



Australian Government

Defence Honours and Awards Appeals Tribunal

Jones and the Department of Defence [2015] DHAAT 47 (10 December 2015)

File number (s) 2015/009

Re **Mr Nigel Ashley Jones**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr R. Rowe PSM (Presiding Member)
Ms J. Schwager AO

Hearing Date 24 September 2015

DECISION

On 10 December 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Nigel Ashley Jones is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of the 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 Regulations 2006

Australian Defence Medal Regulations 2006 – Instrument of Delegation – dated 9 August 2014

CDF Determination on Qualifying Service as Efficient Service – dated 6 February 2013

REASONS FOR DECISION

Introduction

1. The applicant, Mr Nigel Ashley Jones (Mr Jones) seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the Australian Defence Medal (ADM). On 10 February 2015 Mr Jones made an application to the Directorate for the award of the ADM. On 13 March 2015 the Directorate advised Mr Jones that he did not qualify for the award as he had only completed two years efficient service and not the four years of efficient service (aggregated) required. On 24 March 2015 Mr Jones applied to the Tribunal for a review of the Directorate's decision.

Tribunal Jurisdiction

2. Pursuant to s110VB(2) of the *Defence Act 1903* 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. The ADM is included in the defence awards set out in Part 2. Therefore the Tribunal has jurisdiction to review decisions in relation to this award. 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

3. In accordance with the *Defence Honours and Awards Appeal Tribunal Procedural Rules 2011 (as amended)*, on 28 April 2015, the Tribunal wrote to the Secretary of the Department of Defence advising him of Mr Jones' application for review and seeking a report on the reasons for the original decision and the provision of relevant material that was relied upon in reaching the decision. On 17 June 2015, the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission in the form of a written report. The Tribunal forwarded a copy of the Directorate's written report to Mr Jones for comment on 29 June 2015. Mr Jones responded in an undated letter received by the Tribunal on 16 July 2015.

4. The Tribunal considered the material provided by Mr Jones and the Directorate. Mr Jones was invited to give oral evidence (by telephone) to the Tribunal. On 24 September 2015 the Tribunal held a hearing with Mr Jones. The Tribunal sought additional material from Defence regarding Mr Jones' service and training records as well as Defence instructions relating to officer appointments in the Royal Australian Air Force Active Reserve. This additional material was provided to Mr Jones on 30 September 2015 and on 12 October 2015 Mr Jones provided his comments on this material.

Australian Defence Medal

5. 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.*¹

6. The ADM Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006² when they came into force as the *Australian Defence Medal Regulations 2006*. As a result of that amendment 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 ...*

7. The minimum periods of a member's annual qualifying service that is efficient service for the award of the ADM are set out in the *Australian Defence Medal Regulations Determination by the Chief of the Defence Force* dated 6 February 2013. With effect from 20 April 2000, the minimum qualifying period for each year served for all members of both the Royal Australian Air Force and the Australian Army is stipulated to be 20 days.

¹ Commonwealth of Australia Gazette No S48 dated 30 March 2006 – *Australian Defence Medal*

² Commonwealth of Australia Gazette No. S48, 30 March 2006.

Mr Jones' Service Record

8. On 16 June 2001, Mr Jones enlisted in the Australian Army Reserve (AAR), with an enlistment period of four years. On 4 February 2003, Mr Jones discharged from the AAR, having completed one efficient year of service.

9. On 22 September 2009, Mr Jones enlisted in the Royal Australian Air Force (RAAF) Active Reserve (ARes). He continued as a member of the RAAF ARes in 2010, 2011 and 2012. On 22 June 2012, Mr Jones discharged from the RAAF ARes, having completed one year of efficient service.

Mr Jones' Claims for the ADM

10. In his application for review, Mr Jones stated that *'I was unable to fulfil 4 years service as I was discriminated against by my employer who refused to negotiate my release for training. (Australian Defence Medal Regulations 2006 4.d)'*.

11. Mr Jones attached to his application, as supporting documentation, a written note in which he mentions that in 2001 he completed his initial training with the Pilbara Regiment *'+20 days'*. In 2002 he completed his 4x4 training and then volunteered for special duties with the RAAF *'+20 days'*. He then resigned from the Pilbara Regiment because his *'work in the community was overwhelming'* (work which went on to earn him being named as a finalist in the 2008 Australian of the Year Awards). In 2009 he re-enlisted in the RAAF and started Officer Training *'+20days'*; in 2010 he *'worked overseas in Tasmania and U.K. and (was) unable to continue training'*. In 2011 when he returned to Perth, Mr Jones claimed his *'boss refused to negotiate (his) release for training'*.

12. Mr Jones also attached two emails as supporting documentation. The first, dated 18 October 2011, was from Flight Lieutenant (FLTLT) Sue Devine, Training Systems Officer, HQ Air Training Wing, RAAF Pearce, to Mr Jones advising him that she had spoken to his school principal, Ms Gay Fortune, following-up on a conversation three weeks earlier, and had been surprised by Ms Fortune's refusal to negotiate Mr Jones' release to undertake training and that she would wait to hear from Mr Jones before deciding on a further course of action. FLTLT Devine commented in the email that she had to admit to Mr Jones that *'I do understand (Ms Fortune's) viewpoint: the length of leave (18 weeks) would be out of the ordinary; you have not previously sat and explained your commitment to the RAAF-AR nor negotiated a Defence Leave plan with the school; you are asking for far more than the recognised four weeks per year; the Defence Reserves Support Council's Employee Support Payment Scheme would not financially cover a replacement for you; you are a crucial member of staff on whom the school is spending a lot of money for PD, I can see where she is coming from'*. FLTLT Devine also said *'Also, keep in mind that we are now well past the date of having to apply for an Extension To Training Limit and both OTS (Officer Training School) and DP (Directorate of Personnel) may no longer be prepared to support your ongoing desire to complete IOC (Initial Officer's Course) – you have become a training liability and may have to submit a Notice To Show Cause as to why you should be allowed to continue training.....Please keep in mind also that RTW (RAAF Training Wing) is making every effort to finalise RAAF-AR (RAAF-Active Reserve)*

Phased training candidates by 30 June 2012. You are running against several deadlines and constraints here - are you absolutely certain that you wish to continue your IOC ?

13. The second email, dated 2 December 2012, was from FLTLT Devine to Ms Nadia Reece at the Western Australia Department of Education, to inform her of the situation regarding Mr Jones and the leave he was required to take from his primary place of employment (Morely Senior High School) in order to complete his Initial Training for the Royal Australian Air Force Active Reserves. FLTLT Devine outlined the history of the matter: *'Flying officer (FLGOFF) Jones was commissioned in 2009 and joined number 25 (City of Perth) Squadron as a trainee to become an Education Officer. The process for RAAF-AR initial training of officers at that time was that they were given two years to complete their IMT (Initial Military Training) and we (25SQN Training Flight) facilitated five Phases of training for Officers Training School. Phases one and four were conducted at our home unit and the other three required full time attendance at the school (in Victoria) in blocks of two or three weeks at a time. In mid-2010, a review of training occurred and it was required that all officers-under-training were to complete their IOC (Initial Officer Course) by the end of June 2012. FLGOFF Jones completed sections of Phase 1 but then took 2010 off to travel in Tasmania. As a result, he did not attend several residential Phases and has now found himself in a situation where he needs to attend a full Initial Officer Course in order to complete his training. The full time course is 18 weeks long and, of course, this will place a burden on his employer as they will need to find a member of staff to cover for him during this absence.'*

14. This second email went on to say that *'By law, a defence member's employer is required to grant 4 weeks paid leave for Military training or employment. This is accompanied by a proviso that the employee gives the employer adequate notice and that the member negotiates their period of leave to the convenience of both parties. Mrs Fortune (the principal) has done research into the leave allowed by the award as well, and has determined how much paid leave she could offer Nigel (I think she said this was about six weeks). If Nigel decides to pursue this FT training, he will need to take the rest of the time in unpaid leave. In summary, Nigel has to complete his Initial Training by June 2012; this necessitates his FT attendance at OTS for 18 weeks; his employer will give him paid leave as determined by the Defence Reserves Employment Act and the Education Award; Nigel will need to take the rest of the training time off as unpaid leave; as he must finish his training by mid 2012 (a decision made by the Officer Commanding OTS and the Defence Directorate of Personnel), he will have to attend IOC 01/12 being conducted from 23 Jan – 25 May 2012. If Nigel cannot attend OTS over this period, he will be required to offer his resignation from the RAAF-AR'.*

15. The Tribunal also noted that in his response to the Directorate's written submission (paragraph 3 above) Mr Jones stated: *'may I highlight I did 89 days training over my enlistment of 4 years'.*

The Directorate's Submission

16. The Defence submission, dated 17 June 2015, concludes that, after re-assessment of all the material questions of fact, including relevant documentation, Mr Jones is not eligible for the ADM because he did not meet the eligibility criteria for the award, in that he:

- did not complete his initial enlistment period;
- did not give 'qualifying service that is efficient service' for four years in that he only completed two years of 'efficient service';
- was not discharged as medically unfit; and
- was not discharged due to a prevailing discriminatory Defence policy.

17. In relation to Mr Jones' service record, Defence's submission notes that '*for Mr Jones to have been deemed (as) having an efficient year with the AAR and the RAAF ARes he had to complete 20 days service during an enlistment year*'. The submission also notes that "Mr Jones completed two efficient years of service".

18. The following table, extracted from the Defence report, shows the number of service days that Mr Jones completed in each enlistment year.

Australian Defence Medal							
Start of 12mth	End of 12mth	Status	Days Required	Days Served	Qualifying Year	Agg Year	Remarks
16 June 2001	15 June 2002	AAR	20	68.5 days	>20 – Q	1	
16 June 2002 22 September 2009	4 February 2003 31 January 2010	AAR RAAF ARES	20	0.5 day 25.5 days	>20 – Q	2	234 days 131 days
1 February 2010	31 January 2011	RAAF ARES	20	Nil	<20		
1 February 2011	31 January 2012	RAAF ARES	20	1 day	<20		
1 February 2012	22 June 2012	RAAF ARES	20	Nil			Incomplete

The Tribunal's Consideration

19. The Tribunal carefully considered all the material placed before it. In the hearing on 24 September 2015 Mr Jones confirmed the accuracy of his service records. He also acknowledged that his claim of having served 89 days over four years was a 'miscount'. The Tribunal noted that, according to his service records, Mr Jones had completed only two efficient years of service (ie 20 days service during an enlistment year) while enlisted in the Australian Army Reserves and the Royal Australian Air Force Active Reserves over the period 16 June 2001 to 22 June 2012. Mr Jones did not contest this.

20. The Tribunal noted that in Mr Jones' written note (paragraph 12) he refers to three periods of having served over 20 days in 2001, 2002 and 2009, which seems to suggest that he served three efficient years of service. The Tribunal noted that, as shown in the table in paragraph 10, he served more than 20 days in the 'enlistment year' (ie a period of 365 days from the date when the member enlisted or any anniversary of that date) of 16 June 2001 to 15 June 2002 (which was deemed an

efficient year) and also more than 20 days in the enlistment year commencing on 16 June 2002 and ceasing on 4 February 2003 together with service from 22 September 2009 to 31 January 2010 (which was deemed an efficient year). Further, as the table shows, Mr Jones only served one day in the following periods: 1 February 2010 to 31 January 2011; 1 February 2011 to 31 January 2012; and 1 February 2012 to 22 June 2012. The Tribunal accepts the statement in Defence's submission that his service record shows Mr Jones completed only two efficient years of service.

21. In his application for review, Mr Jones stated that he '*was unable to fulfil 4 years service as I was discriminated against by my employer who refused to negotiate my release for training. (Australian Defence Medal Regulations 2006 4.d)*'. The Tribunal pointed out that the clause in the *Australian Defence Medal Regulations 2006* which Mr Jones refers to, which is, in full, clause 4 (1) (d), 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)

(b)

(c)

(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;*

22. Mr Jones commented during the hearing that "Defence could have been more helpful but the discrimination comes from the boss".

23. Insofar as 'discrimination' is concerned, which is the basis for Mr Jones' application for review, and the reason why he asserts he was unable '*to fulfil four years of service*', the relevant reference in the Regulations in clause 4 (1)(d)(iii), is '*...due to a prevailing Defence Policy*'. Mr Jones is not asserting that he was discharged because he was discriminated against by a Defence policy. On the contrary, he asserts that he was 'discriminated against by my employer' ie the Western Australian Department of Education. That is not a matter on which the Tribunal can make a decision. Accordingly, as Mr Jones is not eligible for the ADM on the basis of a discriminatory Defence policy, clause 4(1)(d)(iii) does not apply to his case, and consequently, he is not eligible for the award under sub-section (d)(iii) of that clause.

24. The Tribunal also noted the statement in Mr Jones' Application for Discharge from the RAAF-AR, dated 24 May 2012, that after several months of negotiation the principal at Morely Senior High School had agreed to allow him the time off for the full-time course. However, after a great deal of consideration, he had reluctantly

come to the conclusion that his absence for that amount of time would jeopardise the soccer program - a cherished and hard-won 'gifted athlete' program - that he had implemented at the school and that it was unlikely that he would take time off to complete the 18 week OTS IOC. He, therefore, requested to discharge from the RAAF-AR.

Tribunal's Finding

25. For the reasons set out above, the Tribunal finds that Mr Jones is not eligible for the ADM as he does not meet the eligibility criteria for the award. Accordingly the Tribunal finds that the decision of the Directorate is the correct decision.

DECISION

26. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr Nigel Ashley Jones is not eligible for the award of the Australian Defence Medal.