



Australian Government

Defence Honours and Awards Appeals Tribunal

McElvaney and the Department of Defence [2023] DHAAT 15 (7 August 2023)

File Number(s) 2021/010

Re **Mr Ross Cameron McElvaney**
Applicant

And **The Department of Defence**
Respondent

Tribunal Ms Anne Trengove (Presiding Member)
Brigadier Dianne Gallasch AM CSC (Retd)

Hearing Date 25 May 2023

Attendances Mr McElvaney was not present at the hearing

Ms Jo Callaghan, Assistant Director, Service and Campaign Awards
Mr Wayne Parker, Manager, Veterans and Families
Directorate of Honours and Awards, Department of Defence
For the Respondent

DECISION

On 7 August 2023, the Tribunal decided to affirm the decision of the Department of Defence that Mr Ross Cameron McElvaney not be recommended for the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – eligibility criteria – initial enlistment conditions not met – reasons for cessation – limited exceptions to mandatory period of efficient service – no discretion – ready reserve scheme.

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

Defence Regulation 2016, Regulation 36

Australian Defence Medal Regulations Letters Patent, Commonwealth of Australia Gazette S48, dated 30 March 2006

Australian Defence Medal Regulations Amendments of Letters Patent Commonwealth of Australian Gazette G00629, dated 5 August 2020

Australian Defence Medal Regulations Determination 2021 dated 16 March 2021

Australian Defence Medal Regulations 2006 CDF Instrument of Delegation dated 23 September 2018

Introduction

1. The Applicant, Mr Ross Cameron McElvaney, seeks review of a decision dated 31 August 2022, of the Manager Veterans and Families, Mr Wayne Parker, of the Directorate of Honours and Awards in the Department of Defence (the Directorate), to refuse to recommend him for the Australian Defence Medal (ADM).¹

Decision under review

2. On 31 August 2021, Mr McElvaney applied to the Directorate for an assessment of his eligibility for the ADM. On 31 August 2022, in response to the application, Mr Parker wrote to Mr McElvaney stating that as a result of an assessment, Mr McElvaney could not be recommended for the award. Mr Parker gave the following reasons:

As a result of my assessment, I regret to advise you I cannot recommend you for the award. In making the decision, I have reviewed the following information sources:

Your archived record of service as per People Management Key Solutions (PMKeyS) Your record of Reserve attendance provided by CENRES Member Attendance Summary

The decision to not recommend you for the ADM was made for the following reasons:

- *There is no evidence to show that you completed a minimum requirement of four years' qualifying service in accordance with the Determination.*
- *Additionally, there is no evidence to show that the reason for your discharge was due to any of the exceptions at paragraph 4(1)(d) of the Regulations.*²

3. On 14 September 2022, Mr McElvaney made application to the Tribunal seeking review of the above decision.³

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a 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.

5. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the ADM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

¹ Letter, Mr Parker to Mr McElvaney, dated 31 August 2018.

² Ibid.

³ Mr McElvaney's Application to the Tribunal, dated 14 September 2022.

Mr McElvaney's service

6. Mr McElvaney enlisted in the Active Australian Army Reserve under the Ready Reserve Scheme on 8 February 1994 for a period of five years and was discharged on 14 May 1998 under Australian Military Regulation (AMR) 176(1)(U) 'Failure to render efficient service', having served for a total of four years, three months and seven days in the Ready Reserve Scheme, also known as the General Reserve Special Reserve (GRSR).

7. Mr McElvaney has not been issued with any awards for his service with GRSR.⁴

The Australian Defence Medal

8. In accordance with the *Australian Defence Medal Regulations 2006* (the ADM Regulations), as amended, in order to be eligible for the ADM, a member or former member of the Australian Defence Force must have rendered the minimum annual qualifying service after 3 September 1945 that is efficient service by completing an initial enlistment or appointment period, or a period of or totalling not less than four years' service.

9. The eligibility criteria for awarding the ADM are contained in paragraph 4(1) of the *ADM Regulations 2006*⁵ as amended in 2020,⁶ which states:

4 Award of the Medal

(1) *The Medal may be awarded to a member, or former member, of the Australian Defence Force who after 3 September 1945 has given qualifying service that is efficient service:*

- a) *by completing an initial enlistment or appointment 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 or termination of the member as medically unfit;*
 - (iii) *the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force;*

⁴ Letter, Defence to the Tribunal, dated 2 November 2022.

⁵ *Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette, S48*, dated 30 March 2006.

⁶ *Australian Defence Medal Regulations, Commonwealth of Australia Gazette, G00629*, dated 4 August 2020.

- (iv) *the member ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant factor.*

10. The *Australian Defence Medal Determination 2021*, dated 16 March 2021 (the Determination) provides specific details of prevailing discriminatory policies for the purpose of subparagraph 4(1)(d)(iii) of the Regulations.

11. Those policies relate to the following topics that were in effect before the specified dates and which have been determined to be prevailing discriminatory Defence policies:

- a) *Transgender - before 1 June 2010.*
- b) *Homosexuality - before 24 November 1992.*
- c) *Pregnancy (female) - before 7 January 1975.*
- d) *Marriage (female) - before 1 January 1970.*
- e) *Retention after marriage (female) - before 21 March 1984.*

12. The Determination confirms in Schedule 1 *Minimum Periods of Qualifying Service* that the minimum required period of service in the GRSR per year from 1 July 1993 to 19 April 2000 is 14 days per enlistment year. It states:

The following table specifies the minimum annual periods of service to be completed by a member for a year of qualifying service. The period of service may consist of one, or a combination, of the following.

- a. *Days remunerated at Defence rates of salary or sessional fees.*
- b. *Days on which the member is eligible for a Reserve service payment under Chapter 4 Part 9 Division 4 of Defence Determination 2016/19, Conditions of service, as in force from time to time.*
- c. *Days of approved voluntary unpaid Reserve service.'*

Service Category	Minimum Qualifying Period	Effective Dates	Comments
Australian Army			
Army Reserve	26 days, including such periods of continuous training and home training as directed by the proper military authority	Up to and including 30 June 1993	
	14 days	From 1 July 1993 up to and including 19 April 2000	
Supplementary Reserve Units	14 days continuous service	Up to and including 30 June 1993	From 1 July 1993 as for Army Reserve
Special Conditions Units	26 days continuous service	Up to and including 30 June 1993	From 1 July 1993 as for Army Reserve
Specialist Consultants	7 days	From 1 July 1993 up to and including 19 April 2000	Service to be approved by a formation commander
All members	20 days	From 20 April 2000	

Mr McElvaney's application to the Tribunal

13. In his application to the Tribunal, Mr McElvaney stated:

I served in the Australian Army as a full time Soldier in 1994-1998. I was 17 years old when I enlisted and was for a brief moment the youngest qualified infantry soldier in the country. I was attached to 49RQR in Brisbane. We were full time soldiers we did 12 weeks of recruit training and 12 weeks of Initial employment training and six months in rifle battalion. My Service included one full time year and 62 days of Reserve service. I was employed as a Ready Reserve!, which was marketed as 1 year full time and 4 years part time. 365 days full time and a minimum 14 x 4 (48) days service per year for 4 years.

The service eligibility for the ADM as per the Australian Defence Medal Determination 2021 states that qualifying service for all permanent forces of the ADF be 365 days of effective service. Also I served 62 days of part time service which according to the ADM Determination may be aggregated over a period of years, which broken down equals 15.5 days per year.

Whilst in my full time year after an exercise in Shoal water bay and a place called Mosquito Creek, I along with a few others contracted Ross River fever and had to spend 10 days in 1st Military hospital in Brisbane. Eight of those days on an Intravenous drip. After this I suffered from the long effects of the virus which included Chronic Fatigue Syndrome. Which at the time of the mid 90's was little known or researched. But in time I got over it, however it was a genuine struggle in the testosterone driven environment of an Infantry Battalion.

14. Mr McElvaney further stated:

I can see how the choice to not put my name forward for this service medal was made as I did not complete the last three years of reserve service, however I did my time and at the time I was a full time Soldier for a whole year. Yet now it seems the Ready Reserve scheme is just listed as ARES. We had a lot of money and resources thrown at the scheme at the time. So in parting my service of 1 full year and 62 days part time over 2 years. ADM requirement 1 full year and 48 days part time over 4 years.⁷

15. In his application to the Tribunal, Mr McElvaney directed it to the Determination pointing out 'notes at the bottom' of the Determination which states that:

- 1. Service may be aggregated over a period of three years to achieve an average total of at least 12 days each year, i.e a total of at least 36 days service within a three year period.*
- 2. Service may be aggregated over a period of two years to achieve an average total of at least 12 days each year i.e a total of at least 24 days service within a two-year period.⁸*

⁷ Application for Review, dated 14 September 2022.

⁸ Ibid.

16. However, the Tribunal observed that these notes are only applicable to Royal Australian Navy Reserve service and not Australian Army Reserve service.

Defence report

17. Defence stated that in response to the appeal, it reviewed the original decision from 2022 and re-assessed Mr McElvaney's eligibility for the ADM. The re-assessment supported the original decision to not recommend Mr McElvaney for the ADM.⁹

18. Defence provided the following table which outlined Mr McElvaney's Army Reserve qualifying service:

Start 12 Month	Service Changes	End 12 Month	Service Type	Days Required	Days Served	Qualifying Year	Aggregate Years
8/02/94		7/02/95	RRF (FTS)	FTS	FTS	Y	1
8/02/95		7/02/96	GRSR	14	62	Y	2
8/02/96		7/02/97	GRSR	14	0	N	2
8/02/97		7/02/98	GRSR	14	0	N	2
8/02/98	14/05/98		GRSR	14	0	N	2

19. Defence stated that the information showed that while Mr McElvaney served for a total of four years, three months and seven days, he completed only two qualifying years of service for the purposes of the ADM.

20. Defence further stated that the decision to not recommend Mr McElvaney for the ADM was made for the following reasons:

There is no evidence to show that (he) completed a minimum requirement of four years' qualifying service in accordance with the Determination.

Additionally, there is no evidence to show that the reason for (his) discharge was due to any of the exceptions at paragraph 4(1)(d) of the Regulations. [...]"¹⁰

21. Defence acknowledged Mr McElvaney's comments in his submission to the Tribunal and offered the following in response:

*a. **Ready Reserve service.** For the Australian Army, the Ready Reserve Scheme was established in January 1992, as an element of the Active Army Reserve. The scheme aimed to develop necessary strategic capabilities which could be performed by non-permanent Australian Defence Force members. Members of the scheme enlisted for a period of five years under specific conditions of service, which included completing an initial 12 month period of continuous full-time service (CFTS) followed by four years of part-time service. The scheme was abolished in 1996. Mr McElvaney completed his CFTS obligation which counts as one year of qualifying service towards the total period of qualifying service required for the ADM.*

⁹ Letter, Mr Ian Heldon to the Tribunal, dated 2 November 2022

¹⁰ Ibid, Folio 20

b. **The Determination - Qualifying service for Permanent Forces.** Mr McElvaney indicates that up to and including 19 April 2000, all members of the Permanent Forces had to complete 365 days effective service to qualify for the ADM. In accordance with the Determination's preamble to the Table, the 365 days effective service is the minimum annual period of service to be completed for a year of qualifying service. The minimum annual qualifying service is applied to the provision of the Regulations for either the period of enlistment or a total of four years in order to be eligible for the ADM. Mr McElvaney was not enlisted as a member of the Permanent Forces; therefore, for the purpose of his eligibility for the ADM, 14 days remunerated service per year is the minimum annual period of qualifying service required for a minimum of four years.

c. **The Determination – Aggregating service.** The 'Note' referred to by Mr McElvaney regarding the aggregation of service for the purpose of qualifying service for the ADM applies only to certain members of the Royal Australian Navy Reserve as indicated in the Table comments. The 62 days service rendered by Mr McElvaney during his second year of enlistment counts as a second qualifying year of service towards the ADM; it cannot be divided and applied to subsequent enlisted years.

d. **Ready Reserve listed as ARES.** As detailed in subparagraph 14(a), the Ready Reserve Scheme was an element of the Active Army Reserve, as also reflected in the signed Affirmation on Mr McElvaney's Form AB955 Ready Reserve Scheme Statement of Obligations and Conditions of Service. While not impacting its findings, Defence concedes that the terminology 'General Reserve Special Reserve' (GRSR) which reflects the nature of service rendered under the Ready Reserve Scheme, should have been used in its correspondence to Mr McElvaney.

e. **ADM requirement.** Due to his enlistment period of five years, for the purpose of the ADM, Mr McElvaney was required to complete the minimum qualifying service annually for a total period of four years. As a member of a Reserve element of the Army between 01 July 1993 and 19 April 2000, Mr McElvaney had to complete 14 days of remunerated service per year for a total of four years. A 'Member Status Line and Attendance Summary' drawn from the Management & Analysis Reporting Solution (MARS) reflects Mr McElvaney's pay-related administration for his period of GRSR service is at Attachment D Folio 20. The summary shows that Mr McElvaney did not render any remunerated service after 31 January 1996; therefore he did not complete a total of four qualifying years of service for the purpose of the ADM. A 'Member Attendance Summary' for the purpose of Reserve pay for the period of his part-time obligation drawn from MARS showing Mr McElvaney's 62 days of remunerated service from 08 February 1995 to 31 January 1996 is at Attachment D-01 Folio 77.

22. Defence further stated that the review confirmed Mr McElvaney served in the GRSR for a total of four years, three months and seven days, and was discharged under AMR 176(1)(U) 'Failure to render efficient service' having completed only two years of qualifying service for the purpose of the ADM. As such, in Defence's view he did not complete the minimum requirement of completing a total of four years or annual qualifying service in order to be eligible for the ADM.

23. Defence further stated that Mr McElvaney did not discharge under provisions contained in subparagraphs 4(1)(d)(i-iii) of the ADM Regulations, as amended. Further, in Defence's stated view, there is no evidence or information that mistreatment by a member of the Defence Force or an employee of the Department of Defence was a significant

contributing factor to Mr McElvaney ceasing service (subparagraph 4(1)(d)(iv) of the ADM Regulations, as amended).¹¹

Mr McElvaney's comments on the Defence report

24. On 7 November 2022, Mr McElvaney was provided with a copy of the Defence Report and asked to provide his comments on that report. On 19 December 2022, Mr McElvaney emailed the Tribunal confirming that he had no comment to make on the Defence Report,¹² but did add:

Our training was exactly the same as the regular Army, so much so at the end of our full time year of service we were all offered the option of continuing in the REGULAR Army and being posted to either 2/4 RAR in Townsville or 5/7 RAR in Sydney and we had to sign one of the two contracts that were laid on the table in front of me. One was a discharge from full time service and one was to do another 3 years in the regular Army. As one year had already been served, of the usual 4 year term of a regular soldier.

and:

The eligibility of the Australian Defence Medal is 365 days service in the permanent forces prior to 2000, after which it is only 20 days. And the Army Reserve eligibility is 14 days of service between July 1993 and April 2000. I think my service renders me eligible in both of the above categories. I would not have applied for this recognition if I did not feel that I, like thousands of others, were eligible. And now I guess I know how it feels to have your Military service forgotten once you take off the uniform. That seems to be the last Military experience.¹³

Additional information

25. On 22 March 2023, the Tribunal requested additional material from Defence regarding Mr McElvaney's discharge.¹⁴ This information showed that Mr McElvaney failed to attend a compulsory parade on 4-5 April 1998, and that he did not apply for leave to cover this absence. It also illustrated the 25th/ 49th Battalion, Royal Queensland Regiment's attempts to communicate with him at his last known address in April and May 1998. He was warned that his failure to parade and/or respond to the correspondence would likely result in his discharge. No record of any response from Mr McElvaney to this correspondence was supplied.

26. Defence provided this information to the Tribunal on 27 April 2023.¹⁵ The Tribunal provided this material to Mr McElvaney on 1 May 2023 and in doing so invited his comment at the hearing scheduled for 25 May 2023.

¹¹ Letter, Mr Heldon to the Tribunal, dated 2 November 2022.

¹² Email, Mr McElvaney to the Tribunal dated 19 December 2022.

¹³ Ibid.

¹⁴ Letter, Mr Jay Kopplemann to Mr Heldon, 22 March 2023.

¹⁵ Letter, Mr Heldon to the Tribunal, 27 April 2023.

Tribunal hearing

27. Despite prior arrangement, Mr McElvaney did not appear at the hearing. A hearing via Zoom had been earlier scheduled to suit his availability. However, despite repeated attempts, he could not be reached by phone or email at the time of the hearing.¹⁶ In the circumstances, the hearing was conducted with Defence in Mr McElvaney's absence.

28. At hearing, Defence reiterated its position that Mr McElvaney had not completed the required number of days' service. Defence confirmed that the 'notes' at the bottom of the relevant Determination refer to naval reserve service and could not be applied to Mr McElvaney's Army service. Further, Defence submitted that the additional information provided from his last parading unit tended to confirm that his discharge came about as a result of non-effective service as opposed to discharging under the specific provisions allowed by the Regulations.

Tribunal directions

29. The Tribunal directed that Mr McElvaney be provided an audio recording of the hearing for his comment within 14 days. At the same time, he was also provided with a draft Tribunal decision for comment within 14 days. The draft decision was also sent to Defence for any comment.

30. In response, Mr McElvaney stated that he strongly disagreed with the decision, but provided no further submissions beyond excerpts from General Sir Peter Cosgrove's memoir¹⁷ which Mr McElvaney submitted reflected the 'full-time' nature of his ready reserve service. Defence provided no comment in response to the draft decision.

Tribunal consideration

31. The available evidence led the Tribunal to an initial conclusion that Mr McElvaney served for a total of four years, three months and seven days, and in doing so, he only completed only two qualifying years of service for the purposes of the ADM.

32. The Tribunal then considered the circumstances around Mr McElvaney's discharge. The additional information relating to Mr McElvaney's discharge process satisfied the Tribunal that Defence had taken appropriate action to advise him of his impending discharge and subsequent actions that would be taken by Defence.

33. The Tribunal is bound by the eligibility criteria that govern the award of the ADM. Mr McElvaney had not completed his initial enlistment period (five years) or a period of four years in each of which he served the minimum period of qualifying service. Having failed to satisfy those eligibility criteria, Mr McElvaney's application was judged against the limited exceptions laid down in the Regulations. Those exceptions are death, medical discharge, discharge due to a prevailing discriminatory policy, or mistreatment. Having reviewed Mr McElvaney's service file and the material before it, the Tribunal was satisfied that none of those exceptions applied in Mr McElvaney's case.

¹⁶ Mr McElvaney later advised that he had been overseas at the time of the hearing.

¹⁷ General Sir Peter Cosgrove, *You shouldn't have joined...a memoir by General Sir Peter Cosgrove*, Allen & Unwin, Crows Nest, 2020, p.120, unnumbered page.

Tribunal finding

34. For the above reasons the Tribunal found that Mr McElvaney does not meet the eligibility criteria for the ADM.

DECISION

35. The Tribunal decided to affirm the decision of 31 August 2022 of the Directorate of Honours and Awards of the Department of Defence that Mr Ross Cameron McElvaney is not eligible for the award of the Australian Defence Medal for his service in the Australian Army between 1994 and 1998.