

## Ombudsman's Determination

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

## Outcome

1. I do not uphold Mrs M's complaint and no further action is required by NHS BSA.

## Complaint summary

2. Mrs M's complaint concerns the death benefits that she was awarded under the Scheme, following the death of her husband Dr M. She would like NHS BSA to reconsider its decision not to pay her a death in service lump sum.

## Background information, including submissions from the parties

3. The sequence of events is not in dispute, so I have only set out the key points. I acknowledge there were other exchanges of information between all the parties.
4. Between 28 November 1977 and 20 January 2010, Dr M was a member of the Scheme.
5. On 20 January 2010, Dr M took voluntary early retirement, receiving a lump sum payment of £173,203.26 and a yearly pension of £25,980.49.
6. Dr M remained in NHS employment while receiving his pension from the Scheme. Under the National Health Service Pension Scheme Regulations 1995 (SI 300/1995) (**the 1995 Regulations**), he was not eligible to rejoin the Scheme once in receipt of his pension. Instead, Dr M was enrolled into the NEST Pension Scheme (**NEST**).
7. On 7 July 2020, Dr M died, at the time of his death his annual pension was £32,426.73.
8. On 17 August 2020, Mrs M sent NHS BSA a copy of Dr M's death certificate.
9. On 24 August 2020, NHS BSA received the completed Adult Dependents Pension (**ADP**) form from Mrs M.

10. On 16 September 2020, NHS BSA wrote to Mrs M regarding the payment of her ADP that she had been awarded from the death benefits due from the Scheme. It said:

“We will pay you an initial rate of £39,671.73 a year from 8 July 2020 then a continuing adult dependants’ pension of £24,671.48 a year from 8 October 2020.”
11. On 22 September 2020, NHS BSA paid Mrs M the first instalment of the ADP for the period 8 July 2020 to 16 September 2020. Mrs M was subsequently paid on the 16<sup>th</sup> of each month.
12. On 31 March 2023, Mrs M wrote to NHS BSA requesting that it reconsidered her entitlement to a lump sum payment, she also enquired about a Child Dependant’s Pension (**CDP**).
13. On 13 April 2023, NHS BSA sent an email to Mrs M stating that there was no lump sum payable from the Scheme because Dr M had been in receipt of his pension since January 2010.
14. On 8 June 2023, Mrs M wrote to the Scheme regarding her application for a CDP and the lump sum payment.
15. On 16 June 2023, NHS BSA wrote to Mrs M confirming that her initial pension had been extended from three to six months because her daughter was under 23 at the time of Dr M’s death. NHS BSA confirmed that her initial pension rate of £39,671.73 was payable from 8 July 2020 to 7 January 2021 and any continuing pension would start from 8 January 2021.
16. On 20 June 2023, NHS BSA sent an email to Mrs M confirming that Dr M was not contributing to the Scheme, although he was still working at the time of his death. It advised her that Dr M was contributing to NEST as evidenced on his payslips.
17. On 20 July 2023, NHS BSA wrote to Mrs M clarifying its position regarding the lump sum and CDP. It said that Dr M was not contributing to the Scheme at the time of his death. It also confirmed that the CDP had been extended for three months.
18. On 1 August 2023, Mrs M raised a complaint with NHS BSA regarding its decision not to award her a lump sum payment as part of the death benefits due from the Scheme.
19. On 24 November 2023, NHS BSA responded to the complaint. It said the lump sum was only payable where a member dies before retiring or within five years of receiving their pension. It confirmed that the death benefits had been paid to Mrs M in line with the Scheme Rules.
20. On 9 January 2024, Mrs M invoked Stage One of the Scheme’s Internal Dispute Resolution Process (**IDRP**).
21. On 7 March 2024, Mrs M contacted NHS BSA requesting an update on its IDRP response.

22. On 15 March 2024, NHS BSA provided its IDRP Stage One response. It said Mrs M was not entitled to a lump sum payment under Regulation F2 of the 1995 Regulations, because Dr M had been in receipt of his pension for more than five years. Although Dr M was employed by the NHS at the time of his death, he was not in pensionable employment for the purposes of the Scheme because the 1995 Regulations did not allow him to contribute to the Scheme while receiving his pension.
23. Mrs M remained unhappy and invoked Stage Two of the Scheme's IDRP.
24. On 3 June 2024, NHS BSA sent its Stage Two IDRP response. It said regulation F1 of the 1995 Regulations provides a lump sum payment under the conditions that the member dies in pensionable employment. The 1995 Regulations did not allow him to rejoin the Scheme while receiving his pension and therefore he was not in pensionable employment at the time of his death.
25. On 11 November 2024, Mrs M referred her complaint to this office.

### **Summary of Mrs N's position:-**

26. Although Dr M had been in receipt of his pension since January 2010, he did not retire but continued to work the same contracted hours in his NHS employment. He worked with the NHS until his death. Dr M died in service and she is therefore entitled to a death in service lump sum.
27. The hospital's pension department advised her that she was eligible for a lump sum payment.
28. It was not possible for Dr M to rejoin the Scheme in 2010 when he started drawing his pension, but the rules subsequently changed. From 1 October 2023, members of the Scheme with benefits under the 1995 section could retire, take their pension benefits, return to work after a 24-hour break and rejoin the 2015 NHS Pension Scheme.
29. From 1 October 2023, the *McCloud* judgment<sup>1</sup> provided that members within the 1995 section of the Scheme were permitted to rejoin the Scheme while receiving their pension. This applied to members who retired before 1 April 2023.
30. NHS Pensions failed to consider the *McCloud* judgment which found that the differential treatment afforded to members of the 1995 section of the Scheme constituted unlawful age discrimination. The judgment underscored that fairness in pension schemes demands that all members, irrespective of their age at entry or during reforms, should be treated in line with the original contractual expectations and the broader purpose of safeguarding their financial security. This recognition of discrimination against members of the 1995 Section set the stage for remedial approaches to extend similar protections to those who had previously been excluded.

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<sup>1</sup> *Secretary of State for Justice & others v McCloud & others* [2018] EWCA Civ 2844 (**McCloud**)

31. The Public Sector Pensions and Judicial Offices Act 2022 (“**the PSPJOA**”) puts in place a legal framework to rectify the unlawful discrimination identified in the *McCloud* judgment. For scheme members impacted by the discrimination, the remedy is retrospective.
32. The structure of the Scheme inherently gives Trustees a broader latitude for decision-making, as the scheme trust deed and related documents typically empower Trustees to assess the circumstances surrounding a claim. NHS BSA have failed to take into account all relevant information and act reasonably. The *McCloud* Judgment underscores that Trustees need to ensure that their decisions align with the underlying purpose of the scheme, namely, to protect the financial wellbeing of deceased’s dependents, over and above a strict formula.
33. The Trustees of the Scheme have a wide discretion to award a death in service benefit. Her claim for a lump sum death benefit should be reconsidered, taking into account the *McCloud* judgment and the fact that Dr M relied on a hospital policy to his detriment.

### **Summary of NHS BSA’s position:**

34. At the time of his death, Dr M was a pensioner and he was not in pensionable employment. Therefore, no lump sum was payable under Regulation F1 of the 1995 Regulations. No lump sum was also payable under Regulation F2 of the Regulations, as he had been receiving his pension for more than five years before he died.
35. Dr M was unable to rejoin the Scheme and accrue further pensionable employment despite remaining in active employment because the 1995 Regulations stated that members who took their pension were unable to rejoin the Scheme.
36. Members of the 1995 section of the Scheme are now able to rejoin. This change only came into effect in April 2023 after Dr M had died. NHS BSA does not have discretion as to the application of the regulations.
37. The correct level of pension benefits have been paid to Mrs M in respect of Dr M’s membership in the Scheme.
38. Dr M was contributing to a pension with NEST from 2010 onwards.

### **Adjudicator’s Opinion**

39. Mrs M’s complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA. The Adjudicator’s findings are summarised below:
  - 39.1. Dr M’s decision in January 2010 to take voluntary early retirement excludes him as an eligible member under the *McCloud* Remedy as he was not in

pensionable service during the remedy period. Although he was still in employment, he was considered as a retired member of the Scheme.

39.2. Dr M died on 7 July 2020, prior to the McCloud judgement and was therefore unable to accrue further pensionable service.

39.3. Dr M chose to take voluntary early retirement in January 2010 and whilst he may not have known immediately that he could not rejoin the 1995 section of the Scheme, he would have known soon after when he joined the NEST scheme. Regulation 5 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 restricts TPO from investigating a claim relating to Dr M's inability to rejoin the Scheme in January 2010 because it is time barred.

39.4. Mrs M was entitled to a lump sum payment under Regulation F2 of the Scheme Rules however, Dr M had received his pension for more than five years and therefore the lump sum amount due from the Scheme was £0. The calculation being:

Annual pension = £25,980.49 X 5 = £129,902.45

Pension already paid to Dr M between 21.01.2010 – 07.07.2020 (3818 days)  
= £25,980.49 / 365 X 3818 = £271,763.04

39.5. Mrs M was awarded a short-term annual pension of £39,671.73 between 8 July 2020 to 7 October 2020, followed by a continuing dependant's pension of £24,671.48. However, Mrs M's entitlement to a lump sum is £0 because the pension paid to Dr M exceeded five times the annual pension due to the beneficiary of the death benefits in accordance with the lump sum payment due from the Scheme by £141,860.59.

40. Mrs M did not accept the Adjudicator's Opinion, and the complaint was referred to me to consider. Mrs M provided her further comments in response to the Opinion. She said :-

40.1. Dr M was not paying into the Scheme at the time of his death, because as a member of the 1995 cohort, rules prevented him from doing so. The *McCloud* judgment held that this amounted to unlawful age discrimination, as members in other cohorts were allowed to rejoin the Scheme after retirement, and this unlawful age discrimination has been remedied for those members of the 1995 cohort still working.

40.2. Dr M was a member of the 1995 cohort who suffered discrimination. Had he not been discriminated against, he would have been able to rejoin the Scheme while receiving his pension and would have been a Regulation F1 member in pensionable employment. Had Dr M not died in July 2020, he would have been eligible for a remediable service statement. Dr M's family should not suffer a

further injustice because he died when he did. The Trustees' decision not to award a death in service payment is very unjust.

40.3. Regulation 55 of the National Health Service Pension Schemes (Remediable Service) Regulations 2023 (Mrs M provided a link to a consultation document<sup>2</sup>) sets out that direct compensation may be paid under the PSPJOA, to put the member in the financial position they would have been had the discrimination not occurred. As such, the PSPJOA permits the payment of amounts to the personal representatives of deceased members and compensation for compensable losses.

41. I note the additional points raised by Mrs M, but I agree with the Adjudicator's Opinion that the complaint should not be upheld.

### **Ombudsman's decision**

42. Mrs M has complained that she should receive a death in service lump sum benefit under the Scheme following Dr M's death. She has stated that the Scheme Regulations that prevented a member in receipt of a pension under the Scheme from rejoining the Scheme changed, and the *McCloud* judgment found that those provisions were age discriminatory.

43. The provision of benefits under the Scheme is governed by the Scheme Regulations. My role in this case is limited to assessing whether NHS BSA applied the Scheme Regulations correctly when considering Mrs M's entitlement to a death in service lump sum under the Scheme.

44. Having carefully examined all the available evidence, I find that NHS BSA properly considered Mrs M's entitlement to a death in service lump sum and acted in accordance with the Scheme Regulations.

45. NHS BSA relies on Regulations F1 and F2 of the 1995 Regulations in support of its position (see the Appendix to this Determination for the relevant extracts from Regulations F1 and F2). Regulation F1 sets out the conditions for the payment of a lump sum where a member dies in pensionable employment, while Regulation F2 sets out the conditions for the payment of a lump sum where a member dies after their pension becomes payable. "Pensionable Employment" for the purposes of Regulation F1 is defined in the 1995 Regulations as "NHS employment in respect of which the member contributes to the scheme in accordance with this Section." Dr M was not contributing to the Scheme at the time of his death.

46. Regulation F1(1A)(d) also requires that unless where Regulations E2(11) or R4(6) apply, the member who dies in pensionable employment was not receiving a pension under Regulations E1 to E5. Dr M was receiving a pension under Regulation E5 Early retirement pension (with actuarial reduction). Regulations E2(11) and R4(6) do not

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<sup>2</sup> <https://www.gov.uk/government/consultations/nhs-pension-scheme-mccloud-remedy-part-2-proposed-changes-to-scheme-regulations-2023/mccloud-remedy-part-2-proposed-changes-to-nhs-pension-schemes-regulations-2023>

apply to Dr M. Regulation E2(11) relates to early retirement on the grounds of ill health, while Regulation R4(6) concerns members employed with more than one employing authority who retire early on the grounds of redundancy or termination of employment by one employing authority.

47. I find that a lump sum is not payable under Regulation F1, because Dr M did not satisfy the eligibility criteria at the time of his death. That is, Dr M was not in pensionable employment as defined by the Regulations. He was also receiving a pension under the Scheme.
48. Regulation F2 deals with a different scenario, which is where a member dies after their pension becomes payable, and Regulation F2(2) sets out how the lump sum is to be calculated. Regulation F2(2) states that the lump sum on death will be equal to 5 times the yearly rate of the member's pension (less the amount of pension already paid). Mrs M's entitlement to a lump sum under Regulation F2 is £0, because at the time of his death, Dr M had already received more than five times his yearly pension.
49. NHS BSA can only reach its decision on the entitlement to the lump sum in question based on the Regulations, and the Regulations do not provide NHS BSA any discretion in the matter. Mrs A has stated that the Scheme regulations that prevented a member in receipt of a pension under the Scheme from rejoining the Scheme changed, and NHS BSA did not consider the *McCloud* judgment.
50. I find that the *McCloud* judgment was not a relevant factor to the eligibility of a death in service lump sum in this case. I should firstly clarify that the Scheme regulations regarding re-employment that prevented a pensioner under the 1995 section from contributing to the Scheme are different to the provisions that were the subject of the *McCloud* judgment. With effect from 1 April 2023, pensioners under the 1995 section were permitted to join and contribute to the 2015 career average NHS Pension Scheme. As Dr M had died by the time the April 2023 change came into effect, he could not benefit from this change.
51. The Court of Appeal in *McCloud* was not concerned with the rules regarding re-employment. The Court was concerned with transitional arrangements that were introduced to the Judicial and Firefighters' Pension Scheme as part of reforms to public sector schemes. The claimants in *McCloud* had argued, amongst other things, that they were discriminated against on the grounds of age. This was because under the transitional arrangements, they were not offered the opportunity to continue to accrue benefits under their legacy pension schemes when the 2015 career average pension schemes were introduced, in the same way as members who were closer to their normal retirement dates.
52. The Court decided that the transitional arrangements were age discriminatory and could not be objectively justified. It did not decide that the Scheme regulations regarding re-employment were age discriminatory. Dr M would also not have been affected by the judgment, because he had retired and was not accruing benefits

under the Scheme between April 2015 and March 2022 when the age discrimination in public sector schemes was ongoing (“the remedy period”).

53. Following the *McCloud* judgment, the Government introduced several measures via the PSPJOA to remedy, across public sector schemes, the age discrimination found in *McCloud*. The measures, often collectively referred to as the “McCloud remedy,” include the option for eligible applicants to have their pensionable service in respect of the remedy period remitted to their legacy scheme on a retrospective basis, as well as the payment of compensation in certain circumstances. The remedy applies subject to several eligibility criteria, including that an applicant must have pensionable service during the remedy period for the purposes of the public sector scheme in question. Dr M was not in pensionable service under the Scheme during the remedy period, so he would not be eligible for a McCloud remedy and his personal representative would not have a valid claim for a McCloud remedy on his behalf.
54. The *McCloud* judgment and McCloud remedy do not apply to Dr M and were not therefore relevant considerations for NHS BSA in Mrs S’ complaint.
55. Therefore, I do not uphold Mrs M’s complaint.

**Dominic Harris**

Pensions Ombudsman  
2 December 2025



## **Appendix - Regulations F1 and F2 of the 1995 Regulations**

### **F1 Member dies in pensionable employment**

(1) If a member dies in pensionable employment before reaching age 75 , a lump sum on death shall be payable in accordance with regulation F5.

(1A) A lump sum on death shall be payable in accordance with regulation F5 where, on the day they died, the member is—

(a) under the age of 70;

(b) in NHS employment;

(c) no longer required to pay contributions from a date that falls before 1st April 2008 pursuant to regulation D1(3) or (4) (contributions by members); and

**(d) except where regulations E2(11) or R4(6) apply, not in receipt of a pension under any of regulations E1 to E5.**

(1B) A lump sum on death shall be payable in accordance with regulation F5 where, on the day the member died, the member is—

(a) under the age of 75 if not a special class officer or under the age of 70 if a special class officer;

(b) in NHS employment;

(c) no longer required to pay contributions from a date that falls on or after 1 April 2008 pursuant to regulation D1(3) or (4) (contributions by members), and

(d) except where regulations E2(11), E2A(11) or R4(6) apply, not in receipt of a pension under any of regulations E1 to E5.

(2) Subject to regulation S4 (benefits on death in pensionable employment after pension becomes payable), the lump sum on death will be equal to twice the member's final year's pensionable pay.

### **F2 Member dies after pension becomes payable**

(1) Subject to paragraph (7), if a member dies after his pension under this Section of the scheme becomes payable, a lump sum on death shall be payable in accordance with regulation F5.

(2) Subject to regulation S4, the lump sum on death will be equal to 5 times the yearly rate of the member's pension (**less the amount of pension already paid**) provided that the maximum payment under this paragraph shall not exceed an amount equal to twice the member's final year's pensionable pay less an amount equal to the aggregate of—

- (a) the member's retirement lump sum paid under regulation E6 (lump sum on retirement), and
- (b) any lump sum paid to the member under regulation E7 (general option to exchange part of pension for lump sum).

(3) A person who retires from pensionable employment on, or after, 6th April 2006 may give notice to the scheme administrator in accordance with paragraph (4) that any lump sum payable under this regulation is to be treated as a pension protection lump sum death benefit in accordance with paragraph 14 of Part 2 of Schedule 29 to the 2004 Act.

(4) Such a notice—

- (a) shall be given in writing; and
- (b) may be revoked in writing at any time.

(5) A lump sum paid under this regulation in respect of a member who became entitled to a pension under regulations E1 to E5 or L1 before 6th April 2006, shall be treated as a pension protection lump sum death benefit but regulation T2A(11) shall not apply.

(6) If a member who was in receipt of a substitute tier 1 pension under regulation E2C dies before the end of the protection period that applies to him under regulation E2C(6)(a) or E2C(6)(b), the member's pension referred to in paragraph (2) means that member's original tier 2 pension.

(7) Where a member referred to in paragraph (1) dies on or before 5th April 2011 and had attained the age of 75 at the date of the member's death—

- (a) the lump sum referred to in that paragraph shall cease to be payable, and
- (b) shall instead be converted into an annual pension to be determined and paid in accordance with paragraph (8).