



Australian Government

Defence Honours and Awards Appeals Tribunal

O'Brien and the Department of Defence [2023] DHAAT 13 (14 July 2023)

File Number(s) 2022/024

Re **Mr Grant Mitchell O'Brien**
Applicant

And **The Department of Defence**
Respondent

Tribunal Ms Anne Trengove (Presiding Member)
Rear Admiral Allan du Toit AM RAN (Retd)

Hearing Date 27 June 2023

Attendances Mr Grant O'Brien
Applicant

Ms Jo Callaghan, Assistant Director Veterans and Families
Mr Wayne Parker, Manager Veterans and Families
Directorate of Honours and Awards
Department of Defence
For the Respondent

DECISION

On 14 July 2023, the Tribunal decided to affirm the decision that Mr Grant O'Brien not be recommended for the Australian Defence Medal.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – Army Reserve service - eligibility criteria – initial enlistment conditions not met – over four years’ service - reasons for cessation – limited exceptions to mandatory period of qualifying service per year – no discretion

LEGISLATION

Defence Act 1903 – Part VIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)

Defence Regulation 2016, Regulation 36

Australian Defence Medal Regulations Letters Patent, Commonwealth of Australia Gazette S48, dated 30 March 2006

Australian Defence Medal Regulations Amendments of Letters Patent Commonwealth of Australian Gazette G00629, dated 5 August 2020

Australian Defence Medal Determination 2021, dated 16 March 2021

REASONS FOR DECISION

Introduction

1. The Applicant, Mr Grant Mitchell O'Brien, seeks review of a decision of the Acting Assessments Manager, Mr Frank Pulciani, of the Directorate of Honours and Awards of the Department of Defence (the Directorate), to refuse to recommend him for the Australian Defence Medal (ADM).¹

Decision under review

2. On 2 May 2022, Mr O'Brien applied to the Directorate for an assessment of his eligibility for the ADM. On 3 November 2022, Mr Pulciani advised Mr O'Brien that he was ineligible for the ADM, for the following reasons:

'The decision to not recommend you for the ADM was made for the following reasons:

- There is no evidence to show that you completed the minimum annual qualifying service in accordance with the Determination for a total of not less than four years.*
- Additionally, there is no evidence to show that the reason for your discharge was due to any of the exceptions at paragraph 4(1)(d) of the Regulations.'*²

3. On 24 November 2022, Mr O'Brien made application to the Tribunal seeking review of the above decision.³

Tribunal jurisdiction

4. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 is the ADM. Therefore, the Tribunal has jurisdiction to review decisions in relation to this award.

Mr O'Brien's service

5. Mr O'Brien's service records indicate that he enlisted in the Australian Army Active Reserve on 14 March 2012 and was discharged at the rank of Private on 16 December 2016 for the reason of *'Military in absence'*. Mr O'Brien served for four years, nine months and three days.

6. Mr O'Brien has not been issued any defence awards for his service.⁴

¹ Mr O'Brien's application for review, dated 24 November 2022

² Letter, Mr Pulciani to Mr O'Brien, dated 3 November 2022, as submitted with application for review

³ Mr O'Brien's application for review, dated 24 November 2022

⁴ Defence Report, dated 11 January 2023

The Australian Defence Medal

7. The ADM was created 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.*

8. The Regulations are set out in the Schedule attached to the Letters Patent. The Regulations were amended on 20 March 2006, which resulted in the minimum period of service being changed from six to four years. Further amendments were made in 2020 to introduce additional provisions for the award of the ADM to members who had not met the minimum period of qualifying service.

9. In summary, in accordance with the amended *Australian Defence Medal Regulations 2006*, in order to be eligible for the ADM, a member or former member of the Australian Defence Force must have rendered the minimum annual qualifying service by completing an initial enlistment or appointment period, or a period of or totalling not less than four years' service, unless specified exceptions apply.

10. The relevant eligibility criteria for awarding the ADM is contained in paragraph 4(1) of the *Australian Defence Medal Regulations 2006*⁵ as amended in 2020,⁶ which states:

'4 Award of the Medal

(1) *The Medal may be awarded to a member, or former member, of the Australian 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 of the member as medically unfit due to a compensable impairment;*
 - (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 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 factor. '[...]*

⁵ *Australian Defence Medal Regulations 2006, Commonwealth of Australia Gazette, S48, dated 30 March 2006*

⁶ *Australian Defence Medal Regulations, Commonwealth of Australia Gazette, G00629, dated 4 August 2020*

11. The *Australian Defence Medal Determination 2021*, dated 16 March 2021 (the Determination), provides specific details of prevailing discriminatory policy for the purpose of subparagraph 4(1)(d)(iii) of the Regulations.

‘For subparagraph 4(1)(d)(iii) of the Regulations, policies relating to the following topics that were in effect before the specified dates are determined to be prevailing discriminatory Defence policies:

- a) *Transgender - before 1 June 2010.*
- b) *Homosexuality - before 24 November 1992.*
- c) *Pregnancy (female) - before 7 January 1975.*
- d) *Marriage (female) - before 1 January 1970.*
- e) *Retention after marriage (female) - before 21 March 1984.’⁷*

Army Reserve service and qualification for the ADM

12. The Determination confirms in Schedule 1 *‘Minimum Periods of Qualifying Service’*, the minimum annual periods of service to be completed by a member for a year of qualifying service. It states:

‘The following table specifies the minimum annual periods of service to be completed by a member for a year of qualifying service. The period of service may consist of one, or a combination, of the following.

- a. *Days remunerated at Defence rates of salary or sessional fees.*
- b. *Days on which the member is eligible for a Reserve service payment under Chapter 4 Part 9 Division 4 of Defence Determination 2016/19, Conditions of service, as in force from time to time.*
- c. *Days of approved voluntary unpaid Reserve service.’*

Service Category	Minimum Qualifying Period	Effective Dates	Comments
Australian Army			
Army Reserve	26 days, including such periods of continuous training and home training as directed by the proper military authority	Up to and including 30 June 1993	
	14 days	From 1 July 1993 up to and including 19 April 2000	
Supplementary Reserve Units	14 days continuous service	Up to and including 30 June 1993	From 1 July 1993 as for Army Reserve
Special Conditions Units	26 days continuous service	Up to and including 30 June 1993	From 1 July 1993 as for Army Reserve
Specialist Consultants	7 days	From 1 July 1993 up to and including 19 April 2000	Service to be approved by a formation commander
All members	20 days	From 20 April 2000	

13. Relevant to Mr O’Brien’s service, the requirement was that he serve 20 days in the Army Reserve per enlistment year.⁸

⁷ *Australian Defence Medal Regulations Determination 2021*, dated 16 March 2021

⁸ Ibid

Mr O'Brien's application to the Tribunal

14. In his application to the Tribunal, Mr O'Brien acknowledged that he had not completed the minimum number of days per enlistment year to meet the criteria for the ADM, but that he had completed four years' service from 2012 to 2016. Mr O'Brien stated that there were extenuating circumstances that he thought should be considered in determining whether he receives the ADM.

15. Mr O'Brien stated:

'Records show that in 2013, I had only completed 11.5 days instead of 20. This was due to being at the NSW Police Academy as a fulltime student making it impossible to parade as I was required to reside at the Goulburn Police Academy, however, I did attend a training weekend during this period.'

'On 14 November 2013, I received a letter of separation from LTCOL R.J MILLER due to not being present at 3+ parade nights without reason. I spoke with my Bombardier, Nathan BARNSTABLE who sought advice from the chain of command. I was told that this letter was a mistake and that my employment would not be affected from my recruit training with the NSW Police force. At the end of 2013, I returned to my unit with no issues.'

*'In 2016, I also fell below the required days as my daughter was born premature 11 weeks from complications and was hospitalised for 3 months. I was not able to attend a portion of this year due to my daughter and wife being in and out of hospital. My unit was aware of these circumstances and informed me there was no issue with me being absent during that time.'*⁹

The Defence Report

16. In its report, Defence reaffirmed its original position that Mr O'Brien was not eligible for the ADM because he did not complete the minimum annual qualifying service, in accordance with the Determination, for a total of not less than four years. Nor did Mr O'Brien discharge under provisions contained in subparagraphs 4(1)(d) of the Regulations.

17. Defence submitted the following table outlining Mr O'Brien's Army Reserve qualifying service:

Start 12 Month	Service Changes	End 12 Months	Service Type	Days Required	Days Served	Qualifying Year	Aggregate Years
14/03/2012		13/03/2013	ARES	20	>20	Y	1
14/03/2013		13/03/2014	ARES	20	11.5	N	1
14/03/2014		13/03/2015	ARES	20	>20	Y	2
14/03/2015		13/03/2016	ARES	20	10.5	N	2
14/03/2016	Discharge 16/12/16		ARES	20	0	incomplete	2

⁹ Mr O'Brien's application to the Tribunal, dated 24 November 2022

18. Defence also submitted pay records which confirm that in the 2013-14 and 2015-16 enlistment years, Mr O'Brien received remuneration for service on less than 20 days in each enlistment year.

19. Defence also stated that there was no evidence or information that mistreatment by a member of the Defence Force or an employee of the Department of Defence was a significant contributing factor to Mr O'Brien ceasing service.¹⁰

20. Defence acknowledged Mr O'Brien's personal circumstances as set out in his application to the Tribunal and his explanation as to why he could not complete the required minimum annual qualifying service each year, however it also noted that there were no provisions within the Regulations for such circumstances to be considered for eligibility to the ADM.

Mr O'Brien's comments on the Defence Report

21. Mr O'Brien was provided with the Defence Report on 30 January 2023 and asked to provide comment. In his response of 17 March 2023, Mr O'Brien largely reiterated the reasons set out in his application, and emphasised that he was reassured by his commanding officers at the time that his absence would not affect his Army Reserve employment or time of service.

'I have provided the reasons for my absence in the time I was an active member of the Australian Defence Force. These reasons included being a full-time recruit of the NSW Police force from 5 May 2013 thought (sic) to 13 December, 2013. Even though during this time, I still returned to my unit in Sydney for training weekends when time permitted.

'I acknowledge I also fell behind on hours in 2016 due to my first born child Lily O'BRIEN being born extremely premature and hospitalised for months which took me away from both my full-time job and the Defence force.

*'On both occasions, I communicated with my Chain of command and was assured that my circumstances would not affect my employment or time of service at all. I was told by my NCO's that the Adjutant was also appraised and did not have any issues with my absence.'*¹¹

Tribunal hearing

22. Mr O'Brien outlined his career in the Army Reserve, which began one year prior to his civilian police career. He also outlined challenges in his personal life, which made serving in the Army Reserve difficult, particularly the premature birth of his daughter in April 2016. Mr O'Brien had let his chain of command know of his difficulties for parading for the months after her birth. He was told that the unit did not have an issue with his absence from duty in the circumstances.

¹⁰ Defence Report, dated 11 January 2023

¹¹ Mr O'Brien's comments on the Defence Report, dated 17 March 2023

23. Mr O'Brien said that he slipped out of contact with his unit towards the end of 2016. He said he did not receive the Letter of Intent to Separate¹² issued on 2 August 2016, which was sent to a previous address. Mr O'Brien was unsure if he had updated his new details with his unit, but thought that he had. Mr O'Brien readily acknowledged that he did not try and contact his unit towards the end of 2016, during 2017, or try to recommence Army Reserve service at any time after March 2016.

24. Mr O'Brien said he was encouraged by others to apply for the ADM as he had 'done four years' service. However, the Tribunal explained to Mr O'Brien at the hearing that this did not translate in any way to an exemption for qualifying service for medallic recognition and that the Regulations only allowed for very limited exceptions. Mr O'Brien accepted that his service had not been terminated because he was medically unfit, or due to a prevailing discriminatory policy or mistreatment by Defence.

25. Defence reiterated its position that Mr O'Brien had not completed the required number of annual days' service to qualify for the award of the ADM.

Tribunal consideration

26. The Tribunal found that Mr O'Brien served for a total of four years, nine months and three days in the Army Reserve, but completed only two qualifying years of service for the purposes of the ADM.

27. The Tribunal then considered the circumstances around Mr O'Brien's discharge. The Tribunal accepted his evidence that factors in his personal life and civilian work prevented him from continuing his Army Reserve career.

28. The Tribunal is bound by the eligibility criteria that govern the award of the ADM. Mr O'Brien had not served for a period of four years of qualifying service as defined.

29. Having failed to satisfy the eligibility criteria in respect of qualifying service, Mr O'Brien's application was judged against satisfying any of the limited exceptions laid down in the Regulations. Those Regulatory exceptions were death, medical discharge or discharge due to a prevailing discriminatory policy, or mistreatment as defined. Having reviewed Mr O'Brien's service file and the material before it, as well as his evidence at hearing, the Tribunal was satisfied that none of those exceptions applied in his case.

Tribunal finding

30. For the above reasons the Tribunal found that Mr O'Brien did not fulfil the eligibility criteria for the award of the ADM.

DECISION

31. The Tribunal affirmed the decision of 3 November 2022 of the Directorate of Honours and Awards of the Department of Defence that Mr Grant O'Brien is not eligible for the award of the Australian Defence Medal for his service in the Australian Army between 2012 and 2016.

¹² Mr O'Brien's service history as supplied with the Defence Report, dated 11 January 2023