

Ombudsman's Determination

| | |
|------------|--|
| Applicant | Mr E |
| Scheme | NHS Pension Scheme (the Scheme) |
| Respondent | NHS Business Services Authority (NHS BSA) |

Outcome

1. I do not uphold Mr E's complaint, and no further action is required by NHS BSA.
2. My reasons for reaching this decision are explained in more detail below in paragraphs 45 to 53.

Complaint summary

3. Mr E has complained that NHS BSA incorrectly denied him early, unreduced retirement under Special Class Status (**SCS**) because he was not in pensionable employment as a "Nurse".
4. Mr E has said that his role as an Operating Department Practitioner (**ODP**) required him to have a suitable professional registration and was for all intents and purposes, identical to nursing.

Background information, including submissions from the parties

5. A Scheme member who meets the requirements set out in Regulation R2 of the NHS Pension Scheme Regulations 1995 (as amended) (SI 1995/300) (**the Regulations**) (see Appendix 1), has the option to retire at age 55 without a reduction to their pension for early retirement. This is known as SCS.
6. On 6 March 1995, the Scheme Regulations were amended and SCS was abolished for all members, however, an exception was made for members who already held SCS on or before this date and who did not have a break in membership of 5 years or more.
7. To be eligible for SCS, under Regulation R2 a member must:-
 - Have been in pensionable employment for 5 years or more; and
 - Not have a break in pensionable employment of 5 years or more; and

- Spend the last five years of their pensionable employment as a Nurse, Physiotherapist, Midwife or Health Visitor.
8. “Nurse” is not defined in the Regulations.
 9. On 14 October 2019, Mr E contacted NHS BSA requesting confirmation of whether he qualified for early, unreduced retirement at age 55 under SCS as he had joined the Scheme on 11 January 1987.
 10. On 15 October 2016, NHS BSA responded to Mr E. It confirmed the following:-
 - From 13 January 1987 to 18 September 1994, Mr E held SCS.
 - His record was then changed to non-SCS from 19 September 1994 until the date of the correspondence.
 - As he was in the 1995 Section of the Scheme, and did not have consecutive SCS throughout his employment, his normal retirement age was 60.
 11. On 16 October 2019, Mr E wrote to NHS BSA. He asked:-
 - Why he did not qualify for SCS when his role as an Operating Department Practitioner (**ODP**) was equivalent to a “Nurse”.
 - Why he no longer held SCS from 1994 as he had maintained continuous service since 11 January 1987, without a break.
 12. On 17 October 2019, NHS BSA responded to Mr E’s queries:-
 - Mr E would need to raise a complaint if he was unhappy with its decision that an ODP was not considered a “Nurse”.
 - Regarding the change to the 2015 Section of the Scheme, all members were moved to the 2015 Section unless they had protected arrangements.
 13. On 18 October 2019, Mr E responded to NHS BSA. He said that while his role as an ODP was not analogous to nursing, it was identical. This was borne out of the fact that both roles performed the same functions and had the same job specifications. He contended that he met the SCS requirements set out in the Regulations.
 14. On 21 October 2019, NHS BSA confirmed that it would investigate Mr E’s complaint under stage one of the Scheme’s Internal Dispute Resolution Procedure (**IDRP**).
 15. On 19 November 2019, NHS BSA responded to Mr E’s complaint under stage one of the Scheme’s IDRP. It said:-
 - In order to be considered a “Nurse” a member had to hold a current nursing qualification with the Nursing and Midwifery Council (**NMC**).
 - An ODP had its own standards of profession and was registered under the Health and Care Professional Council (**HCPC**).

- As a member with HCPC registration would not be able to apply for a role as a “Nurse,” his role as an ODP did not attract SCS.
16. On 9 May 2020, Mr E escalated his complaint under stage two of the Scheme’s IDRP. He said:-
- NHS BSA’s stage one IDRP stated he could not apply for the position of a “Nurse.” However, he received adverts for Anaesthetic “Nurse”/Practitioner vacancies.
 - He said he may not have a nursing qualification, but he was in pensionable employment and undertook the exact same duties as a “Nurse” within their respective roles.
17. On 2 September 2020, NHS BSA responded to Mr E’s complaint under stage two of the Scheme’s IDRP. It said:-
- Nurses and ODP’s were their own separate job titles and protected by separate law. As each had different professional qualifications, an ODP could not practice as a “Nurse” and vice versa.
 - The role of ODP had never attracted SCS as it was not regarded as one of the qualifying grades under the Regulations.
 - It had reviewed the job description provided by Mr E. The title, “Deputy Sister/ Charge Nurse/Senior Operating Department Practitioner” related to both nursing and ODP roles within the Surgical Directorate.
 - The section of each job description headed; “Knowledge, Skills, Training and Experience,” differentiated the two roles as having different professional registrations.
 - It acknowledged that there was some overlap of duties between a “Nurse” and an ODP but the two could not be considered the same.

Mr E’s position

18. The only difference between an ODP and a “Nurse” was that one attracted SCS and the other did not.
19. He understood that the judgement of *NHS BSA v Williams*¹ determined that it was not reasonable to rely solely on whether the person had nursing qualifications.
20. However, a previous determination by the Pensions Ombudsman (PO-3522)² and NHS BSA’s subsequent appeal to the High Court considered the definition of a “Nurse” for the purposes of entitlement to SCS under the Regulations. A decision maker needed to consider exactly what type of work was undertaken and whether

¹ *NHS BSA v Williams* (2017) ICR 327 (*NHS BSA v Williams*)

² <https://www.pensions-ombudsman.org.uk/decision/2015/po-3522/nhs-pensions-scheme-po-3522>

nursing was included in this. He did not believe that NHS BSA had adequately investigated the tasks he undertook in his role and whether they included nursing.

NHS BSA's position

21. It confirmed that it maintained its stage two IDRP response as a summary of its general position.
22. It had used the approach set out in *NHS BSA v Williams* as considered by the High Court of Justice in 2017. In the High Court judgment, it was upheld that members working as Nursery Nurses did not meet the conditions within Regulations R2 because:-
 - "employment as a Nurse was intended by the draftsman of the 1995 Regulations to capture principally those members who were qualified Nurses employed in a nursing job... but the reason they are included is not simply because of their job function, but also because of their job titles, job descriptions and more importantly, qualifications." **[Paragraph 137 of NHS BSA v Williams]**
 - "A line has to be drawn between what does and does not qualify as nursing activity, sufficiently to result in employment as a Nurse. Clearly not every member of the Scheme who carries out some nursing activity qualifies as a Nurse ... Practical Application of Regulation R2 suggests that NHSBSA ought to have easily applicable criteria in deciding whether a person qualifies for SCS. An approach based principally on qualification and job description / contractual duties provides such criteria." **[Paragraph 145 of NHS BSA v Williams]**
 - "What is clear is that if a person cannot be described as a Nurse in the first place, that person cannot be in pensionable employment as a Nurse." **[Paragraph 149 of NHS BSA v Williams]**
23. Regulation (R2) did not list ODP as one of the professions that attract SCS.
24. It acknowledged that the ODP role included elements of patient care in a theatre setting, but that such elements alone were not sufficient when qualifications had to be considered in conjunction.

Adjudicator's Opinion

25. Mr E'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 in paragraphs 26 to 44.
26. The Adjudicator had analysed the factsheet produced by NHS BSA, the Regulations, and case precedent set by *NHS BSA v Williams* as referred to in NHS BSA's formal response to Mr E's case.

27. NHS BSA did not consider Mr E to be eligible for early retirement under the remit of SCS because his role as an ODP did not specifically require a qualification under the NMC.
28. It was important to note that Regulation R2 of the Regulations was the principal determining factor as to whether a person held SCS or not. Provisions enforced by individual employers or job specifications could deviate from the criteria set by the Regulations, but only where it was favourable to the member. Provisions that differed to the Regulations could never put the member in a disadvantaged position.
29. Both Mr E and NHS BSA had referred to *NHS BSA v Williams*. The judgement in that case had been reviewed in full by the Adjudicator. The point which Mr E referred to from that judgement was that it was not reasonable to solely rely on a nursing qualification when considering whether a member was a “Nurse”. It was agreed that NHS BSA had to consider the role holistically.
30. However, an important distinction had to be made. Just as the judgement dictated that qualification alone was insufficient, performing duties like a “Nurse” was also insufficient in isolation. Both had to be present in unison for the role of a “Nurse” to be satisfied.
31. The Adjudicator had reviewed the job specification of a Theatre Nurse and compared that with Mr E’s role as an ODP. The duties carried out by the two roles were similar and it was clear that in its stage 2 IDRP, NHS BSA had acknowledged this overlap. Consequently, NHS BSA had reasonably considered and addressed the daily duties carried out by Mr E’s role as an ODP.
32. The matter of SCS had been considered by the previous Ombudsman in case CAS-37294-G0Y2.³ This case served as the leading point of reference for complaints where the definition of a “Nurse” was in dispute. The decision directly relied upon the precedent set in *NHS BSA v Williams*.
33. NHS BSA was not permitted to deny eligibility in circumstances where its actions would conflict with the Regulations. The Regulations did not define what a “Nurse” was, nor did it directly dictate the requirements to be considered a “Nurse.” Therefore, in defining the term “Nurse” itself, NHS BSA had relied upon extra-statutory policies separate to the Regulations. In the circumstances, relying on external policies had placed Mr E in a disadvantaged position. This was because there was no direct statutory basis for defining a “Nurse” in such a way that denied Mr E early retirement under SCS. It was likely that NHS BSA had relied on retention provisions rather than considering eligibility under the Regulations themselves and so, had not assessed his eligibility for SCS appropriately.

³ <https://www.pensions-ombudsman.org.uk/decision/2021/cas-37294-g0y2/nhs-pension-scheme-cas-37294-g0y2>

34. As was clear in CAS-37294-G0Y2, it was found that NHS BSA could not appropriately determine the definition of a “Nurse” to support its rejection of the applicants claim to SCS without inadvertently triggering the detrimental use of external policy. In situations such as this, *NHS BSA v Williams* was referred to.
35. In paragraph 81 of CAS-37294-G0Y2 the powers of an Ombudsman where a term was not defined within the Regulations and a dispute was present were made clear. The previous Ombudsman stated “In the event of a dispute between a member and NHS BSA, it must be decided as a matter of fact by an appropriate judicial authority. Mr Justice Warren (at para 112) referred to this as being “an Ombudsman, the Court or an appellate Court.” In summary, in said scenario, the Ombudsman would consider whether Mr E’s role as an ODP, constituted that of a “Nurse”.
36. It was important to note that as a matter of law, the Ombudsman was not bound by his own Determinations, or those of the Deputy Ombudsman or a previous Ombudsman. However, where a complaint shared similarities with a complaint that had been determined, he would generally determine the complaint on similar lines unless there were compelling reasons not to do so. The Adjudicator considered it likely that the same rationale as set by previous case precedent would be applied.
37. In *NHS BSA v Williams* the court held, per Warren J at 152:

“Employment as a Nurse was intended by the draftsman of the 1995 Regulations to capture principally those members of the Scheme who were qualified “Nurse” employed in a nursing job. It is.... Not simply because of their job function, but also because of their job titles, job descriptions and importantly qualifications.”
38. Qualification was seen by the court as important, and it would only be in exceptional circumstances where someone who was not qualified as a “Nurse” was in employment as a “Nurse”.
39. In CAS-37294-G0Y2, the Ombudsman considered the role and qualifications of Mrs S holistically. The case was upheld on the basis that the duties discharged were similar in nature to a “Nurse” and that in order to ascertain the managerial rank that the applicant worked at, it was an absolute necessity for Mrs S to have a Nursing registration and that the qualification held, was with the NMC.
40. The Adjudicator linked that rationale to Mr E’s role as an ODP and that of a Theatre Nurse. While the two shared similarities, they operated under separate professions with different specific professional registration requirements. An ODP required HCPC registration whereas a Theatre Nurse had to be registered under the NMC.
41. While some overlap in the duties performed by a Registered “Nurse” and those of the ODP within a Theatre setting were clear, the two roles were differentiated by their respective skills, responsibilities, and professional registrations. The job description provided by Mr E evidenced these differences.

42. Paragraph 149 of *NHS BSA v Williams* stated, “what is clear is that if a person cannot be described as a “Nurse” in the first place, that person cannot be in pensionable employment as a “Nurse”.
43. An ODP with only HCPC registration would not meet the person specification of an NHS role for which NMC is essential, such as a Theatre Nurse or a Clinical Nurse Specialist. Unlike in CAS-37294-G0Y2, Mr E would not be able to perform the role of a “Nurse” under the Regulations and therefore could not be described as a “Nurse”.
44. The Adjudicator concluded that NHS BSA had considered all the relevant information. In addition, the Adjudicator found that through case precedent and authority to define terms as conveyed upon an Ombudsman service, the correct application of the word “Nurse” for the purposes of Mr E’s eligibility for SCS, meant that he did not qualify for early, unreduced retirement under SCS as Mr E could not be considered a “Nurse”.
45. Mr E did not accept the Adjudicator’s Opinion, and, in response, he reiterated his previous position and provided the following further comments. In summary he said:-
 - The Opinion assumed that his professional registration was inadequate rather than finding similarities between them, even though a professional registration of any type is not essential for SCS.
 - He did exactly the same role, met the specification, and exceeded it in a management capacity.
 - Mr E felt that the Opinion had not stated that a Nursing Auxiliary had historically been granted SCS without a Nursing Qualification.
46. I have considered the additional points made by Mr E, but they do not change the outcome. I agree with the Adjudicator’s Opinion.

Ombudsman’s decision

47. Mr E has complained that NHS BSA denied him access to early, unreduced retirement under the provisions of SCS. He has stated that his role as an ODP is identical to that of a “Nurse” and should therefore be considered as such.
48. I note that the Adjudicator addressed Mr E’s complaint in depth. I agree with the comments made by the Adjudicator, that precedent set by previous High Court rulings dictates that Mr E’s professional registration is an integral part of determining whether he is employed as a “Nurse” for the purpose of the Regulations.
49. I note that Mr E considered that the Adjudicator’s Opinion searched for inadequacies in his professional registration rather than similarities. He also stated that professional registration was not essential for SCS to apply. While the Regulations do not specify which professional registrations are required for SCS, that does not mean that professional registrations are not relevant when interpreting the meaning of “employment as a nurse, physiotherapist, midwife or health visitor” in the Regulations.

In *NHS BSA v Williams*, it was noted that a qualification is required for employment as a physiotherapist, midwife or health visitor so that an unqualified person could not be employed in that role and that the Regulations should be interpreted as treating nurses in the same way, so that the qualification is “part and parcel of being in ‘pensionable employment as a nurse’ just as much as a midwife, health visitor or physiotherapist”⁴. Warren J goes on to consider the practical difficulties that would arise if job function were the overriding criterion, because it would become necessary to draw a line between what does and does not qualify as nursing activity, and concludes that “it would be wrong (...) to ignore the job title and job descriptions and qualifications of the person concerned and to focus exclusively on job function”.

50. On the basis that qualification, job title and job function are all required to be taken into account in determining whether a person is “in pensionable employment as a nurse” for the purpose of Regulation R2, I conclude that Mr E was not employed as a Nurse but instead was employed as an ODP. This is notwithstanding that his role was a role that could also have been filled by a person qualified and registered as a Nurse and that the job description allowed alternative job titles as “Deputy Sister/ Charge Nurse/Senior Operating Department Practitioner” and could have been filled by either a person qualified as a Nurse or as an ODP. Registration under the NMC is an essential requirement for being a Nurse in the NHS Mr E was not registered as a Nurse but as an ODP and was able to fulfil his role as a Senior ODP. The fact that his job functions would have been no different if he had been registered as a Nurse and employed as such rather than as an ODP does not mean that he was in “employment as a nurse”.
51. Mr E also raised that the Adjudicator’s Opinion had not acknowledged that a Nursing Auxiliary had, on occasion, been granted SCS without a Nursing Qualification.
52. It may help if I elaborate on the evolution of SCS. Since SCS was abolished in 1995, the approach adopted towards Nursing Auxiliaries has been that if a member held such a role prior to 1995, then they could maintain that role, or transfer to any other eligible role (provided the remainder of their employment adhered to the Regulations) and maintain SCS. This was because before 1995, the Nursing Auxiliary role attracted SCS.
53. When SCS was abolished, some roles that previously attracted SCS, were abolished with it. Nursing Auxiliaries are an example of this. To prevent members from being unfairly disadvantaged by Regulation changes which they could not have been aware of, any SCS employment, like with Nursing Auxiliaries, which was held prior to 1995 was honoured after its abolishment.
54. However, as Nursing Auxiliaries no longer attracted SCS after 1995, any member who moved to this role after 1995 would not receive the same leniency as that which was applied to those who held the role prior to 1995. I have reviewed our previous determinations and, in every scenario where a Nursing Auxiliary was granted SCS,

⁴ *NHS BSA v Williams* at para.143.

the member had held this position prior to 1995. However, it does not appear that Mr E qualified for SCS as a former Nursing Auxiliary.

55. At no point, either prior to or after 1995, had employment as an ODP attracted SCS. The fact that certain former Nursing Auxiliaries who did not have professional qualification with the NMC were granted SCS does not allow me to determine that Mr E, as an ODP, qualifies for SCS.
56. For the reasons above, I conclude that Mr E was not “in pensionable employment as a nurse” for the purpose of Regulation R2 of the Regulations and that he did not otherwise qualify for SCS.
57. Therefore, I do not uphold Mr E’s complaint.

Camilla Barry

Deputy Pensions Ombudsman

23 May 2025

Appendix One

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,”