

## Ombudsman's Determination

Applicant	Mr L
Scheme	HSC Pension Scheme ( <b>the Scheme</b> )
Respondent	HSC Business Services Organisation ( <b>HSC</b> )

## 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 have not granted him Mental Health Officer (**MHO**) status for the period 1982 to present. 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. 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 if they had worked till age 60.

6. From 6 April 1982 to 17 October 2010, Mr L worked as a care and nursing assistant at Seymour Gardens Elderly Mental Infirm Centre (**Seymour Gardens**). From 18 October 2010 until the present day, he works as a nursing assistant at AUDLA Lodge. He submitted two applications that were supported by his employer for MHO status.
7. On 26 July 2016, HSC sent a letter to Mr L and said 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 from 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 he was not eligible for MHO status.

8. Mr L was dissatisfied with the response and submitted a stage one internal dispute resolution procedure (**IDRP**) application. He explained that his role in Seymour Gardens, was working with people who had been detained under the Mental Health Act. He said he received the same training as the care workers employed in the hospital, who would potentially be eligible for MHO status. He went on to provide the following quotation which he found on NHS' website (as opposed to that of HSC):

“For an establishment to be classed as a hospital for the treatment of persons suffering from mental disorder it must be used wholly or partly for the care or treatment of patients suffering from mental disorder.

It can include any institution for the reception and treatment of any patients suffering from mental disorder and, in some circumstances, clinics, outpatient departments and community units may be regarded as hospitals”.

9. On 13 September 2016, HSC responded to Mr L and said that the role did not attract MHO status. This was because Seymour Gardens was not a hospital and under the Regulations, for someone to be eligible for MHO status, they were required to work in a hospital.
10. Mr L submitted a stage two application under IDRP and this was addressed by HSC on 2 March 2017. It explained that even though Mr L's role at Seymour Gardens included taking patients to the nearby hospital for appointments, this could not be

classed as him working in the hospital. HSC's view remained that Mr L was not entitled to MHO status.

11. Mr L remained dissatisfied and brought his complaint to the Pensions Ombudsman to be independently reviewed.

## **Adjudicator's Opinion**

12. 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 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 I am hesitant 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 i.e. 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 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 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 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.

- Finally, NHS has said 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.

13. Mr L did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. However, Mr L did not make any additional comments, as he believed he had submitted sufficient information in his application for his complaint to be upheld. But, I agree with the Adjudicator's Opinion and I will therefore only address the key points of Mr L's complaint.

### **Ombudsman's decision**

14. Mr L is dissatisfied that after working for 37 years in the 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.
15. A plain and ordinary interpretation of the Regulations requires Mr L to be on the staff of a hospital in order to gain MHO status, which he is not. Mr L has never worked in a hospital and the work he completed was always community based. As such, I cannot find that HSC are doing anything wrong in applying the plain and ordinary meaning of the Regulations, and concluding he is not eligible for MHO status.
16. Mr L has said he is aware of other community based workers who are receiving MHO status. However, it maybe that other workers did not follow precisely the same career path as Mr L, so it would not be a fair comparison. I have not seen any evidence on which I can rely to conclude that Mr L has been treated unfairly compared to others in exactly the same circumstances.

It is not my role to decide what the Regulations should say or to interfere with the method HSC apply when deciding if someone should retain MHO status in the community or not. It is only for me to decide whether HSC is interpreting and applying the Regulations correctly, which I consider it is.

17. Therefore, I do not uphold Mr L's complaint.

**Anthony Arter**

Pensions Ombudsman  
21 February 2018