

## Ombudsman's Determination

Applicant	Mr Y
Scheme	NHS Pension Scheme ( <b>NHSPS</b> )
Respondent	NHS Pensions (a service provided by NHS Business Services Authority) ( <b>NHS BSA</b> )

## Outcome

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

## Complaint summary

3. Mr Y complains that NHS BSA has said that 'special class status' (**SCS**) no longer applies to him. As a result, he is unable to retire at age 55 with unreduced pension benefits.

## Background information, including submissions from the parties

4. Mr Y was employed by the NHS's Lancashire Care Foundation Trust (**the Trust**), as a nurse from 24 August 1981 to 2009, following which his employment was transferred on a number of occasions under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**). During his employment, Mr Y was a member of the NHSPS.
5. Mr Y's employment, subsequent to being employed by Trust, is as follows:-
  - On 1 October 2009, Mr Y's employment was transferred from the Trust to Inward House Projects. Mr Y's job title was, 'Substance Misuse Nurse (Keyworker)'.
  - On 1 September 2011, Mr Y's employment was transferred from Inward House Projects to Developing Initiatives for Support in the Community (**DISC**). Mr Y's job title was, 'Recovery Worker'.
  - On 1 July 2013, Mr Y's employment was transferred from DISC to Crime Reduction Initiatives (**CRI**). Mr Y's job title was, 'Recovery Worker Care Coordinator'.

6. In May 2014, a few months before his 55<sup>th</sup> birthday, Mr Y began to make enquiries about taking his pension benefits. Mr Y understood that he had SCS, meaning he was able to retire at age 55, earlier than the NHSPS's normal pension age, without any reduction to his benefits.
7. NHS BSA has confirmed that Mr Y's membership of the NHSPS, prior to 1 September 2011, attracted SCS. However it said that Mr Y's employment with DISC from 1 September 2011, and with CRI from 1 July 2013, did not attract SCS. This led to Mr Y's complaint.
8. Mr Y's position is that although his employment has been TUPE transferred, a matter in which he had no choice, he is carrying out what is essentially the same role therefore he should still be entitled to SCS.
9. NHS BSA's position is that both DISC and CRI have confirmed that Mr Y was not employed in a nursing capacity, consequently he is not entitled to SCS.

## **Legislation**

10. The NHSPS is subject to the National Health Service Pension Scheme Regulations 2015 (SI 2015/94) (**the Regulations**).
11. Rule R2 of the Regulations deals with special class status and says:-

"R2 Nurses, physiotherapists, midwives and health visitors

(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 this Section of 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...”

## Adjudicator’s Opinion

12. Mr 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 briefly below: -

- Regulations are to be interpreted and applied on the basis of what they say. But in the case of Rule R2, “nurse” is not defined, consequently the Regulations must be interpreted purposively.
- Within the Regulations, Rule U2 confers responsibility for the interpretation of Rule R2 on NHS BSA. So it is NHS BSA that must decide whether Mr Y was a nurse, based on the role he performed and the duties he undertook, as opposed to focusing on his job title and/or qualifications. The decision NHS BSA comes to must be its own, so it cannot blindly adopt what Mr Y’s employer says.
- In its initial email enquiry to DISC, as part of the internal dispute resolution procedure (**IDRP**) investigation, NHS BSA asked whether Mr Y was “employed as a nurse.” This is the incorrect question to ask, the correct test would have been; whether a person with some knowledge of the field would describe Mr Y as a nurse.
- NHS BSA should, instead, have enquired as to whether Mr Y’s job had any of the characteristics of a nursing role so that it could decide for itself whether Mr Y was working in a nursing capacity.
- NHS BSA has not directed itself correctly when deciding whether Mr Y qualifies for SCS. Regulation U2 means that it is NHS BSA that is the decision maker, and not Mr Y’s current or former employers. This procedural omission amounts to maladministration.
- After the complaint was accepted for investigation by this Office, NHS BSA asked DISC for further information about the duties Mr Y undertook. Based on the information provided by DISC, NHS BSA has decided, for itself, that Mr Y was not “employed in a nursing capacity in this post”.
- NHS BSA’s actions, subsequent to the complaint being accepted by this Office, provided appropriate redress for the earlier maladministration. NHS BSA subsequently asked the correct questions and made a decision for itself, as opposed to accepting what DISC had said without question.

- NHS BSA's decision that Mr Y does not qualify for SCS is not perverse, that is to say, NHS BSA has not made a decision which no reasonable body, properly directing itself, could have reached.
  - Mr Y is required to be employed with SCS for the whole of the last five years of his NHSPS membership. As a consequence of his employment with DISC failing to attract SCS, Mr Y would not be eligible to retire at age 55 with unreduced benefits irrespective of whether or not Mr Y's CRI employment attracted SCS.
  - Although NHS BSA has acted in maladministration, there has not been any financial or non-financial injustice as a consequence of this maladministration, so the complaint cannot be upheld.
13. Mr Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr Y reiterated that he was employed in a nursing capacity. He said that DISC had provided a generic job specification to NHS BSA, which was not fully reflective of the duties he carried out.
14. NHS BSA accepted the Adjudicator's finding that the complaint should not be upheld, but disputed the rationale used saying it did not misdirect itself or ask incorrect questions when establishing Mr Y's entitlement to SCS.
15. Mr Y and NHS BSA provided their further comments which do not change the outcome. I agree with the Adjudicator's Opinion, summarised above, and I will therefore only respond to the key points made by Mr Y for completeness.

### **Ombudsman's decision**

16. NHS BSA disputes that it misdirected itself and has said that Mr Y's employer was best placed to assess whether he was employed as a nurse. It has also pointed out that the word 'nurse' in a job title is not sufficient to qualify for SCS. NHS BSA provides the example of a neo-natal nursery nurse which, it says, does not qualify for SCS.
17. Although Mr Y's employer may be best placed to assess whether Mr Y's role was that of a nurse, I do not accept that NHS BSA had no responsibility to independently assess whether Mr Y was employed as a nurse.
18. For example, if, in response to NHS BSA's question, DISC had confirmed that Mr Y was employed as a neo-natal nursery nurse, then it is very unlikely that NHS BSA would blindly accept this and permit SCS. Put simply there is some onus on NHS BSA to assess, for itself, whether a member's job role qualifies for SCS.
19. Mr Y has argued that insufficient consideration has been given to the similarities between his role and that of his former nursing role with the Trust. In support of this Mr Y has highlighted the similarities between the two roles.

20. My role is not to replace NHS BSA as the decision maker, rather it is to consider whether the decision was reached in a proper manner. I will not usually replace NHS BSA's decision with my own, unless it can be demonstrated that the decision is perverse.
21. In its letter to NHS BSA, dated 27 September 2016, DISC has confirmed that the job specification it provided was generic. However, DISC has supplemented the job description by providing details of some of the additional responsibilities Mr Y undertook.
22. NHS BSA reviewed the additional information provided by DISC and has concluded that this does not confirm that Mr Y was employed in a nursing capacity. NHS BSA has said, "The additional duties listed in DISC's letter are not duties that I would consider must be performed exclusively by a qualified nurse or equivalent grade."
23. I find that NHS BSA has taken all of the evidence into account and has given it appropriate consideration. I consider that when assessing the evidence provided by DISC, NHS BSA has directed itself properly.
24. If Mr Y had been employed as a nurse I do not find it unreasonable to expect DISC to make an unequivocal statement to this effect. The fact that DISC has not expressly confirmed that Mr Y was employed as a nurse leaves sufficient doubt in my mind about what his role entailed. For this reason I cannot find that NHS BSA's decision not to award SCS is perverse, that is a decision which no reasonable decision maker could have reached, based on the same evidence.
25. To be eligible to retire at age 55 with unreduced benefits, Mr Y is required to have SCS for the whole of the last five years of his NHSPS membership. As Mr Y's employment with DISC does not qualify for SCS, it follows that he cannot take unreduced benefits as age 55, irrespective of whether or not the employment with CRI attracted SCS.
26. Therefore, I do not uphold Mr Y's complaint.

**Anthony Arter**

Pensions Ombudsman  
16 May 2017