



Australian Government

Defence Honours and Awards Appeals Tribunal

[REDACTED] and the Department of Defence [2021] DHAAT 9 (6 July 2021)

File Number 2021/002

Re **Mr [REDACTED]**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Graham Mowbray (Presiding Member)
Air Vice-Marshal John Quaife, AM (Retd)

Appearances Mr [REDACTED]

Ms Jo Callaghan, Directorate of Honours and Awards,
Department of Defence
Mr Wayne Parker, Directorate of Honours and Awards,
Department of Defence
Ms Melissa Jones, Special Counsel, Department of Defence
Dr Felicity Williams, Joint Health Command, Department of
Defence

Hearing Date 1 July 2021 (Hearing by Skype)

DECISION

On 6 July 2021 the Tribunal affirmed the decision of the Department of Defence of 22 July 2020 that Mr [REDACTED] is not eligible for the award of the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – initial enlistment period not met – four years service not met – limited exceptions to service requirement – reasons for discharge – medically unfit – mistreatment by a member of the Defence Force

LEGISLATION

Defence Act 1903 – Part V111C – Subsections 110VB(2), 110VB(6).

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

Australian Defence Medal Regulations – Amendments, Commonwealth of Australia Gazette No. G00629, 5 August 2020.

Australian Defence Medal Determination 2020 (No. 1), 12 May 2020.

REASONS FOR DECISION

Introduction

1. Mr [REDACTED] seeks review of the decision of 22 July 2020 of Mr Wayne Parker, then Manager Service and Campaign Award Assessments of the Department of Defence, that he was not entitled to the Australian Defence Medal for his service in the Australian Regular Army.¹
2. Mr [REDACTED] service, commencing with enlistment in the Australian Regular Army (ARA) on 24 May 1989 until his discharge on 23 June 1989, consisted of thirty one days. His initial enlistment period was for four years.
3. It is this period of service, and in particular the circumstances surrounding his discharge, with which this review is concerned.

The Australian Defence Medal

4. The ADM was instituted by 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.'
5. The Regulations are set out in the Schedule attached to the Letters Patent. Those Regulations were amended on 20 March 2006² and on 13 July 2020.³ As a result of the 2006 amendment the minimum 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 or appointment 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 or termination of the member as medically unfit;

¹ This review also encompasses a further unsuccessful assessment of Mr [REDACTED] eligibility for the ADM by Ms J Callaghan of Defence on 4 March 2021.

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

³ *Australian Defence Medal Regulations – Amendments*, Commonwealth of Australia Gazette No. G00629, 5 August 2020.

(iii) the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force;

(iv) the member ceased service in the Permanent Force or the Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor.

(2) For subregulation (1), the Chief of the Defence Force may determine the following:

- (a) that a period of the member's qualifying service is efficient service;*
- (b) the minimum annual period of service to be completed by a member for each year of qualifying service.'*

Agreed Facts

6. At the hearing the Tribunal obtained the agreement of both Mr [REDACTED] and the representatives of Defence to the relevant eligibility criteria and a number of salient facts which are not contested. These are:

- as the reviewable decision was made on 22 July 2020, the eligibility criteria to be applied by the Tribunal are those as amended by the Letters Patent and amending regulations made on 13 July 2020⁴ set out in paragraph 5 above
- Mr [REDACTED] enlisted in the ARA on 24 May 1989
- the duration of the initial enlistment period was four years
- Mr [REDACTED] was discharged on 23 June 1989
- the formal reason for his discharge provided on his discharge documents was 'under AMR 176(1)(L)' 'Not suited to be a soldier'⁵
- Mr [REDACTED] service was a total of thirty one days.

The Issues

7. The issues for the Tribunal are:

- did Mr [REDACTED] complete either his initial enlistment period or four years in the ARA
- does Mr [REDACTED] meet any of the other eligibility criteria

⁴ The criteria in the *Australian Defence Medal Regulations 2006*, Commonwealth of Australia Gazette No. S48, 30 March 2006, as amended by the *Australian Defence Medal Regulations – Amendments*, Commonwealth of Australia Gazette No. G00629, 5 August 2020.

⁵ *Proceedings of RTB Board of Review, 20 June 1989.*

- was Mr [REDACTED] medically unfit at the time of his discharge
- was Defence mistreatment a significant contributing factor in Mr [REDACTED] discharge
- was Mr [REDACTED] unable to complete four years service for any of the reasons set out in paragraph 4(1)(d) of the Regulations.

Did Mr [REDACTED] complete an initial enlistment period or four years service

8. Normally for a person to be eligible for the ADM that person must have completed their initial enlistment period or for at least a total of four years.⁶

9. As set out in the Agreed Facts above, Mr [REDACTED] initial enlistment period was four years. He accepts, however, that he did not complete this period, serving only thirty one days from 24 May 1989 to 23 June 1989. It follows that he also did not complete four years service.

10. Clearly therefore he can not qualify for the ADM under paragraphs 4(1)(a), (b) or (c) of the Regulations.

Does Mr [REDACTED] meet any of the other eligibility criteria

11. Paragraph 4(1)(d) of the Regulations provides four exceptions to the rule that a person must normally serve for the initial enlistment period or four years:

- death during service
- discharge or termination if medically unfit
- discharge or termination due to a prevailing discriminatory defence policy as determined by the Chief of the Defence Force
- cessation of service where mistreatment by a member of the Defence Forces or employee of the Department of Defence was a significant contributing factor.

12. Death did not bring Mr [REDACTED] service to an end.

13. The Chief of the Defence Force on 13 May 2020 relevantly determined four policies to be ‘prevailing discriminatory policies’ for the purposes of subparagraph 4(1)(d)(iii): transgender, homosexuality, pregnancy and marriage for female member – each policy in operation before a particular date.⁷ Both Mr [REDACTED] and Defence agreed that none of these four policies had any relevance to this case.

⁶ Paragraphs 4(1)(a), (b) and (c) of the Regulations.

⁷ *Australian Defence Medal Determination 2020 (No. 1)*, 12 May 2020. This Determination was revoked and replaced on 16 March 2021.

Was Mr [REDACTED] medically unfit at the time of his discharge

14. A further exception to the normal requirement for service is if the member was unable to continue because he was discharged ‘as medically unfit’.⁸

15. In response to the Defence submission to the Tribunal, Mr [REDACTED] asserts

*... the Army has used medical, psychological reports to deem me a unsuitable soldier or not suited to be a soldier, from what I’ve read & seen, the Army has used medical & psychological reports to discharge me ...*⁹

16. Defence has not argued that he was unfit medically at the time of his discharge. The Department could find no evidence that he was being considered for a medical discharge at the time of his discharge from the Army.¹⁰

17. However the written evidence before the Tribunal suggests that there may have been some issues at that time. Army psychological reports recorded

*Basically this person seems to have a clear evidence of psychiatric problems ...*¹¹

*REC [REDACTED] was referred to a psychiatrist on 13 Jun 89 & was reposted upon as being grossly manipulative & not at all psychopathic. The RMO disputes this ...*¹²

*He has limited ability and has always had difficulty in learning. He has a history of poor peer acceptance and evidence of anti-social personality characteristics.*¹³

*The recruit is mentally and emotionally ill-equipped and simply unable to deal with the demands of recruit training. If retained in this environment REC [REDACTED] will be come increasingly unstable.*¹⁴

18. Dr Tym, a consultant psychiatrist who examined Mr [REDACTED] stated

*There is no psychiatric ‘diagnosis’ and he is psychologically unremarkable other than that he admits to me to having made a mistake in joining the army ... In my opinion he has deliberately made himself psychologically unsuited to any service career.*¹⁵

⁸ Subparagraph 4(1)(d)(ii) of the Regulations.

⁹ [REDACTED] email to Tribunal, 17 April 2021.

¹⁰ Defence Submission to the Tribunal, 19 March 2021, paragraph 19.

¹¹ Service Classification Record Trailer, 17 Psych Unit, 7 June 1989.

¹² Service Classification Record Trailer, 17 Psych Unit, 16 June 1989.

¹³ Psychological Report, 18 June 1989.

¹⁴ Psychological Report, 19 June 1989.

¹⁵ Psychiatrist’s/Psychologist’s Recommendation, Dr Robert Tym, Consultant Psychiatrist, 14 June 1989.

19. The report of the Board of Review which recommended his discharge includes

Board Member: *He is obviously not suited to be a soldier. His demeanour appears unstable,*

Psychologist : *Lacks sufficient mental and emotional toughness to cope with demands of recruit training*

President : *...totally unable to assimilate training, ...*¹⁶

20. At the hearing Mr [REDACTED] said that he passed his medical examination when he joined the Army and was 'congratulated' by his medical practitioner. It was only after he went into training that medical and psychological issues such as robustness, and those mentioned above, were raised by military psychologists. He stated that he believed that his discharge was on medical grounds although the Army did not rely on the 'medically unfit' provision in its formal reasons for that discharge.

21. Ms Callaghan said that Defence accepted that the exception 'medically unfit' in subparagraph 4(1)(d)(ii) of the Regulations does cover psychological illnesses.

22. Dr Williams from Defence's Joint Health Command agreed that the reports did describe psychological 'traits' and 'characteristics' in Mr [REDACTED] personality. However in her opinion they were merely that and did not suggest a mental disease. To be considered medically unfit, evidence of a 'disease process' was required. She asserted that the best evidence on this was that of Dr Tym, the consultant psychiatrist who made no psychiatric 'diagnosis' and found Mr [REDACTED] was 'psychologically unremarkable'.

23. We are of the view that although psychological issues were clearly raised before Mr [REDACTED] discharge, the firm and quite specific view of the consultant psychiatrist who saw him a matter of days before his discharge must be accepted. We agree with the submissions of Dr Williams for Defence on this issue. The other comments are not of sufficient weight to question Dr Tym's professional opinion. Mr [REDACTED] did not claim to have been suffering mental disease as the time of his discharge.

24. There is no other evidence which raises the question of his medical fitness.

25. We therefore accept that the reason for his discharge was as set out in his discharge papers – AMR 176 (1)(L) '*Not suited to be a soldier*'. Indeed Mr [REDACTED] signed the Board of Review Proceedings, saying that he understood the contents and wished to be 'discharged as soon as possible'.¹⁷

¹⁶ Proceedings of 1 RTB Board of Review, 20 June 1989.

¹⁷ Ibid.

Was Defence mistreatment a significant contributing factor in Mr [REDACTED] discharge

26. Mr [REDACTED] makes a number of allegations of mistreatment in an email to Defence and the Tribunal on 27 January 2021

I suffered discrimination, bullying & victimisation, I was also giving undue process (sic).

I looked at my record & most of this is hearsay & unjust, ...¹⁸

27. In his application of 2 February 2021 to the Tribunal Mr [REDACTED] repeats these allegations

I signed up in 1989 for 4 yrs & after 30 days was driven out of the Army, by bullying, victimisation, hearsay reports

...

My file will prove how injustice was perpetuated against myself. ... this action wouldn't be tolerated in today's defence force¹⁹

28. In a further email to the Tribunal Mr [REDACTED] says

... my file proves that I was railroaded out of the defence force, with hearsay evidence, I was 20yrs old at the time, so I didn't know my legal right's, I did what I was told & told to shut my mouth.

...

... the defence force members stopped my opportunity in becoming a soldier²⁰

29. In response to the Defence submission to the Tribunal, Mr [REDACTED] challenges some of the assertions made by Defence about his behaviour during his period in the Army and repeats his allegations of mistreatment. Despite pleading guilty and being found guilty of assault at the time, he denies that he assaulted a corporal, but instead claims that he was assaulted by two corporals and was injured. He said he was scared of the corporals and the other recruits. He claims victimisation, bullying and to some extent bastardisation. In his view, his past was used against him to 'railroad' him out of the Army. In an email to the Tribunal Mr [REDACTED] claimed he went AWOL as a consequence of assaults and bastardisation.²¹ On 9 June 1989, Mr [REDACTED] was charged and found guilty of being absent without leave on 6 June 1989. The date of his assault offence was 16 June 1989.

30. On 30 July 2020 Mr [REDACTED] made a complaint to the Inspector-General of the Australian Defence Force (IGADF) concerning victimisation and injustices while serving in the Army and when seeking to re-join the Army. Mr [REDACTED] also complained of an unfair outcome in his attempts to have his records amended through

¹⁸ [REDACTED] email to Defence and Tribunal, 27 January 2021.

¹⁹ [REDACTED] email with application to Tribunal, 2 February 2021.

²⁰ [REDACTED] email to Tribunal, 3 February 2021.

²¹ [REDACTED] email to Tribunal, 17 April 2021.

the Freedom of Information process. Included as part of the Defence Submissions was a report from the Office of the IGADF on these matters.²²

31. The IGADF thoroughly examined Mr [REDACTED] records and Unit, Medical and Psychological files. The report sets out Mr [REDACTED] service, including the AWOL incident and two assaults charges for which he was found guilty and penalised. On Mr [REDACTED] claims of victimization, an Assistant IGADF stated

*There is nothing in Mr [REDACTED] record to indicate that he was victimised during his short period of service or in his subsequent attempts to re-join the Army.*²³

32. The recommendation by the Assistant IGADF for no further inquiry was endorsed by the Inspector-General of the Australian Defence Force.²⁴

33. At the hearing Mr [REDACTED] again repeated his allegations of bullying, victimisation and discrimination. He said that he was not perfect but did not assault two corporals as claimed in the reports. Rather he said he was assaulted twice. This was not mentioned in the reports nor investigated by Defence. He claimed that he was in fear of the corporals and the sergeant. He denied many of the other reports of his behaviour in the Army and allegations about his earlier life that appear in his service file. Regarding his absence without leave, he did not consider himself to have been AWOL because he had returned of his own free will. He said he expected some minor punishment on his return, but not to be 'railroaded' out of the Army. Mr [REDACTED] said that since his time at school he had always wanted to serve in the Army, as illustrated by his three unsuccessful attempts to re-join after his discharge. He said he sought the Australian Defence Medal as 'compensation for what he had missed out in life' because of his inability to pursue an Army career.

34. There is very little in Defence's written records to support Mr [REDACTED] assertions of victimisation, bullying and injustice forcing him out of the Army after such a very short period. The IGADF has examined the records and concluded that there is nothing in the records to indicate that he suffered the mistreatment he alleges.

35. While there may be a grain of truth in some of Mr [REDACTED] allegations as his performance as a recruit is likely to have drawn adverse attention, he has chosen to overlook any aspect of his own behaviour, attitude or performance that would explain his discharge. There is not sufficient nor clear evidence to support a substantive finding by us that mistreatment by a member of the Defence Force was a significant contributing factor to ending his service.

36. We therefore are unable to find that the exception in subparagraph 4(1)(d)(iv) applies to entitle Mr [REDACTED] to the ADM.

²² Office of the IGADF Assessment Mr [REDACTED] 21 September 2020.

²³ Ibid.

²⁴ Ibid.

Was Mr [REDACTED] unable to complete four years service for any of the reasons set out in paragraph 4(1)(d) of the Regulations

37. For the reasons given above none of the exceptions in paragraph 4(1)(d) of the Regulations can be applied to award Mr [REDACTED] the ADM.

38. Furthermore the Tribunal does not have any general power to ignore the rules for the ADM laid down in the Regulations, nor any broad discretion to award the ADM despite the applicant failing to satisfy the eligibility criteria.

Finding : Mr [REDACTED] is not entitled to the ADM

39. For the reasons given above, in particular

- Mr [REDACTED] did not complete his initial enlistment, nor four years of service
- Mr [REDACTED] was not discharged due to being medically unfit
- mistreatment by a member of the Defence Force was not found to be a contributing factor to his discharge
- none of the exceptions in paragraph 4(1)(d) of the Regulations apply to Mr [REDACTED] case
- Mr [REDACTED] was discharged under AMR 176(1)(L) – ‘Not suited to be a soldier’

Mr [REDACTED] is not entitled to the Australian Defence Medal.

TRIBUNAL DECISION

40. The Tribunal affirms the decision of the Department of Defence of 22 July 2020 that Mr [REDACTED] is not eligible for the award of the Australian Defence Medal.