



Australian Government

Defence Honours and Awards Appeals Tribunal

Ing and the Department of Defence [2014] DHAAT 36 (12 September 2014)

File Number(s) 2013/028

Re **Kathleen Lynette Ing**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms C. Heazlewood (Presiding Member)
Air Commodore M. Lax OAM, CSM (Retd)

Hearing Date 24 July 2014

DECISION

On 12 September 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Ms Kathleen Ing is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the Australian Defence Medal – enlistment period – reason for discharge.

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)
Defence Force Regulations 1952 - reg 93C and Schd 3
Australian Defence Medal Regulations 2006

REASONS FOR DECISION

Introduction

1. The applicant, Ms Kathleen Ing (Ms Ing), seeks review of the decision by the Directorate of Honours and Awards of the Department of Defence (the Directorate) that she is not eligible for the award of the Australian Defence Medal (ADM). Ms Ing had lodged an application for the award of the ADM on 28 August 2012, which was rejected by the Directorate on 18 March 2013. Ms Ing sought review of this decision in her application to the Tribunal dated 10 August 2013.

The Tribunal's Jurisdiction

2. 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 a defence award in response to an application. The Directorate made a decision to refuse to recommend Ms Ing for the ADM following her application. Reg 93C of the *Defence Force Regulations 1952* defines a *defence award* as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 is the ADM. Therefore the Tribunal has jurisdiction to review this decision.

Steps taken in the conduct of the Review

3. In accordance with the Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1), on 4 September 2013, the Tribunal wrote to the Secretary of the Department of Defence informing him of Ms Ing's application for review and requesting that he provide a report. On 10 October 2013, the Directorate on behalf of the Secretary provided the Tribunal with a report. A copy of the report of the Directorate was forwarded to Ms Ing for comment. Ms Ing provided a written response to the Tribunal dated 13 February 2014.

4. After hearing Ms Ing's evidence the Tribunal requested a full copy of Ms Ing's service record to ascertain whether she had requested a medical discharge. The copy of Ms Ing's service record was sent to her for comment. On 9 September 2014 Ms Ing replied.

The Australian Defence Medal

5. 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. Those Regulations were amended between 2005 when they were originally instituted and 20 March 2006 when they came into force. As a result of that amendment the minimum period of service was changed to 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*
 - (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 (CDF) made a determination on 8 November 2009 pursuant to reg 4(2). 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.

Ms Ing's service record

7. Defence records of Ms Ing's service show that she enlisted aged 17 years, on 2 June 1981 in the Citizen Military Force (CMF) for an initial enlistment period of three years. Ms Ing was assigned to the 6 Construction Group. According to the records the last parade Ms Ing attended was on 21 July 1982. On 11 May 1983 she was declared non-effective and on 20 August 1983 she was discharged.

8. The order discharging Ms Ing records that she was discharged pursuant to reg 176(1)(a) of the Australian Military Regulation 1927 (AMR) at her own request. Ms Ing had served for a total period of two years, two months and 19 days.

9. On 21 July 1982 Ms Ing had applied for leave for a period commencing on 5 August 1982 because of 'cartilage being removed'. Ms Ing's defence records do not state that she was discharged from the CMF for medical reasons.

Ms Ing's Submission

10. In a letter dated 7 August 2013 accompanying her application for review, Ms Ing stated that she had not had any health problems during her service with the

CMF until August 1982. She had suffered pain in her right kneecap, which had become worse over time. She consulted a surgeon, Mr J. Bartlett who carried out an arthroscopy. Mr Bartlett found no significant abnormality and the cause of her knee pain was unclear. Ms Ing resumed her duties with her unit.

11. Ms Ing wrote that on 11 May 1983 her knee pain became more severe and she was unable to carry out all her duties. After reporting her problem to her superiors she was classified 'non effective'. Ms Ing said that she continued to attend parades until she was discharged.

12. After she was classified as 'non effective' Ms Ing stated that she was paraded before her Commanding Officer. They had a long discussion about her condition and she was advised to seek an 'honourable medical discharge'. Ms Ing reluctantly completed a form requesting a discharge because she had wanted to continue to serve. According to Ms Ing her last parade with her unit was on 21 July 1983 and then she returned her kit. Ms Ing wrote that her service did not cause her injury.

13. Ms Ing stated that her only complaint was that she believed she should not have been advised to apply for a discharge. She would have continued to serve in a less physically demanding role if she had been given the opportunity.

14. Ms Ing provided a copy of a report from Mr Bartlett dated 9 August 1982 indicating that Ms Ing might have injured her knee ligament and have a lateral meniscus tear which would explain her symptoms. In a report of 12 August 1982 Mr Bartlett advised that he had operated on Ms Ing's knee on 10 August 1982 and could find no significant abnormality. In further reports from Mr H. Byrne, surgeon dated 24 February and 20 March 1989 it was noted that Ms Ing continued to suffer from knee pain caused by a subluxing patella.

15. At the hearing Ms Ing told the Tribunal that she injured her knee in a motorbike accident. She thought that she had had an arthroscopy in August 1982 and March 1983. Her doctors advised her that she would need intensive physiotherapy and that her Army service was not good for her knee.

16. Ms Ing described her duties in the Army as weekly training and lots of drills. She was attached to an engineering unit, which meant that she had to carry a heavy pack and her work schedule was physically demanding.

17. Ms Ing told the Tribunal that she was told to seek an honourable discharge, not an 'honourable medical discharge' by her Commanding Officer. She thought that she did mention her knee when she completed her application for discharge form. In her email of 9 September 2014, Ms Ing wrote 'I did notice an approved application of leave to have knee surgery which confirms my reason for discharging. I also note that there is no discharge form included in my records.'

The Directorate's Submission

18. The Directorate noted in its submission that Ms Ing had been discharged from the Defence Force at her own request. There was no mention of a discharge on medical grounds in her service records. Those records showed that Ms Ing had served

for two years, two months and 19 days. Her initial enlistment period was three years. According to the Regulations Ms Ing must serve her initial enlistment period of three years to be entitled to the ADM. Ms Ing did not serve her initial enlistment period and so she had no entitlement to the ADM. None of the exceptions set out in reg 4(1)(d) applied.

Conclusion

19. The facts in this matter are not in issue. The Tribunal finds that Ms Ing enlisted in the CMF on 2 June 1981 for a period of three years. Ms Ing applied for a discharge from the CMF in 1983 and was formally discharged at her own request on 20 August 1983. She did not serve her initial enlistment period having served two years, two months and 19 days.

20. The Regulations set out the requirements to be met to be awarded the ADM. Pursuant to reg 4(1)(a), (b) and (c) Ms Ing needed to have given qualifying service that is effective service in the Australian Defence Force by completing her initial enlistment period. Alternatively Ms Ing would have needed to serve for at least four years. Ms Ing did not serve for her initial enlistment period and nor did she serve for a period that totaled four years.

21. Reg 4(1)(d) sets out three exceptions to the requirement that a person serve their initial enlistment period or a period of four years. None of those exceptions apply to Ms Ing's circumstances.

22. Pursuant to reg 4(2) the CDF made a determination that a member might be entitled to the ADM even if their service was for less than four years or less than their initial enlistment period, if the member was discharged from the Defence Force because of a non compensable injury or disease. Ms Ing argued that she had been discharged from the Defence Force because her knee injury resulted in her being declared 'non effective'. That is, she was discharged because of a non compensable injury and the discretion set out in the CDF's determination should be exercised in her favour.

23. The Tribunal advised Ms Ing that officially she had been discharged at her own request, not because of an injury. Her service record, the official record of her service disclosed that she had been discharged at her own request. The Tribunal has no power to change Ms Ing's service record. However Ms Ing could request that her service record be amended to disclose that the reason for her discharge was her non-compensable injury.

24. Given that Ms Ing's service record states that her discharge was at her own request and not because of a non-compensable injury, the Tribunal was not able to exercise the discretion in the CDF's determination. Because Ms Ing has not given qualifying service that is effective service, she is not entitled to be awarded the ADM.

DECISION

25. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Ms Kathleen Ing is not eligible for the award of the Australian Defence Medal.