



Australian Government

Defence Honours and Awards Appeals Tribunal

Smith and the Department of Defence [2017] DHAAT 017 (20 July 2017)

File Number(s) 2016/004

Re **Mr Simon Smith**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt AM (Retd) (Presiding Member)
Ms J. Schwager, AO

Hearing Date 27 June 2017

DECISION

On 20 July 2017, the Tribunal decided to:

- a. **Set aside** the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Simon Smith is not eligible for the award of the Australian Defence Medal and **refer the matter to the Chief of Army**, to consider that Mr Smith's reason for discharge be amended to being 'medically unfit due to a compensable injury'.
- b. Should the reason for discharge be amended, the Tribunal **substitutes** its decision that Mr Simon Smith is eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal

LEGISLATION

*Defence Act 1903 – ss 110T, 110V(1) 110VB(2),
Defence Force Regulations 1952 - Reg 93C and Schd 3
Commonwealth of Australia Gazette No S48 dated 30 March 2006 – Australian
Defence Medal*

REASONS FOR DECISION

Introduction

1. On 17 May 2013 Mr Simon Smith made application to the Directorate of Honours and Awards of the Department of Defence (the Directorate) for the award of the Australian Defence Medal (ADM). His application was refused on 7 November 2013 as he ‘...did not complete four years service ...’.¹ Mr Smith enlisted in the Australian Army Reserve (ARES) on 20 June 1993². He was discharged ‘at own request’ on 30 July 1996.³

2. On 18 March 2016 Mr Smith lodged an application for review of the decision of the Directorate.⁴ He claimed that he thought he had been discharged on 30 June 1997 and therefore had completed four years of service. In support of his claim he provided a Minute signed by a member of 4th/19th Prince of Wales Light Horse Regiment (4/19 PWLH) in 1997 who he asserted had processed his discharge.⁵ He claims that this Minute was his ‘discharge notice’. He also stated in the application that he should have been discharged as medically unfit due to a work place injury which was preventing him from serving.

Tribunal Jurisdiction

3. 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 an award in response to an application. Regulation 93C of the *Defence Force Regulations 1952* defines a defence award as being those awards set out in Part 2 of Schedule 3.⁶ Included in the defence awards set out in Part 2 is the ADM. Therefore, the Tribunal has jurisdiction to review the decision by the Directorate to refuse to recommend Mr Smith for the ADM. The role of the Tribunal is to determine whether the decision of the Directorate is the correct or preferred decision having regard to the applicable law and the relevant facts.

Conduct of the Review

4. In accordance with its *Procedural Rules 2011*, on 24 March 2016 the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Smith’s application for review and requested a report on the material questions of fact and the reasons for the decision made in relation to the ADM.⁷ A written submission was received from the Directorate on 17 May 2016.⁸ The Defence submission was

¹ DHA 3807706 dated 7 November 2013 to Mr Smith

² Enlistment Advice and Personal Data Sheet 5/306

³ Personal Occurrence Report/Routine Order Part 2; 1 Armed Regt (Tk) 149/96 dated 26 August 1996

⁴ Application for Review of Decision dated 18 March 2016

⁵ 4/19 Prince of Wales Light Horse Regiment Band 78-97 dated 30 June 1997

⁶ Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made under those regulations before their repeal on 1 October 2016.

⁷ DHAAT OUT/2016/105 to the Secretary dated 24 March 2016

⁸ DH&A OUT/2016/0090 dated 11 May 2016

provided to Mr Smith on 17 May 2016.⁹ On 1 and 2 July 2016 Mr Smith provided e-mail comments to the Tribunal relating to the Defence submission.¹⁰

5. The Tribunal met on 22 May 2017 and considered the material provided by Defence and Mr Smith. The Tribunal confirmed the scope of the review, the decision under review, jurisdiction and drafted questions for the subsequent hearing. As part of this initial consideration, the Tribunal asked Mr Smith to provide further evidence relating to the treatment and compensation (if any) of his injury.¹¹ The Tribunal also made a similar request to Defence asking that they provide answers at hearing. Due to privacy restrictions, Defence indicated that they could not make the necessary approaches to the Department of Veterans' Affairs to obtain the information. Mr Smith subsequently stated that due to the passage of time he had been unable to get records of the treatment from the hospital and that in response to his approach to Defence regarding compensation evidence they had provided incomplete information.

6. The Tribunal heard oral evidence from Mr Smith in a telephone hearing on 27 June 2017. The Respondent was represented at the hearing by Mr David Bell accompanied by Ms Francey Felsman and Ms Allison Augustine.

Mr Smith's Service Record

7. Mr Smith's service record states that he enlisted into the Australian Army Reserve on 20 June 1993 at the age of 20 for a four-year initial period. He was allotted to the Royal Australian Armoured Corps and posted to C Squadron, 1st Armoured Regiment at Puckapunyal. He attended a unit recruit training course in July 1993 and qualified as an armoured vehicle driver in September 1993.

8. Mr Smith's service record includes a 'Member Attendance Summary' which indicates he completed 42 days of service in 1993-94, 2 days in 1994-95 and 2 days in 1995-96.¹²

9. Mr Smith's service record states that he was discharged 'at own request' under the provisions of AMR 176(1)(a) on 30 July 1996 having served three years, one month and ten days of his enlistment period.

Australian Defence Medal

10. The ADM was instituted by Her Majesty, Queen Elizabeth the Second by Letters Patent 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.

11. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.¹³ As a result of that amendment

⁹ DHAAT OUT/2016/170 to Mr Smith dated 17 May 2016

¹⁰ Emails from Mr Smith to DHAAT dated 4.48pm 1 July 2016 and 1.46pm 2 July 2016

¹¹ Email from Tribunal to Mr Smith dated 1.47pm 22 May 2017

¹² Member Attendance Summary – Smith Simon 01/04/1993 – 01/09/1996

the minimum period of service became 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 sub regulation (1), the Chief of the Defence Force or his delegate may determine that a period of the member's qualifying service is efficient service ...*

12. 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 Regulation 4(2).¹⁴ 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.

13. On 6 February 2013, the CDF made a determination that outlined the minimum annual periods of service by members to be deemed as efficient service for qualification for the award of the ADM.¹⁵ The relevant part of the schedule attached to the Determination which applies to the Australian Army Reserve for service in the period 1 July 1993 to 20 April 2000 requires a minimum annual qualifying period of 14 days.

¹³ *Commonwealth of Australia Gazette* No. S48, dated 30 March 2006

¹⁴ *Australian Defence Medal Regulations 2006 - Determination by the CDF dated 8 November 2009*

¹⁵ *Australian Defence Medal Regulations - Determination by the CDF dated 6 February 2013*

The Defence Submission

14. The Defence submission dated 11 May 2016 indicates that the decision to refuse Mr Smith's claim was made by an authorised delegate.¹⁶ The submission indicates that the appropriate eligibility criteria were used in assessing Mr Smith's application - *Commonwealth of Australia Gazette* No. S48, dated 30 March 2006 and the subsequent determinations made by the CDF.

15. The submission identifies that Mr Smith was required to complete 14 days paid or approved voluntary service per enlistment year to be deemed efficient in each year of his service. The submission states that on 7 November 2013 the Directorate advised Mr Smith that he was not eligible for the ADM as he did not complete four years of service, was not discharged as medically unfit and was not discharged due to a prevailing discriminatory Defence policy.

16. The submission indicates that on receipt of Mr Smith's 2016 application for review from the Tribunal, the Directorate reassessed his claim noting that he now claimed to have been medically discharged. The reassessment included a review of Mr Smith's medical documents. Defence advised that the reassessment confirmed that Mr Smith was involved in an armoured vehicle accident on 6 April 1994 and that:

*over a period of time after the accident, Mr Smith produced numerous medical certificates advising that he was unfit to continue his usual occupation*¹⁷

17. The submission further identifies that Mr Smith's Squadron Commander wrote to him on 27 June 1996:

thanking him for advising that he wished to discharge

and advising him to 'contact Senior Sergeant (sic) McInnes to discuss his discharge administration'.¹⁸

18. The submission identifies that 'Mr Smith's Personal Occurrence Report/Routine Order Part 2, Single Occurrence confirms his discharge was effective 30 July 1996'. Defence concluded that Mr Smith was not eligible for the ADM as he was only 'efficient' for his first enlistment year and 'did not complete his fourth enlistment year'.

19. The Defence submission also suggested that the Tribunal may wish to advise Mr Smith that he should seek to have his service records amended by Army to 'reflect the reason for his discharge' and that 'if he decides to pursue this option, it will be necessary for him to first contact the Defence Single Access Mechanism'¹⁹

¹⁶DH&A OUT/2016/0090 dated 11 May 2016

¹⁷ Ibid. p.20

¹⁸ C Squadron 1st Armoured Regiment 628/96 'Application for Discharge' dated 27 June 1996

¹⁹ DH&A OUT/2016/0090 dated 11 May 2016 p.28

Mr Smith's Claim for the ADM

20. Mr Smith's initial application for the ADM was submitted to the Directorate on 17 May 2013.²⁰ In the application he states:

I have completed the minimum four years required and unfortunately shortly after that period was required to take a medical discharge. Had it not been for the injury sustained whilst on exercise, and the physical limitations that followed, I would have continued to serve for a longer period.

21. His application indicated that he had enlisted on 20 June 1993 and discharged 'on 30 June 1997'. He attached to the application his enlistment certificate and a Minute signed by Lieutenant Davis of 4/19 PWLH on 30 June 1997 titled 'Discharge – 380706 Trooper S.J. Smith'.²¹ The Minute stated:

1. *Members application for discharge from the General Reserve was lodged on 30 Jun 97. Under APA authority 567-3964/97 Lt Davis discharged member.*
2. *Member was Q cleared on 30 Jun 97 ... due to 1 AR(TK) relocating to Robertson Barracks, part of members personal issue was sent with unit ...*
- ...
6. *... Due to member's medical condition on discharge I do not recommend member for further service ...*

22. Mr Smith said that it became apparent to him after receipt of the 2013 Directorate decision, that Defence had processed his discharge in absentia in 1996, whereas he believed that he had been medically discharged in 1997 after he attended 4/19 PWLH to return his equipment. Mr Smith's initial view was however reinforced after he received the Defence submission in 2016 including extracts of his service and medical records.²² In his comments on the submission he highlights a hand-written note on a letter he sent seeking leave for a training weekend in March 1995.²³ This note from the Squadron Commander states:

*we don't have the room to carry a long term injury*²⁴

23. During the hearing Mr Smith confirmed that he was injured on 19-20 March 1994 when the main battle tank he was crewing drove into a ditch and he was thrown forward striking his ribs on the machine gun. He said that after he returned home the pain in his ribs was such that he could not attend work as a storeman and his local doctor placed him on light duties. He said he returned to Army on 8 April 1994 and attended the Regimental Aid Post where he was placed on restricted duties for two weeks. He said that the injury did not improve and he was unable to continue his civilian occupation as a storeman at his local K-Mart. He stated:

²⁰ Letter and Application from Mr Smith to the Directorate dated 17 May 2005

²¹ 4/19 Prince of Wales Light Horse Regiment Band 78-97 dated 30 June 1997

²² DHAAT OUT/2016/170 to Mr Smith dated 17 May 2016

²³ Email from Mr Smith to DHAAT dated 4.48pm 1 July 2016

²⁴ Handwritten Note of 3 March 1995 on Letter from Mr Smith to C Squadron dated 28 February 1995

as the months passed and it became apparent that my injury was not going to self-heal and that surgery was required, I was forced to find alternative employment. I secured employment in a call centre that required no lifting and I was unable to continue my hobby as a brass bandsman due to additional breathing difficulties²⁵

24. Mr Smith said that in early 1995 his injury continued to cause him difficulty and he furnished several doctor's certificates to his unit to seek leave of absence from training activities between January and June of that year. He said that sometime in the middle of 1995 he attended his unit and met with a Captain at which time he completed paperwork that the Captain told him was to 'cover the treatment for his injury'. He said that he was told that he would need to attend appointments at Victoria Barracks in Melbourne however these did not eventuate because there was confusion over the provision of his medical records either by his unit or by the Compensation Section.

25. Mr Smith said that at about this same time, his unit was preparing to relocate to Darwin and the Reservists were told that they had 12 months to decide whether to stay with the unit or seek transfer. He said that he heard nothing more from his unit. Mr Smith said that early in 1996 sometime around March or April he underwent surgery at Epworth Hospital in Richmond to treat the area of the impact on his ribcage. He said that the treatment and surgery was paid for by Defence and he assumed this was a result of the paperwork he had completed at the unit the previous year.

26. In response to questions from the Tribunal, Mr Smith said that he did not think he was ever compensated for the injury although he did not have to pay for any of the treatment he received or the surgery. He also stated that after the injury he was unable to work in his civilian occupation as a storeman and was initially reduced in hours before being transferred into a more sedentary role in a call centre. He said that he did not return to normal work until June 1996, more than two years after the injury occurred. He noted that the material before the Tribunal included a letter dated 27 June 1996 to him at his residential address in Montmorence from his Squadron Commander, Major Burn, seeking his discharge.²⁶ He denied ever receiving the letter and stated that contrary to the letter claiming to thank him for advising that he wished to discharge, he could not recall ever making such a statement or communicating this intent to his unit.

27. Mr Smith indicated that at the time of the injury he was also a part time musician however the damage to his ribs stopped him playing his primary instrument – the tuba, due to breathing difficulties. He said that he played in the Salvation Army band and it was here that he met Lieutenant Davis. He said that Lieutenant Davis was also a member of the local Watsonia based Army Reserve band attached to 4/19 PWLH. He said that by early 1997 he had heard nothing more from his unit about relocation or future employment and he asked Lieutenant Davis what he should do. He said that Lieutenant Davis told him that he was an 'appropriately authorised

²⁵ Email from Mr Smith to DHAAT dated 4.48pm 1 July 2016

²⁶ C Squadron 1st Armoured Regiment 628/96 'Application for Discharge' dated 27 June 1996

officer' for discharge purposes and that if he attended 4/19 PWLH and returned his issued equipment, he would be able to process his discharge.

28. Mr Smith said that he did this on 30 June 1997 and Lieutenant Davis gave him a copy of the Minute dated 30 June 1997 'authorising' his discharge and indicating that he was not recommended for further service due to his 'medical condition'.²⁷ The Tribunal noted that copies of the Minute were addressed to Mr Smith's unit and to the Army Personnel Agency – Melbourne.

29. Mr Smith said that because of the Minute from Lieutenant Davis, he was always under the impression that he had been medically discharged on 30 June 1997, having completed four years of service. He said that it wasn't until many years later after the ADM had been instituted, that he was encouraged by the local Returned and Services Leagues Club and the Salvation Army to apply for the medal as he had completed four years of service. It was at this time that he discovered that he would be also eligible as a result of his medical discharge as well as his tenure of four years.

The Tribunal's Consideration

30. **General.** 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.²⁸ 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.

31. The facts, law and policy aspects of the decision are all considered afresh and a new decision made.²⁹ 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 original decision was correct.³⁰ 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.

32. **The Legislation.** The Tribunal noted that the Directorate in its assessment of Mr Smith's application had used as the legal basis for its decision the *Australian Defence Medal Regulations 2006* and the subsequent CDF Determinations relating to non-compensable injuries and efficiency. The Tribunal was satisfied that the Directorate had used the correct legislation in the consideration of Mr Smith's application.

33. **The Credibility of Mr Smith's Evidence.** The Tribunal considered that Mr Smith's evidence was sincere, credible and accurate. He clearly understood the gravitas of the issue and took nothing for granted. His account was compelling and logical.

²⁷ 4/19 Prince of Wales Light Horse Regiment Band 78-97 dated 30 June 1997

²⁸ *Council of Australian Tribunals Practice Manual* dated 7 April 2006 p.1.3.1.2

²⁹ Pearson, Linda, "Merit Review Tribunals", in Creyke, Robin and McMillan, John, *Administrative Law – the Essentials*, AIAL 2002, p. 68

³⁰ *McDonald v Director-General of Social Security* (1984) 1 FCR 354

34. **Mr Smith's Service Record.** Relying on the service record, the Tribunal was satisfied that Mr Smith enlisted in the Australian Army Reserve on 20 June 1993. The Tribunal was also satisfied that Mr Smith's first enlistment year (20 June 1993 to 19 June 1994) was correctly recorded as an efficient year of service as he completed 42 days of remunerated service. The Tribunal was reasonably satisfied that Mr Smith completed two days of service in each of the following two enlistment years. The Tribunal notes that Mr Smith was formally declared as an 'unauthorised absentee since 26 June 1995' by the Commanding Officer of 1st Armoured Regiment on 27 February 1996.³¹

35. **Did Mr Smith Suffer an Injury Which Precluded Further Service?** There is no doubt that Mr Smith suffered an injury during an armoured vehicle accident on 19-20 March 1994 and that he reported to unit medical staff on 8 April 1994 where he was placed on restricted duties because of a 'rib injury'.³² The evidence supporting this fact is contained in the Outpatient Clinical Record contained in his medical record.³³ The Record states:

During field manoeuvres on weekend 19-20 March 1994 he was employed in the 'loader hole' of a MBT (main battle tank). The MBT drove into a ditch at 20-30kph. He was propelled forward striking right ribs lateral aspect on machine gun. Pain thereon, reported condition to crew commander, continued exercise to end.

Once home condition became very painful. Lost three shifts at his work due to same. Seen by local Dr Bowen at Eltham who diagnosed 'costo conglular junction' damaged and anticipated three to six months healing time ...

36. The Tribunal noted that Mr Smith had been a regular attendee at training activities until the injury occurred. After attendance at the Army medical centre on 8 April 1994, Mr Smith did not parade again until 14-15 December 1994. He said that during this time he was unable to work and he did not produce medical certificates for absences, nor was he pursued by his unit. He said that in early 1995 he wrote to the unit on four occasions seeking leave not to attend training activities and attaching medical certificates to prove that he could not parade due to his injury.

37. The Tribunal notes that each of these letters contains a statement by Mr Smith that 'the originals have been sent to Compensation Section in Melbourne'. The letters were dated:

- a. 31 January 1995 for training exemption 13-15 January and 3-11 February 1995;³⁴
- b. 28 February 1995 for training exemption 4-17 March 1995;³⁵
- c. 4 April 1995 for training exemption 8-10 April 1995;³⁶ and
- d. 4 May 1995 for training exemption 6-8 May 1995.³⁷

³¹ 1st Armoured Regiment Personal Occurrence report 038/96 dated 27 February 1996

³² Medical Fitness Advice – 3807706 TPR Smith dated 8 April 1994

³³ Outpatient Clinical Record - 3807706 TPR Smith dated 8 April 1994

³⁴ Letter from Simon Smith to C Squadron dated 31 January 1995

³⁵ Letter from Simon Smith to C Squadron dated 28 February 1995

³⁶ Letter from Simon Smith to C Squadron dated 4 April 1995

³⁷ Letter from Simon Smith to C Squadron dated 4 May 1995

38. The Tribunal notes that Mr Smith's service record contains a handwritten page from a notebook possibly written in February/March 1995 which appears to be a list of options regarding Mr Smith's ongoing medical management by his unit.³⁸ It mentions 'repost or discharge', 'special medical board' and:

Not parade in 94 but getting these Comcare/Dr Certificates – being paid for non-attendance and no work ...

38. The Tribunal noted that the letter from Mr Smith of 28 February 1995 contains an annotation presumably made by a staff member of the unit:

Have informed Defence Compensation that we have received a copy of the doctor's certificate.

39. This letter contains a handwritten note dated 3 March 1995 from the Squadron Commander to his Squadron Sergeant Major which states:

Please identify the extent and duration this injury is going to take to heal. We do not have the room to carry a long term injury who could be seen to provide doctor certificates to supplement his wages and not attend. If he's broken let's use the system to get him fixed or posted to an organisation more suited to getting him fixed.

40. The Tribunal noted that Mr Smith last paraded on 24-25 June 1995 and, relying on his evidence and the sequence of medical certificates as annotated, was satisfied that Mr Smith's injury precluded him from service from April 1994 until he recovered from Defence funded surgery which was conducted in early 1996.

41. The Tribunal considered that as his unit was actively involved in facilitating his claims for treatment with the local compensation section, they could have been reasonably expected to be aware that his injury was such that he would be a potential candidate for a medical discharge.

42. The Tribunal therefore finds that Mr Smith did suffer an injury to his ribs during military training on 19-20 March 1994 and that the injury precluded him from further service.

43. **Did Mr Smith Request his Own Discharge?** The Tribunal notes that Mr Smith's service record states that he was discharged by his Commanding Officer on 30 July 1996 under AMR 176(1)(a) 'at own request'.³⁹

44. The Tribunal notes that Mr Smith's attendance record indicates that he last paraded at his unit on the weekend of 24-25 June 1995.⁴⁰ The Tribunal notes that this is consistent with Mr Smith's evidence that he attended his unit in mid-1995 and met with a Captain where he completed paperwork to 'cover the treatment for his injury'.

³⁸ Handwritten Note 'APA Melb'

³⁹ 1st Armoured Regiment Personal Occurrence report 149/96 dated 27 February 1996

⁴⁰ Member Attendance Summary – Smith Simon 01/04/1993 – 01/09/1996

45. The Tribunal notes that Mr Smith's Squadron Commander wrote to him on 27 June 1996, one year later 'thanking' him for his 'advice that he wished to discharge' and enclosing an Application for Discharge 'for you to complete and return to this unit'. The Tribunal notes that a month after the date of this letter, discharge action was taken because of a 'Discharge Request' which was signed on 25 July 1996.⁴¹ The Tribunal notes that this request was not signed by Mr Smith but rather signed:

R. McInnes Ssgt for Tpr Smith S.J.

46. The Tribunal noted that on the same day, 25 July 1996, the Squadron Commander signed the request recommending Mr Smith's discharge. The following day the unit Administrative Commander signed the document approving the discharge.

47. The Tribunal, noting that Mr Smith did not actually sign the discharge request and having provided sworn evidence that he never received a letter and that he never advised that he wished to discharge, was therefore satisfied that he did not seek his own discharge.

48. The Tribunal noted that at the time, 1st Armoured Regiment was in the process of relocating to Darwin from Puckapunyal and administration of the Army Reserve component which would remain in Puckapunyal, may have been challenging as the regular staff departed.

49. Additionally, the Tribunal noted that there is no record of a discharge medical examination and the Tribunal was satisfied that given the location of the unit in Puckapunyal, and the nature of Reserve service at the time, it was highly unlikely that any discharge medical would have been completed on a Reserve soldier who had not paraded for a year and was last reported as living in Melbourne.

50. The Tribunal was also aware that once a Reserve soldier ceased parading, his service was often considered finished and it was rare for Army to even pursue return of personal equipment or uniforms. The Tribunal had been previously advised that it was common practice in the 1980s and 1990s to 'clean up the records' by unit staff.⁴² The staff would process a discharge as being at own request with the request form being signed by a member of the staff – usually from the unit Quartermaster's Store to facilitate the write off of unreturned equipment. The Tribunal notes that in this matter, the discharge form was signed by Staff Sergeant McInnes acting 'for' Mr Smith. He was also the individual identified in the Squadron Commander's letter as the administrative point of contact for Mr Smith and was the individual who certified that Mr Smith was 'kit cleared' from the 'unit Q store'.⁴³

51. The Tribunal considered that the involvement of Lieutenant Davis from 4/19 PWLH was a matter of circumstance. Whilst he may have acted beyond his remit in undertaking the discharge administration of Mr Smith in 1996, there was no ill intent and his actions, in the view of the Tribunal, were an attempt to correctly conclude Mr

⁴¹ Discharge Request ARES Soldiers – 3807706 TPR S.J. Smith

⁴² *Beeche and the Department of Defence* – DHAAT 40 dated 15 September 2015

⁴³ Discharge Request ARES Soldiers – 3807706 TPR S.J. Smith

Smith's service in the best interests of all parties. The fact that he included the Army Personnel Agency – Melbourne in the closure correspondence points to his actions being well intentioned and honest. The Tribunal was of the view that receipt of this correspondence from Lieutenant Davis should have triggered an inquiry from the Personnel Agency regarding the administration of Mr Smith's actual discharge. Unfortunately, it did not and Mr Smith remained recorded as having discharged at own request in July 1996 whilst he remained under the impression that he had been medically discharged in June 1997.

Conclusion

52. There is no doubt that Mr Smith suffered an injury to his ribs in 1994 as a result of an armoured vehicle accident during a military exercise. This injury was appropriately documented, was the subject of treatment liability by the Department and in all likelihood, resulted in him becoming unfit for further military service.

53. The Tribunal determined that on the balance of probabilities there was a strong possibility that the staff of 1st Armoured Regiment processed Mr Smith's discharge as a matter of expediency and that his discharge was not at his own request. The evidence therefore points to maladministration - Mr Smith should have been discharged as medically unfit due to the injury he received during a training exercise on 19-20 March 1994 for which Defence accepted treatment liability. If this had occurred, Mr Smith would have been eligible for the ADM.

54. The Tribunal noted that it did not have the power to alter the reason for discharge and that in previous matters, Army had indicated that should evidence relating to incorrect discharge reasons become available, they would be prepared to review the discharge reason and amend the record.⁴⁴ The Tribunal further notes that in this matter Defence implied that the discharge reason should be reconsidered when it suggested that the Tribunal 'may wish to advise Mr Smith that he should seek to have his service records amended by Army to 'reflect the reason for his discharge'.⁴⁵ The Tribunal considers that this report constitutes the evidence required to amend the record.

Finding in Relation to Mr Smith's Eligibility for the ADM

55. The Tribunal finds that Mr Smith's discharge was incorrectly recorded as 'at own request' and that he was in fact medically unfit to serve in the Australian Army as a result of a compensable injury to his ribs. Accordingly, and subject to the reason for discharge being altered by Army, the Tribunal finds that Mr Smith is eligible for the award of the Australian Defence Medal under the provisions of Australian Defence Medal Regulation 4(1)(d)(ii).

DECISION

⁴⁴ *Beeche and the Department of Defence* – DHAAT 40 dated 15 September 2015

⁴⁵ DH&A OUT/2016/0090 dated 11 May 2016 p.28

56. The Tribunal decided to:
- a. **Set aside** the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Simon Smith is not eligible for the award of the Australian Defence Medal and **refer the matter to the Chief of Army**, to consider that Mr Smith's reason for discharge be amended to being 'medically unfit due to a compensable injury'.
 - b. Should the reason for discharge be amended, the Tribunal **substitutes** its decision that Mr Simon Smith is eligible for the award of the Australian Defence Medal.