



Australian Government

Defence Honours and Awards Appeals Tribunal

Lynch and the Department of Defence [2020] DHAAT 05 (2 April 2020)

File Number 2019/019

Re **Mr Ivan Andrew Lynch**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Major General Simone Wilkie AO (Retd)

Hearing Date 20 February 2020

DECISION

On 2 April 2020, the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Ivan Andrew Lynch is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – enlistment period – claim of inaccurate recording of service dates – reliability of evidence - limited exceptions to mandatory period of efficient service - no discretion – whether discharged as medically unfit due to a compensable impairment.

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 Ivan Andrew Lynch, seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (Defence) dated 23 May 2019 that he is not eligible for the award of the Australian Defence Medal (ADM).
2. Pursuant to s.110VB of the Defence Act 1903, Mr Lynch sought review of that decision in his application to the Tribunal dated 26 July 2019. There was no issue as to jurisdiction.
3. On 20 November 2019 Mr Lynch provided written consent for the Tribunal to access his Department of Veterans' Affairs (DVA) medical files. On 22 November 2019 Mr Lynch was provided with his Defence Reserve Pay Records. Later that day he advised via email that he had served years at 1st Commando Regiment (1 Cdo Regt) at Mosman but had no paperwork as his ex-wife had destroyed his records.
4. A hearing was held on 20 February 2020. Defence was represented by Mr Wayne Parker, assisted by Mr Brett Mitchell. Captain Michael Hall (retired) appeared as a witness by telephone. Mr Lynch did not appear by conference telephone as arranged; when he was unable to be contacted despite repeated attempts, the matter proceeded in his absence.
5. After the conclusion of the hearing the Acting Executive Officer of the Tribunal was able to contact Mr Lynch and asked Mr Lynch if he intended to continue with his application for review or if he wished to withdraw his application. Mr Lynch replied by email: 'either make a yes or no decision.' Mr Lynch later advised via email that he had had to take his wife to hospital and was therefore unable to participate in his hearing. This personal difficulty was not mentioned prior to the hearing (so that appropriate alternative arrangements could have been made), nor when contacted after the hearing. No medical certificate or other evidence was provided as to his wife's condition such as might have precluded the Applicant's participation in the hearing.
6. In fairness to the Applicant, the Tribunal provided him with a recording of the proceedings and invited him to comment. In addition, the Tribunal had asked the Respondent's representative at the hearing about material which had been supplied by Mr Lynch, about which it had reservations as to its authenticity. (Discussed below). Mr Lynch's response was only to the effect that that it was clear that he had served more than four years, including overseas service. Mr Lynch did not address the Tribunal's concerns.

Eligibility criteria for the Australian Defence Medal

7. The ADM was instituted by Her Majesty The Queen 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 four years. Regulation 4 of the amended Regulations provides:

(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.*

Issue for the Tribunal

8. Mr Lynch contended that he satisfied the criteria set out in Regulation 4(1)(b) in that he had served more than four years in the Army Reserve. As best the Tribunal could make out, he submitted, in the alternative, that pursuant to Regulation 4(1)(d)(ii), if he were found not to have served for four years, it was because he had been discharged as medically unfit due to a compensable impairment.

9. Consequently, the Tribunal needed to decide:

- a. Whether Mr Lynch served more than four years;
- b. If not, was that because he had been discharged as medically unfit due to a compensable impairment?

Did Mr Lynch serve more than four years?

10. Defence contended that Mr Lynch enlisted in the Australian Army Reserve (ARES) on 26 September 1990 for an enlistment period of four years and a requirement to serve a minimum of 26 days per enlistment year. Defence records indicate that Mr Lynch discharged at his own request on 1 August 1993, after two years, ten months and seven days service.

11. In his application for review, Mr Lynch claimed that he enlisted in the ARES at 2nd Commando Company (2 Cdo Coy) on 12 June 1989 and discharged from 1 Cdo Regt on 18 July 1996. Mr Lynch contends, therefore, that both his enlistment and discharge dates are inaccurate.

12. In his application for review the Applicant claimed he had served at Gan Gan in 1989 and 1991, Williamstown in 1991, Singleton in 1992, Point Cook in 1992, Curtin in 1992 during Exercise K92 and Exercise K95 in 1995, Puckapunyal in 1992, Swan Island in 1993 and 1994 and Mosman in 1994 and 1996. He also claimed that he assisted in OP SOLACE and OP LAGOON loading HMAS *Tobruk* in December 1992. In his application for benefits from DVA received 12 March 2012 he claimed that he served in Timor from 15 March to 4 June 1991 and in Africa (sic) between 18 August and 3 June 1994.¹ He claimed in that form that he enlisted on 6 August 1989 and discharged on 10 October 1996. The Applicant also claimed to have undertaken counter terrorist training with Kopassus (the Indonesian Special Forces) in Malaysia in 1992/3.

Start date

13. The Tribunal had before it a number of documents which might suggest different dates for the commencement of the Applicant's service, in addition to the date relied on by Defence, namely, 26 September 1990, as appears on the Applicant's Record of Service,² extracted from his Personnel file. The Tribunal observes that the Applicant himself noted that date in a document dated 8 August 1991, in response to a Notice to Show Cause the Applicant wrote "... *Application for Enlistment which I signed on the 26 Sep 90 ...*"³

14. A Clothing Store Record records the issue of a belt and webbing, possibly in 1989.⁴ Defence was unable to explain the date entry, which was in a format not utilised by Defence. Captain Hall (see below) said that kit could have been issued (early) in order to participate in a basic training course.

15. In support of his application Mr Lynch provided a copy of a 'Statement of Defence Force Reserve Service' for the period 1 July 1989 to 30 June 1992 dated 18 July 1992, which recorded that *during the period 1 July 1989 to 30 June 1992 the Applicant had completed 148 days Defence Force Reserve service.*⁵ On 27 February 2020 Defence informed the Tribunal that the document was not located in Mr Lynch's personnel file, nor any other of his service records. On its face, the document contains

¹ Note for File, Qualifying Service, Department of Veterans' Affairs, 15 June 2012.

² Form PH 139, Record of service – Army, 3209178, I. A. Lynch.

³ Response to notice to show cause – 3209178 – PTE I.A. Lynch, 8 August 1991.

⁴ Combat and Field Clothing and Individual Equipment/Protective Clothing, Record of service – Army, 3209178, I. A. Lynch.

⁵ Statement of Defence Force Reserve Service, dated 18 July 1992.

some anomalies. For example, there are some hand-made alterations; a Major has signed in an adjutant's signature block; it purports to have been created by the OC of 2 Cdo Coy but does not provide a name. The Tribunal was doubtful about the authenticity of the document, but in any event, took the view that, even if it accurately reflected that Mr Lynch had undertaken the stated amount of reserve service, the document did not lead to the conclusion that Mr Lynch had in fact served from 1 July 1989.

16. A Course Report extracted from the Applicant's personnel file indicates his participation in a course which commenced on 1 August 1990 and concluded on 9 July 1991.⁶ The anomaly in the dates of the course, the Tribunal considered, was because the start date reflected the general commencement of the course and did not, of itself, mean the Applicant had in fact attended from that date. It was also possible that the course was modularized and the Applicant joined on completion of his recruit course.

17. From the ARES Company Roll Book for 2 Cdo Coy for the period July to September 1990, Mr Lynch appears to have paraded for 3 hours on 19 September 1990, that is, prior to his enlistment date. The Respondent was unable to explain why Mr Lynch appeared to have paraded before his enlistment date, suggesting that the application commencement date had been adjusted from 19 to the 26 September 1990, potentially as a result of an additional medical review. Although there was no evidence of additional medical review, the Tribunal accepted that this was a possible explanation. The Applicant's medical assessment appears to have taken place on 22 September 1990, also before his enlistment date.⁷ The Tribunal considers this to be entirely reasonable, in that, should he have not passed that assessment, he could not have enlisted at all.

18. A Statutory Declaration was provided by the Applicant from Captain Hall, who wrote that Mr Lynch was 'one of his soldiers in 1989 at 2 Commando Company, 1st Commando Regiment'. Captain Hall told the Tribunal that, at that time, he had been the Dandenong Depot commander. They had advertised in the local papers for reservists and he had about 125 recruits, including Mr Lynch, following the campaign.

19. Captain Hall was referred to the Applicant's Application for Enlistment or Appointment form which was affirmed before him on 26 September 1990.⁸ On the form the date of the Applicant's affirmation appears to have changed from 19 to 26 September 1990. Captain Hall had no recollection of the date being changed from 19 to 26 September 1990.

20. Captain Hall told the Tribunal that the recruits had to be put through basic training (IET) before doing their 'green beret' training, and that those courses cannot

⁶ Course Report – Trade Certificate – Retest Report – Army, Record of service – Army, 3209178, I. A. Lynch.

⁷ Entry Medical Examination Report, 22 September 1990, Record of service – Army, 3209178, I. A. Lynch.

⁸ Application for Enlistment or Appointment - Record of service – Army, 3209178, I. A. Lynch.

be undertaken concurrently. The IET course is of 2-3 weeks duration and the subsequent part time commando course is spread over about 18 months and involved specialist courses such as parachuting.

21. Captain Hall was referred to a copy of his 'show cause' minute addressed to the Applicant dated 19 July 1991 in which he had referred to Mr Lynch as undertaking IET at that time. He confirmed that Mr Lynch was undertaking IET in July 1991. Captain Hall told the Tribunal that although at the time he completed the statutory declaration he had thought it Mr Lynch enlisted in 1989, he conceded he possibly had an incorrect recollection.

22. Captain Hall said he and Mr Lynch served together for about 18 months to two years. He did not know where Mr Lynch served after that time, although he mentioned Sydney as a possibility. He had no recollection of Mr Lynch being in Gan Gan, Williamstown, Singleton, Pt Cook and Puckapunyal, as the Applicant had claimed. He explained the Applicant may have been in Singleton for a course, Pt Cook for an exercise and, Puckapunyal for either a course or an exercise. He had no knowledge of the Applicant having served in Timor or Rwanda.

23. *Conclusion in relation to start date.* The Tribunal does not accept that, as the Applicant claimed in his application for benefits from DVA, that he enlisted on 6 August 1989. Further, despite the various anomalies, the Tribunal did not consider there to be any basis for concluding that the Applicant commenced his service any earlier than the official enlistment date of 26 September 1990.

Cessation date

24. The material before the Tribunal includes a request for discharge at own request with an effective date of 1 August 1993.⁹ Mr Lynch's pay records record his discharge date as 1 August 1993.¹⁰ His last pay was on 1 September 1993, which the Tribunal finds is consistent with a discharge date of 1 August 1993.

25. Mr Lynch's name appears on the ARES Company Roll Book for 2 Cdo Coy for the period 1 October to 31 December 1993.¹¹ While there is a notation that he discharged on 1 August 1993, Defence could not explain why Mr Lynch's name remained on the Roll Book when, by the time of the relevant period, he had already discharged.

26. As to his claimed service after the date relied on by Defence, in his DVA application Mr Lynch claimed that that he discharged on 10 October 1996. There he also claimed that he served in Africa (sic) between 18 August and 3 June 1994. In his

⁹ Personnel Occurrence Report/ Routine Order Part 2 Single Name – Single Occurrence – Army Record of service – Army, 3209178, I. A. Lynch.

¹⁰ CENRESPAY – Wiped Reservist Pay Record as at 1 Jan 95, Record of service – Army, 3209178, I. A. Lynch.

¹¹ Australian Army, ARES Company Roll Book, 2 CDO Coy, October – December 1993.

application for review the Applicant also claimed he had served during Exercise K95 in 1995, and Mosman in 1994 and 1996. He claimed had participated in OP LAGOON, which was in 1994. He provided no evidence in relation to these claimed attendances.

27. In support of his application Mr Lynch also provided a minute purportedly signed by Lieutenant Colonel U.L.J. Hamilton-Smith, Commanding Officer of 1st Commando Regiment dated 7 October 1994 addressed to Mr Lynch attaching the training programme for the 1993/4 training year for 2 Cdo Coy.¹² The Tribunal was concerned as to why a programme for the 1993/4 year would have been distributed in October 1994, that is, at least well into, or perhaps even after, the period covered by the programme. On 27 February 2020 Defence informed the Tribunal that the minute was not located in Mr Lynch's personnel file, nor any other of his service records. Furthermore, Defence also advised that Lieutenant Colonel G.V. Ferguson was the 1st Commando Regiment Commanding Officer at the date of the minute, not Lieutenant Colonel Hamilton-Smith, who had left in April 1994. In any event, Defence informed the Tribunal, there was no 'Lieutenant Colonel U.L.J. Hamilton-Smith', only a Lieutenant Colonel M.L.J. Hamilton-Smith.

28. At the hearing the Tribunal expressed reservations about the document's authenticity. Despite the opportunity to comment on matters raised in the course of the hearing, the Applicant made no comment about the Tribunal's observations, and the Tribunal considers the document to be wholly unreliable.

29. As to the Applicant's claim of having served in Rwanda and Timor the Tribunal asked Defence where a record of such service might be recorded. Defence informed the Tribunal that there is a nominal roll for those who deployed to Rwanda and Mr Lynch's name was not there. As to Timor, the Defence representatives explained that Australia's military relationship was minimal at the time referred to by Mr Lynch. There was nothing located in Mr Lynch's records nor his summary of service in Personnel Management Key Solution ('PMKEYS') which reflected any overseas service or operational service. Similarly, there was nothing recorded in relation to Kopassus or service in Malaysia. Defence confirmed there was no record of an official passport on Mr Lynch's file. While not determinative, Tribunal formed the view it was likely that Mr Lynch would have been issued with an official passport if he had been deployed as he claimed. Even if this were not the case, the Tribunal considered it to be highly unlikely that no record was made in his personnel file or other service documents if he served overseas, as he claimed.

30. *Conclusion in relation to cessation date.* The Tribunal does not accept that the Applicant discharged on 10 October 1996, as he claimed in his application for benefits from DVA. Furthermore, the Tribunal did not consider there to be any basis for concluding that the Applicant ceased his service any later than the official discharge date of date of 1 August 1993.

¹² Australian Army Minute re: 2 CDO Coy Parade Card 1993/1994, 7 October 1994, provided by Mr Lynch.

Conclusion as to duration of service

31. The Regulations set out the requirements to be met in order to be eligible for the ADM. Pursuant to Regulation 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. Mr Lynch did not serve for his initial enlistment period and nor did he serve for a period that totaled four years. He therefore does not meet the eligibility criteria set out in Regulation 4 (1)a), (b) or (c). In these matters the Tribunal has no discretion.

32. Having come to that view, the Tribunal considered the Applicant's alternative submission.

Was the Applicant discharged as medically unfit due to a compensable impairment?

33. 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 only relevant exception is whether the discharge of the member was on the basis of being as medically unfit due to a compensable impairment: Regulation 4(1)(d)(ii). Mr Lynch did not elaborate upon this contention in the material he provided to the Tribunal, nor in his later comments.

34. Mr Lynch's DVA claim listed 3 medical conditions. There was no evidence that he had been discharged because of those conditions, nor any other medical conditions. On the other hand, there was clear evidence before the Tribunal that Mr Lynch had discharged at his own request. Consequently, the provisions of Regulation 4(1)(d)(ii) do not apply to Mr Lynch.

DECISION

35. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Ivan Andrew Lynch is not eligible for the award of the Australian Defence Medal.