

Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Service Authority (NHS BSA)

Outcome

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

Complaint summary

2. Mrs Y has complained because NHS BSA has said that she no longer holds Special Class Status (**SCS**). This means that if she chooses to retire at age 55, she will be subject to an early retirement reduction.

Background information, including submissions from the parties

3. The NHS Pension Scheme Regulations 1995 (**the 1995 Regulations**), set out the requirements for SCS. Regulation R2 states that a person working as a midwife, physiotherapist, nurse or health visitor shall have the option to retire at age 55, without being subject to an early retirement reduction. Regulation E2 and L2 of the 1995 Regulations, also apply in Mrs Y's case. Relevant sections of the 1995 Regulations are set out in Appendix 1.
4. On 6 March 1995, SCS was abolished. Members of the Scheme who remained in the same job role, who previously held SCS and did not have a break in service of over five years, were able to retain SCS.
5. At that time, NHS BSA's website had a factsheet called "NHS Pensions-Special Class Status (1995 Section only)" (**the Factsheet**) and "A guide to the NHS Pension Scheme for England and Wales" dated 1992 (**the Guide**), that would have been available to all members. Relevant sections of the Factsheet and the Guide are set out in Appendix 2.
6. Mrs Y joined the Scheme on 17 January 1994, and paid pension contributions while she was employed in several nursing jobs, until 31 March 2015, when she resigned. Mrs Y was aged 45.

7. **Summary of Mrs Y's position:-**

- NHS BSA failed her as an employee, refused her part time hours, so she resigned without notice due to ill health. She believes it was “constructive dismissal”, where an employee resigns “as a result of the employer creating a hostile environment.”
- It has been over four years since she left NHS employment and it is “NOT” possible for her to go back and “recover” her SCS. She no longer wishes to be employed by an organisation that treats its employees so badly.
- The information she had had up to February 2019, did not inform her of losing her SCS status. She referred to the 2014 “Leaving and transferring out guide” and “your NHS pension choice guide” (**the Choice Guide**), available to her prior to leaving her employment and she found no reference to losing SCS.
- She provided a copy of pages 3 and 4 of the Choice Guide that she was provided with in January 2011. The Choice Guide said, “Some members of the Scheme have special class status which means they can retire from age 55 without any reduction in their benefits.” There was no mention that she would lose her SCS.
- She referred to the “Choice Statement” she received in April 2017, which did not have any information regarding her SCS.
- In early 2019, she started thinking of claiming her unreduced pension. She made enquiries to NHS BSA and was only then advised that she could no longer claim an unreduced pension from age 55 and would have to wait until age 60.
- She admits that “when you look with a fine-tooth comb on the website it does state this but this advice is NEW and dated way after [she] had made any decision to leave work in 2015, the information was not there [at the time]...” She believes the NHS website is not easy to access.
- She considers that having accrued over 20 years of service, she should be eligible to maintain her SCS.
- She does not believe that being in current NHS employment at age 55, should be a relevant consideration for keeping her SCS.
- Her pension is now worth £6,600 per annum instead of £8,400 per annum which is not much. Despite putting more hours in, she will get less out of the Scheme as she now has to wait until age 60 to claim an unreduced pension.
- “If you issue someone with misleading or poor information [regarding] their drug prescription and or medical advice and they interpret the advice incorrectly this could result in physical harm or death, in [her] case it resulted in financial harm and mental stress.”
- She believes she was discriminated against by NHS BSA on the grounds of “the length of service and hours worked versus time just spent in pensionable

employment.” She referred to equality legislation. If the Pensions Ombudsman’s Office (**TPO’s Office**) is unable to deal with this issue, she will raise it with the Department of Health and Social Care.

- She referred to the comparison of the membership and benefit position of a full-time member who left the Scheme at age 45, with retirement age 60, and that of an equivalent part-time member with SCS, retiring at age 55 with immediate entitlement to unreduced benefits. She argues that a part-time member takes maternity or long term sickness leave whereas an equivalent full-time member does not.

8. Summary of NHS BSA’s position:-

- Throughout Mrs Y’s pensionable employment as a full-time nurse for more than 20 years, she held SCS and was “on-track” to achieve entitlement to unreduced pension at age 55.
- Mrs Y left her employment in 2015, at age 45, due to ill health and she became a deferred member of the Scheme.
- Maintaining SCS at age 55 was subject to Mrs Y’s continuing in pensionable NHS employment that qualified for SCS until she reached age 55.
- Entitlement to unreduced pension at age 55 is subject to Regulation R2(1)(b) where the whole of the last five years of NHS employment must be spent in a role that attracts SCS.
- It referred to Regulation R3 that provides how Regulation E1 applies as if the reference to normal retirement age in that regulation, at age 60, were age 55. However, Regulation E1 did not apply to Mrs Y as she has not yet reached either retirement age.
- Being an early leaver, Mrs Y was subject to the provision of Regulation L1. Regulation L1(1) states that a member who leaves before age 60 without becoming entitled to a pension under Regulation E1 will become entitled to a pension and lump sum from age 60.
- Regulation L1(3) provides that a pension may be payable before age 60 where the ill health criteria is met or actuarially reduced for early payment.
- As Mrs Y is a deferred member of the Scheme, her current retirement age is 60 and not 55.
- Mrs Y did not contact NHS BSA for guidance about her potential retirement age at any time. She elected to remain in the 1995 Section of the Scheme in November 2010, under the choice exercise undertaken at the time. No further correspondence or enquiry was made to NHS BSA by Mrs Y until February 2017, around two years after she had left the Scheme.

- It also noted Mrs Y's part-time service as a bank nurse, between January and April 1994, which counted toward her qualifying SCS prior to the abolition of the SCS in 1995. Whilst this period was short, Mrs Y still had the benefit of part-time membership with SCS.
- It referred to the Factsheet and the Guide, which would have been available to Mrs Y prior to her leaving the Scheme. These contained sufficient information regarding Mrs Y's eligibility for SCS.
- The relevant page of the Factsheet, located within the Members Hub section, provided a link to the Factsheet. "It is not possible to view the content of the '2014' Factsheet via the Government Web Archive. However, given there have been no changes to the eligibility criteria for an earlier retirement age", it expected this aspect of the (2014) Factsheet to be the same as current (2018) version.
- After the introduction of the 2008 Section, the Choice Guide Mrs Y referred to was provided to her in 2011, specifically for the purpose of generally comparing the 1995 and 2008 Sections. It was for Mrs Y to decide whether to remain in the 1995 Section.
- Page 8 of the Choice Statement said:

"The two most important issues to consider are the age at which you are going to retire and whether you are likely to leave the NHS Pension Scheme before retirement... If you leave NHS employment before retirement and do not return, your retirement benefits will be lower..."
- The Guide, which would have been available to Mrs Y prior to her leaving the Scheme, was issued in 1992. It was not connected to the Choice Guide issued in 2011.
- The key Scheme guidance for Mrs Y to have relied on should have been the Guide, which was provided to new members on joining the Scheme. It draws attention to specific information regarding maintaining SCS.
- For members leaving employment, "employers are expected to provide/ draw members' attention to the guidance relevant to leaving the Scheme early...."
- NHS BSA provided a comparison of calculations of benefits, which Mrs Y has referred to. NHS BSA believes its comparison proves that a member who claims pension from age 60 can, in the longer term, be financially better off than a part time member who was able to claim pension five years earlier by virtue of SCS. Therefore, it does not agree with Mrs Y's comparison.
- Mrs Y has referred to equality legislation but NHS BSA did not provide any comments regarding this.
- It referred to the options still available to Mrs Y. She can (i) leave her benefits in the 1995 Section of the Scheme, deferred for payment, unreduced from age 60; or

(ii) claim early payment of her deferred benefits, reduced, from the minimum age 50, or from a later selected date; or (iii) consider an application for an early payment of benefits on the grounds of ill health.

- It fully recognised Mrs Y's long service in the NHS as a nurse along with the stresses, strains and emotional burdens associated with 'front line' responsibilities. While it appreciated Mrs Y's position, it is obliged to apply the 1995 Regulations. Mrs Y is not eligible to maintain her SCS from age 55 and she still has options to mitigate the loss of SCS.

Adjudicator's Opinion

9. Mrs Y'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:-

- From 1994 to March 2015, Mrs Y worked as a nurse and held SCS. In March 2015, at age 45, Mrs Y left employment by reason of resignation due to ill health. NHS BSA said this meant she was no longer eligible for SCS.
- Section R2 of the 1995 Regulations provides that a person in pensionable employment as a nurse, physiotherapist, midwife or health visitor, was able to retire at age 55, without being subject to an early retirement reduction; this described SCS.
- The conditions for retention of SCS were set out in the 1995 Regulations, but only to the extent of the requirement not to have had a break in pensionable employment for any one period of five years or more. Mrs Y believed that as she had completed more than 20 years of service with SCS, she should have been eligible to SCS.
- Essentially, Regulation R2 provided that a member was able to retire at age 55 and stated that "it applies to a member...who is in pensionable employment as a nurse...who spends the whole of the last 5 years of her pensionable employment as a nurse..."
- However, Regulation E1 referred to entitlement where a member retired on or after age 60 or age 55. Regulation E1 did not apply to Mrs Y because she had not yet reached age 55. The provision for retirement from age 55, by virtue of SCS, was available only where a member reached age 55. Mrs Y argued that, because she had over 20 years of SCS service, she should have been able to maintain her SCS and retire with an unreduced pension at age 55, despite leaving employment before reaching that age. However, NHS BSA must follow the 1995 Regulations and those Regulations did not provide for this. So, the fact that Mrs Y had completed more than 20 years of pensionable service was not relevant in her case, because Mrs Y was not yet age 55 when she left the Scheme . Therefore,

the Adjudicator's view was that Mrs Y was not eligible to maintain her SCS and this meant her retirement age is 60.

- As Mrs Y resigned from NHS employment due to ill health, Regulation L1 stated that a pension may be paid before age 60 where the ill health criteria was met from deferred status. The Adjudicator was satisfied that NHS BSA had advised Mrs Y of the options available to her. Namely, she may wish to apply for an ill health pension, claim her unreduced benefits from age 60 or claim reduced retirement benefits from the minimum age of 50.
- Mrs Y argued that NHS BSA did not provide her with sufficient information regarding her eligibility for SCS prior to leaving the Scheme. Having considered the Factsheet and the Guide, the Adjudicator was satisfied that there was sufficient information regarding SCS that would have been available to Mrs Y prior to her leaving the Scheme.
- The Adjudicator also considered the information provided in the Choice Guide and Choice Statement Mrs Y was provided in 2011. Page 8 of the Choice Statement said the age when she left the Scheme was important and that if a member left NHS employment before age 55, the pension would be lower. The Adjudicator appreciated Mrs Y seemed to have relied on the information in the Choice Guide, but this was general and not specific information, for the purpose of comparing the 1995 and 2008 sections. Mrs Y did not deny receiving the Guide on joining the Scheme. It would have been prudent for Mrs Y to have checked all the information that was available to her and not just rely on the Choice Guide. The Guide had more specific information relating to her SCS.
- Specifically, the Factsheet said that to be eligible for SCS, Mrs Y must have been in NHS employment that attracted SCS five years prior to age 55 or beyond. The Guide also stated that deferred benefits are normally paid at age 60. The Adjudicator had seen no evidence of Mrs Y contacting NHS BSA to query her eligibility for SCS before she left employment. The only time she contacted NHS BSA to query her position was in 2017, around two years after she had left the Scheme.
- The Adjudicator noted that Mrs Y admitted there was information regarding SCS on the NHS website but considered that it was difficult to locate the information. The Adjudicator appreciated that the Factsheet may not have been easy to find, however it was available to members. It was reasonable for Mrs Y to have made enquiries regarding her SCS before she left the Scheme. In the Adjudicator's opinion, Mrs Y's understanding of the position was based on her assumptions about her SCS, and the potential to retire at age 55, rather than any incorrect information provided by NHS BSA.
- Mrs Y argued that she should have been informed by NHS BSA that she might lose her SCS if she left her employment. However, NHS BSA would not have been aware that Mrs Y was leaving employment until it was notified of this by her

employer. It could not have been expected to provide Mrs Y with information about whether she would retain her SCS, unless she had contacted NHS BSA to request that information.

- Mrs Y raised an issue of being discriminated against by NHS BSA. The Adjudicator noted that NHS BSA had noted her concerns. It was not entirely clear on what grounds Mrs Y considered that she had been discriminated against. As the Adjudicator understood it, Mrs Y believed that she was being treated less favourably than part-time members of the Scheme.
- However, Mrs Y had not compared herself with a part-time member in the same circumstances as herself. That was, someone who had left pensionable employment before reaching age 55. In those circumstances, Mrs Y, as a full-time member, would receive more by way of pension than a comparable part-time member. It was not relevant that a part-time member who was still in pensionable service at age 55 might receive a higher pension because it was not reduced. This was not an appropriate comparator.
- Having considered Mrs Y's complaint, the Adjudicator's view was that NHS BSA had correctly applied the 1995 Regulations and had correctly advised that she was not eligible to maintain SCS. NHS BSA would have provided Ms Y with sufficient information regarding her SCS before she left the Scheme. The Adjudicator had seen no evidence that NHS BSA provided Mrs Y with any incorrect information and it was the Adjudicator's view that this complaint should not be upheld.

10. Mrs Y did not accept the Adjudicator's Opinion and in response made the following points:-

- She did not resign because of ill health, she resigned because part-time hours were refused and had she stayed she would have become ill.
- She had no reason to contact NHS BSA when she had all the evidence stating she could retire at age 55.
- She did not see any note in the information provided by NHS BSA that she would lose SCS if she left the Scheme before age 55.
- She did not receive the Factsheet.
- She was discriminated against by NHS BSA on the grounds that it removed SCS because whether she was "employed or not" at age 55, she has lost out financially even though she had "served more in hours worked."
- She has been misled and misinformed by NHS BSA.

11. The complaint was passed to me to consider. I note Mrs Y's further comments but they do not change the outcome, I agree with the Adjudicator's Opinion.

Ombudsman's decision

12. Mrs Y has complained that NHS BSA has said that she cannot retain SCS. I have considered Mrs Y's complaint and her further points. I appreciate her position and also the fact that she says she did not leave NHS employment due to ill health. However, regardless of whether Mrs Y left her NHS employment due to ill health or not, the key issue is her age when she resigned from her NHS employment and became a deferred member of the Scheme.
13. The 1995 Regulations are clear that in order to maintain SCS, Mrs Y must have been in NHS employment that attracted SCS for the five years prior to age 55. As Mrs Y became a deferred member of the Scheme at age 45, I find that she was not eligible to maintain SCS. There is no provision under the 1995 Regulations to allow Mrs Y to maintain her SCS before age 55, so the fact that Mrs Y completed over 20 years of service is not relevant to her case.
14. I have considered all the information that would have been provided by NHS BSA to Mrs Y upon joining the Scheme, such as the Factsheet and the Guide and the information Mrs Y said she relied upon when making a decision to resign from employment. I find that these documents would have provided sufficient information to Mrs Y regarding SCS. Specifically, that if she became a deferred member of the Scheme before age 55, her retirement age would be 60, so she would not receive an unreduced pension from age 55.
15. There is no duty for NHS BSA to provide specific information to members regarding their SCS. NHS BSA would not have been aware that Mrs Y was leaving employment until it was notified of this by her employer. It could not have been expected to provide Mrs Y with information about whether she would retain her SCS, unless she had contacted NHS BSA to specifically request that information.
16. Mrs Y said she believed there was no need to have contacted NHS BSA for further information concerning SCS. However, it would have been prudent to confirm her pension position before she made such an important decision to leave her employment. I have seen no evidence that Mrs Y made any enquiries of NHS BSA, in relation to this, prior to her retirement, or that NHS BSA provided Mrs Y with any incorrect information in this regard.
17. I do not uphold Mrs Y's complaint.

Anthony Arter

Pensions Ombudsman
3 February 2021

Appendix 1

Extract from NHS Pension Scheme Regulations 1995 (as amended) (SI 1995/300)

“Nurses, physiotherapists, midwives and health visitors

R2.—(1) Subject to paragraph (2), this regulation applies to a member—

(a) who, at the coming into force of these Regulations—

- (i) is in pensionable employment as a nurse, physiotherapist, midwife or health visitor, or
- (ii) has accrued rights to benefits under the scheme arising out of a previous period in which she was engaged in such employment and at no time since the last occasion on which she was so engaged has she had a break in pensionable employment for any one period of 5 years or more,

and

(b) who spends the whole of the last 5 years of her pensionable employment as a nurse, physiotherapist, midwife or health visitor.

(2) 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) Where this regulation applies—

(a) regulation E1 (normal retirement pension) will apply to the member as if the reference, in paragraph (1) of that regulation, to age 60, were a reference to age 55;”

Part E Benefits for Members

E1 Normal retirement pension

“(1) A member who retires from pensionable employment on or after attaining age 60 shall be entitled to a pension under this regulation.

(2) The pension under this regulation shall be at a yearly rate of 1/80th of final year's pensionable pay for each complete year of pensionable service, plus the relevant daily proportion of that rate for each additional day of such service.”

Part L Early Leavers

L1 Preserved pension

“(1) Subject to paragraphs (3) and (4), a member who leaves pensionable employment before age 60 without becoming entitled to a pension under any of regulations E1 to E5 shall be entitled to receive a pension and retirement lump sum under this regulation from age 60 if—

- (a) the member leaves with at least 2 years' qualifying service, or
- (b) a transfer payment has been made to this Section of the scheme in respect of the member's rights under a personal pension scheme.

(2) The pension under this regulation will be calculated—

- (a) where it becomes payable by virtue of paragraph (3)(d) below, in accordance with paragraphs (2) to (4) of regulation E5, as if it were a pension under that regulation; and
- (b) in any other case, as described in regulation E1 as if it were a pension under that regulation;

and the retirement lump sum will be calculated as described in regulation E6.

(3) The member shall be entitled to receive the pension and retirement lump sum before age 60 if—

- (a) the member is in NHS employment and the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of efficiently discharging the duties of that employment;
- (b) the Secretary of State is satisfied that the member is suffering from mental or physical infirmity that makes him permanently incapable of engaging in regular employment of like duration; or
- (c) some other pension becomes payable to the member under any of regulations E1 to E5.

the member—

- (i) left pensionable employment after 30th March 2000,
- (ii) has reached the normal minimum pension age or, where relevant, protected pension age, and
- (iii) has applied to the Secretary of State for payment of the pension and retirement lump sum under this regulation.”

Appendix 2

The Factsheet stated:

“Criteria to retire at age 55

In order to retire at age 55 a member must have spent the whole of the last five years pensionable employment in a health service scheme as a Special Class member. Breaks in employment will be ignored when assessing this period but the last five years of pensionable membership must be as a Special Class member to retire from age 55.

A member must be in a special class post immediately prior to retirement. When a member leaves pensionable employment before age 55 benefits become deferred and do not become payable until the Normal Pension Age of 60.

Redundancy - An exception to this is a special class member who is made redundant and is not in receipt of a redundancy pension. In these circumstances a member with deferred benefits may claim these benefits at age 55 if the last five years of pensionable employment was as a member of the special classes.”

The Guide stated:

“Preserved pension rights are normally payable on reaching age 60 (including members of the *special class*).

If an employee with preserved benefits RE-JOINS the *scheme* BEFORE age 60, benefits earned in the new service will be linked with the preserved benefits AND PAID:-

ON RETIREMENT

ON LEAVING THE *SCHEME*

OR AT AGE 70

AT OR AFTER AGE 60 (55 for members of the special class eligible for early retirement) if membership is continuous to that age.

ILL-HEALTH If a member leaves NHS employment with preserved benefits and then becomes permanently incapable of ANY regular employment by reason of physical or mental infirmity, they may claim early payment of the benefits. These benefits will NOT be increased. The claim must be

accompanied by suitable medical evidence. The *scheme* will be advise if necessary. Employees WHO CHOOSE TO LEAVE the *scheme*, but continue working in the NHS, may also claim early payment of any preserved benefits IF they become incapable of performing their NHS duties because of ill-health. However, they will NOT be allowed to rejoin the *scheme* in any future NHS employment.”