

PO-5361

## Ombudsman's Determination

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|----------------------|--|
| <b>Applicant</b>     | Mrs Louise Stewart                       |
| <b>Scheme</b>        | NHS Pension Scheme ( <b>the Scheme</b> ) |
| <b>Respondent(s)</b> | NHS Pensions                             |

### Complaint summary

Mrs Stewart's complaint against NHS Pensions is about their decision not to award her Mental Health Officer (**MHO**) status for parts of her service. She says NHS Pensions' decision is unfair because she is aware of other staff who have retained their MHO status, despite having the same role as her.

### Summary of the Ombudsman's determination and reasons

The complaint is upheld against NHS Pensions because they failed to provide Mrs Stewart with appropriate information about why some of her MHO applications were declined.

### Material Facts

1. Mrs Stewart has been employed by the NHS since 1983. During different periods she has worked as both a Senior Occupational Therapist (**Senior OT**) and a Head Occupational Therapist (**Head OT**).
2. With effect from 6 March 1995, the NHS Pension Scheme became governed by The National Health Service Pension Scheme Regulations 1995 (SI1995/300) (as amended). The 1995 regulations abolished MHO status for new members.
3. Regulation R3, which defines who has MHO status, says:

(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.

4. "Mental Health Officer" is defined in Regulation R3 as follows,

(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 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).

5. The normal retirement age for members of the 1995 section of the NHS Pension scheme is age 60. However, under certain circumstances members with MHO status are allowed to retire at age 55, without reduction to pension entitlement provided they have 20 years MHO membership and they are in pensionable employment at age 55. This is due to each year after 20 years MHO membership counting as two / doubling for benefit purposes. Therefore, for a MHO member to retire at age 55, they would need 20 years ordinary MHO membership by age 50 and a further five years double accrual MHO membership.

6. In 2009, NHS Pensions issued an MHO factsheet, which said:

**"Retention of MHO Status**

Members who move into management posts will be allowed to retain MHO status providing they have line management responsibility for staff responsible for the care and treatment of patients suffering from mental disorders. Entitlement to retain MHO status will be strengthened if the member's responsibilities include setting and monitoring standards of psychiatric nursing and development and training of staff – see SD letter 92 12."

SD letter 92 12 was an announcement dated 16 July 1992, regarding revision of MHO status for managerial staff. The letter said that the revision applied to “...Scheme members who hold MHO status and are appointed to any nursing post up to and including the grade of Director of Nursing Services...”

7. The tables below show a breakdown of NHS Pensions’ decisions in relation to Mrs Stewart’s MHO status and service to 31 March 2015. Mrs Stewart has worked part-time since 1993 but MHO membership is assessed on calendar length.

| Employment dates   |            | Whole / part-time | MHO Status | Calendar Length | Reckonable length |
|--------------------|------------|-------------------|------------|-----------------|-------------------|
| From               | To         |                   |            |                 |                   |
| 08/08/1983         | 31/10/1998 | Whole-time        | Yes        | 3y 085d         | 3y 085d           |
| 01/11/1986         | 08/07/1990 | Whole-time        | Yes        | 3y 250d         | 3y 250d           |
| 05/08/1990         | 13/09/1991 | Whole-time        | No         | 1y 040d         | 1y 040d           |
| 16/09/1991         | 25/05/1993 | Whole-time        | Yes        | 1y 250d         | 1y 250d           |
| 24/05/1993         | 06/01/1998 | Part-time         | Yes        | 4y 228d         | 1y 296d           |
| 04/08/1998         | 11/07/2000 | Part-time         | Yes        | 1y 342d         | 0y 295d           |
| 12/07/2000         | 30/11/2007 | Part-time         | No         | 7y 142d         | 4y 022d           |
| 01/12/2007         | 30/11/2009 | Part-time         | No         | 2y 000d         | 1y 114d           |
| 01/12/2009         | Continuing | Part-time         | No         | 5y 121d         | 3y 123d           |
| Non MHO Membership |            |                   |            | 15y 303d        |                   |
| MHO Membership     |            |                   |            | 15y 060d        |                   |
| Total Membership   |            |                   |            | 30y 363d        | 21y 015d          |

8. Mrs Stewart lost her MHO status from July 2000, when she was promoted to Head OT. Then, on 1 January 2012, as a result of NHS budget cuts, Mrs Stewart stepped down from her post as Head OT. However, on returning to the position as Senior OT, her status remained that of non-MHO.
9. The table below shows a summary of the percentages given on MHO status SM1 forms, which were completed by service line managers.

| Job Title | Employment dates    | Place of work         | Direct Patient Care | Other Duties | Date evidence supplied | MHO |
|-----------|---------------------|-----------------------|---------------------|--------------|------------------------|-----|
| Senior OT | 05/08/90 - 13/09/91 | Rawnsley Day Hospital | 68%                 | 32%          | 14/02/1991             | No  |
| Senior OT | 16/09/91 - 06/01/98 | Chesterfield          | 80%                 | 20%          | 23/01/2002             | Yes |
| Senior OT | 05/08/98 - 11/07/00 | Bolsover              | 85%                 | 18%          | 05/02/2014             | Yes |
| Head OT   | 12/07/00 - 31/12/11 | Bolsover              | 55%                 | 45%          | 03/11/2011             | No  |
| Senior OT | 01/01/12 - date     | Bolsover              | 72%                 | 28%          | 12/12/2012             | No  |

10. A new NHS Pension Scheme was introduced from April 2015. Due to her age (and assuming an NPA of 60), Mrs Stewart has tapered protection and she will not have to join the new Scheme until 1 October 2021 (should she still be in service at that time).

**Summary of Mrs Stewart's position**

11. In her current role as Senior OT she is certain that she spends almost all of her time in the treatment of mentally disordered patients; and in support of this she has supplied copies of her clinical contacts and caseload charts. However, she also believes that MHO status ought properly to have been applied to her years as Head OT.
12. She used to job share with another Head OT. During this period she and her job-sharing colleague had the same terms of employment, yet her colleague retained her MHO status and she did not. Therefore, she concludes that the rules were applied differently in her case and in her view this is unfair.
13. Information supplied with her MHO application indicated that she had "line management responsibility for staff responsible for the care and treatment of patients suffering from mental health disorders." In line with NHS guidance (2009 MHO factsheet) this should have meant that she retained her MHO status.
14. When Human Resources orchestrated cost improvement measures (which resulted in her change of roles from Head to Senior OT) all of her fellow Head OT's held MHO status. Those within five years of retirement age were offered five years protected pay as recognition of their long service and in prospect of their retirement at age 55. As she did not have MHO status she could not be offered the five years protected pay, which her colleagues received. She was awarded two years protected pay.
15. At the time, the Director of Human Resources, her managers, and the Acting Chief Executive of the Trust, were appalled to discover that she did not have MHO Status; this is when her appeal process began. She should have retained her MHO status and received the same compensation as her colleagues.
16. With regard to her current role, she believes that she is the only Head OT in the organisation who does not have MHO status. She disagrees with NHS Pensions that the MHO status of other staff is not relevant because it is a clear indication that NHS Pensions are not applying the rules consistently.
17. She is also at a loss to know why she was not granted MHO status for her post at Rawnsley Day Hospital during 1990 / 1991. This position was in the same environment and almost identical job description to her post in Winchester (1986 - 1990) for which she was awarded MHO status. This further highlights the inconsistency and subjective nature by which these claims are awarded.

**Summary of NHS Pensions' position**

18. MHO status for Nursing staff is defined under R3(14)(a), whereas allied health professionals (including OT's), are considered for MHO status under R3(14)(b). For allied health professionals they consider the amount of time spent in direct hands on contact with patients, the types of duties performed and the member's job description. MHO status is granted in circumstances where the member of staff devotes all, or almost all of their time to the treatment or care of patients. Treatment or care is interpreted as direct hands-on contact with patients.
19. MHO status is assessed on an individual basis and is dependent on information provided or agreed to by the NHS employer.
20. There is no hard and fast rule or policy in relation to how "almost all" (R3(14)) is measured because they consider this to be too arbitrary – almost all is assessed on a case by case basis.
21. When Mrs Stewart was working as a Head OT she spent 55% of her time in direct hands-on contact with patients. This clearly does not represent "almost all" of her time.
22. The 2009 factsheet that Mrs Stewart has mentioned does not apply to OT's. As confirmed within the SD letter mentioned in the factsheet, it applies to nursing staff up to the grade of director of nursing services.
23. Mrs Stewart has named several of her colleagues who she claims have retained their MHO status in similar circumstances to her own. As they have previously said MHO status is awarded on an individual basis and they are unable to comment on other scheme members without their authority.
24. Mrs Stewart has supplied Clinical Contacts and Caseloads from April 2013 to February 2015. Unfortunately, neither of these charts confirms how much time is spent in the direct treatment and care of mentally ill patients, as opposed to other activities. As such, they are no of assistance in determining MHO qualification.
25. Since Mrs Stewart became a Senior OT again in 2012, NHS Pensions has contacted her employer on a number of occasions in relation to how Mrs Stewart spends her time. None of the replies confirm that she spends sufficient time in the treatment and care of mentally ill patients to qualify for MHO status.

**Conclusions**

26. As an OT, Mrs Stewart's entitlement to MHO status is conferred under rule R3(14)(b). Under this regulation, in order to qualify for MHO status Mrs Stewart must spend "...all, or almost all..." of her time in "... the treatment or care of persons suffering from mental disorder".
27. The Regulations do not define the meaning of "all, or almost all, of his time..." or "treatment or care", but the general rule of statutory interpretation is that words are

given their plain and ordinary meaning (unless that would produce an absurd result). NHS Pensions interpret “treatment or care” as time spent in direct hands on contact with patients and I consider this to be reasonable. But NHS Pensions have not said what they consider “all, or almost all, of his time...” to mean.

28. Mrs Stewart has been granted MHO status for the period of her employment from 16 September 1991 to 11 July 2000. During that time she was employed as a Senior OT and 80-85% of her time was spent in direct treatment, or care of persons suffering from mental disorder. There is no dispute about that.
29. Mrs Stewart argues that she should be entitled to MHO status for the entirety of her employment; including the period when she worked as a Head OT. She says that, as Head OT, she was entitled to MHO status by virtue of a factsheet issued in 2009, which says “Members who move into management posts will be allowed to retain MHO status providing they have line management responsibility for staff responsible for the care and treatment of patients suffering from mental disorders.”
30. As indicated by the accompanying SD letter 92 12, the factsheet was in relation to nursing staff not OT’s. I consider that it was reasonable for NHS Pensions to make this distinction because Nursing staff are entitled to MHO status under a different part of the regulations (R3(14)(a) as opposed to R3(14)(b)). Therefore, Mrs Stewart’s MHO status should be assessed on the time, she personally, spent in direct hands on care, irrespective of her line management responsibilities.
31. NHS Pensions say that they have no policy in relation to how “almost all” (R3(14)) is measured because they consider this to be too arbitrary and that almost all is assessed on a case by case basis. However, they also say that the 55% of the time in direct hands-on contact with patients (referring to Mrs Stewart role as Head OT), clearly does not represent “almost all” of her time. I find these two statements slightly contradictory because NHS Pensions do not say how they reach the conclusion that 55% of the time does not represent almost all of her time.
32. NHS Pensions have, quite properly, refused to disclose the MHO status of other staff to Mrs Stewart, due to data protection concerns. However, Mrs Stewart has clearly discussed this matter with her co-workers and from the comments she has made, it is understandable why she should have come to the conclusion that the rules have been applied unfairly in her case; particularly as she hasn’t been provided with clear reasons as to why the percentage of time she spent treating patients was not considered to ‘almost all’ of her time.
33. NHS Pensions ought properly to have provided Mrs Stewart with details of the rationale behind their decisions. Mrs Stewart was entitled to know why the amount of time she spent in direct hands on care was insufficient for MHO status in order to know upon what basis to make an appeal. Not to have provided this information amounts to maladministration.

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34. In summary, given my concerns set out above, I am remitting the matter to NHS Pensions to reconsider Mrs Stewart's eligibility for MHO status.

**Directions**

35. Within 28 days of the date of this document NHS Pensions shall:
- reconsider Mrs Stewart's eligibility for MHO status during the periods from 5 August 1990 to 13 September 1991, and from 12 July 2000 to date; and
  - provide Mrs Stewart with the outcome and the full reasons for reaching their decision.

**Anthony Arter**

Pensions Ombudsman  
18 September 2015