

## Ombudsman's Determination

Applicant	Mr T
Scheme	HSC Pension Scheme ( <b>the Scheme</b> )
Respondents	HSC Pension Service ( <b>HSC</b> )

## Outcome

1. I do not uphold Mr T's complaint and no further action is required by HSC.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mr T is unhappy because HSC has refused to grant him Mental Health Officer (**MHO**) status for the period 1984 – 1993. The effect of this is that he has not accrued sufficient pensionable service as an MHO in order to retire early without a reduction to his pension benefits.

## Background information, including submissions from the parties

4. From 1977 to 2012, Mr T was employed within Health and Social Care Northern Ireland. In particular, he worked for North & West Belfast Trust, which assumed responsibility for Muckamore Abbey hospital in 1993.
5. On 17 August 2011, Mr T applied for MHO status. As part of his application, his line manager signed a declaration stating that he had worked with mental health patients since 1984. The line manager added that this work had been hospital-based, in Muckamore Abbey Hospital, since 1993.
6. MHO status is defined under Health and Personal Social Care (Superannuation) Regulations (Northern Ireland) 1995 (**the Regulations**). In particular, section 76(14) of the Regulations states:

“(14) In this regulation, “mental health officer” means—

(a) an officer working whole-time on the medical or nursing staff of a hospital used wholly or partly for the treatment of people suffering from mental disorder, who devotes all, or almost all, of his time to the treatment or care of persons suffering from mental disorder;”

7. The Regulations confirm that normal retirement age for members of the Scheme is age 60. However, under certain circumstances, members with MHO status are allowed to retire at age 55 without a reduction to pension entitlement. For this to happen, they must have 20 years MHO membership by age 50. After this, each additional year completed with MHO membership counts as double for pension benefit purposes. As such, they only need to complete a further five years before retiring on a full pension; meaning they can retire at age 55 with benefits as if they had worked till age 60.
8. Mr T believes he met the criteria for MHO status under section 76(14) of the Regulations from 1984 onwards. As such, he believes the doubling effect ought to be applied to some of his employment, and he should have been able to retire at age 55 without a reduction in his benefits. Instead, he did retire at age 55, but his pension benefits have been actuarially reduced.
9. HSC agrees that Mr T's work required him to devote all or most of his time to the treatment or care of persons suffering from mental disorder. However, it says that Mr T was not hospital-based before 1993, and as such he did not fit the definition above for those years. HSC notes that Mr T only worked in Muckamore Abbey Hospital from 1993 onwards, and as such it has only awarded him MHO status from this date.
10. Mr T emphasises that the Regulations do not require a worker to be "hospital-based" for MHO status to be awarded. In particular, he notes the word "based" is not used by the Regulations. He adds that the overall intent of the Regulations is to recognise the additional stress suffered by workers who work specifically with mental health patients, and to provide an earlier retirement at full pay as a result.
11. Mr T also says he has colleagues who shared an identical employment history to him, but who have been granted MHO status whilst not working on the staff of a hospital. However, he has not provided any useable evidence of this.
12. HSC has stated that some workers may have been allowed to retain MHO status whilst they were working in the community, provided they attained MHO status beforehand when they were hospital staff.
13. Mr T has argued that the distinction between hospital and community workers is artificial, and highlights that it has been removed by NHS for their workers.

## **Adjudicator's Opinion**

14. Mr T's complaint was considered by one of our Adjudicators who concluded that no further action was required by HSC. The Adjudicator's findings are summarised below:-
  - The interpretation of the Regulations is central to this matter, and the general rule of statutory interpretation is that words are given their plain and ordinary meaning.

- In this instance, the Regulations require a worker to be part of the medical or nursing staff of a hospital, in order to satisfy the criteria for MHO status. Mr T is correct in saying the Regulations do not use the term “based”. However, they do require the worker to be hospital staff. Between 1984 and 1993, Mr T was not part of the medical or nursing staff of a hospital. Instead, he was community staff.
- It is possible that, when the Regulations were drafted, the structural and operational changes that have affected Mr T’s employment were not envisaged. In particular, historically, mental health care may have been purely hospital-based and there may not have been what would now be called community care (or at least not existing in the same form). This would mean that, historically, mental health care workers would always be hospital staff. Whilst it is not desirable to assume the draftsman’s intentions, this may explain why the Regulations only refer to hospital staff.
- The previous regulations were The Health and Personal Social Services (Superannuation) Regulations (Northern Ireland) 1984, which similarly provided that “mental health officer” meant a whole-time officer on the medical or nursing staff of a hospital. These are legacy regulations and are specific in referring to location and not type of work. The actual meaning of hospital is commonly defined in English dictionaries as meaning an institution providing medical and surgical treatment and nursing care for sick or injured people. . It was open to the draftsman to provide a wider definition of hospital when the Regulations were drafted, but he or she did not.
- If the wording of the relevant section was ambiguous, then I may consider the overall intent of the Regulations for assistance in interpreting them. However, whether it might seem outdated or not, the relevant section is not ambiguous, it is clear.
- Mr T’s frustration in this matter is understandable. It is likely that he carried out a role, whilst he was community staff, which would have been awarded MHO status but for the type of building or location he was working from. Nevertheless, this Office cannot amend the Regulations or recommend they are disregarded on the basis that they may be outdated. Instead, this Office’s role is to establish whether there has been maladministration, i.e. whether HSC’s actions are in line with the relevant rules and regulations in place at the relevant time.
- HSC has given the words of the relevant section their plain and ordinary meaning, and considered Mr T’s application for MHO status on that basis.
- The Court considered the circumstances where it would be appropriate to intervene and add or substitute words in legislation in Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586. In doing so, the Court iterated that its role was interpretative and it should only consider adding or submitting words to legislation where it is certain (1) of the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give

effect to that purpose in the provision in question; and (3) of the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The Court concluded that such instances would be rare.

- This approach has been followed in subsequent case law in a pensions context e.g. London Borough of Enfield v Jossa [2017] EWHC 2749 (Ch). In that case, the Court agreed that giving the regulations in question their plain and ordinary meaning resulted in an unattractive result. However, the regulations still made sense and achieved their essential purpose. As such, the Court did not seek to interpret the relevant provisions more widely.
- It is clear that the current scenario prompted by the Regulations in this case is not a drafting mistake and does not fail to give effect to its original intention, it does provide the additional benefit to those who qualify. The Regulations appear to be worded as intended but perhaps have not been amended to reflect changes in mental health and social care provision. But there is no obligation for this to be done. It is a matter for the legislature. Since the wording has not been changed and is not ambiguous in terms of what was meant by hospital staff when drafted, HSC's actions in respect of Mr T's application do not constitute maladministration.
- Mr T has highlighted instances where those working in the community have had or been awarded MHO status. There is some force in an argument that it would be unreasonable for HSC to allow some flexibility to some and not others, if the reasons appeared to be arbitrary or unclear. It seems that HSC has applied some flexibility in terms of retention of MHO status in the community, if it was gained beforehand by a staff member of a hospital (pre-1995), i.e. a relaxation of the policy so that staff who already hold MHO status do not have it taken away simply because of a change in the mental health care regime/contracting arrangements undertaken (possibly with a view to not losing valuable staff). However, Mr T's circumstances do not match these scenarios. It does not follow that, because there has been a relaxation as described above, the Regulations should therefore also be interpreted to allow an extension to allow more people to *gain* MHO status for the first time.
- Finally, NHS has said workers in the community may also be awarded MHO status. However, NHS workers are members of a different scheme. It cannot be recommended that HSC act differently based on what NHS does. HSC does not need to act consistently with NHS, only with its own Regulations.

15. Mr T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Both parties provided their further comments, and these are summarised below:-

- Mr T highlights that this is the third time he has raised this matter with our Office. In the previous two instances, our Office disagreed with HSC's decision-making

process and remitted the matter back to it. Mr T believes this indicates HSC's inability to interpret the Regulations properly.

- Mr T says the nature of his work did not change in 1993. Instead, there was a restructure, such that the organisation he worked for changed. He was not on the staff of Muckamore hospital at any stage during his career. He adds it does not make sense for his role to be distinguished, and MHO status awarded, from 1993 onwards.
- Mr T references the examples he provided of colleagues, who work in the community but have been awarded MHO status. He says their circumstances are evidence that a plain and ordinary interpretation of the Regulations can be applied to those working in the community such that MHO status is awarded.
- Mr T says the trainee consultant psychiatrists and psychologists he has referenced, who work in the community and have been awarded MHO status, have not been commented on. He also says he has provided details of colleagues whose employment histories match his but who have been awarded MHO status where he has not.
- Lastly, Mr T believes HSC and NHS are linked and as such they should act consistently. He says that NHS officers with MHO status have been allowed to transfer to HSC and work in the community, and retain their MHO status. Overall, he feels that HSC interprets the Regulations in a way that suits it best given the circumstances, and fails to interpret them consistently.
- HSC has said that Mr T's line manager confirmed Mr T worked in Muckamore hospital from 1993. In particular, Mr T's office was based in the hospital from 1993 onwards. This was the reason it distinguished his employment from 1993 onwards.
- HSC has said it does not wish to comment on other individual cases, as part of considering Mr T's application for MHO status. However, it has confirmed that those previously awarded MHO status, whilst with NHS, will not automatically be awarded MHO status with HSC.

16. The further comments provided above do not change the outcome. I agree with the Adjudicator's Opinion and I will only respond to the further points made by the parties for completeness.

## **Ombudsman's decision**

17. Whilst I appreciate that Mr T's previous, related, complaints with our Office have been upheld, it does not follow that his current complaint will be upheld. Previously, it was determined that HSC had followed an improper decision-making process when assessing Mr T's application for MHO status. However, this complaint is not about *the process by which* the decision was reached, in Mr T's case, but whether the final

decision was one that could reasonably have been made within the meaning of the regulations. That is how the regulations are to be interpreted in relation to where mental health work was carried out.

18. I am conscious that HSC has failed to properly consider Mr T's application for MHO status on a number of occasions previously, and I have carefully reviewed the Regulations and the circumstances of Mr T's employment to determine whether Mr T meets the criteria for MHO status for his employment from 1984. Having done so, I do not believe he does. I have also considered Mr T's contention that others have been granted MHO status with precisely the same employment background as Mr T, which might indicate maladministration by way of unfair or arbitrary processes. However, this is not supported by the available evidence.
19. A plain and ordinary interpretation of the Regulations requires Mr T to be on the staff of a hospital in order to gain MHO status. This is what the Regulations say. Mr T has now said he was never on the staff of a hospital and his role did not change in 1993. HSC has distinguished his employment from 1993 onwards based on the information provided by his line manager. It is that information, apparently seeking to support Mr T's case, that indicated his (varied) work location over time, while highlighting the similar or identical duties, which appears to have led to the difference in the assessment of Mr T's MHO status for the periods 1984-93 and post-1993. Indeed, if what Mr T is now saying is correct, it may be that he did not qualify for MHO status for any of his employment. In any event, it does not support the argument that he worked as hospital staff throughout, for the purpose of the Regulations.
20. Mr T argues that a plain and ordinary meaning of the Regulations can provide MHO status to those working in the community. He believes the fact that there are those working in the community who have ongoing MHO status is evidence of this. However, from the information Mr T has provided, I cannot see that the colleagues in question met the criteria for MHO status based on a plain and ordinary interpretation of the Regulations. Instead, it is likely HSC was more flexible on those occasions for reasons specific to the employment history or circumstances of those individuals. I cannot instruct HSC to exercise the same flexibility in Mr T's case though, as his circumstances do not match those of the colleagues of whom he has provided details.
21. Mr T has said that he has provided details of colleagues who have been awarded MHO status and whose employment histories match his. However, our Office has requested further information and evidence from him regarding these particular colleagues, on several occasions, and it has not been forthcoming. I appreciate that, assuming such evidence existed it would require the participation or consent of others, so it would not be straightforward for Mr T to arrange. Nevertheless the fact remains that the claim he had made has not been supported by the proof which would be necessary to demonstrate an inconsistency or maladministration by HSC in his case.

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22. I do not find that there has been any maladministration by HSC in its application of the Regulations in Mr T's case.

**Anthony Arter**

Pensions Ombudsman  
13 February 2018