

## Ombudsman's Determination

Applicant	Mrs E
Scheme	NHS Pension Scheme (the <b>Scheme</b> )
Respondent	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. Mrs E's complaint against NHSBSA is partly upheld, but there is a part of the complaint I do not agree with. To put matters right, for the part that is upheld, NHSBSA shall make an award of £1,000 to Mrs E in respect of the serious non-financial injustice she has suffered.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs E says NHSBSA's decision that she does not qualify for special class (**SC**) or mental health officer (**MHO**) status, in respect of pensionable service completed between 20 April 2011 and 22 March 2014, is wrong.
4. Mrs E asserts that NHSBSA unreasonably delayed responding to her enquiries, provided misleading information regarding her eligibility for SC or MHO status, and mismanaged her subsequent complaint.

## Background information, including submissions from the parties

5. The Scheme's provisions are contained in regulations, including the National Health Service Pension Scheme Regulations 1995 (the **1995 Regulations**), as amended.
6. Regulation R2 (**Regulation R2**) of the 1995 Regulations applies to eligible nurses, physiotherapists, midwives and health visitors in pensionable employment under the Scheme. The provisions under Regulation R2 gives an eligible member the right to retire from age 55 with a full pension.
7. For Regulation R2 to apply, the member cannot have a break in pensionable employment of five years or more, and must spend the whole of the last five years of pensionable employment as a nurse, physiotherapist, midwife or health visitor.

8. Regulation R3 of the 1995 Regulations says:

**“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...”

9. The 1995 Regulations defines a ‘mental health officer’ as:

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

(b) any other officer employed in such a hospital who is within a class or description of officers designated by the Secretary of State as mental health officers for this purpose; and

(c) a consultant, senior hospital medical officer or senior hospital dental officer in part-time NHS employment who devotes all, or almost all, his time to the treatment or care of persons suffering from mental disorder and who satisfies the requirements of paragraph (15) ...”

10. A member who has completed more than 20 years' pensionable service as a MHO, and was in pensionable employment as a MHO immediately before leaving the Scheme, is entitled to take their pension from age 55. Each year over 20 years counts as two years' pensionable service.

11. Mrs E is currently employed in the National Health Service (the **NHS**) and is a member of the Scheme. She attained age 55 in April 2018.

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12. On 19 December 2003, Mrs E joined East London NHS Foundation Trust (the **Trust**) as a Clinical Lead Physiotherapist for Adults with Learning Disabilities (the **Lead Physiotherapist Post**). The Trust did not indicate at the time that the post attracted MHO status.
13. On 21 April 2011, Mrs E took up a 'Clinical Lead: Wheelchair and Specialist Seating Service (Adult and Children) management post (the **Wheelchair Post**) with the Trust.
14. In the essential person specification (the **Person Specification**) for the Wheelchair Post, it says the individual must have a recognised "therapy degree". It states that post registration training in management/relevant clinical areas is essential for the post.
15. The job description (the **Job Description**) for the Wheelchair Post states that a highly experienced therapy clinical team manager is required for the operational/professional and general clinical development of the wheelchair service (the **Wheelchair Service**). The duties and responsibilities listed include:

"to handle behavioural, emotional and social issues experienced by patients with empathy, understanding and support."
16. The Trust's website explains that the Service provides wheelchairs and other aids for individuals with a permanent disability affecting their mobility. It states that the Wheelchair Service is available to Newham residents, who have a GP, and have been disabled for more than six months and require a wheelchair.
17. Mrs E left NHS employment on 21 March 2014, to work as a locum physiotherapist.
18. On 6 April 2015, Mrs E contacted NHSBSA for confirmation of her MHO status. She was told that she lost it when she returned to work in January 1999 following maternity leave. After an exchange of correspondence, and enquiries made to Mrs E's employers around June 2015, NHSBSA confirmed to Mrs E in late September 2015, that it had corrected its records to show that she had retained MHO status from 19 January 1999 to 18 December 2003. Around the same time, Mrs E queried the MHO status in respect of her Wheelchair Post.
19. In early October 2015, the Trust responded to an enquiry from NHSBSA concerning the percentage of time Mrs E spent on duties involving hands-on care and treatment of mentally disordered patients. In response to the request for MHO status (the **SM1 form**), the Trust indicated that, on average, 30% of Mrs E's time involved hands-on care based on her job description. It stated that 70% of her time involved duties which did not involve such care and treatment.
20. On 19 July 2016, ten months after Mrs E contacted NHSBSA concerning her Wheelchair Post, NHSBSA replied saying that the Job Description and Person Specification did not meet the criteria which would have enabled her to retain MHO status for her last pensionable employment, and that MHO status did not apply to Mrs E from 27 June 2003.

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21. On 1 August 2016, Mrs E complained under stage one of the Scheme's internal dispute resolution procedure (**IDRP**), that she had retained MHO status continuously throughout her NHS employment.
22. Mrs E joined Oxleas NHS Foundation Trust (**Oxleas**) on 22 August 2016, following a break in NHS pensionable employment of less than five years. Mrs E works as Lead Specialist Physiotherapist in its Adult Learning Disability Physiotherapist Service. Oxleas did not initially record Mrs E's employment as attracting either SC or MHO status.
23. The job description (the **Oxleas' Job Description**) states:

“...The post holder will work as an integral member of the Learning Disabilities Team but will have specific responsibility for the delivery of physiotherapy service and development of best guidelines within the service.”
24. The key tasks and responsibilities listed in the Oxleas' Job Description includes:

“To be responsible for provision of highly specialised assessment, treatment and management of adults with learning disability who present with a wide variety of conditions. These include chronic, complex, disabling and life limiting conditions.”
25. In its formal response of 15 September 2016, NHSBSA acknowledged that Mrs E held MHO status until 2003. However, it said that her job description did not indicate that she qualified for MHO status from 2003 to 2011.
26. Mrs E complained under stage two of the IDRP on 31 October 2016.
27. NHSBSA replied on 21 December 2016, (the **Stage Two Response**), granting Mrs E MHO and SC status in respect of the post she held from 27 June 2003 to 20 April 2011. NHSBSA stated that the Job Description did not indicate that the management responsibilities of the Wheelchair Post would include supervision of Physiotherapists. NHSBSA said it was unable to determine that her move to the post represented a continuing commitment to Physiotherapy. It highlighted that the details provided by the Trust in [October] 2015, indicated that 30% of her time was engaged in the direct treatment and care of patients, while 70% was spent on other responsibilities. Mrs E was advised to contact her employers and ask them to provide NHSBSA with confirmation of her eligibility for MHO/SC status, along with a relevant job description, if she considered that the post met the criteria for either status.
28. In September 2017, Mrs E contacted her current employer's pension department about her pension. She was advised of the following by a Pension Officer seconded to Oxleas, and directed to NHSBSA's MHO factsheet (the **Factsheet**):

“... I note that with [the Trust] your MHO status ceased on 21/04/2011? please be aware that because more than 5 years have passed since your MHO

status ceased (21/04/2011) to joining [Oxleas] on 22/08/2016 this would prevent your MHO status from continuing.

If this is incorrect please contact [the Trust] urgently to ensure that this [is] corrected on [Pensions Online.]”

29. The Factsheet says:

“...to be considered for MHO status a member must spend all, or almost all, of their time in the direct treatment or care of those suffering from mental disorders. Doctors and nurses who are identified by their employer as working with mentally disordered patients will be granted MHO status automatically if they satisfy the membership criteria. Other grades may be accepted on investigation...”

30. Mrs E says she assumed in good faith that she held MHO status continuously since first joining the NHS in 1989, as she has always been employed in similar roles, spending almost all her time as a clinician working with mentally ill patients. When she contacted NHSBSA in April 2015, she specifically asked whether she could take a full pension from age 55, and stated that it would influence her decision to return to the NHS. Had NHSBSA not delayed responding to her enquiries she would have returned to a qualifying post much earlier. She informed NHSBSA in September 2015, that she was making decisions about future employment based on the information it had provided so she could retire at age 55.
31. Mrs E maintains that NHSBSA unreasonably delayed identifying and correcting gaps in its records, NHSBSA informed her in April 2015 that she lost MHO status in January 1999 and failed to correct her records until 22 September 2015. When she responded on this on 25 September 2015, NHSBSA did not reply until July 2016.
32. Mrs E has explained that, based on the misinformation provided by the Pension Officer, she considered that NHSBSA had wrongly stated in its second stage decision that she could resume MHO status by returning to a qualifying post within five years of March 2014. As she did return within this timeframe, NHSBSA should grant her the MHO status that it said she would be able to qualify for.
33. Mrs E says while the Wheelchair Post could be performed by either a suitable qualified physiotherapist or an occupational therapist, the person would need to be a clinical therapist. Her former manager provided an inaccurate breakdown for her Wheelchair Post. She has noted that she was asked to provide details based on the Job Description, rather than the actual role she performed. In her view, an assessment based on this alone is not sufficient.
34. Mrs E has explained that she continued to carry out her full clinical caseload after East London Mental Health Foundation Trust took over the Newham Primary Care Trust in February 2011, her clinical caseload increased further after the Wheelchair Service lost its rotational band 6 physiotherapist in August 2012.

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35. Mrs E says she remains confident that if we were to ask her former manager directly, she would confirm that the Wheelchair Post was in a clinical lead role. Also, a more accurate breakdown of her role could be obtained from the band 7 physiotherapist, or by reviewing the electronic care record system and other clinical records held by the Wheelchair Service.
36. NHSBSA has explained that, at the time of the Stage Two Response, it had not received any information from Oxleas indicating that Mrs E's current post attracted SCS or MHO status. Mrs E was advised by NHSBSA to contact Oxleas if she considered that either status applied to the post. Oxleas later updated NHSBSA's membership records indicating that the post automatically qualified for SC status. However, it advised that the post did not entitle Mrs E to MHO status.
37. NHSBSA has explained that it relied solely on the details provided by the Trust. It does not consider that all the patients Mrs E attended to while carrying out the Wheelchair Post suffered from mental disorder. Based on the SM1 form, the Person Specification and Job Description, Mrs E does not satisfy the criteria for MHO status in that role.
38. NHSBSA is unable to find evidence that it misinformed Mrs E concerning the likelihood of her regaining either SC or MHO status. However, it does accept that it delayed responding to Mrs E's enquiries in 2015. It has apologised to Mrs E for this.
39. NHSBSA updated Mrs E's membership records to reflect her entitlement to MHO and SC status in respect of her various tranches of NHS service completed between 12 February 1989 and 21 April 2011. NHSBSA confirmed that Mrs E's present job has since been recorded by Oxleas as a SC qualifying post. In relation to Mrs E's current SC status, NHSBSA advised that she could potentially achieve normal retirement earlier than age 60. However, her last five years' pensionable NHS employment must be in a SC status qualifying post.
40. During the investigation, NHSBSA asked Oxleas to either decide or confirm whether Mrs E's current post should automatically attract MHO status. NHSBSA clarified that the post must qualify for MHO status because Mrs E did not retain MHO status in her earlier posts.
41. In October 2018, Oxleas submitted a SM1 form in respect of Mrs E's current post. It indicated that, based on Mrs E's job description, an average of 30% of her weekly hours of work was spent in duties involving hands on care and treatment of mentally disordered patients. Following additional information from Oxleas, NHSBSA requested a detailed breakdown of Mrs E's duties. It subsequently asked Oxleas to provide further clarification.
42. NHSBSA has now concluded its enquiries and accepts that Mrs E's post with Oxleas qualifies for MHO status. NHSBSA has confirmed to Mrs E that provided she remains in such employment in the NHS, she is entitled to take her pension before age 60.

43. To put things right, Mrs E wants NHSBSA to also accept that her Wheelchair Post qualifies for both SC and MHO status.

### **Adjudicator's Opinion**

44. Mrs E's complaint was considered by one of our Adjudicators who concluded that NHSBSA should make an award to Mrs E in recognition of the non-financial injustice she has suffered in relation to this matter. The Adjudicator's findings are summarised below:-
- To qualify for MHO status, an individual must spend all or almost all of his/her time in the treatment and care of mental health patients.
  - Neither the Person Specification nor the Job Description state that it is necessary to have qualification or experience in Physiotherapy for the Wheelchair Post.
  - Mrs E's assertion that the Wheelchair Post involved a high degree of responsibility for patients with learning difficulties and mental illness, is not supported by the information the Trust provided to NHSBSA on the SM1 form.
  - Oxleas is not party to the complaint that we have accepted to investigate. Therefore, the alleged misstatement, on the part of the Pensions Officer, falls outside the scope of the complaint under consideration.
  - Although NHSBSA delayed responding to Mrs E's enquiries, the evidence does not support a direct link between this and the alleged delay in Mrs E returning to NHS employment. There was nothing preventing Mrs E from re-joining the NHS while those enquiries were ongoing.
  - While pension provision would likely have been a consideration in her decision to return to the NHS, it is also likely that there were other key factors that influenced Mrs E's decision.
  - Mrs E's complaint should be upheld to the extent that NHSBSA's delay in confirming that the Wheelchair Post did not qualify for MHO status, and that she retained SC and MHO status in respect of her Clinical Lead Physiotherapist position, caused her significant inconvenience. An award of £500 would correct the injustice, and would be in line with what an Ombudsman would direct in similar cases.
45. Mrs E did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs E has provided her further comments but these do not change the outcome. I agree with the Adjudicator's Opinion, except that I consider a higher award of £1,000 is warranted. I will therefore only respond to the key points made by Mrs E in relation to the complaint that we agreed to investigate for completeness.

## Ombudsman's decision

46. Mrs E contends that the Opinion focused too narrowly on the aspect of her complaint concerning whether the Wheelchair Post was eligible for SC or MHO status. Her concern throughout the complaint process was to ensure the completeness and accuracy of her pension record. NHSBSA initially wrongly stated that she had lost MHO status with effect from 15 January 1999. Around the time of making her enquiry in April 2015, it failed to acknowledge her continued right to MHO status. Although its correspondence with the Trust related to the Wheelchair Post, it erroneously rejected her claim to continued right to MHO status from 19 December 2003, based on its cursory review of the Job Description and Person Specification.
47. Mrs E has highlighted that it took NHSBSA more than 15 months before it replied on 19 July 2016, concerning her Wheelchair Post. It then took repeated enquiries over a period of three years before NHSBSA accepted that she is entitled to both SC and MHO status in respect of her various tranches of service completed prior to 21 April 2011.
48. In relation to her Wheelchair Post, Mrs E says the Job Description and Person Specification were the only evidence considered by the Trust and NHSBSA when deciding whether the Wheelchair Post qualifies for MHO Status. These do not, in her view, describe the nature of the post in sufficient detail, nor do they cover her specialist work with clients with mental health conditions and learning disability. She finds it difficult to accept that a clinical lead role she held for three years could be assessed as 70% management to 30% clinical, when the job title alone supports a different view. She questions the basis of the assessment.
49. In addition to making an award of £500 for non-financial injustice, Mrs E says she would like NHSBSA to acknowledge that the Wheelchair Post qualified her for MHO status, grant her MHO status effective from 22 August 2016 in respect of her current post, and update its records accordingly.
50. In her application to us, the main issue Mrs E raised concerned her Wheelchair Post. The outcome Mrs E was seeking was to be able to demonstrate that the Wheelchair Post involved a high level of responsibility for patients with learning disabilities and mental health presentations. I note that Mrs E has explained that, following internal changes at the Trust, she added a further day of clinical work to her workload but this is not reflected in the Job Description or Person Specification. I also note that Mrs E initially acknowledged that, due to lack of evidence, the position cannot now be shown to have qualified for MHO status.
51. It is for the employer to determine whether a post attracts MHO status. It is also the employer's responsibility to provide accurate service records to NHSBSA. Where the member is employed in a management capacity, the relevant job description and person specification should, in my view, reflect that the essential components of the role is consistent with the classification of "mental health officer", as defined in the 1995 Regulations, for MHO status to apply to the role.



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52. The Trust informed NHSBSA in October 2015 that, based on Mrs E's job description, on average 30% of her time was involved in hands-on care of mentally disordered patients. As the employer connected with the post, the Trust was in a better position to make the assessment. In the absence of documentary evidence to the contrary, I can find no valid reason why NHSBSA could not have relied on the information the Trust provided in the SM1 form.
53. Mrs E explains that the scope of her responsibilities evolved over time. However, she has provided no documentary evidence which supports her claim to MHO status in respect of the Wheelchair Post. The fact that Mrs E says the role included a high degree of responsibility for patients with learning disabilities and mental disorder is not in itself sufficient to satisfy the MHO criteria. In the absence of compelling evidence to support her position, I am unable to find that NHSBSA incorrectly recorded the role as not qualifying for MHO status.
54. For Regulation R2 to apply, Mrs E cannot have a break in pensionable employment of five years or more, and must spend the whole of the last five years of her pensionable employment as a nurse, physiotherapist, midwife or health visitor. Mrs E returned to pensionable employment after a break of less than five years. This is not in dispute. NHSBSA has now accepted that Mrs E's current post qualifies her for MHO status. Consequently, by virtue of Regulation R3 of the 1995 Regulations she could take full pension provided she continues in pensionable employment as a MHO until her retirement date.
55. Turning to NHSBSA's handling of Mrs E's enquiries and subsequent complaint. NHSBSA accepts that it mismanaged Mrs E's enquiry concerning her MHO status. NHSBSA's excessive delay in dealing with her request for information would likely have caused her serious distress and inconvenience.
56. NHSBSA compounded the issue by delaying making enquiries of Oxleas. Had it been more proactive earlier in the process, Mrs E's entitlement to MHO status in respect of her current post would more likely have been determined sooner. Mrs E should therefore be awarded a higher distress and inconvenience award of £1,000.

## **Directions**

57. To put matters right, NHSBSA shall, within 28 days of the date of this Determination, pay £1,000 to Mrs E in respect of the serious distress and inconvenience which she has suffered.

**Anthony Arter**

Pensions Ombudsman  
30 January 2019

**Appendix**

Summary of Mrs E's Scheme membership previously recorded by NHSBSA:

<b>ID</b>	<b>period</b>	<b>calendar length membership</b>	<b>MHO status</b>	<b>SC status</b>	<b>whole/part time</b>
8	from 22/08/2016	continuing in service	No	Yes	whole-time
7	21/04/2011 to 21/03/2014	2 years and 335 days	No	No	part-time
6b	01/04/2008 to 20/04/2011	3 years and 20 days	Yes	Yes	part-time
6a	27/06/2003 to 31/03/2008	4 years and 103 days	Yes	Yes	part-time (overlaps with ID5)
5	19/01/1999 to 18/12/2003	4 years and 334 days	Yes	Yes	part-time
4	01/10/1996 to 15/01/1999	2 years and 107 days	Yes	Yes	whole-time
3	05/04/1994 to 30/09/1996	2 years and 179 days	Yes	Yes	whole-time
2	28/08/1990 to 04/04/1994	3 years and 220 days	Yes	Yes	whole-time
1	13/02/1989 to 12/08/1990	1 year and 181 days	Yes	Yes	whole-time
Total calendar length MHO qualifying service				22 years and 49 days	