



Australian Government

Defence Honours and Awards Appeals Tribunal

Simmons and the Department of Defence [2019] DHAAT 15 (11 December 2019)

File Number 2019/015

Re **Mr David Kenneth Simmons**
Applicant

And **Department of Defence**
Respondent

Tribunal Ms Anne Trengove (Presiding Member)
Rear Admiral James Goldrick, AO CSC RAN (Retd)

Hearing Date 28 November 2019

DECISION

On 11 December 2019 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mr David Kenneth Simmons is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – initial enlistment period nor minimum period of service met – discharge at own request on compassionate grounds – eligibility criteria not met.

LEGISLATION

Defence Act 1903 – Part VIIC – Sections 110T, 110V, 110VB(2)
Defence Regulation 2016 – Section 36
Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette No. S48, 30 March 2006
Australian Defence Medal Regulations 2006 - Instrument of Delegation, dated 31 March 2017.

REASONS FOR DECISION

Background

1. On 7 February 2019, the Applicant, Mr David Kenneth Simmons, applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) for the Australian Defence Medal (ADM). On 5 April 2019, he was advised that he was not eligible for this award. On 25 June 2019, Mr Simmons applied to the Tribunal for a review of his eligibility for the ADM.

2. On 4 July 2019, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report concerning the decision to deny Mr Simmons the ADM. On 17 August 2019, the Director of Honours and Awards, on behalf of the Secretary, provided a report. The Defence report was forwarded to Mr Simmons and he advised on 3 September 2019 that he had no further comment. The Tribunal obtained further information from Mr Simmons' service record which was provided to the Directorate and with Mr Simmons prior to the Tribunal's hearing.

Eligibility criteria for the Australian Defence Medal

3. The ADM was instituted 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.*

4. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.¹ As a result of the amendment, the minimum period of service (with limited exceptions) became four years. Regulation 4 of the amended Regulations relevantly states:

4 (1) The Medal may be awarded to a ... 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*
- (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 a 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.

¹Commonwealth of Australia Gazette No. S48, Australian Defence Medal Regulations, 30 March 2006.

5. The Chief of the Defence Force (CDF), in accordance with his delegation above, has made Determinations under the ADM Regulations, relating to circumstances where the qualifying period is not met.

6. The Tribunal undertook a merits review of the applicant's case, applying the eligibility criteria extant at the date of the decision under review, as set out in the relevant Regulations.²

Issue for the Tribunal

7. There was no dispute that Mr Simmons did not complete his initial enlistment period of six years or the required four years of qualifying service, noting he served two years and 65 days. The issue for the Tribunal was therefore whether his discharge fell within one of the three exceptions under the Regulations.³

Mr Simmons' service

8. David Kenneth Simmons enlisted in the Royal Australian Navy on 1 March 1968 for a period of six years. He was enlisted to serve until 28 February 1974.

9. During his Navy career, he served as an Engine Room Artificer Diesel (ERAD). On completion of his artificer training at HMAS *Cerberus*, he was promoted to Acting ERAD 2nd class on 1 June 1968. He went on to serve at sea in HMAS *Moresby* and HMAS *Bombard* and ashore in HMAS *Waterhen*. He discharged while posted to HMAS *Waterhen* on 31 July 1970.

10. Not long into his service, on 7 May 1969, when posted to HMAS *Bombard*, Mr Simmons applied for a discharge from the Navy. The application and response are not in his service file. However, it is plain from correspondence that the application was sought on compassionate grounds and was denied.

12. When posted to HMAS *Waterhen*, towards the end of 1969, Mr Simmons reapplied for discharge.⁴ He requested 'compassionate, and or, service discharge',⁵ citing both family and financial reasons.

13. On 28 January 1970, Commander Ian Wilson RAN, Commanding Officer, HMAS *Waterhen* recommended to the Flag Officer in Charge East Australia Area (FOICEA) that, given the circumstances, Mr Simmons should be 'Discharged Free'.⁶ The Chief Staff Officer (Administration) to FOICEA concurred with the recommendation in a letter to the Secretary of the Department of the Navy on 5 February 1970.⁷

² *Defence Act 1903*: s 110VB(6).

³ *Commonwealth of Australia Gazette No. S48, Australian Defence Medal Regulations*, 30 March 2006, section 4(1)(d)(i), (ii), (iii).

⁴ Letter from A/ERA2D D.K. Simmons R67175 to Commander Ian Wilson, RAN Commanding Officer, HMAS *Waterhen*, undated.

⁵ Letter from A/ERAD2 D.K. Simmons R67175 to Commander Ian Wilson, RAN Commanding Officer, HMAS *Waterhen*, undated.

⁶ Commanding Officer HMAS *Waterhen* Letter 75/21/17 to FOICEA dated 28 January 1970.

⁷ Chief Staff Officer (Administration) to the Flag Officer-in-Charge, East Australia Area Letter N75/21/1348 to the Secretary, Department of the Navy, dated 5 February 1970.

14. The application for discharge was then referred to the Director Personal Services (Administration) DPS(A) on 13 March 1970. Mr Simmons' application was refused. DPS(A) recommended, with the Director General Personal Services (DGPS) concurring, that a sea posting would increase Mr Simmons' qualifications and therefore his pay and thus allow his retention in the Service.⁸

15. Mr Simmons' Navy Personnel Electronic Management Service (EMS) record shows, however, that he was not posted to sea as recommended, but rather, a short time later, he was granted 90 days leave without pay to seek civilian employment, commencing on 5 May 1970.⁹ On 31 July 1970, after 88 days, Mr Simmons was granted a 'Free Discharge'. There are no records in the Mr Simmons' service record in support of the leave without pay application and the reasons for granting the same, nor the reduction to 88 days.

16. Mr Simmons was honourably discharged at his own request on 31 July 1970 after 2 years 153 days effective service.¹⁰ For the purposes of the Regulations, the 88 days leave without pay is subtracted from the total, resulting in qualifying service of 2 years and 65 days service.

Applicant's evidence

17. In his application to the Tribunal, Mr Simmons asserted that he had intended to make the Navy his career for life. He even looked forward to the day he might be commissioned.

18. Mr Simmons explained that when he joined the Navy at 28 years of age he was married with two very young children. He had previously spent some 10 years working in civilian employment as a fitter and turner.

19. When his marriage disintegrated, he looked to join the Navy for a fresh start. Prior to enlistment Mr Simmons had agreed to pay financial maintenance at a set fortnightly amount to his wife. The amount was set to his previous civilian salary, which was higher than his Navy salary was to be. The legal agreement reached through solicitors did not allow for maintenance to be indexed to his current rate of pay.

20. Mr Simmons admitted that when he joined the Navy he did not check the salary disparity. Indeed, he hoped that he would be fast-tracked in his Navy career and earnings. This was not to be. His short naval career was marred by financial difficulties. By paying \$65 fortnightly agreed maintenance to his wife and a fortnightly Navy allotment of \$40 to his fiancée, as well as creditors, he says he was left 5 cents in debt each pay period. Mr Simmons' recollection of his situation is largely confirmed by his Commanding Officer's letter of 28 January 1970, with the minor difference that the take home pay actually amounted to \$1.65. Notably, the letter also described the substantial debts that Mr Simmons owed as a result of his marriage and divorce.¹¹

⁸ Minute 1/67175 'Simmons D.K. A/ERAD R67175: Application for Free Discharge'.

⁹ NPEMS Record, R67165, ERA2 David Kenneth Simmons.

¹⁰ RAN Discharge Certificate dated 13 July 1970.

¹¹ Commanding Officer HMAS *Waterhen* Letter 75/21/17 of 28 January 1970 to FOICEA.

21. At hearing, Mr Simmons stated that he did not seek to negotiate a lower maintenance amount with his then wife nor seek approval for stoppage or a reduced allotment to his fiancée.

22. As well as financial difficulties, Mr Simmons was also having personal difficulties around this time with his eldest son who sought to live with him and his fiancée. It was thus for both financial and family reasons that he sought to leave the Navy and this was the reasoning behind both applications to discharge.

23. Mr Simmons advised that during the three months leave without pay he was able to demonstrate the difference between his civilian pay and Navy pay to Navy officials – approximately 50% greater as a civilian¹² - and he was finally granted Discharge Free.

24. The applicant sought an ADM because ‘through no fault of [his] own [he] had to leave his chosen career’. But for his extenuating circumstances, he claimed that he would have continued to serve the four year minimum qualifying period at least.

25. Mr Simmons candidly acknowledged that he did not come within any of the limited exceptions in the Regulations, nor that he was subject to any mistreatment. In fact, he said he was treated very well by the Navy and he was sad to leave. Mr Simmons stated that he did not ever seek to rejoin the Navy when his personal or financial circumstances changed as he did not know he could do so.

26. Mr Simmons sought the Tribunal’s discretion to award him an ADM given his particular circumstances, the very good service he provided and as something to hand down to his children as a record that he had served in the Navy.

Respondent submission

27. Defence whilst acknowledging the applicant’s service, submitted that the Regulations which set out the requirements to be awarded the ADM were not met in the applicant’s case. Mr Simmons did not serve for his initial enlistment period and nor did he serve for a period that totaled four years.

28. Further, it was submitted that the mitigating provisions in the Regulations do not apply to his case, as he was not discharged medically unfit and there was no prevailing discriminatory Defence Policy extant at the time of his discharge. Discharge at own request on compassionate grounds is not included in the mitigating provisions.

Tribunal consideration

29. There is no issue that Mr Simmons did not have the requisite qualifying service for the ADM. Regulation 4(1)(d) sets out three limited exceptions to the requirement that a person serve their initial enlistment period or a period of four years. None were contended by Mr Simmons and none were relevant in his case.

¹² Mr D.K. Simmons Group Certificates 1 Jul 67-16 Feb 68 (J.I. Case (Australia) Ltd and 1 Jul 68-30 June 169 (Royal Australian Navy).

30. The Tribunal finds that the applicant did not fall within the limited exceptions of Regulation 4(1)(d).

31. The Tribunal has no discretion to grant an award where the qualifying period has not been met and where the circumstances of the discharge were for compassionate grounds only.

32. It was clear to the Tribunal that Mr Simmons was held in high regard by his last Commanding Officer, Commander Wilson who was evidently reluctant to let him go, noting that he was reported to be 'doing his job well'.¹³ However, the Tribunal has no discretion to grant an award, even where a member provides very good service, unless the eligibility criteria are met.

33. The Tribunal therefore declines to find there are circumstances in Mr Simmons' case which would warrant a lesser period of service being considered as being efficient service.

34. The Tribunal acknowledges that this will be a disappointment to Mr Simmons. It takes this opportunity to acknowledge and thank him for his service, however short, in the Royal Australian Navy and to sympathise with his being forced to curtail his naval career in such difficult circumstances.

DECISION

35. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mr David Kenneth Simmons is not eligible for the award of the Australian Defence Medal.

¹³ Letter, Captain Wilson to FOICEA, 28 January 1970.