



Australian Government

Defence Honours and Awards Appeals Tribunal

Williams and the Department of Defence [2016] DHAAT 03 (11 January 2016)

File Number(s) 2015/018

Re **Alan Edwin WILLIAMS**
Applicant

And Department of Defence
Respondent

Tribunal Ms Naida Isenberg (Presiding Member)
Rear Admiral James Goldrick AO, CSC, RAN (Retd)

Hearing Date 11 December 2015

DECISION

On 11 January 2016 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Alan Edwin Williams 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 – end of National Service – completion of obligation.

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2)

Australian Defence Medal Regulations 2006

National Service Act 1951

National Service Termination Act 1973

REASONS FOR DECISION

Introduction

1. The Applicant, Alan Edwin Williams (Mr Williams), seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) dated 2 February 2015 that he is not eligible for the award of the Australian Defence Medal (ADM).

2. Mr Williams had lodged an application for the award of the ADM on 6 November 2014. On 2 February 2015, the Directorate advised Mr Williams by letter that he was not eligible for the ADM as he did not complete his initial enlistment period of 18 months.

3. Pursuant to s.110VB of the *Defence Act 1903* (the Defence Act) Mr Williams sought review of this decision in his application to the Tribunal dated 28 May 2015. There was no issue as to jurisdiction.

Conduct of the Review

4. In accordance with the Tribunal's Procedural Rules, the Secretary of the Department of Defence was informed of Mr Williams' application for review and a report in relation to the decision under review was requested. The Directorate, on behalf of the Secretary, provided the Tribunal with a report which was then forwarded to Mr Williams for comment. Mr Williams provided a written response to the Tribunal dated 9 September 2015. A hearing was held by conference telephone on 11 December 2015.

Eligibility criteria for the Australian Defence Medal

5. The ADM was instituted by Her Majesty the Queen 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.*

6. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006. 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.*

7. On 23 April 2007, the then Chief of the Defence Force, Air Chief Marshal Angus Houston, made a Determination in respect of a member's "qualifying service as efficient service" for the award of the ADM with regard to national service (The 2007 Determination). Relevantly it provided:

*... under the said determination to designate **not less than a minimum period of 18 months** full-time national service, or five years part-time national service, commencing on or after 4 June 1971, as 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. (Tribunal emphasis)*

Mr Williams' service record

8. Mr Williams' service record shows that he enlisted in the Australian Regular Army Supplement (ARAS) to fulfill his National Service obligations. According to the records, Mr Williams was discharged on 12 February 1973 after serving one year and 17 days. The order discharging Mr Williams records that he was discharged pursuant to s.35B(5A) of the *National Service Act 1951* (NS Act), on the ground of exceptional hardship.

9. Mr Williams has been awarded the Anniversary of National Service 1951-1972 Medal for his service in the ARAS.

National Service

10. On 5 December 1972, the newly elected Labor Government, in fulfillment of an electoral promise, discontinued national service. However, because the *National Service Termination Act 1973* (NST Act) was not assented to until 21 June 1973, until that time there was no official discharge provision to discharge national servicemen.

11. To facilitate their discharge, national servicemen were provided with a form which offered them three choices:

- to elect to serve the uncompleted portion of their national service obligation; or

- to apply for a change of category from the Australian Regular Army Supplement (National Service) to the Australian Regular Army/Australian Regular Army Supplement (O); or
- to apply for two years leave without pay on grounds of exceptional hardship and seek earliest possible discharge. (the third option).

12. The third option reflected the provision of s.35B(5A) of the NS Act which provided:

Where -

- a) a national serviceman has been granted leave without pay for periods amounting in the aggregate to not less than two years on the ground that the rendering of the service that he was liable to render under this Act was imposing or would impose exceptional hardship on him or on his parents or dependants; and
- b) the Military Board, or a person authorized by the Military Board, has no reason to believe that the circumstances that led to the grant of leave will not continue and is satisfied that the national serviceman should, for that reason, be discharged,
the national serviceman may be discharged from the Military Forces and may be discharged **on the ground of exceptional hardship**. (Tribunal emphasis)

13. Mr Williams provided a copy of the form which he signed on 12 December 1972, indicating his choice of the third option, namely to 'apply for two years leave without pay on grounds of exceptional hardship and seek earliest possible discharge'.

Issue for the Tribunal

14. Does the Applicant meet the eligibility criteria for the award of the ADM?

Mr Williams' submission

15. In his submission Mr Williams conceded that he did not qualify for the ADM when he took discharge in December 1972.

16. He referred to the election of the Whitlam Government on the 5 December 1972, and the election promise "to have all national servicemen home by Christmas".

17. He said that on the morning of 12 December 1972 all national servicemen in "C" Company 4 RAR, were told to report to one of the lecture rooms, where they were addressed by a senior officer who informed them that, as they were aware, the new government had abolished national service and that the Army was now a peace time force and as a result all promotions and training courses would be given to Regular Army personnel in preference to national servicemen, and they would basically be marking time until they were discharged. Mr Williams understood they were not wanted by the Army. The officer then went on to outline the three options

available to them. If they elected to transfer to the Regular Army, they were told, they would be eligible for "War Service Housing Loans".

18. Mr Williams submitted that he, and others, had taken the offered discharge in good faith. That it was "on the grounds of exceptional hardship" was for political expediency. He submitted that they should have been given 2 years leave without pay initially and when the NST Act was brought in it should have had a clause that those men on leave without pay be discharged on the basis of "Abolishment (sic) of National Service". He also submitted that consideration should have been given to changing the eligibility of ADM for national servicemen who were serving when the scheme was abolished.

19. Mr Williams contended that as the liability for national service ended with the government's announcement, similarly the period of existing conscription obligations should also have ended at that time and not at the end of the 18 month period that national servicemen had been conscripted for. The discharge on exceptional hardship grounds was merely a device to remove them from the Army.

20. Mr Williams also contended that he had been discharged due to a prevailing discriminatory policy: Reg 4(1)(iii). He submitted that the application of s.35B(5A) of the NS Act in relation to discharge "on the grounds of exceptional hardship" to fulfil the government's electoral promise was a prevailing discriminatory workplace policy by the government of the day, with respect to the national servicemen concerned. Further, from his own experience, national servicemen who had selected the third option had difficulty explaining the basis of their discharge to potential employers.

21. Mr Williams gave evidence that in his experience there were some different approaches to the news of the electoral result: some national servicemen continued to report for duty, while others were sent away, and others simply did not report for duty.

The Directorate's Submission

22. The Directorate submitted only that Mr Williams' service records confirm that he did not complete his initial enlistment period of 18 months; was not discharged as medically unfit; and was not discharged due to a prevailing discriminatory Defence policy. Consequently, it considered he is not eligible for the ADM as he did not meet the eligibility criteria.

Consideration

23. It is important to note at the outset that the Tribunal's role in undertaking merits review is to make decisions applying the same legislative framework as the primary decision maker, namely the Directorate.

24. The Regulations and the 2007 Determination set out the eligibility criteria for the ADM for a national serviceman. Mr Williams needed to have given qualifying

service that is efficient service in the Australian Defence Force (ADF) by completing a minimum period of 18 months full-time national service. There was no dispute that Mr Williams enlisted on 27 January 1972 and was formally discharged on 12 February 1973, having served one year and 17 days. We observe that the effect of the 2007 Determination is that those national servicemen who had commenced service after 4 June 1971 and who did not complete 18 months service are not eligible for the ADM.

25. Regulation 4(1)(d) sets out three exceptions to the requirement that a national serviceman serve for a period of 18 months. Of those exceptions, none apply although Mr Williams contended that his discharge was due to a prevailing discriminatory Defence policy: Reg 4(1)(iii). However, we do not accept that the application of s.35B(5A) of the NS Act with respect to the national servicemen to fulfil the government's electoral promise was a prevailing discriminatory Defence policy within the meaning of the Regulation.

26. The end of national service was announced on 5 December 1972, but the NS Act had not been amended at this time to relieve members of their national service obligation. We accept that following the election there was a period of some uncertainty and disorganisation in the management of national servicemen. Mr Williams was offered three choices: to serve the uncompleted portion of his national service obligation; to change category to the Reserve; or to apply for two years leave without pay on grounds of exceptional hardship and seek the earliest possible discharge. In taking the third option Mr Williams exercised a choice. It was open to him to continue in the Army until he had completed his enlistment period. There was no obligation to inform national servicemen that in electing the third option they may be precluded from entitlement to future medallic recognition.

27. We accept that the third option with respect to 'exceptional hardship' was contrived to permit national servicemen a quick discharge, and, at least in Mr Williams' case, did not reflect actual compassionate or personal circumstances. We accept that the third option was an administrative device intended to achieve the Government's policy objective by utilising s.35B(5A) of the NS Act and that it was not until the NST Act which came into effect on 21 June 1973 that the process for early discharge of national servicemen was settled.

28. As to Mr Williams' submission that consideration should have been given to changing the eligibility of ADM for national servicemen who were serving when the scheme was abolished, we again observe that it is the Tribunal's role in conducting a merits review only to apply the relevant law. Similarly, we acknowledge Mr Williams' contention that, as the liability for national service ended with the government's announcement, the period of existing conscription obligations should also have ended at that time; it is unknown if such an outcome was reviewed in the course of the 2007 amendment. In any event, this is not a matter in respect of which the Tribunal has any discretion.

29. It should be mentioned in this context that all national servicemen, including those who elected for early discharge, are eligible for the award of the *Anniversary of*

National Service 1951-1972 Medal irrespective of their period of service. As noted above, Mr Williams has been awarded this medal.

DECISION

30. The Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Alan Edwin Williams is not eligible for the award of the Australian Defence Medal.