



Australian Government

Defence Honours and Awards Appeals Tribunal

Ward and the Department of Defence [2018] DHAAT 24 (18 October 2018)

File number 2018/026

Re **Rodney Joseph WARD**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Mr David Ashley AM

Appearances Mr Ward by telephone
Ms A Augustine, Directorate of Honours and Awards
Mr M Jordan, Directorate of Honours and Awards

Hearing 4 October 2018 in Canberra

DECISION

On 18 October 2018 the Tribunal decided to affirm the decision under review.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – Force Structure Review – invitation to take early discharge - period of qualifying service strictly calculated - no discretion

LEGISLATION

Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette No. S48, 30 March 2006.

REASONS FOR DECISION

Introduction

1. The Applicant, Rodney Joseph Ward applied to the Directorate of Honours and Awards in the Department of the Defence (the Directorate) for an Australian Defence Medal (ADM) in recognition of his service with the Australian Regular Army (Army). He was informed, on 21 March 2018, that he did not meet the eligibility criteria for the award, and now seeks review of that decision by this Tribunal.

Eligibility Criteria for the Australian Defence Medal

2. The ADM was instituted 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. Regulations were set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.¹ As a result of the amendment, the minimum period of service (with limited exceptions) became four years. Regulation 4 of the amended Regulations states, relevantly:

(1) The Medal may be awarded to a ... 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) ...;
 - (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 ... may determine that a period of the member's qualifying service is efficient service.²

3. The Chief of the Defence Force, in accordance with his delegation, made determinations under the ADM Regulations, relating to circumstances where the qualifying period is not met. In general terms, these related to national service after 1971, the ADF Gap Year Scheme, and discharge for a non-compensable injury. None of those circumstances is relevant to the present application.

4. The Tribunal is required to undertake a merits review and is bound to apply the eligibility criteria which applied at the date of the decision under review.³ The Tribunal has no discretion in applying the eligibility criteria referred to above.

¹ *Australian Defence Medal Regulations 2006*, Commonwealth of Australia Gazette No. S48, 30 March 2006.

² *Ibid*

³ Defence Act 1903: s 110VB(6)

Issue for the Tribunal

5. There was no contention that the mitigating provisions in Regulation 4(d)(ii) applied to Mr Ward; his discharge was not due to his being medically unfit due to a compensable impairment.

6. The issue for the Tribunal was whether Mr Ward completed an initial enlistment period, or served for a period of not less than 4 years, or did not complete 4 years service due to a prevailing discriminatory Defence policy.

Did Mr Ward complete an initial enlistment period?: Reg 4(1)(a)

7. From Mr Ward's service records, on 20 February 1990 Mr Ward enlisted in the Army with an enlistment period of four years. At the hearing Mr Ward confirmed that this was accurate.

8. On 31 August 1990, Mr Ward was posted to 6th Battalion, the Royal Australian Regiment (6 RAR) and was posted to Butterworth, Malaysia from 6 June 1992 to 30 August 1992 and 1 March 1993 to 1 April 1993. On 22 June 1993, Mr Ward signed a statement advising of his intention to discharge following completion of his four years service; that is, he would separate from the ADF on 19 February 1994. On 21 July 1993, Mr Ward completed his 'Claim for Discharge' proforma with the intention of being discharged at 2 Military District on 21 (sic) February 1994, which would have completed his enlistment period.

9. On 11 August 1993, the Soldier Career Management Agency, (SCMA) Melbourne, sent the completed discharge order to 6 RAR. The discharge order authorised Mr Ward's request to be discharged on 21 February 1994, "at the expiration of the period for which he was enlisted". He did not elect to serve in the Reserves.

10. Mr Ward gave evidence that in about early August 1993 someone, possibly a sergeant, asked the assembled company on parade, if, following the restructure of 6 RAR which would lead to a significant downsizing of the Battalion, anyone who was due for discharge in the coming months, would consider taking an early discharge. He understood this would "help the Battalion". Mr Ward said that, until then, he had proposed to take his Christmas leave in his home state of New South Wales, and would then return to 6 RAR, which was then based in Enoggera, Queensland, for several weeks, before returning to 2 Military District (NSW) where he had elected to be discharged.

11. On 12 August 1993, Mr Ward chose to be discharged on 5 December 1993. The Commanding Officer of 6 RAR, LTCOL M Evans, endorsed Mr Ward's request for an early discharge, stating "early discharge is recommended to comply with the Force Structure Review and the downsizing of 6 RAR." SCMA sent a fresh discharge order to 6 RAR, which

superseded the order of 11 August 1993. There he was erroneously described as “having claimed his discharge before attaining retiring age”.

12. Mr Ward said that he was a young soldier and that he had been trained to take orders, so had accepted the offer of early discharge when made by someone in authority. The Tribunal does not accept this assertion; Mr Ward made the election to take early discharge and there was no contention that he was ordered to do so.

13. In its submission Defence provided a brief history of the Government initiated Force Structure Review (FSR) and the introduction of the Army Ready Reserve Scheme (ARRS). In 1992, the implementation of the FSR required 6 RAR to transition to a Ready Reserve Motorised Battalion structure, involving a reduction of about 5000 ARA positions. The Tribunal accepts that Mr Ward may have been encouraged to take early discharge and that voluntary reduction in numbers may have indeed assisted the Battalion as he claimed.

14. Contrary to Mr Ward’s assertion in his Application for Review he, and others, volunteered as they were “about to go on Christmas leave”, the application for early discharge was made in August 1993. There was no evidence that there was any element of urgency in making the decision. Mr Ward referred in his Application for Review to the inconvenience of having to go to his home on the south coast of NSW for Christmas leave, return to 6 RAR and discharge again from Brisbane (sic). The Tribunal finds that this “inconvenience” was likely to be a motivating factor in his decision to discharge earlier than had originally been planned; he seized the opportunity, having already made his mind to leave the ADF.

15. In his Application for Review and in his evidence Mr Ward said that he, and others, were not told there would be any consequences for this decision and it would affect them in any way; he said he would have stayed on had he known. When asked by the Tribunal about the “consequences”, Mr Ward said he referred to the failure to be eligible for the ADM because of early discharge and possible repercussions in relation to his superannuation. As was pointed out at the hearing, the ADM only came into effect in 2006, so any “consequences” could not reasonably have been foreseen. Considerations in relation to superannuation are not matters within the Tribunal’s jurisdiction.

16. Mr Ward submitted at the hearing that his initial enlistment period had, effectively, been modified because of the restructure of 6 RAR. In support of this contention he said, at that time, it was highly unusual for members to be permitted to discharge prior to the conclusion of an enlistment period other than for medical reasons. The Tribunal does not accept that permitting early discharge amounted to modifying Mr Ward’s responsibility to complete 4 years service; there was no evidence before the Tribunal that Mr Ward’s initial period of enlistment had in fact been modified.

17. The Tribunal finds that Mr Ward did not complete his initial enlistment period.

Did Mr Ward serve for a period of not less than 4 years?: Reg 4(1)b)

18. From his service record Mr Ward's service dated from 20 February 1990 until 5 December 1993.

19. The Tribunal finds Mr Ward served for 3 years 9 months and 16 days, as Defence had calculated. Mr Ward was therefore about 2.5 months short of the 4 year requirement set out in the eligibility criteria. The criteria for the ADM are strict and no discretion is available to a decision-maker in Defence, or on review, to this Tribunal.

Was Mr Ward unable to serve 4 years due to a prevailing discriminatory Defence policy?: Reg 4(1)(d)(iii)

20. At the hearing Mr Ward contended that there was a discriminatory policy that meant that in accepting the offer of early discharge he had been discriminated against with respect to eligibility for the ADM. Defence submitted, and the Tribunal accepts, the policies to which the sub-Regulation refers are those such as in relation to marriage (females only) and pregnancy. In any event, the Tribunal does not accept that Mr Ward was *unable to serve*, but instead *chose* not to serve for the full 4 years.

Conclusion

21. Mr Ward did not serve his initial period of enlistment, nor the requisite 4 years, nor was he unable to continue to serve. No other provision applies.

22. For the reasons given above, the Tribunal could not be satisfied that he met the eligibility criteria for the ADM.

DECISION

23. The Tribunal decided to affirm the decision under review.