

## Ombudsman's Determination

|             |  |
|-------------|--|
| Applicant   | Mrs M  |
| Scheme      | NHS Pension Scheme ( <b>the Scheme</b> )                               |
| Respondents | NHS Business Service Authority ( <b>NHS BSA</b> )<br>NHS Professionals |

## Outcome

1. I do not uphold Mrs M'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. Mrs M has complained that, as a deferred member, she was provided with incorrect advice on how to claim her NHS pension at age 55 and that as a result she took several steps that she otherwise would not have done.
4. Mrs M has also complained that she has received a generally poor level of service from NHS BSA throughout the complaint process. Mrs M is particularly aggrieved that NHS BSA are unable to provide a call recording from August 2014.

## Background information, including submissions from the parties

5. Mrs M made her last NHS pension contribution on 23 February 2014. While employed by NHS Mrs M held special class status (**SCS**). After leaving her SCS post in February 2014, she remained an NHS staff member, working non-standard hours. Although Mrs M was not aware at the time, her SCS had ceased on 23 February 2014, as this was the date her last contribution to the Scheme was made.
6. Members with SCS are eligible to retire at age 55 with no reduction in benefits but only if the member is in active SCS employment. On 6 March 1995, the 1995 section regulations were changed and SCS was abolished. Consequently, a person joining the Scheme after 6 March 1995 was not eligible to hold SCS, whereas a person who had previously held SCS and who re-joined the Scheme after 6 March 1995, could have their SCS reinstated provided they had not had a break in pensionable service of more than five years.

**PO-13442**

7. On 29 August 2014, Mrs M called the NHS BSA advice line to request information regarding her pension benefits, including an estimate of the pension payable on her 55<sup>th</sup> birthday (3 January 2015) and details of how to claim payment.
8. It was during this call that Mrs M states she was told that in order to receive an estimate and claim payment of her pension she would need to “close” her record as, according to NHS records, her employment record was still “open”.
9. Unfortunately, NHS BSA have been unable to provide a recording of this call. However, the handler that took this call had made the following phone note:  
  
“dpa met  
  
Member called.adv to get her record closed first before we do an est as she has left the scheme and record still active so est will be incorrect.”
10. Mrs M subsequently resigned from NHS Professionals entirely in October 2014, and maintains that she did so as a direct consequence of the information provided to during the call on 29 August 2014. The role she resigned from in October 2014 did not attract SCS.
11. On 27 October 2014, having submitted her resignation Mrs M called to request an estimate of her pension and explained to the call handler that she planned to claim payment from her 55<sup>th</sup> birthday.
12. During this call Mrs M was informed that according to the record she ceased SCS employment on 23 February 2014, and as she was not an active employee she no longer held SCS so could not claim payment from her 55<sup>th</sup> birthday. As this was not consistent with Mrs M’s interpretation of the call on 29 August 2014 the call handler offered to review the call and then call Mrs M back.
13. In the subsequent call back on the same day, Mrs M was informed that the call recording from 29 August 2014, could not be located and as such the information she says she was provided with could not be verified. She was however informed that she should re-join the NHS in a relevant role to qualify for SCS.
14. Mrs M says that she then took steps to do so, which involved extensive training and an interview but was not able to secure a role attracting SCS. Not satisfied with the information she had received Mrs M went through the NHS BSA complaint procedure and eventually brought her complaint to this Office.
15. During the Adjudicators investigation Mrs M has confirmed that she originally left the Prison service in 2011, to work as a full time nurse manager at a GP Practice. However, when she left she was asked to work for NHS Professionals on an ad hoc basis to “offer support and advice” to new team members working on the ‘Methadone programme’ and other specialist administrative tasks. This role was working non-standard hours.

## Adjudicator's Opinion

16. Mrs M's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS BSA or NHS Professionals. The Adjudicator's findings are summarised briefly below:-

- Mrs M held SCS until her employment that attracted SCS effectively ceased on 23 February 2014, this being the last date any pension deductions were made under a SCS role.
- SCS was abolished for all new entrants to the NHS Pension Scheme after 6 March 1995, and for those previously holding the status who have a break in pensionable employment of any one period of five years or more.
- Although Mrs M may have been provided with unclear information when she called NHS on 29 August 2014, by that stage she had already lost SCS because she had in effect become a deferred member of the scheme on 23 February 2014.
- Even if misleading or ambiguous information had been provided there was no reason for Mrs M to have acted as she did so the impact of the incorrect information would have limited impact other than general inconvenience. Also, Mrs N could still apply for a job that attracts SCS.
- When a member leaves pensionable employment their benefits become deferred and do not become payable until the Normal Pension Age. If a member was in pensionable employment (contributing to the Scheme) on 6 March 1995 as a member of the special classes, they qualify for SCS on rejoining the Scheme in employment which attracts SCS, as long as they do not have a break in pensionable employment of any one period of five years or more. Mrs M therefore still has a small chance to apply for a role that attracts SCS, although this may be problematic.
- The provision of incorrect information can be classed as maladministration however not all maladministration inevitably leads to recognition of non-financial injustice. Essentially, if the non-financial injustice is not significant; no award is likely to be made.
- Recognition of non-financial injustice is not warranted in this case because although the service provided by NHS BSA has been poor a finding of maladministration is not enough to qualify. In this case the unclear information provided on 29 August 2014, was sufficiently vague to have prompted Mrs M to seek more clarity regarding the matter before taking the steps she did. To be told to close a record does not necessarily mean she needed to resign from her NHS post.
- As a recording for the 29 August 2014 call is not available the only documented evidence for what was discussed is a call note made at the time. Both this call note and Mrs M agree the word "closed" was used. Unfortunately, in this case the

word closed can have multiple interpretations. That Mrs M interpreted it to mean she had to resign from her NHS Professionals role is regrettable, however on the balance of probabilities it seems this matter has arisen as a result of a misunderstanding. However, this misunderstanding does not change the fact Mrs M lost her SCS on 23 February 2014.

17. After discussions with the Adjudicator, Mrs M accepted that she no longer held a SCS entitlement and as such could not take payment of her unreduced NHS pension from age 55. However, Mrs M did not accept the Adjudicator's Opinion that recognition of non-financial injustice was not warranted. As such, the complaint was passed to me to consider. Mrs M provided her further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mrs M, detailed below, for completeness:

- Although Mrs M accepts her loss of SCS was not to do with the information she received on 29 August 2014, she does not believe she has been suitable recognition has been given to the poor level of service she has received.
- Having been told to close her employment record she took steps to re-join the NHS which she has said were pointless and have added to her inconvenience.
- Mrs M has argued that under Financial Conduct Authority (**FCA**) requirements call recording must be kept for a minimum of 6 months.
- The 1998 Data Protection Act (**DPA 98**), while not specially referencing telephone calls, states that a provider has a responsibility when it comes to the processing of information or data such as "obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data".
- Mrs M believes any telephone call recording "undertaken and retained by a contact centre, be it for training purposes or for subsequent data entry or consultation, could be construed as data that is being processed. It is therefore advisable for contact centres to protect call recordings in the same way they would protect any digital or written data where the customer can be identified by that information and so are susceptible to a data breach".
- Considering both FCA and DPA guidelines it is clear these calls should be kept for a minimum of 6 months. Therefore, the burden of proof that NHS BSA didn't misadvise Mrs M lies with them. Mrs M considers that it is unacceptable that in no communication have NHS BSA ever acknowledged their contravention of DPA and FCA guidelines.
- From the date of the initial enquiry Mrs M has undertaken actions she believed, in the first instance, were required to obtain an estimate of her pension benefits in order to facilitate the payment of her pension at 55. Then, when it became clear she need not have resigned from NHS Professionals as she had already lost SCS, she undertook several steps, including re-training, further professional study and an interview. This has caused her a loss of expectation and distress and inconvenience. All these actions stemmed from the initial call on the 29 August 2014.

- Mrs M has also complained that the internal dispute resolution stage 1 letter (**IDRP1**) claimed that she was told to 'Update' her record, this was not supported by the call note taken on the day which clearly shows the term 'Closed'. The IRDP1 letter also suggested there was no evidence to support Mrs M's actions in closing her account when in fact the call handler has recorded using the word 'Closed'.

## **Ombudsman's decision**

18. The relevant regulations regarding SCS can be found in The National Health Service Pension Scheme Regulations 1995 (Regulation R2).
19. Mrs M acknowledges that she lost her entitlement to SCS when she resigned from NHS employment on 23 February 2014. What I am therefore being asked to consider is whether NHS BSA or NHS Professionals should pay Mrs M an amount to recognise distress and inconvenience caused as a result of information she received and actions she took as a result of that information.
20. There is no dispute that Mrs M called NHS on 29 August 2014, in relation to her pension entitlement.
21. The limited phone note that was taken at the time provides a basic level of information concerning the subject matter of the call. All parties agree that the call handler used the word "closed". The call handler has not made the process by which a record is closed entirely clear.
22. Strictly speaking, the instruction to close the record was correct as, if an estimate had been calculated without this action being taken it would have resulted in Mrs M's benefits being overstated. The information to close the open record therefore was not a negligent misstatement. I do not think it was reasonable to conclude from the explanation given that it was necessary to resign from a job in order to get a pension estimate. I do not consider it would be reasonable to do so in reliance on an undocumented telephone conversation. In any event, since Mrs M already had no SCS status at the point of resignation, her resignation from the bank did not compromise her ability to draw her pension unreduced at 55.
23. I have considered the assertion that the failure to provide a call recording for the 29 August 2014, breaches FCA regulations and is not in keeping with DPA 98 guidelines. My jurisdiction is limited to making findings in disputes or law and complaints of maladministration and does not extend to penalising parties for breach of these provisions.
24. In terms of whether the alleged failings constitute maladministration; TPR have no specific guidance on how to treat lost or erroneously deleted telephone conversations only mentioning that "data" should be retained for as long as is necessary or in line with specific industry standards, which in this case is 6 months.

**PO-13442**

25. It is disappointing that NHS BSA could not trace the audio recording of the telephone discussion that took place on 29 August 2014, however there was a note of the call and the failure to keep a recording does not itself constitute maladministration. I do not agree that the failure to keep a telephone recording reverses the burden of proof on that point.
26. I note that NHS BSA accepted that the enquiry handling overall included misleading or conflicting advice, for which they have apologised. Mrs M says she wasted time and effort going through a process to discover that even re-enrolling herself on the bank staff did not further her objectives. I accept that this will have been very annoying to discover. However, I bear in mind that most of the distress and inconvenience experienced by Mrs M will have been caused by learning that she did not have SCS status when she thought she did, rather than as a consequence of the application to rejoin NHS Professionals. I do not consider that the distress and inconvenience caused by going through the bank application process itself was so significant that it ought to be recognised with the minimum award.
27. Therefore, I do not uphold Mrs M's complaint.

**Karen Johnston**

Deputy Pensions Ombudsman  
26 January 2018