

## Ombudsman's Determination

Applicant	Ms R
Scheme	NHS Pension Scheme ( <b>the Scheme</b> )
Respondent	St Vincent's Hospice ( <b>the Hospice</b> )

## Outcome

1. I do not uphold Ms R's complaint and no further action is required by the Hospice.

## Complaint summary

2. Ms R's complaint is that the Hospice unfairly deprived her of an entitlement to join the Scheme, under the Hospice's NHS direction body status.

## Background information, including submissions from the parties

3. In 2004, Ms R joined the Hospice as a staff nurse following employment within the NHS, where she was a member of the Scheme.
4. Ms R claims the Hospice told her she was not eligible to continue membership of the Scheme because, as a charity, it was not a NHS employer and so it did not provide her with any other details about its pension arrangements.
5. In 2009, Ms R took additional employment within the NHS and joined the Scheme in respect of that employment. In 2012, she joined a workplace pension scheme set up by the Hospice.
6. In 2016, Ms R became aware that some nurses working at the Hospice were members of the Scheme, and she contacted the Royal College of Nursing (**RCN**). The RCN instructed a firm of solicitors (**RCN's solicitors**) to find out if the Hospice was a participating employer in the Scheme.
7. On 5 December 2016, the Hospice explained to RCN's solicitors that, from 2011, a new chief executive of the Hospice (**the CEO**) had allowed many employees to be individually assessed by the senior management team, and some of them were invited to join the Scheme.
8. On 22 December 2016, the CEO also explained that:-

- The Hospice was an independent charity and was not required to offer NHS terms of employment to employees.
  - Eight out of seventy employees were members of the Scheme. They participated from 2011, on an individual basis, as an incentive to solve a recruitment crisis for specialist palliative clinical skill.
  - The Hospice was not able to offer Scheme membership to all employees, due to the cost of employer contributions.
  - Before 2011, all employees had accepted the Hospice's terms of employment, without pension entitlement and, from 2012, all staff were automatically enrolled into a workplace pension scheme.
9. On 20 January 2017, RCN's solicitors asked the Hospice to explain how eight employees could join the Scheme but Ms R could not.
10. On 28 February 2017, the CEO provided RCN's solicitors with a copy of a superannuation direction issued to the Hospice on 15 April 1997, in accordance with sections 7 (2) and (3) of the Superannuation (Miscellaneous Provisions) Act 1967 (**the Act**), and effective from 1 October 1996 (**the 1997 Direction**).
11. Paragraph 3 of the 1997 Direction says:
- "Subject to...paragraph 4 of this direction...the regulations... shall apply to any person specified in the Schedule hereto employed by...the Hospice and who
- (a) is in relation to other employment or was while in a previous employment entitled to participate in... [the Scheme]; and
  - (b) enters or has entered the employment of the Hospice...within 12 months after leaving such previous employment."
12. Paragraph 4 of the 1997 Direction provides that an employee may not join the Scheme unless he or she applies in writing to the Secretary of State, within three months of starting employment with the Hospice, (or such longer period as the Secretary of State allows in a case).
13. The schedule to the 1997 Direction states:
- "Schedule to the St Vincent's Hospice Superannuation Direction 1997 (paragraph 3)**
- Persons specified: [a short list of names is included]".
- The schedule to the 1997 Direction lists two members of the Scheme, as at May 2006.
14. In response, Ms R contended that:-

- Neither paragraph 3 of the 1997 Direction, nor the Act, gave the Hospice a discretion to invite selected employees to join the Scheme and membership was open to any employee who fulfilled the criteria.
  - She fulfilled the criteria and should have been given an opportunity to join the Scheme.
  - There was no reference to Scheme membership in her contract of employment and she was unaware of the issue until 2016, twelve years after joining the Hospice.
15. On 11 April 2017, RCN's solicitors asked the Hospice if Ms R could re-join the Scheme because she was eligible under the 1997 Direction and, if not, demanded she be given compensation for the loss of her benefits in the Scheme from 2004 onwards.
16. On 22 June 2017, the CEO told RCN's solicitors that Ms R had accepted employment with the Hospice under a contract that did not include membership of the Scheme. Accordingly, the matter was closed.
17. Ms R then raised a complaint under the Scheme's internal dispute resolution procedure (**IDRP**) with the Scottish Public Pensions Agency (**SPPA**) who rejected her appeal.
18. On 19 October 2017, the decision issued under the second stage of the IDRP by the Director of Policy at the SPPA concluded that:-
- Ms R did not have an automatic right to join the Scheme at the start of her employment with the Hospice as it is not a NHS employer
  - Scottish ministers have a discretion under sections 7(2) and (3) of the Act to "direct" that staff not directly employed by the NHS but in complimentary NHS services can remain eligible to participate in the Scheme. Directions can be limited to certain people (**closed**) or open to all former NHS employees (**open**)
  - The Hospice held closed direction status, meaning that Scheme membership was not open to all employees, but only to certain eligible employees, who had been selected by the Hospice and included in the schedule to the 1997 Direction.
  - The Hospice had originally applied for the 1997 Direction so that one employee could join the Scheme, and this membership was subject to consent from HM Treasury on financial grounds.
  - Ms R was not invited by the Hospice to join the Scheme under the 1997 Direction. She could not be reinstated in the Scheme, in any event, as she had not applied for membership within the required three-month period from the start of her employment with the Hospice.

19. RCN's solicitors responded that:-

- There is no reference to a discretion for the Hospice in the Act or the 1997 Direction.
- Employees who fulfil the criteria and duly apply to the Secretary of State are entitled to join the Scheme.
- Employees should be informed of the right to apply for membership of the Scheme under the 1997 Direction.

20. On 23 January 2018, the 1997 Direction was withdrawn for new employees (**the 2018 Direction**) and different provisions applied from that date.

21. On 26 March 2018, Ms R raised a complaint with us and, in response to our enquiries, SPPA confirmed that:-

- The Hospice's 1997 Direction status is closed and only employees who were selected by the Hospice can participate in the Scheme.
- Access to the Scheme is not automatic and any decision about membership is at the sole discretion of the Hospice.
- Ms R accepted the post on non-NHS terms in 2004 when she started her employment with the Hospice.

22. On 15 November 2018, the SPPA responded again to Ms R's complaint (**2018 letter**) and said:-

- Ms R does not have an automatic right to join the Scheme as the Hospice is not a NHS employer.
- Only one employee was a member of the Scheme in 1996, the others joined later, in different circumstances, at the request of the Hospice and were added to the Schedule with the approval of the SPPA.
- The Hospice's 1997 Direction status is closed. Paragraph 3 only allows access to the Scheme to individuals named in the schedule and Ms R was not named.
- Access to the scheme is not automatic and any decision whether an employee is included or not remains the sole responsibility of the Hospice.

23. On 11 December 2018, Ms R rejected the arguments from the Hospice and said:-

- She had accepted the terms of her contract of employment in 2004 because she understood they were standard terms. She did not know there was a possibility of joining the Scheme. She was not aware of the 1997 Direction, so she did not ask to be included.

- The Hospice itself had misinterpreted the 1997 Direction in concluding that it had a discretion to invite selected employees to join the Scheme.
- Employees who satisfy the qualifying conditions in the 1997 Direction have a right to apply to join the Scheme, not an automatic right to join the Scheme.
- The Hospice had a duty to inform her that she could apply to join the Scheme but failed to do so.

## **Adjudicator's Opinion**

24. Ms R's complaint was considered by one of our Adjudicators who concluded that no further action was required by the Hospice. The Adjudicator's findings are summarised below:-

- The Adjudicator noted that the dispute between Ms R and the Hospice was about the interpretation of the 1997 Direction. This dispute concerned whether the Hospice had a discretion to invite Ms R, as an eligible employee, to apply to join the Scheme or whether Ms R had an automatic entitlement to apply to join the Scheme. Both parties accepted that the Hospice was not a NHS employer, so that Ms R did not have an automatic right to join the Scheme under the relevant regulations.
- The 1997 Direction was made under section 7(2) of the Act. The provisions of section 7(2) and (3) the Act are set out in the Appendix to this Determination.
- Section 7(2) of the Act enables non-NHS bodies to gain access to the Scheme and allows their employees to continue as members of the Scheme. Section 7(2) directions may cover every employee of an establishment who meets the eligibility criteria, as open status, or may only cover certain employees who were formerly in NHS pensionable employment, as closed status. Therefore, in the Adjudicator's view, the meaning of the terms of the 1997 Direction was crucial.
- In the Adjudicator's opinion, the 1997 Direction has closed status and the words in paragraph 3 (as set-out above in paragraph 11 above) show that Scheme membership was only open to nominated employees who satisfied the eligibility criteria, applied for membership, and were then listed in the schedule.
- The Adjudicator accepted the Hospice's explanation that it used the 1997 Direction as an incentive to solve a recruitment crisis for specialist clinical skills, and not as part of contractual negotiations with all employees. The Adjudicator's opinion was that the Hospice was entitled to invite selected employees to join the Scheme as it saw fit, bearing in mind the potential costs of offering Scheme membership to all employees.
- In the Adjudicator's view, the Hospice had neither a contractual nor a legal obligation to offer Ms R membership of the Scheme when she began employment

with it in 2004, or thereafter. The Adjudicator also considered that there were no requirements under disclosure regulations to inform Ms R about the 1997 Direction because she did not have a right or entitlement to join the Scheme.

- Accordingly, the Adjudicator's view was that Ms R did not have an automatic right to join the Scheme, even if she satisfied the eligibility criteria, and the Hospice did not need to include her in the schedule, tell her about the 1997 Direction, or inform her she could apply to join the Scheme.
- Accordingly, the Adjudicator's opinion was that Ms R's complaint should not be upheld.

25. Ms R did not accept the Adjudicator's Opinion and RCN's solicitors, in a letter dated 16 February 2019, provided further comments on her behalf.

26. RCN's solicitors firstly disputed the factual and legal basis of the Adjudicator's Opinion, and then argued that the 1997 Direction did not have "closed" status. They contended that it could not be "closed" because further employees were added to the schedule in 2006 and 2011.

27. RCN's solicitors argued that:-

- There are no specific words in the 1997 Direction conferring a discretion on the Hospice to nominate employees, contrary to common industry practice. The Hospice has not provided any evidence to show why a discretion should be implied into the 1997 Direction, as the Hospice claims.
- It is also clear from paragraph 4 of the 1997 Direction that the employee, not the employer, gives notice in writing to the Secretary of State if he or she wishes to re-join the Scheme. If the Hospice had a discretion, paragraph 4 would have provided that the employer notified the Secretary of State, not the employee. It is also the Secretary of State who approves the individuals to be specified in the schedule, not the Hospice.
- Ms R did not apply to join the Scheme under the 1997 Direction because she did not know about it. The argument that Mrs R's contract did not refer to Scheme membership is spurious. The Hospice was legally and morally bound to offer her an opportunity to join the Scheme but did not do so.
- Any considerations about funding should not justify the Hospice's decision to deprive Ms R of her right to join the Scheme. In any event, the 1997 Direction only applied to eligible employees so costs could have been modified by recruiting non-eligible employees.

28. RCN's solicitors concluded that there are no words in the 1997 Direction that give the Hospice any discretion to nominate or invite any employee to join the Scheme. Therefore, as an eligible employee of the Hospice, Ms R had an automatic right in

2004 to apply to the Secretary of State to re-join the Scheme, within the terms of the 1997 Direction.

29. In response, the Hospice rejected Ms R's comments. We then asked the Hospice to provide further evidence about how the 1997 Direction was operated in practice and why the 2018 Direction replaced the 1997 Direction.
30. The Hospice provided a copy of a SPPA Matrix (**the SPPA Matrix**) setting out eligibility for new recruits to the Hospice under the 2018 Direction. The SPPA Matrix states that all eligible employees may apply to the Secretary of State within three months of the commencement of their employment, requesting access to the Scheme. We asked the Hospice to confirm why the 2018 Direction applied to all eligible employees whilst the 1997 Direction only applied to selected eligible employees.
31. The Hospice explained that:-
  - Both Directions have "closed status" and the SPPA Matrix was issued in error.
  - The SPPA required the 1997 Direction to be replaced by the 2018 Direction. Both directions were drafted and signed by the SPPA not the Hospice.
  - The SPPA had confirmed that Ms R cannot now, and never would have had, access to the Scheme without being invited, even if she had started more recently with the Hospice. The SPPA's 2018 letter had explained this.
32. RCN's solicitors responded that the Hospice's comments did not alter their view that a discretionary power cannot be read into either the 1997 or 2018 Direction. An employee of the Hospice, like Ms R, must meet the criteria in paragraph 3 of the 1997 Direction and then apply to the SPPA under paragraph 4 in order to join the Scheme. There is no discretion in the 1997 Direction for the Hospice to invite only selected employees to join the Scheme. In addition, if new employees are able to re-join the Scheme, the 1997 and 2018 Directions cannot have "closed status".
33. Accordingly, Ms R through RCN's solicitors did not accept the Adjudicator's Opinion, and the complaint was passed to me to consider.

### **Ombudsman's decision**

34. I have carefully considered the issues raised by Ms R and RCN's solicitors on her behalf and the Hospice's response. However, I agree with the Opinion reached by the Adjudicator and so I will only respond to the key points made by RCN's solicitors, for completeness.
35. RCN's solicitors' interpretation of the 1997 Direction clearly differs markedly from the Hospice's view, so I will analyse the provisions of the Act together with the terms of the 1997 Direction in order to explain my reasoning.

36. In its preamble, the 1997 Direction states that it was made under powers conferred on the Secretary of State by sections 7(2) and 7(3) of the Act. Section 7(2) implies that a direction made under it applies in respect of an individual person, on a case by case basis. It states that “the Minister may direct that regulations so made shall apply to **that** person” (my emphasis).
37. In addition, the wording of section 7(2) sets out the order of events so that if a person meets the eligibility criteria relating to prior membership of the Scheme, the Minister can then make a direction in his or her favour. By contrast, section 7(1) enables a direction to be drafted that applies to a class of persons who are employees of the direction body and if a person belongs to that class, the -existing direction applies to him or her.
38. Paragraph 3 of the 1997 Direction applies to “any person specified in the Schedule hereto”. This suggests that an employee would need to have been included in the schedule in the first place, either when the direction was originally given or added later, as several employees were on request by the Hospice, before the direction applies to him or her.
39. The requirement, under paragraph 4(1) of the 1997 Direction, for the employee to give notice to the Secretary of State that he or she wishes the direction to apply to him or her, does not alter the need to be included in the schedule in the first place. Paragraph 4 applies only to employees to whom the Direction applies and, under paragraph 3, the direction only applies to those listed in the schedule. Employees who are listed in the schedule must then make their wishes known to the Secretary of State within the given timescale.
40. Accordingly, I consider that the 1997 Direction applied to eligible employees who were selected by the Hospice, and whose names were then set out in the schedule. It did not apply to all employees who fulfilled the criteria.
41. I find that, as the 1997 Direction was made under section 7(2) of the Act, Ms R was not entitled to apply to re-join the Scheme, without being invited by the Hospice to do so.
42. I also do not consider there was any requirement for the Hospice to have informed Ms R about the 1997 Direction in 2004, given my finding that she did not have an automatic right or entitlement to apply to re- join the Scheme.
43. I do not uphold Ms R’s complaint.

**Anthony Arter**

Pensions Ombudsman  
8 August 2019



## Appendix

### The Superannuation (Miscellaneous Provisions) Act 1967 (as amended)

#### Section 7 Extension of superannuation provisions of National Health Service Acts

7 (1) The Secretary of State (hereafter in this section referred to as “the Minister”) may direct that regulations made under section 10 of the Superannuation Act 1972 shall, subject to such modifications as may be provided in the direction, apply to any person specified in the direction—

(a) who is—

(i) wholly or mainly engaged in health services, whether provided under [the National Health Service Act 2006, the National Health Service (Wales) Act 2006] or otherwise, but not provided by a . . . local authority; or

(ii) an officer of a government department serving on the medical or nursing staff of that department or at or for the purposes of a hospital maintained by that department,

and who, if he were in the employment of an employing authority within the meaning of those regulations, would be an officer within the meaning of those regulations; or

(b) who is a member of a body constituted under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, other than an NHS trust or an NHS foundation trust,

or to any class so specified of such persons, as if the person, or any person of the class, so specified were, within the meaning of the said regulations, an officer in the employment of an employing authority, and in that event the regulations shall apply accordingly and any scheme under section 1 of the said Act of 1972, if otherwise applicable, shall not apply, or shall cease to apply, to that person

(2) Where any person while continuing in or, within twelve months after leaving employment in which he was entitled to participate in superannuation benefits provided under the said section 10 of the Superannuation Act 1972 (any period spent by that person on an approved course of study or training within the meaning of regulations made under that section being left out of account), enters such other

employment as may be approved by the Minister for the purposes of this subsection, the Minister may direct that regulations so made shall, subject to such modifications as may be provided in the direction, apply to that person as if, while in that other employment, he were, within the meaning of those regulations, an officer in the employment of an employing authority, and in that event those regulations shall apply accordingly.

- (3) A direction under subsection (1) or (2) of this section may be expressed to take effect as from the date of a person's entry into employment notwithstanding that the direction, or the approval of that employment for the purposes of the said subsection (2), was not given until after that date.