

Ombudsman's Determination

Applicant	Mrs S
Scheme	NHS Pensions Scheme (the Scheme)
Respondents	NHS Business Services Authority (NHSBSA) North Staffordshire Combined Healthcare NHS Trust (the Trust)

Outcome

1. I do not uphold Mrs S' complaint, and no further action is required by NHSBSA or the Trust.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs S has complained that her Mental Health Officer (**MHO**) status has been removed, meaning that if she retires at age 55, she will be subject to an early retirement reduction.

Background information, including submissions from the parties

4. MHO status is a provision available in the 1995 section of the NHS Pension Scheme Regulations 1995 (**the Regulations**, as set out in the Appendix to this Determination). Historically, MHO status was available to whole time employees. However, the Regulations were changed to extend the provision to eligible part time employees and these changes were retrospective.
5. The normal retirement age for members in the 1995 Section of the Scheme is 60. However, MHO status members, who had served at least 20 years pensionable service holding the status were able to retire at age 55, with unreduced benefits. In order to be eligible for MHO status, Mrs S needed to be an active member of the Scheme with MHO status when she retired.
6. MHO status was abolished on 6 March 1995, for members joining the Scheme for the first time. Members re-joining the Scheme could have their MHO status retained if they had not had a break in pensionable service of over five years.

7. Mrs S' employment history was as follows:

Period	Employed as	Whole or part time?	MHO status?
5/11/1984 - 19/5/1991	Nurse	Whole time	Yes
20/5/1991 - 9/7/1995	Nurse	Part time	Yes
10/7/1995 - 31/8/2001	Nurse	Whole time	Yes
1/9/2001 - 31/3/2005	Psych Therapist	Whole time	No
1/4/2005 - 31/10/2005	Psych Therapist	Part time	No
1/11/2005 - 28/2/2007	Psych Therapist	Part time	No
1/3/2007 - 24/4/2012	Psych Therapist	Whole time	No

8. NHSBSA originally said that Mrs S' first part time nursing role, from 20 May 1991 to 9 July 1995, could not hold MHO status. But, given the Regulation change, relating to part time employees, it decided that being a part time worker should not preclude Mrs S from qualifying for MHO status. So, her MHO status was reinstated for that period.
9. Mrs S began querying her pension records in November 2016. On 23 February 2017, the Trust submitted an SM1 form, which is a form NHSBSA asks employers to complete, so it can assess whether the member is eligible for MHO status. The Trust completed this for her period of employment from 1 September 2001, to 24 April 2012. Although, the Trust had previously completed incorrect forms on 23 November 2016.
10. NHSBSA wrote to Mrs S and the Trust to say she had not met the criteria for MHO status for her period of employment from 1 September 2001 to 24 April 2012. It said this was because the amount of time she had spent on direct patient care did not meet the criteria of "all or almost all time".
11. On 25 May 2017, Mrs S wrote to NHSBSA and invoked stage one of the internal dispute resolution procedure (**IDRP**). She said she has spent her career in direct contact with patients on a daily basis. Any time where there was no direct contact with patients, was taken up dealing with record keeping, training and supervision

requirements that are a legal requirement of practice. She said there were many people who worked in similar career paths to hers that had been granted MHO status.

12. NHSBSA responded on 20 July 2017, under stage one of the IDRP. It remained of the view that Mrs S did not spend enough of her time in direct hands-on patient care. Therefore, it did not agree that she should hold MHO status.
13. Mrs S invoked stage two of the IDRP.
14. NHSBSA responded on 12 October 2017. It said Mrs S did not meet the criteria for MHO status. However, it went on to say that even if she did meet the criteria, as she had a deferred pension from 24 April 2012, her retirement age was 60. NHSBSA also considered whether, if Mrs S went back to pensionable employment, MHO status could be reinstated. As she had a break in pensionable employment of over five years, it concluded that it would not be reinstated.
15. Mrs S remained dissatisfied and brought her complaint to The Pensions Ombudsman to be independently reviewed.
16. On 20 February 2018, the Trust provided its formal response to the complaint. It opposed the complaint being made against it, as it supported Mrs S' claim for MHO status.
17. NHSBSA provided its formal response on 13 February 2018. It said that the evidence provided by the Trust indicated that Mrs S devoted 70% of her time treating patients, and 30% completing other duties. Therefore, it did not believe she spent almost all of her time treating patients. It acknowledged she spent more than half of her time treating patients, but this did not meet the criteria of almost all, for example 85 to 90%.

Adjudicator's Opinion

18. Mrs S' complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA or the Trust. The Adjudicator's findings are summarised below:-
 - The evidence indicates that NHSBSA reviewed all the documents and in particular, the form relating to MHO status. The form summarised that 70% of Mrs S' time was spent in direct contact with patients. However, 30% was spent completing other tasks which did not include direct patient care. It was the Adjudicator's view that it was reasonable for NHSBSA to conclude that this cannot be classed as "all or almost all", of the time spent on direct patient care.
 - NHSBSA provided further information about its designation policy, specifically its view that care and treatment must be "direct and hands on". This includes an extract from the "Service and Membership procedures notes" circa February 1986 (**the 1986 SAM**); and, a background brief for the Minister of State (circa March

1986). At para f, the 1986 SAM addresses the treatment of ancillary professionals designated under the predecessor of what is now R3(14)(b) as follows:

“This is an area for the use of discretion and judgment. Precedent decisions over the years have determined the criteria, which are numerous and complex, but behind every decision for these and other grades the underlying principle is that the whole spirit and intention of the Regulations are designed to give individual recognition to those who are subjected to the stress and strain of having mental patients constantly in their care.

There are numerous precedents governing whether or not a person is considered to be subject to the strain of caring for patients (‘treatment’ has been regarded as being a function of medical staff and not delegated to other grades). We normally require information about the duties performed and we consider, amongst other things, for how long a person is in the presence of patients, whether what he is doing is likely to cause stress and strain, how many patients there are, how dangerous they may be, whether other nursing staff are present etc. Form [MHO1] is designed to provide us with the information we require in the vast majority of cases.”

- This approach was reiterated in the background brief to the Minister as follows:

“The Regulations give no guidance as to how ‘the whole or substantially the whole of an officer’s time devoted to treatment and care’ is to be measured...the Regulations... are designed to give individual recognition to those who are subjected to the stress and strain of having mental patients constantly in their care.”

- Therefore, NHSBSA considers it is correct to ask employers to differentiate between, hands-on time spent in the presence of mentally ill patients, and time spent away from mentally ill patients, in order to establish whether members meet the relevant criteria. This is because it is the time spent working in the presence of mentally ill patients that carries the extra stresses and strains, due to the increased possibility of violence, and the need to restrain patients.
- Neither “all or almost all” nor “treatment or care” is defined in the Regulations. But the documents provided by NHSBSA demonstrate that the interpretation of the term “treatment or care”, as applied to ancillary staff, has been actively considered since 1972 (and has been the subject of Departmental guidance since 1986). Having reviewed these guidance documents, the Adjudicator considered that NHSBSA’s interpretation of the Regulations, and its method of asking employers to distinguish between direct hands-on and non-direct hands-on work, is reasonable.

- The 1986 SAM sets out the rationale for NHSBSA's interpretation and use of SM1 forms. It supports NHSBSA's understanding that "treatment or care" requires the presence of the patient; and, it shows that this expression of the Secretary of State's position is long-standing. The Adjudicator did not consider that any alternative interpretation of the Regulations should be preferred, or that there are sufficient grounds to interfere with NHSBSA's established policy.
 - The Adjudicator went on to note that Mrs S became a deferred member of the Scheme on 24 April 2012. At this point, even if she had held MHO status in her role, as a deferred member of the Scheme, her retirement age is 60. This is because in order to hold MHO status and retire at age 55, the Regulations specify that the member needs to be in pensionable employment when they retire.
 - The Adjudicator concluded that although the Trust supports Mrs S application for MHO status, it was not the decision maker. It is NHSBSA who ultimately has the final decision as to whether or not MHO status applies.
19. Mrs S did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs S provided her further comments which do not change the outcome. Mrs S said the following:
- she believed holding MHO status was part of her contract of employment;
 - her job did not change, but the management of the department was changed by the Trust;
 - had the Trust asked someone who managed her role to complete the SM1 forms it would have reflected her role differently;
 - she never received information saying her MHO status had been removed;
 - she did not know that at any point in her employment of 27 years, her MHO status could be revoked; and
 - she has been singled out and treated differently to other members.
20. NHSBSA agreed with the Adjudicator's Opinion and made no further comments.
21. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs S for completeness.

Ombudsman's decision

22. Mrs S is dissatisfied that her MHO status has been removed, meaning that if she retires at age 55, she will be subject to early retirement reductions.

23. MHO status is defined in the Regulations, I do not agree that holding MHO status would have been part of Mrs S' employment contract. Further, Mrs S has not provided any evidence of her employment contracts to prove it guaranteed MHO status.
24. Mrs S has said that she did not change her job roles, but that the Trust made management changes to the department. From 5 November 1984 to 31 August 2001, Mrs S was employed as a nurse. Then from 1 September 2001 to 24 April 2012, Mrs S was a psychotherapist. Although, Mrs S may not have chosen to change her job role, there is clearly a change from nurse to psychotherapist. Even though this was a change made by the Trust, it does not change the fact that her job role changed which resulted in less hands-on patient care.
25. Mrs S believes that if someone who knew her role within the Trust completed the SM1 forms, then her MHO status would not have been removed. I do not find that it would have made a difference who completed the SM1 forms in the HR department. The person who completed the forms would have been aware of Mrs S' job split, so I am satisfied that the outcome would not be different dependent on who completed the form.
26. Mrs S has said she was never informed that her MHO status had been removed. SM1 forms should have been completed by the Trust every time she entered into a new role. It would appear the forms were only completed in November 2016. Although this is unfortunate, I do not consider that it changes the outcome of this complaint.
27. As Mrs S had already left employment in April 2012, I do not believe she would have acted differently given the knowledge that her MHO status had been removed. For example, I do not believe she would have continued to work.
28. NHSBSA has concluded that 70% does not meet the necessary requirement to be "all or almost all". It explained that it would consider someone who spends 85 to 90% as "almost all". I do not consider that this method amounts to maladministration.
29. There is no evidence that Mrs S has been treated differently from other members, as NHSBSA has demonstrated that it has a consistent approach for dealing with cases of this nature. It reaches different conclusions in different cases which does not in itself amount to different treatment or maladministration. I cannot comment on Mrs S' colleagues who, she contends, still continue to hold MHO status as they are not parties to this complaint.
30. There is no dispute that Mrs S became a deferred member of the Scheme on 24 April 2012. I agree with the Adjudication that even had she held MHO status in her role in 2012, she would not be able to retire at age 55 as she was no longer in pensionable employment but had become a deferred member.

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31. I have also considered whether Mrs S would have been able to retain MHO status if she had returned to MHO status employment. As she had a break in service of over five years, she would not have retained MHO status.
32. Therefore, I do not uphold Mrs S' complaint.

Anthony Arter

Pensions Ombudsman
30 January 2019

Appendix

The NHS Pension Scheme Regulations 1995 SI 1995/300

Mental health officers

R3.—(1) Subject to paragraph (2), this regulation applies to a member who at the coming into force of these Regulations—

(a) is in pensionable employment under the scheme as a mental health officer, or

(b) has accrued rights to benefits under the scheme arising out of a previous period in which he was engaged in such employment and at no time since the last occasion on which he was so engaged has he had a break in pensionable employment for any one period of 5 years or more.

(2) Subject to paragraph (3), this regulation shall cease to apply if the member has a break in pensionable employment for any one period of 5 years or more ending after the coming into force of these Regulations.

(3) Paragraph (2) shall be without prejudice to the operation of paragraph (5)(a) in relation to any period prior to this regulation ceasing to apply.

(4) For the purposes of paragraphs (1) and (2), “pensionable employment” includes employment that qualified the member for benefit under a health service scheme.

(5) Subject to paragraphs (6) and (7), where this regulation applies—

(a) if the member has in excess of 20 years' pensionable service as a mental health officer, regulation E1 (normal retirement pension) will apply as if the reference, in paragraph (1) of that regulation, to age 60, were a reference to age 55, but only if the member was in pensionable employment as a mental health officer immediately before leaving; and

(b) each complete year of pensionable service as a mental health officer in excess of 20 years will count as 2 years' pensionable service.

(6) For the purposes of calculating the 20 year period referred to in paragraph (5)—

(a) there shall, in the case of a member who has reached age 50, be taken into account any period before he became a mental health officer in which he was employed on the staff of a hospital used wholly or partly for the treatment of persons suffering from mental disorder and in which he devoted the whole or substantially the whole of his time to the treatment and care of such persons, unless it would be more favourable to the member (or, if the member has died, to the persons entitled to benefits in respect of the member) to disregard any such period;

(b) pensionable service does not include additional service bought under regulation Q1 (right to buy additional service).