

Ombudsman's Determination

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

Outcome

1. Mrs S' complaint is upheld and to put matters right NHSBSA shall re-assess whether she is eligible for Special Class Status (**SCS**). NHSBSA should also pay Mrs S £1,000 for the serious distress and inconvenience she has suffered.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mrs S has complained that her SCS has been removed. This means if she chooses to retire at age 55, her pension will be subject to an early retirement reduction.

Background information, including submissions from the parties

4. A Scheme member who worked as a nurse, physiotherapist, midwife or health visitor and who comes within the provisions of SCS, as set out in the NHS Pension Scheme Regulations 1995 (**the Regulations**), has the option to retire at age 55 without a reduction to their pension. The relevant extract from the Regulations is set out in the Appendix 1. On 6 March 1995, SCS was abolished. Members of the Scheme who remained in the same job role, which previously held SCS, and did not have a break in pensionable employment of over five years, were eligible to retain SCS.
5. Mrs S' employment history was as follows:

Employer	From	To	Whole or part-time
Cheltenham & District Health Authority	17.08.1986	23.03.2000	Whole-time
NHS Gloucestershire	14.01.2002	31.03.2007	Part-time
NHS Gloucestershire	01.04.2007	31.03.2013	Whole-time

National Trust Development Authority	01.04.2013	Continuing	Whole-time
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6. Mrs S had always been of the view that she held SCS. On 22 August 2016, Mrs S contacted NHSBSA and queried why her SCS had been removed. She believed it had been done erroneously. She sent job descriptions which demonstrated that it was essential to hold clinical registration. She also explained that all her roles were clinical nursing positions. She had verbal assurance from her employer, NHS Gloucestershire, that SCS applied but this did not seem to be the case. Therefore, she asked NHSBSA to reinstate the SCS.
7. NHSBSA responded to the letter on 14 October 2016. It explained that Mrs S last held SCS on 23 March 2000. On 14 January 2002, NHS Gloucestershire updated her roles as administrative or managerial, which meant she was not employed in a nursing capacity. NHSBSA went on to explain that in order to retain SCS, it needed to be continuous. As the records showed Mrs S did not hold SCS for her roles in 2002, then it was irrelevant whether she held this for her more recent roles. It said if Mrs S was able to prove she should have held SCS in her role in 2002, and continually, then it would re-assess whether or not she was eligible for SCS.
8. On 18 August 2016, NHS Gloucestershire wrote to NHSBSA. It enclosed job descriptions and confirmed that from 2002 to 2013, Mrs S worked in senior clinical nursing roles which attracted SCS. It became apparent that Mrs S' SCS was not recorded in error on the payroll and pensions system. It asked that SCS was reinstated for the period of 2002 to 2013.
9. Further to this on 25 November 2016, NHS Gloucestershire wrote to NHSBSA. It explained that Mrs S' roles from January 2002 to March 2013, were all clinical nursing roles that attracted SCS. It said the following:

“Project Manager, Clinical Governance, January 2002 – March 2003

Assistant Director of Service Development – Clinical Quality Governance,
March 2003 – June 2007

Deputy Director, Clinical Development and Engagement, June 2007 – June 2010

Deputy Director, Clinical Development and Nursing, June 2010 – March 2012

Deputy Director of Quality and Nursing, March 2012 – March 2013

From January 2002 – October 2006 [Mrs S'] employment attracted [SCS] from June 2007 – March 2013 has also been confirmed by the current CEO of [NHS Gloucestershire], along with relevant job descriptions for this period.

Despite [Mrs S'] considerable efforts it has not been possible to trace the job descriptions for the earlier period January 2002 – June 2007. These predecessor organisations no longer exist and she has been unable to retrieve her personal files. Therefore, NHS Pensions have agreed that this letter from us as Directors of Nursing in the NHS organisation that employed [Mrs S] over the period of 2000 – 2013, confirming that [Mrs S] held roles requiring her nursing qualification and that attracted special class would be acceptable evidence...

It has become apparent that [Mrs S' SCS] was not recorded in error on the payroll and pensions system during this time and we would ask that the [SCS] is appropriately reinstated for the period of 2002 – 2013."

10. Mrs S sent a letter to NHSBSA dated 28 November 2016. She provided further explanations about her job roles and requested that the SCS be reinstated.
11. NHSBSA wrote to Mrs S on 17 January 2017, and advised her that "without a job description, it has been decided that retention does not apply to the roles of Project Manager, Clinical Quality and Governance from January 2002 to March 2003...because it is a general management post." The letter said, even if Mrs S' more recent roles allowed retention of SCS, this would not be allowed as SCS needs to continue throughout all roles. Taking into consideration the period from January 2002 to March 2003 which did not attract SCS, it cannot be classed as continuous.
12. On 27 January 2017, Mrs S wrote to NHSBSA. She provided evidence including a letter signed by NHS Gloucestershire. This confirmed that for all the roles she worked in, it was an essential requirement to have a nursing qualification. She believed NHSBSA had not properly considered the evidence because it had taken quite some time for her employer from 15 years ago to confirm that a nursing qualification was an essential requirement for her job, and that it attracted SCS. She said that NHSBSA's decision was based on the job title alone, and consideration was not given to the fact that a nursing requirement was essential.
13. NHSBSA wrote to Mrs S on 9 March 2017, which she received by recorded delivery on 23 March 2017. It explained that NHSBSA was an administrative centre for England and Wales. It said it relied on information from NHS employers to be kept up to date. Mrs S was also informed that as she had a refund of contributions of £778.09 for her employment from 24 May 1982 to 22 December 1985, SCS could not be reinstated. However, NHSBSA acknowledged that Mrs S had been misinformed about this at an earlier date.
14. On 2 April 2017, Mrs S raised numerous concerns relating to how NHSBSA was dealing with her enquiry about SCS. She said her SCS was not recorded in 2002, which was an error, and that she should not be penalised for this. Mrs S also said the issue raised about the refund of contributions was completely irrelevant to her eligibility for SCS.

15. Mrs S wrote to NHSBSA on 4 April 2017, and requested that the complaint be dealt with under stage one of the Scheme's internal dispute resolution procedure (**IDRP**).
16. NHSBSA provided its stage one IDRP response on 2 June 2017. It apologised that the letter dated 9 March 2017 was only received on 23 March 2017, it explained that although it was written on 9 March 2017, it was only sent on 21 March 2017 because of an administrative oversight. NHSBSA apologised for the service Mrs S had received. It said that members of the 1995 section of the Scheme were able to retain SCS if they were working in general managerial roles where a nursing qualification was an essential requirement. NHSBSA stated that the period of employment from 1 April 2007 to 31 March 2013, did not satisfy the requirements for SCS because a nursing qualification was not a requirement. It also explained that the role from January 2002 to March 2003, did not satisfy the criteria because it was not a role based around a nursing qualification. NHSBSA explained that all the estimates she had received which had a retirement age of 55, had been issued by her employer, and not by NHSBSA.
17. After seeking the assistance of the Pensions Advisory Service, Mrs S wrote to NHSBSA on 10 August 2017, and said she wanted to raise her complaint under stage two of the IDRP.
18. NHSBSA responded on 12 October 2017. It said:

"That an individual with a nursing qualification and retained nursing registration does not give that individual an automatic right to SCS.

NHS Pensions has been provided with a copy of your job description...for the period June 2007 to June 2010...The job description refers to the clinical nature of the role and the person specification confirms that the post holder must have...NHS Clinical professional qualification...

That a "NHS Clinical professional qualification" is required means the post is not restricted to a nurse, as other suitably qualified NHS professionals could apply for and be appointed to this post. As a nursing qualification is not essential SCS cannot be retained."
19. Mrs S remained dissatisfied and brought her complaint to this office to be independently reviewed. She also enclosed a letter from NHS Gloucestershire which said:

"...As previously described in previous letter that I sent NHS Pensions [Mrs S] held a variety of senior nursing roles that required her to hold a current nursing registration and to use her nursing skills, knowledge and experience. The job descriptions for these roles included the essential requirement for the post holder to have a current clinical professional registration and to be a member of a relevant professional body. The qualification that [Mrs S] held was a registered nurse which is one of the classes that attracts SCS.

In addition, I would like to draw your attention to the fact that this job description set out the requirement for the post holder to deputise for the Director of Clinical Development and this Clinical Director was the Board Nurse. From October 2006 to March 2013 [Mrs S] was accountable to and deputised for the Director of Nursing and Clinical Development for [NHS Gloucestershire]. Therefore, in order for [Mrs S] to fulfil these duties it was essential that she was a nurse with current registration.”

Adjudicator’s Opinion

20. Mrs S’ complaint was considered by one of our Adjudicators who concluded that further action was required by NHSBSA. The Adjudicator’s findings are summarised below:-

- NHSBSA has agreed it took a considerable amount of time to consider Mrs S’ eligibility for SCS, however there is still a dispute as to whether or not Mrs S is eligible.
- The Regulations provide that for a person to receive SCS, they are required to work in a certain position for example, nurse, physiotherapist, midwife or health visitor.
- NHSBSA provided guidance for nurses going into general managerial roles, an extract is set out in Appendix 2. The guidance said if the new job role specified that it was a requirement to have a nursing qualification, then the individual was able to continue holding SCS.
- NHS Gloucestershire has sent numerous letters to NHSBSA saying it agrees her roles should hold SCS. The Adjudicator did not believe that NHSBSA has provided an adequate reason why it appears not to have taken this evidence into account when making its decision. This is despite the fact that NHSBSA says it is reliant on the information given to it by employers in relation to eligibility for SCS.
- The Adjudicator did not consider that the refund of contribution paid to Mrs S in relation to her membership from May 1982 to December 1985, was a block to her eligibility for SCS. Mrs S re-joined the Scheme in 1986 and at that time, SCS had not yet been abolished. Therefore, if her roles from 1986 onwards were eligible for SCS, she could potentially hold SCS despite the refund of contributions.
- The Adjudicator concluded that NHSBSA’s decision making process was flawed. Therefore, the Adjudicator recommended that NHSBSA reconsider Mrs S’ eligibility for SCS, and pay her £1,000 for the distress and inconvenience she has suffered.

21. NHSBSA and Mrs S did not accept the Adjudicator’s Opinion and the complaint was passed to me to consider.

22. NHSBSA said the following:-

- It believed the majority of Mrs S' complaint was in respect of her previous and current employers not following the procedures laid down when considering her retention for SCS.
- Mrs S' post of Deputy Director, Clinical Development and Engagement confirms that a "Clinical qualification" was essential. That meant a number of different clinical professionals could have applied for the role, including: a hospital doctor or dentist, clinical psychologist, occupational therapist, operating department practitioner, speech and language therapist, radiographer/radiotherapy, haematology, virology and pharmacy/pharmacist. Therefore, a nurse qualification was not an essential requirement.
- NHSBSA retain the final decision as to whether a member should retain SCS or not. NHSBSA said that NHS Gloucestershire should have checked with NHSBSA if SCS was to be retained.
- NHSBSA had no record of NHS Gloucestershire checking with NHSBSA whether SCS would be retained for the role of Deputy Director, Clinical Development and Engagement. Had NHS Gloucestershire checked with NHSBSA, it would have been told that retention was not appropriate for that role.
- As NHS Gloucestershire did not check whether the role retained SCS, it erroneously informed the next employers that Mrs S held SCS.
- As NHSBSA had received incorrect information from NHS Gloucestershire, it was of the view the SCS was still applicable, and no information about Mrs S' roles, were provided. Therefore, NHSBSA was not in a position to change her pension records.
- Mrs S referred to an email extract from NHS Gloucestershire, Finance Shared Service dated 18 February 2011. This confirmed that the pension estimate age was 55. The estimate would have been based on the incorrect information NHS Gloucestershire provided to NHSBSA.
- Information referring to Mrs S' responsibilities is contradicted in the job specification as it refers to the clinical nature of the role but does not specifically say nursing.
- It did not agree that the complaint warranted £1,000 for the distress and inconvenience Mrs S had suffered. It believed that £500 was a sufficient amount. NHSBSA did not believe it provided any misleading information that would have led Mrs S to believe she held SCS.

23. Mrs S said the following:-

- She was disappointed with the suggestion of NHSBSA “putting matters right” by re-assessing whether she should hold SCS or not.
- She believed there was no doubt that she should hold SCS and that her employers fully agree that she should.
- All the statements she has received have always said she was eligible for SCS, and showed the retirement age as 55.
- She is in no doubt that if NHSBSA review her case for SCS, this will result in the same outcome, and further distress and inconvenience.
- A determination is required confirming that she has SCS as she does not want a direction simply telling NHSBSA to reconsider its previous decisions.

24. The further comments 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 S and NHSBSA for completeness.

Ombudsman’s decision

25. On the balance of the information provided by NHSBSA, NHS Gloucestershire and Mrs S, I do not believe there is sufficient evidence to make a final decision on whether Mrs S is eligible for SCS or not. This is because NHSBSA and NHS Gloucestershire have not come to an agreement on the position. I appreciate the final decision maker is NHSBSA, but I do not consider it has properly taken into account all the information provided by NHS Gloucestershire.
26. NHSBSA has consistently said that Mrs S is not eligible for SCS. This is because it believes one of her earlier roles was a general managerial role. Therefore, it believes a nurse qualification was not an essential requirement. So, in accordance with the Regulations, Mrs S would not hold SCS.
27. However, NHS Gloucestershire has made the argument that for all of the roles Mrs S worked in, she would not have been a successful candidate had she not had her nursing experience and qualifications. This means that although the job specifications do not specifically say a nursing qualification was essential, NHS Gloucestershire would not have employed her within those roles, without her nursing qualifications. Essentially, NHS Gloucestershire is saying regardless of the job specification, a nursing qualification was essential. Therefore, Mrs S should not be penalised purely based on the job specification. NHS Gloucestershire has always been of the opinion that she should hold the status.
28. I note that both NHSBSA and NHS Gloucestershire have been consistent with their opinions relating to Mrs S’ SCS, and whether or not she holds the status. There has been no detailed explanation why both decisions are so different. NHSBSA has not

provided an adequate explanation of why it does not accept NHS Gloucestershire's stance regarding Mrs S not being a successful candidate unless she held nursing qualifications. Further, NHSBSA has not communicated with NHS Gloucestershire or Mrs S to explain why it is not accepting this point.

29. Until the argument raised by NHS Gloucestershire is properly considered, I cannot get involved in the decision-making process or determine that Mrs S does or does not hold SCS. I appreciate this is not the outcome Mrs S is seeking, and I understand that Mrs S would like me to direct NHSBSA to grant her SCS.
30. NHSBSA need to complete a full investigation and explain its decision to Mrs S in detail. If applicable, it should include the full reasons why it does not accept NHS Gloucestershire's clear evidence that Mrs S should hold SCS as she was required to hold a nursing qualification, which, of course, she does.
31. If NHSBSA remains of the view that Mrs S is not eligible for SCS then she will be able to bring a new complaint to the Pensions Ombudsman, once she has completed the IDRP. This should provide enough evidence that is clear and consistent for me to make a decision whether SCS should be granted or not. But, as previously explained, I do not consider the evidence to be clear at this stage.
32. I sympathise with Mrs S because she is receiving conflicting information from NHSBSA and NHS Gloucestershire. So, it is understandable that she is utterly frustrated with how the matter is being dealt with.
33. Further to this, prior to her complaint she had always thought she held SCS, and her benefit statements showed the retirement age of 55.
34. This complaint has had a severe effect on Mrs S' health. To the point where she has been signed off with clinical depression. Therefore, I do not agree with NHSBSA's argument that she has not suffered a serious level of distress and inconvenience. I believe an award of £1,000 is completely reasonable given the circumstances.
35. I uphold Mrs S' complaint.

Directions

36. Within 21 days, NHSBSA is to complete a full and substantive investigation into Mrs S' entitlement for SCS.
37. Once this is completed, if it remains of the view that she does not hold SCS, it shall provide Mrs S with the reasons it does not agree with NHS Gloucestershire's position.

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38. Within 21 days, NHSBSA shall pay Mrs S £1,000 for the significant distress and inconvenience she has suffered.

Anthony Arter

Pensions Ombudsman
5 December 2018

Appendix 1

NHS Pension Scheme Regulations 1995 - SI 1995/300

R2 Nurses, physiotherapists, midwives and health visitors

(1) Subject to paragraph (2), this regulation applied 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 right 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 he was so engaged has he 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 his pension employment as a nurse, physiotherapist, midwife or health visitor.

(2) This regulation shall cease to apply if the member has break in pensionable employment for any on 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 pensions) will apply to the member as if the reference in paragraph (1) of that regulation, to age 60, were a reference to age 55;

Appendix 2

Special Class Status – historical

Which grades make up the special class

- Nurses
- Physiotherapists
- Midwives
- Health visitors

Criteria for retention to SCS

In order to retain the status in a senior nurse management post a member must hold a nursing qualification and that nursing qualification must be an essential requirement for the role, which must be demonstrated in the job specification/person specification.

A member must have held the status in the post directly before the post in which they wish to 'retain' the status.

Decision making

The decision about whether a member can retain SCS in a senior nurse management post up to the grade of director of nursing can be made by an employer. For all general management posts, and employer will contact NHS Pensions for advice.

A member who believes they fulfil the criteria to retain SCS should therefore contact their employer in the first instance.

Investigation into retention of SCS should be made before, or at the time a member commences a role. NHS Pensions would not expect these investigations to be commenced just prior to retirement.

When deciding whether a member can retain SCS, consideration is being given to whether the particular member can retain SCS in that role. This does not necessarily mean that SCS would apply automatically to any other members subsequently undertaking the role.

In all cases of retention NHS Pensions have the right to make the final decision.