

Ombudsman's Determination

Applicant	Ms N
Scheme	NHS Pension Scheme (the Scheme)
Respondent	NHS Business Services Authority (NHS BSA)

Complaint Summary

Ms N has complained that NHS BSA has said she is not eligible to retain Special Class Status (**SCS**). This means if she decides to retire at age 55, she will be subject to retirement reductions.

Summary of the Ombudsman's Determination and reasons

The complaint should be upheld against NHS BSA, and within 28 days it should review its decision not to allow Ms N retention of SCS. This is because there are flaws in its decision-making process and it did not follow the approach set out in the judgment of NHS BSA v Williams [2017] ICR 327 (**NHS BSA v Williams**).

Detailed Determination

Material facts

1. The NHS Pension Scheme Regulations 1995 (**the Regulations**, Appendix one) set out the requirement for SCS. It lays down that a person working as a midwife, physiotherapist, nurse or health visitor, shall have the option to retire at age 55, without being subject to an early retirement reduction.
2. On 6 March 1995, SCS was abolished. Members of the Scheme who remained in the same job role who previously held SCS and did not have a break in service of over five years, were able to retain SCS.
3. NHS BSA's website had a factsheet called "NHS Pensions – Special Class Status (1995 Section only)" (**the Factsheet**), that provided information for members of the Scheme who changed roles and explained when SCS could be retained. It said:

"Criteria for retention of Special Class Status

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.

General management posts

Members appointed to general management post will not normally be allowed to retain the status. However, when a nursing qualification is a requirement and a member undertakes functions in addition to general management duties such as a continuing commitment to nursing duties, providing professional advice on a nursing matter or and advisor or supervisory role within nursing, the status can be considered.

Decision making

The decision about whether a member can retain Special Class status in a senior nursing management post up to the grade of director at nursing can be made by the employer. For all general managerial posts an employer will contact NHS Pensions for advice.

A member who believe they fulfil the criteria to retain Special Class status should therefore contact their employer in the first instance.

Investigation into retention of Special Class status should be made before, or at the time a member commences a role. NHS Pensions would not expect these investigation to commence just prior to retirement.

When deciding whether a member can retain Special Class status consideration is being given to whether the particular member can retain Special Class status in that role. It does not necessarily mean that special class status would apply automatically to any other member subsequently undertaking the role.

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

4. In October 1984, Ms N began working for NHS as a nurse. She was granted SCS in line with section R2 of the Regulations.
5. In March 2013, Ms N applied for the role of Head of Quality Governance. In doing so, she queried whether she would be able to retain SCS if she accepted the new role, and she says her employer confirmed she would.
6. On 10 June 2013, Ms N accepted the role of Head of Quality and Governance, and NHS BSA said she lost SCS on that date. NHS BSA argued that this was because Ms N did not meet the criteria for retention. In particular, the job specification for Head of Quality and Governance (Appendix two) did not include a nursing qualification as an essential requirement.
7. In November 2013, NHS Shared Business Services (**NHS SBS**) contacted NHS BSA to check whether Ms N was able to retain SCS in her new role. NHS BSA said that it confirmed to NHS SBS that Ms N was not able to retain SCS in her new role.
8. Ms N's employer contacted NHS SBS and requested that Ms N's SCS be reinstated. The evidence indicates that in February 2014, Ms N's employment records were amended to show that she held SCS. This was without NHS BSA's agreement. NHS BSA has argued that NHS SBS is a separate party and acted without its agreement.
9. On 1 May 2015, Ms N moved roles, but her job description remained the same. As such, both parties agree that this would not have affected whether she retained SCS.
10. On 11 March 2016, Ms N's employment terms were revised, and a new employment contract was signed. Ms N noted at this time that her SCS had been removed from her record again.
11. In April 2016, Ms N's Head of Human Resources request that her SCS be reinstated. NHS BSA subsequently refused the request, and Ms N raised a forma complaint through the Scheme's internal dispute resolution procedure (**IDRP**).
12. Whilst Ms N was going through IDRP, in May 2018, she accepted a new role as Head of Quality (Acute and Community). Her employer said that she could retain SCS in the role.
13. NHS BSA has argued that Ms N cannot retain SCS. In particular, it has highlighted that SCS cannot be retained in a role where it was not held in the role immediately preceding it, as per the Factsheet. It has also said that because Ms N did not hold

SCS in her role as Head of Quality and Governance, she cannot retain SCS in her role as Head of Quality (Acute and Community).

Summary of Ms N's position

14. Ms N has confirmed that neither of her managerial roles had involved hands-on nursing. However, she has raised a number of arguments in support of her position that she should have SCS and urged our office to take a “purposive” approach to her case.
15. SCS retention has been granted to others who carry out/have carried out a similar role to Ms N. In particular, Ms N has provided details of Ms G's employment history and SCS. Ms G has confirmed that her circumstances may be considered for the purpose of the investigation, and she had confirmed that she retains SCS in her role as Head of Quality (Primary Care).
16. Ms N has argued that all her employers believe that nursing skills were essential for all of her roles.
17. SCS was considered in NHS BSA v Williams, and the court said that whether a person has a nurse qualification should not be considered solely with reference to their qualifications, but also their job function, title and description.
18. The Factsheet states that Ms N's employer can make the decision whether her SCS will be retained, and she had been told each time she accepted a new role that it has been.
19. Ms N was able to maintain her Nursing and Midwifery Council (**NMC**) registration in her roles, meaning she has always been a qualified nurse.

Summary of NHS BSA's position

20. SCS retention is considered on an individual basis, and internal guidelines are used to ensure consistency. The guidelines are reflected in the Factsheet. Ms G's circumstances differ from Ms N's, which is why she has SCS, but Ms N does not. Ms G held SCS in her preceding roles, and it is an essential requirement of Ms G's current role that she holds a nursing qualification.
21. NHS BSA has ultimate authority to decide whether SCS can be retained, under Regulation R2. Furthermore, the Factsheet confirms that employers must remit the final decision for SCS retention to NHS BSA.
22. NHS BSA has highlighted that NHS BSA v Williams considered whether the applicant ought to have qualified for SCS; it did not consider retention of SCS, and so the judgment was not applicable to Ms N's circumstances.
23. The Factsheet on SCS retention state that the ultimate decision rests with NHS BSA and employers ought to check their decision with NHS BSA before telling a Scheme member that SCS will be retained.

24. Whilst Mr N may have been able to maintain her NMC registration in her roles, it did not mean it was an essential requirement of the role.
25. NHS BSA has said that Ms N did not qualify for SCS retention in her role as Head of Quality Governance, as a nursing qualification was not an essential requirement. The position was strategic, stretching beyond the field of nursing. Whilst NMC registration was a desired criterion, people who were registered in the Health and Care Professional Council (**HCPC**), could also be successful in getting the roles. HCPC registration could be acquired by a wide range of healthcare professionals, such as speech therapist and operating department practitioners, who would not be eligible for SCS under the Regulations.
26. NHS BSA agrees that Ms N's current role, Head of Quality (Acute and Community), may qualify for SCS because a nursing qualification is an essential requirement. However, in order to retain SCS, Ms N would have needed SCS in her immediately preceding role, for example Head of Governance. As explained above, Ms N was not eligible for SCS in her previous role and so she cannot have SCS in her current role.

Conclusions

27. Ms N is dissatisfied that if she chooses to retire at age 55, her benefits will be subject to an early retirement reduction. This is because NHS BSA has decided that she is not eligible to retain SCS.
28. Section R2 of the Regulations provides that a person in pensionable employment as a nurse, physiotherapist, midwife or health visitor, is able to retire at age 55, without being subject to an early retirement reduction; this is SCS.
29. The retention of SCS is set out in the Regulations, but only to the extent of the requirement not have had a break in pensionable employment for any one period of five years or more.
30. The Regulations do not set out any different position in relation to retention of SCS specifically when an individual member moved into a managerial position. The criteria applied to that specific situation is explained in the Factsheet, which states that in order to retain the status in a general 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. The Factsheet also confirms that a member must have held the status in a post directly before the post in which they wish to retain the status. Neither the requirement to hold a nursing qualification, not the requirement to continuously hold SCS, and mentioned within the Regulations. NHS BSA has set up guidance to implement the Regulations, which is in itself not an unreasonable approach. However, what it has set up is not in line with R2 and the approach set out in the case of NHS BSA v Williams.
31. In NHS BSA v Williams, the court was asked whether Mrs Williams was 'in pensionable employment as a nurse' within the meaning of R2 of the Regulations.

She had no nursing qualifications and was working as a nursery nurse in a hospital. This judgment explained that it is not reasonable to rely solely on whether the person had nursing qualifications. A decision maker needs to consider exactly what type of work was undertaken and whether nursing is included in this. I do not believe that NHS BSA has adequately investigated the tasks Ms N completes in her roles or whether they include nursing. Therefore, this needs to be re-considered and Ms N should be provided with a detailed report of her roles and tasks, together with an explanation of why they are not classed as nursing, if that is in fact the case.

32. I do not consider that NHS BSA adequately addressed the reasons Ms N cannot continue to hold SCS under the terms of R2 and in applying the retention policy. It has not had regard to the interpretive approach that the court have directed in respect of R2. Its decision seems to be based solely on whether it was an essential requirement to hold a nursing qualification, which is not in line with the NHS BSA v Williams judgment. NHS BSA contended that NHS BSA v Williams considered whether applicant ought to have qualified for SCS; it did not consider retention of SCS, and so the judgment was not applicable to Ms N's circumstances. Since R2 is the only regulation governing SCS I cannot see any basis on which the distinction is sustainable.
33. The final decision for SCS is with NHS BSA, which is why the decision should be remitted back to it.
34. Turning to the evidence about Ms G, Ms N contends that their career paths have been the same. However, Ms G is still being granted SCS and Ms N is not. Ms N's role was Head of Quality and Governance, for which a nursing qualification was not an essential requirement; Ms G worked as Head of Quality (Primary Care), a role for which a nursing qualification was an essential requirement. For the reasons stated above I do not consider a comparison of these two roles to be conclusive of Ms N's entitlement. The requirement is to look at the substance of Ms N's role and whether her situation fulfils the requirements of the Regulations or not.
35. Ms N maintains that for her employment as Head of Quality and Governance, it was an essential requirement to have a nursing qualification. She also believes her employer would agree with this. I have already found that NHS BSA has the obligation to interpret the Regulations. However, it is also bound to consider factual matters within the knowledge of the employer when doing so. If NHS BSA ultimately disagrees with Ms N's employer's assessment of her status, it should explain why it does so.
36. Finally, Ms N has said if she had a break in pensionable service of less than five years, then if her current role allows SCS retention then it should be granted. Ms N took up the role of Head of Quality and Governance in June 2013 and she took up the role of Head of Quality (Acute and Community) in May 2018. This was just under five years. However, NHS BSA has said that SCS can only be retained if all of the intervening roles continue to attract SCS. I understand that Ms N had two roles, prior to the Head of Quality (Acute and Community) role. According to NHS BSA neither

attracted SCS. However, I do not believe that NHS BSA followed the approach of the court when making an assessment of the intervening roles. Moreover, there is no legislative requirement to continually hold SCS throughout all roles.

37. Therefore, I uphold Ms N's complaint, but only to the extent that NHS BSA needs to revisit its decision. Before making a fresh decision. NHS BSA will need to consider whether and how the guidance contained in the Factsheet complies with the legislation.

Directions

38. Within 28 days of the date of the Determination, NHS BSA shall re-consider whether or not Ms N qualifies for SCS under Regulation R2, taking into consideration the substance of the role she fulfilled and not looking solely at whether a nursing qualification was stated to be an essential requirement of that role.

Karen Johnston

Deputy Pensions Ombudsman
10 September 2019

Appendix one: *Extract from NHS Pension Scheme Regulations 1995 (as amended)*
SI 1995/300

“Nurses, physiotherapists, midwives and health visitors

R2.—(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 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 period 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.

(3) Where this regulation applies—

(a) regulation E1 (normal retirement pension) 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 two: *Extract from job specification for Head of Quality Governance*

Person Specification

Essential criteria for qualifications and previous experience include:

- Education to Masters Degree or equivalent
- Clinical professional background
- Extensive knowledge of specialist areas acquired through post graduate diploma or equivalent experience or training plus further specialist knowledge or training to a master's level or equivalent

The relevant desirable criteria include:

- Management/leadership qualification
- Registered Health Professional with appropriate professional body (NMC/HCPC) including clinical experience and qualification