

Ombudsman's Determination

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| Applicant | Mr L |
| Scheme | HSC Pension Scheme (the Scheme) |
| Respondent | HSC Business Services Organisation (HSC) |

Outcome

1. I do not uphold Mr L'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 L has complained that HSC has not granted him Mental Health Officer (**MHO**) status for the period 1986 to present. The effect of this is that he has not accrued sufficient pensionable service in order to retire early without a reduction to his pension benefits.

Background information, including submissions from the parties

4. MHO status is defined under the 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;”
5. 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 the age of 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

retirement on a full pension; meaning they can retire at age 55 with benefits as though they had worked till age 60.

6. From July 1986 to July 1987 Mr L worked as a Day Care worker with adults with learning disabilities in Omagh Social Education Centre. He then took on a permanent role at the centre from July 1987 to July 1994.
7. From July 1994 to July 2006, Mr L was employed as a Social Worker in the Health and Disability Programme in Sperrin Lakeland Health and Social Care Trust. Then he worked for the same care trust, from August 2006 to November 2009, as a Senior Social Worker.
8. On 19 February 2015, Mr L's employer completed all the relevant forms in support for him to be awarded MHO status.
9. On 6 May 2015, HSC wrote to Mr L and said that in order for him to receive MHO status he needed to meet the following requirements:

“(a) that the member is on the medical or nursing staff of a hospital used wholly or partly for the treatment of people suffering for mental disorder; or

(b) any other officer on the staff such as a hospital who is within a class designated by the department as MHO; and

(c) that member devotes the whole or substantially the whole of their time to the direct (hands on) treatment or care of such persons; and

(d) has held MHO status prior to 1 April 1995 and have not had a break in superannuable employment of 5 years or more.”

HSC said that Mr L did not satisfy condition (a) and therefore was not entitled to MHO status.

10. Mr L wrote to HSC on 9 May 2015, and queried why HSC were saying he was not eligible for MHO status. He said he understood that HSC believed he did not meet criteria (a), but went on to explain that he was employed for a period between January 1981 and August 1984, as a student nurse in the Tyrone and Fermanagh hospital. During this period of employment Mr L held MHO status.
11. After reviewing the information HSC still did not consider that Mr L was entitled to MHO status.
12. Mr L was dissatisfied and submitted a stage one Internal Dispute Resolution Procedure (**IDRP**) application, he contested the decision not to award him MHO status. He also referred to guidance on NHS Pensions website. This held the following information:

“Eligibility

To be granted MHO status a member must:

Spend either the whole or almost the whole of their time in direct care and treatment of mentally ill patients. (Please note MHOs in the community can also have MHO status)”

Although Mr L did not work for the NHS he believed this wording should also apply to him.

13. On 12 June 2015, HSC responded under stage one of the IDRP. It explained that during the initial period of service Mr L completed as a student nurse he did hold MHO status. However, when he made the decision to have a refund of the contributions he relinquished any rights under the Scheme and lost his entitlement to MHO status. Although, he subsequently re-joined the Scheme this did not mean he would automatically hold MHO status again (which would depend on his role and place of work).
14. On 12 December 2015, Mr L invoked stage two of the IDRP. He said he remained dissatisfied as he believed other members in similar positions were being granted MHO status.
15. HSC considered that Mr L’s roles did not attract MHO status, apart from his student nurse role. But, as he had received a refund of the contributions for that period of service, he could no longer argue that because he held MHO status then that this should continue.
16. Mr L remained dissatisfied and brought his complaint the Pensions Ombudsman to be independently reviewed.

Adjudicator’s Opinion

17. Mr L’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 briefly 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 L considers that the community units he worked in should also be considered as hospitals for the purpose of holding MHO status. However, the Regulations clearly require the worker to be hospital staff. Mr L 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 L’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 on this occasion.
- Mr L's frustration in this matter is completely 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, this is whether HSC's actions are in accordance 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 L'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 substituting 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 provides an 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 L's application do not constitute maladministration.
- Mr L 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 already gained (and maintained) by a staff member of a hospital (pre-1995). It is 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 L'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 thereby allowing more people to gain MHO status for the first time.
- Mr L also pointed out that, NHS has stated that workers in the community may also be awarded MHO status. However, NHS workers are members of a different scheme. HSC cannot act differently based on what the NHS is able to do. HSC is bound by its own Scheme Regulations.

18. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr L provided his further comments which do not change the outcome.

19. Mr L made the following comments:

- he mentioned a colleague, who he believed had a similar work history to him, but the person wished to remain anonymous in case it would affect their MHO status;
- he believed the interpretation of hospital in the Health and Personal Social Services (Quality, Improvement and Regulations) (Northern Ireland) Order 2003, meant that a community unit was a hospital:

"hospital" means, subject to paragraph (8),-

(a) an establishment-

- (i) the main purpose of which is to provide medical or psychiatric treatment for illness or mental disorder or palliative care; or
 - (ii) in which (whether or not other services are also provided) any of the listed services are provided;
- (b) any other establishment in which treatment or nursing (or both) is provided for persons liable to be detained under the Mental Health (Northern Ireland) Order 1986 (NI 4);
- he has also provided a document called “To the year 2000” which provided information that care work would shift from hospitals to the community;
 - he also mentioned that the Scottish Public Pensions Agency (**SPPA**) provides information which says community units are treated as hospitals for the benefit of MHO status; and
 - he does not understand how HSC can ignore his employer’s application which said he was entitled to MHO status.

20. I agree with the Adjudicator’s Opinion and I will therefore only respond to the key points made by Mr L for completeness.

Ombudsman’s decision

21. Mr L is dissatisfied that after working for a number of years in mental health services, he is not being granted MHO status. This takes away his opportunity to retire at age 55, without being subject to an early retirement reduction.
22. I cannot take into account how an anonymised member may have been treated in respect of his or her MHO status. In order for it to be used as evidence the person would need to be named and HSC would need to examine and explain why this member’s position was different to that of Mr L. If HSC then maintained its decision on the basis that their circumstances were different then I could consider whether there was an inconsistency in HSC’s interpretation of the Regulations.
23. I do not believe the Health and Personal Social Services (Quality, Improvement and Regulations) (Northern Ireland) Order 2003, is relevant to Mr L’s complaint. I appreciate that it has a definition of hospital, but it only pertains to the interpretation of those regulations. It also significantly post-dates the period key to Mr L’s application (i.e. prior to 1995). HSC is not required to take these into consideration when making its decision whether to award MHO status, as they are separate regulations and there is no cross referral to the Regulations.
24. There is no dispute that some care work for people suffering from mental disorders has moved from hospitals to the community. However, the Regulations clearly state that in order to receive MHO status the work must be undertaken in a hospital, and unfortunately, Mr L was not based in a hospital.

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25. With regard to information provided by the SPPA, that workers in the community may also be awarded MHO status, the SPPA is a separate body, applying different regulations to those of the HSC, HSC has to apply its own Regulations and not those of another organisation.
26. Although, Mr L's application for MHO status may have been supported by his employer, the ultimate decision is for HSC to decide whether the Regulations permit it to grant the status. I have not found any maladministration by HSC in its refusal to do so.
27. Therefore, I do not uphold Mr L's complaint.

Anthony Arter

Pensions Ombudsman
2 March 2018