

## Ombudsman's Determination

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

## Outcome

1. I do not uphold Mrs R'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 R complains that NHSBSA say she is not eligible for Special Class Status (**SCS**), because she had a break in pensionable employment of over five years.

## Background information, including submissions from the parties

4. Mrs R was employed as a nurse within the NHS. She was a member of the Scheme and held SCS from 21 January 1985 to 31 May 1986, when she opted out of the Scheme, and became a deferred member. Members with SCS are eligible to retire at age 55 with no reduction in benefits.
5. On 6 March 1995, the Scheme regulations were changed and SCS was abolished. Consequently, a person joining the Scheme after 6 March 1995 was not eligible to hold SCS. However, a person who had previously held SCS 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. Before 6 March 1995 there were no restrictions on the length of a break in service and the member re-joining the Scheme again.
6. In November 1988, Mrs R wrote to NHSBSA and enquired about the possibility of transferring her deferred benefits under the Scheme. In her letter she confirms her new address. NHSBSA provided a response to the enquiry on 2 December 1988.
7. Mrs R became an active member of the Scheme again when she re-joined on 14 September 1998.

8. NHSBSA has provided a copy of a Pension Letter 10/94 (**the 10/94 letter**), sent by NHSBSA to all NHS Finance Directors, NHS Personnel, Human Resource Directors, NHS Payroll Managers and Pension Officers and Direction Employers on 15 November 1994. Mrs R and her representative have been provided with a copy. The 10/94 letter detailed the changes coming into effect from 6 March 1995. Annex A to that letter provided further information about those changes and Annex B gave details about the steps required to be taken by the relevant authorities in order to inform employees of those changes.
9. It was confirmed under the 'Information Booklet' section in Annex B, that:

"We have produced a booklet "Your Pension Scheme is changing". Employers have a legal obligation to tell all employees (not just Scheme members) about the changes. So you will need to issue a copy of the booklet to every employee. The booklets will be delivered to employers by the end of December. We would like them to be issued to employees during January to allow them sufficient time before the implementation date to consider how they are affected by the changes".
10. Mrs R received the following benefit statements in subsequent years:
  - 18 September 2007 – showing her normal retirement age (**NRA**) as age 60;
  - 7 November 2007 – two separate benefit statements were produced, stating her NRA as 60 but using two different pensionable salaries;
  - 14 October 2008 – two separate benefit statements one which assumes the last day of pensionable employment as the day before Mrs R's 55<sup>th</sup> birthday and the other as the day before her 60<sup>th</sup> birthday.
  - 28 June 2011 – a "Choice statement" showing her NRA as age 60.
11. On 16 July 2013 Mrs R asked NHSBSA why she did not have SCS. NHSBSA responded on 20 August 2013, confirming that Mrs R's break in pensionable employment was greater than five years and because she had re-joined the Scheme after the abolition of SCS, she was no longer entitled to SCS. It was also confirmed that her membership was in the 1995 section of the Scheme, and her NRA was age 60.
12. In her response to NHSBSA, dated 22 July 2013, Mrs R confirms that she made the decision to opt-out of the Scheme and reduce her working hours following the birth of her children. In that letter she says "This decision was made on the information received by the Finance Department, Ormskirk & District General Hospital, who informed me that contributions already paid into the Scheme would remain and I could begin contributing to the Scheme at a later date without loss of status, once finances permitted."

13. Mrs R formally complained about her loss of SCS through the Internal Dispute Resolution Process (**IDRP**), completing stage one in February 2014 and stage two in October 2014. Mrs R says that had she known about the amendment to the regulations she would have re-joined the Scheme before 6 March 1995.
14. Mrs R contends that it was NHSBSA's responsibility to have informed her of the changes. NHSBSA explained that as Mrs R had a break in pensionable service of over five years, she was not eligible for SCS.
15. Mrs R first referred the matter to this office in March 2015. In turn, NHSBSA asked whether Mrs R was willing to withdraw the complaint at that time, so that it could reconsider the issue about Mrs R's loss of SCS. This was agreed between all parties, and NHSBSA issued its new decision on 16 October 2015, upholding its previous decision.
16. In NHSBSA's letter of 16 October 2015, it further explained that prior to the changes to the regulations effective from 6 March 1995, the Department for Health held a consultation with all stakeholders, including the representatives of NHS employers and staff. NHS employers were instructed to provide all employees, regardless of whether they were an active or deferred member of the Scheme, a booklet named "Your Pension Scheme is Changing" (**the booklet**), as well as publicise the changes in staff canteens, common rooms and staff bulletin boards etc. NHSBSA say it was advised that the Royal College of Nursing (**RCN**) and union bodies also publicised the changes in their own bulletins and printed literature. Furthermore, NHSBSA would also have issued this information on its website.
17. NHSBSA maintain that it relied on NHS employers to comply with the disclosure requirements and provide the relevant information, specifically the booklet, regarding the changes to the Scheme, to all NHS employees.
18. NHSBSA say this is because not every NHS employee is eligible to join the Scheme, and some employees may choose not to join the Scheme or choose to be a member of the Scheme for a specific time. It follows that NHSBSA would not therefore be aware of NHS employees who are not members of the Scheme and so would not hold any records for those individuals.
19. In relation to deferred members of the Scheme, who remain in non-pensionable NHS employment, NHSBSA say that NHS employers do not provide NHSBSA with any further information relating to the individual after they have left the Scheme. Therefore, in NHSBSA's view, it was reasonable to have asked NHS employers to issue the Pension Letter and the Booklet in 1994 to these individuals as they would still hold the necessary details.
20. NHSBSA has confirmed that it was not provided with evidence from each NHS employer that each NHS employee had been provided with the booklet. It has been suggested that NHSBSA ought to have kept a list of all NHS employees ("around 1,000,000 at the time of the changes to the Scheme") as well as deferred members to

confirm they had received the booklet, and that the list ought to have been kept since 1995. NHSBSA says this would be unnecessary and impractical, and in any event the requirements of the Data Protection Act would have prevented NHSBSA from retaining confidential information for individuals who were not and may never have been members of the Scheme.

21. Mrs R does not accept the statement by NHSBSA that only NHS employers can be aware of all NHS employees, nor that the responsibility to disclose information or the booklets fell on NHS employers. She says there is no evidence to support this assertion, nor is there evidence of a document outlining how each NHS employer would be expected to discharge such duties in a prescribed manner.
22. Mrs R holds the view that NHSBSA should have maintained overall responsibility for the management of the Scheme, and had a duty to oversee the disclosure process undertaken by the NHS employers. She questions how NHSBSA were able to satisfy itself that its disclosure obligations had been met without confirmation from the NHS employers. Mrs R says she does not accept that she was sent the booklet, by NHSBSA or her NHS employer, or that she was made aware to the publications in or around her work place.
23. NHSBSA contend that because Mrs R was not an active member of the Scheme and had not kept in touch to confirm her change of address after December 1988, it could not in any event have written to her directly. Therefore, it fulfilled its disclosure obligation by requiring her NHS employer to inform its employees of the changes.
24. Mrs R does not agree. She says her previous address was known to NHSBSA, and as it was her parents address it was reasonable to assume that, had correspondence been sent to that address, it would have been passed on to her. Mrs R also questions how NHSBSA could have known at that time that the address held was not her current address. Mrs R contends that NHSBSA cannot seek to deny that it had any obligation to notify her of the changes directly and simultaneously argue it did not hold a current address.
25. Mrs R says the October 2008 retirement benefit statement led her to believe that her pension benefits were capable of being taken at the age of 55.
26. NHSBSA say that it did not produce the retirement benefit statements between 2007 and 2008, therefore it cannot account for why the NHS employer produced the retirement benefit statement in October 2008 with an NRA of 55.

### **Adjudicator's Opinion**

27. Mrs R'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:-

- Mrs R's entitlement to SCS was not reinstated because she re-joined the Scheme after 6 March 1995, when SCS had been abolished. In order for SCS to have been reinstated Mrs R needed to have had a break in pensionable employment of less than five years.
- As Mrs R was no longer an active member of the Scheme at the time SCS was abolished NHSBSA did not need to make her aware of a change in the regulations. However, she was in NHS employment in March 1995 and so it was likely she still had access to the information relating to changes made to the Scheme.
- Even if Mrs R had been made aware in 1995 of the change in Regulations, she would still have had a break in pensionable service of over five years. As a result of this her SCS could not have been reinstated.
- NHSBSA met its disclosure obligations when it instructed NHS employers to disseminate the relevant information and the booklet to its employees. NHSBSA contacted all relevant authorities to advise them of the changes and informed them of the steps those authorities would need to take in order to disseminate that information.
- The instruction given to each authority was sufficient in clarity and there was little doubt that the responsibility to send the booklet and relevant information to NHS employees, regarding the impending changes to the Scheme, lay with the relevant authority.
- In light of NHSBSA not being in a position to know about every NHS employee it was reasonable for NHSBSA to have required NHS employers to take responsibility for contacting all employees regarding the changes to the Scheme.
- The September and November 2007 retirement benefit statements were clear that Mrs R's NRA was age 60 and it was not reasonable for Mrs R to have disregarded these statements when she received the October 2008 retirement benefit statement. There was sufficient opportunity available to Mrs R to confirm the correct NRA with her NHS employer, or subsequently NHSBSA.
- In any event, the letter she received from NHSBSA dated 20 August 2013, confirmed her NRA as age 60.

28. Mrs R did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs R, through her representative, 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 R for completeness. These are as follows:-

- It is relevant that a person who had previously held SCS who re-joined the Scheme before 6 March 1995 could have their SCS reinstated regardless of the length of their break in service.
- NHSBSA has confirmed that “it did not and does not have confirmation that the booklet was provided...” to Mrs R. Whilst it would not be proportionate for NHSBSA to maintain a list of all the employees to whom the booklet was sent without confirmation from the individual employers that it has followed NHSBSA’s instructions NHSBSA cannot be certain that it had, therefore, discharged its obligations.
- The fact that NHSBSA are unable to provide a single document to confirm its asserted position suggests, on the balance of probabilities, that its position was not communicated to the individual employers.
- Mrs R contacted NHSBSA several times before 12 February 2013. She called the NHSBSA helpline on the same day she received the Choice statement, as well as writing to NHSBSA.
- There has been no explanation as to how Mrs R was provided with two estimates showing different retirement ages (55 and 60). This is evidence that NHSBSA were unclear as to the status of Mrs R’s SCS which, chronologically, can be traced back to the period when the SCS changes were brought in.
- Mrs R did not disregard the pension statements she received in September and November 2007, as they had been provided at her request. Mrs R had always assumed that, regardless of her believing that she had SCS, she would likely work until she was 60.
- The October 2008 pension estimate was produced by NHSBSA not by Mrs R’s employer as evidenced by the footer on the estimate, and Mrs R’s written request dated 29 September 2008, which was sent directly to NHSBSA.
- Mrs R wished to see how her pension estimate would differ if she chose to retire at age 55. This was the reason for her requesting pension estimates for both ages 55 and 60 in October 2008, both of which were provided. There was no reason for Mrs R to confirm the correct NRA as there was no confusion in her mind that she benefitted from SCS. Similarly, there was no mention by NHSBSA that Mrs R did not benefit from SCS and could not retire at age 55.
- Consideration should be given to the facts in the Pensions Ombudsman’s determination in PO-779 (Dunkley).

## Ombudsman's decision

29. Mrs R's complaint is that NHSBSA say that she is not eligible for SCS because she re-joined the Scheme after the regulations had changed on 6 March 1995, by which time her break in pensionable service was more than five years.
30. Mrs R opted out of the Scheme on 31 May 1986 and she re-joined the Scheme on 14 September 1998. Before 6 March 1995 there were no restrictions on the length of a break in service and the member re-joining the Scheme. So, for Mrs R to have regained her SCS status she needed to have re-joined the Scheme before 6 March 1995.
31. Mrs R maintains NHSBSA did not fulfil its obligations in relation to the Disclosure of Information regulations. The relevant regulations are The Occupational Pension Schemes (Disclosure of Information) Regulations 1986 (the **Disclosure Regulations**). Regulation 5(6) provides that 'reasonable steps' must be taken to disclose information about changes to a scheme. Given that NHSBSA wanted the information to be disseminated to current members, deferred members and potential members, in my opinion, it seems to be sensible to have taken the view that the simplest and most effective way of doing this was by asking NHS employers to impart the information because it is the employers who would be in possession of the information to be able to do so.
32. In addition to posting this information on its own website NHSBSA asked employers to make sure that the changes were well publicised, in staff canteens, common rooms and on staff bulletin boards etc. NHSBSA were advised that the Royal College of Nursing and union bodies also publicised the changes in their own bulletins and printed literature. In my view, NHSBSA not only took reasonable steps, as required by the Disclosure Regulations, to ensure the information about the abolition of SCS reached relevant NHS employees but also satisfied themselves that the information was available from other sources too. I conclude that NHSBSA took sufficient action to comply with the Occupational Pension Schemes (Disclosure of Information) Regulations 1986.
33. Mrs R suggests that because NHSBSA is unable to provide confirmation from NHS employers that its instructions were carried out this implies that it did not issue the instruction in the first place. I find it unlikely that NHSBSA would be able to provide the wealth of evidence it has about the changes to the Scheme, effective from 6 March 1995, if they had not been produced and issued at that time. I accept NHSBSA's submission that it would not have been practical to have kept a list of all the NHS employers the literature was sent to any more than it would have been practical to have expected every NHS employer to have confirmed they had followed the instructions given. I conclude that, on the balance of probabilities, the information was provided by NHSBSA to Mrs R's NHS employer in 1994.

34. Mrs R believes that NHSBSA should have written to all relevant individuals to impart the information. She says that she had kept in contact with NHSBSA over the years and so NHSBSA would have been in possession of her current address. As I have concluded above, NHSBSA took the simplest and most practical route to reach as many relevant people as possible by asking NHS employers to impart the information about changes to the Scheme. It is not therefore relevant to this complaint whether or not NHSBSA could have sent the information directly to Mrs R.
35. Mrs R says there has been no explanation as to how she was provided with two estimates showing different retirement ages of 55 and 60. She says that this is evidence that NHSBSA were unclear as to her SCS status. The estimates were produced as a result of Mrs R's request in her letter of 29 September 2008 in which she requests "a pension forecast showing aged 55 and 60 years". Given that all the other statements, save for the one Mrs R specifically requested, refer to her NRA as age 60 I do not find that NHSBSA were unclear as to Mrs R's eligibility for SCS.
36. Mrs R submits that she had no reason to confirm the correct NRA as there was no confusion in her mind that she benefitted from SCS. She says she did not disregard the pension statements she received in September and November 2007 as they had been provided at her request. I accept Mrs R's point that she was unlikely to disregard statements that she herself had requested but that comment does not support her assertion that "there was no doubt in her mind that she benefitted from SCS." If Mrs R was certain that she was entitled to retire at age 55, on unreduced benefits, then surely it would have been reasonable to have queried the information within the statements she had requested as it clearly didn't accord with her understanding.
37. Mrs R has said that the facts in a previous Ombudsman determination (Dunkley PO-779) are also relevant to her case. In that case the Ombudsman found the NHS Pensions Agency (now NHSBSA) had a duty (under Regulation 5 of the Occupational Pension Schemes (Disclosure of Information) Regulation 1986) to take such steps as were reasonably practicable to notify deferred members that special class status would be lost on re-joining the Scheme after 5 March 1995 following a break of more than five years. I have addressed this point above and have concluded that NHSBSA did comply with Regulation 5 of the Occupational Pension Schemes (Disclosure of Information) Regulation 1986). However, that is where the similarity ends as Mrs Dunkley had left NHS employment and Mrs R remained in NHS employment.
38. For the reasons given above I do not uphold Mrs R's complaint.

**Anthony Arter**

Pensions Ombudsman  
18 September 2017