

Ombudsman's Determination

Applicant	Mrs Y
Scheme	NHS Pension Scheme Scotland (the Scheme)
Respondents	NHS Borders Scottish Public Pensions Agency (SPPA)

Outcome

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

Complaint summary

3. Mrs Y has complained that her pension is subject to an early retirement reduction because she retired at age 55. Mrs Y believed that she held Mental Health Officer (**MHO**) status, so she should not be subject to these reductions.

Background information, including submissions from the parties

4. Mrs Y re-joined the Scheme in August 1996. At that time MHO status was defined in regulation R2 and R3 of the NHS Superannuation Scheme (Scotland) Regulations 1995 (SI 1995/365) (**the Regulations**). The relevant parts of the Regulations are set out in the Appendix to this Determination. The Regulations stipulate that the normal retirement age for members of the Scheme is 60. However, under certain circumstances, members with MHO status are permitted to retire early at age 55, without a reduction to their pension entitlement.

5. Mrs Y's membership history for the Scheme is as follows:

Date from	Date to	Employer	Part time service	Whole time service	MHO
03/06/83	22/07/88	NHS Borders		5 years 50 days	Yes
06/02/96	12/08/96	Transfer in		0 years 188 days	No
13/08/96	01/01/01	NHS Border	0 years 60 days		No
1/11/96	10/06/98	NHS Borders	0 years 40 days		No
22/09/97	06/02/98	NHS Borders	0 years 57 days		No
17/06/98	15/10/01	NHS Borders	1 year 90 days		No
16/10/01	31/03/02	NHS Borders		0 years 167 days	No
01/04/02	31/03/16	NHS Borders	11 years 93 days		No

For a contract running from 6 October 2003 until 5 October 2021, Mrs Y opted to purchase additional service.

6. Prior to April 1973, part-time employees were unable to join the Scheme. From 1 April 1973, only employees who worked more than half the conditioned hours for their grade could elect to join the Scheme.
7. After leaving the Scheme in July 1988, Mrs Y re-joined the Scheme on 13 August 1996. She also transferred in some service from Friends Provident, the Scheme's former administrator, for her period of employment from 6 February 1996 to 12 August 1996.
8. Mrs Y sent information to SPPA which showed she was employed in 1991, in a part time position. However, SPPA's records showed that Mrs Y was not contributing to the Scheme for that role.
9. Mrs Y started receiving her pension benefits in 2016, when she turned age 55. It was at this point that she discovered that SPPA was reducing her pension, because she did not hold MHO status.
10. Mrs Y complained through the Scheme's internal dispute resolution procedure (IDRP).
11. On 1 June 2016, SPPA wrote to Mrs Y with its first stage decision and said she was not a member of the Scheme from 22 July 1988 until 13 August 1996. Therefore, she had a break in service of 8 years and 23 days. In accordance with the Regulations, as she had a break in service of over five years, she did not hold the right to retain MHO status.

12. Mrs Y appealed the decision, the letter is not dated, but this was to invoke stage two of the IDRP. She asked for MHO status to be reinstated, but if this could not happen then she believed she should be considered for special class status as she had worked in mental health or learning disabilities since 1982. The only break in employment she had was when she had her three children and she had approximately a year off for each child. However, she agreed that she was not a member of the Scheme when part-time employees were not able to join. She provided evidence of the contracts she was given in 1989 and 1991, which evidenced she was not allowed to pay into the Scheme at the time. She had no recollection of being told she could join prior to 1996.
13. SPPA provided its second stage IDRP response on 15 December 2016. It went into some detail concerning the judgment in *Preston v Wolverhampton Healthcare NHS Trust and others [2001] UKHL 5, (Preston)* where the House of Lords determined that all part-time employees should be allowed to be members of the Scheme. Further, it explained that an Employment Tribunal, held in 1999, determined that it was indirect discrimination not to allow part-time staff MHO status. However, SPPA concluded that Mrs Y was not entitled to MHO status under the Regulations because she had a break in service of over five years. It also said that there was no evidence of Mrs Y being told she was unable to join the Scheme after April 1991. NHS Borders, her employer, confirmed it provided all the relevant information when part-time employees were able to join the Scheme.
14. Mrs Y raised a complaint with NHS Borders. The decision maker for NHS Borders issued the following response on 17 November 2017:

“I have reviewed our records within NHS Borders and compared this against the information held by SPPA. I also had the information you kindly gave me over the telephone. My understanding is that during your employment pre-1988 you held MHO status, however this was removed following a break in service of more than five years before you re-joined the superannuation scheme in 1996.

I have established that you did work for us in the period in between as you joined the nurse bank in 1989 before taking up a 13.5 hour post in Mountview on 11 February 1991, which you continued to do...until 17 October 1994. I have learnt that at this time to be eligible to join the superannuation scheme you had to work a minimum of 0.5 wte (18.75 hours) and this would be the reason you were not entered into the scheme at this time. Changes to the superannuation scheme occurred prior to your return in 1996 which opened up the scheme to employees although no new members were eligible for MHO status.”
15. Mrs Y remained dissatisfied and brought her complaint to the Pensions Ombudsman to be independently reviewed.

16. As part of this Office's investigation, SPPA provided its formal response to the complaint.
17. It was obviously through no fault of Mrs Y that part-time employees were ineligible to join the Scheme for a period of time. So, as part of the investigation, SPPA was asked to explain whether any allowance was made for part-time staff with a break in service.
18. SPPA remained of the view that Mrs Y was not eligible for MHO status, because she had a break in service of over five years. SPPA acknowledged that Mrs Y was paying increased contributions but explained that the reason for this was that it was agreed, on 6 October 2003, that Mrs Y could purchase additional pensionable service of 7 years and 138 days, for a pension to come into payment at age 60. No part of the agreement said Mrs Y could retire at age 55, without being subject to early retirement reductions.
19. Preston determined that part-time employees should be able to participate in an occupational pension scheme. This meant any members excluded from the Scheme, because they worked less than half of their full-time hours, could apply to buy back service from 8 April 1976 to 31 March 1991. SPPA confirmed that NHS Borders received the circular to inform employees of the changes to the pension rules which allowed part-time employees to join the Scheme.
20. NHS Borders also confirmed it received leaflets from SPPA, to provide to part-time members, making them aware that they could join the Scheme. The leaflet included a section to be returned to the employer, if a part-time worker wanted to join the Scheme. NHS Borders said it had not received any indication that Mrs Y wanted to re-join the Scheme until August 1996.
21. In 1999, there was an Employment Tribunal, SPPA has said it is unable to provide full details of this, because the tribunal was over six years ago. The Tribunal found that it was indirect discrimination for a part-time employee not to hold MHO status, purely because they were a part-time worker. Therefore, MHO status was backdated to 8 April 1976, for part-time members who made a valid application, and were contributing to the 1995 Section of the Scheme on 14 January 1999. For this defence, a member would need to join the Scheme as soon as they were eligible. SPPA said that as Mrs Y did not re-join the Scheme as soon as she was able, her break in service of over five years still remained. Therefore, it was of the view that she could not have MHO status reinstated.

Adjudicator's Opinion

22. Mrs Y's complaint was considered by one of our Adjudicators who concluded that no further action was required by NHS Borders or SPPA. The Adjudicator's findings are summarised below:-

- Section R2 of the Regulations lays down if a person had a break in pensionable employment of over five years then, that person was no longer able to retain MHO status.
 - Mrs Y had a break in service from 1988 to 1996. In 1988, Mrs Y left the Scheme because she began employment in part-time roles. If a person was working less than half the hours of a normal full-time employee, then they were not eligible to be a member of the Scheme. Mrs Y did not work the requisite minimum hours, so, for the purpose of the Regulations, she did have a break in pensionable employment of over five years.
 - Under Preston, the court determined that part-time employees should be able to join occupational pension schemes. Because of this judgment, SPPA was under an obligation to allow part-time employees to join the Scheme. It also had to allow part-time employees the option to buy back service from 8 April 1976 to 31 March 1991.
 - At that time, Mrs Y was working for NHS Borders, but was not a member of the Scheme. SPPA sent a mailshot out to all employers, notifying them of the changes in pensions law, including that part-time employees were able to join the Scheme. SPPA also included a leaflet for members to complete if they chose to join the Scheme. NHS Borders confirmed that it received the information from the SPPA, and that this would have been shared with all part-time employees.
 - Mrs Y disputes that she was told she could re-join the Scheme in 1991. However, NHS Borders would have had a process in place whereby it notified members of the Scheme about changes. That was supported by the fact NHS Borders had confirmed that it received the information from the SPPA. It was more likely that the information was available to Mrs Y, but was overlooked in error.
 - Mrs Y did not contact the SPPA or NHS Borders until August 1996, when she re-joined the Scheme. Mrs Y did not re-join the Scheme as soon as the option was available to her, therefore, it was reasonable for SPPA to conclude that her break in service was over five years, so she could not hold MHO status.
 - SPPA also mentioned the Employment Tribunal which decided that it was indirect discrimination not to allow part-time employees MHO status. This did not support Mrs Y's case for MHO status because, in order for her to rely on the Employment Tribunal, the employee needed to become a member of the Scheme as soon as they were eligible to do so. Mrs Y took a number of years to re-join the Scheme. Therefore, SPPA had not done anything wrong in deciding not to grant her MHO status.
23. Mrs Y did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mrs Y provided her further comments which do not change the outcome. She said the following:-

- She did not receive information about being able to re-join the Scheme, until 1996 when she started a new contract. This was because she worked 25 miles away from a main base, meaning no information was passed to her about re-joining the Scheme.
- From 1986 to 1993, she worked in contracts that specifically said she could not be a member of the Scheme.
- She was always a member of the Scheme when she was aware she was able to be.

24. I agree with the Adjudicator's Opinion, and I will only respond to the key points made by Mrs Y for completeness.

Ombudsman's decision

25. There is no dispute that the Regulations that govern the Scheme provide that if a member has a break in service of over five years, then they will not be eligible to retain MHO status. Mrs Y had a break in service from 22 July 1988 to 13 August 1996, which is over five years. SPPA has merely applied the Regulations in making the decision that Mrs Y cannot hold MHO status. This is the correct decision, as it cannot be argued that the break in service was under five years.
26. However, the complaint also concerns whether Mrs Y was made aware that she could have re-joined the Scheme, and whether she would have re-joined the Scheme sooner, had she known this option was available to her.
27. SPPA has explained that in 1991, when pension laws changed and the Scheme was opened to part-time members, that a mailshot was sent to all employers. It was then for the employers to pass the information on to all part-time employees. SPPA has confirmed that NHS Borders, Mrs Y's employer, was sent the information and NHS Borders has confirmed this was received and shared with all part-time employees.
28. I understand Mrs Y has said she did not receive any information about being able to re-join the Scheme. She has said this is because she worked 25 miles from the main base. However, I cannot exclude that the information might have been overlooked by Mrs Y in error, and, on the balance of probabilities, given that NHS Borders has said the information was received from SPPA and shared with employees, I believe that it is more likely than not that Mrs Y overlooked the information.
29. Mrs Y contends that from 1986 to 1993, she worked under contracts that specifically said she could not be a member of the Scheme. Mrs Y is correct because her contract was a part-time one. However, from 1991 when the pension laws changed and the Scheme was opened to part-time employees, she could have re-joined the Scheme from that point onwards.

30. Mrs Y transferred service for her period of employment from 6 February 1996 to 12 August 1996. Even if this service is included, she still would have had a break in service of over five years. Therefore, I do not believe the benefits transferred into the Scheme hold any weight to her complaint.
31. When Mrs Y transferred her benefits into the Scheme, it does not appear that she asked any questions about MHO status. It was only when she retired at age 55, that she queried the early retirement reductions. I do not believe it was reasonable for Mrs Y to assume she held MHO status, when she did not query this when she re-joined the Scheme. She should have been aware that as she had a break in service, and all guidance relating to MHO status shows that a break in service may lead to MHO status not being granted, that she would have been affected. Had she queried this when she re-joined the Scheme in August 1996, SPPA would have considered her application and told her that because her break in service was over five years, she would not be eligible to hold MHO status.
32. Finally, Mrs Y purchased additional service from 6 October 2003 until 5 October 2021, this clearly showed that Mrs Y's final day of employment was expected to be 5 October 2021. This is the day before her 60th birthday. Meaning her retirement age was expected to be 60, so she would have been subject to early retirement deductions if she retired earlier than this date. There is nothing to suggest that at the time of her election to purchase additional years, she queried her MHO status.
33. I do not uphold Mrs Y's complaint.

Anthony Arter

Pensions Ombudsman
20 November 2018

Appendix

The NHS Superannuation Scheme (Scotland) 1995

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 the scheme arising out of a previous period in which the member was engaged in such employment and at no time since the last occasion on which the member was so engaged has 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 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 of 5 years or more ending after the coming into force of these Regulations.

(3) Where this regulations applies-

(a) regulation E1 (normal retirement pension) will apply to the member as if the references, in paragraph (1) of that regulation, to age 60 were a reference to age 55;

(b) if the member leaves NHS employment because of redundancy but without becoming entitled to an immediate pension under regulation E3 (early retirement pension (redundancy etc.)), regulation E6 (preserved pension) will apply as if the reference in that regulation to age 60 were references to age 55.

(4) Where, in accordance with paragraph (3), a member becomes entitled to receive a pension before age 60, the amount payable shall-

(a) in the case of a female member, be calculated by reference to all of her pensionable service under the scheme; and

(b) in the case of a male member, be calculated only by reference to pensionable service on or after 17th May 1990.

(5) Subject to paragraph (6), if the member chooses to pay for additional service or unreduced retirement lump sum by regular additional contributions under regulation Q5, contributions may be made from the next birthday following the exercise of the right to do so, until the member's 55th, 60th or 65th birthday, whichever the member chooses, and that date will be the chosen date under regulation Q5(3).

(6) The period for which a member chooses to pay regular additional contributions under regulation Q5 must be at least 2 years.

(7) for the purpose of paragraph (1), “pensionable employment” includes employment that qualified the member for benefit under a health service scheme from which a transfer payment has been made to the scheme.

(8) For the purpose of paragraph (1) and (2), a person shall not be treated as having ceased to be in pensionable employment during any period in respect of which he is a member of a health service scheme.

(9) For the purpose of calculating the 5 year period referred to in paragraph (1)(b), “pensionable employment” does not include additional service bought under regulation Q1 or a period in respect of which a refund of contributions has been paid under election E9.

R3 Mental health officers

(1) Subject to paragraph (2), this regulation applies to a member who at the coming into force of these Regulations-

(a) is in pensionable employment under the scheme as a mental health officer, or

(b) has accrued rights to benefits under the scheme arising out of a previous period in which he was engaged in such employment and at no time since the last occasion on which he was so engaged has he had a break in pensionable employment for any one period of 5 years or more.

(2) Subject to paragraph (3), this regulation shall cease to apply if the member has a break in pensionable employment for any period of 5 years or more ending after the coming into force of these Regulations.

(3) Paragraph (2) shall be without prejudice to the operation of paragraph (5)(a) in relation to any period prior to this regulation ceasing to apply.

(4) for the purpose of paragraphs (1) and (2), a person shall not be treated as having had a break in pensionable employment during any period in respect of which he is a member of a health service scheme.

(5) Subject to paragraphs (6) to (8), where this regulation applies-

(a) each complete year of the member’s pensionable service as a mental health officer in excess of 20 years will count as 2 years’ pensionable service; and

(b) where there is 20 years or more of such pensionable service the member shall be entitled to a pension under regulation E1 (normal retirement pension) on leaving NHS employment at any time after reaching age 55 but only if the member was in pensionable employment as a mental health officer immediately before leaving.