



Australian Government

Defence Honours and Awards Appeals Tribunal

Anticich and the Department of Defence [2020] DHAAT 07 (14 May 2020)

File Number 2019/024

Re **Mr Nicholas Anticich**
Applicant

And **Department of Defence**
Respondent

Tribunal Mr David Ashley AM (Presiding Member)
Mr Graham Mowbray

Hearing Date 17 April 2020

DECISION

On 14 May 2020 the Tribunal affirmed the decision of the Directorate of Honours and Awards of the Department of Defence of 21 February 2011 that Mr Nicholas Anticich is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – enlistment period not met - limited exceptions to mandatory period of efficient service - no discretion

LEGISLATION

Defence Act 1903 – Part V111C – Sections 110T, 110VB(2), 110VB(6)

Defence Regulation 2016 – Section 36

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

Australian Defence Medal Regulations 2006 – Determination by Chief of the Defence Force dated 6 February 2013, minimum annual periods of qualifying service for the Australian Defence Medal

REASONS FOR DECISION

Introduction

1. On 25 November 2010, the Applicant, Mr Nicholas Anticich, applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) for the Australian Defence Medal (ADM).
2. On 9 February 2011, Mr Paul Waddell from the Directorate's ADM Cell advised Mr Anticich in writing that as he did not complete his three year enlistment period, he was not eligible for the award.¹
3. On 21 February 2011, in response to further correspondence from Mr Anticich dated 18 February 2011, Mr Jeff Birmingham of the Directorate also wrote to Mr Anticich stating *'as you did not complete your initial engagement period of three years, I must confirm our previous advice that you do not qualify for the ADM'*.² The Tribunal considers this to be the reviewable decision.
4. On 17 October 2019, Mr Anticich applied to the Tribunal for a review of the Directorate's decision.³
5. On 24 October 2019, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report on the evidence that Defence relied upon, its findings on material questions of fact and the reasons for its decision.⁴ This report was provided to the Tribunal on 25 November 2019.⁵
6. On 27 November 2019 the Defence report was provided to Mr Anticich⁶ who responded to the Tribunal with his comments on 28 December 2019.⁷
7. On 23 March 2020, the Tribunal requested additional clarification on several matters from the Directorate. The Directorate replied on 15 April 2020.⁸ This additional information was provided to Mr Anticich prior to the hearing.

The Australian Defence Medal

8. 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.'
9. 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

¹ Letter Mr Paul Waddell to Mr Anticich dated 9 February 2011

² Letter Mr Jeff Birmingham to Mr Anticich dated 21 February 2011

³ Application for Review of Defence Decision by Mr Anticich dated 17 October 2019

⁴ Letter Tribunal to Secretary Department of Defence dated 24 October 2019

⁵ Report of Review of Recognition for Mr Nick Anticich dated 24 October 2019

⁶ Letter Tribunal to Mr Anticich dated 27 November 2019

⁷ E-mail Mr Anticich to Tribunal dated 28 December 2019

⁸ Correspondence Directorate to DHAAT dated 4 April 2020

period of service became the initial enlistment period or 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 or her delegate may determine that a period of the member’s qualifying service is efficient service.’*

ARES service and qualification for the ADM

10. Further eligibility criteria for the ADM, contained in the Schedule of *Commonwealth of Australia, Australian Defence Medal Regulations, Determination by the Chief of Defence Force* dated 6 February 2013, *Minimum Periods of Annual Qualifying Service for the Australian Defence Medal* shows the following:

Service Category	Minimum Qualifying Period	Effective Dates
Australian Army		
Army Reserve	26 days, including such periods of continuous training and home training as directed by the proper military authority	Until 30 June 1993
	14 days	From 1 July 1993 to 20 April 2000
All members	20 days	From 20 April 2000

Special Conditions units	26 days continuous service	Until 30 June 1993	From 1 July 1993 as for Army Reserve
--------------------------	----------------------------	--------------------	--------------------------------------

11. Similar periods were set in earlier determinations by the Chief of the Defence Force. As will become obvious from these reasons, it is not necessary for the Tribunal to consider the application of these Determinations to Mr Anticich’s service.

Mr Anticich's service

12. On 27 November 1980 Mr Anticich enlisted into the Australian Army Reserve with the 1st/19th Battalion, the Royal New South Wales Regiment (RNSWR). He discharged on 25 August 1983 from 28 Independent Rifle Company, after serving approximately two years and nine months.

13. Mr Anticich has been issued no awards for his service.

Summary of the hearing

14. The hearing was conducted via telephone on 17 April 2020. The Directorate was represented by Ms Jo Callaghan and Mr Wayne Parker.

15. With Mr Anticich's concurrence the Tribunal read three e-mails sent by him to the Tribunal in support of his claim⁹. Central to this correspondence:

'I disagree with the determination and the lack of knowledge by Defence regarding my engagement at the time. The policy stipulates a date of entry and exit as the qualification period, which was not known to me at the time and in the case of my engagement I made the point that it did not consider the special conditions associated with my engagement. The unit I initially engaged with was to my knowledge a special conditions reserve unit designed to accommodate shift workers and in my case Police Officers. It was different to other units as the requirement was to attend camps rather than weekends. The point I made was that my resignation some three months prior to the three year initial engagement period would have in reality not required any further attendance or commitment to camp. In other words if I had resigned three months later I would have been entitled to the award albeit I would not have any further commitment or attendance during that period. I believe there is a more fulsome claim to this effect on file with the Honours and Awards Directorate'.

16. This correspondence also addressed Mr Anticich's reasons for resignation before completion of his initial period of service, and his argument regarding the number and dates of the days he paraded, noting that he was in a Special Conditions unit and making the comments:

'I see now that Army chooses to record my yearly service based on commencement date, not calendar or financial year', and that 'this misrepresents my attendance.'

17. In the correspondence Mr Anticich made the point that he had attended camps in each calendar year of his service. Mr Anticich was then asked for further comment in support of his claim.

18. Mr Anticich stated that his application was on principle. He conceded that the application of the rules had been '*absolutely correct*' but he believed that '*this decision should not be necessarily what was right according to regulation but about doing the right thing.*' He stated "*you can do things right according to the law or you can do the 'right thing'.*" He stated that the '*right thing*' should apply in the circumstances of his case.

⁹ E-Mails Mr Anticich to DHAAT dated 18 October 2019, 27 December 2019 and 28 December 2019

19. The Tribunal then took Mr Anticich to *the Australian Defence Medal Regulations 2006* and specifically to subregulation 4(1). Mr Anticich agreed to the Tribunal's proposition that he did not meet any of the criteria for the award he seeks.

20. Mr Anticich was then asked if he was requesting the Tribunal to use discretion to disregard the Regulations. Mr Anticich stated that he was asking the Tribunal to '*do the right thing.*' He went on to describe an example during his service with the Australian Federal Police where, while the decision was 'correct', discretion was applied in relation to a clothing replacement issue.

21. The Tribunal advised Mr Anticich that it was bound by the eligibility criteria that governed the making of the reviewable decision and asked him on what basis the Tribunal could exercise discretion in relation to his claim. Mr Anticich expressed the view that there should be discretion and that '*the purpose of the Medal is to recognise service and I did that.*'

The Defence Submission

22. The Directorate stated that it is bound by the eligibility criteria for the ADM, that it had no discretion outside of the criteria, and that in Mr Anticich's case, it had no option but to make the decision to not recommend him for the ADM. The Directorate stated that although it was unable to make a recommendation for the ADM, it recognises Mr Anticich's service.

23. The Directorate agreed with the Tribunal's proposition that since it had determined Mr Anticich did not meet the eligibility criteria for the award of the ADM, regardless of the number of days served, and when those days were served, that was sufficient for a refusal decision and the end of the matter, insofar as Defence was concerned.

24. On questioning by Mr Anticich, the representatives from the Directorate stated that to their knowledge, the ADM had not been issued to someone who did not meet the eligibility criteria.

25. The Tribunal asked the Directorate to provide an explanation to Mr Anticich of the meaning of paragraph 4(1)(d)(iii) of the Regulations *the discharge of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of Defence Force or his or her delegate*, examples, and if any relevant circumstance applied to Mr Anticich. The Directorate provided the meaning, some examples, and confirmed that the exceptions of these criteria did not apply to Mr Anticich.

Issues for the Tribunal:

Did Mr Anticich complete an initial enlistment period for the purpose of eligibility for the ADM?

26. The Tribunal concluded that Mr Anticich's service record is clear.¹⁰ This records his enlistment date of 27 November 1980 '*in ARES for 3 years.*' This would require service until 26 November 1983 to complete his initial enlistment period. The document records his discharge date of 25 August 1983 for a period of less than three years. The Tribunal notes that Mr Anticich conceded in the hearing that he did not complete his initial period of enlistment. The Tribunal concluded that Mr Anticich did not complete his initial period of enlistment.

Does Mr Anticich meet any of the other eligibility criteria set out in the ADM Regulations?

27. At the hearing the parties agreed that Mr Anticich did not meet any of the other criteria required by subregulation 4(1) of the *Australian Defence Medal Regulations 2006*. The Tribunal was unable to find any evidence that Mr Anticich met any of the criteria for the ADM as required by the Regulations. The Tribunal concluded that Mr Anticich did not meet any of the other criteria for the award of the ADM.

Are Mr Anticich's efficient days served relevant to his claim?

28. The Tribunal concluded that for efficient days to be relevant, Mr Anticich would first have needed to meet one or more of the eligibility requirements for the award of the ADM. As he did not meet any of the eligibility requirements his efficient days served, or when and how he served them, were not relevant for a decision on his particular claim.

Does the Tribunal have the power to disregard the ADM Regulations?

29. While conceding that he did not meet the eligibility criteria for the award of the ADM, Mr Anticich asked the Tribunal to '*do the right thing*' in regard to his application for review. This would require the Tribunal to disregard the Regulations that govern the award of the ADM.

30. Section 110VB(6) of the Defence Act requires, '*in reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision.*' The Tribunal determined that it has no power to disregard the Regulations that govern the award of the ADM.

Finding

31. For the reasons stated in this report the Tribunal finds that the Applicant, Mr Nicholas Anticich, is not eligible for the award of the ADM.

¹⁰ Australian Army Record of Service 2268657 N.A. Anticich

Decision

32. The Tribunal affirms the decision of 21 February 2011 of the Directorate of Honours and Awards of the Department of Defence that Mr Nicholas Anticich is not eligible for the award of the Australian Defence Medal.

33. The Tribunal acknowledges Mr Anticich's contribution to Australia through his service with the Army Reserve.