



Australian Government

Defence Honours and Awards Appeals Tribunal

McInnes and the Department of Defence [2020] DHAAT 7 (30 April 2020)

File Number 2019/031

Re **Mr Peter Michael McInnes**
 Applicant

And **Department of Defence**
 Respondent

Tribunal Ms N Isenberg (Presiding Member)
 Ms J Schwager AO

Hearing Date Hearing on the papers

DECISION

On 30 April 2020, the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Peter McInnes is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – enlistment period – period of qualifying service strictly calculated - no discretion – limited exceptions

LEGISLATION

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

Commonwealth of Australia, Australian Defence Medal Regulations, Minimum Periods of Qualifying Service, dated 6 February 2013.

REASONS FOR DECISION

Background

1. The Applicant, Mr Peter McInnes, seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) dated 14 February 2019 that he is not eligible for the award of the Australian Defence Medal (ADM).

2. With the consent of the parties the Tribunal considered the application for review on the material before it, which included the application and supporting documentation, the Directorate's submissions, the Applicant's response to those submissions, and his final submission dated 20 April 2020.

Eligibility criteria for the Australian Defence Medal

3. 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.*

4. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006¹ 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.*

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

- (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.*

5. The Chief of the Defence Force (CDF), 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. CDF also made a Determination specifying the minimum number of remunerated days to satisfy annual periods of qualifying service.²

6. 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 and must apply the eligibility criteria referred to above.

Did the Applicant complete an initial enlistment period?: Regulation 4(1)(a)

7. The Applicant's Record of Service records that he enlisted in the Australian Army Reserve (ARES) on 24 January 1989 at Launceston, Tasmania, with an open-ended enlistment period.⁴ Consequently, Regulation 4(1)(a) does not apply.

Did the Applicant serve for period of not less than 4 years?: Regulations 4(1)(b) and (c)

8. The Applicant was enlisted to serve with 44 Transport Squadron, at Devonport, Tasmania. According to his records, on 20 August 1991 the Applicant was discharged under AMR 176 (1) (A) - 'At own Request'. The records show that his last parade was on 13 August 1991.⁵ He had served for a total of two years, six months, and 28 days.

9. In his application for review the Applicant wrote:

...

When I enlisted I had signed the enlistment papers when the opportunity arose the (sic) travel to Japan for work. The LT Col who was the recruiting officer in Hobart in Tasmania advised me to accept the offer, and apply for transfere (sic) to the in-active list for the duration of my time in Japan. This I did, however this was over-ridden by a Lieut. Anthony Dowling, sect ldr in 44 Tspt Sqn in Devonport, who in my absence discharged me without my knowledge. This only came to light upon my return from Japan and tried to revert to the active list.

10. In its submissions Defence provided a 44 Transport Squadron Discharge Questionnaire, which shows that the Applicant's then Officer Commanding recommended that he be posted to the IARES (Inactive Australian Army Reserves). In

² Determination Chief of the Defence Force dated 6 February 2013, Folios 29-30

³ Defence Act 1903: s 110VB(6)

⁴ Record of Service, Army, McInnes PM, 6101238

⁵ Personnel Occurrence Report, 15 September 1991, McInnes PM, 6101238.

the Discharge at Own Request form, annotated 'Inactive Reserves', completed and approved on 20 August 1991, the Applicant provided the following as his reason for the request:

As there are no jobs here, and my unit doesn't have enough work for me at present, I will be leaving for Japan to work as a barman and waiter.

11. Consistent with this reason is his completion of the Questionnaire to the effect he wished to transfer to the IARES because of 'work commitments' and 'no career progression'. The same form is annotated 'Inactive Reserves', as is the Personal Occurrence Report dated 15 September 1991 which completed the unit's administrative process with respect to the Applicant. The Personal Occurrence form referred to his last parade as being on 13 August 1991.⁶

12. Defence submitted that the Applicant's claim that he was discharged without his knowledge in lieu of transfer to the IARES service has no bearing on his eligibility for the ADM; in accordance with CDF's Determination dated 6 February 2013, which specifies that qualifying service for the ADM is service which is remunerated. IARES service, without attendance days, is not remunerated service, therefore it is not qualifying service for the purpose of the ADM. The Tribunal finds that irrespective of whether the Applicant was discharged or transferred to the IARES, he did not render any qualifying service after 20 August 1991.

13. In his response to the Defence submission the Applicant stated:

I was under the belief at the time of leaving active service and being given inactive status until my return from Japan, that I was required to return all military property at that time. Once reactivated that I could be re-issued equipment as required, I did not knowingly "Dismiss on Request". As I have not completed the required time to qualify for the ADM...

14. Further, he wrote:

I did reapply to the army reserve in Queensland in the mid 1990's, but other issues got in the way to stop me...

15. The Tribunal could locate no evidence in the relevant material extracted from the Applicant's file that he had applied to join the ARES in the mid 1990s. The material suggested he may have sought to join the RAAF reserves as a Signals Operator (Linguist) in 2001.⁷ In any event, the Applicant did not appear to assert that he in fact had undertaken additional qualifying service after he returned from Japan.

⁶ Personnel Occurrence Report, 15 September 1991, McInnes PM, 6101238.

⁷ Minute, Suitability Check for RAAF Ex Army Reserve PTE P.M. McInnes 6101238 TPT, Personnel File, McInnes PM 61013238.

16. The Applicant has apparently served in the Queensland Naval Brigade Officers Corps (Naval Brigade), but the Tribunal does not understand the Applicant to contend that this is qualifying service. The Tribunal notes, in any event, that the Naval Brigade is not part of the ADF, and any service by the Applicant is not relevant to a claim for the ADM.

17. The Tribunal finds that the Applicant's period of service was from 24 January 1989 to 20 August 1991. There was no dispute that the Applicant rendered efficient service during the reporting years 1989/90 and 1990/1. He did not complete the reporting year 1991/2.

18. Consequently, the Applicant's period of service falls short of the required four years. The requirement is strict. The Tribunal has no discretion in this regard, unless the Applicant's circumstances were to fall within the very limited exceptions, considered below.

Was the Applicant discharged as medically unfit due to a compensable impairment?: Regulation 4(1)(d)(ii)

19. In his response to the Defence report the Applicant stated:

As my record states I am registered with the Department of Veteran (sic) Affairs for deafness, making it difficult to hear during my time in service from 1989 after the incident that incurred this deafness, case file MCI0091-01.

20. Defence examined the Applicant's records and noted that there was no reference there to hearing loss which the Applicant had claimed was initially sustained when a rifle discharged on his right side (near his ear) while at a rifle range in Tasmania on 1 February 1989.⁸ It was noted that his recruit training was from 4-18 February 1989 and that there was a requirement to hit a target at 200 metres with the SLR.⁹ Defence considered it was possible that an incident occurred at that time, although there were no audiograms on his file, nor was there evidence of a discharge medical. It is unknown if hearing protection was available at that time. Although the Applicant referred to his deafness, for which he may have received some compensation, there was no contention, as far as the Tribunal could ascertain, that his discharge had been due to his alleged deafness. In fact, the Applicant had specifically stated in his Discharge at Own Request form that he was leaving to take up work as a barman and waiter in Japan, because there were no jobs (presumably referring to civilian employment) and insufficient work in the ARES. Consequently, the Tribunal finds that Regulation 4(1)(d)(ii) does not apply to the Applicant's circumstances.

⁸ Minute, Safety, Rehabilitation & Compensation Act 1998 6101238, Private Peter Michael McInnes, Personnel File, McInnes PM 61013238.

⁹ L1A1 Self Loading Rifle.

**Was the Applicant discharged due to a prevailing discriminatory Defence policy?:
Regulation 4(1)(d)(iii)**

21. In his response to the Defence submission the Applicant further stated:

...
I attended a drivers course from 29 July until 27 August 1989, the only participant to be failed? I attended the next drivers course from 9 June 1990, but was forced to leave early after constant bullying by NCO's, therefore, not being able to complete the course successfully. These courses were to obtain a "Medium Rigid" licence, I have since then successfully attained the greater "Heavy Rigid" licence in civilian life which proves I was capable of successfully completing the drivers course, but was pressured to leave it very early on during the course. This prevailing discrimination made it difficult to serve as well as be considered for any worthwhile positions within the army.

I expected that on my return to Australia I would be able to be reactivated at another location, therefore continuing my service. This treatment was disappointing and unexpected as we were to serve together for a common purpose. This bullying led to my decision to leave for work in Japan (once in a life-time opportunity). I did reapply to the army reserve in Queensland in the mid 1990's, but other issues got in the way to stop me. ...

22. The Applicant's contention appears to be that he was subjected to "constant bullying by NCOs", and had therefore not been able to complete a driving course successfully and was "pressured to leave [the course] very early on". He submitted that this was a "prevailing discrimination [policy which] made it difficult to serve as well as be considered for any worthwhile positions within the army". He said the "bullying led to [his] decision to leave for work in Japan".

23. In his final submission the Applicant wrote:

During the last drivers course a Corporal from 44 Transport Squadron (a firefighter in Civilian work) often bullied me to the point where I left the drivers course early while at the Devonport barracks. We had driven from 6 Military District Headquarters Brighton, where the drivers course started, this Corporal harassed me often during this course, but I did not see him hassle anyone else like he did me. While driving through the Tasmania from 6MD to Devonport he made the point of denouncing & yelling at me publicly in front of all the driver candidates & instructors to make an example of me. While at the Devonport barracks we were preparing for another drive when he sought me out to blast me again. By this time I had had enough & resigned from the course immediately, which seemed to appease him? I was surprised as he seemed quite friendly before the course when I had seen him interact with others. I did want to pass the drivers course, but feel I was victimised each course, & felt that I could have passed if not unnecessarily bullied during these courses. The first Medium Rigid drivers course I was the only driver to be failed & the last course I was harassed until I left. Later in Civilian life I gained my Heavy Rigid license, which proves I could have passed the army drivers course & been more useful to the unit I was in, having not been excessively harassed? Given this bullying, I felt discouraged to re-enlist after I returned from Japan to Australia. When I initially joined the army I was interested in a career in the Services, but the

excessive & unnecessary harassment disheartened me. Many of the NCO's were supportive such as Corporal Dave Allan, Sargent (sic) Grant Monday, Warrant Officer De Boer...etc. ...

24. The Applicant in fact undertook two driving courses – one which was conducted from 29 July to 27 August 1989, in which he failed one component,¹⁰ and another conducted from 9 to 24 June 1990. The report of the second course to which he referred, noted that he was insufficiently prepared for the course and that his performance was below average.¹¹ He was recorded as having difficulty in assimilating practical/theory instruction. He was said to have had difficulty with practical aspects of the course and was unable to accept constructive criticism. He was recorded as having sought permission to leave the course, which was granted. That the Applicant may subsequently have attained the greater 'Heavy Rigid' licence in civilian life does not persuade the Tribunal that he was, at the time he failed the Army course, "capable of successfully completing the drivers' course", as he claimed.

25. The Applicant asserted that he was pressured to leave the course. The Tribunal observes that the course date was from 9 to 24 June 1990, and the Applicant did not submit his Discharge at Own Request/transfer to the IARES until 14 August 1991. The Tribunal does not find a link between his leaving the ADF and his course performance.

26. The Tribunal did not consider the remarks about his course performance to provide sufficient evidence to constitute "bullying". Neither, was there any other material available to the Tribunal which would support the Applicant's contention that he was "constantly bullied". In his final submission the Applicant contended that during the last driver's course a Corporal from 44 Transport Squadron (a firefighter in Civilian work) *often* bullied him to the point where he left the course early. This claim was inconsistent with the course report. He claimed that the Corporal often harassed him, but no one else during this course. The Corporal, presumably an instructor, was said to have twice publicly denounced him and yelled at him in front of all the course participants and instructors. As a result, he said, he resigned from the course immediately, which, he said, seemed to appease the Corporal. He said that, given this bullying, he felt discouraged to re-enlist after he returned from Japan to Australia. However, this is inconsistent with his assertion that he only discovered he had been discharged, instead of being transferred to the IARES, upon his return from Japan and tried to revert to the active list.

27. Furthermore, for the Applicant to assert that he left the ARES because of bullying is inconsistent, in the Tribunal's view, with his description of working in Japan as a barman and waiter as a "once in a life-time opportunity".

28. In any event, the Tribunal does not consider that "bullying" constitutes a "prevailing Defence policy".

¹⁰ Course Report – Army, 27 August 1989, Personnel File, McInnes PM 61013238.

¹¹ Course Report – Army, 24 June 1990, Personnel File, McInnes PM 61013238.

29. Consequently, the Tribunal finds there was no evidence of the Applicant's discharge was due to any prevailing discriminatory Defence policy.

Conclusion

30. The Regulations set out the requirements to be met to be awarded 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. The Applicant did not serve for a period that totalled four years.

31. Regulation 4(1)(d) sets out only very limited exceptions to the requirement that a person serve their initial enlistment period or a period of four years; in this regard the Tribunal has no discretion. The Tribunal has found that neither of those relevant exceptions apply to the Applicant's circumstances.

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

DECISION

33. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Peter Michael McInnes is not eligible for the award of the Australian Defence Medal.