

Ombudsman's Determination

Applicant	Mrs H
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHSBSA)

Outcome

1. I do not uphold Mrs H'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 H has complained that NHSBSA say she is not eligible for Special Class Status (**SCS**). Therefore, she cannot retire at age 55 without suffering an early retirement reduction.

Background information, including submissions from the parties

4. Mrs H was an active member of the 1995 section of the Scheme, from September 1988 until 9 October 2011, when she left NHS employment and started working in Jersey where she joined the Public Employees Contributory Retirement Scheme (**PECRS**).
5. In June 2011, Mrs H says she sought information from NHSBSA about what would happen if she transferred her benefits from the Scheme to the PECRS. She said she was told over the telephone that there was a reciprocal agreement that as long as she transferred her benefits from the Scheme within five years of leaving, she would be able to re-join the 1995 section of the Scheme, and would not lose her SCS.
6. There is no record of this telephone conversation. However, there was conflicting information in the Scheme Guide which was available since March 2011, providing that if Mrs H transferred her benefits away she would have no option but to re-join the 2008 section of the Scheme, meaning she would lose her SCS. In particular it says a member would not be eligible to re-join the 1995 section if :

"you... left this Scheme on or after 1 April 2008 and transferred your benefits out of the Scheme".

7. Mrs H resumed her NHS pensionable employment on 13 May 2013. In August 2013, she began making enquiries about transferring her benefits under PECRS back into the Scheme. In August 2013 her previous employer sent a transfer value statement for her benefits.
8. On 9 January 2014, NHSBSA wrote to Mrs H, and said that if she transferred her pension rights back into the 1995 section of the Scheme, and the criteria in respect of SCS was met, this would be reinstated, as her break in service was less than five years.
9. It would appear that no further action was taken until 22 January 2015, when NHSBSA wrote to Mrs H and confirmed that she was a member of the 2008 section of the Scheme which meant that she could not hold SCS.
10. Mrs H wrote to NHSBSA and said she was extremely disappointed that she had not re-joined the 1995 section of the Scheme, and that her SCS would not be reinstated. She said it would have a huge impact on her benefits if she chose to retire at age 55 as her benefits would be reduced.
11. On 31 March 2015, NHSBSA wrote to Mrs H, and apologised that she had been given misleading information in their letter of 9 January 2014. It explained that when she transferred her benefits from the Scheme to PECRS, she ceased to have any rights under the Scheme and so lost her SCS. NHSBSA said that in-line with the Regulations Mrs H was not able to re-join the 1995 section of the Scheme because she had left pensionable employment after 1 April 2008.

Adjudicator's Opinion

12. Mrs H'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:
 - When Mrs H transferred to PECRS, she ceased to be a member of the Scheme and lost her SCS status. Mrs H said she made her decision to transfer out of the Scheme based on the information she received over the phone in June 2011. As there is no record of the telephone conversation it was not possible to reach any conclusion about what was said.
 - The letter Mrs H received from NHSBSA in January 2014 was incorrect and it led Mrs H to believe, incorrectly, that her SCS would be reinstated. The letter said if she transferred all her pension rights back into the 1995 section of the Scheme, and met the criteria for SCS, then it would be reinstated. However, the letter did not take into account Mrs H's personal circumstances and did not adequately explain when a person was able to re-join the 1995 section of the Scheme, or when a person would become a member of the 2008 section of the Scheme.

- For Mrs H to have been reinstated into the 1995 section of the Scheme, the Regulations provided that she would have had to have left pensionable employment before 1 April 2008, and kept her deferred benefits in the Scheme. Mrs H left pensionable employment on 9 October 2011 and transferred her deferred benefits to the PECRS and so her only option was to re-join the 2008 section if she wanted to be a member of the Scheme. This was in accordance with the Regulations.
- It is clear that by the time Mrs H received the information in January 2014, she had already taken action that meant she could no longer hold SCS. So in effect she suffered a loss of expectation as a result of that misinformation. It did not cause her to take action that resulted in a financial loss.

13. Mrs H did not accept the Adjudicator's Opinion, and made the following comments:

- She said it is not the fact that she left the Scheme after April 2008, that precluded her from re-joining the 1995 section of the Scheme, it was that she transferred her pension to PECRS meaning she was no longer a deferred member of the Scheme;
- She would not have transferred her pension to the PECRS, had she known that she would be unable to re-join the 1995 section of the Scheme.
- On the balance of probability it is unlikely that a reasonable person would have accepted the role in Jersey, if they had been made aware of the true implications this would have on SCS. She believes that NHSBSA had a basic duty of care to let her know what would happen if she transferred;
- Her current life and retirement plans have been disrupted as a result of NHSBSA's maladministration. She is currently working in Manchester and her husband has retired in Devon this means they are only able to see each other every two to three weeks. If she had been given the correct information she would have left her deferred pension in the 1995 section of the Scheme; and
- She would like to be compensated for the considerable distress and inconvenience she has suffered as a result of receiving incorrect information.

14. The complaint was passed to me to consider, I agree with the Adjudicator's Opinion that the complaint cannot be upheld and set out my reasons below.

Ombudsman's decision

15. I find that NHSBSA have correctly interpreted the Regulations that govern the Scheme and Mrs H is not eligible for SCS.

16. The Regulations provide:

“B2 Restrictions on membership

“(1) A person may not join this scheme if...

(h) that person is a person who-

(i) leaves pensionable employment on, or after, 1st April 2008; and

(ii) before returning to or commencing NHS employment, exercises the member’s right to transfer out all of that person’s benefits in this section of the scheme in accordance with regulation M1 or M2;”

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...

(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 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...”

17. Mrs H argues that had she not transferred her deferred pension benefits to the PE CRS she would have been able to re-join the 1995 section of the Scheme. She draws attention to the information in the NHSBSA factsheet “Re-joining the Scheme” which states:

“If you leave pensionable employment and are entitled to deferred benefits you can only return to the 1995 section if you meet the following criteria:

- You return to work before age 60
- You have not transferred the value of your NHS Pensions to another pension arrangement
- The break is less than five years

- You are fully 'Protected' or still within your 'Tapered Protection' period (please read the Scheme Protection in the Membership of the NHS Pensions Scheme section of the website)."

18. I agree that under the Regulations the reason Mrs H cannot re-join the 1995 section of the Scheme, is because she transferred her benefits to the PECRS. Therefore, the fact Mrs H decided to do so has caused her a disadvantage, in that she has lost her SCS.
19. I have therefore considered the information that was available to Mrs H in 2011, when she made the decision to transfer her benefits to PECRS. Mrs H says she received information in a telephone conversation in 2011, where she was informed that if she transferred her benefits away, but re-joined the Scheme within five years, she would still have been eligible to be a member of the 1995 section of the Scheme. To uphold the complaint on this basis, I would have to be persuaded that there was a clear and unequivocal misstatement made to Mrs H on which she reasonably relied to make her decision to transfer out. The burden of proof rests with Mrs H and I can only consider the evidence which exists.
20. Unfortunately, there is no evidence of the telephone conversation. It is therefore impossible to reconstruct what may have been asked and answered.
21. Evidence of the technical guidance available to members and Scheme staff at the time is contained in the 2011 Scheme Guide. This states the effect of the Regulations correctly. There is no evidence which persuades me on the balance of probabilities that Mrs H was provided with a clear and unequivocal statement which was inconsistent with the scheme guide.
22. Mrs H says it is unlikely that a reasonable person would have accepted the role in Jersey if they had been made aware of the true implications this would have on SCS. There were clearly positive reasons for Mrs H to have decided to take the role in Jersey, or presumably she would not have done so and in any event that decision did not mean she had to transfer her benefits out. I accept that Mrs H may have formed the belief that she could transfer back in, but as I have explained above, I cannot see sufficient evidence that she was given a clear and unequivocal statement to that effect. Insofar as the decision to transfer her retirement benefits is concerned, it seems to be an unusual decision to have made unless the original intention was to remain in Jersey. I cannot infer from either decision that Mrs H must have been told that she could transfer back in to the 1995 Section if she returned to NHS employment within 5 years. In any event, if the retention or loss of SCS status was central to either decision, I do not consider it would have been reasonable to make it in reliance on the understanding gathered from an undocumented phone call rather than what was documented in the scheme literature.
23. Mrs H has said that losing her SCS has resulted in her retirement plans being disrupted. She has explained that she is now continuing to work in Manchester whilst her husband has retired in Devon. Although, I sympathise with the position she finds

herself in it was Mrs H's choice to work in Manchester rather than finding employment closer to where her husband is living. NHSBSA cannot be held responsible for Mrs H's decision not to work nearer to her home.

24. Finally, whilst I appreciate that Mrs H received incorrect information in January 2014, that information did not cause her financial loss. She had, by that time, already taken the action that meant she could no longer hold SCS, because she had already transferred her benefits to the PECRS. I also find that the distress and inconvenience which she has experienced flows from the operation of the scheme rules themselves, rather than what she was incorrectly told in 2014.
25. Therefore, I do not uphold Mrs H's complaint.

Karen Johnston

Deputy Pensions Ombudsman
23 August 2017