

## Ombudsman's Determination

Applicant	Mrs T
Scheme	NHS Pension Scheme (the <b>Scheme</b> )
Respondents	NHS Business Services Authority ( <b>NHSBSA</b> )

## Outcome

1. I do not uphold Mrs T's complaint and no further action is required by NHSBSA.
2. My reasons for reaching this decision are explained in more detail below.

## Complaint summary

3. Mrs T's complaint against NHSBSA is that they do not agree that she has Special Class Status (**SCS**) under the Scheme.

## Background information, including submissions from the parties

4. Mrs T worked as a nurse at the George Eliot Hospital (the **Hospital**) from 16 January 1978. She joined the Scheme on 16 January 1979. Under the Scheme she had SCS, which meant that she could retire at the age of 55 and take her full benefits.
5. Under the regulations governing the Scheme (the **Regulations**), in order to retain SCS a member must not have a break of more than five years in respect of their membership of the Scheme.
6. Mrs T left the employment of the Hospital and joined a GP practice (the **Practice**) around February/March 1990. At the time, the Practice was not an NHS employer and therefore she was not admitted to the Scheme when she joined them. The benefits she had accrued whilst employed by the Hospital were preserved under the Scheme.
7. A request form for Mrs T to attend a chest x-ray with the Hospital is dated 20 March 1990. Under the section headed 'Ward/O.P.D.' in the form the word 'SISTER' is inserted. Towards the bottom the form it is signed 'OCCUPATIONAL HEALTH'.
8. A form showing the results of the x-ray examination Mrs T had attended is dated 7 June 1990. In the section headed 'Ward/O.P.D.' the word 'Staff' is inserted.

9. On 26 March 1991 in a letter to Mrs T about her benefits under the Scheme, NHSBSA referred to the benefits she had built up during her membership of the Scheme which ended on 21 February 1990.
10. In 1992 Mrs T took out a personal pension plan with Prudential and transferred her preserved benefits from the Scheme into it.
11. On 6 March 1995, the Regulations were amended and SCS was abolished for all members. However, an exception was made for members of the Scheme who had SCS prior to this date and who did not have a break in membership of five years or more.
12. With effect from 1 September 1997, the Regulations were amended again and the Practice became an employer who could enrol employees who worked for them into the Scheme.
13. Mrs T was enrolled into the Scheme by the Practice as from 1 September 1997. Around this time, representations were made to the Department of Health on behalf of nurses working in the Practice who could not join the Scheme from 6 March 1995 until 1 September 1997; dispensation was granted to discount this period when establishing if a member had a break of five years or more for the purpose of SCS.
14. In 2001 Mrs T's previous service within the Scheme was reinstated in the wake of the SIB review of personal pensions. NHSBSA wrote to Mrs T, on 17 June 2002, informing her that her pensionable service in the Scheme had been reinstated and enclosed a copy of a letter they had sent to Prudential. The letter from NHSBSA to Prudential, also dated 17 June 2002, stated that the service periods reinstated were from 16 January to 26 September 1979 and from 7 October 1979 to 21 February 1990.
15. As her benefits under the Scheme had been reinstated, Mrs T could have been considered for SCS provided she did not have a break in membership of five years or more.
16. In May 2015, Mrs T contacted NHSBSA about her SCS. She said:

“...it has been confirmed that if I can provide you with confirmation of my employment as a practice nurse with NHS GP's from February 1990 to 1 September 1997, I can request a “retention of specialist status” as I wish to retire age 55 in January 2016...

I was not aware at that time of leaving George Eliot Hospital in 1990 (February), at the end of my maternity leave that this could result in potential difficulties, otherwise I would have remained working at the hospital.”
17. In June 2015, NHSBSA sent Mrs T a pension statement. They pointed out that an application for pension on age grounds after age 50, but before normal retirement

age, under the Scheme's Voluntary Early Retirement provisions, may lead to an actuarial reduction in pension.

18. On 13 July 2015, after some correspondence with Mrs T, NHSBSA sent her a letter telling her that according to their records her previous pensionable employment, prior to re-entering the Scheme in September 1997 (with Warwickshire NHS Payroll Services) was up to 21 February 1990. They also confirmed that as she did not have over a five year break in employment she would be able to retain her SCS.
19. On 5 August 2015, in response to a complaint made by Mrs T, NHSBSA apologised for their delays in answering her telephone enquiries. They also apologised for providing her with misleading information about her eligibility for SCS in their letter of 13 July 2015. They explained that her break in membership of the Scheme ran from 22 February 1990 to 31 August 1997 which equated to seven years 191 days. When the period from 6 March 1995 to 31 August 1997 (two years 179 days) was subtracted, this left five years 12 days and therefore, she was ineligible for SCS.
20. On 25 August 2015, Dr H at the Practice wrote to NHSBSA confirming that Mrs T commenced employment with them on 19 March 1990. He added that she had worked four weeks' notice with her previous employer where she was in pensionable employment.
21. NHSBSA checked their record with HM Revenue & Customs (**HMRC**). A letter dated 20 February 2016 from HMRC to NHSBSA confirms that according to their records Mrs T paid D rate (contracted-out contributions) under the Scheme for the periods 16 January 1979 to 21 February 1990 and from 1997/98 to the present.
22. On 5 February 2016 NHSBSA upheld her complaint that she had been given the wrong information in the letter of 13 July 2015 and accepted that their customer service had fallen below standard but stood by their decision that she did not retain SCS status.
23. As she could not resolve her complaint with NHSBSA, Mrs T brought it to us.
24. Mrs K, who was Mrs T's manager at the Hospital and is her representative, wrote to us with her comments as set out below.
  - She can confirm that Mrs T did transfer to the community on 22 March 1990. She gave notice of her intention to become a practice nurse within the local community commencing 22 March 1990. She added that there was no break in Mrs T's service and cannot understand why Mrs T finds herself in this intolerable situation. She had contacted the Chief Executive of the Hospital and the Human Resources Department, and was informed that after ten years all records of employment are destroyed.
  - Mrs T has done her utmost to provide all the information requested; however as soon as she fulfils one request further demands are made for more information.

- The crucial question is Mrs T's final working day at the Hospital. Dr H has confirmed that Mrs T commenced work with the Practice on 19 March 1990. This means that Mrs T's last actual working day with the Hospital would have been 16 March 1990, giving no break in service.
25. Ms N, the current Director of Human Resources at the Hospital, wrote to us confirming that Mrs K was well qualified to provide information about Mrs T's employment with the Hospital. On being asked to provide evidence of Mrs T's last working day with the Hospital, Ms N said that personal information for Mrs T was no longer available and they could only rely on evidence provided by Mrs K, who was Mrs T's manager in 1990.
26. Mrs T's comments are set out below.
- NHSBSA have, in her opinion, been negligent in their duty of care towards her.
  - She was informed when she started her nursing career in 1978 that the Scheme was mandatory for all nurses, because they were entitled to SCS. Therefore, she had no option but to join the Scheme. Had she been informed of the terms and conditions from the very start, she could have made an informed choice not to leave hospital nursing as she would have been aware of the potential risk to her SCS.
  - The request form for a chest x-ray by the Hospital's Occupational Health Department is dated 20 March 1990. This department only deals with staff in post at the Hospital. On the form showing the x-ray result, the word 'staff' is clearly written proving without doubt that she was still in the Hospital's employment.
27. NHSBSA's comments are set out below.
- They were informed by the Hospital, at the time Mrs T left the Hospital's employment, that her pensionable employment ended on 21 February 1990.
  - After her membership of the Scheme was reinstated, they wrote to her in June 2002 confirming her periods of employment which had been reinstated ended on 21 February 1990. She accepted the terms of reinstatement and there is nothing in their records to show that she queried that date of reinstatement.
  - As part of their investigation into Mrs T's case, they contacted HM Revenue & Customs (**HMRC**) NIC and FO who confirmed that she paid contracted out contributions until 21 February 1990.
  - They have tried to establish with the Hospital the records held for Mrs T, but the Hospital have been unable to trace any records of any employee who left their employment in 1990.

- Mrs T has not been able to provide a copy of either her payslip for February or March 1990 or her P45 form to support her claim that she left the Hospital and pensionable NHS employment any later than 21 February 1990.

## **Adjudicator's Opinion**

28. Mrs T's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHSBSA. The Adjudicator's findings are summarised briefly below.
- The Regulations are clear that in order for a member of the Scheme to retain SCS, the member could not have a break of more than five years in their pensionable service.
  - Mrs T knew when she joined the Practice that she could no longer continue her membership of the Scheme. If she had any concerns about the implications of leaving the Scheme, she could have queried the matter at that time but she did not.
  - NHSBSA say that they were informed by the Hospital in 1990 that Mrs T left service on 21 February 1990. Mrs K, who was Mrs T's manager in 1990 says that Mrs T's last working day with the Hospital was 16 March 1990. Mrs K is no longer employed by the Hospital, having left in December 1999, and even though she was Mrs T's manager in 1990 the Hospital would need to verify this. Ms N says that the Hospital no longer has any personal information for Mrs T and therefore her last working day with the Hospital cannot be verified.
  - Dr H confirms that Mrs T joined the Practice on 19 March 1990. However, this does not mean that she was employed by the Hospital until 16 March 1990.
  - NHSBSA have provided a letter from HMRC confirming that Mrs T paid contracted-out contributions up to 21 February 1990. This information would have been obtained by HMRC through returns made by the Hospital.
  - When Mrs T's benefits, which had previously been transferred to a personal pension plan with Prudential, were reinstated back into the Scheme, the period of service reinstated was up to 21 February 1990 and not to 16 March 1990. This confirms that her pensionable service while employed by the Hospital ended on 21 February 1990.
  - On the balance of probability, Mrs T's pensionable service, in respect of her employment with the Hospital, ended on 21 February 1990.
29. Mrs T did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs K, on behalf of Mrs T, provided her comments which do not change

the outcome. I agree with the Adjudicator's Opinion, as summarised above, and I will therefore only respond to the key points made by Mrs T for completeness.

### **Ombudsman's decision**

30. Mrs K, on behalf of Mrs T, made the further comments set out below.

- NHSBSA's admission that they provided Mrs T with incorrect misleading information is deplorable. In addition, it was confirmed to Mrs T, during telephone conversations with NHSBSA staff, that SCS did apply to her.
- Mrs T did not receive the letter in June 2002 which NHSBSA say they sent to her confirming that her membership of the Scheme had been reinstated to 21 February 1990.
- In 1990, the Hospital was not a self-governing trust and was accountable to North West Health Authority. The fact that Mrs T's last day of service with the Hospital is recorded incorrectly is dilatory in the extreme. As the health authorities no longer exist, it would seem there is no recourse to their mismanagement.
- It is unfair to expect Mrs T to provide a copy of either her payslip for February or March 1990 or her P45 form to support her claim that she left the service of the Hospital after 21 February 1990.
- She questions what information was made available to practice nurses in 1990 about the potential risk to their SCS if they left hospital nursing. NHSBSA are responsible for providing nurses with this information.
- Mrs T tendered her resignation on 21 February 1990, but continued working in the NHS because she had to work out her period of notice.
- The request form for a chest x-ray for Mrs T confirms that she was in continuous employment after 21 February 1990.

31. I have carefully considered the points made by Mrs K and set out below my conclusions.

- NHSBSA did provide incorrect information to Mrs T in their letter of July 2015. However, this error was quickly corrected by NHSBSA, a few weeks later, in August 2015. There is no evidence to show that Mrs T had been informed, during telephone conversations with NHSBSA staff, that SCS did apply to her. Therefore, even though the incorrect information provided in July 2015 is maladministration, given that the error was corrected quickly I am unable to find that she suffered significant injustice as a consequence of this.

- I do not dispute that Mrs T may not have received the letter sent to her by NHSBSA in June 2002, informing her that her pensionable service in the Scheme had been reinstated to 21 February 1990. However, this does not detract from the fact that all of the communications issued by NHSBSA about this period of service records this date. I do not agree that NHSBSA should have told Mrs T in 1990 of the threat to her SCS status as a consequence of transferring to GP Practice. Information regarding benefits under the Scheme is produced by NHSBSA, but is provided to staff by the employer. The employer would be responsible for providing information about whether the job she took up in 1990 allowed her to participate in the Scheme. In 1990 NHSBSA could not have foreseen the terms of the abolition of SCS introduced by changes to the Regulations made in 1995, nor could they have foreseen the 1997 changes which subsequently made GP practices NHS employers. Therefore they could not have notified her how the choice she was making in 1990 would in future interrelate with her ability to retain SCS status.
- Both the letter of 26 March 1991 from NHSBSA to Mrs T and the letter of 20 February 2016 from HMRC to NHSBSA, show that her pensionable service with the Hospital ended on 21 February 1990.
- The challenges which have been made to the accuracy of the Scheme records are essentially an argument that her employer must have provided incorrect information about pensionable service end date to NHSBSA. However, the complaint before me is not about the conduct of Mrs T's previous employer. It is about the administration of NHSBSA and I cannot see that they have done anything wrong in the way that they have approached the question of whether she has SCS status. They properly interrogated the records which they held and attempted to verify them with HMRC and Mrs T's previous employers. Having considered the few additional records which exist, they concluded that there was nothing to show that the Scheme records were inaccurate. I have seen nothing which persuades me that their approach to the evidence or the conclusion which they drew from it was wrong.
- I have considered the evidence of their recall recently put forward by Dr H, Mrs K and Mrs T, but I can see no reason why NHSBSA should have preferred that recall to the more nearly contemporaneous records held by them. The recall of events and precise dates after a period of more than 25 years has passed is inherently less likely to be accurate than documentary records created closer in time.
- I have also considered the request form for Mrs T to attend a chest x-ray with the Hospital dated 20 March 1990. This records Mrs T's status as 'Sister'. The later X-ray examination form dated 7 June 1990 records her status as 'staff'. Dr H's evidence was that Mrs T had already started work at the GP Practice on 19 March 1990 and there has been no suggestion that she was hospital staff in June 1990. I cannot agree that either of those forms provides compelling evidence that her

pensionable service with the Hospital continued past 21 February 1990 such that NHSBA should have concluded that the records which they and HMRC currently hold are probably wrong.

32. I conclude it was reasonable of NHSBA to rely upon their own and HMRC records to reach the conclusion that they did about Mrs T's entitlement to SCS status. Therefore, I do not uphold Mrs T's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
11 May 2017