



Australian Government

Defence Honours and Awards Appeals Tribunal

Bower and the Department of Defence [2017] DHAAT 018 (3 August 2017)

File Number(s) 2016/019

Re **Mr Douglas Lewis Bower**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms J. Schwager, AO (Presiding Member)
Brigadier K.J. O'Brien CSC (Retd)

Hearing Date 27 June 2017

DECISION

On 3 August 2017, the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Douglas Lewis Bower is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – 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 9 September 2015, Mr Douglas Lewis Bower made application to the Directorate of Honours and Awards of the Department of Defence (the Directorate) for the award of the Australian Defence Medal (ADM). On 25 September 2015, M. Lewis, Assessor, Directorate of Honours and Awards wrote to Mr. Bower inviting him to provide further information relevant to his application.¹ Mr. Bower did not provide any further information in response to Mr Lewis's correspondence. His application was refused on 28 May 2016 as he '...did not complete an initial enlistment period of two years ...'.² Mr Bower enlisted in the Citizens Military Force (CMF) on 25th July 1959³ for a two year obligation and discharged 'at own request' on 28 February 1961, having served one year, seven months and four days.

2. On 3 October 2016, Mr Bower lodged an application for review of the decision of the Directorate.⁴ In his application for review Mr Bower claimed that he discharged 'not to marry or other options' - but to join the Australian Merchant Navy, where he spent 36 years. He claimed that had a state of war arisen in that period, he would have served in any way needed to defend his country.

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 3.⁵ Included in the defence awards set out in Part 2 is the ADM. Therefore, the Tribunal has jurisdiction to review the decision by the Directorate to refuse to recommend Mr Bower for the ADM. 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. In accordance with its *Procedural Rules 2011*, on 13 October 2016 the Tribunal wrote to the Secretary of the Department of Defence regarding Mr Bower's application for review and requested a report on the material questions of fact and the reasons for the decision made in relation to the ADM.⁶ A written submission was received from the Directorate on 28 November 2016.⁷ The Defence submission was

¹ DHA 2243265 dated 25 September 2015

² DHA 2243265 dated 28 May 2016 to Mr Bower

³ Attestation form and Discharge form

⁴ Application for Review of Decision dated 3rd October 2016

⁵ Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016.

⁶ DHAAT OUT/2016/420 to the Secretary dated 13 October 2016

⁷ DH&A OUT/2016/0199 dated 24 November 2016

provided to Mr Bower on 29 November 2016⁸ seeking his comments within 20 working days. On 9th February 2017 a reminder letter was sent from the Tribunal to Mr Bower again inviting him to respond to the submission from Defence.⁹ On 10 February 2017 Mr Bower replied by e-mail stating that he did not wish to make any further comment on the Defence report.¹⁰

5. The Tribunal met on 1 June 2017 and considered the material provided by Defence and Mr Bower. The Tribunal confirmed the scope of the review, the decision under review, jurisdiction and drafted questions for the subsequent hearing.

6. The Tribunal heard oral evidence from Mr Bower in a telephone hearing on 27 June 2017. The Respondent was not represented at the hearing.

Mr Bower's Service Record

7. Mr Bower's service record states that he joined the Citizen Military Forces (CMF) at the age of 17 for an initial enlistment period of two years. Mr Bower served with 1 Infantry Battalion, 1st Royal New South Wales Regiment, Commando Section.

8. Mr Bower's service record confirms that he served one year, seven months and four days efficient service towards the ADM.¹¹

9. Mr Bower's service record also confirms that he was discharged under Australian Military Regulation 176 (1)(a) 'at own request' on 28 February 1961.

Australian Defence Medal

10. 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.

11. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.¹² 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*

⁸ DHAAT OUT/2016/490 to Mr Bower dated 29 November 2016

⁹ DHAAT OUT/2017/051 to Mr Bower dated 9 February 2017

¹⁰ Email from Mr Bower to DHAAT dated 11:07am 14 February 2017

¹¹ DHA/OUT/2016/0199

¹² *Commonwealth of Australia Gazette* No. S48, dated 20 March 2006

(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 ...

12. On 6 February 2013, the Chief of the Defence Force (CDF) made a determination that outlined the minimum annual periods of service by members to be deemed as efficient service for qualification for the award of the ADM.¹³

The Defence Submission

14. The Defence submission dated 24 November 2016 indicates that the decision to refuse Mr Bower's claim was made by an authorised delegate.¹⁴ The submission indicates that the appropriate eligibility criteria was used in assessing Mr Bower's application - *Commonwealth of Australia Gazette* No. S48, dated 30 March 2006 and the subsequent determinations made by the CDF.

15. The submission identifies that Mr Bower was required to complete an initial enlistment period of two years to be deemed to have completed an initial enlistment period. The submission states that on 28 May 2016, the Directorate advised Mr Bower that he was not eligible for the ADM as he did not complete his initial enlistment period; was not discharged as medically unfit and was not discharged due to a prevailing discriminatory Defence policy.

16. The Directorate, in undertaking its initial assessment requested Mr. Bower's service records from the Defence Archive Centre – Melbourne. These records were examined by DH&A Service Assessment and Awards medals assessor, Mr Michael Lewis. On 25 September 2015, Mr Lewis wrote a 'procedural fairness letter' to Mr Bower requesting any additional information that might assist in the assessment of his eligibility for the ADM. Mr Bower did not provide any additional evidence or information.

17. On 28 May 2016, the Directorate advised Mr Bower by letter that he was not eligible for the ADM as he did not complete his initial enlistment period.¹⁵

¹³ *Australian Defence Medal Regulations* - Determination by the CDF dated 6 February 2013

¹⁴ DH&A OUT/2016/0199 dated 24 November 2016

¹⁵ DH&A OUT/2016/0199 dated 24 November 2016

18. The Defence Submission indicates that on receipt of Mr Bower's 2016 application to the Tribunal, a reassessment of his eligibility for the ADM was conducted by the Directorate, which again found that he was ineligible for the award.

Mr Bower's Claim for the ADM

19. In his application to the Tribunal Mr Bower stated:

I resigned, not to marry or the other options, but to join the Australian Merchant Navy, where I spent 36 years. Had a state of war arisen in that period, I would have served in any way needed to defend my country in an Australian Merchant ship. I have a Merchant Navy Service Medal with clasp.¹⁶

20. During the hearing Mr Bower confirmed that he had received a copy of the Department of Defence submission dated 24 November 2016; that he had received further correspondence from the Tribunal seeking his comments and that he had replied by email to the Tribunal on the 10 February 2017 informing the Tribunal that he did not wish to make any further comment on the Defence report.

21. Mr Bower confirmed that he enlisted in the CMF on 25 July 1959 for a two year obligation and discharged on 28 February 1961 at his own request having served one year, seven months and four days, in order to join the Australian Merchant Marine

22. Mr Bower confirmed that he had served for 36 years in the Merchant Navy and that he had been awarded a Merchant Navy Service Medal with clasp.¹⁷

23. When invited by the Tribunal to explain why he believed he was entitled to the ADM, Mr Bower explained that when he applied to join the RSL in Port Macquarie he sent his service records to the sub-branch for consideration. He was advised by the sub-branch that he was eligible to join the RSL because of his defence service, and that he might also be eligible for 'a defence medal' for that service. He said that this prompted his application for the ADM. This was because of the view that leaving the CMF in his circumstances might have made him eligible for the ADM.

24. At the Hearing the Tribunal informed Mr Bower that it had sought further advice from Defence as to whether there has been any policy decision, review or any record of a defence award having been considered or awarded to members of the Australian Merchant Navy. Mr Bower was informed that their email response dated 23 June 2017, again confirmed that the Merchant Navy is not listed as an arm of the Defence Force and therefore service in that organisation does not qualify towards the award of the ADM.¹⁸ The Tribunal noted however, that during the Second World War, certain service with the Australian Mercantile Marine did count towards campaign awards, such as the Australia Service Medal 1939-1945.

¹⁶ Application to Tribunal for Review of Decision by Mr Bower.

¹⁷ This is not an award within the Australian Honours and Awards System.

¹⁸ Email from Mrs Augustine to Tribunal 2.32pm, 23 June 2017

The Tribunal's Consideration

25. **General.** The Tribunal is required to review decisions 'on the merits'. This requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.¹⁹ The merits review revolves around the evidence and accordingly, the Tribunal conducts an independent review, with values, expertise, methods and procedures of its own, and not those of the decision-maker.

26. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.²⁰ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof, and there is no presumption that the original decision was correct. The Tribunal is bound to make what it regards as the 'correct or preferable' decision and must reach a decision that is legally and factually correct.

27. **The Legislation.** The Tribunal noted that the Directorate in its assessment of Mr Bower's application had used as the legal basis for its decision the *Australian Defence Medal Regulations 2006* and the subsequent CDF Determinations. The Tribunal was satisfied that the Directorate had used the correct legislation in the consideration of Mr Bower's application.

28. **The Credibility of Mr Bower's Evidence.** The Tribunal considered that Mr Bower's evidence was sincere. His account of his service experience and the advice given to him regarding his possible eligibility for a medal by the RSL was credible.

29. **Mr Bower's Service Record.** Relying on the service record, the Tribunal was satisfied that Mr Bower enlisted in the CMF on 25 July 1959 for a two year obligation and discharged on 28 February 1961, at his own request, having served one year, seven months and four days.

Finding in Relation to Mr Bower's Eligibility for the ADM

30. The Tribunal finds that Mr Bower did serve with the Defence Force when he undertook his CMF service. However he did not complete his initial enlistment period. After resignation, Mr Bower then served with the Australian Merchant Navy, however such service does not count as service with the Australian Defence Force.

31. The Tribunal finds, based on the evidence that Mr Bower is not eligible for the ADM as he does not meet the eligibility criteria for the award, set out in *Australian Defence Medal Regulation 4(1)*.

32. The Tribunal finds that the decision of the Directorate is the correct decision.

¹⁹ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2

²⁰ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

DECISION

33. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Douglas Lewis Bower is not eligible for the award of the Australian Defence Medal.