



Australian Government

Defence Honours and Awards Appeals Tribunal

Baumgarten and the Department of Defence [2020] DHAAT 4 (12 March 2020)

File Number 2019/003

Re **Mrs Leanne May Baumgarten (nee Bartholomaeus)
Applicant**

And **Department of Defence
Respondent**

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

Hearing Date 14 August 2019

DECISION

On 12 March 2020 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mrs Leanne Baumgarten 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 - whether early discharge due to a prevailing discriminatory Defence Policy – validity of *The Commonwealth of Australia, Australian Defence Medal Regulations 2006 - Efficient Service (Discharge Consequential to Mistreatment) Determination*, 2 April 2015

LEGISLATION

Defence Act 1903 – Part VIIIIC – Sections 110T, 110V, 110 VB(2).

Defence Regulation 2016, Section 36.

Commonwealth of Australia Gazette No. S48, Letters Patent and Regulations for the Australian Defence Medal, dated 30 March 2006

Australian Defence Medal Regulations 2006 – Instrument of Delegation, dated 31 March 2017.

Commonwealth of Australia, Australian Defence Medal Regulations 2006 - Efficient Service (Discharge Consequential to Mistreatment) Determination, dated 2 April 2015.

REASONS FOR DECISION

Background

1. The Applicant, Mrs Leanne May Baumgarten (nee Bartholomaeus) applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) on 27 February 2018 for the Australian Defence Medal (ADM). She was advised that she was not eligible on 26 March 2018. On 4 February 2019, Mrs Baumgarten applied to the Tribunal for a review of her eligibility for the ADM.

2. On 7 February 2019, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report concerning the decision to deny Mrs Baumgarten the ADM. On 18 March 2019, the Director of Honours and Awards, on behalf of the Secretary, provided a report. The Defence report¹ was forwarded to the Applicant with a request from the Tribunal for further information. Mrs Baumgarten provided additional information which was then provided to the Directorate before 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.*

The Regulations

4. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006.² 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) ...;

(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.³

¹ Defence Report enclosed in the letter from the Acting Director of Honours and Awards of 18 March 2019 DH&A/OUT/ 2019/0012

² Commonwealth of Australia Gazette No. S48, Australian Defence Medal Regulations, dated 30 March 2006.

³ Emphasis added by the Tribunal.

- (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.*

The Determination

5. The Chief of the Defence Force (CDF) or his or her delegate, in accordance with the subregulation above, may make Determinations under the ADM Regulations, providing that a member's qualifying service is efficient service. On 2 April 2015, CDF made a Determination, purportedly pursuant to this subregulation, namely *the Commonwealth of Australia, Australian Defence Medal Regulations 2006 - Efficient Service (Discharge Consequential to Mistreatment Determination)* of 2 April 2015, hereafter referred to as the 'Determination'.

6. The Determination sets out that CDF:

....

*(b) pursuant to sub-regulation 4(2) of the Regulations, determine that where a former member was discharged and the period of service of that member is less than that prescribed under Paragraphs 4(1)(a) to (c), that lesser period of service may be considered as being efficient service for the award **if mistreatment by Defence was a significant contributing factor to the member's discharge;**⁴ and*

(c) I delegate to the Director of Honours and Awards the authority to determined that a period of the member's qualifying service is efficient service for the award for the purposes of paragraph (b) of this Determination.

The Policy Directive

7. On 2 April 2015, CDF in his *Directive 04/15*⁵ (the Policy Directive), formulated an administrative guidance policy regarding the above Determination. It states that it is not necessary for the delegate to have determined that mistreatment occurred to any particular legal standard, such as the balance of probabilities. Rather, the delegate should exercise discretion to award the ADM if it is warranted in all the circumstances, including whether it would be 'beneficial to the member'. The Policy Directive then listed potential considerations which might be relevant to an application.

Preliminary Issue regarding validity of the Determination

8. Mrs Baumgarten's application and another before the Tribunal are the first to be decided by the Tribunal involving application of the Determination and the corresponding Policy Directive.

9. Post the hearing, the Tribunal raised with the Respondent an issue concerning the validity of the Determination and the corresponding Policy Directive. On 19 December 2019, the Tribunal wrote to the Respondent outlining its tentative view that subregulation 4(2) as set out above, did not appear to give power to CDF to extend the exceptions beyond subregulation 4(1)(d) and further, it only conferred on CDF the power to determine which periods of a member's service could be considered

⁴ Emphasis added by the Tribunal.

⁵ CDF Directive 04/15 – 'Australian Defence Medal Regulation 2006 – Efficient Service (Discharge Consequential to Mistreatment) Determination – Administrative Guidance'.

‘efficient’. That is, to the Tribunal, it appeared that the CDF is empowered by subregulation 4(2) only to determine the *period* of member’s efficient service but not the *reason or circumstances* as to why the service was unable to continue.

10. The Tribunal observes that where subordinate legislation, such as Determinations, are inconsistent with or seek to extend the scope of the higher authority Regulations, they are invalid.

11. Relevant to Mrs Baumgarten’s application, none of the exceptions in subregulation 4(1)(d) refer to ‘mistreatment’ being a ‘significant contributing cause’ in a member’s discharge. The only power given to the CDF in relation to the exceptions is to determine which ‘prevailing discriminatory Defence policies’ can be included in the exception covered by subregulation 4(1)(d)(iii).

12. The Tribunal on 19 December 2019 sought assistance from the Respondent as to the validity of the Determination and any implication for the extant applications under review concerning the Determination. The Tribunal also provided a copy of this letter to the Applicant.

13. On 5 February 2019, the Respondent provided a response. It advised that the Respondent agreed with the Tribunal’s view that there was no power under the extant Regulations to award an Australian Defence Medal on the grounds of a discharge consequential to mistreatment.

14. The Respondent’s advice was forwarded to the Applicant, who declined the invitation to make any comment.

Tribunal finding - Determination invalid

15. The Tribunal finds that the Determination is invalid for the following reasons.

16. The starting point in determining the validity of any subordinate legislation is to closely examine the higher legislative authority. In this case, the higher authority is the *Australian Defence Medal Regulations 2006*. This is the legal instrument which sets out the eligibility criteria for the ADM. Subregulation 4(1)(a)-(c) refers to qualifying service that is, efficient service, as being referable to members or former members. Subregulation 4(1)(d), sets out the only exceptions. Subregulation 4(2) gives power to the CDF or his or her delegate to determine that a period of the member’s qualifying service is efficient service.

17. The Determination, purportedly made pursuant to subregulation 4(2), states that:

‘... where a former member was discharged and the period of service of that member is less than that prescribed under [subregulations 4(1)(a)-(c), then]‘that lesser period may be considered as being efficient service of the award if mistreatment by Defence was a significant contributing factor to the member’s discharge’.

18. This element of the Determination is repeated in the Policy Directive. However, none of the exceptions in subregulation 4(1)(d) refer to ‘mistreatment’ being a ‘significant’ cause for a member’s discharge.

19. Furthermore, the only power given to the CDF in relation to the exceptions is to determine which ‘prevailing discriminatory Defence policies’ can be included in the exception covered by subregulation 4(1)(d)(iii). Mistreatment of the kind being considered by the Tribunal cannot be characterised as ‘prevailing discriminatory Defence policy’. Subregulation 4(2) does not give power to CDF to extend the exceptions beyond subregulation 4(1)(d) and further, it only conferred on CDF the power to determine which periods of a members or a former member could be considered to be ‘efficient’. CDF is only empowered by subregulation 4(2) to determine the *period* of member’s efficient service but not the *reason* or the *circumstances* as to why the service was unable to continue.

20. The Determination is therefore inconsistent with the Regulations. As stated, where subordinate legislation, such as Determinations, are inconsistent with or seek to extend the scope of the higher authority Regulations, they are invalid. The Tribunal notes that the Respondent now also agrees that the Determination is invalid.

21. The Tribunal finds that the Determination, namely *The Commonwealth of Australia, Australian Defence Medal Regulations 2006 - Efficient Service (Discharge Consequential to Mistreatment Determination)*, 2 April 2015, is invalid.

Tribunal could not consider the Policy Directive

22. Further, the Tribunal did not have a legal basis to consider Mrs Baumgarten’s application against the Policy Directive providing guidance to the invalid Determination. Where government policy is inconsistent with higher authority, such as Regulations, such policy cannot be relied upon.⁶ The Respondent’s policy is inconsistent with the Regulatory eligibility criteria.

23. The Policy Directive, like the invalid Determination, could not be given any consideration in assessing the eligibility criteria for consideration for an award of the ADM.

24. Therefore, any discharge consequent to mistreatment could not considered by the Tribunal for an award of an ADM.

Merits review

25. The Tribunal proceeded to undertake a merits review of Mrs Baumgarten’s application against the applicable eligibility criteria, pursuant to Regulation 4, repeated below:

- 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:*

⁶ In *Green v Daniels (1977) 51 ALJR 463*, the High Court acknowledged that policy guidelines may be provided for the benefit of delegates and in the interests of consistent administration, so long as these are consistent with the statutory criteria.

- (i) ...;
 - (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.*

Issue for the Tribunal

26. There was no dispute that Mrs Baumgarten did not complete her initial enlistment period of three years or the required four years for qualifying service, noting she served one year and 10 months. The issue for the Tribunal was whether her discharge was due to a prevailing discriminatory Defence policy at the time of her service.

Mrs Baumgarten's (nee Bartholomaeus) service

27. Ms Leanne May Bartholomaeus, as the Applicant then was, enlisted in the Australian Regular Army Supplement on 3 February 1982 for a period of three years. During her training to be an Assistant Nurse, she was posted to 2 Military Hospital. On completion of her training, the applicant was assigned to the Royal Australian Army Nursing Corps and then posted to Royal Military College Hospital Duntroon.

28. On 18 March 1983, the Applicant and her partner Lieutenant Mark Atkinson became engaged to be married. On 20 July 1983, Reverend Thorpe provided written confirmation that he was to marry the couple on 31 December 1983 in South Australia. This information was provided to Private Bartholomaeus' chain of command.

29. The Applicant applied for discharge on 31 August 1983 citing her impending marriage as the reason for discharge. The discharge was to take effect from 9 December 1983 at Watsonia, 3 Military District. The Applicant's service record states that she discharged at her 'own request' under AMR 176(1)(A), having completed one year and 10 months service.⁷

Mrs Baumgarten's evidence at hearing

30. In her application to the Tribunal, Mrs Baumgarten asserted that she had: 'experienced subliminal harassment and extreme pressure to leave the Australian Defence Force as a result of her engagement and pending nuptials to an Officer.' She said although the discriminatory policy whereby marrying females were mandatorily discharged formally changed in 1968-1969, it lingered as an 'unwritten policy' as late as 1983 and influenced her decision to discharge at her own request.

31. She states that those senior to her were unsupportive of her engagement to Lieutenant Atkinson when it was announced. For instance, Mrs Baumgarten states that

⁷ Discharge procedure form and annexures in the applicant's service personnel file.

her Matron⁸ and the RMC Duntroon Regimental Sergeant Major⁹ made it plain to her that officers and her rank did not mix and she would be better off ending the relationship and keeping within her own rank. Her Matron further advised her that she would likely be better off in a civilian nursing career in support of her husband-to-be's career as a Signals Officer. Being a young Private of 21 years Mrs Baumgarten said she did not question the advice of her senior officers and felt that she should essentially do the 'right thing' and seek a discharge.

32. The Applicant stated that it was not only a lack of support for her to remain in the Army, but claims that she was bullied and harassed by her Adjutant¹⁰ and senior nursing Sister,¹¹ as a result of her engagement to a soon to be commissioned officer. She stated her Adjutant was extremely unsupportive of the match and the rank disparity. He was said to have instigated a situation where the applicant would require approval signatures of all attending officers, before she was allowed to attend officer functions with her fiancé. This included Lieutenant Atkinson's graduation dinner, which she was not allowed to attend, even in civilian dress. She also stated that the Sister was very proactive rostering the applicant on shifts which coincided with functions, activities and events which she sought to attend with her fiancé.

33. The Applicant stated that only member in her chain of command who was supportive of the relationship and tried to provide solutions was Captain Marg Daley. However, with the rest of her chain of command against her, there was little to arrest her treatment.

34. Sometime after 20 July 1983, she disclosed the letter from her religious minister about her impending marriage in December of that year to those in her command chain. Sometime in August she found out that she was to be posted to 1 Military Hospital, Brisbane while her fiancée was to be posted to Simpson Barracks, Watsonia, Victoria. She did not want to be posted from her new husband for two years. This was a significant factor in her decision to resign and the 'final straw'. In her eyes, it was deliberate action by her chain of command to post her and her future husband interstate and away from each other.

35. On 31 August 1983, Mrs Baumgarten applied for discharge from the Army citing her impending marriage as the reason for discharge. She stated that 'but for' the ongoing treatment she received once she announced her engagement and then being posted away from her fiancée, she had intended to stay in the Army beyond her enlistment period. She stated that to this day she enjoys going to local RSL events and attending marches and services in replica nurses' uniforms.

36. Mrs Baumgarten stated that, to her surprise, even after she discharged from the Army she continued to experience harassment at Army functions with her husband, given her background as an ex-Private. She said she was not invited into the Defence family nor made welcome.

37. The Applicant stated at hearing that there were now no witnesses available to speak of her treatment except for Ms Julie Gavin (nee Hawkins) who was a nurse at

⁸ The Matron's full name and rank were provided to the Tribunal by the Applicant.

⁹ The Regimental Sergeant Major's full name and rank were provided to the Tribunal by the Applicant.

¹⁰ The Adjutant's full name and rank were provided to the Tribunal by the Applicant.

¹¹ The Sister's full name and rank were provided to the Tribunal by the Applicant.

Duntroon and who witnessed the need for her to obtain attendance approval and which was denied by the Sister at one such function.¹² At the hearing, Mrs Baumgarten said one officer was aware of her issues and advised her to ‘keep a low profile’.¹³ She stated that the relevant conversations with her superiors were ‘one on one’ and without formal record. As the Applicant divorced some time ago and she is no longer in contact with her ex-husband she has not been able to garner evidence from him to attest to the mistreatment she suffered.

Respondent’s submission at hearing

38. Defence submitted that the Regulations which set out the requirements to be awarded the ADM were not met in the applicant’s case. Mrs Baumgarten did not serve for her initial enlistment period and nor did she serve for a period that totaled four years, which, in any event, is longer than her enlistment period.

39. Further, it was submitted that the mitigating provisions in the Regulations do not apply to her case, as there was no ‘prevailing discriminatory Defence policy’ extant at the time of her discharge.¹⁴ The discriminatory policy relating to the mandatory discharge of marrying females was removed prior to 1969.¹⁵ The Directorate applies 1 January 1970 as being end date for the policy.¹⁶

Evidence provided after the hearing¹⁷

40. Noting that Mrs Baumgarten had difficulty providing evidence of colleagues attesting to her situation and that she had provided contact details of a Ms Janine O’Hara (nee Turner) as being a person happy to be contacted about her ‘relationship with Mark and some of the issues [she] had’,¹⁸ the Tribunal directed that inquiries be made.

41. Tribunal Secretariat staff spoke to Ms O’Hara by telephone on 24 September 2019. Ms O’Hara advised that she knew the Applicant, the then Private Bartholomaeus, on a social basis. At that time Ms O’Hara was posted to Simpson Barracks, Watsonia. However, Ms O’Hara could not recall any mistreatment of Private Bartholomaeus. She did, however, confirm that Mess arrangements at that time dictated that ORs did not enter the Officers’ Mess unless specifically invited to do so and vice versa.

42. The information provided by Ms O’Hara was disclosed to the parties for any comment.¹⁹ On 18 October 2019, Mrs Baumgarten responded via email that she now believed Ms O’Hara was not aware of the harassment she experienced at the time.²⁰ However, Mrs Baumgarten sought to get in contact with another member to whom she believed could provide evidence in support. The Tribunal agreed to grant the applicant

¹² Email of Ms Julie Gavin dated 22 March 2019

¹³ The officer’s name and rank were provided to the Tribunal by the Applicant.

¹⁴ Defence Response of 26 July 2019 (DH&A/OUT/2019/0037) in relation to ‘Prevailing Discriminatory Defence Policy’.

¹⁵ Defence Honours and Awards Tribunal – Inquiry into Eligibility criteria for the award of the Australian Defence Medal, 11 February 2009.

¹⁶ Letter from the Director Honours and Awards to the Tribunal Secretariat of 26 July 2019, DH&A/OUT2019/0037.

¹⁷ Much of the evidence provided by the Applicant post hearing was in support of the Determination and accompanying Policy Directive which the Tribunal has since ruled invalid.

¹⁸ Letter from Ms Baumgarten to the Tribunal, received 25 March 2019.

¹⁹ Tribunal Secretariat file note, 24 September 2019.

²⁰ Email, Mrs Baumgarten to the Tribunal Secretariat, 18 October 2019.

an extension of time to find this person by 29 October 2019. Mrs Baumgarten subsequently advised that she had been undergoing medical treatment and she needed more time to provide the further evidence. In the circumstances, the Tribunal agreed to a further extension of time.

43. On 22 November 2019, Mrs Baumgarten provided, via email, a statement from Ms Terri King dated 20 November 2019. Ms King served as a nursing colleague with the applicant at the relevant time. The two became friends. Ms King observed that the then Private Bartholomaeus was frequently upset by the treatment she received after she announced her engagement. In Ms King's view, this treatment had ultimately led to her resignation from the Army.

44. Ms King considered that Private Bartholomaeus' treatment and advice from others seemed particularly old-fashioned, especially for the 1980s. Ms King related that Private Bartholomaeus confided that she was being pressured to end the relationship with her fiancé. Senior members advised Private Bartholomaeus that it would ruin her career as her future husband's career would always take precedence and she would not be given the opportunities she sought, including further training. These members were said to include the Matron, Senior Sister and other officers.

45. Ms King relayed a conversation which she had directly heard between the Nursing Sister and Private Bartholomaeus as the wedding drew closer. The Nursing Sister stated that in her view Private Bartholomaeus had 'sullied the Nursing Corps' reputation by becoming involved with an Officer'. Further 'it was considered shameful for an Officer to marry beneath himself'. It was clear to Ms King that this conversation upset Private Bartholomaeus greatly at the time. Ms King recalled, that due to the 'onslaught' of negativity and abuse, as well as, being posted in different localities, Private Bartholomaeus decided to resign from the Army, preferring this option to remaining in the Army or ending her relationship.

46. The above information was provided to the Respondent for comment. The Respondent reiterated its position on 5 February 2020, that Mrs Baumgarten does not meet the qualifying provisions for an award of the ADM.

Determination by the Tribunal

47. As stated, there is no issue that Mrs Baumgarten does not have the requisite qualifying service for the ADM. Subregulation 4(1)(d) sets out only three limited exceptions to the requirement that a person serve their initial enlistment period or a period of four years. The only potentially relevant exception relating to this case is whether there was a prevailing discriminatory Defence policy.

48. The Tribunal finds that in 1983 there was no prevailing discriminatory Defence policy against married women or marrying women serving in the ADF. It is contended by the Applicant there was an 'unwritten policy', however, the subregulation 4(1)(d) makes it plain it must be an actual Defence Policy, as determined by the CDF, which prevailed at the relevant time. Therefore, the Tribunal finds that the Applicant does not fall within the limited exception of Subregulation 4(1)(d) nor any other exception.

49. In summary, the Tribunal was not satisfied that Mrs Baumgarten met the Regulatory eligibility criteria for the ADM, or fell within any of the Regulatory exceptions for the ADM.

50. The Tribunal notes that much of the evidence provided by Mrs Baumgarten in support of her application was directed to the issue of mistreatment, now found to be an invalid consideration. The Tribunal was required to limit its determination to the limited exceptions in subregulation 4(1)(d) and not concern itself with the issue of any mistreatment. It was therefore not necessary for the Tribunal to make a finding in relation to mistreatment.

51. The Tribunal observes that the Respondent is currently reviewing its Regulations, Determinations and Directives to ensure there is provision for members whose discharge is considered to be consequential to mistreatment for eligibility for the ADM.²¹ Neither the decision by the Tribunal nor the Respondent's refusal decision of 26 March 2018 prevent Mrs Baumgarten from reapplying for the ADM, pending a change in the law.

DECISION

52. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mrs Leanne Baumgarten is not eligible for the award of the Australian Defence Medal.

²¹ Directorate letter of 5 February 2020