



Australian Government

Defence Honours and Awards Appeals Tribunal

James Owens and the Department of Defence [2014] DHAAT 16 (27 June 2014)

File Number (s) 2013/006

Re: **James Owens**
APPLICANT

And **Department of Defence**
RESPONDENT

Tribunal Professor D. Horner AM (Chair)
Mr A. Bodzioch
Ms C. Heazlewood

Hearing Date 2 December 2013

DECISION

On 27 June 2014 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr James Joseph Owens is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

Defence Award – Australian Defence Medal – did not serve enlistment period – prevailing discriminatory Defence Policy

LEGISLATION

Defence Act 1903 – ss 9a, 58B, 110V, 110VB
Defence Force Amendment Regulations 2011 – Reg 93C
Australian Defence Medal Regulations 2006 – Reg 4
Cadet Force Regulations – Regs 5, 12 & 14
Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management

REASONS FOR DECISION

Introduction

1 The applicant Mr James Joseph Owens (Mr Owens) 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). Mr Owens was informed of that decision on 5 March 2009.

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 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 Mr Owens for the ADM following his 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.

3. The Tribunal conducts a merits review of the Directorate's decision, which means that it considers Mr Owens's application afresh and makes a new decision as to his eligibility for the ADM.

Background

4. Mr Owens served as an instructor and officer in the Air Training Corps (AIRC), otherwise known as the Air Cadets, from 1978 to 1988. He was appointed as a pilot officer in the AIRC in 1979, was promoted to flying officer in 1980, to flight lieutenant in 1983 and to squadron leader in 1985. While Mr Owens served in the AIRC, he also served in the Army Reserve for an enlistment period of three years, commencing on 27 February 1981. He was enlisted as a corporal, was promoted to sergeant in 1982, and was discharged from the Army Reserve on 2 June 1983.

5. In his original application Mr Owens had sought the award of both the Australian Cadet Forces Service Medal (ACFSM) and the ADM. Qualifying service for the ACFSM is fifteen years' service. Mr Owens served ten years as a cadet instructor with the AIRC, but claimed that he undertook additional work to what was required and that this should be considered as 'extra time required for the award'. Defence deemed him ineligible for the ACFSM and the ADM.

6. The ADM may be awarded to members (or former members) of the Australian Defence Force (ADF) who have completed not less than four years service, or who have completed their initial enlistment period. Reg 4(1)(d)(iii) of *Australian Defence Medal Regulations 2006 (ADM Regulations)* provides that if a prevailing discriminatory Defence policy as determined by the Chief of the Defence Force resulted in the member being unable

to continue their service for four years or the enlistment period, the member may be awarded the ADM.

7. Mr Owens claims that he was subject to a discriminatory Defence policy, in that he was required to resign from the AIRTC or the Army Reserve, because he was prohibited from concurrently being a member of the Royal Australian Air Force (RAAF) Officers' and Army senior Non-Commissioned Officers' (NCOs') messes. He claims that this was because of a prohibition on 'Duality of Mess Structure' and that following a discussion with his AIRTC Commanding Officer, Wing Commander B. Videon, he was left with no choice but to leave one service. He chose to leave the Army Reserve.

8. In 2010 the Defence Honours and Awards Tribunal (the old Tribunal) conducted a review of Defence's decision not to recommend Mr Owens for the ACFSM and the ADM. In conducting its review, the old Tribunal sought clarification of the 'Duality of Mess Structure' rule applicable in 1982 or 1983 and was unable to locate any official Defence policy to this effect. The Tribunal therefore concluded that the policy did not exist at that time, and in its statement of reasons wrote that because there was no prevailing Defence policy the Tribunal could not find that Mr Owens had been the subject of a discriminatory Defence policy.

9. The Tribunal recommended that the decisions not to recommend Mr Owens for the ACFSM and the ADM be affirmed.

10. In 2012 Mr Owens provided the Tribunal with a copy of a letter from another AIRTC instructor, Mr N. Spurrell, in which Mr Spurrell claimed that in 1980 he was subject to a similar choice in respect of his service with the RAAF Reserve. The Tribunal then wrote back to Defence seeking further information on whether such a policy applied at the time. Defence replied on 8 February 2013 with evidence in the form of an excerpt from the *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management* of 11 June 1982 (*AIRTC Manual of Management*) which appeared to add weight to Mr Owens's claim that there was a policy against dual membership of messes.

11. On 21 March 2013 the Tribunal advised Defence that it had accepted Mr Owens's correspondence of 27 February 2012 as a new application.

Steps taken in the conduct of the review

12. As noted above, on 21 March 2013 the Tribunal advised Defence that it was reviewing the decision concerning Mr Owens' eligibility for the ADM and invited it to make a submission and provide the Tribunal with any material on which it ought to rely. Defence forwarded a written submission to the Tribunal on 10 April 2013.

13. The Tribunal met on 25 June 2013 and decided to ask Defence whether it would have been compulsory for an AIRTC officer to be a member of a mess at any time in the course of their duty. Defence replied on 11 July 2013 that it did not consider that it would have been compulsory for an AIRTC officer to be a member of a mess.

14. The Tribunal met on 9 September to consider the material provided by Mr Owens and the Directorate and decided to ask Defence for advice on the delegations made by the Chief of Defence Force (CDF) under Reg 4(1)(d)(iii) of the *ADM Regulations*. This clause provided that the CDF, or his or her delegate, can determine that a member, who has been discharged due to a prevailing discriminatory Defence policy before completing the prescribed qualifying period, can be awarded the ADM. The Tribunal also decided to ask for the list of all ‘prevailing discriminatory Defence policies’ identified over time for the purposes of these regulations.

15. The Tribunal met on 2 December 2013, heard evidence from Mr Owens by telephone, and then considered its findings.

Evidence from Defence submissions and Mr Owens

16. In its submission of 10 April 2013 the Directorate forwarded a report from the RAAF’s Director General Personnel (DGPERS-AF) Air Commodore Rodgers dated 14 January 2014, which advised the following:

- The *AIRTC Manual of Management* stated that:

Members of the Navy, Army or Air Force (Permanent or Reserve elements) may be appointed to the AIRTC. Non-commissioned members of the Navy, Army and Air Force (Permanent or Reserve elements) must not be appointed as AIRTC officers.
- This guidance has been in effect since the re-inception of the AIRTC in 1976 and remains so today according to an AIRTC officer who has been serving in the AIRTC since 1976.
- Persons joining the AIRTC as an officer or instructor were given guidance relating to mess membership during AIRTC induction training and were likely to be made aware that ongoing or future parallel service with a Permanent/Reserve Force may cause the terms of their service with the AIRTC to be reviewed.
- Copies of the *AIRTC Manual of Management* were available to all AIRTC regions and AIRTC officers and instructors were required to read and understand the contents of the manual.
- On behalf of the RAAF, administering AIRTC regions were likely to have provided affected AIRTC members with the following three options when dealing with issues of dual mess status that arose subsequent to a member’s appointment to the AIRTC:
 - (1) make an election to resign from the AIRTC;
 - (2) make an election to discharge from the Reserve/Permanent Force; or
 - (3) accept a reduction in AIRTC rank to align their mess status to that of the permanent/Reserve Force, in order to continue serving with both Forces.

17. Commenting on the matter of dual mess status in DGPERS-AF Air Commodore Rodgers stated:

Whilst the existence of an Air Force policy precluding members from dual mess status may appear to be discriminatory, its purpose is connected to preventing disparity in mess status in respect of AIRTC members who also serve in an element of the Defence Forces. This policy should not be considered to have directly caused the termination of any member's service from a particular Force element.

18. In its submission of 10 April 2013 Defence attached a letter from Mr Owens (then an Army Reserve corporal), dated 25 May 1981 (just three months after he joined the Army Reserve) in which he sought an officer's commission in the Army Reserve. He noted that he was being considered for promotion to flight lieutenant in the AIRTC and that the AIRTC would need to advise Air Office of his dual rank. He observed that it would be normal 'for Reserve rank to determine AIRTC rank and it would follow that I should be required to take appropriate reduction. This in itself does not worry me, but it follows that I would have to relinquish my present post as Commanding Officer of No 17 Flight, Brighton, which I would not be prepared to do'.

19. Mr Owens had been a pilot officer in the AIRTC since 6 February 1979. In 1980 he was promoted to flying officer. While it was permissible for Mr Owens to be a member of both the AIRTC and the Army Reserve¹, Defence, in their submission, argued that he could not be an officer in the AIRTC and an NCO in the Army Reserve. Mr Owens's letter of 25 May 1981 indicates that he understood this from the beginning and soon after joining the Army Reserve he sought a commission in the Army Reserve. If he had been successful he would have been permitted to be an officer in the AIRTC.

20. In response to a request from the Army Reserve about Mr Owens's suitability for a commission, on 13 May 1981 the Regional Liaison Officer for the AIRTC in Victoria, a permanent RAAF officer, stated: 'Air Training Corps staff may be appointed at any rank from Aircraftsman to Flight Lieutenant . . . As Air Training Corps rank confers the appropriate Mess access and effective status on RAAF establishments, every effort is made to appoint and promote members to a rank appropriate to their qualifications, experience and personal qualities'. Unfortunately for Mr Owens, he did not receive a commission in the Army Reserve, but was promoted to sergeant in 1982. As a sergeant he was required to be a member of the Senior NCOs' mess.

21. It appears that at this point his AIRTC commanding officer tried to resolve the matter by presenting Mr Owens with options. Significantly the *AIRTC Manual of Management* was issued in June 1982 (the same year that Mr Owens was promoted to sergeant). In a letter to the Tribunal on 7 March 2013 Mr Owens stated that he was only given options (1) or (2) in

¹ *Defence Instruction (Air Force) AAP 5110.001 Air Training Corps Manual of Management* of 11 June 1982, clause 604.

paragraph 16 (above) and that he resigned from the Army Reserve ‘under protest’. However, Mr Owens’s letter of 25 May 1981 (described in paragraph 18) suggests that he understood that he had a third option, namely to accept a reduction in rank in the AIRTC.

22. It was compulsory for RAAF officers and NCOs to be members of a rank-appropriate mess, and provision was made for AIRTC officers and instructors to be granted affiliated or honorary membership of relevant messes. The requirement for RAAF officers and NCOs to join a mess is set out in *Defence Instructions (Air Force) ADMIN 12-9* dated 1 February 2000, and the RAAF has advised that the same policy applied in the 1980s.

23. In its submission of 11 July 2013 the Directorate advised that it could find no compulsory requirement for AIRTC officers to be members of a mess. There was, however, a strong implication and expectation in the *AIRTC Manual of Management* that AIRTC officers would be a member of a mess.² This is also alluded to in the letter from the AIRTC Regional Liaison Officer quoted in paragraph 20 above.

24. On 10 October 2013 Defence advised the Tribunal that the CDF had made no delegation under clause 4 (1) (d) (III) of the *ADM Regulations* (described in para 14 above). Further, Defence advised that on the establishment of the ADM three policies were identified as being ‘prevailing discriminatory Defence policies’. These were:

- a. discharge of female members upon their marriage;
- b. discharge of female members upon childbirth; and
- c. discharge of ADF members on grounds of homosexuality.

These policies are no longer in existence, and when the ADM was established it was deemed appropriate that those members affected in the past should not be disadvantaged from being considered for the ADM.

The Tribunal’s Findings

25. The Tribunal finds that it was permissible to be a member of both the AIRTC and the Army Reserve, but that under the conditions laid down in the *AIRTC Manual of Management*, non-commissioned members of the Army Reserve were not to be appointed as AIRTC officers. Further, prevailing RAAF policy precluded Mr Owens from belonging to both the RAAF officers’ mess (as an AIRTC officer) and an Army Reserve senior NCO mess (as a sergeant). That is, there are two parts to the policy. The first part unequivocally states that non-commissioned members of the Army Reserve were not permitted to be appointed as AIRTC officers. The second part states: ‘No AIRTC member is to have dual mess status’.

26. In the light of RAAF policy that non-commissioned officers may not be appointed AIRTC officers, the advice given to Mr Owens by his commanding officer that he had three options: resign from the AIRTC; resign from the Army Reserve; or accept a reduction in rank

² *Determination 3498* made pursuant to s58B *Defence Act 1903*, referred to cadet officers, while attending continuous training, being provided with meals in a mess.

in the AIRTC; was sensible and correct advice. They were the only ways by which the requirement of RAAF policy could be met.

27. To be eligible to receive the ADM Mr Owens had to have given qualifying service that was efficient service by completing his initial enlistment period or a period of service of not less than four years or periods that totalled four years. It is not in issue that Mr Owens did not complete his initial period of service (three years) or a period of service of not less than four years. Mr Owens argued that he was unable to complete his initial enlistment period because he was subject to a prevailing discriminatory Defence policy, namely the policy set out in clause 604 of the *AIRTC Manual of Management*.

28. That policy is not included in the list determined by the CDF as being discriminatory. Therefore the Tribunal cannot find that Mr Owens was forced to resign from the Army Reserve because of a prevailing discriminatory Defence policy and thus the exemption in reg 4(1)(d)(iii) does not apply to him. The Tribunal further considered whether it should recommend to the CDF that the policy outlined in clause 604 of the *AIRTC Manual of Management* was discriminatory.

29. The concept of discrimination is a product of statute law not the common law. In legislation discrimination is expressed as being in relation to a certain characteristic of the person such as gender, disability, sexuality or race. The three Defence policies that have been determined to be discriminatory are based on the characteristics of gender and sexuality. In *Purvis v New South Wales* (2003) 217 CLR 92 Gleeson CJ observed that discrimination legislation dealt with discrimination that was considered unjust. McHugh and Kirby JJ set out the test to be applied as: was the characteristic a reason for the treatment suffered? Or to put it another way: was the person treated less favourably than a person without the characteristic and was this because of the characteristic?

30. The first issue to be addressed is whether Mr Owens had a 'characteristic' that might attract discrimination. According to Mr Owens he was discriminated against because he was required to join the RAAF officers' mess because he was an AIRTC officer. The Tribunal has found that it was not compulsory for an AIRTC officer to join the mess but rather it was an expectation. The Tribunal accepts that Mr Owens was told that he could not belong to both messes and that Mr Owens understood this to mean that he must belong to the RAAF officers' mess. The prevailing policy was that a member of the Army Reserve who was not an officer could not be appointed an officer in the AIRTC and no adult member of the AIRTC could hold dual mess status. The characteristic identified by Mr Owens was that he was an officer in the AIRTC, and then appointed a corporal in the Army Reserve and therefore the policy applied to him

31. In spite of the above finding the Tribunal could not see how being an officer in one service and an NCO in another service could be described as a 'characteristic' of Mr Owens that attracted unjust discrimination. The characteristics that have been accepted as attracting unjust discrimination are traits that cannot be changed by the person even if they wanted to. Mr Owens' situation is not a characteristic as described in discrimination law because he

could take action to change the characteristic and Mr Owens attempted to do just that when he wrote the letter of 25 May 1981. If he had been commissioned as an officer in the Army Reserve the policy would no longer have applied. In the opinion of the Tribunal the policy set out in clause 604 of the *AIRTC Manual of Management* was not discriminatory.

DECISION

32. The decision of the Directorate of Honours and Awards of the Department of Defence that Mr James Joseph Owens is not eligible for the award of the Australian Defence Medal is affirmed.