 by telephone.

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<sup>1</sup> Kavanagh Oral Evidence – Hearing 24 September 2015

## Mr Kavanagh's Service Record

6. Mr Kavanagh was born on 30 August 1951 in South Australia. Defence records state that Mr Kavanagh made application to serve to the Department of Labour and National Service on 15 November 1971. He was enlisted in the ARAS-NS for an initial period of 18 months on 27 January 1972 and allocated to the Royal Australian Infantry Corps. On 17 June 1972 following initial employment training, he was posted to the 3<sup>rd</sup> Battalion, The Royal Australian Regiment in Woodside, South Australia. His service record indicates he made an election for leave without pay and early discharge on 12 December 1972 and he was subsequently discharged on 11 January 1973.

7. For his service Mr Kavanagh has previously been awarded the ANSM.

## Australian Defence Medal

8. 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.*

9. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.<sup>2</sup> 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;*

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

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<sup>2</sup> Commonwealth of Australia Gazette No. S48, 30 March 2006.

10. Of relevance to National Servicemen, on 23 April 2007, the Chief of the Defence Force (CDF) made a determination, pursuant to clause 4(2) of the Regulations.<sup>3</sup> The Determination stated that:

*... designate not less than a minimum period of 18 months full-time national service, or five years part-time national service, commencing on or after 4 June 1971, as 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. Following an Inquiry by the Defence Honours and Awards Tribunal in 2009 the CDF made a determination on 8 November 2009 pursuant to Regulation 4(2).<sup>4</sup> 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.*

### **Summary of Mr Kavanagh's Claims for the ADM**

12. Mr Kavanagh's application for review of the decision to deny his eligibility for the ADM states:

*'On applying for the Defence Medal (sic) I was informed not entitled due to being discharged early when Gough Whitlam was elected in 1972. I can't understand that if given the National Service Medal ... why not entitled to the Defence medal...'*

13. In an earlier email to the Tribunal he had stated along similar lines:

*'...having been discharged early (Mr Gough Whitlam) elected Prime Minister. We were told we would have no further need for service. Why should I be denied like many others who answered the call to national service, a medal that at that time had not even existed but be entitled to the national service medal ... yet all other ex-servicemen and women have been accorded the honour including national service people of the 1950 (3 months service) who I believe are as entitled as I and natio from the seventies should be...'*

14. Mr Kavanagh's contention is that he should be entitled to the ADM as he provided service and the ADM was instituted to recognise that service. During the oral hearing on 24 September 2015 the Tribunal pointed Mr Kavanagh to the respective Regulations for both awards and emphasised that they had different conditions. Mr Kavanagh agreed that the medals had different criteria but stated that

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<sup>3</sup> Australian Defence Medal Regulations 2006 – Determination by the Chief of the Defence Force dated 23 April 2007

<sup>4</sup> Australian Defence Medal Regulations 2006 - Determination by the CDF dated 8 November 2009

in his capacity as the President of the Ardrossan Sub-Branch of the Returned and Services League he was frequently required to explain why ex-National Servicemen were not entitled to both the ANSM and ADM and that he failed to understand why the Government had taken the decisions that they had to have separate criteria. His basic assertion was that he was asked to do a job by the Government and did the job. He stated that he was of the view that it was discriminatory to deny his eligibility on the basis that he had not served for a sufficient period of time. He stated that he and his colleagues in the 3<sup>rd</sup> Battalion were ready and able to deploy to Vietnam if necessary. He indicated that he left a good job, not by choice and was then required to sacrifice many things including extended absences on courses and training at a time when he was newly married.

15. The Tribunal drew Mr Kavanagh's attention to his own election for discharge dated 12 December 1972 and pointed out that the form had three options, two of which he had dismissed leaving him to discharge in the most expedient manner. Mr Kavanagh indicated that it was his intention when he signed the election to seek discharge at his own request and to be out of the service as quickly as possible. He stated that there were no exceptional circumstances surrounding his discharge; he knew in the weeks leading up to the 1972 election that if the Australian Labor Party were elected, the National Service scheme would be abandoned and he, like many of his colleagues were keen to depart. He indicated that his brother had been killed in Vietnam when serving with the 7<sup>th</sup> Battalion in 1970 and whilst this was not a reason for his discharge, it made his National Service all the more poignant.

### **The Defence Submission**

16. The Directorate submission of 20 February 2015 stated that the decision to not recommend Mr Kavanagh was made by an appropriate delegate. In making the decision, the delegate noted that Mr Kavanagh enlisted in the ARAS-NS for an 18 month period on 27 January 1972 and discharged on 11 January 1973 after 11 months and 16 days of service. The submission indicated that Mr Kavanagh was discharged pursuant to the National Service Act 1951 Act 35B (5a):

*Whenever it is found that a national serviceman has become exempt from liability to render service under this Act, he shall be discharged from the Military Forces. Where –*

*(a) a national serviceman has been granted leave without pay for periods amounting in aggregate to not less than two years on the ground that rendering of the service that he was liable to render under this Act was imposing or would impose exceptional hardship on him or on his parents or dependants: and*

*(b) ...*

*the national serviceman may be discharged from the Military Forces and may be so discharged on the ground of exceptional hardship.*

17. The Directorate noted that to be eligible for the ADM, Mr Kavanagh must satisfy Regulation 4 of the ADM Regulations 2006:

...

*(a) by completing an initial enlistment period; or*

*(b) for a period of not less than 4 years service; 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;*

18. The Directorate also noted that the CDF determination, made pursuant to clause 4(2) of the Regulations designated:

*... not less than a minimum period of 18 months full-time national service ... commencing on or after 4 June 1971, as efficient service for the award of a medal to members or former members of the Defence Force who qualify ....*

19. The Directorate concluded that Mr Kavanagh did not complete a minimum of 18 months of efficient service in the ARAS-NS, did not complete his initial enlistment period, was not discharged as medically unfit and was not discharged due to a prevailing discriminatory Defence policy. Accordingly, the delegate decided that Mr Kavanagh was not entitled to the ADM as he did not meet the eligibility criteria.

20. In relation to Mr Kavanagh's claim that he should be entitled to the ADM as he was entitled to and had also received the ANSM, the Directorate indicated that he had qualified for the award of the ANSM as he had met the eligibility criteria – specifically:

*(iv) The Medal may be awarded to a person who was registered and called up for national service under the National Service Act 1951 and was serving on 5 December 1972 as such a member.<sup>5</sup>*

21. The Directorate indicated that the two awards had different purposes and eligibility criteria and as a result needed to be considered individually and on their respective merit.

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<sup>5</sup> Commonwealth of Australia Gazette No S409, Declaration and Determination under the Anniversary of National Service 1951-72 Medal Regulations dated 30 October 2002

## **The Tribunal's Consideration of Eligibility for the ADM**

22. There is no dispute regarding Mr Kavanagh's service record. The Tribunal, relying on the service record was satisfied that he enlisted in the ARAS-NS for an 18 month period on 27 January 1972 and discharged on 11 January 1973 after 11 months and 16 days of service and that his reason for discharge was NSA35B(5a) 'on the grounds of exceptional hardship'. During the hearing Mr Kavanagh confirmed his enlistment and discharge dates.

23. The Tribunal noted that Mr Kavanagh made application for the ADM on 2 April 2009 and the decision to refuse him was made on 19 June 2009. The Tribunal was therefore satisfied that the legislation to be applied in review of the decision is the Regulation in place at that time - being the *Australian Defence Medal Regulations 2006*.<sup>6</sup> The Tribunal was also satisfied that the CDF determination, made pursuant to clause 4(2) of the Regulations required that Mr Kavanagh must render service as a National Serviceman for 'a minimum period of 18 months' to qualify for the award of the ADM.<sup>7</sup> The Tribunal relying on the service record and the Determination found that Mr Kavanagh did not complete a minimum period of 18 months service to be eligible for the ADM.

24. The Tribunal reviewed Mr Kavanagh's discharge and in so doing, turned to the *2009 Inquiry Into Eligibility Criteria for the Award of the ADM*. Among other matters, this Inquiry addressed the specific matter of National Servicemen who were discharged before meeting their minimum period of service. The Inquiry found that on 5 December 1972 the newly elected Labor Government announced that National Servicemen could choose to leave if they wished. The Inquiry found that in the absence of appropriate legislation, Defence used 'exceptional hardship' grounds as an expedient to permit quick discharge from the scheme. Noting from the service record that Mr Kavanagh signed his election for discharge on 12 December 1972, just one week after the election and announcement of cessation of the scheme, the Tribunal was satisfied that he had made a deliberate decision to discharge and was in all likelihood well aware that he had other options including to continue serving, to complete his initial obligation or to transfer. Mr Kavanagh confirmed this during the hearing and that he did not have any 'exceptional circumstances' at the time he elected to discharge – his priority was get out of Service as quickly possible. The Tribunal therefore found that Mr Kavanagh's discharge did not satisfy any of the three exception clauses as stipulated in ADM Regulation 4(1)(d).

### **Finding**

25. The Tribunal found that Mr Kavanagh did not complete 18 months of efficient service with the ARAS-NS, did not complete his initial enlistment period, was not discharged as medically unfit and was not discharged due to a prevailing discriminatory Defence policy. The Tribunal also found that Mr Kavanagh was eligible for and had received the ANSM but eligibility for this award was under a different set of conditions to the ADM.

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<sup>6</sup> *Commonwealth of Australia Gazette No S48 dated 30 March 2006 – Australian Defence Medal*

<sup>7</sup> *Australian Defence Medal Regulations 2006 – Determination by the Chief of the Defence Force dated 23 April 2007*

26. For the reasons stated above, the Tribunal found that Mr Kavanagh was not eligible for the ADM and that the decision of the Directorate to deny his eligibility was the correct decision.

## **DECISION**

27. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Kevin Kavanagh is not eligible for the award of the Australian Defence Medal.