



Australian Government

Defence Honours and Awards Appeals Tribunal

Green and the Department of Defence [2019] DHAAT 14 (20 November 2019)

File Number(s) 2019/009

Re **Mr Robert John Green**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Josephine Lumb (Presiding Member)
Brigadier Mark Bornholt, AM (Retd)

Hearing Date 4 November 2019

DECISION

On 20 November 2019, the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence dated 22 December 2010, that Mr Robert John Green is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – enlistment period – reasons for cessation – limited exceptions to mandatory period of efficient service – no discretion

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2).

Defence Regulation 2016 – s 36.

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

REASONS FOR DECISION

Background

1. The Applicant, Mr Robert John Green seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) dated 22 December 2010, that he is not eligible for the award of the Australian Defence Medal (ADM).

2. Pursuant to s.110VB of the *Defence Act 1903* the Applicant sought review of that decision in an application to the Tribunal dated 4 April 2019.¹ There was no issue as to jurisdiction.

Conduct of the review

3. In accordance with its *Procedural Rules 2011*, on 23 April 2019 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Green's application for review and requested a report on the material questions of fact and the reasons for the decision made in relation to Mr Green's recognition.²

4. On 3 June 2019, the Defence Submission recommending that the decision to not recommend Mr Green for the ADM be affirmed was received.³ Mr Green's comments on the Defence Submission were received on 11 July 2019.⁴ A hearing was held in Canberra on 4 November 2019 at which Mr Green appeared by conference telephone. The Respondent was represented by Ms Jo Callaghan, Assistant Director, Directorate of Honours and Awards of the Department of Defence.

Eligibility criteria for the Australian Defence Medal

5. The ADM was instituted by Her Majesty, Queen Elizabeth the Second by Letters Patent on 20 March 2006, *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 *Australian Defence Medal Regulations 2006* (the Regulations) are set out in the Schedule attached to the Letters Patent and were subsequently amended, notably to reduce the period of qualifying service to 4 years. Regulation 4 of the amended Regulations provides:

¹ Application for Review of Decision by Mr Green dated 4 April 2019. DHAAT/IN/2019/035.

² DHAAT letter DHAAT/OUT/2019/107 to the Secretary of Defence dated 23 April 2019.

³ DH&A letter DH&A/OUT/2019/0024 to the Tribunal dated 3 June 2019 covering the Defence Submission.

⁴ Email to the Tribunal from Mr Green dated 11 July 2019.

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

6. Following an Inquiry by the Defence Honours and Awards Tribunal in 2009 the Chief of the Defence Force made a determination on 8 November 2009 pursuant to Regulation 4(2).⁵ 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.

Does the Applicant meet the eligibility criteria for the award of the ADM?

7. There was no dispute that Mr Green enlisted in the Australian Regular Army Supplement (ARAS-O) on 8 July 1970 for an initial enlistment period of three years.⁶

⁵ *Australian Defence Medal Regulations 2006* - Determination by the CDF dated 8 November 2009.

⁶ Record of Service – 314190 – Robert John Green.

8. The Nominal Roll of Vietnam Veterans⁷ records that Mr Green served for a total of 232 days in Vietnam with the following units:

1 Australian Reinforcement Unit: from 22/07/1971 to 12/08/1971;
3 RAR from 18/08/1971 to 04/10/1971; and
4 RAR from 05/10/1971 to 04/03/1972.

9. There was no dispute that, on return from Vietnam in March 1972, Mr Green remained posted to the 4th Battalion which was garrisoned in Townsville. On 8 September 1972 Mr Green made application for discharge at own request.⁸ His stated reasons for requesting an early discharge were to support his fiancé who was suffering emotionally due to his absences. Mr Green was given approval on 10 October 1972 to be discharged under AMR 176 (1) (A) ‘having requested his discharge’. Mr Green therefore rendered a total period of two years, three months and two days’ service.

10. In his Application for Review, Mr Green acknowledged that he did not meet the minimum enlistment period required to be awarded the ADM. However, he asked the Tribunal to consider that his early separation was “*essentially because of [his] emotional state following return from Vietnam*”.⁹

11. In an email to the Tribunal dated 11 July 2019¹⁰ Mr Green elaborated on his contention that his early discharge was due to a combination of mental and physical health challenges that he was facing in 1972:

... upon return from Active Service in 1972, I was emotionally unwell/unstable and as a result, physically unwell and that was ultimately a contributing factor for my request for early discharge. I am fully aware that the above statement about my health is in conflict with comments/entries made by Army Medical staff at that time. [Findings and treatment arranged by civilian doctors over the ensuing years following discharge, vindicated myself completely].

12. During the hearing, Mr Green gave oral evidence consistent with his contentions as outlined above. He described his return to Australia and his reluctance to go to Townsville. He noted the vast majority of his fellow soldiers and mates were National Servicemen who left the Army on return from Vietnam leaving him as a senior soldier in the Battalion expected to train and mentor new soldiers. He sought alternative employment as a driver and throughout this period said that he was ‘messed up’ and made some ‘serious blunders’.¹¹ Mr Green expressed his disappointment at the

⁷ Nominal Roll of Vietnam Veterans – <http://www.vietnamroll.gov.au/VeteranDetails> accessed 7 March 2019.

⁸ AAF-A196 Application for Discharge dated 8 September 1972 – Private R.J. Green 4 RAR.

⁹ Application for Review of Decision by Mr Green dated 4 April 2019. DHAAT/IN/2019/035.

¹⁰ Email to the Tribunal from Mr Green dated 11 July 2019.

¹¹ Oral Evidence by Mr Green at the hearing on 4 November 2019 in Canberra.

comments which were made about him by the unit Adjutant in his various applications. He claimed the Adjutant and others in the unit who had not been with the Battalion in Vietnam were prejudiced against those who returned and generally made life difficult for them or harassed them. He asserted that a lack of support from some of his unit superiors in Townsville exacerbated an already difficult set of personal circumstances and this had contributed to his decision to request an early discharge.

13. Following the hearing, Mr Green submitted to the Tribunal a number of medical records in support of his contention that his poor mental and physical health resulted in him requesting early discharge in 1972. In particular, a report from Consultant Psychiatrist Dr Norman Pomorin dated 27 August 2012 opines that Mr Green suffered from a Generalised Anxiety Disorder and further that:

The onset of his condition was evident within six months of his return to Australia from his service in Vietnam ... he sought medical help for it on the 11/4/72.

There appears to be no event before, during and after service which had any impact on the development of Mr Green's Generalised Anxiety Disorder.

14. **The Defence Submission.** In summary, the Defence submission was that Mr Green did not complete his three-year enlistment period, nor did he discharge as a result of being medically unfit due to a compensable impairment or due to a prevailing discriminatory Defence policy. Accordingly, Mr Green could not be recommended for the ADM as he did not meet the conditions for the award or the exceptions to the eligibility criteria. The Defence Assessment Report dated 8 May 2019 states, inter alia, that:

In Mr Green's application to [the Tribunal] for the ADM, dated 4 April 2019, he informed that the reason for his discharge was due to his emotional state following his return from Vietnam.

Examination of Mr Green's service record does not indicate that he was suffering from psychological or emotional issues following his return from Vietnam.

Mr Green's service record shows that since his return from Vietnam in March 1972, he has tried to obtain a compassionate reposting from Townsville to either Eastern or Southern Command to be with his fiancé, or divorced parents who were both in poor health and were living separately in Sydney and Melbourne.

...

In Mr Green's statement in support of an early discharge of 8 September 1972, he mentions that he will only be a "nuisance and hindrance" if he were to remain in the Army during the time left to complete his engagement. Further he

realized that he “cannot carry out a soldier’s duties without severely upsetting” his fiancé.

...

On 10 October 1972, Mr Green’s application for discharge was given approval by the Assistant Adjutant Lieutenant Colonel D Quinn under the reason AMR 176(1)(A) – Having requested his discharge.¹²

Tribunal consideration

15. 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.¹³ 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.

16. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.¹⁴ 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 decision was correct.¹⁵ 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.

17. The relevant Regulations (paragraph 5 above refers) set out the requirements to be met in order to be eligible for the ADM. Pursuant to Reg 4(1)(a), (b) and (c) the Applicant needed to have given qualifying service that is effective service in the Australian Defence Force by completing his initial enlistment period, or alternatively, have served for at least four years. It is not disputed that Mr Green did not complete his initial enlistment period and nor did he serve for a period that totalled four years.

18. The Tribunal acknowledges that Mr Green was facing a difficult set of circumstances following his return from active service in Vietnam, involving a combination of emotional and mental health challenges, as well as an understandable desire to be located with his then fiancé. The Tribunal accepts that it was a combination of these factors that prompted Mr Green’s request for early discharge.

19. However, Regulation 4(1)(d) clearly sets out only three - very limited - exceptions to the requirement that a person must serve their initial enlistment period or a period of four years in order to qualify for the ADM. The Tribunal notes the evidence of Consultant Psychiatrist Dr Pomorin which diagnosed the condition of Generalised Anxiety Disorder but notes that this diagnosis was provided in 2012 some 40 years after

¹² Directorate of Honours and Awards Tribunal Assessment Working Paper dated 8 May 2019.

¹³ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2.

¹⁴ Pearson, Linda, “Merit Review Tribunals”, in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68.

¹⁵ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

the period in question. There is no actual evidence before the Tribunal from the 1972 period which points to Mr Green suffering from or being treated for any form of mental health condition at the time he made application for early discharge. In the absence of this type of evidence it is not possible to make a judgment as to whether or not Mr Green could have been considered for a medical discharge in 1972.

20. Further, the Tribunal has no discretion to waive the requirement to have served his initial enlistment period despite Mr Green's stated reasons for his inability to continue his service. The Tribunal notes Mr Green's assertions that the criteria for the ADM are 'inequitable and wrong' but as discussed at the hearing, this is not the forum to seek redress of the Regulations.¹⁶ The Tribunal is required by law to apply the Regulations.

21. The Tribunal takes this opportunity to thank Mr Green for his service and further commends him for the constructive manner in which he has engaged in the review process, as well as his ongoing advocacy efforts in support of the broader veteran community.

TRIBUNAL DECISION

22. The Tribunal affirms the Directorate's decision dated 22 December 2010 that Mr Robert Green is not eligible for the award of the Australian Defence Medal.

¹⁶ Oral Evidence by Mr Green at the hearing on 4 November 2019 in Canberra.