

## Ombudsman's Determination

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

## Outcome

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

## Complaint summary

2. Dr M has complained that she is not entitled to a pension from the Scheme because she holds insufficient qualifying service. Dr M believes that the Regulations are discriminatory towards women doctors.

## Background information, including submissions from the parties

3. The relevant regulations in this case are Regulation 10 of The National Health Service (Superannuation) (Scotland) Regulations 1980 (**the 1980 Regulations**) and Regulation M1 of the NHS Superannuation Scheme (Scotland) Regulations 2011 (**the 2011 Regulations**).
4. In 1975, the Social Security Act 1973 (**SSA 73**) was introduced.
5. Under the SSA 73, if a member of an occupational pension scheme left service before normal pension age, and had reached age 26, a scheme had to provide a deferred pension, but only if they had completed a minimum of five years' qualifying service. Members with less than five years' qualifying service were eligible for a refund of the contributions that they had made into the scheme, if applicable.
6. Between 1 August 1983 and 25 May 1986, Dr M was employed by NHS Scotland as a doctor and was a member of the Scheme.
7. Dr M took a career break when she left NHS Scotland.
8. On 12 November 1990, Dr M joined NHS England. At this point, she joined the NHS Superannuation Scheme, which is administered by NHS Business Services Authority (**NHS BSA**).

9. The normal pension age (**NPA**) for both the Scheme and the NHS Superannuation Scheme was 60, which she reached in November 2018.
10. SPPA, the Scheme administrator, has said that, in 2011, it carried out an exercise to refund contributions to entitled members. It said that it did not hold Dr M's address so it could not contact her as part of this exercise despite her being entitled to a refund of the contributions she had paid into the Scheme.
11. In 2012, Dr M contacted NHS BSA to request an estimate of her benefits at retirement. The estimate did not include her benefits from the Scheme, so NHS BSA told Dr M to contact SPPA.
12. Dr M said that she did not contact SPPA until November 2017 because her pension benefits were not payable until November 2018.
13. On 30 November 2017, Dr M telephoned SPPA about her service in the Scheme because she believed it had transferred to the NHS Superannuation Scheme when she joined it in 1990. SPPA said it told Dr M that this was not the case and she did not qualify for a pension from the Scheme because she did not complete five years' qualifying service when she was employed by NHS Scotland. Dr M said that she was told she was entitled to a pension or lump sum from the Scheme when she reached age 60.
14. On 7 December 2017, Dr M wrote to SPPA with her updated address and asked it to provide an estimate of her benefits in the Scheme.
15. On 29 January 2018, SPPA responded to Dr M and explained that:-
  - Under the 1980 Regulations, between 1 October 1972 and 5 April 1988, the qualifying period necessary to retain a pension benefit was five years.
  - As Dr M had not completed five years' qualifying service and did not re-join the Scheme within one year of leaving, she was only entitled to a refund of contributions.
  - It had included a refund form so that she could claim the contributions that she had personally paid into the Scheme.
16. On 10 March 2018, Dr M made a stage one Internal Dispute Resolution Procedure (**IDRP**) complaint to SPPA. She said that:-
  - During a telephone conversation with SPPA on 29 November 2017, she was told that she would be able to take a pension or lump sum from the Scheme when she reached age 60 there was no mention of a qualifying period.
  - The 1980 Regulations, if true, were unfair and discriminatory towards women who took a career break to have children.

- She had worked for NHS Scotland from 1 August 1983 until September 1990, with the exception of her career break to have children. It was not fair that this period was disregarded and she believed that she had been financially penalised.
17. On 13 March 2018, SPPA contacted Dr M and told her that it could transfer her Scheme benefits to the NHS Superannuation Scheme, if NHS BSA was willing to accept the transfer.
18. Dr M said that between March and April 2018:-
- She had contacted NHS BSA and:
    - asked if it could exercise its discretion and allow her to transfer her Scheme benefits to the NHS Superannuation Scheme. NHS BSA explained that this was not possible;
    - raised a query about her part-time service during her membership in the NHS Superannuation Scheme; and
    - asked if she could take a “single life option” pension. NHS BSA told Dr M that this was not possible.
  - SPPA had received a transfer request from NHS BSA which noted that she did not join NHS England until 12 November 1990, so there was more than a year between each period of NHS employment (**disqualifying break**).
  - SPPA provided NHS BSA with details of the service that she held in the Scheme and agreed to allow the transfer, if NHS BSA was agreeable.
  - She withdrew her IDRPs complaint because she believed that the dispute had been resolved. But subsequently requested that it be re-opened.
  - NHS BSA confirmed that it could not accept the transfer due to the disqualifying break.
19. On 25 April 2018, SPPA responded to Dr M’s stage one IDRPs complaint and said:-
- It had misinformed her that she could transfer her benefits in the Scheme to the NHS Superannuation Scheme, at NHS BSA’s discretion.
  - NHS BSA had previously agreed to exercise its discretion and accept the transfer from the Scheme. However, this was not possible because of the disqualifying break.
  - It had discussed the matter with NHS BSA and been advised that the transfer was not possible.
  - It apologised that Dr M was provided with incorrect information, but it did not uphold the complaint.
20. Dr M appealed the decision and, in summary, said:-

- The 1980 Regulations and the disqualifying break were unfair and discriminatory towards women who took a career break to have children.
  - She was not told that she could transfer her benefits from the Scheme to the NHS Superannuation Scheme in 1990.
  - She was unhappy with the level of service that she had received.
21. On 9 May 2018, SPPA wrote to Dr M and explained that from 1 May 2018, the IDRPs changed from a two stage process to a one stage process. It gave Dr M the option to have her complaint reviewed under either stage one or stage two of the IDRPs.
22. In response, Dr M asked it to respond under the old two stage process.
23. On 27 July 2018, SPPA provided a second stage one IDRPs response. It apologised that Dr M was misinformed, but said that she was only entitled to a refund of the contributions that she paid to the Scheme.
24. Dr M disputed the response for the same reasons that she gave to the first IDRPs stage one decision (see paragraph 20 above). She: added that-
- Had she been made aware of the 1980 Regulations at the time, she could have considered reducing her career break or transferring her benefits from the Scheme to the NHS Superannuation Scheme.
  - She was unhappy that she had to apply for a refund of contributions and the leaflet that she had received said that she was only entitled to a refund if she held less than two years' service.
  - SPPA had let her down because it had not addressed her concerns or answered her questions.
25. On 18 January 2019, SPPA provided its stage two IDRPs response and upheld the stage one decision.
26. Dr M's position:-
- SPPA had misunderstood her complaint which was that the 1980 Regulations were discriminatory against women.
  - She was not entitled to a refund of the contributions paid to the Scheme because she held more than two years' membership in the Scheme.
27. SPPA's position:-
- The 1980 Regulations were in line with the SSA73 which provided that a member had to accrue five years' qualifying service to be entitled to a pension from the Scheme.

- Under the 2011 Regulations, Dr M was not entitled to transfer her benefits from the Scheme because she had a disqualifying break between leaving NHS Scotland and joining NHS England.
- The 1980 and 2011 Regulations did not discriminate on the grounds of gender and did not treat either gender more, or less, favourably.
- Dr M would have been advised to obtain a booklet about the Scheme from her employer. It was unclear whether Dr M had requested a copy, but it was reasonable to assume that it would have contained information about the qualifying criteria for benefits and leaving the Scheme.

28. It accepted that it had provided Dr M with incorrect information about transferring her benefits and apologised for this.

### Adjudicator's Opinion

29. Dr M'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:-

- Dr M left the Scheme without completing five years' qualifying service, so she was not entitled to a pension from the Scheme. This was in accordance with the 1980 Regulations and with the SSA73, which said that a member had to hold five years' qualifying service to be entitled to a deferred pension.
- The 1980 Regulations are not indirectly discriminatory on the grounds of sex because indirect sex discrimination only occurs where A applies to B a provision, criterion or practice (**PCP**) which is discriminatory in relation to B's sex. A PCP is discriminatory if:
  - A applies, or would apply, it to persons not of the same sex as B;
  - it puts, or would put, persons of A's sex at a particular disadvantage when compared with persons not of the same sex as B;
  - it puts, or would put, B at that disadvantage; and
  - A cannot show it to be a proportionate means of achieving a legitimate aim.
- Section 67 of the Equality Act 2010, provides that, if an occupational pension scheme does not include a sex equality rule, it is to be treated as including one. However, Section 67(10) provides that it does not have effect in relation to terms relating to pensionable service prior to 17 May 1990. The period of service for which Dr M is claiming indirect sex discrimination pre-dates this.
- Dr M was entitled to a refund of the contributions that she had made to the Scheme.

- There was no evidence that Dr M paid into the Scheme during her career break or that she requested to transfer her benefits into the NHS Superannuation Scheme in time in accordance with the Regulations.
- SPPA had, in the Adjudicator's view, acted in accordance with the 1980 and 2011 Regulations.

30. Dr M did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Dr M provided her further comments which do not change the outcome. In summary, she said:-

- Her main complaint was that the Regulations were an example of indirect discrimination against women.
- The Gov.uk website defined indirect discrimination as:

“...putting rules or arrangements in place that apply to everyone, but that put someone with a protected characteristic at an unfair disadvantage.”
- It was unclear whether the Adjudicator believed that:
  - indirect discrimination had not occurred in her case; or
  - there had been indirect discrimination, but the Equality Act 2010 prevented the injustice from being corrected and compensated.
- She disputed SPPA's record of the telephone conversation in November 2017. She was told that SPPA had a record of her service, and she would be entitled to a pension from the Scheme.
- SPPA's attempt to contact her in 2011 was “half-hearted” because she did not change address or her name after she left NHS Scotland and the Scheme. Furthermore, it could have obtained her details from NHS England “with little effort”.
- The disqualifying period and the five years' qualifying service were indirectly discriminatory.
- The Adjudicator had not criticised SPPA despite the misinformation, misleading guidance, incorrect advice about transferring to the NHS Superannuation Scheme, repetition of steps already undertaken and a complaint response that showed no understanding of indirect discrimination.

31. I note the additional points raised by Dr M but agree with the Adjudicator's Opinion.

### **Ombudsman's decision**

32. Dr M maintains that the Regulations are indirectly discriminatory on the grounds of sex. This is on the grounds that the 1980 Regulations, disqualifying break and five

years' qualifying service affected females who took career breaks to have children more than males.

33. As the Adjudicator has explained, Section 67 of the Equality Act 2010 provides that, if an occupational pension scheme does not include a sex equality rule, it is to be treated as including one. However, Section 67(10) of the Equality Act 2010 provides that it does not have effect in relation to terms relating to pensionable service prior to 17 May 1990. The period of service for which Dr M is claiming indirect sex discrimination pre-dates this. I find there is no evidence of indirect sex discrimination because a male in Dr M's position that took the same break in service, for paternity leave or ill health, for example, would have been treated in the same way.
34. Dr M disputes SPPA's assertion that, in November 2017, she was told that she did not qualify for a pension because she did not complete five years' qualifying service with NHS Scotland. However, she has not provided any contemporaneous evidence to support her recollection of the telephone conversation. I am therefore unable to make a finding on what Dr M was told during the telephone conversation.
35. Dr M believes that SPPA could have made more of an effort to contact her in 2011 when it carried out the contribution refund exercise. Dr M has said that SPPA should have used the details that it held for her when she left NHS Scotland or contacted NHS England. I disagree, considering 25 years had passed since Dr M left NHS Scotland, there was no guarantee that she would have still resided at the same address. I accept that SPPA could have written to Dr M at the address it held for her when she left NHS Scotland but its failure to do so does not constitute maladministration. In 1990, on joining NHS England, Dr M became a member of the NHS Superannuation Scheme that is administered by NHS BSA, rather than SPPA. I find that it would not have been practicable for SPPA to contact NHS BSA to obtain Dr M's address because even if SPPA was aware that Dr M had joined NHS England following her career break, there was no guarantee that she had continued to work for NHS England.
36. It is important to note that when Dr M contacted NHS BSA for an estimate of her benefits in 2012, and found that it did not include her benefits from the Scheme, she was advised to contact SPPA, but she did not do so until some five years later. It is reasonable to conclude that, had Dr M contacted SPPA in 2012, it would have made her aware that she was entitled to a refund of contributions, rather than a pension from the Scheme.
37. Dr M comments that the Adjudicator had not criticised SPPA despite a number of failings. The role of my Adjudicators is to give an opinion on the merits of complaints and to make findings in relation to any maladministration. In this case, I am satisfied that the Adjudicator considered the relevant facts when reaching a decision.

CAS-40710-H5J1

38. I do not uphold Dr M's complaint.

**Anthony Arter**

Pensions Ombudsman  
13 January 2022