



Australian Government

Defence Honours and Awards Appeals Tribunal

Oldenhove and the Department of Defence re: Morrison [2020] DHAAT 6 (16 April 2020)

File Number	2019/001
Re	Mr Dennis Oldenhove obo Mrs Gail Jean Morrison Applicant
And	Department of Defence Respondent
Tribunal	Ms Josephine Lumb (Presiding Member) Rear Admiral James Goldrick, AO CSC RAN (Retd)
Hearing Date	28 November 2019

DECISION

On 16 April 2020 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Mrs Gail Morrison 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 VIIC – Sections 110T, 110V, 110VB(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. Mrs Gail Jean Morrison (nee Smith) applied to the Directorate of Honours and Awards of the Department of Defence (the Directorate) on 6 February 2018 for the Australian Defence Medal (ADM). She was advised that she was not eligible on 13 April 2018. On 4 January 2019, Mr Dennis Oldenhove, President of the Macclesfield RSL Sub-Branch (South Australia), applied to the Tribunal on Mrs Morrison's behalf for a review of her eligibility for the ADM.

2. On 25 January 2019, the Chair of the Tribunal wrote to the Secretary of the Department of Defence seeking a report concerning the decision to deny Mrs Morrison the ADM. On 5 March 2019, the Director of Honours and Awards, on behalf of the Secretary, provided a report. Mr Oldenhove's response to the Defence report¹ was received on 5 May 2019.

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

(2) For subregulation (1), the Chief of the Defence Force or his or her delegate

¹ Defence Report enclosed in the letter from the Acting Director of Honours and Awards of 5 March 2019 DH&A/OUT/ 2019/0007

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

³ Emphasis added by the Tribunal.

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 determine 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. The Tribunal noted that in his application to the Tribunal, Mr Oldenhove made specific reference to the '*ongoing harassment and intimidation*' experienced by Mrs Morrison in the leadup to her application for discharge. The Tribunal was therefore of the view that the preliminary issue of the validity of the Determination was relevant to its consideration of this matter.

9. Mr Oldenhove's application and another matter considered by the Tribunal around the same time are the first to be decided by the Tribunal involving application of the Determination and the corresponding Policy Directive. Following 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),

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'.

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 '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 Mr Oldenhove'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. In its letter dated 19 December 2020 the Tribunal further sought the view of 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 2020, 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 ADM on the grounds of a discharge consequential to mistreatment.

14. The Respondent's advice was forwarded to the Applicant, who subsequently advised in an email to the Tribunal dated 25 February 2020 that neither he nor Mrs Morrison had any further comment to add to the proceedings.

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 Mr Oldenhove’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 be considered by the Tribunal for an award of an ADM. The Tribunal therefore makes no finding in relation to mistreatment.

Merits review

25. The Tribunal proceeded to undertake a merits review of Mr Oldenhove’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

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.

- (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.*
- (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. It is not disputed that Mrs Morrison did not complete her initial enlistment period of four years. The issue for the Tribunal to decide was whether her discharge was due to a prevailing discriminatory Defence policy at the time of her service.

Mrs Morrison's service

27. Ms Gail Jean Smith (as the applicant then was) enlisted in the Women's Royal Australian Naval Service (WRANS) on 9 November 1970 for a fixed period of four years. Then WRWTR Smith completed two years and five months fulltime service and having applied for discharge, was subsequently discharged effective from 8 April 1973. On 9 April 1973, WRWTR Smith was transferred to the WRANS Reserve. On 18 June 1975, WRWTR Smith was discharged from the WRANS Reserve.

Applicant's case

28. In his application to the Tribunal, Mr Oldenhove outlines the timeline of events he contends led to Mrs Morrison's application for discharge in 1973. In summary he states that in 1972 (then) WRAN WTR Smith became engaged to a sailor at HMAS *Cerberus* and was subsequently posted away to HMAS *Coonawarra* (Darwin) following a '*negative reaction to engagement*'. Following a '*lengthy and acrimonious process for transfer*', WRWTR Smith was posted back to HMAS *Cerberus* to be with her fiancé. In 1973, during the examination process for her promotion to Leading Rate, and as a result of '*ongoing harassment and intimidation*' over her relationship status, WRWTR Smith felt that she had '*no option but to discharge in order to save [her] engagement*'.

29. Mr Oldenhove further submits in his application to the Tribunal that subregulation 4(1)(d)(iii) (as set out in paragraph 17 above) is applicable to Mrs Morrison's case. He elaborates in this context that:

Throughout the period of post WW2 until the introduction of the Sex Discrimination Act in 1984 the discriminatory policies relating to the service in the ADF are numerous. Although the ban on working women being married was lifted by the Commonwealth in 1966 the RAN did not implement the policy until

1968 for Naval servicewomen. Likewise the automatic discharge for servicewomen being pregnant was not removed until 1973. During this period, also during the period of WRAN Smith's service, whilst the policies were being introduced it can be argued that the implementation at ground level was not made easy for young and junior servicewomen.

As many recent ADF reviews into the systemic abuse, intimidation, harassment and bullying of servicewomen over the length of their involvement in defence would most likely find, the perpetrators and enablers of this behaviour would not likely document their actions. This therefore makes it very hard for any servicewomen to provide documentary evidence to any assessment panel or review board, especially with the passage of time.

WRAN Smith's Discharge Certificate notes her Type of Discharge as "Honourable" and indicates no negative conduct. The assessment for her application for the ADM did not take into account the reason for her discharge. It did not take into account the workplace environment that many servicewomen were subject to because of discriminatory policies that would linger in the workplace for decades and force many women to leave their respective service...

30. In support of his application to the Tribunal, Mr Oldenhove attached a letter from Federal Member for Mayo Rebekha Sharkie MP, in which she submits inter alia that:

... Mrs Morrison's transfer, and eventual discharge, was a result of an engagement and the prevailing attitudes towards the marital status of women in the ADF ...

I again reiterate my support for Mrs Morrison's application for the ADM notwithstanding she was unable to complete the requisite four years of service as a result of the then discriminatory attitudes of the Australian Defence Force.

31. During the hearing both Mr Oldenhove and Mrs Morrison gave evidence consistent with the contentions outlined in Mr Oldenhove's written application to the Tribunal. Mrs Morrison emphasised to the Tribunal that, at the time of her enlistment, she had every intention of completing her full enlistment period, but, as a result of the sustained campaign of bullying and harassment she experienced at that time, she felt she had no choice but to apply for her early discharge.

Respondent's case

32. In summary, Defence submitted that the Regulations which set out the requirements to be awarded the ADM were not met in the applicant's case. Mrs Morrison did not serve for her initial enlistment period and nor did she serve for a period that totaled four years.

33. 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.⁷ The discriminatory policy relating to the mandatory discharge of marrying females was removed prior to 1969.⁸ The Directorate applies 1 January 1970 as being end date for the policy.⁹

Determination by the Tribunal

34. As stated, it is not disputed that Mrs Morrison 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.

35. The Tribunal finds that at the time of Mrs Morrison’s discharge in 1973 there was no prevailing discriminatory Defence policy against married women or marrying women serving in the ADF. The Tribunal notes the Applicant’s contentions regarding a broader culture of discrimination in the ADF at the time (paragraph 29 above refers), 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.

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

37. 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.¹⁰ Neither the decision by the Tribunal nor the Respondent’s refusal decision of 13 April 2018 prevent the Applicant or Mrs Morrison from reapplying for the ADM, pending a change in the law.

DECISION

38. The Tribunal affirms the decision of the Directorate of Honours and Awards of the Department of Defence that Mrs Gail Jean Morrison is not eligible for the award of the Australian Defence Medal.

⁷ Defence Response of 26 July 2019 (DH&A/OUT/2019/0037) in relation to ‘Prevailing Discriminatory Defence Policy’.

⁸ Defence Honours and Awards Tribunal – Inquiry into Eligibility criteria for the award of the Australian Defence Medal, 11 February 2009.

⁹ Letter from the Director Honours and Awards to the Tribunal Secretariat of 26 July 2019, DH&A/OUT2019/0037.

¹⁰ Directorate letter of 5 February 2020.