

## Ombudsman's Determination

Applicant	Ms R
Scheme	NHS Superannuation Scheme (Scotland) ( <b>the Scheme</b> )
Respondent	Scottish Public Pensions Agency ( <b>SPPA</b> )

## Outcome

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

## Complaint summary

2. Ms R's complaint is that SPPA should re-instate her Mental Health Officer (**MHO**) status.

## Background information, including submissions from the parties

3. Between 28 June 1981 and 4 November 1989 Ms R was a member of the NHS Pension Scheme (**NHSPS**) and had MHO status.
4. It is accepted by all parties that between January 1994 and September 1996 Ms R was employed at the Patient Advocacy Service at Ashworth Hospital. Ms R says that this period was pensionable service and she should have retained MHO status. However, SPPA does not accept that this period was pensionable.
5. On 1 April 1995, the Scheme Regulations were amended and MHO status was abolished for new members. However, an exception was made for members who already held MHO status on or before this date who did not have a break in membership of five years or more.
6. On 1 November 1999, Ms R re-joined the NHSPS and worked for the NHS in England until 15 July 2009.
7. On 7 January 2010, Ms R joined the Scheme and subsequently transferred her NHSPS entitlement into the Scheme.

## **PO-28653**

8. On 15 February 2016, in response to a query from Ms R, SPPA wrote to her saying that she had a gap of more than five years' service between employments and had not retained MHO status. SPPA also said that Ms R was able to submit further evidence in support of her claim for MHO status if she considered that SPPA held an incomplete record.
9. On 23 May 2016, Ms R wrote to SPPA saying that she had worked in the mental health field consistently throughout her career. Ms R maintained that she was eligible for MHO status and supplied a letter from Ashworth Hospital stating that she was employed there between January 2004 and September 2006.
10. On 15 July 2016, SPPA acknowledged that Ms R had worked in the mental health field throughout her career. However, SPPA said there was a gap of more than five years in Ms R's pensionable service that made her ineligible for MHO status. SPPA said that it had seen no evidence that Ms R's employment at Ashworth Hospital was pensionable. SPPA also said that Her Majesty's Revenue and Customs (**HMRC**) had no record of Ms R making contracted-out contributions for this period.
11. On 18 May 2018, Ms R made a complaint under the Scheme's internal dispute resolution procedure (**IDRP**). Ms R said that she should have retained MHO status because she met the criteria stated in the Regulations and had worked in the mental health field all through her career. Ms R also said that it was unfair that while she was not a Scheme member on 1 April 1995, she was working for the NHS in England and contributing to the NHSPS.
12. On 27 November 2018, after further exchanges of correspondence, SPPA provided its response under its single stage IDR and did not uphold Ms R's complaint. SPPA maintained that Ms R was not eligible for MHO status under the Regulations. SPPA said this was due to Ms R's break in pensionable service of 9 years and 361 days between 1989 and 1999.
13. Ms R brought her complaint to us. In response to the complaint made against it SPPA maintained its previous arguments. SPPA also said that Ms R was not discriminated against by working in England and contributing to the NHSPS because this was provided for and allowed under the Regulations.

## **Adjudicator's Opinion**

14. Ms R's complaint was considered by one of our Adjudicators who concluded that no further action was required by SPPA. The Adjudicator's findings are summarised below:-
  - a. The relevant section of the Regulations applicable to Ms R's complaint is included in the NHS Superannuation Scheme (Scotland) 2011 Regulations:-

### **R3 Mental health officers**

(1) Subject to paragraph (2), this regulation applies to a member who at the coming into force of the 1995 Regulations—

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

(b) has accrued rights to benefits under this Section of the scheme arising out of a previous period in which the member was engaged in such employment and at no time since the last occasion on which the member was so engaged has the member 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 period of 5 years or more ending after the coming into force of the 1995 Regulations...

(4) For the purposes of paragraphs (1) and (2), a person shall not be treated as having had a break in pensionable employment during any period in respect of which that person is a member of a health service scheme.

- b. Ms R says that she has worked in the mental health field throughout her career, including her job at Ashworth Hospital. SPPA has not disputed that Ms R worked at Ashworth Hospital. However, this period would also have to qualify as pensionable service for Ms R to retain MHO status. The Adjudicator had seen no evidence to suggest that Ms R was a member of the Scheme or any other “health service scheme” as defined under the Regulations between 1994 and 1996. Consequently, the entire period between 4 November 1989 and 1 November 1999 was non-pensionable and SPPA should not re-instate Ms R’s MHO status.
- c. It was unlikely that Ms R will have retained paperwork and payslips from her employment in Ashworth Hospital. However, SPPA also investigated Ms R’s National Insurance contribution record with HMRC as well as its own records. In the Adjudicator’s view, this is compelling evidence that Ms R did not contribute to a qualifying pension scheme between 1994 and 1996. In the absence of further evidence that Ms R contributed to the Scheme, or any other qualifying pension as defined in the Regulations, the Adjudicator considered that it was highly unlikely Ms R’s complaint would be upheld if formally determined by an ombudsman.
- d. The Adjudicator also appreciated the personal reasons why Ms R feels that SPPA should re-instate her MHO status. However, under the Regulations SPPA has no discretion to award MHO status in special cases. Ms R’s eligibility must be determined solely in accordance with the defined criteria stipulated in the Scheme Regulations.

15. Ms R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Ms R maintained her previous arguments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Ms R for completeness.

### **Ombudsman's decision**

16. MHO status was designed to acknowledge, and compensate for, the stressful nature of working with patients with mental health problems. However, members could only retain that status if they were in pensionable employment in a qualifying role. I empathise with the position in which Ms R finds herself but, her eligibility for MHO status can only be determined in accordance with the Scheme Regulations.
17. It is not disputed that Ms R was employed at Ashworth Hospital. I am satisfied that SPPA made adequate efforts to establish if Ms R was eligible by allowing her to submit evidence, investigating its own records and those of HMRC. However, no evidence has been presented to suggest that this employment was pensionable. Consequently, I agree with the Adjudicator's view that Ms R's employment at Ashworth Hospital was not pensionable.
18. There is no dispute that the Regulations that govern the Scheme provide that if a member has a break in service of over five years from any qualifying scheme, then they will not be eligible to retain MHO status. Ms R had a break in service between 4 November 1989 and 1 November 1999, which is over five years. SPPA has applied the Regulations in making the decision that Ms R cannot retain MHO status. This is the correct decision, as it cannot be argued that the break in service was under five years.
19. I do not uphold Ms R's complaint.

**Anthony Arter**

Pensions Ombudsman  
7 October 2019